### 2AC Case

#### No link

Robert Chesney 11, Charles I. Francis Professor in Law at the UT School of Law as well as a non-resident Senior Fellow at Brookings, "Examining the Evidence of a Detention-Drone Strike Tradeoff", October 17, www.lawfareblog.com/2011/10/examining-the-evidence-of-a-detention-drone-strike-tradeoff/

Yesterday Jack linked to this piece by Noah Feldman, which among other things advances the argument that the Obama administration has resorted to drone strikes at least in part in order to avoid having to grapple with the legal and political problems associated with military detention:¶ Guantanamo is still open, in part because Congress put obstacles in the way. Instead of detaining new terror suspects there, however, Obama vastly expanded the tactic of targeting them, with eight times more drone strikes in his first year than in all of Bush’s time in office.¶ Is there truly a detention-drone strike tradeoff, such that the Obama administration favors killing rather than capturing? As an initial matter, the numbers quoted above aren’t correct according to the New America Foundation database of drone strikes in Pakistan, 2008 saw a total of 33 strikes, while in 2009 there were 53 (51 subsequent to President Obama’s inauguration). Of course, you can recapture something close to the same point conveyed in the quote by looking instead to the full number of strikes conducted under Bush and Obama, respectively. There were relatively few drone strikes prior to 2008, after all, while the numbers jump to 118 for 2010 and at least 60 this year (plus an emerging Yemen drone strike campaign). But what does all this really prove?¶ Not much, I think. Most if not all of the difference in drone strike rates can be accounted for by specific policy decisions relating to the quantity of drones available for these missions, the locations in Pakistan where drones have been permitted to operate, and most notably whether drone strikes were conditioned on obtaining Pakistani permission. Here is how I summarize the matter in my forthcoming article on the legal consequences of the convergence of military and intelligence activities:¶ According to an analysis published by the New America Foundation, two more drone strikes in Pakistan’s FATA region followed in 2005, with at least two more in 2006, four more in 2007, and four more in the first half of 2008.[1] The pattern was halting at best. Yet that soon changed. U.S. policy up to that point had been to obtain Pakistan’s consent for strikes,[2] and toward that end to provide the Pakistani government with advance notification of them.[3] But intelligence suggested that on some occasions “the Pakistanis would delay planned strikes in order to warn al Qaeda and the Afghan Taliban, whose fighters would then disperse.”[4] A former official explained that in this environment, it was rare to get permission and not have the target slip away: “If you had to ask for permission, you got one of three answers: either ‘No,’ or ‘We’re thinking about it,’ or ‘Oops, where did the target go?”[5]¶ Declaring that he’d “had enough,” Bush in the summer of 2008 “ordered stepped-up Predator drone strikes on al Qaeda leaders and specific camps,” and specified that Pakistani officials going forward should receive only “‘concurrent notification’…meaning they learned of a strike as it was underway or, just to be sure, a few minutes after.”[6] Pakistani permission no longer was required.[7] ¶ The results were dramatic. The CIA conducted dozens of strikes in Pakistan over the remainder of 2008, vastly exceeding the number of strikes over the prior four years combined.[8] That pace continued in 2009, which eventually saw a total of 53 strikes.[9] And then, in 2010, the rate more than doubled, with 188 attacks (followed by 56 more as of late August 2011).[10] The further acceleration in 2010 appears to stem at least in part from a meeting in October 2009 during which President Obama granted a CIA request both for more drones and for permission to extend drone operations into areas of Pakistan’s FATA that previously had been off limits or at least discouraged.[11] ¶ There is an additional reason to doubt that the number of drone strikes tells us much about a potential detention/targeting tradeoff: most of these strikes involved circumstances in which there was no feasible option for capturing the target. These strikes are concentrated in the FATA region, after all. ¶ Having said all that: it does not follow that there is no detention-targeting tradeoff at work. I’m just saying that drone strikes in the FATA typically should not be understood in that way (though there might be limited exceptions where a capture raid could have been feasible). Where else to look, then, for evidence of a detention/targeting tradeoff?¶ Bear in mind that it is not as if we can simply assume that the same number of targets emerge in the same locations and circumstances each year, enabling an apples-to-apples comparison. But set that aside.¶ First, consider locations that (i) are outside Afghanistan (since we obviously still do conduct detention ops for new captures there) and (ii) entail host-state government control over the relevant territory plus a willingness either to enable us to conduct our own ops on their territory or to simply effectuate captures themselves and then turn the person(s) over to us. This is how most GTMO detainees captured outside Afghanistan ended up at GTMO. Think Bosnia with respect to the Boumediene petitioners, Pakistan’s non-FATA regions, and a variety of African and Asian states where such conditions obtained in years past. In such locations, we seem to be using neither drones nor detention. Rather, we either are relying on host-state intervention or we are limiting ourselves to surveillance. Very hard to know how much of each might be going on, of course. If it is occurring often, moreover, it might reflect a decline in host-state willingness to cooperate with us (in light of increased domestic and diplomatic pressure from being seen to be responsible for funneling someone into our hands, and the backdrop understanding that, in the age of wikileaks, we simply can’t promise credibly that such cooperation will be kept secret). In any event, this tradeoff is not about detention versus targeting, but something much more complex and difficult to measure.

