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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.

## Intel EU Sharing

### Clear signal for low evidentiary bar now—habeas wins on circumstantial evidence

Linzer 11 (Appeals Court Makes It Easier for Gov’t to Hold Gitmo Detainees by Dafna Linzer ProPublica, March 29, 2011, 4:51 p.m http://www.propublica.org/article/appeals-court-makes-it-easier-for-govt-to-hold-gitmo-detainees)

In a decision that will likely make it more difficult for Guantanamo prisoners to win release, the U.S. Court of Appeals for the D.C. Circuit today reversed a lower court’s ruling in the pivotal case of a Yemeni detainee. In a 14-page decision, the appeals court rejected the lower court’s ruling to release Uthman Abdul Rahim Mohammed Uthman, who has been held at Guantanamo without charge since 2002. Uthman’s case and the government’s attempts to classify the legal opinions it generated were the subject of a ProPublica story. The appeals court standard for detention has been laid out over the last year in a number of significant cases, and as with today’s case, each time in the government’s favor. The results have been a boon for the Obama administration’s efforts to keep certain Guantanamo detainees in custody. Today’s decision further clarifies that standard by declaring that the government doesn’t need direct evidence that a detainee fought for or was a member of al-Qaida in order to justify a detention. Much was riding on the Uthman case because he is among several dozen prisoners the Obama administration plans to hold indefinitely without charge. For other detainees, it will likely alter the way they can present their cases for release. In 2008, Guantanamo detainees won the right to challenge the lawfulness of their detention in court. The first challenges were largely successful for detainees, but a number of significant cases have been pushed back at the circuit court. Uthman filed a challenge, and in February 2010, District Court Judge Henry H. Kennedy, Jr. ruled that he was being improperly held and that the United States had failed to demonstrate that he was a member of al-Qaida. As ProPublica detailed, the government censored Kennedy’s decision and quickly appealed the case to a court that was already lowering the government’s burden for proving a prisoner’s detainability. In another case last year, known as Salahi, the appeals court rejected a lower court’s standard that the government show direct evidence the detainee was a member of al-Qaida. In that case, the court sent the detainee back to the district court to have his habeas corpus petition reheard. In today’s opinion, written by Judge Brett Kavanaugh, the appeals court went further by reversing the habeas win outright. In doing so, the court determined that circumstantial evidence, such as a detainee being in the same location as other al-Qaida members, is enough to meet the standard to hold a prisoner without charge. That standard, the court wrote in its decision today, “along with uncontested facts in the record, demonstrate that Uthman more likely than not was part of al Qaeda.” Benjamin Wittes of the Brookings Institution and the national security blog Lawfare attended Uthman’s appeals hearing in February and predicted that the government would prevail. Noting the circuit court’s emerging standards, Wittes wrote that if the appeals court ordered an outright reversal of the Uthman decision “a lot of other Guantanamo detainees are going to share his pain. His case could end up lowering the substantive bar for the government to prevail in these habeas cases.” Jonathan Hafetz, a professor at Seton Hall University School of Law who has represented a number of Guantanamo detainees including Salahi, said today’s opinion significantly favors the government in ways the Supreme Court did not intend when it granted detainees the right to challenge detentions. “The Uthman case cements the trend in the D.C. Circuit's decisions toward a broad and malleable definition of who can be considered ‘part of’ al Qaeda, combined with a highly deferential view of the government's interpretation of the facts,” Hafetz said, “In many cases, the result is indefinite detention based on suspicion or assumptions about a detainee's behavior.” Hafetz argued that today’s decision conflicts not only with the approach taken by the district courts but also with the Supreme Court. Hafetz said the Supreme Court “mandated a meaningful judicial process in which the government would be called to account; Uthman says judges should not require much in the way of an answer.” Wittes embraced today’s opinion, writing on his blog that the court’s opinion reflects the complex reality of Guantanamo Bay. Today’s case asks “whether a relatively spare string of incriminating facts can get the government over the hump. The answer now is clear: It can,” Wittes wrote. “Many fewer detainees will prevail under this understanding of the government’s evidentiary burden than would prevail under one less tolerant of a mosaic of incriminating facts,” he wrote.

