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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.

### EU Intel Sharing

#### 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)

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

#### 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

### 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.

#### Hegemony solves great power wars

Thayer 2006 (Bradley A. Thayer, Missouri State University Defense and Strategic Studies Institute, November/December, 2006 “In Defense of Primacy,” NATIONAL INTEREST Issue 86)

THROUGHOUT HISTORY, peace and stability have been great benefits of an era where there was a dominant power--Rome, Britain or the United States today. Scholars and statesmen have long recognized the irenic effect of power on the anarchic world of international politics. Everything we think of when we consider the current international order--free trade, a robust monetary regime, increasing respect for human rights, growing democratization--is directly linked to U.S. power. Retrenchment proponents seem to think that the current system can be maintained without the current amount of U.S. power behind it. In that they are dead wrong and need to be reminded of one of history's most significant lessons: Appalling things happen when international orders collapse. The Dark Ages followed Rome's collapse. Hitler succeeded the order established at Versailles. Without U.S. power, the liberal order created by the United States will end just as assuredly. As country and western great Ral Donner sang: "You don't know what you've got (until you lose it)." Consequently, it is important to note what those good things are. In addition to ensuring the security of the United States and its allies, American primacy within the international system causes many positive outcomes for Washington and the world. The first has been a more peaceful world. During the Cold War, U.S. leadership reduced friction among many states that were historical antagonists, most notably France and West Germany. Today, American primacy helps keep a number of complicated relationships aligned--between Greece and Turkey, Israel and Egypt, South Korea and Japan, India and Pakistan, Indonesia and Australia. This is not to say it fulfills Woodrow Wilson's vision of ending all war. Wars still occur where Washington's interests are not seriously threatened, such as in Darfur, but a Pax Americana does reduce war's likelihood, particularly war's worst form: great power wars. Second, American power gives the United States the ability to spread democracy and other elements of its ideology of liberalism: Doing so is a source of much good for the countries concerned as well as the United States because, as John Owen noted on these pages in the Spring 2006 issue, liberal democracies are more likely to align with the United States and be sympathetic to the American worldview.( n3) So, spreading democracy helps maintain U.S. primacy. In addition, once states are governed democratically, the likelihood of any type of conflict is significantly reduced. This is not because democracies do not have clashing interests. Indeed they do. Rather, it is because they are more open, more transparent and more likely to want to resolve things amicably in concurrence with U.S. leadership. And so, in general, democratic states are good for their citizens as well as for advancing the interests of the United States. Critics have faulted the Bush Administration for attempting to spread democracy in the Middle East, labeling such aft effort a modern form of tilting at windmills. It is the obligation of Bush's critics to explain why :democracy is good enough for Western states but not for the rest, and, one gathers from the argument, should not even be attempted. Of course, whether democracy in the Middle East will have a peaceful or stabilizing influence on America's interests in the short run is open to question. Perhaps democratic Arab states would be more opposed to Israel, but nonetheless, their people would be better off. The United States has brought democracy to Afghanistan, where 8.5 million Afghans, 40 percent of them women, voted in a critical October 2004 election, even though remnant Taliban forces threatened them. The first free elections were held in Iraq in January 2005. It was the military power of the United States that put Iraq on the path to democracy. Washington fostered democratic governments in Europe, Latin America, Asia and the Caucasus. Now even the Middle East is increasingly democratic. They may not yet look like Western-style democracies, but democratic progress has been made in Algeria, Morocco, Lebanon, Iraq, Kuwait, the Palestinian Authority and Egypt. By all accounts, the march of democracy has been impressive. Third, along with the growth in the number of democratic states around the world has been the growth of the global economy. With its allies, the United States has labored to create an economically liberal worldwide network characterized by free trade and commerce, respect for international property rights, and mobility of capital and labor markets. The economic stability and prosperity that stems from this economic order is a global public good from which all states benefit, particularly the poorest states in the Third World. The United States created this network not out of altruism but for the benefit and the economic well-being of America. This economic order forces American industries to be competitive, maximizes efficiencies and growth, and benefits defense as well because the size of the economy makes the defense burden manageable. Economic spin-offs foster the development of military technology, helping to ensure military prowess. Perhaps the greatest testament to the benefits of the economic network comes from Deepak Lal, a former Indian foreign service diplomat and researcher at the World Bank, who started his career confident in the socialist ideology of post-independence India. Abandoning the positions of his youth, Lal now recognizes that the only way to bring relief to desperately poor countries of the Third World is through the adoption of free market economic policies and globalization, which are facilitated through American primacy.( n4) As a witness to the failed alternative economic systems, Lal is one of the strongest academic proponents of American primacy due to the economic prosperity it provides. Fourth and finally, the United States, in seeking primacy, has been willing to use its power not only to advance its interests but to promote the welfare of people all over the globe. The United States is the earth's leading source of positive externalities for the world. The U.S. military has participated in over fifty operations since the end of the Cold War--and most of those missions have been humanitarian in nature. Indeed, the U.S. military is the earth's "911 force"--it serves, de facto, as the world's police, the global paramedic and the planet's fire department. Whenever there is a natural disaster, earthquake, flood, drought, volcanic eruption, typhoon or tsunami, the United States assists the countries in need. On the day after Christmas in 2004, a tremendous earthquake and tsunami occurred in the Indian Ocean near Sumatra, killing some 300,000 people. The United States was the first to respond with aid. Washington followed up with a large contribution of aid and deployed the U.S. military to South and Southeast Asia for many months to help with the aftermath of the disaster. About 20,000 U.S. soldiers, sailors, airmen and marines responded by providing water, food, medical aid, disease treatment and prevention as well as forensic assistance to help identify the bodies of those killed. Only the U.S. military could have accomplished this Herculean effort. No other force possesses the communications capabilities or global logistical reach of the U.S. military. In fact, UN peacekeeping operations depend on the United States to supply UN forces. American generosity has done more to help the United States fight the War on Terror than almost any other measure. Before the tsunami, 80 percent of Indonesian public opinion was opposed to the United States; after it, 80 percent had a favorable opinion of America. Two years after the disaster, and in poll after poll, Indonesians still have overwhelmingly positive views of the United States. In October 2005, an enormous earthquake struck Kashmir, killing about 74 000 people and leaving three million homeless. The U.S. military responded immediately, diverting helicopters fighting the War on Terror in nearby Afghanistan to bring relief as soon as possible To help those in need, the United States also provided financial aid to Pakistan; and, as one might expect from those witnessing the munificence of the United States, it left a lasting impression about America. For the first time since 9/11, polls of Pakistani opinion have found that more people are favorable toward the United States than unfavorable, while support for Al-Qaeda dropped to its lowest level. Whether in Indonesia or Kashmir, the money was well-spent because it helped people in the wake of disasters, but it also had a real impact on the War on Terror. When people in the Muslim world witness the U.S. military conducting a humanitarian mission, there is a clearly positive impact on Muslim opinion of the United States. As the War on Terror is a war of ideas and opinion as much as military action, for the United States humanitarian missions are the equivalent of a blitzkrieg.

