

## Interdependency Theory and the Two Approaches to the Global War on Terror

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### Abstract

*The purpose of this article is to review some of the most pertinent literature in each of the two general approaches on the global war of terror, namely the analysis of American empire, imperial power or colonialism on the one hand, and the 'state of exception' on the other. Both approaches present unique understandings of the global war on terror, although neither can present a comprehensive account on their own. As such, an attempt will be made to capture the pertinent points of both approaches through the unique theory of Peter Fitzpatrick and Richard Joyce on the interdependence of law, sovereignty, democracy and empire. This theoretical framework not only presents the critical linkage between the two general approaches, but it also provides an opportunity to consider the war on terror as a telling case in understanding the nature of these four foundational principles.*

**Keywords:** Global War on Terror, Terrorism, State of Exception, Empire, Interdependency Theory

### 1. Introduction

The 'global war on terror' initiated by the United States following the terrorist attacks in New York on September 11, 2001 has resulted in a substantial degree of debate concerning a multitude of topics ranging from the balance between national security and civil liberties, the legality of certain aspects of the war under international law, and the treatment of the prisoners being held at Guantanamo Bay. The Obama administration has sought to address many of these concerns and distance itself from the controversy through its intention to close the detention camp at Guantanamo Bay, and also by abandoned the terms "war on terrorism" and "global war" in favour of the intentionally less stirring 'overseas contingency operation.' While it may be too early to gauge whether such changes indeed represent a turning point, this crossroads presents an opportunity to reflect on some of the most pertinent academic reviews that have sought to assess the nature of the war on terror. The majority of academic reviews of the various aspects of the global war on terror can be classified into two broad approaches: the analysis of American empire, imperial power or colonialism on the one hand, and the 'state of exception' on the other. Concern and unease over the developments that have occurred both within the United States and globally from the war on terror is the common thread that binds these two broad approaches, although the explanations and solutions they propose vary quite extensively.

The purpose of this paper is to review some of the most pertinent literature in each of these two general approaches in order to develop a comprehensive understanding of the global war on terror and its relationship to law/legality, politics and the state. Each of the two approaches contain unique attributes through which specific aspects of the war on terror can be understood, although neither can provide a comprehensive account on its own. There is considerable practical appeal to considering the global war on terror in the context of American empire, specifically because of its ability to account for a multitude of economic, global and colonial elements which the state of exception fails to consider, although it lacks the rich theoretical nature of the literature on the state of exception, which is grounded in the work of prominent theorists such as Carl Schmitt, Walter Benjamin and Giorgio Agamben. Conversely, despite its theoretical appeal, the literature of the state of exception in the tradition of Agamben that views Guantanamo Bay as a 'lawless place,' 'a place devoid of law,' or a 'legal black hole,' does not adequately come to terms with the increasing number of reviews that question this premise on the basis of the sheer volume of law that applies to the prisoners and the cases that have been decided by the Supreme Court.

As such, an attempt will be made to encompass the most pertinent points contained in both approaches. In order to do so, reliance will be placed on the theoretical framework of Peter Fitzpatrick and Richard Joyce (2007), whose unique thesis on the interdependence of law, sovereignty, democracy and empire provides the critical linkage between the two general approaches and an opportunity to consider the war on terror as a telling case in understanding the nature of these four foundational principles. Guantanamo Bay is the site where this theory can be observed in concrete application, and it will be shown to be a place where law not only operates, but also where one can most clearly observe the constituting dimensions of law, and the close relationship between law, sovereignty, democracy and empire. The state of the law at Guantanamo Bay will be demonstrated to be a result of the imperial tendencies of law and democracy, and from the desire of the Bush administration to ground its sovereign actions in the concept of right.

Finally, it will be demonstrated that the interdependence theory allows for the possibility of positive change through resistance by recourse to law's determinate dimension.