### Law enforcement shift and evidentiary review 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.

### EU judicial and intelligence 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

### Courts accept classified docs in habeas hearings now and BALK at hearsay and statements which would be offered otherwise

Benhalim 10 (The Emerging Law of Detention The Guantánamo Habeas Cases as Lawmaking\* Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. Robert M. Chesney is a nonresident senior fellow in Governance Studies at The Brookings Institution. Rabea Benhalim is a legal fellow in Governance Studies at The Brookings Institution. January 22, 2010 http://www.brookings.edu/~/media/research/files/papers/2010/1/22%20guantanamo%20wittes%20chesney/0122\_guantanamo\_wittes\_chesney.pdf)

In conceptual terms, Judge Kessler’s hearsay jurisprudence tracks Judge Leon’s, although she seems to display considerably more skepticism. As with Judge Leon, third-party hearsay material—statements by other detainees inculpating the petitioner—bears consideration only when corroborated, but Judge Kessler’s sense of appropriate corroboration appears more demanding than Judge Leon’s. For instance, in Ahmed, the government alleged the following facts: “the Petitioner fought in Afghanistan, trained in Afghanistan, used the kunya [redaction] traveled in Afghanistan with al-Qaida and/or Taliban members, [and] stayed at [redaction] with al-Qaida and/or Taliban member.”145 As with the cases in which third-party hearsay evidence failed to move Judge Leon, the government’s “chief pieces of evidence” in support of these allegations were statements by other detainees, not self-incriminatory statements by the petitioner himself or strong documentary evidence.146 Unfortunately for the government, one of these detainees is one of the same people whose testimony Judge Leon rejects in El Gharani—and Judge Kessler agrees with Judge Leon’s skeptical assessment of him.147 A second witness, she rules, gave statements that were “equivocal and lacking in detail or description” and “riddled...with equivocation and speculation,” while a third gave inconsistent statements, had a history of mental health problems, and may have faced torture. The fourth also apparently had credibility problems, though redactions in the opinion make it impossible to discern what they were.148 Ultimately, Judge Kessler rejects almost all of the allegations—because of weakness, because the hearsay is not corroborated, and some simply because they were given at Bagram amidst the alleged torture and abuse of others.149 The one significant fact that Judge Kessler is willing to find against Ahmed is that he spent a considerable period of time at a guesthouse in Faisalabad in the company of Al Qaeda terrorists. This fact was not based on hearsay, however. It was, rather, undisputed. And Judge Kessler finds this fact unimportant in the absence of evidence of terrorist activity on Ahmed’s part while staying there: “the problem with this charge is that there is no solid evidence that… [the petitioner] engaged in, or planned, any future wrongdoing.…There is no evidence that he was arrested with any weapons or other terrorist paraphernalia.…Though others at the House admitted their affiliation with al-Qaida, they did not implicate… [the petitioner] in any terrorist activity,” she writes. While Judge Kessler allows that the government proved that the petitioner stayed at the guest house, she writes that it had “utterly failed to present evidence that he was a substantial supporter of al-Qaida and/or the Taliban while he did stay there.”150 In short, in Ahmed, Judge Kessler allows no fact to be proven based on uncorroborated hearsay from other detainees. In fact, she allows no fact to be proven that the detainee does not concede. She takes a similar approach in Al Adahi and in doing so raises, if only implicitly, the question of what quantity or quality of extrinsic evidence is necessary in order to satisfy the corroboration requirement. She describes the government’s evidence in this case as “classified intelligence and interview reports” which “contain the statements of Petitioner, as well as statements made by other detainees. . . .”151 And in general, she accepts these reports to the extent they are not contested or to the extent they find corroboration in the detainee’s own statements. Yet where the government relies more completely on third-party hearsay that the detainee either contests or has supported with his own statements, she consistently balks. So while she accepts, for example, that the detainee stayed in a guest house for one night, a fact he admitted repeatedly, she writes that she “cannot rely” on another detainee’s “vague and uncorroborated statement about his meeting with Al-Adahi at an unnamed Kandahar guesthouse.”152 And while she accepts that Al-Adahi was present at the Al Farouq camp, which he admits, she rejects a statement by another detainee, even when corroborated by “several pieces of circumstantial evidence,” that he was an instructor there.153 She likewise rejects a detainee’s statement that Al Adahi served as a bodyguard for Bin Laden, even though Al Adahi’s statements reflect a great deal of familiarity with Bin Laden’s other bodyguards.154 In these latter two instances, Judge Kessler seems to be applying standards of corroboration more rigorous than Judge Leon’s. At a minimum, however, she makes clear not only that corroboration is required in actual practice for hearsay statements by other detainees, but also that minimal corroboration will not suffice. Judge Kessler demands a high level of confidence that hearsay allegations are accurate.

