## 1AC

**1AC: Blowback**

**Contention 1 is Blowback:**

**US legitimacy has been severely damaged by detention—ending use of military commissions is key to reverse negative perceptions**

**Carson 10** (Carlissa, Judge Advocate, US Army Reserves; former US Army Military Intelligence Officer. J.D., Emory University School of Law, Spring 2010, "Yes We Can Revise the Current Military Commission System, but Why?" Connecticut Journal of International Law, Lexis)

Conclusion President Obama recently has taken a step towards the preservation of human rights through deciding to revise some provisions of the 2006 MCA and to use federal courts to try some detainees (e.g., Khalid Sheikh Mohammad). **Given that current military commissions still fail to address all of the human rights violations present in previous commissions, the US has not yet reached its final destination.** Even though the US Constitution allows our President broad war-making powers, the US is not immune to the provisions and prohibitions set forth in international treaties and customary international law. Customary international law and the treaties the US has signed and ratified undoubtedly bind the nation. n326 Even the Supreme Court has consistently held that international law is an important part of US law. n327 **The US failure to adhere to international law is detrimental in several respects. This is especially true today given the US's increasingly negative reputation in the international community. One can look to the widening political gap between the US and Europe** as an example. **n328 As the US's reputation diminishes,** so does its power **to negotiate and garner much needed support from other nations.** Moreover, **the presence of contrasting definitions and applications of the law governing detention and trial of detainees worldwide is dangerous. If the US, as the most powerful nation in the world, does not adhere to international law, what states will?** [\*430] In short, **failure to adhere to international law, especially concerning human rights, may provide fertile ground for the development of** permanent blemishes **on the US's** reputation as a leader in the realm of human rights. **Given that the use of military commissions is unnecessarily unfair and unlawful, their use should cease.** The US, while fighting terrorism, must not forget that it is not helpful to ignore international law and succumb to using the techniques implemented by our enemies, the terrorists. **The very reason we are fighting terrorism is to preserve rights such as human dignity, which should be inherent in a democratic society. The US must adopt detention and trial procedures that are in accordance with both domestic US and international bodies of law**, for these are the foundation upon which the US stands. "This is the destiny of democracy-it does not see all means as acceptable, and the ways of its enemies are not always open before it." n329 **Use of courts-martial and/or regularly constituted courts,** while imperfect, nonetheless **would bring the US into conformity with the principles of international law.** Perhaps if current procedures are brought into conformity with international law, UN Special Rapporteur Martin Scheinin will no longer have reason to wear a frown on flights back from Guantanamo Bay.

**Legitimacy is crucial to sustainable and effective US hegemony—judicial review is key**

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

**American unipolarity has created a challenge for realists. Unipolarity was thought to be inherently unstable because other nations, seeking to protect their own security**, form alliances to counter-balance the leading state. n322 **But no nation or group of nations has yet attempted to challenge America's military predominance**. n323 Although some realists predict that [\*140] counter-balancing will occur or is already in some ways occurring, n324 William Wohlforth has offered a compelling explanation for why true counter-balancing, in the traditional realist sense, will probably not happen for decades. n325 American unipolarity is unprecedented. n326 First, **the United States is geographically isolated from other potential rivals**, who are located near one another in Eurasia. n327 **This mutes the security threat that the U.S. seems to pose while increasing the threats that potential rivals seem to pose to one another**. n328 Second, **the U.S. far exceeds the capabilities of all other states in every aspect of power** - military, economic, technological, and in terms of what is known as "soft power." **This advantage "is larger now than any analogous gap in the history of the modern state system."** n329 Third, **unipolarity is entrenched as the status quo** for the first time since the seventeenth century, multiplying free rider problems for potential rivals and rendering less relevant all modern previous experience with balancing. n330 Finally, the potential rivals' possession of nuclear weapons makes the concentration of power in the United States appear less threatening. A war between great powers in today's world is very unlikely. n331 These factors make the current system much more stable, peaceful and durable than the past multi-polar and bipolar systems in which the United States operated for all of its history until 1991. **The lack of balancing means that the U**nited **S**tates, **and by extension the executive branch, faces** much **weaker external constraints on its exercise of power** than in the past. n332 Therefore, **the internal processes of the U.S. matter now more than any other nations' have in history**. n333 And **it is these internal processes**, as much as external developments, **that will determine the durability of American unipolarity. As one realist scholar has argued, the U.S. can best ensure the [\*141] stability of this unipolar order by ensuring that its predominance appears legitimate**. n334 **Hegemonic orders take on hierarchical characteristics**, with the preeminent power having denser political ties with other nations than in a unipolar order. n335 **Stability in hegemonic orders is maintained in part through security guarantees and trade relationships that result in economic specialization** among nations. n336 For example, if Nation X's security is supplied by Hegemon Y, Nation X can de-emphasize military power and focus on economic power. In a hegemonic system, **the preeminent state has "the power to shape the rules of international politics according to its own interests."** n337 **The hegemon**, in return, **provides public goods for the system as a whole**. n338 **The hegemon possesses** not only superior command of military and economic resources but "**soft" power, the ability to guide other states' preferences and interests.** n339 **The durability and stability of hegemonic orders depends on other states' acceptance of the hegemon's role. The hegemon's leadership must be seen as legitimate.** n340 [\*142] **The U**nited **S**tates **qualifies as a global hegemon**. In many ways, **the U.S. acts as a world government**. n341 **It provides public goods for the world**, such as security guarantees, the protection of sea lanes, and support for open markets. n342 After World War II, the U.S. forged a system of military alliances and transnational economic and political institutions - such as the United Nations, NATO, the International Monetary Fund, and the World Bank - that remain in place today. The U.S. provides security for allies such as Japan and Germany by maintaining a strong military presence in Asia and Europe. n343 Because of its overwhelming military might, the U.S. possesses what amounts to a "quasi-monopoly" on the use of force. n344 This prevents other nations from launching wars that would tend to be truly destabilizing. Similarly, **the United States provides a public good through its efforts to combat terrorism** and confront - even through regime change - rogue states. n345 **The U**nited **S**tates also **provides a public good through its promulgation and enforcement of international norms. It exercises a dominant influence on the definition of international law because it is the largest "consumer" of such law and the only nation capable of enforcing it on a global scale.** n346 The U.S. was the primary driver behind the establishment of the United Nations system and the development of contemporary treaties and institutional regimes to effectuate those treaties in both public and private international law. n347

Moreover, **controlling international norms are** [\*143] sometimes **embodied in the U.S. Constitution and domestic law rather than in treaties or customary international law.** For example, **whether terrorist threats will be countered effectively depends "in large part on U.S. law regarding armed conflict, from rules that define the circumstances under which the President can use force to those that define the proper treatment of enemy combatants.**" n348 **These public goods provided by the United States stabilize the system by legitimizing it and decreasing resistance to it.** **The transnational** political and economic **institutions created by the U**nited **S**tates **provide other countries with informal access to policymaking and tend to reduce resistance to American hegemony, encouraging others to "bandwagon"** with the U.S. rather than seek to create alternative centers of power. n349 American hegemony also coincided with the rise of globalization - the increasing integration and standardization of markets and cultures - which tends to stabilize the global system and reduce conflict. n350 **The legitimacy of American hegemony is strengthened and sustained by the democratic and accessible nature of the U.S. government. The American constitutional separation of powers is an international public good. The risk that it will hinder the ability of the U.S. to act swiftly, coherently or decisively** in foreign affairs **is counter-balanced by the benefits it provides in permitting foreigners multiple points of access to the government**. n351 Foreign nations and citizens lobby Congress and executive branch agencies in the State, Treasury, Defense, and Commerce Departments, where foreign policy is made. n352 They use the media to broadcast their point of view in an effort to influence the opinion of decision-makers. n353 Because the United States is a nation of immigrants, many American citizens have a specific interest in the fates of particular countries and form "ethnic lobbies" for the purpose of affecting foreign policy. n354 **The courts,** too, **are accessible to foreign nations and non-citizens. The Alien Tort Statute is emerging as an** [\*144] **important vehicle for adjudicating tort claims among non-citizens in U.S. courts.** n355 Empires are more complex than unipolar or hegemonic systems. Empires consist of a "rimless-hub-and-spoke structure," with an imperial core - the preeminent state - ruling the periphery through intermediaries. n356 The core institutionalizes its control through distinct, asymmetrical bargains (heterogeneous contracting) with each part of the periphery. n357 Ties among peripheries (the spokes) are thin, creating firewalls against the spread of resistance to imperial rule from one part of the empire to the other. n358 The success of imperial governance depends on the lack of a "rim." n359 Stability in imperial orders is maintained through "divide and rule," preventing the formation of countervailing alliances in the periphery by exploiting differences among potential challengers. n360 Divide-and-rule strategies include using resources from one part of the empire against challengers in another part and multi-vocal communication - legitimating imperial rule by signaling "different identities ... to different audiences." n361 Although the U.S. has often been labeled an empire, the term applies only in limited respects and in certain situations. Many foreign relations scholars question the comparison. n362 However, the U.S. does exercise informal imperial rule when it has routine and consistent influence over the foreign policies of other nations, who risk losing "crucial military, economic, or political support" if they refuse to comply. n363 The "Status of Force Agreements" ("SOFAs") that govern legal rights and responsibilities of U.S. military personnel and others on U.S. bases throughout the world are typically one-sided. n364 And the U.S. occupations in Iraq and Afghanistan had a strong imperial dynamic because those regimes depended on American support. n365 [\*145] But the management of empire is increasingly difficult in the era of globalization. Heterogeneous contracting and divide-and-rule strategies tend to fail when peripheries can communicate with one another. The U.S. is less able control "the flow of information ... about its bargains and activities around the world." n366 In late 2008, negotiations on the Status of Force Agreement between the U.S. and Iraq were the subject of intense media scrutiny and became an issue in the presidential campaign. n367 Another classic imperial tactic - the use of brutal, overwhelming force to eliminate resistance to imperial rule - is also unlikely to be effective today. The success of counterinsurgency operations depends on winning a battle of ideas, and collateral damage is used by violent extremists, through the Internet and satellite media, to "create widespread sympathy for their cause." n368 The abuses at Abu Ghraib, once public, harmed America's "brand" and diminished support for U.S. policy abroad. n369 Imperial rule, like hegemony, depends on maintaining legitimacy.B. Constructing a Hegemonic Model International relations scholars are still struggling to define the current era. The U.S.-led international order is unipolar, hegemonic, and, in some instances, imperial. In any event, this order diverges from traditional realist assumptions in important respects. It is unipolar, but stable. It is more hierarchical. The U.S. is not the same as other states; it performs unique functions in the world and has a government open and accessible to foreigners. And the stability and legitimacy of the system depends more on successful functioning of the U.S. government as a whole than it does on balancing alliances crafted by elite statesmen practicing realpolitik. "World power politics are shaped primarily not by the structure created by interstate anarchy but by the foreign policy developed in Washington." n370 These differences require a new model for assessing the institutional competences of the executive and judicial branches in foreign affairs. [\*146] One approach would be to adapt an institutional competence model using insights from a major alternative theory of international relations - liberalism. Liberal IR theory generally holds that internal characteristics of states - in particular, the form of government - dictate states' behavior, and that democracies do not go to war against one another. n371 Liberalists also regard economic interdependence and international institutions as important for maintaining peace and stability in the world. n372 Dean Anne-Marie Slaughter has proposed a binary model that distinguishes between liberal, democratic states and non-democratic states. n373 Because domestic and foreign issues are "most convergent" among liberal democracies, Slaughter reasons, the courts should decide issues concerning the scope of the political branches' powers. n374 With respect to non-liberal states, the position of the U.S. is more "realist," and courts should deploy a high level of deference. n375 One strength of this binary approach is that it would tend to reduce the uncertainty in foreign affairs adjudication. Professor Nzelibe has observed that it would put courts in the difficult position of determining which countries are liberal democracies. n376 But even if courts are capable of making these determinations, they would still face the same dilemmas adjudicating controversies regarding non-liberal states. Where is the appropriate boundary between foreign affairs and domestic matters? How much discretion should be afforded the executive when individual rights and accountability values are at stake? To resolve these dilemmas, an institutional competence model should be applicable to foreign affairs adjudication across the board. In constructing a new realist model, it is worth recalling that the functional justifications for special deference are aimed at addressing problems of a particular sort of role effectiveness - which allocation of power among the branches will best achieve general governmental effectiveness in foreign affairs. In the twenty-first century, **America's global role has changed, and the best means of achieving effectiveness in foreign affairs have changed as well. The international realm remains highly political** - if not as much as in the past - but **it is American politics that matters most.** If the U.S. is truly an empire - [\*147] and in some respects it is - the problems of imperial management will be far different from the problems of managing relations with one other great power or many great powers. Similarly, **the management of hegemony or unipolarity requires a different set of competences.** Although American predominance is recognized as a salient fact, there is no consensus among realists about the precise nature of the current international order. n377 The hegemonic model I offer here adopts common insights from the three IR frameworks - unipolar, hegemonic, and imperial - described above. First, the "hybrid" hegemonic model assumes that the goal of U.S. foreign affairs should be the preservation of American hegemony, which is more stable, more peaceful, and better for America's security and prosperity, than the alternatives. **If the United States were to withdraw from its global leadership role, no other nation would be capable of taking its place. n378 The result would be radical instability and a greater risk of major war**. n379 In addition, the United States would no longer benefit from the public goods it had formerly produced; as the largest consumer, it would suffer the most. Second, the hegemonic model assumes that **American hegemony is unusually stable and durable**. n380 As noted above, **other nations have many incentives to continue to tolerate the current order**. n381 And although other nations or groups of nations - China, the European Union, and India are often mentioned - may eventually overtake the United States in certain areas, such as manufacturing, **the U.S. will remain dominant in most measures of capability for decades.** According to 2007 estimates, the U.S. economy was projected to be twice the size of China's in 2025. n382 **The U.S. accounted for half of the world's military spending in 2007 and holds enormous advantages in defense technology that far outstrip would-be competitors. n383 Predictions of American decline are not new, and they have thus far proved premature.** n384 [\*148] Third, **the hegemonic model assumes that preservation of American hegemony depends not just on power, but legitimacy. n385 All three IR frameworks for describing predominant states - although unipolarity less than hegemony or empire - suggest that legitimacy is crucial to the stability and durability of the system.** **Although empires and predominant states in unipolar systems can conceivably maintain their position through the use of force, this is much more likely to exhaust the resources of the predominant state and to lead to counter-balancing or the loss of control. n386 Legitimacy as a method of maintaining predominance is far more efficient.** The hegemonic model generally values courts' institutional competences more than the anarchic realist model. **The courts' strengths in offering a stable interpretation of the law, relative insulation from political pressure, and power to bestow legitimacy are important for realizing the functional constitutional goal of effective U.S. foreign policy.** This means that courts' treatment of deference in foreign affairs will, in most respects, resemble its treatment of domestic affairs. Given the amorphous quality of foreign affairs deference, this "domestication" reduces uncertainty. **The increasing boundary problems caused by the proliferation of treaties and the infiltration of domestic law by foreign affairs issues are lessened by reducing the deference gap**. And **the dilemma caused by the need to weigh different functional considerations** - liberty, accountability, and effectiveness - **against one another is made less intractable because it becomes part of the same project that the courts constantly grapple with in adjudicating domestic disputes.**

**Hegemony solves conflicts that cause extinction**

Thomas P.M. **Barnett,** chief analyst, Wikistrat, “The New Rules: Leadership Fatigue Puts U.S. and Globalization, at Crossroads,” WORLD POLITICS REVIEW, 3—7—**11**, www.worldpoliticsreview.com/articles/8099/the-new-rules-leadership-fatigue-puts-u-s-and-globalization-at-crossroads

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

**Indefinite detention increases terrorism—multiple mechanisms**

Martin **Scheinin**, Professor, International Law, “Should Human Rights Take a Back Seat in Wartime?” REAL CLEAR WORLD, interviewed by Casey L. Coombs, 1—11—**12**, www.realclearworld.com/articles/2012/01/11/national\_defense\_authorization\_act\_scheinin\_interview-full.html, accessed 8-21-13.

CLC: As a world leader and active promoter of universal human rights, **the practice of indefinite detention without charge would** seem to **clash with U.S. ideals**. Could you comment on this contradiction? MS: **One of the main lessons learned in the** international **fight against terrorism is that counter-terrorism professionals** have gradually **come to learn and admit that human rights violations are not an acceptable shortcut** in an effective fight against terrorism. **Such measures** tend to **backfire in multiple ways**. **They** result in legal problems by **hamper**ing **prosecution, trial and punishment**. **The use of torture is a clear example** here. **They** also tend to **alienate** the **communities with which authorities should be working** in order **to** detect and **prevent terrorism**. And **they add to causes of terrorism,** both **by perpetuating "root causes" that involve the alienation of communities and by providing "triggering causes" through which bitter individuals** make the morally inexcusable decision to **turn to** methods of **terrorism.** The NDAA is just one more step in the wrong direction, by aggravating the counterproductive effects of human rights violating measures put in place in the name of countering terrorism. CLC: Does the NDAA afford the U.S. a practical advantage in the fight against terrorism? Or might the law undermine its global credibility? MS: **It is hard to see any practical advantage gained through the NDAA**. It is just another form of what I call symbolic legislation, enacted because the legislators want to be seen as being "tough" or as "doing something." The law is written as just affirming existing powers and practices and hence not providing any meaningful new tools in the combat of terrorism. By constraining the choices by the executive, **it** nevertheless **hampers e**ffective counter-terrorism work, including criminal investigation and prosecution, as well as **international counter-terrorism cooperation**, markedly in the issue of closing the Guantanamo Bay detention facility. Hence, **it carries the risk of distancing** the **U**nited **S**tates **from its closest allies and the international community generally**. And of course **these kinds of** legal **provisions are** always **open for bad faith copying by repressive governments that will use them for their own political purposes**.

**Al Qaeda is still a major threat—predictions of decline are premature and false**

**Sinai 13** (Joshua, JINSA Fellow, Washington, DC-based consultant on national security studies, focusing primarily on terrorism, counterterrorism, and homeland security, 3-11-13, “Al Qaeda Threat to U.S. Not Diminished, Data Indicates” The Jewish Institute for National Security Affairs) http://www.jinsa.org/fellowship-program/joshua-sinai/al-qaeda-threat-us-not-diminished-data-indicates#.UbaiWvmsiSo

**Conventional wisdom holds that the threat** to America **posed by al Qaeda** and its affiliates **is greatly diminished** compared to 9/11. Today, it is claimed, al Qaeda is less well organized, with many of its top leaders eliminated, and is so broken into geographically disparate franchises that it is unable to recruit, train, and deploy a specialized cell to carry out a comparable catastrophic attack against America. The fact that no al Qaeda terrorist attacks have been carried out in America over the last two years, while some 20 individuals have plotted to carry out attacks but were arrested and convicted during the pre-incident phases, is seen as evidence that this terrorist threat is decreasing domestically. Therefore, according to this thesis, security authorities should prepare for more numerous and frequently occurring but low casualty attacks mounted by less well-trained and capable homegrown operatives, particularly by what are termed "lone wolves." **When a more complete compilation of all the components** involved in terrorism **are taken into account, however, the magnitude of the threat becomes much clearer and includes a higher likelihood of attempts to carry out catastrophic attacks as well as evidence that al Qaeda continues to recruit and prepare terrorist operatives in the United States.** Downplaying the terrorist threat posed by al Qaeda and its affiliates also has significant political implications due in part to the more than $70 billion that is spent annually on America's domestic counterterrorism programs (with larger amounts expended for overseas operations), all of which need to be continuously justified as cost effective by Administration planners and Congressional appropriators. Such **purported decline in al Qaeda attacks domestically**, however, **is** now **being seized upon by those who favor reduced government funding for counterterrorism programs, including weakening the USA PATRIOT Act**, to support their position that a reduced threat requires reduced funding and resources. **When the trajectory of attacks by al Qaeda and its associates over the years are carefully studied,** however, **certain patterns recur.** Specifically, **every time the threat is underplayed, it is invariably followed by a major attack. In the months leading up to the November 2012 elections, the media was filled with pronouncements that al Qaeda's threat had greatly diminished** as a result of the elimination of its leadership and the reduced operational role over attacks by what is termed "al Qaeda Central" in Pakistan's tribal areas. **While accurate on one level, this did not stop al Qaeda and its affiliates from continuing to launch major terrorist attacks, including** that by its Libyan affiliate against the U.S. consulate in **Benghazi** on September 11, 2012, which led to severe political repercussions for the Administration for its unpreparedness to anticipate such an attack. **This was followed by** the launching of **the devastating cross-border attack against the natural gas facility in eastern Algeria** in mid-January by another al Qaeda affiliate in Mali. **Thirty-six foreign workers were murdered in that attack, which, again, was unanticipated.** Moreover, **the fact that a catastrophic attack against America comparable to 9/11 has not occurred over the past 11 years should not suggest that a future one is not being planned. In summer 2006, al Qaeda-linked operatives in London plotted to detonate liquid explosives on board 10 transatlantic airliners flying from the UK to America and Canada. In** September **2009**, Najibullah **Zazi and his associates were arrested for plotting to conduct a suicide bombing attack against the New York City subway system. On Christmas Day, 2009,** Umar Farouk **Abdulmutallab failed to detonate plastic explosives while on board an airliner heading to Detroit.** Anwar al Awlaki, a former American extremist cleric, reportedly masterminded Abdulmutallab's operation. Awlaki was killed in a drone attack in Yemen on September 30, 2011. The killings of al Awlaki and Samir Khan, another American extremist who had made his way to Yemen in 2009, could well trigger a catastrophic attack by al Qaeda to avenge their deaths. **The recent capture of** Osama **Bin Laden's son-in-law**, Sulaiman abu Ghaith, and the decision to try him in New York City, **is also likely to trigger a major revenge attack against America.** Finally, **organizing catastrophic terrorist attacks requires** extensive **planning, funding and preparation. A terrorist group that feels** itself **strong will take its time to carefully plan a few but devastating attacks**, while a group that regards itself as weak may feel compelled to carry out frequent, but low-casualty attacks to demonstrate its continued relevancy. Some **incident databases, such as** a recent compilation of **data about American al Qaeda terrorists by the UK-based Henry Jackson Society, only account for completed attacks** and convictions of those arrested. **If such counting is expanded to include other factors**, however, then **the overall threat becomes much more severe. Other factors**, therefore, **should include** the **potential consequences of** the **thwarted attacks** had they not been prevented, **the number of radicalized Americans** who travel overseas to join al Qaeda-affiliated insurgencies, and the extent of radicalized activity by al Qaeda's American sympathizers in jihadi website forums and chatrooms. **A more complete accounting of the threat will** now **reveal that the supportive extremist infrastructure for al Qaeda in America is actually not diminishing and that the purported "lone wolf" actors have actual ties to al Qaeda operatives overseas. We should not,** therefore, also **be misled into complacency if catastrophic attacks by al Qaeda do not occur for lengthy periods. Nor so by the comforting but false sense of security that comes with believing that "lone wolf" attacks** in the United States **are not a product of al Qaeda** recruitment and support. It is also possible, nevertheless, that **al Qaeda's terrorist planners are considering both types of attacks, infrequent catastrophic and frequent low casualty. This may explain why al Qaeda's propaganda organs are calling on its radicalized followers in the West to take matters into their own hands and embark on any sort of attacks that may be feasible at the moment, but with further surprise attacks of a catastrophic nature still ahead.**

**Terrorists will obtain nuclear weapons—multiple potential sources**

**Neely 13** (Meggaen, research intern for the Project on Nuclear Issues, 3-21-13, "Doubting Deterrence of Nuclear Terrorism" Center for Strategic and International Studies) csis.org/blog/doubting-deterrence-nuclear-terrorism

**The risk that terrorists will set off a nuclear weapon on U.S. soil is disconcertingly high.** While a terrorist organization may experience difficulty constructing nuclear weapons facilities, **there is significant concern that terrorists can obtain a nuclear weapon or nuclear materials.** The fear that **an actor could steal a nuclear weapon** or fissile material **and transport it to the U**nited **S**tates has long-existed. It takes a great amount of time and resources (including territory) to construct centrifuges and reactors to build a nuclear weapon from scratch. **Relatively easily-transportable nuclear weapons**, however, **present one opportunity to terrorists.** For example, **exercises similar to the recent Russian movement of nuclear weapons from munitions depots to storage sites may prove attractive targets. Loose nuclear materials pose a second opportunity. Terrorists could use them to create a crude nuclear weapon similar to the gun-type design of Little Boy. Its simplicity** – two subcritical masses of highly-enriched uranium – **may make it attractive to terrorists.** While such a weapon might not produce the immediate destruction seen at Hiroshima, the radioactive fall-out and psychological effects would still be damaging. These two opportunities for terrorists differ from concerns about a “dirty bomb,” which mixes radioactive material with conventional explosives.

