# Neg Round 2

# 1NC

### 1NC

#### Restrictions impose limits on action- regulations merely manage practices associated

Schackleford 17 J. is a justice of the Supreme Court of Florida. “Atlantic Coast Line Railroad Company, a corporation, et al., Plaintiff in Error, v. The State of Florida, Defendant in Error,” 73 Fla. 609; 74 So. 595; 1917 Fla., Lexis

There would seem to be no occasion to discuss whether or not the Railroad Commissioners had the power and authority to make the order, requiring the three specified railroads running into the City of Tampa to erect a union passenger station in such city, which is set out in the declaration in the instant case and which we have copied above. [\*\*\*29] It is sufficient to say that under the reasoning and the authorities cited in State v. Atlantic Coast Line R. Co., 67 Fla. 441, 458, 63 South. Rep. 729, 65 South. Rep. 654, and State v. Jacksonville Terminal [\*631] Co., supra, it would seem that HN14the Commissioners had power and authority. The point which we are required to determine is whether or not the Commissioners were given the authority to impose the fine or penalty upon the three railroads for the recovery of which this action is brought. In order to decide this question we must examine Section 2908 of the General Statutes of 1906, which we have copied above, in the light of the authorities which we have cited and from some of which we have quoted. It will be observed that the declaration alleges that the penalty imposed upon the three railroads was for the violation of what is designated as "Order No. 282," which is set out and which required such railroads to erect and complete a union depot at Tampa within a certain specified time. If the Commissioners had the authority to make such order, it necessarily follows that they could enforce a compliance with the same by appropriate proceedings in the courts, but [\*\*\*30] it does not necessarily follow that they had the power and authority to penalize the roads for a failure to comply therewith. That is a different matter. HN15Section 2908 of the General Statutes of 1906, which originally formed Section 12 of Chapter 4700 of the Laws of Florida, (Acts of 1899, p. 86), expressly authorizes the imposition of a penalty by the Commissioners upon "any railroad, railroad company or other common carrier doing business in this State," for "a violation or disregard of any rate, schedule, rule or regulation, provided or prescribed by said commission," or for failure "to make any report required to be made under the provisions of this Chapter," or for the violation of "any provision of this Chapter." It will be observed that the word "Order" is not mentioned in such section. Are the other words used therein sufficiently comprehensive to embrace an order made by the Commissioners, such as the one now under consideration? [\*632] It could not successfully be contended, nor is such contention attempted, that this order is covered by or embraced within the words "rate," "schedule" or "any report,' therefore we may dismiss these terms from our consideration and [\*\*\*31] direct our attention to the words "rule or regulation." As is frankly stated in the brief filed by the defendant in error: "It is admitted that an order for the erection of a depot is not a 'rate' or 'schedule' and if it is not a 'rule' or 'regulation' then there is no power in the Commissioners to enforce it by the imposition of a penalty." It is earnestly insisted that the words "rule or regulation" are sufficiently comprehensive to embrace such an order and to authorize the penalty imposed, and in support of this contention the following authorities are cited: Black's Law Dictionary, defining regulation and order; Rapalje & Lawrence's Law Dictionary, defining rule; Abbott's Law Dictionary, defining rule; Bouvier's Law Dictionary, defining order and rule [\*\*602] of court; Webster's New International Dictionary, defining regulation; Curry v. Marvin, 2 Fla. 411, text 515; In re Leasing of State Lands, 18 Colo. 359, 32 Pac. Rep. 986; Betts v. Commissioners of the Land Office, 27 Okl. 64, 110 Pac. Rep. 766; Carter V. Louisiana Purchase Exposition Co., 124 Mo. App. 530, 102 S.W. Rep. 6, text 9; 34 Cyc. 1031. We have examined all of these authorities, as well as those cited by the [\*\*\*32] plaintiffs in error and a number of others, but shall not undertake an analysis and discussion of all of them. While it is undoubtedly true that the words, rule, regulation and order are frequently used as synonyms, as the dictionaries, both English and law, and the dictionaries of synonyms, such as Soule's show, it does not follow that these words always mean the same thing or are interchangeable at will. It is well known that the same word used in different contexts may mean a different thing by virtue of the coloring which the word [\*633] takes on both from what precedes it in the context and what follows after. Thus in discussing the proper constructions to be placed upon the words "restrictions and regulations" as used in the Constitution of this State, then in force, Chap. 4, Sec. 2, No. 1, of Thompson's Digest, page 50, this court in Curry v. Marvin, 2 Fla. 411, text 415, which case is cited to us and relied upon by both the parties litigant, makes the following statement: "The word restriction is defined by the best lexicographers to mean limitation, confinement within bounds, and would seem, as used in the constitution, to apply to the amount and to the time [\*\*\*33] within which an appeal might to be taken, or a writ of error sued out. The word regulation has a different signification -- it means method, and is defined by Webster in his Dictionary, folio 31, page 929, to be 'a rule or order prescribed by a superior for the management of some business, or for the government of a company or society.' This more properly perhaps applies to the mode and form of proceeding in taking and prosecuting appeals and writs of error. By the use of both of those terms, we think that something more was intended than merely regulating the mode and form of proceedings in such cases." Thus, in Carter v. Louisiana Purchase Exposition Co., 124 Mo. App. 530, text 538, 102 S.W. Rep. 6, text 9, it is said, "The definition of a rule or order, which are synonymous terms, include commands to lower courts or court officials to do ministerial acts." In support of this proposition is cited 24 Amer. & Eng. Ency. of Law 1016, which is evidently an erroneous citation, whether the first or second edition is meant. See the definition of regulate and rule, 24 amer. & Eng. Ency. of Law (2nd Ed.) pages 243 to 246 and 1010, and it will be seen that the two words are not always [\*\*\*34] synonymous, much necessarily depending upon the context and the sense in which the words are used. Also see the discussion [\*634] of the word regulation in 34 Cyc. 1031. We would call especial attention to Morris v. Board of Pilot Commissioners, 7 Del. chan. 136, 30 Atl. Rep. 667, text 669, wherein the following statement is made by the court: "These words 'rule' and the 'order,' when used in a statute, have a definite signification. They are different in their nature and extent. A rule, to be valid, must be general in its scope, and undiscriminating in its application; an order is specific and not limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made." Also see 7 Words & Phrases 6271 and 6272, and 4 Words & Phrases (2nd Ser.) 419, 420. As we held in City of Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. Rep. 17, "The meaning of the word 'rules' is of wide and varied significance, depending upon the context; in a legal sense it is synonymous with 'laws.'" If Section 2908 had contained the word order, or had authorized the Commissioners to impose a penalty for the violation of any order [\*\*\*35] made by them, there would be no room for construction. The Georgia statute, Acts of 1905, p. 120, generally known as the "Steed Bill," entitled "An act to further extend the powers of the Railroad Commission of this State, and to confer upon the commission the power to regulate the time and manner within which the several railroads in this State shall receive, receipt for, forward and deliver to its destination all freight of every character, which may be tendered or received by them for transportation; to provide a penalty for non-compliance with any and all reasonable rules, regulations and orders prescribed by the said commission in the execution of these powers, and for other purposes," expressly authorized the Railroad Commissioners "to provide a penalty for non-compliance with any and all reasonable rules, regulations and orders prescribed by the said Commision." [\*635] See Pennington v. Douglas, A. & G. Ry. Co., 3 Ga. App. 665, 60 S.E. Rep. 485, which we cited with approval in State v. Atlantic Coast Line R. Co., 56 fla. 617, text 651, 47 South. Rep. 969, 32 L.R.A. (N.S.) 639. Under the reasoning in the cited authorities, especially State v. Atlantic Coast Line R. Co., [\*\*\*36] supra, and Morris v. Board of Pilot Commissioners, we are constrained to hold that the fourth and eighth grounds of the demurrer are well founded and that HN16the Railroad Commissioners were not empowered or authorized to impose a penalty upon the three railroads for failure to comply with the order for the erection of a union depot.

#### Voting issue – the destroy predictable limits, conditions on authority are multi-directional, and there are dozens of different small conditions on any executive action. They can claim to enhance the credibility of executive actions- effectively making the topic bidirectional

### 1NC

#### By executive order, the President of the United States should commit the Solicitor General & White House Counsel’s Office to advance consultation with the Office of Legal Counsel and require written publication of Office of Legal Counsel opinions over current law regarding indefinite detention. The President should publicly pledge to act consistent with these opinions.

#### The Office of Legal Counsel should opine that the best interpretation of current law requires that the Suspension Clause applies to individuals indefinitely detained at the will of the United States.

#### CP competes on ‘authority’ but DOJ pre-commitment solves

Pillard 2005 – JD from Harvard, Faculty Director of Supreme Court Institute at Georgetown University Law Center, former Deputy Assistant Attorney General in the DOJ (February, Cornelia T., Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758, http://scholarship.law.georgetown.edu/facpub/189/)

V. ENABLING EXECUTIVE CONSTITUTIONALISM

The courts indisputably do not and cannot fully assure our enjoyment of our constitutional rights, and it is equally clear that the federal executive has an independent constitutional duty to fulfill the Constitution's promise. Executive constitutionalism seems ripe with promise. Yet, it is striking how limited and court-centered the executive's normative and institutional approaches to constitutional questions remain.¶ One conceivable way to avoid the pitfalls of court-centric executive lawyering on one hand and constitutional decisions warped by political expedience on the other would be to make the Solicitor General and Office of Legal Counsel - or perhaps the entire Department of Justice - as structurally independent as an independent counsel or independent agency.207 Making the SG and OLC independent in order to insulate them from politics presumably would alleviate the "majoritarian difficulty" resulting from their service to elected clients. Promoting fuller independence in that sense does not, however, appear to be clearly normatively attractive, constitutionally permissible, nor particularly feasible. In all the criticism of our current constitutionalism, there is little call for an SG or OLC that would act, in effect, as a fully insulated and jurisprudentially autonomous constitutional court within the executive branch, operating with even less transparency and accountability than the Supreme Court. Moreover, as a practical matter it would be complex and problematic to increase the independence of the SG and OLC. The federal government faces Article II obstacles to formally insulating executive lawyers from politics and institutional pressures, and the president and his administration likely would be less amenable to guidance from such unaccountable lawyers.208¶ The challenge, rather, is to draw forth from the executive a constitutional consciousness and practice that helps the government actively to seek to fulfill the commitments of the Constitution and its Bill of Rights, interpreted by the executive as guiding principles for government. Adjustments to executive branch constitutional process and culture should be favored if they encourage the executive to use its experience and capacities to fulfill its distinctive role in effectuating constitutional guarantees. There is transformative potential in measures that break ingrained executive branch habits of looking to the Constitution only as it is mediated through the courts, and of reflexively seeking, where there is no clear doctrinal answer, to minimize constitutional constraint. It is difficult fully to imagine what kinds of changes would best prompt executive lawyers and officials to pick up constitutional analysis where the courts leave off, and to rely on the Constitution as an affirmative, guiding mandate for government action; what follows are not worked-out proposals, but are meant to be merely suggestive.¶ A. Correcting the Bias Against Constitutional Constraint¶ As we have seen, the SG's and OLC's default interpretive approach to individual rights and other forms of constitutional constraints on government is to follow what clear judicial precedents there are and, where precedents are not squarely to the contrary, to favor interpretations that minimize constitutional rights or other constitutional obligations on federal actors. Those court-centered and narrowly self-serving executive traditions produce a systematic skew against individual rights.¶ 1. Encourage Express Presidential Articulation of Commitment to Constitutional Rights¶ To the extent that a president articulates his own rights-protective constitutional vision with any specificity, he ameliorates the tension his constitutional lawyers otherwise face between advancing individual rights and serving their boss's presumed interest in maximum governing flexibility. Case or controversy requirements and restrictions against courts issuing advisory opinions do not, of course, apply to the executive's internal constitutional decisionmaking, and presidents can better serve individual rights to the extent that they expressly stake out their constitutional commitments in general and in advance of any concrete controversy."° When the president takes a stand for advancing abortion rights, property rights, disability rights, "charitable choice," a right to bear arms, or full remediation of race and sex discrimination, he signals to his lawyers that they should, in those areas, set aside their default bias in favor of preserving executive prerogative, even if it requires extra executive effort or restraint to do so.¶ If presented in a concrete setting with a choice between interpreting and applying the Constitution in fully rights-protective ways or sparing themselves the effort where Supreme Court precedent can be read not to require it, government officials typically default to the latter course without considering whether they might thereby be giving short shrift to a constitutional duty. A president's stated commitment to protection of particular rights, however, flips the default position with respect to those rights, acting as a spur to executive-branch lawyers and other personnel to work to give effect to constitutional rights even where, for a range of institutional reasons, the courts would not. A president is thus uniquely situated to facilitate full executive-branch constitutional compliance by precommitting himself to a rights-protective constitutional vision, and thereby making clear that respect for constitutional rights is part of the executive's interest, not counter to it.

### 1NC Shell

#### Still pushing for vote on Iran sanctions bill – Obama pc is key to prevent passage.

Josh Rogin, 2-5-14 http://www.thedailybeast.com/articles/2014/02/05/gop-will-force-reid-to-save-obama-s-iran-policy-over-and-over-again.html

The Republican caucus is planning to use every parliamentary trick in the book to push Senate Majority Leader Harry Reid to allow a floor vote on a new Iran sanctions bill that the Obama administration strenuously opposes. The Obama White House has succeeded in keeping most Democrats in line against supporting quick passage of the “Nuclear Weapon Free Iran Act,” which currently has 59 co-sponsors, including 13 Democrats. Reid has faithfully shelved the bill, pending the outcome of negotiations between Iran and the world’s major powers—the so-called “P5+1.” But tomorrow, Republicans plan to respond by using an array of floor tactics—including bringing up the bill and forcing Reid to publicly oppose it—as a means of putting public pressure on Reid and Democrats who may be on the fence. “Now we have come to a crossroads. Will the Senate allow Iran to keep its illicit nuclear infrastructure in place, rebuild its teetering economy and ultimately develop nuclear weapons at some point in the future?” 42 GOP senators wrote in a letter sent to Reid late Wednesday and obtained by The Daily Beast. “The answer to this question will be determined by whether you allow a vote on S. 1881, the bipartisan Nuclear Weapon Free Iran Act, which is cosponsored by more than half of the Senate.” The GOP letter calls on Reid to allow a vote on the bill during the current Senate work period—in other words, before the chamber’s next recess. Senate GOP aides said that until they get a vote, GOP senators are planning to use a number of procedural tools at their disposal to keep this issue front and center for Democrats. Since the legislation is already on the Senate’s legislative calendar, any senator can bring up the bill for a vote at any time and force Democrats to publicly object. Senators can also try attaching the bill as an amendment to future bills under consideration. Senate Minority Leader Mitch McConnell has been a harsh critic of Reid’s shelving of the bill, so he could demand a vote on it as a condition of moving any other legislation. If those amendments are blocked by Reid, Senators can then go to the floor and make speech after speech calling out Reid for ignoring a bill supported by 59 senators—and calling on fence-sitting Democrats to declare their position on the bill. Senate Republicans issue a ‘final warning’ to Harry Reid on Iran sanctions. “This letter is a final warning to Harry Reid that if Democrats want to block this bipartisan legislation, they will own the results of this foreign policy disaster,” one senior GOP senate aide said. The Republican senators believe, based on recent polls, that the majority of Americans support moving forward with the Iran sanctions bill now. They also believe that if Reid did allow a vote, the bill would garner more than the 59 votes of its co-sponsors and that Democrats vulnerable in 2014 races would support it, pushing the vote total past a veto-proof two-thirds supermajority. “I stand with the majority of Americans who want Iran’s illicit nuclear infrastructure dismantled before economic sanctions are lifted,” Sen. Mark Kirk, one of the bill’s sponsors, told The Daily Beast. “The American people deserve a vote on the bipartisan Nuclear Weapon Free Iran Act.” Besides McConnell and Kirk, other senators prepared to lead the effort to demand a vote on the bill include Marco Rubio and Lindsey Graham.

#### **Plan destroys Obama**

Loomis 7 Dr. Andrew J. Loomis is a Visiting Fellow at the Center for a New American Security, and Department of Government at Georgetown University, “Leveraging legitimacy in the crafting of U.S. foreign policy”, March 2, 2007, pg 36-37, http://citation.allacademic.com//meta/p\_mla\_apa\_research\_citation/1/7/9/4/8/pages179487/p179487-36.php

Declining political authority encourages defection. American political analyst Norman Ornstein writes of the domestic context, In a system where a President has limited formal power, perception matters. The reputation for success—the belief by other political actors that even when he looks down, a president will find a way to pull out a victory—is the most valuable resource a chief executive can have. Conversely, the widespread belief that the Oval Office occupant is on the defensive, on the wane or without the ability to win under adversity can lead to disaster, as individual lawmakers calculate who will be on the winning side and negotiate accordingly. In simple terms, winners win and losers lose more often than not. Failure begets failure. In short, a president experiencing declining amounts of political capital has diminished capacity to advance his goals. As a result, political allies perceive a decreasing benefit in publicly tying themselves to the president, and an increasing benefit in allying with rising centers of authority. A president’s incapacity and his record of success are interlocked and reinforce each other. Incapacity leads to political failure, which reinforces perceptions of incapacity. This feedback loop accelerates decay both in leadership capacity and defection by key allies. The central point of this review of the presidential literature is that the sources of presidential influence—and thus their prospects for enjoying success in pursuing preferred foreign policies—go beyond the structural factors imbued by the Constitution. Presidential authority is affected by ideational resources in the form of public perceptions of legitimacy. The public offers and rescinds its support in accordance with normative trends and historical patterns, non-material sources of power that affects the character of U.S. policy, foreign and domestic.