## **2. Interdependency Theory and the State of Exception**

Fitzpatrick and Joyce's complex thesis on the interdependence of law, sovereignty, democracy and empire stems from both Schmitt's and Agamben's account of the state of exception, as well as from Fitzpatrick's previous work on the constitutive characteristic of law. Both Schmitt and Agamben attribute a degree of autonomy to law while at the same time subordinating it to some other element, such as society or sovereignty (Fitzpatrick & Joyce, 2007: p. 69). Fitzpatrick and Joyce view this as a divide which can be bridged through a constitutive theory of law that sees interdependence between law and society, whereby "society constitutes or 'shapes' law," and "law also constitutes or 'shapes' society" (p. 69). Autonomous law means that it provides a determinate reference in the form of a constant normative value or hold over human relations, although in order to do so law has to be receptive to the constantly changing human relations, and that gives it a sense of 'vacuity'. Thus, law is a fusion of its determinate and receptive dimensions. Unlike Schmitt and Agamben, whose merger of the two divergent dimensions can only occur through a divine source, Fitzpatrick and Joyce attempt to find an answer that is grounded in modernity (p. 69). They do so through the concept of sovereignty, which enters into law through its vacuity (p. 70).

Sovereignty is likewise made up of the two dimensions – the determinate represents unity, while the receptive signifies the necessity for sovereignty to incorporate the disparate forces that constitute it. Moreover, sovereignty is as much dependent on law as law is on sovereignty. Sovereignty requires more than the exercise of power for its existence, and it looks to law for the concept of right which serves as the impetus behind the merger of the two dimensions (Fitzpatrick & Joyce, 2007: p. 71). The same can be said of democracy and empire, although before considering these two concepts, it is first necessary to trace the origins of the interdependency theory back to Schmitt and Agamben. While Fitzpatrick and Joyce provide some background information on Schmitt and Agamben, a more comprehensive account is necessary in order to locate the exact point of departure in Agamben's thought which diverted him from making the link on the interdependence of law and sovereignty. Doing so will not only assist the development of the interdependency theory, but will also display the limitations of considering the war on terror pursuant to Agamben's thought.

William Scheuerman (2006) accurately depicts Carl Schmitt as a political and legal observer that possessed "an uncanny ability to identify dilemmas that would soon gain widespread attention" (p. 108). Schmitt's work on the state of exception in *Political Theology* (1922) proved its relevance to the events that shortly thereafter unfolded in his native Germany and quickly spread into a global phenomenon. Over eighty years after *Political Theology* was first published, the state of exception found new expression in the work of Giorgio Agamben (2005), who provides the most comprehensive and intricate account of the global war on terror through the use of the concept. Agamben's understanding of the state of exception differs considerably from Schmitt's, although it is not the difference between the two authors that is of central importance to this undertaking but rather a correlation that they both persistently circle around but never fully grasp – the interdependence of law and sovereignty. How they each do so is of considerable importance in understanding the nature of this interdependency.

### **2.1 Giorgio Agamben and the state of exception**

Tracing the origins of the interdependency necessarily begins with early accounts of the state of exception and the debate on whether the exceptional is within the sphere of the juridical order. While Agamben briefly refers to a number of authors in passing, his initial reaction is to dismiss the entire debate as misrepresentative of the true nature of the state of exception. He states:

In truth the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other (p. 23).

However, despite the firmness of this dismissal, Agamben returns, as he must, to the debate in order to investigate the nature of the 'blurring' which his keen intuition detects. Interestingly, in this passage Agamben both realizes the limitations of the inside/outside debate in understanding the state of exception and he begins to sense an important and complex relationship between the exception and the juridical order, which paradoxically can only be uncovered by reference to the inside/outside debate. In doing so, Agamben considers the debate between Schmitt and Walter Benjamin, which he concisely sums up as follows: "while Schmitt attempts every time to reinscribe violence within a juridical context, Benjamin responds to this gesture by seeking every time to assure it – as pure violence – an existence outside of the law" (p. 59). Since Agamben developed his idea of 'force of law without law' prior to his review of the debate between Schmitt and Benjamin, it is not surprising that he immediately turned to Benjamin's 'pure violence' after recounting the debate (p. 59).