**Nuke terror causes extinction—equals a full-scale nuclear war**

Owen B. **Toon 7**, chair of the Department of Atmospheric and Oceanic Sciences at CU-Boulder, et al., April 19, 2007, “Atmospheric effects and societal consequences of regional scale nuclear conflicts and acts of individual nuclear terrorism,” online: http://climate.envsci.rutgers.edu/pdf/acp-7-1973-2007.pdf

To an increasing extent, **people are congregating in the world’s great urban centers, creating megacities with populations exceeding 10 million individuals**. At the same time, **advanced technology has designed nuclear explosives of such small size they can be easily transported in a car**, small plane or boat **to the heart of a city**. We demonstrate here that **a single detonation in the 15 kiloton range can produce urban fatalities approaching one million** in some cases, **and casualties exceeding one million**. Thousands of small weapons still exist in the arsenals of the U.S. and Russia, and there are at least six other countries with substantial nuclear weapons inventories. In all, thirty-three countries control sufficient amounts of highly enriched uranium or plutonium to assemble nuclear explosives. A conflict between any of these countries involving 50-100 weapons with yields of 15 kt has the potential to create fatalities rivaling those of the Second World War. Moreover, **even a single surface nuclear explosion**, or an air burst in rainy conditions, **in a city center is likely to cause the entire metropolitan area to be abandoned at least for decades** owing to infrastructure damage and radioactive contamination. As the aftermath of hurricane Katrina in Louisiana suggests, **the economic consequences of even a localized nuclear catastrophe would most likely have severe national and international economic consequences**. Striking effects result even from relatively small nuclear attacks because low yield detonations are most effective against city centers where business and social activity as well as population are concentrated. Rogue nations and **terrorists would be most likely to strike there**. Accordingly, an organized **attack on the U.S. by a small nuclear state, or terrorists** supported by such a state, **could generate casualties comparable to those** once **predicted for a full-scale nuclear “counterforce” exchange in a superpower conflict**. Remarkably, the **estimated quantities of smoke generated by attacks totaling about one megaton of nuclear explosives could lead to significant global climate perturbations** (Robock et al., 2007). While we did not extend our casualty and damage predictions to include potential medical, social or economic impacts following the initial explosions, such analyses have been performed in the past for large-scale nuclear war scenarios (Harwell and Hutchinson, 1985). Such a study should be carried out as well for the present scenarios and physical outcomes.

**Russia’s rule of law deficit undermines cooperation and internal stability—plan is key to restoring our credibility to deal with this issue**

Sarah E. **Mendelson**, Director, Human Rights and Security Initiative, Center for Strategic and International Studies, “U.S.-Russian Relations and the Democracy and Rule of Law Deficit,” CENTURY FOUNDATION REPORT, 20**09**, p. 3-4.

Since the collapse of the Soviet Union in 1991, every U.S. administration has considered Russia’s political trajectory a national security concern. Based on campaign statements and President Barack Obama’s early personnel choices, this perspective likely will affect policy toward Russia in some way for the foreseeable future. **While** the **Obama** administration **plans to cooperate with Moscow** on a number of issues, **it will find that Russia’s** current **deficit in** the areas of **democracy and the rule of law complicate the relationship and** may, in some cases, **undermine** attempts at **engagement.** The organizers of the Century Foundation Russia Working Group have labeled this policy problem “coping with creeping authoritarianism.” Results from nearly a dozen large, random sample **surveys** in Russia since 2001 that examine the views and experiences of literally thousands of Russians, combined with other research and newspaper reporting, all s**uggest the current democracy and rule of law deficit is** rather **stark**. The deficit does not diminish the importance of Russia in international affairs, nor is it meant to suggest the situation is unique to Russia. The internal conditions of many states have negative international security implications. As Europeans repeatedly pointed out during the administration of George W. Bush, **U.S. departures from the rule of law made the** **U**nited **S**tates **increasingly problematic as a global partner**, whether through the use of force in Iraq or the manner in which the United States pursued and handled terrorist suspects. In fact, **coping with authoritarian trends in Russia** (and elsewhere) **will involve changes in U.S. policies** that have, on the surface, nothing to do with Russia. Bush administration **counterterrorism policies that authorized torture, indefinite detention** of terrorist suspects, and the rendering of detainees to secret prisons and Guantánamo **have had numerous negative unintended consequences** for U.S. national security, **including serving as a recruitment tool** for al Qaeda and insurgents in Iraq. Less often recognized, **these policies also have undercut** whatever **leverage the** **U**nited **S**tates **had, as well as limited the effectiveness of American decision-makers, to push back on authoritarian policies adopted by,** among others, the **Putin** administration. At its worst, **American departures from the rule of law** may **have enabled abuse inside Russia.** These departures certainly left human rights defenders isolated. **Repairing the damage to U.S. soft power and reversing the departure from human rights norms** that characterized the Bush administration’s counterterrorism policies **will provide the** Obama **administration strategic and moral authority and improve the ability of the United States to work with allies. It also can have positive consequences for Obama’s Russia policy.** The **changes** that **need to be made in U.S.** counterterrorism **policies**, however politically sensitive, **are** somewhat more **straightforward** than the adjustments that must be made to respond to the complex issues concerning Russia. The Obama administration must determine how best to engage Russian leaders and the population on issues of importance to the United States, given Russia’s poor governance structures, the stark drop in oil prices, Russia’s continued aspirations for great power status, and the rather serious resentment by Russians concerning American dominance and prior policies. The policy puzzle, therefore, is how to do all this without, at the same time, sacrificing our values and undercutting (yet again) U.S. soft power. This report assesses the political dynamics that have shaped Russia’s authoritarian drift, briefly addresses a few of the ways in which they matter for U.S. policy, and suggests several organizing principles to help the Obama administration manage this critical relationship. Possible approaches include working closely with Europe on a joint approach to Russia, accurately anticipating the unintended consequences of U.S. policy in one realm (such as Kosovo) for Russia policy, and embracing the rights of states to choose their own security alliances. A final important principle relates to U.S. engagement with Russians beyond the Kremlin. President Obama should speak directly to the Russian people, engaging in a manner that respects their interests and desires, but also reflects the core values of the Obama administration; that is, “reject[s] as false the choice between our safety and our ideals.”6 The Obama administration also should endorse a platform and a process for a renewed dialogue between U.S. and Russian civil society. the VIew from the KremlIn Two interactive dynamics over the past several years have shaped the dominant approach by the Russian government to the outside world: the United States declined as a world power, and at the same time, the Russian state accumulated massive wealth from high gas and oil prices. Following what many in the Russian elite view as the “humiliation” of the 1990s, by 2008, Russia was no longer a status quo power. Instead, revisionist in nature, Russian authorities focused on the restoration of great power status.7 Fueled by petrodollars, the government tackled this project in numerous ways, including military exercises around the globe, soft power projects such as a twenty-four-hour-a-day English language cable news station, “think tanks” in New York and Paris, and perhaps most important, gas and oil distribution systems meant to make Russia a central player in energy security for decades to come.8 This restoration project undoubtedly will be slowed by the current financial crisis and drop in oil revenues, but the building blocks remain in place. As the restoration project evolved, the Putin administration increasingly challenged aspects of the post–World War II and post–cold war legal, security, and economic architecture, and suggested the need for new arrangements. Many in the Russian elite seemed to view the changes that have occurred in Europe over the past twenty years, such as the enlargement of the North Atlantic Treaty Organization (NATO) and the European Union (EU), as illegitimate, driven not by the choices of local governments or populations, but by the will of Washington. Nostalgia for the Soviet era, a related sentiment, is widely shared, and is an important source of former president and now Prime Minister Vladimir Putin’s popularity.9 Some experts even suggest that many in Russia’s governing structures believe that Europe whole and free—that is, post–cold war Europe—is not in the security interest of Russia. The Carnegie Moscow Center’s Lilya Shevtsova has labeled this view “great power nationalism” and observes that the “Putin-Medvedev-Lavrov doctrine” derives from the premise that Russia seeks to contain the West—while the West is busy trying not to offend Russia.10 Some other studies suggest that Russian policymakers have attempted, in fact, to divide the United States from Europe, and generally have preferred bilateral to multilateral engagement.11 At the United Nations, Russia, together with China, repeatedly has challenged international responses to gross human rights violations in Burma, Darfur, and Zimbabwe, and it has engaged in systematic efforts to undermine the Organization for Security and Co-operation in Europe’s (OSCE) election monitoring efforts and the Council of Europe’s human rights monitoring.12 Meanwhile, Russian leaders seem to believe the current European security arrangements are soft commitments, ripe for renegotiation and restructuring. President Dmitri Medvedev has, in fact, called for a new “collective security arrangement,” at the same time reintroducing the concept of spheres of influence.13 All of these actions taken together, along with the decline in U.S. soft power, have looked at times as if some in the Russian government were trying to reset the table on human rights and international law, exporting its democracy and rule of law deficit abroad. How best can the United States, together with Europe, respond to this situation? Two additional dynamics are relevant: Russian internal weaknesses, both political and economic, but also the degree to which the Russian authorities’ assessment of the condition of the international system is correct. For example, in August 2008, Russian government officials fecklessly deployed human rights and international law rhetoric to justify the Russian use of force in South Ossetia—was that just a murky reflection of the current deeply inconsistent international order?14 Will that calculation be challenged by the Obama administration? How can it do so effectively? Will we see a new era of more robust international organizations, underpinned by respect for human rights and international law? If not, will we be in for a period of serious instability in Europe, along Russia’s borders? russIa’s democracy and rule oflaw defIcIt What makes these questions so pressing is the reality that American and European political strategy dating back to the early 1990s of integrating Russia into the Euro-Atlantic community and thus encouraging democratic development has largely failed. By 2009, Vladimir Putin’s policies have systematically closed off nearly all legitimate structures for voicing opposition. Many nongovernmental organizations are under daily pressure from the authorities.15 The parliament is dominated by a government-run party, United Russia, and outcomes of local and national elections are controlled by the authorities. The government controls national television. The few critically minded journalists that exist routinely are threatened or are under constant surveillance by the authorities, and twenty murders of journalists since 2000 have gone unsolved.16 One small newspaper known for its criticism of Kremlin policies has seen four of its journalists killed in recent years. At a minimum, the authorities have presided over an era of impunity, and at worst, some fear government authorities may have been directly involved in these deaths.17 Meanwhile, the democratic political opposition is extremely marginal and dysfunctional—irrespective of whatever government pressures are brought to bear on it. Russia has no leading liberal figures that might emerge as national leaders at present. In years past, the fighting among liberal parties was legendary, and led to multiple fratricidal losses in single-mandate districts, as liberal parties ran against one another—back when there were competitive elections for parliamentary seats.18 Today, it is unclear when or how the democratic opposition will repair itself. Yet, as political space has shrunk steadily in the past ten years, the majority of Russians do not appear to mind. In terms of the younger generation, the conventional wisdom that wealth would lead to a demand for democracy has not been borne out; only about 10 percent of survey respondents could be considered strongly supportive of democracy, while most are ambivalent. In the early 1990s, many in the West assumed that the older Soviet generation would be replaced eventually by a younger, pro-Western, pro-democratic generation. Experts and policymakers alike assumed this succession would be a natural course of events, like gravity. A similar conventional wisdom about the younger generation in Russia continues. It holds that iPods, lattes, skateboards, and other artifacts of Western consumer culture will translate into a desire for independent media, justice, and human rights. In 2005 and 2007, in an environment of steadily shrinking political space, a study based at the Center for Strategic and International Studies (CSIS) explored how young Russians viewed Soviet history and Stalin. Our nationally representative surveys of 16-to- 29-year-old Russians suggested that, despite economic prosperity, most young people gravitated enthusiastically to Vladimir Putin’s ideological platform of revisionist history and nostalgia. The narrative advanced by the government concerning recent history quite simply resonated with this younger generation. In both surveys, a majority believed that Stalin did more good than bad and that the collapse of the Soviet Union was the greatest geopolitical catastrophe of the twentieth century. These findings undoubtedly reflected coordinated strategic communications efforts by government authorities, including support of a teacher’s guide rewriting Soviet history, downplaying the deaths of millions of citizens, and effacing historical memory. These actions facilitated Russia’s authoritarian trend.19 In sum, the Russian middle class and support for authoritarian governance coexist. The tacit bargain of the past decade, however, in which dissenters were punished but Russians’ pocketbooks grew, may now be threatened by the international economic crisis. Oil prices plunged from a high of $147 a barrel in July 2008 to about $40 a barrel in December 2008. If the price of oil stays low, the lubricating effect of oil and gas revenues may well dry up, laying bare Russia’s dysfunctional state institutions and challenging the authorities’ ability to govern. Economic hardship and poor governance seem, at least anecdotally, to correlate with an increase in public protest and nervousness on the part of the ruling authorities.20 Perhaps, in the long run, the mix of economic hard times and poor governance will stimulate a greater demand for democracy and the rule of law in Russia, as citizens grow unhappy with state institutions that do not function and link that dysfunction to poor governance. In the near term, we can expect growth in nationalism and xenophobia. 21 To be sure, the democracy and rule of law deficit and the growth in nationalism pose problems primarily for Russians. In the twenty-first century, independent investigative journalism and the legitimate use of courts for prosecution are necessary to fight corruption. Today, Russia is plagued by corruption, and the Russian authorities dominate both television and court decisions.22 Independent newspapers and Internet sites exist, but journalists who have engaged in investigative journalism have been killed or live under threat.23 In a state where the rule of man predominates, the population experiences the police as predatory rather than protective. Torture in police stations is said to be common and police officers who have been rotated through Chechnya are said to be especially abusive.24 In a 2004 CSIS survey of 2,400 Russians ages 16 to 65, 41 percent of respondents feared arbitrary arrest by the police.25 In a 2007 CSIS survey of 2,000 Russians ages 16 to 29, 62 percent of respondents fully or partially distrusted the police.26 While one cannot make direct comparisons for methodological reasons, it is worth bearing in mind a recent study of attitudes toward police in China, where only 25 percent reported distrust.27 Undoubtedly, the democracy and rule of law deficit varies regionally, but it is particularly worrisome in the southern regions of Russia. The government’s approach to what it perceives as widespread radical Islamic sentiment in the North Caucasus has increased violence rather than contained it. Between May 1 and August 31, 2008, there were at least 282 incidents, and between September 1 and December 31, 2008 there were at least 333.28 When the situation is at its most dire, the Russian government appears not to control this part of its territory. Many experts worry that there will be war in the North Caucasus in 2009, or possibly that, south of the border, a Russian-Georgia war will break out again.29 That prognosis may be overly gloomy, but violence is clearly on the rise and the socioeconomic conditions in the region are dire. why It matters What does any of this have to do with the Obama administration? The democracy and rule of law deficit in Russia has a range of security and human rights implications for the United States and our allies in Europe. For example, the Obama administration comes to office with a number of arms control goals. These plans may be complicated by the absence of Russian military reform that, in turn, correlates with abuse inside the army. (They are also complicated by continued government reliance on nonconventional forces: in September 2008, President Medvedev committed to modernizing the nuclear arsenal.30) Serious, joint counterterrorism efforts with the United States, Europe, and Russia are likely to remain illusive as long as the police and security services are corrupt and abusive, and the media, a potential source to expose that corruption, is largely controlled by the government. Even at the nongovernmental, track-two level, it is now difficult to have the sort of transatlantic policy dialogue on terrorism that has been common among other nations and societies since 2001.31 The most dire evidence suggests that security service personnel or contractors have been deployed abroad, in European cities, to eliminate Kremlin enemies. In the most famous example, British authorities have sought the extradition from Moscow of former KGB bodyguard and current Duma member Andrew Lugovoi for the murder by Polonium poisoning of Alexander Litvinenko in London in November 2006.32 Kremlin proxies, such as Chechnya’s Ramzan Kadyrov, may have agents doing the same on his behalf on the streets of Austria, also with apparent impunity.33 At a minimum, the Russian authorities seem to have drawn a red line at additional enlargement of Euro-Atlantic organizations. Instead of allowing states and societies to decide for themselves what alliances and security or economic arrangements they want, Russian officials speak of “zones of interest” and “neutral” spaces—presumably such as Ukraine. In the worst case scenario, the Kremlin might decide to probe the resolve of existing NATO and EU security commitments. Presumably, this realization led General James Craddock to request that NATO begin defense planning for the Baltic states.34 Some believe, although the evidence is not clear, that the May 2007 cyber attack on Estonian government agencies, banks, newspapers, and other organizations was a first probe by the Russian government.35 In the August 2008 war in Georgia, for which all sides deserve some blame, experts saw evidence of additional Russian government cyber attacks and a prime example of blatant disregard for international law as the Russian government sought to change an internationally recognized border by force.36 Meanwhile, existing Euro-Atlantic organizations are negatively and directly affected by Russia’s democracy and rule of law deficit. In recent years, the European Court of Human Rights has heard far more cases from Russia than any other country, effectively substituting for Russia’s domestic judiciary. Some European human rights lawyers argue that this situation is severely undermining the court’s efficacy and ability to handle cases from a broad range of countries. Moreover, the Russian government increasingly has failed to compensate victims or their families, apparently now risking its expulsion from the Council of Europe.37 According to numerous OSCE officials, the Kremlin has waged a systematic campaign to undercut the organization’s various monitoring efforts.38 The emergent norm of international election observation has been undermined by the Kremlin’s attempts to legitimize fraudulent elections at home and in neighboring states, supporting a wave of authoritarian governments in this region.39 an obama strategy The unprecedented economic crisis and wars in Iraq and Afghanistan dominate the initial agenda of the Obama administration. Worries over another Israeli Palestinian war, relations with Iran, nuclear proliferation, and the status of al Qaeda are somewhere next on the list of serious security challenges. Russia is, of course, on the list, as was made clear by Vice President Joseph Biden’s speech in Munich, Secretary of State Hillary Clinton’s meeting with Foreign Minister Sergei Lavrov in Geneva, the April London meeting and the July Moscow summit with President Obama and President Medvedev. The Obama administration appears keen not to let U.S.-Russia policy drift as it did in the Bush administration, and the Obama team is moving quickly to establish the organizing principles that would drive policy and guide how it copes with the political realities of Russia today, and seeking opportunities to change the relationship. As a guide to coping with creeping authoritarianism, and for planning purposes, **the Obama administration** reasonably **can** (1) assume that Russia will continue, in the near term, on an authoritarian trajectory while at the same time, try to **encourage** President **Medvedev toward more openness and engagement**; (2) consider that Russia’s political regime may grow more brittle and thus potentially more fragile, rather than more robust and invulnerable; (3) propose and prepare for joint cooperation with Moscow on a number of issues, but anticipate that these plans could be overwhelmed by internal dynamics in Russia; and (4) understand and prepare for that which is difficult to anticipate, such as the depth and length of the economic crisis, and the potential divisions within Russian leadership that might emerge over a range of issues such as whether and how to cooperate with the United States and how to address the effects of the crisis, including the use of force against civilians to stop public protest.40 The ability of any U.S. administration to shape what happens inside Russia has long been exaggerated and misunderstood. The impact of foreign assistance clearly matters to those individuals who receive funds and technical training, but recent evidence suggests that **how the U**nited **S**tates **conducts itself in the world has far more weight in terms of its ability to bolster or undermine democracy, human rights and the rule of law in other countries.**41 For example, **U.S. noncompliance with human rights norms and laws has enabled**, although not caused, **Russia’s authoritarian drift. Therefore, a robust and comprehensive effort to opt back in to international legal frameworks will have important knock-on effects for our relations with Russia, in addition to bolstering our ability to work with allies. The United States needs to shape the larger policy context in a positive, rather than a negative, way. 42 An array of** **new U.S. policies unrelated to Russia (such as** **closing Guantánamo, ending detention without charge**, and halting unlawful interrogation of terror suspects) **can help restore U.S. soft power, as well as repair the international architecture that Russia** (correctly) **views as weak and that it** (regrettably) **seeks to replace. If the United States once again is associated with justice** instead of injustice, **it will do much to shore up human rights activists inside Russia. It will also challenge core assumptions that have taken hold within the Russian elite about the hypocrisy and weakness of democracy and human rights norms within the international system.**

**Continued human rights violations risk a Russian revolution**

Harlan **Ullman**, senior advisor, Atlantic Council, “The Third Russian Revolution,” UPI, 6—12—**13**, www.upi.com/Top\_News/Analysis/Outside-View/2013/06/12/Outside-View-The-third-Russian-Revolution/UPI-84461371009900/, accessed 8-7-13.

**Make no mistake: On the current trajectory, Russia won't be immune to** many of the **forces that provoked** the so-called colored **revolutions in** adjacent states and even **the** misnomered **Arab Awakening. A third Russian revolution is unfolding.** The only questions are when will that revolution reach a critical mass and, most importantly, will the forces of autocracy or pluralism carry the day? Russia, of course, experienced two revolutions in the 20th century. The Kaiser's Germany provoked the first by sending Lenin from Switzerland to Russia in the famous sealed train in 1917. That led to the undoing of the tsar and the Kerensky government as well as the Treaty of Brest-Litovsk that ended the war with Germany and allowed the Bolsheviks to sweep away the opposition. The second revolution came about in some seven decades later. The causes were a corrupt and fundamentally dishonest political system kept in place by a disciplined central leadership and dictatorship of the party. But that required able or at least competent leadership. Instead, the ruling Politburo became a genitocracy headed by sick, old men. Leonid Brezhnev took years to die and was replaced by two even less well general secretaries. In the mid-1970s, CIA Director William Colby repeatedly predicted Brezhnev's pending demise. It wasn't until 1982 that Colby's forecast came true. In the succession process, a few younger members were elevated to the Politburo. Because of the succession of antiquated leaders, Mikhail Gorbachev found himself moving from post to post from his appointment to the Politburo in 1979. In each post, he realized that the Soviet Union was an empty shell and each department was grossly mismanaged and underperforming. Six years later, when he became general secretary, Gorbachev was determined to save the Soviet Union and modernize the failing system. Gorbachev's tools were glasnost (openness) and perestroika (restructuring). The floodgates of reform were fully opened and the old and unworkable system couldn't resist them. By 1991, the Soviet Union was no more. In the two decades since, Vladimir **Putin has emerged as the Ironman of Russia.** In the process, **Russia has been** described and **viewed by many as a kleptocracy ruled by the few who have pillaged national wealth** for their own benefits. Under what Republicans and Democrats alike in the United States see as a government of and by thugs, **human rights have been violated; dissidents and members of the media arrested; and opponents of the Kremlin subjected to purges and show trials leading to long prison sentences.** Russia's immediate neighbors are fearful of the return of the aggressive Russian bear anxious to spread its influence through manipulating its oil and natural gas reserves for political purposes and through military maneuvers designed to intimidate. Further, cyberattacks, principally against Estonia, reinforce this perception of a neo-Soviet Union under the leadership of former KGB Colonel Putin. And Putin's commitment to far greater military spending as well as unwillingness to accept NATO's missile defenses raises sinister possibilities. **Within Russia, discontent** on the part of many Russians **is waxing. Outright theft on the part of oligarchs has gone too far. Persecution** of political **opposition is particularly vexing**. And **the health and longevity of a declining population** reflects more than excesses of consumption of vodka and harsh winters. Indeed, as a buffer to Putin's intent to ramp up his military, the Kremlin faces a very limiting factor: 90 percent of all Russian youth are unfit for military service. Unfortunately, the West in general and the United States in particular have never been very good at Kremlinology (or indeed in understanding many foreign cultures). **Whether Putin is aware of the ticking time bomb over which he presides or not, Russia is still very important to Western interests**. Syria and Iran are two major crises where Russian support could be important.

**That causes miscalc and nuclear war**

**Pry 99** (Peter Vincent, Former US Intelligence Operative, War Scare: U.S.-Russia on the Nuclear Brink, netlibrary)

**Russian internal troubles**—such as a leadership crisis, coup, or civil war—**could aggravate Russia’s fears of foreign aggression and lead to a miscalculation of U.S. intentions and to nuclear overreaction**. While this may sound like a complicated and improbable chain of events, **Russia’s story** in the 1990s **is one long series of domestic crises that have all too often been the source of nuclear close calls.** The war scares of August 1991 and October 1993 arose out of coup attempts. The civil war in Chechnya caused a leadership crisis in Moscow, which contributed to the nuclear false alarm during Norway’s launch of a meteorological rocket in January 1995. Nuclear war arising from Russian domestic crises is a threat the West did not face, or at least faced to a much lesser extent, during the Cold War. **The** Russian **military’s continued fixation on surprise-attack scenarios into the 1990s, combined with Russia’s deepening internal problems, has created a situation in which the U**nited **S**tates **might find itself the victim of a preemptive strike for no other reason than a war scare born of Russian domestic troubles.** At least in nuclear confrontations of the 1950s–1970s—during the Berlin crisis, Cuban missile crisis, and 1973 Middle East war—both sides knew they were on the nuclear brink. There was opportunity to avoid conflict through negotiation or deescalation. The nuclear war scares of the 1980s and 1990s have been one-sided Russian affairs, with the West ignorant that it was in grave peril.

**Leaves earth uninhabitable**

**Starr 10**—Director of Clinical Laboratory Science Program @ University of Missouri [Steven Starr (Senior scientist @ Physicians for Social Responsibility.), “The climatic consequences of nuclear war,” *Bulletin of the Atomic Scientists*, 12 March 2010, Pg. http://www.thebulletin.org/web-edition/op-eds/the-climatic-consequences-of-nuclear-war]

This isn't a question to be avoided. Recent **scientific studies have found that a war** fought **with** the deployed **U.S. and Russian nuclear arsenals would leave Earth** virtually **uninhabitable**. In fact, **NASA computer models have shown that** **even a "successful" first strike** **by Washington or Moscow would inflict catastrophic environmental damage that would make agriculture impossible** and cause mass starvation. Similarly, in the January Scientific American, Alan Robock and Brian Toon, the foremost experts on the climatic impact of nuclear war, warn that the environmental consequences of a "regional" nuclear war would cause a global famine that could kill one billion people.

