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#### Gray area now on domestic arrests skews lower courts and funnels suspects into the civilian system

Elsea 13 (Detention of U.S. Persons as Enemy Belligerents Jennifer K. Elsea Legislative Attorney July 25, 2013 Congressional Research Service http://www.fas.org/sgp/crs/natsec/R42337.pdf)

A majority of the Hamdi Court appears to have accepted the view that, in principle, U.S. citizens who join an enemy armed force and engage in hostilities against the United States may be treated as enemy belligerents on the same basis that alien enemy belligerents may be so treated under the laws and usages of war.28 It seems to follow that the same criteria and definition used to determine the status of aliens who are believed to be enemy belligerents would apply equally to U.S. citizens. Thus, there is little reason to suppose that the contours of the legal category of persons subject to detention, as it has been developed by the lower courts interpreting Hamdi, 29 by the executive branch, and most recently, by Congress, will differ according to citizenship. It may be the case that U.S. citizenship will entitle citizen-detainees to more procedural rights in contesting the factual basis for their detention than alien detainees have enjoyed. Moreover, there is no dispute that citizens detained in U.S. custody abroad may seek habeas review, and Congress has not stripped the courts of jurisdiction over non-habeas cases by U.S. citizens detained as enemy belligerents, as it has done with respect to aliens,30 nor has it established jurisdiction in military commissions to try citizens for war crimes.31 On the other hand, lower courts have applied the plurality opinion in Hamdi, which decision expressly deals with the rights of a U.S. citizen-detainee, as a baseline for determining the procedural rights due to aliens detained at Guantanamo in habeas proceedings, apparently without requiring proof of the existence of “exigent circumstance.”32 Assuming that the Supreme Court jurisprudence establishes that citizens accused of participating in hostilities against the United States may be treated the same as similarly situated aliens, the seemingly relaxed procedural rights and evidentiary burden applicable in the Guantanamo cases may also apply to any habeas cases involving citizen-detainees.33 The Supreme Court has not yet addressed on the merits whether an alien lawfully present in the United States can be detained under the authority of the AUMF based on activity conducted there. A noncitizen could not invoke the Non-Detention Act, but might nevertheless be able to contest whether the government’s facts support an enemy combatant designation. After all, the Hamdi plurality suggested there may be a distinction based on the fact that that case involved a capture on a foreign battlefield. 34 At about the same time that it issued Hamdi and Padilla, the Court denied certiorari to review the case of Ali Saleh Kahlah al-Marri, a Qatari student who had been arrested in Peoria, IL in late 2001 but declared an “enemy combatant” prior to trial and transferred to military custody in South Carolina. His petition for habeas corpus was dismissed for lack of jurisdiction by the U.S. Court of Appeals for the Seventh Circuit.35 Both al-Marri and Padilla filed new petitions for habeas corpus in the Fourth Circuit, meaning that the issue of detention authority with respect to citizens and aliens within the United States would have to be relitigated there before the Supreme Court would have another opportunity to address it. As we explain more fully below, the Fourth Circuit ultimately confirmed both detentions, but without establishing a conclusive test for determining which persons arrested within the United States are subject to detention under AUMF authority. Supreme Court review was avoided in both cases after the government filed charges against the petitioners and moved them into the civilian court system. The only opinion left standing, that which affirmed the detention of Jose Padilla on grounds very different from the original allegations that had been addressed by the Second Circuit, does little to expand the understanding of detention authority beyond that which Hamdi already established, that is, that detention is justified in the case of a person who fought alongside enemy forces against the United States on a foreign battlefield.

### Plan

#### The United States federal government should restrict the war powers authority of the President of the United States to assert, on behalf of the United States, immunity from judicial review through a statutory cause of action allowing civil suits brought against the United States by those unlawfully injured by indefinite detention

### Judicial Modeling

#### Law enforcement shift through right to compensation key to implement European derogation model

Cassel 8 (Journal of Criminal Law and Criminology Volume 98 Issue 3 Article 3 Spring 2008 Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law Douglass Cassel Professor of Law; Director, Center for Civil and Human Rights, Notre Dame Law School. http://www.law.northwestern.edu/journals/jclc/backissues/v98/n3/9803\_811.Cassel.pdf)

VIII.CONCLUSION Because of the difficulties in relying exclusively on criminal prosecution to confront the threat of terrorism, the United States, United Kingdom and other States have grappled with developing systems of preventive detention of suspected terrorists for security purposes. These systems have not distinguished themselves as exemplars of the rule of law. If prolonged or indefinite security detention is to be permitted, far greater attention must be paid to the substantive and procedural safeguards of international human rights and humanitarian law. Except in the member states of the Council of Europe, where security detention is allowed, if at all, only by derogation from the right to liberty, IHRL allows security detention, provided it is not arbitrary or discriminatory, is based on grounds and procedures previously established by law that meet minimum procedural requirements, does not entail inhuman treatment of detainees, and is no more restrictive of liberty or long-lasting than required to meet the exigencies of security. In addition, unlawfully detained persons have a right to be compensated. Security detention must also comply with other provisions of international law where applicable, in particular IHL, which imposes similar requirements, with the important addition that IHL generally prohibits detention of foreign nationals in international armed conflict unless “absolutely necessary” or “necessary, for imperative reasons of security.” IHRL would do well to follow the European model, which permits security detention, if at all, only by derogation.234 That approach makes clear that security detention is an extraordinary device to be used (if at all) only in exceptional circumstances. The formalities of having to declare and defend states of emergency235 in order to derogate also ensure that conscious, visible attention by government officials, lawmakers and judges will focus on whether there is truly a need for security detention in a given situation and, later, on whether the exigencies truly continue. Under a derogation framework, this visible attention may be focused at three distinct stages: when the legislature authorizes and designs a system of preventive detention; when the executive formally invokes it in an emergency; and when the independent judiciary considers, on a case-by-case basis, whether preventive detention of a particular suspected terrorist is warranted. Whether security detention is done under the European model, allowing it only by derogation if at all, or is authorized without derogation as currently allowed by IHRL outside Europe, two central questions merit further consideration. First, what is the evidentiary basis required to justify security detention? Given the fundamental liberty interests at stake in a prolonged detention, the standard for preventive detention should be no less than a preponderance of the evidence. Second, should security detention outside the context of armed conflict be allowed at all? Even taking into account that criminal justice systems encounter extreme difficulties in coping with terrorism, is preventive detention always, or ever, necessary? Might not a system of alternative restraints suffice, including house arrest, electronic ankle bracelets and the other devices used in recent years in Britain? Acknowledging that some suspects have managed to escape those restraints, can the devices be finetuned to be more efficient? If security detention is to be allowed, it must be only with the greatest caution and restraint. Granting executive or military officials authority, on the basis of secret and often flawed intelligence information and subject only to limited judicial review, to deprive persons of their liberty based on grounds of security alone, is dangerous to liberty and to the rule of law. In many countries political dissidents may be deemed security threats. Even in democracies under the rule of law, zealous officials may be too quick to conclude that someone is a security threat on the basis of shaky intelligence information. If security detention is not prohibited altogether, its use must be kept to an absolute minimum, and subjected to rigorous and redundant procedural safeguards. As a plurality of the United States Supreme Court recently warned: [A]s critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.236

#### Detention policies specifically skew US-EU counterterror cooperation—shared values and recruitment

Archick 13 (U.S.-EU Cooperation Against Terrorism Kristin Archick Specialist in European Affairs September 4, 2013 Congressional Research Service http://www.fas.org/sgp/crs/row/RS22030.pdf)

Archick 13 (U.S.-EU Cooperation Against Terrorism Kristin Archick Specialist in European Affairs September 4, 2013 Congressional Research Service http://www.fas.org/sgp/crs/row/RS22030.pdf)

Detainee Issues and Civil Liberties U.S. and European officials alike maintain that the imperative to provide freedom and security at home should not come at the cost of sacrificing core principles with respect to civil liberties and upholding common standards on human rights. Nevertheless, the status and treatment of suspected terrorist detainees has often been a key point of U.S.-European tension. Especially during the former George W. Bush Administration, a number of U.S. policies were subject to widespread criticism in Europe; these included the U.S.-run detention facility at Guantánamo Bay, Cuba; U.S. plans to try enemy combatants before military commissions; and the use of “enhanced interrogation techniques.” The U.S. practice of “extraordinary rendition” (or extrajudicial transfer of individuals from one country to another, often for the purpose of interrogation) and the possible presence of CIA detention facilities in Europe also gripped European media attention and prompted numerous investigations by the European Parliament, national legislatures, and judicial bodies, among others. Some individuals held at Guantánamo and/or allegedly subject to U.S. rendition have been European citizens or residents. Many European leaders and analysts viewed these U.S. terrorist detainee and interrogation policies as being in breach of international and European law, and as degrading shared values regarding human rights and the treatment of prisoners. Moreover, they feared that such U.S. policies weakened U.S. and European efforts to win the battle for Muslim “hearts and minds,” considered by many to be a crucial element in countering terrorism. The Bush Administration, however, defended its detainee and rendition polices as important tools in the fight against terrorism, and vehemently denied allegations that such policies violated U.S. human rights commitments. Bush Administration officials acknowledged European concerns about Guantánamo and sought agreements with foreign governments to accept some Guantánamo detainees, but maintained that certain prisoners were too dangerous to be released.