#### Loss of capital means veto override

Kampeas, 1/24/14– Washington, D.C. bureau chief of the Jewish Telegraphic Agency (Ron, Heritage Florida Jewish News, “Iran sanctions have majority backing in Senate, but not enough to override veto”

<http://www.heritagefl.com/story/2014/01/24/news/iran-sanctions-have-majority-backing-in-senate-but-not-enough-to-override-veto/2115.html>

WASHINGTON (JTA)—More than half the United States Senate has signed on to a bill that would intensify sanctions against Iran. But in a sign of the so-far successful effort by the White House to keep the bill from reaching a veto-busting 67 supporters, only 16 Democrats are on board.

The number of senators cosponsoring the bill, introduced by Sens. Mark Kirk (R-Ill.) and Robert Menendez (D-N.J.), reached 58 this week, up from just 33 before the Christmas holiday break.

Notably only one of the 25 who signed up in recent days—Sen. Michael Bennet (D-Colo.)—is a Democrat, a sign of intense White House lobbying among Democrats to oppose the bill.

Backers of the bill say it would strengthen the U.S. hand at the negotiations. But President Obama has said he would veto the bill because it could upend talks now underway between the major powers and Iran aimed at keeping the Islamic Republic from obtaining a nuclear bomb. A similar bill passed this summer by the U.S. House of Representatives had a veto-proof majority.

On Thursday, the White House said backers of the bill should be upfront about the fact that it puts the United States on the path to war.

“If certain members of Congress want the United States to take military action, they should be up front with the American public and say so,” Bernadette Meehan, the National Security Council spokeswoman, said in a statement posted by The Huffington Post. “Otherwise, it’s not clear why any member of Congress would support a bill that possibly closes the door on diplomacy and makes it more likely that the United States will have to choose between military options or allowing Iran’s nuclear program to proceed.”

A number of pro-Israel groups, led by the American Israel Public Affairs Committee, are leading a full-court press for the bill’s passage, with prominent Jewish leaders in a number of states making calls and writing letters to holdouts. Dovish Jewish groups such as J Street and Americans for Peace Now oppose the bill.

#### Deal collapses and causes Israel strikes

**Leubsdorf, 1/22/14 –** former Washington Bureau chief of The Dallas Morning News (Carl, Dallas Morning News, “Hard-liners’ mischief-making threatens Iran nuke talks” <http://www.dallasnews.com/opinion/columnists/carl-p-leubsdorf/20140122-carl-leubsdorf-hard-liners-mischief-making-threatens-iran-nuke-talks.ece>)

The measure’s most dangerous provision, according to various published reports, reads as follows:

“If the government of Israel is compelled to take military action in legitimate self-defense against Iran’s nuclear weapon program, the United States should stand with Israel and provide in accordance with the law of the United States and the constitutional responsibility of Congress to authorize the use of military force, diplomatic and economic support to the Government of Israel in the defense of its territory, people and existence.”

While not requiring U.S. action, critics note the language suggests the mere existence of an Iranian “nuclear weapon program” would be sufficient to compel Israel to attack “in legitimate self-defense.” And it says the U.S. “should” provide such an Israeli attack with “military, diplomatic and economic support” according to U.S. laws and congressional constitutional responsibility.

In effect, that could enable the hard-liners who control the Israeli government to kill the talks or try to drag the United States into a war against Iran if they decide that Iranian compliance with the current agreement is insufficient to protect Israel.

The measure would also enable Congress to kill any agreement the West reaches with Iran by overriding Obama’s decision to waive existing sanctions.

#### Global war

Reuveny, 10– professor in the School of Public and Environmental Affairs at Indiana University (Rafael, “Unilateral strike could trigger World War III, global depression” Gazette Xtra, 8/7, - See more at: <http://gazettextra.com/news/2010/aug/07/con-unilateral-strike-could-trigger-world-war-iii-/#sthash.ec4zqu8o.dpuf>)

A unilateral Israeli strike on Iran’s nuclear facilities would likely have dire consequences, including a regional war, global economic collapse and a major power clash.

For an Israeli campaign to succeed, it must be quick and decisive. This requires an attack that would be so overwhelming that Iran would not dare to respond in full force.

Such an outcome is extremely unlikely since the locations of some of Iran’s nuclear facilities are not fully known and known facilities are buried deep underground.

All of these widely spread facilities are shielded by elaborate air defense systems constructed not only by the Iranians but also the Chinese and, likely, the Russians as well.

By now, Iran has also built redundant command and control systems and nuclear facilities, developed early warning systems, acquired ballistic and cruise missiles and upgraded and enlarged its armed forces.

Because Iran is well-prepared, a single, conventional Israeli strike—or even numerous strikes—could not destroy all of its capabilities, giving Iran time to respond.

Unlike Iraq, whose nuclear program Israel destroyed in 1981, Iran has a second-strike capability comprised of a coalition of Iranian, Syrian, Lebanese, Hezbollah, Hamas, and, perhaps, Turkish forces. Internal pressure might compel Jordan, Egypt and the Palestinian Authority to join the assault, turning a bad situation into a regional war.

During the 1973 Arab-Israeli War, at the apex of its power, Israel was saved from defeat by President Nixon’s shipment of weapons and planes. Today, Israel’s numerical inferiority is greater, and it faces more determined and better-equipped opponents. After years of futilely fighting Palestinian irregular armies, Israel has lost some of its perceived superiority—bolstering its enemies’ resolve.

Despite Israel’s touted defense systems, Iranian coalition missiles, armed forces, and terrorist attacks would likely wreak havoc on its enemy, leading to a prolonged tit-for-tat.

In the absence of massive U.S. assistance, Israel’s military resources may quickly dwindle, forcing it to use its alleged nuclear weapons, as it had reportedly almost done in 1973.

An Israeli nuclear attack would likely destroy most of Iran’s capabilities, but a crippled Iran and its coalition could still attack neighboring oil facilities, unleash global terrorism, plant mines in the Persian Gulf and impair maritime trade in the Mediterranean, Red Sea and Indian Ocean.

Middle Eastern oil shipments would likely slow to a trickle as production declines due to the war and insurance companies decide to drop their risky Middle Eastern clients. Iran and Venezuela would likely stop selling oil to the United States and Europe.

From there, things could deteriorate as they did in the 1930s. The world economy would head into a tailspin; international acrimony would rise; and Iraqi and Afghani citizens might fully turn on the United States, immediately requiring the deployment of more American troops.

Russia, China, Venezuela, and maybe Brazil and Turkey—all of which essentially support Iran—could be tempted to form an alliance and openly challenge the U.S. hegemony.

Russia and China might rearm their injured Iranian protege overnight, just as Nixon rearmed Israel, and threaten to intervene, just as the U.S.S.R. threatened to join Egypt and Syria in 1973. President Obama’s response would likely put U.S. forces on nuclear alert, replaying Nixon’s nightmarish scenario.

Iran may well feel duty-bound to respond to a unilateral attack by its Israeli archenemy, but it knows that it could not take on the United States head-to-head. In contrast, if the United States leads the attack, Iran’s response would likely be muted.

If Iran chooses to absorb an American-led strike, its allies would likely protest and send weapons but would probably not risk using force.

While no one has a crystal ball, leaders should be risk-averse when choosing war as a foreign policy tool. If attacking Iran is deemed necessary, Israel must wait for an American green light. A unilateral Israeli strike could ultimately spark World War III.

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#### CP: The USFG should ban the extension of habeus corpus to terrorist suspects captured in the war on terror in civilian Article III Courts--- and establish a National Security Court with exclusive jurisdiction over detention authority

#### Solves the aff and avoids the net benefits

Joseph Schaeffer, Pitt Law '12, attended a talk on a proposed national security court system given by US Coast Guard Captain Glenn Sulmasy\*, a law professor at the US Coast Guard Academy and a National Security and Human Rights Fellow at Harvard Universityhttp://jurist.org/dateline/2009/10/us-national-security-courts-sulmasys.php

But all this was only a preview of what was to come. Sulmasy felt obligated to rebut the feasibility of the military commission and the civilian court system alternatives, perhaps to preempt criticisms that his third way is unnecessary. According to Sulmasy, the primary defect of the civilian court system consists of its strict evidentiary and procedural requirements. While this might initially seem counter-intuitive, it actually makes quite a bit of sense. Guantanamo detainees were not captured according to civilian evidentiary and procedural requirements. Trial courts could deal with this by either acquitting detainees en masse or relaxing evidentiary and procedural requirements, thereby raising constitutional issues and weakening the protections afforded all Americans. Neither of these options seems particularly attractive. Sulmasy also argued that civilian court judges lack the requisite experience to try national security cases and that it would be difficult to find impartial jurors. Turning to military commissions, Sulmasy defended their use while simultaneously acknowledging their impracticability. Arguing that military commissions are both constitutional and just, since most detainees have more rights than in their home countries, Sulmasy nonetheless acknowledged that the previous administration's public relations blunders meant that the military commission would need to be abandoned. One could argue that this was a gross understatement, but Sulmasy seemed anxious to move on. It was time to discuss his proposed National Security Court System. A National Security Court System would be established by Congress under its Article III powers, similar in nature to current specialty taxation, bankruptcy, and FISA courts. The NSCS would be firmly in the public sphere, overseen by the Department of Justice rather than the Department of Defense, and proceedings would be presumptively open. As explained by Sulmasy, this means that the press, international observers, etc., would have access to the proceedings, except where classification and national security issues mandated otherwise. Detainees would be represented by either Judge Advocate Generals or federal public defenders and would be guaranteed a habeas corpus hearing within three months of capture and full trial within one year of capture. Detainees would not receive the full benefit of American constitutional protections, but would rather be subject to lessened evidentiary and procedural requirements. Sulmasy acknowledged the controversiality of these lessened protections without prompt, but argued again that the majority of detainees still would have more rights than in their home countries. The trials would occur on military bases for security reasons and would be chaired by special military National Security Court judges. Finally, the NSCS would be established with a sunset provision, which Sulmasy proposed setting at five years, in order to force Congress to reevaluate its efficacy and Constitutionality at some future point.

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#### Congress and the courts have preserved detention powers

Michael Tomatz 13, Colonel, B.A., University of Houston, J.D., University of Texas, LL.M., The Army Judge Advocate General Legal Center and School (2002); serves as the Chief of Operations and Information Operations Law in the Pentagon. AND Colonel Lindsey O. Graham B.A., University of South Carolina, J.D., University of South Carolina, serves as the Senior Individual Mobilization Augmentee to The Judge Advocate Senior United States Senator from South Carolina, “NDAA 2012: CONGRESS AND CONSENSUS ON ENEMY DETENTION,” 69 A.F. L. Rev. 1

Through a growing series of habeas challenges, the D.C. Circuit has fleshed out habeas requirements in these wartime cases, addressing a number of procedural, definitional and evidentiary considerations. In Al-Bihani v. Obama, the Circuit Court considered the definition under which a person may be detained pursuant to the AUMF. The D.C. Circuit accepted the earlier definition offered: "an individual who was part of or supporting Taliban or al-Qaeda force, or associated forces ... and [\*51] the modified definition offered by the Obama administration requiring "substantial support." n311 Regarding the boundaries of who qualifies under the definition, the Circuit observed that "wherever the outer bounds may lie" they include individuals who engage in "traditional food operations essential to a fighting force and the carrying of arms." They concluded that "Al-Bihani was part of and supported a group--prior to and after September 11-- that was affiliated with al-Qaeda and Taliban forces and engaged in hostilities against a U.S. Coalition partner. Al-Bihani, therefore, falls squarely within the scope of the President's statutory detention powers. n312¶ Al-Bihani next argued that law of war detention authority exists only until the end of hostilities and in this instance, he asserted relevant hostilities had ended. The Circuit cogently rejected this argument. If the election of President Karzai or the installation of a post-Taliban regime required the release of detainees, then¶ . . . each successful campaign of a long war [would be] but a Pyrrhic prelude to defeat. The initial success of the United States and its Coalition partners in ousting the Taliban from the seat of government and establishing a young democracy would trigger an obligation to release Taliban fighters captured in earlier clashes. Thus, the victors would be commanded to constantly refresh the ranks of the fledgling democracy's most likely saboteurs. n313¶ Further, the D.C. Circuit concluded that the determination of when hostilities have ceased is fundamentally a political decision, at least absent a congressional declaration terminating the war. n314 The recent Congressional affirmation of the AUMF's detention authority confirms Congress's view that hostilities against al-Qaeda remain ongoing and constitute a persistent, global military threat.¶ Regarding procedural safeguards, Al Bihani raised a host of issues ranging from the standard of proof to the requirement for a separate evidentiary hearing. n315 [\*52] The D.C. Circuit found that habeas review for military detainees "need not match the procedures developed by Congress and the courts specifically for habeas challenges to criminal convictions." n316 Relying on Boumediene, the court instead embraced innovative, pragmatic procedures that would not unduly burden the military. n317 Further, the D.C. Circuit rejected the contention that proof beyond a reasonable doubt or proof by clear and convincing evidence was necessary to hold a detainee. The court expressly declined to articulate the minimum proof standard required, but found the preponderance standard constitutionally permissible. n318¶ Other cases demonstrate the D.C. Circuit's pragmatic approach. In Bensayah v. Obama, the court recognized the amorphous nature of the al-Qaeda threat and rejected formalistic criteria for determining whether a person is part of al-Qaeda. n319 In Barhoumi v. Obama, the court upheld Barhoumi's detention as a member of an "associated force" based on diary records singling him out as a member of Zubaydah's associated militia organization. n320 In Awad v. Obama, the D.C. Circuit reviewed the district court's factual finding for "clear error," weighing each piece of evidence, not in isolation, but "taken as a whole." n321 In reversing the lower court's ruling in Al-Adahi v. Obama, the court found the district judge failed to take into account the "conditional probability" of the evidence, n322 leading the lower court to reject evidence erroneously because each particular fact did not by itself prove the ultimate fact that Al-Adahi was part of al-Qaeda. The mistake of requiring each [\*53] piece of evidence to bear independent weight constituted a "fundamental mistake that infected the lower court's entire analysis." n323¶ The D.C. Circuit addressed discovery issues in Al Odah v. U.S. n324 For habeas purposes, the touchstone for discovery it developed was enabling a "meaningful review"; thus, access to classified material by detainees' counsel must be necessary to facilitate such a review. n325 A naked declaration or mere certification by the government regarding sensitive information will not suffice. n326 The D.C. Circuit supported a presumption favoring release of most classified information to detainees' counsel and rejected the contention that submission of classified evidence to the court for in camera, ex parte review, in itself, resolved the discovery burden. n327 The court suggested that its opinion in Bismullah v. Gates requiring the district court's ex parte review of "highly sensitive information" n328 did not end the inquiry regarding release to detainees' counsel. In Al Odah, the court concluded that habeas court should proceed further by determining whether "classified information is material and counsel's access to it is necessary to facilitate meaningful review." n329 If no alternatives would afford a detaining the meaningful review required by Boumediene, even sensitive classified information may need to be released to counsel.¶ Much has been written about hearsay in relation to war crimes trials and military commissions. Post-Boumediene, the D.C. Circuit determined hearsay evidence is not automatically invalid, nor is a traditional Confrontation Clause objection sustainable because habeas reviews are not criminal prosecutions. n330 The court explained, "hearsay is always admissible." The issue is what "probative weight to ascribe" to the evidence and whether there is "sufficient indicia of reliability." n331 The D.C. Circuit applied similar logic in Parhat v. Gates, a case involving a Chinese citizen of Uighur heritage. There it required evaluation of the raw evidence, which must be sufficiently reliable and probative to demonstrate the truth of the asserted proposition. n332¶ In summary, the D.C. Circuit has carved out a tailored, pragmatic approach in these detainee cases. Habeas proceedings for law of war detainees are not criminal [\*54] trials. Each habeas-eligible detainee enjoys the benefit of an independent judicial review, but the parameters differ categorically from a criminal trial. The definition of who may be detained is not dependent on formalistic criteria. Proof beyond a reasonable doubt is not required. There is no jury. Confrontation is different--hearsay, for example, is admissible when reliable. The process of weighing evidence must account for the exigencies of military operations. Through this evolving process, some detainees have been released. Others have been continued in law of war detention consistent with the AUMF. Ardent proponents of habeas may find this promised panacea somewhat unsatisfying. Those who feared judicial meddling in military affairs likely would agree habeas has not been the disaster some feared. Thus far, the D.C. Circuit has taken its duty seriously and made some tough calls designed to balance the inevitable tension between liberty and security. The next section briefly considers application of a purely civilian criminal law framework in law of war detainee cases.