#### No circumvention and the courts are effective—the executive will consent

Prakash and Ramsay 12, Professors of Law

 [2012, Saikrishna B. Prakash is a David Lurton Massee, Jr. Professor of Law and Sullivan and Cromwell Professor of Law, University of Virginia School of Law., and Michael D. Ramsey is a Professor of Law, University of San Diego School of Law; “The Goldilocks Executive”, Review of THE EXECUTIVE UNBOUND:AFTER THE MADISONIAN REPUBLIC. By Eric A. Posner & Adrian Vermeule, 90 Texas L. Rev. 973, <http://www.texaslrev.com/wp-content/uploads/Prakash-Ramsey-90-TLR-973.pdf>]

The Courts.—The courts constrain the Executive, both because courts are necessary to the Executive imposing punishments and because courts can enforce the Constitution and laws against the Executive. It is true, as Posner and Vermeule say, that courts often operate ex post and that they may defer to executive determinations, especially in sensitive areas such as national security. But these qualifications do not render the courts meaningless as a Madisonian constraint. First, to impose punishment, the Executive must bring a criminal case before a court. If the court, either via jury or by judge, finds for the defendant, the Executive does not suppose that it can nonetheless impose punishment (or even, except in the most extraordinary cases, continue detention). This is so even if the Executive is certain that the court is mistaken and that failure to punish will lead to bad results. As a result, the Executive’s ability to impose its policies upon unwilling actors is sharply limited by the need to secure the cooperation of a constitutionally independent branch, one that many suppose has a built-in dedication to the rule of law.84 And one can hardly say, in the ordinary course, that trials and convictions in court are a mere rubber stamp of Executive Branch conclusions. Second, courts issue injunctions that bar executive action. Although it is not clear whether the President can be enjoined,85 the rest of his branch surely can and thus can be forced to cease actions that judges conclude violate federal law or the Constitution.86 As a practical matter, while courts issue such injunctions infrequently, injunctions would be issued more often if an administration repeatedly ignored the law. Third, courts’ judgments sometimes force the Executive to take action, such as adhering to a court’s reading of a statute in areas related to benefits, administrative process, and even commission delivery. Though the claim in Marbury v. Madison87 that courts could issue writs of mandamus to executive officers was dicta,88 it was subsequently confirmed in Kendall v. United States ex rel. Stokes, 89 a case where a court ordered one executive officer to pay another.90 Finally, there is the extraordinary practice of the Executive enforcing essentially all judgments. The occasions in which the Executive has refused to enforce judgments are so few and far between that they are the stuff of legend. To this day, we do not know whether Andrew Jackson said, “John Marshall has made his decision, now let him enforce it.”91 Lincoln’s disobedience of Chief Justice Taney’s writ of habeas corpus is so familiar because it was so singular. Yet to focus on actual court cases and judgments is to miss the broader influence of the courts. Judicial review of executive action matters because the knowledge of such review affects what the Executive will do. Executives typically do not wish to be sued, meaning that they often will take measures designed to stave off such suits and avoid actions that raise the risk of litigation. The ever-present threat that someone will take a case to court and defeat the Executive acts as a powerful check on executive decision making. The Executive must take account of law, including law defined as what a court will likely order.

## AT T

### AT T—Indefinite Detention

#### We meet—there are less conditions under which the executive can detain someone after the plan

#### We meet – Challenges to evidentiary standards reduce the President’s authority to indefinitely detain

LAKHDAR BOUMEDIENE, et al., 2008

v. GEORGE W. BUSH, PRESIDENT of the UNITED STATES, et al. KHALED A. F. AL ODAH, next friend of FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al. v. UNITED STATES et al., (No. 06-1195), (No. 06-1196), SUPREME COURT OF THE UNITED STATES, 553 U.S. 723; 128 S. Ct. 2229; 171 L. Ed. 2d 41; 2008 U.S. LEXIS 4887; 76 U.S.L.W. 4406; 21 Fla. L. Weekly Fed. S 329, December 5, 2007, Argued, June 12, 2008 \*

