

The Illusion of Safety:  
Lawfare and the Democratic Security

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Thesis submitted in partial fulfillment of  
the requirements for the degree of  
Master of Arts in the Department of  
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ABSTRACT

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## **Abstract**

The Democratic Peace Theory notes the reduced incidence of war between democracies. The emerging field of Democratic Security Studies is motivated by this finding, yet the field's future growth is contingent on a further finding that democracy reduces the incidence of war between democracies and non-democracies. If mechanisms within democracy cause democracies to war less often with each other, do these same mechanisms cause democracies to war less often with non-democracies? If so, the reduced incidence is likely caused by a mechanism internal to democracy. This paper hypothesizes that the causal mechanism internal to democracy resulting in fewer wars between democracies and non-democracies is the requirement that the executive adhere to the dictates of democratic governance and rule of law. To test this hypothesis, this paper employs the method of difference, comparing Spain (negative case) to the United States of America (positive case). The initial finding is that democratic governance and the rule of law so constrain the American executive that he refrains from waging aggressive war. The paper then introduces the concept of "Lawfare" and concludes that, by looking at the conduct of the American executive through the lens of "Lawfare," the author is unable to confirm the hypothesis that adherence to democratic governance and rule of law so constrain the American executive that he refrains from waging aggressive war.

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# 1. The Democratic Security

The German philosopher Immanuel Kant imagined a “perpetual peace” that would be the direct result of the spread of democratic governance and the rule of law.<sup>1</sup> However, as Jarrod Hayes points out in his article, “The Democratic Peace and the New Evolution of an Old Idea,” “this idea, that democratic governance could result in the reduction or elimination of war, while potent, got little traction.”<sup>2</sup>

Scholars in the 1970’s began to use large-N statistical models to test this democratic peace theory.<sup>3</sup> Essentially, research in the field of democratic peace theory established that democracies war less often with other democracies than with non-democracies.<sup>4</sup> According to Hayes, the initial research suggesting that democracies war less often with each other than with non-democracies tends to support Kant’s prediction of a “perpetual peace” resulting from widespread adherence to democratic governance and rule of law.<sup>5</sup> However, their studies, according to Hayes, demonstrated “only correlation, not causation.”<sup>6</sup>

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<sup>1</sup> Jarrod Hayes, “The Democratic Peace and the New Evolution of an Old Idea,” *European Journal of International Relations*, No. 18 (2012): 767, <http://ejt.sagepub.com.proxy.lib.duke.edu/content/18/4/767> (accessed February 17, 2013).

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Charles W. Kegley, Jr. and Margaret G. Hermann, “Military Intervention and the Democratic Peace,” *International Interactions: Empirical and Theoretical Research in International Relations*, Vol. 21, Issue 1 (1995): 1, <http://www.tandfonline.com/doi/citedby/10.1080/03050629508434857#tabModule> (accessed February 17, 2013).

<sup>5</sup> Jarrod Hayes, “The Democratic Peace and the New Evolution of an Old Idea,” 768.

<sup>6</sup> Ibid.

But the stakes are high enough that such initial findings compel the inquisitive scholar of international relations to wonder about causes, not just correlations. That is, such initial findings compel one to wonder whether the causal mechanism within democracy that ultimately results in fewer wars between democracies, might also cause democracies to fight fewer wars altogether. If this causal mechanism within democracy can be identified, then study of its application to various cases can be explored in future research in hopes of producing the perpetual peace Kant predicted.

In pursuit of such an agenda, Hayes opines that “The end of the Cold War and the subsequent (at least rhetorical) inclusion of the democratic peace in U.S. foreign policy means the field...needs to develop a better understanding of the mechanisms within (and without) democracies that generate the observed peace.”<sup>7</sup>

If, indeed, there are mechanisms within democracy that generate the observed peace, then depending on what those mechanisms are, the peace might extend beyond inter-democracy relations and affect democracy to non-democracy relations. That is, one wonders whether the mechanism causing the observed peace between democracies can also cause peace between democracies and non-democracies, such that the spread of democracy increases the observed peace between all countries, not just democracies. This inquiry necessarily expands the scope of possible case studies because the question

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<sup>7</sup> Jarrod Hayes, “The Democratic Peace and the New Evolution of an Old Idea,” 768.

is whether democracy can effect peace between democracies and non-democracies, as opposed to only between democracies.

Hayes acknowledges this expansion of inquiry when he says that “In the process of expanding our inquiry of the mechanisms behind the democratic peace, we will actually generate a new, broader field of study: Democratic Security.”<sup>8</sup>

The field of democratic security studies would attempt to answer the broader question: Does democracy result in less war? If so, then the mechanism causing the absence of war is most likely internal to democracy. Hayes mentions one strain of thought in democratic peace studies that suggests the mechanism causing democracies to war less often with other democracies than with non-democracies is internal to democracy. According to Hayes,

Rationalist approaches to the democratic peace have largely emphasized the importance of domestic political structure in governing violence in inter-democratic relations. One such approach is the political accountability or constraints model. The argument essentially posits that, because political leaders want to retain office, they avoid foreign policy blunders and pursue high success foreign policies in an effort to diffuse political opposition and build domestic political capital.<sup>9</sup>

Hayes points out that leaders of democratic countries with the ability and willingness to use force abroad are nonetheless constrained in their decision-making by the prospect of being replaced or impeached.<sup>10</sup> According to Hayes and the rationalists,

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<sup>8</sup> Jarrod Hayes, “The Democratic Peace and the New Evolution of an Old Idea,” 768.

<sup>9</sup> Ibid. at 771.

<sup>10</sup> Ibid.



this prospect of impeachment/replacement constrains the executive such that he refrains from waging wars he thinks he will lose. However, democratic governance and the rule of law are about more than “might makes right.”

To argue that the mechanisms of democratic accountability cause the executive to refrain only from waging wars he might lose, is to ignore the precepts of democratic governance and the rule of law, namely that the democratic leader should only wage war in keeping with the rule of law. Indeed, it is the hallmark of the rule of law that war be waged only according to the dictates of law, as opposed to the arbitrary dictates of the leader, otherwise known as the rule of man.<sup>11</sup>

Democratic security studies should first and foremost attempt to prove that some mechanism internal to democracy causes democracies to war less often.<sup>12</sup> The rationalists posit that processes of democratic accountability constrain democratic executives such that they refrain from waging wars they think they will lose. However, by this logic, one can wage an aggressive war that one thinks one will win, just as easily as one can fail to wage a defensive war one thinks one will lose. However, we do not expect leaders of any country, democratic or not, to refrain from waging defensive wars. Every nation enjoys the right to self-defense, and so one does not expect the decision whether to wage

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<sup>11</sup> Democracy Web: Comparative Studies in Freedom, “Rule of Law: Essential Principles,” <http://www.democracyweb.org/rule/principles.php> (accessed February 17, 2013).

<sup>12</sup> Such a finding would expose broad new areas of inquiry to the light of political research, with potentially positive outcomes in terms of foreign policy and warfare.

defensive war to be based solely on the prospect of victory.<sup>13</sup> But one would expect a decision to wage aggressive war to be based on the prospect of victory, if the rationalists are correct.<sup>14</sup>

However, it is a violation of the dictates of democracy and the rule of law to wage aggressive wars on the sole basis that one is capable of winning those wars.<sup>15</sup> If a democratic security is to emerge, it would most likely emerge as the product of adherence to the rule of law, meaning that the reduction in the instance of aggressive war would be the product of the executive being legally constrained to waging only those wars justified and legitimized by law. Therefore, democratic security studies should ask whether the dictates of democratic governance and the rule of law together constitute the causal mechanism that so constrains the executive that he refrains from waging aggressive war.

In hopes of confirming the validity of democratic security studies, this paper will attempt to verify the following statement: The dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war.