#### Restrictions on detention kill exec flex—key to prevent terrorism

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Reading the tea leaves of judicial dicta may be fraught with difficulty, but one certainly discerns from these pragmatic guidelines a view that the Executive should be accorded reasonable deference in matters of preventive detention. This deference is strongest during the early phases of detention, when facts are unclear, when the risks of release are acute, and the dangers of substituting a judicial judgment for that of the military or the Commander-in-Chief is greatest. If the Government learns that al-Qaeda operatives have invaded the U.S. bent on detonating explosives near chemical-laden rail cars, the overwhelming national effort must be directed toward destroying or detaining those forces intent on harming the country. This is not the time for Miranda and presentment but for concerted, decisive action bounded by the law of war. Every instrument of national power must be brought to bear, both military and civilian. If it makes the most sense for the FBI to detain someone, they should do so. If the military has the most information and can most quickly and effectively detain and interrogate, then consistent with military regulations, they should do so.¶ The process of understanding the depth and breadth of the danger, connecting the web of those involved, determining the possibility of future attacks takes time. It remains essential to afford the Commander-in-Chief adequate time and decision space to maximize the opportunity to defeat the threat and prevent future attacks.That is why the NDAA imposes no temporal limits, why it avoids geographic restrictions and why it grants no special protections to citizens who take up arms with the enemy. As Hamdan and Boumerdiene make clear, there are limits to the Court's deference. The more time that passes, the greater the consequences of an erroneous deprivation of liberty and the greater the risk of not affording someone a reasonable opportunity to challenge the basis for their detention. If there is consensus on the matter of process in preventive detention, it appears to mean reasonable deference followed by increased scrutiny with the passage of time. It means judicial review bounded by pragmatism, and it means balancing very real security concerns against the need to protect individuals from arbitrary deprivation of liberty.

#### Detention without trial is crucial to incapacitate high value terrorists

Jack Goldsmith 10, Henry L. Shattuck Professor at Harvard Law School, 10/8/10, “Don’t Try Terrorists, Lock Them Up,” http://www.nytimes.com/2010/10/09/opinion/09goldsmith.html

The real lesson of the ruling, however, is that prosecution in either criminal court or a tribunal is the wrong approach. The administration should instead embrace what has been the main mechanism for terrorist incapacitation since 9/11: military detention without charge or trial.¶ Military detention was once legally controversial but now is not. District and appellate judges have repeatedly ruled — most recently on Thursday — that Congress, in its September 2001 authorization of force, empowered the president to detain members of Al Qaeda, the Taliban and associated forces until the end of the military conflict.¶ Because the enemy in this indefinite war wears no uniform, courts have rightly insisted on high legal and evidentiary standards — much higher than what the Geneva Conventions require — to justify detention. And many detainees in cases that did not meet these standards have been released.¶ Still, while it is more difficult than ever to keep someone like Mr. Ghailani in military detention, it is far easier to detain him than to convict him in a civilian trial or a military commission. Military detention proceedings have relatively forgiving evidence rules and aren’t constrained by constitutional trial rules like the right to a jury and to confront witnesses. There is little doubt that Mr. Ghailani could be held in military detention until the conflict with Al Qaeda ends.¶ Why, then, does the Obama administration seek to prosecute him in federal court? One answer might be that trials permit punishment, including the death penalty. But the Justice Department is not seeking the death penalty against Mr. Ghailani. Another answer is that trials “give vent to the outrage” over attacks on civilians, as Judge Kaplan has put it. This justification for the trial is diminished, however, by the passage of 12 years since the crimes were committed.¶ The final answer, and the one that largely motivates the Obama administration, is that trials are perceived to be more legitimate than detention, especially among civil libertarians and foreign allies.¶ Military commissions have secured frustratingly few convictions. The only high-profile commission trial now underway — that of Omar Khadr, a Canadian who was 15 at the time he was detained — has been delayed for months. Commissions do not work because they raise scores of unresolved legal issues like the proper rules of evidence and whether material support and conspiracy, usually the main charges, can be brought in a tribunal since they may not be law-of-war violations.¶ Civilian trials in federal court, by contrast, often do work. Hundreds of terrorism-related cases in federal court have resulted in convictions since 9/11; this week, the would-be Times Square bomber, Faisal Shahzad, was sentenced to life in prison after a guilty plea.¶ But Mr. Ghailani and his fellow detainees at Guantánamo Bay are a different matter. The Ghailani case shows why the administration has been so hesitant to pursue criminal trials for them: the demanding standards of civilian justice make it very hard to convict when the defendant contests the charges and the government must rely on classified information and evidence produced by aggressive interrogations.¶ A further problem with high-stakes terrorism trials is that the government cannot afford to let the defendant go. Attorney General Eric Holder has made clear that Khalid Shaikh Mohammed, the 9/11 plotter, would be held indefinitely in military detention even if acquitted at trial. Judge Kaplan said more or less the same about Mr. Ghailani this week. A conviction in a trial publicly guaranteed not to result in the defendant’s release will not be seen as a beacon of legitimacy.¶ The government’s reliance on detention as a backstop to trials shows that it is the foundation for incapacitating high-level terrorists in this war. The administration would save money and time, avoid political headaches and better preserve intelligence sources and methods if it simply dropped its attempts to prosecute high-level terrorists and relied exclusively on military detention instead.

**Terrorism causes extinction**

Nathan **Myhrvold 13**, Phd in theoretical and mathematical physics from Princeton, and founded Intellectual Ventures after retiring as chief strategist and chief technology officer of Microsoft Corporation , July 2013, "Stratgic Terrorism: A Call to Action," The Lawfare Research Paper Series No.2, <http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf>

Several **powerful trends have aligned to** profoundly **change the way that the world works. Technology** ¶ now **allows stateless groups to organize, recruit, and fund** ¶ **themselves in an unprecedented fashion**. **That, coupled** ¶ **with** the extreme **difficulty of** finding and **punishing a stateless group, means that stateless groups are positioned to be** ¶ **lead players on the world stage.** **They may act on their own,** ¶ **or** they may act **as proxies for nation-states that wish to** ¶ **duck responsibility**. Either way, stateless groups are forces ¶ to be reckoned with.¶ At the same time, a different set of **technology trends** ¶ **means that small numbers of people can obtain incredibly** ¶ **lethal power.** Now, for the first time in human history, **a** ¶ **small group can be as lethal as the largest superpower**. Such ¶ a group could execute an attack that could kill millions of ¶ people. **It is technically feasible for such a group to kill billions** of people, to end modern civilization—perhaps **even** ¶ to drive the human race to extinction. Our defense establishment was shaped over decades to ¶ address what was, for a long time, the only strategic threat ¶ our nation faced: Soviet or Chinese missiles. More recently, ¶ it has started retooling to address tactical terror attacks like ¶ those launched on the morning of 9/11, but the reform ¶ process is incomplete and inconsistent. **A real defense will require rebuilding our military and intelligence capabilities** from the ground up. Yet, so far, **strategic terrorism has** ¶ **received relatively little attention in defense agencies, and** ¶ the **efforts** that have been **launched to combat this existential threat seem fragmented**.¶ **History suggests what will happen. The only thing that shakes America out of complacency is a direct threat from a determined adversary that confronts us with our shortcomings by repeatedly attacking us or hectoring us for decades.**

### Legitimacy

#### Best evidence concludes no legitimacy impact

Brooks & Wohlforth 8 – Stephen G. Brooks, Assistant Professor of Government at Dartmouth, and William C. Wohlforth, Associate Professor of Government at Dartmouth, 2008, World Out of Balance: International Relations and the Challenge of American Primacy, p. 201-206

First, empirical studies find no clear relationship between U.S. rulebreaking, legitimacy, and the continued general propensity of other governments to comply with the overall institutional order. Case studies of U.S. unilateralism—that is, perceived violations of the multilateral principle underlying the current institutional order—reach decidedly mixed results.74 Sometimes unilateralism appears to impose costs on the United States that may derive from legitimacy problems; in other cases, these acts appear to win support internationally and eventually are accorded symbolic trappings of legitimacy; in yet others, no effect is discernable. Similar results are reported in detailed analyses of the most salient cases of U.S. noncompliance with international law, which, according to several studies, is as likely to result in a “new multilateral agreement and treaties [that] generally tilt towards U.S. policy preferences” as it is to corrode the legitimacy of accepted rules.75¶ The contestation created by the Bush administration’s “new unilateralism,” on the one hand, and the “new multilateralism” represented by other states’ efforts to develop new rules and institutions that appear to constrain the United States, on the other hand, fits the historical pattern of the indirect effect of power on law. Highlighting only the details of the struggle over each new rule or institution may deflect attention from the structural influence of the United States on the overall direction of change. For example, a focus on highly contested issues in the UN, such as the attempt at a second resolution authorizing the invasion of Iraq, fails to note how the institution’s whole agenda has shifted to address concerns (e.g., terrorism, proliferation) that the United States particularly cares about. The secretary-general’s Highlevel Panel on Threats, Challenges and Change endorsed a range of U.S.-supported positions on terrorism and proliferation.76 International legal scholars argue that the United States made measurable headway in inculcating new rules of customary law to legitimate its approach to fighting terrorism and containing “rogue states.”77 For example, UN Security Council Resolution 1373 imposed uniform, mandatory counterterrorist obligations on all member states and established a committee to monitor compliance.¶ That said, there is also evidence of resistance to U.S. attempts to rewrite rules or exempt itself from rules. Arguably the most salient example of this is the International Criminal Court (ICC). During the negotiations on the Rome Convention in the late 1990s, the United States explicitly sought to preserve great-power control over ICC jurisdiction. U.S. representatives argued that the United States needed protection from a more independent ICC in order to continue to provide the public good of global military intervention. When this logic failed to persuade the majority, U.S. officials shifted to purely legal arguments, but, as noted, these foundered on the inconsistency created by Washington’s strong support of war crimes tribunals for others. The Rome Convention rejected the U.S. view in favor of the majority position granting the ICC judicial panel authority to refer cases to court’s jurisdiction.78 By 2007, 130 states had signed the treaty and over 100 were full-fledged parties to it.¶ President Clinton signed the treaty, but declined to submit it to the Senate for ratification. The Bush administration “unsigned” it in order legally to be able to take action to undermine it. The United States then persuaded over 75 countries to enter into agreements under which they undertake not to send any U.S. citizen to the ICC without the United States’ consent; importantly, these agreements do not obligate the United States to investigate or prosecute any American accused of involvement in war crimes. This clearly undermines the ICC, especially given that about half the states that have signed these special agreements with the United States are also parties to the Rome Statute. 79 At the same time, the EU and other ICC supporters pressured governments not to sign special agreements with the United States, and some 45 have refused to do so—about half losing U.S. military assistance as a result. In April 2005, the United States chose not to veto a UN Security Council resolution referring the situation in Darfur, Sudan, to the ICC. To many observers, this suggests that inconsistency may yet undermine U.S. opposition to the court.80 If the U.S. campaign to thwart the court fails, and there is no compromise solution that meets some American concerns, the result will be a small but noticeable constraint: U.S. citizens involved in what might be construed as war crimes and who are not investigated and prosecuted by the U.S. legal system may have to watch where they travel.¶ The upshot as of 2007 was something of a stalemate on the ICC, demonstrating the limits of both the United States’ capability to quash a new legal institution it doesn’t like and the Europeans’ ability to legitimize such an institution without the United States’ participation. Similar stalemates characterize other high-profile arguments over other new international legal instruments, such as the Kyoto Protocol on Climate Change and the Ottawa Landmine Convention. Exactly as constructivists suggest, these outcomes lend credence to the argument that power does not translate unproblematically into legitimacy. What the larger pattern of evidence on rule breaking shows, however, is that this is only one part of the story; the other part involves rule breaking with few, if any, legitimacy costs, and the frequent use of go-it-alone power to revise or create rules.¶ AN EROSION OF THE ORDER?¶ The second general evidence pattern concerns whether fallout from the unpopular U.S. actions on ICC, Kyoto and Ottawa, Iraq, and many other issues have led to an erosion of the legitimacy of the larger institutional order. Constructivist theory identifies a number of reasons why institutional orders are resistant to change, so strong and sustained action is presumably necessary to precipitate a legitimacy crisis that might undermine the workings of the current order. While aspects of this order remain controversial among sections of the public and elite both in the United States and abroad, there is little evidence of a trend toward others opting out of the order or setting up alternatives. Recall also that the legitimacy argument works better in the economic than in the security realm. It is also in the economic realm that the United States arguably has the most to lose. Yet it is hard to make the empirical case that U.S. rule violations have undermined the institutional order in the economic realm. Complex rules on trade and investment have underwritten economic globalization. The United States generally favors these rules, has written and promulgated many of them, and the big story of the 1990s and 2000s is their growing scope and ramified nature—in a word, their growing legitimacy. On trade, the WTO represents a major strengthening of the GATT rules that the United States pushed for (by, in part, violating the old rules to create pressure for the upgrade). As of 2007, it had 149 members, and the only major economy remaining outside was Russia’s. And notwithstanding President Putin’s stated preference for an “alternative” WTO, Russian policy focused on accession.81 To be sure, constructivists are right that the WTO, like other rational-legal institutions, gets its legitimacy in part from the appearance of independence from the major powers.82 Critical analysts repeatedly demonstrate, however, that the organization’s core agenda remains powerfully influenced by the interests of the United States.83¶ Regarding international finance, the balance between the constraining and enabling properties of rules and institutions is even more favorable to the United States, and there is little evidence of general legitimacy costs. The United States retains a privileged position of influence within the International Monetary Fund and the World Bank. An example of how the scope of these institutions can expand under the radar screen of most legitimacy scholarship is International Center for Settlement of Investment Disputes (ICSID)—the major dispute settlement mechanism for investment treaties. Part of theWorld Bank group of institutions, it was established in 1966, and by 1991 it had considered only 26 disputes. With the dramatic growth in investment treaties in the 1990s, however, the ICSID came into its own. Between 1998 and 2004, over 121 disputes were registered with the Center.84 This increase reflects the rapidly growing scope of international investment law. And these new rules and treaties overwhelmingly serve to protect investors’ rights, in which the United States has a powerful interest given how much it invests overseas.¶ Looking beyond the economic realm, the evidence simply does not provide a basis for concluding that serial U.S. rule-breaking imposed general legitimacy costs sufficient to erode the existing order. On the contrary, it suggests a complex and malleable relationship between rule breaking, legitimacy, and compliance with the existing order that opens up numerous opportunities for the United States to use its power to change rules and limit the legitimacy costs of breaking rules. The evidence also suggests that just as rules do not automatically constrain power, power does not always smoothly translate into legitimacy. As our review of the ICC issue showed, the United States is not omnipotent, and its policies can run afoul of the problems of hypocrisy and inconsistency that constructivists and legal scholars identify. Indeed, neither the theory nor the evidence presented in this chapter can rule out the possibility that the United States might have enjoyed much more compliance, and had much more success promulgating its favored rules and quashing undesired rule change, had it not been such a rule breaker or had it pursued compensating strategies more energetically.

#### NSA triggers the adv.

Ingrid Wuerth, Vanderbilt Law School Professor, 10/25/13, Dispatch from Berlin on a Diplomatic Disaster, www.lawfareblog.com/2013/10/dispatch-from-berlin-on-a-diplomatic-disaster/

A diplomatic disaster for the United States is currently unfolding in Berlin. The revelation that the NSA may have monitored cell phone conversations and text messages of Chancellor Angela Merkel has led to popular outrage in Germany, as well as unusually pointed language from the Chancellor and other government officials. The U.S. Ambassador was not merely asked but summoned (“einbestellt”) to the German foreign office—a strong verb used until now (if at all) only for the Syrian and Iranian ambassadors. The Chancellor’s phone conversation with President Obama did nothing to ease the tension. Merkel declared such practices totally unacceptable: Between friends and partners such as the United States and Germany, the monitoring of communications by government leaders is a grave breach of trust, her press secretary emphasized. The Obama administration, other than saying the Chancellor’s phone is not now and will not in the future be monitored, has offered nothing: neither apology, nor explanation of what happened in the past, nor any sort of suggestion for future cooperation or discussion of a collective solution.¶ Maybe all of this will blow over quickly—just a headline-grabbing news story, made even better by the emerging details of the Chancellor’s two very different cellphones (one secure, one not) and questions about German helicopters flown over the U.S. consulate in Frankfurt in September. But it may not. Chancellor Merkel’s tone is sharp and that of minority parties in Parliament is even sharper. Those parties have been critical of Merkel for failing to react more strongly to prior revelations about the NSA. Mostly, however, the two center parties (Merkel’s CDU and the SPD) are united, rather than divided by their criticism of the United States. The current dispute goes may have deep roots as well. Roger Cohen has a nice piece up at the New York Times, detailing the German (and European) perception that the Obama administration has been dismissive, including with respect to possible military intervention in Syria.¶ The Federal Republic of Germany has traditionally been more willing than the United States to sacrifice some civil liberties in order to protect democratic values—their “streitbare” or “aggressive” democracy prohibits, for example, certain political parties that lean extremely far right or left. But totalitarian East Germany—in which spying on and on behalf of the government was very widespread—has left its mark on the popular culture. Listening in on other people’s private phone conversations brings to mind an immediate past of repression and brutality for the Germans. And today the United States is seen as presenting a serious threat to the civil liberties of all Germans, not just Chancellor Merkel. The comparison of Obama to East German state security is explicit. Although U.S.-German relations suffered during the invasion of Iraq, that was widely blamed on the Republican presidency of George W. Bush. With the Democrat Obama at the helm, however, localizing the blame is no longer so easy. U.S.-German relations may be at their lowest point since the end of World War II. Even if the German government wanted to overlook U.S. snooping (to avoid too much scrutiny of their own activities), the domestic political costs of looking the other way now have increased here as they have in France and Brazil.¶ What are the potential costs for U.S. foreign policy? In the short term, there is discussion in Europe of conditioning further European-U.S. bilateral trade negotiations upon a satisfactory solution to the problem of U.S. government data collection from Europe. Moreover, data sharing of various sorts could be limited; German or European laws could substantially ramp up data privacy protection, at potential cost to U.S. businesses; German prosecutors and the German Parliament may take up the issue. And, finally of course, there is a cost to U.S. soft power.

