# ASU Cards Round 5 UNLV

## 1AC

#### Same as round 1

## 2AC

### Leadership

#### Status quo turns the reasons why detention is good – it results in civilian trials that only Congress can prevent. CP can’t solve it.

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.

### XO CP

#### Permutation do both.

#### Links to politics – immense opposition to bypassing debate

Hallowell 13

(Billy Hallowell, writer for The Blaze, B.A. in journalism and broadcasting from the College of Mount Saint Vincent in Riverdale, New York and an M.S. in social research from Hunter College in Manhattan, “HERE’S HOW OBAMA IS USING EXECUTIVE POWER TO BYPASS LEGISLATIVE PROCESS” Feb. 11, 2013, <http://www.theblaze.com/stories/2013/02/11/heres-how-obamas-using-executive-power-to-bylass-legislative-process-plus-a-brief-history-of-executive-orders/>, KB)

“In an era of polarized parties and a fragmented Congress, the opportunities to legislate are few and far between,” Howell said. “So presidents have powerful incentive to go it alone. And they do.”¶ And the political opposition howls.¶ Sen. Marco Rubio, R-Fla., a possible contender for the Republican presidential nomination in 2016, said that on the gun-control front in particular, Obama is “abusing his power by imposing his policies via executive fiat instead of allowing them to be debated in Congress.”¶ The Republican reaction is to be expected, said John Woolley, co-director of the American Presidency Project at the University of California in Santa Barbara.¶ “For years there has been a growing concern about unchecked executive power,” Woolley said. “It tends to have a partisan content, with contemporary complaints coming from the incumbent president’s opponents.”

#### CP can’t solve

#### Rollback DA - Future presidents prevent solvency

Harvard Law Review 12,

["Developments in the Law: Presidential Authority," Vol. 125:2057, www.harvardlawreview.org/media/pdf/vol125\_devo.pdf]

The recent history of signing statements demonstrates how public opinion can effectively check presidential expansions of power by inducing executive self-binding. **It remains to be seen**, however, **if this more restrained view of signing statements can remain intact, for it relies on the promises of one branch — indeed of one person — to enforce and maintain the separation of powers**. To be sure, President **Obama’s guidelines for the use of signing statements contain all the hallmarks of good executive branch policy: transparency, accountability, and fidelity to constitutional limitations.** Yet, in practice**, this apparent constraint (**however well intentioned**) may amount to** little more than voluntary self-restraint. 146 Without a formal institutional check, it is unclear what mechanism will prevent the next President (or President Obama himself) from reverting to the allegedly abusive Bush-era practices. 147 Only time, and perhaps public opinion, will tell.

#### Credibility DA - Multiple branch involvement is key to credibility, meaning only the plan can solve our internal links.

Wittes and Gitenstein, ‘7

[Benjamin (Senior Fellow in Governance Studies at the Brookings Institution, where he is the Research Director in Public Law, and Co-Director of the Harvard Law School - Brookings Project on Law and Security) and Mark (non-resident senior fellow at the Brookings Institution), “A Legal Framework for Detaining Terrorists: Enact a Law to End the Clash over Rights”, Opportunity 8, The Brookings Institution, RSR]

The paradox is that, precisely because terrorists flout the rules of warfare and make ¶ themselves harder to distinguish from civilians when captured, they necessitate a level ¶ of due process that conventional forces, which make no secret of their status as ¶ belligerents, do not require. The question is what sort of process might identify these ¶ unlawful combatants accurately and with public credibility. The Geneva ¶ Conventions require only that, in cases of doubt, all individuals receive review by a ¶ “competent tribunal”— historically, cursory field panels that provide few procedural ¶ protections. But such panels are a bad fit with the war on terrorism. In many of ¶ these cases, the factual issues are too complicated, the lines between civilian and ¶ combatant too hazy, the duration of the conflict too uncertain, and the consequences ¶ to the liberty of individuals too vast. ¶ Congress therefore needs to create new statutory procedures for handling “unlawful ¶ enemy combatants” of the Guantanamo type. The procedures must not be subject to ¶ the whim of the executive. Instead, they should be blessed by all three branches of ¶ government, reflecting the unified will of the American political system. These ¶ processes need not include all the protections of a criminal trial. But, they need to be considerably more robust than the process applied to prisoners in a conventional ¶ military conflict or the process applied to detainees today at Guantanamo.

