# 1nc

## 1nc t

Topical affs can only restrict detention authority that is temporally constrained

Larsen, PhD Candidate in Sociology at York University and a Researcher at the York Centre for International and Security Studies, 3/30/2012

(Mike, http://redfile.wordpress.com/2012/03/30/indefinite-detention-2/)

The Wikipedia definition may not be the most useful starting point. For one thing, the reference to ‘enemy combatants’ suggests that the definition is based primarily on the American experience. This is fine, but indefinite detention is a much broader phenomenon. I would suggest that you start by defining the two component concepts:

Detention involves an involuntary deprivation of liberty. Martin and Mitchelson (2009, 460). define detention as “intentional practices that (i) restrict individuals’ ability to move from one place to another and (ii) impose order of space and time so that individual mobility is highly constrained, if not eliminated”. Detention is a form of incarceration that comes in many forms and takes place in a variety of settings, under various legal regimes.

Marten, Lauren L. and Mitchelson, Matthew L. 2009. “Geographies of Detention and Imprisonment: Interrogating Spatial Practices of Confinement, Discipline, Law, and State Power.” In Geography Compass. 3:1 459-477.

Something that is indefinite has no defined limits or boundaries. In the context of a discussion of indefinite detention, **this implies something other than** a fixed-term sentence or other **temporally-constrained period of incarceration**. It is a form of detention that is characterized by uncertainty in terms of its limits.

Violation—the plan restricts detention authority temporally-bounded by the cessation of armed hostilities

Oona Hathaway, Yale University professor of law and political science, et al, 2012, The Power to Detain: Detention and Terrorism Suspects After 9/11, www.law.yale.edu/documents/pdf/Intellectual\_Life/YLS\_PowertoDetain.pdf

For example, the 2002 AUMF uses the same “necessary and appropriate” language used in the 2001 AUMF. In addition, the scope of detention authority under the 2002 AUMF is geographically limited to Iraq and temporally limited to the duration of hostilities in Iraq and/or the temporal scope of the 2002 AUMF; any detention authority that comes with it is also similarly limited. See Military Commissions Act of 2009, Pub. L. No. 111-184, 123 Stat. 2190.

Vote neg

Limits – they shift the topic to any form of military detention, an unpredictable and expansive topic area

Ground – neg ground requires aff mechanism unity – allowing the aff to restrict definite detention skews neg link ground

Precision – the resolution, not the affirmative, is the focal point for neg preparation and research

## 1nc cp

Text:

--The United States federal government should mandate the release of all detainees that have won their habeas hearing.

--The United States federal government should rule that all habeas corpus hearing of persons detained at Guantanamo Bay be subject to due process guarantees.

Expanding precedent against detention collapses military operations - bigger internal link to their heg impacts

Ford, 10

(Colonel, U.S. Army Judge Advocate General's Corps, currently serving as the Staff Judge Advocate, Multi-National Security Transition Command-Iraq, Baghdad, Iraq, “Keeping Boumediene off the Battlefield: Examining Potential Implications of the Boumediene v. Bush Decision to the Conduct of United States Military Operations,” 30 Pace L. Rev. 396, Winter, Lexis)

Boumediene, and the potential extension of its holding, impacts U.S. detention operations not only at Guantanamo Bay but also at Bagram and other current or future detention facilities. As a preliminary matter, the natural question in light of Boumediene is how necessary or beneficial is Guantanamo Bay? If the DoD initially established Guantanamo Bay for its foreign location - more convenient for U.S.-based intelligence and interrogation personnel - then, in light of Boumediene, the base is no longer "foreign." The purported freedom from domestic legal requirements initially presumed at Guantanamo no longer exists. As the current administration seeks to close Guantanamo n48 - whether due to legal, political, or policy reasons - it is clear that Boumediene has done away with at least one benefit of housing detainees at Guantanamo. Could Boumediene impact current detention activities in Bagram? If Boumediene reaches that facility, the Eisentrager Court's worst fears would be realized. n49 Military interrogations [\*412] might require court approval, or worse, the presence of a detainee's counsel. Moving a detainee may likewise require approval from the court. Conditions of confinement might be reviewable by a court. Military prison guards may be liable to their enemy captives in constitutional tort. The implications, again, are vast. In addition to detention operations in a theater of war, Boumediene may **directly impact actual day-to-day combat operations**. Justice Scalia warned that Boumediene could "cause more Americans to be killed." n50 Practically speaking, he was referring to a situation where a court releases a terrorist who returns to fight against Americans. Additionally, battlefield impact and risk to service members for other reasons is not improbable. As a preliminary matter, the issue arises in determining when habeas rights attach. Habeas would attach on the battlefield only if the United States exercises functional control over a combatant - that is, if it exercises the functional equivalent of legal sovereignty over the detainee. In a country like Afghanistan, or even Iraq, there is no question that functioning governments active in inter-and intra-state affairs are operating, and the nations maintain their sovereignty. But does (or would) the United States operate in a pocket or umbrella of sovereignty in either nation for purposes of Boumediene? Liberal stationing agreements, UNSCRs, or other documents authorizing or defining the scope and breadth of authority for U.S. forces in a country could be read to grant Boumediene-like autonomy. During the heightened occupation of Iraq, and the initial invasion of Afghanistan, a stronger argument could have been made that habeas in fact attached to [\*413] in-country detentions. And, in a certain area of occupation, such as post-war Germany, or immediately following invasive hostilities, the case is again much closer. If a U.S. soldier operates in a pocket of sovereignty, habeas rights may attach to any enemy he seizes or captures on the battlefield. Those rights would remain during temporary detention, transfer, and long-term detention. In this (hopefully unlikely) situation, U.S. combat troops would have to be trained in the latest version of habeas law for the battlefield. They would need to know not only the operational requirements and details of the military operation - for example, seizing terrain or raiding a compound - but also the legal niceties associated with capturing an enemy who has constitutional rights and seizing the evidence that might be necessary to keep that enemy in detention and off of future battlefields. At the very least, these new requirements would be a distraction to an undertaking where focus and attention to detail are vital, a distraction that could be deadly. Essentially, troops on patrol would be carrying the full panoply of rights and privileges afforded under the U.S. Constitution in their assault packs. Every enemy encountered would be entitled to rummage through the pack to choose the U.S. domestic law - the legal weapon n51 - to use against the soldier. In effect, the military operation would be converted into a pseudo-law enforcement search and seizure operation. U.S. combat troops would be no different than police officers on patrol in any town or city in the United States. **The military would cease to exist as we know it** and would become nothing more than a deployable F.B.I. As indicated above, evidence experts and/or law enforcement experts may be integrated into the operation. These individuals are likely not familiar with military operations and have not trained with the unit to which they would be assigned. The potential for confusion, hesitation, mistaken identity, and uncertainty is great. Each creates a **recipe for fratricide, enemy advantage**, or worse - **mission failure and defeat.**

## 1nc da

Court involvement in national security decisions decimate war fighting capabilities

Yoo 13

John. John Yoo has been a professor of law at the University of California, Berkeley, School of Law since 1993 and a visiting scholar at AEI since 2003. He served as a deputy assistant attorney general in the Office of the Legal Counsel of the U.S. Department of Justice from 2001 to 2003, where he worked on constitutional and national security matters. He also served as general counsel of the Senate Judiciary Committee, and a law clerk to Justice Clarence Thomas and Judge Laurence Silberman. “Hiding behind judicial robes in the battle over national security”Published June 13th. Accessed 6/30/2013. Available at http://www.aei.org/article/foreign-and-defense-policy/defense/hiding-behind-judicial-robes-in-the-battle-over-national-security/

In the most unlikely of outcomes, everyone's favorite crutch in the controversy over the National Security Agency's eavesdropping programs has become the Foreign Intelligence Surveillance Court (FISC). Sitting in a steel vault at the top of the Justice Department building in Washington, D.C., the Court issues warrants under the 1978 FISA law, enhanced by the 2001 Patriot Act, to conduct electronic surveillance of potential spies and terrorists. Until the 1978 FISA, presidents unilaterally ordered electronic surveillance of enemy spies and, later, terrorists, based on their Commander-in-Chief powers. Gathering signals intelligence - i.e., intercepting enemy communications - has long been a weapon in the executive national security arsenal. But stung by the Nixon administration's abuses of the CIA and NSA to pursue its domestic political opponents, the post-Watergate Congress attempted to tame the commander-in-chief with the rule of judges. The Constitution clearly resists the effort to legalize national security. Judges are very good at reconstructing historical events (such as crimes), hearing evidence from all relevant parties in formal proceedings, and finding fair results - because they have the luxury of time and resources. National security and war, however, demand fast decisions based on limited time and imperfect information, where judgments may involve guesses and prediction as much as historical fact. As the Framers well understood, only a single executive could act with the "decision, activity, secrecy, and dispatch" required for the "administration of war" (in the words of Alexander Hamilton's Federalist No. 70). The September 11 attacks made clear the harms of altering the Constitution's original design for war. Concerned that domestic law enforcement might use information gathered under the FISA's lower warrant standards, the FISC erected the much-maligned "wall" that prohibited intelligence agencies from sharing information with the FBI. That wall prevented the CIA from informing the FBI of the identities of two of the 9-11 hijackers who had entered the country. A president acting under his commander-in-chief powers, without the unconstitutional involvement of federal judges, could have ordered the agencies to cooperate to track terrorists whose operations don't stop at national borders. Hiding behind the FISA court may allow our elected leadership to dilute their accountability for the electronic surveillance that has helped stopped terrorist attacks. It may even reassure the public that a pair of impartial judicial eyes has examined the NSA's operations and found them reasonable. But it will also advance the legalization of warfare, which will have the deeper cost of slowing the ability of our military and intelligence agencies to act with the speed and secrecy needed to protect the nation's security. And judicial involvement won't magically subject our intelligence operations to the Constitution. If anything, it will further distort our founding document's original design to fight and win wars.

The impact is the loss of fourth-gen warfighting capabilities that escalate to nuclear use – turns terror, bioterror, and heg

**Li ‘9**

Zheyao, J.D. candidate, Georgetown University Law Center, 2009; B.A., political science and history, Yale University, 2006. This paper is the culmination of work begun in the "Constitutional Interpretation in the Legislative and Executive Branches" seminar, led by Judge Brett Kavanaugh, “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 modem 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.

Unconstrained president is key to prevent financial crises---generates confidence in waning markets---2008 proves

Posner and Vermuele 9—Professor of Law, UChicago AND Professor of Law, Harvard Law School (Eric and Adrian, Fall 2009, “Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008,” University of Chicago Law Review, 76 U. Chi. L. Rev. 1613, Accessed 06-27-2013)

Finally, we mention a dynamic that further tightens the political constraints in times of crisis. Precisely because markets expected the House to pass the EESA, the House's initial failure to do so created a perceived "crisis of authority," n202 suggesting a risk that dysfunctional political institutions would not be able to coordinate on any economic policy at all. That second-order crisis supervened on the underlying economic crisis, but acquired force independent of it. The Senate had [\*1665] to scramble to undo the damage and did so in world-record time. The House quickly fell into line. 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 will 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. n203 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. n204 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 chairman who, acting in tandem, did not once express disagreement publicly.

Extinction

Kemp 10

Geoffrey Kemp, Director of Regional Strategic Programs at The Nixon Center, served in the White House under Ronald Reagan, special assistant to the president for national security affairs and senior director for Near East and South Asian affairs on the National Security Council Staff, Former Director, Middle East Arms Control Project at the Carnegie Endowment for International Peace, 2010, The East Moves West: India, China, and Asia’s Growing Presence in the Middle East, p. 233-4

The second scenario, called Mayhem and Chaos, is the opposite of the first scenario; everything that can go wrong does go wrong. The world economic situation weakens rather than strengthens, and India, China, and Japan suffer a major reduction in their growth rates, further weakening the global economy. As a result, energy demand falls and the price of fossil fuels plummets, leading to a financial crisis for the energy-producing states, which are forced to cut back dramatically on expansion programs and social welfare. That in turn leads to political unrest: and nurtures different radical groups, including, but not limited to, Islamic extremists. The internal stability of some countries is challenged, and there are more “failed states.” Most serious is the collapse of the democratic government in Pakistan and its takeover by Muslim extremists, who then take possession of a large number of nuclear weapons. The danger of war between India and Pakistan increases significantly. Iran, always worried about an extremist Pakistan, expands and weaponizes its nuclear program. That further enhances nuclear proliferation in the Middle East, with Saudi Arabia, Turkey, and Egypt joining Israel and Iran as nuclear states. Under these circumstances, the potential for nuclear terrorism increases, and the possibility of a nuclear terrorist attack in either the Western world or in the oil-producing states may lead to a further devastating collapse of the world economic market, with a tsunami-like impact on stability. In this scenario, major disruptions can be expected, with dire consequences for two-thirds of the planet’s population.

# solvency

Detention restrictions increases rendition and drone strikes—comparatively worse and turns cred

Goldsmith, 12

(Law Prof-Harvard, 6/29, Proxy Detention in Somalia, and the Detention-Drone Tradeoff, www.lawfareblog.com/2012/06/proxy-detention-in-somalia-and-the-detention-drone-tradeoff/

There has been speculation about the effect of the Obama administration’s pinched detention policy – i.e. no new detainees brought to GTMO, and no new detainees to Parwan (Afghanistan) from outside Afghanistan – on its other counterterrorism policies. I have long believed there must be some tradeoff between narrowing U.S. detention capabilities and other counterterrorism options, at least implicitly, and not necessarily for the better. As I wrote three years ago, in response to news reports that the Obama administration’s cutback on USG detentions resulted in more USG drone strikes and more outsourcing of rendition, detention, and interrogation: There are at least two problems with this general approach to incapacitating terrorists. First, it is not ideal for security. Sometimes it would be more useful for the United States to capture and interrogate a terrorist (if possible) than to kill him with a Predator drone. Often the United States could get better information if it, rather than another country, detained and interrogated a terrorist suspect. Detentions at Guantanamo are more secure than detentions in Bagram or in third countries. The second problem is that terrorist suspects often end up in less favorable places. Detainees in Bagram have fewer rights than prisoners at Guantanamo, and many in Middle East and South Asian prisons have fewer yet. Likewise, most detainees would rather be in one of these detention facilities than be killed by a Predator drone. We congratulate ourselves when we raise legal standards for detainees, but in many respects all we are really doing is driving the terrorist incapacitation problem out of sight, to a place where terrorist suspects are treated worse. The main response to this argument – especially as it applies to the detention-drone tradeoff – has been to deny any such tradeoff on the ground that there are no terrorists outside of Afghanistan (a) whom the United States is in a position to capture on the ground (as opposed to kill from the sky), and (b) whom the USG would like to detain and interrogate. Dan Klaidman’s book provides some counter-evidence, but I will save my analysis of that for a review I am writing. Here I would like to point to an important story by Eli Lake that reveals that the “United States soldiers have been hunting down al Qaeda affiliates in Somalia”; that U.S. military and CIA advisers work closely with the Puntland Security Force in Somalia, in part to redress piracy threats but mainly to redress threats from al-Shabab; that the Americans have since 2009 captured and brought to the Bosaso Central Prison sixteen people (unclear how many are pirates and how many are al-Shabab); and that American interrogators are involved in questioning al-Shabab suspects. The thrust of Lake’s story is that the conditions of detention at the Bosaso Central Prison are atrocious. But the story is also important for showing that that the United States is involved outside of Afghanistan in capturing members of terrorists organizations that threaten the United States, and does have a national security need to incapacitate and interrogate them. It does not follow, of course, that the USG can or should be in the business of detaining every al-Shabab suspect currently detained in the Bosaso Central Prison. But the Lake story does show that the alternatives to U.S. detention are invariably worse from a human rights perspective. It portends (along with last month’s WPR Report and related DOD press release) that our creeping involvement on the ground in places like Somalia and Yemen mean that the USG will in fact be in a position to capture higher-level terrorists in al Qaeda affiliates. And that in turn suggests that the factual premise underlying the denial of a detention-drone tradeoff will become harder and harder to defend.

Executive will circumvent any legal challenges to detention

McNeal, 8

(Law Prof-Penn State, Northwestern University Law Review Colloquy, “BEYOND GUANTANAMO, OBSTACLES AND OPTIONS,” 103 Nw. U. L. Rev. Colloquy 29, August, Lexis)

. Executive Forum-Discretion--Any reform which allows for adjudication of guilt in different forums, each with differing procedural protections, raises serious questions of legitimacy and also **incentivizes the Executive to use "lesser" forms of justice**--nonprosecution or prosecutions by military commission. In this section, my focus is on the incentives which compel the Executive to not prosecute, or to prosecute in military commissions rather than Article III courts. Understanding the reason for these discretionary decisions will guide reformers pondering whether a new system will actually be used by the next President. There are two primary concerns that executive actors face when selecting a forum: protecting intelligence and ensuring trial outcomes. Executive forum-discretion is a different form of prosecutorial discretion with a different balancing inquiry from the one engaged in by courts. Where prosecutorial discretion largely deals with the charges a defendant will face, executive forum-discretion impacts the procedural protections a defendant can expect at both the pretrial and trial phase. Where balancing by Courts largely focuses on ensuring a just outcome which protects rights, the balancing engaged in by executive actors has inwardly directed objectives [\*50] which value rights only to the degree they impact the Executive's self interest. Given the unique implications flowing from forum determinations, reformers can benefit from understanding why an executive actor chooses one trial forum over another. I contend that there are seven predictive factors that influence executive discretion; national security court reformers should be aware of at least the two most salient predictive factors: trial outcomes and protection of intelligence equities. n112 The Executive's balancing of factors yields outcomes with direct implications for fundamental notions of due process and substantial justice. Any proposed reform is incomplete without thoroughly addressing the factors that the Executive balances.

# judiciary adv

## top level

US de-emphasizing detention now—reducing authority irrelevant

Chesney, 13

(8/6, Law Prof-UT, “Postwar: An Essay on Whether the Armed-Conflict Model Still Matters,” http://www.lawfareblog.com/2013/08/postwar-an-essay-on-whether-the-armed-conflict-model-still-matters/)

The situation with military detention is different, but much less so than many assume. True, the demise of the armed-conflict model would matter for the dwindling legacy population at Guantanamo (and, if any remain by that time, for a handful of legacy detainees in Afghanistan). It will not matter nearly so much for potential future detainees, however, for the simple reason that **the U**nited **S**tates **has long-since gotten almost entirely out of the business of taking on new detainees**. For a variety of reasons (most of which would remain true under an administration of a different party) long-term military detention has become unattractive compared to alternatives such as prosecution (including prosecution in combination with short-term detention), the use of lethal force, and encouraging detention in the hands of other countries. In light of this larger dynamic, the theoretical **loss of legal authority to detain in the postwar period will have comparatively little real consequence.**

Detention authority goldilocks now—resolves detainee rights but maintains executive flex

Goldsmith, 12

(Prof-Harvard Law, Hoover Institution Task Force on National Security and Law, March, Power and Constraint, p. 192-96)