#### Their author says Boumediene was sufficient {Reading the yellow here, Trinity folks!}

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

The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head.¶ In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate ¶ than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige. Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449

#### Due process doomed—this card means you vote neg on presumption

Alford, 11 [Copyright (c) 2011 Utah Law Review Society Utah Law Review 2011 Utah Law Review 2011 Utah L. Rev. 1203 LENGTH: 41771 words ARTICLE: The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens NAME: Ryan Patrick Alford\* BIO: \* © 2011 Ryan Patrick Alford, Assistant Professor, Ave Maria School of Law, p. lexis]

From 2001 to 2004, the constitutional order of the United States was severely tested. In Hamdi v. Rumsfeld, n408 the Supreme Court held that the writ of habeas corpus extended to a United States citizen held at Guantanamo Bay. n409 Eight of the nine Justices agreed that the executive branch did not have the power to hold a citizen indefinitely, without access to basic due process protections enforceable in open court. n410 This case was properly seen as a watershed, a rejection of theories of executive detention that were incompatible with the basic tenets of our common law tradition. n411 However, the clear right to habeas corpus is only slightly over three hundred years old - the right not to be killed without due process of law is twice as old and considerably more fundamental. As Blackstone made clear, habeas corpus was originally necessary because it was a prophylactic protection for Magna Carta's right not to be killed. n412 To turn a blind eye to executive death warrants would be to trample upon numerous principles the Framers believed so important as to put into a document that outlines the parameters of the state itself. It would also trample upon principles that predate the Bill of Rights: the balance of powers, the constraints on arbitrary executive action, and the specific requirements of additional due process for those accused of crimes amounting to treason. It would also make a mockery of their [\*1271] comprehensive view of due process, which precluded the use of military justice against civilians. It would allow a return to the very features of royalist justice that they and their forbearers detested, such as allowing the executive the power of judgment and denying the courts the power to intervene - this was the hallmark of the detested Star Chamber, which was abolished on these grounds in 1641. n413 What is perhaps most perplexing about this current crossroads is that there seems to be very little discussion of the importance of this case within the legal profession in general, and in particular among the scholars and lawyers who had opposed the legal framework for the indefinite detention of the detainees at Guantanamo Bay. It is difficult to understand why so much determined opposition should emerge to the withholding of the rights of habeas corpus from American citizens (which led to the decision in Hamdi), n414 while the administration's decision to issue executive death warrants has led to so little. Apart from the decision of the ACLU and the CCR to litigate the case on behalf of Nasser Al-Aulaqi, there has been very little action taken within the legal community to publicize the Obama Administration's decision to use the targeted killing program to assassinate an American citizen. n415 As the discussion of the targeted killing program after Al-Awlaki's extrajudicial execution reveals, American militants like Anwar al-Awlaki are placed on a kill or capture list by a secretive panel of senior government officials, which then informs the president of its decisions ... . There is no public record of the operations or decisions of the panel, which is a subset of the White House's National Security Council ... . Neither is there any law establishing its existence or setting out the rules by which it is supposed to operate. n416 [\*1272] Not only is there no law addressing the due process rights of Americans with respect to targeted killing, but no law on this subject can be made. The executive branch has prevented the judiciary from addressing the killing of citizens by asserting that the courts do not have jurisdiction over these cases because they present political questions. Since the judiciary may not adjudicate the claims of those about to be killed, the prevailing law of the land now comes in the form of secret memoranda created by the executive's Office of Legal Counsel ("OLC"). n417 The executive branch now has the final say on the constitutionality of its decision to kill an American citizen, since it asserts that no court has jurisdiction to review its opinion. This is executive privilege beyond James I's wildest dreams. While the administration insists that the OLC memorandum did not formulate general criteria for deciding whether Americans accused (impliedly, but not formally) of treason may be tortured or killed, n418 its version of events is actually worse than the alternative. The administration advances the position that a citizen suspected of treason may be killed after a singular determination within the executive branch that this would not violate the citizen's due process rights. "If that's true, then the Obama Administration is playing legal Calvinball, making decisions based on individual cases, rather than consistent legal criteria." n419 Unfortunately, this has been confirmed to be true: the recommendations for targeted killings are reportedly made on a case-by-case basis by "a grim debating society" of "more than 100 members of the government's sprawling national security apparatus," who provide no indication of using legal principles when determining such issues as which sort of "facilitators" of terrorism should be marked for death. n420 This sort of Star Chamber is precisely what the rule of law was designed to protect us against. After months of silence, Attorney General of the United States Eric Holder traced out the rationale for the targeted killing of an American citizen. n421 Rebutting this article's thesis, he argued: Some have argued that the president is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of Al Qaeda or associated forces... . [\*1273] This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process. n422 Given the Obama Administration's decision not to release the OLC memorandum or even acknowledge that they did in fact kill Al-Awlaki, n423 this will likely be the most comprehensive description of the legal case for targeted killings the American people ever receive. Its arrogance is stunning. Attorney General Holder appears to rely implicitly on a Court decision holding that those having their social security benefits terminated are not entitled to a hearing in advance in support of another proposition. Namely, that some unspecified degree of procedural fairness apportioned in secret within the executive branch is all that is required before an American citizen can be killed. The Constitution, and a tradition of resistance to arbitrary executive power that it reaffirmed that extends back to the Magna Carta, is being held for naught - on the basis of a holding from an administrative law case wrenched forcibly out of context. With this flimsy justification, the administration rationalizes the creation of a new Star Chamber, newly empowered to administer capital punishment in secret and unchallengeable proceedings. Should this pass unchallenged, this may herald the end of the rule of law in America.

#### Drones tubes all their advs---resentment, rule of law, legitimacy, etc

Jeremy Scahill 13, 10/29/13, national security correspondent for the Nation magazine and author of the New York Times bestsellers Blackwater, Obama Presidency Marred by Legacy of Drone Program, www.motherjones.com/politics/2013/10/obama-drone-counterterrorism-war-legacy

Using drones, cruise missiles, and Special Ops raids, the United States has embarked on a mission to kill its way to victory. The war on terror, launched under a Republican administration, was ultimately legitimized and expanded by a popular Democratic president. Although Barack Obama's ascent to the most powerful office on Earth was the result of myriad factors, it was largely due to the desire of millions of Americans to shift course from the excesses of the Bush era.¶ Had John McCain won the election, it is difficult to imagine such widespread support, particularly among liberal Democrats, for some of the very counterterrorism policies that Obama implemented. As individuals, we must all ask whether we would support the same policies—the expansion of drone strikes, the empowerment of Joint Special Operations Command (JSOC), the use of the State Secrets Privilege, the use of indefinite detention, the denial of habeas corpus rights, the targeting of US citizens without charge or trial—if the commander in chief was not our candidate of choice.¶ But beyond the partisan lens, the policies implemented by the Obama administration will have far-reaching consequences. Future US presidents—Republican or Democratic—will inherit a streamlined process for assassinating enemies of America, perceived or real. They will inherit an executive branch with sweeping powers, rationalized under the banner of national security.¶ Assassinating Enemies¶ In 2012, a former constitutional law professor was asked about the US drone and targeted killing program. "It's very important for the president and the entire culture of our national security team to continually ask tough questions about 'Are we doing the right thing? Are we abiding by the rule of law? Are we abiding by due process?'" he responded, warning that it was important for the United States to "avoid any kind of slippery slope into a place where we're not being true to who we are."¶ That former law professor was Barack Obama.¶ The creation of the kill list and the expansion of drone strikes "represents a betrayal of President Obama's promise to make counterterrorism policies consistent with the US constitution," charged Boyle. Obama, he added, "has routinized and normalized extrajudicial killing from the Oval Office, taking advantage of America's temporary advantage in drone technology to wage a series of shadow wars in Afghanistan, Pakistan, Yemen, and Somalia. Without the scrutiny of the legislature and the courts, and outside the public eye, Obama is authorizing murder on a weekly basis, with a discussion of the guilt or innocence of candidates for the 'kill list' being resolved in secret." Boyle warned:¶ "Once Obama leaves office, there is nothing stopping the next president from launching his own drone strikes, perhaps against a different and more controversial array of targets. The infrastructure and processes of vetting the 'kill list' will remain in place for the next president, who may be less mindful of moral and legal implications of this action than Obama supposedly is."¶ In late 2012, the ACLU and the New York Times sought information on the legal rationale for the kill program, specifically the strikes that had killed three US citizens—among them 16-year-old Abdulrahman Awlaki. In January 2013, a federal judge ruled on the request. In her decision, Judge Colleen McMahon appeared frustrated with the White House's lack of transparency, writing that the Freedom of Information Act (FOIA) requests raised "serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men."¶ She charged that the Obama administration "has engaged in public discussion of the legality of targeted killing, even of citizens, but in cryptic and imprecise ways, generally without citing to any statute or court decision that justifies its conclusions." She added, "More fulsome disclosure of the legal reasoning on which the administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable 'hot' field of battle, would allow for intelligent discussion and assessment of a tactic that (like torture before it) remains hotly debated. It might also help the public understand the scope of the ill-defined yet vast and seemingly ever-growing exercise."¶ Ultimately, Judge McMahon blocked the release of the documents. Citing her legal concerns about the state of transparency with regard to the kill program, she wrote:¶ "This Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret."¶ How to Make Enemies and Not Influence People¶ It is not just the precedents set during the Obama era that will reverberate into the future, but also the lethal operations themselves. No one can scientifically predict the future consequences of drone strikes, cruise missile attacks, and night raids. But from my experience in several undeclared war zones across the globe, it seems clear that the United States is helping to breed a new generation of enemies in Somalia, Yemen, Pakistan, Afghanistan, and throughout the Muslim world.¶ Those whose loved ones were killed in drone strikes or cruise missile attacks or night raids will have a legitimate score to settle. In an October 2003 memo, written less than a year into the US occupation of Iraq, Donald Rumsfeld framed the issue of whether the United States was "winning or losing the global war on terror" through one question: "Are we capturing, killing, or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training, and deploying against us?"¶ More than a decade after 9/11, that question should be updated. At the end of the day, US policymakers and the general public must all confront a more uncomfortable question: Are our own actions, carried out in the name of national security, making us less safe or more safe? Are they eliminating more enemies than they are inspiring? Boyle put it mildly when he observed that the kill program's "adverse strategic effects… have not been properly weighed against the tactical gains associated with killing terrorists."¶ In November 2012, President Obama remarked that "there's no country on Earth that would tolerate missiles raining down on its citizens from outside its borders." He made the statement in defense of Israel's attack on Gaza, which was launched in the name of protecting itself from Hamas missile attacks. "We are fully supportive of Israel's right to defend itself from missiles landing on people's homes and workplaces and potentially killing civilians," Obama continued. "And we will continue to support Israel's right to defend itself." How would people living in areas of Yemen, Somalia, or Pakistan that have been regularly targeted by US drones or missile strikes view that statement?¶ Toward the end of President Obama's first term in office, the Pentagon's general counsel, Jeh Johnson, gave a major lecture at the Oxford Union in England. "If I had to summarize my job in one sentence: it is to ensure that everything our military and our Defense Department do is consistent with US and international law," Johnson said. "This includes the prior legal review of every military operation that the Secretary of Defense and the President must approve."¶ As Johnson spoke, the British government was facing serious questions about its involvement in US drone strikes. A legal case brought in the United Kingdom by the British son of a tribal leader killed in Pakistan alleged that British officials had served as "secondary parties to murder" by providing intelligence to the United States that allegedly led to the 2011 strike. A U.N. commission was preparing to launch an investigation into the expanding kill program, and new legal challenges were making their way through the US court system. In his speech, Johnson presented the US defense of its controversial counterterror policies:¶ "Some legal scholars and commentators in our country brand the detention by the military of members of al-Qaeda as 'indefinite detention without charges.' Some refer to targeted lethal force against known, identified individual members of al-Qaeda as 'extrajudicial killing.'¶ "Viewed within the context of law enforcement or criminal justice, where no person is sentenced to death or prison without an indictment, an arraignment, and a trial before an impartial judge or jury, these characterizations might be understandable.¶ "Viewed within the context of conventional armed conflict—as they should be—capture, detention, and lethal force are traditional practices as old as armies."¶ The Era of the Dirty War on Terror¶ In the end, the Obama administration's defense of its expanding global wars boiled down to the assertion that it was in fact at war; that the authorities granted by the Congress to the Bush administration after 9/11 to pursue those responsible for the attacks justified the Obama administration's ongoing strikes against "suspected militants" across the globe—some of whom were toddlers when the Twin Towers crumbled to the ground—more than a decade later.¶ The end result of the policies initiated under President Bush and continued and expanded under his Democratic successor was to bring the world to the dawn of a new age, the era of the Dirty War on Terror. As Boyle, the former Obama campaign counterterrorism adviser, asserted in early 2013, the US drone program was "encouraging a new arms race for drones that will empower current and future rivals and lay the foundations for an international system that is increasingly violent."¶ Today, decisions on who should live or die in the name of protecting America's national security are made in secret, laws are interpreted by the president and his advisers behind closed doors, and no target is off-limits, including US citizens. But the decisions made in Washington have implications far beyond their impact on the democratic system of checks and balances in the United States.¶ In January 2013, Ben Emmerson, the U.N. special rapporteur on counterterrorism and human rights, announced his investigation into drone strikes and targeted killing by the United States. In a statement launching the probe, he characterized the US defense of its use of drones and targeted killings in other countries as "Western democracies… engaged in a global [war] against a stateless enemy, without geographical boundaries to the theatre of conflict, and without limit of time." This position, he concluded, "is heavily disputed by most States, and by the majority of international lawyers outside the United States of America."¶ At his inauguration in January 2013, Obama employed the rhetoric of internationalism. "We will defend our people and uphold our values through strength of arms and rule of law. We will show the courage to try and resolve our differences with other nations peacefully—not because we are naive about the dangers we face, but because engagement can more durably lift suspicion and fear," the president declared. "America will remain the anchor of strong alliances in every corner of the globe; and we will renew those institutions that extend our capacity to manage crisis abroad, for no one has a greater stake in a peaceful world than its most powerful nation."¶ Yet, as Obama embarked on his second term in office, the United States was once again at odds with the rest of the world on one of the central components of its foreign policy. The drone strike in Yemen the day Obama was sworn in served as a potent symbol of a reality that had been clearly established during his first four years in office: US unilateralism and exceptionalism were not only bipartisan principles in Washington, but a permanent American institution. As large-scale military deployments wound down, the United States had simultaneously escalated its use of drones, cruise missiles, and Special Ops raids in an unprecedented number of countries. The war on terror had become a self-fulfilling prophecy.

### Iraq

#### Any regional draw-in would contain the conflict

Hadar, research fellow, foreign policy studies – Cato, 7/28/’10

(Leon, <http://www.cato.org/pub_display.php?pub_id=12011>)

In fact, the expectation for U.S. military pull-out from Iraq has helped produce similar incentives for regional powers like Turkey, Iran and the Sunni Arab states to establish a certain balance of power in that country, with Turkey establishing friendly ties with the Kurds in the North while cooperating with Iran to prevent the emergence of an independent Kurdish state. Similarly, Iran and the Saudis have a common interest in averting a full-blown military confrontation between the Shiites and the Sunnis. There is no reason why India and Pakistan would not cooperate in controlling their clients in Afghanistan in order to avoid a regional military conflagration.

#### The aff can’t solve rule of law and there’s no impact

Thomas Carothers is vice president for studies at the Carnegie Endowment for International Peace, 06 (“Promoting the Rule of Law Abroad: In Search of Knowledge,” Chapter 1, http://carnegieendowment.org/2006/01/01/promoting-rule-of-law-abroad-in-search-of-knowledge/35vq)

The effects of this burgeoning rule-of-law aid are generally positive,¶ though usually modest. After more than ten years and hundreds of millions¶ of dollars in aid, many judicial systems in Latin America still function¶ poorly. Russia is probably the single largest recipient of such aid,¶ but is not even clearly moving in the right direction. The numerous ruleof-¶ law programs carried out in Cambodia after the 1993 elections failed¶ to create values or structures strong enough to prevent last year’s coup.¶ Aid providers have helped rewrite laws around the globe, but they have¶ discovered that the mere enactment of laws accomplishes little without¶ considerable investment in changing the conditions for implementation¶ and enforcement. Many Western advisers involved in rule-of-law assistance¶ are new to the foreign aid world and have not learned that aid¶ must support domestically rooted processes of change, not attempt to¶ artificially reproduce preselected results.¶ Efforts to strengthen basic legal institutions have proven slow and difficult.¶ Training for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor¶ impact. The desirability of embracing such values as efficiency, transparency,¶ accountability, and honesty seems self-evident to Western aid¶ providers, but for those targeted by training programs, such changes¶ may signal the loss of perquisites and security. Major U.S. judicial reform¶ efforts in Russia, El Salvador, Guatemala, and elsewhere have foundered¶ on the assumption that external aid can substitute for the internal¶ will to reform.¶ Rule-of-law aid has been concentrated on more easily attained type¶ one and type two reforms. Thus it has affected the most important elements¶ of the problem least. Helping transitional countries achieve type¶ three reform that brings real change in government obedience to law is¶ the hardest, slowest kind of assistance. It demands powerful tools that¶ aid providers are only beginning to develop, especially activities that¶ help bring pressure on the legal system from the citizenry and support¶ whatever pockets of reform may exist within an otherwise selfinterested¶ ruling system. It requires a level of interventionism, political¶ attention, and visibility that many donor governments and organizations¶ cannot or do not wish to apply. Above all, it calls for patient, sustained¶ attention, as breaking down entrenched political interests, transforming¶ values, and generating enlightened, consistent leadership will¶ take generations.¶ The experience to date with rule-of-law aid suggests that it is best to¶ proceed with caution. The widespread embrace of the rule-of-law imperative¶ is heartening, but it represents only the first step for most transitional¶ countries on what will be a long and rocky road. Although the¶ United States and other Western countries can and should foster the¶ rule of law, even large amounts of aid will not bring rapid or decisive¶ results. Thus, it is good that President Ernesto Zedillo of Mexico has¶ made rule-of-law development one of the central goals of his presidency,¶ but the pursuit of that goal is certain to be slow and difficult,¶ as highlighted by the recent massacre in the south of the country. Judging¶ from the experience of other Latin American countries, U.S. efforts¶ to lighten Mexico’s burden will at best be of secondary importance. Similarly,¶ Wild West capitalism in Russia should not be thought of as a brief¶ transitional phase. The deep shortcomings of the rule of law in Russia¶ will take decades to fix. The Asian financial crisis has shown observers¶ that without the rule of law the Asian miracle economies are unstable.¶ Although that realization was abrupt, remedying the situation will be a¶ long-term enterprise.