#### Congress and the courts will roll back the CP. Proves it doesn’t solve activism.

Howell 5

(William G. Howell, Associate Prof Gov Dep @ Harvard 2005 (Unilateral Powers: A Brief¶ Overview; Presidential Studies Quarterly, Vol. 35, Issue: 3, Pg 417)

Plainly, presidents cannot institute every aspect of their policy agenda by decree. The checks and balances that define our system of governance are alive, though not always well, when presidents contemplate unilateral action. Should the president proceed without statutory or constitutional authority, the courts stand to overturn his actions, just as Congress can amend them, cut funding for their operations, or eliminate them outright. (4) Even in those moments when presidential power reaches its zenith--namely, during times of national crisis--judicial and congressional prerogatives may be asserted (Howell and Pevehouse 2005, forthcoming; Kriner, forthcoming; Lindsay 1995, 2003; and see Fisher's contribution to this volume). In 2004, as the nation braced itself for another domestic terrorist attack and images of car bombings and suicide missions filled the evening news, the courts extended new protections to citizens deemed enemy combatants by the president, (5) as well as noncitizens held in protective custody abroad. (6) And while Congress, as of this writing, continues to authorize as much funding for the Iraq occupation as Bush requests, members have imposed increasing numbers of restrictions on how the money is to be spent.

#### The plan’s external oversight on detention maintains heg---legitimacy is the vital internal link to global stability.

Knowles, Acting Assistant Professor, New York University School of Law, ‘9

[Robert, Spring, “Article: American Hegemony and the Foreign Affairs Constitution”, 41 Ariz. St. L.J. 87, Lexis]

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424¶ The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429¶ In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.¶ The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436¶ Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438¶ At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440¶ The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige.¶ Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449¶ Conclusion¶ When it comes to the constitutional regime of foreign affairs, geopolitics has always mattered. Understandings about America's role in the world have shaped foreign affairs doctrines. But the classic realist assumptions that support special deference do not reflect the world as it is today. A better, more realist, approach looks to the ways that the courts can reinforce and legitimize America's leadership role. The Supreme Court's rejection of the government's claimed exigencies in the enemy combatant cases strongly indicates that the Judiciary is becoming reconciled to the current world order and is asserting its prerogatives in response to the fewer constraints imposed on the executive branch. In other words, the courts are moving toward the hegemonic model. In the great dismal swamp that is the judicial treatment of foreign affairs, this transformation offers hope for clarity: the positive reality of the international system, despite terrorism and other serious challenges, permits the courts to reduce the "deference gap" between foreign and domestic cases.

#### Heg solves nuclear war.

Barnett 11 (Thomas P.M., Former Senior Strategic Researcher and Professor in the Warfare Analysis & Research Department, Center for Naval Warfare Studies, U.S. Naval War College American military geostrategist and Chief Analyst at Wikistrat., worked as the Assistant for Strategic Futures in the Office of Force Transformation in the Department of Defense, “The New Rules: Leadership Fatigue Puts U.S., and Globalization, at Crossroads,” March 7 <http://www.worldpoliticsreview.com/articles/8099/the-new-rules-leadership-fatigue-puts-u-s-and-globalization-at-crossroads>)

Events in Libya are a further reminder for Americans that we stand at a crossroads in our continuing evolution as the world's sole full-service superpower. Unfortunately, we are increasingly seeking change without cost, and shirking from risk because we are tired of the responsibility. We don't know who we are anymore, and our president is a big part of that problem. Instead of leading us, he explains to us. Barack Obama would have us believe that he is practicing strategic patience. But many experts and ordinary citizens alike have concluded that he is actually beset by strategic incoherence -- in effect, a man overmatched by the job. It is worth first examining the larger picture: We live in a time of arguably the greatest structural change in the global order yet endured, with this historical moment's most amazing feature being its relative and absolute lack of mass violence. That is something to consider when Americans contemplate military intervention in Libya, because if we do take the step to prevent larger-scale killing by engaging in some killing of our own, we will not be adding to some fantastically imagined global death count stemming from the ongoing "megalomania" and "evil" of American "empire." We'll be engaging in the same sort of system-administering activity that has marked our stunningly successful stewardship of global order since World War II. Let me be more blunt: As the guardian of globalization, the U.S. military has been the greatest force for peace the world has ever known. Had America been removed from the global dynamics that governed the 20th century, the mass murder never would have ended. Indeed, it's entirely conceivable there would now be no identifiable human civilization left, once nuclear weapons entered the killing equation. But the world did not keep sliding down that path of perpetual war. Instead, America stepped up and changed everything by ushering in our now-perpetual great-power peace. We introduced the international liberal trade order known as globalization and played loyal Leviathan over its spread. What resulted was the collapse of empires, an explosion of democracy, the persistent spread of human rights, the liberation of women, the doubling of life expectancy, a roughly 10-fold increase in adjusted global GDP and a profound and persistent reduction in battle deaths from state-based conflicts. That is what American "hubris" actually delivered. Please remember that the next time some TV pundit sells you the image of "unbridled" American military power as the cause of global disorder instead of its cure. With self-deprecation bordering on self-loathing, we now imagine a post-American world that is anything but. Just watch who scatters and who steps up as the Facebook revolutions erupt across the Arab world. While we might imagine ourselves the status quo power, we remain the world's most vigorously revisionist force. As for the sheer "evil" that is our military-industrial complex, again, let's examine what the world looked like before that establishment reared its ugly head. The last great period of global structural change was the first half of the 20th century, a period that saw a death toll of about 100 million across two world wars. That comes to an average of 2 million deaths a year in a world of approximately 2 billion souls. Today, with far more comprehensive worldwide reporting, researchers report an average of less than 100,000 battle deaths annually in a world fast approaching 7 billion people. Though admittedly crude, these calculations suggest a 90 percent absolute drop and a 99 percent relative drop in deaths due to war. We are clearly headed for a world order characterized by multipolarity, something the American-birthed system was designed to both encourage and accommodate. But given how things turned out the last time we collectively faced such a fluid structure, we would do well to keep U.S. power, in all of its forms, deeply embedded in the geometry to come. To continue the historical survey, after salvaging Western Europe from its half-century of civil war, the U.S. emerged as the progenitor of a new, far more just form of globalization -- one based on actual free trade rather than colonialism. America then successfully replicated globalization further in East Asia over the second half of the 20th century, setting the stage for the Pacific Century now unfolding.