**1AC: Judiciary**

**Boumediene upheld the deference doctrine—by failing to specify a remedy, the courts have cemented executive power**

**Scheppele 12** (Kim, Professor of Sociology and Public Affairs in the Woodrow Wilson School, Director of the Program in Law and Public Affairs, Princeton University, January 2012, "The New Judicial Deference" Boston University Law Review, Lexis)

The majority in Boumediene had indeed found that the political branches had designed a system that violated the Constitution. **The majority in Boumediene hardly looked deferential**, at least when one examines the reasoning. **But the signature element of the new judicial deference is that the Court does not defer in principle; it defers in practice.** The petitioners won the right to have a regular court hear their habeas petitions. But what should such a court say about the Guantanamo detentions after this case? The majority frankly admitted that "our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined." n294 So, **while the Court appeared to take seriously the years of delay in granting the petitioners any independent review of the bases for their detention, the Court would still not explain when and by what evidentiary standard detention would be permissible. That required more litigation. And that process would require more time, which would in turn allow the executive to detain the petitioners longer.**

**Problems in civil-military relations are likely to reach crisis proportions in 2014—now is key to reverse the trend**

**Munson 12** (Peter, Marine officer, author, and Middle East specialist, 11-12-12, "A Caution on Civil-Military Relations" Small Wars Journal) smallwarsjournal.com/jrnl/art/a-caution-on-civil-military-relations

This brief post represents only a few quickly dashed thoughts in the hope of getting something on paper that might morph into a longer and more useful essay on civil-military relations. I believe that **civil-military relations in the U**nited **S**tates **are deeply troubled.** The issues are lurking mostly in the background right now. On the surface, our leadership—civilian and military—has been able to negotiate some relatively complex rapids without any of the major drama that has cropped up in the past. The falling out between Truman and MacArthur comes to mind. Nonetheless, there are serious background **issues that will only get worse in 2014** and beyond. There are several reasons for concern. The all-volunteer force has fought two brutal wars for over a decade while a (guilty or thankful) American population has stood by with very little involvement. There have been no war bonds, no victory gardens, no bandage wrapping drives, no air raid drills—nothing to make them feel a part of the conflict other than the human interest stories about killed and wounded veterans and the once-nightly footage of shattered HMMWVs and burning convoys. This has created an inequality in experience and sacrifice that the public has generally attempted to repay through extreme deference and ever-multiplying shows of thankfulness, the likes of which have never been seen in American society. Part of this is as a corrective to the disgraceful treatment of our Vietnam veterans, to be sure, but it has consequences nonetheless. In the face of such an inequality of experience and service and in such a deferential environment, **public criticism of the military is all too easily dismissed as unpatriotic.** Not only is this foil used to deflect criticism, but its threat deters many from bringing up much needed commentary and dissent. Likewise, **unquestioning support of the military** plays no small factor in **mak**ing **any discussion of rationalizing military budgets and targeting wasteful military spending difficult, if not impossible.** Late addition: This dynamic plays out in media coverage of the military, as well, leading to an insufficient criticality, or at least a lack of perspective, in much coverage. At worst, the media becomes a propaganda arm or engages in a cult of hero worship that perpetuates the dynamics above. As this coverage creates narratives that impact critical national security decisions, it likewise skews civil-military relations. The media is a central part of any civil-military dynamic in a democracy, providing the information that informs public discourse and shapes the decision-making space. If the media is incapable of being a relatively objective arbiter, this contributes to a flawed civil-military dynamic. The military, itself, has internalized much of this adulation. When ushered to the front of boarding lines at the airport, offered discounts at a myriad of establishments, proffered all sorts of swag at any number of appreciation venues, and even venerated daily on cable news with the incredibly self-centered practice of surprise homecomings, it is difficult for members **of the military not to fall victim to a culture of creeping narcissism.** Faced with lengthy, rapid fire deployments that placed some military members away from the stabilizing influences of family and normality for years of their lives, the military itself had to play up a narrative of sacrifice and exceptionalism to help keep the trains running. This narrative was drummed into the military and reinforced by its members who saw themselves deploying again and again as society stayed home and placed them on a pedestal. This is not to say that the sacrifice was insignificant, but to acknowledge that there were second order effects of the adulation. Even within the military, there was a significant inequality in hardships faced, from “FOBbits” with daily access to all the comforts of home to infantrymen living in squalor and under the constant threat of not only death, but horrific dismemberment. This additional dynamic, as an aside, has led to a significant insecurity on the part of some (but surely not most or all) of those servicemembers who operated in support roles. You can see it in those who make cryptic references to their “special operations” background or play up training that they never rightfully received. You see, even within the military there is a distinct hierarchy of who has truly “been there and done that” and those who feel they must insinuate that they did. I may be wrong, but I get the sense that the post-WWII culture just assumed that everyone had done their part and little need be said about it. In all, **this adds up to a military that** at least in part **feels it has earned entitlement, that it deserves the deferential treatment** it receives, and that America needs to sacrifice to provide for the military—whether that be benefits or budget outlays. **This is an incredibly dangerous cultural artifact**, especially in light of the coming period of adjustment. **As America’s involvement in Afghanistan winds down and as the nation is forced to adjust to new fiscal realities, the military will face a time of significant adjustment and** likely **austerity. A military with an entitled culture and** an **inability to countenance searing introspection will be unable to properly adjust** to these new realities and will fail to make the necessary reforms, corrections, and resets that the strategic situation demands. More critically, the prospects for **an unfavorable outcome in Afghanistan, coupled with significant budget cuts, will open the door for a “knife in the back” narrative that might argue that the civilian politicians and the American public “lost” the conflict** by giving up on the great sacrifice and heroic efforts of the American military there and, furthermore, the government then slashed the military budget (and perhaps restructured some entitlements) betraying a military charged with facing a plethora of threats around the world. **Such a narrative would be** dangerous—**poisonous—for civil-military relations**. In this it is important to recognize that our political institutions are undergoing a crisis of their own. Trust in government is at its lowest ebb in recent history. Political polarization is at its highest mark since the Great Depression. **Demographic and economic pressures will multiply in coming years** not only on the US, but more significantly on its key allies in Europe. The world will see a significant transformation of its power structure in the coming decades, all of **which will put great strain on the country’s civil-military relations. Thus, it is of critical importance that we** discuss, address, and **correct any flaws in this dynamic now before they reach crisis proportions in the years to come.**

**Judicial deference is responsible for the split—a less deferential role for the courts is necessary to restore balance in civil-military relations**

**Mazur 10** (Diane, Professor of Law, University of Florida Levin College of Law, "A More Perfect Military: How the Constitution Can Make Our Military Stronger" Oxford University Press, Print)

One of the ways the doctrine of **judicial deference has left a scar on civil-military relations** is **by changing how civilian government manages the military advice it receives**. I don't meant to suggest this is a new problem for civilian control of the military—President Harry Truman certainly struggled to manage the military advice offered by General Douglas MacArthur during the Korean War1—but **judicial deference has contributed to a more pervasive problem broadly affecting the way civilians engage with information from military sources.** Strictly speaking, judicial deference in military affairs applies only when constitutional or legal issues are in play. When the question is whether a particular military policy or plan of action is a wise or prudent thing to do, and not whether it is constitutional or lawful, courts have no role in answering the question and judicial deference is irrelevant. However, **because judicial deference has expanded beyond an abstract legal theory into a more general way of thinking** about military affairs, **it has come to have an** indirect **effect on all forms of military decision making by civilian officials. Deference in a strictly legal sense is only a part of the broad cultural deference on military issues we have adopted since the end of the Vietnam War. We** consistently **discourage civilians from serious engagement with military issues**. Wc assume most civilians arc incapable of understanding the military and have little to add to the conversation. We suspect they have not earned the right to speak about military affairs, even though at some level we must know civilian engagement is necessary in a system built on civilian control of the military. There is always a risk that asking too many questions will be interpreted as a lack of support for the military, and so the easier path is often to endorse whatever appears to be the consensus "military" position on an issue, whether or not the consensus position is actually helpful to the military. **Our inclination toward deference in matters involving the military is so strong that military advice can sometimes carry the power of a military veto when the advice becomes part of public debate. Few government officials want to be in the position of asking for the military's viewpoint on an issue and then choosing a policy direction inconsistent with that viewpoint.** As a result, civilians may package or present military advice in a way that mis-lcadingly removes any conflict with civilian policy preference, ensuring at least the appearance of a deferential attitude. The "Don't Ask, Don't Tell" debate offered a good example of this phenomenon. Congress put on what were essentially "show hearings" to create the appearance of unified military opposition to gay citizens in military service. I don't doubt that in 1993 military opposition outweighed military support, but the hearings were carefully scrubbed of any military expertise from the minority viewpoint. The military's increasing political partisanship also plays an important role in how we characterize and respond to military advice, and there may be no better example of why political partisanship is damaging to military professionalism. At the same time civilians have an incentive to package military opinion selectively for favorable effect, the military may also feel an obligation to shape the advice it gives (or to withhold contrary opinions) in an effort to be loyal to a particular political interest. Political partisanship within the military imposes great pressure on military professionals to produce advice supportive of its political allegiance. At the very least, there will always be an air of uncertainty as to whether military advice has been tainted by a desire to either support or undercut the commander in chief or the Congress. Even the general public responds to military advice differently depending on whether the advice matches expectations about the military's presumed political allegiance. When military officials were uncooperative to the point of being insubordinate and refused to seriously consider how to implement President Clinton's proposal to end sexual orientation discrimination in the military, most people believed they were simply following their professional obligation to give civilian leaders candid military advice. We are so comfortable with the idea of military testimony running counter to policy preferences of the Democratic Party that no one objected when General Colin Powell gave a speech at the Naval Academy encouraging midshipmen to resign if they believed they could not morally serve in a military that also permitted gay people to serve." That's not advice, that's insubordination. On the other hand, when military advice upsets the careful civil-military consensus we usually construct for public consumption and also runs counter to the military's expected political allegiances, people take notice and ask whether the military has violated its ethical obligation of subordination to civilian control. The recent example of note occurred when General Eric Shinseki, the Army chief of staff, responded to a question during a Senate hearing asking how large a force would be necessary to maintain public order in Iraq following an invasion. This was information Congress needed to know in order to carry out its constitutional responsibilities to declare war and fund military operations. Shinseki responded with a significantly higher number than the administration's party line, and it began a debate among civil-military experts that continues today. A scries of essays in the professional journal Armed Forces and Society examined the controversy,5 and one author seriously argued Shinseki had a professional obligation to answer in a way that would protect the president from the perception he might be acting against military advice, or at least without a consensus military opinion.'1 Our system of civilian control of the military included, according to this argument, an obligation on the part of military professionals to adjust their advice to shore up civilian policy preferences. I have a feeling, however, the same ethical argument would not have been made on behalf of a Democratic Party commander in chief. The solution is both simple to understand and difficult to achieve. **If we were more comfortable with open engagement and conversation about military advice—if we were more comfortable with robust, messy debate about military issues—it would not be so important to shape or distort military advice to match civilian preferences. If we were more comfortable with military viewpoints, and believed we could invite them, consider them, weigh their strengths and weaknesses, balance them against other nonmilitary concerns, and then, if necessary, make a decision inconsistent with those viewpoints, our civil-military relations would be much healthier.** This is the same dynamic that inhibits a healthy civil-military exchange in judicial settings. We believe the system cannot tolerate the complexity or the inconvenience of real information, and so we construct a system specifically designed to generate a false consensus—the doctrine of judicial deference—so we can all feel better about making military decisions.

**Civilian control key to military effectiveness—solves array of existential threats**

Dr. Mackubin Thomas **Owens**, Professor, National Security Affairs, “What Military Officers Need to Know About Civil-Military Relations,” NAVAL WAR COLLEGE REVIEW v. 65 n. 2, Spring 20**12**, p. 81-82.

The combination of **c**ivil-**m**ilitary **r**elations patterns and service doctrines **affect military effectiveness**. In essence, the ultimate test of a civil-military relations pattern is how well it contributes to the effectiveness of a state's military, especially at the level of strategic assessment and strategy making. (50) However, Richard **Kohn** has explicitly called into question the effectiveness of the American military in this realm, especially with regard to the planning and conduct of operations other than those associated with large-scale conventional war. "Nearly twenty years after the end of the Cold War, the American military, financed by more money than the entire rest of the world spends on its armed forces, failed to defeat insurgencies or fully suppress sectarian civil wars in two crucial countries, each with less than a tenth of the U.S. population, after overthrowing those nations' governments in a matter of weeks." (51) He **attributes** this **lack of effectiveness to** a **decline in** the **military**'s professional **competence** with regard to strategic planning. "In effect, in the most important area of professional expertise--the connecting of war to policy, of operations to achieving the objectives of the nation--the American military has been found wanting. The excellence of the American military in operations, logistics tactics, , weaponry, and battle has been manifest for a generation or more. Not so with strategy." (52) This phenomenon manifests itself, he argues, **in** recent **failure to adapt to a** changing **security environment in which** the **challenges to global stability are** "less from massed armies than from **terrorism; economic** and particularly financial **instability; failed states; resource scarcity** (particularly **oil and** potable **water**); pandemic **disease; climate change**; and international crime in the form of piracy, smuggling, narcotics trafficking, and other forms of organized lawlessness." He observes that this decline in strategic competence has occurred during a time in which the U.S. military exercises enormous influence in the making of foreign and national security policies. He echoes the claim of Colin Gray: "All too often, **there is a black hole where** American **strategy ought to reside**." (53) Is there something inherent in **current U.S. civil-military affairs** that **accounts for this failure** of strategy? The failure of American civil-military relations to generate strategy can be attributed to the confluence of three factors. The first of these is the continued dominance within the American system of what Eliot Cohen has called the "normal" theory of civil-military relations, the belief that there is **a clear line of demarcation** between civilians who determine the goals of the war and the uniformed military who then conduct the actual fighting. Until President George W. Bush abandoned it when he overruled his commanders and embraced the "surge" in Iraq, the normal theory has been the default position of most presidents since the Vietnam War. Its longevity is based on the idea that the failure of Lyndon Johnson and Robert McNamara to defer to an autonomous military realm was the cause of American defeat in Vietnam. The normal theory can be traced to Samuel Huntington's The Soldier and the State, in which he sought a solution to the dilemma that lies at **the heart of civil-military relations**--**how to guarantee civilian control** of the military while still ensuring the ability of the uniformed military to provide security. His solution was a mechanism for creating and maintaining a professional, apolitical military establishment, which he called "objective control." Such a professional military would focus on defending the United States but avoid threatening civilian control. (54) But as Cohen has pointed out, the normal theory of civil-military relations often has not held in practice. Indeed, such storied democratic war leaders as Winston Churchill and Abraham Lincoln "trespassed" on the military's turf as a matter of course, influencing not only strategy and operations but also tactics. The **reason that civilian leaders cannot simply leave the military to its own devices** during war **is that war is an iterative process** involving the interplay of active wills. What appears to be the case at the outset of the war may change as the war continues, modifying the relationship between political goals and military means. The fact remains that wars are not fought for their own purposes but to achieve policy goals set by the political leadership of the state. The second factor, strongly reinforced by the normal theory of civil-military relations, is the influence of the uniformed services' organizational cultures. Each military service is built around a "strategic concept" that, according to Samuel Huntington, constitutes "the fundamental element of a military service," the basic "statement of [its] role ... or purpose in implementing national policy." (55) A clear strategic concept is critical to the ability of a service to organize and employ the resources that Congress allocates to it. It also largely determines a service's organizational culture. Some years ago, the late Carl Builder of the RAND Corporation wrote The Masks of War, in which he demonstrated the importance of the organizational cultures of the various military services in creating their differing "personalities," identities, and behaviors. His point was that each service possesses a preferred way of fighting and that "the unique service identities ... are likely to persist for a very long time." (56)

**Judicial deference justifies military medical and bioweapons research**

**Parasidis 12** (Efthimios, Assistant Professor of Law, Center for Health Law Studies, Saint Louis University School of Law, 2012, "Justice and Beneficence in Military Medicine and Research" Ohio State Law School, Lexis)

The military has long nurtured a culture and identity that is fundamentally distinct from civil society, n522 and **the U.S.** **government has a history of bending** [\*792] **and breaking the law during times of war.** n523 **While the military has traditionally enjoyed great deference from civilian courts** in the United States, n524 military discipline and **national security interests should not grant government officials carte blanche to violate fundamental human rights.** n525 To the contrary, Congress and the courts should work to ensure that military and intelligence agencies remain subordinate to the democratic rule of law. n526 The motto of the American military physician is "to conserve the fighting force," yet **the last decade has seen a notable shift in emphasis to enhancing the fighting force through novel applications of biomedical enhancements.** n527 The nefarious **conduct of military officials during** the course of the **mustard gas, radiation, biological warfare, and psychotropic drug experiments provides ample evidence of the "lies** and half-truths" that **the DoD has utilized in the name of national security.** n528 Indeed, the Army Inspector General has acknowledged the "inadequacy of the Army's institutional memory" regarding experimental research. n529 **When one considers socio-economic dimensions of the armed forces, this history of neglect has served to further societal inequalities.** n530 As a judge on the Sixth Circuit, and former Commander in Chief [\*793] of the Ohio National Guard explains, "in a democracy **we have far more to fear from the lack of military accountability than from the lack of military** discipline **or aggressiveness**." n531

**That risks bioweapons use—theft, arms racing, tradeoff**

H. Patricia **Hynes**, retired Professor, Environmental Health, Boston University, “Biological Weapons: Bargaining with the Devil,” TRUTHOUT, 8—18—**11**, http://www.truth-out.org/news/item/2693:biological-weapons-bargaining-with-the-devil

The bullish climate of the "war on terrorism" set off a massive flow of federal funding for research on live, virulent bioweapons' organisms (also referred to as biodefense, bioterrorism and biosafety organisms) to federal, university and private laboratories in rural, suburban and urban areas. Among the federal agencies building or expanding biodefense laboratories are the Departments of Defense (DoD), Homeland Security, State and Agriculture; the Environmental Protection Agency; and the National Institutes of Health (NIH). A new network, comprised of two large national biowarfare laboratories at BU and University of Texas, Galveston medical centers, more than a dozen small regional laboratories and ten Regional Centers of Excellence for Biodefense and Emerging Infectious Diseases Research, was designed for funding by the National Institute for Allergy and Infectious Diseases, a division of NIH. The validation offered by the federal health research agency for ramped-up biological warfare research is the dual use of the research results: "better vaccines, diagnostics and therapeutics against bioterrorist agents but also for coping with naturally occurring disease." Today, in dozens of newly sprung laboratories, **research on the most lethal** bacteria and **viruses** with no known cure **is being conducted in an atmosphere of secrecy**, with hand-picked internal review boards and little, if any, public oversight or accountability. Fort Detrick, Maryland, a longstanding military base and major government research facility, is the site of the largest biodefense lab being built in the United States. Here, **biowarfare pathogens will be created**, including new genetically engineered viruses and bacteria, in order **to simulate** potential **bioweapons attacks** by terrorist groups. Novel, lethal organisms and methods of delivery in biowarfare will be tested, all rationalized by the national security need to study them and develop a figurative bioshield against them. In fact, Fort Detrick's research agenda - modifying and dispersing lethal and genetically modified organisms - has "unmistakable hallmarks of an offensive weapons program" ... "in essence **creating new threats that we're going to have to defend ourselves against" - threats from accidents, theft of organisms and stimulus of a bioarms race**.(3) Between 2002 and 2009, approximately 400 facilities and 15,000 people were handling biological weapons agents in sites throughout the country, in many cases unbeknownst to the local community. The marathon to spend nearly $60 billion since 2002 on biological weapons research has raised serious concerns for numerous scientists and informed public critics. Among these are: runaway biodefense research without an assessment of biowarfare threat and the need for this research; (See the Sunshine Project web site for the most comprehensive map of biodefense research sites through 2008 in the United States ) militarization of biological research and the risk of provoking a biological arms race; neglect of vital public health research as a tradeoff for enhanced biodefense research; lack of standardized safety and security procedures for high-risk laboratories; increased risk of accident and intentional release of lethal organisms with the proliferation of facilities and researchers in residential communities; lack of transparency and citizen participation in the decision-making process; and vulnerability of environmental justice (i.e., low income and minority) communities to being selected for the location of these high-risk facilities. Is this federal research agenda "the biological equivalent of our misadventure in Iraq?" An expert on biological weapons at the University of California Davis, Mark Wheelis, contends that a "mass-casualty bioterrorist attack" is unlikely and that "**plastering the country" with bioweapons laboratories leaves the country with a weakened public health research infrastructure and,** thus, **less secure. The** Government Accounting Office (GAO) and many others have drawn the same conclusion. In May 2009, a study of security in DoD biodefense laboratories determined that the **security systems of high biocontainment laboratories cannot protect against theft of bioweapons agents**. Soon after, a Washington Post story revealed that an inventory of potentially deadly pathogens at the government's premier bioweapons research laboratory at Fort Detrick, Maryland, uncovered that more than 9,000 vials were missing. In testimony to a House Committee hearing on the proliferation of bioweapons laboratories, Nancy Kingsbury of the GAO revealed that expansion of bioweapons laboratories has been "so uncoordinated that no federal agency knows how many exist"; nor, she added, is there any sense among federal agencies of how many are needed, of their operational safety and of the cumulative risks they pose to the public. Keith Rhodes, the GAO's chief technologist, testified in the same October 2007 Congressional hearing "'we are at greater risk today' of an infectious disease epidemic because of the great increase in biolaboratories and the absence of oversight they receive." As many have gravely observed, the biodefense build-up means a huge number of people has access to extremely lethal material.

**Bioweapons cause extinction**

Anders **Sandberg** et al., James Martin Research Fellow, Future of Humanity Institute, Oxford University, "How Can We Reduce the Risk of Human Extinction?" BULLETIN OF THE ATOMIC SCIENTISTS, 9-9-**08**, http://www.thebulletin.org/web-edition/features/how-can-we-reduce-the-risk-of-human-extinction, accessed 5-2-10.

The risks from anthropogenic hazards appear at present larger than those from natural ones. Although great progress has been made in reducing the number of nuclear weapons in the world, humanity is still threatened by the possibility of a global thermonuclear war and a resulting nuclear winter. We may face even greater risks from emerging technologies. **Advances in synthetic biology might make it possible to engineer pathogens capable of extinction-level pandemics**. **The knowledge, equipment, and materials needed to engineer pathogens are more accessible than those needed to build nuclear weapons. And unlike other weapons, pathogens are self-replicating, allowing a small arsenal to become exponentially destructive. Pathogens have been implicated in the extinctions of many wild species**. Although most pandemics "fade out" by reducing the density of susceptible populations, pathogens with wide host ranges in multiple species can reach even isolated individuals**. The intentional or unintentional release of engineered pathogens with high transmissibility, latency, and lethality might be capable of causing human extinction**. While such an event seems unlikely today, the likelihood may increase as biotechnologies continue to improve at a rate rivaling Moore's Law.