#### Damages allowance key to counterterror precedent

Vladeck 13 (Unlawfully Detained by the U.S. Government? Don't Bother Suing. BY STEVE VLADECK professor of law and the associate dean for scholarship at American University Washington College of Law. SECURITY STATES OCTOBER 17, 2013 http://www.newrepublic.com/article/115216/unlawful-detainment-lawsuits-against-us-government-keep-failing)

First, from the plaintiffs’ perspectives, such decisions have the effect, if not the intent, of appearing to validate the government’s conduct—even in cases, like Arar, in which all now agree that the government acted wrongly. As a consequence, the inability to obtain damages relief may well give rise to a form of functional impunity—not just for the offending government officers, but for those who follow in their footsteps, for whom no precedent has been set specifically disclaiming the government’s ability to engage in the same controversial policies in the future. Whereas any number of other mechanisms exist outside the damages context to create forward-looking precedent in non-counterterrorism cases, it may well be damages or bust in these cases.

#### EU judicial standard co-op is crucial to stopping the next US terror attack—logistical and planning bases

Archick 13 (U.S.-EU Cooperation Against Terrorism Kristin Archick Specialist in European Affairs September 4, 2013 Congressional Research Service http://www.fas.org/sgp/crs/row/RS22030.pdf)

The September 11, 2001, terrorist attacks on the United States and the subsequent revelation of Al Qaeda cells in Europe gave new momentum to European Union (EU) initiatives to combat terrorism and improve police, judicial, and intelligence cooperation. The EU is a unique partnership that defines and manages economic and political cooperation among its current 28 member states.1 The EU is the latest stage in a process of European integration begun in the 1950s to promote peace and economic prosperity throughout the European continent. As part of this drive toward further European integration, the EU has long sought to harmonize policies among its members in the area of “justice and home affairs” (or JHA). Efforts in the JHA field are aimed at fostering common internal security measures while protecting the fundamental rights of EU citizens and promoting the free movement of persons within the EU. Among other policy areas, JHA encompasses countering terrorism and cross-border crimes, police and judicial cooperation, border controls, and immigration and asylum issues. For many years, however, EU attempts to forge common JHA policies were hampered by member state concerns that doing so could infringe on their national legal systems and national sovereignty. Insufficient resources and a lack of trust among member state law enforcement agencies also impeded progress in the JHA area. The 2001 terrorist attacks changed this status quo and served as a wake-up call for EU leaders and member state governments. In the weeks after the attacks, European law enforcement efforts to track down terrorist suspects and freeze financial assets—often in close cooperation with U.S. authorities—produced numerous arrests, especially in Belgium, France, Germany, Italy, Spain, and the United Kingdom. Germany and Spain were identified as key logistical and planning bases for the attacks on the United States. As a result, European leaders recognized that the EU’s largely open borders and Europe’s different legal systems enabled some terrorists and other criminals to move around easily and evade arrest and prosecution. For example, at the time of the 2001 attacks, most EU member states lacked anti-terrorist legislation, or even a legal definition of terrorism. Without strong evidence that a suspect had committed a crime common to all countries, terrorists or their supporters were often able to avoid apprehension in one EU country by fleeing to another with different laws and criminal codes. Moreover, although suspects could travel among EU countries quickly, extradition requests often took months or years to process. Since the 2001 attacks, the EU has sought to speed up its efforts to harmonize national laws and bring down barriers among member states’ law enforcement authorities so that information can be meaningfully shared and suspects apprehended expeditiously. Among other steps, the EU has established a common definition of terrorism and a list of terrorist groups, an EU arrest warrant, enhanced tools to stem terrorist financing, and new measures to strengthen external EU border controls and improve aviation security. The EU has been working to bolster Europol, its joint criminal intelligence body, and Eurojust, a unit charged with improving prosecutorial coordination in cross-border crimes in the EU. The March 2004 terrorist bombings in Madrid and the July 2005 attacks on London’s metro system injected a greater sense of urgency into EU counterterrorism efforts, and gave added impetus to EU initiatives aimed at improving transport security, impeding terrorist travel, and combating Islamist extremism. In the wake of the Madrid attacks, the EU created the position of Counterterrorist Coordinator. Key among the Coordinator’s responsibilities are enhancing intelligence-sharing among EU members and promoting the implementation of already agreed EU anti-terrorism policies, some of which have bogged down in the legislative processes of individual member states. Following the London attacks, the EU adopted a new counterterrorism strategy outlining EU goals to “prevent, protect, pursue, and respond to the international terrorist threat,” as well as a plan to combat radicalization and terrorist recruitment.2

#### Next nuclear terror attack is extremely likely

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(Zafar Nawaz, “Nuclear/Radiological Terrorism: Myth or Reality?”, Journal of Political Studies, Vol. 19, Issue - 1, 2012, 91:111)

The misperception, miscalculation and above all ignorance of the ruling elite about security puzzles are perilous for the national security of a state. Indeed, in an age of transnational terrorism and unprecedented dissemination of dualuse nuclear technology, ignoring nuclear terrorism threat is an imprudent policy choice. The incapability of terrorist organizations to engineer fissile material does noteliminate completely the possibility of nuclear terrorism. At the same time, the absence of an example or precedent of a nuclear/ radiological terrorism does not qualify the assertion that the nuclear/radiological terrorism ought to be remained a myth. Farsighted rationality obligates that one should not miscalculate transnational terrorist groups — whose behavior suggests that they have a death wish — of acquiring nuclear, radiological, chemical and biological material producing capabilities. In addition, one could be sensible about the published information that huge amount of nuclear material is spread around the globe. According to estimate it is enough to build more than 120,000 Hiroshima-sized nuclear bombs (Fissile Material Working Group, 2010, April 1). The alarming fact is that a few storage sites of nuclear/radiological materials are inadequately secured and continue to be accumulated in unstable regions (Sambaiew, 2010, February). Attempts at stealing fissile material had already been discovered (Din & Zhiwei, 2003: 18). Numerous evidences confirm that terrorist groups had aspired to acquire fissile material for their terrorist acts. Late Osama bin Laden, the founder of al Qaeda stated that acquiring nuclear weapons was a“religious duty” (Yusufzai, 1999, January 11). The IAEA also reported that “al-Qaeda was actively seeking an atomic bomb.” Jamal Ahmad al-Fadl, a dissenter of Al Qaeda, in his trial testimony had “revealed his extensive but unsuccessful efforts to acquire enriched uranium for al-Qaeda” (Allison, 2010, January: 11). On November 9, 2001, Osama bin Laden claimed that “we have chemical and nuclear weapons as a deterrent and if America used them against us we reserve the right to use them (Mir, 2001, November 10).” On May 28, 2010, Sultan Bashiruddin Mahmood, a Pakistani nuclear scientist confessed that he met Osama bin Laden. He claimed that “I met Osama bin Laden before 9/11 not to give him nuclear know-how, but to seek funds for establishing a technical college in Kabul (Syed, 2010, May 29).” He was arrested in 2003 and after extensive interrogation by American and Pakistani intelligence agencies he was released (Syed, 2010, May 29). Agreed, Mr. Mahmood did not share nuclear know-how with Al Qaeda, but his meeting with Osama establishes the fact that the terrorist organization was in contact with nuclear scientists. Second, the terrorist group has sympathizers in the nuclear scientific bureaucracies. It also authenticates bin Laden’s Deputy Ayman Zawahiri’s claim which he made in December 2001: “If you have $30 million, go to the black market in the central Asia, contact any disgruntled Soviet scientist and a lot of dozens of smart briefcase bombs are available (Allison, 2010, January: 2).” The covert meetings between nuclear scientists and al Qaeda members could not be interpreted as idle threats and thereby the threat of nuclear/radiological terrorism is real. The 33Defense Secretary Robert Gates admitted in 2008 that “what keeps every senior government leader awake at night is the thought of a terrorist ending up with a weapon of mass destruction, especially nuclear (Mueller, 2011, August 2).” Indeed, the nuclear deterrence strategy cannot deter the transnational terrorist syndicate from nuclear/radiological terrorist attacks. Daniel Whiteneck pointed out: “Evidence suggests, for example, that al Qaeda might not only use WMD simply to demonstrate the magnitude of its capability but that it might actually welcome the escalation of a strong U.S. response, especially if it included catalytic effects on governments and societies in the Muslim world. An adversary that prefers escalation regardless of the consequences cannot be deterred” (Whiteneck, 2005, Summer: 187) Since taking office, President Obama has been reiterating that “nuclear weapons represent the ‘gravest threat’ to United States and international security.” While realizing that the US could not prevent nuclear/radiological terrorist attacks singlehandedly, he launched 47an international campaign to convince the international community about the increasing threat of nuclear/ radiological terrorism. He stated on April 5, 2009: “Black market trade in nuclear secrets and nuclear materials abound. The technology to build a bomb has spread. Terrorists are determined to buy, build or steal one. Our efforts to contain these dangers are centered on a global non-proliferation regime, but as more people and nations break the rules, we could reach the point where the center cannot hold (Remarks by President Barack Obama, 2009, April 5).” He added: “One terrorist with one nuclear weapon could unleash massive destruction. Al Qaeda has said it seeks a bomb and that it would have no problem with using it. And we know that there is unsecured nuclear material across the globe” (Remarks by President Barack Obama, 2009, April 5). In July 2009, at the G-8 Summit, President Obama announced the convening of a Nuclear Security Summit in 2010 to deliberate on the mechanism to “secure nuclear materials, combat nuclear smuggling, and prevent nuclear terrorism” (Luongo, 2009, November 10). President Obama’s nuclear/radiological threat perceptions were also accentuated by the United Nations Security Council (UNSC) Resolution 1887 (2009). The UNSC expressed its grave concern regarding ‘the threat of nuclear terrorism.” It also recognized the need for all States “to take effective measures to prevent nuclear material or technical assistance becoming available to terrorists.” The UNSC Resolution called “for universal adherence to the Convention on Physical Protection of Nuclear Materials and its 2005 Amendment, and the Convention for the Suppression of Acts of Nuclear Terrorism.” (UNSC Resolution, 2009) The United States Nuclear Posture Review (NPR) document revealed on April 6, 2010 declared that “terrorism and proliferation are far greater threats to the United States and international stability.” (Security of Defence, 2010, April 6: i). The United States declared that it reserved the right to“hold fully accountable” any state or group “that supports or enables terrorist efforts to obtain or use weapons of mass destruction, whether by facilitating, financing, or providing expertise or safe haven for such efforts (Nuclear Posture Review Report, 2010, April: 12)”. This declaration underscores the possibility that terrorist groups could acquire fissile material from the rogue states.