### Flex DA

#### Congress has already killed Obama’s flexibility – prevented transfer of detainees from Guantanamo.

Alexander, Frederick I. Richman Professor of Law, Stanford Law School, ‘12

[Janet, “MILITARY COMMISSIONS: A PLACE OUTSIDE THE LAW’S REACH”, SAINT LOUIS UNIVERSITY LAW JOURNAL, Vol. 56, 2012, RSR]

On the other hand, the limitations on presidential ability to prosecute ¶ detainees in federal court, release them to other countries, or transfer them to ¶ facilities within the United States for detention or to serve their sentences are ¶ contained in statutes and thus will apply regardless of who is president. These ¶ include the mandatory military detention provisions of the 2012 NDAA.260¶ Indeed, the Feinstein amendment to the 2012 NDAA, designed in part to meet ¶ objections to mandating military custody or trial of U.S. citizens, could well ¶ turn out to support that very outcome.261 The compromise, which helped to ¶ secure passage of the 2012 NDAA without a provision for mandatory military ¶ custody or trial, is worded simply to state that the statute does not change ¶ ―existing law.‖ Many argued at the time—apparently supported by a phrase in ¶ Hamdi—that existing law already permits treating U.S. citizens and permanent ¶ residents who are determined to be ―enemy combatants‖ or unprivileged ¶ belligerents exactly the same as foreign nationals, even if they are taken into ¶ custody inside the United States. If in the future the Supreme Court, the D.C. ¶ Circuit, or another federal circuit, so holds, then the trial, detention, and waiver ¶ provisions of the 2012 NDAA will apply equally to U.S. citizens.¶ Thus, because Congress has frustrated the executive branch‘s efforts to ¶ bring the treatment of suspected terrorists back to fundamental principles of the ¶ rule of law and the Obama Administration has abandoned as futile any attempt ¶ to secure legislation to make the changes permanent, the military ¶ commissions—however improved over the Bush era—remain ―outside the ¶ law‘s reach.‖¶ 262

#### Creating a fair process for detainees preserves executive flexibility – results in judicial deference.

Bauer, Junior Editor at the Alabama Law Review, ‘6

[Jay, “DETAINEES UNDER REVIEW: STRIKING THE RIGHT¶ CONSTITUTIONAL BALANCE BETWEEN THE EXECUTIVE'S¶ WAR POWERS AND JUDICIAL REVIEW”, Vol. 57, No. 4, RSR]