#### Decline causes numerous nuclear wars

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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.

### 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

# 2AC

### 2AC WPA/Restrict

#### We meet---we prohibit the President’s ability to act without judicial review

John C. Eastman 6, Prof of Law at Chapman University, PhD in Government from the Claremont Graduate University, served as the Director of Congressional & Public Affairs at the United States Commission on Civil Rights during the Reagan administration, “Be Very Wary of Restricting President's Power,” Feb 21 2006, http://www.claremont.org/publications/pubid.467/pub\_detail.asp]

Prof. Epstein challenges the president's claim of inherent power by noting that the word "power" does not appear in the Commander in Chief clause, but the word "command," fairly implied in the noun "Commander," is a more-than-adequate substitute for "power." Was it really necessary for the drafters of the Constitution to say that the president shall have the power to command? Moreover, Prof. Epstein ignores completely the first clause of Article II -- the Vesting clause, which provides quite clearly that "The executive Power shall be vested in a President." The relevant inquiry is whether those who ratified the Constitution understood these powers to include interception of enemy communications in time of war without the permission of a judge, and on this there is really no doubt; they clearly did, which means that Congress cannot restrict the president's authority by mere statute.¶ Prof. Epstein's own description of the Commander in Chief clause recognizes this. One of the "critical functions" performed by the clause, he notes, is that "Congress cannot circumvent the president's position as commander in chief by assigning any of his responsibilities to anyone else." Yet FISA does precisely that, assigning to the FISA court a core command authority, namely, the ability to authorize interception of enemy communications. This authority has been exercised by every wartime president since George Washington.

#### C/I – Authority is what the president may do not what the president can do

Ellen Taylor 96, 21 Del. J. Corp. L. 870 (1996), Hein Online

The term authority is commonly thought of in the context of the law of agency, and the Restatement (Second) of Agency defines both power and authority.'89 Power refers to an agent's ability or capacity to produce a change in a legal relation (whether or not the principal approves of the change), and authority refers to the power given (permission granted) to the agent by the principal to affect the legal relations of the principal; the distinction is between what the agent can do and what the agent may do.

#### Prefer it

#### 1. Aff ground---only process-based affs can beat the executive CP and ex ante review is illegal

Bloomberg 13, Bloomberg Editorial Board, Feb 18 2013, “Why a ‘Drone Court’ Won’t Work,” http://www.bloomberg.com/news/2013-02-18/why-a-drone-court-won-t-work.html

As for the balance of powers, that is where we dive into constitutional hot water. Constitutional scholars agree that the president is sworn to use his “defensive power” to protect the U.S. and its citizens from any serious threat, and nothing in the Constitution gives Congress or the judiciary a right to stay his hand. It also presents a slippery slope: If a judge can call off a drone strike, can he also nix a raid such as the one that killed Osama bin Laden? If the other branches want to scrutinize the president’s national security decisions in this way, they can only do so retrospectively.