Although we make no judgment whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." See Bismullah III, 514 F.3d at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore. [\*786] HN24Go to this Headnote in the case. [\*\*\*LEdHR24] LEdHR(24)[24] For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This [\*\*\*90] includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. See Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). Here that opportunity is constitutionally required. HN25Go to this Headnote in the case. [\*\*\*LEdHR25] LEdHR(25)[25] Consistent with the historic function and province of the writ, habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here. In two habeas cases involving enemy aliens tried for war crimes, In re Yamashita, 327 U.S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946), and Ex parte Quirin, 317 U.S. 1, 63 S. Ct. [\*\*2271] 2, 87 L. Ed. 3 (1942), for example, this Court limited its review to determining whether the Executive had legal authority to try the petitioners by military commission. See Yamashita, supra, at 8, 66 S. Ct. 340, 90 L. Ed. 499 ("[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged"); Quirin, supra, at 25, 63 S. Ct. 2, 87 L. Ed. 3 ("We are not here concerned with any question of the guilt or innocence of petitioners"). Military courts are not courts of record. See Watkins, 3 Pet., at 209; Church 513. And the procedures used to try General Yamashita have been sharply criticized by Members of this Court. See Hamdan, 548 U.S., at 617, 126 S. Ct. 2749, 165 L. Ed. 2d 723; Yamashita, supra, at 41-81, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J., dissenting). We need not revisit these cases, however. For on their own terms, the proceedings in Yamashita and Quirin, like those in Eisentrager, had an adversarial structure that is lacking here. See Yamashita, [\*787] supra, at 5, 66 S. Ct. 340, 90 L. Ed. 499 (noting that General Yamashita was represented by six military lawyers and that "[t]hroughout the proceedings . . . defense counsel . . . demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged"); Quirin, supra, at 23-24, 63 S. Ct. 2, 87 L. Ed. 3; Exec. Order No. 9185, 7 Fed. Reg. 5103 (1942) (appointing counsel to represent the German saboteurs). The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that HN26Go to this Headnote in the case. [\*\*\*LEdHR26] LEdHR(26)[26] when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release. C We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards. HN27Go to this Headnote in the case. [\*\*\*LEdHR27] LEdHR(27)[27] "[W]e are obligated to construe the statute to avoid [constitutional] problems" if it is "'fairly possible'" to do so. St. Cyr, 533 U.S., at 299-300, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (quoting Crowell v. Benson, 285 U.S. 22, 62, 52 S. Ct. 285, [\*\*\*91] 76 L. Ed. 598 (1932)). There are limits to this principle, however. The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation. See Clark v. Martinez, 543 U.S. 371, 385, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them"). We cannot ignore the text and purpose of a statute in order to save it. The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify [\*788] detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. In that case it would be possible to hold that a remedy of release is impliedly provided for. The DTA might be read, furthermore, to allow petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. (Whether the President has such authority turns on whether the AUMF [\*\*2272] authorizes--and the Constitution permits--the indefinite detention of "enemy combatants" as the Department of Defense defines that term. Thus a challenge to the President's authority to detain is, in essence, a challenge to the Department's definition of enemy combatant, a "standard" used by the CSRTs in petitioners' cases.) At oral argument, the Solicitor General urged us to adopt both these constructions, if doing so would allow MCA § 7 to remain intact. See Tr. of Oral Arg. 37, 53.

#### War power = power to conduct war as Commander-in-chief

Gerald G. Howard - Spring, 2001, Senior Notes and Comments Editor for the Houston Law Review, COMMENT: COMBAT IN KOSOVO: IGNORING THE WAR POWERS RESOLUTION, 38 Hous. L. Rev. 261, LexisNexis

 [\*270] The issue, then, becomes one of defining and monitoring the authority of the political leader in a democratic nation. Black's Law Dictionary defines "war power" as "the constitutional authority of Congress to declare war and maintain armed forces, and of the President to conduct war as commander-in-chief." n45 The power and authority of United States political leaders to conduct war stems from two documents: the United States Constitution and the War Powers Resolution. n46 One must understand each of these sources of authority to properly assess the legality of the combat operations in Kosovo.

#### Restriction is a direct limitation

IMF, 10

Prepared by the Legal Department of the IMF, 12/31, http://www.imf.org/external/pubs/ft/sd/index.asp?decision=1034-%2860/27%29

The guiding principle in ascertaining whether a measure is a restriction on payments and transfers for current transactions under Article VIII, Section 2, is whether it involves a direct governmental limitation on the availability or use of exchange as such.

