# 1NC

## Offcase

### Warfighting

#### Obama’s Syria maneuver has maximized presidential war powers because it’s on his terms

Posner 9/3, Law Prof at University of Chicago

(Eric, Obama Is Only Making His War Powers Mightier, www.slate.com/articles/news\_and\_politics/view\_from\_chicago/2013/09/obama\_going\_to\_congress\_on\_syria\_he\_s\_actually\_strengthening\_the\_war\_powers.html)

President Obama’s surprise announcement that he will ask Congress for approval of a military attack on Syria is being hailed as a vindication of the rule of law and a revival of the central role of Congress in war-making, even by critics. But all of this is wrong. Far from breaking new legal ground, President Obama has reaffirmed the primacy of the executive in matters of war and peace. The war powers of the presidency remain as mighty as ever. It would have been different if the president had announced that only Congress can authorize the use of military force, as dictated by the Constitution, which gives Congress alone the power to declare war. That would have been worthy of notice, a reversal of the ascendance of executive power over Congress. But the president said no such thing. He said: “I believe I have the authority to carry out this military action without specific congressional authorization.” Secretary of State John Kerry confirmed that the president “has the right to do that”—launch a military strike—“no matter what Congress does.” Thus, the president believes that the law gives him the option to seek a congressional yes or to act on his own. He does not believe that he is bound to do the first. He has merely stated the law as countless other presidents and their lawyers have described it before him. The president’s announcement should be understood as a political move, not a legal one. His motive is both self-serving and easy to understand, and it has been all but acknowledged by the administration. If Congress now approves the war, it must share blame with the president if what happens next in Syria goes badly. If Congress rejects the war, it must share blame with the president if Bashar al-Assad gases more Syrian children. The big problem for Obama arises if Congress says no and he decides he must go ahead anyway, and then the war goes badly. He won’t have broken the law as he understands it, but he will look bad. He would be the first president ever to ask Congress for the power to make war and then to go to war after Congress said no. (In the past, presidents who expected dissent did not ask Congress for permission.) People who celebrate the president for humbly begging Congress for approval also apparently don’t realize that his understanding of the law—that it gives him the option to go to Congress—maximizes executive power vis-à-vis Congress. If the president were required to act alone, without Congress, then he would have to take the blame for failing to use force when he should and using force when he shouldn’t. If he were required to obtain congressional authorization, then Congress would be able to block him. But if he can have it either way, he can force Congress to share responsibility when he wants to and avoid it when he knows that it will stand in his way.

#### Statutory restriction of Presidential War Powers makes warfighting impossible

Yoo 12 – prof of law @ UC Berkeley

(John, War Powers Belong to the President, ABA Journal February 2012 Issue, http://www.abajournal.com/magazine/article/war\_powers\_belong\_to\_the\_president) <we do not endorse the ableist language used in this card, but have left it in to preserve the author’s intent. we apologize for the author’s inappropriate use of the word “paralyze”>

The framers realized the obvious. Foreign affairs are unpredictable and involve the highest of stakes, making them unsuitable to regulation by pre-existing legislation. Instead, they can demand swift, decisive action—sometimes under pressured or even emergency circumstances—that is best carried out by a branch of government that does not suffer from multiple vetoes or is delayed by disagreements. Congress is too large and unwieldy to take the swift and decisive action required in wartime. Our framers replaced the Articles of Confederation, which had failed in the management of foreign relations because they had no single executive, with the Constitution’s single president for precisely this reason. Even when it has access to the same intelligence as the executive branch, Congress’ loose, decentralized structure would paralyze American policy while foreign threats grow. Congress has no political incentive to mount and see through its own wartime policy. Members of Congress, who are interested in keeping their seats at the next election, do not want to take stands on controversial issues where the future is uncertain. They will avoid like the plague any vote that will anger large segments of the electorate. They prefer that the president take the political risks and be held accountable for failure. Congress’ track record when it has opposed presidential leadership has not been a happy one. Perhaps the most telling example was the Senate’s rejection of the Treaty of Versailles at the end of World War I. Congress’ isolationist urge kept the United States out of Europe at a time when democracies fell and fascism grew in their place. Even as Europe and Asia plunged into war, Congress passed the Neutrality Acts designed to keep the United States out of the conflict. President Franklin Roosevelt violated those laws to help the Allies and draw the nation into war against the Axis. While pro-Congress critics worry about a president’s foreign adventurism, the real threat to our national security may come from inaction and isolationism. Many point to the Vietnam War as an example of the faults of the “imperial presidency.” Vietnam, however, could not have continued without the consistent support of Congress in raising a large military and paying for hostilities. And Vietnam ushered in a period of congressional dominance that witnessed American setbacks in the Cold War and the passage of the ineffectual War Powers Resolution. Congress passed the resolution in 1973 over President Richard Nixon’s veto, and no president, Republican or Democrat, George W. Bush or Obama, has ever accepted the constitutionality of its 60-day limit on the use of troops abroad. No federal court has ever upheld the resolution. Even Congress has never enforced it. Despite the record of practice and the Constitution’s institutional design, critics nevertheless argue for a radical remaking of the American way of war. They typically base their claim on Article I, Section 8, of the Constitution, which gives Congress the power to “declare war.” But these observers read the 18th century constitutional text through a modern lens by interpreting “declare war” to mean “start war.” When the Constitution was written, however, a declaration of war served diplomatic notice about a change in legal relations between nations. It had little to do with launching hostilities. In the century before the Constitution, for example, Great Britain—where the framers got the idea of the declare-war power—fought numerous major conflicts but declared war only once beforehand. Our Constitution sets out specific procedures for passing laws, appointing officers and making treaties. There are none for waging war because the framers expected the president and Congress to struggle over war through the national political process. In fact, other parts of the Constitution, properly read, support this reading. Article I, Section 10, for example, declares that the states shall not “engage” in war “without the consent of Congress” unless “actually invaded, or in such imminent danger as will not admit of delay.” This provision creates exactly the limits desired by anti-war critics, complete with an exception for self-defense. If the framers had wanted to require congressional permission before the president could wage war, they simply could have repeated this provision and applied it to the executive. Presidents, of course, do not have complete freedom to take the nation to war. Congress has ample powers to control presidential policy, if it wants to. Only Congress can raise the military, which gives it the power to block, delay or modify war plans. Before 1945, for example, the United States had such a small peacetime military that presidents who started a war would have to go hat in hand to Congress to build an army to fight it. Since World War II, it has been Congress that has authorized and funded our large standing military, one primarily designed to conduct offensive, not defensive, operations (as we learned all too tragically on 9/11) and to swiftly project power worldwide. If Congress wanted to discourage presidential initiative in war, it could build a smaller, less offensive-minded military. Congress’ check on the presidency lies not just in the long-term raising of the military. It can also block any immediate armed conflict through the power of the purse. If Congress feels it has been misled in authorizing war, or it disagrees with the president’s decisions, all it need do is cut off funds, either all at once or gradually. It can reduce the size of the military, shrink or eliminate units, or freeze supplies. Using the power of the purse does not even require affirmative congressional action. Congress can just sit on its hands and refuse to pass a law funding the latest presidential adventure, and the war will end quickly. Even the Kosovo war, which lasted little more than two months and involved no ground troops, required special funding legislation. The framers expected Congress’ power of the purse to serve as the primary check on presidential war. During the 1788 Virginia ratifying convention, Patrick Henry attacked the Constitution for failing to limit executive militarism. James Madison responded: “The sword is in the hands of the British king; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist.” Congress ended America’s involvement in Vietnam by cutting off all funds for the war. Our Constitution has succeeded because it favors swift presidential action in war, later checked by Congress’ funding power. If a president continues to wage war without congressional authorization, as in Libya, Kosovo or Korea, it is only because Congress has chosen not to exercise its easy check. We should not confuse a desire to escape political responsibility for a defect in the Constitution. A radical change in the system for making war might appease critics of presidential power. But it could also seriously threaten American national security. In order to forestall another 9/11 attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility. It is not hard to think of situations where congressional consent cannot be obtained in time to act. Time for congressional deliberation, which leads only to passivity and isolation and not smarter decisions, will come at the price of speed and secrecy. The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security. Presidents can take the initiative and Congress can use its funding power to check them. Instead of demanding a legalistic process to begin war, the framers left war to politics. As we confront the new challenges of terrorism, rogue nations and WMD proliferation, now is not the time to introduce sweeping, untested changes in the way we make war.

#### The plan spills over to broader Congressional decisionmaking

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Legacy Chains

Finegold & Skocpol (1995: 222) describe policy legacies: Past and present policies are connected in at least three different ways. First, past policies give rise to analogies that affect how public officials think about contemporary policy issues. Second, past policies suggest lessons that help us to understand the processes by which contemporary policies are formulated and implemented and by which the conse quences of contemporary policies will be determined. Third, past policies impose limi tations that reduce the range of policy choices available as responses to contemporary problems. All three of the ways in which they connect past policy to present policy can be viewed as changes in the institutional context in which policy is made. These legacies are institutionalized in two different ways: first, through changes in formal rules or procedures, and second, in the 'taken for granteds', 'schemas', and accepted wisdom of policy makers and ordinary citizens alike (Sewell, 1992: 1-29). While a policy or event can leave multiple legacies, it often leaves a single major legacy. For example, the War Powers Resolution for mally changed the relationship between the president and the congress with regard to war-making and the deployment of troops. Subsequent military interventions were influenced by this change and have, in turn, left their own legacy (legal scholars might call it precedent) as a link in that chain. Legacy chains can be modified, trans formed, or reinforced as they step through each 'link' in the chain. As another example, US involvement in Vietnam left a legacy in the sphere of press/military relations which affected the intervention in Grenada in 1983 (the press was completely excluded for the first 48 hours of the operation). The press legacy chain begun in Vietnam also affected the Panama invasion of 1989 (a press pool was activated, in country, but excluded from the action), but the legacy had been trans formed slightly by the Grenada invasion (the press pool system itself grew out of complaint regarding press exclusion in Grenada) (Paul & Kim, 2004). Because of the different ways in which policy legacies are institutionalized, some legacies have unintended institutional conse quences. The War Powers Resolution was intended to curtail presidential war-making powers and return some authority to the con gress. In practice, the joint resolution failed to force presidents to include congressional participation in their intervention decision making, but it had the unintended conse quence of forcing them to change the way they planned interventions to comply with the letter of the law (see the extended ex ample presented later in the article).1

#### Executive control of warmaking is key to avoiding nuclear war and terrorism

Li 2009 - J.D. candidate, Georgetown University Law Center, 2009; B.A., political science and history, Yale University (Zheyao, “War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare,” 7 Geo. J.L. & Pub. Pol'y 373 2009 WAR POWERS IN THE FOURTH GENERATION OF WARFARE)

A. The Emergence of Non-State Actors

Even as the quantity of nation-states in the world has increased dramatically since the end of World War II, the institution of the nation-state has been in decline over the past few decades. Much of this decline is the direct result of the waning of major interstate war, which primarily resulted from the introduction of nuclear weapons.122 The proliferation of nuclear weapons, and their immense capacity for absolute destruction, has ensured that conventional wars remain limited in scope and duration. Hence, "both the size of the armed forces and the quantity of weapons at their disposal has declined quite sharply" since 1945.123 At the same time, concurrent with the decline of the nation-state in the second half of the twentieth century, non-state actors have increasingly been willing and able to use force to advance their causes. In contrast to nation-states, who adhere to the Clausewitzian distinction between the ends of policy and the means of war to achieve those ends, non-state actors do not necessarily fight as a mere means of advancing any coherent policy. Rather, they see their fight as a life-and-death struggle, wherein the ordinary terminology of war as an instrument of policy breaks down because of this blending of means and ends.124 It is the existential nature of this struggle and the disappearance of the Clausewitzian distinction between war and policy that has given rise to a new generation of warfare. The concept of fourth-generational warfare was first articulated in an influential article in the Marine Corps Gazette in 1989, which has proven highly prescient. In describing what they saw as the modem trend toward a new phase of warfighting, the authors argued that: In broad terms, fourth generation warfare seems likely to be widely dispersed and largely undefined; the distinction between war and peace will be blurred to the vanishing point. It will be nonlinear, possibly to the point of having no definable battlefields or fronts. The distinction between "civilian" and "military" may disappear. Actions will occur concurrently throughout all participants' depth, including their society as a cultural, not just a physical, entity. Major military facilities, such as airfields, fixed communications sites, and large headquarters will become rarities because of their vulnerability; the same may be true of civilian equivalents, such as seats of government, power plants, and industrial sites (including knowledge as well as manufacturing industries). 125 It is precisely this blurring of peace and war and the demise of traditionally definable battlefields that provides the impetus for the formulation of a new. theory of war powers. As evidenced by Part M, supra, the constitutional allocation of war powers, and the Framers' commitment of the war power to two co-equal branches, was not designed to cope with the current international system, one that is characterized by the persistent machinations of international terrorist organizations, the rise of multilateral alliances, the emergence of rogue states, and the potentially wide proliferation of easily deployable weapons of mass destruction, nuclear and otherwise. B. The Framers' World vs. Today's World The Framers crafted the Constitution, and the people ratified it, in a time when everyone understood that the state controlled both the raising of armies and their use. Today, however, the threat of terrorism is bringing an end to the era of the nation-state's legal monopoly on violence, and the kind of war that existed before-based on a clear division between government, armed forces, and the people-is on the decline. 126 As states are caught between their decreasing ability to fight each other due to the existence of nuclear weapons and the increasing threat from non-state actors, it is clear that the Westphalian system of nation-states that informed the Framers' allocation of war powers is no longer the order of the day. 127 As seen in Part III, supra, the rise of the modem nation-state occurred as a result of its military effectiveness and ability to defend its citizens. If nation-states such as the United States are unable to adapt to the changing circumstances of fourth-generational warfare-that is, if they are unable to adequately defend against low-intensity conflict conducted by non-state actors-"then clearly [the modern state] does not have a future in front of it.' 128 The challenge in formulating a new theory of war powers for fourthgenerational warfare that remains legally justifiable lies in the difficulty of adapting to changed circumstances while remaining faithful to the constitutional text and the original meaning. 29 To that end, it is crucial to remember that the Framers crafted the Constitution in the context of the Westphalian system of nation-states. The three centuries following the Peace of Westphalia of 1648 witnessed an international system characterized by wars, which, "through the efforts of governments, assumed a more regular, interconnected character."' 130 That period saw the rise of an independent military class and the stabilization of military institutions. Consequently, "warfare became more regular, better organized, and more attuned to the purpose of war-that is, to its political objective."' 1 3' That era is now over. Today, the stability of the long-existing Westphalian international order has been greatly eroded in recent years with the advent of international terrorist organizations, which care nothing for the traditional norms of the laws of war. This new global environment exposes the limitations inherent in the interpretational methods of originalism and textualism and necessitates the adoption of a new method of constitutional interpretation. While one must always be aware of the text of the Constitution and the original understanding of that text, that very awareness identifies the extent to which fourth-generational warfare epitomizes a phenomenon unforeseen by the Framers, a problem the constitutional resolution of which must rely on the good judgment of the present generation. 13 Now, to adapt the constitutional warmarking scheme to the new international order characterized by fourth-generational warfare, one must understand the threat it is being adapted to confront. C. The Jihadist Threat The erosion of the Westphalian and Clausewitzian model of warfare and the blurring of the distinction between the means of warfare and the ends of policy, which is one characteristic of fourth-generational warfare, apply to al-Qaeda and other adherents of jihadist ideology who view the United States as an enemy. An excellent analysis of jihadist ideology and its implications for the rest of the world are presented by Professor Mary Habeck. 133 Professor Habeck identifies the centrality of the Qur'an, specifically a particular reading of the Qur'an and hadith (traditions about the life of Muhammad), to the jihadist terrorists. 134 The jihadis believe that the scope of the Qur'an is universal, and "that their interpretation of Islam is also intended for the entire world, which must be brought to recognize this fact peacefully if possible and through violence if not."' 135 Along these lines, the jihadis view the United States and her allies as among the greatest enemies of Islam: they believe "that every element of modern Western liberalism is flawed, wrong, and evil" because the basis of liberalism is secularism. 136 The jihadis emphasize the superiority of Islam to all other religions, and they believe that "God does not want differing belief systems to coexist."' 37 For this reason, jihadist groups such as al-Qaeda "recognize that the West will not submit without a fight and believe in fact that the Christians, Jews, and liberals have united against Islam in a war that will end in the complete destruction of the unbelievers.' 138 Thus, the adherents of this jihadist ideology, be it al-Qaeda or other groups, will continue to target the United States until she is destroyed. Their ideology demands it. 139 To effectively combat terrorist groups such as al-Qaeda, it is necessary to understand not only how they think, but also how they operate. Al-Qaeda is a transnational organization capable of simultaneously managing multiple operations all over the world."14 It is both centralized and decentralized: al-Qaeda is centralized in the sense that Osama bin Laden is the unquestioned leader, but it is decentralized in that its operations are carried out locally, by distinct cells."4 AI-Qaeda benefits immensely from this arrangement because it can exercise direct control over high-probability operations, while maintaining a distance from low-probability attacks, only taking the credit for those that succeed. The local terrorist cells benefit by gaining access to al-Qaeda's "worldwide network of assets, people, and expertise."' 42 Post-September 11 events have highlighted al-Qaeda's resilience. Even as the United States and her allies fought back, inflicting heavy casualties on al-Qaeda in Afghanistan and destroying dozens of cells worldwide, "al-Qaeda's networked nature allowed it to absorb the damage and remain a threat." 14 3 This is a far cry from earlier generations of warfare, where the decimation of the enemy's military forces would generally bring an end to the conflict. D. The Need for Rapid Reaction and Expanded Presidential War Power By now it should be clear just how different this conflict against the extremist terrorists is from the type of warfare that occupied the minds of the Framers at the time of the Founding. Rather than maintaining the geographical and political isolation desired by the Framers for the new country, today's United States is an international power targeted by individuals and groups that will not rest until seeing her demise. The Global War on Terrorism is not truly a war within the Framers' eighteenth-century conception of the term, and the normal constitutional provisions regulating the division of war powers between Congress and the President do not apply. Instead, this "war" is a struggle for survival and dominance against forces that threaten to destroy the United States and her allies, and the fourth-generational nature of the conflict, highlighted by an indiscernible distinction between wartime and peacetime, necessitates an evolution of America's traditional constitutional warmaking scheme. As first illustrated by the military strategist Colonel John Boyd, constitutional decision-making in the realm of war powers in the fourth generation should consider the implications of the OODA Loop: Observe, Orient, Decide, and Act. 44 In the era of fourth-generational warfare, quick reactions, proceeding through the OODA Loop rapidly, and disrupting the enemy's OODA loop are the keys to victory. "In order to win," Colonel Boyd suggested, "we should operate at a faster tempo or rhythm than our adversaries." 145 In the words of Professor Creveld, "[b]oth organizationally and in terms of the equipment at their disposal, the armed forces of the world will have to adjust themselves to this situation by changing their doctrine, doing away with much of their heavy equipment and becoming more like police."1 46 Unfortunately, the existing constitutional understanding, which diffuses war power between two branches of government, necessarily (by the Framers' design) slows down decision- making. In circumstances where war is undesirable (which is, admittedly, most of the time, especially against other nation-states), the deliberativeness of the existing decision-making process is a positive attribute. In America's current situation, however, in the midst of the conflict with al-Qaeda and other international terrorist organizations, the existing process of constitutional decision-making in warfare may prove a fatal hindrance to achieving the initiative necessary for victory. As a slow-acting, deliberative body, Congress does not have the ability to adequately deal with fast-emerging situations in fourth-generational warfare. Thus, in order to combat transnational threats such as al-Qaeda, the executive branch must have the ability to operate by taking offensive military action even without congressional authorization, because only the executive branch is capable of the swift decision-making and action necessary to prevail in fourth-generational conflicts against fourthgenerational opponents.

### Politics

**The farm bill is Obama’s top priority it will pass**

**Dreiling, 11/15** (Larry, 11/15/2013, “Branches jockey for farm bill positions,” http://www.hpj.com/archives/2013/nov13/nov18/1112FarmBillLDsr.cfm))

**While the House-Senate farm bill discussions continue, the White House staked out its position** in an address in New Orleans.

**Senate Agriculture Committee Chairwoman** Debbie **Stabenow** signaled Nov. 5 that face-to-face talks among the top four farm bill negotiators will resume this week, and she **is upbeat enough to hope for a deal by Thanksgiving**.

“I hope so. **It’s doable**,” the Michigan Democrat said to the Capitol Hill publication Politico.

“I feel confident the four of us can come together,” Stabenow said, speaking of herself, Sen. Thad Cochran, R-MS; Rep. Collin Peterson, D-MN; and House Agriculture Committee Chairman Frank Lucas, R-OK.

While the House remained on recess through Veterans Day, Peterson’s office confirmed that he was flying back to Washington early in the week, and Stabenow told Politico that all four would meet.

“The savings of the farm bill will certainly be part of the solution to the budget,” said Stabenow, who is also part of those House-Senate negotiations. But she and Lucas have both said repeatedly that the text of any farm bill will be theirs to write.

“The issue is who writes the farm bill,” Stabenow said. “We’ll write the farm bill.”

For all her optimism, the chairwoman gave little ground herself on the contentious issue of savings on nutrition programs.

The Senate farm bill proposes about $4 billion in 10-year savings, compared with the $39 billion in reductions assumed in the revised nutrition title approved by the House in September. It’s a huge gap, but Stabenow insisted that negotiators can’t ignore previously enacted food stamp cuts that went into effect Nov. 1.

Those reductions will reduce spending by as much as $11 billion over the period used by the Congressional Budget Office to score the farm bill. Typically, these are not counted since the savings result from prior actions by Congress. But Stabenow said they cannot be ignored.

“I am counting them,” she told Politco. “That’s real and if (the House’s) objective is to cut help for people, that started last Friday. I do count that. In fairness, that needs to be counted.”