#### Cause of action and removing sovereign immunity are restrictions on Presidential war powers

Edward Keynes 10, Professor of Political Science at The Pennsylvania State University and has been visiting professor at the universities of Cologne, Kiel, and Marburg. A University of Wisconsin Ph.D., he has been a Fulbright and an Alexander von Humboldt fellow, “Undeclared War: Twilight Zone of Constitutional Power”, Google Books, p. 119-120

Despite numerous cases challenging the President’s authority to initiate and conduct the Vietnam War, the Federal courts exhibited extreme caution in entering this twilight zone of constitutional power. The federal judiciary’s reluctance to decide war-powers controversies reveals a respect for the constitutional separation of powers, an appreciation of the respective constitutional functions of Congress and the President in external affairs, and a sense of judicial self-restraint. Although most Federal courts exercised self-restraint, several courts scaled such procedural barriers as jurisdiction, standing to sue, sovereign immunity, and the political question to address the scope of congressional and presidential power to initiate war and military hostilities without a declaration of war. The latter decisions reveal an appreciation of the constitutional equilibrium upon which the separation of powers and the rule of law rest. Despite judicial caution, several Federal courts entered the political thicket in order to restore the constitutional balance between Congress and the President. Toward the end of the war in Indochina, judicial concern for the rule of law recommended intervention rather than self-restraint.

#### Restrictions can happen after the fact

ECHR 91, European Court of Human Rights, Decision in Ezelin v. France, 26 April 1991, http://www.bailii.org/eu/cases/ECHR/1991/29.html

The main question in issue concerns Article 11 (art. 11), which provides:¶ "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.¶ 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. ..."¶ Notwithstanding its autonomous role and particular sphere of application, Article 11 (art. 11) must, in the present case, also be considered in the light of Article 10 (art. 10) (see the Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 23, § 57). The protection of personal opinions, secured by Article 10 (art. 10), is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 (art. 11).¶ A. Whether there was an interference with the exercise of the freedom of peaceful assembly¶ In the Government’s submission, Mr Ezelin had not suffered any interference with the exercise of his freedom of peaceful assembly and freedom of expression: he had been able to take part in the procession of 12 February 1983 unhindered and to express his convictions publicly, in his professional capacity and as he wished; he was reprimanded only after the event and on account of personal conduct deemed to be inconsistent with the obligations of his profession.¶ The Court does not accept this submission. The term "restrictions" in paragraph 2 of Article 11 (art. 11-2) - and of Article 10 (art. 10-2) - cannot be interpreted as not including measures - such as punitive measures - taken not before or during but after a meeting (cf. in particular, as regards Article 10 (art. 10), the Handyside judgment of 7 December 1976, Series A no. 24, p. 21, § 43, and the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 19, § 28).

### 2ac def

#### Sustainable—econ and military—short term snapshots are insufficient

Kagan 12 (Not Fade Away The myth of American decline. Robert Kagan senior fellow at Brookings Inst. January 11, 2012 | 5:04 pm; The New Republic, http://goo.gl/SEyOM)

