# Cards Harvard Round 7

## Case

### EU Coop

#### First, indefinite detention hurts US cooperation with Europe which is crucial to combat terrorism.

Archick 12 (Kristen, Specialist in European Affairs at Congressional Research Service, “U.S.-EU Cooperation Against Terrorism”, Congressional Research Service, 5-21-12, RSR]

U.S. and European officials alike maintain that the imperative to provide freedom and security at ¶ home should not come at the cost of sacrificing core principles with respect to civil liberties and ¶ upholding common standards on human rights. Nevertheless, the status and treatment of ¶ suspected terrorist detainees has often been a key point of U.S.-European tension. Especially ¶ during the former Bush Administration, the U.S.-run detention facility at Guantánamo Bay, Cuba; ¶ U.S. plans to try enemy combatants before military commissions; and the use of “enhanced ¶ interrogation techniques” came under widespread criticism in Europe. The U.S. practice of ¶ “extraordinary rendition” (or extrajudicial transfer of individuals from one country to another, ¶ often for the purpose of interrogation) and the possible presence of CIA detention facilities in ¶ Europe also gripped European media attention and prompted numerous investigations by the ¶ European Parliament, national legislatures, and judicial bodies, among others. ¶ Many European leaders and analysts viewed U.S. terrorist detainee, interrogation, and ¶ “extraordinary rendition” policies as being in breach of international and European law and as ¶ degrading shared values regarding human rights and the treatment of prisoners. Moreover, they ¶ feared that such U.S. policies weakened U.S. and EU efforts to win the battle for Muslim “hearts ¶ and minds,” considered by many to be a crucial element in countering terrorism. The Bush ¶ Administration, however, defended its detainee and rendition polices as important tools in the ¶ fight against terrorism, and vehemently denied allegations of violating U.S. human rights ¶ commitments, including the prohibition against torture. Bush Administration officials also ¶ acknowledged European concerns about Guantánamo and sought agreements with foreign ¶ governments to accept some Guantánamo detainees, but maintained that certain prisoners were ¶ too dangerous to be released.

#### This policy of counter terrorism crushes NATO and the Atlantic alliance.

Parker 12 (Tom, Former Policy Dir. for Terrorism, Counterterrorism and H. Rts. at Amnesty International, U.S. Tactics Threaten NATO, September 17, <http://nationalinterest.org/commentary/us-tactics-threaten-nato-7461>]

The United States has bet heavily on the efficacy of a new array of counterterrorism powers as the answer to Al Qaeda. In doing so it has evolved a concept of operations that has much more in common with the approach to terrorist threats taken by Israel and Russia than by its European partners. There has been little consideration of the wider strategic cost of these tactics, even as the Obama administration doubles down and extends their use. Meanwhile, some of America’s oldest and closest allies are beginning to place more and more constraints on working with U.S. forces. NATO cannot conduct military operations under two competing legal regimes for long. Something has to give—and it may just be the Atlantic alliance.

### Geneva

#### Next, blanket indefinite detention violates the Geneva Convention – doesn’t differentiate between types of combatants nor the different durations of conflict.

Murphy 7 (Law Professor at George Washington University Law School, “Evolving Geneva Convention Paradigms in the¶ 'War on Terrorism': Applying the Core Rules to the¶ Release of Persons Deemed 'Unprivileged¶ Combatants'”, GW Law Faculty Publications & Other Works, 2007, RSR]

The general assertion that all detainees at Guantánamo Bay may be detained for the “duration¶ of hostilities” is doubtful. First, that assertion may be overbroad in covering all persons detained¶ worldwide in the “war on terrorism.” While detention of persons on the battlefield in Afghanistan,¶ whether the person is associated with the Taliban or with Al Qaeda, seems fairly to fall within the¶ scope of the evolving laws of war, the detention of persons outside Afghanistan who are suspected¶ of connections to global terrorism is more problematic. The laws of war operate within temporal and¶ geographic realms; considerable attention is given to when it can be said that an “armed conflict”¶ has arisen and ended, and to where it is that protected persons are located (in enemy territory, in¶ occupied territory, in neutral territory, etc.) These rules do not fit well the new paradigm of an armed¶ conflict between a state and a non-state actor that is transnational in nature, especially when that nonstate actor is not a centralized organization. Links to Al Qaeda may be found in numerous countries,¶ not because the indigenous factions there are actively engaged in a coordinated fight against the¶ United States, but because Al Qaeda attracts movements that seek to reduce Western influence in their countries or region, be it Somalia, Algeria, or elsewhere.135 A principal architect of the radical¶ thinking that came to characterize Al Qaeda, Abu Musab al-Suri, has written that Al Qaeda is not¶ an organization, it is not a group, nor do we want it to be. . . . It is a call, a reference, a¶ methodology.”136 If that is correct, it becomes very strained to view all persons suspected of ties to¶ Al Qaeda as unlawful combatants engaged in an armed conflict with the United States. It would be¶ as if, during the Cold War, the United States decided to treat all persons suspected of being¶ communists as combatants because communist groups were fighting the United States in places like¶ Vietnam or Korea.¶ While it may be the case that Al Qaeda persons detained outside Afghanistan fall within the¶ same rules at those detained on the battlefield, it may also be the case that the rules are different.¶ Perhaps in recognition of this fact, the Supreme Court in Hamdi, after stating the general principle¶ of the law of war that detention may last no longer than active hostilities, went on to note that “[i]f¶ the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed¶ the development of the law of war, that understanding may unravel.”137 Indeed, the Court appears¶ to have been influenced by the fact that Hamdi allegedly took up arms with the Taliban and that¶ active fighting against Taliban forces remained ongoing in Afghanistan. ¶ If Al Qaeda suspects picked up in places other than the battlefield in Afghanistan are not¶ regarded as combatants under the laws of war, then they would fall under the same rules that apply¶ to any transnational criminal; they could be arrested and tried in regular courts for transnational¶ crime, and otherwise could be closely monitored by law enforcement authorities. They could not,¶ however, simply be detained without trial indefinitely.¶ Second, even if one assumes that all the detainees at Guantánamo Bay should be treated¶ alike, the general assertion that they may be detained for the “duration of hostilities” still is¶ problematic. That general assertion appears based on Article 118 of Geneva Convention III¶ (“[p]risoners of war shall be released and repatriated without delay after the cessation of active¶ hostilities”), and perhaps on the analogous Article 133 of Geneva Convention IV (any internment¶ of civilians “shall cease as soon as possible after the close of hostilities”). Persons who have been¶ prosecuted in accordance with the conventions, of course, may be held even after the cessation of¶ hostilities, but they remain under the protections of the conventions until the completion of their sentences and their release.¶ The sentiment expressed by the 1949 Geneva Convention provisions in favor of expeditious¶ release after the cessation of hostilities was animated by the problems that were experienced prior¶ to 1949. The 1907 Hague Regulations138 and the 1929 Geneva Conventions on Prisoners of War139¶ were interpreted as allowing a detaining power not to repatriate until either the conclusion of an¶ armistice agreement or even a final peace agreement. Since those agreements might take months or¶ even years after the cessation of active hostilities, the repatriation of millions of prisoners of war in¶ both the world wars were considerably delayed.140 Consequently, the1949 Geneva Conventions (and¶ Protocol I) sought to detach the issue of repatriation from the conclusion of a formal agreement, and¶ instead tie the matter to core justification for detention—i.e., whether the individual would pose a¶ threat to the detaining power after release. In this sense, the obligation became a unilateral one¶ imposed on the detaining power, and not one contingent on some formal of consent from the¶ opposing belligerent. For the 1949 Geneva Conventions, the threat no longer existed once the¶ hostilities were over.¶ Yet, regardless of the duration of the conflict, Geneva Convention III and Geneva Convention¶ IV are oriented toward an individualized assessment of the circumstances arising with respect to¶ individual POWs and civilian internees. Under Geneva Convention III, a detaining power may¶ release a particular POW on “parole or promise,”141 and may also “conclude agreements with a view¶ to the direct repatriation or interment in a neutral country of able-bodied prisoners of war who have¶ undergone a long period of captivity.”142 Likewise, the standard set forth in Geneva Convention IV¶ for release of civilian internees is not tied to the cessation of hostilities; it provides that civilian¶ internees “shall be released by the Detaining Power as soon as the reasons which necessitated his¶ internment no longer exist.”143