**Court action on detention is key to challenge the deference doctrine**

**Masur 05** (Jonathan, Law clerk for Posner, JD from Harvard, "A Hard Look or a Blind Eye: Administrative Law and Military Deference" Hastings Law Journal, Lexis)

In evidence is a court that instinctively views military action as judicially incomprehensible and legally untouchable. To the Fourth Circuit, law cannot bend the exigent realities of war to its constraining will because it cannot extract necessary factual clarity from amidst the "murkiness and chaos"; courts would thus be well-advised to remain outside the fray. n320 It is this judicial predilection that necessitates firm proof of dissimilitude between military and criminal detention. **When military operations assume the form and function of typical law enforcement acts, courts become hard-pressed to justify their abstention** from the rule-of-law constitutional questions that form the core of their juridical task. Despitea body of Supreme Court administrative law doctrine counseling judicial intervention into areas of executive expertise, and despite the principle that courts must act to vindicate the rule of law even [\*519] in fields of overwhelming executive or legislative authority, **Article III courts have come to view military questions as a taxonomic grouping they are simply incapable of navigating. Yet in this legal area** (as in most others), **doctrinal facts ought to drive psychological attitudes. Military cases do not always hold the threat of substantially greater national peril, nor offer more pressing exigencies, nor present more intractable** fact or policy **questions** than do typical administrative law adjudications. **Courts that remain unafraid to pass on the factual rationality of highway safety regulations** that may affect tens of thousands of lives each year **should hold no** particular impressionistic **aversion towards inquiring into the legality of detentions** or secretive hearings. There, the danger of a judicial misstep remains speculative precisely because courts have refused to put the Administration to its proofs. Moreover, **courts** themselves **possess responsibility for enforcing the legal limitations that exist to bind administrative actors. To leave wartime cases exclusively in the hands of the Executive Branch in the name of** "comity" or "**deference" would be to reduce fundamental constitutional guarantees to mere precatory language,** slaves to the vicissitudes of the executive expediency they were meant to curb. Lower courts need not shrink from validating the rule of law in cases that bear such resemblance to the administrative law doctrines with which they are familiar. If they continue to do so, **the Supreme Court must act to reconstitute wartime doctrine** along existing precedential lines, **lest the U**nited **S**tates **reap the consequences of this** unfortunate, self-conscious **judicial hand-washing.** Conclusion **Over the past three years, the "War on Terror" has become as much a legal strategy as a military operation.** Incursions abroad have been matched by informational blackouts at home. International manhunts for suspected terrorists are coupled with detention of American citizens. Constitutional rights have been eroded by a torrent of ostensibly security-enhancing measures, and aggrieved individuals have turned to the courts for redress, just as they did six decades ago when the Japanese population of the West Coast was interned in the name of national defense. Yet **courts have behaved solicitously** not towards claims of constitutional deprivations, but rather **towards governmental declarations of necessity and authority** over the lives and rights of the citizenry in wartime. In particular, **courts have overwhelmingly deferred to the executive branch** regarding the assertions of fact that form the factual predicates for governmental actions. Deference has come according to two rationales: first, the President's unique constitutional role as guarantor of national security, and second, the Executive's [\*520] superior institutional expertise in wartime matters. **In awarding deference** on these grounds, **the judiciary has ignored the operation of the Constitution** and laws as contemporaneous structural constraints on executive military action. The President and the military hold only the authority vested in them by the Constitution or by law. Action outside of those legal boundaries is by definition unconstitutional and unauthorized. Similarly, the Bill of Rights enshrines individual freedoms that executive action, even if otherwise lawful, cannot infringe. Moreover, **many cases implicating national security turn on issues of individual statutory and constitutional rights - such as the lawfulness of detention** or free speech rights such as access to information - that form the archetypal bailiwick of civilian tribunals. Thus, **even in wartime circumstances there is often constitutional and statutory law to apply, law to which courts must hold the Executive** and the legislature. As courts have nearly unanimously recognized, **it is emphatically the province of the judiciary to vindicate the rule of law by demanding that government bodies remain within circumscribed boundaries.** It is in this respect that administrative law can usefully inform the adjudication of wartime cases. Administrative law jurisprudence developed to address the particular problems presented by executive branch agencies possessing tremendous institutional expertise and resources and specially empowered by Congress to manage technically difficult subject matter. So-called "military" cases come to Article III courts within precisely the same jurisprudential framework as civilian administrative ones: courts must determine the degree to which they should defer to the legal or factual allegations of an expert, empowered executive branch organization. Despite the obvious considerations favoring substantial administrative deference, the Supreme Court's modern administrative law jurisprudence stands for the principle that adherence to the rule of law demands that courts meaningfully scrutinize administrative determinations of fact. The Court has recognized that enforcement of a legal stricture is toothless without a concomitant inquiry into that stricture's factual predicate. It has therefore insisted upon "substantial evidence" in support of agency judgments before affirming them and required courts to perform "rationality review" of agency policy decisions to ensure that agencies have considered all available alternatives and reached logical conclusions from available information. The rule-of-law principles that motivate judicial scrutiny of administrative determinations compel similar treatment for the claims of fact proffered by the military in the interest of surmounting constitutional restraints. The reasons that courts advance in defense of their acquiescence in wartime circumstances are logically unconvincing. [\*521] **The military matters that have come before the judiciary are neither more judicially inscrutable nor more legally intractable than the administrative issues upon which hard look and substantial evidence review were founded. If military cases present greater national dangers - a question that can hardly be answered accurately without judicial review in the first instance - than their civilian counterparts, they also threaten more dramatic erosions of civil and constitutional rights**. Courts cannot continue to invoke "national security" as a shibboleth absolving them from their responsibility, exemplified within the principles of administrative law, to examine especially those actions taken by broadly empowered, highly experienced executive bodies. On September 22, 2004, almost three years after Yaser Esam Hamdi was taken into custody by American forces in Afghanistan, and nearly three months after the Supreme Court had ruled that he could not be held indefinitely without some nature of adjudicative process, the United States Department of Justice decided that Hamdi's "intelligence value had been exhausted" and agreed to release him, provided he never again set foot in the United States. n321 Nineteen days later, Hamdi was placed on a flight bound for Saudi Arabia. n322 What justification the United States military believed it possessed for holding Hamdi may never be known; one can only presume that it would not have withstood even the limited scrutiny the Supreme Court had prescribed. Hamdi's release completed the military's circular narrative: it was the executive branch that chose to incarcerate Hamdi; it was the executive branch that unilaterally chose to release him; and it appears that the executive branch never ceased believing that it alone held the authority to make these decisions. Yaser **Hamdi**, Jose **Padilla, and** all American **citizens** bearing constitutional rights **are entitled to a government that operates by law and logic, not by executive fiat. Courts must act to vindicate the rule of law if such a government is to persevere.**

**Plan is key to domestic and international rule of law**

Michael P. **Scharf** et al., Counsel of Record, Brief of the Public International Law & Policy Group as Amicus Curiae in Support of the Petitioners, Jamal Kiyemba, et. Al., v. Barack H. Obama, et al., SCOTUS, No. 08-1234, 12—**09**, p. 3-8.

**The precedent of this Court has a significant impact on rule of law in foreign states**. **Foreign governments, in particular foreign judiciaries, notice and follow the example set by the U.S. in upholding the rule of law**. **As foreign** governments and **judiciaries grapple with** new and challenging issues associated with **upholding the rule of law during times of conflict, U.S. leadership on the primacy of law during the war on terror is particularly important**. **Recent decisions of this Court have reaffirmed the primacy of rule of law** in the U.S. during the war on terror. As relates to the present case, a number of this Court’s decisions, most notably **Boumediene** v. Bush, 128 S.Ct. 2229 (2008**), have established clear precedent that** Guantanamo detainees **have a right to** petition for **habeas corpus relief. Despite a clear holding** from this Court in Boumediene, the **Court of Appeals sought** in Kiyemba v. Obama **to narrow Boumediene** **to such a degree as to render this Court’s ruling hollow**. 555 F.3d 1022 (D.C. Cir. 2009). **The** present **case is** thus **a test of both the substance of the right granted in Boumediene and the role of this Court in ensuring faithful implementation of its prior decisions**. Although this Court’s rulings only have the force of law in the U.S., **foreign governments will take note of the decision** in the present case **and use the precedent set by this Court to guide their actions in times of conflic**t. PILPG has advised over two dozen foreign states on peace negotiations and post-conflict constitution drafting, as well as all of the international war crimes tribunals. Through providing pro bono legal assistance to foreign governments and judiciaries, **PILPG has observed the important role this Court and U.S. precedent serve in promoting rule of law in foreign states.** In Uganda, for example, the precedent established by this Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and Boumediene, influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In Nepal, this Court has served as a model for the nascent judiciary. In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. And in the South Sudan peace process, the Sudan People’s Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of enforceability of previous adjudicative decisions in the Abyei Arbitration, one of the most important and contentious issues in the ongoing implementation of the peace agreement**. Foreign judges also follow the work of this Court closely**. In a number of the judicial training programs PILPG has conducted, **foreign judges have asked PILPG detailed questions about the role of this Court in upholding rule of law during the war on terror**. **A review of foreign precedent confirms how closely foreign judges follow this Court**. **In numerous foreign states, and in the international war crimes tribunals, judges regularly cite the precedent of this Court to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own legal systems.** **Given the significant influence of this Court on foreign governments and judiciaries**, a decision in Kiyemba **implementing Boumediene will reaffirm this Court’s leadership in upholding the rule of law and promote** respect for rule of law in foreign states **during times of conflict**. ARGUMENT I. KIYEMBA v. OBAMA IS A TEST OF SUPREME COURT LEADERSHIP IN UPHOLDING RULE OF LAW IN TIMES OF CONFLICT **The precedent set by the Supreme Court** in the present case **will have a significant impact on the development of rule of law in foreign states. Foreign judicial, executive, and parliamentary bodies closely follow the work of this Court, and this Court’s previous decisions related to the war on terror have shaped how foreign states uphold the rule of law** in times of conflict. **Foreign governments and judiciaries** will **review** this Court’s **decision** in the present case in light of those previous decisions. **A decision** in the present case **implementing previous decisions of this Court granting habeas rights to Guantanamo detainees is an opportunity for this Court to reaffirm to foreign governments that the U.S. is a leader and role model in upholding the rule of law during times of conflict**. **Recent Supreme Court precedent established a clear role for the primacy of law in the U.S. war on terror**. In particular, this Court’s landmark decision in **Boumediene highlighted the critical role of the judiciary in a system dedicated to the rule of law, as well as the “indispensable” role of habeas corpus as a “time tested” safeguard of liberty.** Boumediene v. Bush, 128 S.Ct. 2229, 2247, 2259 (2008). **Around the globe, courts and governments took note of this Court’s** stirring **words:** “**Security subsists, too**, in **fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint** and the personal liberty **that is secured by adherence to the separation of powers**. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.” Id. at 2277. In contrast to the maxim silent enim leges inter arma (in times of conflict the law must be silent), this Court affirmed in Boumediene that “[t]**he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled**, and in our system they are reconciled within the framework of the law.” Id. Boumediene held that the detainees in the military prison at Guantanamo Bay are “entitled to the privilege of habeas corpus to challenge the legality of their detentions.” Id. at 2262. Inherent in that privilege is the right to a remedy if the detention is found to be unlawful. In the present case, the Petitioners, who had been found not to be enemy combatants, sought to exercise their privilege of habeas corpus. The Executive Branch conceded that there was no legal basis to continue to detain the Petitioners, that years of diligent effort to resettle them elsewhere had failed, and that there was no foreseeable path of release. The District Court implemented Boumediene, ordering that the Petitioners be brought to the courtroom to impose conditions of release. In re Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 42-43 (D.C. Cir. 2008). The Court of Appeals reversed, with the majority concluding that the judiciary had no “power to require anything more” than the Executive’s representations that it was continuing efforts to find a foreign country willing to admit Petitioners. Kiyemba v. Obama, 555 F.3d 1022, 1029 (D.C. Cir. 2009). **The Court of Appeals’ decision effectively narrowed Boumediene to such a degree that it rendered the ruling hollow**. Circuit Judge Rogers recognized this in her dissent, opining that the majority’s analysis “was not faithful to Boumediene.” Id. at 1032 (Roberts, J., dissenting). Given the Court of Appeals’ attempt to narrow Boumediene, Kiyemba v. Obama is a test of this Court’s role in upholding the primacy of law in times of conflict. A decision in favor of the Petitioners in Kiyemba will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict.

**Rule of law solves war—multiple triggers**

**Feldman ‘8** [Noah Feldman, a contributing writer for the magazine, is a law professor at Harvard University and an adjunct senior fellow at the Council on Foreign Relations, “When Judges Make Foreign Policy”, NEW YORK TIMES, 9—25—08, www.nytimes.com/2008/09/28/magazine/28law-t.html]

Looking at today’s problem through the lens of our great constitutional experiment, it emerges that there is no single, enduring answer to which way the Constitution should be oriented, inward or outward. The truth is that we have had an inward- and outward-looking Constitution by turns, depending on the needs of the country and of the world. Neither the text of the Constitution, nor the history of its interpretation, nor the deep values embedded in it justify one answer rather than the other. In the face of such ambiguity, the right question is not simply in what direction does our Constitution look, but where do we need the Constitution to look right now? Answering this requires the Supreme Court to think in terms not only of principle but also of policy: to weigh national and international interests; and to exercise fine judgment about how our Constitution functions and is perceived at home and abroad. The conservative and liberal approaches to legitimacy and the rule of law need to be supplemented with a healthy dose of real-world pragmatism. In effect, the fact that the Constitution affects our relations with the world requires the justices to have a foreign policy of their own. On the surface, it seems as if such inevitably political judgments are not the proper province of the court. If assessments of the state of the world are called for, shouldn’t the court defer to the decisions of the elected president and Congress? Aren’t judgments about the direction of our country the exclusive preserve of the political branches? Indeed, the **Supreme Court** does need to be limited to its proper role. But when it comes to our **engagement with the world,** that role **involves taking a stand, not stepping aside.** The reason for this is straightforward: the court is in charge of interpreting the Constitution, and the Constitution plays a major role in shaping our engagement with the rest of the world. The court therefore has no choice about whether to involve itself in the question of which direction the Constitution will face; it is now unavoidably involved. Even choosing to defer to the other branches of government amounts to a substantive stand on the question. That said, **when the court exercises its own independent political judgment, it** still **does so in a distinctively legal way.**For one thing, the court can act only through deciding the cases that happen to come before it, and the court is limited to using the facts and circumstances of those cases to shape a broader constitutional vision. The court also speaks in the idiom of law — which is to say, of regular rules that apply to everyone across the board. It cannot declare, for instance, that only this or that detainee has rights. It must hold that the same rights extend to every detainee who is similarly situated. **This**, too, **is an effective constraint on the way the court exercises** its policy **judgment.** Indeed, it is this very regularity that gives its decisions legitimacy as the product of judicial logic and reasoning. Why We Need More Law, More Than Ever So what do we need the Constitution to do for us now? The answer, I think, is that the Constitution must be read to help us remember that while the war on terror continues, we are also still in the midst of a period of rapid globalization. An enduring lesson of the Bush years is the extreme difficulty and cost of doing things by ourselves. **We need to build and rebuild alliances — and law has** historically **been** one of **our best tool**s for doing so. In our present precarious situation, **it would be a** terrible **mistake to abandon our** historic **position of leadership in the g**lobal **spread of** the **rule of law. Our leadership matters** for reasons both universal and national. Seen from the perspective of the world, **the fragmentation of power** after the cold war **creates new dangers** of disorder that need to be mitigated by the sense of regularity and predictability **that only the rule of law can provide. Terrorists need to be deterred. Failed states need to be brought under the umbrella of international organizations so they can govern themselves. And economic interdependence demands coordination, so that the collapse of one does not become the collapse of all**. From a national perspective, our interest is less in the inherent value of advancing individual rights than in claiming that our allies are obligated to help us by virtue of legal commitments they have made. The Bush administration’s lawyers often insisted that lawwas a tool of the weak, and that therefore as a strong nation we had no need to engage it. But this notion of “lawfare” as a threat to the United States is based on a misunderstanding of the very essence of how law operates. **Law** comes into being and is sustained not because the weak demand it but because it is a tool of the powerful — as it has been for the United States since World War II at least. The reason those with power prefer law to brute force is that it **regularizes and legitimates the exercise of authority. It is easier and cheaper to get the compliance of weaker** people or **states by promising them rules** and a fair hearing **than by threatening them constantly with force.** After all, if those wielding power really objected to the rule of law, they could abolish it, the way dictators and juntas have often done the world over.

**1AC: Plan**

**Plan: The United States federal judiciary should rule that individuals indefinitely detained under the War Powers authority of the President of the United States must be tried by an existing Article III court, a military court martial, or be released within a reasonable, specified time period.**

**1AC: Solvency**

**Contention 3 is Solvency:**

**Action by the judiciary is key**

**Feldman 13** (Noah, professor of Constitutional and International Law at Harvard, “Obama Can Close Guantanamo: Here’s How,” Bloomberg, May 7, 2013, http://www.bloomberg.com/news/2013-05-07/obama-has-leverage-to-get-his-way-on-guantanamo.html)

**Faced with a standoff between two branches, the system allows an orderly answer: turning to the** third branch, the **courts, to resolve the conflict. Since 2003, the Supreme Court has taken an interest in Guantanamo, deciding on the statutory and constitutional rights extended there, and vetting procedures for detainee hearings and trials.** Along the way, it has shown an equal-opportunity willingness to second-guess the executive -- as when President George W. Bush denied hearings to detainees -- and Congress, which passed a law denying habeas corpus to the prisoners. How could the court get involved? The first step would be for the Obama administration to show some of the legal self-confidence it did in justifying drone strikes against U.S. citizens or in ignoring the War Powers Resolution in the Libya military intervention. Likewise, it could assert a right of control over where the detainees should be held. And if the president’s lawyers are worried about Bush-style assertions of plenary executive power (which, for the record, didn’t concern them when it came to drones or Libya), there is a path they could follow that would hew closer to their favored constitutional style. Geneva Conventions **The reasoning could look like this:** The president’s war power must be exercised pursuant to the laws of war embodied in the Geneva Conventions. And though Guantanamo once conformed to those laws -- as the administration asserted in 2009 -- it no longer does. The conditions are too makeshift to manage the continuing prisoner resistance, and **indefinite detention in an indefinite war with no enemy capable of surrendering is pressing on the bounds of lawful POW detention.** Congress doesn’t have the authority to force the president to violate the laws of war. Yet by blocking Obama from closing Guantanamo, that is just what Congress is doing. What’s more, he has the inherent authority to ensure that we are complying with our treaty obligations. This argument isn’t a certain winner. And there would still be the problem of whether the president could put the detainees in an existing prison. But at least spelling this out would put the fear of God into Congress. Continued congressional resistance would also trigger a court case. The president could have a tough time convincing five justices. According to the framework developed by Justice Robert Jackson in the Truman-era steel seizure case, and used today by the courts, the president’s power is at its “lowest ebb” when Congress has expressly barred him from acting. But even at ebb tide there is still an ocean, and **lots of things Congress can’t stop the president from doing. Complying with** his **legal obligations should surely be at the top of the list.** The Supreme Court might want to duck this controversial issue. But **there is a precedent for the court wading in where Congress is blocking necessary action. In the Cold War, lawful racial segregation in the U.S. became costly as a matter of foreign relations.** President Harry **Truman desegregated the military, but he lacked the authority to overturn state-based discrimination.** The Senate filibuster, originally born of slavery, ensured that Congress wouldn’t pass a civil-rights bill that could have solved the problem. **That left the high court -- which gave us Brown v. Board** of Education. And in that case, the U.S. -- as friend of the court -- quoted Secretary of State Dean Acheson to the effect that segregation was being used as propaganda by the Soviet Union. It is absurd that the commander in chief can’t do what he believes is in the country’s national interests when it comes to detainees. Win, lose or draw, it is time to get around Congress. And if ordinary politics won’t do the trick, **going to the courts may be the best option -- because it is the only one.**

**Mandating release is crucial—any alternative leaves the judiciary powerless and fails to rectify injustice**

**Stanton 10** (Caroline Wells, J.D. at Georgetown Law, Summer 2010, "Rights and Remedies: Meaningful Habeas Corpus in Guantanamo" Georgetown Journal of Legal Ethics, Lexis)

**The** inclusion of the **Suspension Clause** in the Constitution **was meant to preserve the common law tradition of protection against the Executive, and the ability of the petitioner to force the Executive to justify detention** or release the petitioner. **In 2008, the Supreme Court held that these protections had "full effect" in Guantanamo.** n105 **Because the writ of habeas** corpus **is both a statement of the rights of the individual and the means by which he can enforce a remedy, the denial of access to a remedy has resulted in a de facto suspension of the writ at Guantanamo. Without the power to order a remedy, the Court lacks the power to enforce the right, and it becomes no right at all.** **"Without a remedy, judicial decisions are merely advisory opinions, hypothetical undertakings with no practical effect" n106 that are unlikely to present any significant limitation on the government's ability to restrict individual liberty.** **While some argue that our Constitutional system contains instances in which certain rights lack enforceable remedies, it would be anathema to our understandings of judicial review and individual liberty to accept that the executive and the courts can concede that detention is unlawful, but the courts lack the power to grant release.** The Court has deemed the ability to order release the "Constitutionally required remedy," and by denying Guantanamo petitioners a remedy to enforce the writ, **the D.C. Circuit has circumvented Boumediene and denied Guantanamo petitioners full habeas rights.** The Government has simply substituted the plenary power of immigration for MCA § 7--the net effect of which is the same--petitioners are denied release from unlawful detention. **Because rights are only as meaningful as the remedies available to enforce them, extending a right of habeas without also extending the right to order a remedy to end the unlawful imprisonment has resulted in a de facto suspension of the writ.** n107 The extension of habeas to Guantanamo has become meaningless. If the Suspension Clause truly has "full effect" in Guantanamo, the denial of a remedy constitutes a suspension of habeas and the elimination of a fundamental protection to ensure personal liberty. **The Government has raised concerns that permitting the courts to craft remedies directing transfer to particular countries and restricting transfer to others would set a dangerous precedent of allowing the judiciary to direct the executive's foreign relations.** n108 **But appropriately crafting the judicial remedy,** [\*905] **rather than denying it all together, can sufficiently avoid this peril. The courts need not issue detailed release orders; they simply need to issue a traditional habeas order requiring release within a specified time period.** n109 **Such an order would likely "induce" the Executive to quickly effectuate transfer** in almost every case where it was safe. n110 Indeed, the Government has shown that it will respond to judicial pressure to effectuate transfer. In Ali Ahmed v. Obama, the petitioner was abruptly transferred ngs indicated the judge was "losing patience with the delay in complying with her order." n111 The Executive is apt to respond to judicial pressure because if the Government is unable to repatriate detainees within the time period specified, the court could order the release of detainees within the United States, while still permitting the government to transfer detainees as soon as such transfer becomes possible. n112 Notably, the government's success in obtaining resettlement offers for the Kiyemba petitioners did not come until after the Supreme Court granted cert and judicial review appeared imminent. n113 The appropriate remedy in this case is no different than that offered in Clark and Zadvydas: the Government is entitled to a reasonable, specified period of time to effectuate the Court's order, and then the detainee is entitled to release wherever the Executive may accomplish it. Such a remedy would give the Executive fair notice of the potential consequence of failure to transfer, while at the same time protecting the detainee's liberty.

**Prosecution in federal courts solves best—multiple reasons, experts agree**

Oona **Hathaway**, Professor, International Law, Yale Law School, Samuel Adelsberg, Spencer Amdur, Philip Levitz, Freya Pitts and Sirine Shebaya, “The Power to Detain: Detention of Terrorism Suspects after 9/11,” YALE JOURNAL OF INTERNATIONAL LAW v. 38, Winter 20**13**, p. 161-167.

The United States is still actively engaged in hostilities with global terrorist organizations, but there are indications that "we're within reach of strategically defeating al-Qaeda." n227 This development, combined with the growing distance from the national trauma of September 11, has reinvigorated the debate surrounding the detention and prosecution of suspected terrorists both outside of and within the United States. Even though Congress has recently expanded military detention and prosecution, n228 **prosecution in federal court offers several key advantages over law-of-war detention, including predictability, legitimacy, greater cooperation** by defendants and international partners, **and flexibility**. n229 These advantages have led a diverse set of actors - from current Department of Defense and counterterrorism officials, n230 to [\*162] former Bush Administration officials, n231 to the Washington Post editorial board n232 - to support the prosecution and detention of individuals through the federal courts, despite Congress's recently expressed preference for law-of-war detention. **In some cases, prosecution in federal court is the only available option for prosecuting an accused terrorist. Federal antiterrorism statutes are extensive and provide statutory authority to prosecute individuals who are** part of or **supporting terrorist groups without direct ties to** forces associated with **al-Qaeda or the Taliban** (and therefore outside the scope of the 2001 AUMF or the NDAA), n233 **and independently operating terrorists** who are inspired by, but are not part of or associated with, al-Qaeda or the Taliban. **n234 These** **statutes also reach persons** or citizens **who, because they are apprehended in the U**nited **S**tates, **cannot be tried under the MCA**. The following sections discuss the contours and limitations of such criminal prosecution and detention in the terrorism context. Even where detention under the law of war is available, **the criminal justice system offers** some **key advantages** **for** the **detention and prosecution of suspected terrorists.** We thus aim here to offer a correction to the recent trend toward favoring law-of-war detention over criminal prosecution and detention. **In the vast majority of cases, criminal prosecution** and detention **is the most effective and legitimate way to address the terrorist threat.** A. The Advantages of Criminal Prosecution and Detention The least contested bases for detention authority in any context are post-conviction criminal detention and pre-verdict detention for those who pose a risk of flight. It is often assumed that such criminal detention is ill-suited to terrorists. However, with very little fanfare, **federal district court dockets have been flush with terrorism cases over the past decade. Strikingly, efforts to measure the conviction rate in these cases place it between 86 and 91 percent.** n235 Far from being ineffective, then, **trying suspected terrorists in criminal courts is remarkably effective. It also offers** the **advantages** of predictability, legitimacy, and strategic benefits in the fight against terrorism. **1. Predictability Post-conviction detention of terrorists after prosecution in federal court provides predictability that is currently absent in the military commission system. Federal** district **courts have years of experience trying complex cases and convicting dangerous criminals, including international terrorists, and the rules are well established and understood. The current military commission system**, on the other hand, **is** a **comparatively untested** adjudicatory regime. n236 As already noted, **conviction rates in terrorism trials have been close to ninety percent** since 2001, and those rates have remained steady in the face of large increases in the number of prosecutions. **The military commissions,** by contrast, **have** - as of this writing - **convicted seven people** since 2001, five of whom pled guilty. n237 Charges have been dropped against several defendants, n238 [\*164] and other defendants have been charged but not tried. n239 The commission procedures have been challenged at every stage, and it is unclear what final form they will ultimately take. Even their substantive jurisdiction remains unsettled. In October 2012, the Court of Appeals for the D.C. Circuit overturned Salim Hamdan's military commission conviction for providing material support to terrorism. n240 The Court held that the Military Commissions Act of 2006, which made material support for terrorism a war crime that could be prosecuted in the commissions, was not retroactively applicable to Hamdan's conduct prior to enactment of the statute. n241 Moreover, the Court explained that material support for terrorism was not a recognized war crime under international law. n242 As a result, his conviction for material support for terrorism in the commission could not stand. n243 It is uncertain how this will affect other trials of detainees, but this decision clearly illustrates the unsettled nature of the commissions. n244 **2. Legitimacy** **Federal courts are** also generally **considered more legitimate than military commissions. The stringent procedural protections reduce the risk of error and generate trust and legitimacy**. n245 **The federal courts**, for example, **provide** more **robust hearsay protections** than the commissions. n246 In addition, **jurors are** [\*165] **ordinary citizens, not U.S. military personnel**. Indeed, **some of the weakest procedural protections in the military commission system have been successfully challenged as unconstitutiona**l. n247 **Congress and the Executive have responded to these legal challenges - and to criticism of the commissions from around the globe - by significantly strengthening the commissions' procedural protections. Yet the remaining gaps - along with** what many regard as **a tainted history - continue to raise doubts about the fairness and legitimacy of the commissions.** The current commissions, moreover, have been active for only a short period - too brief a period for doubts to be confirmed or put to rest. n248 **Federal criminal procedure**, on the other hand, **is well-established and widely regarded as legitimate. Legitimacy of the trial process is important** not only to the individuals charged but also **to the fight against terrorism.** As several successful habeas corpus petitions have demonstrated, **insufficient procedural protections create a real danger of erroneous imprisonment** for extended periods. n249 **Such errors can generate resentment and distrust of the U**nited **S**tates **that undermine** the **effectiveness of counterterrorism efforts.** Indeed, evidence suggests that **populations are more likely to cooperate in policing when they believe they have been treated fairly.** n250 The understanding that a more legitimate detention regime will be a more effective one is reflected in recent statements from the Department of Defense and the White House. n251 **3. Strategic Advantages There is clear evidence that other countries recognize and respond to the difference in legitimacy between civilian and military courts and that they are**, indeed, **more willing to cooperate with U.S. counterterrorism efforts when terrorism suspects are tried in the criminal justice system. Increased international cooperation is** therefore **another advantage of criminal prosecution.** Many **key U.S. allies have been unwilling to cooperate in cases involving law-of-war detention** or prosecution **but have cooperated in criminal** [\*166] **prosecutions.** In fact, **many U.S. extradition treaties, including those with allies such as India and Germany, forbid extradition when the defendant will not be tried in a criminal court.** n252 This issue has played out in practice several times. An al-Shabaab operative was extradited from the Netherlands only after assurances from the United States that he would be prosecuted in criminal court. n253 Two similar cases arose in 2007. n254 In perhaps the most striking example, five terrorism suspects - including Abu Hamza al-Masr, who is accused of providing material support to al-Qaeda by trying to set up a training camp in Oregon and of organizing support for the Taliban in Afghanistan - were extradited to the United States by the United Kingdom in October 2012. n255 The extradition was made on the express condition that they would be tried in civilian federal criminal courts rather than in the military commissions. n256 And, indeed, both the European Court of Human Rights and the British courts allowed the extradition to proceed after assessing the protections offered by the U.S. federal criminal justice system and finding they fully met all relevant standards. n257 An insistence on using military commissions may thus hinder extradition and other kinds of international prosecutorial cooperation, such as the sharing of testimony and evidence. Finally, **the criminal justice system is simply a more agile and versatile prosecution forum. Federal jurisdiction offers an extensive variety of antiterrorism statutes that can be marshaled to prosecute terrorist activity committed outside the U**nited **S**tates, **and subsequently to detain those who are convicted.** n258 **This greater variety of offenses** - military commissions can only [\*167] punish an increasingly narrow set of traditional offenses against the laws of war n259 - **offers prosecutors important flexibility.** For instance, **it might be very difficult to prove al-Qaeda membership in an MCA prosecution or a law-of-war habeas proceeding; but if the defendant has received training at a terrorist camp** or participated in a specific terrorist act, **federal prosecutors may convict under various statutes tailored to more specific criminal behavior.** n260 In addition, military commissions can no longer hear prosecutions for material support committed before 2006. n261 Due in part to the established track record of the federal courts, **the federal criminal justice system also allows for more flexible interactions between prosecutors and defendants. Proffer and plea agreements are powerful incentives for defendants to cooperate, and often lead to valuable intelligence-gathering, producing more intelligence over the course of prosecution**. n262