Powerful as this sense of decline may be, however, it deserves a more rigorous examination. Measuring changes in a nation’s relative power is a tricky business, but there are some basic indicators: the size and the influence of its economy relative to that of other powers; the magnitude of military power compared with that of potential adversaries; the degree of political influence it wields in the international system—all of which make up what the Chinese call “comprehensive national power.” And there is the matter of time. Judgments based on only a few years’ evidence are problematic. A great power’s decline is the product of fundamental changes in the international distribution of various forms of power that usually occur over longer stretches of time. Great powers rarely decline suddenly. A war may bring them down, but even that is usually a symptom, and a culmination, of a longer process. The decline of the British Empire, for instance, occurred over several decades. In 1870, the British share of global manufacturing was over 30 percent. In 1900, it was 20 percent. By 1910, it was under 15 percent—well below the rising United States, which had climbed over the same period from more than 20 percent to more than 25 percent; and also less than Germany, which had lagged far behind Britain throughout the nineteenth century but had caught and surpassed it in the first decade of the twentieth century. Over the course of that period, the British navy went from unchallenged master of the seas to sharing control of the oceans with rising naval powers. In 1883, Britain possessed more battleships than all the other powers combined. By 1897, its dominance had been eclipsed. British officials considered their navy “completely outclassed” in the Western hemisphere by the United States, in East Asia by Japan, and even close to home by the combined navies of Russia and France—and that was before the threatening growth of the German navy. These were clear-cut, measurable, steady declines in two of the most important measures of power over the course of a half-century. SOME OF THE ARGUMENTS for America’s relative decline these days would be more potent if they had not appeared only in the wake of the financial crisis of 2008. Just as one swallow does not make a spring, one recession, or even a severe economic crisis, need not mean the beginning of the end of a great power. The **U**nited **S**tates **suffered** deep and prolonged economic crises in the 1890s, the 1930s, and the 1970s. In each case, it rebounded in the following decade and actually ended up in a stronger position relative to other powers than before the crisis. The 1910s, the 1940s, and the 1980s were all high points of American global power and influence. Less than a decade ago, most observers spoke not of America’s decline but of its enduring primacy. In 2002, the historian Paul Kennedy, who in the late 1980s had written a much-discussed book on “the rise and fall of the great powers,” America included, declared that never in history had there been such a great “disparity of power” as between the United States and the rest of the world. Ikenberry agreed that “no other great power” had held “such formidable advantages in military, economic, technological, cultural, or political capabilities.... The preeminence of American power” was “unprecedented.” In 2004, the pundit Fareed Zakaria described the United States as enjoying a “comprehensive uni-polarity” unlike anything seen since Rome. But a mere four years later Zakaria was writing about the “post-American world” and “the rise of the rest,” and Kennedy was discoursing again upon the inevitability of American decline. Did the fundamentals of America’s relative power shift so dramatically in just a few short years? The answer is no. Let’s start with the basic indicators. In economic terms, and even despite the current years of recession and slow growth, America’s position in the world has not changed. Its share of the world’s GDP has held remarkably steady, not only over the past decade but over the past four decades. In 1969, the United States produced roughly a quarter of the world’s economic output. Today it still produces roughly a quarter, and it remains not only the largest but also the richest economy in the world. People are rightly mesmerized by the rise of China, India, and other Asian nations whose share of the global economy has been climbing steadily, but this has so far come almost entirely at the expense of Europe and Japan, which have had a declining share of the global economy. Optimists about China’s development predict that it will overtake the United States as the largest economy in the world sometime in the next two decades. This could mean that the United States will face an increasing challenge to its economic position in the future. But the sheer size of an economy is not by itself a good measure of overall power within the international system. If it were, then early nineteenth-century China, with what was then the world’s largest economy, would have been the predominant power instead of the prostrate victim of smaller European nations. Even if China does reach this pinnacle again—and Chinese leaders face significant obstacles to sustaining the country’s growth indefinitely—it will still remain far behind both the United States and Europe in terms of per capita GDP. Military capacity matters, too, as early nineteenth-century China learned and Chinese leaders know today. As Yan Xuetong recently noted, “military strength underpins hegemony.” Here the United States remains unmatched. It is far and away the most powerful nation the world has ever known, and there has been no decline in America’s relative military capacity—at least not yet. Americans currently spend less than $600 billion a year on defense, more than the rest of the other great powers combined. (This figure does not include the deployment in Iraq, which is ending, or the combat forces in Afghanistan, which are likely to diminish steadily over the next couple of years.) They do so, moreover, while consuming a little less than 4 percent of GDP annually—a higher percentage than the other great powers, but in historical terms lower than the 10 percent of GDP that the United States spent on defense in the mid-1950s and the 7 percent it spent in the late 1980s. The superior expenditures underestimate America’s actual superiority in military capability. American land and air forces are equipped with the most advanced weaponry, and are the most experienced in actual combat. They would defeat any competitor in a head-to-head battle. American naval power remains predominant in every region of the world. By these military and economic measures, at least, the United States today is not remotely like Britain circa 1900, when that empire’s relative decline began to become apparent. It is more like Britain circa 1870, when the empire was at the height of its power. It is possible to imagine a time when this might no longer be the case, but that moment has not yet arrived.

## CP

## 2AC Drone Shift

#### Restrictions now—burden of proof cases brought before the DC circuit court—that’s benhalim—detention uncertainty in federal courts wrecks efficacy and causes shift to civilian system now—that’s elsea

#### That’s already triggered the shift—aff solves

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."

#### No link—shift is because of difficulty of CAPTURE not conviction—Pakistani permission’s a big alt cause

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.

#### Key to the credibility of future detentions

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)

Second, and perhaps counterintuitively (if no less significantly), such lack of precedent setting also creates uncertainty on the part of the government, which can’t know for sure whether the lack of a judicial decision on the merits has actually validated the challenged policy, or has merely left the issue unresolved going forward. As former CIA General Counsel Tony Lapham put it in an analogous context, such uncertainty leads to the “worst of both worlds” wherein citizens are “as unsure of their liabilities as I am unsure of their obligations.”