#### Adapting to public perception on detention and international law is key to regain credibility of US compliance

Murphy 7 (Law Professor at George Washington University Law School, “Evolving Geneva Convention Paradigms in the¶ 'War on Terrorism': Applying the Core Rules to the¶ Release of Persons Deemed 'Unprivileged¶ Combatants'”, GW Law Faculty Publications & Other Works, 2007, RSR]

The dominant paradigms of the 1949 Geneva Conventions, which concern either inter-state¶ or internal armed conflict, do not sit well with the new face of armed conflict presented by Al Qaeda.¶ The non-state actor who engages in heinous conduct has been an outcast to the laws of war, whether¶ one looks at the terrorism of William Quantrill in the 1860's or the terrorism of Al Qaeda today. For¶ that reason, it is understandable that the full protections envisaged by those conventions were not¶ applied in the types of conflicts that emerged after 9/11. Nevertheless, influenced by developments¶ in the fields of human rights and international criminal law, the laws of war have now evolved to a¶ point where the “public dictates of conscience” compel the application of core protections even for¶ the outcast. Those protections are reflected in both conventional and customary international law,¶ and may be seen in common Article 3 of the 1949 Geneva Conventions, and Article 75 of their¶ Additional Protocol I. If the United States wishes to act in accordance with international law, such standards should guide the United States in the conditions of the detention and the mechanisms by¶ which detainees are prosecuted for crimes.¶ Moreover, those standards should guide the United States in its decision-making on the¶ release of detainees. Detainees in the “war on terror” may not be held until the “cessation of¶ hostilities.” They may only be held so long as the particular detainee at issue represents a danger or¶ threat to the detaining power. The detaining power is obligated to undertake periodic reviews, by an¶ appropriate court or administrative board, of whether that threat continues to exist. Once the detainee¶ is determined not to be a threat, or their mental or physical fitness has been gravely diminished, the¶ detainee must be released immediately. If the detainee will likely be exposed to abuse by being sent¶ back to his country of origin, he may not be returned. In that case, or in the case of a detainee whose¶ country of origin will not accept his return or recognize his nationality, the United States is obligated¶ to release the detainee in the United States until an appropriate alternative place for relocation can¶ be resolved. Continued detention of persons deemed not to be a threat is unlawful and¶ unconscionable.

#### US Failure to adhere to Geneva undermines the entire Geneva regime

Beard 7 (Jack, ecturer at UCLA former Deputy General Counsel at the D.o.D., “The Geneva Boomerang: The Military Commissions Act of 2006 And US Counterterror operations,” The American Journal of International Law, KM]

At a fundamental level, unilateral revision of the Geneva Conventions by the United States undermines the credibility of the U.S. commitment to the existing Geneva regime. In an international setting that lacks effective external enforcement mechanisms, allowing the easy violation of agreements, a state may seek to send a signal of credible commitment to other states by constraining its own ability to act in ex ante legal structures, institutions, or procedures that reduce ex post incentives for such noncompliance. n58 A legislative act that restrains or makes it [\*66] costly to exercise such discretionary power and reduces the attractiveness of breaching an agreement can serve such a signaling function. n59 To the extent, however, that the MCA is perceived as unilaterally revising key obligations in the Geneva Conventions and providing the president with the discretion to issue further reinterpretations, it undermines the credible commitment of the United States to other states in the international community. n60 And to the extent that the U.S. commitment is perceived as increasingly less credible, theory suggests that other countries are unlikely to maintain the stringency of their own commitments.

#### A national security court would solve US compliance with Geneva - allows for oversight to review the individual detentions

McCarthy and Velshi 9 [Andrew (Director of the Center for Law & Counterterrorism at the Foundation for the Defense of Democracies) and Alykhan (staff attorney at the Center for Law & Counterterrorism, where he focuses on the international law of armed conflict and the use of force), “We Need a National Security Court”, Submission for AEI, 2009, RSR]