Agamben's hasty turn to Benjamin unfortunately led him to stray from the path which was leading towards the interdependency of law and sovereignty. Interestingly, in chapter 3 – before he considered the debate between Schmitt and Benjamin, Agamben appeared remarkably close to discovering this interdependence within the context of his discussion of the Roman *iustitium*. This can be observed in the following passage:

This space devoid of law seems, for some reason, to be so essential to the juridical order that it must seek in every way to assure itself in relation with it, as if in order to ground itself in the juridical order necessarily had to maintain itself in relation with an anomie. On the one hand, the juridical void at issue in the state of exception seems absolutely unthinkable for the law; on the other, this unthinkable thing nevertheless has a decisive strategic relevance for the juridical order and must not be allowed to slip away at any cost (p. 51).

Agamben concludes chapter 3 by stating that “the essential task of a theory of the state of exception is not simply to clarify whether it has a juridical nature or not, but to define the meaning, place, and modes of its relation to the law” (p. 51). While at face value this seems to suggest an interest in the relationship between law and sovereignty, what leads him to a different direction from interdependency is both his prior insistence on the inadequacy of the inside/outside debate and his development of the ‘force of law without law.’ By the end of chapter 4 Agamben is so absorbed in Benjamin's pure violence that arriving at an account of interdependence becomes inconceivable. Agamben refers to Benjamin in the last paragraph in the chapter and states: “one day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free from it for good” (p. 64). This is unfortunately as far as Agamben can take us towards understanding the interdependence of law and sovereignty. While Agamben has a great deal to say about law, politics, sovereignty and the state, what must be kept in mind is that his preoccupation was in understanding the state of exception, and thus his consideration of these issues was oriented towards that specific end rather than developing a broader theory of law's relationship to sovereignty. However, if one accepts the interdependence thesis, the ironical upshot of this is that Agamben's obsession over the state of exception is what ultimately prevented him from understanding it!

## **2.2 Carl Schmitt and the State of Exception**

Discussing Agamben's departure from the inside/outside debate is not to imply that Schmitt's placement of the state of exception within the juridical order is correct. What is of interest is not necessarily Schmitt's placement of the state of exception within the juridical order, but rather what Fitzpatrick and Joyce refer to as “the mutual contamination of the exception and the legal order” (p. 67). In looking at the relationship between sovereignty and the law, Schmitt's first inclination is to give the two a significant degree of autonomy by providing a sharp break from each other when the sovereign decides to shift from the normal legal order to the state of exception. He describes it in the following way:

The decision frees itself from all normative ties and becomes in the true sense absolute. ... The two elements of the concept *legal order* are then dissolved into independent notions and thereby testify to their conceptual independence. Unlike the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception (p. 12).

Despite the boldness of this statement, it is immediately followed by comments which attempt to reconnect the two concepts which he just detached from each other:

The exception remains, nevertheless, accessible to jurisprudence because both elements, the norm as well as the decision, remain within the framework of the juristic (pp.12-13).

While these comments appears to almost entirely retract his earlier statement, it should instead be read as though he begins to see that two things are simultaneously taking place, autonomy and interdependency, and not knowing how precisely to make a linkage between the two he puts these two seemingly opposing statements together without anything between them to bring them together. He also does a similar thing when discussing the sovereign in its direct form rather than through the state of exception, and while he wants to give it considerable autonomy from law he nevertheless still places it within the juridical order. He says the following about the sovereign:

He [the sovereign] decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety (p. 7).

## **3. Interdependency Theory and American Empire**

We can therefore see how close both Agamben and Schmitt came to making the link on the interdependence of law and sovereignty. Since Agamben didn't arrive at the link he pursued an analysis on the war on terror which didn't include a consideration of American empire.