### No one follows our drone norms

Kenneth Anderson 11, Professor of International Law at American University, 10/9/11, “What Kind of Drones Arms Race Is Coming?,” <http://www.volokh.com/2011/10/09/what-kind-of-drones-arms-race-is-coming/#more-51516>

New York Times national security correspondent Scott Shane has an opinion piece in today’s Sunday Times predicting an “arms race” in military drones. The methodology essentially looks at the US as the leader, followed by Israel – countries that have built, deployed and used drones in both surveillance and as weapons platforms. It then looks at the list of other countries that are following fast in US footsteps to both build and deploy, as well as purchase or sell the technology – noting, correctly, that the list is a long one, starting with China. The predicament is put this way:

Eventually, the United States will face a military adversary or terrorist group armed with drones, military analysts say. But what the short-run hazard experts foresee is not an attack on the United States, which faces no enemies with significant combat drone capabilities, but the political and legal challenges posed when another country follows the American example. The Bush administration, and even more aggressively the Obama administration, embraced an extraordinary principle: that the United States can send this robotic weapon over borders to kill perceived enemies, even American citizens, who are viewed as a threat.

“Is this the world we want to live in?” asks Micah Zenko, a fellow at the Council on Foreign Relations. “Because we’re creating it.”

By asserting that “we’re” creating it, this is a claim that there is an arms race among states over military drones, and that it is a consequence of the US creating the technology and deploying it – and then, beyond the technology, changing the normative legal and moral rules in the international community about using it across borders. In effect, the combination of those two, technological and normative, forces other countries in strategic competition with the US to follow suit. (The other unstated premise underlying the whole opinion piece is a studiously neutral moral relativism signaled by that otherwise unexamined phrase “perceived enemies.” Does it matter if they are not merely our “perceived” but are our actual enemies? Irrespective of what one might be entitled to do to them, is it so very difficult to conclude, even in the New York Times, that Anwar al-Awlaki was, in objective terms, our enemy?)

It sounds like it must be true. But is it? There are a number of reasons to doubt that moves by other countries are an arms race in the sense that the US “created” it or could have stopped it, or that something different would have happened had the US not pursued the technology or not used it in the ways it has against non-state terrorist actors. Here are a couple of quick reasons why I don’t find this thesis very persuasive, and what I think the real “arms race” surrounding drones will be.

Unmanned aerial vehicles have clearly got a big push from the US military in the way of research, development, and deployment. But the reality today is that the technology will transform civil aviation, in many of the same ways and for the same reasons that another robotic technology, driverless cars (which Google is busily plying up and down the streets of San Francisco, but which started as a DARPA project). UAVs will eventually move into many roles in ordinary aviation, because it is cheaper, relatively safer, more reliable – and it will eventually include cargo planes, crop dusting, border patrol, forest fire patrols, and many other tasks. There is a reason for this – the avionics involved are simply not so complicated as to be beyond the abilities of many, many states. Military applications will carry drones many different directions, from next-generation unmanned fighter aircraft able to operate against other craft at much higher G stresses to tiny surveillance drones. But the flying-around technology for aircraft that are generally sizes flown today is not that difficult, and any substantial state that feels like developing them will be able to do so.

But the point is that this was happening anyway, and the technology was already available. The US might have been first, but it hasn’t sparked an arms race in any sense that absent the US push, no one would have done this. That’s just a fantasy reading of where the technology in general aviation was already going; Zenko’s ‘original sin’ attribution of this to the US opening Pandora’s box is not a credible understanding of the development and applications of the technology. Had the US not moved on this, the result would have been a US playing catch-up to someone else. For that matter, the off-the-shelf technology for small, hobbyist UAVs is simple enough and available enough that terrorists will eventually try to do their own amateur version, putting some kind of bomb on it.

Moving on from the avionics, weaponizing the craft is also not difficult. The US stuck an anti-tank missile on a Predator; this is also not rocket science. Many states can build drones, many states can operate them, and crudely weaponizing them is also not rocket science. The US didn’t spark an arms race; this would occur to any state with a drone. To the extent that there is real development here, it lies in the development of specialized weapons that enable vastly more discriminating targeting. The details are sketchy, but there are indications from DangerRoom and other observers (including some comments from military officials off the record) that US military budgets include amounts for much smaller missiles designed not as anti-tank weapons, but to penetrate and kill persons inside a car without blowing it to bits, for example. This is genuinely harder to do – but still not all that difficult for a major state, whether leading NATO states, China, Russia, or India. The question is whether it would be a bad thing to have states competing to come up with weapons technologies that are … more discriminating.

#### No SCS conflict—economics and deterrence

Creehan 12 – Senior Editor of the SAIS (school of advanced international studies, johns Hopkins) Review of International Affairs (Sean, “Assessing the Risks of Conflict in the South China Sea,” Winter/Spring, SAIS Review, Vol. 32, No. 1)

Regarding Secretary Clinton’s first requirement, the risk of actual closure of the South China Sea remains remote, as instability in the region would affect the entire global economy, raising the price of various goods and commodities. According to some estimates, for example, as much as 50 percent of global oil tanker shipments pass through the South China Sea— that represents more than three times the tanker traffic through the Suez Canal and over five times the tanker traffic through the Panama Canal.4 It is in no country’s interest to see instability there, least of all China’s, given the central economic importance of Chinese exports originating from the country’s major southern ports and energy imports coming through the South China Sea (annual U.S. trade passing through the Sea amounts to $1.2 trillion).5 Invoking the language of nuclear deterrence theory, disruption in these sea lanes implies mutually assured economic destruction, and that possibility should moderate the behavior of all participants. Furthermore, with the United States continuing to operate from a position of naval strength (or at least managing a broader alliance that collectively balances China’s naval presence in the future), the sea lanes will remain open. While small military disputes within such a balance of power are, of course, possible, the economic risks of extended conflict are so great that significant changes to the status quo are unlikely.