The most important principle was that the President could, as the Bush and Obama administrations claimed, detain members of al Qaeda and the Taliban, including those captured outside Afghanistan, "until hostilities cease."' In acknowledging this principle, the **courts** also **placed a number of procedural and evidentiary requirements on how the government must prove to the courts its detention authority**. Most of these **requirements are nontrivial**, and **some are burdensome**. All amount to unprecedented (that term, again) demands on the Commander in Chief's traditional detention authority and unprecedented demands of evidence collection by soldiers in the field. They also establish a new role for the courts. In "pass[ing] judgment on the admissibility of evidence collected on the battlefield, and thus on the propriety of the methods used for such collection," the courts "monitor, and to a degree supervise, the battlefield conduct of the U.S. military," noted Judge Stephen Williams, in one of the habeas cases. "That is a consequence of Boumediene, in which the federal judiciary assumed an entirely new role in the nation's military operations," he added.' Some have doubted that these decisions had much of an effect on the President's discretion because the lower courts have rejected most of the habeas petitions from GTMO on the merits.' The issue is hard to judge because the executive branch, under various legal and political pressures over the years, had released four hundred or so detainees by 2009, and so most of the ones remain-ing at GTMO at that point were truly "the worst of the worst," as Donald Rumsfeld had quipped in 2002.7' Even taking this fact into account, the courts in 2009-2011 granted habeas relief to detainees in fourteen cases that the government ultimately did not subsequently challenge, a number that amounts to almost a quarter of the habeas cases brought by GTMO detainees.' The government also released others because they believed they could not meet detention standards announced by the courts.' But the courts' impact on presidential discretion went far beyond these cases, and included unusual influences on the battlefield beyond the evidence gathering and the distractions that resulted from the habeas cases themselves. One influence was on the executive branch's targeting practices. Courts in the habeas cases ruling on who could and could not be detained in effect defined the scope of the conflict with al Qaeda under the 2001 congressional authorization of force. When Obama administration lawyers determine how far they can go in targeting terrorist threats—especially threats off the traditional battlefield in places like Yemen and Somalia—they are guided by some of the analysis and basic restrictions recognized in these cases." The habeas cases also affect detention operations in places like Afghanistan. The definition of "the enemy" used by the Obama administration in the GTMO habeas cases is the same one employed in Afghanistan, and no one is detained there who does not meet this definition. This definition is, as one senior lawyer in Afghanistan says, "a direct response to Supreme Court decisions in Rasul, Hamdi, Hamdan, and Boumediene.' Subsequently the federal appellate court in the District of Columbia has ruled that habeas jurisdiction does not extend to Afghanistan. But that does not mean that the courts did not influence detention standards there. On the contrary, the hope of reaching this result is one reason the Obama administration decided to raise detention standards in Afghanistan in the summer of 2009.82 And senior lawyers in Afghanistan still live with the concern that the Supreme Court will overturn this habeas decision. "I warn capturing units that [law-of-war detention] must adhere the highest legal standards to avoid habeas litigation," said one such lawyer. "This creates a huge burden on [law-of-war detention] in that we must perform customary military legal operations in a combat zone with an eye toward defensive litigation [and] must be concerned how a civilian court will view our legal actions and decisions?"83 In these and other ways, the GTMO habeas corpus cases have had a constraining impact on the President, his senior national security advisers, and soldiers in the field. **But these constraints have also empowered the presidency** and the military, directly and indirectly, **in important ways**. "Our opinion does not undermine the Executive's powers as Commander in Chief," asserted Justice Kennedy in his Boumediene opinion for the Supreme Court. "On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch!"84 The unusual burdens imposed by the Boumediene decision and the other landmark Supreme Court decisions in the last decade have been accompanied by judicial and legislative approval for some extraordinary presidential powers in the long war against terrorists. It is a remarkable fact that in the eleventh year of the "war on terrorism," the administration of Barack Obama is detaining over 170 terrorist soldiers in GTMO without charge or trial, is planning to try some of these detainees in a military commission on the island, and is detaining almost two thousand more in Afghanistan. These practices remain controversial in some quarters, and are not what the Obama administration set out to do. But **as a result of judicial and legislative interventions over the last decade, there is no doubt now that these practices are lawful and legitimate** within the American constitutional system. The presidency was empowered to exercise these and other military prerogatives in this unusual war because the other branches of the government considered the matter and, with caveats, told the President he could. The legitimation and continuance of these unusual executive powers are enormous disappointments to Michael Ratner and his colleagues. The lawsuits and activist campaigns by these men and women accomplished much in the decade after 9/11, much more than they anticipated at the beginning. They built up a global social movement of activists, lawyers, foreign governments, and the media, to bring habeas corpus rights to GTMO and to pressure the government to release all but the most dangerous prisoners there. "Obviously, getting six or seven hundred people out of Guantanamo out of the nine hundred was a huge accomplishment," notes Ratner. Working in the ecology of transparency, Ratner and his colleagues, as Ratner himself said, "have also taken on what I consider the most egregious aspects of what I call the national security state since 9/11, and made them public debating issues." By making the issues matters of public debate, they ensured that the courts and Congress and the American people had to engage in the issues, and to address them. But the bitter reality for Ratner and his colleagues in the GTMO Bar is that the courts, Congress, and the American people do not share their outlook, and the United States is in a place at the end of 2011 where Ratner desperately did not want it to be. The GTMO Bar won landmark Supreme Court decisions on due process for detainees, on habeas corpus, and on the limits of presidential power over military commissions. And **yet stepping back from these battles**, **Ratner** believes that he and his colleagues **lost the war**. "We lost on the enemy combatant issue, and the definition. We lost on the preventive detention issue, more or less. We lost on the military commission issue, more or less." They lost on these issues because while the courts and Congress imposed significant constraints on these traditional practices by the Commander in Chief, they also affirmed the legitimacy of the practices in the round. The efforts of the other branches of the government placed these practices on a much firmer foundation than they were during the early unilateralist era of George W. Bush. The foundation became firmer yet because it was embraced, albeit grudgingly, by the administration of Barack Obama. "My problem is that when you have a Democrat doing it as well as a Republican, . . . both the good and the bad becomes embedded in the rule of law," says Ratner. This is a problem for Ratner because he thinks that military detention, military commissions, and many other wartime prerogatives of the Commander in Chief are unnecessary, immoral, or illegal. But for those who disagree with Ratner on these points—for **those who believe that the terrorist threat remains real and scary, and that the nation needs a Commander in Chief empowered to meet the threat in unusual ways—embedding these presidential prerogatives in the rule of law is an enormous blessing**. It is a blessing, ironically, for which the nation has Michael Ratner and his colleagues to thank.

## rule of law

US not a key model to rule of law

Pederson 8 Ole, Professor @ Newcastle, Fading Influence of the US Supreme Court, http://internationallawobserver.eu/2008/09/18/fading-influence-of-the-us-supreme-court/

It appears that it is not only the EU whose authority is fading. Today’s NY Times has a very interesting story on the influence of the US Supreme Court, which is well worth a read. The article states that the number of citations of US Supreme Court cases in other jurisdictions is in decline compared to just ten years ago. There are many reasons for this, according to, inter alia, Thomas Ginsburg of University of Chicago and Aharon Barak, former president of the Israeli Supreme Court. One reason is the rise in the numbers of constitutional courts elsewhere, which has, through time, created a rich jurisprudence on constitutional law rendering the need to cite US cases less essential. Additionally, US foreign policy may play a part in the diminishing influence of the oldest constitutional court in world. Finally, the reluctance of the US Supreme Court itself to cite foreign law when adjudicating may play a role. This final point is perhaps the most interesting. Whereas European (including the ECJ and the ECtHR), Australian and Canadian courts do not shy away from referring to foreign law, it has always been a sensitive topic in the US where many scholars favour leaving aside foreign law. This approach has its clear democratic justification but as Justice Ruth Bader Ginsberg said in 2006 in an address to the South African Constitutional Court:

“[F]oreign opinions are not authoritative; they set no binding precedent for the U.S. judge. But they can add to the store of knowledge relevant to the solution of trying questions. Yes, we should approach foreign legal materials with sensitivity to our differences, deficiencies, and imperfect understanding, but imperfection, I believe, should not lead us to abandon the effort to learn what we can from the experience and good thinking foreign sources may convey.”

I-law causes judicial overshoot – kills rule of law

Kochan, Asst Prof – Champman U School of Law, ‘6

(Donald J, 29 Fordham Int'l L.J. 507)

The development of rules in the United States is meant to be tough - bicameralism and presentment, for example, is one means by which the production of law is controlled. Such controls do not necessarily exist in the production of foreign and international law, making them more suspect and, in a system based in the rule of law, inappropriate for judicial application.

When a judge is defining law, reference to laws generated according to U.S. constitutional processes is a closed set. Accepting judicial ability to search the world allows judges to select from an open set, creating the risk of selection bias. n152 Outcome determinative judges will select what best supports their desired result. It is like giving a referee in America's National Football League ("NFL") the power to selectively apply Australian rules when it suits him during the game.

This brings the Article back to the cocktail party. If the crowd at the party is the whole world, judges have a nearly infinite number of guests they can find to infuse and support their decisions. It is an intoxicating opportunity for judicial activists. As stated previously, injecting international and foreign sources in judicial decision-making can be described as the same as entering  [\*543]  a crowded cocktail party and avoiding all the unknown people, disliked people, annoying people, or boring people, and scoping the scene to maneuver toward your friends. n153 With foreign and international law as potential and acceptable sources of authority, judges have a large crowd to pick from and a large pool to ignore or reject. Determining which countries matter, what principles matter, and what constitutes "authority" is difficult, and - when decided by a judge looking beyond U.S. borders - constitutes a preferential decision not necessarily endorsed by U.S. lawmakers. n154

There is no reliable discerning principle for the selection of applicable and appropriate extra-constitutional laws to the interpretation of U.S. law. n155 The concomitant effect is that the citizenry has no certain, predictable, and identifiable means for understanding what the "law" is that governs their actions when reference to, or reliance on, extra-constitutional sources of law are allowed.

If judges can cite foreign or international authorities in their interpretation of U.S. law or in the definition of liabilities  [\*544]  in tort litigation, there is a tremendous amount of leeway to inject personal preferences at the expense of adherence to established law. n156 The rule of law requires that judicial authority be insulated from such preferential powers. n157

This debate is not simply a political issue. If liberals can invoke foreign or international law to advance their preferences, conservatives can do the same. n158 In both cases, this attempt to legitimize preferences is beyond the judicial role.

Furthermore, rule of law issues are affected not simply by selection bias but by the non-U.S. nature of production of foreign and international sources. In other words, these "laws" were not created under the strictures of the U.S. Constitution. As such, they lack formal elements or intentions as enforceable law.

Most often, customary international law outputs are intended only as aspirational or symbolic, rather than drafted as enforceable legal obligations or with the intent of creating liability. n159 If these outputs are used as evidence of enforceable customary  [\*545]  international law obligations and liabilities or as authority for the interpretation of U.S. law, courts mangle and inappropriately manipulate their purpose and character. n160 Indeed, allowing judges to use elusive and diffuse principles of human rights to discover applicable international law is beyond their capacity and beyond the power committed to them by the Constitution.

Finally, in terms of activism, reliance on extraterritorial "law" is a run around Congress's ability, prerogative, and responsibility to define U.S. law. n161 Indeed, some cases have relied on certain international or foreign "laws" despite direct evidence of Congress's intent that such documents not create legal obligations or liabilities and are not drafted as "law." n162 When courts have discretion to look beyond the United States for the foundations of their decisions, serious dangers arise to the rule of law  [\*546]  and the sanctity of the concept that the law is known and ascertainable by persons subject to it. Congress has failed to ratify the vast majority of human rights treaties sponsored by the United Nations. n163 This record indicates a general unwillingness on the part of the United States to recognize broad principles of human rights as controlling legal authority. n164 For the courts to ignore this reality and insist that these documents form a foundation for ascertaining the applicable law in the United States demonstrates disdain for recognized lawmaking processes. n165

## torture

Torture's inevitable by US or others

It's decreasing in the status quo

No D rule - util's the only moral framework

**Murray 97** (Alastair, Professor of Politics at U. Of Wales-Swansea, *Reconstructing Realism*, p. 110)

Weber emphasised that, while the 'absolute ethic of the gospel' must be taken seriously, it is inadequate to the tasks of evaluation presented by politics. Against this 'ethic of ultimate ends' — Gesinnung — he therefore proposed the 'ethic of responsibility' — Verantwortung. First, whilst the former dictates only the purity of intentions and pays no attention to consequences, the ethic of responsibility commands acknowledgement of the divergence between intention and result. Its adherent 'does not feel in a position to burden others with the results of his [OR HER] own actions so far as he was able to foresee them; he [OR SHE] will say: these results are ascribed to my action'. Second, the 'ethic of ultimate ends' is incapable of dealing adequately with the moral dilemma presented by the necessity of using evil means to achieve moral ends: Everything that is striven for through political action operating with violent means and following an ethic of responsibility endangers the 'salvation of the soul.' If, however, one chases after the ultimate good in a war of beliefs, following a pure ethic of absolute ends, then the goals may be changed and discredited for generations, because responsibility for consequences is lacking. The 'ethic of responsibility', on the other hand, can accommodate this paradox and limit the employment of such means, because it accepts responsibility for the consequences which they imply. Thus, Weber maintains that only the ethic of responsibility can cope with the 'inner tension' between the 'demon of politics' and 'the god of love'. 9 The realists followed this conception closely in their formulation of a political ethic.10 This influence is particularly clear in Morgenthau.11 In terms of the first element of this conception, the rejection of a purely deontological ethic, Morgenthau echoed Weber's formulation, arguing tha/t:the political actor has, beyond the general moral duties, a special moral responsibility to act wisely ... The individual, acting on his own behalf, may act unwisely without moral reproach as long as the consequences of his inexpedient action concern only [HER OR] himself. What is done in the political sphere by its very nature concerns others who must suffer from unwise action. What is here done with good intentions but unwisely and hence with disastrous results is morally defective; for it violates the ethics of responsibility to which all action affecting others, and hence political action par excellence, is subject.12 This led Morgenthau to argue, in terms of the concern to reject doctrines which advocate that the end justifies the means, that the impossibility of the logic underlying this doctrine 'leads to the negation of absolute ethical judgements altogether'.13

## cmr

CMR strong now

Andrew Exum, CNAS Senior Fellow, 7/4/12, No Crisis in Wartime U.S. Civil-Military Relations, EBSCO

Last week, I noted one of the ironies of the U.S. effort in Afghanistan since 2009: From the perspective of civil-military relations, the process worked. Regardless of one's opinion of the Obama administration's strategy in Afghanistan and despite the high degree to which the U.S. government and its allies have struggled to implement that strategy, the division of labor between civilian officials and military officers in formulating the strategy itself functioned more or less according to design.

In light of the reaction the column generated, I'd like to examine civil-military relations in the United States more broadly. Today, I will discuss some of the literature that informs our thinking on civil-military relations, and next week, I will offer my thoughts on the state of civil-military relations in the United States today and offer policy recommendations to improve them.

I should say from the start that I do not believe there to be any "crisis" in civil-military relations in the United States. Several wise scholars -most notably Andrew Bacevich and Richard Kohn -have argued there is such a crisis. And I share many of the concerns both of them raise, from the fetishization of military service to the active involvement of retired general officers in political campaigns.

But either because I am writing from France -which does have a history of toxic and even mutinous civil-military relations in its recent democratic past -or because I remember historical accounts of the days when Douglas MacArthur used his military staff to plot his political career, I consider contemporary civil-military relations in the United States to be quite healthy.

In addressing the issue, I will consider civil-military relations only as they pertain to the prosecution of war itself. I am less concerned by civil-military relations in peacetime, though for many of the reasons Bacevich and Kohn raise, this subject is also worth considering.

The canonical text on civil-military relations in the United States remains Samuel Huntington's "The Soldier and the State" (1957). If we start with the belief that war takes place on four levels -the political, the strategic, the operational and the tactical -Huntington's model reserves the role of defining the political ends of a war for elected civilian leaders, while assigning the operational and tactical levels of war to the professional military officers. As for the strategic aims of a conflict as well as the resources the nation will devote to its prosecution, civilians and military officers decide on them together in Huntington's model.

It is not clear whether or not Huntington entirely intended for his scholarly work to be normative. Regardless, successive generations of U.S. military officers have been raised in the belief that Huntington's model is the way in which the division of labor in war is supposed to be organized. Military officers thus resent it when civilian officials stick their noses into tactical and operational affairs.

As Eliot Cohen ably demonstrates in "Supreme Command" (2002), however, civilians do sometimes stick their noses into the tactical and operational affairs of the military -and often to positive effect. Choosing historical examples ranging from Abraham Lincoln to David Ben-Gurion, Cohen demonstrates why it is sometimes necessary for politicians to get their hands dirty running a war. After all, war is fundamentally a political affair -and it really is sometimes too important to be left to the generals. A statesman who ignores military affairs can be as much of a menace as a statesman who fancies himself a better tactician than his generals.

U.S. military officers, as a whole, dislike Cohen's arguments for reasons that should be obvious to all. These officers reflexively resent what they see as "interference" in their affairs. What those officers perhaps miss is that among Cohen's intended audience was a certain former governor of Texas who Cohen feared was not as interested in military affairs as he needed to be having become president. Indeed, George W. Bush learned the hard way -and at the cost of much U.S. blood and treasure -that even though the U.S. military will insist as an institution that its general officers are equally able, that is not always the case. Some officers are better than others, and one of the more important decisions a president can make is in his selection of commander.

To the chagrin of military officers, then, the division of labor between civilian officials and military officers in wartime is not fixed. Civilians have long reserved the right to interfere in military affairs. Lincoln and Ben-Gurion did this to positive effect. Adolf Hitler, among others, did so in such a way that his meddling hamstrung his generals.

What is rigidly fixed in the U.S. system of government, however, is civilian supremacy over the military. Article I of the U.S. Constitution gives the U.S. Congress the sole right to declare war, while Article II establishes the president as the commander-in-chief. Remarkably, the civilian leadership of the United States has never faced a serious threat by the military to usurp powers reserved for civilian authorities. Only MacArthur mounted a serious challenge -a series of challenges, really -to civilian authorities, and even he was eventually put in his place.

Those who fear that civil-military relations in the United States are in crisis -and these fears reached an apex in 2009 -lack both comparative and historical perspective. The 82nd Airborne Division might not have done the best job in Iraq's al-Anbar province in 2003, but unlike its French counterparts, it has never threatened to jump onto the Washington mall and overthrow the government. And despite the fears of many pundits in 2009 that high-profile general officers such as David Petraeus and Stanley McChrystal harbored secret ambitions to undermine a young Democratic president, both men now happily and humbly serve as civilians in that same president's administration.

CMR impact is all hype

Feaver and Kohn 05

Peter Feaver, professor of Political Science and Public Policy and the director of the Triangle Institute for Security Studies at Duke University, and Richard H. Kohn, Professor of History at the University of North Carolina, “The Gap: Soldiers, Civilians, and Their Mutual Misunderstanding,” in American Defense Policy, 2005, ed. Paul J. Bolt, Damon V. Coletta, Collins G. Shackelford, p. 339

Concerns about a troublesome divide between the armed forces and the society they serve are hardly new and in fact go back to the beginning of the Republic. Writing in the 1950s, Samuel Huntington argued that the divide could best be bridged by civilian society tolerating, if not embracing, the conservative values that animate military culture. Huntington also suggested that politicians allow the armed forces a substantial degree of cultural autonomy. Countering this argument, the sociologist Morris Janowitz argued that in a democracy, military culture necessarily adapts to changes in civilian society, adjusting to the needs and dictates of its civilian masters.2 The end of the Cold War and the extraordinary changes in American foreign and defense policy that resulted have revived the debate. The contemporary heirs of Janowitz see the all volunteer military as drifting too far away from the norms of American society, thereby posing problems for civilian control. They make tour principal assertions. First, the military has grown out of step ideologically with the public, showing itself to be inordinately right-wing politically, and much more religious (and fundamentalist) than America as a whole, having a strong and almost exclusive identification with the Republican Party. Second, the military has become increasingly alienated from, disgusted with, and sometimes even explicitly hostile to, civilian culture. Third, the armed forces have resisted change, particularly the integration of women and homosexuals into their ranks, and have generally proved reluctant to carry out constabulary missions. Fourth, civilian control and military effectiveness will both suffer as the military—seeking ways to operate without effective civilian oversight and alienated from the society around it—loses the respect and support of that society. By contrast, the heirs of Huntington argue that a degenerate civilian culture has strayed so far from traditional values that it intends to eradicate healthy and functional civil-military differences, particularly in the areas of gender, sexual orientation, and discipline. This camp, too, makes four key claims. First, its members assert that the military is divorced in values from a political and cultural elite that is itself alienated from the general public. Second, it believes this civilian elite to be ignorant of, and even hostile to, the armed forces—eager to employ the military as a laboratory for social change, even at the cost of crippling its warfighting capacity. Third, it discounts the specter of eroding civilian control because it sees a military so thoroughly inculcated with an ethos of subordination that there is now too much civilian control, the effect of which has been to stifle the military's ability to function effectively Fourth, because support for the military among the general public remains sturdy, any gap in values is inconsequential. The problem, if anything, is with the civilian elite. The debate has been lively (and inside the Beltway, sometimes quite vicious), but it has rested on very thin evidence—(tunneling anecdotes and claims and counterclaims about the nature of civilian and military attitudes. Absent has been a body of systematic data exploring opinions, values, perspectives, and attitudes inside the military compared with those held by civilian elites and the general public. Our project provides some answers.

## bioweapons

No risk of bioterror

Keller 13 (Rebecca, 7 March 2013, Analyst at Stratfor, “Bioterrorism and the Pandemic Potential,” Stratfor, http://www.stratfor.com/weekly/bioterrorism-and-pandemic-potential)

The risk of an accidental release of H5N1 is similar to that of other infectious pathogens currently being studied. Proper safety standards are key, of course, and experts in the field have had a year to determine the best way to proceed, balancing safety and research benefits. Previous work with the virus was conducted at biosafety level three out of four, which requires researchers wearing respirators and disposable gowns to work in pairs in a negative pressure environment. While many of these labs are part of universities, access is controlled either through keyed entry or even palm scanners. There are roughly 40 labs that submitted to the voluntary ban. Those wishing to resume work after the ban was lifted must comply with guidelines requiring strict national oversight and close communication and collaboration with national authorities. The risk of release either through accident or theft cannot be completely eliminated, but given the established parameters the risk is minimal. The use of the pathogen as a biological weapon requires an assessment of whether a non-state actor would have the capabilities to isolate the virulent strain, then weaponize and distribute it. Stratfor has long held the position that while terrorist organizations may have rudimentary capabilities regarding biological weapons, the likelihood of a successful attack is very low. Given that the laboratory version of H5N1 -- or any influenza virus, for that matter -- is a contagious pathogen, there would be two possible modes that a non-state actor would have to instigate an attack. The virus could be refined and then aerosolized and released into a populated area, or an individual could be infected with the virus and sent to freely circulate within a population. There are severe constraints that make success using either of these methods unlikely. The technology needed to refine and aerosolize a pathogen for a biological attack is beyond the capability of most non-state actors. Even if they were able to develop a weapon, other factors such as wind patterns and humidity can render an attack ineffective. Using a human carrier is a less expensive method, but it requires that the biological agent be a contagion. Additionally, in order to infect the large number of people necessary to start an outbreak, the infected carrier must be mobile while contagious, something that is doubtful with a serious disease like small pox. The carrier also cannot be visibly ill because that would limit the necessary human contact.