### It’s a big issue of deference—aff solves the accordance of special weight to executive evidence

Benhalim 10 (The Emerging Law of Detention The Guantánamo Habeas Cases as Lawmaking\* Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. Robert M. Chesney is a nonresident senior fellow in Governance Studies at The Brookings Institution. Rabea Benhalim is a legal fellow in Governance Studies at The Brookings Institution. January 22, 2010 http://www.brookings.edu/~/media/research/files/papers/2010/1/22%20guantanamo%20wittes%20chesney/0122\_guantanamo\_wittes\_chesney.pdf)

Both government and habeas counsel are also pushing the appeals courts to redirect the lower court concerning the use of hearsay evidence, with a particular focus on the admissibility of and weight to be accorded such evidence. Again, the potential range of possible approaches the parties urge is wide, and the universe of cases likely affected by the Court of Appeals’ ultimate standard is presumably large as well. In Al Adahi, the government argues that Judge Kessler flyspecked its evidence way too closely, looking at each piece of evidence individually and applying scrutiny to it that, “far from acknowledging the realities of the wartime military setting and the weight and sensitivity of the government’s interests. . . [applied a] heightened standard of proof for the government.”240 In one instance, the government argues, Judge Kessler “searched for reasons, including mistaken reasons, to discredit the government’s witness, and refused on legally erroneous grounds to even consider the evidence that corroborated the witness’s statements.”241 The proper approach, it urges the D.C. Circuit, “is to recognize the distinct nature of the intelligence information and other sources on which the military must rely, and to accord appropriate deference to the inferences that expert military personnel draw from such material based on the insights they derive from their military operations and experience.”242 This latter point is particularly important, as the notion of deference has not heretofore played a significant role in the habeas decisions. In other contexts relating to national security and military affairs, the government routinely urges judges to defer to its factual judgments, citing comparative institutional competence and legitimacy. Such claims, for example, frequently emphasize the executive branch’s presumed access to special expertise in the relevant subject matter.243 The government’s hearsay-related arguments in Al Adahi appear to invoke a similar principle, insofar as the government criticizes Judge Kessler for failing to accord special weight to the factual conclusions drawn by executive branch experts. If adopted by the courts, this approach could have far-reaching implications for future habeas proceedings whether the evidentiary dispute concerns hearsay or not.

### Intel reliability pushes now—precedent’s key

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While the government complains that Judge Kessler gives insufficient weight to its hearsay material, the detainees have complained that Judge Leon shows too much solicitude for it—though the D.C. Circuit has not been receptive to this complaint to date. One of the central grounds of attack in Bensayah alleges that Judge Leon “credited unfinished, conclusory intelligence reports and uncorroborated assertions from anonymous sources in disregard of Parhat v. Gates.”244 These “raw intelligence reports for which no reliability assessment was possible,” Bensayah’s lawyers argue, were corroborated only with other such reports which “were themselves raw, unfinished intelligence” whose “reliability is just as questionable” as the original. There is, they argue, “no indication in the record that the originating agencies rigorously analyzed them or concluded they were reliable.”245 Likewise, Al Bihani’s lawyers objected to Judge Leon’s “wholesale admission of unreliable hearsay without balancing any purported need to proceed in that manner against Al-Bihani’s due process rights.”246 The D.C. Circuit, as previously noted, rejected Al Bihani’s arguments on this point, but again, this is an interim, not a final step. Ultimately, the Supreme Court, and not the D.C. Circuit, is likely to determine what it meant when it suggested that hearsay had a role to play in these cases. The consequences of appellate courts’ approach to this question seem particularly significant: If it adopts the government’s view of hearsay, the district court judges will be obliged to find a great deal more facts in the government’s favor than if it adopts a more closely-scrutinizing approach.