#### Overlimits the topic—every type of detention has some access to some remedial form of habeas and all detention ends when the WOT ends—kills affirmative flex which drives topic debates and innovation

#### Predictability—their interpretation conflates “indefinite” with “permanent”—only our interpretation reflects topic precision—their limit isn’t valuable if it isn’t predictable

#### Good is good enough

## AT OLC CP

### 2AC

#### Doesn’t solve—the XO can’t change standards in courts

#### The detention guads, can’t be not racist—utopian fiat

#### Doesn’t solve racism

Perm: CP

#### 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.

Perm: Do Both

#### Counterplan is overwhelmed by other precedent driving continued presidential powers

Marshall, 8 --- Professor of Law at the University of North Carolina

(April 2008, William P., Boston University Law Review, “THE ROLE OF THE PRESIDENT IN THE TWENTY-FIRST CENTURY: ARTICLE: ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS,” 88 B.U.L. Rev. 505))

Presidential power also inevitably expands because of the way executive branch precedent is used to support later exercises of power. n34 Many of the [\*511] defenders of broad presidential power cite historical examples, such as President Lincoln's suspension of habeas corpus, as authority for the position that Presidents have considerable powers in times of war and national emergency. n35 Their position is straight-forward. The use of such powers by previous Presidents stands as authority for a current or future President to engage in similar actions. n36 Such arguments have considerable force, but they also create a one-way ratchet in favor of expanding the power of the presidency. The fact is that every President but Lincoln did not suspend habeas corpus. But it is a President's action in using power, rather than forsaking its use, that has the precedential significance. n37 In this manner, every extraordinary use of power by one President expands the availability of executive branch power for use by future Presidents.

#### The executive CP is a voting issue—

#### a. Avoids the resolutional question—executive skirts debates over whether the executive should be restricted by artificially imagining the need for executive restrictions doesn’t exist

#### b. Agential Recognition—whether or not the executive can act, doesn’t disprove the federal government’s responsibility—the CP inculcates a culture of responsibility shifting that makes us inactive agents who let atrocities happen

#### Executive flexibility leads to detention policy failure—organizational insulation ensures it—internal link turns their DA

Pearlstein 9, Visiting Scholar and Lecturer at Princeton

[July, 2009, Deborah N. Pearlstein is a Visiting Scholar and Lecturer in Public and International Affairs, Woodrow Wilson School of Public & International Affairs, Princeton University, “Form and Function in the National Security Constitution”, 41 Conn. L. Rev. 1549]

Examples of excessive flexibility producing adverse consequences are ample. Following Hurricane Katrina, one of the most important lessons independent analysis drew from the government response was the extent to which the disaster was made worse as a result of the lack of experience and knowledge of crisis procedures among key officials, the absence of expert advisors available to key officials (including the President), and the failure to follow existing response plans or to draw from lessons learned from simulations conducted before the fact. n199 Among the many consequences, [\*1605] basic items like food, water, and medicines were in such short supply that local law enforcement (instead of focusing on security issues) were occupied, in part, with breaking into businesses and taking what residents needed. n200 Or consider the widespread abuse of prisoners at U.S. detention facilities such as Abu Ghraib. Whatever the theoretical merits of applying coercive interrogation in a carefully selected way against key intelligence targets, n201 the systemic torture and abuse of scores of detainees was an outcome no one purported to seek. There is substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security. n202 While there remain important questions about the extent to which some of the abuses at Abu Ghraib were the result of civilian or senior military command actions or omissions, one of the too often overlooked findings of the government investigations of the incidents is the unanimous agreement that the abuse was (at least in part) the result of structural organization failures n203 -failures that one might expect to [\*1606] produce errors either to the benefit or detriment of security. In particular, military investigators looking at the causes of Abu Ghraib cited vague guidance, as well as inadequate training and planning for detention and interrogation operations, as key factors leading to the abuse. Remarkably, "pre-war planning [did] not include[] planning for detainee operations" in Iraq. n204 Moreover, investigators cited failures at the policy level- decisions to lift existing detention and interrogation strictures without replacing those rules with more than the most general guidance about custodial intelligence collection. n205 As one Army General later investigating the abuses noted: "By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved." n206 It was thus unsurprising that detention and interrogation operations were assigned to troops with grossly inadequate training in any rules that were still recognized. n207 The uncertain effect of broad, general guidance, coupled [\*1607] with the competing imperatives of guidelines that differed among theaters of operation, agencies, and military units, caused serious confusion among troops and led to decisionmaking that it is overly kind to call arbitrary. n208 Would the new functionalists disagree with the importance of government planning for detention operations in an emergency surrounding a terrorist nuclear attack? Not necessarily. Can an organization anticipate and plan for everything? Certainly not. But such findings should at least call into question the inclination to simply maximize flexibility and discretion in an emergency, without, for example, structural incentives that might ensure the engagement of professional expertise. n209 Particularly if one embraces the view that the most potentially damaging terrorist threats are nuclear and biological terrorism, involving highly technical information about weapons acquisition and deployment, a security policy structure based on nothing more than general popular mandate and political instincts is unlikely to suffice; a structure that systematically excludes knowledge of and training in emergency response will almost certainly result in mismanagement. n210 In this light, a general take on role effectiveness might suggest favoring a structure in which the engagement of relevant expertise in crisis management is required, leaders have incentives to anticipate and plan in advance for trade-offs, and [\*1608] organizations are able to train subordinates to ensure that plans are adhered to in emergencies. Such structural constraints could help increase the likelihood that something more than arbitrary attention has been paid before transcendent priorities are overridden.