Establishing a detainee review process that is as transparent and fair as¶ possible may be the best way to "strik[e] the proper constitutional balance."'179 In considering the executive's concerns for national security and¶ protection of classified information, the courts have shown an ability to be¶ flexible and accommodate the special needs of the executive while preserving¶ the fundamental precepts of the Constitution. That flexibility will likely¶ come into play regardless of whether a court is reviewing a habeas petition¶ or the final decision of a tribunal under a separate statutory scheme like that¶ in the Detainee Treatment Act.¶ If a court is reviewing a non-citizen detainee's habeas claim, now that¶ the Supreme Court has established in Rasul that federal courts do have jurisdiction¶ over detainees at Guantanamo, the federal courts and habeas jurisprudence¶ may actually prove beneficial for the executive. For instance,¶ because a habeas court looks primarily to the authority and process of detention¶ in a habeas case, this Comment argues that from a practical standpoint¶ the more the executive branch establishes a solidly fair and judicial¶ process for determining detainee status, the better it would be for the executive.¶ Since the courts tend to deny habeas petitions when there is apparent¶ authority and alternative remedies available to a habeas petitioner, it is logical¶ that a full and fair process establishing those remedies for non-citizen¶ detainees is in the executive's best interest. In other words, if the executive¶ branch wants to preserve its independent control over detainees, then practically¶ speaking it could rely on history and precedence as a model. The¶ courts will defer to executive action, but only to a point. They will seek to¶ preserve the authority of the Constitution, albeit in a restrained sense considering¶ the unique nature of detaining enemy combatants in the "war on¶ terror." Habeas corpus jurisprudence teaches that as long as there is a way¶ for an independent judiciary to examine the lawfulness of executive detention,¶ or at least ensure that the detainee has an appropriate alternative remedy¶ available, then that detention will be upheld. Thus, ironically, the way¶ for the executive to retain control over detainees is to create a full and fair¶ tribunal process. Moreover, the traditional deference the judiciary pays to¶ the executive branch when it is looking at executive wartime actions or¶ judgments should also give the executive branch confidence that federal¶ court jurisdiction over detainees at Guantanamo Bay is not going to hinder¶ its execution of the "war on terror."¶ When it passed the Detainee Treatment Act, Congress intended to interject¶ congressional oversight into the detainee review process by dictating¶ the standard of evidence used, and it wanted to ensure that the procedures of¶ the CSRT are in accordance with the Constitution. 80 The passage of the Act¶ clearly shows that the executive should anticipate more, not less, assertion¶ of authority over the detainee review process by the other branches of government.¶ Although the consequences of the Act are unknown at this point in¶ time, it is also fairly clear that however the courts consider the detainee review process-whether it is through habeas litigation or under another¶ statutorily prescribed method like that of the Detainee Treatment Act-the¶ analysis will be in terms of whether that process fundamentally complies¶ with the Constitution. Thus, from just a pragmatic standpoint, it would be¶ prudent for the executive branch to ensure that the detainee review procedures¶ uphold the ideals of that great charter.¶ Consequently, creating a detainee review process as transparent and fair¶ as possible is the best option for our government and this nation as it seeks¶ to strike the right balance between executive war powers and judicial right¶ of review.

#### Our credibility internals also solve flexibility.

Schwarz, senior counsel, and Huq, associate counsel at the Brennan Center for Justice at NYU School of Law, 2007 [Frederick A.O., Jr., partner at Cravath, Swaine & Moore, chief counsel to the Church Committee, and Aziz Z, former clerk for the U.S. Supreme Court, Unchecked and Unbalanced: Presidential Power in a Time of Terror, p. 201]

The Administration insists that its plunge into torture, its lawless spying, and its lock-up of innocents have made the country safer. Beyond mere posturing, they provide little evidence to back up their claims. Executive unilateralism not only undermines the delicate balance of our Constitution, but also lessens our human liberties and hurts vital counterterrorism campaigns. How? Our reputation has always mattered. In 1607, Massachusetts governor John Winthrop warned his fellow colonists that because they were a "City on a Hill," "the eyes of all people are upon us."4 Thomas Jefferson began the Declaration of Independence by invoking the need for a "decent respect to the opinions of mankind:' In today's battle against stateless terrorists, who are undeterred by law, morality, or the mightiest military power on earth, our reputation matters greatly.¶ Despite its military edge, the United States cannot force needed aid and cooperation from allies. Indeed, our status as lone superpower means that only by persuading other nations and their citizens—that our values and interests align with theirs, and so merit support, can America maintain its influence in the world. Military might, even extended to the globe's corners, is not a sufficient condition for achieving America's safety or its democratic ideals at home. To be "dictatress of the world," warned John Quincy Adams in 1821, America "would be no longer the ruler of her own spirit." A national security policy loosed from the bounds of law, and conducted at the executive's discretion, will unfailingly lapse into hypocrisy and mendacity that alienate our allies and corrode the vitality of the world's oldest democracy.5

#### No impact to Iran prolif – won’t spread.

Miklos, International Affairs Review contributor, 13

(Timothy, George Washington University's Elliott School of International Affairs Publication, “Iran Proliferation Triggering a Nuclear Domino Effect in the Middle East: An Unrealistic Scenario,” 3-3-13, da 3-27-13, <http://www.iar-gwu.org/node/468>, mee)