#### Nobody cares

Eric Black 12, former reporter for the Star Tribune and Twin Cities blogger, Some ideas to limit the ‘supremacy’ of the U.S. Supreme Court, 11/27/12, www.minnpost.com/eric-black-ink/2012/11/some-ideas-limit-supremacy-us-supreme-court

It seems to be part of our national DNA. We see ourselves as so unlike the rest of the world that we have developed a semi-religious belief in what we call “American exceptionalism.” Maybe the upside is some kind of boost to our collective self-esteem. But one of the downsides is a reluctance to look around the world and see if anyone (especially not France) has a good idea from which we might benefit.

Especially on democracy. We see ourselves as the world’s model for democracy and the “rule of law.” We expect others to copy us, although they have long since stopped doing so with reference to the specifics of how to design a government. We grumble a good deal about the breakdowns in our system, but we are not much open to ideas for improving it.

University of Minnesota political scientist Lisa Hilbink, whose specialties include comparative constitutional systems around the world, said that basically, since the end of World War II, most of the world outside of Latin America came to the conclusion that the U.S. system was “pretty crazy.”

#### Judicial modeling is bogus – especially for autocratic nations

Abebe and Posner, 11 - Assistant Professor and Kirkland & Ellis Professor, University of Chicago Law School (Daniel and Eric, “The Flaws of Foreign Affairs Legalism” VIRGINIA JOURNAL OF INTERNATIONAL LAW Vol. 51:507, <http://www.ericposner.com/THE%20FLAWS%20OF%20FOREIGN%20AFFAIRS%20LEGALISM.pdf>)

Slaughter never clearly explains the mechanism of influence. “Transjudicial dialogue,” as she puts it,41 is a lofty way of referring to conversations that judges have with each other when they meet at international conferences. It is possible that these conversations cause judges to adopt the legal views of their counterparts, but it is just as possible that the conversations have no effect on their judicial activities or even lead to greater disagreement rather than convergence. Even if judges are influenced in a positive way by foreign counterparts, judges in most countries have very limited authority to make policy — much less so than in the United States.42 It seems doubtful that they could have more than a marginal effect on the foreign affairs of their countries. Moreover, judges in many countries have little or no independence. Thus, any attempt on their part to constrain their national governments and executives would fail.

### Afghanistan

#### Instability is inevitable but wont escalate

Finel 9 [Dr. Bernard I. Finel, an Atlantic Council contributing editor, is a senior fellow at the American Security Project, “Afghanistan is Irrelevant,” Apr 27 http://www.acus.org/new\_atlanticist/afghanistan-irrelevant]

It is now a deeply entrenched conventional wisdom that the decision to “abandon” Afghanistan after the Cold War was a tragic mistake. In the oft-told story, our “abandonment” led to civil war, state collapse, the rise of the Taliban, and inevitably terrorist attacks on American soil. This narrative is now reinforced by dire warnings about the risks to Pakistan from instability in Afghanistan. Taken all together, critics of the Afghan commitment now find themselves facing a nearly unshakable consensus in continuing and deepen our involvement in Afghanistan. The problem with the consensus is that virtually every part of it is wrong. Abandonment did not cause the collapse of the state. Failed states are not always a threat to U.S. national security. And Pakistan’s problems have little to do with the situation across the border. First, the collapse of the Afghan state after the Soviet withdrawal had little to do with Western abandonment. Afghanistan has always been beset by powerful centrifugal forces. The country is poor, the terrain rough, the population divided into several ethnic groups. Because of this, the country has rarely been unified even nominally and has never really had a strong central government. The dominant historical political system in Afghan is warlordism. This is not a consequence of Western involvement or lack thereof. It is a function of geography, economics, and demography. Second, there is no straight-line between state failure and threats to the United States. Indeed, the problem with Afghanistan was not that it failed but rather that it “unfailed” and becameruled by the Taliban. Congo/Zaire is a failed state. Somalia is a failed state. There are many parts of the globe that are essentially ungoverned. Clearly criminality, human rights abuses, and other global ills flourish in these spaces. But the notion that any and all ungoverned space represents a core national security threat to the United States is simply unsustainable. Third, the problem was the Taliban regime was not that it existed. It was that it was allowed to fester without any significant response or intervention. We largely sought to ignore the regime — refusing to recognize it despite its control of 90% of Afghan territory. Aside from occasional tut-tutting about human rights violations and destruction of cultural sites, the only real interaction the United States sought with the regime was in trying to control drugs. Counter-drug initiatives are not a sound foundation for a productive relationship for reasons too numerous to enumerate here. Had we recognized the Taliban and sought to engage the regime, it is possible that we could have managed to communicate red lines to them over a period of years. Their failure to turn over bin Laden immediately after 9/11 does not necessarily imply an absolute inability to drive a wedge between the Taliban and al Qaeda over time. Fourth, we are now told that defeating the Taliban in Afghanistan is imperative in order to help stabilize Pakistan. But, most observers seem to think that Pakistan is in worse shape now — with the Taliban out of power and American forces in Afghanistan — than it was when the Taliban was dominant in Afghanistan. For five years from 1996 to 2001, the Taliban ruled Afghanistan and the Islamist threat to Pakistan then was unquestionably lower. This is not surprising actually. Insurgencies are at their most dangerous — in terms of threat of contagion — when they are fighting for power. The number of insurgencies that actually manage to sponsor insurgencies elsewhere after taking power is surprising low. The domino theory is as dubious in the case of Islamist movements as it was in the case of Communist expansion. There is a notion that “everything changed on 9/11.” We are backing away as a nation from that concept in the case of torture. Perhaps we should also come to realize that our pre-9/11 assessment of the strategic value and importance of Afghanistan was closer to the mark that our current obsession with it. We clearly made some mistakes in dealing with the Taliban regime. But addressing those mistakes through better intelligence, use of special forces raids, and, yes, diplomacy is likely a better solution than trying to build and sustain a reliable, pro-Western government in Kabul with control over the entire country.

#### Corruption is key to resolving the courts—their evidence

The Nation 9 (Nov. 11, 2009, <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/International/11-Nov-2009/UN-body-urges-Karzai-to-fight-corruption>)

UNITED NATIONS - The UN General Assembly has urged the government of re-elected Afghan President Hamid Karzai to press ahead with “strengthening of the rule of law and democratic processes, the fight against corruption (and) the acceleration of justice sector reform.” The 192-member assembly made that call Monday night by unanimously adopting a resolution that also declared that Afghanistan’s presidential election “credible” and “legitimate”, despite allegations of widespread fraud that led Karzai’s main challenger Abdullah Abdullah to pull out of the run-off round of the election. But the UN assembly raised no doubts about Karzai’s mandate or his right to continue leading the war-torn country. The resolution welcomed “the efforts of the relevant institutions to address irregularities identified by the electoral institutions in Afghanistan and to ensure a credible and legitimate process in accordance with the Afghan Election Law and in the framework of the Afghan Constitution.” It appealed to the international community to help Afghanistan in countering the challenges of the militants’ attacks that threaten its democratic process and and economic development. Before the assembly approved the resolution, 24 countries, including Pakistan, spoke in the debate on the deteriorating situation in Afghanistan in which they stressed the need for the Afghan Government and the global community to work closely together. Pakistan’s Acting Permanent Representative Amjad Hussain Sial said the core of violence and conflict in Afghanistan emanated from terrorist groups, foreign militants such as Al-Qaeda, and militant Taliban who were not prepared to reconcile and give up fighting. The nexus with drug traders was increasingly discernable. The key to long-term stability in Afghanistan, he said, was reformation of the country’s corrupt governmental systems. Equally important was building the civilian institutions at the central and subnational levels.

#### Independent judiciary not key to Afghanistan

Huq, 2004

Aziz Huq, Postgraduate Fellow, Columbia Law School, 2004,

http://www.cic.nyu.edu/pdf/E23SummaryConstitutional%20Court%20Judicial%20ReviewAHaq.pdf

Courts with judicial review authority can nullify the preferences of democratically elected legislatures. There is a risk in concentrating power in courts’ hands, especially when it is not clear that Afghan judges are sufficiently professional, and when some judges have been willing to impose their ideology regardless of provisions of the constitution, statutory law, or popular beliefs. ¶ • Courts’ authority rests largely on public support. In its early days, however, an Afghan constitutional court is unlikely to have much public support, so other government institutions may reject or ignore its rulings, undermining its long-term credibility. Thus, judicial review might either be irrelevant or undermine democracy.

#### One ruling doesn’t solve

Rex Glensy, Associate Professor, Drexel University College of Law, 11 [“THE USE OF INTERNATIONAL LAW IN U.S. CONSTITUTIONAL ADJUDICATION,” International Law in U.S. Constitutional Adjudication, Vol. 25, 2011]

The other side of the coin is represented by the consequences for the United¶ States if it decides to forego the increasing judicial conversation that is taking¶ place between courts of different countries. The failure of U.S. courts to¶ engage in this enterprise “weakens Amer¶ ica’s voice as a principled defender of¶ human rights around the world and diminishes America’s moral influence and¶ stature.”¶ 182¶ In fact, because of the raised profile of the United States in the¶ world, its actions are routinely more heavily scrutinized than those of other¶ nations, and any notion of the United States disengaging from international¶ dialogue, or behaving in a manner that is considered inappropriate by the¶ international community, results in a greater diminution of influence than if¶ those same actions were to be performed by another nation.¶ 183¶ This diminution¶ of influence is already beginning to take its course, in large part due to the¶ current Supreme Court’s predominantly regressive jurisprudence that has¶ shown hostility to ideas and authority that originate from abroad.¶ 184¶ Thus, even¶ though historically the Un¶ ited States has provided, through its Constitution,¶ inspiration to many fledgling democracies,¶ 185¶ “the recent direction of United¶ States constitutional jurisprudence has led most constitution-makers to seek¶ alternative models.”¶ 186¶ Unfortunately, the United Stat¶ es is increasingly used by courts of other nations as a “c¶ ounter-example” because “as a global¶ constitutionalism begins to flourish, this failure to engage [by the United States¶ Supreme Court (in particular)] threat¶ ens increasingly to marginalize the¶ experience of the constantly evolving United States Constitution that was once¶ the inspiration of all constitutionalists.”¶ 187¶ Concerns about the reputation of the United States’s legal system similarly¶ motivate an integration of comparative law within American jurisprudence.¶ Reputation is an important component¶ of a nation’s ability to function on the¶ international stage, and historically, the United States, through its international¶ leadership and its “commitment to the rule of law and to the betterment of the¶ human situation,” obtained a reputation that drew other nations towards¶ adopting its values and outlook.¶ 188¶ But reputation is a characteristic that needs¶ constant feeding, and resting on its past laurels, or worse, showing disinterest¶ or contempt for the international stage,¶ 189¶ will result in long-term damage to¶ the United States’s reputation (which ta¶ kes a long time to rebuild), with the¶ consequent diminution of its ability to impact other nations.¶ 190¶ By showing¶ willingness to consult legal ideas derive¶ d from international law principles,¶ courts in the United States can go some way towards increasing their clout on¶ the international stage, with the consequent improvement of the United States’s¶ international reputation on the whole. Ultimately, it is in the interest of the¶ United States to do so.¶ Nevertheless, the “pursuit of self-interest is tempered by recognition of the¶ legitimate interests of other players and a desire to encourage reciprocal¶ behavior.”¶ 191¶ That is, because of the assured interaction between the United¶ States (either through its institutions or its citizens) and foreign countries in the¶ future, the United States would want to guarantee itself a modicum of¶ treatment equal to the level of treatment such foreign countries (or their citizens) would receive in the United States.¶ 192¶ Thus, reciprocity, assisted by¶ “transjudicial communication,”¶ 193¶ gives a regime a “longer shelf life”¶ 194¶ as it is¶ helped along by international cooperation (or non-interference) of foreign¶ nations.¶ Many scholars have noted that the current lack of reciprocity (personified¶ by the reticence of U.S. courts to participate in the comparative enterprise) is¶ not going unnoticed in international bodies and foreign countries.¶ 195¶ International judges too have noticed this retrenchment by the U.S. Supreme¶ Court and its failure to cite interna¶ tional sources, particularly from those¶ international tribunals that referred, or used to refer, to the U.S. Supreme¶ Court’s own decisions, thereby noting that (through reciprocity) those same¶ international tribunals are going to rely on the U.S. Supreme Court’s decision¶ with less and less frequency.¶ 196¶ This attitude is exemplified by a Canadian¶ Supreme Court decision preventing the extradition from Canada to the United¶ States of two defendants who faced the death penalty.¶ 197¶ It cited, among other¶ international authorities, Justice Breyer’s dissent in¶ Knight v. Florida¶ in¶ concluding that the death penalty was being phased out.¶ 198¶ The need to provide reciprocal treatment to other nations of the world has¶ been exacerbated by the fact that the world has become more interconnected,¶ and consequently, domestic law and activity increasingly have international consequences, and vice versa.¶ 199¶ As a result of this interconnection, the United¶ States has demonstrated that it holds no reservations to imposing laws and¶ regulations over activities occurring abroad that supposedly have effect within¶ its territory.¶ 200¶ It seems inconsistent to advocate a one-way ratchet approach to¶ the effects of globalization that allows for exports but is resistant to imports,¶ particularly when imports serve the same interests as do the exports. In fact,¶ this excessive nation-centric view of the world, with the premise that any legal¶ thought of any importance can only originate from the United States, seems¶ largely obsolete in the new world order,¶ and has already been rejected by the¶ United States in areas such as international trade.¶ 201¶ Like recent developments¶ in the area of international trade, the use of international law as persuasive¶ authority for domestic cases merely acknowledges today’s global reality and¶ serves the United States by offering reciprocity to other nations, thus¶ enhancing its stature on the international legal stage.

#### Their conception of global judicial spillover has no empirical basis

David Law, Professor of Law and Professor of Political Science, Washington University, and Wen-Chen Chang, Associate Professor, National Taiwan University College of Law, 11 [“THE LIMITS OF GLOBAL JUDICIAL DIALOGUE,” Vol. 86:523, 2011]

INTRODUCTION: MUCH ADO ABOUT NOTHING?¶ No aspect of the globalization of constitutional law has thus far¶ attracted more attention or controversy than the use of foreign and¶ international legal materials by constitutional courts.1 Although judicial¶ citation of foreign law is hardly a new phenomenon, there is a¶ widespread sense that constitutional courts are turning more frequently¶ to foreign jurisprudence for guidance and inspiration.2 Moreover, the¶ manner in which courts and judges interact with one another has¶ changed in ways that are said to have systemic implications for the¶ global evolution of constitutional law. Prominent scholars and jurists¶ now speak in glowing terms of the emergence of a “global” or¶ “international” or “transnational judicial dialogue”3 that unites judges around the world in a “common global judicial enterprise.”4 It is said¶ that, by engaging in “open” and “self-conscious” debate with courts in¶ other countries over common questions of both substance and¶ methodology, constitutional courts not only “improve the quality of their¶ particular national decisions,” but also “contribute to a nascent global¶ jurisprudence,” most notably in the area of human rights.5¶ Several varieties of global judicial dialogue are said to exist. One¶ variety, which has already been mentioned, is comparative analysis of¶ the type found in judicial decisions. Although judicial citation of foreign¶ law is hardly a new phenomenon,6 it is increasingly suggested that the¶ manner in which constitutional courts analyze the work of their¶ counterparts in other countries is characterized by such a degree of¶ mutual engagement and substantive debate that it amounts to an ongoing¶ conversation conducted through the medium of judicial opinions.7 A¶ second variety of global judicial dialogue is dialogue in a literal sense, in¶ the form of “direct interactions”8 and networking among judges. This¶ type of dialogue has been fostered by technological advances, such as¶ the internet, that have lowered the barriers to international¶ communication, and by the deliberate efforts of academic institutions,¶ intergovernmental and international organizations, and constitutional¶ courts themselves to generate proliferating opportunities for face-to-face¶ interaction, in the form of conferences, visits, and the like.9¶ It is not the goal of this Article to contribute to the normative debate¶ over whether global judicial dialogue is cause for celebration or¶ consternation. Nor is it our purpose to evaluate the normative arguments¶ in favor of an interpretive posture of “engagement”10 or a “dialogical”¶ approach to comparative analysis.11 This Article aims, instead, to explain¶ as an empirical matter why the concept of “global judicial dialogue”¶ neither describes the actual practice of comparative analysis by judges¶ nor explains the emergence of a global constitutional jurisprudence. We¶ also demonstrate that the frequency with which a court cites foreign law¶ in its opinions is an extremely unreliable measure of the extent to which¶ the court actually makes use of foreign law. Scholars who wish to¶ understand or measure a particular court’s usage of foreign law must¶ therefore be prepared to supplement quantitative research methods, such¶ as statistical analysis of citations to foreign law, with qualitative¶ approaches that are capable of probing more deeply, such as interviews¶ with court personnel.¶ Part II of this Article argues that the notion of “dialogue” is, both¶ conceptually and empirically, an inapt metaphor for the comparative¶ analysis performed by constitutional courts. Part III takes advantage of a¶ natural experiment in judicial isolation to show that judge-to-judge¶ dialogue and “judicial networks,” as eye-catching as they may be, have¶ limited impact on constitutional adjudication and do little to explain the¶ frequency or sophistication with which constitutional judges resort to¶ foreign law. The natural experiment that we evaluate goes by the name¶ of Taiwan—a democratic country with an active constitutional court that¶ is nevertheless systematically deprived of opportunities to interact¶ directly with other courts for a combination of historical and political reasons. Our case study of Taiwan combines quantitative and qualitative¶ empirical research methods, in the form of statistical analysis of the¶ Taiwanese Constitutional Court’s decisions and numerous off-the-record¶ interviews with members of the Court and their law clerks. Although the¶ Court rarely cites foreign law, foreign legal research forms a routine and¶ indispensable part of its deliberations. Taiwan’s experience strongly¶ suggests that judicial interaction and networking play a much smaller¶ role in shaping a court’s utilization of foreign law than institutional¶ factors such as the rules and practices governing the composition and¶ staffing of the court and the extent to which the structure of legal¶ education and the legal profession incentivizes judges and academics to¶ possess expertise in foreign law. Comparison of the Taiwanese¶ Constitutional Court with the U.S. Supreme Court, which rarely looks to¶ foreign law for inspiration notwithstanding its extensive participation in¶ various forms of global judicial dialogue, only reinforces this¶ conclusion. This comparison is performed in Part IV. The Article¶ concludes by highlighting the role that American legal education must¶ play if the global influence of American constitutionalism is to be¶ revived, or if American courts are to engage in comparativism of their¶ own.