No impact – slow spread and defense mechanisms

Mueller 99, John Mueller, Prof. Pol. Sci. @ Ohio State and Karl Mueller, June, ’99 (Foreign Affairs, l/n)

Biological weapons seem a promising candidate to join nuclear ones in the WMD club because, properly developed and deployed, they might indeed kill hundreds of thousands, perhaps even millions, of people. The discussion remains theoretical, however, because biological weapons have scarcely ever been used, even though knowledge of their destructive potential goes back centuries. (The English, for example, made some efforts to spread smallpox among American Indians during the French and Indian War.) Belligerents have eschewed such weapons with good reason, because biological weapons are extremely difficult to deploy and control. Although terrorist groups or rogue states may overcome such problems in the future through advances in knowledge and technology, the record thus far is not likely to encourage them. Japan reportedly infected wells in Manchuria and bombed several Chinese cities with plague-infested fleas before and during World War II. These ventures may have killed thousands of Chinese but apparently also caused thousands of unintended casualties among Japanese troops and had little military impact. In the 1990s the large and extremely well funded Japanese cult Aum Shinrikyo apparently tried at least nine times to set off biological weapons by spraying pathogens from trucks and wafting them from rooftops. these efforts failed to cause a single fatality -- in fact, nobody even noticed that the attacks had taken place. For best results biological weapons need to be dispersed in very low-altitude aerosol clouds, which is very difficult to do. Explosive methods of dispersion, moreover, may destroy the organisms. And except for anthrax spores, long-term storage of lethal organisms in bombs or warheads is difficult; even if refrigerated, most have a limited lifetime. The effects of such weapons are gradual, very hard to predict, and could spread back onto the attacker, and they can be countered with civil defense measures.

# blowback adv

## legitimacy/heg

Can't solve legitimacy

Fettweis 10

Christopher J. Fettweis is an assistant professor of political science at Tulane University, August 2010, Paper prepared for the 2010 meeting of the American Political Science Association, Washington, DC, September 1-4, "The Remnants of Honor: Pathology, Credibility and U.S. Foreign Policy", http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1657460

Both theoretical logic and empirical evidence suggest that actions taken in the present will likely not have a predictable effect on the crises of the future, for better or for worse. The almost overwhelming tendency to try to send messages through national actions increases the odds of policy mishaps and outright folly, for at least two reasons. First, and most basically, an eye toward the future prevents complete focus on the present. During a crisis, the national interest cannot be correctly ascertained unless policymakers de-link present concerns from future expectations. Second, as unsettling as it may be, the future is not subject to our control. There is much that can and will occur between the current crisis and the next, and the international environment will change in quite unpredictable ways. Target actors – whether they be superpowers or terrorist groups or vaguely-defined “threats” – are not likely to believe that the actions of a state give clues to its future actions. In other words, they believe that our actions are independent, and there is little that can be done to change that.81 Generally speaking, therefore, policymakers are wise to fight the natural temptation to look beyond the current crisis when deciding on action.

Honor is a socially determined good, in the sense that the community is the ultimate arbiter of whether any individual possesses it. Likewise, the status of its credibility is beyond the control of the United States. Neither people nor states own their reputation, which can be affected by the actions to some extent but ultimately exist primarily in the minds of others. “Credibility exists,” noted the recent U.S. politician perhaps most obsessed with its maintenance, “only in the eye of the beholder.”82 Try as they might, states cannot exert complete control over their reputations or level of credibility; target adversaries and allies will ultimately form their own perceptions, ones that will be affected by their needs and goals. Even if states were to take what appeared to be the logical actions to protect their credibility, it is possible (perhaps likely) that others will not receive the messages in the way they were intended.83 Sending messages for their consideration in future crises, therefore, is all but futile.

Legitimacy inevitable and irrelevant - not key to cooperation

Brooks and Wohlforth 09

Stephen G. Brooks is Associate Professor of Government at Dartmouth College. William C. Wohlforth is Daniel Webster Professor of Government and Chair of the Department of Government at Dartmouth College, Foreign Affairs, March/April 2009, "Reshaping the World Order", http://www.dartmouth.edu/~govt/faculty/BrooksWohlforth-FA2009.pdf

THE LEGITIMACY TO LEAD?

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. Spain fashioned 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 of lucrative 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 aªecting 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 United States today has the necessary legitimacy to shepherd reform of the international system.

## terror

The plan destroys the war on terror—undermines intel gathering and crisis response

Carafano, 7

(PhD & Assistant Director of the Kathryn and Shelby Cullom Davis Institute for International Studies, “The War on Terrorism: Habeas Corpus On and Off the Battlefield,” 7/5, http://www.heritage.org/research/reports/2007/07/the-war-on-terrorism-habeas-corpus-on-and-off-the-battlefield)

Impeding the Effectiveness of Military Operations

Soldiers have a number of equally compelling responsibilities in war: accomplishing the mission, safeguarding innocents, and protecting their fellow soldiers. These tasks are difficult enough. Soldiers should not be required to provide to unlawful combatants, in the same manner and to the same extent as would be expected of a civil court, the full array of civil protections afforded to U.S. citizens by the Constitution and created by judges since the 1960s. For example, it is highly unrealistic to expect soldiers during active operations to collect evidence and insure the integrity of the chain of custody for that evidence. American soldiers would effectively face a Hobson's choice: on one hand, win the war, bring fellow soldiers home, and safeguard innocents; or, on the other hand, meet novel legal standards that might result in prematurely releasing war criminals who will go back to the battlefield. Crippling Intelligence Gathering **Gaining timely, actionable information is the most powerful weapon in uncovering and thwarting terrorist plots. Requiring the armed forces to place detainees under a civilian legal process will severely restrict their access to detainees and, in turn, cripple their capacity to obtain intelligence through legitimate, lawful interrogation**. Military authorities are giving Gitmo detainees treatment that is as good as or better than that typically afforded to U.S.-held POWs. The only real difference is that Gitmo detainees may be interrogated for more than name, rank, and serial number. Unnecessary Burdens Changing the legal framework governing unlawful combatants is simply unnecessary. The military is already meeting its obligations to deal justly with individuals in its custody. Since the inception of the Geneva Conventions, no country has ever given automatic habeas corpus rights to POWs. Furthermore, such action is not required by the U.S. Constitution. The Supreme Court ruled in 2004 that, at most, some detainees were covered by a statutory privilege to habeas corpus. The Court concluded, in other words, that Congress had implicitly conferred habeas corpus rights to certain individuals. However, the Military Commissions Act of 2006 repealed that privilege and, so far, Congress has not acted to restore it. The Department of Defense already operates two tribunals that safeguard the legal rights of detainees. The Combatant Status Review Tribunal (CSRT) uses a formal process to determine whether detainees meet the criteria to be designated as enemy combatants. Tribunals known as Administrative Review Boards (ARB) ensure that enemy combatants are not held any longer than necessary. Both processes operate within the confines of traditional law-of-war tribunals and are also subject to the appeals process and judicial review. In addition, Congress has established a process under the Military Commissions Act to allow the military to try any non-U.S. detainees for war crimes they are alleged to have committed. Conclusion Imposing U.S. civil procedures over the conduct of armed conflict **will damage national security and make combat more dangerous for soldiers and civilians alike.** The drive to do so is based on erroneous views about the Constitution, the United States' image abroad, and the realities of war. U.S. military legal processes are on par with or exceed the best legal practices in the world. While meeting the needs of national security, the system respects individuals' rights and offers unlawful enemy combatants a fundamentally fair process that is based on that afforded to America's own military men and women. Having proven itself in past conflicts, **the current legal framework can continue to do so in a prolonged war against terrorism.**

## russia

Legitimacy not key to human rights pressure – backlash isn’t prohibitive

Ignatieff, 2 – Carr professor of human rights, Kennedy School of Government @ Harvard

(Michael, “NO EXCEPTIONS?” *Legal Affairs*, May/June)

This defense of the United States does not, however, address the charge of hypocrisy. If America wants to be a human rights leader, the argument goes, it must obey the rules it seeks to champion. Leadership depends on legitimacy, and legitimacy requires consistency. But it's not clear that the effective use of American power in fact depends on being consistent, or on being seen by others as legitimate. Perceived legitimacy eases but it isn't essential to the exercise of power.

Being seen as hypocritical or double-dealing may impose some costs on a superpower, but these costs are rarely prohibitive. America has faced a storm of protest about its treatment of the Guantanamo Bay prisoners—a storm that has led the Bush Administration to concede that the Geneva Convention should determine which protections Taliban prisoners (though not Al Qaeda ones) receive. At the same time, the prisoners remain, and are likely to remain, in American custody and subject to American justice.

In another example, Slobodan Milosevic is in detention in The Hague, thanks in large measure to the pressure of the United States on the Serbian government. America could exert that pressure despite resisting the creation of a permanent criminal court with the power to try American citizens. (Milosevic will make much of this resistance to demonstrate that he is the casualty of victor's justice.) And again, as a matter of equity and ethics, it may be undesirable for the United States to support international tribunals for others but not for its own citizens. It is less clear, however, that this prevents American support for these tribunals from being effective.

Impact isn’t reverse causal – Russian human rights abuses inevitable

Probability is zero

Graham 7 (Thomas Graham, senior advisor on Russia in the US National Security Council staff 2002-2007, 2007, "Russia in Global Affairs” The Dialectics of Strength and Weakness http://eng.globalaffairs.ru/numbers/20/1129.html)

An astute historian of Russia, Martin Malia, wrote several years ago that “Russia has at different times been demonized or divinized by Western opinion less because of her real role in Europe than because of the fears and frustrations, or hopes and aspirations, generated within European society by its own domestic problems.” Such is the case today. To be sure, mounting Western concerns about Russia are a consequence of Russian policies that appear to undermine Western interests, but they are also a reflection of declining confidence in our own abilities and the efficacy of our own policies. Ironically, this growing fear and distrust of Russia come at a time when Russia is arguably less threatening to the West, and the United States in particular, than it has been at any time since the end of the Second World War. Russia does not champion a totalitarian ideology intent on our destruction, its military poses no threat to sweep across Europe, its economic growth depends on constructive commercial relations with Europe, and its strategic arsenal – while still capable of annihilating the United States – is under more reliable control than it has been in the past fifteen years and the threat of a strategic strike approaches zero probability. Political gridlock in key Western countries, however, precludes the creativity, risk-taking, and subtlety needed to advance our interests on issues over which we are at odds with Russia while laying the basis for more constructive long-term relations with Russia.

# 2nc

# cp

## solvency

resolving Guantanamo is sufficient to restore US cred towards rule of law

Elisa Massimino, Human Rights First, 7/24/13, CLOSING GUANTANAMO: The National Security, Fiscal, and Human Rights Implications, http://www.judiciary.senate.gov/pdf/7-24-13MassiminoTestimony.pdf

To the extent that the administration has not resolved the disposition of any detainees prior to the end of hostilities, the administration should repatriate or resettle these detainees at the end of combat operations in Afghanistan or some other reasonable marker of the end of hostilities.

III. Conclusion

In one sense, closing Guantanamo is a numbers problem—how to get from 166 to zero. Once there were 779 prisoners at Guantanamo. The Bush administration resettled or repatriated more than 500 of them. The Obama Administration has gotten that number down to 166, a majority of whom have been cleared for transfer by the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff. The remaining task is about managing risk to achieve an important national security objective on which there is bipartisan consensus. The risks of transfer can be mitigated; the risks of maintaining Guantanamo forever cannot.

But in another sense, closing Guantanamo is about who we are as a Nation. As the President recently said:

“I know the politics are hard. But history will cast a harsh judgment on this aspect of our fight against terrorism, and those of us who fail to end it. Imagine a future – ten years from now, or twenty years from now – when the United States of America is still holding people who have been charged with no crime on a piece of land that is not a part of our country. Look at the current situation, where we are force-feeding detainees who are holding a hunger strike. Is that who we are?”

At a certain point, who we are as a Nation cannot be separated from what we do. Guantanamo is a symbol for many around the world of torture, injustice and illegitimacy. As the United States winds down the war in Afghanistan, Congress and the President have the opportunity to transform this legacy and restore America’s reputation **for justice and the rule of law.**

## blowback

We solve blowback

Legitimacy terror links are about the releasing of current detainees who have won their cases – the counterplan does that

Knowles is about a stable legal interpretation – the plan does that by establishing a stable remedy for human rights law, but the plan conflates human rights law with humanitarian law which usually takes precedence in military conflicts – it kills war fighting capabilities.

Corn 9 (Geoffrey, South Texas College of Law, “Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict”, papers.ssrn.com/sol3/papers.cfm?abstract\_id=1511954, ZBurdette)

One of the most complex contemporary debates related to the regulation of armed conflict is the relationship between international humanitarian law (or the law of armed conflict) and international human rights law. Since human rights experts first began advocating for the complementary application of these two bodies of law, there has been a steady march of human rights application into an area formerly subject to the exclusive regulation of the law of armed conflict. While the legal aspects of this debate are both complex and fascinating, like all areas of conflict regulation the outcome must ultimately produce guidelines that can be translated into an effective operational framework for war-fighters. In an era of an already complex and often confused battle space, there can be little tolerance for adding complexity and confusion to the rules that war-fighters must apply in the execution of their missions. Instead, clarity is essential to aid them in navigating this complexity. This article will explore this debate from a military operational perspective. It asserts the invalidity of extreme views in this complementarity debate, and that the inevitable invocation of human rights obligations in the context of armed conflict necessitates a careful assessment of where symmetry between these two sources of law is operationally logical and where that logic dissipates.

## 2nc impact

#### Regulations on detention require huge military investments that trade-off with effective war-fighting—causes failure in Iraq and Afghanistan

Ford, 10

(Colonel, U.S. Army Judge Advocate General's Corps, currently serving as the Staff Judge Advocate, Multi-National Security Transition Command-Iraq, Baghdad, Iraq, “Keeping Boumediene off the Battlefield: Examining Potential Implications of the Boumediene v. Bush Decision to the Conduct of United States Military Operations,” 30 Pace L. Rev. 396, Winter, Lexis)

Programmatically and institutionally, extension would require a re-evaluation of the DoD's policies, regulations, training, and organization. Currently, all military personnel are trained to the Geneva standard under the DoD Law of War Program. n38 This program ensures that service members are trained in and abide by the international legal norms of warfare. Would the DoD implement a similar program to ensure compliance with domestic laws during combat operations, including detention operations? And, if so, should it be separate from the Law of War Program or integrated into it? A progressive extension of Boumediene may require service members in combat to abide by constitutional provisions normally applicable to domestic law enforcement personnel. Such an extension would require a massive training and education program to be implemented department-wide. This training might include instruction on the court-directed domestic laws that might now be applicable, essentially a shifting body of criminal law for the battlefield. In [\*405] implementing this new standard, both the DoD and the military might be required to implement several new procedures, including: training packages for new entrants at basic training installations, annual refresher training, formalized procedures for integration into major military training exercises and actual military operations, a reporting procedure for violations, and benchmarks for methods of effectiveness. The International Committee of the Red Cross ("ICRC") might choose to monitor U.S. forces not only for compliance with international law but also for compliance with our applicable domestic laws. The DoD would be interested in the ICRC's new focus area and would need to implement procedures to address these new areas of international scrutiny. As the DoD attempts to operationalize Boumediene, it must consider the new concept of how to support a federal case while concomitantly conducting military operations. Justice Scalia, in his dissent, noted that the Boumediene holding "sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner." n39 Practically speaking, this is already happening in the U.S. District Court for the District of Columbia as the Guantanamo detainees' habeas cases progress. n40 The Supreme Court is not, as Justice Scalia noted, establishing the rules under which these cases will proceed. That task has fallen on the district court judges, specifically Senior Judge Thomas F. Hogan, who has been charged with establishing general rules for the administration and management of most of these cases. n41 [\*406] These rules and procedures will be vitally important not only for the process, but also for the DoD and combat soldiers whose actions they will dictate. Courts will create, and lawyers argue endlessly about, such important matters as the definition of "enemy combatant," the standard of proof for this yet-to-be defined term, the admissibility of evidence, the scope and breadth of exclusionary rules, presumptions afforded to government evidence, whether the presence of the detainee is required, access to government witnesses, the extent of government disclosures of exculpatory evidence pursuant to Brady v. Maryland, n42 and a host of other procedural and substantive issues. Every issue that may arise in a federal criminal case will have to be addressed, interpreted, decided, and applied to the current and future unique enemy prisoner habeas actions. These procedures create daunting tasks. Enter CSI: Kandahar. Extending the Boumediene holding would require detailed procedures for the collection, preservation, and maintenance of "evidence." Normally, the military treats information regarding enemy captives as battlefield information or intelligence. Military personnel process this information, important to the conduct of military operations, through intelligence channels. Intelligence analysts and commanders use the information to determine enemy strengths, weaknesses, vulnerabilities, and locations important to the commander on the ground. Treating captured enemy information as evidence in a federal case would require an entirely new method of collecting and processing intelligence. More likely, the DoD and the intelligence agencies would choose to establish an entirely separate but parallel system to process and sanitize battlefield intelligence information for transmittal to federal courts because of the significant risk to intelligence sources and methods. The DoD may be forced to address these federal evidence requirements. Standards may have to be established, beginning with procedures to determine what constitutes the [\*407] equivalent of probable cause to detain, and including procedures for, inter alia, the seizure and collection of evidence, chain of custody, evidence storage and maintenance, evidence authentication, and witness availability. n43 This may, in turn, require procedures to formalize investigations, including a requirement of a pseudo-criminal case file for every detained enemy. Certainly, service members do not have the training to make and prove a federal case. Service members on the ground are now familiar with basic evidence collection requirements, and great strides have been taken in Iraq and Afghanistan to formalize information collection resulting from raids. n44 Site exploitation teams and specially trained personnel have assisted in gathering and maintaining site intelligence information, which may later be used as evidence, normally in an Iraqi or Afghani court. But imagine if every military operation required a police-like crime scene analysis, with the [\*408] collection of evidence to be used in a federal court. Soldiers simply cannot conduct such an undertaking, nor should they be required to. Military law enforcement personnel are a limited asset on the battlefield, busily investigating alleged misconduct by military personnel, contract fraud, and the deaths of service members. The DoD would be hard pressed to meet new stringent investigative and evidentiary requirements. The DoD may have to adjust its force structure and dramatically increase the capacity of the services' law enforcement investigative agencies, a precarious undertaking for a military already stretched thin. Or, perhaps the DoD would create a new habeas investigative agency, uniformed and/or civilian, to accompany forces on the battlefield. One solution is to use another federal law enforcement agency, such as the Federal Bureau of Investigation ("F.B.I."), to augment military forces, similar to the manner in which the U.S. Coast Guard augments U.S. Navy operations during law enforcement actions at sea. n45

Nuclear war

Morgan 7

(Stephen John, former National Executive Officer of the British Labour Party, his responsibilities included international relations, ethnic minority work, women’s issues, finance, local government and organization, he specialised particularly in international crisis situations spending long periods working in Belfast, in efforts to overcome sectarian strife and terrorism, former Director of WIC, a research and publishing company based in London, he went to live in Budapest during the Gorbachov period from where he helped build opposition groups in the underground in Hungary, Yugoslavia, Bulgaria and East Germany, Stephen left active politics in the early 1990 and came to live in Brussels, where he established and managed his own publishing company, has lived and worked in more than 27 different countries, including underground political work during the troubles in in Northern Ireland and war in Yugoslavia, http://www.electricarticles.com/display.aspx?id=639)