President Obama has stated that Iranian acquisition of a nuclear weapon will spark an arms race in the Middle East. This view is a status quo dogma among policymakers of both the Republican and Democratic parties, and dissenting views are generally ignored. Ari Shavit of Haaretz identifies the most at-risk states as Egypt, Saudi Arabia, and Turkey. However, a nuclear arms race in the Middle East in response to an Iranian weapon is highly unlikely. For those countries most likely to proliferate, the political and financial costs are too high. The nuclear domino scenario has been an accepted doctrine since 1962 when President Kennedy warned that by the 1970s there would be around 25 nuclear weapon states. Yet, today there are only nine. According to a recent Center for a New American Security (CNAS) report, “Cairo does not see Iran’s nuclear ambitions as an existential threat.” Egypt’s true enemy is Israel, which has defeated Egypt in four consecutive wars. If Egypt did not pursue a nuclear option to deter its nuclear-armed enemy Israel, then it will not do so against Iran. Egypt simply does not have the financial resources, nuclear infrastructure, or motive to build a successful clandestine nuclear program, as its facilities are under IAEA safeguards. As a signatory of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), Egypt has remained committed to non-proliferation since the Treaty’s inception and would be unlikely to withdraw. Even if Egypt had the capability and intention to pursue nuclear weapons, its security would not be enhanced. An attempted breakout would likely be destroyed in a preemptive strike by Israel, which has proven the credibility of this threat twice by destroying the Osirak reactor in Iraq in 1981 and the Al Kibar reactor in Syria in 2007. Unlike Iran, Egypt does not have long distances, deep reactors, and strong air defenses to protect itself from Israeli preemption. Iran poses the largest threat to Saudi Arabia and, as such, the Kingdom would have the strongest security motive to pursue a deterrent. Riyadh has called on a Nuclear Weapon Free Zone (NWFZ) in the Middle East, yet has repeatedly warned that an Iranian nuclear weapon may compel it to follow suit. This is not credible and is likely an attempt to pressure the United States to take greater action against Tehran. According to Philipp Bleek of the Monterey Institute, “states whose rivals pursue or acquire nuclear weapons are much likely to themselves explore a nuclear weapons option…but are no more (or less) likely to pursue or acquire nuclear weapons” ("Why do states proliferate?," Forecasting Nuclear Proliferation in the 21st Century: Volume 1 The Role of Theory). Nasser of Egypt made a similar threat in response to Israel’s nuclear program and explored Egypt’s nuclear possibilities, but in 1968 chose to sign the NPT instead. Saudi Arabia has virtually no domestic nuclear infrastructure, resources, or knowledge base to conduct a “crash” program. It is also an NPT state and has many U.S. military and foreign investors on its territory, making it difficult to support such a program. Its only option would be to purchase a nuclear weapon from Pakistan. However, Islamabad is unlikely to spare any weapons, as they are needed to deter India. Additionally, selling a nuclear weapon would bring world condemnation on Pakistan and leave it a pariah state surrounded by nuclear enemies. Riyadh would risk losing the support of the United States if it were to attempt to pursue a deterrent, leaving it open to an Israeli strike. Instead, Saudi Arabia will likely rely on its preferred weapons of “cash and diplomacy,” finding the U.S. nuclear umbrella a “more attractive offer.” Turkey is a NATO member with around 70 tactical nuclear weapons on its soil and is protected by the U.S. nuclear umbrella. An indigenous nuclear program would forfeit this position. Etel Solingen (“Domestic Models of Political Survival," Forecasting Nuclear Proliferation in the 21st Century: Volume 1 The Role of Theory) asserts that states with integrated economies face greater costs to proliferating and are therefore less likely to do so. There is too much at stake for these nations to develop nuclear weapons, as they each stand to suffer great financial and political losses and will ultimately be less secure because of it. The United States has far greater influence over these nations than it does over Iran. Washington should keep the pressure on Tehran to adhere to IAEA safeguards. However, alarmist rhetoric of a Middle East arms race is unjustified and not conducive to reaching an agreeable diplomatic settlement with Iran.

### Immigration Reform

#### Won’t pass – no chance for compromise nor even small reform bills.

Gomez, USA Today, 10-17

[Alan, “Unlike shutdown, GOP says Democrats must bend on immigration”, 10-17-13, USA Today,

http://www.usatoday.com/story/news/politics/2013/10/17/government-shutdown-shift-immigration-reform/3000575/, RSR]