In the same vein, she showed no interest in a compromise narrowing the range of income and asset tests now used by states in judging eligibility for food stamps.

“At this point, what I’m interested in doing is focusing on fraud and abuse—ways to tighten up the system to make it more accountable,” she said. “I’m not interested in taking food away from folks who have had an economic disaster, just as I’m not interested in cutting crop insurance for farmers who have had economic disasters.”

Meanwhile, President Barack **Obama delivered a speech** at the Port of New Orleans Nov. 8, **saying that passing a farm bill is the No. 1 way that Democrats and Republicans can increase jobs in the economy**.

Helping American businesses grow, creating more jobs—these are not Democratic or Republican priorities, Obama said.

“They are priorities that everybody, regardless of party, should be able to get behind. And that’s why, in addition to working with Congress to grow our exports, I’ve put forward additional ideas where I believe Democrats and Republicans can join together to make progress right now,” Obama said.

That’s when **Obama launched into his pitch on the farm bill**.

**“Congress needs to pass a farm bill that helps rural communities grow and protects vulnerable Americans,”** Obama said. “For decades, Congress found a way to compromise and pass farm bills without fuss. For some reason, now Congress can’t even get that done.

“Now, this is not something that just benefits farmers. Ports like this one depend on all the products coming down the Mississippi. So let’s do the right thing, pass a farm bill. We can start selling more products. That’s more business for this port. And that means more jobs right here.”

**Obama listed immigration reform and a responsible budget as his second and third priorities.**

**Obama’s involvement is key to a SNAP deal --- that’s the biggest sticking point**

**Hagstrom, 11/3** --- founder and executive editor of The Hagstrom Report (11/3/2013, Jerry, “Compromise Is the Key to a New Farm Bill; It is time for House and Senate conferees to stop listening to the lobbyists and finish the bill,” <http://www.nationaljournal.com/outside-influences/compromise-is-the-key-to-a-new-farm-bill-20131103>))

"Can we do it? Can we still compromise?" a prominent agricultural lobbyist who has worked on several farm bills asked last week as the House and Senate conference committee on the next farm bill was about to meet for the first time.

It was a good question because the bill's overlong development period has given all the interests so many opportunities to state their positions that they seem more dug in than in past bill-writing efforts. But **at the conference last week there were signals that the conferees think the time to act has come**.

The 41 conferees did use the last and possibly only public opportunity to make the case for their views. But almost all the members abided by the directive from the conference leader, House Agriculture Committee Chairman Frank Lucas, R-Okla., to keep their remarks to three minutes. And even the most ideological of them on the right and left were polite and stressed that they were there to compromise and finish a bill.

It's unclear how quickly the conferees will proceed to the big issues because the House has left town until Nov. 12, the day after Veterans Day. There has been talk of a meeting on the bill between President Obama and the four conference committee principals—Lucas, House Agriculture ranking member Collin Peterson, D-Minn., Senate Agriculture Chairwoman Debbie Stabenow, D-Mich., and Senate Agriculture ranking member Thad Cochran, R-Miss. Peterson said he has mixed feelings about such a meeting because support from Obama might cause some House members to oppose the bill.

But **Peterson noted that the "one place" on which Obama could be "helpful" would be resolving the size of the cut to food stamps, formally known as** the **S**upplemental **N**utrition **A**ssistance **P**rogram. **Lucas has said that it is likely to be the last item settled and that Obama**, House Speaker John **Boehner**, R-Ohio, **and** Senate Majority Leader Harry **Reid**, D-Nev., **will have to make the call on that**. The official White House position on food stamps is to make no cuts, while the Senate-passed farm bill would cut the program by $4 billion over 10 years and the House-passed bill would cut it by $39 billion over the same period.

**The plan de-rails the agenda**

Kriner, 10 --- assistant professor of political science at Boston University

(Douglas L. Kriner, “After the Rubicon: Congress, Presidents, and the Politics of Waging War”, University of Chicago Press, Dec 1, 2010, page 68-69)

**While congressional support leaves the president’s reserve of political capital intact, congressional criticism saps energy from other initiatives on the home front by forcing the president to expend energy and effort defending his international agenda. Political capital spent shoring up support for a president’s foreign policies is capital that is unavailable for his future policy initiatives**. Moreover, any weakening in the president’s political clout may have immediate ramifications for his reelection prospects, as well as indirect consequences for congressional races.59 Indeed, Democratic efforts to tie congressional Republican incumbents to President George W. Bush and his war policies paid immediate political dividends in the 2006 midterms, particularly in states, districts, and counties that had suffered the highest casualty rates in the Iraq War. 60

**In addition to boding ill for the president’s perceived political capital and reputation, such partisan losses in Congress only further imperil his programmatic agenda, both international and domestic.** Scholars have long noted that President Lyndon **Johnson’s dream of a Great Society also perished in the rice paddies of Vietnam. Lacking** the requisite funds in a war-depleted treasury and **the political capital needed to sustain his legislative vision, Johnson gradually let his domestic goals slip away** as he hunkered down in an effort first to win and then to end the Vietnam War. In the same way, **many of** President **Bush’s highest second-term domestic proprieties, such as Social Security and immigration reform, failed perhaps in large part because the administration had to expend so much energy and effort waging a rear-guard action against congressional critics of the war in Iraq.**61

**When making their cost-benefit calculations, presidents surely consider these wider political costs of congressional opposition to their military policies.** If congressional opposition in the military arena stands to derail other elements of his agenda, all else being equal, the president will be more likely to judge the benefits of military action insufficient to its costs than if Congress stood behind him in the international arena.

**SNAP is the main barrier --- farm bill’s key to ag and the economy**

**Denver Post, 11/10** (The Post Editorials, 11/10/2013, “Here's why the farm bill matters,” Factiva))

The farm bill has the rap of being a public policy snooze, a broad measure that gets boiled down to a debate over subsidies to wealthy farmers and food stamp handouts to the poor.

Agriculture Secretary Tom Vilsack reminded the Denver Post editorial board last week that it's important to see beyond those flashpoints. **In Colorado**, for example, **the bill has vital implications for agricultural production, conservation and struggling rural economies**.

Vilsack is right, of course, but it's also true that **trench warfare over food assistance is the major point of disagreement between GOP and Democratic lawmakers**, who will meet this week in committee to seek compromise.

**They need to find consensus, and it shouldn't be that hard.**

Although the Supplemental Nutrition Assistance Program (SNAP) is a crucial safety net, there are ways to trim it back somewhat more than the $4 billion over 10 years that Democrats have proposed.

Slicing SNAP by $39 billion, however, which some Republicans seek, is both unfair and unrealistic.

One area ripe for reform involves tightening standards for states that waive work requirement rules for able-bodied adults.

There are circumstances in which a waiver is justified, in an economy where there are few jobs to be found. As Vilsack told us, when a plant closes in a small town and 1,000 people lose work, it may be unrealistic to expect those people to find jobs.

But waivers shouldn't go on forever if the economy improves, and tightening the rules could result in savings.

Republicans have been alarmed by the growth of food assistance spending in recent years. But that trend isn't likely to be permanent even with the present law. While the Congressional Budget Office projects small increases in SNAP recipients through 2014, that number will then decline as the economy improves.

A steady course that includes continued support for the needy and moderate cuts to slow government spending should be the goal.

**Reaching consensus on the food assistance piece will allow the other initiatives in the farm bill to go forward, including partnerships to create marketable products from beetle-killed trees and job development in rural areas.**

**The farm bill** may not be the sexiest piece of legislation, but it **works in important ways to secure the nation's food supply, protect the health of federal forests and strengthen rural economies.** Federal lawmakers need to move off their entrenched positions and pass the legislation.

**Farm bill critical U.S. economic stability --- sustains a vital sector**

**Johanns, 11/12** --- Senator from Nebraska who sits on the Agriculture, Nutrition and Forestry; the Banking, Housing and Urban Affairs committee (Sen. Mike Johanns, “Bill can be part of budget solution,” <http://thehill.com/homenews/news/190046-bill-can-be-part-of-budget-solution>))

But the farm bill is much more than a tool for budget hawks in Washington to achieve savings. **Fresh agriculture policy has proven elusive for those who feed and fuel our world since the old policy expired last year. Recent droughts and freak blizzards underscore the need for replenished disaster assistance that expired in 2011.**

Farmers and ranchers from my home state of Nebraska tell me they could live without costly annual direct payments to bolster their income, and they are happy to pay into a crop insurance program that provides a backstop in tough years. They are prepared to do their part to help reduce government spending so long as they have the risk management tools they need to succeed. Lawmakers must also be prepared to provide these tools while reducing government spending.

Eliminating direct payments and streamlining duplicative conservation programs are part of the agriculture titles that save about $13 billion in both chambers’ farm bills. While lawmakers might differ on how additional cost savings are achieved, the end product will reflect improved efficiency and a commitment to targeting government resources more narrowly to meet specific needs.

**The food stamp program is the biggest sticking point in farm bill negotiations.** The Senate bill saves $4 billion from the Supplemental Nutrition Assistance Program (SNAP), or about one-half of a percent. The House bill saves about 10 times more. Admittedly, there’s a lot of pasture between those two figures. And both sides should be prepared to live with something in the middle.

As these negotiations move forward, we must acknowledge that we are working with a limited pot of resources, requiring a strong commitment to efficiency and priority. Nobody wants to block assistance from folks truly in need, and we should seek ways to protect limited resources for these families. One way to do this is to crack down on states that skirt eligibility requirements for SNAP recipients by enrolling folks in the program who don’t qualify for the benefit. Doing so would save roughly $20 billion and ensure limited resources are not being diluted by state programs that lure unqualified Americans into unneeded federal benefits.

**The farm bill is not out of the woods yet, but it stands as a model for fiscally responsible governance. The bipartisan, multiregional, multifaceted House and Senate plans focus on how to save rather than how to spend. A new long-term farm bill would provide certainty for the rural sector that is so important for economic stability.** It guarantees real savings while protecting vulnerable families. And **it might be just the example Congress needs to inspire responsible solutions to the fiscal challenges facing our nation.**

#### Economic decline causes extinction

Cesare **Merlini 11**, nonresident senior fellow at the Center on the United States and Europe and chairman of the Board of Trustees of the Italian Institute for International Affairs, May 2011, “A Post-Secular World?”, Survival, Vol. 53, No. 2

Two neatly opposed scenarios for the future of the world order illustrate the range of possibilities, albeit at the risk of oversimplification. The first scenario entails the premature crumbling of the post-Westphalian system. **One or more of the acute tensions apparent today evolves into** an open and **traditional conflict between states, perhaps** even **involving the use of nuclear weapons. The crisis might be triggered by a collapse of the global economic and financial system**, the vulnerability of which we have just experienced, **and the prospect of a second Great Depression, with consequences for peace and democracy similar to those of the first**. Whatever the trigger, **the unlimited exercise of national sovereignty, exclusive self-interest and rejection of outside interference** would self-interest and rejection of outside interference **would** likely **be amplified, emptying**, perhaps entirely, the half-full glass of **multilateralism**, including the UN and the European Union. Many of the more likely conflicts, such as between Israel and Iran or India and Pakistan, have potential religious dimensions. Short of war, tensions such as those related to immigration might become unbearable. F**amiliar issues of creed and identity could be exacerbated**. One way or another, the **secular rational approach would be sidestepped by a return to theocratic absolutes**, competing or **converging with** secular absolutes such as **unbridled nationalism**.

#### So does ag collapse

Klare 12 -- Hampshire College security studies professor

[Michael, defense correspondent of The Nation magazine, serves on the boards of directors of Human Rights Watch, and the Arms Control Association, “As Food Prices Rise, Dangers of Social Unrest Seem Imminent,” August 9]

The Great Drought of 2012 has yet to come to an end, but we already know that its consequences will be severe. With more than one-half of America’s counties designated as drought disaster areas, the 2012 harvest of corn, soybeans, and other food staples is guaranteed to fall far short of predictions. This, in turn, will boost food prices domestically and abroad, causing increased misery for farmers and low-income Americans and far greater hardship for poor people in countries that rely on imported U.S. grains. This, however, is just the beginning of the likely consequences: If history is any guide, rising food prices of this sort will also lead to widespread social unrest and violent conflict. Food—affordable food—is essential to human survival and well-being. Take that away, and people become anxious, desperate, and angry. In the United States, food represents only about 13 percent of the average household budget, a relatively small share, so a boost in food prices in 2013 will probably not prove overly taxing for most middle—and upper-income families. It could, however, produce considerable hardship for poor and unemployed Americans with limited resources. “You are talking about a real bite out of family budgets,” commented Ernie Gross, an agricultural economist at Omaha’s Creighton University. This could add to the discontent already evident in depressed and high-unemployment areas, perhaps prompting an intensified backlash against incumbent politicians and other forms of dissent and unrest. It is in the international arena, however, that the Great Drought is likely to have its most devastating effects. Because so many nations depend on grain imports from the U.S. to supplement their own harvests, and because intense drought and floods are damaging crops elsewhere as well, food supplies are expected to shrink and prices to rise across the planet. “What happens to the U.S. supply has immense impact around the world,” says Robert Thompson, a food expert at the Chicago Council on Global Affairs. As the crops most affected by the drought, corn and soybeans, disappear from world markets, he noted, the price of all grains, including wheat, is likely to soar, causing immense hardship to those who already have trouble affording enough food to feed their families. The Hunger Games, 2007-2011 What happens next is, of course, impossible to predict, but if the recent past is any guide, it could turn ugly. In 2007-2008, when rice, corn, and wheat experienced prices hikes of 100 percent or more, sharply higher prices—especially for bread—sparked “food riots” in more than two dozen countries, including Bangladesh, Cameroon, Egypt, Haiti, Indonesia, Senegal, and Yemen. In Haiti, the rioting became so violent and public confidence in the government’s ability to address the problem dropped so precipitously that the Haitian Senate voted to oust the country’s prime minister, Jacques-Édouard Alexis. In other countries, angry protestors clashed with army and police forces, leaving scores dead. Those price increases of 2007-2008 were largely attributed to the soaring cost of oil, which made food production more expensive. (Oil’s use is widespread in farming operations, irrigation, food delivery, and pesticide manufacture.) At the same time, increasing amounts of cropland worldwide were being diverted from food crops to the cultivation of plants used in making biofuels. The next price spike in 2010-11 was, however, closely associated with climate change. An intense drought gripped much of eastern Russia during the summer of 2010, reducing the wheat harvest in that breadbasket region by one-fifth and prompting Moscow to ban all wheat exports. Drought also hurt China’s grain harvest, while intense flooding destroyed much of Australia’s wheat crop. Together with other extreme-weather-related effects, these disasters sent wheat prices soaring by more than 50 percent and the price of most food staples by 32 percent. Once again, a surge in food prices resulted in widespread social unrest, this time concentrated in North Africa and the Middle East. The earliest protests arose over the cost of staples in Algeria and then Tunisia, where—no coincidence—the precipitating event was a young food vendor, Mohamed Bouazizi, setting himself on fire to protest government harassment. Anger over rising food and fuel prices combined with long-simmering resentments about government repression and corruption sparked what became known as the Arab Spring. The rising cost of basic staples, especially a loaf of bread, was also a cause of unrest in Egypt, Jordan, and Sudan. Other factors, notably anger at entrenched autocratic regimes, may have proved more powerful in those places, but as the author of Tropic of Chaos, Christian Parenti, wrote, “The initial trouble was traceable, at least in part, to the price of that loaf of bread.” As for the current drought, analysts are already warning of instability in Africa, where corn is a major staple, and of increased popular unrest in China, where food prices are expected to rise at a time of growing hardship for that country’s vast pool of low-income, migratory workers and poor peasants. Higher food prices in the U.S. and China could also lead to reduced consumer spending on other goods, further contributing to the slowdown in the global economy and producing yet more worldwide misery, with unpredictable social consequences. The Hunger Games, 2012-? If this was just one bad harvest, occurring in only one country, the world would undoubtedly absorb the ensuing hardship and expect to bounce back in the years to come. Unfortunately, it’s becoming evident that the Great Drought of 2012 is not a one-off event in a single heartland nation, but rather an inevitable consequence of global warming which is only going to intensify. As a result, we can expect not just more bad years of extreme heat, but worse years, hotter and more often, and not just in the United States, but globally for the indefinite future. Until recently, most scientists were reluctant to blame particular storms or droughts on global warming. Now, however, a growing number of scientists believe that such links can be demonstrated in certain cases. In one recent study focused on extreme weather events in 2011, for instance, climate specialists at the National Oceanic and Atmospheric Administration (NOAA) and Great Britain’s National Weather Service concluded that human-induced climate change has made intense heat waves of the kind experienced in Texas in 2011 more likely than ever before. Published in the Bulletin of the American Meteorological Society, it reported that global warming had ensured that the incidence of that Texas heat wave was 20 times more likely than it would have been in 1960; similarly, abnormally warm temperatures like those experienced in Britain last November were said to be 62 times as likely because of global warming. It is still too early to apply the methodology used by these scientists to calculating the effect of global warming on the heat waves of 2012, which are proving to be far more severe, but we can assume the level of correlation will be high. And what can we expect in the future, as the warming gains momentum? When we think about climate change (if we think about it at all), we envision rising temperatures, prolonged droughts, freakish storms, hellish wildfires, and rising sea levels. Among other things, this will result in damaged infrastructure and diminished food supplies. These are, of course, manifestations of warming in the physical world, not the social world we all inhabit and rely on for so many aspects of our daily well-being and survival. The purely physical effects of climate change will, no doubt, prove catastrophic. But the social effects including, somewhere down the line, food riots, mass starvation, state collapse, mass migrations, and conflicts of every sort, up to and including full-scale war, could prove even more disruptive and deadly. In her immensely successful young-adult novel, The Hunger Games (and the movie that followed), Suzanne Collins riveted millions with a portrait of a dystopian, resource-scarce, post-apocalyptic future where once-rebellious “districts” in an impoverished North America must supply two teenagers each year for a series of televised gladiatorial games that end in death for all but one of the youthful contestants. These “hunger games” are intended as recompense for the damage inflicted on the victorious capitol of Panem by the rebellious districts during an insurrection. Without specifically mentioning global warming, Collins makes it clear that climate change was significantly responsible for the hunger that shadows the North American continent in this future era. Hence, as the gladiatorial contestants are about to be selected, the mayor of District 12’s principal city describes “the disasters, the droughts, the storms, the fires, the encroaching seas that swallowed up so much of the land [and] the brutal war for what little sustenance remained.” In this, Collins was prescient, even if her specific vision of the violence on which such a world might be organized is fantasy. While we may never see her version of those hunger games, do not doubt that some version of them will come into existence—that, in fact, hunger wars of many sorts will fill our future. These could include any combination or permutation of the deadly riots that led to the 2008 collapse of Haiti’s government, the pitched battles between massed protesters and security forces that engulfed parts of Cairo as the Arab Spring developed, the ethnic struggles over disputed croplands and water sources that have made Darfur a recurring headline of horror in our world, or the inequitable distribution of agricultural land that continues to fuel the insurgency of the Maoist-inspired Naxalites of India. Combine such conflicts with another likelihood: that persistent drought and hunger will force millions of people to abandon their traditional lands and flee to the squalor of shantytowns and expanding slums surrounding large cities, sparking hostility from those already living there. One such eruption, with grisly results, occurred in Johannesburg’s shantytowns in 2008 when desperately poor and hungry migrants from Malawi and Zimbabwe were set upon, beaten, and in some cases burned to death by poor South Africans. One terrified Zimbabwean, cowering in a police station from the raging mobs, said she fled her country because “there is no work and no food.” And count on something else: millions more in the coming decades, pressed by disasters ranging from drought and flood to rising sea levels, will try to migrate to other countries, provoking even greater hostility. And that hardly begins to exhaust the possibilities that lie in our hunger-games future. At this point, the focus is understandably on the immediate consequences of the still ongoing Great Drought: dying crops, shrunken harvests, and rising food prices. But keep an eye out for the social and political effects that undoubtedly won’t begin to show up here or globally until later this year or 2013. Better than any academic study, these will offer us a hint of what we can expect in the coming decades from a hunger-games world of rising temperatures, persistent droughts, recurring food shortages, and billions of famished, desperate people.

### Kieyemba CP

#### The United States federal judiciary should require that the president cannot continue the detention of personnel that have successfully won a habeas corpus hearing.

#### This is what their Knowles card is talking about – proves solvency

### OLC CP

#### The President of the United States of America should seek the legal advice of the United States Department of Justice’s Office of Legal Counsel in the area of creation of a domestic terror court with exclusive jurisdiction to resolve the legal status of persons detained in an Active Theater of War.

#### The OLC should publically disclose a written legal opinion that the executive branch of the United States federal government should not exercise the authority to detain in an Active Theater of War without adjudication by a domestic terror court and the President should issue an executive order complying with that advice. Other executive branch legal personnel, including the Attorney General, will defer to the advice of the OLC on this issue.

#### The counterplan solves --- internalizes legal norms, effectively constrains the president, establishes precedent and is sufficiently immune from political influences

Bradley and Morrison, 13 --- Professor of Law at Duke, AND \*\*Professor of Law at Colombia (May 2013, Columbia Law Review, “ESSAY: PRESIDENTIAL POWER, HISTORICAL PRACTICE, AND LEGAL CONSTRAINT,” 113 Colum. L. Rev. 1097))

III. Possible Mechanisms of Constraint

Having specified in the previous Part what counts as legal constraint in our view, this Part considers how legal constraints might work with respect to the presidency. It first examines two familiar potential mechanisms of constraint: the internalization of legal norms by relevant actors within the executive branch and the threat of external sanctions for violating those norms. This Part then discusses the implications of an obvious but less-discussed phenomenon - the fact that executive officials frequently engage in public dialogue about the President's constitutional authority, including his practice-based authority. It concludes by analyzing the debate over the military intervention in Libya, mentioned earlier, in order to highlight some of the challenges associated with empirically studying the ways in which the presidency may be constrained by law.