Although disliked and despised in many quarters, the Taliban could not advance without the support or acquiescence of parts of the population, especially in the south. In particular, the Taliban is drawing on backing from the Pashtun tribes from whom they originate. The southern and eastern areas have been totally out of government control since 2001. Moreover, not only have they not benefited at all from the Allied occupation, but it is increasingly clear that with a few small centres of exception, all of the country outside Kabul has seen little improvement in its circumstances. The conditions for unrest are ripe and the Taliban is filling the vacuum. The Break-Up of Afghanistan? However, the Taliban is unlikely to win much support outside of the powerful Pashtun tribes. Although they make up a majority of the nation, they are concentrated in the south and east. Among the other key minorities, such as Tajiks and Uzbeks, who control the north they have no chance of making new inroads. They will fight the Taliban and fight hard, but their loyalty to the NATO and US forces is tenuous to say the least. The Northern Alliance originally liberated Kabul from the Taliban without Allied ground support. The Northern Alliance are fierce fighters, veterans of the war of liberation against the Soviets and the Afghanistan civil war. Mobilized they count for a much stronger adversary than the NATO and US forces. It is possible that, while they won’t fight for the current government or coalition forces, they will certainly resist any new Taliban rule. They may decide to withdraw to their areas in the north and west of the country. This would leave the Allied forces with few social reserves, excepting a frightened and unstable urban population in Kabul, much like what happened to the Soviets. Squeezed by facing fierce fighting in Helmund and other provinces, and, at the same time, harried by a complementary tactic of Al Qaeda-style urban terrorism in Kabul, sooner or later, a “Saigon-style” evacuation of US and Allied forces could be in the cards. The net result could be the break-up and partition of Afghanistan into a northern and western area and a southern and eastern area, which would include the two key cities of Kandahar and, the capital Kabul. « Pastunistan?» The Taliban themselves, however may decide not to take on the Northern Alliance and fighting may concentrate on creating a border between the two areas, about which the two sides may reach an agreement regardless of US and Allied plans or preferences. The Taliban may claim the name Afghanistan or might opt for “Pashtunistan” – a long-standing, though intermittent demand of the Pashtuns, within Afghanistan and especially along the ungovernable border regions inside Pakistan. It could not be ruled out that the Taliban could be aiming to lead a break away of the Pakistani Pashtuns to form a 30 million strong greater Pashtun state, encompassing some 18 million Pakistani Pashtuns and 12 Afghan Pashtuns. Although the Pashtuns are more closely linked to tribal and clan loyalty, there exists a strong latent embryo of a Pashtun national consciousness and the idea of an independent Pashtunistan state has been raised regularly in the past with regard to the disputed territories common to Afghanistan and Pakistan. The area was cut in two by the “Durand Line”, a totally artificial border between created by British Imperialism in the 19th century. It has been a question bedevilling relations between the Afghanistan and Pakistan throughout their history, and with India before Partition. It has been an untreated, festering wound which has lead to sporadic wars and border clashes between the two countries and occasional upsurges in movements for Pashtun independence. In fact, is this what lies behind the current policy of appeasement President Musharraf of Pakistan towards the Pashtun tribes in along the Frontiers and his armistice with North Waziristan last year? Is he attempting to avoid further alienating Pashtun tribes there and head–off a potential separatist movement in Pakistan, which could develop from the Taliban’s offensive across the border in Afghanistan? Trying to subdue the frontier lands has proven costly and unpopular for Musharraf. In effect, he faces exactly the same problems as the US and Allies in Afghanistan or Iraq. Indeed, fighting Pashtun tribes has cost him double the number of troops as the US has lost in Iraq. Evidently, he could not win and has settled instead for an attempted political solution. When he agreed the policy of appeasement and virtual self-rule for North Waziristan last year, President Musharraf stated clearly that he is acting first and foremost to protect the interests of Pakistan. While there was outrageous in Kabul, his deal with the Pashtuns is essentially an effort to firewall his country against civil war and disintegration. In his own words, what he fears most is, the « Talibanistation » of the whole Pashtun people, which he warns could inflame the already fierce fundamentalist and other separatist movement across his entire country. He does not want to open the door for any backdraft from the Afghan war to engulf Pakistan. Musharraf faces the nationalist struggle in Kashmir, an insurgency in Balochistan, unrest in the Sindh, and growing terrorist bombings in the main cities. There is also a large Shiite population and clashes between Sunnis and Shias are regular. Moreover, fundamentalist support in his own Armed Forces and Intelligence Services is extremely strong. So much so that analyst consider it likely that the Army and Secret Service is protecting, not only top Taliban leaders, but Bin Laden and the Al Qaeda central leadership thought to be entrenched in the same Pakistani borderlands. For the same reasons, he has not captured or killed Bin Laden and the Al Qaeda leadership. Returning from the frontier provinces with Bin Laden’s severed head would be a trophy that would cost him his own head in Pakistan. At best he takes the occasional risk of giving a nod and a wink to a US incursion, but even then at the peril of the chagrin of the people and his own military and secret service. The Break-Up of Pakistan? Musharraf probably hopes that by giving de facto autonomy to the Taliban and Pashtun leaders now with a virtual free hand for cross border operations into Afghanistan, he will undercut any future upsurge in support for a break-away independent Pashtunistan state or a “Peoples’ War” of the Pashtun populace as a whole, as he himself described it. However events may prove him sorely wrong. Indeed, his policy could completely backfire upon him. As the war intensifies, he has no guarantees that the current autonomy may yet burgeon into a separatist movement. Appetite comes with eating, as they say. Moreover, should the Taliban fail to re-conquer al of Afghanistan, as looks likely, but captures at least half of the country, then a Taliban Pashtun caliphate could be established which would act as a magnet to separatist Pashtuns in Pakistan. Then, the likely break up of Afghanistan along ethnic lines, could, indeed, lead the way to the break up of Pakistan, as well. Strong centrifugal forces have always bedevilled the stability and unity of Pakistan, and, in the context of the new world situation, the country could be faced with civil wars and popular fundamentalist uprisings, probably including a military-fundamentalist coup d’état. Fundamentalism is deeply rooted in Pakistan society. The fact that in the year following 9/11, the most popular name given to male children born that year was “Osama” (not a Pakistani name) is a small indication of the mood. Given the weakening base of the traditional, secular opposition parties, conditions would be ripe for a coup d’état by the fundamentalist wing of the Army and ISI, leaning on the radicalised masses to take power. Some form of radical, military Islamic regime, where legal powers would shift to Islamic courts and forms of shira law would be likely. Although, even then, this might not take place outside of a protracted crisis of upheaval and civil war conditions, mixing fundamentalist movements with nationalist uprisings and sectarian violence between the Sunni and minority Shia populations. The nightmare that is now Iraq would take on gothic proportions across the continent. The prophesy of an arc of civil war over Lebanon, Palestine and Iraq would spread to south Asia, stretching from Pakistan to Palestine, through Afghanistan into Iraq and up to the Mediterranean coast. Undoubtedly, this would also spill over into India both with regards to the Muslim community and Kashmir. Border clashes, terrorist attacks, sectarian pogroms and insurgency would break out. A new war, and possibly nuclear war, between Pakistan and India could not be ruled out. Atomic Al Qaeda Should Pakistan break down completely, a Taliban-style government with strong Al Qaeda influence is a real possibility. Such deep chaos would, of course, open a "Pandora's box" for the region and the world. With the possibility of unstable clerical and military fundamentalist elements being in control of the Pakistan nuclear arsenal, not only their use against India, but Israel becomes a possibility, as well as the acquisition of nuclear and other deadly weapons secrets by Al Qaeda. Invading Pakistan would not be an option for America. Therefore a nuclear war would now again become a real strategic possibility. This would bring a shift in the tectonic plates of global relations. It could usher in a new Cold War with China and Russia pitted against the US. What is at stake in "the half-forgotten war" in Afghanistan is far greater than that in Iraq. But America's capacities for controlling the situation are extremely restricted. Might it be, in the end, they are also forced to accept President Musharraf's unspoken slogan of «Better another Taliban Afghanistan, than a Taliban NUCLEAR Pakistan!

## turns terror

#### Sources on the ground will stop cooperating if they think information could be publicized

Ford, 10

(Colonel, U.S. Army Judge Advocate General's Corps, currently serving as the Staff Judge Advocate, Multi-National Security Transition Command-Iraq, Baghdad, Iraq, “Keeping Boumediene off the Battlefield: Examining Potential Implications of the Boumediene v. Bush Decision to the Conduct of United States Military Operations,” 30 Pace L. Rev. 396, Winter, Lexis)

 [\*414] **Intelligence operations will be the most vulnerable**. If court-directed discovery occurs, a unit's intelligence files would become the equivalent of a law enforcement investigative file. Information deemed relevant to the defense, including information that the United States expended significant resources, and potentially lives, to obtain, would become discoverable in some form. Valuable intelligence sources and methods, some irreplaceable, would be lost. **Sources would dry up or perhaps be revealed and killed.** Consider the sad and dangerous contradiction. Military planners and intelligence officers study and analyze an enemy, compiling tens of thousands of pieces of information into a precise operations plan, targeted at important leaders or facilities. Troops receive an order, conduct mission-specific training, and prepare to execute. Approvals are obtained from appropriate commanders. A joint and multi-national combined arms operation ensues to attain the military objective sought. Conventional troops, special operations forces, combat aircraft, artillery support, and overhead assets all converge on the target in a dangerous and complex culmination of modern military power. Enemy, friendly, and civilian lives are lost, and prisoners are taken. Specialized teams exploit the site and sweep through the complex, retrieving valuable enemy information that will assist in future operations and save American lives. Now the contradiction is revealed. All the information relevant to a federal court case - information gained in the planning, execution, and exploitation of the mission - is transmitted back to a U.S. court, to counsel, and, perhaps, back to the same enemy captives who required so much time, effort, resources, and lives to capture. This truly is a sad and dangerous contradiction. Soldiers will have risked their lives to regurgitate the fruits of their sweat, toil, and blood back to the enemy. **This example illustrates why Boumediene must stop at Guantanamo Bay.**

#### The plan destroys convictions and leads to shorter sentences---undermines ability to stabilize Afghanistan and Iraq

Goldsmith, 9

(Law Prof-Harvard, 2/4, “Long-Term Terrorist Detention and Our National Security Court,” http://www.brookings.edu/~/media/research/files/papers/2009/2/09%20detention%20goldsmith/0209\_detention\_goldsmith.pdf

These three concerns challenge the detention paradigm. They do nothing to eliminate the need for detention to prevent detainees returning to the battlefield. But many believe that we can meet this need by giving trials to everyone we want to detain and then incarcerating them under a theory of conviction rather than of military detention. I disagree. For many reasons, **it is too risky for the U.S. government to deny itself the traditional military detention power altogether,** and to commit itself instead to try or release every suspected terrorist. For one thing, **military detention will be necessary in Iraq and Afghanistan** for the foreseeable future. For another, we likely cannot secure convictions of all of the dangerous terrorists at Guantánamo, much less all future dangerous terrorists, who legitimately qualify for non-criminal military detention. The evidentiary and procedural standards of trials, civilian and military alike, are much higher than the analogous standards for detention. With some terrorists too menacing to set free, the standards will prove difficult to satisfy. Key evidence in a given case may come from overseas and verifying it, understanding its provenance, or establishing its chain of custody in the manners required by criminal trials may be difficult. This problem is exacerbated when evidence was gathered on a battlefield or during an armed skirmish. The problem only grows when the evidence is old. And perhaps most importantly, **the use of such evidence in a criminal process may compromise intelligence sources and methods,** requiring the disclosure of the identities of confidential sources or the nature of intelligence-gathering techniques, such as a sophisticated electronic interception capability. Opponents of non-criminal detention observe that despite these considerations, the government has successfully prosecuted some Al Qaeda terrorists—in particular, Zacharias Moussaoui and Jose Padilla. This is true, but it does not follow that prosecutions are achievable in every case in which disabling a terrorist suspect represents a surpassing government interest. Moreover, the Moussaoui and Padilla prosecutions highlight an under-appreciated cost of trials, at least in civilian courts. The Moussaoui and Padilla trials were messy affairs that stretched, and some observers believe broke, our ordinary criminal trial conceptions of conspiracy law and the rights of the accused, among other things. The Moussaoui trial, for example, watered down the important constitutional right of the defendant to confront witnesses against him in court, and the Padilla trial rested on an unprecedentedly broad conception of conspiracy.15 An important but under-appreciated cost of using trials in all cases is that these prosecutions will invariably bend the law in ways unfavorable to civil liberties and due process, and these changes, in turn, will invariably spill over into non-terrorist prosecutions and thus skew the larger criminal justice process.16 A final problem with using any trial system, civilian or military, as the sole lawful basis for terrorist detention is that the trials can result in short sentences (as the first military commission trial did) or even acquittal of a dangerous terrorist.17 In criminal trials, guilty defendants often go free because of legal technicalities, government inability to introduce probative evidence, and other factors beyond the defendant's innocence. These factors are all exacerbated in terrorist trials by the difficulties of getting information from the place of capture, by classified information restrictions, and by stale or tainted evidence. One way to get around this problem is to assert the authority, as the Bush administration did, to use non-criminal detention for persons acquitted or given sentences too short to neutralize the danger they pose. But such an authority would undermine the whole purpose of trials and would render them a sham. As a result, putting a suspect on trial can make it hard to detain terrorists the government deems dangerous. For example, the government would have had little trouble defending the indefinite detention of Salim Hamdan, Osama Bin Laden's driver, under a military detention rationale. Having put him on trial before a military commission, however, it was stuck with the light sentence that Hamdan is completing at home in Yemen. As a result of these considerations, insistence on the exclusive use of criminal trials and the elimination of non-criminal detention would significantly raise the chances of releasing dangerous terrorists who would return to kill Americans or others. Since noncriminal military detention is clearly a legally available option—at least if it is expressly authorized by Congress and contains adequate procedural guarantees—this risk should be unacceptable. In past military conflicts, the release of an enemy soldier posed risks. But they were not dramatic risks, for there was only so much damage a lone actor or small group of individuals could do.18 Today, however, that lone actor can cause far more destruction and mayhem because technological advances are creating ever-smaller and ever-deadlier weapons. It would be astounding if the American system, before the advent of modern terrorism, struck the balance between security and liberty in a manner that precisely reflected the new threats posed by asymmetric warfare. We face threats from individuals today that are of a different magnitude than threats by individuals in the past; having government authorities that reflect that change makes sense.

## trials link

#### Civilian trials devastate military effectiveness

Ford, 10

(Colonel, U.S. Army Judge Advocate General's Corps, currently serving as the Staff Judge Advocate, Multi-National Security Transition Command-Iraq, Baghdad, Iraq, “Keeping Boumediene off the Battlefield: Examining Potential Implications of the Boumediene v. Bush Decision to the Conduct of United States Military Operations,” 30 Pace L. Rev. 396, Winter, Lexis)

Justice Scalia devoted attention to what he termed the "disastrous consequences" of the majority opinion. n15 He cautioned that the holding "will almost certainly cause more [\*400] Americans to be killed" n16 and concluded that "the Nation will live to regret what the Court has done today." n17 Justice Scalia pointed to evidence showing that, of the detainees that the DoD has released from Guantanamo, approximately 30 have returned to the battlefield. n18 He argued that this data "illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection." n19 Essentially, Justice Scalia argued that **the military, rather than the courts, is in the best position to determine friend or foe**. n20 If the DoD in fact released terrorists inadvertently, under procedures the Court determined were inadequate to protect the detainees, then the heightened review, as now mandated by the Court, would doubtless result in the release, back to the battlefield, of even more terrorists who feign false imprisonment as innocent bystanders. Justice Scalia and Chief Justice Roberts expressed additional concerns about providing detainees access to U.S. military witnesses, who may be otherwise unavailable, at war in a combat zone. n21 They also resisted releasing classified information to detainee counsel, which **could be used against U.S. forces or to the advantage of the terrorist enemy**. n22 Noting that the DoD relied on previous Court decisions, namely Eisentrager, n23 in moving detainees all the way from Afghanistan to Cuba, Justice Scalia chastised the majority for essentially changing the rules in the middle of the war. n24 Concluding his discussion of the decision's consequences, he warned that "how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the [\*401] national security concerns that the subjects entails." n25 The Boumediene dissenters raise an issue that has slithered into today's modern battlefield and one that must be confronted by national security policy makers: lawfare. Lawfare is the concept that the current enemy, or any enemy for that matter, will use our laws and general compliance with the Rule of Law against us. The term was coined in 2001 by then-Colonel, now Major General, Charles J. Dunlap, Jr., of the U.S. Air Force, in an article questioning whether lawfare undercuts the effectiveness of the military. n26 The Boumediene dissenters would likely argue that it does. More significantly, Boumediene could be described as a form of fratricide - self-imposed, self-perpetuating lawfare. Will the concerns of the dissenters be realized? Is the majority opinion an attempt by the Court to structure a remedy applicable only to Guantanamo Bay, perhaps in order to make a political statement or rectify a perceived particularized wrong? Regardless of the answers, the fact remains that the decision provides a precedential framework for analysis. The Court must be taken at its word. In its holding, the Court fashioned a new test for determining whether a foreign fighter detained overseas may rely on the habeas right. n27 In applying this test, a subsequent court could conceivably determine that the United States exercises functional control over a U.S. prisoner of war holding or detention camp located in a foreign area, particularly where the area is a traditional Occupied Territory under the laws of war - where U.S and/or coalition forces are the occupiers. For some of the practical reasons and obstacles described herein, Boumediene should not be extended. Under Boumediene, did prisoners held at Abu Ghraib [\*402] during the height of the United States' occupation of Iraq possess habeas rights? n28 Does habeas attach to the prisoners currently held in overseas locations, such as Bagram Air Base in Afghanistan? n29 Notwithstanding current restrictions on the use of certain areas for military purposes, what if the United States chose to establish a Guantanamo Bay-like location in Antarctica, or in space? Or in the middle of an ocean, on a ship, or on a man-made island? The questions are fair ones, and some are already being asked by commentators. To many who have followed the Court's decisions in this area, the holding is no surprise. Boumediene reinforced a position the Court began to signal a few years earlier. In 2004, in Rasul v. Bush, the Court found that the statutory habeas corpus provisions contained in the U.S. Code n30 applied to the Guantanamo detainees. n31 And, in deciding Hamdan v. Rumsfeld in 2006, the Court applied Geneva Convention protections to the Guantanamo detainees. n32 Will this trend by the Court of providing rights to detained foreign fighters continue? Referring to Boumediene, former Attorney General Michael Mukasey expressed concern that the trend could continue when he warned that **our wartime efforts in Afghanistan could become an evidentiary nightmare and turn into CSI: Kandahar**. n33 With this in mind, what measures could [\*403] the DoD undertake? II. Boumediene in the Pentagon The scope of the problem the DoD may face is a bit daunting. What could happen - and, in the case of the Guantanamo detainees, what is happening - is that foreign detainees held by U.S. forces in locations deemed to be the functional equivalent of United States territory could be entitled not just to Geneva protections (for prisoners of war) or Detainee Treatment Act n34 protections (in the case of enemy combatants at Guantanamo Bay not declared prisoners of war), but also to habeas review by a federal district court. If the functional analysis test of Boumediene is extended, or is interpreted by the DoD to extend to physical locations other than Guantanamo, then foreign fighters will be afforded additional protections under the U.S. Constitution and U.S. laws - protections normally reserved for U.S. citizens or other persons in the country. n35 These new rights could include a right to counsel, Miranda warnings, heightened due process, and countless other rights and privileges normally associated with citizenship or presence in the United States. Imagine a military commander needing probable cause to detain - or worse, some higher level of proof to attack - an enemy! n36 **The implications are mind-boggling to** [\*404] **a military professional**. Our military force would essentially be converted into a de facto law enforcement organization or would have such an organization as its adjunct. **Such extension would completely change the face of combat**. n37 Perhaps some of these examples are far-fetched; the issue, though, is **how far toward this end will the courts go? They should go no further than Boumediene**. If, however, courts continue the trend and extend this holding, how would the DoD meet these new requirements?

#### Expansion of rights for detainees would require huge diversion of resources from operations – but the counterplan doesn’t link

Bellinger, 11

(Sr. Fellow-National Security Law-CFR & Law Prof-Cardozo, April, Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law, http://www.lawfareblog.com/wp-content/uploads/2013/08/BellingerPadmanabhan\_Detentions\_April\_20111.pdf)

A second difficulty concerning judicial review is whether it is feasible in conflicts having larger numbers of detainees.143 For example, the demands that the U.S. federal courts have imposed on the government in justifying detention at Guantanamo could not practically be applied if many more detainees were involved. In 2007, the D.C. Circuit in Bismullah v. Gates interpreted the Detainee Treatment Act as granting the court the authority to review all reasonably available information in the government’s possession bearing on the issue of whether the detainee was an enemy combatant.144 In seeking en banc and later Supreme Court review of the decision, the United States explained that meeting such demands required “hundreds of man-hours” per case, **diverting valuable intelligence and military resources from the ongoing war effort**.145 While these demands may be met relatively easily with small numbers of detainees, such as the population at Guantanamo, **they would be impractical if** imposed in conflicts with nonstate actors resulting in thousands of detainees.146 In those cases, administrative review may be more realistic.

## add on

Judicial overreach destroys stability and causes a coup

Fazl-e-Haider, development analyst in Pakistan and writer for The National, UAE, 7/24/2013

(Syed, “Judges, not generals, emerge as Pakistan's dominant actors,” www.thenational.ae/thenationalconversation/comment/judges-not-generals-emerge-as-pakistans-dominant-actors#full)

Today, judges in Pakistan seem to be more powerful than military generals, who are apparently no more the "movers and shakers" in domestic politics. Under Chief Justice Iftikhar Chaudhry, over the past three years, the court has become powerful enough to challenge a sitting prime minister. Last year, the court disqualified and removed former prime minister, Yousuf Raza Gilani, by convicting him for contempt of court.

There is even talk of a judicial coup, instead of a military coup. Speaking in Lahore last year, Chief Justice Chaudhry reportedly said: "Gone are the days when the stability and security of the country was defined in terms of the number of missiles and tanks as a manifestation of hard power available at the disposal of the state".

The powerful judiciary played an effective role in checking the culture of kickbacks and corruption that reached epidemic levels under the previous government. Former prime minister Raja Pervez Ashraf is still on trial over a power plant scam. Similarly, the court ordered a freeze on the assets of Ali Musa Gilani, son of former prime minister Yousaf Gilani, in the ephedrine quota case - a massive drug scam.

Courts are now virtually ruling the country. The Supreme Court recently struck down a one-percent increase in the General Sales Tax (GST) proposed in the fiscal budget presented by the new government this month. The court's decision was welcomed by a public already reeling from inflation. The court also disqualified heavyweight politicians from contesting polls and arrested others for holding fake education degrees in the run up to the general elections on May 11. The nomination papers of prominent figures in politics had been rejected by the judiciary-backed returning officers.

The judicial activism, however, has invited criticism about the conduct of the courts. Are courts moving toward judicial tyranny by intervening in areas beyond their purview? Certainly, the undue interference in government affairs by the judiciary or overstepping its juridical powers is neither in the interests of democracy nor does it serve the interests of the institution itself. Is the country really witnessing a power shift from the military to the judiciary? The court, through Mr Musharraf's trial, will set a precedent that a military dictator who dislodged a democratic system by abrogating the constitution can be tried for high treason and duly punished. Justice Jawwad S Khawaja recently said the court sought to write history by initiating a trial against a former military ruler.