House Speaker John Boehner, R-Ohio, has said he is committed to advancing immigration legislation in this Congress but there is virtually no interest among GOP lawmakers to vote for the kind of sweeping bill that Democrats are seeking. Rep. Raul Labrador, R-Idaho, a conservative who was once a member of a bipartisan House group that tried to draft a broad immigration bill, said the prospects for even smaller bills are slim in the House. "It's not going to happen this year," Labrador said. "After the way the president acted over the last two or three weeks where he would refuse to talk to the speaker of the House ... they're not going to get immigration reform. That's done." Getting immigration changes through the House was always going to be a difficult task. The majority of House Republicans have consistently opposed the bill passed by the Senate in July that allows the nation's undocumented immigrants to apply for U.S. citizenship after 13 years, something many in the conference refer to as "amnesty." That means Boehner, who struggled to unify his members throughout the shutdown, would have to "divide the conference" to pass an immigration bill, said Rep. Tim Huelskamp, R-Kan. "That would really melt down the conference," said Huelskamp, a Tea Party conservative. That faction of the House wielded considerable influence over the chamber throughout the 16-day shutdown, pushing Boehner to demand cuts or delays to the president's signature health care law. Those conservatives were supported by Sen. Ted Cruz, R-Texas, a presidential contender for 2016 who has railed against Obamacare and the national debt. And while Cruz was marginalized during Senate hearings on the immigration law, his opposition to the bill may get new life through the more conservative wing of the House.

#### Won’t pass – Obama’s the kiss of death – Republicans don’t trust him.

Preston and Parker, 10-18

[Julia and Ashley, “Democrats Aim to Restore Immigration to Agenda”, 10-18-13, The New York Times,

http://www.nytimes.com/2013/10/19/us/politics/democrats-aim-to-restore-immigration-to-agenda.html, RSR]

Mr. Boehner would like to make progress this year on immigration, a spokesman said Friday. “The speaker remains committed to a step-by-step process to fix our broken immigration system,” said the spokesman, Michael Steel. But House Republican leaders are waiting to gauge the intensity of distrust of the White House among fractious conservatives in their caucus. “The president’s attitude and actions over the past few weeks have certainly made getting anything done on immigration considerably harder,” a senior Republican aide said. Several Republicans who had been working on immigration bills before the shutdown said they no longer believed Mr. Obama would negotiate fairly. “I think what he has done over the last two and a half weeks, he’s tried to destroy the Republican Party,” Representative Raúl R. Labrador, Republican of Idaho, said Wednesday. “I think that anything we do right now with this president on immigration will be with that same goal in mind, which is to destroy the Republican Party and not to get good policies.”

#### **Obama’s PC low – can’t use it on immigration.**

Parnes, Staff Writer, 10-18

[Amie, “Obama’s hollow debt victory”, 10-18-13, The Hill,

http://thehill.com/homenews/administration/329219-obamas-hollow-debt-victory, RSR]

President Obama’s victory over congressional Republicans is likely to have a short shelf life. Even the president’s staunchest allies are skeptical that his triumph in the debt-ceiling battle has produced much capital for the White House to spend on priorities like immigration reform. “I don’t know that this changes anything,” one former senior administration official said. “I don’t think the president has new mojo from this.” “What did they really do? They brought the country to the same place where we were a few weeks ago,” the former official said. “This isn’t like he passed healthcare. He ended a government shutdown and raised the debt limit. Those are routine items. It’s not like he campaigned on it.” Obama took his second victory lap in two days Thursday on the heels of the bipartisan deal, chiding congressional Republicans for engaging in political brinksmanship with the economy on the day the government reopened after a 16-day shutdown. He also blamed the GOP — as he has in recent days — for bringing the nation dangerously close to defaulting on the debt limit. “You don’t like a particular policy or a particular president, then argue for your position,” Obama said in the State Dining Room at the White House. “Go out there and win an election.” “Push to change it,” the president said. “But don’t break it.” While he rallied White House allies with the sentiment, he also angered Republicans, who felt it was a sucker punch. “The president’s admonishment ignores his own shortcomings,” said one senior Republican adviser working on Capitol Hill. “The fact is, he shares equal blame for the shutdown. It’s not as if the stalemate was created overnight. The shutdown is fallout from Obama’s lack of outreach and his ineffective approach to being a leader.” The GOP adviser — who acknowledged defeat in the fight — said Obama’s admonition was “entirely void of the substance of the debate and designed to demonize legitimate opposition. “[It] totally ignored was the president’s own past opposition to raising the debt ceiling and the months leading to this episode when the White House could have been working with Congress to avoid such a crisis,” the adviser said. Republican strategist Ron Bonjean said he didn’t expect relations between Obama and Republicans to improve. “No one has political capital at this point to really accomplish major legislative initiatives by the end of this year,” Bonjean said. “It’s highly unlikely that any comprehensive immigration reform bill would be able to move through the House after such a bruising fight over the shutdown and the debt ceiling.”

#### Plan solves – prevents unpopular status quo shift to civilian courts.

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.