### XX No impact—drones will fail inevitably—domestic and international pressures

Zenko 2013 (Micah Zenko, Douglas Dillon fellow in the Center for Preventive Action at CFR, previously worked at Harvard Kennedy School and State Department, January 2013, “Reforming U.S. Drone Strike Policies,” CFR Special Report No 56)

In his Nobel Peace Prize acceptance speech, President Obama declared: “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. Even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war.”63 Under President Obama drone strikes have expanded and intensified, and they will remain a central component of U.S. counterterrorism operations for at least another decade, according to U.S. officials.64 But much as the Bush administration was compelled to reform its controversial coun- terterrorism practices, it is likely that the United States will ultimately be forced by domestic and international pressure to scale back its drone strike policies. The Obama administration can preempt this pressure by clearly articulating that the rules that govern its drone strikes, like all uses of military force, are based in the laws of armed conflict and inter- national humanitarian law; by engaging with emerging drone powers; and, most important, by matching practice with its stated policy by limiting drone strikes to those individuals it claims are being targeted (which would reduce the likelihood of civilian casualties since the total number of strikes would significantly decrease).

The choice the United States faces is not between unfettered drone use and sacrificing freedom of action, but between drone policy reforms by design or drone policy reforms by default. Recent history dem- onstrates that domestic political pressure could severely limit drone strikes in ways that the CIA or JSOC have not anticipated. In support of its counterterrorism strategy, the Bush administration engaged in the extraordinary rendition of terrorist suspects to third countries, the use of enhanced interrogation techniques, and warrantless wiretapping. Although the Bush administration defended its policies as critical to protecting the U.S. homeland against terrorist attacks, unprecedented domestic political pressure led to significant reforms or termination. Compared to Bush-era counterterrorism policies, drone strikes are vulnerable to similar—albeit still largely untapped—moral outrage, and they are even more susceptible to political constraints because they occur in plain sight. Indeed, a negative trend in U.S. public opinion on drones is already apparent. Between February and June 2012, U.S. support for drone strikes against suspected terrorists fell from 83 per- cent to 62 percent—which represents less U.S. support than enhanced interrogation techniques maintained in the mid-2000s.65 Finally, U.S. drone strikes are also widely opposed by the citizens of important allies, emerging powers, and the local populations in states where strikes occur.66 States polled reveal overwhelming opposition to U.S. drone strikes: Greece (90 percent), Egypt (89 percent), Turkey (81 percent), Spain (76 percent), Brazil (76 percent), Japan (75 percent), and Pakistan (83 percent).67

This is significant because the United States cannot conduct drone strikes in the most critical corners of the world by itself. Drone strikes require the tacit or overt support of host states or neighbors. If such states decided not to cooperate—or to actively resist—U.S. drone strikes, their effectiveness would be immediately and sharply reduced, and the likelihood of civilian casualties would increase. This danger is not hypothetical. In 2007, the Ethiopian government terminated its U.S. military presence after public revelations that U.S. AC-130 gun- ships were launching attacks from Ethiopia into Somalia. Similarly, in late 2011, Pakistan evicted all U.S. military and intelligence drones, forc- ing the United States to completely rely on Afghanistan to serve as a staging ground for drone strikes in Pakistan. The United States could attempt to lessen the need for tacit host-state support by making signifi- cant investments in armed drones that can be flown off U.S. Navy ships, conducting electronic warfare or missile attacks on air defenses, allow- ing downed drones to not be recovered and potentially transferred to China or Russia, and losing access to the human intelligence networks on the ground that are critical for identifying targets.

According to U.S. diplomats and military officials, active resistance—such as the Pakistani army shooting down U.S. armed drones— is a legitimate concern. In this case, the United States would need to either end drone sorties or escalate U.S. military involvement by attack- ing Pakistani radar and antiaircraft sites, thus increasing the likelihood of civilian casualties.68 Beyond where drone strikes currently take place, political pressure could severely limit options for new U.S. drone bases.

For example, the Obama administration is debating deploying armed drones to attack al-Qaeda in the Islamic Maghreb (AQIM) in North Africa, which would likely require access to a new airbase in the region. To some extent, anger at U.S. sovereignty violations is an inevitable and necessary trade-off when conducting drone strikes. Nevertheless, in each of these cases, domestic anger would partially or fully abate if the United States modified its drone policy in the ways suggested below.