The NSC would oversee a new process for ¶ monitoring and reviewing the detention of alien enemy combatants captured by our ¶ military (and allied forces) outside U.S. territory and detained wherever the military ¶ chooses to detain them (including within the United States). The district court division of ¶ the NSC would perform, primarily, a monitoring function. As already noted, judicial ¶ review would principally proceed at the appellate level, as it now does under the DTA ¶ and MCA. The process would work as follows. Within a reasonable time after capture, the ¶ Justice Department would report to the NSC the fact that an alleged unlawful combatant ¶ had been captured in a particular theater of combat and was being detained.69¶ Presumptively within one year of capture, the military would hold a CSRT pursuant to ¶ the procedures currently in place.70 Assuming the detainee is designated an alien enemy¶ combatant, the appeal process would proceed, first in the military system and, ultimately, ¶ to the appellate tribunal of the NSC. ¶ Review in the NSC would proceed in a manner similar to that envisioned by the ¶ MCA. In creating the NSC, Congress would (a) make a finding that aliens who are nonU.S. persons (i.e., who are neither American citizens nor lawful permanent resident aliens ¶ of the United States) have no entitlements under the Constitution, and (b) provide that ¶ such aliens have no enforceable entitlements against detention during wartime under any ¶ U.S. statute or treaty if found by a properly constituted CSRT to be enemy combatants. ¶ Consequently, review in the NSC would be limited to challenging compliance at the ¶ appellant’s CSRT with the military’s standards and procedures for CSRTs. To avoid the empirical problem of judicial activism, the Congress would make clear that the grounds it ¶ has set forth are the only available grounds for judicial review.71¶ In connection with each certified combatant, the Justice Department would also ¶ certify to the NSC (at the district court level) that hostilities were ongoing in the war on ¶ terror, that hostilities were ongoing in the theater of combat relevant to the particular ¶ enemy combatant (which, of course, will not necessarily be the place where the ¶ combatant was captured), and that it was in the national security interest of the United ¶ States that the combatant continue to be held because of the likelihood that he would ¶ resume operations against the United States if released. The CSRT determination would ¶ be reviewed annually, as would DOJ’s certification.¶ The government’s certification would be unreviewable as long as the executive ¶ branch represented that combat operations were still ongoing in the theater which was the ¶ predicate (or were the predicates) for finding the particular detainee an alien enemy ¶ combatant. Here, it is worth pausing to rehearse that, once prospects for useful ¶ intelligence have been exhausted, the sole justification for holding enemy combatants is ¶ to prevent them from rejoining the battle. While it is often observed that the global war ¶ on terror may go on indefinitely, this does not mean it will go on throughout the world ¶ indefinitely. ¶ Of course, some detainees will be a credible threat to join the battle wherever it ¶ rages. However, the evidence that would make such a threat credible will frequently ¶ provide grounds for charging the terrorist-combatant with war crimes and prosecuting ¶ him – such that it will not be necessary to detain him interminably merely as an enemy ¶ combatant (which is the principal international objection to current U.S. policy). Other ¶ detainees will only be credible local threats, and will not be a continuing national security ¶ challenge for the United States once combat operations have been completed in the place ¶ where they were captured. Such combatants should be repatriated once combat operations ¶ in their region have wound down (and it bears mention here that the United States has, in fact, released hundreds of combatants from Guantanamo Bay).72 Moreover, as progress is ¶ made in the war on terror, and particularly if functioning governments replace tyrannical ¶ regimes, it will increasingly be possible to repatriate combatants with the confidence that ¶ they will be treated appropriately (including by prosecution, if grounds exist) by the new ¶ governments in their home countries (or in countries where they have committed crimes). ¶

### Drone Miscalc

#### US drone use is creating an international drone arms race —how the US drone uses its drones sets a precedent

Farley 11 (Robert, Assistant Professor at the Patterson School of Diplomacy and International Commerce at the University of Kentucky, Oct. 12, 2011, World Politics Review, “Over the Horizon: U.S. Drone Use Sets Global Precedent”, <http://www.worldpoliticsreview.com/articles/10311/over-the-horizon-u-s-drone-use-sets-global-precedent>]

Is the world about to see a "drone race" among the United States, China and several other major powers? Writing in the New York Times, Scott Shane argued that just such an arms race is already happening and that it is largely a result of the widespread use of drones in a counterterror role by the United States. Shane suggests that an international norm of drone usage is developing around how the United States has decided to employ drones. In the future, we may expect that China, Russia and India will employ advanced drone technologies against similar enemies, perhaps in Xinjiang or Chechnya. Kenneth Anderson agrees that the drone race is on, but disagrees about its cause, arguing that improvements in the various drone component technologies made such an arms race inevitable. Had the United States not pursued advanced drone technology or launched an aggressive drone campaign, some other country would have taken the lead in drone capabilities. So which is it? Has the United States sparked a drone race, or was a race with the Chinese and Russians inevitable? While there's truth on both sides, on balance Shane is correct. Arms races don't just "happen" because of outside technological developments. Rather, they are embedded in political dynamics associated with public perception, international prestige and bureaucratic conflict. China and Russia pursued the development of drones before the United States showed the world what the Predator could do, but they are pursuing capabilities more vigorously because of the U.S. example. Understanding this is necessary to developing expectations of what lies ahead as well as a strategy for regulating drone warfare. States run arms races for a variety of reasons. The best-known reason is a sense of fear: The developing capabilities of an opponent leave a state feeling vulnerable. The Germany's build-up of battleships in the years prior to World War I made Britain feel vulnerable, necessitating the expansion of the Royal Navy, and vice versa. Similarly, the threat posed by Soviet missiles during the Cold War required an increase in U.S. nuclear capabilities, and so forth. However, states also "race" in response to public pressure, bureaucratic politics and the desire for prestige. Sometimes, for instance, states feel the need to procure the same type of weapon another state has developed in order to maintain their relative position, even if they do not feel directly threatened by the weapon. Alternatively, bureaucrats and generals might use the existence of foreign weapons to argue for their own pet systems. All of these reasons share common characteristics, however: They are both social and strategic, and they depend on the behavior of other countries. Improvements in technology do not make the procurement of any given weapon necessary; rather, geostrategic interest creates the need for a system. So while there's a degree of truth to Anderson's argument about the availability of drone technology, he ignores the degree to which dramatic precedent can affect state policy. The technologies that made HMS Dreadnought such a revolutionary warship in 1906 were available before it was built; its dramatic appearance nevertheless transformed the major naval powers' procurement plans. Similarly, the Soviet Union and the United States accelerated nuclear arms procurement following the Cuban Missile Crisis, with the USSR in particular increasing its missile forces by nearly 20 times, partially in response to perceptions of vulnerability. So while a drone "race" may have taken place even without the large-scale Predator and Reaper campaign in Pakistan, Yemen and Somalia, the extent and character of the race now on display has been driven by U.S. behavior. Other states, observing the effectiveness -- or at least the capabilities -- of U.S. drones will work to create their own counterparts with an enthusiasm that they would not have had in absence of the U.S. example. What is undeniable, however, is that we face a drone race, which inevitably evokes the question of arms control. Because they vary widely in technical characteristics, appearance and even definition, drones are poor candidates for "traditional" arms control of the variety that places strict limits on number of vehicles constructed, fielded and so forth. Rather, to the extent that any regulation of drone warfare is likely, it will come through treaties limiting how drones are used. Such a treaty would require either deep concern on the part of the major powers that advances in drone capabilities threatened their interests and survival, or widespread revulsion among the global public against the practice of drone warfare. The latter is somewhat more likely than the former, as drone construction at this point seems unlikely to dominate state defense budgets to the same degree as battleships in the 1920s or nuclear weapons in the 1970s. However, for now, drones are used mainly to kill unpleasant people in places distant from media attention. So creating the public outrage necessary to force global elites to limit drone usage may also prove difficult, although the specter of "out of control robots" killing humans with impunity might change that. P.W. Singer, author of "Wired for War," argues that new robot technologies will require a new approach to the legal regulation of war. Robots, both in the sky and on the ground, not to mention in the sea, already have killing capabilities that rival those of humans. Any approach to legally managing drone warfare will likely come as part of a more general effort to regulate the operation of robots in war. However, even in the unlikely event of global public outrage, any serious effort at regulating the use of drones will require U.S. acquiescence. Landmines are a remarkably unpopular form of weapon, but the United States continues to resist the Anti-Personnel Mine Ban Convention. If the United States sees unrestricted drone warfare as being to its advantage -- and it is likely to do so even if China, Russia and India develop similar drone capabilities -- then even global outrage may not be sufficient to make the U.S. budge on its position. This simply reaffirms the original point: Arms races don't just "happen," but rather are a direct, if unexpected outcome of state policy. Like it or not, the behavior of the United States right now is structuring how the world will think about, build and use drones for the foreseeable future. Given this, U.S. policymakers should perhaps devote a touch more attention to the precedent they're setting.