## AT AUMF DA

### 2AC

#### No uq

Barnes, 12 --- J.D. at Boston University and M.A. in Law and Diplomacy at The Fletcher School of Law and Diplomacy at Tufts University (Spring 2012, Beau D., Military Law Review, “REAUTHORIZING THE “WAR ON TERROR”: THE LEGAL AND POLICY IMPLICATIONS OF THE AUMF’S COMING OBSOLESCENCE,” 211 Mil. L. Rev. 57))

Part V outlines specific policy proposals for a reauthorization of military force against terrorist groups that reflects the current contours of the armed conflict against terrorist groups. It begins by analyzing Congress's recent efforts to reaffirm the AUMF in the 2012 National Defense Authorization Act, which ultimately failed to address the AUMF's fragile legal foundation. This section ends by arguing for a new AUMF that includes time limits, a regular review procedure, a more clearly defined geographic scope, and unambiguous target definitions, thereby avoiding excessive deference to executive branch determinations in the critical arena of targeted killing. Prolonged and systematic military action, perhaps the most consequential activity a state can undertake, should be supported by the Congress. The AUMF, passed in the uncertain days immediately following the attacks of September 11, was sufficient for its immediate purpose: preventing further attacks by those who perpetrated 9/11. The now antiquated statute, however, must be updated for the dramatically different world we face today, or else it will surely fall short of properly guaranteeing the security of the United States.

**No link – their evidence is about POW status – that’s far wider than the right to a habeas trial**

**ICRC 10/29**, International Committee of the Red Cross, Prisoner of War Detainees Protected Under International Humanitarian Law, <http://www.icrc.org/eng/war-and-law/protected-persons/prisoners-war/overview-detainees-protected-persons.htm>

**POWs cannot be prosecuted** for taking a direct part in hostilities.  Their detention is not a form of punishment, but only aims to prevent further participation in the conflict. **They must be released and repatriated without delay after the end of hostilities**. The detaining power may prosecute them for possible war crimes, but not for acts of violence that are lawful under IHL.

**POWs must be treated humanely in all circumstances**. They are protected against any act of violence, as well as against intimidation, insults, and public curiosity. **IHL** also **defines minimum conditions of detention covering** such issues as **accommodation, food, clothing, hygiene and medical care**.

#### And PMCs

Daniel P. Ridlon, A.F. Captain, JD Harvard, 8, “CONTRACTORS OR ILLEGAL COMBATANTS? THE STATUS OF ARMED CONTRACTORS IN IRAQ,” 62 A.F. L. Rev. 199, ln

In addition to legal liability, the United States' employment of PMF personnel in future conflicts has potential negative policy ramifications. Employing PMF personnel who are potentially viewed as illegal combatants may undermine the public image that the United States conducts its military operations in accordance with the laws of war. This would not only serve as a public relations problem for the United States, but it could also be used as justification for other nations or non-state actors to violate the laws of war, especially if those states or groups are engaged in a conflict against the United States. In the end, the employment of illegal combatants could reduce prisoner of war [\*253] protections afforded to United States military personnel if they are captured.

## AT Terrorism

### 2AC Resource T/O

#### ABOUT EXISTING TRIALS

#### Judicial review key to detention restraint—avoids false leads

O’Neil 11 [Winter, 2011, Robin O'Neil, “THE PRICE OF PURITY: WEAKENING THE EXECUTIVE MODEL OF THE UNITED STATES' COUNTER-TERROR LEGAL SYSTEM”, 47 Hous. L. Rev. 1421]

While providing for judicial review may not make sense in every anti-terror context, absent limitation, the executive may offend the Constitution in any number of ways, leaving those affected no recourse. n152 Further, the lack of judicial review compromises counter-terror activities by not requiring the President to provide plausible reasons for and explanations of his actions; n153 for example, "by failing to provide even perfunctory individualized hearings [to detainees at Guantanamo Bay], ... the U.S. government ... misspent our scarce interrogation capacities on individuals of minimal or no intelligence value." n154 Had the President's orders been subject to [\*1445] judicial oversight, he would have had to explain how the unilaterally implemented deprivations of due process were narrowly tailored to effect an important purpose, prompting a more thorough analysis of what was to be gained by the President's detention policies. n155 The weak form of the executive model gives the President limited flexibility in exigent circumstances to move forward without congressional authorization, while retaining a strong preference for specifically authorized executive action and the judicial recourse it usually provides. n156 The fact that both Congress and the Bush Administration made a concerted effort to cut the courts out of the counter-terrorism legal scheme altogether supports the proposition that the anti-terrorism legal system developed during the Bush Administration has brought the U.S. executive model perilously close to operating in its pure form, notwithstanding the broad legislative mandates enacted in support of the President's unilateral activities. n157 President Obama should heed the Boumediene Court's admonitions regarding the centrality of judicial review to the preservation of American democracy and press Congress to lift what barriers to judicial recourse the MCA continues to impose on War on Terror detainees. n158 In those rare circumstances in which legislative authorization is not practicable, the President should provide for meaningful judicial recourse by his own order. n159