The trial may eventually bring the military and judiciary on a collision course. The military already feels uneasy over the way its former army chief has been treated. The country may plunge into a political crisis as a result of tussle between the military and judiciary. It is worth noting that Pakistan's stock market tumbled on June 23 after Mr Sharif announced his intention to initiate a case, scaring investor sentiment about short-term political stability.

Judicial overreach supports terrorism and instability – it will topple the government

Ahmed, writer for the Friday Times, Pakistan, August 2012

(Khaled, “Judicial supremacy or dictatorship?” http://www.thefridaytimes.com/beta3/tft/article.php?issue=20120803&page=3)

On 7 July, 2012, Chief Justice of Pakistan Justice Iftikhar Muhammad Chaudhry said that Article 8 of the constitution empowered the Supreme Court to strike down any legislation which encroached upon the basic rights of the citizens. He said this while speaking at a ceremony for newly enrolled advocates at the Supreme Court's Karachi Registry.

He sought to debunk the universally accepted supremacy of parliament in Pakistan by adding that 'even in the United Kingdom itself, the doctrine of supremacy of Parliament is now seen to be out of place'. Quoting a note written by Justice Jawwad Khwaja, he said, 'It is time, after 65 years of Pakistan's independence, that we freed ourselves from the shackles of obsequious intellectual servility to colonial paradigms and start adhering to our Constitution'.

Parliament in Pakistan is going through its moment of weakness not because the Constitution wants it weak but because the political parties in it are at each other's throat. The two big parties the PPP and PMLN are at loggerheads, the latter threatening to launch long marches in addition to staging fisticuffs on the floor of the National Assembly. Out on the streets, the Chief Justice and his fellow judges in the Supreme Court are being supported by aggressive and increasingly vandalistic lawyers, beating up the police and slapping judges in the lower courts.

Parties that stayed out of the 2008 elections also consider the parliament wrongly composed, rebuking the PMLN for sitting inside it while it should be out on the road demanding new elections. The religious parties are committed to the Chief Justice because of his 'basic structure' doctrine which encourages the clergy to assert their alternative jihadi vision of the state. They are hopeful that Chief will continue to the trend set in the way the Court has dealt with Lal Masjid, a known stronghold of Al Qaeda before it was dismantled in 2007.

The media, silently obeying the Al Qaeda diktat of non-reference to terrorists and their affiliates in the madrassa network, is one of the pillars of the Chief's strength. Conservative like the judiciary, it is subjecting parliament and government to tough one-sided scrutiny. In Balochistan, terrorists demanding independence are on the side of the Chief Justice; the 'nationalists' in Sindh want him to take cognizance of the way the PPP-MQM combine is treating them, knowing full well that the Court is punitively inclined towards the federal government.

The only relief is the opinion in the English-language press where the Chief Justice is frequently challenged on points of law. Those lawyers who dare criticise the Court's conduct are frequently threatened and the threat could come equally from the state or the terrorist network affiliated with Al Qaeda.

There is no argument with the fact the Supreme Court is a constitutional arbiter and can strike down laws but it is an arbiter without accountability. Who will judge the Chief Justice's supremacy? His court suffers from a lack of restraint and that is being noted in countries that he refers to having broken the shackles of supremacy of parliament. He is himself to blame for this swing of opinion from the judiciary to the executive which the international opinion now thinks is being bullied by him. His son's scandal which should have compelled him to resign pending investigation has actually strengthened the ranks of those who want him in place to finally get rid of the executive.

In March 2011, Supreme Court Bar Association President Asma Jahangir said the judiciary under Chief Justice Iftikhar Muhammad Chaudhry was becoming judicial dictatorship, as reflected in the Supreme Court's orders on the 'National Accountability Bureau chairman and judges' extension cases'. Ms Jahangir in 2012 lives under terrorist threat and the Bar under a new president is behaving more carefully. Nobody wants to die.

The Supreme Court in India went through the same kind of mood swing but began to return to normal after 2010 when some judges thought that the Court's hyper-activism had gone too far. Tehelka newsmagazine (TFT 9 Feb 2012) reported that in a public lecture, the current Chief Justice SH Kapadia in March 2011 acknowledged that judges imposed their 'values', 'likes' and 'dislikes' on the society. He said: 'The judges should not speak anything beyond the principles of a particular case. Let us not give lectures to society'.

After that the number of cases of Obiter Dictum certainly went down in India but the clash between the judiciary and the executive continued. In the same month, the SC quashed the appointment of the Chief Vigilance Commissioner PJ Thomas due to pending corruption cases against him.

In January 2012, the court struck down the government's decision to impose $2.2 billion tax on telecom giant Vodafone. Various decisions of the green bench of SC which looked into environmental cases were often at variance with the government's view. The prosecution in the 2G telecom scam case itself gained pace after the Supreme Court took it over and started directly supervising the Central Bureau of Investigation.

There has been a growing clamour in India about the accountability of judges, especially from the elected representatives. 'They behave like gods', 'They are not responsible for any of their actions', 'What about judicial corruption' - Indian MPs and ministers were heard complaining in hushed voices. The government tried to bring in the judicial accountability bill. Selection of judges to Indian Supreme Court is perhaps one of the non-transparent processes in the country.

(NB: The judiciary in India is/was activist in very different conditions. The executive was not hounded by a virtually absent writ of the state. The executive and the courts are were not forced to live under intimidation from highly organised terrorists funded from abroad and domestically through kidnappings and bank robberies. And in India judiciary was not embroiled in the politics of toppling incumbent governments before their time.)

Judicial overreach escalates civilian-military conflict

Khanna, former director of South Asia Desk in the Voice of America Newsroom, 1/29/2012

(Ravi M., Pakistan's dynamic instability: Road to real democracy? (Comment), MyNews Interactive Media, Lexis)

The Chief Justice is asserting the judiciary's supremacy through a kind of judicial activism that is becoming very common in several of today's democratic countries. But the problem is Pakistan is still a fledgling democracy which is not ready for this kind of judicial activism.

Since 2009, Pakistan's Supreme Court has issued numerous rulings that have propelled them into areas traditionally dominated by the government in Pakistan. The court has also dictated the price of petrol and sugar, and supported the rights of transsexuals.

Not only that, this judicial activism, very new for Pakistan, has also prompted the court to intervene in a fight between the civilian government and the army over allegations that government officials sought US help in averting what they thought could have been a military coup.

# solvency

#### Status quo incremental approach best—one-size fits all model risks rollback of prior habeas gains

Nesbit, 10

(JD-U Minnesota, Meeting Boumediene's Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation, November, 95 Minn. L. Rev. 244, Lexis)

It bears emphasizing that the political branches could pass new detention legislation that appropriately reckoned with the implications of Boumediene, ensuring that detainees have a prompt, meaningful chance to contest their status, to assess the evidence against them, and so on. n201 **The suggestion here, however, is that the game would not be worth the candle: the federal courts in Washington, D.C. have already done this work for them.** C. Congressional Inaction **The best option is, in the end, the simplest one. The political branches should allow the courts to continue to adjudicate habeas petitions** on the basis of the AUMF as construed in Hamdi and in light of the Court's guidance in Boumediene. As has happened over the last two years, remaining differences among judges will likely narrow over time as the jurisprudence matures. n202 True, as Judge Brown pointed out in urging congressional [\*281] action, the common-law process depends on incrementalism and eventual correction, and may be most effective where there are a significant number of cases brought before a large number of courts; by contrast, the number of Guantanamo detainees is limited, the circumstances of their confinement are unique, and all cases are heard before the D.C. courts. n203 Yet, as Part II demonstrated, even as district court judges have rejected the alternative approaches of their colleagues on both substantive and procedural issues, n204 **the common-law process has already worked to resolve many of these disagreements. And that all habeas cases are heard before the federal courts in Washington, D.C. is a virtue rather than a vice, as it allows the D.C. judges to rapidly accumulate expertise**. n205 A central purpose of the habeas litigation is to allow each detainee a fair and equal chance to challenge his confinement. The early months of litigation gave reasons to doubt whether that was happening. But times have changed. Detainees need not wait for the law to cohere on some future date; it is already beginning to do so. While detainees do not benefit from all aspects of the jurisprudence emerging from the D.C. Circuit, the law is at least becoming coherent and consistent enough to provide every detainee the same, genuine opportunity to challenge his detention. The D.C. Circuit has not resolved every divergence, nor could it. Some disagreements, rooted in different conceptions of the appropriate amount of deference to accord the government in light of Boumediene, will persist. n206 Given the convergence of [\*282] substantive detention standards discussed above, such disagreements may increasingly be about procedural matters. From a uniformity standpoint this result is less of a problem. Procedure is an area of unique judicial expertise; district court judges are well suited to develop procedures that ensure accurate fact-finding and a fair - or at least reasoned and public - resolution of each habeas case. n207 **It would be unwise to mandate a one-size-fits-all procedural framework for cases that are widely recognized to be "unique" and "unprecedented**." n208 CONCLUSION The Guantanamo habeas cases have challenged our court system. With little guidance from Congress or the Supreme Court, federal judges have been muddling through the habeas cases for over two years. But while district court judges have disagreed about both substantive and procedural issues, the D.C. Circuit has resolved the most salient of these disagreements. As a result, the **habeas jurisprudence is increasingly coherent, and effectively provides each detainee with the same, meaningful chance to challenge his detention**. Moreover, the many detainee wins have not come at the expense of laying precedent that threatens U.S. national security. Indeed, the standards emerging from the D.C. Circuit are, if anything, overly protective of national security prerogatives at the expense of detainee liberty. For detainees as well as for the government, then, habeas works. Many eight-or-more-year denizens of Guantanamo never belonged there, and the story of their detention will no doubt long stain the reputation of the United States as a champion of individual liberty and human rights. But the story recounted [\*283] here is not an unmitigated failure of these principles. Boumediene gave detainees access to a process that has led many to freedom; Fouad Al-Rabiah, the aviation engineer discussed in the Introduction, is now at home in Kuwait. n209 In sum, **the habeas cases decided so far suggest that the wisest course of action is also the simplest and most politically attractive. Congress should stand back and allow the habeas litigation to proceed.**

#### Current gradual judicial approach solves detainee rights

Nesbit, 10

(JD-U Minnesota, Meeting Boumediene's Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation, November, 95 Minn. L. Rev. 244, Lexis)

But the pragmatic case for new detention legislation will no longer write. The D.C. Circuit has stepped in to answer many of the lingering questions that plagued the early months of habeas litigation. Unequal application of the law is now significantly less likely. Moreover, the D.C. Circuit's opinions almost uniformly favor the government, and thus undermine the key motivation for Congress to pass new detention legislation - namely, the maintenance of national security. Still, detainees are the biggest beneficiaries of the habeas litigation: so far judges have sided with thirty-eight of fifty-three of them, a remarkable seventy-one percent success rate for detainees. n17 In short, more than two years after the Supreme Court handed the reins of executive detention to federal judges in Washington, D.C., **it is increasingly clear that the habeas process appropriately balances U.S. national security and detainee liberty concerns.** Through a critical examination of how the jurisprudence has unfolded, this Note tells the story of how and why habeas works. It concludes that new detention legislation would be unnecessary and counterproductive; rather, **the most prudent approach is to allow the D.C. Circuit to continue to resolve disagreements among lower court judges as they arise.** Part I reviews the legislation and precedent leading up to the current process of habeas review. Part II analyzes the district court and D.C. Circuit opinions, paying particular attention to uniformity (or lack thereof) among district court judges and to their approaches to balancing national security and liberty concerns. While the early state of the law benefitted neither the government nor detainees as a whole, the jurisprudence has matured remarkably quickly. Most foundational disagreements among judges have now been resolved, and have been resolved in a manner that should allay congressional concerns about national security. Part III argues that while new detention legislation would have made sense during the first eighteen months of habeas litigation, **the maturation of the jurisprudence has rendered this option unnecessary at best and counterproductive at worst. Habeas works. Congress should stand back and allow the courts to proceed.**

#### Balance ideal now--executive self-restraint sufficient

Goldsmith, 12

(Prof-Harvard Law, Hoover Institution Task Force on National Security and Law, March, Power and Constraint, p. 174-81

Of all of the establishment amicus briefs condemning the Bush administration and defending the rule of law before the Supreme Court, however, perhaps none were as significant as the ones filed by military officers who purported to represent the views of soldiers fighting in the war on terrorism.' Former U.S. military officers and military lawyers filed briefs that emphasized the importance to the military of the post–World War II Geneva Conventions, and especially their procedural protections for prisoner rights that, they charged, the Bush administration was flouting. The United States had long taken the lead in extending and enforcing these rights, they maintained, and American soldiers would suffer most from the Bush administration's disregard of them. "If American detention of the Guantanamo prisoners— indefinite confinement without any type of review by a court or tribunal is regarded as precedent for similar actions by countries with which we are at peace, it is obvious that it may be similarly regarded by enemies who capture American soldiers in an existing or future conflict," argued the retired military officers. Even more remarkable was the amicus brief filed by current military lawyers representing alleged terrorist detainees in military corn-missions. There lawyers, in a public rebuke to the Commander in Chief they served, described the administration's claims about GTMO as a "monarchical regime."' As with Korematsu and the civilian government officials, the military briefs were not telling the justices much that they had not learned in the newspapers in the previous two years. Since 2001 the judge advocates general (JAGs) in the Pentagon had been pushing back hard against what they viewed as the Bush administration's disregard of military law and traditions. Two legal commitments by the military were especially important. One was the 1950 Uniform Code of Military Justice (UCMJ), which replaced a command-dominated justice system with a system of courts-martial that eventually looked much like the civilian counterpart in its commitment to independence and due process. Another was the Geneva Conventions and related customary international laws of war. By 2001 both the UCMJ and the laws of war had become pillars of U .S. military discipline and central to the military's self-understanding as honorable warriors. The JAGs were the guardians of these laws, with a deserved reputation for interpreting and enforcing them in ways that both protected the integrity of the military and reflected the realistic needs of battlefield discipline. For decades the U.S. military had built its doctrine, training, and policies around the JAG understandings of the UCMJ and the laws of war. And for decades their vision of law-governed military operations led them to have professional and even ideological points of contact and agreement with human rights groups and especially with the International Committee of the Red Cross. Of course, the military lawyers did not agree on all points with these NGOs. But as Harvard Law School professor David Kennedy notes, "They all know one another, hang out at the same places, read the same things, and have their own parallel problems with more exuberant people in their own 'camps.' '"40 They shared a general outlook, especially about the relevance of certain international laws, and it was an outlook not shared by the Bush administration. The Bush administration's post-9/ 11 counterterrorism policies were a direct affront to the JAG view of the world and the Defense Department institutions that had built up around it. Vice Presidential Counsel David Addington and Defense Department General Counsel Jim Haynes had a principled commitment to reducing JAG independence based on notions of civilian control of the military. They also had principled views about the non-applicability of the UCMJ and the Geneva Conventions to certain aspects of the war on terrorism, and about vindicating these views—which were, after all, the views of the President—throughout the military. The JAGs fought hard against these policies inside the Pentagon, in public testimony, and in leaks to the press. The first clash came in November 2001 when the Bush administration announced its military commissions with little input from the JAGs. The JAGs viewed the commissions' departures from the UCMJ as both illegal under domestic and international law and a challenge to the authority they had built up around the UCMJ as the standard-bearers of military justice. The next clash came over the Bush administration's decision in January 2002 to proclaim that the Geneva Conventions had no application in the war on terrorism, a proclamation that the JAGs argued was illegal and dangerous for U.S. soldiers who might one day need Geneva protections. The third clash, which began in the fall of 2002, concerned the Bush administration's aggressive interrogation techniques, which the JAGs once again vehemently opposed on legal and policy grounds. Never before had military lawyers so thoroughly disagreed with civilian officials during war over legal matters. The JAGs in the post-9/ 11 world were—like inspectors general, and like lawyers in other agencies, but with more power yet another fount of independent scrutiny, law enforcement, and pushback inside the executive branch. The JAG counterattack on legal issues was remarkable because it was directed toward the Commander in Chief, who is supposed to be the chief law interpreter for the executive branch and whose power is supposed to be at its height during war. It was all the more remarkable because for assistance in their fights, the JAGs turned to human rights organizations with which, on these issues, they had a greater commonality of interests than with the President.' The ecology of transparency ensured that the clashes between military and civilian lawyers spilled into the public realm, and was churned by commentators, by the time the Supreme Court considered the GTMO cases in the spring of 2004. In a testament to the JAGs' reputation and independence, and to the mistrust of the Bush administration by this point, the stories about the law fights inside the Pentagon were not generally treated as military subordination or affronts to civilian control. They were, rather, treated as JAGs standing up to the law-defying Bush administration in the name of the rule of law. The presidency was untrustworthy, out of control, and defying the rule of law and military traditions. That was the message the amici in Rasul's case sent to the Court—a message the Court had heard long before it read the briefs. Two months before the Court issued its final decision in the case on habeas corpus rights for GTMO detainees, the message received devastating public confirmation. On April 28, 2004, Justice Ruth Bader Ginsburg asked Deputy Solicitor General Paul Clement a seemingly innocuous set of questions in a case about the government's power to detain a U.S. citizen in the United States with little judicial scrutiny. "So what is it that would be a check against torture?" she asked. "What's constraining? . . . Is it just up to the good will of the executive?" Clement answered that the possibility of executive abuse in war "is not a good and sufficient reason for judicial micromanagement and overseeing of that authority." He added, "You have to recognize that in situations where there is a war—where the Government is on a war footing, that you have to trust the executive to make the kind of quintessential military judgments that are involved in things like that."42 Seven hours later, the CBS program 60 Minutes published the first photographs of U.S. soldiers abusing detainees at Abu Ghraib. The vile and shameful photos visualized years of worries and stories and charges about the dangers of unchecked executive power. They became the face of what it meant to trust the executive branch in war. On June 18, 2004, the Supreme Court ruled that Ratner's client and almost six hundred other GTMO detainees could file petitions for habeas corpus in federal court to seek their release. The decision marked the first time in American history that enemy soldiers held outside the United States during wartime could force the executive branch to explain and defend their detention before a court. The Court did not mention Abu Ghraib or any of the amicus briefs. But it tied its decision to the tradition, dating back to before the Magna Carta, of judges employing the writ of habeas corpus to review "oppressive and lawless" executive detentions. And in a related war-on-terror case decided the same day, Justice Sandra Day O'Connor noted that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others.' The Court explained its decision on a narrow ground: that Congress had intended for courts' habeas corpus power to extend to places like GTMO that were under U.S. control. This was an implausible rationale that defied Eisentrager, which the Court did cartwheels to distinguish. But it had the virtue of making the Court's momentous step a relatively small one, for it left open the possibility that Congress could retract habeas corpus power from GTMO, and it said practically nothing about what legal rights, if any, these detainees possessed. As Justice Breyer would later say, the Court in Rasul "found a way to hold the president accountable to [the] limited extent" of allowing GTMO detainees to challenge their detention "while leaving much to be worked out later.' There was indeed much to be worked out, but the Rasul decision still had an immediate impact. The administration had already released eighty detainees from GTMO in reaction to the Court's grant of review the previous November.' In response to the decision, it set up Combatant Status Review Tribunals (CRSTs) composed of military officers to review the legality of detentions for each person held at GTMO. CSRTs were based on Army regulations for detaining prisoners of war, and gave detainees the right to hear evidence against them, the right to challenge the detention by testifying and introducing evidence and calling witnesses, and the right to a personal representative to assist. Also in response to Rasul, the Bush administration established Administrative Review Boards (ARBs) to help ensure going forward that only detainees who remain dangerous were detained. The CSRTs determined that thirty-eight detainees could not be held as enemy combatants, and by 2006 the ARBs had determined that an additional 188 detainees could be released or transferred from GTMO.' All in all, **the threat and reality of judicial review in Rasul caused the executive branch to tighten its detention standards** and contributed to the discharge of 308 detainees from GTMO. In 2006 the Supreme Court issued an even more significant decision in a case that asked whether Salim Ahmed Hamdan, Osama Bin Laden's bodyguard and driver, could be tried in the military commission system that President Bush announced in November 2001. On the surface, once again, the executive branch's legal arguments looked sound, since President Bush's order establishing the commissions had relied on the same language that FDR had used for his commissions in World War II and that the Supreme Court had approved in Quirin. But that 1942 precedent seemed like a relic in light of the massive intervening changes in military justice, criminal procedure, and the laws of war. And the rule-of-law concerns had grown in the intervening two years with the leak of the so-called torture memos; the floodgates opening on news reports of abuse in GTMO, Iraq, Afghanistan, and in secret prisons; and the New York Times' revelation of the warrantless wiretapping program known as the "Terrorist Surveillance Program" and other secret surveillance initiatives. Hamdan's lawyers, which included his military lawyer assigned to the case, argued that Bush's commissions violated the Constitution, congressional commands, and the international laws of war. Once again, amici swarmed the Court, this time with a 37-5 balance against the government's position, and with a yet broader array of U.S. and foreign government officials and former officials weighing in on domestic and international rule-of-law concerns.' On June 29, 2006, the Supreme Court invalidated the Bush military commissions, reasoning that they did not comply with conditions previously imposed by Congress. This ruling left the President free to go to Congress to seek approval for commissions. "The Court simply limited the President's authority to act as he had on his own, without legislative authority," Justice Breyer later explained. "Insofar as **the Court** rested its holding on statutes, it **did not limit the President's ability**, or that of the military, **to act in time of hostilities**.' But this is a drastically incomplete statement of what the decision accomplished, for the Court also ruled that Common Article 3 of the Geneva Conventions governed the "conflict with al Qaeda." **This was a far-reaching ruling that altered the entire character of the President's legal authorities in the "war on terrorism."** The non-application of the Geneva Conventions was the foundation for the Bush administration's post-9/ 11 counterterrorism program. It allowed the administration to avoid the Conventions' trial requirements and prohibitions on torture and cruel and inhuman treatment; it also allowed the administration to avoid the criminal prohibitions of the congressional War Crimes Act that were tied to the application of the Geneva Conventions. **The Court's ruling on Common Article 3 thus brought a sudden rush of law and international precedent—backed with** the threat of criminal **sanctions—into GTMO's legal black hole, and to military operations around the globe**. It also called into question the legality of the CIA's interrogation program. As we saw in Chapter 4, the Bush administration had, six months before the Hamdan decision, suspended the CIA interrogation program temporarily following a congressional ban on cruel, inhuman, and degrading treatment. But the December 2005 ban was not a criminal prohibition. The Court's Article 3 ruling brought into play a criminal law that was more restrictive than the earlier noncriminal congressional ban. **The Hamdan decision had an immediate impact**. One week after the decision Deputy Secretary of Defense Gordon England issued a memorandum to the entire U.S. military. It noted the Court's Common Article 3 ruling and ordered the entire military establishment to "ensure that all DoD personnel adhere to these standards." It further ordered a review, to be completed within three weeks, of "all relevant directives, regulations, policies, practices, and procedures . . . to ensure that they comply with the standards of Common Article 3."49 The decision also had a big effect on the CIA, which became more fearful than ever of criminal recriminations for its interrogation program. Just over two months after the Hamdan decision, President Bush, at the urging of CIA Director Michael Hayden, disclosed the secret CIA program that by that point everyone knew about, and announced that Khalid Sheikh Mohammed, the 9/11 mastermind, and thirteen other senior terrorists were being transferred to GTMO. The President also acknowledged that the terrorists who had no legal rights in the secret prisons just a few months earlier would now, at GTMO, receive the protections of Article 3; meet with the International Committee of the Red Cross; have access to the same food, clothing, medical care, and opportunities for worship as other detainees; and be subject to questioning only pursuant to the relatively mild U.S. Army Field Manual. Such were the beginnings of the fruits of the Supreme Court's international law decision in Hamdan.