#### Lack of US-led norms cause Chinese drone aggression in maritime disputes---that increases tensions.

Bodeen 13 (Christopher, writer for the Huffington Post, May 3rd, 2013, "China's Drone Program Appears To Be Moving Into Overdrive," Huffington Post, www.huffingtonpost.com/2013/05/03/china-drone-program\_n\_3207392.html]

BEIJING -- Determined to kill or capture a murderous Mekong River drug lord, China's security forces considered a tactic they'd never tried before: calling a drone strike on his remote hideaway deep in the hills of Myanmar.¶ The attack didn't happen – the man was later captured and brought to China for trial – but the fact that authorities were considering such an option cast new light on China's unmanned aerial vehicle program, which has been quietly percolating for years and now appears to be moving into overdrive.¶ Chinese aerospace firms have developed dozens of drones, known also as unmanned aerial vehicles, or UAVs. Many have appeared at air shows and military parades, including some that bear an uncanny resemblance to the Predator, Global Hawk and Reaper models used with deadly effect by the U.S. Air Force and CIA. Analysts say that although China still trails the U.S. and Israel, the industry leaders, its technology is maturing rapidly and on the cusp of widespread use for surveillance and combat strikes.¶ "My sense is that China is moving into large-scale deployments of UAVs," said Ian Easton, co-author of a recent report on Chinese drones for the Project 2049 Institute security think tank.¶ China's move into large-scale drone deployment displays its military's growing sophistication and could challenge U.S. military dominance in the Asia-Pacific. It also could elevate the threat to neighbors with territorial disputes with Beijing, including Vietnam, Japan, India and the Philippines. China says its drones are capable of carrying bombs and missiles as well as conducting reconnaissance, potentially turning them into offensive weapons in a border conflict.¶ China's increased use of drones also adds to concerns about the lack of internationally recognized standards for drone attacks. The United States has widely employed drones as a means of eliminating terror suspects in Pakistan and the Arabian Peninsula.¶ "China is following the precedent set by the U.S. The thinking is that, `If the U.S. can do it, so can we. They're a big country with security interests and so are we'," said Siemon Wezeman, a senior fellow at the arms transfers program at the Stockholm International Peace Research Institute in Sweden, or SIPRI.¶ "The justification for an attack would be that Beijing too has a responsibility for the safety of its citizens. There needs to be agreement on what the limits are," he said.¶ Though China claims its military posture is entirely defensive, its navy and civilian maritime services have engaged in repeated standoffs with ships from other nations in the South China and East China seas. India, meanwhile, says Chinese troops have set up camp almost 20 kilometers (12 miles) into Indian-claimed territory.

#### That leads to US-Sino nuclear war and extinction.

Fisher 11 (Max, foreign affairs writer and editor for the Atlantic, MA in security studies from Johns Hopkins, Oct 31 2011, “5 Most Likely Ways the U.S. and China Could Spark Accidental Nuclear War,” <http://www.theatlantic.com/international/archive/2011/10/5-most-likely-ways-the-us-and-china-could-spark-accidental-nuclear-war/247616>]

Neither the U.S. nor China has any interest in any kind of war with one other, nuclear or non-nuclear. The greater risk is an accident. Here's how it would happen. First, an unforeseen event that sparks a small conflict or threat of conflict. Second, a rapid escalation that moves too fast for either side to defuse. And, third, a mutual misunderstanding of one another's intentions.¶ This three-part process can move so quickly that the best way to avert a nuclear war is for both sides to have absolute confidence that they understand when the other will and will not use a nuclear weapon. Without this, U.S. and Chinese policy-makers would have to guess -- perhaps with only a few minutes -- if and when the other side would go nuclear. This is especially scary because both sides have good reason to err on the side of assuming nuclear war. If you think there's a 50-50 chance that someone is about to lob a nuclear bomb at you, your incentive is to launch a preventative strike, just to be safe. This is especially true because you know the other side is thinking the exact same thing. In fact, even if you think the other side probably won't launch an ICBM your way, they actually might if they fear that you're misreading their intentions or if they fear that you might over-react; this means they have a greater incentive to launch a preemptive strike, which means that you have a greater incentive to launch a preemptive strike, in turn raising their incentives, and on and on until one tiny kernel of doubt can lead to a full-fledged war that nobody wants.¶ The U.S. and the Soviet Union faced similar problems, with one important difference: speed. During the first decades of the Cold War, nuclear bombs had to be delivered by sluggish bombers that could take hours to reach their targets and be recalled at any time. Escalation was much slower and the risks of it spiraling out of control were much lower. By the time that both countries developed the ICBMs that made global annihilation something that could happen within a matter of minutes, they'd also had a generation to sort out an extremely clear understanding of one another's nuclear policies. But the U.S. and China have no such luxury -- we inherited a world where total mutual destruction can happen as quickly as the time it takes to turn a key and push a button.¶ The U.S. has the world's second-largest nuclear arsenal with around 5,000 warheads (first-ranked Russia has more warheads but less capability for flinging them around the globe); China has only about 200, so the danger of accidental war would seem to disproportionately threaten China. But the greatest risk is probably to the states on China's periphery. The borders of East Asia are still not entirely settled; there are a number of small, disputed territories, many of them bordering China. But the biggest potential conflict points are on water: disputed naval borders, disputed islands, disputed shipping lanes, and disputed underwater energy reserves. These regional disputes have already led to a handful of small-scale naval skirmishes and diplomatic stand-offs. It's not difficult to foresee one of them spiraling out of control. But what if the country squaring off with China happens to have a defense treaty with the U.S.?¶ There's a near-infinite number of small-scale conflicts that could come up between the U.S. and China, and though none of them should escalate any higher than a few tough words between diplomats, it's the unpredictable events that are the most dangerous. In 1983 alone, the U.S. and Soviet Union almost went to war twice over bizarre and unforeseeable events. In September, the Soviet Union shot down a Korean airliner it mistook for a spy plane; first Soviet officials feared the U.S. had manufactured the incident as an excuse to start a war, then they refused to admit their error, nearly pushing the U.S. to actually start war. Two months later, Soviet spies misread an elaborate U.S. wargame (which the U.S. had unwisely kept secret) as preparations for an unannounced nuclear hit on Moscow, nearly leading them to launch a preemptive strike. In both cases, one of the things that ultimately diverted disaster was the fact that both sides clearly understood the others' red lines -- as long as they didn't cross them, they could remain confident there would be no nuclear war.¶ But the U.S. and China have not yet clarified their red lines for nuclear strikes. The kinds of bizarre, freak accidents that the U.S. and Soviet Union barely survived in 1983 might well bring today's two Pacific powers into conflict -- unless, of course, they can clarify their rules. Of the many ways that the U.S. and China could stumble into the nightmare scenario that neither wants, here are five of the most likely. Any one of these appears to be extremely unlikely in today's world. But that -- like the Soviet mishaps of the 1980s -- is exactly what makes them so dangerous.