Indeed, Derek Gregory (2006) observed that Agamben interchangeably uses the terms 'state of exception' and 'space of exception', but that "its spatiality has received little sustained analysis" (p. 407). Gregory goes on to further suggest that while Agamben focuses solely on the domestic aspects the use of the state of exception, the war on terror has a transnational dimension which has included other states, most notably Afghanistan, Iraq and Cuba (p. 407). This important global dimension of the war on terror that considers American empire can be taken into account once the interdependence between law and sovereignty is established. Considering the nature of American empire presents its own set of difficulties because of its longstanding 'informal' characteristic and because referring to the United States as an empire is not something that most Americans are comfortable with or accustomed to (Panitch & Gindin, 2006: p. 21). That is why David Harvey (2003) suggests that the war on terror has changed the nature of the empire when a mainstream publication such as the *New York Times* published an article by Michael Ignatieff which states that "America's entire war on terror is an exercise in imperialism" (p. 3).

The aversion to empire in theory has a long history in both the thought and practice of American democracy. Since at least the time of James Madison the belief has been that foreign engagements would in fact undermine American democracy (Harvey, 2003: p. 50). Americans eagerly sought to distance themselves from their European imperial predecessors, and they denied the significance of territorial gains and "sought to conceal imperial ambition in an abstract universalism" (Harvey, 2003: p. 50). Military interventions are justified on the basis of spreading liberal democratic values and human rights, and thus even intervention helps support the denial of American empire because the goal is to 'liberate and enlighten', and not to subjugate and dominate. As Canadian historian Harold Innis observed: "American imperialism ... has been made plausible and attractive in part by the insistence that it is not imperialistic" (Panitch & Gindin, 2006: p. 22). The theory of interdependence helps make sense of this seeming enigma between the democratic aversion to empire and an informal empire in practice. This stems from a contradiction within democracy itself, where on the one hand it is extremely open and receptive, while on the other it lacks a determinate existence because the identity of the people is always in question.

As Fitzpatrick and Joyce point out, this contradiction is not new, but rather what Plato based his opposition to democracy on in the *Republic* which is summed up in the saying that "democracy is rule by the people, but the people in itself cannot rule" (Fitzpatrick & Joyce, 2007: p. 72). Thus, democracy relies on law for its determinate dimension, which creates unity and identity through the establishment of a political and legal order. The openness of democracy, its reliance on law for its determinate dimension, combined with law's vacuity through which sovereignty enters, opens up law and democracy to a specific type of sovereignty: imperial power. This imperial power is justified on the basis that "others will be brought within the fold of democracy and the rule of law" (Fitzpatrick & Joyce, 2007: p. 74). Perhaps then Thomas Jefferson was ahead of his time when he made the following comment about the American constitutional order in 1809: "no constitution was ever before as well-calculated for extensive empire and self-government" (Panitch & Gindin, 2006: p. 27). Thus, the American state has managed to contain and balance the seeming contradictory elements of 'republican liberty' and 'extensive empire' which are "embedded in the federal constitution" (Panitch & Gindin, 2006: p. 28).

### **3.1 The economic and political dimensions of American empire**

History has demonstrated that there are multiple ways of establishing and maintaining an empire (Harvey, 2003: p. 5). The uniqueness of the American model can be traced back to at least the late nineteenth century and the Monroe Doctrine that essentially declared the Americas a zone free from European colonialism, which as a consequence, affirmed that the United States would have free reign in the region for its capitalist expansion (Harvey, 2003: p. 5). This strategy enabled the United States to pursue its economic and political imperialism while conveniently maintaining the guise of a republic that was categorically opposed to the tradition of European empire.

Despite the pre-eminence of capitalist growth in the development of American empire, Leo Panitch and Sam Gindin demonstrate the need to account for the centrality of the American state in the development of this empire, whose active role in the process prevents it from being labelled as an "empire without a centre," as is common in the post-modernist tradition, or as a consequence of "inter-imperial rivalry" which is a Lenin-inspired Marxist conception (p. 21). The American state was an enthusiastic supporter of the global expansion of American capitalism and the informal empire, which was made possible by a constitution that gave the central government the power to "expand trade and make war" (Panitch & Gindin, 2006: p. 21). Amy Kaplan (2005) describes how this strategy was promoted by prominent figures, such as Alfred Thayer Mahan and Theodore Roosevelt, who advocated for a strong military that could support American economic and political expansion throughout the world without being burdened by governing annexed territories and foreign populations.