**Obama will comply—the Court has the final word**

Joe **Meacham,** executive editor, Random House, “Why Obama Shouldn’t Declare War on Supreme Court,” TIME, 4—2—**12**, http://ideas.time.com/2012/04/02/why-obama-shouldnt-declare-war-on-the-supreme-court/

With the Supreme Court weighing the constitutionality of a central element of President Obama’s comprehensive health care reform, there’s a lot of talk (in the places where people talk about such things, usually unburdened by responsibility or firsthand knowledge) of making the court an issue in the campaign if it were to rule against the White House. But here is a pretty good rule of thumb for Democratic Presidents: if it didn’t work for Franklin D. Roosevelt, who won four terms and a World War, it probably won’t work for you either. In one of the rare political debacles of his long life, FDR overreached after his landslide win against Alf Landon in 1936. (Roosevelt carried every state, save for Maine and Vermont.) A largely conservative Supreme Court had already struck down key parts of New Deal legislation, and there was the threat of more anti-Roosevelt decisions to come. And so FDR proposed a plan that would have enabled him to appoint additional justices in an attempt to shift the court’s political orientation. The effort failed, miserably. Justified or not, **the Supreme Court has** a kind of **sacred status in American life**. For whatever reason, **Presidents can safely run against Congress**, and vice versa, **but** I think **there is an inherent popular aversion to assaults on the court itself**. Perhaps **it has to do with an instinctive belief that life needs umpires**, even ones who blow calls now and then. Ironies abound. One of the great partisans of the early republic, John Marshall, created an ethos around the court that has largely protected it (even from itself) from successful partisan attack. **Even when it makes bad law (Bush v. Gore), it has the last word**. **Even when it makes decisions that enrage vast swaths of** politically, culturally and religiously motivated **citizens** (Roe v. Wade), **it** basically **has the last word**. (If you disagree with this example, ask yourself how successful pro-lifers have been in amending the Constitution over the past 40 years.) It has had the grimmest of hours (Dred Scott v. Sandford) and the finest (Brown v. Board of Education). The court is, of course, a political institution. In no way is it a clinically impartial tribunal, for virtually every decision requires an application of values and an assessment in light of experience. “Activist judges” tend to be judges who make decisions with which you disagree. Wise Presidents have learned that taking the court on directly rarely turns out well. Thomas Jefferson cordially hated his cousin Marshall, but even Jefferson trod carefully as he repealed John Adams’ extension of Federalist judicial power. “John Marshall has made his decision,” Andrew Jackson is alleged to have said after a Cherokee case. “Now let him enforce it.” The showdown between Marshall and Jackson over the fate of Native Americans, however, was much more subtle on both sides, with Marshall characteristically taking care not to force an existential crisis with the executive branch. Segregationist Southerners may have put up billboards urging the impeachment of Earl Warren in the 1950s, but the chief justice’s job — and his place in history — was never in actual jeopardy. On a human level, Presidents who have to fight and claw their way to shape public opinion, pass legislation and then try to implement their policies must be mightily tempted to make a hostile Supreme Court a target to energize the base. But history shows that Obama should resist the temptation. There are subtle ways to make the point about a given court’s seeming hostility to your agenda and still win over highly informed independents in swing states who tend to decide elections. The big thing experience shows is that you should not declare war on the court. More in sadness than in anger, just mention the issues on which you feel stymied by the justices. From health care to campaign finance, those independent voters will get the message without being frightened off by an unsettling rhetorical attack on the judiciary. That’s what FDR got wrong. Obama may well have a chance to get it right.

**Plan brings us into complicance with Geneva and restores US legitimacy**

**Glazier 09** (David, Professor of Law, Loyola Law School, December 2009, "PLAYING BY THE RULES: COMBATING AL QAEDA WITHIN THE LAW OF WAR" William and Mary Law Review, Lexis)

**Preventive detention of al Qaeda personnel should be lawful until** the earlier of the time that **they no longer pose an individual threat or the WAQT reaches an end.** Nevertheless, **detention based on a criminal conviction and sentence should be preferable for several reasons. First, "hard-core" individuals might remain willing to use violence against U.S. interests even after al Qaeda has ceased to exist as a recognizable entity or pose a credible threat.** The sentence of a detainee convicted during an armed conflict is unaffected by the end of hostilities, n541 so trial for serious offenses can provide more reliable long-term incapacitation than mere preventive detention. Many Americans consider detainee living conditions mandated by the law of war too good for terrorists and strongly prefer actual [\*1045] imprisonment. n542 **A guilty verdict also attaches substantial moral culpability to the detainee and may help bring closure to victims of terrorist violence.** **Conviction following a criminal trial meeting internationally recognized standards of justice should result in the widest possible acceptance of the validity of any detainee's continued detention.** Criminal trials applying standard American constitutional criminal procedure standards should thus be employed whenever adequate admissible evidence exists to support a good faith conviction. **Federal trials not only enjoy the greatest legitimacy, but they also allow application of the broadest scope of possible charges, including specialized offenses such as providing material support to terrorism and the full range of inchoate offenses recognized under Anglo- American law**. n543 Detainees classified as either civilians or unlawful combatants are subject to prosecution under the full scope of U.S. domestic criminal law, whereas those classified as lawful combatants should at least be subject to trial for violations of the War Crimes Act. n544 **For** those **cases involving either offenses committed in captivity that are properly triable under the UCMJ, or any violations of the law of war that fall outside the scope of crimes triable under the War Crimes Act, trial by regularly convened general courts-martial should be used.** n545 Contrary to frequent public assertions by officials who really should know better, n546 American military justice is no longer the "gold standard." A number of democracies have abolished separate military trials entirely, n547 whereas other heirs of the [\*1046] British military justice system, the U.K. and Canada, have had to eliminate the multiple roles still allowed the convening authority under U.S. practice. n548 Nevertheless, **the fact that trials under national military justice are specifically authorized by Geneva III should effectively mute criticism of detainee trials by actual courts-martial.** But the fact that U.S. military justice no longer measures up to the standards of other leading democracies highlights the desirability of trials by actual federal courts whenever possible. Although the MCA 2009 authorizes the President to try suspected terrorists before military commissions, nothing in the statute requires him to do so. n549 While their early history shows that military commissions can be used to provide "full and fair" trials, the history of their use in the "war on terror" is irreparably flawed, and they should be abandoned. **The Executive Branch has all the authority necessary to try any person over whom statutory jurisdiction can be obtained, either by regular Article III courts or courts-martial.**

**Court involvement key to setting precedent that checks abuses**

**Pearlstein 03** [Deborah N., Deputy Director of the U.S. Law and Security Program at the Lawyers Committee for Human Rights, and a Visiting Fellow at the Stanford University Center for Democracy, Development and the Rule of Law, “The Role of the Courts in Protecting Civil Liberties and Human Rights for the Post-9/11 United States”, 2nd Pugwash Workshop on Terrorism: External and Domestic Consequences of the War on Terrorism, http://www.pugwash.org/reports/nw/terrorism2003-pearlstein.htm]

**In each** of the **historical examples** just given, **the judiciary** **ultimately played a critical role in evaluating the legality of executive action**. In the Civil War case, Lambdin Milligan, who had led armed uprisings against Union forces in Indiana, appealed his military tribunal prosecution to the U.S. Supreme Court. In Ex Parte Milligan (1865), the U.S. Supreme Court held Milligan's military prosecution unconstitutional, holding that as long as the civilian "courts are open and their process unobstructed, . . . they can never be applied to civilians in states which have upheld the authority of the government." In Ex Parte Quirin (1942), the Supreme Court reviewed the military prosecution of the German army spies for violations of the laws of war and concluded that it was within the executive's power**.** Unlike the civilian subject to military justice in Ex Parte Milligan, the Quirin defendants were members of the army of a nation with which the United States was in declared war. And critically, Congress had expressly authorized military commission trials for the offenses for which they were accused. The Supreme Court likewise upheld the exclusion of Japanese-Americans from their homes in Korematsu v. United States (1944), explaining: "Korematsu was not excluded from the military area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, and finally, because Congress, reposing its confidence in this time of war in our military leaders - as inevitably it must - determined that they should have the power to do just this." As these examples demonstrate, the U.S. Supreme Court has not always acted to enforce positive legal protections in favor of the individual against the government's exercise of 'wartime' power. Nonetheless**, the Court's structural involvement conveyed a critical political message that executive power remained subject to the rule of law.** In addition**, the Court's** published majority **opinions clarified the nature of the executive action** taken in response to perceived wartime threats, **providing a basis for comparative analysis of subsequent executive conduct**. In vigorous and public dissenting opinions accompanying each decision, minority justices gave expression to the strong opposing arguments on the resolution of the legal questions presented. Perhaps most important, the judicial decisions provided Congress, legal scholars, and the American public a means for understanding and, in the relative calm of post-war decision-making, for reevaluating the political wisdom of the challenged actions. Thus, for example, a federal court eventually granted a writ of coram nobis in Mr. Korematsu's case as a result of executive misrepresentations. (Korematsu v. United States (N.D. Cal. 1984)). In 1971, to rein in what was by then broadly recognized as executive excesses, Congress passed 18 U.S.C. § 4001(a), providing: "No citizen shall be . . . detained by the United States except pursuant to an Act of Congress." And in 1988, Congress awarded reparations to the remaining survivors and descendants of those interned during World War II as a result of the military exclusion order.

## 2AC

**Drone Shift DA: 2AC**

**Drone shift now, but plan still solves legitimacy**

David **Ignatius 10**, Washington Post, "Our default is killing terrorists by drone attack. Do you care?", December 2, www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120104458.html

Every war brings its own deformations, but consider this disturbing fact about America's war against al-Qaeda: **It has become easier, politically and legally, for the United States to kill suspected terrorists than to capture** and interrogate **them**.¶ **Predator and Reaper drones**, armed with Hellfire missiles, **have become the weapons of choice against al-Qaeda** operatives in the tribal areas of Pakistan. They have also been used in Yemen, and the demand for these efficient tools of war, which target enemies from 10,000 feet, is likely to grow.¶ **The pace of drone attacks on the tribal areas has increased sharply** during the Obama presidency, with more assaults in September and October of this year than in all of 2008. **At the same time, efforts to capture al-Qaeda suspects have virtually stopped.** Indeed, if CIA operatives were to snatch a terrorist tomorrow, the agency wouldn't be sure where it could detain him for interrogation.¶ Michael **Hayden, a former director of the CIA, frames the puzzle** this way: "Have **we made detention** and interrogation **so legally difficult and politically risky that our default option is to kill our adversaries rather than capture** and interrogate **them**?"¶ It's curious why the American public seems so comfortable with a tactic that arguably is a form of long-range assassination, after the furor about the CIA's use of nonlethal methods known as "enhanced interrogation." When Israel adopted an approach of "targeted killing" against Hamas and other terrorist adversaries, it provoked an extensive debate there and abroad.¶ "**For reasons that defy logic, people are more comfortable with drone attacks"** than with killings at close range, says Robert Grenier, a former top CIA counterterrorism officer who now is a consultant with ERG Partners. "**It's something that seems so clean and antiseptic, but the moral issues are the same."**

**There’s no tradeoff**

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

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

**Terror: A2 “Mueller”**

**Mueller’s wrong—Cherry Picks his arguments**

Hugh **Gusterson**, February 20**11**, Anthropologist on Nuclear Culture, International Security and Anthropology of Science at George Mason University “Atomic Escapism” American Scientist, Volume 99, Number 1, pg.72 Lexis

**Reading John Mueller’s Atomic Obsession is like going through the looking glass with Alice.** Examining the conventional wisdom about nuclear weapons from the other side of the looking glass, Mueller tells us that their destructiveness has been exaggerated; that the bombings of Hiroshima and Nagasaki were of marginal importance in ending World War II; that “nuclear weapons have been of little historic consequence,” and that the United States and the Soviet Union would not have gone to war even in the absence of nuclear deterrence; that arms-control treaties are usually a waste of time and effort; that the dangers of nuclear proliferation are greatly exaggerated; that sanctions aimed at stopping countries from seeking nuclear weapons make it more likely that they will pursue them; and, finally, that “the likelihood a terrorist group will come up with an atomic bomb seems to be vanishingly small.”¶ **In arguing against atomic “alarmism” and the inclination “to wallow in a false sense of insecurity,” Mueller has something to annoy everyone**. Conservatives can take umbrage at his arguments that the bombing of Hiroshima was unnecessary to end World War II and that the Cold War nuclear buildup was not needed to deter the Soviets. Liberals can be upset by the claim that arms-control treaties are pointless and sometimes even counterproductive.¶ The challenge in reading Mueller’s book is to separate insights that are deviant but useful (some of his deconstructions of the conventional wisdom are genuinely insightful) from arguments that are deviant because they are exaggerated, misshapen or just plain wrong. Many of Mueller’s sharp-edged points about the hyping of the dangers of nuclear proliferation and terrorism fall into the first (insightful) category, but his critiques of arms control and his apparent smugness about all nuclear dangers belong in the latter.¶ Mueller argues that liberals and conservatives have joined in exaggerating the danger and importance of nuclear weapons; they have used our fears over the years to justify unnecessary weapons programs and arms-control negotiations, a counterproductive invasion of Iraq, and now bloated counterterrorism initiatives. **He builds his argument atop an exercise in counterfactual history, maintaining that nuclear weapons were unnecessary to keep the peace during the Cold War, because both superpowers would have been deterred from war anyway by memories of the carnage of World War II, and because the Soviet Union was too risk-averse to chance an invasion of Europe**. (**He does not ask whether Soviet nuclear weapons might have deterred the United States from starting a war with the Soviets**.) **Those who know Cold War history in its rich complexity will be infuriated by the simplifications, omissions and blithe assumptions in this exercise in intellectual casuistry, which brings to mind not the work of a scholar seriously weighing evidence, but the efforts of a high-school debate team to push a contrived point of view as far as possible.¶** The most original, incisive and interesting part of the book is the last third, in which Mueller slashes through the hype that guides much public discourse and policymaking about the risk of nuclear terrorism. He points out that a foreign government is unlikely to give a nuclear weapon to a terrorist group because of the danger that, as supplier, that country would invite retaliation against itself. He also uses the writings of several nuclear scientists, including the former Los Alamos division leaders Carson Mark and Steve Younger, to argue that it would be prohibitively difficult for a small terrorist group that lacked state sponsorship to acquire the subtle engineering knowledge needed to overcome the technical challenges involved in turning black-market nuclear material into a workable nuclear weapon. Many scientific experts not cited here by Mueller would take issue with that argument. And having read one of the articles that Mueller does cite—“Can Terrorists Build Nuclear Weapons?,” by J. Carson Mark and others (1987)—I am of the opinion that it does not, in fact, support Mueller’s argument. Furthermore**, in dismissing the case for a terrorist nuclear threat, Mueller does not adequately address the possibility that a terrorist group seeking a bomb might have access to a scientist with nuclear-weapons experience from another state as an adviser or team member.** Still, by pointing out the importance of tacit and esoteric knowledge to the success of such an endeavor**, Mueller is making an important challenge to glib assumptions about the ease with which a terrorist group, even if it had access to uranium and plutonium, might be able to make a bomb.¶** **Mueller fails to discuss another possibility:** that **a rogue element within a state, not the state leadership itself, might sell an intact nuclear weapon to which it has access**. **This scenario is far from speculative**: After the fall of the Berlin wall, a Soviet soldier guarding nuclear weapons in East Germany offered to sell an atomic warhead to the antinuclear organization Greenpeace; Greenpeace wanted to buy the weapon and display it to show the dangers of nuclear proliferation. They were arranging payment and transportation when the warhead in question was abruptly removed from East Germany by the Soviets. It is, sadly, all too typical of Mueller’s style of argument that he makes his case with copious references to any literature that supplies evidence supporting his point of view, but he ignores inconvenient facts and arguments.¶ We see something similar **in Mueller’s discussion of arms-control treaties**. He **regards such treaties as bureaucratically unwieldy and argues that states often only agree to them when they involve no real sacrifice or merely codify what the state already intended to do**. **He bases this argument largely on a discussion of the Limited Test Ban Treaty of 1963, which forced nuclear testing underground but did nothing to curtail the nuclear arms race, and the Strategic Arms Limitation Talks Agreement (SALT I), which limited missiles but not the newly miniaturized warheads packed several to a missile, which were the real problem.¶** **Mueller has cherry-picked his treaties here. Why not discuss the Outer Space Treaty, which preempted a nuclear arms race in space?** And what about the 1988 Intermediate-Range Nuclear Forces (INF) Treaty, which eliminated an entire category of nuclear weapons from Europe, much to the chagrin of hardliners in both superpowers? Above all, **why not discuss the 1972 Anti-Ballistic Missile (ABM) Treaty (the existence of which, astonishingly, is never mentioned in Mueller’s book)?** The ABM Treaty was widely seen by arms-control advocates as having headed off an expensive and destabilizing race between offensive and defensive weapons during the Cold War.¶ The strengths and weaknesses **of Mueller’s argument collide most jarringly in his discussion of nuclear proliferation.** **He is entertaining when he catalogs decades of dire predictions from experts about a coming cascade of countries crossing the nuclear threshold—predictions that have failed to come true, although this has not deterred contemporary pundits from re-sounding the alarm.** And we need to think seriously about his argument that sanctions intended to deter nuclear proliferation killed hundreds of thousands of civilians in Iraq and North Korea while increasing the attractiveness of nuclear weapons to the paranoid leaders of those countries; the remedy may be worse than the disease.¶ But **surely Mueller goes too far, and his polemical casuistry becomes dangerous, when he argues that sanctions and treaties are largely unnecessary because most countries have freely eschewed proliferation, recognizing that nuclear weapons are “militarily useless, and a spectacular waste of money and scientific talent.”** Although he is surely right that nuclear weapons are overrated and often fail to bring the bargaining power and military strength their owners seek, some countries (whether because they are in a bad neighborhood or have a bad regime) have spared no expense to seek them. **And when a country acquires them, this puts pressure on rivals and neighbors to seek them too** (as Pakistan did in response to India, for example). **There can be a collective logic that forces individual countries to make choices they would rather not. The importance of the Treaty on the Non-Proliferation of Nuclear Weapons, for which Mueller shows so little respect, is that it releases countries from the prisoner’s dilemma here: The treaty and its inspection provisions give confidence to countries who want to eschew nuclear weapons as long as they can be sure that their rivals do so too**. This is why Brazil and Argentina both joined the treaty regime in the 1990s, for instance.¶ In short, **Mueller has a gimlet eye for hype about nuclear weapons but is blind to their very real dangers. His book, which should sport a “don’t-worry-be-happy” smiley face rather than a scrawled atom on the cover, counsels us in its final sentence that we are not in danger and should “sleep well**.” **Mueller seems to assume that, because there has not yet been an accidental nuclear war, because terrorists have not yet exploded a nuclear weapon, and because no country has used nuclear weapons since the United States bombed Nagasaki, we are safe**. Presumably BP executives talked the same way about the safety of deep-water drilling before April 20, 2010; Soviet engineers talked the same way about the safety of their nuclear reactors before April 26, 1986; and NASA engineers talked the same way about the safety of shuttle launches at low temperatures before January 28, 1986. **In regard to nuclear weapons, we have** arguably **been lucky**. **There have been several incidents in which U.S. planes carrying nuclear weapons have crashed or burned.** In 1995 the Soviets mistook a Norwegian weather rocket for a U.S. nuclear attack, and Boris Yeltsin found himself staring into the nuclear briefcase as his aides told him he might only have a few minutes to launch Russian nuclear weapons. And we now know that in the early years of the Cold War, there were senior U.S. military officers who wanted to preemptively attack the Soviet Union.¶ Mueller mocks those who warn of events that are possible but have not happened. “There is a ‘genuine possibility,’” he says, “that Osama bin Laden could convert to Judaism, declare himself to be the Messiah, and fly in a gaggle of Mafioso hit men from Rome to have himself publicly crucified.”¶ **If only nuclear disaster were that unlikely.**

**Heg DA: 2AC**

**Courts can effectively review national security cases—regulatory lawsuits prove**

**Martin 11** Craig, Visiting Assistant Professor, University of Baltimore School of Law, “ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law”, Winter, 76 Brooklyn L. Rev. 611, Lexis

**Turning to the normative arguments against judicial review of national security** issues, **many of these are similar to** the **functionalist claims for executive power in** the **war power**s debate. **These claims are a subset of undertheorized and** often **internally inconsistent "special deference" doctrines**, according to which the courts ought to defer entirely on foreign affairs issues. n323 **The reasons given include the need for secrecy** in decision making; **the courts' lack of access to crucial information** to resolve complex issues relating to national security; **the courts' lack of professional competency** to decide such issues; and from the political question doctrine itself, **the need to avoid "embarrassment**" flowing from conflicting decisions from different branches of government in foreign affairs, **and the lack of manageable standards for the judiciary to apply** in resolving disputes, particularly given the allegedly political and dynamic nature of international norms (in contrast to the stable and legal norms in the domestic system). n324 **All of these claims have been dismissed at some length elsewhere**, n325 **and many of the more general counterarguments to broader functionalist claims have already been addressed** in the previous section on the legislative role. To address briefly a few of the criticisms specific to the judicial role, **the arguments advanced on the lack of judicial competency do not bear scrutiny when placed in the context of the demands made of courts for the resolution of incredibly complex**, large scale, and hugely significant domestic **issues. The problems relating to judicial access to information, specialized knowledge and competency**, and the development of sufficiently manageable standards **are no less problematic in various kinds of** environmental, securities, insolvency, and **similarly technical issues arising in a regulatory context**, some of which may include constitutional aspects and even impact the state's foreign affairs. n326 **Yet the advocates of special deference on national security issues do not object to judicial review of these** [\*703] sorts of **complex domestic cases**. Moreover, **those who suggest that there is some fundamental difference between these kinds of cases and those relating to national security issues again mischaracterize the question** at issue in national security cases. As already discussed, **the courts are not seeking to second-guess the policy determination** as to what is in the na-tional interest on the basis of highly classified information--**they are simply assessing whether such decisions were made with the requisite authority**, based on a sufficient consideration of the required criteria, and not otherwise in violation of constitutional rights or limitations. **The notion of "special deference" is inconsistent with** a thick conception of the **rule of law**, as David Dyzenhaus has argued, **and even champions of "special deference" such as** like Adrian **Vermeule have conceded**. n327 The idea rests in part on the theories of Carl Schmitt regarding the ineffectiveness of constitutional law constraints in moments of crisis--arguments that were ultimately intended to prove the invalidity of liberal democratic theory, as we have already examined. And it will of course be clear by now that this entire project is premised upon the legitimacy and validity of liberal democratic theory and the importance of a thick or substantive conception of the rule of law. n328 **Claims for deference to the executive in foreign affairs are also grounded in an anachronistic adherence to the most conservative versions of realism in i**nternational **r**elations. They flow from the belief in a Hobbesian world char-acterized by an anarchical international system in perpetual conflict, in which unitary sovereign states are the sole ac-tors and self-preservation is the prime directive. n329 **That worldview does not comport with the reality of an increasingly** interconnected and **globalized** international **society**, with growing networks of transnational relations at various levels and involving nonstate actors, governed by an increasingly integrated web of international and domestic legal systems. Descriptively, the **international society does not reflect the Hobbesian conception of the world**, and normatively, this project is predicated upon [\*704] the need to move us further away from the vestigial remnants of that pre-twentieth century understanding of the world. **In short, as an empirical matter, the evidence casts doubt on the extent to which courts are reluctant to engage national security issues. The normative arguments for such deference are neither persuasive nor grounded in theories of i**nternational **r**elations **and constitutional law that are consistent with a liberal understanding of international law and explanations for the democratic peace, or indeed deliberative democracy and the place of the rule of law in liberal democracy. There is evidence to suggest that courts will** quite willingly **engage in judicial review where there are clear** constitutional **provisions regarding the distribution of authority** and the establishment of limits on the exercise of such au-thority in national security matters. **And the kinds of questions that are presented to courts in such situations do not attract many of the objections**, such as technical competence and the nature of standards to be applied, **that are often raised by opponents of judicial review in** the realm of **national security**