The causal mechanism about which Hayes wonders – that causal mechanism resulting in the observed peace between democracies – is here assumed to be the dictates

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<sup>13</sup> United Nations General Assembly Resolution 3314 (XXIX): Definition of Aggression, December 14, 1974): 142-3, <http://daccess-ods.un.org/TMP/3760678.76815796.html> (accessed February 17, 2013).

<sup>14</sup> Jarrod Hayes, "The Democratic Peace and the New Evolution of an Old Idea," 771.

<sup>15</sup> Ibid.

of democratic governance and the rule of law together. Within these concepts are included constitutional or power-sharing arrangements that constrain executives in foreign and/or domestic policy, as well as impeachment and election laws that cause executives to be accountable to the constituents.<sup>16</sup> Adherence to the rule of law, from the perspective of the executive, means operating the state, and especially the war machine, according to those arrangements and constraints.

Do the dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war?

If this paper answers in the affirmative, then it suggests that Kant, Hayes, and the rationalists are correct in their assertion that some mechanism of democracy causes democracies to war less often. If this paper answers in the affirmative, it also suggests that the problem of aggressive war can be “cured” with the remedy of democratic governance and adherence to the rule of law. If this paper answers in the affirmative, then democratic security studies reveals itself as a powerful and valuable area of inquiry that might lead to international peace.

However, if this paper answers in the negative, it suggests that democracy does not cause an absence or reduction in the frequency with which democratic executives wage aggressive wars. If this paper answers in the negative, it

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<sup>16</sup> Thus, horizontal and vertical constraints on the executive are included.

suggests that, although the democratic peace theory has been borne out by research,<sup>17</sup> the democratic peace theory should not be optimistic about its ability to expand into the generalized area of democratic security studies, not least because it would have been shown that the dictates of democratic governance and rule of law do not result in fewer aggressive wars. If this paper answers in the negative, there is no “democratic security” as such, only a tendency between democracies to wage aggressive war less frequently against each other than against non-democracies.

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<sup>17</sup> Charles W. Kegley, Jr. and Margaret G. Hermann, “Military Intervention and the Democratic Peace,” *International Interactions: Empirical and Theoretical Research in International Relations*, Vol. 21, Issue 1, (1995): 1, <http://www.tandfonline.com/doi/citedby/10.1080/03050629508434857#tabModule> (accessed February 17, 2013).

## 2. The Method of Difference

The purpose of this paper is to test the hypothesis that “the dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war.” To answer the question, this paper will use the “method of difference.”

The method of difference is a qualitative methodology for identifying causal mechanisms based on the comparison of two cases. According to Theda Skocpol and Margaret Sommers, scholars employing the method of difference,

can contrast cases in which the phenomenon to be explained and the hypothesized causes are present, to other (“negative”) cases in which the phenomenon and the causes are both absent, although they are similar as possible to the “positive” case in other respects.<sup>1</sup>

Thus, setting up the method of difference requires a few steps. First, one should identify the phenomenon to be explained.<sup>2</sup> For the purposes of the present inquiry, the phenomenon to be explained is the absence of aggressive wars, since this paper is attempting to confirm the statement: the dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war.

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<sup>1</sup> Theda Skocpol and Margaret Sommers, “The Uses of Comparative History in Macrosocial Inquiry,” *Comparative Studies in Society and History*, Vol. 22, No. 2, (April, 1980): 174-197, 183-4, <http://links.jstor.org/sici?sici=0010-4175%28198004%2922%3A2%3C174%3ATUOCHI%3E2.0.CO%3B2-P> (accessed February 1, 2013).

<sup>2</sup> Ibid.

The next step is to identify the causal variable or mechanism.<sup>3</sup> For the purposes of the present inquiry, the causal mechanism is adherence to democratic governance and the rule of law. In plain words, the argument is that the presence of the mechanism (democracy/rule of law) causes the phenomenon (absence of aggressive wars). The case that demonstrates both the presence of the causal mechanism and the phenomenon to be explained is known as the “positive case.”<sup>4</sup>

If it is true that the presence of the mechanism causes the phenomenon, then it must also be true that the absence of the mechanism causes an absence of the phenomenon, all else being equal. The case in which the absence of the mechanism causes an absence of the phenomenon is known as the “negative case.”<sup>5</sup>

In order to best isolate the causal mechanism, it is necessary that the two cases, positive and negative, be as similar as possible in all other respects, except for the presence of the causal mechanism and the phenomenon to be explained. That is, if two cases are identical except that the first displays the causal mechanism (democracy/rule of law) and the resulting phenomenon (absence of aggressive war), while the second does not display the causal mechanism nor the phenomenon, then one succeeds in isolating the factor that was different between the two cases, and one infers that since that factor was the only difference, it accounts for the different resulting phenomena.

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<sup>3</sup> Theda Skocpol and Margaret Sommers, “The Uses of Comparative History in Macrosocial Inquiry,” 174-197, 183-4.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

Thus, the positive and negative cases should be as similar as possible, and the only differing factors should be the hypothesized causal mechanism and the phenomenon to be explained. But as a matter of practicality, it is nearly impossible to find two cases identical in all but two respects (presence of causal mechanism, phenomenon to be explained). Therefore, there is a certain discretion involved in choosing cases, and this paper will now proceed to identify the cases which it will use to confirm the following statement: the dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war.

The positive case is the case in which the causal mechanism (democracy/rule of law) and the phenomenon to be explained (absence of aggressive wars) are both present. This paper will use the United States of America as the positive case because (as will be shown) its leaders are constrained by the dictates of democratic governance and rule of law, and because United States foreign policy displays the phenomenon to be explained (absence of aggressive wars).

The negative case is the case in which the causal mechanism (democracy/rule of law) and the phenomenon to be explained (absence of aggressive wars) are both absent. This means that there are three requirements to choosing the negative case for the present inquiry. (It is important to note that "'negative' – or control – cases are discussed much less fully. For they are introduced strictly for the purpose of helping to validate

the main argument about the causes....”<sup>6</sup>) First, the negative case country must lack the causal mechanism. That is to say, the negative case country must be a non-democracy. Second, the negative case country must lack the phenomenon to be explained, which means the negative case country must demonstrate a record of waging aggressive wars. The third requirement is that the negative case be as similar as possible to the positive case in as many other respects as possible.

However, on the point of similarity between cases, a difficulty arises. It is difficult to find any country that matches the United States of America in every conceivable way save for two (presence of democracy and absence of aggressive wars). One crucial way that America is different from most other historical cases – and a way that is especially pertinent to the present inquiry – is that America is the greatest military, diplomatic, and economic empire<sup>7</sup> of its time.<sup>8</sup> Therefore, when choosing a negative case, it will not be enough to choose a country that is non-democratic and that waged aggressive wars. Rather, to be similar to the United States, the negative case must be an *empire* that was non-democratic and waged aggressive wars. The Spanish empire is one such case.

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<sup>6</sup> Theda Skocpol and Margaret Sommers, “The Uses of Comparative History in Macrosocial Inquiry,” 174-197, 183-4.

<sup>7</sup> Martin Durham, “The Republic in Danger: Neoconservatism, the American Right and the Politics of Empire,” *The Political Quarterly*, Vol. 77, No. 1, (January-March, 2006): 43-51, <http://onlinelibrary.wiley.com.proxy.lib.duke.edu/doi/10.1111/j.1467-923X.2006.00729.x/pdf> (accessed February 17, 2013).

<sup>8</sup> F. William Engdahl, *Full Spectrum Dominance: Totalitarian Democracy in the New World Order*, (Progressive Press: Wiesbaden, 2009).



### 3. Spanish Empire: The Negative Case

Choosing the Spanish empire as the negative case means satisfying three criteria.