A. Norm Internalization

Perhaps the most obvious way that law can have a constraining effect is if the relevant actors have internalized the legal norms, whether those norms are embodied in authoritative text, judicial decisions, or institutional practice. As a general matter, the internalization of legal norms is a phenomenon that can potentially take place wherever the law is thought to operate, in both the private and public sectors. But precisely how that internalization operates, including how it affects actual conduct, depends heavily on institutional context. When speaking of legal norm internalization as it relates to the presidency, it is important first to note that Presidents act through a wide array of agencies and departments, and that presidential decisions are informed - and often made, for all practical purposes - by officials other than the President. In most instances involving presidential power, therefore, the relevant question is whether there has been an internalization of legal norms by the executive branch.

The executive branch contains thousands of lawyers. n124 The President and other executive officials are regularly advised by these lawyers, and sometimes they themselves are lawyers. Although lawyers serve in a wide variety of roles throughout the executive branch, their [\*1133] experience of attending law school means that they have all had a common socialization - a socialization that typically entails taking law seriously on its own terms. n125 Moreover, the law schools attended by virtually all U.S. government lawyers are American law schools, which means that the lawyers are socialized in an ethos associated with the American polity and the American style of law and government. n126 These lawyers are also part of a professional community (including the state bars to which they are admitted) with at least a loosely shared set of norms of argumentative plausibility.

Certain legal offices within the executive branch have developed their own distinctive law-internalizing practices. This is particularly true in places like OLC, which, as noted above, provides legal advice based on its best view of the law. OLC has developed a range of practices and traditions - including a strong norm of adhering to its own precedents even across administrations - that help give it some distance and relative independence from the immediate political and policy preferences of its clients across the executive branch, and that make it easier for OLC to act on its own internalization of legal norms. n127 Another example is the State Department Legal Adviser's Office, which often takes the lead within the executive branch on matters of international law and which has developed its own set of traditions and practices that help protect it from undue pressure from its clients. n128

More broadly, government legal offices may internalize legal norms even if they do not regularly focus on identifying the best view of the law. For example, an office committed not to seeking the best view of the law but to providing professionally responsible legal defenses of certain already-determined policy positions could still operate under legal constraints if it took the limits of professional responsibility seriously. [\*1134] That may well describe the typical posture of agency general counsel offices across the executive branch. As noted above, although it can be difficult to identify with consistent precision the outer boundaries of legal plausibility, a commitment to remaining within those boundaries is a commitment to a type of legal constraint.

If executive branch legal offices operate on the basis of certain internalized norms that treat law as a constraint, the next question is whether those offices have any effect on the actual conduct of the executive branch. In the case of OLC, there are two key points. First, although OLC possesses virtually no "mandatory" jurisdiction, there is a general expectation that, outside the litigation context, legal questions of special complexity, controversy, or importance will be put to OLC to address. n129 Second, established traditions treat OLC's legal conclusions as presumptively binding within the executive branch, unless overruled by the Attorney General or the President (which happens extremely rarely). n130 Combined, these practices make OLC the most significant source of centralized legal advice within the Executive Branch.

Still, OLC addresses only a very small fraction of all the legal questions that arise within the executive branch, and a complete picture of the extent to which executive officials internalize legal norms (or are affected by others who internalize such norms) must extend well beyond [\*1135] that office. n131 Looking across the executive branch more broadly, there may be a practical imperative driving at least some measure of legal norm internalization. The executive branch is a vast bureaucracy, or series of bureaucracies. Executive officials responsible for discharging the government's various policy mandates cannot act effectively without a basic understanding of who is responsible for what, and how government power is to be exercised - all topics regulated by law, including practice-based law. n132 Some of the understandings produced by those allocations are probably so internalized that the relevant actors cannot even imagine (at least in any serious way) a different regime. n133

Even on the more high-profile policy questions that receive the attention of the White House itself, the internalization of law may have a constraining effect. There are lawyers in the White House, of course, including the Office of Counsel to the President (otherwise known as the White House Counsel's Office). Some commentators - most notably Bruce Ackerman, as part of his general claim that the executive branch tends toward illegality - have characterized that office as populated by "superloyalists" who face "an overwhelming incentive to tell [the President] that the law allows [him] to do whatever [he] wants to do." n134 If that were an accurate portrayal, it would suggest that there is little to no internalization of the law in the White House Counsel's Office. But there are serious descriptive deficiencies in that account. n135 [\*1136] Still, the White House Counsel's immediate proximity to and close working relationship with the President and his senior political advisors surely do cause politics to suffuse much of the work of that office in a way that is not true of all of the executive branch.

The more fundamental point, however, is that it is in the nature of modern government that the President's power to act often depends at least in part on the input and actions of offices and departments outside the White House. That commonly includes the input of legal offices from elsewhere across the executive branch. n136 Many of those offices are headed by political appointees, and thus politics are not likely to be wholly absent from their work either. But many of those offices are also populated primarily by nonpolitical "career" civil servants, whose work as government lawyers across presidential administrations likely increases the internalization of relevant legal norms. To the extent that the input and actions of such offices affect the President's ability to act, he may be constrained by law without regard to whether he or his most senior White House advisers think about the law.

Internalization of legal norms may at least partially explain the now-famous standoff during the George W. Bush Administration between high-ranking lawyers in the Justice Department and various White House officials over the legality of a then-secret warrantless surveillance program. The program was deeply important to the White House, but the Attorney General, Deputy Attorney General, and head of OLC all refused to certify the legality of the program unless certain changes were made. When the White House threatened to proceed with the program without certification from the Justice Department, the leaders of the Department (along with the Director of the FBI and others) all prepared to resign. Ultimately, the White House backed down and acceded to the changes. n137 Some substantial part of the explanation for why the Justice Department officials acted as they did seems to lie in their internalization of a set of institutional norms that not only takes law seriously as a constraint, but that insists on a degree of independence in determining [\*1137] what the law requires. n138 Buckling under pressure from the White House was evidently inconsistent with the Justice Department officials' understanding of their professional roles.

## Case

### AT: Credibility

#### US-EU intel legal confrontation now

Henry Farrell, WaPo, 10/23/13, The Merkel phone tap scandal paves the way toward E.U.-U.S. confrontation, www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/23/the-merkel-phone-tap-scandal-paves-the-way-toward-e-u-u-s-confrontation/?wprss=rss\_politics&clsrd

According to German news magazine, Spiegel, there is some evidence that the United States has tried to tap German Chancellor Angela Merkel’s cellphone. The evidence seems strong enough to have caused Merkel to make an angry phone call to Obama to complain. The administration, in response, has said that the United States “is not monitoring and will not monitor the communications of Chancellor Merkel.” It has declined to comment on whether it has monitored her phone communications in the past.

It’s likely that Germany is being hypocritical in complaining about the phone tap. The transcripts of the Wikileaks diplomatic cables reveal that Merkel has been privately very sympathetic to U.S. surveillance in the past. Almost certainly, Merkel would not be making angry and well publicized phone calls if the scandal hadn’t already become public. Now that it is public, she has to. The scandal is equivalent to the scandal that would erupt in the United States, if it was discovered that France had been tapping into President Obama’s blackberry.

Yet as Martha Finnemore and my arguments about hypocrisy suggest, the interesting question isn’t whether the German government is entirely sincere. It’s whether these revelations are making it tougher for the United States to have its cake and eat it too. And there is good reason to believe that they will make direct confrontation between Europe and the United States more likely.

On Monday, the European Parliament agreed on new privacy legislation, which included a provision that forbade businesses from giving personal information to U.S. authorities without informing European authorities, and the European citizen affected. The United States had previously successfully lobbied to get this provision deleted; it was reinstated as a result of the Snowden scandal. The European Parliament doesn’t get sole final say on this legislation — it now has to negotiate with Europe’s member states. U.S. politicians and lobbyists have been hoping that they can persuade enough member states to quietly delete the provision yet again.

This has suddenly become a lot harder. Merkel would probably personally like to see the provision deleted. Yet it is going to be very hard for her to push that argument, without looking like a sellout to the German public. The French wiretapping scandal is similarly going to harden public opposition in France. Disagreements over spying are usually handled discreetly through back channels. Not this time.

Thus — even if Merkel doesn’t want it (and she has done her best in her public statement to limit the controversy by only demanding that U.S. spying stops) — this latest scandal is plausibly going to lead to a major confrontation between the European Union and the United States over NSA spying, in which the two sides make incompatible legal demands. If this happens, Google, Facebook, and other companies that operate across both jurisdictions will be caught in the crossfire. It’s possible that Europe and the United States will find some way to fudge this and avoid confrontation, but it’s hard for me to see how.

#### Dispute is escalating—it collapses relations and overwhelms any increased trust from the plan

EuroNews, staff writer, 10/26/13, Europe-US trust, shattered by NSA spying, could take decades to rebuild, www.euronews.com/2013/10/26/europe-us-trust-shattered-by-nsa-spying-could-take-decades-to-rebuild/

The document, from 2006, does not give names but says the NSA encourages senior officials of the administration and government to share their contact details with the agency. One unnamed official alone is said to have passed on 200 numbers. It has set another cat among the pigeons, sparking a fresh escalation in the simmering diplomatic crisis between Washington and its allies. It is becoming increasingly difficult for Barack Obama to limit the consequences of this incessant flow of revelations and counter the lingering Cold War atmosphere it has created. The bugging of Chancellor Angela Merkel’s mobile phone is particularly embarrassing. Friends don’t do this sort of thing, Berlin says, while the US has been desperately emphasising the importance of its friendship with Germany, insisting that a few lines in the press are not going to undermine that. Our Washington correspondent Stefan Grobe asked the head of one of Germany’s largest private non-profit organisations, the Bertelsmann Foundation, to help gauge the potential for worsening relations between that country and the United States. Legal specialist and political analyst Annette Heuser responded on the transatlantic NSA spying scandal. The foundation’s executive director in the US capital, Heuser said: “The question is not only whether the Chancellor’s cell phone has been bugged or whether the German government has been bugged. The general question is whether friends can put up with operations like these. The answer is: definitely not. The Obama administration is not doing itself any favours by downplaying the whole affair and saying: ‘We won’t do it any more’ and that is it. We are witnessing the beginning of a foreign policy tsunami that is going to bother American and European transatlantic policy for quite some time.” And this is the president whom many in Europe wanted for the US; so their feelings were hurt when, swiftly following his 2008 election victory, Obama immediately showed the Europeans that he just was not that into them. He was more attentive to Asia – perhaps taking Europe’s good nature for granted. Our Bertelsmann expert said: “I believe that there is a tendency here in the US and in this administration not to take relations with Europeans seriously, and to believe that scandals and problems can easily be brushed away. This is a fundamental mistake. We have also noticed that the Obama administration, like no other US administration in post-war history, has lost the ability to understand the Europeans and to read them accurately. This is a huge problem for transatlantic relations. Until now, there has been a deep-rooted trust between Europeans and Americans – especially between Germans and Americans – but this scandal now contributes to a situation in which this trust is being eroded and is no longer an essential part of these relations.” In 2011, Chancellor Merkel was the first European leader Obama invited to dinner at the White House. It served a double function, to honour her and to somewhat wash away the bitterness in many people’s mouths that the Bush administration had left. According to Annette Heuser: “This scandal will have very important consequences for the future of transatlantic relations. Until now, we have always said that the lowest point in these relations, especially between Germany and the US, was the struggle over the Iraq war in 2003. It was the question of whether to intervene militarily in Iraq. The German government at the time, under Gerhard Schroeder, clearly opted against it. But that was merely a question of military strategy. What we are seeing right now is much more fundamental; we are dealing with trust. This trust is disappearing from transatlantic relations and will take decades to rebuild.”

#### [prob save for ext.] Multiple alt causes

McGill, School of Graduate and Continuing Studies in Diplomacy – Norwich U, and Gray, Campbell University, ‘12

(Anna-Katherine and David, “Challenges to International Counterterrorism Intelligence Sharing,” Global Security Studies, Summer, Volume 3, Issue 3)

Indeed, in the aftermath of 9/11 the US saw not only its NATO counterparts rise to action but also a new enthusiasm from its traditional bilateral relationships in improving counterterrorism coordination and more specifically intelligence sharing. Still, the rallying of support for the US following the attacks is not enough to overcome longstanding political and institutional hurdles to counterterrorism intelligence sharing. Although the US shares many political and cultural values with its traditional allies, their views diverge on issues like the invasion of Iraq, personal data protection, and the treatment or punishment of terrorists. The Invasion of Iraq The invasion of Iraq provides a perfect example of how the national interests of one nation can threaten the interests of its allies and more specifically, how policies in one arena can affect cooperation in another. According to US Senator Byrd, a major critic of the Bush administration, the invasion of Iraq “split traditional alliances, possibly crippling, for all time, international order-keeping entities like the United Nations and NATO” (qtd in Gardner 16). The central concerns arising from the 2003 Iraq invasion were the use of “preemptive” or “preventative” (depending on who you ask) strikes, unilateral action, and ultimately questionable motives. Consequently, bilateral cooperation from Germany, France, and NATO ally Turkey has taken a major hit. France argued against military intervention in favor of enforced inspections and diplomacy. Furthermore, it refuted that the US invasion of Iraq did not constitute collective security and therefore was not an obligation of NATO’s article V. Hall Gardner explains that while France has always been a reluctant ally, Germany and Turkey “represented the most loyal NATO allies during the Cold War” (3). As a result of the Iraq invasion, however, these two nations “bitterly questioned US policies and actions for very different reasons” (Gardner 3). For Germany, the use of preventative military strikes set a dangerous precedent for state behavior. They feared that should this become the norm, “it would undermine international law and concepts of national sovereignty dating back to Westphalia” (Gardner 3). Turkey, on the other hand, feared that the US invasion of Iraq would run directly counter to its national interests in regards to the Kurds of northern Iraq. While these countries have remained committed to the counterterrorism effort, the public row over the Iraq invasion shaped global public opinion of the US led war on terrorism and likely lessened domestic support for aiding the Americans in future CT endeavors. The fallout from US actions and its greater presence in the Middle East has arguably made it a larger target to terrorist organization which portray the US as a global crusader. By default, those who supported and contributed to the invasion of Iraq are also greater targets of transnational terrorist networks like al Qaeda. Additionally, the use of ultimately false intelligence on Iraqi position of WMD to justify the invasion heightened criticism of the US intelligence community and thus hurt their reputation in producing credible intelligence analysis. Personal data protection Personal data is critical to counterterrorism efforts because it “often provide[s] the only evidence of connections between members of terrorist groups and the types of activities that they are conducting” (Bensehal 48). However, Europe has shown resistance to freely sharing this type of information with its American counterparts since many of the US’s European allies have much more stringent views on the protection of personal data. In the EU, there are safeguards at the national and regional level that regulate the storage and sharing of personal data information. These laws are a product of Europe’s historical experience with fascism and thus its sensitivity to the abuse of such information as travel records or communications (Bensahel, 48). In “The Counterterror Coalitions: Europe, NATO, and the European Union” Nora Bensahel explains “by contrast, the United States protects personal information through legal precedents and procedures rather than [unified] legislation” which the Europeans find insufficient (48). The EU’s concerns over the US’s protection of personal data caused them to withhold information from the US and created a substantial challenge to their combined counterterrorism efforts. Following 9/11 the heightened political will to overcome such issues enabled the US and the EU to compromise on this issue but there are lingering limits to EU willingness to share personal data with the US. In the wake of the attacks, the US and Europol signed an agreement to permit the sharing of personal data. Although it increased operational effectiveness and intelligence sharing this agreement is limited to law enforcement operations which excludes personal data found in commercial activities. Furthermore, provisions in the agreement state that “personal information can be used only for the specific investigation for which it was requested” (Bensahel, 48). If the suspect is being investigated for murder and is discovered to have ties to a smuggling ring the US must submit a separate request to use the murder information in the case regarding the smuggling activities. The Rights of the Accused The US and the EU have also had substantial disagreements on the treatment and punishment of accused terrorists. This tension hinges on such issues as the use of the death penalty and “extraordinary rendition”. Fortunately, the death penalty issue was resolved with the passage of an multilateral treaty on extradition however the US has not fully recovered from the backlash of criticism and mistrust from its practice of “extraordinary rendition”. Prior to a May 2002 summit, the US and EU were at a disagreement over the death penalty. The EU’s aversion to capital punishment led it to not only hesitate from sharing information but deny requests for extradition unless the US would guarantee that the individual in question would not face the death penalty. The 2002 summit did however bring both the US and EU to at least agree in principle to a treaty on extradition and Mutual Legal Assistance Treaty (MLAT) and both parties ratified the treaties in 2003. The extradition treaty allowed for a blanket policy for European nations to “grant extradition on the condition that the death penalty will not be imposed” and the MLAT provided enhanced capability to gather and exchange information (Bensahel 49). The CIA’s use of “extraordinary rendition”, the practice of transporting a suspect to a third country for interrogation, has also stoked the ire of many traditional allies. Critics charge that this tactic quite simply allows the CIA to sidestep international laws and obligations by conducting interrogations in nations with poor human-rights records. In 2003, an Italian magistrate formally indicted 13 CIA agents for allegedly kidnapping an Italian resident and transporting him to a third country for interrogation. Ultimately 22 CIA agents and one US military officer were convicted in absentia of crimes connected to the abduction (Stewart, 1). The case not only heightened criticism of the US in Italy but challenged U.S. strategic communications aimed at reducing anti-Americanism worldwide (Reveron 462). According to Julianne Smith, director of the Europe program at the Center for Strategic and International Studies (CSIS), “[extraordinary rendition] makes it extremely difficult [for European governments] to stand shoulder-to-shoulder with the U.S.” (Heller 1).

#### No impact to NATO failure

**Schmidt 7** John R. Schmidt is the senior analyst for Europe in the Bureau of Intelligence and Research at the Department of State, served as director of the NATO office at the State Department and as director for NATO affairs at the National Security Council, “Last Alliance Standing? NATO after 9/11,” Washington Quarterly, Winter, 2007

The real problem is that the United States does not really know what it wants from NATO. It continues to perceive the alliance through what is essentially a Cold War prism, as the key mechanism through which the United States attempts to project influence in Europe. The successes of the NATO enlargement process, which addressed genuine security concerns among newly freed former Communist states, and of NATO involvement in the Balkans have only helped to sustain this perception. Current U.S. efforts to give NATO a more global reach also reflect the same perception of NATO preeminence, with the alliance moving out from its European core to embrace the wider world. It is undeniably a grand vision, but it is also clearly **at odds with reality**. The notion of giving pride of place to a military alliance made sense during the Cold War, but it does not make sense today when the most critical threats are more varied and diffuse. NATO is of limited use as a diplomatic actor, which is why the United States has never really used it in this capacity. Other vehicles and partners are preferred for U.S. diplomatic activity, the EU increasingly among them, and this is unlikely to change. Even in the military sphere, NATO is no longer the primary instrument of choice and has at best only a circumscribed, if still important, role to play.

#### Even if the plan makes NATO more cohesive, financial pressure means it can’t operate effectively

**Atlantic Council, 8/7/13** – The Atlantic Council of Canada, independent, non-profit, non-governmental organization, founded in 1966 to promote knowledge and understanding of international peace and security and the North Atlantic Treaty Organization (“NATO Dollars and Sense,” <http://atlantic-council.ca/portfolio/nato-dollars-and-sense/>)

This national conversation has emerged only two weeks after NATO Supreme Allied Commander Europe Philip Breedlove made an impassioned call for funding to Alliance members. In an attempt to save national defense expenditures from widespread austerity cuts, the US Air Force General underlined the importance of stable, long-term funding, so that the Alliance is prepared to face unknown and diverse challenges in the future. “**NATO is at its most cohesive yet**,” he said, “**but must ensure that spending cuts do not erode the power of an alliance** facing tasks as diverse as a new training mission in Afghanistan and protecting Turkey’s border with Syria.” He explained further, “Right now we [NATO] **are at the height of our ability to operate together**, our **cohesiveness is high**, our **tactics, techniques and procedures are** as **good as they have ever been.** My concern is that we do not lose the edge…clearly we need the budget to do that, so we are emphasizing with our NATO partners that defense spending is important.” It is true that after thirteen years of war in Afghanistan, the extent of cohesion and interoperability between NATO allies has undeniably improved. **However, the cost of this war**, in dollars and in lives, **has also motivated NATO’s pending withdrawal. Many contributing countries consider their debt to the alliance paid and look forward to the dividends of peace.** Four years after the financial crisis of 2008/2009, most **NATO members remain burdened by public debt and high unemployment** rates. Forecasted growth rates offer little comfort to cash-strapped treasuries and incumbent politicians. Though Canada fared the financial crisis better than many of its allies, it is by no means immune to this trend. The federal government posted a 2.7 billion dollar deficit in the first two months of its 2013-2014 fiscal year (beginning April 1). With a 2015 federal election in mind, Prime Minister Harper has made it clear that he wants federal finances back in black by then. Though the conservative party once promised stable and predictable funding for the Canadian Armed Forces, the army has seen a **22% cut in funding since 2010**. The Royal Canadian Navy has similarly seen an 11% decrease. The spokesman for Canadian Defense Minister Peter MacKay told the National Post in March 2013, “After years of unprecedented growth, and following the end of the combat mission in Afghanistan, it is necessary for the government to balance military needs with taxpayer interests.” These cuts make headlines, though perhaps indirectly. They explain why the Canadian Forces will no longer boast a brand new fleet of Lockheed Martin F-35 fighters, and why Prime Minister Harper has refocused his Arctic lens on development, as opposed to protecting Canadian sovereignty. Photo-ops north of the 66th seem quite unnecessary in the absence of an actual threat. In short, after thirteen years of war and a global financial crisis, Canada and its NATO allies have been forced to **re-evaluate their defense priorities and economize accordingly.** As a network for, and product of, these member countries, NATO must do the same. Last week, General Breedlove named failing states, restive populations and “ungoverned spaces” as the key issues facing the world. However, he insisted that NATO must be prepared to counter any threat, from counter-insurgency to “the more conventional defensive or offensive fights that NATO’s history was centered on.” Given pressing fiscal realities, the General’s comments are **unfortunately idealistic.** With fewer resources at NATO’s disposal, attempting to cover all bases means that member countries will be relatively more vulnerable to their most likely threats. Rather than challenging the fiscal constraints of its member states, NATO HQ would do better to articulate how it intends to accommodate them.