#### No slippery slope—detention authority not overbroad

Wittes, 11

Senior Fellow in Governance Studies-Brookings Institution, “ARTICLE: Preventive Detention in American Theory and Practice,” 2 Harv. Nat'l Sec. J. 85, Lexis)

The legal power to detain the enemy combatant neatly illustrates several of the general currents running through preventive detention in American practice. First, as this overview shows, the power is not so much an exception to a broad constitutional norm as a track that runs [\*100] parallel to the criminal justice system, operating according to its own distinctive rules, which evolved without reference to criminal justice norms. Importantly, **these rules have not functioned as a slippery slope** by which narrow detention powers have grown in scope and menace to liberty over time. **Rather, to the contrary, broad authorities** to capture, kill, and ransom prisoners **have narrowed over centuries of refinement and now focus on detaining under humane and respectful conditions only those people whom it is necessary to detain, and only for as long as detention remains necessary**.

## legitimacy

Other actors will base legitimacy regarding their current political situation

Legitimacy theory is bankrupt - empirical and psychological studies prove

Fettweis 10

Christopher J. Fettweis is an assistant professor of political science at Tulane University, August 2010, Paper prepared for the 2010 meeting of the American Political Science Association, Washington, DC, September 1-4, "The Remnants of Honor: Pathology, Credibility and U.S. Foreign Policy", http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1657460

Scholars have been struggled to identify cases where high credibility helped the United States achieve its goals during the Cold War. The short-term aftermath of the Cuban Missile Crisis, for example, included neither a string of Soviet reversals nor a display of bandwagoning with the West throughout the Third World.73 In fact, the perceived reversal in Cuba seemed to harden Soviet resolve. As the crisis was drawing to a close, Soviet diplomat Vasily Kuznetsov angrily told his counterpart “you Americans will never be able to do this to us again.”74 Kissinger commented in his memoirs that “the Soviet Union thereupon launched itself on a determined, systematic, and long-term program of expanding all categories of its military power….The 1962 Cuban crises was thus an historic turning point – but not for the reason some Americans complacently supposed.”75 The reassertion of the credibility of the United States, which was done at the brink of nuclear war, had few long-lasting benefits. The Soviets seemed to have learned the wrong lesson.

There is actually scant evidence that target states ever learn the right lessons. Cold War history contains little reason to believe that the credibility the superpowers had very much effect on their ability to influence others. Since Vietnam, a series of major scholarly studies have cast further doubt upon the fundamental assumption of interdependence across foreign policy actions. Jonathan Mercer argued that threats are far more independent than commonly believed, and therefore that reputations are not likely to form based upon individual actions.76 While policymakers may feel that their decisions send messages about their basic dispositions to others, most of the evidence from social psychology suggests otherwise. Groups tend to interpret the actions of their rivals as situational, dependent upon the constraints of place and time. Therefore they are not likely to form lasting impressions of irresolution from single, independent events. Mercer argued that the interdependence assumption had been accepted on faith, and rarely put to a coherent test – when it was, it almost inevitably failed.77

Other studies on the utility of credibility have tended to yield similar results. A reputation for belligerence has not been shown to be of much value in deterring challenges in large N analyses (which are methodologically challenging for this subject), in-depth case studies, or even in examination of behavior from ancient times.78 Although there seem to be times when credibility can help in limited ways – such as in multiple interactions with the same actor – there is no reason to believe that third parties ever learn from the actions of a state in other matters.79 The evidence suggests that international actions are much more independent than early deterrence theorists believed. It has been difficult for the imperative’s defenders to identify an instance where a post-Cold War state (or independent actor) was either encouraged by a discredited United States or discouraged by its apparent resolution. Of course one can always respond that such counterfactual argument is impossible – successful deterrence is hard to measure, of course, since the analyst can never be sure that the aggressor was deterred from attacking or simply never planned to attack in the first place.80 But the evidence that we do have does not support the belief that it is ever wise for states to be overly concerned for their reputations.

Legitimacy is worthless - laundry list

Fettweis 10

Christopher J. Fettweis is an assistant professor of political science at Tulane University, August 2010, Paper prepared for the 2010 meeting of the American Political Science Association, Washington, DC, September 1-4, "The Remnants of Honor: Pathology, Credibility and U.S. Foreign Policy", http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1657460

In sum, when the credibility imperative drives policy, states fearful of catastrophic future consequences are likely to follow hawkish recommendations in otherwise irrelevant situations, attempting to send messages that other states are unlikely to receive. Policymakers would be wise to beware of the credibility imperative while devising policy, question the assumptions it contains and remain skeptical of the fantastic disasters of which it warns. Most importantly, perhaps they should be given pause by the knowledge that scholars can supply virtually no evidence supporting the conventional wisdom about its importance.

Both logic and a preponderance of the evidence suggest that the current U.S. obsession with credibility is as insecure, misplaced and mal-informed as all that have preceded it. Whether or not it will result in the kind of counter-productive policies that accompanied the Cold War credibility imperative remains to be seen. What is more assured is that there is no clear way to control the perceptions of others, whether they are superpowers, small states or loosely connected non-state groups. The impression that their thoughts can be controlled by our actions may be comforting, springing perhaps from basic human psychological needs, but in reality their perception of us is largely outside of our influence. The messages we hope to send through our actions are unlikely to be successfully received. Washington would be welladvised to avoid the understandable and natural temptation to look beyond the current crisis when making decisions. As unsettling as it may be, since the future is largely outside our control, the tangible interests of the present, therefore, must outweigh the intangible interests of the future.

Although it is no longer fashionable to name honor as a reason for war, its underlying effects are still with us. When the credibility imperative drives policymaking, the United States is likely to behave in manifestly pathological ways. No matter what term is used, concerns for honor march states toward folly. The foreign policy of the United States is not driven only by tangible, material measures of interest; however, it should be. Just because our policies have not been rational does not mean that they cannot be moving forward. One sure way to approach that goal would be to recognize, and eliminate, the urge to act in order to bolster the credibility of our commitments.

## legitimacy - russia

Other factors outweigh in human rights compliance

Ignatieff, 5 – Carr professor of human rights, Kennedy School of Government @ Harvard

(Michael, “AMERICA THE MERCURIAL” *Legal Affairs*, March/April)

**\*note: Oona Hathaway is an associate professor @ Yale Law School**

Two other factors, she argues, also influence a state's compliance. The first is the presence of actors and institutions with the capacity to demand that their country abide by its agreements. NGOs, political parties, free media, courts, and government lawyers can all play this role. Hathaway's key contribution is to insist that these domestic institutions are the critical variable in determining whether states will be good international citizens.

This important insight implies that democracy at home is the key to improving human rights worldwide. Hathaway argues that outsiders can't do much to improve China or Russia by naming and shaming their rulers or by inducing them to ratify an international treaty. Instead, would-be international reformers should focus on opening the state political system to competition and on fostering a free media and free NGOs. American policy makers and human rights activists should read Hathaway's theory as a call to bring together the often separate efforts to promote democracy and human rights.

Hathaway's second major contribution is to emphasize the role of incentives outside the law that help ensure compliance with international agreements. Countries eager to secure international aid or loans will sign treaties and comply with them if they believe that doing so will help them achieve their goal. Turkey, for example, is revising its policies on minority languages and the return of the displaced Kurds because it wants to get into the European Union.

## rule of law

I-law causes judicial overshoot – kills rule of law

Kochan, Asst Prof – Champman U School of Law, ‘6

(Donald J, 29 Fordham Int'l L.J. 507)

The development of rules in the United States is meant to be tough - bicameralism and presentment, for example, is one means by which the production of law is controlled. Such controls do not necessarily exist in the production of foreign and international law, making them more suspect and, in a system based in the rule of law, inappropriate for judicial application.

When a judge is defining law, reference to laws generated according to U.S. constitutional processes is a closed set. Accepting judicial ability to search the world allows judges to select from an open set, creating the risk of selection bias. n152 Outcome determinative judges will select what best supports their desired result. It is like giving a referee in America's National Football League ("NFL") the power to selectively apply Australian rules when it suits him during the game.

This brings the Article back to the cocktail party. If the crowd at the party is the whole world, judges have a nearly infinite number of guests they can find to infuse and support their decisions. It is an intoxicating opportunity for judicial activists. As stated previously, injecting international and foreign sources in judicial decision-making can be described as the same as entering  [\*543]  a crowded cocktail party and avoiding all the unknown people, disliked people, annoying people, or boring people, and scoping the scene to maneuver toward your friends. n153 With foreign and international law as potential and acceptable sources of authority, judges have a large crowd to pick from and a large pool to ignore or reject. Determining which countries matter, what principles matter, and what constitutes "authority" is difficult, and - when decided by a judge looking beyond U.S. borders - constitutes a preferential decision not necessarily endorsed by U.S. lawmakers. n154

There is no reliable discerning principle for the selection of applicable and appropriate extra-constitutional laws to the interpretation of U.S. law. n155 The concomitant effect is that the citizenry has no certain, predictable, and identifiable means for understanding what the "law" is that governs their actions when reference to, or reliance on, extra-constitutional sources of law are allowed.

If judges can cite foreign or international authorities in their interpretation of U.S. law or in the definition of liabilities  [\*544]  in tort litigation, there is a tremendous amount of leeway to inject personal preferences at the expense of adherence to established law. n156 The rule of law requires that judicial authority be insulated from such preferential powers. n157

This debate is not simply a political issue. If liberals can invoke foreign or international law to advance their preferences, conservatives can do the same. n158 In both cases, this attempt to legitimize preferences is beyond the judicial role.

Furthermore, rule of law issues are affected not simply by selection bias but by the non-U.S. nature of production of foreign and international sources. In other words, these "laws" were not created under the strictures of the U.S. Constitution. As such, they lack formal elements or intentions as enforceable law.

Most often, customary international law outputs are intended only as aspirational or symbolic, rather than drafted as enforceable legal obligations or with the intent of creating liability. n159 If these outputs are used as evidence of enforceable customary  [\*545]  international law obligations and liabilities or as authority for the interpretation of U.S. law, courts mangle and inappropriately manipulate their purpose and character. n160 Indeed, allowing judges to use elusive and diffuse principles of human rights to discover applicable international law is beyond their capacity and beyond the power committed to them by the Constitution.

Finally, in terms of activism, reliance on extraterritorial "law" is a run around Congress's ability, prerogative, and responsibility to define U.S. law. n161 Indeed, some cases have relied on certain international or foreign "laws" despite direct evidence of Congress's intent that such documents not create legal obligations or liabilities and are not drafted as "law." n162 When courts have discretion to look beyond the United States for the foundations of their decisions, serious dangers arise to the rule of law  [\*546]  and the sanctity of the concept that the law is known and ascertainable by persons subject to it. Congress has failed to ratify the vast majority of human rights treaties sponsored by the United Nations. n163 This record indicates a general unwillingness on the part of the United States to recognize broad principles of human rights as controlling legal authority. n164 For the courts to ignore this reality and insist that these documents form a foundation for ascertaining the applicable law in the United States demonstrates disdain for recognized lawmaking processes. n165

# 1nr

## 2nc ov

Lack of executive crisis containment causes rapid-fire proliferation and nuclear and bio terrorism—the impact is extinction - also causes economic collapse because it precludes flexible executive responses that are empirically key - that causes global instability that goes nuclear—that’s Kemp

Solves the aff—fast op-tempos check escalation—that’s Li—nuclear deterrence checks their impact but not ours so try or die flips neg.

Best studies validate the econ impact

Jedidiah **Royal 10**, Director of Cooperative Threat Reduction at the U.S. Department of Defense, “Economic Integration, Economic Signalling And The Problem Of Economic Crises”, in Economics of War and Peace: Economic, Legal and Political Perspectives, ed. Goldsmith and Brauer, p. 213-215

Second, on a dyadic level. Copeland's (1996. 2000) theory of trade expectations suggests that 'future expectation of trade' is a significant variable in understanding economic conditions and security behaviour of states. He argues that interdependent states are likely to gain pacific benefits from trade so long as they have an optimistic view of future trade relations. However, if the expectations of future trade decline, particularly for difficult to replace items such as energy resources, the likelihood for conflict increases, as states will be inclined to use force to gain access to those resources. Crises could potentially be the trigger for decreased trade expectations either on its own or because it triggers protectionist moves by interdependent states.4 Third, others have considered the link between economic decline and external armed conflict at a national level. Blomberg and Hess (2002) find a strong correlation between internal conflict and external conflict, particularly during periods of economic downturn. They write, The linkages between internal and external conflict and prosperity are strong and mutually reinforcing. Economic conflict tends to spawn internal conflict, which in turn returns the favour. Moreover, the presence of a recession lends to amplify the extent to which international and external conflicts self-rein force each other. (Blombcrj! & Hess. 2002. p. 89) Economic decline has also been linked with an increase in the likelihood of terrorism (Blomberg. Hess. & Weerapana, 2004). which has the capacity to spill across borders and lead to external tensions. Furthermore, crises generally reduce the popularity of a sitting government. "Diversionary theory" suggests that, when facing unpopularity arising from economic decline, sitting governments have increased incentives to fabricate external military conflicts to create a 'rally around the flag' effect. Wang (1996), DeRouen (1995), and Blombcrg. Mess, and Thacker (2006) find supporting evidence showing that economic decline and use of force are at least indirectly correlated. Gelpi (1997), Miller (1999). and Kisangani and Pickering (2009) suggest that the tendency towards diversionary tactics arr greater for democratic states than autocratic states, due to the fact that democratic leaders are generally more susceptible to being removed from office due to lack of domestic support. DeRouen (2000) has provided evidence showing that periods of weak economic performance in the United States, and thus weak Presidential popularity, are statistically linked to an increase in the use of force.

Also causes rollback/circumvention

Laura Young, Ph.D., Purdue University Associate Fellow, June 2013, Unilateral Presidential Policy Making and the Impact of Crises, Presidential Studies Quarterly, Volume 43, Issue 2

A president looks for chances to increase his power (Moe and Howell 1999). Windows of opportunity provide those occasions. These **openings create an environment where the president faces little backlash from Congress, the judicial branch, or even the public**. Though institutional and behavioral conditions matter, domestic and international crises play a pivotal role in aiding a president who wishes to increase his power (Howell and Kriner 2008, 475). These events overcome the obstacles faced by the institutional make-up of government. They also allow a president lacking in skill and will or popular support the opportunity to shape the policy formation process. In short, focusing events increase presidential unilateral power.

Outweighs their mechanism

Laura Young, Ph.D., Purdue University Associate Fellow, June 2013, Unilateral Presidential Policy Making and the Impact of Crises, Presidential Studies Quarterly, Volume 43, Issue 2

During periods of crisis, the time available to make decisions is limited. Because the decision-making process is often arduous and slow in the legislative branch, it is not uncommon for the executive branch to receive deference during a crisis because of its ability to make swift decisions. The White House centralizes policies during this time, and presidents seize these opportunities to expand their power to meet policy objectives. Importantly, presidents do so with limited opposition from the public or other branches of government (Howell and Kriner 2008). In fact, despite the opposition presidents often face when centralizing policies, research shows policies formulated via centralized processes during times of crisis receive more support from Congress and the American people (Rudalevige 2002, 148-49). For several reasons, a crisis allows a president to promote his agenda through unilateral action. First, a critical exogenous shock shifts attention and public opinion (Birkland 2004, 179). This shift is a phenomenon known as the “rally round the flag” effect (Mueller 1970). The rally effect occurs because of the public's increase in “its support of the president in times of crisis or during major international events” (Edwards and Swenson 1997, 201). Public support for the president rises because he is the leader and, therefore, the focal point of the country to whom the public can turn for solutions. Additionally, individuals are more willing to support the president unconditionally during such times, hoping a “united front” will increase the chance of success for the country (Edwards and Swenson 1997, 201). As a result, a crisis or focusing event induces an environment that shifts congressional focus, dispels gridlock and partisanship, and increases positive public opinion—each of which is an important determinant for successful expansion of presidential power (Canes-Wrone and Shotts 2004; Howell 2003). In other words, a crisis embodies key elements that the institutional literature deems important for presidential unilateral policy making. The president's ability to focus attention on a particular issue is also of extreme importance if he wishes to secure support for his agenda (Canes-Wrone and Shotts 2004; Edwards and Wood 1999; Howell 2003; Neustadt 1990). The role the media play is pivotal in assisting a president in achieving such a result because of its ability to increase the importance of issues influencing the attention of policy makers and the priorities of viewers. Although it is possible a president can focus media attention on the policies he wishes to pursue through his State of the Union addresses or by calling press conferences, his abilities in this regard are limited, and the media attention he receives is typically short lived (Edwards and Wood 1999, 328-29). High-profile events, on the other hand, are beneficial because they allow the president to gain focus on his agenda. This occurs because the event itself generates attention from the media without presidential intervention. Thus, the ability of crises to set the agenda and shift media and public attention provides another means for overcoming the constraints placed upon the president's ability to act unilaterally. Finally, Rudalevige finds support that a crisis increases the success of presidential unilateral power even if the policy process is centralized. A crisis allows little time to make decisions. As a result, “the president and other elected officials are under pressure to ‘do something’ about the problem at hand” (2002, 89, 148). Because swift action is necessary, presidents rely on in-house advice. As a result, the policy formation process is centralized, and the president receives deference to unilaterally establish policies to resolve the crisis. During a crisis, the president has greater opportunity to guide policy because the event helps him overcome the congressional and judicial obstacles that typically stand in his way.2 This affords the president greater discretion in acting unilaterally (Wildavsky 1966). It is possible the institutional make-up of the government will align so that the president will serve in an environment supportive of his policy decisions. It is also likely a president will have persuasive powers that enable him to gain a great deal of support for his policy agenda. An event with the right characteristics, however, enhances the president's ability to act unilaterally, regardless of the institutional make-up of government or his persuasive abilities.