The first criterion to be satisfied is that the Spanish empire was not a democracy. The second criterion to be satisfied is that the Spanish empire waged aggressive wars. The third criterion to be satisfied is that the Spanish empire and American empire are similar in as many other ways as possible.<sup>1</sup>

Addressing the last criterion first, one must assess whether it is possible to choose a perfect negative case, and it is most likely not possible. The difficulty in choosing a negative case in the present instance lies not in finding a country that was non-democratic and that waged aggressive war. Rather, the difficulty in the present instance is finding a non-democratic country that waged aggressive war, that is otherwise similar to America.

Since it is most likely impossible to choose a country that is similar to America in every way except as regards the causal mechanism (democracy/rule of law) and the phenomenon to be explained (absence of aggressive wars), one must prioritize the factors in the positive case that one hopes to find in the negative case. The factor that this inquiry prioritizes above all others is the status of empire. Because America is an empire of global reach and historical significance,<sup>2</sup> it only makes sense that the negative case

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<sup>1</sup> Theda Skocpol and Margaret Sommers, "The Uses of Comparative History in Macrosocial Inquiry," 174-197, 183-4.

<sup>2</sup> Thomas Bender, "The American Way of Empire," *World Policy Journal*, Vol. 23, No. 1 (Spring, 2006): 45-6, <http://www.jstor.org/stable/40210006> (accessed February 18, 2013).

also be an empire of global reach and historical significance. To narrow the class of potential negative cases even further, one must recognize that the American empire is so powerful as to be hegemonic.<sup>3</sup> Thus, it will be necessary to show that Spain was at one time a non-democratic empire of hegemonic status waging aggressive war.

In his legendary article titled, "The Conquest of the United States by Spain," published in the *Yale Law Review*, American scholar and sociologist, William G. Sumner concedes that "Spain was the first, for a long time the greatest, of the modern imperialistic States."<sup>4</sup> Indeed, some Spaniards have held their empire in such high esteem they paid themselves backhanded compliments when they said things like, "When we contemplate Spain's hegemony, and compare it with the poverty from which it arose, we should not let ourselves give way to pride."<sup>5</sup>

Spain enjoyed its *Siglo de Oro*, or its "Golden Age," between 1521 and 1643.<sup>6</sup> But it was even before then that Spain began to amass its empire. According to author Roger Bigelow Merriman in his book, "The Rise of the Spanish Empire in the Old World and New, Volume 1,"

The European lands outside the limits of the [Iberian] peninsula which acknowledged the rule of Spanish sovereigns in the year of the discovery of

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<sup>3</sup> Thomas Bender, "The American Way of Empire," 45-61.

<sup>4</sup> William G. Sumner, "The Conquest of the United States by Spain," *The Yale Law Journal*, Vol. 8, No. 4, (January, 1899): 168, <http://www.jstor.org/stable/781012> (accessed February 18, 2013).

<sup>5</sup> Henry Arthur Francis Kamen, *Empire: How Spain Became a World Power, 1492-1763* (Great Britain: Penguin Books, 2002): xxi.

<sup>6</sup> The Latin Library, "The Spanish Empire," <http://www.thelatinlibrary.com/imperialism/notes/spanishempire.html> (accessed February 18, 2013).

America were already extensive, and they were to be substantially increased during the first century of the conquest and exploration of the New World.<sup>7</sup>

Thus, Spain was an empire in its own right at the time it conquered the Americas. Since Spain was an empire even before it sent emissaries to the Americas, Spain's conquest of the Americas qualify as aggressive wars waged by an empire. Thus, the second criteria to be satisfied – that the negative case demonstrate an absence of the phenomenon to be explained – will be satisfied if it can be shown that Spain was an empire that waged aggressive wars.

In his recent book titled, "The Golden Age: The Spanish Empire of Charles V," Thomas Hugh argues that between 1522 and 1558 the Spanish empire conquered, "Guatemala, Yucatan, Colombia, Venezuela, Peru and Chile, and [controlled] the banks of the mighty River Plate."<sup>8</sup> Per the language of Hugh's tome, one deduces that the wars waged by the *conquistadores* were most certainly fitting of the label "aggressive."<sup>9</sup> The very name of the Spanish imperial explorers – "conquerors" in Spanish – demonstrates the aggressive nature of their wars.

To be more precise, however, this paper applies the United Nations definition of aggression because it is the same definition to which this paper compares the actions of

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<sup>7</sup> Roger Bigelow Merriman, *The Rise of the Spanish Empire in the Old World and New, Volume 1*, (Norwood, Massachusetts, United States: The MacMillan Company, 1918): 4.

<sup>8</sup> Thomas Hugh, *The Golden Age: The Spanish Empire of Charles V*, (London; New York: Allen Lane, 2010): 1.

<sup>9</sup> United Nations General Assembly Resolution 3314 (XXIX): Definition of Aggression, December 14, 1974): 142-3, <http://daccess-ods.un.org/TMP/3760678.76815796.html> (accessed February 17, 2013).

the positive case (United States). Thus, it makes sense to determine how Spanish conduct compares to the United Nations definition of aggression.

The United Nations General Assembly Resolution 3314 (XXIX) defines the crime of aggression in international relations as,

The invasion or attack by the armed forces of a State on the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.<sup>10</sup>

Or, alternatively,

The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.<sup>11</sup>

Although the United Nations did not exist between 1522 and 1558, the time during which the Spanish empire conquered Guatemala, Yucatan, Colombia, Venezuela, Peru and Chile, it is safe to say the Spanish conquest of the aforementioned territories would have satisfied the United Nation's definition of "aggression" because, to avoid such a definition and defeat the *prima facie* case against it, the Spanish argument would have to posit that it either (a) never waged the wars, or (b) waged the wars in self-

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<sup>10</sup> United Nations General Assembly Resolution 3314 (XXIX): Definition of Aggression, December 14, 1974): 142-3, <http://daccess-ods.un.org/TMP/3760678.76815796.html> (accessed February 17, 2013).

<sup>11</sup> Ibid.

defense.<sup>12</sup> However, none of the Native American communities could conceivably have threatened the Iberian peninsula, nor any of Spain's other territories. Thus, one finds reason to label Spain's wars in Guatemala, Yucatan, Colombia, Venezuela, Peru and Chile between 1522 and 1558, "aggressive."<sup>13</sup>

The third and final criterion to be satisfied before Spain can be accepted as the negative case is the criterion of non-democracy. In Henry Kamen's "Empire: How Spain Became a World Power, 1492-1763," one learns that the Spanish were proud of their empire. One learns that "they usually referred to [Spain] not as an empire, but as a monarchy."<sup>14</sup> As the Gale Encyclopedia of World History puts it, "the Spanish empire was governed by an absolute monarchy."<sup>15</sup>

Thus, this section has succeeded in satisfying the three criteria necessary for choosing a negative case: first, that the country be a non-democracy. It has been shown that the Spanish empire was dominated by an absolute monarchy.<sup>16</sup> No reference to Spain between 1522 and 1558 as a democracy or anything approximating it could be found by this author.

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<sup>12</sup> United Nations Security Council Resolution 1368 (2001), September 12, 2001, [http://avalon.law.yale.edu/sept11/unsecres\\_1368.asp](http://avalon.law.yale.edu/sept11/unsecres_1368.asp) (accessed September 30, 2012).

<sup>13</sup> Thomas Hugh, *The Golden Age: The Spanish Empire of Charles V*, (London; New York: Allen Lane, 2010).

<sup>14</sup> Henry Arthur Francis Kamen, *Empire: How Spain Became a World Power, 1492-1763* (Great Britain: Penguin Books, 2002).