#### Terrorism causes miscalculation that draws in Russia and China and culminates in extinction- also causes rising alert levels

Ayson 2010 (Robert Ayson, Professor of Strategic Studies and Director of the Centre for Strategic Studies: New Zealand at the Victoria University of Wellington, “After a Terrorist Nuclear Attack: Envisaging Catalytic Effects,” Studies in Conflict & Terrorism, Volume 33, Issue 7, July, Available Online to Subscribing Institutions via InformaWorld)

A terrorist nuclear attack, and even the use of nuclear weapons in response by the country attacked in the first place, would not necessarily represent the worst of the nuclear worlds imaginable. Indeed, there are reasons to wonder whether nuclear terrorism should ever be regarded as belonging in the category of truly existential threats. A contrast can be drawn here with the global catastrophe that would come from a massive nuclear exchange between two or more of the sovereign states that possess these weapons in significant numbers. Even the worst terrorism that the twenty-first century might bring would fade into insignificance alongside considerations of what a general nuclear war would have wrought in the Cold War period. And it must be admitted that as long as the major nuclear weapons states have hundreds and even thousands of nuclear weapons at their disposal, there is always the possibility of a truly awful nuclear exchange taking place precipitated entirely by state possessors themselves. But these two nuclear worlds—a non-state actor nuclear attack and a catastrophic interstate nuclear exchange—are not necessarily separable. It is just possible that some sort of terrorist attack, and especially an act of nuclear terrorism, could precipitate a chain of events leading to a massive exchange of nuclear weapons between two or more of the states that possess them. In this context, today’s and tomorrow’s terrorist groups might assume the place allotted during the early Cold War years to new state possessors of small nuclear arsenals who were seen as raising the risks of a catalytic nuclear war between the superpowers started by third parties. These risks were considered in the late 1950s and early 1960s as concerns grew about nuclear proliferation, the so-called n+1 problem. It may require a considerable amount of imagination to depict an especially plausible situation where an act of nuclear terrorism could lead to such a massive inter-state nuclear war. For example, in the event of a terrorist nuclear attack on the United States, it might well be wondered just how Russia and/or China could plausibly be brought into the picture, not least because they seem unlikely to be fingered as the most obvious state sponsors or encouragers of terrorist groups. They would seem far too responsible to be involved in supporting that sort of terrorist behavior that could just as easily threaten them as well. Some possibilities, however remote, do suggest themselves. For example, how might the United States react if it was thought or discovered that the fissile material used in the act of nuclear terrorism had come from Russian stocks,40 and if for some reason Moscow denied any responsibility for nuclear laxity? The correct attribution of that nuclear material to a particular country might not be a case of science fiction given the observation by Michael May et al. that while the debris resulting from a nuclear explosion would be “spread over a wide area in tiny fragments, its radioactivity makes it detectable, identifiable and collectable, and a wealth of information can be obtained from its analysis: the efficiency of the explosion, the materials used and, most important … some indication of where the nuclear material came from.”41 Alternatively, if the act of nuclear terrorism came as a complete surprise, and American officials refused to believe that a terrorist group was fully responsible (or responsible at all) suspicion would shift immediately to state possessors. Ruling out Western ally countries like the United Kingdom and France, and probably Israel and India as well, authorities in Washington would be left with a very short list consisting of North Korea, perhaps Iran if its program continues, and possibly Pakistan. But at what stage would Russia and China be definitely ruled out in this high stakes game of nuclear Cluedo? In particular, if the act of nuclear terrorism occurred against a backdrop of existing tension in Washington’s relations with Russia and/or China, and at a time when threats had already been traded between these major powers, would officials and political leaders not be tempted to assume the worst? Of course, the chances of this occurring would only seem to increase if the United States was already involved in some sort of limited armed conflict with Russia and/or China, or if they were confronting each other from a distance in a proxy war, as unlikely as these developments may seem at the present time. The reverse might well apply too: should a nuclear terrorist attack occur in Russia or China during a period of heightened tension or even limited conflict with the United States, could Moscow and Beijing resist the pressures that might rise domestically to consider the United States as a possible perpetrator or encourager of the attack? Washington’s early response to a terrorist nuclear attack on its own soil might also raise the possibility of an unwanted (and nuclear aided) confrontation with Russia and/or China. For example, in the noise and confusion during the immediate aftermath of the terrorist nuclear attack, the U.S. president might be expected to place the country’s armed forces, including its nuclear arsenal, on a higher stage of alert. In such a tense environment, when careful planning runs up against the friction of reality, it is just possible that Moscow and/or China might mistakenly read this as a sign of U.S. intentions to use force (and possibly nuclear force) against them. In that situation, the temptations to preempt such actions might grow, although it must be admitted that any preemption would probably still meet with a devastating response. As part of its initial response to the act of nuclear terrorism (as discussed earlier) Washington might decide to order a significant conventional (or nuclear) retaliatory or disarming attack against the leadership of the terrorist group and/or states seen to support that group. Depending on the identity and especially the location of these targets, Russia and/or China might interpret such action as being far too close for their comfort, and potentially as an infringement on their spheres of influence and even on their sovereignty. One far-fetched but perhaps not impossible scenario might stem from a judgment in Washington that some of the main aiders and abetters of the terrorist action resided somewhere such as Chechnya, perhaps in connection with what Allison claims is the “Chechen insurgents’ … long-standing interest in all things nuclear.”42 American pressure on that part of the world would almost certainly raise alarms in Moscow that might require a degree of advanced consultation from Washington that the latter found itself unable or unwilling to provide. There is also the question of how other nuclear-armed states respond to the act of nuclear terrorism on another member of that special club. It could reasonably be expected that following a nuclear terrorist attack on the United States, both Russia and China would extend immediate sympathy and support to Washington and would work alongside the United States in the Security Council. But there is just a chance, albeit a slim one, where the support of Russia and/or China is less automatic in some cases than in others. For example, what would happen if the United States wished to discuss its right to retaliate against groups based in their territory? If, for some reason, Washington found the responses of Russia and China deeply underwhelming, (neither “for us or against us”) might it also suspect that they secretly were in cahoots with the group, increasing (again perhaps ever so slightly) the chances of a major exchange. If the terrorist group had some connections to groups in Russia and China, or existed in areas of the world over which Russia and China held sway, and if Washington felt that Moscow or Beijing were placing a curiously modest level of pressure on them, what conclusions might it then draw about their culpability? If Washington decided to use, or decided to threaten the use of, nuclear weapons, the responses of Russia and China would be crucial to the chances of avoiding a more serious nuclear exchange. They might surmise, for example, that while the act of nuclear terrorism was especially heinous and demanded a strong response, the response simply had to remain below the nuclear threshold. It would be one thing for a non-state actor to have broken the nuclear use taboo, but an entirely different thing for a state actor, and indeed the leading state in the international system, to do so. If Russia and China felt sufficiently strongly about that prospect, there is then the question of what options would lie open to them to dissuade the United States from such action: and as has been seen over the last several decades, the central dissuader of the use of nuclear weapons by states has been the threat of nuclear retaliation. If some readers find this simply too fanciful, and perhaps even offensive to contemplate, it may be informative to reverse the tables. Russia, which possesses an arsenal of thousands of nuclear warheads and that has been one of the two most important trustees of the non-use taboo, is subjected to an attack of nuclear terrorism. In response, Moscow places its nuclear forces very visibly on a higher state of alert and declares that it is considering the use of nuclear retaliation against the group and any of its state supporters. How would Washington view such a possibility? Would it really be keen to support Russia’s use of nuclear weapons, including outside Russia’s traditional sphere of influence? And if not, which seems quite plausible, what options would Washington have to communicate that displeasure? If China had been the victim of the nuclear terrorism and seemed likely to retaliate in kind, would the United States and Russia be happy to sit back and let this occur? In the charged atmosphere immediately after a nuclear terrorist attack, how would the attacked country respond to pressure from other major nuclear powers not to respond in kind? The phrase “how dare they tell us what to do” immediately springs to mind. Some might even go so far as to interpret this concern as a tacit form of sympathy or support for the terrorists. This might not help the chances of nuclear restraint.