#### Canada solves the aff

Richard 7 [John D. Richard (Chief Justice of the Fed. Court of Appeals in Canada); “JUDICIAL REVIEW IN THE AMERICAS ... AND BEYOND: SYMPOSIUM ISSUE: ARTICLE: Judicial Review in Canada”; Duquesne Law Review; 45 Duq. L. Rev. 483; Spring, 2007]

2. Judicial Independence

**The principle of judicial independence exists in Canada in numerous forms. The** preamble to the **Constitution** Act, 1867, **states that Canada is to have** a Constitution "similar in Principle to that of the United Kingdom." As noted by the Supreme Court, "since **judicial independence** has been for centuries an important principle [\*490] of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble." n12 In addition, **judicial independence is** explicitly referenced **in sections 96 through 100 of the Constitution** Act, 1867. n13 For example, superior court **judges in Canada enjoy a high degree of security of tenure** in the constitutional guarantee of **section 99** of the Constitution Act, 1867, which **provides that they "shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons**." Finally, section 11(d) of the Charter expressly entitles those arraigned before courts to "an independent and impartial tribunal."¶ An independent judiciary has long been recognized as the foundation upon which a true democracy rests because it allows judges to make impartial decisions without fear of consequence. This is critical since public trust in the legal system and the judiciary depends upon society's confidence in the impartiality of individual decisions. Impartiality does not mean that judges have no sympathies or opinions, but rather that they are free to consider and act upon different points of view without interference from any source. The judiciary is increasingly at the center of many current debates about social change and social values. As a result, the public has attained a new awareness of the crucial need for judges who are free to make independent and impartial decisions, and to apply the law as they understand it, without fear or favour, and without regard to whether a decision is popular or not.¶ **Independence of the judiciary, impartiality of the judges and access to justice are** fundamental values **in the eyes of all Canadians,** representing the very essence of a free and democratic society. The public's acceptance and support of judicial decisions is dependent upon the public's confidence in the integrity and independence of the judges. It is therefore important that the Federal Court of Appeal and its judges be perceived as independent and impartial.¶ As a democratic society, **Canada has undergone some very important changes** in the relationship between individuals and the state. The judiciary in Canada must have the necessary knowledge and experience to contribute significantly to the maintenance and ongoing evolution of our free and democratic society. **The role [\*491] of the courts as adjudicators of disputes, interpreters of the law, and defenders of the Constitution and the Charter requires that their powers and functions be completely separate from all other stakeholders in the legal system**. **Canada's tradition of judicial independence ensures that the courts will continue to be accessible to everyone and that the proceedings remain public, transparent and free of interference from the government**.

# 2NC

## Terror DA

### 2NC Impact Calc

#### Turning the tide is critical – al-Qaeda affiliates pose a high risk of nuclear and biological terrorism

Allison, IR Director @ Harvard, 12 [Graham, Director, Belfer Center for Science and International Affairs; Douglas Dillon Professor of Government, Harvard Kennedy School, "Living in the Era of Megaterror", Sept 7, <http://belfercenter.ksg.harvard.edu/publication/22302/living_in_the_era_of_megaterror.html>.]

Forty years ago this week at the Munich Olympics of 1972, Palestinian terrorists conducted one of the most dramatic terrorist attacks of the 20th century. The kidnapping and massacre of 11 Israeli athletes attracted days of around-the-clock global news coverage of Black September’s anti-Israel message. Three decades later**, on 9/11, Al Qaeda killed nearly 3,000 individuals** at the World Trade Center and the Pentagon, announcing a new era of megaterror. In an act that killed more people than Japan’s attack on Pearl Harbor, a band of terrorists headquartered in ungoverned Afghanistan demonstrated that individuals and small groups can kill on a scale previously the exclusive preserve of states. **Today, how many people can a small group of terrorists kill in a single blow?** **Had** Bruce **Ivins, the U.S. government microbiologist responsible for the 2001 anthrax attacks, distributed his deadly agent with sprayers he could have purchased off the shelf, tens of thousands of Americans would have died**. **Had the 2001 “Dragonfire” report that Al Qaeda had a small nuclear weapon** (from the former Soviet arsenal) in New York City **proved correct,** and not a false alarm, **detonation of that bomb in Times Square could have incinerated a half million Americans**. In this electoral season, President Obama is claiming credit, rightly, for actions he and U.S. Special Forces took in killing Osama bin Laden. Similarly, at last week’s Republican convention in Tampa, Jeb Bush praised his brother for making the United States safer after 9/11. There can be no doubt that the thousands of actions taken at federal, state and local levels have made people safer from terrorist attacks. Many are therefore attracted to the chorus of officials and experts claiming that the “strategic defeat” of Al Qaeda means the end of this chapter of history. But we should remember a deeper and more profound truth. **While applauding actions that have made us safer from future terrorist attacks, we must recognize that they have not reversed an inescapable reality:** **The relentless advance of science and technology is making it possible for smaller and smaller groups to kill larger and larger numbers of people**. **If a Qaeda affiliate,** or some terrorist group in Pakistan whose name readers have never heard, **acquires highly enriched uranium or plutonium made by a state, they** **can construct an elementary nuclear bomb capable of killing hundreds of thousands of people**. **At biotech labs** across the United States and **around the world, research scientists** making medicines that advance human well-being **are also capable of making pathogens, like anthrax, that can produce massive casualties**. What to do? Sherlock Holmes examined crime scenes using a method he called M.M.O.: motive, means and opportunity. In a society where citizens gather in unprotected movie theaters, churches, shopping centers and stadiums, opportunities for attack abound. Free societies are inherently “target rich.” Motive to commit such atrocities poses a more difficult challenge. In all societies, a percentage of the population will be homicidal. No one can examine the mounting number of cases of mass murder in schools, movie theaters and elsewhere without worrying about a society’s mental health. Additionally, actions we take abroad unquestionably impact others’ motivation to attack us. As Faisal Shahzad, the 2010 would-be “Times Square bomber,” testified at his trial: “Until the hour the U.S. ... stops the occupation of Muslim lands, and stops killing the Muslims ... we will be attacking U.S., and I plead guilty to that.” Fortunately, it is more difficult for a terrorist to acquire the “means” to cause mass casualties. Producing highly enriched uranium or plutonium requires expensive industrial-scale investments that only states will make. If all fissile material can be secured to a gold standard beyond the reach of thieves or terrorists, aspirations to become the world’s first nuclear terrorist can be thwarted. Capabilities for producing bioterrorist agents are not so easily secured or policed. While more has been done, and much more could be done to further raise the technological barrier, as knowledge advances and technological capabilities to make pathogens become more accessible, the means for bioterrorism will come within the reach of terrorists. **One of the hardest truths about modern life is that the same advances in science and technology that enrich our lives also empower potential killers to achieve their deadliest ambitions.** To imagine that we can escape this reality and return to a world in which we are invulnerable to future 9/11s or worse is an illusion. For as far as the eye can see, we will live in an era of megaterror.

#### Nuclear terrorism is feasible---high risk of theft and attacks escalate

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Hundreds of scientific papers and reports have been published on nuclear terrorism. International conferences have been held on this threat with participation of Russian organizations, including IMEMO and the Institute of U.S. and Canadian Studies. Recommendations on how to combat the threat have been issued by the International Luxembourg Forum on Preventing Nuclear Catastrophe, Pugwash Conferences on Science and World Affairs, Russian-American Elbe Group, and other organizations. The UN General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism in 2005 and cooperation among intelligence services of leading states in this sphere is developing.¶ At the same time, these efforts fall short for a number of reasons, partly because various acts of nuclear terrorism are possible. Dispersal of radioactive material by detonation of conventional explosives (“dirty bombs”) is a method that is most accessible for terrorists. With the wide spread of radioactive sources, raw materials for such attacks have become much more accessible than weapons-useable nuclear material or nuclear weapons. The use of “dirty bombs” will not cause many immediate casualties, but it will result into long-term radioactive contamination, contributing to the spread of panic and socio-economic destabilization.¶ Severe **consequences can be caused by sabotaging nuclear power plants, research reactors, and radioactive materials storage facilities. Large cities are especially vulnerable to such attacks. A large city may host dozens of research reactors with a nuclear power plant or a couple of spent nuclear fuel storage facilities and dozens of large radioactive materials storage facilities located nearby.** The past few years have seen significant efforts made to enhance organizational and physical aspects of security at facilities, especially at nuclear power plants. Efforts have also been made to improve security culture. But these efforts do not preclude the possibility that well-trained terrorists may be able to penetrate nuclear facilities.¶ Some estimates show that sabotage of a research reactor in a metropolis may expose hundreds of thousands to high doses of radiation. A formidable part of the city would become uninhabitable for a long time.¶ Of all the scenarios, it is building an improvised nuclear device by terrorists that poses the maximum risk. **There are no engineering problems that cannot be solved if terrorists decide to build a simple “gun-type” nuclear device.** Information on the design of such devices, as well as implosion-type devices, is available in the public domain. It is the acquisition of weapons-grade uranium that presents the sole serious obstacle. Despite numerous preventive measures taken, we cannot rule out the possibility that such materials can be bought on the black market. Theft of weapons-grade uranium is also possible. Research reactor fuel is considered to be particularly vulnerable to theft, as it is scattered at sites in dozens of countries. There are about 100 research reactors in the world that run on weapons-grade uranium fuel, according to the International Atomic Energy Agency (IAEA).¶ A terrorist “gun-type” uranium bomb can have a yield of least 10-15 kt, which is comparable to the yield of the bomb dropped on Hiroshima. The explosion of such a bomb in a modern metropolis can kill and wound hundreds of thousands and cause serious economic damage. There will also be long-term sociopsychological and political consequences.¶ The vast majority of states have introduced unprecedented security and surveillance measures at transportation and other large-scale public facilities after the terrorist attacks in the United States, Great Britain, Italy, and other countries. These measures have proved burdensome for the countries’ populations, but the public has accepted them as necessary. A nuclear terrorist attack will make the public accept further measures meant to enhance control even if these measures significantly restrict the democratic liberties they are accustomed to. Authoritarian states could be expected to adopt even more restrictive measures.¶ If a nuclear terrorist act occurs, nations will delegate tens of thousands of their secret services’ best personnel to investigate and attribute the attack. Radical Islamist groups are among those capable of such an act. We can imagine what would happen if they do so, given the anti-Muslim sentiments and resentment that conventional terrorist attacks by Islamists have generated in developed democratic countries. Mass deportation of the non-indigenous population and severe sanctions would follow such an attack in what will cause **violent protests in the Muslim world**. **Series of armed clashing terrorist attacks may follow**. The prediction that Samuel Huntington has made in his book “The Clash of Civilizations and the Remaking of World Order” may come true. Huntington’s book clearly demonstrates that it is not Islamic extremists that are the cause of the Western world’s problems. Rather there is a deep, intractable conflict that is rooted in the fault lines that run between Islam and Christianity. This is especially dangerous for Russia because these fault lines run across its territory. To sum it up, the political leadership of Russia has every reason to revise its list of factors that could undermine strategic stability.  BMD does not deserve to be even last on that list because its effectiveness in repelling massive missile strikes will be extremely low. BMD systems can prove useful only if deployed to defend against launches of individual ballistic missiles or groups of such missiles. Prioritization of other destabilizing factors—that could affect global and regional stability—merits a separate study or studies. But even without them I can conclude that nuclear terrorism should be placed on top of the list. The threat of nuclear terrorism is real, and a successful nuclear terrorist attack would lead to a radical transformation of the global order.  All of the threats on the revised list must become a subject of thorough studies by experts. States need to work hard to forge a common understanding of these threats and develop a strategy to combat them.

#### Even a conventional attack causes retaliation

Daniel **Byman**, director of the Center for Peace and Security Studies at Georgetown’s School of Foreign Service, September **2007**, US Counter-Terrorism Options, Survival, Vol. 49, Is. 3, p. informaworld

One of the biggest problems with containment is the home front. Containment is the antithesis of a ’crush‘ strategy, and thus appears as weakness to domestic audiences who are scared, angry and hungry for vengeance after a terrorist attack. This public response is not based on a rational calculation of the risks. Yet **terrorism scares people. Even** a **limited** number of **deaths**, particularly **on home soil**, thus **has a disproportionate psychological effect**. Work stops, and people refuse to travel. **Public confidence in government plunges**. This may be irrational from an actuarial point of view, but **policymakers must adjust policy to cope with the behaviour of their citizens**. Moreover, every government must ensure the security of its citizens to be credible, and the deliberate murder of civilians is a direct challenge to a government’s legitimacy. **It is impossible for politicians not to respond to such provocations**. The **Bush** administration **has spent** the **years** since 11 September **telling the American people how dangerous the threat is**, and most Democratic politicians have joined in the chorus. When politicians try to soften their rhetoric on terrorism, they face tremendous criticism. During the waning days of the 2004 elections, Democratic presidential candidate John Kerry told the New York Times that he wanted to turn terrorism into a ‘nuisance’ like crime; President Bush told reporters that the United States would never achieve a clear victory in the war. The public outcry forced both to ‘clarify’ – that is, to disown – their statements. One cannot take the politics out of counter-terrorism. The painful reality might be that ‘doing something‘ – whether spending money on homeland security or **acting aggressively abroad** – **is necessary to reassure people after a** massive **attack on the homeland, since a perception that the government was passive could contribute to a massive overreaction**. Reaction may be necessary to prevent overreaction.

#### Even a 1% probability means you vote neg.

Matthew **Bunn**, Associate Professor of Public Policy at the Belfer Center for Science and International Affairs at the John F. Kennedy School of Government, November **2008**, Securing the Bomb 2008, p. 14-15

Even a 1 percent chance over the next ten years would be enough to justify substantial action to reduce the risk, given the scale of the consequences. No one in their right mind would operate a nuclear power plant upwind of a major city that had a 1 percent chance over ten years of blowing sky-high—the risk would be understood by all to be too great. But that, in effect, is what we are doing—or worse—by managing the world’s nuclear stockpiles as we do today. The nuclear security improvements and nuclear material removals that have been accomplished in recent years— along with the disruption of al-Qaeda’s central command—have reduced the risk. But the danger remains very real.