#### False positives cause a chilling effect—means officials are deterred from pursuing even the valid leads

Rose 8

[12/16/08, David Rose is a contributing editor citing numerous CIA officials in every paragraph, “Tortured Reasoning”, <http://www.vanityfair.com/magazine/2008/12/torture200812>]

To reach a final calculus of the Bush administration’s use of torture will take years. It will require access to a large body of material that for now remains classified, and the weighing not just of information gained against false or missed leads but of the wider consequences: of the damage done to America’s influence with its friends, and of the encouragement provided to its enemies. Even harder to quantify is the damage done to institutions and their morale, especially the C.I.A. “We were done a tremendous disservice by the administration,” one official says. “We had no background in this; it’s not something we do. They stuck us with a totally unwelcome job and left us hanging out to dry. I’m worried that the next administration is going to prosecute the guys who got involved, and there won’t be any presidential pardons at the end of it. It would be O.K. if it were John Ashcroft or Alberto Gonzales. But it won’t be. It’ll be some poor G.S.-13 who was just trying to do his job.” At the F.B.I., says a seasoned counterterrorist agent, following false leads generated through torture has caused waste and exhaustion. “At least 30 percent of the F.B.I.’s time, maybe 50 percent, in counterterrorism has been spent chasing leads that were bullshit. There are ‘lead squads’ in every office trying to filter them. But that’s ineffective, because there’s always that ‘What if?’ syndrome. I remember a claim that there was a plot to poison candy bought in bulk from Costco. You follow it because someone wants to cover himself. It has a chilling effect. You get burned out, you get jaded. And you think, Why am I chasing all this stuff that isn’t true? That leads to a greater problem—that you’ll miss the one that is true. The job is 24-7 anyway. It’s not like a bank job. But torture has made it harder.”

## AT PQD

### 2AC N/U—PQD

#### The Zivotofsky case killed PQD

Skinner 8/23, Professor of Law at Willamette

(13, Gwynne, Misunderstood, Misconstrued, and Now Clearly Dead: The 'Political Question Doctrine' in Cases Arising in the Context of Foreign Affairs, papers.ssrn.com/sol3/papers.cfm?abstract\_id=2315237)