## Deference

### UQ

#### Court intervention on detention is inevitable now

Horowitz 13 (Colby, J.D. Candidate at Fordham University, “CREATING A MORE MEANINGFUL ¶ DETENTION STATUTE: LESSONS LEARNED ¶ FROM HEDGES V. OBAMA”, Fordham Law Review, Vol. 81, 2013, RSR]

The Supreme Court has not decided the merits of a detention case since ¶ Boumediene in 2008.144 Additionally, in 2011 the Supreme Court denied ¶ certiorari to six different Guantanamo detainee cases appealed from the D.C. Circuit.145 As a result of its continued abstention, the Supreme Court ¶ has had little impact in shaping the substantive parameters of executive ¶ detention.146¶ The substantive law of executive detention has been primarily created by ¶ the D.C. District Court and the D.C. Circuit as they evaluate habeas corpus ¶ petitions from detainees held at Guantanamo Bay.147 As the law has ¶ evolved since 2008, the D.C. courts have often applied different or ¶ changing standards, and some believe that “the D.C. Circuit’s opinions ¶ almost uniformly favor the government.”148 Additionally, some ¶ commentators have expressed concerns about “the habeas process as a ¶ lawmaking device” and fear that the standards established by the D.C. ¶ Courts are “interim steps” or “a kind of draft” until the Supreme Court ¶ eventually steps in to resolve the issues.149¶ The judges of the D.C. courts recognize that they are creating law. In ¶ their opinions, they have often commented on the lack of guidance from the ¶ Supreme Court150 and their significant role in shaping substantive detention ¶ law with each decision.151

#### Vagueness in the NDAA hampers executive flexibility by encouraging judicial activism. The plan is key to reverse that.

Horowitz 13 (Colby, J.D. Candidate at Fordham University, “CREATING A MORE MEANINGFUL ¶ DETENTION STATUTE: LESSONS LEARNED ¶ FROM HEDGES V. OBAMA”, Fordham Law Review, Vol. 81, 2013, RSR]

This part recommends ways to improve section 1021, with the goal of ¶ creating a clearer, more meaningful detention statute. In section 1021, ¶ Congress simply codified verbatim the executive branch’s interpretation of ¶ detention authority.350 Congress failed to define or limit key terms like ¶ “substantial support” or “associated forces,” and thus abdicated its role in ¶ shaping the substantive parameters of executive detention. This section ¶ recommends ways to improve a future detention statute and includes some ¶ proposed definitions of key detention criteria. ¶ A vague and unclear detention statute harms the separation of powers ¶ between the three branches. As Justice Jackson’s widely accepted ¶ Youngstown framework explains,351 executive war powers are relational to ¶ Congress, and the judiciary decides what Congress has or has not ¶ authorized—thus all three branches have a role. Vague statutes enhance the ¶ power of the judiciary at the expense of the legislature for two reasons. ¶ First, vague statutes make congressional intent unclear and give the courts ¶ significant discretion to determine if the President is in Zone 1, 2, or 3.352¶ Second, vague statutes invite close judicial scrutiny because they ¶ demonstrate to the courts that the political process has failed.353 Thus, ¶ vague congressional authorizations that attempt to delegate broad authority ¶ to the President can be counterproductive because, instead of empowering ¶ the President, they actually empower the courts.354¶ In addition to expanding the role of the judiciary, vague statutes create ¶ uncertainty for the executive. The President cannot act quickly and ¶ decisively if the limits of his authority are unclear.355 Finally, Congress ¶ plays an important role in detention policy, and vague statutes like section 1021 represent a congressional abdication of that role.356 Congressional ¶ legislation is essential when creating long-term, effective antiterrorism ¶ policies that have a solid legal foundation.357 This Note recommends ¶ substantive changes to section 1021 to make it a clearer, more meaningful ¶ congressional statement about the limits of indefinite executive detention. ¶ The major recommendations are: (1) move away from the AUMF; ¶ (2) provide specific definitions of key terms (proposed definitions are ¶ suggested); (3) exclude protected First Amendment activities; and ¶ (4) include a clear statement about the indefinite detention of American ¶ citizens.