#### Strong executives are key to coalition support

Ashraf 2011 – PhD from Pitt (April 5, A.S.M. Ali, “THE POLITICS OF COALITION BURDEN-SHARING: THE CASE OF THE WAR IN AFGHANISTAN ” <http://d-scholarship.pitt.edu/7898/1/ThePoliticsOfCoalitionBurden-Sharing.pdf>)

Domestic Political Regime. Domestic political regime acts as the first intervening variable in shaping a state's coalition decisions. There is a rich body of domestic politics literature, which shows that key decisions regarding a state's burden-sharing behavior are taken by the chief executive of an incumbent government.5 Hence, the strength of a chief executive's decision-making power vis-a-vis other organs of the government will play a decisive role in shaping a state's coalition contribution.5\* This means that the legislative or judicial oversight may act as a constraining factor in shaping a chief executive's decision power on foreign policy issues, including participation in a military coalition. Most domestic political regime theories examine the distribution of power among various political institutions such as the chief government executive and the legislature. In an analysis of states' crisis time bargaining behavior, Susan Peterson defines executive strength as the relative autonomy of the office of chief executive from legislative pressures.39 Auerswald defines executive strength in relation to the entities that have the "power to terminate office tenure."60 Two such entities are more relevant: the mass public and the legislature. In Auerswald's analysis, the support of the general voters as well as the members of the legislative assembly is crucial for a president, prime minister, or premier in a liberal democratic country. As discussed below, Sarah Kreps discards the importance of public opinion, and shows that elite consensus among the parliamentary parties matter more than public opinion.61 Auerswald's typology of executive strength is useful in predicting coalition burden-sharing. He suggests three types of executive strength—strong, weak, and medium. Each type of chief executive is likely to pursue a distinct burden-sharing policy toward a military coalition. First, a strong chief executive with less legislative oversight and strong elite consensus is likely to favor the use of force, if such a decision serves the national interests, or if such a decision is taken to please the domestic constituents. Second, a weak chief executive with varying degree of legislative control and elite disagreement will be constrained to take a bold decision on the use of force, and avoid participating in the coalition for fear of losing the election. Third, a medium executive will craft a policy that balances between the competing demands from legislature, elite consensus, and public opinion.

#### US capability is key to success in coalitions

Ashraf 2011 – PhD from Pitt (April 5, A.S.M. Ali, “THE POLITICS OF COALITION BURDEN-SHARING: THE CASE OF THE WAR IN AFGHANISTAN ” <http://d-scholarship.pitt.edu/7898/1/ThePoliticsOfCoalitionBurden-Sharing.pdf>)

Emphasis on U.S. Leadership. The United States has led the coalition operations in Afghanistan and Iraq, and it is likely to lead future operations around the world. This leadership role comes from the unprecedented military capability and the global reach of the U.S. forces.14 The U.S. allies in NATO, such as, Britain, France, and Germany are most likely to partner with the United States in sharing the burdens of coalition operations. Since alliance dependence may have reduced role in the post-Cold War era, an emphasis transatlantic alliance solidarity would better serve the U.S.-led coalitions. For out of area operations, the political and military support of the regional actors would be crucial. The United States will need to provide military and economic aid to encourage the participation of non-NATO allies and informal allies.

### AT: Terror

**Nuke Terror**

**Probability of nuke terror is one in 3.5 billion**

**Schneidmiller 9** (Chris, Experts Debate Threat of Nuclear, Biological Terrorism, 13 January 2009, http://www.globalsecuritynewswire.org/gsn/nw\_20090113\_7105.php)

**There is an "almost vanishingly small" likelihood that terrorists would ever be able to acquire and detonate a nuclear weapon**, one expert said here yesterday (see GSN, Dec. 2, 2008). **In even the most likely scenario** of nuclear terrorism, **there are 20 barriers** between extremists and a successful nuclear strike on a major city, **said** John Mueller, **a political science professor at Ohio State** University. The process itself is seemingly straightforward but exceedingly difficult -- **buy** or steal highly enriched **uranium, manufacture** a weapon, **take the bomb** to the target site and blow it up. Meanwhile, **variables strewn across the path** to an attack **would increase the complexity** of the effort, Mueller argued. **Terrorists would have to bribe officials** in a state nuclear program to acquire the material, **while avoiding** a sting by **authorities** or a scam by the sellers. **The material itself could also turn out to be bad. "Once the purloined material is purloined, [police are] going to be chasing after you**. They are also going to put on a high reward, extremely high reward, on getting the weapon back or getting the fissile material back," Mueller said during a panel discussion at a two-day Cato Institute conference on counterterrorism issues facing the incoming Obama administration. Smuggling the material out of a country would mean relying on criminals who "are very good at extortion" and might have to be killed to avoid a double-cross, Mueller said. **The terrorists would then have to find scientists and engineers** willing to give up their normal lives to manufacture a bomb, which would require an expensive and sophisticated machine shop. Finally, further **technological expertise would be needed** to sneak the weapon across national borders to its destination point and conduct a successful detonation, Mueller said. Every obstacle is "difficult but not impossible" to overcome, Mueller said, putting the chance of success at no less than one in three for each. **The likelihood of successfully passing through each obstacle, in sequence, would be roughly one in 3 1/2 billion,** he said, but for argument's sake dropped it to 3 1/2 million. "It's a total gamble. This is a very expensive and difficult thing to do," said Mueller, who addresses the issue at greater length in an upcoming book, Atomic Obsession. "So unlike buying a ticket to the lottery ... you're basically putting everything, including your life, at stake for a gamble that's maybe one in 3 1/2 million or 3 1/2 billion." Other scenarios are even less probable, Mueller said. **A** **nuclear-armed state is "exceedingly unlikely" to hand a weapon to a terrorist group, he argued: "States just simply won't give it to somebody they can't control." Terrorists are also not likely to be able to steal a whole weapon, Mueller asserted, dismissing the idea of "loose nukes." Even Pakistan,** which today is perhaps the nation of greatest concern regarding nuclear security, **keeps its bombs in two segments that are stored at different locations,** he said (see GSN, Jan. 12). Fear of an "extremely improbable event" such as nuclear terrorism produces support for a wide range of homeland security activities, Mueller said. He argued that there has been a major and costly overreaction to the terrorism threat -- noting that the Sept. 11 attacks helped to precipitate the invasion of Iraq, which has led to far more deaths than the original event. Panel moderator Benjamin Friedman, a research fellow at the Cato Institute, said academic and governmental **discussions** of acts of nuclear or biological terrorism have tended to **focus on "worst-case assumptions** about terrorists' ability to use these weapons to kill us." **There is need for consideration for what is probable rather than simply what is possible,** he said. Friedman took issue with the finding late last year of an **experts' report that** an act of **WMD terrorism would "more likely than not" occur in the next half decade unless the international community takes greater action. "I would say that the report, if you read it, actually offers no analysis to justify that claim**, which seems to have been made to change policy by generating alarm in headlines." One panel speaker offered a partial rebuttal to Mueller's presentation. Jim Walsh, principal research scientist for the Security Studies Program at the Massachusetts Institute of Technology, said he agreed that nations would almost certainly not give a nuclear weapon to a nonstate group, that **most terrorist organizations have no interest** in seeking out the bomb, and that it would be difficult to build a weapon or use one that has been stolen.

**Ayson agrees**

**Ayson 10** - Professor of Strategic Studies and Director of the Centre for Strategic Studies: New Zealand at the Victoria University of Wellington (Robert, “After a Terrorist Nuclear Attack: Envisaging Catalytic Effects,” Studies in Conflict & Terrorism, 33.7, Francis & Taylor)//VP

A terrorist nuclear attack, and even the use of nuclear weapons in response by the country attacked in the ﬁrst place, would not necessarily represent the worst of the nuclear worlds imaginable. Indeed, there are reasons to wonder whether nuclear terrorism should ever be regarded as belonging in the category of truly existential threats. A contrast can be drawn here with the global catastrophe that would come from a massive nuclear exchange between two or more of the sovereign states that possess these weapons in signiﬁcant numbers. Even the worst terrorism that the twenty-ﬁrst century might bring would fade into insigniﬁcance alongside considerations of what a general nuclear war would have wrought in the Cold War period. And it must be admitted that as long as the major nuclear weapons states have hundreds and even thousands of nuclear weapons at their disposal, there is always the possibility of a truly awful nuclear exchange taking place precipitated entirely by state possessors themselves.

#### Weak detention responses emboldens terrorists

Andrew McCarthy 09, 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 Velshi, a staff attorney at the Center for Law & Counterterrorism, where he focuses on the international law of armed conflict and the use of force, 8/20/09, “Outsourcing American Law,” AEI Working Paper, http://www.aei.org/files/2009/08/20/20090820-Chapter6.pdf

3. Terrorism prosecutions create the conditions for more terrorism. The treatment of a national security problem as a criminal justice issue has consequences that imperil Americans. To begin with, there are the obvious numerical and motivational results. As noted above, the justice system is simply incapable, given its finite resources, of meaningfully countering the threat posed by international terrorism. Of equal salience, prosecution in the justice system actually increases the threat because of what it conveys to our enemies. Nothing galvanizes an opposition, nothing spurs its recruiting, like the combination of successful attacks and a conceit that the adversary will react weakly. (Hence, bin Laden’s well-known allusion to people’s instinctive attraction to the “strong horse” rather than the “weak horse,” and his frequent citation to the U.S. military pullout from Lebanon after Hezbollah’s 1983 attack on the marine barracks, and from Somalia after the 1993 “Black Hawk Down” incident). For militants willing to immolate themselves in suicide-bombing and hijacking operations, mere prosecution is a provocatively weak response. Put succinctly, where they are the sole or principal response to terrorism, trials in the criminal justice system inevitably cause more terrorism: they leave too many militants in place and they encourage the notion that the nation may be attacked with relative impunity.

#### We can win the war on terror by increasing the costs of terrorism with military operations – Cold War proves

Jakacky 13 – staff writer

(Gary, The Microeconomics of Terrorism, Money News, http://www.moneynews.com/Gary-Jakacky/terror-attack-war-microeconomics/2013/07/31/id/517930)

Terrorists respond to incentives and costs as surely as shoppers and businesses do. Running a terrorist cell is expensive, not only in lives, but in dollars. Thus, our most effective method(s) for reducing the incidence of terrorism consists of two comprehensive steps: increase the costs and reduce the benefits. ¶ We can increase the costs of terrorism in numerous ways, some of which involve steps that have already been taken. Countries and regions that harbor terrorists need to pay a high military, diplomatic and economic price. The costs imposed upon Pakistan's Northeast Frontier Provinces, for example, have become so great (as a result of drone attacks and other, more specialized, military operations) are such that politicians in the region have turned a blind eye toward U.S. actions — even if they do not admit so publicly.¶ Liberal and open Western societies appear vulnerable because of the privacy by which we conduct economic transactions and the openness of our public places and borders. But as was seen in Boston recently, the widespread use of surveillance technology makes it easier to discover culprits and, as we shall see in the future, prevent attacks from occurring by using software to flag suspicious behaviors and objects. ¶ Such software is already in use at many airports and train stations. Those who carp about "big brother" are missing the point. This surveillance is by private companies and individuals — everything from a cell phone camera to an ATM electric eye. ¶ No one I know suggests these are an infringement on liberty. In fact, "eternal vigilance" has always been the price of freedom. Technology is making this vigilance less costly and more effective. Conversely, the costs for terrorists — in terms of prosecution and the costs of evading surveillance — are far higher. ¶ What about the revenue side? Here the task is more difficult. In order for a terrorist organization to receive a steady flow of funds, it must be able to take credit for its acts in a public forum. Websites and Twitter accounts have largely supplanted the mainstream news media for terrorists to boast credit for their actions. But we still see media — especially state-run media overseas — in celebration mode when attacks occur. ¶ Even some U.N. officials felt Boston had it coming. Such media and individuals are every bit a part of the terrorist network as the attackers themselves. As such, they can and should be military/economic targets. They are providing air and comfort to the enemy. ¶ Servers and webhosts of jihad sites are vulnerable to cyber attacks, one of the fastest growing areas of counterterrorism. The same young hackers who bedevil the Pentagon can and are being trained to disrupt these sites. ¶ Many terror cells have merged with drug cartels to siphon off funds. I cannot think of a better reason for decriminalization of marijuana and other categories of "drugs" than the billions that cartels reap because of this protected monopoly status. ¶ As I made clear in last week's article, the War on Terrorism is a marathon, not a sprint. It sometimes appears, like the mythical hydra that from each terrorist head that is nipped off, two sprout back in their place. ¶ Yet Communism was a far more insidious and, unfortunately, seductive lure for decades in the 20th century. If we can vanquish that, we can win this war as well.

#### Drones are an alt cause

Stephen Holmes 13, the Walter E. Meyer Professor of Law, New York University School of Law, July 2013, “What’s in it for Obama?,” The London Review of Books, <http://www.lrb.co.uk/v35/n14/stephen-holmes/whats-in-it-for-obama>

On the basis of undisclosed evidence, evaluated in unspecified procedures by rotating personnel with heterogeneous backgrounds, the US is continuing to kill those it classifies as suspected terrorists in Somalia, Yemen and Pakistan. It has certainly been eliminating militants who had nothing to do with 9/11, including local insurgents fighting local battles who, while posing no realistic threat to America, had allied themselves opportunistically with international anti-American jihadists. By following the latter wherever they go, the US is allowing ragtag militants to impose ever new fronts in its secret aerial war. Mistakes are made and can’t be hidden, at least not from local populations. Nor can the resentment of surrounding communities be easily assuaged. This is because, even when it finds its target, the US is killing not those who are demonstrably guilty of widely acknowledged crimes but rather those who, it is predicted, will commit crimes in the future. Of course, the civilian populations in the countries where these strikes take place will never accept the hunches of CIA or Pentagon futurologists. And so they will never accept American claims about the justice of Obama’s slimmed-down war on terror, but instead claim the right of self-defence, and this would be true even if drone operators could become as error-free as Brennan once claimed they already are. But of course collateral damage and mistaken-identity strikes will continue. They are inevitable accompaniments of all warfare. And they, too, along with intentional killings that are never publicly justified, will communicate resoundingly to the world that the arbitrary and unpredictable killing of innocent Muslims falls within America’s commodious concept of a just war.

**Can’t solve recruitment – it’s just based on Al Qaeda paying**

**Axe 13**

(David Axe, quoting Christopher Swift, fellow at the University of Virginia’s Center for National Security Law,“Expert: No Drone Backlash in Yemen”, http://christopher-swift.com/th\_gallery/expert-no-drone-backlash-in-yemen)

**Lethal strikes by armed drones are America’s best and less obtrusive method of killing Islamic militants and dismantling their terror networks while minimizing civilian casualties. Or they’re a misguided and counter-productive attempt at sterilizing the dirty work of counter-terrorism — one that serves as a rallying cry for terrorist recruiters and ends up creating more militants than it eliminates.¶ Those are the opposing views in one of the most urgent debates in military, policy and humanitarian circles today. Now a new, ground-level investigation by a daring American researcher adds a fresh wrinkle to the controversy. Chris Swift, a fellow at the University of Virginia’s Center for National Security Law, spent a week in late May interviewing around 40 tribal leaders in southern Yemen, one of the major drone battlegrounds.¶ What he found might disappoint activists and embolden counter-terrorism officials. “Nobody in my cohort [of interview subjects] drew a causal link between drones on one hand and [militant] recruiting on other,” Swift says.¶ Tweets, blog posts and news reporting from Yemen seem to contradict Swift’s conclusion. Drone strikes in Yemen have gone up, way up, from around 10 in 2011 to some two dozen so far this year. No fewer than 329 people have died in the Yemen drone campaign, at least 58 of whom were innocent civilians, according to a count by the British Bureau of Investigative Journalism.¶ But some Yemenis believe the civilian body count is much higher. “For every headline you read regarding ‘militants’ killed by drones in #Yemen, think of the civilians killed that are not reported,” NGO consultant Atiaf Al Wazir Tweeted.¶ Another Yemeni Twitter user drew the link between the drone war’s innocent victims in a Tweet directed at top U.S. counterterrorism adviser John Brennan. “Brennan do you hear us?!!! We say #NoDrones #NoDrones #NoDrones. You are killing innocent people and creating more enemies in #Yemen.”¶ Reporters have run with the claim that drone strikes breed terrorists. “Drones have replaced Guantánamo as the recruiting tool of choice for militants,” Jo Becker and Scott Shane wrote in The New York Times.¶ “Across the vast, rugged terrain of southern Yemen, an escalating campaign of U.S. drone strikes is stirring increasing sympathy for Al Qaeda-linked militants and driving tribesmen to join a network linked to terrorist plots against the United States,” The Washington Post‘s Sudarsan Raghavan reported.¶ But the narrative embraced by Yemeni Tweeters the Times and the Post originated in, and is sustained by, a comparatively wealthy, educated and English-speaking community based in Yemen’s capital city Sana’a, Swift explains. He calls them the “Gucci jean-wearing crowd.” But cosmopolitan Sana’a isn’t breeding many terrorists, and popular opinions in the city don’t necessarily reflect the reality in Yemen’s embattled south.¶ To get to the sources that really mattered, Swift sensed he had to “get out of the Sana’a political elite,” he says. He teamed up with an experienced fixer — a combined guide, translator and protector — and slipped into heavily-armed Aden in Yemen’s south in the back of pickup trucks. “I always expected that my next checkpoint was going to be my last,” Swift says.¶ Swift survived some close calls and brought back what is arguably the freshest and most relevant data on militant recruiting in southern Yemen. He has since written articles for Foreign Affairs and the Sentinel counterterrorism journal. In southern Yemen “nobody really gets excited about drones,” he explains. He says his sources were “overwhelming saying that Al Qaeda is recruiting through economic inducement.” In other words, for the most part the terror group pays people to join.¶ Which isn’t to say Yemen’s militants don’t fear the American killer robots. In fact, they’re “terrified of drones,” Swift says. “They make a big deal of surviving drones in their propaganda videos.”¶ The militants’ fear of drones perhaps underscores the robots’ effectiveness. It does not argue for widespread resentment among everyday people in southern Yemen that compels them to join the terrorists’ ranks. At least, that’s what Swift believes.**

### Solvency

#### Gitmo’s not closing – it’s just political posturing that proves circumvention

Hafetz, 11/5 --- law professor at Seton Hall

(11/5/2013, Jonathan, “Outrage Fatigue: The Danger of Getting Used to Gitmo,” http://www.worldpoliticsreview.com/articles/13311/outrage-fatigue-the-danger-of-getting-used-to-gitmo))

The Obama administration has shown no shortage of creative lawyering in justifying U.S. military involvement in Libya and Syria as well as in expanding America’s use of targeted drone strikes. In those instances, the administration has interpreted presidential authority robustly, while narrowly construing congressional attempts to cabin that authority, as in the War Powers Resolution. Yet, when it comes to releasing Guantanamo detainees, the administration remains sheepish. It has failed to apply the same interpretive approach to congressional transfer restrictions despite what the president has described as the clear national security interests in closing the prison. Only external events, such as the hunger strike, now seem to prompt any action. And even there, the urgency tends to dissipate once the public pressure and media attention fades.

#### Relaxed rules undermine rule of law – turns the aff

Cole 08, Professor of Law at Georgetown

(David, A CRITIQUE OF “NATIONAL SECURITY COURTS, www.constitutionproject.org/pdf/Critique\_of\_the\_National\_Security\_Courts.pdf)

Most importantly, there is the intrinsic and inescapable problem of definition. Whereas the argument for specialized courts for tax and patent law is that expert judges are particularly necessary given the complex subject-matter, proposals for specialized courts for terrorism trials are based on the asserted need for relaxed procedural and evidentiary rules and are justified on the ground that terrorists do not deserve full constitutional protections. This creates two fundamental constitutional problems. First, justifying departures from constitutional protections on the basis that the trials are for terrorists undermines the presumption of innocence for these individuals. Second, if a conviction were obtained in a national security court using procedural and evidentiary rules that imposed a lesser burden on the government, then the defendant would be subjected to trial before a national security court based upon less of a showing than would be required in a traditional criminal proceeding. The result would be to apply less due process to the question of guilt or innocence, which, by definition, would increase the risk of error. And, if the government must make a preliminary showing that meets traditional rules of procedure and evidence in order to trigger the jurisdiction of a national security court, such a showing would also enable it to proceed via the traditional criminal process.

#### Due process deprivations spillover to the rest of the judicial system – magnifies rule of law degradation

Cole 08, Professor of Law at Georgetown

(David, A CRITIQUE OF “NATIONAL SECURITY COURTS, www.constitutionproject.org/pdf/Critique\_of\_the\_National\_Security\_Courts.pdf)

National security courts for criminal prosecutions are not just unnecessary; they are also dangerous. They run the risk of creating a separate and unequal criminal justice system for a particular class of suspects, who will be brought before such specialized courts based on the very allegations they are contesting. Such a system undermines the presumption of innocence for these defendants, and risks a broader erosion of defendants’ rights that could spread to traditional Article III trials. It was Justice Frankfurter who wrote that “It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” Committee members strongly believe that the shadow of terrorism must not be the basis for abandoning these fundamental tenets of justice and fairness.