#### Europe’s key to rendition upon release—no due process frustrates the process now

Archick 13 (U.S.-EU Cooperation Against Terrorism Kristin Archick Specialist in European Affairs September 4, 2013 Congressional Research Service http://www.fas.org/sgp/crs/row/RS22030.pdf)

At the same time, the Obama Administration has faced significant challenges in its efforts to close Guantánamo. Some observers contend that U.S. officials have been frustrated by the reluctance of other countries, including some in Europe, to take in more detainees. Congressional opposition to elements of the Administration’s plan for closing Guantánamo, and certain restrictions imposed by Congress (including on the Administration’s ability to transfer detainees to other countries amid concerns that some released detainees were engaging in terrorist activity), have also presented obstacles. Consequently, the Obama Administration has not fulfilled its promise to shut down Guantánamo. In March 2011, President Obama signed an executive order that in effect creates a formal system of indefinite detention for those detainees at Guantánamo not charged or convicted but deemed too dangerous to free. The Administration also announced in March 2011 an end to its two-year freeze on new military commission trials for Guantánamo detainees.52 Some European policymakers continue to worry that as long as Guantánamo remains open, it helps serve as a recruiting tool for Al Qaeda and its affiliates. Some European officials have also voiced concern about those detainees at Guantánamo who began hunger strikes in early 2013 to protest their ongoing incarceration. In May 2013, the European Parliament adopted a resolution that expresses concern for those on hunger strike, and again calls upon the United States to close the detention facility.53 The Obama Administration asserts that it is still committed to closing Guantánamo. In late May 2013, President Obama renewed his pledge to work toward this goal; as a first step, he announced that U.S. authorities would restart the process of sending home or resettling in third countries those detainees already cleared for transfer. In August 2013, the Administration released two Algerian detainees (the first such releases in nearly a year), after certifying to Congress that they no longer posed a threat to U.S. national security. Press reports indicate that 164 detainees currently remain at Guantánamo.54

#### XXLatest IAEA assessment concludes the risk is underestimated

Sturdee 2013 (Simon Sturdee, AFP reporter, July 1, 2013, “UN atomic agency sounds warning on 'nuclear terrorism',” Fox News, http://www.foxnews.com/world/2013/07/01/un-atomic-agency-sounds-warning-on-nuclear-terrorism/#ixzz2dsmqwOk3)

The head of the UN atomic agency warned Monday against complacency in preventing "nuclear terrorism", saying progress in recent years should not lull the world into a false sense of security.¶ "Much has been achieved in the past decade," Yukiya Amano of the International Atomic Energy Agency told a gathering in Vienna of some 1,200 delegates from around 110 states including 35 ministers to review progress on the issue.¶ "Many countries have taken effective measures to prevent theft, sabotage, unauthorised access, illegal transfer, or other malicious acts involving nuclear or other radioactive material. Security has been improved at many facilities containing such material."¶ Partly as a result, he said, "there has not been a terrorist attack involving nuclear or other radioactive material."¶ "But this must not lull us into a false sense of security. If a 'dirty bomb' is detonated in a major city, or sabotage occurs at a nuclear facility, the consequences could be devastating.¶ "Nuclear terrorism" comprises three main risks: an atomic bomb, a "dirty bomb" -- conventional explosion spreading radioactive material -- and an attack on a nuclear plant.¶ The first, using weapons-grade uranium or plutonium, is generally seen as "low probability, high consequence" -- very difficult to pull off but for a determined group of extremists, not impossible.¶ There are hundreds of tonnes of weapons-usable plutonium and uranium -- a grapefruit-sized amount is enough for a crude nuclear weapon that would fit in a van -- around the world.¶ A "dirty bomb" -- a "radiological dispersal device" or RDD -- is much easier but would be hugely less lethal. But it might still cause mass panic.¶ "If the Boston marathon bombing (in April this year) had been an RDD, the trauma would be lasting a whole lot longer," Sharon Squassoni from the Center for Strategic and International Studies (CSIS) told AFP.¶ Last year alone, the IAEA recorded 17 cases of illegal possession and attempts to sell nuclear materials and 24 incidents of theft or loss. And it says this is the "tip of the iceberg".¶ Many cases have involved former parts of the Soviet Union, for example Chechnya, Georgia and Moldova -- where in 2011 several people were arrested trying to sell weapons-grade uranium -- but not only.¶ Nuclear materials that could be used in a "dirty bomb" are also used in hospitals, factories and university campuses and are therefore seen as easy to steal.¶ Major international efforts have been made since the end of the Soviet Union in 1991 and the September 11, 2001 attacks in the United States to prevent nuclear material falling into the wrong hands.¶ US President Barack Obama hosted a summit in 2010 on the subject which was followed by another one in Seoul last year. A third is planned in The Hague in March.¶ A report issued in Vienna on Monday to coincide with the start of the meeting by the Arms Control Association and the Partnership for Global Security said decent progress had been made but that "significant" work remained.¶ Ten countries have eliminated their entire stockpiles of weapons-grade uranium, many reactors producing nuclear medicines were using less risky materials and smuggling nuclear materials across borders, for example from Pakistan, is harder, it said.¶ But some countries still do not have armed guards at nuclear power plants, security surrounding nuclear materials in civilian settings is often inadequate and there is a woeful lack of international cooperation and binding global rules.¶ "We are still a long way from having a unified regime, a unified understanding of the threat and a way to address it," Michelle Cann, co-author of the report, told AFP.