#### Status quo ambiguity on indefinite detention promotes a shift to drones by hampering effective warfighting.

Chertoff 11 (Michael, Former Secretary of the Department of Homeland Security,

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So, where has this left us? It has left us in a puzzling situation. ¶ In a decision called Al-Bihani in the D.C. Circuit in 2010, Judge ¶ Janice Rogers Brown talked about the consequences—practical ¶ consequences—of having habeas review in Guantánamo as it affects ¶ the battlefield.42 And what she said is that the process at the tail end ¶ is now impacting the front end because when you conduct combat ¶ operations, you now have to worry about collecting evidence.43¶ A somewhat darker analysis has been put forward by Ben Wittes ¶ who has recently written a book called Detention and Denial, where ¶ he argues that the courts have now created an incentive system to ¶ kill rather than capture.44 And much of the law of war over the years ¶ was designed to move away from the “give no quarter” theory, where ¶ you killed everybody at the battlefield, into the theory of you would ¶ rather capture than kill. And his point, and you can agree or ¶ disagree with it, is that you have now actually loaded it the other ¶ way; you have pushed it in the direction of kill rather than capture.45 We have complete uncertainty now in the standards to be ¶ applied in the individual cases. If you read Ben Wittes‟s book ¶ Detention and Denial, he will details about ten or twelve district ¶ court cases where literally on the same facts you get different ¶ answers.46 And it is not that the district judges are not doing their ¶ best, but they have no guidance. There is no standard, and no one ¶ has offered them a standard.¶ We now have litigation about Bagram Air Force Base in ¶ Afghanistan.47 It was absolutely predictable when Boumediene was ¶ decided that the next case would be against Bagram Airbase. I do ¶ not know how it is going to come out at the end. I think it is still in ¶ the district court, but I will tell you, the logic—now they may have ¶ stopped the logic of Guantánamo—the logic of Boumediene certainly ¶ raises questions about Bagram. How do you wind up having habeas ¶ in Bagram? And then what is going to happen when you are in a ¶ forward firebase? Are you going to have habeas cases there? No one¶ knows, but the big problem is that the battlefield commanders do not ¶ know either; that is a serious operational problem.¶ In many ways, it is absolutely a great example of what the Court ¶ in Eisentrager predicted.48 When you go down this path, you are ¶ going to actually have real operational problems with warfighting. ¶ But of course, we are not in 1950 now; we are actually in active ¶ operations.¶ Finally, and I find this really to be the most interesting ¶ contemporary question posed by this series of issues, the press ¶ reports—and I cannot verify this, I am not confirming it, but I am ¶ assuming it to be true—the press reports that President Obama has ¶ authorized the killing of Anwar al-Aulaki, the American citizen in ¶ Yemen who is, in my mind for quite good reason, believed to be a ¶ major recruiter and operation leader for al-Qaeda.49 I want to be ¶ clear: I am perfectly okay with that, and I think it is exactly the right ¶ decision, so I do not want to be misunderstood. But I will say that if ¶ you read the decision and logic of Boumediene that is a very puzzling ¶ situation for al-Aulaki. Because if you need court permission to ¶ detain somebody, and if you need court permission to wiretap ¶ somebody, how can you kill that person without court permission? But that is what warfighting is. You cannot fight a war without that. ¶ There is current litigation on this issue where people are purporting ¶ to represent al-Aulaki‟s family.50 It has been tossed out, but we are ¶ just at the early stages. And frankly, I think we are going to see ¶ more of this.51 I have been reading that there are debates taking ¶ place about this. They are holding a moot court, I believe, on this ¶ issue.¶ A lot of interesting comments can be made about where we find ¶ ourselves, where the current administration finds itself if you believe ¶ the al-Aulaki allegations to be true. But to me, what it suggests is ¶ that when you abruptly change the attitude of deference—and I ¶ think you must look at Boumediene as an abrupt change—the ¶ consequences become unpredictable and very serious. And there is a ¶ reason that judges and courts in the past forswore from doing that. ¶ We may be seeing some of this play out. How it ends is difficult to ¶ predict. ¶ Before I take a few minutes of questions, let me conclude by ¶ making sure I do not cast blame only on the Court, because it is not ¶ the Court‟s fault. This is something where everybody was complicit in ¶ putting us in this situation—all three branches of government. The ¶ fact is, I was here about seven or eight years ago in 2003, at Rutgers, ¶ not here in this particular building but across the street where they ¶ have a campus, and I gave a talk. I had just left as head of the ¶ criminal division, and I said we have kind of put a lot of things ¶ together in a jerry-built way. We need to have a sustainable legal ¶ architecture that is going to make this a framework that we are ¶ comfortable with over a long period of time. Congress has to get ¶ involved—the executive branch has to go to Congress. It is seven ¶ years later, and we have not done it. So that, to me, is a failure of ¶ both branches. For the executive branch, the failure to push ¶ Congress on this has been a mistake. It has led to, for example, a lot ¶ of delay in setting up the administrative process for dealing with ¶ these detainees. Frankly, I think that was a strategic error that more ¶ or less baited the Court into doing what the Court did. I come from ¶ the old school of believing that whatever you think the right answer ¶ is, you do not want to test the limit of what you think it is if you can ¶ avoid it. You want to go into court with the strongest possible position, and you want to be the most modest and incremental in ¶ asking for power because that is how you maximize your chance to ¶ win. I do not think the executive branch was wise in pushing the ¶ envelope on this. That included also delaying the process for years. ¶ There was a lot of internal back and forth on that. It is unfortunate ¶ that the delaying impulse won. I think that some of the processes put ¶ in place in the first couple of rounds were overly scanty—it was more ¶ parsimonious than it should have been and than it needed to be. And ¶ this comes to the point: do not tempt fate. So the executive branch, by ¶ delaying and being parsimonious with how it handled these cases, ¶ essentially begged the Court—not literally but functionally—to get ¶ involved and to step into this. And that is historically, of course, ¶ what courts do.¶ Congress has never stepped up to the plate on this—other than ¶ the jurisdiction stripping in the Detainee Treatment Act and the ¶ Military Commissions Act.52 Even there, in terms of looking at what ¶ habeas might be and writing the kind of complex procedures you ¶ would need to really build the process for detaining people, Congress ¶ still has not stepped up to do that. There are people like Senator ¶ Lindsey Graham of South Carolina who are constantly out there ¶ saying that both parties should work together to identify a solution, ¶ but I have not seen the action taken yet. So, in a way, I have to say in ¶ defense of the decision in Boumediene, at some point when the Court ¶ sees that neither branch is addressing the problem, where there is a ¶ serious issue of balancing security and liberty, and where we are ¶ uncomfortable about the idea of just locking people up indefinitely ¶ without having some confidence that we can review it, the courts are ¶ going to step in. And that leads to the old adage that hard cases ¶ make bad law.¶ The best result, in my mind, would be for the executive branch ¶ and Congress to sit down and put together, like they did with the ¶ Debt Commission now, a plan that talks about how we deal with ¶ detaining people when we are not going to put them in a criminal ¶ case or in a military commission. What is the process of review? ¶ What should the procedural rights be? What should the standard be? ¶ And what is the ultimate target that the judge has to find? I would ¶ hope that if we got that kind of comprehensive and robust statute ¶ that the courts would back off and would give the deference that has ¶ traditionally been good both for the executive and for the courts when ¶ dealing with these kinds of sensitive national security issues.