However, by the beginning of the twentieth century American capital was outgrowing its restrictive enclave in the Western Hemisphere. The conclusion of the First World War and the demise of a number of European empires provided the opportunity for global expansion, and President Woodrow Wilson's *Fourteen Points* display the desire of universalizing the principles of the Monroe Doctrine (Harvey, 2003: p. 47). This cloaked American imperialistic ambitions in the promotion of universal values (Harvey, 2003: p. 47). This model would be repeated and intensified after the Second World War with the inception of the Marshall Plan which created a loan and reconstruction plan for Western Europe that rebuilt European economies into essentially client states of the United States. This is what led Panitch and Gindin to regard America's informal empire to be characterized firstly by "economic penetration and informal incorporation of other capitalist states" (p. 21).

While this may conceal its imperialistic nature compared to conventional militaristic empires, it does not diminish its scope, and its imperial reach has stretched "far beyond that of nineteenth-century Britain," particularly with American foreign direct investment (Panitch & Gindin, 2006: pp. 21, 27 & 29). In Gramscian terms this ensured the hegemony of the United States whereby it exercised its control through "leadership and consent of the governed" rather than through coercion (Panitch & Gindin, 2006: p. 36). In addition to 'economic penetration and informal incorporation,' America's informal empire is also characterized by policing and intervention, particularly against 'rogue states,' "which have not been incorporated into the neoliberal capitalist order" (Panitch & Gindin, 2006: p. 36). This is how Panitch and Gindin present American empire, as characterized by 'economic penetration and informal incorporation' on the one hand, and policing and intervention on the other (p. 21).

### **3.2 American empire and colonialism**

These economic aspects to American empire are complemented and furthered by a complex colonial dimension. Capitalist expansion into South America resulted in the United States occupying thousands of naval bases in support of its commercial interests. In this light, Panitch and Gindin label the United States' annexation of Puerto Rico, the Philippines and Hawaii a 'deviation' from the regular economic and political features of American empire (p. 27). In the case of Guantanamo Bay, Kaplan effectively recounts how it had been a strategic colonial site since the arrival of the Spanish in the fifteenth century, and how the United States came to possess it by first ridding the Spanish from Cuba as part of their universalizing mission of 'liberation,' and then by insisting on the incorporation of the infamous Platt Amendment into Cuba's constitution, which granted the United States the right to intervene "for the preservation of Cuban independence" (2005).

The United States need for a base in Cuba for its economic reach into the Caribbean and South America was achieved through the use of a 'perpetual lease' over Guantanamo Bay, which granted "complete jurisdiction and control" to the United States, and "ultimate sovereignty" to the Republic of Cuba (Kaplan, 2005). In this sense American empire developed interwoven economic and colonial dimensions which attempted to maintain the anti-imperial appearance of the United States. An interesting example of the interwoven economic and colonial dimensions of American empire, which most authors overlook, is that Guantanamo Bay and the Panama Canal Zone were acquired at almost the same time. This example is of interest because the United States encouraged Panamanian secession from Colombia solely to gain control over the canal which Colombia refused to grant (Hussein, 2007: p. 738).

### **3.3 American Empire and International Law**

In addition to colonialism propping American empire, Gregory sheds light on another aspect of colonialism which presents Guantanamo Bay as an example of the influence which the colonial past has had on international law. In doing so, he considers William Rasch's account of how spaces were created in the New World where "bestial deeds could be acted out," and how for Agamben this "judicially empty" space is spilling outside of its "spatiotemporal boundaries" (Gregory, 2006: p. 409). At this point we can recall how sovereignty enters into law through its vacuity, and in the case of the colonial context law needed to be particularly receptive because of the degree of change that was occurring. As Gregory says:

The law was intimately involved in the modalities of colonial violence, and international law bears the marks of those colonial predations; its locus is drawn not only through relations of sovereign states, therefore, but also through what Peter Fitzpatrick calls 'the colonial domination of people burdened by racial difference' (p. 410).