In case there was any doubt, the Supreme Court in 2012 once and for sounded the death knell for the “political question doctrine” as a nonjusticiability doctrine - even in cases involving foreign policy – in Zivotofsky v. Clinton. In Zivotofsky, the Court adopted the analysis articulated in this article – finding that the question was justiciable, and that the proper analysis was whether Congress or the President acted within their powers. In an 8-1 decision, the Supreme Court in reversed the lower courts’ dismissal based on political question grounds of the Zivotofsky’s lawsuit requesting that because he was born in Jerusalem, Israel be listed as his place of birth on his passport. The Court found that the “political question doctrine” did not bar the lawsuit. In so finding, the Court called into question the continued existence of the “political question doctrine” as a nonjusticiability doctrine in individual rights claims, even in the area of foreign policy. Moreover, the case serves as a model for how courts should approach the “political question doctrine” in the future – deciding which branch of government has the authority and discretion to act under the Constitution in the area of contention. In 2002, Congress enacted a statute that part of the Foreign Relations Authorization Act of 2003 providing that “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” 308 When President Bush signed the Act into law, he protested that § 214 “impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch.” Zivotofsky was born shortly after that, and when his parents requested that Jerusalem, Israel be listed as his place of birth, the State Department, citing State Department long-standing policy that prohibits recording “Israel” as the place of birth for those born in Jerusalem, refused to do.310 The parents sued for declaratory judgment and a permanent injunction.311 The Secretary of State moved to dismiss the case, arguing that it presented a nonjusticiable political question.312 Both lower courts dismissed the case under the “political question doctrine”.313 The District Court explained that “[r]esolving [Zivotofsky's] claim on the merits would necessarily require the Court to decide the political status of Jerusalem.”314 Concluding that the claim therefore presented a political question, the District Court dismissed the case for lack of subject matter jurisdiction. 315 The D. C. Court of Appeals, also dismissing the case on political question grounds, reasoned that the Constitution gives the Executive the exclusive power to recognize foreign sovereigns, and that the exercise of that power cannot be reviewed by the courts.316 It rejected the argument that Congress’ attempt to take a position on the matter did not change the analysis.317 Judge Edwards, however, in a notable opinion concurring in judgment, found that the “political question doctrine” did not preclude determination of the case since it involved “commonplace issues of statutory and constitutional interpretation” plainly within the constitutional authority of the Judiciary to decide.”318 Judge Edwards then opined that the Act unconstitutionally infringed on the power of the President’s recognition power, and that the plaintiff had no viable cause of action.319 The Supreme Court rejected the argument that the case required it to define U.S. policy, and criticized the court of appeals for finding that because the executive had the exclusive authority over the issue, the claim presented a nonjusticiable judicial question.320 Rather, the Court found, the suit simply required that the Court adjudicate whether Zivotofsky “can vindicate his statutory right under § 214(d) to choose to have Israel recorded as his place of birth on his passport,” by determining whether the statute was constitutional.321 The Court noted that “this is a familiar judicial exercise,” and further noted that it is the province and duty of the Court to determine the constitutionality of a statute – the only real issue in the case – something the court has the province and duty to do. 322 The Court noted it cannot refrain from this simply because the determination has political implications. The Court reasoned that if the statute impermissibly intruded upon the President’s constitutional powers, then the claim would need to be dismissed for “failure to state a claim” – not as a nonjusticiable question or for lack of standing.324 If the statute is constitutional, then the Secretary of State must be ordered to comply with the statute and issue the passport with Israel listed.325 Either way, the Court noted that no political question is involved.326 The Court then remanded the case for determination on the Constitutional question. In reaching its decision, the Court framed the “political question doctrine” quite narrowly. First, it began its analysis by citing Cohens v. Virginia328 for the proposition that “the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid,’” and noting that the Court has created a “very narrow exception” to the “political question doctrine.”329 Interestingly, rather than reiterate the six factors outlined in Baker, it suggested a narrowing test, looking at two basic factors: whether there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’330 The Court rejected the argument that there was a constitutional commitment of the question about recognition of governments to the Executive, finding instead that question was one of constitutional interpretation of a statute and, thus, belonged with the Court. 331 The Court noted that it was its role to determine the powers of Congress and the Executive under the Constitution. The Court also rejected the argument that it lacked judicially manageable standards in reaching any such decision by outlining all the various arguments and principals available in order for a court to adjudicate the matter. At the end of the day, Court’s opinion reaffirmed the judiciary’s role over certain foreign affairs issues. Thus, it is fair to say that this case indicates that the Court is signaling a serious retreat in the use of the “political question doctrine” to find that individual rights cases are off-limits to the judiciary, even where those cases affect national security or foreign policy.

#### Their DA already happened

Kaufman 8, Marc Kaufman is a staff writer at the Washington Post, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/03/AR2008010303887.html

A federal judge yesterday severely limited the Navy's ability to use mid-frequency sonar on a training range off the Southern California coast, ruling that the loud sounds would harm whales and other marine mammals if not tightly controlled.

The decision is a blow to the Navy, which has argued that it needs the flexibility to train its sonar operators without undue restrictions. In her decision, however, U.S. District Judge Florence-Marie Cooper said the Navy could conduct productive training under the limitations, which she said were required under several environmental laws.

## AT Politics

### 2AC

#### Their evidence proves holes and disconnects—their UQ ev concludes Obama irrelevant because of election efforts—that would be separate from the alienation of the plan, because it doesn’t change public pressure

Mimms, 2/7 (Sarah, 2/7/2014, “Why Democrats Will Win on Unemployment Insurance; Hint: It has little to do with poor people,” <http://www.nationaljournal.com/congress/why-democrats-will-win-on-unemployment-insurance-20140207>))

For the fifth time this year, Senate Majority Leader Harry Reid brought an unemployment-insurance extension to the floor on Thursday, even though several members of his party admitted that they didn't have the votes to pass it.They came close. But more important for Democratic campaign operatives across the country, they once again got Republicans on the record opposing assistance for the long-term unemployed. Although Democrats have been crowing about the importance of passing an extension since the benefits expired on Dec. 28, the party has been hesitant to make concessions to Republicans to acquire more of their votes. That is not to say that Democrats hope the legislation fails. Passing an unemployment-insurance extension would be great news for their party—and the 1.6 million Americans now living without support. Think of it as a win-win situation. The party is facing little pressure to cave to Republicans, who are asking Democrats to pay for the extension for only the second time in the program's history. Instead, as each week passes, Democrats seem to be getting closer to the 60 votes they'll need to pass the extension—they reached 59 (not counting Reid's procedural switch) for the first time during a vote on Thursday—and Democrats are hopeful that if they hold out a little longer, they'll get the votes. But more significant, as they prepare for an election in which they plan to run on income inequality and improving the middle class, the more times Republicans vote against an extension of popular benefits for unemployed individuals, or the House refuses to take up the issue, the better.The Democratic Congressional Campaign Committee on Wednesday blasted out a CBS News polls showing that 65 percent of Americans—and, importantly, an equal number of independents—support extending unemployment insurance benefits. With Republicans voting against the issue or avoiding it altogether, while simultaneously "spending a full day debating new restrictions to women's health," one national Democratic operative said, that fits in well with the party's broader electoral message. National Democratic strategists are already messaging on the unemployment issue in key races across the country, setting up an even larger fight over what the operative termed "middle-class security"—that will include raising the minimum wage and other issues—in the fall.