## Prolif

Prolif will be fast, destabilizing, and escalates to nuclear war

Kroenig 12

Matthew Kroenig, Assistant Professor of Government, Georgetown University and Stanton Nuclear Security Fellow, Council on Foreign Relations, Nonproliferation Policy Education Center, May 26, 2012, "Matthew Kroenig: The History of Proliferation Optimism: Does It Have A Future?", http://www.npolicy.org/article.php?aid=1182%26tid=30)

Why Nuclear Proliferation Is a Problem The spread of nuclear weapons poses a number of severe threats to international peace and U.S. national security including: nuclear war, nuclear terrorism, emboldened nuclear powers, constrained freedom of action, weakened alliances, and further nuclear proliferation. This section explores each of these threats in turn. Nuclear War. The greatest threat posed by the spread of nuclear weapons is nuclear war. The more states in possession of nuclear weapons, the greater the probability that somewhere, someday, there is a catastrophic nuclear war. A nuclear exchange between the two superpowers during the Cold War could have arguably resulted in human extinction and a nuclear exchange between states with smaller nuclear arsenals, such as India and Pakistan, could still result in millions of deaths and casualties, billions of dollars of economic devastation, environmental degradation, and a parade of other horrors. To date, nuclear weapons have only been used in warfare once. In 1945, the United States used one nuclear weapon each on Hiroshima and Nagasaki, bringing World War II to a close. Many analysts point to sixty-five-plus-year tradition of nuclear non-use as evidence that nuclear weapons are unusable, but it would be naïve to think that nuclear weapons will never be used again. After all, analysts in the 1990s argued that worldwide economic downturns like the great depression were a thing of the past, only to be surprised by the dot-com bubble bursting in the later 1990s and the Great Recession of the late Naughts.[53] This author, for one, would be surprised if nuclear weapons are not used in my lifetime. Before reaching a state of MAD, new nuclear states go through a transition period in which they lack a secure-second strike capability. In this context, one or both states might believe that it has an incentive to use nuclear weapons first. For example, if Iran acquires nuclear weapons neither Iran, nor its nuclear-armed rival, Israel, will have a secure, second-strike capability. Even though it is believed to have a large arsenal, given its small size and lack of strategic depth, Israel might not be confident that it could absorb a nuclear strike and respond with a devastating counterstrike. Similarly, Iran might eventually be able to build a large and survivable nuclear arsenal, but, when it first crosses the nuclear threshold, Tehran will have a small and vulnerable nuclear force. In these pre-MAD situations, there are at least three ways that nuclear war could occur. First, the state with the nuclear advantage might believe it has a splendid first strike capability. In a crisis, Israel might, therefore, decide to launch a preemptive nuclear strike to disarm Iran’s nuclear capabilities and eliminate the threat of nuclear war against Israel. Indeed, this incentive might be further increased by Israel’s aggressive strategic culture that emphasizes preemptive action. Second, the state with a small and vulnerable nuclear arsenal, in this case Iran, might feel use ‘em or loose ‘em pressures. That is, if Tehran believes that Israel might launch a preemptive strike, Iran might decide to strike first rather than risk having its entire nuclear arsenal destroyed. Third, as Thomas Schelling has argued, nuclear war could result due to the reciprocal fear of surprise attack.[54] If there are advantages to striking first, one state might start a nuclear war in the belief that war is inevitable and that it would be better to go first than to go second. In a future Israeli-Iranian crisis, for example, Israel and Iran might both prefer to avoid a nuclear war, but decide to strike first rather than suffer a devastating first attack from an opponent. Even in a world of MAD, there is a risk of nuclear war. Rational deterrence theory assumes nuclear-armed states are governed by rational leaders that would not intentionally launch a suicidal nuclear war. This assumption appears to have applied to past and current nuclear powers, but there is no guarantee that it will continue to hold in the future. For example, Iran’s theocratic government, despite its inflammatory rhetoric, has followed a fairly pragmatic foreign policy since 1979, but it contains leaders who genuinely hold millenarian religious worldviews who could one day ascend to power and have their finger on the nuclear trigger. We cannot rule out the possibility that, as nuclear weapons continue to spread, one leader will choose to launch a nuclear war, knowing full well that it could result in self-destruction. One does not need to resort to irrationality, however, to imagine a nuclear war under MAD. Nuclear weapons may deter leaders from intentionally launching full-scale wars, but they do not mean the end of international politics. As was discussed above, nuclear-armed states still have conflicts of interest and leaders still seek to coerce nuclear-armed adversaries. This leads to the credibility problem that is at the heart of modern deterrence theory: how can you threaten to launch a suicidal nuclear war? Deterrence theorists have devised at least two answers to this question. First, as stated above, leaders can choose to launch a limited nuclear war.[55] This strategy might be especially attractive to states in a position of conventional military inferiority that might have an incentive to escalate a crisis quickly. During the Cold War, the United States was willing to use nuclear weapons first to stop a Soviet invasion of Western Europe given NATO’s conventional inferiority in continental Europe. As Russia’s conventional military power has deteriorated since the end of the Cold War, Moscow has come to rely more heavily on nuclear use in its strategic doctrine. Indeed, Russian strategy calls for the use of nuclear weapons early in a conflict (something that most Western strategists would consider to be escalatory) as a way to de-escalate a crisis. Similarly, Pakistan’s military plans for nuclear use in the event of an invasion from conventionally stronger India. And finally, Chinese generals openly talk about the possibility of nuclear use against a U.S. superpower in a possible East Asia contingency. Second, as was also discussed above leaders can make a “threat that leaves something to chance.”[56] They can initiate a nuclear crisis. By playing these risky games of nuclear brinkmanship, states can increases the risk of nuclear war in an attempt to force a less resolved adversary to back down. Historical crises have not resulted in nuclear war, but many of them, including the 1962 Cuban Missile Crisis, have come close. And scholars have documented historical incidents when accidents could have led to war.[57] When we think about future nuclear crisis dyads, such as India and Pakistan and Iran and Israel, there are fewer sources of stability that existed during the Cold War, meaning that there is a very real risk that a future Middle East crisis could result in a devastating nuclear exchange. Nuclear terrorism. The spread of nuclear weapons also increases the risk of nuclear terrorism.[58] It used to be said that “terrorists want a lot of people watching, not a lot of people dead,” but the terrorist attacks of September 11, 2001 changed expert perceptions of the terrorist threat.[59] September 11th demonstrated that Al Qaeda and other modern terrorist groups are interested in imposing massive casualties and there are few better ways of killing large numbers of civilians than detonating a nuclear weapon in a major metropolitan area. And, while September 11th was one of the greatest tragedies in American history, it would have been much worse had Osama Bin Laden been able to acquire nuclear weapons. Osama Bin Laden declared it a “religious duty” for Al Qaeda to acquire nuclear weapons and radical clerics have issued fatwas declaring it permissible to use nuclear weapons in Jihad against the West.[60] Unlike states, which can be deterred, there is little doubt that if terrorists acquired nuclear weapons, they would use them. Indeed, in recent years, many U.S. politicians and security analysts have agreed that nuclear terrorism poses the greatest threat to U.S. national security.[61] Wanting nuclear weapons and actually possessing them, however, are two different things and many analysts have pointed out the tremendous hurdles that terrorists would have to overcome in order to acquire nuclear weapons.[62] Nevertheless, as nuclear weapons spread, the possibility that they will eventually fall into terrorist hands increases. States could intentionally transfer nuclear weapons, or the fissile material required to build them, to terrorist groups. There are good reasons why a state might be reluctant to transfer nuclear weapons to terrorists, but, as nuclear weapons spread, the possibility that a leader might someday purposely arm a terrorist group with nuclear weapons increases. Some fear, for example, that Iran, with its close ties to Hamas and Hezbollah, might be at a heightened risk of transferring nuclear weapons to terrorists. Moreover, even if no state would ever intentionally transfer nuclear capabilities to terrorists, a new nuclear state, with underdeveloped security procedures, might be vulnerable to theft, allowing terrorist groups or corrupt or ideologically-motivated insiders to transfer dangerous material to terrorists. There is evidence, for example, that representatives from Pakistan’s atomic energy establishment met with Al Qaeda members to discuss a possible nuclear deal.[63] Finally, a nuclear-armed state could collapse, resulting in a breakdown of law and order and a loose nuclear weapons problem. U.S. officials are currently very concerned about what would happen with Pakistan’s nuclear weapons if the government were to fall. As nuclear weapons spread, this problem is only further amplified. Iran is a country with a history of revolutions and a government with a tenuous hold on power. The regime change that Washing has long dreamed about in Tehran could actually become a nightmare if Iran had nuclear weapons and a break down in authority forced us to worry about the fate of Iran’s nuclear arsenal. Regional instability: The spread of nuclear weapons also emboldens nuclear powers contributing to regional instability. States that lack nuclear weapons need to fear direct military attack from other states, but states with nuclear weapons can be confident that they can deter an intentional military attack, giving them an incentive to be more aggressive in the conduct of their foreign policy. In this way, nuclear weapons provide a shield under which states can feel free to engage in lower-level aggression. Indeed, international relations theories about the “stability-instability paradox” maintain that stability at the nuclear level contributes to conventional instability.[64] Historically, we have seen that the spread of nuclear weapons has emboldened their possessors and contributed to regional instability. Recent scholarly analyses have demonstrated that, after controlling for other relevant factors, nuclear-weapon states are more likely to engage in conflict than nonnuclear-weapon states and that this aggressiveness is more pronounced in new nuclear states that have less experience with nuclear diplomacy.[65] Similarly, research on internal decision-making in Pakistan reveals that Pakistani foreign policymakers may have been emboldened by the acquisition of nuclear weapons, which encouraged them to initiate militarized disputes against India.[66] Currently, Iran restrains its foreign policy because it fears a major military retaliation from the United States or Israel, but with nuclear weapons it could feel free to push harder. A nuclear-armed Iran would likely step up support to terrorist and proxy groups and engage in more aggressive coercive diplomacy. With a nuclear-armed Iran increasingly throwing its weight around in the region, we could witness an even more crisis prone Middle East. And in a poly-nuclear Middle East with Israel, Iran, and, in the future, possibly other states, armed with nuclear weapons, any one of those crises could result in a catastrophic nuclear exchange. Nuclear proliferation can also lead to regional instability due to preventive strikes against nuclear programs. States often conduct preventive military strikes to prevent adversaries from acquiring nuclear weapons. Historically, the United States attacked German nuclear facilities during World War II, Israel bombed a nuclear reactor in Iraq in 1981, Iraq bombed Iran’s Bushehr reactors in the Iran-Iraq War in the 1980s and Iran returned the favor against an Iraqi nuclear plant, a U.S.-led international coalition destroyed Iraq’s nuclear infrastructure in the first Gulf War in 1991, and Israel bombed a Syrian nuclear reactor in 2007. These strikes have not led to extensive conflagrations in the past, but we might not be so lucky in the future. At the time of writing in 2012, the United States and Israel were polishing military plans to attack Iran’s nuclear program and some experts maintain that such a strike could very well lead to a wider war in the Middle East. Constrained freedom of action. The spread of nuclear weapons also disadvantages American’s national security by constraining U.S. freedom of action. As the most powerful country on the planet, with the ability to project power to every corner of the globe, the United States has the ability to threaten or protect every other state in the international system. This is a significant source of strategic leverage and maintaining freedom of action is an important objective of U.S. national security policy.[67] As nuclear weapons spread, however, America’s military freedom of action is constrained. The United States can use or credibly threaten to use force against nonnuclear states. The threat of military action against nuclear-armed states is much less credible, however, because nuclear-armed states can deter U.S. military action with the threat of nuclear retaliation. In January of 2012, for example, Iran threatened to close the Strait of Hormuz, a narrow Persian Gulf waterway through which roughly 20% of the world’s oil flows, and the United States issued a counter-threat, declaring that Washington would use force to reopen the Strait. If Iran had had nuclear weapons, however, Washington’s threats would have been much less credible. Would a U.S. President really be willing to risk nuclear war with Iran in order to reopen the Strait? Maybe. But, maybe not. While the United States might not be deterred in every contingency against a nuclear-armed state, it is clear that, at a minimum, the spread of nuclear weapons greatly complicates U.S. decisions to use force. Undermines alliances: The spread of nuclear weapons also complicates U.S. alliance relationships. Washington uses the promise of military protection as a way to cement its alliance structures. U.S. allies depend on America’s protection, giving Washington influence over allied states’ foreign policies. Historically, the United States has offered, and threatened to retract, the security guarantee carrot to prevent allied states from acting contrary to its interests. As nuclear weapons spread, however, alliances held together by promises of military protection are undermined in two ways. First, U.S. allies may doubt the credibility of Washington’s commitments to provide a military defense against nuclear-armed states, leading them to weaken ties with their patron. As Charles de Gaulle famously asked about the U.S. commitment to defend France from the Soviet Union during the Cold War, would Washington be willing to trade New York for Paris? Similarly, if Iran acquires nuclear weapons, U.S. partners in the Middle East, such as Israel and Gulf States, will question Washington’s resolve to defend them from Iran. After all, if the United States proves unwilling to use force to prevent Iran from acquiring nuclear weapons, would it really be willing to fight a war against a nuclear-armed Iran? Qatar, for example, already appears to be hedging its bets, loosening ties to Washington and warming to Tehran. Second, nuclear proliferation could encourage client states to acquire nuclear weapons themselves, giving them greater security independence and making them less dependable allies. According to many scholars, the acquisition of the force de frappe was instrumental in permitting the French Fifth Republic under President Charles de Gualle to pursue a foreign policy path independent from Washington at NATO.[68] Similarly, it is possible that Turkey, Saudi Arabia, and other regional states will acquire independent nuclear capabilities to counter Iran’s nuclear arsenal, greatly destabilizing an already unstable region and threatening Washington’s ability to influence regional dynamics. Further proliferation. Nuclear proliferation poses an additional threat to international peace and security because it causes further proliferation. As former Secretary of State George Schultz once said, “proliferation begets proliferation.”[69] When one country acquires nuclear weapons, its regional adversaries, feeling threatened by its neighbor’s new nuclear capabilities, are more likely to attempt to acquire nuclear weapons in response. Indeed, the history of nuclear proliferation can be read as a chain reaction of proliferation. The United States acquired nuclear weapons in response to Nazi Germany’s crash nuclear program. The Soviet Union and China acquired nuclear weapons to counter the U.S. nuclear arsenal. The United Kingdom and France went nuclear to protect themselves from the Soviet Union. India’s bomb was meant to counter China and it, in turn, spurred Pakistan to join the nuclear club. Today, we worry that, if Iran acquires nuclear weapons, other Middle Eastern countries, such as Egypt, Iraq, Turkey, and Saudi Arabia, might desire nuclear capabilities, triggering an arms race in a strategically important and volatile region.

## 2nc speed/flex key

New state of warfare = fast, flexible response key to all deterrence and military functions - it's the biggest internal link - that's Li

Key to winning all future conflicts

Johson ‘6

Karlton, Army War College, “Temporal and Scalar Mechanics of Conflict Strategic Implications of Speed and Time on the American Way of War,” http://www.dtic.mil/dtic/tr/fulltext/u2/a449394.pdf

The U.S. Army War College uses the acronym “VUCA” to describe the volatile, uncertain, chaotic and ambiguous environment in which strategy is made.4 If the present is any indication of the future, then it is reasonable to assume that the world will become increasingly dangerous as long as that strategic environment exists. Many long-range assessments predict that global tensions will continue to rise as resources become even more constrained and as transnational threats endanger international security. 5 Future leaders and planners can expect to see weak and failed states persisting to dominate U.S. foreign policy agendas. Terrorism will remain a vital interest, and the use of American military strength will remain focused on the dissuasion, deterrence, and, where necessary, the preemption of strategic conflict. Enemies will work aggressively to offset U.S. military superiority by seeking out technologies that will offer some level of asymmetric advantage, and the challenging asymmetric nature of future conflicts will add deeper complexity to both war planning and the development of national security strategy. 6 The “National Defense Strategy of the United States,” published in March 2005, addressed the unconventional nature of the future. It argued that enemies are increasingly likely to pose asymmetric threats resulting in irregular, catastrophic and disruptive challenges.7 This means that, in some cases, non-state actors will choose to attack the United States using forms of irregular warfare that may include the use of weapons of mass destruction. These actors may also seek new and innovative ways to negate traditional U.S. strengths to their advantage.8 In fact, one author theorizes that “speed of light engagements” will be the norm by the year 2025, and America may lose its monopoly on technological advances as hostile nations close the gap between technological “haves” and “have nots.”9 This type of warfare lends itself to engagements of varying speed and temporal geometry. 10 Therefore, in conflicts of the future, time and speed will matter. Consequently, it is necessary to analyze these elements with rigor and discipline in order to understand their far-reaching implications.

Key to victory in every domain

Johson ‘6

Karlton, Army War College, “Temporal and Scalar Mechanics of Conflict Strategic Implications of Speed and Time on the American Way of War,” http://www.dtic.mil/dtic/tr/fulltext/u2/a449394.pdf

Military services appear to be increasingly dependent on speed, and these organizations continue to place a premium on its relative value. The Army’s “Field Manual 1: The Army,” embraces the idea that speed is critical to its operational concept, necessary for maneuver forces to keep the initiative in battle, and vital towards achieving shock and surprise.25 The United States Navy looks to speed as an essential component of maritime operations. In “Fleet Tactics and Costal Combat,” Wayne P. Hughes reasons that speed is necessary to win the sea battle **within the first few shots of an engagement**.26 The United States Air Force has plans to increase the speed and fidelity of command, control, communications and computers, intelligence, surveillance and reconnaissance (C4ISR) to create Predictive Battlespace Awareness over the combat area. The desired end state of these capabilities will be “getting a cursor over a target” upon demand.27 Even U.S. Air Force doctrine is replete with references to speed. The concept of speed clearly underlies the tenets and principles of airpower as an enabling factor.28

Solves prolif and regional crises

Bohnemann ‘2

Edward, Major, US Army, “Rapid, Decisive Operations: The Execution of Operational Art by a Standing Joint Task Force,” http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA403628%26Location=U2%26doc=GetTRDoc.pdf

Modern campaigns, such as OPERATION DESERT STORM conducted by the United States and its allies; nineteenth century campaigns conducted by Napoleon in Europe; or the ancient campaigns conducted by the Romans or the Mongols have all sought to apply an asymmetrical advantage to the battlefield. The great captains have continuously struggled to find an advantage possessed by their forces and developed ways in which to leverage that advantage against an opponent. Lightning campaigns such as OPERATION DESERT STORM, were the result of the application of asymmetrical advantages such as: superior mobility, speed, intelligence, synchronization, and training of friendly forces. These advantages and superior technology shocked opponents and often led to the rapid conclusion of the conflict.81 As the United States enters the twenty-first century as the lone superpower, it must develop ways in which to harness the tremendous capabilities the joint forces bring to a confrontation and apply those joint capabilities in a manner consistent with the characteristics of operational art. The asymmetrical advantages currently enjoyed by the United States over potential adversaries must focus on placing him in a reactionary mode, while creating too many dilemmas for him to deal with at a particular time and space. September 11, 2001 significantly changed the way America views the world. With the attacks on the World Trade Centers and the Pentagon, the post-Cold War era ended violently and was replaced by an era of uncertainty. The forces of terror that had previously operated on distant shores now brought their violence home to Americans with the killing of innocent civilians within the borders of the United States. This single act of violence, along with the emergence of other regional powers and the proliferation of weapons of mass destruction has set the stage for the future operational environment; with it comes the military requirement to possess the capability to respond rapidly and decisively. With the need to respond rapidly and decisively to worldwide contingencies, the United States can no longer afford a system within the military that is essentially unprepared for action at the onset of each crisis. The ad hoc JTFs previously examined lacked the inherent capabilities demanded in modern crises, with rapidly unfolding situations, taking place in obscure areas around the world. All three of the examined JTFs lacked critical personnel needed to plan courses of action during the initial phases of the operation, causing problems during the execution phases. The one-dimensional approach to the crisis in Kosovo was reminiscent of the singular focus LANTCOM had before OPERATION URGENT FURY. Humanitarian aid operations, as well as other stability and support operations also require a **command** and control **system** in place to enable a rapid and effective response.