## B ond

#### No CBW cred now

Logan 9/9 (Justin Logan, director of foreign policy studies at the Cato Institute, September 9, 2013, “Washington's Weak Case for War in Syria,” Real Clear World, http://www.realclearworld.com/articles/2013/09/09/washingtons\_weak\_case\_for\_war\_in\_syria.html)

The Obama administration's position for more than two years has been that "Assad must go," but, apparently aware of reticence to replay Iraq or Afghanistan, they have insisted that a military attack against a man they say "must go" has nothing to do with regime change. Rather, they have outlined two main rationales: defending an international norm against the use of chemical weapons, and defending the president's credibility.¶ The norms argument holds that since more than 98 percent of countries have signed the Chemical Weapons Convention (CWC), the use of chemical weapons violates a norm against their use, and thus warrants an American bombing campaign.¶ This is a curious definition of "norm," and a dubious political rationale as well. The dictionary defines norm as "a principle of right action binding upon the members of a group and serving to guide, control or regulate proper and acceptable behavior," but says little about what punishment, if any, should be meted out for violation. And the CWC is a treaty, not a norm, that specifies only that redress of violations should be "in conformity with international law," which presumably would preclude a unilateral U.S. bombing campaign. Further, by not signing the CWC, Syria made clear that it was not part of the group bound by the convention.¶ The United States once again finds itself standing nearly alone in defense of a principle it swears is shared by a vast majority of the globe. If other nations cannot be roused in defense of the principle that chemical weapons should not be used, perhaps the norm is not so strongly held after all.

#### This DA is incoherent--- lots of other controversial cases coming up--- make them provide a specific piece of spillover evidence

Slattery 9/17 (Elizabeth Slattery, September 17, 2013, “Preview of Next Supreme Court Term,” The Foundry, http://blog.heritage.org/2013/09/17/preview-of-next-supreme-court-term/)

Monday, October 7, marks the beginning of the Supreme Court’s next term. The last term included a number of high-profile cases involving voting rights, same-sex marriage, drug-sniffing dogs, and racial preferences in college admissions. So what is on deck for this next term?¶ There are a number of cases already lined up. Some of the potentially big cases are:¶ McCutcheon v. Federal Election Commission: Are aggregate limits on contributions to federal candidates, political action committees, and party committees constitutional?¶ McCullen v. Coakley: Can a state ban pro-life speech outside abortion clinics while allowing pro-abortion speech?¶ Town of Greece v. Galloway: Does a town violate the Establishment Clause by opening its board meetings with a prayer?¶ Schuette v. Coalition to Defend Affirmative Action: May states limit the use of racial preferences by amending their constitutions?¶ Bond v. United States: What is the scope of the Treaty Power? Can the President, the Senate, and a foreign country conspire to expand the powers of the federal government through treaties?¶ National Labor Relations Board v. Noel Canning: Who decides when Congress is in “recess” for the purpose of making presidential appointments: the President or the Senate?

#### No impact--- workarounds and self-executing treaties solve

Ku 2013 (Julian Ku, Professor of Law and Faculty Director of International Programs at Hofstra School of Law, “Will Bond v. United States Matter?,”

Bond v. United States is one of those cases that promises both more and less than it seems.

At first glance, it seems an important and fascinating case because it is the first time the U.S. Supreme Court will revisit any aspect of the famous 1920 Oliver Wendell Holmes Jr.’s decision in Missouri v. Holland. That decision, arguably the most famous decision in the U.S. foreign affairs law canon, held that the treaty power was not constrained by the state’s rights limitations in the Tenth Amendment of the U.S. Constitution. It also held that Congress’ power to implement treaties through normal legislation is similarly unconstrained.¶ By agreeing to decide Bond, the Supreme Court may reconsider the second (and less famous) of those two holdings. That second holding, on the much understudied “treaty implementation” power, was challenged in a 2005 Harvard Law Review article by Georgetown Professor Nicholas Rosencranz. (BTW, large congratulations should go to Nick for almost single-handedly creating, or at least reviving, this argument.)¶ As a matter of high constitutional principle about the nature of the U.S. Constitution’s grant of enumerated powers, this could be a huge case. But there are reasons to doubt the practical importance of any decision by the Court to revisit Missouri v. Holland in the context of Bond. Why? Because the central holding of Missouri v. Holland was that treaties are not constrained by the Tenth Amendment. Even if the Court holds that Congress cannot use a treaty to exceed its Article I powers, the President and Senate could still simply use a self-executing treaty to implement the same obligations (as Prof. Rick Pildes argues here).¶ Having said all that, a favorable decision for the petitioners in Bond could still have a practical impact by reviving that almost extinct constitutional creature: the self-executing treaty. The President and Senate, at least in the past few decades, have very rarely approved self-executing treaties outside of a few subject matter areas (like taxes, extradition, and investment). Big important treaties, such as human rights treaties, have generally been approved on the condition they are non-self-executing. (Go ahead, name the most important self-executing treaty of the past thirty years. That Tax Convention with Chile?) Or they are approved like most trade agreements via the route of the congressional-executive agreement.