This sheds some light on the actions of the Bush administration vis-a-vis international law, and the inadequacy of the argument that the United States is disregarding law. Before refuting this line of thinking, however, it is first necessary to consider some its manifestations. Gregory notes that a number of critics have accused Bush of administration of "waging a war against law" (p. 408). Indeed, Scheuerman says that the "Bush Administration's legal arguments about the status of accused terrorists mirror crucial facets of Schmitt's logic" (p. 118).

In doing so, he recounts the events surrounding the two legal opinions provided by the Justice Department to the Pentagon and the White House for the purposes of giving guidance on what constitutes torture under the law to assist in establishing interrogation policy of suspected terrorists. More specifically, he says that the memos reveal that the Bush administration “was not merely interested in advancing a distinct or less demanding legal standard for treating accused terrorists than found in the Geneva Convention for legal combatants, but instead that *the possession of full discretionary power* was what he really sought” (p. 119). Despite the boldness of this assertion Scheuerman circles around the main point, which is that the Bush administration does not seek to repudiate international law but rather seeks to have the United States regarded as the global sovereign (Gregory, 2006: p. 408). The interdependence of law and sovereignty gives the world’s superpower considerable room to enter into international law through its vacuity. While this does not automatically result in a Schmittian state of exception, it is still of concern given the nature of the Bush administration. International law is particularly ripe for the type of regressive change sought by the Bush administration because it developed within a context of colonial violence, combined with the fact that law’s receptiveness opens it to both change and sovereignty.

The Bush administration seeks to change international law rather than merely negate it because the interdependency theory reminds us that sovereignty relies on law for the concept of right. The Bush administration is seeking support for its sovereign actions – to shroud it in the legitimating force of international law. As Fitzpatrick and Joyce state: “sovereign power cannot simply and purely in itself match the dimensions of law. It has also to be dependent on law” (p. 71). The origins of the Bush administration’s interest in changing international law has its origins, oddly enough, more in domestic issues than in the economic aspect of American empire. As was previously suggested, the openness of democracy gives it a quality of disorder, and this was the basis to Plato’s opposition to it as a form of government. Democracy is a condition where the individual, in Plato’s own words: “submits to “every passing pleasure” and where “his lifestyle has no rhythm” (Fitzpatrick & Joyce, 2007: p. 72). These were the negative attributes that Plato saw in classical Athenian democracy, which despite its limitations at the very least had a cohesive political community and a sense of the public good. This stands in sharp contrast to modern bourgeois forms of liberal democracy, in which, as Hannah Arendt correctly observed, there is no cohesive sense of political community and the public good, but rather a “senseless chaos of private interests” (Harvey, 2003: p. 17).

Harvey displays the Bush administration’s agenda as being aimed primarily at instituting a neoconservative solution to the inherent instability neoliberal state. This solution does not seek to address the systemic limitations of the neoliberal state, and indeed is content with the system of private enterprise, corporate power and market freedoms that are present in the neoliberal state (Harvey, 2003: p. 82). However, unlike neoliberals, the neoconservatives seek a sense of order not naturally present in the neoliberal state and promote morality as the “social glue to keep the body politic secure” (Harvey, 2003: p. 82). This is a far cry from the more organic return to genuine politics that moves beyond private interests that Arendt espoused. Since the neoconservatives still support the politics of private interests, the substitute that they offer to achieve order is militarization and a fixation on threats “to the integrity and stability of the nation” (Harvey, 2003: p. 82). When Bush took the helm of the United States in 2000 civil society was, according to Harvey, “fragmented and flying apart at an alarming rate,” and that part of Bush’s election appeal must have been his “strong-minded and tough moral compass” (p. 17). The militaristic solidarity and order sought by the neoconservatives escalated to war. Harvey refers to a 1999 report that indicated that it would take a “catastrophic and catalyzing event, like a new Pearl Harbour” to get achieve both the domestic and international approval for war (2003: p. 15). 9/11 provided that event.