#### Judicial oversight results in eventual civilian trials

McCarthy and Velshi 9 [Andrew (Director of the Center for Law & Counterterrorism at the Foundation for the Defense of Democracies. From 1985 through 2003, he was a federal prosecutor at the U.S. Attorney’s Office for the Southern District of New York, and was the lead prosecutor in the seditious conspiracy trial against Sheikh Omar Abdel Rahman and eleven others, described subsequently) and Alykhan (a staff attorney at the Center for Law & Counterterrorism, where he focuses on the international law of armed conflict and the use of force), “Outsourcing American Law,” AEI Working Paper, <http://www.aei.org/files/2009/08/20/20090820-Chapter6.pdf>]

2. While alien enemy combatants, who are neither U.S. citizens nor lawful aliens, have no rights under the U.S. constitution, judicial oversight of their cases without thoughtful consideration of the standards and procedures under which those cases should proceed, is a prescription for turning those cases into full-blown criminal trials. Even the Rasul decision recognized the inarguable point that persons who are neither citizens nor aliens lawfully resident in the United States do not enjoy the protections of our Constitution, including its habeas corpus provision. The majority argued that the alien combatants’ right of access to U.S. courts for the purpose of challenging their detention under habeas corpus was statutory (i.e., derived from the federal habeas statute, 28 U.S.C., 2241 et seq.).26¶ This distinction, though seemingly salient, proved in the event to be of little moment. Regardless of their lack of constitutional entitlements, experience shows that once alien combatants are permitted access to our courts, judges, under the rubric of due process, will effectively treat them as if they are every bit as vested as citizens with substantive and procedural protections – even in wartime and regardless of the what this portends for national security. Only firm instructions to the contrary could have bucked this inevitability. The Supreme Court’s decision in Rasul failed to provide any guidance to lower courts, and the guidance provided in this regard by Congress since late 2005 has been insufficient.¶ Some explanation is in order here. In the other 2004 Supreme Court case noted above, Hamdi v. Rumsfeld, at issue was the very different scenario of the rights of American citizens captured and detained in the course of fighting against the U.S. in wartime. The Justice Department did not dispute that such citizen combatants had a constitutional right to file habeas claims. To the contrary, at issue were the questions whether they could compel a judicial review of the executive’s decision to detain, and how searching that review should be. The case is instructive for present purposes because the court, in holding that judicial review was available, also indicated that the habeas proceedings in connection with U.S. citizens would be very deferential to the executive branch, to the point of indicating that a military determination would be accepted by the court as long as the citizen combatant had received adequate notice and a meaningful opportunity in the military proceeding to contest his detention.27¶ Of course, the entitlement of alien enemy combatants – assuming they have any rights (other than the right not to be tortured, which is provided by both U.S. and international law28) – should be dramatically less substantial than the very limited rights the Supreme Court accorded to American citizens in Hamdi. Predictably, however, that is not what developed in the district courts when they considered alien combatants detained at Guantanamo Bay on the basis of a decision, Rasul, which opened the courthouse doors but gave district judges no substantive or procedural guidance. Until Congress finally stepped in and put a stop to the experiment, the trajectory was toward an array of judicially fashioned rights approximating not merely those of citizens but, indeed, those accorded to American criminal defendants.

### Link

#### First, creating an appropriate framework limits judicial creativity

McCarthy and Velshi 9 [Andrew (Director of the Center for Law & Counterterrorism at the Foundation for the Defense of Democracies) and Alykhan (staff attorney at the Center for Law & Counterterrorism, where he focuses on the international law of armed conflict and the use of force), “We Need a National Security Court”, Submission for AEI, 2009, RSR]

What is an asset in the criminal justice system, however, would be a liability in a system whose priority is not justice for the individual but the security of the American people. That liability, though, can be satisfactorily rectified by clear procedural rules which underscore that the overriding mission – into which the judicial function is being imported for very limited purposes – remains executive and military. The default position of the criminal justice system would not carry over to a system conceived for enemies of the United States – i.e., terrorist operatives who would not be facing NSC trials in the first place absent a finding, tested by judicial review, that they were alien enemy combatants. ¶ In such a system, the opportunities for judicial creativity would be limited by being plainspoken and unapologetic in enabling legislation about the fact that the defendants are not Americans but those who mean America harm; that the task of federal judges is not to ensure that defendants are considered as equals to our government before the bar of justice, but merely to ensure that they are not capriciously convicted of war crimes by the same branch of government that is prosecuting the war; that if credible and convincing evidence supports the allegations, the system’s preference is that defendants be convicted and harshly sentenced; and that the authority of judges is enumerated and finite – if the rules as promulgated do not expressly provide for the defendant to have particular relief, the judge is powerless to direct it. In short, the system would curb judicial excess by the recognition, which underlies the military justice system, that prosecuting war remains a quintessentially executive endeavor; in the NSC, judges would be a check against arbitrariness but they would not have any general supervisory authority over the conduct of proceedings and they would not be at liberty to create new entitlements by analogizing to ordinary criminal proceedings.

#### Second, plan accommodates concerns from all sides preventing forum shopping.

Sulmasy and Logman 9 [Glenn (professor of law at the U.S. Coast Guard Academy) and Andrea (assistant professor of law at the U.S. Coast Guard Academy), “A HYBRID COURT FOR A HYBRID WAR”, Case Western Reserve Journal of International Law, Vol. 42, RSR]

Prior to the anticipated closure of the Guantánamo Bay Detention ¶ Facility on January 22, 2010 many questions remain. To date, no decision ¶ has been made regarding the transfer of the detainees. In August 2009 it was ¶ reported that the Obama Administration is reviewing a proposal that would bring the detainees to U.S. soil.46 The reported proposal would transfer ¶ Guantánamo detainees to a U.S. federal prison facility, would allow for ¶ prosecution of detainees in either federal criminal courts or under military ¶ commissions, would co-locate a court facility with the prison facility, and ¶ would allow for preventive detention of detainees considered a threat to ¶ U.S. security interests.47 The potential transfer of detainees to U.S. facilities ¶ is raising public concern and many in Congress have publicly resisted this ¶ notion.48¶ This potential forum shopping is also problematic, sets a dangerous ¶ precedent, and will likely lead, if implemented, to numerous defense challenges. It is, however, a recognition of the hybrid nature of this war with alQaeda. There must be a dedicated process and forum for addressing the ¶ detention and adjudication of the detainees. Congress has made it clear that ¶ it will not approve the requested funding for transfer of prisoners from ¶ Guantánamo until there is a definite plan in place. ¶ The NSCS is fundamentally a balance and a reasonable accommodation of many competing legal and policy interests. It is structured upon ¶ the foundations of the U.S. understanding of the rule of law. The NSCS ¶ exceeds the standards of most requirements of international law and embraces human rights by ensuring that the dignity of each alleged detainee is ¶ maintained. It is an outgrowth—or an evolution—of the military commissions. It provides the answer for policy makers to get us out of the quicksand we find ourselves in regarding detainees. We have been attempting to ¶ force the civilian justice model or the military justice model onto a new ¶ entity—the al-Qaeda fighter. Neither will work. The proposed system provides a delicate balance between the competing interests of U.S. national ¶ security and our human rights obligations to the detainees. The NSCS provides an adjudicatory system of justice that will answer the needs of policy ¶ makers for years to come. We simply cannot remain mired in the ways of ¶ the past or the ideals of our generation, but rather must step forward with ¶ pragmatic idealism as our guide and promote the rule of law while bringing ¶ unlawful combatants to justice.