#### Comprehensive reform fails – if it passes it has too many compromises that prevent solvency.

Morrison, ‘12

[Bruce, a former U.S. Representative from Connecticut, was the chairman of the House immigration subcommittee and the author of the Immigration Act of 1990. December 9th, 2012, "One Bill of Compromises Isn’t the Answer”,

www.nytimes.com/roomfordebate/2012/12/09/understanding-immigration-reform/one-immigration-bill-of-compromises-isnt-the-answer]

To many, “comprehensive immigration reform” means “fix it and forget it.” But doing it all in one bill reprises what got us in the current mess in the first place. After major reform bills in 1986 and 1990, the failing employment verification scheme and the clogged green card process were allowed to go unattended. The “enforcement only” 1996 law only froze the mess in place.¶ Save the 'punishment' for those that do not comply with a system that works, not those ensnared in the current system that does not.¶ **A huge compromise of all competing immigration fixes larded into one bill will involve compromises that do not serve the nation’s interests.** Instead we need to assemble the votes to do the two things that must be done — a broad earned legalization program for the 11 million now illegally resident in the country in conjunction with the assurance that this problem will not happen again. That assurance will come from a universal, electronic, identity-authenticating screening of all workers to ensure that they are authorized to work in the U.S.¶ Because almost all who make unauthorized entries and overstays do so to seek and accept employment, no other tool will get the result we need to make legalization politically and philosophically justified — that we have fixed the source of the problem. And this also means using the employment relationship to roll-in legalization while rolling out universal verification.¶ The key point is that prevention of illegal presence is the goal. Save the “punishment” for those that do not comply with a system that works, not those ensnared in the current system that does not.¶ Our legal immigration system needs lots of fixing, like the increase of STEM green cards passed by the House last week and much more. But these fixes, including all future flows beyond the current one million annual immigrants and the millions who will be legalized, will get much easier to negotiate when the legalization-prevention barrier is removed.

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#### Internal processes destroy legitimacy and cred – including the courts is key

Kent Roach 13, Professor of Law and Prichard-Wilson Chair of Law and Public Policy at the University of Toronto, editor-in-chief of the Criminal Law Quarterly, “Managing secrecy and its migration in a post-9/11 world,” Ch 8 in **Secrecy, National Security And The Vindication Of Constitutional Law**, ed. David Cole, Federico Fabbrini, and Arianna Vedaschi, google books

Secret evidence is used by the US military and the CIA in decisions about targeted killing. Attorney General Holder has stressed that the evidence supporting such decisions is carefully reviewed within the government and has argued that the process satisfies due process because due process need not be judicial process.11 The problem with this approach is that it requires people to trust the government that the secret evidence has been thoroughly tested and vetted even though the executive has an incentive to err on the side of security. In contrast to the Israeli courts, American courts have taken a hands-off approach to review of targeted killing.12 The Israeli courts have in one prominent case reviewed targeted killings and have stressed the importance of both ex ante and ex post review within the military and involving the courts.13 To be sure, Israel has not gone as far as the United Kingdom in giving security cleared special advocates access to secret information, but it has provided a process that goes beyond the executive simply reviewing itself. The Obama administration does not seem to think that anyone could seriously challenge the legitimacy of their attempts to keep strategic military information behind targeted killings secret. In a sense, this is a return to a Cold War strategy where the need to preserve secrets from the other side was widely accepted. What has changed since 9;11, however, is that terrorism as opposed to invasion or nuclear war is widely accepted as the prime threat to national security. Terrorism is seen by many as a crime and the use of war-like secrecy is much more problematic in responding to a crime than to a threat of invasion or nuclear war. Hence, the legitimacy of the US’s use of secrets to kill people in its controversial war against al Qaeda has been challenged. It may become a liability in the US’s dealings with the Muslim world.

#### Internal fixes aren’t credible

Goldsmith 13

[Jack Goldsmith, Henry L. Shattuck Professor at Harvard Law School, 5-1-13, “How Obama Undermined the War on Terror,” <http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism>]