From this perspective the urgency of getting United Nations Security Council approval to legalize the war in Iraq takes on a new meaning. One only needs to think back to Colin Powell’s embarrassing presentation at the United Nations on Saddam Hussein’s alleged weapons of mass destruction. While the United States was able, and did, respond unilaterally, the consequences of not doing so under the legitimating force of law haunts the legacy of the Bush administration and the United States as a whole. As American empire becomes more obviously and visibly imperialistic it loses “the advantages of not appearing imperialistic,” which was what made it “plausible and attractive” (Panitch & Gindin, 2006: p. 37). Sovereignty without the determinate element or law prevents the “normative hold on the futurity of our being together,” and cracks in the informal empire became apparent as the United States’ capacity for moral leadership has been “squandered” (Fitzpatrick & Joyce, 2007: p. 69; Harvey, 2006: p. 200). Opposition to the war in Iraq by other capitalist states such as France, Germany and Canada, should trouble the United States, not because they can pose as rivals to its dominion, they are much too deeply penetrated and incorporated into the informal empire for that, but rather because the United States relies on other states to help rule over the world capitalist order (Panitch & Gindin, 2006: p. 40).

Not only is the United States experiencing increasing difficulty at creating new ‘effective states’, as it is unlikely that Iraq and Afghanistan can be rebuilt along the lines of postwar Japan and Germany, but long-term unilateral action risks “overextension and overreach”, which Paul Kennedy has shown in *The Rise and Fall of Great Powers*, have led to the demise of great empires throughout history (Panitch & Gindin, 2006: pp. 32 & 37; Harvey, 2003: p. 35).

### 3.4 American Empire and resistance

So where does this lead in terms of resistance to American empire and the Bush administration’s actions in the war on terror? The first and most obvious form of resistance, resistance within the legal order, is either outright rejected or at least its potential is challenged by the majority of academic reviews. On what basis have the reviews rejected this form of resistance? Kaplan’s concern lies with the Supreme Court being an accomplice to American empire, and attempts to display how it has historically aided in the United States’ imperial reach, and how in its 2004 decision of *Rasul v. Bush* it contributed to the global expansion of imperial power by reworking the earlier history of imperialism (2005). Kaplan correctly points out that the court in *Rasul* did not determine whether the American Constitution applies in Guantanamo Bay. While it would have certainly assisted resistance to the Bush administration’s actions had the court ruled positively on the application of the Constitution, the Court did find that federal courts have jurisdiction over the naval base at Guantanamo Bay “to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing” Even if one accepts Kaplan’s premise that the Supreme Court assists in perpetuating empire, at the very least it provides a venue to verify whether the Bush administration’s have the colour of right attached to them.

As Gregory observes, Kaplan expressed these concerns before the Supreme Court released the decision of *Hamdan v. Rumsfeld* (p. 420). In a nutshell the decision held that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions. The *Hamdan* decision displays how important the concept of right is for the Bush administration, as the military commissions and the extensive and complex procedure which they follow is an attempt to shroud its sovereign goals in law. Fleur Johns (2005) refers to the “panoply of regulations concerning the handling of detainees” as an example of how Guantanamo Bay is a work of “legal representation and classification” (p. 613). It therefore appears to be practical to consider Guantanamo Bay along the same lines as Nasar Hussein (2007) – as a creation of extensive amounts of administrative and bureaucratic legality and classification (p. 744). Hussein displays considerable wisdom when he recommends a response that emphasizes general rules over “ad hoc and administrative regulations,” while at the same time balancing this by not wholeheartedly accepting F.A. Hayek’s faith in the laissez-faire state (p. 752). This of course can be complemented with what he refers to as a broader political and ethical response that includes public pressure “demands for direct accountability” (p. 752).

### 4. Conclusion

The interdependency theory is the logical framework from which to consider the global war on terror as it can take into account the best elements of both the state of exception and American empire approaches. It provides a novel way of considering resistance through the law that does not contain the naivety about the nature of law and democracy found in traditional liberalism and support for the rule of law. Moreover, it avoids Agamben’s ambiguous call for a “political response” which dangerously appears to be supporting violence.

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