#### It’s discriminatory --- that destroys legitimacy

Shulman 09, Law Prof at Pace

(Mark, NATIONAL SECURITY COURTS: STAR CHAMBER OR SPECIALIZED JUSTICE?, ssrn.com/abstract=1328427)

National security or terrorist courts in other countries offer troubling lessons, mostly because of their implications for the respect for civil liberties generally—not only of the accused, but of the wider population. Existing proposals to create such a court in the United States inadequately account for this risk, or explain how it would be minimized or mitigated. Emergency systems in other countries have invariably reduced civil liberties for the general population. It is understandable that governments wish to be seen to be responding to the urgent threats posed by those who use violence to affect policy. However, it is important to recognize that these emergency systems in such diverse jurisdictions as Great Britain, Malaysia, and South Africa have diminished freedoms for society as a whole. This principle lesson derived of foreign experiences is not particularly surprising. Examples abound of domestic emergency measures taken to promote national security that have undermined the base norm presumption of innocence that lies at the center of America’s constitutional order. The largescale internment of Japanese-Americans during the Second World War provides a notorious example. In that case, the federal courts deferred to the Executive’s misguided policy and thereby created a new and heinous rule allowing for internment, displacement, and forced sales of property based on no more than the notion that citizens of a given race might seek to harm the United States. Although the United States has officially apologized for this shameful episode, Korematsu has not been overruled in the two generations since the Supreme Court handed down its 6-3 decision. The Korematsu precedent may have given some legal cover for the large scale detention of Americans of Moslem, Arab, or Middle-Eastern background in the months following September 11.62 These discriminatory policies undermine the soft power America otherwise derives from its role as a leader in promoting respect for human rights. In other countries, emergency powers have had a similarly deleterious effect on civil liberties. In the United Kingdom, in order to address violence originating in troubled Northern Ireland, the government revoked the right to trial by jury for criminal offenses; denied access to legal counsel; held prisoners without charge; and allowed coercive interrogation techniques and admitted confessions elicited because of them, among other measures. In Malaysia, the government transferred judges from their positions to avoid judicial review of its decisions or release of suspects arrested without even probable cause—in violation of well-established constitutional law. In apartheid South Africa, judicial review was revoked for interrogation purposes. These extra-judicial detentions lasted weeks. In addition to radical nationalists, they swept up completely harmless nuns and pastors urging more widespread equality and access to education. Three cases, of course, do not constitute a comprehensive survey or prove the point. Even the Akin Gump survey of 123 domestic cases can lead only to limited conclusions. However, these three examples do offer insights into the threats to liberty posed by special purpose terrorism courts. IV. QUO VADIS? Would a system of national security courts offer the kind of specialized justice necessary for addressing the threat posed by radical Islamists or others who seek to use terrorist means? Or, in a tragic parallel to the Stuart kings’ infamous Star Chamber, would these courts ultimately undermine the nation’s security by degrading both its legal system and the soft power derived from its cherished reputation as a model for justice? On the eve of the inauguration of Barack Obama, these critical questions remain unresolved in the court of “public opinion which alone can here protect the values of democratic government.”

**You get *circumvented***

**Rojas, 12** --- Associate Professor of Sociology at Indiana University (4/16/2012, Fabio, “rachel maddow will not bring peace,” <http://orgtheory.wordpress.com/2012/04/16/rachel-maddow-will-not-bring-peace/>)

Andrew Sullivan’s blog excerpted a passage from Rachel Maddow’s recent book. Understandably, Maddow’s book urges Congress to take a stand against war:

 When we go to war, we should raise taxes to pay for it. We should get rid of the secret military. The reserves should go back to being reserves. We should cut way back on the contractors and let troops peel their own potatoes. And above all, Congress should start throwing its weight around again…

I agree in principle, but disagree on practice. **Rules and institutions that end war are ineffective** for two reasons. First, **if you really want war, you can always vote to have a new rule for war or to make an exception.** Also, **most rules have wiggle room in them, which makes it easy to wage war under other guises**. Secondly, **there’s a consistent “rally around the leader effect.” It is incredibly hard for anyone to oppose leaders during war time. Elected leaders are in a particularly weak position.** Simply put, **legislatures can’t be trusted to assert their restraining role in most cases**.

#### Administration will hold detainees on ships to circumvent restrictions

AP, 10/8 (“Warships are the new interrogation ‘black sites’” 10/8/2013, <http://nypost.com/2013/10/08/warships-are-the-new-black-sites-for-terror-interrogations/>))

WASHINGTON — Instead of sending suspected terrorists to Guantanamo Bay or secret CIA “black” sites for interrogation, the Obama administration is questioning terrorists for as long as it takes aboard US naval vessels.

And it’s doing it in a way that preserves the government’s ability to ultimately prosecute the suspects in civilian courts.

Modal Trigger

Abu Anas al-Libi was captured on Oct., 5, 2013Photo: FBI

That’s the pattern emerging with the recent capture of Abu Anas al-Libi, one of the FBI’s most wanted terrorists, long-sought for his alleged role in the 1998 bombings of US embassies in Africa. He was captured in a raid Saturday and is being held aboard the USS San Antonio, an amphibious warship mainly used to transport troops.

Questioning suspected terrorists aboard US warships in international waters is President Barack Obama’s answer to the Bush administration detention policies that candidate Obama promised to end. The strategy also makes good on Obama’s pledge to prosecute terrorists in US civilian courts, which many Republicans have argued against. But it also raises questions about using “law of war” powers to circumvent the safeguards of the US criminal justice system.

By holding people in secret prisons, known as black sites, the CIA was able to question them over long periods, using the harshest interrogation tactics, without giving them access to lawyers. Obama came to office without a ready replacement for those secret prisons. The concern was that if a terrorist was sent directly to court, the government might never know what intelligence he had. With the black sites closed and Obama refusing to send more people to the US detention facility at Guantanamo Bay, Cuba, it wasn’t obvious where the US would hold people for interrogation.

And that’s where the warships came in.

On Saturday, the Army’s Delta Force and Libyan operatives captured al-Libi in a raid. A team of US investigators from the military, intelligence agencies and the Justice Department has been sent to question him on board the San Antonio, two law enforcement officials told The Associated Press. The San Antonio was in the Mediterranean as part of the fleet preparing for now-canceled strikes on Syria last month.

Al-Libi, who was indicted in 2000 for his involvement in the 1998 bombings of US embassies in Africa, was being held on the warship in military custody under the laws of war, which means a person can be captured and held indefinitely as an enemy combatant, one of the officials said. Both spoke on condition of anonymity to discuss the ongoing investigation.

As of Monday, al-Libi had not been read his Miranda rights, which include the rights to remain silent and speak with an attorney. And it was unclear when al-Libi would be brought to the US to face charges.

“It appears to be an attempt to use assertion of law of war powers to avoid constraint and safeguards in the criminal justice system,” said Hina Shamsi, an attorney with the American Civil Liberties Union and the director of the civil rights organization’s national security project. “I am very troubled if this is the pattern that the administration is setting for itself.”

The Obama administration publicly debuted the naval ship interrogation tactic in 2011 when it captured Ahmed Abdulkadir Warsame, a Somali citizen who the US government said helped support and train al Qaeda-linked militants. Warsame was questioned aboard a US warship for two months before he went to New York to face terrorism charges. He pleaded guilty earlier this year and agreed to tell the FBI what he knew about terror threats and, if necessary, testify for the government.

The White House would not discuss its plans for prosecuting al-Libi.

“As a general rule, the government will always seek to elicit all the actionable intelligence and information we can from terrorist suspects taken into our custody,” National Security Council spokeswoman Caitlin Hayden said Monday.

The interrogators sent to question al-Libi are part the same group that questioned Warsame — the High-Value Detainee Interrogation Group. The Obama administration created the group of interrogators in 2009 to juggle the need to extract intelligence from captured suspected terrorists and preserve evidence for a criminal trial.

Under interrogation, Warsame gave up what officials called important intelligence about al-Qaida in Yemen and its relationship with al-Shabab militants in Somalia. Because those sessions were conducted before Warsame was read his Miranda rights, the intelligence could be used to underpin military strikes or CIA actions but were not admissible in court. After that interrogation was complete, the FBI stepped in and started the questioning over in a way that could be used in court.

After the FBI read Warsame his rights, he opted to keep talking for days, helping the government build its case.

Al-Libi’s case is different from Warsame’s in that he already has been indicted for allegedly conducting “visual and photographic surveillance” of the US Embassy in Nairobi that was attacked in 1998. Warsame was indicted after he was questioned aboard the naval ship.

The ACLU’s Shamsi said it’s a good thing that al-Libi was not being held secretly, as was the policy during the Bush administration. But, she said, al-Libi should be entitled to counsel and a speedy trial.

While prisoners have a right to a speedy trial, there’s no reason the US needs to rush al-Libi to court. That’s because in 2010 US District Judge Lewis Kaplan ruled that the government could prosecute al Qaeda suspect Ahmed Ghailani in New York, despite holding him for five years in CIA and military custody. Kaplan said the delay didn’t violate Ghailani’s speedy-trial rights because the government has the authority to detain suspects during wartime. Kaplan is also the judge in al-Libi’s case.

The Obama administration has said it can hold high-value detainees on a ship for as long as it needs to. During his confirmation hearing in June 2011 to be the head of US Special Operations Command, Adm. William McRaven said the US could keep a detainee on a ship for as long as it takes to determine whether the US could prosecute the suspect in civilian court or whether the US could return the suspect to another country.

“This situation, like the one with Ahmed Warsame two years earlier, is a hybrid model in which military detention under the laws of war is used to facilitate short-term interrogation, and then combined with civilian criminal prosecution in order to take the person off the streets for the long term,” said Robert Chesney, a professor at the University of Texas School of Law who tracks terrorism issues.

“The hybrid approach is not always available,” he said. “But it can be the perfect approach in the right circumstances.”

# 2NC

### AT: Soft Power

#### Soft power doesn’t solve anything- last few years prove

Rosett 2007 (Claudia, January, pg. http://canadafreepress.com/index.php/article/1242)

If American diplomacy were delivering on its promises, we’d be heading into boom times for peace and security. Instead, the new year begins with Washington foreign policy increasingly cocooned in a cloud of “soft power,” trying to deflect threats through the wiles of diplomacy, the art of the deal. Welcome to the world of wishful thinking. The irony is that with the gains in Iraq of the 2007 surge, the much-criticized toppling of Saddam Hussein is looking more and more like the signal success of Bush foreign policy. It is on the rest of the chessboard, where America has been trying to go along to get along, that the real failures are now in the making. One by one, military options have been swept aside, and step by step, the quest for United Nations-style “consensus” has replaced U.S. leadership. In 2002, President Bush described the regimes of Iran and North Korea as members of an axis of evil, their totalitarian ideologies destined for “history’s unmarked graveyard of discarded lies.” Today, with Hussein having in effect taken one for the team, the regimes of Iran and North Korea are just as evil, but appear destined to do pretty much what they want, as long as Washington can bottle and sell the product as diplomacy-in-progress. Take North Korea’s failure to meet the Dec. 31 deadline to come clean on the full extent of its nuclear programs. “Unfortunate” was the bland term with which State Department deputy spokesman Tom Casey acknowledged this failure - as if it were an accident of fate, not a deliberate dodge by Pyongyang. Casey added, “The important thing is not whether we have the declaration by today,” but that whenever it finally appears, it is “full and complete.” Actually, in the wheeling and dealing with Pyongyang, it matters quite a lot whether Kim Jong Il’s regime makes the deadlines. North Korea has long experience making deals in which it promises better behavior in exchange for aid, then takes the largesse and cheats on the deal. That’s exactly how the 1994 nuclear freeze deal went down the tubes during President Bill Clinton’s second term: Kim raked in tribute from the West, and fed and fueled his military while an estimated one million to two million North Koreans starved to death. Now, following a North Korean nuclear test, the Bush administration is going down the same road. With every missed deadline shrugged off as “unfortunate,” Washington sends the signal that we are not serious in our demands. That message gets heard way beyond North Korea - which brings us to Iran, where U.S. policy has now entered the era of what might be called wishful estimating. Following the release last month of an absurdly flawed and bizarrely worded National Intelligence Estimate downplaying Iran’s interest in getting the nuclear bomb, Iran has been de facto downgraded as a threat. On the slim chance that, despite its rhetoric and obsessive focus on nuclear energy, Tehran actually had abandoned the bomb program the mullahs had been pursuing since the late 1980s, there could be no better opening for Iran to go full speed ahead on producing those bombs. Washington is taking a break. Then there’s nuclear-armed Pakistan, where Washington’s wishful thinking last fall anointed Benazir Bhutto as the face of democracy and urged her return in the name of saving her country (and enhancing American security). This required wishful ignoring not only of the threats that on Dec. 27 cost Bhutto her life, but of her own record of failure and corruption scandals during two previous stints as prime minister - as well as her complicity during the 1990s in the clandestine program with which Pakistan acquired its nuclear bombs and missiles in the first place. And of course there’s the endless Palestinian “peace process,” to which Secretary of State Condoleezza Rice has succumbed with a vengeance. Wishful diplomacy on that front has produced a Gaza Strip controlled by the terrorists of Hamas, and plans to pour billions more in aid into a Palestinian Authority that can guarantee nothing. This may be the usual way of things during the final year of any lame-duck presidency. But this was the road to Sept. 11, and it is an approach that right now we can ill afford. America doesn’t have to wage war on every enemy on the planet, but appeasement and denial do not buy peace.

### 2NC Coalition DA Link Block

#### Modeling a strong executive is key to international coalitions –

#### Comparative evidence – studies prove executive decision power is the largest factor

Ashraf 2011 – PhD from Pitt (April 5, A.S.M. Ali, “THE POLITICS OF COALITION BURDEN-SHARING: THE CASE OF THE WAR IN AFGHANISTAN ” <http://d-scholarship.pitt.edu/7898/1/ThePoliticsOfCoalitionBurden-Sharing.pdf>)

Military coalitions are an enduring feature of international politics. This dissertation examines the international and domestic sources of a country's coalition behavior. It shows that neither the international factors nor the domestic factors alone can explain why countries join and support a coalition. Instead, the interactions of external and internal factors provide better explanations of a country's coalition policy. This means, under conditions of international systemic incentives, variations in a country's domestic political processes can better explain why it joins a coalition and how it contributes to support the coalition. Within the domestic political processes, the chief executive's decision power and the ability of a country's military forces are the most important factors. Academic theorists should further explore the complex decision processes of the chief executives. The focus should be on how the institutionalized versus personalized decision process affect the outcome of a country's burden-sharing behavior. The military analysts should examine the effect of military doctrines and capabilities on coalition operations. The two streams of research should nol proceed in isolation of each other. Instead, there is much room for bridging the gap, as Alexander George says, between the scholarly and policy communities. This dissertation is simply a step toward that bridge.

### 2NC Peacekeeping Scenario

#### Coalitions are key to effective peacekeeping missions

Ramotowski 2003 - Deputy Assistant Secretary for Visa Services at the U.S. Department of State (Edward, “Alliances Still Matter: The Importance of Coalition Warfare in a Unipolar World ” <http://www.dtic.mil/dtic/tr/fulltext/u2/a441741.pdf>)

The need for such assistance is great. The structure of the US Army in particular is such that the vast majority of combat support and civil affairs units is in the reserves rather than the active duty force. Recent deployments in Bosnia, Kosovo, Afghanistan, and now Iraq have imposed a tremendous strain on these units, which have experienced an operations tempo far in excess of what most of their personnel probably anticipated. Some units have been mobilized since shortly after the September 11 attacks, and the total number of reserve and National Guard personnel called up now exceeds 220.000.15 Such intensive use of reserve forces has raised concerns that significant numbers of reservists will choose to leave the service when their current enlistments expire. While no one can say for sure what will happen, it is safe to assume thai the longer these deployments last, the greater will be the hardship experienced by reservists with civilian careers and the larger the exodus from the reserve force and National Guard. This potential decline has serious implications for US force structure. More support and civil affairs units will need to be moved to the active forces to meet the demand for these critical, "high demand, low density" skills. Since the Secretary of Defense is attempting to keep a tight lid on increases in military manpower16, this implies a reduction in the numbers of other active duty forces. It is also a major consideration in the Secretary's recently announced initiative to "civilianize" tens of thousands of jobs now performed by uniformed military personnel — a task fraught with political and managerial hazards.'' There is another way. An effective international coalition can supplement US forces in the all-important tasks of pacification and peacekeeping, providing financial as well as personnel support. The United Nations and other global institutions can contribute valuable assistance as well as a vital imprimatur of international legitimacy. The value of these coalition contributions has been demonstrated in several recent and on-going crises. In Bosnia and Kosovo, for example, US forces performed the majority of the actual combat missions, but were supplemented by substantial foreign contingents in the follow-on peacekeeping missions. Indeed, it is the deployment of additional forces from France and other NATO allies to the Balkans that has permitted the United States to draw down its own forces in the region to meet other pressing commitments.'\* Operation Enduring Freedom offers another example, where US forces played (and continue to play) the leading combat role while allied units perform peacekeeping tasks and attempt to consolidate the shaky authority of the Karzai regime in Kabul.19 The Australian-led and US-supported intervention in East Timor is yet another recent instance where effective allied participation permitted the United States to economize on the use of its own forces. These cases illustrate the benefits of true coalition warfare across a wide spectrum of conflict situations. In all of them a significant share of the mundane, day-to-day peacekeeping mission, as opposed to the "shock and awe" of combat, is being undertaken by US allies. It is unreasonable to expect, however, that US allies will perform these duties in future intervention scenarios if they are not accommodated as part of an effective coalition from the outset.

#### Peacekeeping is key to solving intrastate violence which outweighs – heg can’t address it

Cordesman 2000 - a senior fellow at the Center for Strategic and International Studies (date obtained from most recent cite, Anthony, “The Military in a New Era: Living with Complexity” <http://indianstrategicknowledgeonline.com/web/C18Corde.pdf>)

It is also important to note that the existence of peer threats during World War I, World War II, and the Cold War tended to disguise the true nature of global violence. Figure 1 shows that such violence has always been dominated by intrastate killing, and that the kind of violence that leads to the peacemaking activity that now dominates U.S. and Western military operations is nothing new. There is nothing new about this aspect of global ism or about the U.S. military involvement that follows. Work by Adam Spiegel of the Center for Naval Analyses found that the United States had overtly used military force more than 240 times before the end of the Cold War, excluding covert action and major military assistance efforts not involving an active combat presence. The real total would be well in excess of 300. These actions ranged from demonstrative actions to major wars, and they have very little in common. They are also almost impossible to categorize without getting into endless controversies over their context and definition. The collapse of the Soviet Union and Warsaw Pact have scarcely brought global stability or peace, or an end to such U.S. military involvement. Instead, it has shifted the focus of military operations to peacemaking activities that have become something close to a new paradigm of globalism. UN peacekeeping and peacemaking activity is accelerating, and the United States alone has deployed troops 36 times since 1989— largely in peacekeeping missions. This compares with 10 times during the previous 40 years of the Cold War, including deployments for Korea and Vietnam. This trend has led to increased levels of U.S. military deployments even as U.S. forces have been cut. These engagements, which are summarized in table 3, are likely to remain key priorities for U.S. force planning indefinitely.

#### State failure spreads to international conflict

Geib 09, Legal Advisor at the Legal Division of the International Committee of the Red Cross

(Armed violence in fragile states: Low-intensity conflicts, spillover conflicts, and sporadic law enforcement operations by third parties, www.icrc.org/eng/assets/files/other/irrc-873-geiss.pdf)

In 1992, Security Council Resolution was considered a milestone resolution because, without explicit reference to any cross-border effects, it confirmed a threat to peace in the sense of the UN Charter’s Article 39 solely on grounds of ‘the magnitude of the human tragedy caused by the conflict in Somalia’.17 During the following years, failed and failing states were associated first of all with humanitarian catastrophes and, in view of the risk of local spillover effects, at the most were regarded as a regional problem. This perception has changed, at the latest since September 2001. Today, state failure in and of itself is understood – largely because of the attractiveness of weak states to transnational terror networks and transnational criminal organizations, and irrespective of an acute humanitarian crisis – as a concern of global reach. Afghanistan and Pakistan have become security priorities for the international community; both the US National Security Strategy (2002) report and the European Security Strategy (2003) report have identified state failure as a central threat to international security. In 2009, amid the turmoil of a global financial and economic crisis, the risk of further weakened state structures and occurrences of state failure is clearly as pertinent as ever It remains to be seen whether the Security Council will follow through and one day consider state failure, as such, as a threat to peace in the sense of Article 39, irrespective of an impending humanitarian crisis. The better view may be to regard fragile statehood merely as a catalyst for potential threats to peace rather than as a threat per se. However, past experience has shown that once the potential threats commonly associated with fragile statehood start to materialize, the mutually reinforcing effects of fragile statehood and those various security threats will soon lead to a consolidated and persistent crisis that becomes more and more difficult to counter. Preambular paragraph 11 of Security Council Resolution 1851 notably determines ‘that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region’.23 States may be increasingly inclined to seek avenues for more preventive and less costly action. Categorizing state failure – and more specifically, the absence of government control and the inability to perform basic law enforcement functions – as a threat to peace may pave the way for such a preventive approach.