<sup>15</sup> Gale Encyclopedia of World History, "Spanish Empire," Vol. 1, (Detroit: Gale, 2008). [http://go.galegroup.com.proxy.lib.duke.edu/ps/i.do?action=interpret&id=GALE|CX3048600062&v=2.1&u=duke\\_perkins&it=r&p=GVRL&sw=w&authCount=1](http://go.galegroup.com.proxy.lib.duke.edu/ps/i.do?action=interpret&id=GALE|CX3048600062&v=2.1&u=duke_perkins&it=r&p=GVRL&sw=w&authCount=1) (accessed February 18, 2013).

<sup>16</sup> Thomas Hugh, *The Golden Age: The Spanish Empire of Charles V*, (London; New York: Allen Lane, 2010).

Second, it has been shown that the Spanish empire at this time waged aggressive wars. Since this paper will use the United Nations definition of aggression to analyze the conduct of the positive case (United States), this paper applies that definition to the conduct of the Spanish empire between 1522 and 1558. Since the Spanish monarchy sent “armed bands, groups, irregulars or mercenaries” to the Americas, where they “[carried] out acts of armed force” against the native populations of “Guatemala, Yucatan, Colombia, Venezuela, Peru and Chile,”<sup>17</sup> this paper assumes that a United Nations council convened to answer the question whether Spain’s conduct in the Americas amounted to “aggression,” would find that it did.

Third, it has been shown that Spain is similar to the United States in key ways. It is impossible that the positive and negative cases will match in every way, and so one matches them based on prioritized factors. The most important factor which the United States and Spain should share in this respect, is their status as hegemonic empires of global reach and historical importance.

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<sup>17</sup> Thomas Hugh, *The Golden Age: The Spanish Empire of Charles V*, (London; New York: Allen Lane, 2010).

## 4. American Empire: The Positive Case

This section must satisfy three criteria in order to qualify the United States as the positive case. First, that the United States exhibits the phenomenon to be explained. That is, that the United States does not fight aggressive wars. Second, that the United States exhibits the causal mechanism, i.e. democratic governance and rule of law. Third, that the United States is an empire.

Again addressing the last criterion first: scholars and pundits refer to the current era of American empire using convenient euphemisms, like “unipolarity,” “unilateralism,” and “hegemony,” but these are really “just [ways] to avoid talking about empire, “empire” being a word to which most Americans remain averse.”<sup>1</sup> According to the same article, “analysis on both the left and the right are beginning to refer to ‘American empire’ as the dominant narrative of the twenty-first century.”<sup>2</sup> Whereas Spain was the dominant superpower in its time, the United States is the superpower of the twenty-first century.<sup>3</sup>

However, according to Bernard Porter in his seminal book, “Empire and Superempire: Britain, America, and the World,” “the modern American empire is

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<sup>1</sup> Daniel H. Nexon and Thomas Wright, “What’s at Stake in the American Empire Debate,” *American Political Science Review*, Vol. 101, No. 2, (May 2007): 253.

<sup>2</sup> Ibid.

<sup>3</sup> William G. Sumner, “The Conquest of the United States by Spain,” *The Yale Law Journal*, Vol. 8, No. 4, (January, 1899): 168, <http://www.jstor.org/stable/781012> (accessed February 18, 2013).

different from all others in history.”<sup>4</sup> Porter clarifies this difference when he says that, “in its rhetoric...[the modern American empire] can claim to be more benevolent than most.”<sup>5</sup> Porter also notes that, although previous empires were “defined in terms of clear and overt rule by one nation over others,” that “later this came to seem an inadequate way of characterizing imperialism” because it “left out all kinds of control across national boundaries that were every bit as confining as this “formal” kind of empire, even though they were only indirect.”<sup>6</sup>

Porter’s new definition of empire does not require formal rule over subject territories and peoples, as such. Instead, Porter classifies the United States as an empire because of its ability to control and confine decision-makers across national boundaries – that is, the twenty-first century empire of democracy is not identified by its practice of formal subjugation (per the Spanish empire), but by its ability to influence key decision-makers across national boundaries. Thus, it is possible to accept that the United States is an empire without necessarily accepting that the United States wages aggressive wars.

The second criterion to be satisfied is that the United States is a democracy. This fact is borne out in many studies over many years, but if one source can prove the point succinctly, it is the Polity IV dataset. According to this index of democratization, the United States exhibits a high degree of democracy. Indeed, the Polity IV dataset bestows

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<sup>4</sup> Bernard Porter, *Empire and Superempire: Britain, America, and the World*, (Yale University Press, 2006): 2.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.



upon the United States a “+10,” its highest rating of democracy.<sup>7</sup> Although Polity data does not extend back to the Golden Age of Charles V and the Spanish empire between 1522 and 1558, historical records suggest that Spain was an absolute monarchy and would have deserved a ranking far below the highest possible +10 (fully democratic), and probably closer to the lowest possible, -10 (fully authoritarian).

The final criterion to be satisfied is that the American empire does not wage aggressive wars. Porter’s definition of empire makes clear that the two seemingly opposite phenomena (empire and absence of aggressive wars) can, indeed, coexist. However, one must choose examples of wars and prove they are not “aggressive” if one is to bear the point out empirically. For this reason, the inquiry will now proceed to judge whether America’s most recent wars have been “aggressive.”

Porter says the American empire reached “full magnification” in the post-9/11 world.<sup>8</sup> According to Porter,

All the ingredients of post-9/11 American imperialism can be traced back to earlier times; but after that date they were suddenly pushed to the forefront. It was then that American imperialism for the first time transcended its British predecessor; became something far greater....I call this superempire.<sup>9</sup>

Because Porter’s new definition of American empire begins post-9/11, and because democratic security studies must focus on recent trends to predict future

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<sup>7</sup> Center for Systemic Peace, “Polity IV Annual Time-Series 1800-2011,” <http://www.systemicpeace.org/inscr/inscr.htm> (accessed February 2, 2013).

<sup>8</sup> Bernard Porter, *Empire and Superempire: Britain, America, and the World*, (Yale University Press, 2006): 8.

<sup>9</sup> *Ibid.*

outcomes, this paper will constrict the question of American aggression to wars fought in the post-9/11 “War on Terror.”

This paper will now address, separately, three of America’s most recent military conflicts (Afghanistan, Iraq, Libya) and argue that they were not aggressive wars, in hopes of confirming the statement: The dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war.

From safe haven within certain regions of Afghanistan, extremist Islamist groups operating under the umbrella-term “al-Qaeda” planned to hijack airplanes and fly them into buildings in Washington, D.C. and New York City on September 11, 2001 as the surprise first attack in a war against America.<sup>10</sup> Congress’ subsequent Authorization for the Use of Military Force (AUMF) gave the American executive permission to retaliate against al-Qaeda in Afghanistan, where the Taliban allowed al-Qaeda to operate with impunity.<sup>11</sup> While the AUMF arguably met the domestic legal requirements necessary to commit troops abroad,<sup>12</sup> the Executive also argued at international law that the invasion

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<sup>10</sup> “The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States,” <http://www.gpo.gov/fdsys/pkg/GPO-911REPORT/content-detail.html> (accessed October 30, 2012).

<sup>11</sup> Authorization for the Use of Military Force, Public Law 107-40, September 18, 2001, <http://news.findlaw.com/hdocs/docs/terrorism/sjres23.es.html>. (accessed October 31, 2012).

<sup>12</sup> One can argue that an “Authorization for the Use of Military Force” is distinct from a formal declaration of war, which declaration Congress must make if the nation is to wage war, according to the Constitution of the United States of America, Article 1, Section 8.

was necessary and appropriate per Chapter VII, Article 51 (self-defense) of the United Nations Charter.<sup>13</sup>

By virtue of being a war waged in self-defense, the Afghanistan war cannot be considered an aggressive war, given the preceding analysis. Unlike the hypothesized trial at which the Spanish empire would be found liable for waging aggressive wars in “Guatemala, Yucatan, Colombia, Venezuela, Peru and Chile,”<sup>14</sup> one hypothesizes that the United States would face no such prosecution from the United Nations on that front, because it was the United Nations itself that granted the United States the legal basis on which to invade Afghanistan in the first place.