#### Bioweapons are imminent and cause extinction – they’re easily obtainable and overwhelm our best defenses

Myhrvold, July 2013 [Nathan, formerly Chief Technology Officer at Microsoft, is co-founder of Intellectual Ventures—one of the largest patent holding companies in the world, “Strategic Terrorism: A Call to Action”, The Lawfare Research Paper Series Research paper NO . 2, <http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf>,]

**Biotech**nology **is advancing so rapidly** that **it is hard to**  **keep track of all** **the new potential threats**. Nor is it clear that anyone is even trying. In addition to lethality and drug resistance, many other parameters can be played with, given that the infectious power of an epidemic depends on many properties, including the length of the latency period during which a person is contagious but asymptomatic. Delaying the onset of serious symptoms allows each new case to spread to more people and thus makes the virus harder to stop. This dynamic is perhaps best illustrated by HIV , which is very difficult to transmit compared with smallpox and many other viruses. Intimate contact is needed, and even then, the infection rate is low. The balancing factor is that HIV can take years to progress to AIDS , which can then take many more years to kill the victim. What makes HIV so dangerous is that infected people have lots of opportunities to infect others. This property has allowed HIV to claim more than 30 million lives so far, and approximately 34 million people are now living with this virus and facing a highly uncertain future.15 A virus genetically engineered to infect its host quickly, to generate symptoms slowly—say, only after weeks or months—and to spread easily through the air or by casual contact would be vastly more devastating than HIV . It could silently penetrate the population to unleash its deadly effects suddenly. This type of epidemic would be almost impossible to combat because most of the infections would occur before the epidemic became obvious. **A technologically sophisticated terrorist group could**  **develop** such **a virus and kill a large part of humanity with it**. **Indeed, terrorists may not have to develop it themselves:**  **some scientist may** do so first and publish the details. **Given the rate at which biologists are making discoveries** about viruses and the immune system, **at some point in**  **the near future**, **someone may create artificial pathogens**  **that could** drive the human race to extinction. Indeed, a detailed species-elimination plan of this nature was openly proposed in a scientific journal. The ostensible purpose of that particular research was to suggest a way to extirpate the malaria mosquito, but similar techniques could be directed toward humans.16 When I’ve talked to molecular biologists about this method, they are quick to point out that it is slow and easily detectable and could be fought with biotech remedies. If you challenge them to come up with improvements to the suggested attack plan, however, they have plenty of ideas. **Modern biotechnology** **will soon be capable**, if it is not already, **of bringing about the demise of the human race**— or at least of killing a sufficient number of people to end high-tech civilization and set humanity back 1,000 years or more. **That terrorist groups could achieve this level of technological**  **sophistication may seem far-fetched, but** keep in mind **that it takes only a handful of individuals to accomplish**  **these tasks**. Never has lethal power of this potency been accessible to so few, so easily. Even more dramatically than nuclear proliferation, **modern biological science has frighteningly undermined the correlation between the lethality of a weapon and its cost**, a fundamentally stabilizing mechanism throughout history. **Access to extremely lethal**  **agents**—lethal enough to exterminate Homo sapiens—**will**  **be available to anybody with a solid background in biology,**  **terrorists included**. The 9/11 attacks involved at least four pilots, each of whom had sufficient education to enroll in flight schools and complete several years of training. **Bin Laden had a degree**  **in civil engineering**. Mohammed Atta attended a German university, where he earned a master’s degree in urban planning—not a field he likely chose for its relevance to terrorism. **A future set of terrorists could** just as **easily be**  **students of molecular biology who enter their studies innocently**  **enough but later put their skills to homicidal use**. Hundreds of universities in Europe and Asia have curricula sufficient to train people in the skills necessary to make a sophisticated biological weapon, and hundreds more in the United States accept students from all over the world. **Thus it seems likely that sometime in the near future a** **small band of terrorists**, or even a single misanthropic individual, **will overcome our best defenses and do something**  **truly terrible, such as fashion a bioweapon that could kill millions or even billions of people**. Indeed, **the creation of such weapons within the next 20 years seems to be a virtual certainty**. The repercussions of their use are hard to estimate. One approach is to look at how the scale of destruction they may cause compares with that of other calamities that the human race has faced.

### Deference Uniqueness

#### Broad executive authority winning the war now ---- Restricting detention would signal weakness

Majidyar, 13 Ahmad Majidyar, American Enterprise Institute senior research associate “We Need Military Authorization Until Al-Qaida Is No Longer a Threat,” June 17th, http://www.usnews.com/debate-club/should-the-authorization-for-use-of-military-force-be-repealed/we-need-military-authorization-until-al-qaida-is-no-longer-a-threat]

Nearly 12 years since 9/11, the United States remains in a state of armed conflict and the 2001 Authorization for Use of Military Force continues to provide the principal legal framework for military and detentionoperations against al-Qaida, the Taliban and associated forces. The law has given both the Bush and Obama administrations the authority to "use all necessary and appropriate force against those nations, organizations, or persons" responsible for the September 11 attacks, in order to prevent any future terror plots against America. As a result, al-Qaida and the Taliban were removed from power in Afghanistan; Osama bin Laden and many of his top lieutenants were killed in Pakistan; and there have been no terror attacks of the 9/11 magnitude on American soil. Despite these gains, however, al-Qaida remains a viable threat. Over the past years, the terror group has metastasized and spread across the Middle East, forming al-Qaida in the Arabian Peninsula and al-Qaida in the Islamic Maghreb. Al-Qaida-affiliated groups have also exploited regional instability in the aftermath of the Arab Spring to gain a foothold in Syria, Libya and Egypt's Sinai. Moreover, some regional radical groups have become co-belligerents with al-Qaida in the fight against the West, including Somalia-based Al-Shabaab and Nigeria's Boko Haram. It is therefore premature and dangerous to repeal or significantly restrict the AUMF at this point, since it would undercut the effectiveness of U.S. counterterrorism efforts to deal with al-Qaida-related emerging threats worldwide. Suggestions to incorporate temporal and geographical limitations into the AUMF are also ill-advised. Confining the law to a specific number of countries or terrorist groups would give the enemy more freedom of action and allow it to create new fronts and sanctuaries in areas immune from U.S. counterterrorism operations. In his counterterrorism policy speech three weeks ago, President Obama promised to continue a "series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America." In the absence of the AUMF, such actions would become untenable and devoid of a legal basis. At present, the AUMF provides the administration with adequate authorities to pursue the war. Until al-Qaida and associated forces are degraded to a level where they pose no substantial national security threat to the United States, the law should not be repealed or replaced.

#### Courts are carefully splitting decisions between rights and remedies to preserve deference while giving the *appearance* of judicial review but preserving executive immunity – the plan *wrecks* the balance

Scheppele 12—Professor of Sociology and Public Affairs @ Princeton University [Kim Lane Scheppele (Dir. of the Program in Law and Public Affairs @ Princeton University), “The New Judicial Deference,” Boston University Law Review, 92 B.U.L. Rev. 89, January 2012]

In this Article, I will show that American courts have often approached the extreme policies of the anti-terrorism campaign by splitting the difference between the two sides—the government and suspected terrorists. One side typically got the ringing rhetoric (the suspected terrorists), and the other side got the facts on the ground (the government). In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge. The government continued to treat suspected terrorists almost as badly as it did before the suspected terrorists "won" their cases. And any change in terrorism suspects' conditions that did result from these victorious decisions was slow and often not directly attributable to the judicial victories they won.¶ Does this gap between suspected terrorists' legal gains and their unchanged fates exist because administration officials were flouting the decisions of the courts? The Bush Administration often responded with sound and fury and attempted to override the Supreme Court's decisions or to comply minimally with them when they had to. n6 But, as this Article will show, these decisions did not actually require the government to change its practices very quickly. The decisions usually required the government to change only its general practices in the medium term. Judges had a different framework for analyzing the petitioners' situation than the petitioners themselves did; judges generally couched their decisions in favor of the suspected terrorists as critiques of systems instead of as solutions for individuals. In doing so, however, courts allowed a disjuncture between rights and remedies for those who stood before them seeking a vindication of their claims. Suspected terrorists may have won [\*92] in these cases—and they prevailed overwhelmingly in their claims, especially at the Supreme Court—but courts looked metaphorically over the suspects' heads to address the policies that got these suspects into the situation where the Court found them. Whether those who brought the cases actually got to benefit from the judgments, either immediately or eventually, was another question.¶ Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference. n7 Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, inter arma silent leges: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still "hot," courts jumped right in, dealing governments one loss after another. n8 After 9/11, it appears that deference is dead.¶ [\*93] But, I will argue, deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice. n9 Suspected terrorists have received [\*94] from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives.¶ Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference.¶ This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted—often bold, ambitious, and brave solutions—nonetheless fail to address the plights of the specific individuals who brought the cases.¶ This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something—an appearance not entirely false in the long run—while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

#### Court deference in the context of war fighting is at an all-time high --- most recent cases prove

George D. Brown 11, Interim Dean and Robert F. Drinan, S.l., Professor of Law, Boston College Law School, 1/7/11, “Accountability, Liability, and the War on Terror -- Constitutional Tort Suits as Truth and Reconciliation Vehicles,” Florida Law Review, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1337&context=lsfp>

Still, the notion of national security deference is deeply ingrained in our constitutional tradition. Its institutional foundations make sense, as ably demonstrated by Professor Pushaw.415 The question that arises is whether things have changed with the Court's decisions in a series of "enemy combatant" cases since the onset ofthe war on terror.416 These cases have arisen in the context of petitions for habeas corpus. The Court, as Professor Pushaw puts it, "interpreted the habeas corpus statute generously,'.417 even to the point of distortion.418 On the other hand, the substantive results represented a mixed bag of defects and victories for the President. "[T]hese three cases did not necessarily signal a major shift in the Court's jurisprudence in which individual liberties will be upheld vigorously against executive claims of national security.'.419 Professor Pushaw wrote these words before Boumediene v. Bush,420 in which the Court took on both political branches. Boumediene, far more than its immediate predecessors, might be seen as the case that broke the back of national security deference.421 The majority opinion emphasized the judiciary's Marburybased role as the branch that says "what the law is,' 22 echoing its earlier statement in Hamdi v. Rumsfeld that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake. ,.424 ¶ On the other hand, it is possible to see Boumediene as resting primarily on the key role of habeas corpus. The Court proclaimed the writ's "centrality," noting that "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. ,.425 I have raised elsewhere the argument that one should not extrapolate too far from the habeas cases, even if they are viewed as an assertion of the judicial role.426 Habeas raises the fundamental question of the lawfulness of executive detention and often presents the judiciary with familiar issues of the validity of procedures. Reverse war on terror suits would take the courts much further. ¶ Certainly, the Court's two most recent war on terror decisions show a reluctance to go further and may even constitute a retrenchment. The importance of Ashcroft v. I{lbar27 has already been noted. Holder v. Humanitarian Law Project's points in the same direction. Holder upheld a criminal statute that is a crucial component of the war on terror.429 It did so in the face of a vigorous First Amendment challenge, supported by three Justices.43o Both cases show deference toward the government and appreciation of the difficulties of waging the war on terror. Iqbal noted that "the Nation's top law enforcement officers [were acting] in the aftermath of a devastating terrorist attack .... ,.431 Holder's language is even stronger. The Court stated explicitly that deference was appropriate because "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs.'.432 Indeed, the opinion went further endorsing the preventive approach to counterterrorism and recognizing the government's need to often act "based on informed judgment rather than concrete evidence.'.433 In perhaps the ultimate demonstration of the importance of rhetoric, the Court's opinion closed with a citation of the Preamble to the Constitution and its recognition of the need to provide '''for the common defence [sic].".434 Iqbal and Holder stand in stark contrast to the habeas decisions of a few years earlier.

### Terrorism Uniqueness

#### Terrorist capabilities are degraded- they still have operational intent though

McLaughlin 2013 [John McLaughlin was a CIA officer for 32 years and served as deputy director and acting director from 2000-2004. He currently teaches at the Johns Hopkins University's School of Advanced International Studies and is a Non-Resident Senior Fellow at the Brookings Institution July 12, 2013 “Terrorism at a moment of transition” http://security.blogs.cnn.com/2013/07/12/terrorism-at-a-moment-of-transition/]

On targets, jihadists are now pulled in many directions. Many experts contend they are less capable of a major attack on the U.S. homeland. But given the steady stream of surprises they’ve sprung – ranging from the 2009 “underwear bomber” to the more recent idea of a surgically implanted explosive – it is hard to believe they’ve given up trying to surprise us with innovations designed to penetrate our defenses.¶ We especially should remain alert that some of the smaller groups could surprise us by pointing an attacker toward the United States, as Pakistan’s Tehrik e Taliban did in preparing Faizal Shazad for his attempted bombing of Times Square in 2010.¶ At the same time, many of the groups are becoming intrigued by the possibility of scoring gains against regional governments that are now struggling to gain or keep their balance – opportunities that did not exist at the time of the 9/11 attacks.¶ Equally important, jihadists are now learning from their mistakes, especially the reasons for their past rejection by populations where they temporarily gained sway.¶ Documents from al Qaeda in the Islamic Maghreb, discovered after French forces chased them from Mali, reveal awareness that they were too harsh on local inhabitants, especially women. They also recognized that they need to move more gradually and provide tangible services to populations – a practice that has contributed to the success of Hezbollah in Lebanon.¶ We are now seeing a similar awareness among jihadists in Syria, Tunisia, Libya, and Yemen. If these “lessons learned” take hold and spread, it will become harder to separate terrorists from populations and root them out.¶ Taken together, these three trends are a cautionary tale for those seeking to gauge the future of the terrorist threat.¶ Al Qaeda today may be weakened, but its wounds are far from fatal. It is at a moment of transition, immersed in circumstances that could sow confusion and division in the movement or, more likely, extend its life and impart new momentum.¶ So if we are ever tempted to lower our guard in debating whether and when this war might end, we should take heed of these trends and of the wisdom J. R. R. Tolkien has Eowyn speak in “Lord of the Rings”: "It needs but one foe to breed a war, not two ..."

### 2NC Terrorism Link Wall

#### Judicial interpretation that gives rights to detainees wrecks warfighting

Chertoff 2011 [Michael Chertoff Secretary, Department of Homeland Security (2005-2009); Judge, Court of ¶ Appeals for the Third Circuit (2003-2005); Assistant Attorney General, Criminal ¶ Division, U.S. Department of Justice (2001-2003); U.S. Attorney for the District of New ¶ Jersey (1990-1994).¶ February 3, 2011 “THE DECLINE OF JUDICIAL DEFERENCE ON NATIONAL SECURITY” Rutgers Law Review http://www.rutgerslawreview.com/wp-content/uploads/archive/vol63/Issue4/Chertoff\_Speech\_PDF.pdf]

But here, we are dealing with people who are not Americans; ¶ they were not apprehended on American soil. It is true that they are ¶ in Guantánamo, and there is a lot of discussion about how to ¶ distinguish Guantánamo from the Philippines. But remember, in ¶ Hamdi, we were told that it is an immaterial point because if all we ¶ are doing is resolving Guantánamo, then why take the case?36 We are ¶ never going to see anybody brought into Guantánamo because they ¶ are going to be back at Bagram, Afghanistan, or someplace else, and ¶ this question would never be resolved.37 In many ways, it is the core ¶ and most interesting, fundamental question of the whole litigation: What is the right of the enemy combatant? Someone who is not an ¶ American, who is on the field of battle overseas, what rights do they ¶ have with respect to being detained anywhere in the world? Do they ¶ have any constitutional rights? The tradition is that non-Americans ¶ overseas do not have constitutional rights. If you are going to change ¶ that, at a minimum, you expect to have a very lengthy discussion ¶ about that topic, but you do not really find it in the opinion. So you ¶ are left with the feeling that there is a process that has been created, ¶ but the substance to go through the process has not been identified.38¶ In many ways, from the standpoint of deference to the Executive, ¶ this is the most striking element because if you are going to intrude ¶ into the area of battlefield operations—I will explain in a minute ¶ where that becomes a critical part of this—you have to have a clear ¶ idea of what it is you are vindicating. If it is just—it is not enough of ¶ a basis to hold someone—you have to be able to answer the question: ¶ Not enough under what standard? And just to put things in context ¶ again, in a war, we do not just detain, we kill people. In World War ¶ II, we carpet bombed Dresden. That was not collateral damage; that ¶ was the absolute intent of the war fighter—to break the back of the ¶ Germans and to force them to surrender. In Japan, we dropped ¶ nuclear bombs. So it has to raise the question: If foreigners have ¶ rights not to be detained, do they have rights not to be killed? That ¶ kind of undercuts the whole notion of warfighting. And again, at a ¶ minimum, we would like to have some discussion on this, but we do ¶ not really see it.

#### Relaxing due process standards is a huge resource drain

Bellinger, 11

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

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

#### It makes mission effectiveness impossible

Jacob, 12

(Partner-O’Melveny & Myers, 10/1 “Detention Policies: What Role for Judicial Review?” http://www.abajournal.com/magazine/article/detention\_policies\_what\_role\_for\_judicial\_review/)

**More than a decade into the war on terror, no federal court has seriously called into question the government’s potentially unending authority to detain captured combatants until the conflict “ends.”** Whether there are or should be any temporal limitations to that authority is a question that future judges and political leaders may well address. Boumediene, however, demonstrates the judiciary’s concern that as the war on terror drags on, and with it the length of ongoing detentions (at the time of the Boumediene decision, some of the detainees had been held for more than six years), we need to at least be increasingly sure that the individuals we are detaining are in fact enemy combatants. Boumediene expressly declined to state how greater certainty concerning the validity of military detentions should be achieved, noting that “our opinion does not address the content of the law that governs [enemy combatant] detention” and directing the lower courts to establish a framework capable of reconciling “liberty and security … within the framework of the law.” This is what the D.C. Circuit has attempted to do. Probably the most important war on terror decision handed down by the D.C. Circuit since Boumediene was decided is Maqaleh, in which the court declined to extend the writ of habeas corpus to aliens captured abroad, designated enemy combatants and held at Bagram Air Force Base in Afghanistan. From the military’s perspective, **the nightmare scenario has always been the prospect that the judiciary would assert the right to engage in a searching inquiry into the basis for every capture and detention of an alien abroad, even while active combat operations are ongoing. In World War II, such a rule could have required the government to litigate hundreds of thousands of habeas claims, costing the government significant expense and causing substantial disruption to military operations.** Maqaleh puts such fears to rest.