### AT: Intel Link Turn

#### Aff’s intel sharing doesn’t matter – only the executive branch can gather effective information

#### The executive branch is better at intel gathering

Nzelibe and Yoo 2005 - Assistant Professor of Law, Northwestern University Law School AND Professor of Law, University of California at Berkeley School of Law (Jide and John, “Rational War and Constitutional Design ” 115 Yale L.J. 2512 (2005), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1067&context=facpubs>)

The executive branch also has access to broader forms of information about foreign affairs than those available to Congress. It has access to foreign policy and national security information produced not only by diplomatic channels, but also by clandestine agents and electronic eavesdropping. In terms of receiving and processing that information, the executive branch is not restricted by the collective action problems that plague a multi-member body like Congress.30 Since the bulk of the intelligence community works in the executive branch, that branch also devotes more resources to analyzing intelligence information than does the legislature. While Congress may have its own independent staff that analyzes intelligence and foreign information, this staff is dwarfed by the size of the executive branch's intelligence and foreign policy apparatus.3'

#### Centralization is key to good intel gathering

Nzelibe and Yoo 2005 - Assistant Professor of Law, Northwestern University Law School AND Professor of Law, University of California at Berkeley School of Law (Jide and John, “Rational War and Constitutional Design ” 115 Yale L.J. 2512 (2005), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1067&context=facpubs>)

A critic might argue that having two institutions involved in the decision for war, even if both are reading the same facts, would lead to better judgments. This point has an intuitive appeal, although recent efforts at intelligence reform have rejected it in favor of greater centralization." Further, it ignores the problems with the organization and incentives of legislators, both of which make it unlikely that Congress will be willing to make difficult decisions in foreign affairs and national security. David Epstein and Sharyn O'Halloran, for example, have developed a promising theoretical model to explain when Congress will delegate significant discretion to the other branches, particularly to the executive.15 According to their model, legislators interested in re-election will delegate authority to reduce transaction costs. Epstein and O'Halloran argued that Congress will delegate when the internal inefficiencies of making policy are high (as when committees are outliers to the views of the median member of Congress); when the internal organization of Congress prevents effective bargaining; and when coordination problems prevent the building of coalitions. Congress will also delegate when the President's views are closer to that of the median member of Congress and when uncertainty associated with a certain policy area is high.16

### AT: Credibility = Coalitions

#### Informal agreements are only useful when there’s an underlying alliance

Sherwood-Randall 2006 - Adjunct Senior Fellow for Alliance Relations at the Council on Foreign Relations (October, Elizabeth, “ALLIANCES AND AMERICAN NATIONAL SECURITY” <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub730.pdf>)

It is instructive to contrast an alliance with the current vogue in cooperation: the "coalition of the willing." The two are entirely different organisms with respect to the durability of the commitment and the breadth of cooperation — in an era in which cooperation must go far beyond traditional military definitions. Indeed, the sloppy thinking that has characterized the argument that alliances can be replaced with such impromptu arrangements derives from a failure to recognize one fundamental fact: The capabilities that have been fielded by these groupings (despite their evident shortcomings) have derived almost entirely from underlying alliance commitments that over decades have coordinated national policies and prepared participants to operate together effectively on the battlefield. Recent coalitions of the willing have borrowed from investments made in long-standing alliances without acknowledging their debt. The differences could not be starker between alliances and coalitions of the willing in terms of value added over time. To borrow from the language of interpersonal relations, an alliance is akin to a long marriage, based on an initial lofty commitment that creates a context of comfort, convenience, and the pooling of resources. It also assures reliability because it sets clear standards about partners' behavior. Although it eventually can be burdened by cyclical irritations, accumulated baggage, and the inevitable inclination to push each others' buttons, the price of exit is high. A coalition of the willing is more like a summer romance, an intense but fleeting attachment, without any fundamental commitment, beginning with the best of behavior but deteriorating over time, and not infrequently ending in heartbreak. It confers less legitimacy and does not offer the promise of enduring loyalty, leading to a greater inclination on the part of members to "play the field," and resulting in a relatively insecure and unpredictable security environment. Above all, a coalition of the willing forsakes the opportunity to invest over the long term and reap the consequent rewards. Comparing the two options, Ashton B. Carter has written that coalitions of the willing should be judged as "a desperate fallback, not a preferred vehicle for U.S. leadership."2

#### Official coalitions are key – political ad-hoc alliances fail

Ramotowski 2003 - Deputy Assistant Secretary for Visa Services at the U.S. Department of State (Edward, “Alliances Still Matter: The Importance of Coalition Warfare in a Unipolar World ” <http://www.dtic.mil/dtic/tr/fulltext/u2/a441741.pdf>)

But consigning military alliances and international institutions to the sidelines and duplicating Operation Iraqi Freedom elsewhere in the world would be a serious mistake. There are sound military and strategic reasons to fight with a real coalition of allies, instead of an ad-hoc and largely political one. Warfare should not be treated as a global "pick-up" game where the United States will take allies wherever it can find them, or "play alone" if necessary. To do otherwise runs the risk of overextending and exhausting US forces, and diminishing US influence around the world. Real coalition warfare will impose some constraints on the exercise of US military power, but the benefits outweigh these costs. Both current and historical examples illustrate the truth of Churchill's words on "fighting with allies." The Spectrum of Conflict The United States has no peer when it comes to warfighting ability and sheer military power. Neither the NATO allies, nor the Russians, nor the Chinese can match the capabilities of the US armed forces, especially the ability to project power across the globe. None of these countries could hope to accomplish an operation like Iraqi Freedom or Enduring Freedom in Afghanistan. The Europeans bungled the Bosnian crisis in the mid-nineties under a UN banner. Russia is still mired in a bitter internal war in Chechnya. The Chinese sought to "leach Vietnam a lesson" in 1979 but learned a few things themselves in that short, sharp border conflict. In contrast, it was primarily US airpower that forced Serbia's Slobodan Milosevic to capitulate after a 78-day campaign. US Special Forces played a vital role in rapidly undermining Taliban rule in Afghanistan, and the US military was the key component in both Operations Desert Storm and Iraqi Freedom. There is little that allies could contribute to further enhance the combat power of US military forces. The destruction of an enemy's military forces is only a portion of the entire spectrum of conflict, however. The occupation, pacification, and reconstruction of nations or regions also require a significant commitment of military resources. Peacekeeping and humanitarian operations frequently impose similar demands over long periods of time. It is in these areas that an effective coalition can provide vital support to help achieve US objectives. Without such assistance, the United States faces a much greater risk of global overcommitment and blunting the sharp edge of its combat power.

## Solvency

### Enemy Combatant

#### “Enemy combatant” is a legal status

Matthew Larotonda – 4/20/13, ABC News, Obama Convenes National Security Team, Legal Questions Surface After Bombing Arrest, http://abcnews.go.com/blogs/politics/2013/04/obama-convenes-national-security-team-legal-questions-surface-after-bombing-arrest/

But as the president met with his council today some Republican lawmakers urged the Obama administration to label Tsarnaev an “enemy combatant” — a legal status – after a habeas hearing – that they say could allow his continued confinement for intelligence gathering.

## Warfighting

### Overview

#### Turns terror in shorter term

#### Conceded cred impact

#### Credible warfighting key to deter Russia

Dowd, 11, Senior Fellow of the Fraser Institute

(The Big Chill: Energy Needs Fueling Tensions in the Arctic,” https://www.fraserinstitute.org/research-news/news/display.aspx?id=2147483979)

One reason a military presence will be necessary is the possibility of accidents caused by drilling and shipping. In addition, competition for Arctic resources could lead to confrontation. Adm. James Stavridis, who serves as NATO’s military commander, concedes that the Arctic could become “a zone of conflict” (UPI). To brace for that possibility and thwart Russia’s Arctic fait accompli, the United States, Canada, Denmark and Norway—all NATO members and Arctic nations—should follow the Cold War playbook: build up the assets needed to defend their interests, use those assets to deter aggression, and deal with Moscow from a posture of strength and unity. The challenge is to remain open to cooperation while bracing for worst-case scenarios. After all, Russia is not the Soviet Union. Even as Putin and his puppets make mischief, Moscow is open to making deals. Russia and Norway, for instance, recently resolved a long-running boundary dispute, paving the way for development in 67,000 square-miles of the Arctic. Moreover, the U.S., Russia, Canada, Denmark and Norway have agreed on Arctic search-and-rescue responsibilities (Cummins). In a world of increasingly integrated markets, we know there is much to gain from Arctic cooperation and much to lose from protracted military standoff. But we also know that dealing naively with Moscow carries a heavy cost—and that integration is a two-way street. “Russian leaders today yearn not for integration,” the Brookings Institution’s Robert Kagan concludes, “but for a return to a special Russian greatness.” In short, Russia is more interested in recreating the autarky of some bygone era than in the shared benefits of globalization. Framework for Partnership Dealing with Russia is about power. As Churchill once said of his Russian counterparts, “There is nothing they admire so much as strength, and there is nothing for which they have less respect than for weakness.” When the message is clear—or “hard and consistent,” to use Putin’s language—Russia will take a cooperative posture. When the message is unclear, Russia will take what it can get.

#### Arctic conflict goes nuclear

Wallace 10, Professor Emeritus at the University of British Columbia

(Ridding the Arctic of Nuclear Weapons A Task Long Overdue”, http://www.arcticsecurity.org/docs/arctic-nuclear-report-web.pdf)

The fact is, the Arctic is becoming a zone of increased military competition. Russian President Medvedev has announced the creation of a special military force to defend Arctic claims. Last year Russian General Vladimir Shamanov declared that Russian troops would step up training for Arctic combat, and that Russia’s submarine fleet would increase its “operational radius.” Recently, two Russian attack submarines were spotted off the U.S. east coast for the first time in 15 years. In January 2009, on the eve of Obama’s inauguration, President Bush issued a National Security Presidential Directive on Arctic Regional Policy. It affirmed as a priority the preservation of U.S. military vessel and aircraft mobility and transit throughout the Arctic, including the Northwest Passage, and foresaw greater capabilities to protect U.S. borders in the Arctic. The Bush administration’s disastrous eight years in office, particularly its decision to withdraw from the ABM treaty and deploy missile defence interceptors and a radar station in Eastern Europe, have greatly contributed to the instability we are seeing today, even though the Obama administration has scaled back the planned deployments. The Arctic has figured in this renewed interest in Cold War weapons systems, particularly the upgrading of the Thule Ballistic Missile Early Warning System radar in Northern Greenland for ballistic missile defence. The Canadian government, as well, has put forward new military capabilities to protect Canadian sovereignty claims in the Arctic, including proposed ice-capable ships, a northern military training base and a deep-water port. Earlier this year Denmark released an all-party defence position paper that suggests the country should create a dedicated Arctic military contingent that draws on army, navy and air force assets with shipbased helicopters able to drop troops anywhere. Danish fighter planes would be tasked to patrol Greenlandic airspace. Last year Norway chose to buy 48 Lockheed Martin F-35 fighter jets, partly because of their suitability for Arctic patrols. In March, that country held a major Arctic military practice involving 7,000 soldiers from 13 countries in which a fictional country called Northland seized offshore oil rigs. The manoeuvres prompted a protest from Russia – which objected again in June after Sweden held its largest northern military exercise since the end of the Second World War. About 12,000 troops, 50 aircraft and several warships were involved. Jayantha Dhanapala, President of Pugwash and former UN under-secretary for disarmament affairs, summarized the situation bluntly: “From those in the international peace and security sector, deep concerns are being expressed over the fact that two nuclear weapon states – the United States and the Russian Federation, which together own 95 per cent of the nuclear weapons in the world – converge on the Arctic and have competing claims. These claims, together with those of other allied NATO countries – Canada, Denmark, Iceland, and Norway – could, if unresolved, lead to conflict escalating into the threat or use of nuclear weapons.” Many will no doubt argue that this is excessively alarmist, but no circumstance in which nuclear powers find themselves in military confrontation can be taken lightly. The current geo-political threat level is nebulous and low – for now, according to Rob Huebert of the University of Calgary, “[the] issue is the uncertainty as Arctic states and non-Arctic states begin to recognize the geo-political/economic significance of the Arctic because of climate change.”

### AT: Restrictions Coming

#### Here is the definitive evidence – Congress has neither the ability, incentive, or willingness to check presidential power – polarization makes it a non-starter

Devins 9 – prof @ William & Mary Law School

(Neal, Williamette Law Review 45:395, Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives)

Let me shift focus to the question that lies at the heart of this essay, namely, why party polarization prevents today's Congress from standing up for institutional prerogatives and checking the executive branch. Please note that I am not taking a position on whether President Bush's claims of presidential power were well founded. My concern is simply whether today's Congress is capable of embracing the types of legislative reforms that were enacted by the Watergate-era Congress. My analysis will proceed in two parts. First, I will discuss party polarization and how it has contributed to the resurgence of presidential unilateralism.37 Second, I will explain why the modern-day Congress has neither the will nor the way to check presidential unilateralism. In particular, Congress's uninterest in asserting institutional prerogatives to check the George W. Bush administration highlights dramatic differences between the modem day Congress and the Watergate-era Congress. With regard to party polarization, it is quite clear that the days of the Rockefeller Republican and Southern Democrat are behind us. Measures of ideology reveal that all or nearly all Republicans are more conservative than the most conservative Democrat.38 Correspondingly, there is no meaningful ideological range within either the Democratic or Republican Party. For example, with the demise of Rockefeller Republicans and Southern Democrats, the gap between Northern and Southern members of the two parties had largely disappeared by the 1990s. 39 Indeed, as Figure 1 on the following page makes abundantly clear, party polarization is more extreme today than ever before. This pattern will likely continue. With only one-half of eligible voters voting, there is greater emphasis on mobilizing the more partisan base. More than that, in the House of Representatives, computer-driven redistricting has resulted in the drawing of lines that essentially guarantee that Democrats will win certain districts and Republicans other districts. And while there are some toss-up districts, the vast majority of districts are noncompetitive. What this means is that-in the House-the party primary often controls who will win the election and, as such, candidates have incentive to appeal to the partisans who vote in the primaries (and not the median voter ithe general elections).The consequences of party polarization are profound. Party leaders, especially in the House, have capitalized on the fact that lawmakers are more apt to see themselves as members of a party, not as independent power brokers (willing to cross party lines in order to pursue favored policies). Correspondingly, party leaders are increasingly concerned with "message politics," that is, with using the legislative process to make a symbolic statement to voters and other constituents.43 Rather than allow decentralized committees to define Congress's agenda, Democrats and Republicans alike see the lawmaking process as a way to stand behind a unified party message and, in this way, to distinguish their party from the other. Relatedly, rather than seek middle ground bipartisan solutions, each party looks to gain political advantage from the other. oversight.48 But when the President's opponents took over Congress, oversight became a top priority-with the President's party accusing the majority of using its powers "to harass and intimidate. 49 Finally and, for my purposes, most significant, party polarization contributes to the rise of presidential unilateralism. When the Congress is polarized, members of the President's party are not likely to break ranks and vote to limit presidential initiatives. When government is unified, this means that no bill will get through Congress to limit presidential initiatives. When Congress is divided, members of the President's party will resist any opposition party efforts to repudiate the President. More than that, since divided government is increasingly common (thirty of the past forty years), it is also increasingly difficult for Congress to enact significant legislation. As such, Presidents have even more incentive to act unilaterally-since they cannot get Congress to enact their legislative agenda.5 Consider, for example, Bill Clinton's health care reforms and George W. Bush's faith-based initiatives. In both instances, the President went to Congress seeking legislative authorization for his policy agenda. In both cases, Congress did not bite, leaving it to the President either to abandon his policy initiative or pursue his initiative through unilateral action. Clinton did so by issuing several directives that, among other things, "established a patient's bill of rights for federal employees . . . and set penalties for companies that deny health coverage to the poor and people with pre-existing medical conditions. The Clinton impeachment is a classic example of this phenomenon. Unlike the Nixon impeachment (where members of Congress "rose above partisanship"), "it is harder to identify such actors" in President Clinton's case.44 "The virtual party-line votes in the House and the Senate reinforce public perception of the intense partisanship underlying the proceedings. 45 Party polarization likewise contributes to partisanship in how Congress conducts hearings as well as Congress's willingness to hold the executive accountable through oversight.46 Today's lawmakers do not need hearings to sort out their views. With increasing polarization and appeals to the party base, members are both more ideological and less trusting of the other party. Correspondingly, majority and minority staff rarely work together-instead, each side will call witnesses who back up the predetermined views of the party that has enlisted them.47 When it comes to oversight, party identity is also key. When the President and Congress are from the same party, the majority in Congress will not use oversight to hold the President to task. And when the government is divided, Congress will make oversight a top priority. This pattern held true for both the Clinton and George W. Bush presidencies. When the President's party in Congress was in the majority, the opposition party bitterly complained of the majority's "lack[ing] backbone" and "abdicating" its responsibility for conditions." 51 Bush likewise acted unilaterally, establishing the White House Office of Faith Based Initiatives and ordering an audit of government agencies to make sure that their practices did not improperly discourage or forbid faith-based organizations.5 2 Political polarization, moreover, encourages Presidents to act unilaterally and take greater control of the administrative state. Specifically, with political polarization and divided government shifting the locus of government policymaking away from lawmaking and towards executive and administrative action, Presidents (beginning with Ronald Reagan) have used the Office of Management and Budget to review agency policymaking.53 Likewise, in an effort to ensure that agency policymaking conforms to the President's policy agenda, Presidents (again beginning with Ronald Reagan) have made use of signing statements and pre-regulatory directives.54 Finally, Presidents have used their appointments power to ensure agency loyalty to the President's agenda.55 More than any President before him, George W. Bush pushed the boundaries of presidential unilateralism. "What almost no one disputes," wrote Adam Liptak in The New York Times, "is that a central legacy of the Bush presidency will be its distinctively muscular vision of executive power." 56 The architect of this campaign was Vice President Dick Cheney. 7 A witness to Watergate and its aftermath, Cheney helped staff the "White House with conservative veterans of the 1970s and 1980s who believed that" the President should push his agenda "without having to compromise" and that Watergate-era reforms had wrongly "emasculated the presidency."'5 8 More to the point, just as the Nixon administration pushed the boundaries of executive power, the Bush administration extended the efforts of Ronald Reagan and Bill Clinton to assert broad inherent power over national security, to make use of executive orders to unilaterally advance policy objectives, and to centralize presidential control of the administrative state. To cite a few well known examples: the assertion of the power to indefinitely detain so-called enemy combatants, the establishment of a military tribunal system without formal congressional approval, the warrantless wiretapping of U.S. citizens, the robust use of executive privilege, and the expansive use of presidential signing statements to direct agency policymaking-including agency non-enforcement of laws that the President deems unconstitutional. No doubt, just as Nixon's strong view of the presidency did not sit well with the Supreme Court or the American people, the Bush White House has also suffered defeats both before the Supreme Court and the court of public opinion. 59 Unlike the Watergate era, however, the Bush-era Congress did not enact legislation limiting the reach of presidential unilateralism. Political polarization, for reasons already detailed, is an important part of this story. But it is not the only part of the story. Not only did Congress lack a way to restrict presidential power, Congress also lacked the will to check the President. Members, as I will soon explain, saw no political advantage in defending Congress's institutional turf. Before explaining why lawmakers lacked the incentives to rein in the President, a bit of a recap. At the start of this essay, I quoted Justices Jackson and Ginsburg to make-what I consider-a fairly obvious point. Congress has the power to check the President. But if it does not use that power, the President has incentive to fill the void. That does not mean that the President can do whatever he wants. As was true in the war on terror cases, the Supreme Court can place some limits on presidential power. But without a Congress willing to assert its institutional prerogatives, defeats in court are not likely to stick to the President. Richard Nixon lost several significant cases in court. But that is not the reason the presidency was hampered after Nixon left office. The reason was tied to the Watergate-era Congress's willingness to assert itself through numerous legislative enactments and through beefed up oversight. Remember: Dick Cheney's complaint about an imperiled presidency had nothing to do with Supreme Court decision-making and everything to do with congressionally imposed constraints that cut against presidential power. Today, Congress has neither the will nor the way to pursue the type of bipartisan reforms that characterized the Watergate-era Congress. Democrats and Republicans in Congress are more interested in strengthening their position vis-a-vis the other party than in strengthening Congress as an institution. Members of the President's party are loyal to their party, not Congress as an institution, and therefore, will not join forces with the opposition party to assert Congress's institutional prerogatives. Equally telling, members of Congress see little personal gain in advancing a legislative agenda that shifts power from the President to Congress. Unlike during the Watergate era, the American people are not seeking a diminution of presidential power, and especially not on national security matters. Disapproval of President Bush was tied to how he exercised his authority-not to the amount of power the President possesses. Indeed, today's Democratically controlled Congress supported President Bush on national security measures notwithstanding the President's low job approval rating and Democratic complaints about administration overreaching. In July 2008, for example, Democrats in Congress-rather than open themselves up to election-year charges of being soft on national security-revamped an important Watergate-era statute, the Foreign Intelligence Surveillance Act. Bowing to Bush administration demands, Democrats and Republicans joined together to immunize phone companies from liability when wiretapping the international calls of U.S. citizens. The practices of the current Congress are to be expected. Members of Congress hardly ever gain personal political advantage by embracing structural checks of presidential power. Just as Congress has incentive to delegate to the executive (rather than absorb the costs of making a decision that disfavors identifiable participants in the political process), Congress is more interested in responding to executive branch initiatives than in foreclosing particular types of initiatives.63 Sometimes, as was true with the 1974 budget act, structural reforms serve the personal interests of members of Congress. In that case, members had a personal political interest to protect their authority to enact budget bills that reward constituents. Most of the time, however, Congress would rather respond to presidential initiatives than place restrictions on presidential authority-restrictions that shift the locus of decision making power to Congress (so that Congress bears the cost of decision). For this very reason, lawmakers rarely advance their personal political interests by structurally constraining the President in ways that shift the decision back to Congress. Indeed, the War Powers Resolution while ostensibly placing limits on the President-gave the President significant authority to launch unilateral military strikes. Congress's assent was not required until 60 days after the President's initiative (and only if the President triggered the clock by making a formal report to Congress).64 As such, Congress-while insisting it had a role to play-was content to play a reactive role. Long story short: Not only does political polarization stand as a roadblock to the modern Congress standing up for its institutional prerogatives, but lawmakers typically do not gain personal political advantage by placing structural limits on presidential power. On Tuesday November 4, 2008, Barack Obama was elected President. While the Obama administration will undoubtedly pursue a different set of policy initiatives than did the Bush administration, it is to be expected that President Obama will issue executive orders, pre-enforcement directives, review proposed agency regulations, and otherwise take unilateral action to advance his policy initiatives. And it is also to be expected that Congress will not check such presidential unilateralism. Today's polarized Congress lacks both the will and the way to check the presidency. 65 For those who embrace a constitutional design in which (as James Madison put it) "ambition must be made to counteract ambition,"66 today's system of checks and balances is an abject failure.