#### TPA comes first

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Obama is already being called a lame-duck president, so the fight for free trade may be his last, best opportunity to show that he has some fight left in him. That will require him to buck the popular consensus within his own party -- in fact, more than 150 House Democrats recently signed a letter to Obama opposing TPA. (To be fair, there is bipartisan opposition to TPA; some protectionist Republicans don't like it either.) I take the White House at its word when it says free trade is an important policy priority. Obama should follow through on the commitment he made in his State of the Union address on Tuesday and first work with free traders in Congress on both sides of the aisle to pass legislation restoring TPA. Then he should set out to quickly complete negotiations over the two pending trade deals. It may be the only bipartisan victory Obama can claim during his time as president, but it would be an important one for the U.S.'s workers and economy.

#### Obama juggling is the assumption their evidence ignores—“it’s a priority” isn’t a link UQ evidence for them, because everything is

Mckeown, 1/7 --- advises leaders in Silicon Valley and speaks around the world (1/7/2014, Greg, “Obama's Attention Deficit Disorder; If you don’t prioritize your presidency, someone else will,” <http://www.politico.com/magazine/story/2014/01/obamas-attention-deficit-disorder-101840.html?hp=r3#.Us1rXrTnNXQ>))

President Obama has a problem: One day he’s talking about economic inequality, the next day school reform, or immigration reform, or something else entirely. At a time when the political system is so gridlocked, it seems crazy to flit from issue to issue in this way—and it’s no way to run a parade, either.This presidential attention deficit disorder is bad politics because it’s bound to result in disappointment: There’s no way Obama, or his chief of staff Denis McDonough, for that matter, can juggle all of these priorities successfully. And if you look at his poll numbers, it seems the American people think so too. I’m not trying to make a partisan point here. This is a problem I see routinely with the leaders I advise in Silicon Valley. It is a problem many of us feel on a daily basis, whether we’re the high-flying CEO of a Fortune 500 company or just a regular working stiff trying to make ends meet. So here are my suggestions for how Obama can stop sweating the distractions and start focusing on what’s most essential. First, ask, “If we only get one thing done in 2014, what should it be?” In Obama’s reelection video, “The Road We’ve Travelled,” his team sought to put his first term in the most positive light possible, in the same spirit as Bill Clinton’s “A Man from Hope” or Ronald Reagan’s “It’s Morning in America.” In it, Obama’s former chief of staff, Rahm Emanuel, recalls asking Obama which of all of the problems they should take on and Obama said, “All of them!” Emanuel saw this as an evidence of inspiring leadership. Me, not so much. When leaders believe they can take on every problem, they are ignoring the ruthless reality of tradeoffs. Not even the most powerful person in the world can escape this principle: When you try to make everything a priority, nothing will be.As I write in my new book, Essentialism, the word priority came into the English language in the 1400s. It was singular. It meant the very first or prior thing. It stayed singu­lar for the next 500 years. Only in the 1900s did we pluralize the term and start talking about priorities. Illogically, we reasoned that by changing the word we could bend reality. Somehow we would now be able to have multiple “first” things. People—and presidents—routinely try to do just that. One leader told me of his experience where the chief executive often talked of “Pri-1, Pri-2, Pri-3, Pri-4, and Pri-5.” I am not suggesting for one moment that this is easy. To define the priority is hard. It takes debate, disagreement and really tough conversations—and that’s just within a leader’s inner circle. Still, it goes to the very essence of leadership. Obama needs to debate and answer this question, “If we only get one thing done in 2014, what should it be?” I won’t presume to tell him which of the many competing agenda items, from jobs to health care to immigration, he should pick. But he has to pick one and stick with it. That’s how the most effective leaders get things done. Second, ask, “What important initiatives should we say no to in 2014?” Identifying the priority is necessary but not sufficient. Talk is cheap when it comes to prioritization. The test comes when a leader decides what to say no to.Indeed, the Latin root of the word decision—cis or cid—literally means “to cut” or “to kill.” You can see this in words like scissors, homicide or fratricide. Leaders often think a decision means saying yes to something, but the core of the idea is what we’re willing to reject. As I wrote here, Steve Jobs, the late Apple founder, said in an interview with Fortune’s Betsy Morris in 2008, “People think focus means saying ‘yes’ to the thing you’ve got to focus on. But that’s not what it means at all. It means saying ‘no’ to the hundred other good ideas that there are. You have to pick carefully. I’m actually as proud of the things we haven’t done as the things we have done.”