### 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, t+

e 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.

### BOP fights now

Benhalim 10 (The Emerging Law of Detention The Guantánamo Habeas Cases as Lawmaking\* Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. Robert M. Chesney is a nonresident senior fellow in Governance Studies at The Brookings Institution. Rabea Benhalim is a legal fellow in Governance Studies at The Brookings Institution. January 22, 2010 http://www.brookings.edu/~/media/research/files/papers/2010/1/22%20guantanamo%20wittes%20chesney/0122\_guantanamo\_wittes\_chesney.pdf)

Burden of Proof The consensus among the lower-court judges that the government bears the burden of proof by a preponderance of the evidence has faced a multi-faceted attack at the D.C. Circuit. In both of the detainee appeals—Bensayah and Al Bihani—the detainees have attacked the standard directly, arguing that the lower court should have adopted a more rigorous standard before authorizing their indefinite detentions. “No decision of the Supreme Court or this Court suggests that an individual may be permanently deprived of his most fundamental personal liberty based on anything less than clear and convincing evidence. Given the grave implications of being labeled and treated as an ‘enemy combatant,’ a reasonable doubt standard would be in order,” write Bensayah’s attorneys.226 Likewise, AlBihani’s lawyers argued that “Indefinite detention requires proof beyond-a reasonable-doubt” or, “At a minimum, clear-and-convincing evidence should apply.”227 The D.C. Circuit in Al Bihani not only expressly rejects this argument, but also goes out of its way in a footnote to note that it remains an open question whether a still-lower calibration of the government’s burden might be constitutional as well. The issue thus seems likely to return at some point, perhaps in Bensayah. The D.C. Circuit panel also rejects Al Bihani’s argument that the preponderance standard in any event was misapplied and that Judge Leon had not adequately accepted that the burden lay with the government but had effectively “shift[ed] the burden” to the detainee by making him address government evidence and fill in gaps within it.228 The detainees, in short, are asking the appeals courts to raise the standard or, failing that, at least to enforce it strictly and make the government prove every fact on which a decision can rely. So far, the one appeals panel to confront the issue has wondered only if the preponderance standard is too tough.

### XNo circumvention—Court structures national security law

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)

[\*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.

### XXClassified docs in detention habeas trials key to mosaic preponderance—it’s a judicial abomination

Benhalim 10 (The Emerging Law of Detention The Guantánamo Habeas Cases as Lawmaking\* Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. Robert M. Chesney is a nonresident senior fellow in Governance Studies at The Brookings Institution. Rabea Benhalim is a legal fellow in Governance Studies at The Brookings Institution. January 22, 2010 http://www.brookings.edu/~/media/research/files/papers/2010/1/22%20guantanamo%20wittes%20chesney/0122\_guantanamo\_wittes\_chesney.pdf)