### \*\*AT: Credibility/Legitimacy

#### The only question is capability – no chance for structural decline of conflict because of the speed and complexity of threats

Cordesman 2000 - a senior fellow at the Center for Strategic and International Studies (date obtained from most recent cite, Anthony, “The Military in a New Era: Living with Complexity” <http://indianstrategicknowledgeonline.com/web/C18Corde.pdf>)

Put simply, there is no meaningful prospect that the United States will face less need to plan for major regional wars during the next quarter century, or that any U.S. military service will face less need for global engagement, than it does today. The same is true of peacemaking activity, no matter what strategies and doctrines U.S. political and military leaders may appear to agree on at any given time. Moreover, the very complexity of the national and regional problems in the modern world means that crises will emerge with only ambiguous strategic warning, that most U.S. scenario analysis and contingency planning will continue to have only limited success, and that the level of U.S. involvement will be contingency-driven. Strategy and doctrine that attempt to deny these realities have no chance of success and will almost certainly lead to planning that fails to properly prepare U.S. military forces for the future.7 It should also be clear that the risk of underestimating the true nature of the complexity of the trends that shape the modern world is particularly severe in the case of military forces. Conflicts and crises almost inevitably are random walks through history. They involve the cases in which the system does not work, and the trends that are perceived as dominant do not apply. This is true even in the case of the use of force to prevent conflict or when the United States and its allies attempt two politically correct oxymorons: crisis management and conflict resolution. The true nature of globalism means that U.S. military action will remain event-driven. Neither the Clinton nor Weinberger doctrines will have a meaningful impact on this fact. Vacuous generalizations about treating the world as a morality play are neither a doctrine nor a policy. Statements about committing U.S. forces only to contingencies that involve vital strategic interests are strategically naive to the point of being ridiculous. The United States will be unable to wait to determine whether a given crisis affects vital national interests.

#### Legitimacy’s inevitable and not key to heg

Brooks and Wohlforth, 9 (Stephen Brooks and William Wohlforth, both are professors of Government at Dartmouth, “Reshaping the world order: how Washington should reform international institutions,” Foreign Affairs, March-April)

FOR ANALYSTS such as Zbigniew Brzezinski and Henry Kissinger, the key reason for skepticism about the United States' ability to spearhead global institutional change is not a lack of power but a lack of legitimacy. Other states may simply refuse to follow a leader whose legitimacy has been squandered under the Bush administration; in this view, the legitimacy to lead is a fixed resource that can be obtained only under special circumstances. The political scientist G.John Ikenberry argues in After Victory that states have been well positioned to reshape the institutional order only after emerging victorious from some titanic struggle, such as the French Revolution, the Napoleonic Wars, or World War I or II. For the neoconservative Robert Kagan, the legitimacy to lead came naturally to the United States during the Cold War, when it was providing the signal service of balancing the Soviet Union. The implication is that today, in the absence of such salient sources of legitimacy, the wellsprings of support for U.S. leadership have dried up for good. But this view is mistaken. For one thing, it overstates how accepted U.S. leadership was during the Cold War: anyone who recalls the Euromissile crisis of the 1980s, for example, will recognize that mass opposition to U.S. policy (in that case, over stationing intermediaterange nuclear missiles in Europe) is not a recent phenomenon. For another, it understates how dynamic and malleable legitimacy is. Legitimacy is based on the belief that an action, an actor, or a political order is proper, acceptable, or natural. An action - such as the Vietnam War or the invasion of Iraq - may come to be seen as illegitimate without sparking an irreversible crisis of legitimacy for the actor or the order. When the actor concerned has disproportionately more material resources than other states, the sources of its legitimacy can be refreshed repeatedly. After all, this is hardly the first time Americans have worried about a crisis of legitimacy. Tides of skepticism concerning U.S. leadership arguably rose as high or higher after the fall of Saigon in 1975 and during Ronald Reagan's first term, when he called the Soviet Union an "evil empire." Even George W. Bush, a globally unpopular U.S. president with deeply controversial policies,oversaw a marked improvement in relations with France, Germany, and India in recent years - even before the elections of Chancellor Angela Merkel in Germany and President Nicolas Sarkozy in France. Of course, the ability of the United States to weather such crises of legitimacy in the past hardly guarantees that it can lead the system in the future. But there are reasons for optimism. Some of the apparent damage to U.S. legitimacy might merely be the result of the Bush administration's approach to diplomacy and international institutions. Key underlying conditions remain particularly favorable for sustaining and even enhancing U.S. legitimacy in the years ahead. The United States continues to have a far larger share of the human and material resources for shaping global perceptions than any other state, as well as the unrivaled wherewithal to produce public goods that reinforce the benefits of its global role. No other state has any claim to leadership commensurate with Washington's. And largely because of the power position the United States still occupies, there is no prospect of a counterbalancing coalition emerging anytime soon to challenge it. In the end, the legitimacy of a system's leader hinges on whether the system's members see the leader as acceptable or at least preferable to realistic alternatives. Legitimacy is not necessarily about normative approval: one may dislike the United States but think its leadership is natural under the circumstances or the best that can be expected. Moreover, history provides abundant evidence that past leading states - such as Spain, France, and the United Kingdom - were able to revise the international institutions of their day without the special circumstances Ikenberry and Kagan cite. Spainfashioned both normative and positive laws to legitimize its conquest of indigenous Americans in the early seventeenth century; France instituted modern concepts of state borders to meet its needs as Europe's preeminent land power in the eighteenth century; and the United Kingdom fostered rules on piracy, neutral shipping, and colonialism to suit its interests as a developing maritime empire in the nineteenth century. As Wilhelm Grewe documents in his magisterial The Epochs of International Law, these states accomplished such feats partly through the unsubtle use of power: bribes, coercion, and the allure oflucrative long-term cooperation. Less obvious but often more important, the bargaining hands of the leading states were often strengthened by the general perception that they could pursue their interests in even less palatable ways - notably, through the naked use of force. Invariably, too, leading states have had the power to set the international agenda, indirectly affecting the development of new rules by defining the problems they were developed to address. Given its naval primacy and global trading interests, the United Kingdom was able to propel the slave trade to the forefront of the world's agenda for several decades after it had itself abolished slavery at home, in 1833. The bottom line is that the UnitedStates today has the necessary legitimacy to shepherd reform of the international system.

### 2NC Congress Spillover Block (With XO)

#### 2.) Precedential effect – the plan requires reframing constitutional separations of power

Heder 2010 - magna cum laude , J. Reuben Clark Law School, Brigham Young University (Adam, J.D., “THE POWER TO END WAR: THE EXTENT AND LIMITS OF CONGRESSIONAL POWER,” St. Mary’s Law Journal Vol. 41 No. 3, http://www.stmaryslawjournal.org/pdfs/Hederreadytogo.pdf)

This constitutional silence invokes Justice Rehnquist’s oftquoted language from the landmark “political question” case, Goldwater v. Carter . 121 In Goldwater , a group of senators challenged President Carter’s termination, without Senate approval, of the United States ’ Mutual Defense Treaty with Taiwan. 122 A plurality of the Court held, 123 in an opinion authored by Justice Rehnquist, that this was a nonjusticiable political question. 124 He wrote: “In light of the absence of any constitutional provision governing the termination of a treaty, . . . the instant case in my view also ‘must surely be controlled by political standards.’” 125 Notably, Justice Rehnquist relied on the fact that there was no constitutional provision on point. Likewise, there is no constitutional provision on whether Congress has the legislative power to limit, end, or otherwise redefine the scope of a war. Though Justice Powell argues in Goldwater that the Treaty Clause and Article VI of the Constitution “add support to the view that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone,” 126 the same cannot be said about Congress’s legislative authority to terminate or limit a war in a way that goes beyond its explicitly enumerated powers. There are no such similar provisions that would suggest Congress may decline to exercise its appropriation power but nonetheless legally order the President to cease all military operations. Thus, the case for deference to the political branches on this issue is even greater than it was in the Goldwater context. Finally, the Constitution does not imply any additional powers for Congress to end, limit, or redefine a war. The textual and historical evidence suggests the Framers purposefully declined to grant Congress such powers. And as this Article argues, granting Congress this power would be inconsistent with the general war powers structure of the Constitution. Such a reading of the Constitution would unnecessarily empower Congress and tilt the scales heavily in its favor. More over, it would strip the President of his Commander in Chief authority to direct the movement of troops at a time when the Executive’s expertise is needed. 127 And fears that the President will grow too powerful are unfounded, given the reasons noted above. 128 In short, the Constitution does not impliedly afford Congress any authority to prematurely terminate a war above what it explicitly grants. 129 Declaring these issues nonjusticiable political questions would be the most practical means of balancing the textual and historical demands, the structural demands, and the practical demands that complex modern warfare brings . Adjudicating these matters would only lead the courts to engage in impermissible line drawing — lines that would both confus e the issue and add layers to the text of the Constitution in an area where the Framers themselves declined to give such guidance.

#### 3.) Perception of divided government – causes enemies to be emboldened

Posner and Vermeule, 10 - \*professor of law at the University of Chicago AND \*\*professor of law at Harvard (Eric and Adrian, The Executive Unbound, p. 60)

In this way, measures urged by the executive to cope with a crisis of unclear magnitude acquired a kind of self-created momentum. Rejection of those measures would themselves create a political crisis that might, in turn, reduce confidence and thus trigger or exacerbate the underlying financial crisis. A similar process occurred in the debates over the AUMF and the Patriot Act, where proponents of the bills urged that their rejection would send terrorist groups a devastating signal about American political willpower and unity, thereby encouraging more attacks. These political dynamics, in short, create a self-fulfilling crisis of authority that puts legislative institutions under tremendous pressure to accede to executive demands, at least where a crisis is even plausibly alleged. Critics of executive power contend that the executive exploits its focal role during crises in order to bully and manipulate Congress, defeating Madisonian deliberation when it is most needed. On an alternative account, the legislature rationally submits to executive leadership because a crisis can be addressed only by a leader. Enemies are emboldened by institutional conflict or a divided government; financial markets are spooked by it. A government riven by internal conflict will produce policy that varies as political coalitions rise and fall. Inconsistent policies can be exploited by enemies, and they generate uncertainty at a time that financial markets are especially sensitive to agents’ predictions of future government action. It is a peculiar feature of the 2008 financial crises that a damaged president could not fulfill the necessary leadership role, but that role quickly devolved to the Treasury secretary and Fed chair who, acting in tandem, did not once express disagreement publicly.

# 1NR

### Extension #1: Undermines the Rule of Law

#### a) Relaxed evidentiary rules

Vladeck 09, Law Prof at American

(Stephen, THE CASE AGAINST NATIONAL SECURITY COURTS, willamette.edu/wucl/resources/journals/review/pdf/Volume%2045/WLR45-3\_Vladeck.pdf)

A national security court, in contrast, would be marked by relaxed evidentiary rules, including the ability to introduce hearsay testimony and perhaps even evidence that is produced by governmental coercion. As importantly, the government would also be able, under most proposals, to use classified information as evidence without fully disclosing such to the defendant. Otherwise, as McCarthy and Velshi describe in their proposal: [P]eople who commit mass murder, who face the death penalty or life imprisonment, and who are devoted members of a movement whose animating purpose is to damage the United States, are certain to be relatively unconcerned about violating court orders (or, for that matter, about being hauled into court at all). Our congenial rules of access to attorneys, paralegals, investigators and visitors make it a very simple matter for accused terrorists to transmit what they learn in discovery to their confederates—and we know that they do so.

#### b) No jury trial or adequate defense counsel

Rittgers 09, Attorney, decorated former Army Special Forces officer, and legal policy analyst at Cato

(David, National Security Court: Reinventing the Wheel, Poorly, www.cato.org/publications/commentary/national-security-court-reinventing-wheel-poorly)

In Sulmasy’s proposed “national security court,” suspected terrorists would be tried in front of a panel of three federal judges, violating their Sixth Amendment right to a jury trial. Defendants would be detained, tried, and imprisoned on military bases, a practice out of step with a federal statutory bar to the military’s direct participation in domestic law enforcement. The Bush administration kept its military commissions more palatable for the public by keeping American citizens and aliens detained in the United States out of Guantanamo. Sulmasy proposes that we bring Gitmo home and open its doors to citizens and non-citizens alike. Sulmasy does endeavor to solve one perceived problem with the military commissions that military lawyers have expressed to me: few courts-martial deal with contested felony charges, so most military lawyers have little courtroom experience. We are now entrusting them with the biggest trials of our time. Sulmasy proposes to fix this by using veteran federal prosecutors instead. The catch? The defense counsel would be those same military lawyers he says are not up to the task of prosecuting the case, unless the defendant could afford his own attorney with a high-level security clearance. Sulmasy also reduces the core protections of defendants by barring the use of the exclusionary rule, the doctrine that bars evidence collected illegally or otherwise in violation of the law. Without the prospect of excluding evidence collected in ways barred by federal courts, there is no incentive for law enforcement officers to follow any rules. Looking for terrorists? No warrant? No problem.

#### c) Judge selection

Cole 08, Professor of Law at Georgetown

(David, A CRITIQUE OF “NATIONAL SECURITY COURTS, www.constitutionproject.org/pdf/Critique\_of\_the\_National\_Security\_Courts.pdf)

In addition, these proposals are alarmingly short on details with respect to the selection of judges for these national security courts. Although there is a history of creating specialized federal courts to handle particular substantive areas of the law (e.g., taxation; patents), unlike tax and patent law, there is simply no highly specialized expertise that would form relevant selection criteria for the judges. Establishing a specialized court solely for prosecutions of alleged terrorists might also create a highly politicized process for nominating and confirming the judges, focusing solely on whether the nominee had sufficient “tough on terrorism” credentials — hardly a criterion that lends itself to the appearance of fairness and impartiality.

### Extension #2: Spillover

#### And they concede spill over --- our ev cites

#### NSC’s constitutional deprivations will spillover to other areas because of definitional ambiguity

Rittgers 09, Attorney, decorated former Army Special Forces officer, and legal policy analyst at Cato

(David, National Security Court: Reinventing the Wheel, Poorly, www.cato.org/publications/commentary/national-security-court-reinventing-wheel-poorly)

Sulmasy attempts to allay fears of lost civil liberties by claiming that this court’s jurisdiction is limited to “international terrorists” such as al Qaeda and their ilk. In this, he falls into the trap that Benjamin Wittes, another proponent of national security courts, warns us of: “a slippery slope in which what they approve for Khalid Sheikh Mohammed today the government will use for someone like Jose Padilla tomorrow, a minor drug offender next week, and a political dissenter five years from now.” Sulmasy makes the leap from Khalid Sheikh Mohammed (a non-citizen terrorist organizer) to Padilla (a citizen terrorist operative) immediately, leaving the rest of the downhill slide to broader jurisdiction to an aggressive prosecutor’s argument or a subsequent change in the court’s authorizing statute. After all, with an increasingly connected world, the definition of “international terrorist” is an elastic term. Would someone have to have orders from abroad to be “international”? If so, then Jose Padilla, alleged “dirty bomb” plotter, certainly qualifies. What about two American citizens who traveled overseas to help suicide bombers planning to infiltrate Iraq and attack American troops? What about a native-born American citizen who met with like-minded extremists in Canada and sent surveillance videos of potential targets to a radical in London? Federal courts dealt with all of the above. No special court needed.

## 2NC Discriminatory

#### It’s discriminatory --- that destroys legitimacy

Shulman 09, Law Prof at Pace

(Mark, NATIONAL SECURITY COURTS: STAR CHAMBER OR SPECIALIZED JUSTICE?, ssrn.com/abstract=1328427)

National security or terrorist courts in other countries offer troubling lessons, mostly because of their implications for the respect for civil liberties generally—not only of the accused, but of the wider population. Existing proposals to create such a court in the United States inadequately account for this risk, or explain how it would be minimized or mitigated. Emergency systems in other countries have invariably reduced civil liberties for the general population. It is understandable that governments wish to be seen to be responding to the urgent threats posed by those who use violence to affect policy. However, it is important to recognize that these emergency systems in such diverse jurisdictions as Great Britain, Malaysia, and South Africa have diminished freedoms for society as a whole. This principle lesson derived of foreign experiences is not particularly surprising. Examples abound of domestic emergency measures taken to promote national security that have undermined the base norm presumption of innocence that lies at the center of America’s constitutional order. The largescale internment of Japanese-Americans during the Second World War provides a notorious example. In that case, the federal courts deferred to the Executive’s misguided policy and thereby created a new and heinous rule allowing for internment, displacement, and forced sales of property based on no more than the notion that citizens of a given race might seek to harm the United States. Although the United States has officially apologized for this shameful episode, Korematsu has not been overruled in the two generations since the Supreme Court handed down its 6-3 decision. The Korematsu precedent may have given some legal cover for the large scale detention of Americans of Moslem, Arab, or Middle-Eastern background in the months following September 11.62 These discriminatory policies undermine the soft power America otherwise derives from its role as a leader in promoting respect for human rights. In other countries, emergency powers have had a similarly deleterious effect on civil liberties. In the United Kingdom, in order to address violence originating in troubled Northern Ireland, the government revoked the right to trial by jury for criminal offenses; denied access to legal counsel; held prisoners without charge; and allowed coercive interrogation techniques and admitted confessions elicited because of them, among other measures. In Malaysia, the government transferred judges from their positions to avoid judicial review of its decisions or release of suspects arrested without even probable cause—in violation of well-established constitutional law. In apartheid South Africa, judicial review was revoked for interrogation purposes. These extra-judicial detentions lasted weeks. In addition to radical nationalists, they swept up completely harmless nuns and pastors urging more widespread equality and access to education. Three cases, of course, do not constitute a comprehensive survey or prove the point. Even the Akin Gump survey of 123 domestic cases can lead only to limited conclusions. However, these three examples do offer insights into the threats to liberty posed by special purpose terrorism courts. IV. QUO VADIS? Would a system of national security courts offer the kind of specialized justice necessary for addressing the threat posed by radical Islamists or others who seek to use terrorist means? Or, in a tragic parallel to the Stuart kings’ infamous Star Chamber, would these courts ultimately undermine the nation’s security by degrading both its legal system and the soft power derived from its cherished reputation as a model for justice? On the eve of the inauguration of Barack Obama, these critical questions remain unresolved in the court of “public opinion which alone can here protect the values of democratic government.”

#### NSC’s will be viewed as unfair – undermines soft power

Shulman 09, Law Prof at Pace

(Mark, NATIONAL SECURITY COURTS: STAR CHAMBER OR SPECIALIZED JUSTICE?, ssrn.com/abstract=1328427)

The seventh and most complicated set of issues arises out of the complex relationship between the Bush Administration’s detention policies and actual national security. The Bush Administration consistently claimed that its policies were correctly designed and properly implemented in order to ensure security. Those detained were the worst of the worst, and their detention was both essential and effective. Conditions were appropriate. Methods of interrogation were both lawful and necessary. Any exceptions were aberrations attributable to a few bad apples. On the other hand, critics argued that the detentions and interrogations were in great part unlawful and that they undermined national security by inflaming tensions and alienating the United States in the world court of public opinion. Most experts who are not currently serving in the Bush Administration conclude that torture does not produce useful information. And while the federal courts have resolved many of the legal questions (at least for now), the security question may ultimately prove impossible to resolve. Justice Stewart’s view that public opinion plays a critical role in assessing the legality of national security measures can be extended to drawing conclusions about their effectiveness. Indeed, their effectiveness reinforces assessments of their legitimacy. However, Justice Stewart’s concurrence addressed the relatively specific question of prior censorship and writing in 1971; he could not reasonably take into account only the opinion of the American public. Today, the United States depends on global good will that in turn rests on its reputation for fairness. To the extent the United States is viewed as responsible for torture and other serious insults inflicted at Abu Ghraib and Guantánamo, it is alienating people and possibly fostering terrorism. If this political/strategic conclusion is correct, then the question of whether to create national security courts should be approached with great caution. If they appear unfair—ad hoc, less lawful, discriminatory, or hypocritical—they may diminish America’s soft power.