**Congress can correct judicial overreach, but there is no check on the executive—err on rejecting deference**

**Jinks and Katyal 7** [April, 2007, Derek Jinks is Assistant Professor of Law, University of Texas School of Law. Neal Kumar Katyal is Professor of Law, Georgetown University Law Center, “Disregarding Foreign Relations Law”, 116 Yale L.J. 1230]

**Courts say that the nation must speak in "one voice" in its foreign policy; the executive can do this, while Congress and the courts cannot. They say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively**; the other branches cannot. As emphasized in Chevron, the executive, unlike the judiciary, is politically accountable as well as uniquely knowledgeable ... . n78 **This line of reasoning misses the mark** in several important respects **and**, in our view, **offers no good reason to augment the deference already accorded** executive interpretations of international law. First, **there is no reason to conclude that the current scope of judicial deference unacceptably impedes the ability of the President to respond to a crisis**. Second, **wholly adequate checking mechanisms limit the power of the courts to foist unwelcome interpretations of international law on the political branches**. Consider a few examples. **The political branches**, in the course of negotiating, ratifying, performing, and otherwise implementing U.S. treaty obligations, **undertake a series of actions that signal, and at times establish, the U.S. interpretation of specific treaty terms**. **When the United States has** authoritatively and discernibly **embraced an interpretation of its treaty obligations, courts give effect to this interpretation**. n79 The President might also issue formal interpretations of U.S. treaty obligations through the proper exercise of his substantial lawmaking (or delegated rulemaking) n80 authority. n81 In addition, **the President has the constitutional** [\*1251] **authority to execute the laws** - this power almost certainly includes the authority to terminate, suspend, or withdraw from treaties in accordance with international law. **Congress has the constitutional authority to abrogate**, in whole or in part, **U.S. treaty obligations via an ordinary statute** - a lawmaking process that, of course, includes the President. **Augmenting the law-interpreting** (and lawbreaking) **power of the President drastically diminishes the role of courts** - thereby **effectively depriving international law in the executive-constraining zone of its capacity to constrain meaningfully and**, [\*1252] consequently, **its status as enforceable "law**." **Such an expansion of the President's authority also subverts the institutional capacity** (and hence, the political will) **of Congress to regulate the executive in these domains.** These themes merit some elaboration. **Exigency does not compel a rejection of the status quo**. Indeed, **Posner and Sunstein's article** is not concerned with whether the President can put boots on the ground without a statute; rather, it **is addressed to litigation and what courts should do, typically years after the fact**. **Speed is often irrelevant.** n82 **So, too, is accountability**. **The legislature is just as accountable as the executive**. And textually, of course, **Congress has a strong role to play in the incorporation of international law into the domestic sphere**, from its Article I, Section 8 powers to "declare War," to "make Rules concerning Captures on Land and Water," and to "punish ... Offences against the Law of Nations," to the Senate's Article II, Section 2 power to ratify treaties. n83 In one sense, then, our disagreement centers around default rules. Posner and Sunstein acknowledge that Congress can specify an antidelegation/ antideference principle. n84 Yet oddly, their whole article frames the relevant issue as the competence of the executive branch versus that of the judiciary. But **given the fact that this tussle between the executive and the judiciary will always play out within a matrix set by the legislature**, **it is not quite appropriate to compare the foreign policy expertise of the executive branch with that of the courts**. n85 After all, **Congress could specify a prodelegation/prodeference policy** [\*1253] **most of the time as well**. (In fact, it has repeatedly done so. n86) **The more precise question is which entity is better suited to interpret a legislative act of some ambiguity, when international law principles would yield an answer that restrains the executive branch.** Once the question is properly framed, much of Posner and Sunstein's challenge to the status quo falls out. Most crucially, **they fail to account for a dynamic statutory process** **- through which mistakes** (if any) **made by courts in the area can be corrected by the legislature**. **Such legislative corrections can take place in both the statutory and the treaty realm**. **If a court reads a statute in light of international law principles and Congress disagrees with those principles, it can rewrite the statute**. And **if a court reads a treaty to constrain the executive in a way Congress does not like, it can trump the treaty**, in whole or in part, **with a statute under the "last-in-time" rule**. n87 More fundamentally, **the Senate can define the role of courts up front - during the ratification process - by attaching to the instrument of ratification specific reservations, declarations, or understandings concerning the judicial enforceability of the treaty**. n88 With a stylized account that criticizes the relative competence of the judiciary, **Posner and Sunstein make it appear that a judicial decision in foreign affairs is the last word**. But **that set of events would rarely, if ever, unfold in this three-player game**. **If the courts err in a way that fails**

**to give the executive enough power, Congress will correct them**. Surely **national security is not an area rife with process failures.** In that sense, **current law** works better than the Posner and Sunstein proposal because it **forces democratic deliberation before international law is violated.** For this reason, **it obscures more than it illuminates to say that "the courts, and not the executive, might turn out to be the fox."** n89 **Such language assumes** [\*1254**] a stagnant legislative process, so that the choice is "court" versus "executive," when the real choice is really "court + Congress**." That is to say, **if the courts grab power in a way that undermines the executive, Congress can correct them.** **The relevant calculus turns on which type of judicial error is more likely to be resolved, one in which the court wrongly sides with the President** (in which case Congress would have to surmount the veto) **or one in which the court wrongly sides against the President** (in which case the veto would be unlikely to be a barrier to corrective legislation). Recall that Posner and Sunstein are not addressing their argument to constitutional holdings by courts, but statutory ones that are the subject of Chevron deference. **There is much to criticize when courts declare government practices unconstitutional in the realm of foreign affairs, as those practices cannot then be resuscitated by the legislature** absent a constitutional amendment. But **when a court's holding centers on a statutory interpretation, the dynamic legislative process ensures that the judiciary will not have the last word.** Indeed, in this statutory area, **the risks of judicial error are asymmetric** - that is, **judicial decisions that side with the President are far less likely to be the subject of legislative correction than those that side against him.** While contemporary case law and theory have not taken the point into account, we believe that they provide a powerful reason to reject Posner and Sunstein's proposal. Our claim centers on the President's veto power and how **the structure of the Constitution imposes serious hurdles when Congress tries to modify existing statutes to restrict presidential power. Suppose that**, for example, **the President asserts that the D**etainee **T**reatment **A**ct, n90 sponsored by Senator John McCain and others to prohibit the torture of detainees, **does not forbid a particular practice**, such as waterboarding. **A group of plaintiffs**, in contrast, **argue that standard principles of international law and treaties ratified by the Senate forbid waterboarding**, and that these principles require reading the statute to forbid the practice. **Now imagine that the matter goes to the Supreme Court. The risks from judicial error are not equivalent. If the Court sides with the plaintiffs, the legislature can** - presumably with presidential encouragement - **modify the statute to permit waterboarding, provided that a bare majority of Congress agrees**. **The [\*1255] prospect of legislative revision explains why many of the criticisms of the Supreme Court's involvement in the war on terror thus far are entirely overblown. n91 Now take the other possibility** - that **the Court sides with the President**. In such a case, **it is virtually impossible to alter the decision**. **That would be so even if everyone knew that the legislative intent at the time of the Act was to forbid waterboarding**. **Even if**, after that Court decision, **Senator McCain persuaded every one of his colleagues in the Senate to reverse the Court's interpretation of the Detainee Treatment Act and to modify the Act to prohibit waterboarding, the Senator would also have to persuade a supermajority in the House of Representatives.** After all, **the President would be able to veto the legislation, thus upping the requisite number of votes necessary from a bare majority to two-thirds.** And **his veto power functions ex ante as a disincentive even to begin the legislative reform process, as Senators are likely to spend their resources and time on projects that are likely to pass. n92** So **what Posner and Sunstein seek is not a simple default rule, but one with a built-in ratchet in favor of presidential power**. **The President can take, under the guise of an ambiguous legislative act, an interpretation that gives him striking new powers, have that interpretation receive deference from the courts, and then lock the interpretation into place for the long term by brandishing his veto power.** For authors who assert structural principles as [\*1256] their touchstone, Posner and Sunstein's omission of the veto is striking and provides a lopsided view of what would happen under their proposal.

**PQD DA: 2AC**

**The PQD is already dead in the realm for foreign policy**

**Skinner 8/23**, Professor of Law at Willamette

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

Lower federal courts often erroneously cite the “political question doctrine” to dismiss as nonjusticiable individual rights claims arising in foreign or military affairs contexts, a trend that has increased since the 1962 case of Baker v. Carr. Similarly, lower courts have begun citing “special factors counselling hesitation” when dismissing constitutional claims (“Bivens claims”) in similar contexts, inappropriately treating “special factors” as a nonjusticiability doctrine. Lower federal courts should not cite either doctrine as a reason to avoid adjudicating individual rights claims arising **in the context of foreign or military affairs**. Rather, lower federal **courts should adjudicate these claims** on their merits **by deciding whether the political branch at issue had the power under the Constitution to act as it did. Doing so is consistent with the manner in which the Supreme Court has approached these types of cases for over 200 years. The Court affirmed this approach in the 2012 case of Zivotofsky v. Clinton, a case in which the Court once and for all rung the death knell for the application of the “political question doctrine”** as a nonjusticiability doctrinein cases involving individual rights – even those arising **in a foreign policy context.** In fact, **a historical review of Supreme Court cases demonstrates that the Supreme Court has never applied the** so-called “**political question doctrine**” as a true nonjusticiable doctrine **to dismiss individual rights claims** (and arguably, not to any claims at all), **even those arising in the context of foreign or military affairs**. This includes the seminal “political question” case of Marbury v. Madison. Rather, **the Supreme Court has almost always rejected the “political question doctrine” as a basis to preclude adjudication of individual rights claims, even in the context of foreign or military affairs**. Moreover, the Supreme Court has consistently admonished lower courts regarding the importance of the judiciary branch’s adjudication of individual rights claims, even in such contexts.13 That is not to say that from time to time the Court has not cited a “political question doctrine” in certain of its cases. However, a close review of those cases demonstrates that rather than dismissing such claims in those cases as “nonjusticiable,” the Court in fact adjudicated the claims by finding that either the executive or Congress acted constitutionally within their power or discretion. Moreover, **the post-9/11 Supreme Court cases of Hamdi** v. Rumsfeld, **Rasul** v. Bush, **and** Bush v. **Boumediene, in which the Supreme Court consistently found that the political branches overstepped their constitutional authority, clarified that the doctrine should not be used to dismiss** individual rights claims as nonjusticiable**, even those arising in a foreign or military affairs context. In case there remained any doubt, the Supreme Court in Zivotofsky rejected the “political question doctrine**” as a nonjusticiability doctrine, at least in the area individual rights, if not altogether. The Court found the case, involving whether the parents of a boy born in Jerusalem had the right to list Israel as his place of birth pursuant to a Congressional statute, was justiciable.17 The Court addressed the real issue, which was whether Congress had the authority to trump the President over whether Israel could be listed as the country of birth on passports where a person was born in Jerusalem, notwithstanding the President’s sole authority to recognize other governments. 18 In ruling as it did, the Court stayed true to many of its earlier cases involving “political questions” by adjudicating the claim through deciding whether one of the political branches took action that was within its constitutional authority. **In the case, the Court showed its willingness to limit the power of the President in the area of foreign affairs** rather than finding the claim nonjusticiable.

**No link to PQD**

**Roberts 09** (Caprice, Visiting Professor of Law, The Catholic University of America; Professor of Law, West Virginia University, Fall 2009, "Rights, Remedies, And Habeas Corpus--The Uighurs, Legally Free While Actually Imprisoned" Georgetown Immigration Law Journal, Lexis)

We no doubt live in interesting times. Extraordinary times may well call for extraordinary measures by the political branches of government. **The** [\*30] **federal judiciary may find it prudent to give the political branches wide berth, but it should not turn a blind eye. An ongoing violation of an applicable constitutional right should not go unreviewed and unremedied lightly. The federal courts at issue grappled in good faith with vexing issues raised by the Uighurs' allegations. Ultimately, the highest court to pass on the matter determined that it was powerless to resolve the case or remedy the wrong.** n212 In this section, I maintain that **the federal judiciary is not powerless, despite the potential political question. The federal judiciary possesses the authority under Article III of the Constitution to hear the Uighurs' case, which is otherwise justiciable**. Prudential reasons exist for finding that the case poses a nonjusticiable political question, but the context and rights at stake outweigh those prudential reasons. **Federal courts should lean towards accepting jurisdiction in cases like the Uighurs', because two political branches of government have acted in concert to threaten core constitutional rights.** Alternatively, the Executive exceeded limitations imposed by Congress and operated at the Executive's "lowest ebb" of power. n213 Certainly one political branch, Congress, may serve as an effective check on another political branch, the Executive. Given the pressures of the global war on terror, Congress has often not served as a meaningful check on potential abuses of presidential power. It is in these moments that judicial review is all the more essential. In fact, **judicial review should be exercised unless constitutionally prohibited. Of all the traditional justifications for the political question doctrine, the one with the strongest constitutional force is the textual commitment ground.** Although the immigration cases rely on this ground (as well as others), they differ from traditional political question cases because the text of the Constitution does not explicitly commit exclusion of aliens to the political branches. Rather, the power stems from extra-constitutional sources such as the implied and inherent powers as sovereign. **If the commitment stems from implied powers, the political question doctrine may be inapplicable under a strict construction of the textual commitment factor. The doubt presented by this gray area may mean declining jurisdiction is not required.** Other political question rationales, including judicial functionality and interbranch respect, suggest moving cautiously, but not halting all review.

**Plan doesn’t overturn PQD**

**Roberts 09** (Caprice, Visiting Professor of Law, The Catholic University of America; Professor of Law, West Virginia University, Fall 2009, "Rights, Remedies, And Habeas Corpus--The Uighurs, Legally Free While Actually Imprisoned" Georgetown Immigration Law Journal, Lexis)

**The political question doctrine represents a significant restraint on the federal judiciary.** It is a judicially created doctrine with a rich history. The Supreme Court acknowledged its force early in the life of the federal judiciary: "Questions, in their nature political, or which are, by the constitution and the laws, submitted to the executive, can never be made in this court." n111 As stated, the doctrine sounds mandatory rather than discretionary. A finding of nonjusticiability based on political question is arguably mandatory if the Constitution establishes the basis for the determination that the issue belongs to political branches and not the judicial branch. n112 Issues constituting nonjusticiable political questions include the constitutional guarantee [\*17] of the republican form of government n113 and the Senate's power to try impeachments. n114 In Nixon v. United States, for example, the Court ruled that explicit language of the Constitution textually committed the issue exclusively to a political branch rather than the judicial branch. n115 **In the war-powers context, federal courts have a long tradition of hearing cases in which a private party challenges a determination of "enemy" status.** n116 One federal court decision, coined "the sole outlier," n117 held an "enemy" determination not subject to any judicial review, despite following on the heels of the Supreme Court's Hamdi decision. n118 The Hamdi plurality warned that the President does not possess a "blank check" simply due to wartime status, n119 and thus judicial review would not be cabined during wartime. n120 The United States Court of Appeals for the Federal Circuit, in El-Shifa Pharmaceutical Industries Co. v. United States, n121 dismissed jurisdiction on the basis of the political question doctrine by inferring commitment to the political branches from the Constitution's text and structure. n122 El-Shifa involved President Clinton's decision that private property owned by aliens in Sudan constituted "enemy property." n123 The court ruled that the designation, and thus the plaintiff's allegation of an improper taking without just compensation, was not subject to any judicial review. n124 The lower court, in an opinion by Judge Baskir also dismissed the case but on broad assertions of deference to the President's determination rather than a direct invocation of the political question doctrine. n125 Judge Clevenger, writing for the Federal Circuit, affirmed the lower court's opinion in its entirety but formally cast the President's designation as a nonjusticiable political question under Baker. n126 The Federal Circuit distinguished the Hamdi decision on the basis that Hamdi involved an enemy combatant designation pursuant to the President's power to detain indefinitely captured enemy combatants versus the El-Shifa [\*18] context of the President's "go/no go" determination. n127 Ultimately, the Federal Circuit ruled that the political question doctrine "counsels deference to the President's extraterritorial enemy property determination." n128 Even granting that the President requires and the Constitution provides vast war powers, including latitude in making good-faith designations regarding enemy status, it is dangerous to cede an entire field of decisionmaking exclusively to the political branches. Further, it is unclear how the Constitution commits all issues surrounding the designation of enemy property "solely" to the political branches. n129 Cases like El-Shifa demonstrate the potential sweeping significance of a federal court's determination that it has no role in reviewing the case and its "open-ended deference to the Executive Branch" n130 --the political branches are immune from any liability for the damage caused by their errors. It is even more dangerous when the federal judiciary cedes review and remedial power over arbitrary suspensions of the writ and unlawful detainment of individuals. **The political question doctrine may operate as a jurisdictional barrier to a much broader set of cases based on any of the remaining five more prudential grounds of Baker**. Despite the fact that cases are otherwise justiciable, a federal court may find the matter a nonjusticiable political question if the court lacks judicially discoverable techniques for effectively handling the matter. **n131 This functional concern is a matter of prudence rather than a prohibition. Similarly, other comity reasons may warrant declining jurisdiction**. n132 Again, **respect for the expertise of another branch, for example, is a discretionary rationale for restraint rather than a mandate that jurisdiction cannot exist. If clear text of the Constitution commits an issue solely to a political branch, then a federal court must dismiss the matter as a nonjusticiable political question. To the extent the justification for application of political question is prudential in a given case, however, the ground warrants heightened** [\*19] **scrutiny in certain circumstances. Those special circumstances may arise when core individual rights are threatened by a significant use of political power by one branch with inadequate oversight by another governmental branch. The federal judiciary has an obligation to protect its essential functions, including effective judicial review.** Such cases may represent close judgment calls, but given that the heart of our constitutional democracy may be at stake, clear constitutional grounds must justify a dismissal of jurisdiction or refusal to render relief. **Accepting jurisdiction and then artfully crafting the remedy to demonstrate respect for the expertise of the political branches may best maintain the delicate balance of interbranch tension.**

### T

1. We meet – plan text says “indefinitely detained” - t is a question of the plan

w/m – they are indef detained – no end of hostilities – hostilities are indeff

2. CI: NDAA is indefinite – c/a their card

Prefer it

a) aff ground – no topical affs - except immigration - ridiculous

b) limits explosion inev

reasonability

**Gitmo-Only CP: 2AC**

**Closing Guantanamo is insufficient—setting a legal precedent against indefinite detention broadly is necessary to solve the aff**

**Waxman 13** (Matthew, professor of law at Columbia Law School and an adjunct senior fellow at the Council on Foreign Relations, 6-12-13, "Obama’s Guantanamo Legacy" Hoover Institution, Stanford University) www.advancingafreesociety.org/the-briefing/obamas-guantanamo-legacy/

**Even if** President **Obama** successfully **closes Guantanamo**, ironically **he may leave behind for future presidents a stronger and more reliable law-of-war detention tool** for terrorist enemies than he inherited. **If the U**nited **S**tates **finds itself in another war** (technically, an “armed conflict”) **with a terrorist group, the president will** likely **have** very **dependable and well-tested military detention powers** in his arsenal, in part thanks to some of the Obama administration’s efforts. **Closing Guantanamo only makes sense in the context of a broader detention policy that is legally, politically, diplomatically, and strategically sustainable. More important than the location of detention is the legal and administrative process of detention. For many participants in the debate**, therefore, **“Guantanamo” is shorthand for a broader set of policies. “Closing Guantanamo,” to many advocates, means ending detention-without-trial. “Keeping Guantanamo open,” to many** of its proponents, **means continuing to use law-of-war authority to hold captured enemy fighters until the end of hostilities, even if that detention occurs at other sites**, and to some it means using military rather than civilian trials to prosecute war crimes. President Obama has charted an ambiguous middle path between these views. On the one hand, he calls Guantanamo a stain on America’s reputation and anathema to our values. On the other hand, he has implied that his pathway to closing it will include at least some continued detention of al Qaeda leaders and fighters who are not prosecutable yet are too dangerous to release, and his administration has staunchly defended its law-of-war detention powers. In some respects, the surprising result of this incongruous path is that law-of-war detention is now a stronger counterterrorism tool under Obama’s leadership than it was under Bush’s. First, the Obama administration has helped to bolster mainstream moderate political support for some long-term law-of-war detention. Statements like the president’s 2009 Archives speech regarding the likely need to detain long-term without trial some dangerous Guantanamo detainees gave political credibility to a position that many of the political left (and some of the libertarian right) had been reluctant to acknowledge. Additional legitimacy of at least some detention of enemy terrorists outside the criminal justice system has come from the Obama administration’s improving periodic review processes and emphasizing their fairness and accuracy; its commitment to detention consistent with the laws of war and prohibitions on torture; and Guantanamo skeptics’ increasing awareness that the alternative to detention in some cases may be lethal force or proxy detention by others. To close Guantanamo, President Obama may have to go further and endorse or accept additional statutory powers to hold indefinitely some detainees who are moved to the United States. Although not a very principled stance, the Obama administration’s view seems to be that so long as it’s only a small number of very dangerous enemy al Qaeda terrorists, it is legitimate to hold them without trial, and the Obama administration has been winning over political allies to this compromise position. Second, as a legal matter, the Obama administration has adopted and implemented an effective legal strategy that secured strong judicial validation of law-of-war detention, at least when conducted pursuant to a congressional force authorization. A significant move was the Obama administration’s March 2009 brief in habeas litigation, arguing that the 2001 Authorization for the Use of Military Force justified detention of Guantanamo detainees strongly suspected of participating in hostilities on behalf of al Qaeda and its allies, even if they were captured far from a traditional battlefield. The Obama administration’s broad asserted definition of the substantive and geographic scope of detention authority has been accepted by federal courts thanks to effective lawyering and avoiding overreaching. While it decries Guantanamo as contrary to American values, the Obama administration has convinced courts of Guantanamo’s legal validity. It is now even more clear that any future AUMF — which Congress may pass in the event of future conflict with terrorist organizations — presumptively carries with it strong detention powers. Third, despite its preference for civilian trials, the Obama administration has helped make trials by military commissions a more legitimate instrument for handling some terrorism suspects. Soon after coming to office, the Obama administration not only worked with the Democrat-controlled Congress to reform military commissions rules, but the resulting statute applies beyond just the current armed conflict with al Qaeda to future unprivileged belligerents as well. Although the Obama administration came to office critical of the Bush administration’s approach to military trials, its own legislative fix to this issue helped institutionalize a military detention instrument for future counterterrorism conflicts. This likely if unintended legacy is partly a product of improvised and incremental moves and reluctance to work with Congress on a comprehensive and forward-looking solution to detention issues. It is partly a product of treating Guantanamo as an inherited problem comprised of Bush administration errors, rather than as a manifestation of a deeper problem: the mismatch of both traditional criminal justice tools and traditional warfare tools with the challenges of fighting transnational terrorist networks. True, criminal justice tools are much more powerful counterterrorism tools than they were before 2001, and efforts by some Obama opponents to close off criminal prosecution options are dangerously misguided. But future presidents are unlikely to rely exclusively on criminal justice for detention in any armed conflicts with terrorist organizations that significantly threaten the United States. The Obama administration has helped lay a strong legal and political foundation for retaining alternative, law-of-war detention. In sum, **even if Obama closes this current Guantanamo, nothing he has so far proposed would prevent creation of a future one. Indeed, barring a surprisingly bold policy reversal, he will likely leave behind some important legal and political building blocks to do so.**

**Guantanamo only holds 1% of our detainees—broad detention reforms are key**

David **Welsh 11**, J.D. from the University of Utah, “Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy”, http://law.unh.edu/assets/images/uploads/publications/unh-law-review-vol-09-no2-welsh.pdf

Although this paper focuses specifically on the detention of sus­pected terrorists at the **Guantanamo** Bay Detention Camp (Guanta-namo Bay),34 this facility **is but one of many detention centers hold­ing suspected terrorists on behalf of the U**nited **S**tates.35 Today, **ap­proximately 250 prisoners** (out of approximately 800) **remain at this U.S.-run military base in Cuba** that is outside U.S. legal jurisdic­tion.56 **However, it is critical to note that these 250 individuals represent a mere 1% of "approximately 25,000 detainees worldwide held** directly or indirectly **by** or on behalf of **the U**nited **S**tates."37 **Prisoners have alleged torture, sexual degradation, religious persecu­tion, and many other specific forms of mistreatment while being detained.**39 **In many detention facilities including** Guantanamo Bay, **Abu Ghraib, and Bagram, these allegations** are substantiated by sig­nificant evidence and **have gained worldwide attention**.40

**Detentions at Bagram will prevent post-2014 Afghanistan troop presence**

**Sisk 13** (Richard, 1-4-13, "Afghan Jail a 'Tougher Problem Than Guantanamo'" Military.com) www.military.com/daily-news/2013/01/04/afghan-jail-a-tougher-problem-than-guantanamo.html