**Underpins all deterrence and power projection**

Karren ‘12

Major Wade, USAF, “Long-Range Strike The Bedrock of Deterrence and America’s Strategic Advantage,” Air Force Research Institute\*LRS=long range strike

The basic concept behind LRS—using military power projection to influence the behavior of others—is as old as human conflict itself. Whether it took the form of naval expeditions by Athenian amphibious forays deep into Sparta, overwhelming ground attacks by Mongol light cavalry archers, or the massive aerial bombardment of the Combined Bomber Offensive of World War II, projecting power with speed across a wide span of the enemy’s territory and interests has made attacking or defending against such forces **increasingly difficult.** Napoleonic warfare, as described by Jomini and Clausewitz, led subsequent military planners to seek ways to identify and attack an enemy’s decisive points and centers of gravity.6 These concepts of power projection framed early ideas of how to break the bloody stalemate of World War I. Col Edgar S. Gorrell consolidated the innovative ideas of military theorists and aviators like William “Billy Mitchell, William Sherman, Sir Hugh Trenchard, and Giulio Douhet, leading to the development of a practice commonly called “strategical bombardment.” In his World War I publication The Final Report, Gorrell called for a strategy using the flexibility and reach of airpower to bypass the strength of the enemy’s military formations and defenses to attack vulnerable, war-supporting infrastructure.7 Though never implemented because hostilities ended in 1918, this idea served as the intellectual bedrock for the strategic bombing concepts developed in World War II. During the 1930s, students at the Air Corps Tactical School studied the writings of Gorrell and Lord Tiverton to formulate the industrial web theory, which held that one could disrupt or destroy certain bottlenecks of production and thereby incapacitate an enemy’s ability to make war.8 Unfortunately, the early theorists overestimated the destructive and moral effects of bombing and underestimated the effectiveness of ground- and air-based defenses, as well as the resilience and regenerative capabilities of modern societies and their industrial complexes. Early bombers did not have the range, precision, or payload to deliver a decisive blow to the enemy’s heartland. By the time air forces had sufficiently established air superiority, which would allow truly long-range platforms to deliver atomic weapons, the war had come to a close. Despite the continuing debate concerning strategic bombing as an independent war winner, World War II demonstrated that ultimate victory came to the side that could project forcible power at a longer distance, preserving its own war capability while denying the same to its opponent. The proposed German strategy leading up to World War II offers an example of how a lack of LRS can affect a conflict. Agreeing with the LRS premise, Germany’s first chief of the General Staff, Gen Walther Wever, advocated a strategy of long-range strategic bombing. He based his strategy on bombing enemy bases, aircraft factories, warsustaining industries, and logistical networks in order to paralyze the enemy’s war-making capabilities.9 Fortunately for the Allies, General Wever’s untimely death in 1936 prevented his strategy from coming to fruition. His immediate successors and, ultimately, Hermann Göring, commander in chief of the Luftwaffe, fatefully steered the latter away from the long-range bombing strategy. Göring’s decision to develop shorter-range bombers such as the He-177 Griffon and the Ju-87 Stuka, emphasizing tactical close air support of ground forces, allowed aircraft-production facilities in England to survive the Battle of Britain. Despite the fact that Germany enjoyed a formidable tactical fighter force, its lack of strategic focus on LRS eventually conceded the strategic advantage to the Allies by allowing British Avro 683 Lancasters and US B-17s and B-24s to project airpower from longer range without fear of long-range counterstrikes.10 The Allies were victorious in large part because they could continue war production unhindered, while the Axis powers found their war-fighting prowess constantly degraded by a combination of short- and long-range attacks. One may debate the effects of LRS in Europe, but after the use of atomic bombs on Hiroshima and Nagasaki and the end of World War II, the value of longrange power projection became readily apparent. The latent threat of further violence by LRS proved valuable to the United States and the allies because it contributed significantly to the end of the war. The value and capability of LRS had matured exponentially by the late 1950s with the introduction of intercontinental ballistic missiles (ICBM) armed with nuclear warheads. ICBMs enhanced the value of LRS by increasing standoff range and overcoming the lack of precision evident in World War II with nuclear yields. In the end, the ability of the United States and Union of Soviet Socialist Republics to project power through LRS developed to the point where, for all practical purposes, each country could hold the entire planet at risk of instantaneous annihilation. LRS subsequently became the backbone of each country’s comprehensive deterrent strategies. As the concepts of massive retaliation and mutually assured destruction emerged to deal with the reality of the new strategic standoff, theorists such as Schelling, Brodie, and Lawrence Freedman came to grips with the implications of using LRS for deterrence in the nuclear age. By definition, deterrence is “the prevention of action by the existence of a credible threat of unacceptable counteraction and/or belief that the cost of action outweighs the perceived benefits.”11 It depends solely on the adversary’s perception of what the opposition (United States) is willing and capable of doing. The first component of the equation—a country’s will—ebbs and flows with the political climate. Yet without a credible capability to strike, the will to act becomes a paper tiger because a lack of capability would nullify the ability to act. Thus, capability is a prerequisite to any successful deterrent strategy. Compared to other instruments of military power, LRS platforms historically provide the best requisite capability to hold any target at risk, at any time, and therefore enable successful deterrence strategies. Assuming a nation’s will to act, the strategic foresight to develop, modernize, and adequately fund LRS has paid invaluable dividends by lending credibility to that country’s deterrent threats. Consequently, the value and importance of LRS with respect to national defense and security remain evident today and into the foreseeable future. Nearly every conflict since World War II has demonstrated the United States’ willingness and ability to use conventional LRS assets for limited objectives while retaining sufficient nuclear capability as a plausible deterrent. Despite the demonstrated capacity to destroy targets from long range at will—in Serbia, Iraq, Libya, or Afghanistan—air strikes alone cannot bring about desired political outcomes. Diplomatic engagement, effective strategic communications, economic embargoes, governance aid, and financial incentives for commercial investment are all part of resolving and recovering from wars. Yet without LRS, these forms of soft power possess less coercive power over the enemy. Even in today’s complex world, **the power of LRS remains the essence of deterrence and a foundational element of America’s strategic advantage**. However, as Mark Gunzinger points out, for the United States, “that advantage is dissipating.”1

**Solves all conflict**

**Kim ‘8**

Jung Hyok, KDI School of Public Policy and Management, “A STUDY ON THE IMPACT OF U.S. “STRATEGIC FLEXIBILITY” ON THE KOREA-U.S. ALLIANCE

Military **flexibility is more important than ever** because nobody can expect complicated security environment and battlefield condition of today easily. The 21st century security environment faces various military and non-military threats; it becomes difficult to find the countermeasure against threatening. In this situation, military‘s mission and its scope of activity having been broadened from the conventional operation to the counter-terror and supporting national catastrophe as well as Military Operations Other Than War (MOOTW) such as peace keeping operations (PKO). Consequently, under the uncertain and complicated security environment, flexible thinking and countermeasures are necessarily needed for the military and leaders in order to successfully complete various duties. In the aspect of strategic theory and military doctrine, **flexibility functions as one of the War Principles.** For example, British military adopts flexibility as one of the ten Principles of War. 33 They emphasize that flexibility is an essential principle to cope with unpredictable and changeable conditions as well as in order not to indulge in dogma. On the other hand, the U.S. doctrine does not adopt ―Flexibility‖ as one of the nine Principles of War34 ; however, it functions same as the Principle of War. In order to achieve the military victory and strategic success simultaneously, the nine Principles of War should be adopted harmoniously; in addition, flexibility plays a role as binding material for these nine Principles of War, as if it functions like the tenth Principle of War.35 As discussed earlier, future forms of warfare can take many paths, and much uncertainty lies ahead. Flexible responses are often born of **flexible planning**. Further, in tomorrow‘s unfolding environment where asymmetric and other nontraditional threats will be more prevalent, open-minded, nonjudgmental and critical thinking skills—at all ranks and levels of war—will become the tools to eliminate dangerous blind spots and develop effective solutions. That is flexibility. As we go through the 21st century, the need for flexibility is an indispensable condition for conducting a victory for military operations in uncertain security conditions and ambiguous battlefield environments. 36

## Spillover

Yes spillover - creates legal precedent that affects other areas - that's Yoo

Legacy chains cause further restraint

Paul ‘8

Christopher, Senior Social Scientist; Professor, Pardee RAND Graduate School Pittsburgh Office Education Ph.D., M.A., and B.A. in sociology, University of California, Los Angeles, “US Presidential War Powers: Legacy Chains in Military Intervention Decisionmaking\* ,” Journal of Peace Research, Vol. 45, No. 5 (Sep., 2008), pp. 665-679

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

Legitimacy concerns lock in a culture of restrictions on Executive war power

Paul ‘8

Christopher, Senior Social Scientist; Professor, Pardee RAND Graduate School Pittsburgh Office Education Ph.D., M.A., and B.A. in sociology, University of California, Los Angeles, “US Presidential War Powers: Legacy Chains in Military Intervention Decisionmaking\* ,” Journal of Peace Research, Vol. 45, No. 5 (Sep., 2008), pp. 665-679

The Institutional Context 'Institution' is used quite inclusively in this article. Following Nee & Ingram (1998: 19), 'An institution is a web of interrelated norms ? formal and informal ? governing social relationships' (emphasis in original).For military intervention decisions, these institutions include not only the formal organizations and departments of the gov ernment, but also the basic building blocks of the policy formation process: the laws gov erning who participates in the policy process and the procedures that must be followed. More subtle factors in policy formation are also institutionalized: the relationships between different policy participants (for ex ample, the congress and the White House, or the press and the military), taken for granted normative categories such as isolationism vs. interventionism, and the range of policies that are considered 'legitimate' by the elec torate and by other nations. The **preferences, capabilities, and basic self-identities** of indi viduals are conditioned by these institutional structures; if these individuals are part of the policymaking process, they can affect policy (Haney, 1997: 17). All actors are constrained by existing political institutions (Mann, 1993: 52). These institutions create and constitute the context (writ large) in which policy is made. The changes in the institutional contexts that constitute policy legacies tend to be of two different types. The first type of in stitutional legacy is a formal change in rules, structure, organization, or procedure. The second type is an informal institutional change, perhaps a change in the broad taken-for-granted logics that inform decision making. This could include changes in institu tionalized preferences, perceptions, informal rules, and 'sch?mas' (Sewell, 1992: 1-29). The most important difference between the two has to do with how the legacy comes about. Changes in taken-for-granted logics and schemas involve subtle shifts in perceptions based on demonstrated challenges to previously held assumptions or beliefs. These changes may or may not be undertaken consciously and reflexively, but they are certainly not something that is discussed and decided on; rather, they are a product of collective logic, sense, and unspoken consensus. For example, prior to President Truman's commitment of US forces to combat in Korea without congressional permission or a declaration of war, the division of powers laid down in the Constitution was assumed to be a sufficient protection of the various branches of the government s prerogatives with regarding to war-making. After Korea, such protections were less taken for granted and more contested, ultimately resulting in a formal institutional change: the War Powers Resolution of 1973. Such formal organizational institutional legacies, on the other hand, are the product of active decisionmaking and are codified in rule or law. As the product of a decision making process, these are 'intended' changes, and, if the language formalizing the change is not precisely aligned with its intentions, unintended institutional consequences can result. A case in point: the War Powers Re solution has not so much retilted the balance of power over war-making toward congress as placed artificial institutional constraints (time limits, reporting requirements) on how presidents plan and launch military interventions.

## Chemical Soldiers

Wow - bad argument - their impact's from "Suite 101" - Deubel has ZERO qualifications - her other posts are about spirit animals and puppies - the person she's citing is writing in the 80's. Util takes out the value to life claim and it doesn't get close to causing nuclear war.

Chemical soldiers not key - their author's conclusion

**Deubel 13** (Paula, Professor Gabriel has held positions at the Brookings Institution, the Army Intelligence School, the Center for the Study of Intelligence at the CIA, and at the Walter Reed Army Institute of Research, Department of Combat Psychiatry, in Washington. 3-25-13, "The Psychopath Wars: Soldiers of the Future?" Suite 101) suite101.com/article/the-psychopath-wars-soldiers-of-the-future-a366977 \*\*evidence is gender modified\*\*

Psychopathic Behavior During War

During the 1991 Iraq war a pilot interviewed on European television callously remarked ambushing Iraqis was “like waiting for the cockroaches to come out so we could kill them." Other U.S. pilots compared killing human beings to “shooting turkey” or like “attacking a farm after someone had opened a sheep stall.”

This same lack of empathy can be seen in Iraq’s Abu Graib prison scandal (2004) where U.S. soldiers were shown seemingly to enjoy torture, as well as more recent photos of military men posing with dead Afghans (first published in Germany's Der Spiegel magazine); more gruesome photos were later published in Rolling Stone before the U.S. Army censored all the remaining damning material from public view.

No More Heroes warns that modern warfare will become increasingly difficult for sane men to endure. The combat punch of man’s weapons has increased over 600% since World War II. These weapons are highly technical. High Explosive Plastic Tracers (HEP-T) send fragments of metal through enemy tanks and into humans at speeds faster than the speed of sound. The Starlight Scope is able to differentiate between males and females by computing differences in body heat given off by pelvic areas. The Beehive artillery ammunition (filled with three-inch long nail-like steel needles) is capable of pinning victims to trees. The world has a nightmare arsenal of terrible weapons advanced beyond the evolution of our morality.

According to renowned psychologist, Robert Hare, one out of every twenty-five persons is a psychopath (most are undetected by society). Many of these unnoticed pathological people obtain unique positions of leadership and power, so is it surprising warfare remains so frequently occurring and grim?

Looked at it this way, Gabriel’s “psychopath pill” may not even be needed in warfare, because normal human beings are easily influenced, hypnotized, and swayed by the power of psychopaths who are already among us.

Sources:

Voices from our Conscience (out-of-print), P. Mari, Archangel & White Feather Press, 1995

No More Heroes; Madness and Psychiatry in War, Richard A. Gabriel, New York: Hill and Wang, 1987

## Link

The aff decimates Presidential war powers—it’s a key issue.

Horowitz ‘13

Colby, Fordham Law Review, “CREATING A MORE MEANINGFUL DETENTION STATUTE: LESSONS LEARNED FROM HEDGES V. OBAMA,” 81 Fordham L. Rev. 2853

On December 31, 2011, President Obama signed into law the National Defense Authorization Act, n90 an extensive act containing five divisions and spanning over 550 pages. n91 President Obama "signed this bill despite having serious reservations with certain provisions that regulate the [\*2866] detention, interrogation, and prosecution of suspected terrorists." n92 One of the provisions that caused the President to have "serious reservations" about the NDAA was section 1021. n93 Section 1021 is titled "Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use of Military Force." n94 This section "affirms that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority for the Armed Forces of the United States to detain covered persons ... pending disposition under the law of war." n95 Section 1021 specifies two categories of "covered persons" that can be detained: section 1021(b)(1) applies to those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible," and section 1021(b)(2) applies to those who were "a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." n96 President Obama commented that, despite new language in the NDAA that is not included in the AUMF, section 1021 "breaks no new ground and is unnecessary." n97 The President's interpretation is supported by a subsection of section 1021 titled "Construction," which states that "nothing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF]." n98 Another subsection, titled "Authorities," further limits section 1021 by declaring that "nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." n99 Although other statutes (like the DTA and MCA) have dealt with executive detention, section 1021 of the NDAA is the first statute to explicitly codify the President's substantive authority to detain terrorist suspects pursuant to the AUMF. n100 As commentators have recognized, the [\*2867] problem is that **the meaning of section 1021 is far from clear**. n101 There are two general views about the scope of section 1021. Some, including the Chairman of the Senate Armed Services Committee, believe that it does nothing new. n102 Others view section 1021 as a dangerous expansion of the power of executive detention beyond the scope of the AUMF. n103 Regardless of whether section 1021 actually expands the President's substantive detention authority, both sides seem to agree on two things. First, section 1021 is significant because irrespective of its precise meaning, it is an explicit congressional affirmation of executive detention practices. n104 As will be discussed in the next section, congressional approval can significantly expand **the President's war powers.** Second, section 1021 leaves open the possibility of indefinite detention of American citizens. n105 As mentioned above, section 1021(e) merely states that the law remains unchanged regarding citizens, lawful resident aliens, or persons captured in the United States. It does not affirmatively state that individuals in these categories cannot be detained. The language of section 1021(e) (also known as the Feinstein Amendment I) leaves the question of whether American citizens can be indefinitely detained to the other branches. n106 The Supreme Court recognized the right to detain an American citizen in Hamdi n107 - a right, however, that appears to be against the policy of the Obama Administration. n108 As one Senator predicted, "these detention [\*2868] provisions, even as they are amended, will present numerous constitutional questions that the courts will inevitably have to resolve." n109

of our soldiers as warriors are forced to compete with the obligation to act as investigators.

## at: Iraq

**Not when he was busy being awesome at fighting terrorists—**

Howell ‘7

William, professor of political science at U-Chicago, and Jon C. Pevehouse, professor of Political Science UW-Madison, “While Dangers Gather : Congressional Checks on Presidential War Powers,” 2007 ed.

Evidence of congressional checks on this president, meanwhile, appeared in short supply. During the first six years of Bush's administration, Bush's foreign policy agenda did not suffer grand defeats at the hand of congressionally enacted statutes or judicial rulings. Though an epic inter-branch showdown may yet erupt, during Bush's first term, conflicts proved rather muted—even though the president, quite explicitly, sought to exalt his own power and to denigrate Congress's, insisting on more than a few occasions that members should not, and constitutionally cannot, meddle in his campaigns against terrorism at home and abroad. Among critics, the president's defiant stance generated a growing consensus, articulated in a New York Times editorial^ that "the system of checks and balances is a safety net that doesn't feel particularly sturdy at present."13

## Econ

Crushes heg

Friedberg, professor of politics and IR @ Princeton, and Schoenfeld, visiting scholar @ the Witherspoon Institute, 10/21/’8

(Aaron and Gabriel, “The Dangers of a Diminished America,” <http://online.wsj.com/article/SB122455074012352571.html?mod=googlenews_wsj>)

One immediate implication of the crisis that began on Wall Street and spread across the world is that the primary instruments of U.S. foreign policy will be crimped. The next president will face an entirely new and adverse fiscal position. Estimates of this year's federal budget deficit already show that it has jumped $237 billion from last year, to $407 billion. With families and businesses hurting, there will be calls for various and expensive domestic relief programs. In the face of this onrushing river of red ink, both Barack Obama and John McCain have been reluctant to lay out what portions of their programmatic wish list they might defer or delete. Only Joe Biden has suggested a possible reduction -- foreign aid. This would be one of the few popular cuts, but in budgetary terms it is a mere grain of sand. Still, Sen. Biden's comment hints at where we may be headed: toward a major reduction in America's world role, and perhaps even a new era of financially-induced isolationism. Pressures to cut defense spending, and to dodge the cost of waging two wars, already intense before this crisis, are likely to mount. Despite the success of the surge, the war in Iraq remains deeply unpopular. Precipitous withdrawal -- attractive to a sizable swath of the electorate before the financial implosion -- might well become even more popular with annual war bills running in the hundreds of billions.

Protectionist sentiments are sure to grow stronger as jobs disappear in the coming slowdown. Even before our current woes, calls to save jobs by restricting imports had begun to gather support among many Democrats and some Republicans. In a prolonged recession, gale-force winds of protectionism will blow.

Then there are the dolorous consequences of a potential collapse of the world's financial architecture. For decades now, Americans have enjoyed the advantages of being at the center of that system. The worldwide use of the dollar, and the stability of our economy, among other things, made it easier for us to run huge budget deficits, as we counted on foreigners to pick up the tab by buying dollar-denominated assets as a safe haven. Will this be possible in the future?

Meanwhile, traditional foreign-policy challenges are multiplying. The threat from al Qaeda and Islamic terrorist affiliates has not been extinguished. Iran and North Korea are continuing on their bellicose paths, while Pakistan and Afghanistan are progressing smartly down the road to chaos. Russia's new militancy and China's seemingly relentless rise also give cause for concern.

If America now tries to pull back from the world stage, it will leave a dangerous power vacuum. The stabilizing effects of our presence in Asia, our continuing commitment to Europe, and our position as defender of last resort for Middle East energy sources and supply lines could all be placed at risk.

In such a scenario there are shades of the 1930s, when global trade and finance ground nearly to a halt, the peaceful democracies failed to cooperate, and aggressive powers led by the remorseless fanatics who rose up on the crest of economic disaster exploited their divisions. Today we run the risk that rogue states may choose to become ever more reckless with their nuclear toys, just at our moment of maximum vulnerability.

Most comprehensive data sets

Brock Blomberg, Professor of Economics at Wellesley College, Gregory Hess, Professor of Economics at Oberlin College, February 2002, “The Temporal Links between Conflict and Economic Activity,” Journal of Conflict Resolution

To begin this temporal “causal” investigation, we first need to develop a statistical framework to estimate the joint, dynamic determination of the occurrence of internal conflict, external conflict, and growth. Because conflict is measured as a discrete variable, researchers typically estimate the occurrence as a probability, or if we consider both internal and external conflict, we can always estimate the joint probability distribution. But are there similar interpretations of economic activity as a discrete state? Indeed, a broad literature considers the evolution of states in the economy as the natural progression of phases. In fact, one of the key historical studies of U.S. and international business cycles, undertaken by Burns and Mitchell (1944), treated the state of the economy as either an expansion or contraction, on which the National Bureau of Economic Research’s dating procedure for recessions was founded. 4 The relevance for our study is that breakpoints in the state of the economy, either expansion or recession, are analogous to break points in peace—internal or external conflicts.5 Using an unbalanced panel of data covering 152 countries from 1950 to 1992, we therefore consider the joint determination of internal conflict, external conflict, and the state of the economy as measured by the aforementioned discrete variables. We find that the relationship between the variables is not a simple one. Conflict does appear to be highly related to the economy for the entire sample. However, it seems to be most highly related when considering certain nation-groups. For nondemocracies or in regions highly populated by nondemocracies, there seems to be an intimate link between a poor economy and the decision to go to war—both internally and externally. These results confirm much of the original hypotheses put forth in Blomberg, Hess, and Thacker (2001)—namely, that there is compelling evidence of a conditional poverty-conflict trap.

## k2 econ

Courts and Congress come too late---only centralized presidential power can solve ever-changing economic changes

Posner and Vermuele 9—Professor of Law, UChicago AND Professor of Law, Harvard Law School (Eric and Adrian, Fall 2009, “Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008,” University of Chicago Law Review, 76 U. Chi. L. Rev. 1613, Accessed 06-27-2013)

The nub of Schmitt's view is his idea that liberal lawmaking institutions, such as legislatures and courts, "come too late" to crises in the [\*1641] modern state. Those institutions frame general norms that are essentially "oriented to the past," whereas "the dictates of modern interventionist politics cry out for a legal system conducive to a present- and future-oriented steering of complex, ever-changing economic scenarios." n125 Legislatures and courts, then, are continually behind the pace of events in the administrative state; they play an essentially reactive and marginal role. Legislatures may be asked to delegate new authority to administrators after a crisis is already underway, but the frontline response is inevitably administrative, and the posture in which legislators are asked typically to grant new delegations of authority, with the crisis looming or in full blast, all but ensures that legislators will give the executive much of what it asks for. Courts, for their part, get involved only much later, if at all, and essentially do mop-up work after the main administrative programs and responses have solved the crisis, or not. The result is that in the administrative state, broad delegations to executive organs will combine lawmaking powers with administrative powers; "only then can the temporal distance between legislation and legal application be reduced." n126