## Kiyemba

### AT: Public

No reason the public is key

**Judicial restrictions are effective — mere possibility constrains the executive and mobilizes the public — majoritarian politics fail**

**Cole 2011** - Professor, Georgetown University Law Center (Winter, David, “WHERE LIBERTY LIES: CIVIL SOCIETY AND INDIVIDUAL RIGHTS AFTER 9/11,” 57 Wayne L. Rev. 1203, Lexis)

D. The Role of Politics **The force of ordinary electoral politics also cannot account for the shift in U.S. counterterrorism policy. None of the Bush administration's** initial **initiatives sparked majoritarian opposition**. To the contrary, [\*1244] President **Bush**, who had very low approval ratings shortly before 9/11, **shot up in popularity when he declared the "war on terror,"** and was reelected in 2004, in large measure on his promise to deliver security. n235 **Apart from opposition to the war in Iraq, there was little widespread popular pressure on President Bush to rein in his security initiatives**. Despite this evidence, Eric Posner and Adrian Vermeule have argued that in the modern era, political checks are all there are when it comes to restraining executive power. n236 They maintain that Congress, the courts, and the law itself cannot effectively constrain the executive, especially in emergencies, but that this need not concern us because the executive is adequately limited by political forces. **At first blush, the past decade might appear to vindicate Posner and Vermeule's views**, as political forces, broadly speaking, seem to have been at least as effective at checking the President as were Congress or the judiciary. n237 But **there is in fact little evidence that electoral politics or majoritarian sentiment played much, if any, role in persuading President Bush to ratchet back his security initiatives.** While **formal judicial and legislative checks cannot tell the whole story, the alternative account is not "politics**" as Posner and Vermeule define and describe it, **but a much more complex interplay of civil society, law, politics, and culture:** what I have called "civil society constitutionalism." [\*1245] In my view, **Posner and Vermeule** simultaneously **underestimate the constraining force of law and overestimate the influence of political limits** on executive overreaching. Sounding like Critical Legal Studies adherents, **they sweepingly claim that law is so indeterminate and manipulable as to constitute only a "façade of lawfulness."** n242 But in assessing law's effect, they look almost exclusively to formal indicia--statutes and court decisions. n243 **That approach disregards the role that law plays without coming to a head in a judicial decision** or legislative act. As the post-9/11 period illustrates, **when law is reinforced and defended by civil society institutions, it can have a disciplining function long before cases reach final judgment,** and even when no case is ever filed, a reality to which anyone who has worked in the executive branch will attest. n244 **Executive officials generally cannot know in advance whether their actions will attract the attention of civil society watchdogs, or lead to court review.** **They** often **cannot know whether such oversight**--whether by a court, a legislative committee, or a nongovernmental organization--**will be strict or deferential. As long as there is some risk of such oversight, the resultant uncertainty itself is likely to have a disciplining effect on the choices they make**. There are, in short, plenty of reasons why executive lawyers generally take legal limits seriously. They take an oath and are acculturated to do so. They know that claims of illegality can undermine their objectives. And they cannot predict when a legal claim will be advanced against them. Similarly, in focusing exclusively on statutes and their enforcement by courts, Posner and Vermeule disregard the considerable checking function that Congress's legal oversight role plays through means short of formal statutes, such as by holding hearings, launching investigations, requesting information about doubtful executive practices, or restricting federal expenditures. **The effectiveness of these checks, moreover, will often turn on the strength of civil society**. **If there are significant watchdogs in the nongovernmental sector and/or the media focused on executive actions, ready to bring allegedly illegal conduct to public attention, the law will have substantial deterrent effect, with or without actual court decisions.** While they are overly skeptical about law, **Posner and Vermeule are unrealistically romantic about the constraining force of majoritarian politics. The political checks they identify consist solely of the fact that Presidents must worry about election returns, and must cultivate** [\*1246] credibility and **trust** among the electorate. n245 There are several reasons to doubt that these political realities are sufficient to guard against executive overreaching. First, and most fundamentally, **while the democratic process is well designed to protect the majority's rights** and interests, **it is poorly designed to protect the rights of minorities, and not designed at all to protect the rights of foreign nationals**, who have no say in the political process. n246 **In times of crisis, the executive nearly always selectively sacrifices the rights of foreign nationals**, often defending its actions by claiming that "they" do not deserve the same rights that "we" do. n247 To say the law is superfluous because we have elections is to relegate foreign nationals, and minorities generally, to largely unchecked abuse. Second, **the ability of the political process to police the executive is hampered by secrecy. Much of what the executive does, especially in times of crisis, is secret, and even when some aspects of executive action are public, its justifications often rest on grounds that are** assertedly **secret**. n248 Courts and Congress have at least some ability to pierce that veil and to insist on accountability. Absent legal rights, such as those created by the Freedom of Information Act, the general public has virtually no ability to do so. n249 Third, **the electoral process is a blunt-edged sword**. Presidential **elections occur only once every four years, and congressional elections every two** years. **Congressional elections** will often **involve an unpredictable mix of local and national matters, and there is little reason to believe they will concentrate on executive overreaching**. **Presidential elections** also inevitably **encompass a broad range of issues, most of which will have nothing to do with security** and liberty. **Elections are** therefore **unlikely to be effective at addressing specific abuses of power**. Voters' **concerns about abstract institutional issues s**uch as executive power may **clash with their interests on the substantive merits of particular issues, such as whether to use military force in support of Libyan rebels**. There is no guarantee that citizens will separate these issues in their minds, and no reason to believe that if they do so, they will favor abstract institutional concerns over specific policy preferences at the ballot box. [\*1247] Fourth, **the political process is notoriously focused on the short term**, while **constitutional rights and separation of powers generally serve long-term value**s. n250 **It was precisely because ordinary politics tend to be shortsighted that the framers adopted a constitutional democracy**. The Constitution identifies those values that society understands as important to preserve for the long term, but knows it will be tempted to sacrifice in the short term. n251 **If ordinary politics were sufficient to protect such values, we would not need a constitution in the first place**. Thus, there is little evidence in fact that majoritarian politics played a significant checking role in the aftermath of 9/11, or that such politics would generally be a sufficient checking force in times of crisis. And more generally, **there is little reason to believe that political checks will be sufficient to restrain presidential abuse**. The story is infinitely more complicated. As I have sought to illustrate here, in the aftermath of 9/11, the interplay of law, politics, and culture, framed and prompted by civil society organizations, was critical to rendering effective constitutional and international legal checks.

#### Yoshino is not about detention also just says Judicial action works best when with Congress, not a reason its insufficient on its own

**Also this only applies to issues that the vast majority of the public opposes --- not the aff**

**Yoshino 11** (Kenji, a professor at N.Y.U. School of Law, The Military in the Constitution, June 28, <http://www.nytimes.com/roomfordebate/2010/10/13/the-future-of-dont-ask-dont-tell/the-military-in-the-constitution>) ap

**I have a** general and a specific **reason for favoring legislative action over judicial action** here. The general reason is that **any time** over 70 percent of **the nation opposes a policy,** as is the case with "don't ask, don't tell," **that opposition is** presumptively **best expressed through** our **elected representatives**. **Such** action **gives** more **legitimacy to the** ultimate **decision because it** more clearly **hews to the democratic process.**¶ **The specific reason for preferring** a **legislative repeal** of the policy **is** that **the Constitution** explicitly **gives the legislative and executive branches control over the military.** Article I of our Constitution grants Congress the power to regulate the military, while Article II makes the president the commander in chief of the armed forces.¶ Historically, **these grants of authority** have **led** the **courts to accord** extreme **deference to the elected branches of government with respect to military issues**. In the 1981 case of Rostker v. Goldberg, the Supreme Court rejected a sex-discrimination challenge to the male-only draft by observing that "**judicial deference . . . is at its apogee when legislative action under** the **congressional authority to** raise and **support armies** and make rules and regulations for their governance **is challenged**."

### AT: Due Process

#### Only judicial clarification of a meaningful right to habeas solves

Knowles 9 [Spring, 2009, Robert Knowles is a Acting Assistant Professor, New York University School of Law, “American Hegemony and the Foreign Affairs Constitution”, ARIZONA STATE LAW JOURNAL, 41 Ariz. St. L.J. 87]

The Bush Administration's detainee policy made clear that - due to America's power - the content of enforceable international law applicable to the detainees would largely depend on interpretation by the U.S. government. Under the classic realist paradigm, international law is less susceptible to judicial comprehension because it cannot be taken at face value; its actual, enforceable meaning depends on ever-shifting political dynamics and complex relationships among great powers. But in a hegemonic system, while enforceable international legal norms may still be political, their content is heavily influenced by the politics of one nation - the United States. n412 As an institution of that same government, the courts are well-positioned to understand and interpret international law that has been incorporated into U.S. law. Because the courts have the capacity to track international legal norms, there was no longer a justification for exceptional deference to the Administration's interpretation of the Geneva Conventions as applied to the detainees. Professors Posner and Sunstein have argued for exceptional deference on the ground that, unless the executive is the voice of the nation in foreign affairs, other nations will not know whom to hold accountable for foreign policy decisions. n413 But the Guantanamo litigation demonstrated that American hegemony has altered this classic assumption as well. The [\*154] transparent and accessible nature of the U.S. government made it possible for other nations to be informed about the detainee policy and, conceivably, to have a role in changing it. The Kuwaiti government hired American attorneys to represent their citizens held at Guantanamo. n414 In the enemy combatant litigation, the government was forced to better articulate its detainee policies, justify the detention of each detainee, and permit attorney visits with the detainees. n415 Other nations learned about the treatment of their citizens through the information obtained by attorneys. n416 Although the political climate in the U.S. did not enable other nations to have an effect on detainee policy directly - and Congress, in fact, acted twice to limit detainees' access to the courts n417 - this was an exceptional situation. Foreign governments routinely lobby Congress for favorable foreign affairs legislation, and are more successful with less politically-charged issues. n418 Even "rogue states" such as Myanmar have their lobbyists in Washington. n419 In addition, foreign governments facing unfavorable court decisions can and do appeal or seek reversal through political channels. n420 The accessibility and openness of the U.S. government is not a scandal or weakness; instead, it strengthens American hegemony by giving other nations a voice in policy, drawing them into deeper relationships that serve America's strategic interests. n421 In the Guantanamo litigation, the courts served as an important accountability mechanism when the political branches were relatively unaccountable to the interests of other nations. 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

#### These rulings make habeas useless—this abdicates the Court’s key role

Milko 12 [Winter, 2012, Jennifer L. Milko, “Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, 50 Duq. L. Rev. 173]

A. Arguments for a Remedy By urging deference to the Executive Branch, the D.C. Circuit Court of Appeals has scolded the district courts that have second-guessed the political branches' determinations about release and suitable transfers. Those in favor of judicial power have argued that the denial of the right to review the Executive's decisions is allowing too much deference to that branch and severely limiting the remedies that courts have had the power to issue in the past. Though the petitioners have made several arguments for relief, the main arguments for judicial power stem from the idea that the court of appeals has been improperly applying Supreme Court precedent. Petitioners have argued that the D.C. Court of Appeals expanded the scope of Munaf too broadly as the Supreme Court noted that the decision was limited to the facts of that case. n118 In Munaf, the Court was primarily concerned about allowing the Iraqi government to have the power to punish people who had committed crimes in that territory when fashioning its holding, and the petitioners in that case had the opportunity of notice because they were told about their transfer and were able to petition the court to try and prevent it. n119 Petitioners have argued that those facts are entirely different than cases such as Mohammed and Khadr were there was concern of torture in foreign nations but no need to allow those nations to have the ability to prosecute the detainees for crimes, there was potential for torture at the hands of non-government entities, and no notice of transfer was permitted. n120 [\*190] Additionally, Petitioners have argued that the use of Munaf has impermissibly limited Boumediene by preventing courts from fashioning equitable relief for habeas petitions. n121 There has been concern that the ability to use the writ of habeas will be essentially eliminated if there is no chance for a petitioner to challenge the Executive Branch's determinations regarding safe transfers. The Boumediene Court spent considerable time discussing the history of the writ n122 and noted that the tribunals implemented in that case to determine enemy combatant status were not a sufficient replacement for the writ of habeas because they lacked, in part, the authority to issue an order of release. n123 Here, the D.C. Circuit Court of Appeals has effectively prevented the other courts from determining if there is a right not to be transferred, which has been argued to be an inadequate statement of the right of habeas. n124 Similarly, it has been argued that by accepting the Executive Branch's assurances of its efforts to release the detainees, the courts are not properly using the power of habeas corpus that has been granted to them by the Constitution. n125 By refusing to question these assertions, the courts would be unable to offer a remedy to the petitioners who have the privilege of habeas corpus. n126 The Petitioners also argued a due process right to challenge transfers as the detainees have a right to a meaningful hearing to at least have the opportunity to challenge the Government's conclusions regarding safety. n127 By refusing to second-guess the Executive, the judiciary may be losing an important check on the former's power because there is no guarantee that the Executive is ensuring safety or making the best effort to protect the unlawfully kept detainees. Without allowing courts to have the power to enjoin a transfer in order to examine these concerns, there is the potential that the detainee could be harmed at the hands of foreign terrorists. Without the ability to challenge the Executive Branch through the judicial tool of habeas corpus, there has been genuine concern that the courts are losing too much power and that their authority [\*191] is being improperly limited, as they are not utilizing their constitutional power properly.

#### Remedy is independently key

Alex Young K. **Oh** et al., Counsel of Record, Brief for the Association of the Bar of the City of New York, the Brennan Center for Justice at the New York University School of Law, the Constitution Project, People for the American Way Foundation, the Rutherford Institute, and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of the Petitioners, amal Kiyemba, et. Al., v. Barack H. Obama, et al., SCOTUS, No. 08-1234, 12—11—**09**, p. 11-12.

**The "judicial Power" granted by the Constitution includes the power to effectuate remedies** in those cases where a federal court properly exercises jurisdiction. As Justice Johnson explained, riding circuit in 1808, "[t]**he term 'judicial power' conveys the idea, both of exercising the faculty of judging and of applying physical force to give effect to a decision**. The term 'power' could with no propriety be applied, nor could the judiciary be denominated a department of government, without the means of enforcing its decrees." Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 361 (C.C.D.S.C. 1808) (Johnson, J.) (emphasis added). Indeed, **if the power to effectuate remedies independently were not part of the "judicial Power**" granted to the courts by the Constitution, **the power of the courts to "say what the law is,"** Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803**), would be a functional nullity in the face of any contrary whim of the political branches and courts would be relegated to the issuance of hortatory advisory opinions**. See Michaelson v. United States, 266 U.S. 42, 66 (1924) (recognizing, in the context of a discussion of courts' inherent contempt power, that "the attributes which inhere in [judicial] power and are inseparable from it can neither be abrogated nor rendered practically inoperative"). **The "judicial Power**," of course, **embodies a far more substantial power. The heart of the "judicial Power" vested by Article III** in the several federal courts **is the power to speak authoritatively and finally on any matter of law over which they have jurisdiction, as this power sustains the judiciary's independence. "At the core of [the judicial] power is the federal courts' independent responsibility**—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—**to interpret federal law**." SanchezLlamas v. Oregon, 548 U.S. 331, 354 (2006) (internal quotation marks omitted) (citing Williams v. Taylor, 529 U.S. 362, 378-79 (2000)). **The Court maintains its independence because this power to declare the law is the power to do so through orders and judgments that are binding and enforceable**. That is, **the Court acts only when its judgment on the law is not merely advisory, but effective**.

#### **Congress gets bogged down causing delays, can’t solve rule of law principles, and politicizes the signal**

Eviatar 10(Daphne- Senior Associate in Human Rights First’s Law and Security Program, June 10, “Judges to Congress: Don't Legislate Indefinite Detention”, http://www.huffingtonpost.com/daphne-eviatar/judges-to-congress-dont-l\_b\_607801.html)

For months now, **certain commentators and legislators have been arguing that Congress needs to pass a new law authorizing the indefinite detention without charge or trial of suspected terrorists and their supporters.**¶ **On its face**, **that would** seem to **violate** some **basic tenets of the U.S. Constitution**. But the U.S. government is already detaining hundreds of suspects captured abroad at Guantanamo Bay and elsewhere. The question is whether Congress should expand that authority and define it in more detail.¶ **Writers** such as Benjamin Wittes of the Brookings Institution and lawmakers such as Senator Lindsey Graham of South Carolina **argue** that even though hundreds of people have been detained over the last eight years at Guantanamo Bay, the law that justifies their detention or mandates their release isn't clear, and **Congress needs to step in and make new rules**.¶ In fact, as a new report issued today by **16 former federal judges makes clear, that's nonsense**. The people in the best position to decide when military detention is legal are already doing just that. **The** new **report**, published by Human Rights First and the Constitution Project, **explains** exactly **how that process is working** -- and demonstrates that it's actually working very well. Responding to a series of habeas corpus petitions, where Guantanamo detainees have asked the federal court to review the legality of their detentions, federal district court judges in Washington, D.C., have already issued written opinions concerning 50 different detainees that set out the legal standard for indefinite wartime detention, and which cases do and do not meet it.¶ **The claim by Wittes and Graham that judges are somehow overstepping their bounds and usurping the role of Congress reflects a fundamental misunderstanding of how the federal courts and judges work. In fact, the courts are doing just what they're supposed to do: interpret the law**.¶ **The reason judges are so well-situated to explain the contours of U.S. detention authority is because, according to judicial rulings, the right to detain arises out of existing laws, including the Authorization for Use of Military Force against Terrorists, or AUMF, passed by Congress in 2001; the traditional law of war; and the U.S. Constitution.¶** Traditionally, a government at war can detain fighting members of the enemy's forces, under humane conditions, until the war is over. Although that authority is less clear when the government is fighting a loose coalition of insurgent forces around the world rather than another country, the Supreme Court has said that at least in some circumstances, pursuant to the AUMF, the United States can detain enemy fighters seized on the battlefield.¶ **It's the Supreme Court's rulings on the subject, combined with the law of war and the mandates of the U.S. Constitution, that highly experienced federal judges have been applying to the habeas corpus cases that have come before them. Applying those rulings**, **they've developed a clear and consistent body of law that explains what kind of evidence the government needs to have amassed against a suspected insurgent to justify his military detention.¶** Under the D.C. District Court's rulings, for example, Fouad Al Rabiah, a 43-year-old, 240-pound, Kuwaiti Airways executive with a long history of volunteering for Islamic charities who'd been discharged from compulsory military service in Kuwait due to a knee injury, and who suffered from high blood pressure and chronic back pain, did not meet the requirement of being "part of" or having "substantially supported" al Qaeda, the Taliban or associated forces. Although seized while attempting to leave Afghanistan in 2001, by the time of Al Rabiah's hearing, even the government had decided the witnesses who claimed he'd helped al Qaeda weren't credible. The government's own interrogators didn't believe his "confessions," which the court determined had been coerced and were "entirely incredible."¶ On the other hand, Fawzi Al Odah, also Kuwaiti, did meet the law's detention standards. The same judge found that he'd attended a Taliban training camp, learned to use an AK-47, traveled with other armed fighters on a route common to jihadists, and took directions from Taliban leaders - all making it more likely than not that he was a member of Taliban fighting forces.¶ Still, despite the courts' careful analysis in these cases, Congress could step in and write its own new law on indefinite detention. **But how can any one statute possibly address all the vastly different factual scenarios, many spanning several countries and decades, that constitute the government's claims that any particular individual is detainable**? What's more, **any new law will still have to meet the requirements of the U.S. Constitution**, **and the Supreme Court gets the ultimate say on that**. **Any new statute passed by Congress, then, would likely be challenged as soon as it's applied, causing more confusion about what the law really is until the U.S. Supreme Court weighs in on that new statute several years later.**¶ The federal judges of the D.C. District Court and Court of Appeals are already way ahead of that game. In addition to the trial court opinions, the appellate court recently issued its own opinion setting out the law of detention and the government's constitutional authority. That decision may be appealed to the Supreme Court, whose opinion would set out the binding standard that every judge and future U.S. administration will have to follow.¶ The upshot of all this is that **if Congress legislates some new detention standard now**, **it will actually take a lot longer** **to get a clearly-defined and binding law that guides the government than it would if Congress** **just let the courts continue to play the role they're supposed to: deciding the legality of government detention**.¶ Wittes, Graham and others may secretly be hoping that **Congress** will **legislate in this area** anyway and try to expand the government's indefinite detention autuhority beyond Guantanamo Bay to reach even suspects arrested on U.S. soil. But that **would create a whole new constitutional firestorm, resulting in exactly the opposite of what they say they're after: a clear and reliable statement of the law.**

**Court abdication sends the signal Obama can circumvent Congress --- only the perm solves**

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Thus the opinions of the plurality and Justice Souter interpreted silence or ambiguity in the AUMF differently. This, of course, produced a significant practical consequence: the plurality upheld a novel and questionable use of executive power—a judgment that even led some commentators to conclude that Hamdi represented a significant victory for the Bush Administration.43 Yet, despite proposing differing outcomes, O’Connor’s plurality and Souter’s concurrence fall methodologically within the Youngstown framework: **each opinion looks to whether Congress delegated the executive action** (though the two employ meaningfully different burdens of proof), **and each can claim that a coordinate branch of government supported its decision to uphold or reject the asserted lawful delegation of power**. Moreover, both the plurality and the Souter concurrence concluded that, **while Congress may have authorized** the **detention of “enemy combatants**” such as Hamdi—i.e. persons who actually engaged in hostilities in a zone of combat44—**judicial supervision of Hamdi’s habeas petition and scrutiny of the Executive’s** **“enemy combatant” classification must be meaningful, and not just a rubber-stamp of the Executive’s claimed superior institutional judgme**nt.45 Thus, drawing upon common-law balancing principles it developed in the due-process context, the Court insisted that Hamdi “receive notice of the factual basis for his [enemy combatant] classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” In Rasul, **the Court held that U.S. courts had jurisdiction under the habeas statute**, 28 U.S.C. § 2241, to hear petitions filed by detainees held in Guantanamo, **despite the Government’s protest that the** **U**nited **S**tates **did not exercise formal sovereignty over that territory**.47 **The Court deemed inapplicable** a canon of **judicial construction which presumes that statutes do not reach extraterritorially**.48 Because of Guantanamo’s peculiar status as a territory over which the United States exercises “complete jurisdiction and control,” it is functionally a part of U.S. territory.49 Justice Stevens’s majority opinion was relatively opaque about whether **the habeas statute** (1) was limited to the arguably unique territorial status of Guantanamo, as much of the Court’s rhetoric seemed to suggest, or (2) **could extend to all locations where U.S. forces hold foreign prisoners, meaning the courts have personal jurisdiction over respondents50**—in Justice Scalia’s prophecy, “**to the four corners of the earth.”**51 Scholars have variously viewed the Court’s attempt to harmonize the habeas statute’s unlimited provision for habeas jurisdiction with the peculiar circumstances of the Administration’s detention policy as “distort[ed]”52 or “entirely plausible.”53 Nevertheless, **the Court’s interpretation appears consistent with the** Triad’s **functionalist perspective, by rejecting the talismanic significance of sovereignty or citizenship rules** **and by ensuring that Congress and the judiciary together** **have a role in checking executive-branch operations.** More fundamentally, **the Court signaled to the Executive that it could not locate detention operations completely outside the constraints of law.54**