**With more than five times the** number of **prisoners than** the detention facility on **Guantanamo** Bay, **the U.S. jail next to Bagram Airfield is** just one of many factors **affecting the degree to which U.S. forces remain in Afghanistan after 2014.** President Obama and Afghan President Hamid Karzai will meet next week in the White House to discuss the fate of the prison, the pace of America’s withdrawal, and the size of the U.S. presence in Afghanistan after 2014. “The first thing is to establish how many will stay in Afghanistan” after 2014, said George Little, the chief Pentagon spokesman. Karzai has warned that he will not approve a troop agreement unless all Afghans in U.S. custody are turned over to his jurisdiction. A complicating factor is the U.S. custody of suspects who allegedly committed insider attacks against allied troops. These attackers, who often posed as Afghan police officers and soldiers, killed U.S. and allied troops at a record rate in 2012. The number of prisoners detained at the high-security, $60 million detention facility is a tightly protected figure. Afghan officials, prison administrators, International Security Assistance Force spokesmen, and senior Pentagon officials all have repeatedly declined comment in recent weeks on how many are held at the facility located next to Bagram Airfield. U.S. Combined Joint Interagency Task Force 435 is the unit assigned to run the detention facility. “As a matter of operational security, we do not discuss numbers of detainees transferred or currently held by CJIATF 435 or U.S. Forces,” said Col. Thomas Collins, an ISAF spokesman in Kabul. However, President Obama discussed the numbers in December. In one of his required periodic reports to Congress under the War Powers Act , Obama wrote on Dec. 14 that “United States Armed Forces are detaining in Afghanistan approximately 946 individuals under the Authorization for the Use of Military Force (Public Law 107-40) as informed by the law of war.” The vast majority of the 946 are detained by CJIATF 435. A small number of recently captured prisoners are kept at local commands until they can be transferred to the detention facility next to Bagram I n the Parawan province. Obama’s report did not state whether the prisoners were captured on the battlefield or were taken into custody for other reasons. “We do not talk about individual detainees and we do not discuss the provenance” of the prisoners’ presence in custody, said Lt. Col. Todd Brasseale, a Pentagon spokesman. Since 2005, Karzai has demanded that prisoners held by the U.S. and the NATO coalition be turned over to Afghan jurisdiction -- with the exception of foreign nationals who were captured in military operations. About one-third of the 946 in Parwan are thought to be foreign nationals, mostly Pakistani but also Yemenis and Saudis, Brasseale said. Karzai has said that he does not want custody of the foreign nationals. In November, Karzai called for "urgent actions” by the U.S. to release the prisoners in Parawan to his control. He said in a statement that the U.S. did not "have the right to run prisons and detain Afghan nationals in Afghanistan." **Karzai threatened to cancel the already difficult negotiations on a post-2014 presence for U.S. forces. A main sticking point to those negotiations involves “status of forces” -- whether U.S. troops in the residual force would be immune from Afghan law.** Iraq’s refusal to provide immunity forced the U.S. to remove military forces from Iraq. Karzai’s spokesman, Aimal Faizi, has said that **more than 70 detainees held by the U.S. under “administrative detention” have already been cleared of wrongdoing by Afghan courts. He said the U.S. had no justification for continuing to hold them since administrative detention was not recognized under Afghan law. "There are some prisoners found innocent by the court who are still in custody,” Faizi said.** “This act is a serious breach of a memorandum of understanding." The U.S. has not faced the same issue at Guantanamo, where the host nation of Cuba has not claimed jurisdiction of the alleged terrorists held on the naval base. Under U.S. court rulings and acts of Congress, many of the 166 prisoners at Naval Station Guantanamo Bay have been cleared to return to their own countries or to a third-party nation willing to take them pending agreements on their continued monitoring and detention. The rest of the prisoners at Gitmo, where the first 20 captives in the war on terror arrived in January 2002, can be tried before a military commission. There is no such prospect for the prisoners next to Bagram. “We have never held a military commission in Afghanistan and we don’t expect there will be one,” Brasseale said. A senior Pentagon official, speaking on background, said “our goal, eventually, is to turn all of the prisoners over” to the Afghans, but the official added that “there is not a mechanism currently in place” for achieving the goal. The Parwan prisoner impasse has left the U.S. in a legal and political bind under international law, the Geneva Conventions and the law of armed conflict, said Gary Solis, a former Marine Corps Judge Advocate General. “We are simply disregarding agreements with the Afghans,” said Solis, an adjunct professor at Georgetown University who also teaches the law of war at West Point. “There is no guidebook for this, no precedent for this situation.” For years, Parwan was a key factor in U.S. worldwide intelligence gathering operations, as interrogators grilled insurgents captured on the battlefield for information on Al Qaeda and the war on terror. In August 2009, Army Gen. Stanley McChrystal, then the coalition commander as head of the International Security Assistance Force, said Parwan was at risk of becoming a “strategic liability” for the U.S. McChrystal said the extrajudicial detentions at Bagram were eroding Afghan support for the allies. Under a Memorandum of Understanding between the U.S. and the Afghan governments reached last March, the U.S. was to have turned over all of the prisoners in September. This led to an awkward change of command ceremony at Parwan on Sept. 9, which Army Lt. Gen. Keith Huber, commander of CJIATF 435, declined to attend. The U.S. transferred about 3,000 prisoners to the Afghans. The U.S. held back more than 50 who were captured before March along with hundreds of others captured by U.S. forces between March and September. The Memorandum of Understanding called for the U.S. to turn over the entire Parwan jail to the Afghans, but the U.S. retained a section closed off to the Afghans. In the dispute over control of the Parwan facility, the U.S. stance has been that the Afghans might not be ready to manage the jail and that the corrupt Afghan justice system might hold trials that would result in the release of dangerous prisoners. In its latest “Report on Progress and Security and Stability in Afghanistan” to Congress last month, the Defense Department said “the Afghan judicial system continues to face numerous challenges.” The system is riddled with “systemic corruption at all levels resulting in a lack of political will to pursue prosecutions against many politically connected individuals,” the Defense Department report said. U.S. and Afghan officials declined comment on whether suspects in insider attacks by Afghan soldiers and police on coalition forces that have killed at least 62 allied troops last year were being held back for fear they would be turned loose. Several field commands said perpetrators in the attacks had been sent to Parwan. One such suspect was a 15-year-old boy allegedly working for the Taliban. A Marine spokesman said the boy had been sent to Parwan after he killed three Marines in southwestern Helmand province in August. According to the Long War Journal, at least 22 suspects in insider attacks have been captured, but U.S. and Afghan officials declined comment on their status. “No one is ever charged with anything so it’s difficult to know what they’re being held for” at Parwan, where prisoners “are not afforded even the minimal protections that the people at Guantanamo have,” said Heather Barr, a researcher in Kabul for Human Rights Watch, an independent advocacy group. Barr said she had attended sessions of the Detention Review Boards set up by the U.S. to determine the status of the prisoners, but the boards have never led to specific charges against prisoners. “We know of only one case that has gone to trial,” Barr said, and that case involved a prisoner, Abdul Sabor, who was captured by the French and handed over to the Afghans. Sabor, who allegedly killed five French troops in an insider attack last January, has been sentenced to death and his case is now under appeals in the Afghan courts, Barr said. Barr said the U.S. was “trying to bully the Afghans into setting up an administrative detention system” for high value prisoners that would allow them to be held indefinitely without the risk of a trial that might set them free. “The Afghan government has said it’s not going to do administrative detention, it’s unconstitutional under Afghan law,” Barr said. British officials have argued against transferring prisoners to the Afghans. In a November letter to Parliament, British Defense Secretary Phillip Hammond wrote that he was canceling future transfer of insurgents captured by British forces to the Afghans on grounds that they might be tortured. “There are currently reasonable grounds for believing that UK-captured detainees who are transferred to Lashkar Gah would be at real risk of serious mistreatment," Hammond said in a reference to the Afghan-run jail in the southwestern Helmand province capital of Lashkar Gah. U.S. Congressional leaders have expressed concerns that Afghan prisoners who still pose a threat might be released. In an August statement, Rep. Howard McKeon (R-Calif.), chairman of the House Armed Services Committee, cited the release of a “high-value terrorist” by Iraq over U.S. objections. “We call upon the President and Secretary of Defense (Leon) Panetta to extend all efforts to ensure that this tragic mistake is not repeated with terrorists currently in U.S. custody in Afghanistan,” McKeon said. **The central question on the Afghan prisoner issue was whether “the U.S. courts are going to take notice of what’s going on in Afghanistan” as they did in setting minimal habeas corpus rights on the charges against prisoners in Guantanamo, said** Donald **Huber**, a former Navy judge advocate general and now dean of the South Texas College of Law.

**Withdrawal causes Afghan instability and terror**

**Curtis 13** (Lisa, senior research fellow, 7-10-13, "Afghanistan: Zero Troops Should Not Be an Option" Heritage Foundation) www.heritage.org/research/reports/2013/07/afghanistan-zero-troops-should-not-be-an-option

The Obama Administration is considering **leaving no U.S. troops behind in Afghanistan after it ends its combat mission** there **in 2014**. This **would undermine U.S. security interests**, as it would **pave the way for the Taliban to regain influence in Afghanistan and ~~cripple~~ [badly hurt]** the U.S. ability to conduct **counterterrorism missions** in the region. President **Obama instead should commit the U.S. to maintaining a robust troop presence** (at least 15,000–20,000) in Afghanistan after 2014 in order to train and advise the Afghan troops and conduct counterterrorism missions as necessary. **The U.S. should** also **remain** diplomatically, politically, and financially **engaged** in Afghanistan in order to sustain the gains made over the past decade **and ensure that the country does not again serve as a sanctuary for international terrorists intent on attacking the U.S.** Flaring Tensions Fuel Poor Policy Decisions Tensions between the Obama and Karzai administrations have escalated in recent months. The U.S. Administration blundered in its handling of the opening of a Taliban political office in Doha in mid-June. In sending a U.S. delegation to Doha to meet with the Taliban leadership without the presence of the Afghan government, the Taliban appeared to be achieving its long-sought objective of cutting the Karzai administration out of the talks. The Taliban also scored a public relations coup by raising the flag associated with its five-year oppressive rule in front of the office. The episode angered Afghan President Hamid Karzai to the point that he pulled out of the Bilateral Security Agreement (BSA) talks with the U.S., thus fulfilling another Taliban goal of driving a wedge between the U.S. and Afghan governments. Karzai’s opposition to the U.S. talking unilaterally with the Taliban is understandable, but his decision to pull out of the BSA talks is misguided, since maintaining an international troop presence post-2014 is essential to the stability of the Afghan state and the ability of Afghan forces to protect against the use of its territory for international terrorism. The BSA talks are necessary to forge an agreement on a post-2014 U.S. troop presence. If the White House is publicizing its consideration of the zero-troop option to try to pressure the Karzai administration, it also is misguided in its negotiating tactics. The Afghans already believe the U.S. is likely to cut and run, similar to the way Washington turned its back on the Afghans over two decades ago when the Soviets conceded defeat and pulled out of the country. The Obama Administration’s failure to reach agreement with the Iraqi government on the terms for a residual U.S. force presence there highlights the White House’s poor track record in managing these kinds of negotiations. Taliban Talks a Masquerade The Taliban leadership has shown no sign that it is ready to compromise for peace in Afghanistan. The Taliban has refused to talk directly with the Karzai government, calling it a puppet of the U.S., and has shown little interest in participating in a normal political process. The Taliban appears to believe that it is winning the war in Afghanistan and simply needs to wait out U.S. and NATO forces. The insurgent leaders’ only motivation for engaging with U.S. officials appears to be to obtain prisoner releases and to encourage the U.S. to speed up its troop withdrawals. The Taliban has already scored tactical points through the dialogue process by playing the U.S. and Afghans off one another and establishing international legitimacy with other governments. Moreover, the Taliban has not tamped down violence in order to prepare an environment conducive to talks. In fact, in recent weeks Taliban insurgents have stepped up attacks. In early June, for instance, insurgents conducted a suicide attack near the international airport in Kabul, and two weeks later they attacked the Afghan presidential palace. Perseverance Required to Achieve U.S. Objectives As difficult as the job may be, it is essential that the U.S. remain engaged in Afghanistan. It would be shortsighted to ignore the likely perilous consequences of the U.S. turning its back on this pivotal country from where the 9/11 attacks originated. Moving forward, the U.S. should: Lay its cards down on the number of troops it plans to leave in Afghanistan post-2014. The White House should commit to keeping a fairly robust number of U.S. forces in Afghanistan over the next several years. Former U.S. Central Command chief General James Mattis made clear in recent remarks to Congress that he hoped the U.S. would leave behind around 13,500 troops and that other NATO nations would leave an additional 6,500 troops.[1] This would bring a total of around 20,000 international forces stationed in Afghanistan beyond 2014 to help with training and advising the Afghan forces. Encourage continued strengthening of the democratic process in the country rather than rely on the false hope of political reconciliation with the Taliban. The Taliban believe they will win the war in Afghanistan without compromising politically and through violent intimidation of the Afghan population, especially when U.S. and coalition troops are departing. Taliban leaders appear unmotivated to compromise for peace and indeed are stepping up attacks on the Afghan security forces and civilians. The White House should focus on promoting democratic processes and institutions that will directly counter extremist ideologies and practices. Integral to this strategy is supporting a free and fair electoral process next spring both through technical assistance and regular and consistent messaging on the importance of holding the elections on time. Further condition U.S. military aid to Pakistan on its willingness to crack down on Taliban and Haqqani network sanctuaries on its territory. There continues to be close ties between the Pakistani military and the Taliban leadership and its ally, the Haqqani network, which is responsible for some of the fiercest attacks against coalition and Afghan forces. In early June, the U.S. House of Representatives approved language in the fiscal year 2014 National Defense Authorization Act that conditions reimbursement of Coalition Support Funds (CSF) pending Pakistani actions against the Haqqani network. Hopefully, the language will be retained in the final bill. The U.S. provides CSF funds to reimburse Pakistan for the costs associated with stationing some 100,000 Pakistani troops along the border with Afghanistan. Pakistan has received over $10 billion in CSF funding over the past decade. Avoid Repeating History **The U.S. should not repeat the same mistake it made 20 years ago by disengaging abruptly from Afghanistan, especially when so much blood and treasure has been expended in the country over the past decade. There is a genuine risk of the Taliban reestablishing its power base and facilitating the revival of al-Qaeda in the region if the U.S. gives up the mission in Afghanistan.** While frustration with Karzai is high, U.S. officials should not allow a troop drawdown to turn into **a rush for the exits** that **would lead to greater instability in Afghanistan and** thus **leave the U.S. more vulnerable to the global terrorist threat.**

**Global nuclear war**

**Morgan 07** (Stephen J., Political Writer and Former Member of the British Labour Party Executive Committee, “Better another Taliban Afghanistan, than a Taliban NUCLEAR Pakistan!?”, 9-23, http://www.freearticlesarchive .com/article/\_Better\_another\_Taliban\_Afghanistan\_\_than\_a\_Taliban\_NUCLEAR\_Pakistan\_\_\_/99961/0/)

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 no 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**.

**Heg DA: 2AC**

**Courts can effectively review national security cases—regulatory lawsuits prove**

**Martin 11** Craig, Visiting Assistant Professor, University of Baltimore School of Law, “ARTICLE: Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law”, Winter, 76 Brooklyn L. Rev. 611, Lexis

**Turning to the normative arguments against judicial review of national security** issues, **many of these are similar to** the **functionalist claims for executive power in** the **war power**s debate. **These claims are a subset of undertheorized and** often **internally inconsistent "special deference" doctrines**, according to which the courts ought to defer entirely on foreign affairs issues. n323 **The reasons given include the need for secrecy** in decision making; **the courts' lack of access to crucial information** to resolve complex issues relating to national security; **the courts' lack of professional competency** to decide such issues; and from the political question doctrine itself, **the need to avoid "embarrassment**" flowing from conflicting decisions from different branches of government in foreign affairs, **and the lack of manageable standards for the judiciary to apply** in resolving disputes, particularly given the allegedly political and dynamic nature of international norms (in contrast to the stable and legal norms in the domestic system). n324 **All of these claims have been dismissed at some length elsewhere**, n325 **and many of the more general counterarguments to broader functionalist claims have already been addressed** in the previous section on the legislative role. To address briefly a few of the criticisms specific to the judicial role, **the arguments advanced on the lack of judicial competency do not bear scrutiny when placed in the context of the demands made of courts for the resolution of incredibly complex**, large scale, and hugely significant domestic **issues. The problems relating to judicial access to information, specialized knowledge and competency**, and the development of sufficiently manageable standards **are no less problematic in various kinds of** environmental, securities, insolvency, and **similarly technical issues arising in a regulatory context**, some of which may include constitutional aspects and even impact the state's foreign affairs. n326 **Yet the advocates of special deference on national security issues do not object to judicial review of these** [\*703] sorts of **complex domestic cases**. Moreover, **those who suggest that there is some fundamental difference between these kinds of cases and those relating to national security issues again mischaracterize the question** at issue in national security cases. As already discussed, **the courts are not seeking to second-guess the policy determination** as to what is in the na-tional interest on the basis of highly classified information--**they are simply assessing whether such decisions were made with the requisite authority**, based on a sufficient consideration of the required criteria, and not otherwise in violation of constitutional rights or limitations. **The notion of "special deference" is inconsistent with** a thick conception of the **rule of law**, as David Dyzenhaus has argued, **and even champions of "special deference" such as** like Adrian **Vermeule have conceded**. n327 The idea rests in part on the theories of Carl Schmitt regarding the ineffectiveness of constitutional law constraints in moments of crisis--arguments that were ultimately intended to prove the invalidity of liberal democratic theory, as we have already examined. And it will of course be clear by now that this entire project is premised upon the legitimacy and validity of liberal democratic theory and the importance of a thick or substantive conception of the rule of law. n328 **Claims for deference to the executive in foreign affairs are also grounded in an anachronistic adherence to the most conservative versions of realism in i**nternational **r**elations. They flow from the belief in a Hobbesian world char-acterized by an anarchical international system in perpetual conflict, in which unitary sovereign states are the sole ac-tors and self-preservation is the prime directive. n329 **That worldview does not comport with the reality of an increasingly** interconnected and **globalized** international **society**, with growing networks of transnational relations at various levels and involving nonstate actors, governed by an increasingly integrated web of international and domestic legal systems. Descriptively, the **international society does not reflect the Hobbesian conception of the world**, and normatively, this project is predicated upon [\*704] the need to move us further away from the vestigial remnants of that pre-twentieth century understanding of the world. **In short, as an empirical matter, the evidence casts doubt on the extent to which courts are reluctant to engage national security issues. The normative arguments for such deference are neither persuasive nor grounded in theories of i**nternational **r**elations **and constitutional law that are consistent with a liberal understanding of international law and explanations for the democratic peace, or indeed deliberative democracy and the place of the rule of law in liberal democracy. There is evidence to suggest that courts will** quite willingly **engage in judicial review where there are clear** constitutional **provisions regarding the distribution of authority** and the establishment of limits on the exercise of such au-thority in national security matters. **And the kinds of questions that are presented to courts in such situations do not attract many of the objections**, such as technical competence and the nature of standards to be applied, **that are often raised by opponents of judicial review in** the realm of **national security**

**Congress can correct judicial overreach, but there is no check on the executive—err on rejecting deference**

**Jinks and Katyal 7** [April, 2007, Derek Jinks is Assistant Professor of Law, University of Texas School of Law. Neal Kumar Katyal is Professor of Law, Georgetown University Law Center, “Disregarding Foreign Relations Law”, 116 Yale L.J. 1230]

**Courts say that the nation must speak in "one voice" in its foreign policy; the executive can do this, while Congress and the courts cannot. They say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively**; the other branches cannot. As emphasized in Chevron, the executive, unlike the judiciary, is politically accountable as well as uniquely knowledgeable ... . n78 **This line of reasoning misses the mark** in several important respects **and**, in our view, **offers no good reason to augment the deference already accorded** executive interpretations of international law. First, **there is no reason to conclude that the current scope of judicial deference unacceptably impedes the ability of the President to respond to a crisis**. Second, **wholly adequate checking mechanisms limit the power of the courts to foist unwelcome interpretations of international law on the political branches**. Consider a few examples. **The political branches**, in the course of negotiating, ratifying, performing, and otherwise implementing U.S. treaty obligations, **undertake a series of actions that signal, and at times establish, the U.S. interpretation of specific treaty terms**. **When the United States has** authoritatively and discernibly **embraced an interpretation of its treaty obligations, courts give effect to this interpretation**. n79 The President might also issue formal interpretations of U.S. treaty obligations through the proper exercise of his substantial lawmaking (or delegated rulemaking) n80 authority. n81 In addition, **the President has the constitutional** [\*1251] **authority to execute the laws** - this power almost certainly includes the authority to terminate, suspend, or withdraw from treaties in accordance with international law. **Congress has the constitutional authority to abrogate**, in whole or in part, **U.S. treaty obligations via an ordinary statute** - a lawmaking process that, of course, includes the President. **Augmenting the law-interpreting** (and lawbreaking) **power of the President drastically diminishes the role of courts** - thereby **effectively depriving international law in the executive-constraining zone of its capacity to constrain meaningfully and**, [\*1252] consequently, **its status as enforceable "law**." **Such an expansion of the President's authority also subverts the institutional capacity** (and hence, the political will) **of Congress to regulate the executive in these domains.** These themes merit some elaboration. **Exigency does not compel a rejection of the status quo**. Indeed, **Posner and Sunstein's article** is not concerned with whether the President can put boots on the ground without a statute; rather, it **is addressed to litigation and what courts should do, typically years after the fact**. **Speed is often irrelevant.** n82 **So, too, is accountability**. **The legislature is just as accountable as the executive**. And textually, of course, **Congress has a strong role to play in the incorporation of international law into the domestic sphere**, from its Article I, Section 8 powers to "declare War," to "make Rules concerning Captures on Land and Water," and to "punish ... Offences against the Law of Nations," to the Senate's Article II, Section 2 power to ratify treaties. n83 In one sense, then, our disagreement centers around default rules. Posner and Sunstein acknowledge that Congress can specify an antidelegation/ antideference principle. n84 Yet oddly, their whole article frames the relevant issue as the competence of the executive branch versus that of the judiciary. But **given the fact that this tussle between the executive and the judiciary will always play out within a matrix set by the legislature**, **it is not quite appropriate to compare the foreign policy expertise of the executive branch with that of the courts**. n85 After all, **Congress could specify a prodelegation/prodeference policy** [\*1253] **most of the time as well**. (In fact, it has repeatedly done so. n86) **The more precise question is which entity is better suited to interpret a legislative act of some ambiguity, when international law principles would yield an answer that restrains the executive branch.** Once the question is properly framed, much of Posner and Sunstein's challenge to the status quo falls out. Most crucially, **they fail to account for a dynamic statutory process** **- through which mistakes** (if any) **made by courts in the area can be corrected by the legislature**. **Such legislative corrections can take place in both the statutory and the treaty realm**. **If a court reads a statute in light of international law principles and Congress disagrees with those principles, it can rewrite the statute**. And **if a court reads a treaty to constrain the executive in a way Congress does not like, it can trump the treaty**, in whole or in part, **with a statute under the "last-in-time" rule**. n87 More fundamentally, **the Senate can define the role of courts up front - during the ratification process - by attaching to the instrument of ratification specific reservations, declarations, or understandings concerning the judicial enforceability of the treaty**. n88 With a stylized account that criticizes the relative competence of the judiciary, **Posner and Sunstein make it appear that a judicial decision in foreign affairs is the last word**. But **that set of events would rarely, if ever, unfold in this three-player game**. **If the courts err in a way that fails to give the executive enough power, Congress will correct them**. Surely **national security is not an area rife with process failures.** In that sense, **current law** works better than the Posner and Sunstein proposal because it **forces democratic deliberation before international law is violated.** For this reason, **it obscures more than it illuminates to say that "the courts, and not the executive, might turn out to be the fox."** n89 **Such language assumes** [\*1254**] a stagnant legislative process, so that the choice is "court" versus "executive," when the real choice is really "court + Congress**." That is to say, **if the courts grab power in a way that undermines the executive, Congress can correct them.** **The relevant calculus turns on which type of judicial error is more likely to be resolved, one in which the court wrongly sides with the President** (in which case Congress would have to surmount the veto) **or one in which the court wrongly sides against the President** (in which case the veto would be unlikely to be a barrier to corrective legislation). Recall that Posner and Sunstein are not addressing their argument to constitutional holdings by courts, but statutory ones that are the subject of Chevron deference. **There is much to criticize when courts declare government practices unconstitutional in the realm of foreign affairs, as those practices cannot then be resuscitated by the legislature** absent a constitutional amendment. But **when a court's holding centers on a statutory interpretation, the dynamic legislative process ensures that the judiciary will not have the last word.** Indeed, in this statutory area, **the risks of judicial error are asymmetric** - that is, **judicial decisions that side with the President are far less likely to be the subject of legislative correction than those that side against him.** While contemporary case law and theory have not taken the point into account, we believe that they provide a powerful reason to reject Posner and Sunstein's proposal. Our claim centers on the President's veto power and how **the structure of the Constitution imposes serious hurdles when Congress tries to modify existing statutes to restrict presidential power. Suppose that**, for example, **the President asserts that the D**etainee **T**reatment **A**ct, n90 sponsored by Senator John McCain and others to prohibit the torture of detainees, **does not forbid a particular practice**, such as waterboarding. **A group of plaintiffs**, in contrast, **argue that standard principles of international law and treaties ratified by the Senate forbid waterboarding**, and that these principles require reading the statute to forbid the practice. **Now imagine that the matter goes to the Supreme Court. The risks from judicial error are not equivalent. If the Court sides with the plaintiffs, the legislature can** - presumably with presidential encouragement - **modify the statute to permit waterboarding, provided that a bare majority of Congress agrees**. **The [\*1255] prospect of legislative revision explains why many of the criticisms of the Supreme Court's involvement in the war on terror thus far are entirely overblown. n91 Now take the other possibility** - that **the Court sides with the President**. In such a case, **it is virtually impossible to alter the decision**. **That would be so even if everyone knew that the legislative intent at the time of the Act was to forbid waterboarding**. **Even if**, after that Court decision, **Senator McCain persuaded every one of his colleagues in the Senate to reverse the Court's interpretation of the Detainee Treatment Act and to modify the Act to prohibit waterboarding, the Senator would also have to persuade a supermajority in the House of Representatives.** After all, **the President would be able to veto the legislation, thus upping the requisite number of votes necessary from a bare majority to two-thirds.** And **his veto power functions ex ante as a disincentive even to begin the legislative reform process, as Senators are likely to spend their resources and time on projects that are likely to pass. n92** So **what Posner and Sunstein seek is not a simple default rule, but one with a built-in ratchet in favor of presidential power**. **The President can take, under the guise of an ambiguous legislative act, an interpretation that gives him striking new powers, have that interpretation receive deference from the courts, and then lock the interpretation into place for the long term by brandishing his veto power.** For authors who assert structural principles as [\*1256] their touchstone, Posner and Sunstein's omission of the veto is striking and provides a lopsided view of what would happen under their proposal.