### Deference

#### Congressional cause of action resolves court dismissal of damages suits—key to national security accountability

Vladeck 13 (Unlawfully Detained by the U.S. Government? Don't Bother Suing. BY STEVE VLADECK professor of law and the associate dean for scholarship at American University Washington College of Law. SECURITY STATES OCTOBER 17, 2013 http://www.newrepublic.com/article/115216/unlawful-detainment-lawsuits-against-us-government-keep-failing)

Last Monday, on the same day as the opening of the new Supreme Court term, the federal appeals court in San Francisco threw out a damages suit by a former Guantánamo detainee who alleged that his detention and his treatment while detained had been unlawful. The decision by a unanimous three-judge panel in Hamad v. Gates did not hold that the plaintiff’s rights hadn’t been violated; rather, it held that it lacked the power to even address that question because of a 2006 statute that appears to take away the jurisdiction of the federal courts in such cases. Although there are reasons to quibble with the Ninth Circuit’s analysis, the result underscores a far broader point about which there can be no dispute: In case after case, on issues ranging from Guantánamo to surveillance to “extraordinary rendition” and torture, the federal courts have been categorically hostile to damages claims arising out of post-September 11 counterterrorism policies. And as in Hamad, this hostility has been reflected in the courts’ reliance upon a host of procedural doctrines to reject the plaintiffs’ claims without actually adjudicating—one way or the other—the underlying legality of the government’s conduct. Perhaps the most notorious of these cases was that of Maher Arar, the dual Canadian-Syrian citizen who U.S. authorities arrested at JFK Airport in 2002, detained for several weeks, and then sent to Syria, where he was tortured. Arar, who, as we now know, had no links to terrorism, brought suit to challenge his “extraordinary rendition.” But in 2009, the federal appeals court in New York ruled, 7-4, that U.S. law does not recognize a “cause of action” for claims like Arar’s—and the Supreme Court denied certiorari three months later. Whereas Arar’s was by far the most prominent, a number of other challenges to post-9/11 counterterrorism policies have been dismissed on similar grounds—that the Constitution doesn’t authorize damages suits in such cases unless Congress specifically provides for them. But even when Congress has provided a “cause of action,” the courts have bent over backwards to avoid allowing their use to challenge controversial government counterterrorism policies. Late last year, for example, the Ninth Circuit threw out a challenge by an Islamic charity to allegedly unlawful governmental surveillance under the Foreign Intelligence Surveillance Act (FISA), even though that statute includes an express provision authorizing suits by parties whose communications are wrongfully intercepted thereunder. As the Court of Appeals concluded, although Congress did provide a private remedy for violations of the statute, Congress wasn’t sufficiently clear that it intended for that remedy to also encompass damages—and so there was no waiver of the federal government’s sovereign immunity. (Of course, this reasoning misses the whole point of the FISA provision, which is to allow individuals to sue after their communications are intercepted—at which point damages would be the only viable remedy.) And speaking of FISA, perhaps the pinnacle of the judicial hostility to these kinds of suits came this February, when a 5-4 Supreme Court ruled in Clapper v. Amnesty International that a coalition of attorneys and human rights, labor, legal, and media organizations could not pursue their constitutional challenge to section 702—the basis for the subsequently disclosed PRISM program—because, owing to the secret nature of such surveillance (at least before Edward Snowden came along), they could not demonstrate that interception of their communications was “certainly impending.” These three sets of cases are hardly exhaustive. Even a cursory perusal of other challenges to U.S. counterterrorism policies reveals a host of other non-merits grounds on which these suits have been dismissed, including the state secrets privilege; official immunity doctrines; and failure to satisfy heightened pleading standards. (I’ve described these cases as “The New National Security Canon.”) Indeed, one is hard-pressed to find post-9/11 counterterrorism damages suits in which the government actually won on the merits—that is, where a court held that the plaintiff was not entitled to damages simply because his rights were not actually violated. To be sure, many of these decisions may simply reflect a larger pattern, not limited to national security cases, wherein it has become increasingly difficult for plaintiffs to obtain damages for unlawful government conduct writ large. But whatever the merits of that larger theme, it has three especially pernicious consequences for accountability in the national security arena specifically.

#### The Supreme Court has consistently leaned towards the requirement of damage suit availability now—statutory restriction resolves Circuit court ambiguities

Vladeck 12 (The Subtle New (Constitutional) Holding in Al-Zahrani By Steve Vladeck professor of law and the associate dean for scholarship at American University Washington College of Law. Tuesday, February 21, 2012 at 2:47 PM http://www.lawfareblog.com/2012/02/the-subtle-new-constitutional-holding-in-al-zahrani/)

Given Ben’s report on the oral argument, today’s fairly cryptic D.C. Circuit opinion in al-Zahrani v. Rodriguez, throwing out a damages suit arising out of the deaths of several inmates at Guantanamo, is hardly surprising. Writing for a himself and Judges Williams and Randolph, Chief Judge Sentelle held that the plaintiffs’ claims are barred by the non-habeas jurisdiction-stripping provision of the Military Commissions Act of 2006, i.e., 28 U.S.C. § 2241(e)(2), which forecloses jurisdiction over “any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of non-citizens detained by the United States as enemy combatants. The question, of course, is whether § 2241(e)(2) is unconstitutional to the extent that it thereby bars even those damages suits seeking to enforce constitutional rights. The D.C. Circuit’s answer is pretty straightforward. Unfortunately, as I explain below the fold, it’s a little too straightforward. As Chief Judge Sentelle writes in the opinion’s critical passage, the only remedy [plaintiffs] seek is money damages, and, as the government rightly argues, such remedies are not constitutionally required. The Supreme Court has made this eminently clear in its jurisprudence finding certain of such claims barred by common law or statutory immunities, and applying its “special factors” analysis in preclusion of Bivens claims. The problem with such analysis is that the Supreme Court has never, in fact, squarely held that damages remedies for constitutional claims are never constitutionally required. To the contrary, with one equivocal exception, every decision the Court has handed down in the Bivens context has presented a scenario where at least some remedy was available in some other forum–where the choice was not “Bivens or nothing.” And in other non-habeas contexts, the Court has gone so far as to suggest that there may be circumstances in which the Constitution does require a remedy (from which it should follow that the remedy would be damages when no other alternatives were available). Even the Court’s most recent foray into Bivens conditioned the unavailability of Bivens claims against private contractors on the existence of adequate remedies under state law. Of course, the Court has never held that damages for constitutional claims are constitutionally compelled, but that just means that this is an open question–not, as the D.C. Circuit would have you believe, that the answer necessarily follows from existing precedent.

#### Political branches are incapable of resolving clarity—MCA proves Court detainment check’s key to refinement of executive deference

Landau 12 (ARTICLE: CHEVRON MEETS YOUNGSTOWN: NATIONAL SECURITY AND THE ADMINISTRATIVE STATE Joseph Landau Associate Professor, Fordham Law School. December, 2012 Boston University Law Review 92 B.U.L. Rev. 1917. Lexis)

B. Congressional Remands After 9/11 Once the post-9/11 decisions are understood through the lens of the Court's preference for dual-branch solutions to national security problems, Chevron's absence becomes more understandable. Rather than adopt a default rule of deference to reasonable Executive Branch interpretations of statutes that do not actually delegate power to the Executive to act with the force of law, the Court has required collective political branch assessment of the underlying merits of the Executive's preferred policies. In this way, the Court has attempted, whenever possible, to elevate presidential decisionmaking from Youngstown Category Two to Category One. 307 But the political branches have not always responded to the Court's overtures. While the AUMF speaks only generally to a use of force against al-Qaeda and the Taliban, 308 it has served as the primary statutory basis for the Executive Branch's policymaking regarding domestic and international detention, surveillance, and military commissions. Yet, the AUMF provides at best vague indications of the President's national security powers and little clarity on questions such as the definition of those persons the President may detain at Guantanamo, the length of those detentions, the conditions of those detentions, and the substantive rights and remedies cognizable in habeas challenges. While courts have resolved subsidiary elements of these questions, the Supreme Court has mainly adopted a policy of [\*1965] remanding these questions to Congress for clarification through statutory delegations, and Congress has generally avoided those calls. 309 While the resulting statutes contain some important procedural improvements, 310 Congress has generally refrained from legislating on numerous other matters concerning Executive Branch national security powers. Hamdan's requirement for a clear legislative mandate authorizing the President's commissions led to a "quick and inevitably messy quilting bee in Congress" culminating in the MCA. 311 The most recent National Defense Authorization Act, which addresses a few of the questions raised by the Guantanamo litigation, leaves the lion's share of those matters unanswered. 312 Because Congress, when it has acted, generally has done so through broad, vague, and at times sweeping national security legislation, often with little debate and with few (if any) indications of the limits of executive implementation, 313 a number of important issues have been left for judicial development. 314 [\*1966] It should be noted that, since 9/11, Congress has not refrained from enacting detailed framework statutes when it wants to do so. After Hamdan, Congress authorized military commissions, 315 and at least one court that had initially rejected the commissions approved them after Congress acted. 316 Other post-9/11 statutes, such as the USA PATRIOT Act, also speak clearly and specifically to national security detention issues by, for example, prescribing clear limits to Executive Branch detention authority in the absence of formal criminal charges or the initiation of removal proceedings. 317 Notably, those provisions have so far survived constitutional scrutiny. 318 But in the post-9/11 arena, clear delegations to the President have been lacking, and the kind of "super-strong" deference championed by Chevron-backers has consequently been absent.