Note, also, that the American executive procured a domestic legal basis – the Congressional Authorization for the Use of Military Force – before invading Afghanistan. This fact lends credence to the argument that the dictates of democratic governance and rule of law that so constrain the executive that he refrains from waging aggressive war.

As regards the subsequent invasion of Iraq, the American executive invaded Iraq based on the legal argument that the Hussein regime presented an imminent and existential threat to America, and to international security generally, due to its weapons

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<sup>13</sup> United Nations Security Council Resolution 1368 (2001), September 12, 2001. [http://avalon.law.yale.edu/sept11/unsecres\\_1368.asp](http://avalon.law.yale.edu/sept11/unsecres_1368.asp) (accessed October 30, 2012).

Phyllis Bennis, “Article 51: Self-Defense and its Limits in the U.N. Charter,” Transnational Institute, February 1, 2002, [http://www.tni.org/archives/archives\\_bennis\\_art51](http://www.tni.org/archives/archives_bennis_art51) (accessed October 30, 2012).

<sup>14</sup> Thomas Hugh, *The Golden Age: The Spanish Empire of Charles V*, (London; New York: Allen Lane, 2010): 1.

program and the possibility that it could distribute those weapons to al-Qaeda and/or other terrorist organizations.<sup>15</sup> The purported purpose of the invasion was to stop Saddam Hussein from developing weapons of mass destruction, or to find and eliminate the weapons of mass destruction he had already developed.<sup>16</sup> For weeks administration officials made the case that Hussein was a threat to international security and American interests because of his weapons program, and that the American executive needed to invade Iraq in a self-defensive posture for this reason.<sup>17</sup>

In support of such a seemingly worthy objective, Congress passed Public Law 107-243, otherwise known as the Authorization for the Use of Military Force Against Iraq Resolution of 2002. This grant of authority to the Executive gave domestic legal backing to the Iraq invasion.<sup>18</sup> It seems that, although the United States did not enjoy United Nations Security Council backing for the Iraq invasion, that the dictates of democratic governance and rule of law nevertheless compelled the executive to seek a domestic legal basis before waging a war that – absent said legal basis – might qualify as

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<sup>15</sup> Tim Dickinson and Jonathan Stein, “Lie by Lie: A Timeline of How We Got Into Iraq: Mushroom Clouds, Duct Tape, Judy Miller, Curveball. Recalling How Americans were Sold a Bogus Case for Invasion,” *Mother Jones Magazine*, September/October 2006 Issue, <http://www.motherjones.com/politics/2011/12/leadup-iraq-war-timeline>. (accessed October 31, 2012).

Authorization for the Use of Military Force Against Iraq Resolution of 2002, Public Law 107-243, October 16, 2002, [www.gpo.gov/fdsys/pkg/PLAW-107publ243/pdf/PLAW-107publ243.pdf](http://www.gpo.gov/fdsys/pkg/PLAW-107publ243/pdf/PLAW-107publ243.pdf). (accessed October 31, 2012): “Whereas members of al Qaida, an organization bearing responsibility for attacks on the United States, its citizens, and interests, including the attacks that occurred on September 11, 2001, are known to be in Iraq....”

<sup>16</sup> Jonathan Stein and Tim Dickinson, “Lie by Lie: A Timeline of How We Got Into Iraq,” (accessed October 31, 2012).

<sup>17</sup> Id.

<sup>18</sup> Authorization for the Use of Military Force, Public Law 107-40, September 18, 2001, <http://news.findlaw.com/hdocs/docs/terrorism/sjres23.es.html>. (accessed October 31, 2012).

an aggressive war. Note that the executives waging war in behalf of the Spanish empire did not need to find a legal basis in domestic democratic processes, nor in international law, and as a result of this lack of constraint, the Spanish empire waged aggressive wars across the Americas.

Note, also, that the argument justifying the Iraq invasion was made so as to evoke a self-defense mentality. The moral self-defense aspect to the legal argument justifying the Iraq invasion makes it easier to argue that the Iraq invasion was not an aggressive war (since a war fought in self-defense cannot be aggressive per the United Nations charter).<sup>19</sup> Admittedly, one can argue that because the Iraq invasion lacked a United Nations mandate, that a United Nations council might find the United States liable for aggression, but considering that the United Nations has not actually proceeded to prosecute on such grounds even though it is free to do so, suggests that the matter is not so obvious. In this legal “grey space” there is room to argue that the Iraq invasion was not aggressive because it was waged in self-defense.<sup>20</sup>

The Obama administration’s legal cover for invading Libya was United Nations Security Council Resolution 1973 (2011), which called for a no-fly zone over Libya, an arms embargo against the Qaddafi regime, and an asset freeze of all the regime’s

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<sup>19</sup> Ewen MacAskill and Julian Borger, “Iraq War was Illegal and Breached U.N. Charter, Says Annan,” *The Guardian*, Wednesday, September 15, 2004, <http://www.guardian.co.uk/world/2004/sep/16/iraq.iraq> (accessed February 19, 2013).

<sup>20</sup> Ibid.

accounts in U.N. member states' banks.<sup>21</sup> Like the Afghanistan legal argument, the argument that the Libya invasion was not an aggressive war finds support in the very fact of the passage of UNSC Resolution 1973 (2011). The standard to which both the positive and negative cases are held in this regard is the United Nations definition of aggression, and it is difficult to imagine that a United Nations body would issue UNSC 1973 (2011) and subsequently find the American executive liable for waging aggressive war in Libya.

It has been shown that the United States, as the positive case, (1) is an empire; (2) a democracy; and (3) does not wage aggressive wars. On the other hand, the Spanish empire – the negative case – has been shown to be non-democratic and to wage aggressive wars.

In attempting to confirm the following statement: “The dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war,” this paper uses the method of difference. By comparing the positive case, in which the causal mechanism (democracy/rule of law) and the phenomenon to be explained (absence of aggressive wars) are both present, to the negative case, in which the causal mechanism and phenomenon to be explained are both absent, one succeeds in isolating the causal mechanism and direction of causation.

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<sup>21</sup> “U.N. Security Council Resolution 1973 (2011) on Libya – Full Text,” *The Guardian*, March 17, 2011, <http://www.guardian.co.uk/world/2011/mar/17/un-security-council-resolution> (accessed October 31, 2012).

Notwithstanding the difficulty of finding a negative case that shares the American empire's various unique qualities, it has been shown that the absence of the causal mechanism in the negative case results in the absence of the phenomenon to be explained in the negative case.

Contrariwise, it has been shown that the causal mechanism in the positive case results in the phenomenon to be explained. That is, American adherence to the dictates of democratic governance and rule of law so constrain the American executive that he refrains from waging aggressive war. Note that, by virtue of its wars being waged in self-defense and/or at the behest of the United Nations, that none of the three wars waged by the American executive in the post-9/11 "War on Terror" would likely be seen to violate the United Nations' prohibition against aggressive war.

Thus, the method of difference has been fully drawn; it shows, at least as a preliminary matter, that adherence to the dictates of democratic governance and rule of law so constrain the executive that he refrains from waging aggressive war.

## 5. Lawfare

Unfortunately, the matter is not so simple. The preceding analysis – specifically, the section on America’s post-9/11 “War on Terror” – is incomplete. This analysis was left incomplete in order to demonstrate that by overlooking certain facts and phenomena, even the adept political scientist could employ the method of difference to the question at hand and arrive at a seemingly convincing, but nevertheless mistaken conclusion.