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#### Costs are contextually marginal—withdrawal is way worse

Kagan 12 (Not Fade Away The myth of American decline. Robert Kagan senior fellow at Brookings Inst. January 11, 2012 | 5:04 pm; The New Republic, http://goo.gl/SEyOM)

If we are serious about this exercise in accounting, moreover, the costs of maintaining this position cannot be measured without considering the costs of losing it. Some of the costs of reducing the American role in the world are, of course, unquantifiable. What is it worth to Americans to live in a world dominated by democracies rather than by autocracies? But some of the potential costs could be measured, if anyone cared to try. If the decline of American military power produced an unraveling of the international economic order that American power has helped sustain; if trade routes and waterways ceased to be as secure, because the U.S. Navy was no longer able to defend them; if regional wars broke out among great powers because they were no longer constrained by the American superpower; if American allies were attacked because the United States appeared unable to come to their defense; if the generally free and open nature of the international system became less so—if all this came to pass, there would be measurable costs. And it is not too far-fetched to imagine that these costs would be far greater than the savings gained by cutting the defense and foreign aid budgets by $100 billion a year. You can save money by buying a used car without a warranty and without certain safety features, but what happens when you get into an accident? American military strength reduces the risk of accidents by deterring conflict, and lowers the price of the accidents that occur by reducing the chance of losing. These savings need to be part of the calculation, too. As a simple matter of dollars and cents, it may be a lot cheaper to preserve the current level of American involvement in the world than to reduce it.

### Dr shift

#### \*Status quo detention triggers the link—aff’s key to solve

Craig Whitlock 13, Washington Post, "Renditions continue under Obama, despite due-process concerns", January 1, articles.washingtonpost.com/2013-01-01/world/36323571\_1\_obama-administration-interrogation-drone-strikes

The three European men with Somali roots were arrested on a murky pretext in August as they passed through the small African country of Djibouti. But the reason soon became clear when they were visited in their jail cells by a succession of American interrogators.¶ U.S. agents accused the men — two of them Swedes, the other a longtime resident of Britain — of supporting al-Shabab, an Islamist militia in Somalia that Washington considers a terrorist group. Two months after their arrest, the prisoners were secretly indicted by a federal grand jury in New York, then clandestinely taken into custody by the FBI and flown to the United States to face trial.¶ The secret arrests and detentions came to light Dec. 21 when the suspects made a brief appearance in a Brooklyn courtroom.¶ The men are the latest example of how the Obama administration has embraced rendition — the practice of holding and interrogating terrorism suspects in other countries without due process — despite widespread condemnation of the tactic in the years after the Sept. 11, 2001, attacks.¶ Renditions are taking on renewed significance because the administration and Congress have not reached agreement on a consistent legal pathway for apprehending terrorism suspects overseas and bringing them to justice.¶ Congress has thwarted President Obama’s pledge to close the military prison at Guantanamo Bay, Cuba, and has created barriers against trying al-Qaeda suspects in civilian courts, including new restrictions in a defense authorization bill passed last month. The White House, meanwhile, has resisted lawmakers’ efforts to hold suspects in military custody and try them before military commissions.¶ The impasse and lack of detention options, critics say, have led to a de facto policy under which the administration finds it easier to kill terrorism suspects, a key reason for the surge of U.S. drone strikes in Pakistan, Yemen and Somalia. Renditions, though controversial and complex, represent one of the few alternatives.

#### The impact is a decade away and not likely

Zenko 2013 [Micah Zenko is the Douglas Dillon fellow in the Center for Preventive Action (CPA) at the Council on Foreign Relations (CFR). Previously, he worked for five years at the Harvard Kennedy School and in Wash- ington, DC, at the Brookings Institution, Congressional Research Ser- vice, and State Department’s Office of Policy Planning January 2013 Council on Foreign Relations Special Report no. 65 “Reforming U.S. Drone Strike Policies”]

Based on current trends, it is unlikely that most states will have, within ten years, the complete system architecture required to carry out distant drone strikes that would be harmful to U.S. national interests. However, those candidates able to obtain this technology will most likely be states with the financial resources to purchase or the industrial base to manufacture tactical short-range armed drones with limited firepower that lack the precision of U.S. laser-guided munitions; the intelligence collection and military command-and-control capabilities needed to deploy drones via line-of-sight communications; and cross- border adversaries who currently face attacks or the threat of attacks by manned aircraft, such as Israel into Lebanon, Egypt, or Syria; Russia into Georgia or Azerbaijan; Turkey into Iraq; and Saudi Arabia into Yemen. When compared to distant U.S. drone strikes, these contingen- cies do not require system-wide infrastructure and host-state support. Given the costs to conduct manned-aircraft strikes with minimal threat to pilots, it is questionable whether states will undertake the significant investment required for armed drones in the near term.