#### Judicially legitimated flexibility’s key to heg—detention policies are the determinant

Knowles 2009 (Robert Knowles, Acting Assistant Professor, New York University School of Law, 41 Ariz. St. L.J. 87 American Hegemony and the Foreign Affairs Constitution)

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability.421 G. John Ikenberry analogizes America's hegemonic position to that of a “giant corporation” seeking foreign investors: “The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and accountability.”422 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make “abrupt or aggressive moves toward other states.”423¶ The Bush Administration’s detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch.424 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law.425 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions.426 It declared all detainees at Guantánamo to be “enemy combatants” without establishing a regularized process for making an individual determination for each detainee.427 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections.428¶ In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s—a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage.429 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability.430 America’s military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.

#### Outweighs material advantage

Kagan 2004 (Robert Kagan, senior associate at the Carnegie Endowment for International Peace, January 24, 2004, “A Tougher War For the U.S. Is One Of Legitimacy,” New York Times, http://www.nytimes.com/2004/01/24/books/a-tougher-war-for-the-us-is-one-of-legitimacy.html?pagewanted=all&src=pm)

Today a darker possibility looms. A great philosophical schism has opened within the West, and instead of mutual indifference, mutual antagonism threatens to debilitate both sides of the trans-Atlantic community. Coming at a time in history when new dangers and crises are proliferating, this schism could have serious consequences. For Europe and the United States to decouple strategically has been bad enough. But what if the schism over ''world order'' infects the rest of what we have known as the liberal West? Will the West still be the West?¶ It is the legitimacy of American power and American global leadership that has come to be doubted by a majority of Europeans. America, for the first time since World War II, is suffering a crisis of international legitimacy.¶ Americans will find that they cannot ignore this problem. The struggle to define and obtain international legitimacy in this new era may prove to be among the critical contests of our time, in some ways as significant in determining the future of the international system and America's place in it as any purely material measure of power and influence.¶ Americans for much of the past three centuries have considered themselves the vanguard of a worldwide liberal revolution. Their foreign policy from the beginning has not been only about defending and promoting their material national interests. ''We fight not just for ourselves but for all mankind,'' Benjamin Franklin declared of the American Revolution, and whether or not that has always been true, most Americans have always wanted to believe that it is true. There can be no clear dividing line between the domestic and the foreign, therefore, and no clear distinction between what the democratic world thinks about America and what Americans think about themselves.¶ Every profound foreign policy debate in America's history, from the time when Jefferson squared off against Hamilton, has ultimately been a debate about the nation's identity and has posed for Americans the primal question ''Who are we?'' Because Americans do care, the steady denial of international legitimacy by fellow democracies will over time become debilitating and perhaps even paralyzing.¶ Americans therefore cannot ignore the unipolar predicament. Perhaps the singular failure of the Bush administration is that it has been too slow to recognize this. Mr. Bush and his advisers came to office guided by the narrow realism that dominated in Republican foreign policy circles during the Clinton years. The Clinton administration, Condoleezza Rice, the national security adviser, wrote in a famous essay in January 2000, had failed to focus on the ''national interest'' and instead had addressed itself to ''humanitarian interests'' or the interests of ''the international community.'' The Bush administration, by contrast, would take a fresh look at all treaties, obligations and alliances and re-evaluate them in terms of America's ''national interest.''¶ The notion that the United States could take such a narrow view of its ''national interest'' has always been mistaken. But besides being an analytical error, the enunciation of this ''realist'' approach by the sole superpower in a unipolar era was a serious foreign policy error. The global hegemon cannot proclaim to the world that it will be guided only by its own definition of its ''national interest.''¶ This is precisely what even America's closest friends fear: that the United States will wield its unprecedented vast power only for itself. In her essay, Ms. Rice derided ''the belief that the United States is exercising power legitimately only when it is doing so on behalf of someone or something else.'' But for the rest of the world, what other source of legitimacy can there be? When the United States acts in its own interests, Ms. Rice claimed, as would many Americans, it necessarily serves the interests of everyone.¶ ''To be sure,'' she argued, ''there is nothing wrong with doing something that benefits all humanity, but that is, in a sense, a second-order effect.''¶ But could even America's closest friends ever be persuaded that an America always pursuing its self-interest could be relied upon to serve their interests, too, as some kind of ''second-order effect''?¶ Both the unipolar predicament and the American character require a much more expansive definition of American interests. The United States can neither appear to be acting only in its self-interest, nor can it in fact act as if its own national interest were all that mattered. Even at times of dire emergency, and perhaps especially at those times, the world's sole superpower needs to demonstrate that it wields its great power on behalf of its principles and all who share them.

#### Ambiguous status hierarchies cause conflict

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SIT is often seen in a scholarly context that contrasts power-based and identity-based explanations.31 It is thus put forward as a psychological explanation for competitive behavior that is completely divorced from distributions of material resources. But there is no theoretical justification for this separation. On the contrary, a long-standing research tradition in sociology, economics, and political science finds that actors seek to translate material resources into status. Sociologists from Weber and Veblen onward have postulated a link between material conditions and the stability of status hierarchies. When social actors acquire resources, they try to convert them into something that can have more value to them than the mere possession of material things: social status. As Weber put it: “Property as such is not always recognized as a status qualification, but in the long run it is, and with extraordinary regularity.” 32 This link continues to find support in the contemporary economics literature on income distribution and status competition.33 Status is a social, psychological, and cultural phenomenon. Its expression appears endlessly varied; it is thus little wonder that the few international relations scholars who have focused on it are more struck by its variability and diversity than by its susceptibility to generalization. 34 Yet if sit captures important dynamics of human behavior, and if people seek to translate resources into status, then the distribution of capabilities will affect the likelihood of status competition in predictable ways. Recall that theory, research, and experimental results suggest that relative status concerns will come to the fore when status hierarchy is ambiguous and that people will tend to compare the states with which they identify to similar but higher-ranked states.35 Dissatisfaction arises not from dominance itself but from a dominance that [End Page 38] appears to rest on ambiguous foundations. Thus, status competition is unlikely in cases of clear hierarchies in which the relevant comparison out-groups for each actor are unambiguously dominant materially. Applied to international politics, this begins to suggest the conditions conducive to status competition. For conflict to occur, one state must select another state as a relevant comparison that leaves it dissatisfied with its status; it must then choose an identity-maintenance strategy in response that brings it into conflict with another state that is also willing to fight for its position. This set of beliefs and strategies is most likely to be found when states are relatively evenly matched in capabilities. The more closely matched actors are materially, the more likely they are to experience uncertainty about relative rank. When actors start receiving mixed signals—some indicating that they belong in a higher rank while others reaffirm their present rank—they experience status inconsistency and face incentives to resolve the uncertainty. When lower-ranked actors experience such inconsistency, they will use higher-ranked actors as referents. Since both high- and low-status actors are biased toward higher status, uncertainty fosters conflict as the same evidence feeds contradictory expectations and claims. When the relevant out-group is unambiguously dominant materially, however, status inconsistency is less likely. More certain of their relative rank, subordinate actors are less likely to face the ambiguity that drives status competition. And even if they do, their relative weakness makes strategies of social competition an unlikely response. Given limited material wherewithal, either acquiescence or strategies of social creativity are more plausible responses, neither of which leads to military conflict. The theory suggests that it is not just the aggregate distribution of capabilities that matters for status competition but also the evenness with which key dimensions— such as naval, military, economic, and technological—are distributed. Uneven capability portfolios—when states excel in different relevant material dimensions—make status inconsistency more likely. When an actor possesses some attributes of high status but not others, uncertainty and status inconsistency are likely.36 The more a lower-ranked actor matches the higher-ranked group in some but not all key material dimensions of status, the more likely it is to conceive an interest in contesting its rank and the more [End Page 39] likely the higher-ranked state is to resist. Thus, status competition is more likely to plague relations between leading states whose portfolios of capabilities are not only close but also mismatched. Hypotheses When applied to the setting of great power politics, these propositions suggest that the nature and intensity of status competition will be influenced by the nature of the polarity that characterizes the system. Multipolarity implies a flat hierarchy in which no state is unambiguously number one. Under such a setting, the theory predicts status inconsistency and intense pressure on each state to resolve it in a way that reflects favorably on itself. In this sense, all states are presumptively revisionist in that the absence of a settled hierarchy provides incentives to establish one. But the theory expects the process of establishing a hierarchy to be prone to conflict: any state would be expected to prefer a status quo under which there are no unambiguous superiors to any other state’s successful bid for primacy. Thus, an order in which one’s own state is number one is preferred to the status quo, which is preferred to any order in which another state is number one. The expected result will be periodic bids for primacy, resisted by other great powers.37 For its part, bipolarity, with only two states in a material position to claim primacy, implies a somewhat more stratified hierarchy that is less prone to ambiguity. Each superpower would be expected to see the other as the main relevant out-group, while second-tier major powers would compare themselves to either or both of them. Given the two poles’ clear material preponderance, second-tier major powers would not be expected to experience status dissonance and dissatisfaction, and, to the extent they did, the odds would favor their adoption of strategies of social creativity instead of conflict. For their part, the poles would be expected to seek to establish a hierarchy: each would obviously prefer to be number one, but absent that each would also prefer an ambiguous status quo in which neither is dominant to an order in which it is unambiguously outranked by the other. Unipolarity implies the most stratified hierarchy, presenting the starkest contrast to the other two polar types. The intensity of the competition over status in either a bipolar or a multipolar system might [End Page 40] vary depending on how evenly the key dimensions of state capability are distributed—a multipolar system populated by states with very even capabilities portfolios might be less prone to status competition than a bipolar system in which the two poles possess very dissimilar portfolios. But unipolarity, by definition, is characterized by one state possessing unambiguous preponderance in all relevant dimensions. The unipole provides the relevant out-group comparison for all other great powers, yet its material preponderance renders improbable identity-maintenance strategies of social competition. While second-tier states would be expected to seek favorable comparisons with the unipole, they would also be expected to reconcile themselves to a relatively clear status ordering or to engage in strategies of social creativity. Despite increasingly compelling findings concerning the importance of status seeking in human behavior, research on its connection to war waned some three decades ago.38 Yet empirical studies of the relationship between both systemic and dyadic capabilities distributions and war have continued to cumulate. If the relationships implied by the status theory run afoul of well-established patterns or general historical findings, then there is little reason to continue investigating them. The clearest empirical implication of the theory is that status competition is unlikely to cause great power military conflict in unipolar systems. If status competition is an important contributory cause of great power war, then, ceteris paribus, unipolar systems should be markedly less war-prone than bipolar or multipolar systems. And this appears to be the case. As Daniel Geller notes in a review of the empirical literature: “The only polar structure that appears to influence conflict probability is unipolarity.”39 In addition, a larger number of studies at the dyadic level support the related expectation that narrow capabilities gaps and ambiguous or unstable capabilities hierarchies increase the probability of war.40 [End Page 41] These studies are based entirely on post-sixteenth-century European history, and most are limited to the post-1815 period covered by the standard data sets. Though the systems coded as unipolar, near-unipolar, and hegemonic are all marked by a high concentration of capabilities in a single state, these studies operationalize unipolarity in a variety of ways, often very differently from the definition adopted here. An ongoing collaborative project looking at ancient interstate systems over the course of two thousand years suggests that historical systems that come closest to the definition of unipolarity used here exhibit precisely the behavioral properties implied by the theory. 41 As David C. Kang’s research shows, the East Asian system between 1300 and 1900 was an unusually stratified unipolar structure, with an economic and militarily dominant China interacting with a small number of geographically proximate, clearly weaker East Asian states.42 Status politics existed, but actors were channeled by elaborate cultural understandings and interstate practices into clearly recognized ranks. Warfare was exceedingly rare, and the major outbreaks occurred precisely when the theory would predict: when China’s capabilities waned, reducing the clarity of the underlying material hierarchy and increasing status dissonance for lesser powers. Much more research is needed, but initial exploration of other arguably unipolar systems—for example, Rome, Assyria, the Amarna system—appears consistent with the hypothesis.43