Certain facts surrounding the “War on Terror” call into question the conclusion that America’s post-9/11 wars do not qualify as “aggressive.” In order to explain how these facts lead one to conclude that although it is a democracy, the United States nevertheless engages in aggressive war, it will first be necessary to introduce the qualitative political science concept: Lawfare.

Lawfare is the direction (or, better yet, misdirection) of the law’s violent enforcement mechanism against a political enemy for the purpose of achieving political ends, as opposed to legitimate law enforcement ends. Thus, he who engages in lawfare attempts to use law enforcement’s violent means against his political enemy with the purpose of achieving a political goal. To demonstrate a simple example, imagine that man (A) is running for mayor of a small city and wants to eliminate his main rival (B) for the same position. Imagine, as well, that the two men are neighbors. Man (A) crosses into his neighbor’s property, plants a quantity of illegal narcotics on his neighbor’s



property, returns to his own property, then anonymously calls local police to report his neighbor for narcotics possession. If the police arrive and arrest the neighbor for narcotics possession, then man (A) who planted the narcotics has practiced lawfare by using the law's violent enforcement mechanism against his political enemy, when his enemy did not deserve the law's violence, and all this to achieve the political goal of winning the mayoral election.

Lawfare on the international scene operates according to the same principles, but appears much more complex, and is more difficult to discern amidst the fog of war. One should begin explaining lawfare by reference to Carl von Clausewitz, the legendary German war strategist who said that "war is the violent means to political ends."<sup>1</sup> Imagine Country A's political goal is to solicit trade concessions from Country B. Country A might first engage Country B in diplomatic negotiations. If negotiations fail, Country A might try to coerce Country B into concessions, perhaps by manipulating trade flows or propagandizing Country B's population. These are political means to political ends.

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<sup>1</sup> Carl von Clausewitz, *On War*, Trans. Colonel J.J. Graham, (1874), <http://www.gutenberg.org/files/1946/1946-h/1946-h.htm>. (accessed October 31, 2012).  
Heading 24: "WAR IS A MERE CONTINUATION OF POLICY BY OTHER MEANS. We see, therefore, that War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means. All beyond this which is strictly peculiar to War relates merely to the peculiar nature of the means which it uses. That the tendencies and views of policy shall not be incompatible with these means, the Art of War in general and the Commander in each particular case may demand, and this claim is truly not a trifling one. But however powerfully this may react on political views in particular cases, still it must always be regarded as only a modification of them; for the political view is the object, War is the means, and the means must always include the object in our conception."

Once Country A realizes that Country B will not voluntarily give Country A trade concessions, Country A might decide to employ violent means toward its political ends. If Country A were to enforce a military blockade against Country B's ports until Country B agreed to trade concessions, then Country A would be engaged in warfare – per Clausewitz's definition – against Country B. If Country A sent troops ashore to kill Country B's leader and install a new leader willing to negotiate trade concessions with Country A, then Country A has used violent means to achieve political ends. It is important to note that the violence of war is not an end in and of itself. Rather, violence in war is always calculated to coerce one's enemy into a political concession. War is the violent attempt to convince one's enemy.

But the use of naked military force in the 21<sup>st</sup> Century is politically untenable. Many countries of the world, and especially the "international community," no longer accept the dictates of *real politick* and aggressive war, as the Spaniards did in their time.<sup>2</sup>

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<sup>2</sup> Coalition for the International Criminal Court: "An act of aggression is defined as the use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council. The definition of the act of aggression, as well as the actions qualifying as acts of aggression contained in the amendments (for example invasion by armed forces, bombardment and blockade), are influenced by the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974." <http://www.iccnw.org/?mod=aggression>. (accessed October 20, 2012).

UN General Assembly Resolution 3314 (XXIX)(1974), Article 3: Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within

The mass-adoption of democratic systems of government across the earth makes it more difficult for leaders to impose the costs of war upon their peoples, unless the people think the war justified. This is where lawfare becomes useful to the democratic leader.

When a leader of a democratic country wants to achieve a political end which he cannot manage to achieve by peaceful, i.e. nonviolent, means, then he will seek to achieve that end through violent means. However, democracy imposes on the leader the requirement that he convince his people that the use of violence is warranted, and this convincing is the purpose of lawfare.

The democratic leader who wants to employ violent means against his political enemy must convince his people that it is necessary and appropriate to bring violence against said enemy. Accusing his enemy of breaking the law is one way he can convince his people that his enemy deserves violence.

If a democratic leader intends to convince his people that his enemy deserves violence, he must convince his people that his enemy broke the law. Only then will the violent mechanism of law enforcement be necessary and appropriate against said enemy, and only thusly will the democratic executive overcome the constraints of democratic governance and rule of law. Thus, the stage is set for deceit because all the

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the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (l) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

democratic leader need do is convince his own people that his enemy broke the law – whether it is true or not – and the democratic leader will gain popular support for a campaign of violence against said enemy. In such a case, the democratic leader disguises “political violence” as legitimate “law enforcement violence” as a way around the constraints of democratic governance and rule of law. Such is the purpose and appeal of lawfare.

This paper will operationalize the concept of lawfare by showing how the American Executive has used questionable legal arguments to justify violence against its political enemies. Specifically, this paper will show how the legal arguments made by the American Executive in the “War on Terror” are calculated to justify regime change (and, thus, aggressive war) in Afghanistan, Iraq, and Libya. If it can be shown that each of these wars – contrary to the initial analysis – is an aggressive war, then it will seriously call into question the burgeoning field of democratic security studies, as well as the validity of the statement: The dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war.

## ***5.1 Afghanistan***

To justify the Afghanistan invasion, the Bush administration argued that al-Qaeda, sheltered by the Taliban, struck the United States from their bases in

Afghanistan.<sup>3</sup> Since al-Qaeda struck at America first, the argument went, America was justified in retaliating, per the dictates of self-defense. Under Chapter VII, Article 51 of the United Nations Charter, a country is legally justified in pursuing “the inherent right of...self-defense if an armed attack occurs against” that country.<sup>4</sup> Indeed, the United Nations Security Council the next day passed Resolution 1368 (2001) essentially affirming the American legal argument.<sup>5</sup>

However, by responding to the 9/11 attacks with a full-scale ground invasion and occupation of Afghanistan, the American Executive showed that its purpose in responding to the 9/11 attacks was to effect regime change in Afghanistan, as distinct from the purpose of simply apprehending those individuals responsible for the 9/11 attacks. Instead of executing the Afghanistan campaign as a law enforcement action, which option would be the least invasive and most appropriate response to a specific crime (the 9/11 attacks), the American Executive executed the Afghanistan campaign as a full-scale invasion and occupation, because only then could the American Executive achieve its true purpose of removing and replacing the Taliban regime.

It is clear the American Executive used the 9/11 attacks as justification to retaliate – with domestic and international legal cover – against its enemy, the Taliban regime

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<sup>3</sup> 9/11 Commission, “The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States,” <http://www.gpo.gov/fdsys/pkg/GPO-911REPORT/content-detail.html> (accessed October 30, 2012).

<sup>4</sup> United Nations Charter, Chapter VII, Article 51, <http://www.un.org/en/documents/charter/chapter7.shtml> (accessed October 31, 2012).

<sup>5</sup> United Nations Security Council Resolution 1368 (2001): Threats to International Peace and Security Caused by Terrorist Acts, <http://daccess-ods.un.org/TMP/3829719.72227097.html> (accessed October 31, 2012).

that had taken over Afghanistan<sup>6</sup> to the detriment of western business and governments.<sup>7</sup> In other words, when the American Executive staged a full-scale ground invasion and occupation of Afghanistan in response to the 9/11 attacks, the American Executive used both domestic (Congressional AUMF) and international (UNSC 1368) law's violent enforcement mechanisms to direct violence against a class of people (all Afghans) that was much larger than the class of people who had directly or indirectly participated in the 9/11 attacks. The American Executive did this because its goal was to replace the Taliban regime, and was not limited to apprehending those individuals suspected of committing the 9/11 attacks.