The idea of a “mosaic theory” has long described a relatively straightforward strategy for intelligence analysis. As one scholar puts it, “[d]isparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information. Combining the items illuminates their interrelationships and breeds analytic synergies, so that the resulting mosaic of information is worth more than the sum of its parts.”194 Stated in this fashion, the mosaic theory poses no special controversy; it merely describes the process of mining the latent probative value of seemingly innocuous or irrelevant information. It is a rough analogue for the use in courts of circumstantial evidence. The mosaic theory became a subject of some public attention and controversy in the 1980s, however, when the Reagan Administration invoked it as justification for classifying otherwise-innocuous information that a foreign intelligence service could use in combination with other information to generate knowledge of sensitive matters. Employed in this defensive capacity, the mosaic theory became central to arguments for resisting disclosures under the Freedom of Information Act and for invocations of the State Secrets Privilege. By extension, the theory became associated with the larger debate concerning excessive government secrecy, overclassification, and the like.195 Against this backdrop, the mosaic theory made its first significant appearance in the Guantánamo habeas litigation in Judge Leon’s opinion in El Gharani. There the government’s evidence amounted to what the judge called “a mosaic of allegations made up of statements by the petitioner, statements by several of his fellow detainees, and certain classified documents that allegedly establish in greater detail the most likely explanation for, and significance of, petitioner’s conduct.”196 Judge Leon makes clear that the allegations in question, “if proven, would be strong evidence of enemy combatancy,”197 but he finds that the government’s evidence failed to establish by the preponderance standard that any of the allegations actually were true.198 That in turn raised the question of whether the government might nonetheless satisfy its ultimate burden of proof by pointing to the cumulative impact of this otherwise-weak evidence. That is, might the government be able to prove by a preponderance of the evidence that El Gharani was part of or supporting Al Qaeda even if its evidence did not suffice to prove true some or all of the individual underlying allegations—such as claims that he had stayed at an Al Qaeda guesthouse, that he was present at the battle of Tora Bora, or that he attended an Al Qaeda training camp? It is commonplace for litigants to prove particular facts through combinations of evidence that would not carry the burden of proof if examined in isolation; the government suggested, in essence, that it might do the same at the level of the ultimate question to be determined in the habeas litigation. Judge Leon in El Gharani does not take a clear position on whether it might ever be possible to rescue the government’s case in this manner. In his judgment, the evidence in any event is too weak in this instance to achieve such an outcome. “A mosaic of tiles bearing images this murky,” he explains, “reveals nothing about the petitioner with sufficient clarity, either individually or collectively, that can be relied upon by this Court” (emphasis added).199 Subsequent to the El Gharani decision, at least one judge in the habeas litigation has repeatedly questioned the general propriety of using a mosaic theory in this setting, suggesting that adoption of the mosaic approach would tend to confuse the standards of habeas review with the standards of intelligence analysis. In identical language in the Ahmed, Al Adahi, and Mohammed opinions,200 Judge Kessler notes that it “may well be true” that the mosaic “approach is a common and well-established mode of analysis in the intelligence community.” Nonetheless, she observes, “at this point in this long, drawn-out litigation the Court’s obligation is to make findings of fact and conclusions of law which satisfy the appropriate and relevant legal standards as to whether the government has proven by a preponderance of the evidence that the Petitioner is justifiably detained.”201 She adds that the “kind and amount of evidence which satisfies the intelligence community in reaching final conclusions about the value of information it obtains may be very different, and certainly cannot govern the Court’s ruling.”202

### XXAff forces individual sufficiency of evidence—breaks the tiles

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One can read this language in one of three ways. First, Judge Kessler could simply be asserting the uncontroversial proposition that an intelligence analyst may appropriately apply a less-demanding standard than a federal judge in a habeas case when engaged in the task of generating factual conclusions for inclusion in analytic reports. Seen from this perspective, Judge Kessler’s statement is not truly about the mosaic theory at all, but rather is using the label “mosaic” as a loose proxy to describe the less rigorous nature of the intelligence community’s analytical processes as compared to the habeas process.203 Alternatively, she could also intend to reject the mosaic insight itself—that is, to reject the proposition that facially-irrelevant or innocuous evidence may have latent probative value that emerges only when considered in a fuller context informed by other evidence. This is the core point of mosaic analysis, and Judge Kessler could be arguing that it has no place in a courtroom. Third, Judge Kessler could also mean that the individual items of evidence— the mosaic’s tiles—have to be analyzed in an atomized fashion regardless of whether their probative value is latent or manifest, with their weight determined only on an individual basis. Put another way, one could read these opinions as insisting that the government carry its burden of proof through individually sufficient evidence rather than by using the totality of the evidence. This is the reading pressed—and strenuously objected toMARKED—by the government in its pending appeal in Al Adahi. In that case, as we discuss later, the government accuses Judge Kessler of having examined each individual item of evidence in artificial isolation, improperly refusing to review the items in the context of one another.204 This is the same issue raised but not answered by Judge Leon in El Gharani. 205

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The United States federal government should increase judicial restrictions on the indefinite detention war powers authority of the President of the United States.