#### Decline causes numerous nuclear wars

Brzezinski 2012 Zbigniew K. Brzezinski (CSIS counselor and trustee and cochairs the CSIS Advisory Board. He is also the Robert E. Osgood Professor of American Foreign Policy at the School of Advanced International Studies, Johns Hopkins University, in Washington, D.C. He is cochair of the American Committee for Peace in the Caucasus and a member of the International Advisory Board of the Atlantic Council. He is a former chairman of the American-Ukrainian Advisory Committee. He was a member of the Policy Planning Council of the Department of State from 1966 to 1968; chairman of the Humphrey Foreign Policy Task Force in the 1968 presidential campaign; director of the Trilateral Commission from 1973 to 1976; and principal foreign policy adviser to Jimmy Carter in the 1976 presidential campaign. From 1977 to 1981, Dr. Brzezinski was national security adviser to President Jimmy Carter. In 1981, he was awarded the Presidential Medal of Freedom for his role in the normalization of U.S.-China relations and for his contributions to the human rights and national security policies of the United States. He was also a member of the President’s Chemical Warfare Commission (1985), the National Security Council–Defense Department Commission on Integrated Long-Term Strategy (1987–1988), and the President’s Foreign Intelligence Advisory Board (1987–1989). In 1988, he was cochairman of the Bush National Security Advisory Task Force, and in 2004, he was cochairman of a Council on Foreign Relations task force that issued the report Iran: Time for a New Approach. Dr. Brzezinski received a B.A. and M.A. from McGill University (1949, 1950) and Ph.D. from Harvard University (1953). He was a member of the faculties of Columbia University (1960–1989) and Harvard University (1953–1960). Dr. Brzezinski holds honorary degrees from Georgetown University, Williams College, Fordham University, College of the Holy Cross, Alliance College, the Catholic University of Lublin, Warsaw University, and Vilnius University. He is the recipient of numerous honors and awards) February 2012 “After America” http://www.foreignpolicy.com/articles/2012/01/03/after\_america?page=0,0

For if America falters, the world is unlikely to be dominated by a single preeminent successor -- not even China. International uncertainty, increased tension among global competitors, and even outright chaos would be far more likely outcomes. While a sudden, massive crisis of the American system -- for instance, another financial crisis -- would produce a fast-moving chain reaction leading to global political and economic disorder, a steady drift by America into increasingly pervasive decay or endlessly widening warfare with Islam would be unlikely to produce, even by 2025, an effective global successor. No single power will be ready by then to exercise the role that the world, upon the fall of the Soviet Union in 1991, expected the United States to play: the leader of a new, globally cooperative world order. More probable would be a protracted phase of rather inconclusive realignments of both global and regional power, with no grand winners and many more losers, in a setting of international uncertainty and even of potentially fatal risks to global well-being. Rather than a world where dreams of democracy flourish, a Hobbesian world of enhanced national security based on varying fusions of authoritarianism, nationalism, and religion could ensue. RELATED 8 Geopolitically Endangered Species The leaders of the world's second-rank powers, among them India, Japan, Russia, and some European countries, are already assessing the potential impact of U.S. decline on their respective national interests. The Japanese, fearful of an assertive China dominating the Asian mainland, may be thinking of closer links with Europe. Leaders in India and Japan may be considering closer political and even military cooperation in case America falters and China rises. Russia, while perhaps engaging in wishful thinking (even schadenfreude) about America's uncertain prospects, will almost certainly have its eye on the independent states of the former Soviet Union. Europe, not yet cohesive, would likely be pulled in several directions: Germany and Italy toward Russia because of commercial interests, France and insecure Central Europe in favor of a politically tighter European Union, and Britain toward manipulating a balance within the EU while preserving its special relationship with a declining United States. Others may move more rapidly to carve out their own regional spheres: Turkey in the area of the old Ottoman Empire, Brazil in the Southern Hemisphere, and so forth. None of these countries, however, will have the requisite combination of economic, financial, technological, and military power even to consider inheriting America's leading role. China, invariably mentioned as America's prospective successor, has an impressive imperial lineage and a strategic tradition of carefully calibrated patience, both of which have been critical to its overwhelmingly successful, several-thousand-year-long history. China thus prudently accepts the existing international system, even if it does not view the prevailing hierarchy as permanent. It recognizes that success depends not on the system's dramatic collapse but on its evolution toward a gradual redistribution of power. Moreover, the basic reality is that China is not yet ready to assume in full America's role in the world. Beijing's leaders themselves have repeatedly emphasized that on every important measure of development, wealth, and power, China will still be a modernizing and developing state several decades from now, significantly behind not only the United States but also Europe and Japan in the major per capita indices of modernity and national power. Accordingly, Chinese leaders have been restrained in laying any overt claims to global leadership. At some stage, however, a more assertive Chinese nationalism could arise and damage China's international interests. A swaggering, nationalistic Beijing would unintentionally mobilize a powerful regional coalition against itself. None of China's key neighbors -- India, Japan, and Russia -- is ready to acknowledge China's entitlement to America's place on the global totem pole. They might even seek support from a waning America to offset an overly assertive China. The resulting regional scramble could become intense, especially given the similar nationalistic tendencies among China's neighbors. A phase of acute international tension in Asia could ensue. Asia of the 21st century could then begin to resemble Europe of the 20th century -- violent and bloodthirsty. At the same time, the security of a number of weaker states located geographically next to major regional powers also depends on the international status quo reinforced by America's global preeminence -- and would be made significantly more vulnerable in proportion to America's decline. The states in that exposed position -- including Georgia, Taiwan, South Korea, Belarus, Ukraine, Afghanistan, Pakistan, Israel, and the greater Middle East -- are today's geopolitical equivalents of nature's most endangered species. Their fates are closely tied to the nature of the international environment left behind by a waning America, be it ordered and restrained or, much more likely, self-serving and expansionist. A faltering United States could also find its strategic partnership with Mexico in jeopardy. America's economic resilience and political stability have so far mitigated many of the challenges posed by such sensitive neighborhood issues as economic dependence, immigration, and the narcotics trade. A decline in American power, however, would likely undermine the health and good judgment of the U.S. economic and political systems. A waning United States would likely be more nationalistic, more defensive about its national identity, more paranoid about its homeland security, and less willing to sacrifice resources for the sake of others' development. The worsening of relations between a declining America and an internally troubled Mexico could even give rise to a particularly ominous phenomenon: the emergence, as a major issue in nationalistically aroused Mexican politics, of territorial claims justified by history and ignited by cross-border incidents. Another consequence of American decline could be a corrosion of the generally cooperative management of the global commons -- shared interests such as sea lanes, space, cyberspace, and the environment, whose protection is imperative to the long-term growth of the global economy and the continuation of basic geopolitical stability. In almost every case, the potential absence of a constructive and influential U.S. role would fatally undermine the essential communality of the global commons because the superiority and ubiquity of American power creates order where there would normally be conflict. None of this will necessarily come to pass. Nor is the concern that America's decline would generate global insecurity, endanger some vulnerable states, and produce a more troubled North American neighborhood an argument for U.S. global supremacy. In fact, the strategic complexities of the world in the 21st century make such supremacy unattainable. But those dreaming today of America's collapse would probably come to regret it. And as the world after America would be increasingly complicated and chaotic, it is imperative that the United States pursue a new, timely strategic vision for its foreign policy -- or start bracing itself for a dangerous slide into global turmoil.