Essentially, the American executive used domestic and international legal self-defense arguments to justify invading Afghanistan for the political end of replacing the Taliban regime.<sup>8</sup> In even simpler terms, the American Executive used 9/11 as an excuse to invade Afghanistan and replace the Taliban regime in order to secure American/western hegemony in Central Asia, even though it could have constricted its

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<sup>6</sup> Jayshree Bajoria, "The Taliban in Afghanistan," The Council on Foreign Relations. October 6, 2011, <http://www.cfr.org/afghanistan/taliban-afghanistan/p10551> (accessed October 31, 2012).

<sup>7</sup> Nafeez Mosaddeq Ahmed, "America and the Taliban: From Co-operation to War," *Global Dialogue*, Volume 4, Number 2, Spring 2002, United Kingdom, <http://www.worlddialogue.org/content.php?id=200> (accessed October 31, 2012).

<sup>8</sup> Zbigniew Brzezinski, *The Grand Chessboard: American Primacy and Its Geostrategic Imperatives* (New York: Basic Books, 1997), p. xiii.

Nafeez Mosaddeq Ahmed, "America and the Taliban: From Co-operation to War," <http://www.worlddialogue.org/content.php?id=200> (accessed October 31, 2012).

"Any nation becoming predominant in Central Asia would pose a direct threat to US control of oil resources there and in the Persian Gulf. It follows that America's primary interest is to help ensure that no single power comes to control this geopolitical space and that the global community has unhindered financial and economic access to it. The aim is to ensure US dominance over Eurasia, via the consolidation of US hegemony in the Central Asian republics."

response to the specific law enforcement end of apprehending those individuals responsible for committing the 9/11 attacks.

Though waging a war in self-defense is legal per the United Nations charter, the self-defense claim does not give the actor *carte blanche* to effect regime change and occupy a country and its peoples such that its response is grossly disproportionate to the magnitude of the initial offense (the 9/11 attacks). Thus, by emphasizing that the American response in Afghanistan far exceeded the use of force necessary to defend itself, one finds reason to hold that the American invasion and occupation of Afghanistan qualify as aggressive war. In fact, one can see quite clearly how the American executive used the method of lawfare to direct the law's violent enforcement mechanism against the entire nation of Afghanistan when law enforcement violence was only appropriate as against the individual perpetrators of the 9/11 attacks.

## **5.2 Iraq**

As regards Iraq, one must first look to the Project for a New American Century's (PNAC) September 2000 report, "Rebuilding America's Defenses."<sup>9</sup> In that document, influential "neo-conservatives" including future Deputy Secretary of Defense under Donald Rumsfeld, Paul Wolfowitz, as well as Scooter Libby and William Kristol, laid out their vision to increase American military presence in the Middle East. According to the report,

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<sup>9</sup> "Rebuilding America's Defenses: Strategy, Forces and Resources For a New Century," The Project for The New American Century, Washington, D.C., September 2000.

The United States has for decades sought to play a more permanent role in Gulf regional security. While the unresolved conflict with Iraq provides the immediate justification, the need for a substantial American force presence in the Gulf transcends the issue of the regime of Saddam Hussein.<sup>10</sup>

The report also named Libya as a “regime deeply hostile to America.”<sup>11</sup> It is important to understand that this document demonstrates the intent to invade both Iraq and Libya before the 9/11 attacks and the “War on Terror” ever occurred.

It is clear now that members of the Bush administration, occupying the office of the Executive, intended to increase the American force presence in the Middle East prior to the 9/11 attacks.<sup>12</sup> According to insider accounts, it seems the Bush administration – and President George W. Bush himself – began publicly advocating for an invasion of Iraq just three months after the 9/11 attacks.<sup>13</sup> Although executive branch aides and experts advised the president that Iraq had nothing to do with 9/11 and had no connections to al-Qaeda or the Taliban, the President pushed forward. In 2003, after much media hype, the American Executive invaded Iraq.<sup>14</sup>

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<sup>10</sup> Id. at p.14.

<sup>11</sup> Id. at p. 51-2.

<sup>12</sup> “Rebuilding America’s Defenses: Strategy, Forces and Resources For a New Century,” The Project for The New American Century, Washington, D.C., September 2000.

<sup>13</sup> William Hamilton. “Bush began to Plan War Three Months After 9/11: Book Says President Called Secrecy Vital,” *The Washington Post*, April 17, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A17347-2004Apr16.html>, (accessed October 31, 2012).

<sup>14</sup> Lee Kuan Yew. “The United States, Iraq, and the War on Terror,” *Foreign Affairs*, January/February 2007, <http://www.foreignaffairs.com/articles/62266/lee-kuan-yew/the-united-states-iraq-and-the-war-on-terror>, (accessed October 31, 2012).



Recall that the PNAC report advocated removing Saddam Hussein from power in Iraq three years before the invasion occurred, and one year before 9/11 occurred.<sup>15</sup> As regards lawfare, the question is whether the American Executive invaded because it really believed Saddam Hussein was developing weapons of mass destruction, or because Iraq was the next step in the incremental Middle East regime-change agenda. The latter is undoubtedly the case because even the Central Intelligence Agency reported that no evidence of an Iraqi WMD program had surfaced, and that the intelligence reports alleging such a program were unfounded.<sup>16</sup> This means that one has reason to believe former Secretary General of the United Nations, Kofi Annan, when he said that the American invasion of Iraq was an act of aggression.<sup>17</sup>

The claim that Hussein was running a nuclear weapons program was quickly debunked after the invasion.<sup>18</sup> Given that Iraq did not host any weapons of mass destruction, then-United Nations Secretary General, Kofi Annan, condemned the invasion.<sup>19</sup> That the United Nations Security Council failed to pass a resolution

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<sup>15</sup> "Rebuilding America's Defenses: Strategy, Forces and Resources For a New Century," The Project for The New American Century, Washington, D.C., September 2000.

<sup>16</sup> "CIA's Final Report: No WMD Found in Iraq: Recommends Freeing Detainees Held for Weapons Knowledge," *Associated Press*, April, 25, 2005, [http://www.msnbc.msn.com/id/7634313/ns/world\\_news-mideast\\_n\\_africa/t/cias-final-report-no-wmd-found-iraq/](http://www.msnbc.msn.com/id/7634313/ns/world_news-mideast_n_africa/t/cias-final-report-no-wmd-found-iraq/) (accessed October 31, 2012).

<sup>17</sup> Ewen MacAskill and Julian Borger, "Iraq War was Illegal and Breached U.N. Charter, Says Annan," *The Guardian*, September 15, 2004, <http://www.guardian.co.uk/world/2004/sep/16/iraq.iraq> (accessed October 31, 2012).

<sup>18</sup> "CIA's Final Report: No WMD Found in Iraq: Recommends Freeing Detainees Held for Weapons Knowledge," *Associated Press*, April, 25, 2005, [http://www.msnbc.msn.com/id/7634313/ns/world\\_news-mideast\\_n\\_africa/t/cias-final-report-no-wmd-found-iraq/](http://www.msnbc.msn.com/id/7634313/ns/world_news-mideast_n_africa/t/cias-final-report-no-wmd-found-iraq/) (accessed October 31, 2012).

<sup>19</sup> Ewen MacAskill and Julian Borger, "Iraq War was Illegal and Breached U.N. Charter, Says Annan," *The Guardian*, September 15, 2004, <http://www.guardian.co.uk/world/2004/sep/16/iraq.iraq> (accessed October 31, 2012).

legitimizing the American invasion of Iraq deprived the American Executive the international legal cover it enjoyed pursuant to the Afghan invasion.<sup>20</sup> These facts, taken together, provide further support to the argument that the American invasion of Iraq was an act of aggression in violation of the United Nation's charter.