**Heg DA: A2 “Battlefield”**

**Rule of law on the battlefield is key to 21st century warfighting—COIN operations, allied efforts, and asymmetric threats all require a new approach**

**Bahar 09** (Michael, Lieutenant in the U.S. Navy Judge Advocate General’s (“JAG”) Corp and an adjunct professor at NYU’s Wilf Family Department of Politics, January 2009, "As Necessity Creates The Rule: Eisentrager, Boumediene, And The Enemy"How Strategic Realities Can Constitutionally Require Greater Rights For Detainees In The Wars Of The Twenty-First Century" Journal of Constitutional Law) https://www.law.upenn.edu/journals/conlaw/articles/volume11/issue2/Bahar11U.Pa.J.Const.L.277(2009).pdf

As the Army and Marine Corps' own doctrine now makes clear, **military necessity in** counterinsurgency ("**COIN**") **campaigns** of the type fought in Iraq and Afghanistan **now require** "[**establishing** the **rule of law**" over there, **as well as** die **impartial application and respect for the law in the U**nited **S**tates. As one of its key "unsuccessful practices" of counterinsurgencies, the Field Manual lists: "Ignore peacetime government processes, including legal procedures." **The Field Manual** also **wisely warns that** "[a]ny **human rights abuses or legal violations by U.S. forces quickly become known throughout the local populace and eventually around the world**." **These actions "undermine" the war effort**, both in the "long- and short-term.""1 Each of the major U.S. Supreme Court decisions on the extension of rights to enemies have thus far turned on the dangers involved in extending rights, even while they more recently have resisted at- tempts to curtail those rights. It has been left to the dissents, as in Yamashita, to sound the alarm of what will happen when rights are not extended: The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. Even the Israeli Supreme Court, which upheld restrictions on its military despite powerful arguments of necessity, acknowledged that the restrictions it was imposing handcuffed the military. ' "That is the fate of democracy," Justice Barak wrote in a 1999 case involving interrogation methods, which he then cited in a 2007 case involving targeted killings.'\*' "[I]n [democracy's] eves not all means are per-mitted, and . .. not all the methods used by her enemies are open." At times, "democracy fights with one hand tied behind her back."19" Justice Barak comes closest to realizing the affirmative value of law, but his peroration stops short of recognizing the positive pragmatics or the strategic value of law: Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her spirit, and allow her to overcome her difficulties. **The Field Manual**, written by military officers including the general who would go on to lead the U.S. war in Iraq and would ultimately be selected to assume military responsibility over the entire region, **demonstrates that upholding the law not only reminds the counterin-surgents of who they are and what they are fighting for, but it accomplishes a strategic imperative. American generals are not alone in this view.** For example**, British general** Sir Rupert **Smith**, former commander of the British Armoured Division in the first Gulf War in 1991 and later the leader for UNPROFOR, the U.N. Protection Force in Bosnia, **states that "if we are to operate amongst the people . . . we must do so within the law. To do otherwise is to attack the essence of our own strategic objective**, which is to establish and uphold the law. A. Lawyers as Tactical Commanders? **Legal adherence**, as many prominent commentators have argued, **does not necessarily attach a yoke on America's power**. In his Foreign Affairs review of General Wesley Clark's book on the Balkan Wars, Richard Betts, for example, decried the role of law and lawyers in the Kosovo campaign as well as in military interventions in general.'\* He asserts that "[t]he hyperlegalism applied to NATO's campaign made the conflict reminiscent of the quaint norms of premodern war."200 Further, he alleges that "lawyers constrained even the preparation of options for decisive combat" and declares: **One of the most striking features of the Kosovo campaign**, in fact, **was the remarkably direct role lawyers played in managing combat operations**—to a degree unprecedented in previous wars. . . . The role played by lawyers in this war should also be sobering—indeed alarming—for devotees of power politics who denigrate the impact of law on international conflict. . .. . . . NATO's lawyers . . . became, in effect, its tactical commanders." In his thoughtful and balanced analysis of "lawfare"—i.e., the use of law as a weapon of war against the United States—Major General Charles Dunlap is less pessimistic about the law of armed conflict's ability to limit U.S. power, but he concludes that while the role of the law and lawyers in the U.S. military exists for practical and altruistic reasons, "there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself." While law no doubt constrains the tactical use of American power—and America's enemies certainly can use its respect for the law against it in the short term—the field Manual demonstrates that **the top military commanders now understand law to be essential to maximizing the strategic use of American power in twenty-first century conflicts. Force is still necessary, but it must be used with restraint, discrimination, and in strict compliance with the laws of war, or it "risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge**.""" While the Field Manual is not the last word in twenty-first century military strategy,"'" and while warfare will always evolve and great power struggles will rise again, **the time for knee-jerk antipathy towards law** on a stra-tegic level **is over.** B. The Fuller Range of Benefits And even the Field Manual itself does not fully account for the full range of benefits adherence to law provides. For example, **law and legal procedures force actors to think; they allow actors to practice pre-planned responses or "PPRs"; they force actors, including the President, to internalize costs of their actions; and of course, they restrain all actors from going too far. Law is also a trip wire, signaling to actors that some value is worth protecting, and if they continue on that path, it better be for a good reason. Historically, this country has looked back in shame and horror at some of its wartime excesses, be they the internment of Japanese-Americans** during World War II" **'or the** thousands of Americans who lost their livelihoods, reputations, and even freedom during the **McCarthy era. Courts could have prevented these** baleful and counterproductive **events by interposing themselves more to enforce the appropriate legal hurdles**.""7 Finally, while high-level Bush administration lawyers like David Addington and influential commentators like Robert KaganJIW still view "law and force as antonyms,"\* and while many still assert that the United States can operate independently of allies, the realities of Iraq. Afghanistan, and the overall war on terror have proven otherwise. **Adherence to the law is key to obtaining partners. As** Stephen **Walt has** persuasively **argued, "[w]hen foreign populations disapprove of U.S. policy and are fearful of U.S. dominance, their governments are less likely to endorse Washington's initiatives and more likely to look for ways to hinder them**."\* The experiences of Matthew Waxman, one of the Bush administration's key national security lawyers and now a professor at Columbia Law School, reinforce this point. Using the Guantanamo Bay detention facility as an example, he writes that the "widespread perception that it exists simply to keep detainees forever beyond the reach of the law" is "a drag on America's ... global counterterrorism efforts," hampering "cooperation with our friends on such critical counterterrorism tasks as information sharing, joint military operations and law enforcement." \* "I know," he continues, "[a]s a State Department official, I often spent valuable time and diplomatic capital fruitlessly defending our detention practices rather than fostering counterterrorism teamwork.""'\* **The U**nited **S**tates **may be able to topple a country by itself with shock and awe, but it cannot win the peace, or keep its borders safe, without international involvement.**" Germany's summer 2007 arrest of Islamic militants allegedly planning to target the United States demonstrates this point. ' The Field Manual and **high-level national security documents also recognize the essential force multiplier of coalition involvement.** As President George W. Bush's National Strategy for Maritime Security rightly concludes: [E]vcn an **enhanced national effort is not sufficient**. The challenges that remain ahead for the United States, the adversaries we confront, and the environment in which we operate compel us to strengthen our ties with allies and friends and to seek new partnerships with others. Therefore, inteniational cooperation is critical to ensuring that lawful private and public activities in the maritime domain are protected from attack and hostile or unlawful exploitation. **Maximizing coalition involvement requires maximizing adherence to U.S. and international law.** V. 1 HE BATTLEFIELD PRESUMPTION With the Field Manual, law and strategy are now officially and doc-trinallv aligned. In Guantanamo Bay, facts of sovereignty and modern technology' indicate that there is nothing impractical or anomalous about at least giving detainees the right to contest their status as enemies. The Constitution requires that courts recognize strategic and pragmatic realities and, where appropriate, expand the application of certain constitutional provisions to U.S. enemies and those the government captures in the global struggle against terrorism. But this is not to say that the constitutional extension should be in constant flux, or that a court should scrutinize the nature of a conflict too soon or interject itself too much. Rather, this Article posits a careful battlefield presumption within the context of a general wartime jurisprudence. Instead of debating whether law should apply in the "new paradigm," as Justice Thomas puts it,2" it is better to design appropriate rules to maximize the chances for peace based on the best possible American terms, which includes optimizing the extension of constitutional principles. Boumediene explicitly opened the door for this battlefield jurisprudence. Justice Kennedy stated: In cases involving foreign citizens detained abroad by the Executive, it likelv would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. At the far end of the spectrum, enemies captured on the battlefield should have a constitutional right to contest their status as enemies and combatants."1\* But **even battlefield captures and seizures should not necessarily be subject to a categorical denial of all other constitutional privileges since**, as the top military officers make clear, **U.S.** militan1 **policy is better off with a certain degree of law.** Rather, precedent dictates that the United States should adjust the extension of rules based on the strategic and practical implications of doing so. And, **as the detained individual moves away from the constitutional, state-based understanding of an enemy, his level of due process protections should increase the further away he is from the battlefield.** Professors Fallon and Meltzer have produced a magisterial work which provides a sound analytical framework for sorting out "the tangle of jurisdictional, substantive, procedural, and scope-of-review issues that habeas cases often present"" Much of that framework turns on the individual's status as an alien or citizen, and on his or her place of capture and detention. Methodologically, their article also advocates a common law-like approach to habeas adjudication under which courts must exercise responsible judgment in adapting both statutory and constitutional language to "novel circum- nXtl stances. What they do not fully appreciate, however, is that a common lawlike approach is not necessary because the original understanding of the Constitution and the precedent permit strategic and pragmatic assessments. Decision-making in this context comes closer to what Fallon and Meltzer call the "Agency Model,""" as strictly "applying the law, not making it\*\*"" permits the evaluation of pragmatic and strategic circumstances. Fallon and Meltzer also do not fully appreciate the paradigmatic shift in the strategic realities which can accommodate a larger expan- sion of rights than they anticipate. They view Eisentrager as rightly decided so long as it stands for the proposition that aliens detained abroad "generally" have no constitutional right to habeas, but that the possibility is left open that "a small subset of aliens might have sufficient contacts with the United States to possess both substantive constitutional rights and a constitutional right of access to a court to assert those rights."'4 As an extension of that argument, they proffer a batdefield rule with regard to citizens. They write that "[wjithout attempting to anticipate even' imaginable scenario, we would follow this general principle: the central distinction for purposes of appraising the legality, and ultimately the constitutionality, of executive de-tendons of American citizens is between battlefield and nonbattle-field contexts, not between seizures at home and those abroad.""5 Bowing to the stories of battlefield exigencies, they posit that "[i]n all nonbattlefield cases, seizure and detention of citizens should rest on evidence that has been carefully assembled and is reasonably capable of being maintained."' But this principle can be extended even further. **Fallon and Meltzer operate under the implicit assumption that the military is distinct from the police force, in both function and capacity.** Their position that, in "all nonbatdefield cases," the seizure and detention of citizens should rest on evidence that has been carefully assembled and is reasonably capable of being maintained, implies that such careful assembly is not possible in the military context. "**Imagine moving detainees, witnesses, or lawyers around in Baghdad today to develop evidence for a habeas proceeding**,"227 **they ask. But this sharp divide between military and police actions is not necessarily true on the twenty-first century battlefield. As the Field Manual states: "In counterinsurgencies, warfighting and policing are dynamically linked**.""" **While there is a clear difference between warfighting and policing**. . . [**counterinsurgency] operations require that every unit be adept at both and capable of moving rapidly be- tween one and the other.**wB9 The Field Manual also reminds operators that every insurgent is a "criminal suspect[]" and thus evidence must be properly documented and preserved.\*\*0 **In the asymmetric battlefield of this century, the traditional military functions are being increasingly fused with the police functions, even outside of the strict counterinsurgency context.** As I have demonstrated elsewhere, **the Navy, for example, is being increasingly called upon to police the seas against pirates, maritime terrorists, and traffickers in illicit materials** by sea."\*1 **Given this reality**, and drawing on my own experiences capturing and detaining Somali pirates, I have argued that **the U**nited **S**tates **should design procedural rules for the at-sea or battlefield capture rather than either assume**, or take the position, **that no procedural rules apply**."\*" While the Patriot Act\*\*\* is highly controversial, and many of its provisions have not been fully tested in the courts, it nevertheless demonstrates that the United States is alreadv tailoring procedural rules to accommodate certain realities. For example, the Patriot Act authorizes the Attorney General to detain any alien whom he "has reasonable grounds to believe" is "described in" certain sections of United States Code."1 These code sections "describe" aliens who: (1) "seek[] to enter the United States" to "violate any law of the United States relating to espionage or sabotage" or to use "force, violence, or other unlawful means" in opposition to the government of the United States; (2) have "engaged in a terrorist activity;" or (3) the Attorney General believes are "likely to engage after entry in any terrorist activity," have "incited terrorist activity," are "representative[s]" or "member[s] of a terrorist organization" or are "representative[s]" of a group that "endorses or espouses terrorist activity," or have "received military-type training" from a terrorist organization.m But, it requires that the Attorney General step through procedural checks. The Act expressly prohibits unlimited indefinite detention and requires the Attorney General to begin removal proceedings "not later than 7 days after the commencement of such detention.""\*" If a terrorist alien's removal is "unlikely in the reasonably foreseeable future," he may be detained for additional periods of up to six months if his release will "threaten the national security of the United States."2" Regardless of one's views on the overall constitutionality (or advisability) of the Patiiot Act, it is worth pointing out that many rules of criminal procedure are prophylactic rules designed to protect the underlying constitutional provision. They can be adjusted. Take, for example, the rules requiring a warrant prior to arrest, or a forty-eight-hour probable cause determination subsequent to an arrest without a warrant. These rules were designed to ensure the full protection of the Fourth Amendment." In the military, these rules are slightlv different to reflect military necessities, but they are still designed to protect an individual's Fourth Amendment rights. The military has a fortv-eight-hour probable cause determination,"\*\* a seventy-two-hour requirement for a command memorandum detailing the probable cause for pretrial restraint,"10 and the initial review officer's ("IRO's") independent determination of probable cause."" **If the rules can be constitutionally adjusted to reflect military necessities at home, they can be adjusted to reflect military necessities on the expanding battlefield.** After all, in addition to rejecting the proposition that a probable cause hearing is only prompt under Cer-stein when provided "immediate [ly]" upon completion of the "administrative steps incident to arrest,""'" **McLaughlin allows the Government to demonstrate "the existence of a bona Fide emergency or other extraordinary circumstance" which caused it to hold a probable cause determination beyond forty-eight hours**."4\* The fact that a de-tendon may take place on the high seas, for example, could qualify as an "extraordinary circumstance." Accordingly, **the military has a specific "at sea" exception to its normal procedural requirements."** Most importantly, however, **there is a precise constitutional provision which specifically authorizes the Congress not only to declare war, to wage imperfect or limited warfare via letters of marque and reprisal**,"15 **but also to "make Rules concerning Captures on Land and Water.** Fallon and Meltzer are correct that exigencies and practical considerations should afford a more tailored, if not tiered, jurisprudence. Their argument, however, misses the fact that this tailoring does not require a shift to a common law-like approach to judging because it is already required by the Constitution and such precedent as Eisentrager, Milligan (which also confirms the Framers' original, pragmatic intentions), and McLaughlin. Their argument also misses the practical and strategic shift in which battlefield realities now increasingly require greater expansion of rights. Matthew **Waxman has correctly called for an end to the debate between "those who say that only traditional habeas corpus rights to a fair hearing can sort out these cases and those who say that nonciti-zen enemy fighters captured abroad in wartime have never been entitled to their day in court." We would "all be better off," he urges, "forging a broad agreement about the minimum acceptable conditions for any long-term detention process, firmly within the rule of law**."" The positive pragmatic principle is the vehicle through which we can forge this new agreement, firmly within the rule of law.

**Iraq and Vietnam disprove the link**

**National Institute of Military Justice**, Amicus Brief, Rasul v. Bush, 2003 U.S. Briefs 334, January 14, 20**04**, p. 12-13.

**The experience of U**nited **S**tates **armed forces** in combat **belies the Government's** expressed **concern that judicial review of the claims of combatants "would interfere with the President's authority** as Commander in Chief." (Opp. at 11) **Courts-martial, prisoner status determinations, and other legal processes have been a regular adjunct of American wartime operations** throughout the **period since Eisentrager. During** the **Vietnam** era, **the U**nited **S**tates **Army held** approximately **25,000 courts-martial in the war theater.** In 1969 alone, 7691 of these were special and general courts-martial, which are trials presided over by a military judge in which the defendant is entitled to a panel equivalent to a jury as provided in the UCMJ. Frederic L. Borch, Judge Advocates In Combat: Army Lawyers in Military Operations from Vietnam to Haiti 29 (2001). Another 1146 special and general courts-martial were held in Vietnam by the Marine Corps in 1969. In addition, still only in 1969, the Army held 66,702 less formal disciplinary proceedings under Article 15 of the UCMJ, 10 U.S.C. § 815. Id. . The United States Military Assistance Command in Vietnam enforced strict requirements for the classification of captured personnel, including providing impartial tribunals to determine eligibility for prisoner of war status. Military Assistance Command Vietnam, Directive No. 381-46, Annex A (Dec. 27, 1967) and Directive No. 20-5 (Sept. 21, 1966 as amended Mar. 15, 1968.) . During the 1991 Persian Gulf War, the status of approximately 1200 detainees was determined by "competent tribunals" established for that purpose. Dep't of Defense, Final Report to Congress: Conduct of the Persian Gulf War 578 (1992); Army Judge Advocate General's School, Operational Law Handbook 22 (O'Brien ed. 2003). . At this very time, **U**nited **S**tates **forces in Iraq, a theater of actual combat, are providing impartial tribunals** compliant with Article 5 of the GPW to adjudicate the status of captured belligerents. Although details are difficult to come by, American commanders of forces in Iraq acknowledge that as many as 100 prisoners there have had their status adjudicated by impartial tribunals under Article 5 of the GPW.

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#### indefinite detention is detention without trial

US LEGAL 13 [last modified, US Legal Forms Inc., Indefinite Detention Law and Legal Definition http://definitions.uslegal.com/i/indefinite-detention/]

Indefinite detention is the practice of detaining an arrested person by a national government or law enforcement agency without a trial. It may be made by the home country or by a foreign nation. Indefinite detention is a controversial practice, especially in situations where the detention is by a foreign nation. It is controversial because it seems to violate many national and international laws. It also violates human rights laws. Indefinite detention is seen mainly in cases of suspected terrorists who are indefinitely detained. The Law Lords, Britain’s highest court, have held that the indefinite detention of foreign terrorism suspects is incompatible with the Human Rights Act and the European Convention on Human Rights. [Human Rights Watch] In the U.S., indefinite detention has been used to hold terror suspects. The case relating to the indefinite detention of Jose Padilla is one of the most highly publicized cases of indefinite detention in the U.S. In the U.S., indefinite detention is a highly controversial matter and is currently under review. Organizations such as International Red Cross and FIDH are of the opinion that U.S. detention of prisoners at Guantanamo Bay is not based on legal grounds. However, the American Civil Liberties Union is of the view that indefinite detention is permitted pursuant to section 412 of the USA Patriot Act.

reasonability- wpa

#### Reasonability

Mark J. **Yost 89** associated with Severstal Dearborn, LLC, Georgetown Law Journal December, 1989 78 Geo. L.J. 415 NOTE: Self Defense or Presidential Pretext? The Constitutionality of Unilateral Preemptive Military Action. Lexis

[\*415] The boundary between the warmaking powers of congress and the President defies clear definition. n1 The Constitution explicitly grants warmaking authority to both the legislative and executive branches, but it often leaves the scope of their respective powers ambiguous. This ambiguity has created what one commentator has described as "constitutional gaps" n2 in the allocation of war powers -- areas of interest to both branches but exclusively within the purview of neither. The confusion caused by these gaps is aggravated by a general overlap in war powers -- an overlap that sometimes causes both branches to claim authority over a given issue. n3 Principled attempts to resolve these disputes are complicated by a separation of powers scheme that relies on interbranch tension for sound war powers decisionmaking. n4 This [\*416] interbranch tension fuels the political debates that ultimately decide what the war powers mean. n5

### LOAC

#### alt causes prove resilience

**Boucher 98** (Doug, "Not with a Bang but a Whimper," Science and Society, Fall, http://www.driftline.org/cgi-bin/archive/archive\_msg.cgi?file=spoon-archives/marxism-international.archive/marxism-international\_1998/marxism-international.9802&msgnum=379&start=32091&end=32412)

The political danger of catastrophism is matched by the weakness of its scientific foundation. Given the prevalence of the idea that the entire biosphere will soon collapse, it is remarkable how few good examples ecology can provide of this happening m even on the scale of an ecosystem, let alone a continent or the whole planet. Hundreds of ecological transformations, due to introductions of alien species, pollution, overexploitation, climate change and even collisions with asteroids, have been documented. They often change the functioning of ecosystems, and the abundance and diversity of their animals and plants, in dramatic ways. The effects on human society can be far-reaching, and often extremely negative for the majority of the population. But one feature has been a constant, nearly everywhere on earth: life goes on. Humans have been able to drive thousands of species to extinction, severely impoverish the soil, alter weather patterns, dramatically lower the biodiversity of natural communities, and incidentally cause great suffering for their posterity. They have not generally been able to prevent nature from growing back. As ecosystems are transformed, species are eliminated -- but opportunities are created for new ones. The natural world is changed, but never totally destroyed. Levins and Lewontin put it well: "The warning not to destroy the environment is empty: environment, like matter, cannot be created or destroyed. What we can do is replace environments we value by those we do not like" (Levins and Lewontin, 1994). Indeed, from a human point of view the most impressive feature of recorded history is that human societies have continued to grow and develop, despite all the terrible things they have done to the earth. Examples of the collapse of civilizations due to their over- exploitation of nature are few and far between. Most tend to be well in the past and poorly documented, and further investigation often shows that the reasons for collapse were fundamentally political.

### COMMISSSIONS

**Judicial review has been in place for fifty years with zero negative effect on military operations**

**National Institute of Military Justice**, Brief for the National Institute of Military Justice as Amicus Curiae in Support of Petitioners, Ronald W. Meister, Counsel of Record, in Fawzi Khalid Abdullah Fahad Al Odah, et al., Petitioners, v. United States of America, et al., Respondents. Shafiz Rasul, et al., Petitioners, v. George W. Bush, et al., Respondents, Nos. 03-334, 03-343, 2003 U.S. Briefs 334; 2004 U.S. S. Ct. Briefs LEXIS 20, January 14, 20**04**, LN.

The Government relies on Johnson v. Eisentrager for the proposition that upholding jurisdiction over prisoners held by the United States military at Guantanamo Bay will interfere with the exercise of the executive's power by "fettering...field commander[s]." (Brief for the Respondents in Opposition to the petitions for certiorari ("Opp.") at 11) The National Institute of Military Justice submits this brief to emphasize that, **in the half-century since Eisentrager, both domestic military law and the international law of war have advanced, increasing the role of the judiciary in respect of military matters, in war as well as in peace**. A well-developed body of law regarding individuals seized during hostilities has been enforced regularly by impartial tribunals in past conflicts, and is being applied today by United States armed forces in combat. **The application of the rule of law to individuals seized during hostilities is not inconsistent with the Executive Branch's exercise of its war powers**, either in theory or in the practice of the United States over the past fifty years. Nor is there anything novel about issuing a writ of habeas corpus on the application of an individual confined by the military at Guantanamo Bay, something the highest court of the military did in Burtt v. Schick, 23 M.J. 140 (1986).

**Military effectiveness claims empirically denied**

**Al Odah**, Brief for Petitioners, Al Odah v. US, 2003 U.S. Briefs 334, January 14, 20**04**, LN.

**The government bluntly declares that judicial review would be "very damaging to the military's ability to win the war,"** that any court involvement would "directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters," and that judicial review would "no doubt be highly comforting to enemies of the United States." G. Br. 42, 43. **The Executive has made similar claims throughout our nation's history, and they have consistently been rejected**. Although the Executive is entitled to considerable discretion in exercising military authority, this Court has long understood that "what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."