#### The court preserves national security while sending an international signal

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[Glenn, “THE LEGAL LANDSCAPE AFTER HAMDAN:¶ THE CREATION OF HOMELAND SECURITY¶ COURTS”, NEW ENG. J.INT'L & COMP.L., Vol. 13, RSR]

Article I judges with law of armed conflict expertise would proceed¶ over the trials. Theses judges will be appointed by the President and¶ possess the educational background necessary to determine the lawfulness¶ of intelligence gathering, terrorist surveillance, and other necessary areas in¶ the field of terrorism and homeland security. Several scholars, advocating¶ against judicial intervention in the war, correctly note that those who are¶ making such decisions now are not necessarily versed in this unique area of¶ the law.43 Whether you agree or disagree, the nature of this war seems to¶ necessitate judicial intervention more than has been custom or standard in¶ previous U.S. military wars and operations. As it stands now, the system¶ allows for judges who have no background in warfare or national security¶ to intervene, hear, and decide cases with little or no understanding of the¶ issues because they are beyond the scope of their expertise.4 The threat¶ we face demands these procedures as a minimum requirement.¶ Prosecutors, assigned by the Department of Justice (hereinafter¶ referred to as "DOJ") would represent the government and exercise¶ prosecutorial discretion on whether or not to proceed in cases. Oversight¶ would be conducted by the Chief, Criminal Division of DOJ. 45 The powers¶ of these prosecutors, as in other nations, would be great, but they would¶ still operate under the ethical rules standard for all U.S. government¶ attorneys.¶ Judge advocates (military lawyers) would serve as government¶ provided defense counsel. This group would be similar to what has been¶ provided for the detainees in the military commissions. The judge¶ advocates would be made available by the Department of Homeland Security46 and the Department of Defense. Initially, a pool of ten judge¶ advocates would serve on defense teams. If desired, the accused may¶ employ, at his expense, civilian counsel as long as they have requisite¶ classified document clearance(s). This would ensure alleged international¶ terrorists with a defense capable of handling their cases. Further, this¶ would help satisfy some international concern about lack of representation.¶ As a result of the sensitive nature of intelligence gathering and¶ methods employed as well as ensuring such hearings do not become¶ propaganda tools for the enemy,47 the trials would be closed to the public.¶ Reasons for closed trials include disallowing access to the media, an action¶ that was not taken in the trials of the perpetrators of the World Trade¶ Center bombings in 1993 and the recent Moussaoui case.48 However,¶ representatives from several appointed NGO's and the United Nations¶ would be permitted to attend as "observers" to ensure fairness of the trial¶ and to witness the procedural protections expected of a nation dedicated to¶ upholding the rule of law.¶ The trials would be held on military bases located within the¶ continental United States. This would keep the detainees held in a location¶ that is secure, like GITMO, but with less controversy. This would, in part,¶ also remove some of the international concerns about the detention centers¶ located in GITMO. Under this proposal, our own armed forces, alleged¶ and convicted criminals, are held at the same location as the terrorist. Fort¶ Leavenworth in Kansas, or even Fort Belvoir in Washington D.C., would¶ be appropriate locations to detain, try, and imprison persons accused of¶ engaging in international terror. Since Eisentrager has been essentially¶ overruled by recent cases, 49 the extraterritoriality needs are no longer¶ applicable and, in essence, are moot.50¶ As noted previously, military brigs are the most appropriate place to detain accused terrorists because it is both a secure place and it affords the¶ same protection against abuse given to those in the U.S. service members¶ who are tried, convicted, and sentenced under the UCMJ by courts-martial.¶ Having the detainees alongside members of the U.S. military would go a¶ long way toward reducing international concerns of torture and unfair¶ tribunals. In addition, it seems as though keeping the detainees within our¶ nation would provide an additional appearance of process and certainly¶ remove the taint of being held in the base at GITMO. Remaining¶ consistent with the theme of the homeland security courts being a hybrid,¶ any appeals would go through the Courts of Appeals of the Armed Forces¶ (CAAF)." This limited right of appeal would ensure the cases were heard¶ by an outside panel of judges versed in military law, the laws of war, and¶ have some background in the procedural nuances of national security law.¶ Appellate counsel would be provided by Air Force, Coast Guard, Navy-¶ Marine Corps, and the Army.¶ Under this system, the death penalty would still be an authorized¶ punishment. This penalty would only be authorized in those cases deemed¶ egregious enough and ones that severely impact the homeland security of¶ the United States. Certain aggravating factors would have to be developed¶ and codified to distinguish between what cases are appropriate for a life¶ sentence or those better suited as capital cases. Recognizing that this¶ would still cause concern among our European and other international¶ colleagues, this proposal certainly requires further elaboration prior to¶ implementation.

#### NSC decreases Constitutional protections, allowing for more executive flex.

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[Glenn, The National Security Court System: A Natural Evolution of Justice in an Age of Terror, Oxford University Press, 2009, RSR]

The three-judge panels in the trials will use the “beyond a reasonable doubt” standard and require a two-thirds majority of the judges to convict any alleged detainee. Unanimity of the three judges will be required only for capital cases. The evidentiary standards will also be diminished from standard, civilian prosecutions - or military courts- martial for that matter. The NSCS offers the detainee great process and protections but necessarily a decreased expectation of the process ordinarily afforded U.S. citizens. No detainee should, by virtue of his or her status, have traditional U.S. constitutional rights attach. Specifically, the Fourth and Fifth Amendment rights so precious within our judicial system must necessarily be reduced in significance or removed altogether in the NSCS. To do otherwise would be to ensure acquittals in virtually all cases against the detainees.