Understand that the American Executive used the false threat of Hussein's weapons arsenal to make a moral/legal argument which recalled the same self-defense mentality sparked by the 9/11 attacks. This is not a coincidence. The purpose of casting the Hussein regime as a WMD threat was calculated to convince the American people – the argument failed internationally – that the Hussein regime deserved violence. The Bush administration used this lawfare “cover threat” to conceal its true purpose of effecting regime change in Baghdad, and in this way circumvented the constraints of democratic governance and rule of law.

### **5.3 Libya**

As regards Libya, The Security Council resolution only prescribed a no-fly zone, an arms embargo, and an asset freeze against Libya, with the purpose of reducing Qaddafi's ability to terrorize Libyan citizens.<sup>21</sup> These measures appear to prescribe non-violent means to protect civilians, however, language of the resolution allowed member states to “take all necessary measures” in pursuit of those ends. Considering the

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<sup>20</sup> Ibid.

<sup>21</sup> “U.N. Security Council Resolution 1973 (2011) on Libya – Full Text,” *The Guardian*, March 17, 2011, <http://www.guardian.co.uk/world/2011/mar/17/un-security-council-resolution> (accessed October 31, 2012).

American Executive (through NATO) exceeded the mandate to protect civilians and hunted down Qaddafi and his family, it is clear that the American Executive interpreted “all necessary measures” to include violent means.<sup>22</sup> In fact, protecting civilians was not the purpose of enforcing the UN resolution. Indeed, protecting civilians was only a lawfare cover meant to give the American Executive and NATO a legal basis for removing and replacing the Qaddafi regime.

The lawfare dynamics proceed as such: The U.N. resolution grants the American Executive and NATO the legal cover to take all necessary measures to protect Libyan civilians and enforce the no-fly zone, the arms embargo, and the asset freeze. These are non-violent means to law enforcement ends. If NATO and the American Executive had stuck to the resolution, there would be no lawfare component to discuss. Unfortunately, but predictably, the American Executive interpreted “all necessary measures” to include violent means, and it interpreted “protect civilians” to mean killing Qaddafi and his family. Clearly, the aerial bombardment and NATO support of eastern rebels were violent means intended to exceed the resolution’s mandate and achieve the political end of removing the Qaddafi regime from power.

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<sup>22</sup> Ibid.

Martin Iqbal. “The ‘Rebel’ Assassination of Muammar Qaddafi: A NATO Operation From A to Z,” *EmpireStrikesBlack*, October 22, 2011, <http://empirestrikesblack.com/2011/10/did-nato-special-forces-assassinate-muammar-gaddafi/> (accessed October 31, 2012).

Julian Borger, Ian Traynor and Ewen MacAskill, “Gaddafi Family Deaths Reinforce Doubts About NATO’s U.N. Mandate,” *The Guardian*, May 01, 2011, <http://www.guardian.co.uk/world/2011/may/01/gaddadi-family-deaths-reinforce-doubts> (accessed October 31, 2012).

By effecting regime change beyond the mandate of the UN Security Council resolution, the American executive succeeded in redirecting the law's violent enforcement mechanism against its political enemy (the Qaddafi regime), and thereby circumvented the constraints of democratic governance and rule of law.

## 6. Conclusion

It is clear after the preceding section that the concept of lawfare (misdirection of the law's violent enforcement mechanism against a political enemy for political ends) makes the inquiry at hand more difficult to resolve. Whereas the democratic peace theory and the burgeoning field of democratic security studies suggest that the dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war, the study of lawfare makes clear the difficulties of proving such a statement.

In hopes of affirming the notion that the dictates of democratic governance and the rule of law so constrain the executive that he refrains from waging aggressive war, this paper developed an argument based on the method of difference. To succeed in such attempt, this paper had to prove that the dictates of democratic governance and rule of law do, in fact, constrain the executive such that he refrains from waging aggressive wars. Thus, it had to find that the causal mechanism (democracy/rule of law) resulted in the phenomenon to be explained (absence of aggressive wars). To do this, the paper set up the United States (post-9/11) as the positive case, and the Spanish empire between 1522 and 1558 as the negative case. The negative case, of course, demonstrated an absence of the causal mechanism and the phenomenon to be explained.

As an initial matter, this paper found that the comparison of Spain as the negative case, and the United States as the positive case, did provide reason to believe

that adherence to the dictates of democratic governance and the rule of law so constrains the executive that he refrains from waging aggressive wars. Adherence to democratic governance and the rule of law were evidenced by the American executive's procurement of legal bases for each of its three wars in the post-9/11 "War on Terror," namely the wars in Afghanistan, Iraq, and Libya. Each of these conflicts enjoyed a legal basis that made it appear as though the American executive was arguably not in violation of the United Nations charter for any of the three conflicts. Thus, finding that each of the three conflicts was not aggressive, and considering that the reason they were deemed not aggressive is that they enjoyed legal bases that seemed to satisfy the dictates of democratic governance and rule of law, it was argued that adherence to the dictates of democratic governance and rule of law did, indeed, so constrain the executive that he refrained from waging aggressive wars.

After establishing the argument that the causal mechanism (democracy/rule of law) resulted in the phenomenon to be explained (absence of aggressive wars), the inquiry was complicated by the introduction of the concept of lawfare. Lawfare is the misdirection of the law's violent enforcement mechanism against a political enemy for political purposes. It was shown that although each of the three conflicts (Afghanistan, Iraq, Libya) did enjoy – on their faces – legitimate legal bases, that the American executive actually misdirected legal violence against each of the three countries for the purpose of removing and replacing the entrenched regimes. In each case, the legal basis

for invasion precluded a formal finding of aggression by the United Nations. But it was discovered through the application of lawfare to the instant cases that the American executive exceeded, in each instance, the legal mandate it used to justify each invasion. That is, although the American executive claimed self-defense as the purpose of invading Afghanistan, the American executive's disproportionate response (invasion, indefinite occupation, and regime change) exceeded the requirements of self-defense, and therefore qualified as an example of misdirecting the law's violent enforcement mechanism for the purpose of achieving political ends (regime change).

In Iraq, the American executive claimed self-defense as against Saddam Hussein's supposed weapons of mass destruction program, though no program was ever discovered. However, this did not stop the American executive from removing and replacing the Hussein regime, which goal it articulated in the PNAC report. Thus, the American executive used a self-defense argument to misdirect the law's violent enforcement mechanism against the Hussein regime.

As per Libya, the American executive (and NATO) claimed to invade for the sole purpose of protecting Libyan civilians, but its conduct suggested otherwise. The subsequent annihilation of the Qaddafi regime (and members of his family) suggests that NATO and the United States exceeded the UN legal mandate and directed the law's violent enforcement mechanism against Qaddafi for the purpose of effecting regime change.

The introduction of lawfare to the “method of difference” analysis results in an inability to conclude that the causal mechanism (democracy/rule of law) results in the phenomenon to be explained (absence of aggressive wars) in the positive case. This paper initially built up the argument that the causal mechanism does result in the phenomenon to be explained in order to demonstrate exactly how the concept of lawfare impacts the current study of international relations, and especially how it calls into question the efficacy of the democratic peace theory and democratic security studies.

Essentially, lawfare is a way that democratic executives can appear to adhere to the dictates of democratic governance and the rule of law, while actually circumventing them. Thus, this paper cannot confirm the statement that the dictates of democratic governance and rule of law so constrain the executive that he refrains from waging aggressive war. Further, this paper cannot confirm Hayes’ impression that the democratic peace theory should expand into a generalized study of democratic security, because this paper finds no support for the notion that adherence to the dictates of democratic governance and rule of law so constrain the executive that he refrains from waging aggressive war.



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