### Solvency

#### Youngstown makes review inevitable—push for executive deference polarizes the engagement—pragmatic clarification of scope sets a productive precedent

Landau 12 (ARTICLE: CHEVRON MEETS YOUNGSTOWN: NATIONAL SECURITY AND THE ADMINISTRATIVE STATE Joseph Landau Associate Professor, Fordham Law School. December, 2012 Boston University Law Review 92 B.U.L. Rev. 1917. Lexis)

E. Chevron, Executive Unilateralism, and Civil Libertarianism Although certain Chevron-backers in theory call for a statutory, not constitutional, solution to national security problems, they advocate deference even when "there is no interpretation of a statutory term[,] but simply a policy judgment by the executive." 351 This expansive theory of Chevron not only [\*1972] rests on a dubious doctrinal foundation 352 but is at times virtually indistinguishable from a theory of unilateral executive power that disregards entirely Youngstown's centrality to national security law. As Chevron-backers such as Posner and Sunstein explain, "in the domain of foreign relations, the approach signaled in Chevron should apply even if the executive is not exercising delegated authority to make rules or conduct adjudications," a point that is strengthened by "considerations of constitutional structure [that] argue strongly in favor of deference to the executive" 353 and that "makes the argument for deference stronger than in Chevron itself." 354 By advocating a vast policy space for the Executive that supplants congressional legislation whenever statutory authority is absent, their argument comes closer to the brand of pure and unalloyed executive unilateralism that the Court has rejected throughout the post-9/11 decisions. 355 Their enthusiasm for single-branch approaches causes them to espouse a theory outside the mainstream understanding of Chevron that undermines the "realistic and middle-ground alternative" that an administrative law approach can bring to the polarized debate between executive unilateralists and civil libertarians. 356 Perhaps it should not be surprising, then, that some Chevron-backers also support broader theories of executive unilateralism. For example, John Yoo, who has argued for a model of foreign affairs law based on executive unilateralism, 357 also makes the case for Chevron deference in national security [\*1973] jurisprudence. 358 While Chevron-backers often resist the comparison of their administrative law theory of national security jurisprudence with executive unilateralism, 359 the lack of any strict delegation requirement, and the replacement of that requirement with strong deference to the Executive on functionalist grounds, begs the question Chevron was meant to solve in the first place through legislative delegations. Hence, it seems entirely reasonable to draw parallels between the advocacy of Chevron, at least in its most extreme articulation, with an argument favoring the consolidation of all national security powers into a single branch. The risks are especially apparent when Chevron-backers push their argument for broad deference from the realm of statutory ambiguity - where there is at least plausible (if contested) justification for agency or presidential self-expansion - to cases of legislative silence. Although Chevron-backers argue that "the executive is in the best position to reconcile the competing interests at stake, and in the face of statutory silence or ambiguity, Congress should therefore be presumed to have delegated interpretive power to the executive," 360 this purely functional understanding of Chevron disregards its formal foundation. Given Congress's apparent disinterest in authorizing, much less reversing, executive national security policy through legislation since 9/11, 361 the Chevron-in-national-security argument, as a practical matter, collapses into a theory of single-branch governance. These problems would be severely lessened if Chevron-backers grounded their view of deference in arguments about legislative supremacy, or if they highlighted the importance of procedural formalities (such as notice-and-comment rulemaking or formal adjudications) that administrative law doctrine takes as an indication of such a delegation. 362 But to the extent that Chevron-backers countenance single-branch decisionmaking, it is hard to square their view either with the underlying delegation requirement of administrative law [\*1974] or with the Supreme Court's interpretations of Chevron in the domestic context. The Court's invocation of Youngstown has often resulted in seemingly non-deferential rulings. This is because "the Youngstown framework assumes that Congress will be actively involved in making the difficult policy decisions required during wartime and will provide the oversight of Executive-initiated action that courts feel ill-suited to offer through first-order rights adjudication." 363 But the opinions have been geared less toward restraining the Executive or vindicating certain conceptions of civil liberties, and more toward revitalizing Congress and involving the courts in the process of restoring that institutional balance. Once the post-9/11 decisions are understood to require congressional delegations to authorize executive action, it is hard to see the rulings as either purely deferential or non-deferential. Rather, the cases reflect a more practical inquiry that recalls "the imperatives of events and contemporary imponderables" 364 that define Jackson's "zone of twilight." 365 Instead of adopting a broad view of civil libertarianism or executive unilateralism, Supreme Court majorities of the past decade have engaged in a more focused, Youngstown-based inquiry. This pragmatic approach, which has implications for security-related questions beyond the post-9/11 habeas decisions addressed in this Article, 366 avoids the polls of pure deference or complete non-deference. It shifts the emphasis away from any single branch of government toward a collective responsibility of the political branches to engage one another on policy, promoting an inquiry that turns less on whether the Executive should "win" and more about the terms on which courts vindicate executive policies or individual liberties. By resetting the proper institutional balance, Jackson's framework clarifies the proper scope of judicial review during times of emergency, providing an important rule-of-law basis for judicial review of national security policy.

#### No circumvention—Court structures national security law

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 [\*1976] However, in both the domestic and national security contexts, the Supreme Court has resisted any apparent temptation to "dial down" review in the ways Vermeule describes. The Court, by invoking Youngstown, has tamed Chevron doctrine from becoming precisely the type of legal hole Vermeule attributes to the administrative law response to emergencies. While Vermeule considers only Circuit-level decisions, 377 where one finds many examples of broad deference to the Executive Branch, 378 the Supreme Court cases are not so easily ignored. 379 Importantly, the decisions between Rasul and Boumediene discussed in this Article constitute Supreme Court reversals of Circuit-level rulings that might otherwise be used to illustrate the gray holes Vermeule attributes to national security jurisprudence. 380 While Vermeule is certainly correct that Chevron (and other tests of administrative law) can be subject to dynamic interpretations across different cases, he rejects any possibility of the kind of rule-of-law framework that has taken hold in the post-9/11 context. Rather than expose gray holes of administrative law, the post-9/11 decisions have invoked Youngstown as a way to bring important structure to national security, a field of law that is often bereft of clear procedural and substantive guidelines.