For official secrecy abroad to work, the secrets must be kept at home as well. In speeches, interviews, and leaks, Obama's team has tried to explain why its operations abroad are lawful and prudent. But to comply with rules of classified information and covert action, the explanations are conveyed in limited, abstract, and often awkward terms. They usually raise more questions than they answer—and secrecy rules often preclude the administration from responding to follow-up questions, criticisms, and charges. ¶ As a result, much of what the administration says about its secret war—about civilian casualties, or the validity of its legal analysis, or the quality of its internal deliberations—seems incomplete, self-serving, and ultimately non-credible. These trust-destroying tendencies are exacerbated by its persistent resistance to transparency demands from Congress, from the press, and from organizations such as the aclu that have sought to know more about the way of the knife through Freedom of Information Act requests.¶ A related sin is the Obama administration's surprising failure to secure formal congressional support. Nearly every element of Obama's secret war rests on laws—especially the congressional authorization of force (2001) and the covert action statute (1991)—designed for different tasks. The administration could have worked with Congress to update these laws, thereby forcing members of Congress to accept responsibility and take a stand, and putting the secret war on a firmer political and legal foundation. But doing so would have required extended political efforts, public argument, and the possibility that Congress might not give the president precisely what he wants.¶ The administration that embraced the way of the knife in order to lower the political costs of counterterrorism abroad found it easier to avoid political costs at home as well. But this choice deprived it of the many benefits of public argumentation and congressional support. What Donald Rumsfeld said self-critically of Bush-era unilateralism applies to Obama's unilateralism as well: it fails to "take fully into account the broader picture—the complete set of strategic considerations of a president fighting a protracted, unprecedented and unfamiliar war for which he would need sustained domestic and international support." ¶ Instead of seeking contemporary congressional support, the administration has relied mostly on government lawyers' secret interpretive extensions of the old laws to authorize new operations against new enemies in more and more countries. The administration has great self-confidence in the quality of its stealth legal judgments. But as the Bush administration learned, secret legal interpretations are invariably more persuasive within the dark circle of executive branch secrecy than when exposed to public sunlight. On issues ranging from proper targeting standards, to the legality of killing American citizens, to what counts as an "imminent" attack warranting self-defensive measures, these secret legal interpretations—so reminiscent of the Bushian sin of unilateral legalism—have been less convincing in public, further contributing to presidential mistrust.¶ Feeling the heat from these developments, President Obama promised in his recent State of the Union address "to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world." So far, this promise, like similar previous ones, remains unfulfilled. ¶ The administration has floated the idea of "[shifting] the CIA's lethal targeting program to the Defense Department," as The Daily Beast reported last month. Among other potential virtues, this move might allow greater public transparency about the way of the knife to the extent that it would eliminate the covert action bar to public discussion. But JSOC's non-covert targeted killing program is no less secretive than the CIA's, and its congressional oversight is, if anything, less robust. ¶ A bigger problem with this proposed fix is that it contemplates executive branch reorganization followed, in a best-case scenario, by more executive branch speeches and testimony about what it is doing in its stealth war. The proposal fails to grapple altogether with the growing mistrust of the administration's oblique representations about secret war. The president cannot establish trust in the way of the knife through internal moves and more words. Rather, he must take advantage of the separation of powers. Military detention, military commissions, and warrantless surveillance became more legitimate and less controversial during the Bush era because adversarial branches of government assessed the president's policies before altering and then approving them. President Obama should ask Congress to do the same with the way of the knife, even if it means that secret war abroad is harder to conduct.

### Flex DA

#### Empirics go aff – massive historical precedent for judicial activism in the face of unclear statutes. Congressional action is key to reverse this.

Posner and Sunstein, ‘6

[Eric (Kirkland & Ellis Professor of Law, University of Chicago) and Cass (Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago), “Chevronizing Foreign Relations Law”, Chicago PUBLIC LAW AND LEGALTHEORYWORKING PAPER NO. 128, RSR]

Courts have sometimes denied the executive law interpreting authority on the ground that the key decisions must be explicitly made by the ¶ national lawmaker. The most important principle is that the executive is not permitted to ¶ construe statutes so as to raise serious constitutional doubts.96 So long as the statute is ¶ unclear, and the constitutional question serious, Congress must decide to raise that ¶ question via explicit statement. Some canons of interpretation thus operate as part of the ¶ court’s analysis during Step One; the executive’s interpretation might fail because it is ¶ inconsistent with the meaning of the statute, as established, in part, by reference to the ¶ canon against constitutional avoidance. ¶ Why does the Avoidance Canon overcome the executive’s power of ¶ interpretation? The reason is that we are speaking of a kind of nondelegation canon—¶ one that attempts to require Congress to make its instructions exceedingly clear, and that ¶ does not permit the executive to make constitutionally sensitive decisions on its own.97¶ Other interpretive principles, also serving as nondelegation canons, trump Chevron as ¶ well. One of the most general is the rule of lenity, which says that in the face of ambiguity, criminal statutes will be construed favorably to criminal defendants.98¶ Similarly, the executive cannot interpret statutes and treaties unfavorably to Native ¶ Americans.99 Consider also the notion that unless Congress has spoken with clarity, the ¶ executive is not allowed to apply statutes retroactively.100 There are many other ¶ examples.101 In areas ranging from broadcasting to the war on terror,102 the ¶ nondelegation canons operate as constraints on the interpretive discretion of the ¶ executive.