### 2NC Detention Key

#### Military detention is key to combating terrorism

Michael Tomatz 13, Colonel, B.A., University of Houston, J.D., University of Texas, LL.M., The Army Judge Advocate General Legal Center and School (2002); serves as the Chief of Operations and Information Operations Law in the Pentagon. AND Colonel Lindsey O. Graham B.A., University of South Carolina, J.D., University of South Carolina, serves as the Senior Individual Mobilization Augmentee to The Judge Advocate Senior United States Senator from South Carolina, “NDAA 2012: CONGRESS AND CONSENSUS ON ENEMY DETENTION,” 69 A.F. L. Rev. 1

In bringing the conference report to the Senate floor, which all 26 Senate conferees signed, Senator Carl Levin emphasized the depth and breadth of flexibility left to the Executive branch. As he explained, the final bill does not restrain law enforcement agencies from conducting investigations or interrogations. n87 "If and when a determination is made that a suspect is a foreign al-Qaeda terrorist, that person would be slated for transfer to military custody under procedures written by the Executive branch." n88 Importantly, even after transfer "all existing law enforcement tools remain available to the FBI and other law enforcement agencies." n89 Military detention and military commissions trials for foreign al-Qaeda terrorists may enjoy Congressional preference, but are not the only means of dealing with foreign terrorists in what is fundamentally an all-in approach designed to give the Executive primary and residual authorities to deal with a complex threat. A preference for military detention ensures the availability of established tactics, techniques and procedures not necessarily present in the civilian justice system, and is ultimately meant to enhance intelligence gathering and prevent dangerous enemy forces from returning to the fight.

#### Detention key to intel

Blum, 8

(Department of Homeland Security Office of General Counsel, October 2008, Homeland Security Affairs, “Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects,” Vol 4. No. 3, http://www.hsaj.org/?fullarticle=4.3.1)

After September 11, 2001, the Administration decided to detain certain individuals suspected of being members or agents of al Qaeda or the Taliban as enemy combatants and hold them indefinitely and incommunicado for the duration of the war on terror. The rationale behind this system of preventive detention is to incapacitate suspected terrorists, facilitate interrogation, and hold them when traditional criminal charges are not feasible for a variety of reasons. By employing an armed-conflict model that treats terrorists as “combatants,” the Bush Administration argues it can preventively detain terrorists until the end of hostilities, despite there being no foreseeable ending scenario to an amorphous war on terror. Furthermore, terrorists are automatically “unlawful” or “enemy” combatants and hence not entitled to protections as true prisoners of war; yet, under the Bush Administration’s approach, they also are not entitled to the legal protections afforded criminals. As law professor David Luban notes: “By selectively combining elements of the war model and elements of the law model, Washington is able to maximize its own ability to mobilize lethal force against terrorists while eliminating most traditional rights of a military adversary, as well as the rights of innocent bystanders caught in the crossfire.” Designating individuals as enemy combatants and holding them indefinitely for a war on terror that may never end raises serious legal and policy concerns. After 9/11, the Administration determined that the Geneva Conventions did not apply to the conflict with the Taliban and al Qaeda. 8 Hence, all Taliban and al Qaeda operatives were automatically unlawful “prisoners of war” and could be subjected to interrogation. 9 In August 2002, Jay Bybee, then-assistant attorney general in the Office of Legal Counsel, sent President Bush a memorandum stating: “As commander-in-chief, the President has constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy.” 10 According to John Yoo, former deputy assistant attorney general under the Bush Administration, “Information is the primary weapon in the conflict against this new kind of enemy, and intelligence gathered from captured operatives is perhaps the most effective means of preventing future terrorist attacks upon U.S. territory.” 11 As law professor Howard Ball observes, “the Administration has offered one fundamental rationale for such treatment [designations of enemy combatants]: the acquisition of actionable intelligence.” 12

### A2 Allies

#### Court intervention on detention decimates war powers authority—undermines alliances and compromises military operations

McCarthy, 9

(Director-Center for Law & Counterterrorism at the Foundation for the Defense of Democracies, 8/20, “Outsourcing American Law,” http://www.aei.org/files/2009/08/20/20090820-Chapter6.pdf)

**Empirically, judicial demands on executive branch procedural compliance, if unchecked, become steadily more demanding over time.** **The executive naturally responds by being more internally exacting to avoid problems.** Progressively, **executive compliance**, initially framed and understood as a reasonably modest set of burdens to promote the integrity of judicial proceedings, **becomes instead a consuming priority and expenditure, which, if permitted in the context of warfare, would inevitably detract from the military mission that is the bedrock of our national security.** In the fore here, plainly, are such matters as discovery and confrontation rights. **If the courts were given final authority, while hostilities are ongoing, to second-guess the executive’s decision to detain a combatant by scrutinizing reports** that summarize the basis for detention, **it is only a short leap to the court’s asking follow-up questions or determining that testimony**, perhaps subject to cross-examination, **is appropriate.** Are we to make combat personnel available for these proceedings? Shall we take them away from the battle we have sent them to fight so they can justify to the satisfaction of a judge the capture of an alien enemy combatant that has already been approved by military commanders? Given the fog and anxiety of war, shall we expect them to render events as we would an FBI agent describing the circumstances of a domestic arrest? Nor is that the end of the intractable national security problems. **What if capture was effected by our allies rather than our own forces** (as was the case, for example, with the jihadist who was the subject of the Hamdi case)? Shall we try to compel affidavits or testimony from members of, say, the Northern Alliance? **What kinds of strains will be put on our essential wartime alliances if they are freighted with requests to participate in American legal proceedings, and possibly compromise intelligence methods and sources – all for the purpose of providing heightened due process to the very terrorists who were making war on those allies?** These are lines that Congress must draw. **Leaving them for the courts themselves to sort out would place us on a path toward full-blown civilian trials for alien enemy combatants – the very outcome the creation of a new system was intended to avoid.**

#### Allied terror coop is high now, despite frictions – their author

Kristin Archick, European affairs specialist @ CRS, 9-4-2013, “U.S.-EU Cooperation Against Terrorism,” Congressional Research Service, <http://www.fas.org/sgp/crs/row/RS22030.pdf>

As part of the EU’s efforts to combat terrorism since September 11, 2001, the EU made improving law enforcement and intelligence cooperation with the United States a top priority. The previous George W. Bush Administration and many Members of Congress largely welcomed this EU initiative in the hopes that it would help root out terrorist cells in Europe and beyond that could be planning other attacks against the United States or its interests. Such growing U.S.-EU cooperation was in line with the 9/11 Commission’s recommendations that the United States should develop a “comprehensive coalition strategy” against Islamist terrorism, “exchange terrorist information with trusted allies,” and improve border security through better international cooperation. Some measures in the resulting Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) and in the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53) mirrored these sentiments and were consistent with U.S.-EU counterterrorism efforts, especially those aimed at improving border controls and transport security. U.S.-EU cooperation against terrorism has led to a new dynamic in U.S.-EU relations by fostering dialogue on law enforcement and homeland security issues previously reserved for bilateral discussions. Despite some frictions, most U.S. policymakers and analysts view the developing partnership in these areas as positive. Like its predecessor, the Obama Administration has supported U.S. cooperation with the EU in the areas of counterterrorism, border controls, and transport security. At the November 2009 U.S.-EU Summit in Washington, DC, the two sides reaffirmed their commitment to work together to combat terrorism and enhance cooperation in the broader JHA field. In June 2010, the United States and the EU adopted a new “Declaration on Counterterrorism” aimed at deepening the already close U.S.-EU counterterrorism relationship and highlighting the commitment of both sides to combat terrorism within the rule of law. In June 2011, President Obama’s National Strategy for Counterterrorism asserted that in addition to working with European allies bilaterally, “the United States will continue to partner with the European Parliament and European Union to maintain and advance CT efforts that provide mutual security and protection to citizens of all nations while also upholding individual rights.”

## Legitimacy

### No Impact

#### Irrelevant to actual statecraft

Stacey 13

Dr. Jeffrey Stacey is currently Senior Visiting Fellow at the Center for Transatlantic Relations at the Paul H. Nitze School for Advanced International Studies at Johns Hopkins University, Duck of Minerva, February 25, 2013, "Time to Redefine the Term “soft power”?", http://www.whiteoliphaunt.com/duckofminerva/2013/02/time-to-redefine-the-term-soft-power.html

Nye’s classic definition of the term–the attractiveness of a country based on the legitimacy of its policies and the political and cultural values that underpin them–seemed reasonable enough when I first became familiar with it **in the mid 19**90s**. The notion** that **a country’s cultural power could influence other countries and cause their governments to** either **agree more** with a country of cultural prowess or adopt similar values **made a lot of sense. The Cold War had recently come to an end**, and **the rush of East Central European governments to join the West** in all ways **seemed just the evidence one needed to subscribe** not only **to the concept**, but also the view that the U.S. possessed a whole lot of soft power that was causing other countries to agree with or emulate it. After all liberalism and openness of all kinds were being celebrated, and the new concept of globalization was further and futher in evidence while the third wave of democracy was spreading fast. **But something I always feared as an academic was readily confirmed when I entered the government: more than a decade later, despite the large number of policymakers who learned Nye’s definition in graduate school**, for the vast majority of them soft power‘s academic definition is of little practical use. To a pragmatic policymaker the concept is too complex, too difficult to measure, and near impossible to manipulate as a device of influence. **While Nye’s definition is intuitive on some level**, most policymakers–and especially non American ones–simply choose to define soft power as exercising influence by non military means. And why shouldn’t they? For even more intuitive is the notion that the counterpart to hard power (by military means) naturally is soft power (by non-military means). Thus, the other tools in one’s foreign policy toolbox–from diplomacy to economic sanctions, and development aid to cultural attractiveness–make perfect sense as comprising soft power. Indeed, Hillary Clinton, whom I knew as Madame Secretary, became well known for promoting the concept of smart power, which basically means the same thing and was part of her somewhat successful effort to elevate the D’s of diplomacy and development next to the big D of defense.

#### Their internal link can’t affect the structural reasons why heg solves war – multiple institutions check back their offense

Maher 11---adjunct prof of pol sci, Brown. PhD expected in 2011 in pol sci, Brown (Richard, The Paradox of American Unipolarity: Why the United States May Be Better Off in a Post-Unipolar World, Orbis 55;1)

The United States should start planning now for the inevitable decline of its preeminent position in world politics. By taking steps now, the United States will be able to position itself to exercise maximum influence beyond its era of preponderance. This will be America’s fourth attempt at world order. The first, following World War I and the creation of the League of Nations, was a disaster. The second and third, coming in 1945 and 1989-1991, respectively, should be considered significant achievements of U.S. foreign policy and of creating world order. This fourth attempt at world order will go a long way in determining the basic shape and character of world politics and international history for the twenty-first century. The most fundamental necessity for the United States is to create a stable political order that is likely to endure, and that provides for stable relations among the great powers. The United States and other global stakeholders must prevent a return to the 1930s, an era defined by open trade conflict, power competition, and intense nationalism. Fortunately, the United States is in a good position to do this. The global political order that now exists is largely of American creation. Moreover, its forward presence in Europe and East Asia will likely persist for decades to come, ensuring that the United States will remain a major player in these regions. The disparity in military power between the United States and the rest of the world is profound, and this gap will not close in the next several decades at least. In creating a new global political order for twenty-first century world politics, the United States will have to rely on both the realist and liberal traditions of American foreign policy, which will include deterrence and power balancing, but also using international institutions to shape other countries’ preferences and interests. Adapt International Institutions for a New Era of World Politics. The United States should seek to ensure that the global rules, institutions, and norms that it took the lead in creating---which reflect basic American preferences and interests, thus constituting an important element of American power---outlive American preeminence. We know that institutions acquire a certain ‘‘stickiness’’ that allow them to exist long after the features or forces at the time of their creation give way to a new landscape of global politics. The transaction costs of creating a whole new international---or even regional--- institutional architecture that would compete with the American post-World War II vintage would be enormous. Institutions such as the International Monetary Fund (IMF), World Bank, and World Trade Organization (WTO), all reflect basic American preferences for an open trading system and, with a few exceptions, have near-universal membership and overwhelming legitimacy. Even states with which the United States has significant political, economic, or diplomatic disagreement---China, Russia, and Iran---have strongly desired membership in these ‘‘Made in USA’’ institutions. Shifts in the global balance of power will be reflected in these institutions---such as the decision at the September 2009 Pittsburgh G-20 summit to increase China’s voting weight in the IMF by five percentage points, largely at the expense of European countries such as Britain and France. Yet these institutions, if their evolution is managed with deftness and skill, will disproportionately benefit the United States long after the demise of its unparalleled position in world politics. In this sense, the United States will be able to ‘‘lock in’’ a durable international order that will continue to reflect its own basic interests and values. Importantly, the United States should seek to use its vast power in the broad interest of the world, not simply for its own narrow or parochial interests. During the second half of the twentieth century the United States pursued its own interests but also served the interests of the world more broadly. And there was intense global demand for the collective goods and services the United States provided. The United States, along with Great Britain, are history’s only two examples of liberal empires. Rather than an act of altruism, this will improve America’s strategic position. States and societies that are prosperous and stable are less likely to display aggressive or antagonistic behavior in their foreign policies. There are things the United States can do that would hasten the end of American preeminence, and acting in a seemingly arbitrary, capricious, and unilateral manner is one of them. The more the rest of the world views the American-made world as legitimate, and as serving their own interests, the less likely they will be to seek to challenge or even transform it.19 Cultivate Balance of Power Relationships in Other Regions. The United States enjoys better relations with most states than these states do with their regional neighbors. South and East Asia are regions in which distrust, resentment, and outright hostility abound. The United States enjoys relatively strong (if far from perfect) strategic relationships with most of the major states in Asia, including Japan, India, Pakistan, and South Korea. The United States and China have their differences, and a more intense strategic rivalry could develop between the two. However, right now the relationship is generally stable. With the possible exception of China (but perhaps even Beijing views the American military presence in East Asia as an assurance against Japanese revanchism), these countries prefer a U.S. presence in Asia, and in fact view good relations with the United States as indispensable for their own security.

### Knowles

#### Conclusions agrees ---- their article is describing what the court did in Boumediene – going farther causes nuclear terror

Knowles, assistant professor at the New York University school of law, Spring 2009

(Robert, “American Hegemony and the Foreign Affairs Constitution,” 41 Ariz. St. L.J. 87, Lexis)

The hegemonic model generally values courts' institutional competences more than the anarchic realist model. The courts' strengths in offering a stable interpretation of the law, relative insulation from political pressure, and power to bestow legitimacy are important for realizing the functional constitutional goal of effective U.S. foreign policy. This means that courts' treatment of deference in foreign affairs will, in most respects, resemble its treatment of domestic affairs. Given the amorphous quality of foreign affairs deference, this "domestication" reduces uncertainty. The increasing boundary problems caused by the proliferation of treaties and the infiltration of domestic law by foreign affairs issues are lessened by reducing the deference gap. And the dilemma caused by the need to weigh different functional considerations - liberty, accountability, and effectiveness - against one another is made less intractable because it becomes part of the same project that the courts constantly grapple with in adjudicating domestic disputes.

[End of “key to U.S. leadership” card]

The domestic deference doctrines - such as Chevron and Skidmore - are hardly models of clarity, but they are applied and discussed by the courts much more often than foreign affairs deference doctrines, and can be usefully applied to foreign affairs cases as well. n387 The domestic deference doctrines are a recognition that legal interpretation often depends on politics, just as it does in the international realm. n388 Most of the same functional rationales - expertise, accountability, flexibility, and uniformity - that are advanced in support of exceptional foreign affairs deference also undergird Chevron. Accordingly, Chevron deference provides considerable latitude for the executive branch to change its interpretation of the law to adjust to foreign policy requirements. Once courts determine that a statute is ambiguous, the reasonableness threshold is [\*149] easy for the agency to meet; that is why Chevron is "strong medicine." n389 At the same time, Chevron's limited application ensures that agency interpretations result from a full and fair process. Without such process, the courts should look skeptically on altered interpretations of the law.¶ Returning to domestic deference standards as a baseline clarifies the ways in which foreign affairs are truly "special." The best response to the special nature of foreign affairs matters does not lie simply in adopting domestic deference on steroids. Instead, accurate analysis must also take into account the ways in which the constitutional separation of powers already accommodates the uniqueness of foreign affairs. Many of the differences between domestic and foreign affairs play out not in legal doctrine, but in the relationship between the President and Congress. **Under the hegemonic model**, **courts would still wind up deferring to executive branch interpretations much more often in foreign affairs matters because Congress is more likely to delegate law-making to the executive branch in those areas**. n390¶ Nonetheless, foreign relations remain special, and courts must treat them differently in one important respect. In the twenty-first century, speed matters, and the executive branch alone possesses the ability to articulate and implement foreign policy quickly. **Even non-realists will acknowledge that the international realm is** much more **susceptible to crisis and emergency** than the domestic realm. But speed remains more important even to non-crisis foreign affairs cases. n391 It is true that the stable nature of American hegemony will prevent truly destabilizing events from happening without great changes in the geopolitical situation - the sort that occur over decades. The United States will not, for some time, face the same sorts of existential threats as in the past. n392 Nonetheless, in foreign affairs matters, it is only the executive branch that has the capacity successfully to conduct [\*150] treaty negotiations, for example, which depend on adjusting positions quickly.¶ The need for speed is particularly acute in crises. Threats from transnational terrorist groups and loose nuclear weapons are among the most serious problems facing the United States today. **The U**nited **S**tates **maintains a** "**quasi-monopoly on the** international **use of force**," n393 **but the rapid pace of** change and improvements in **weapons** technology mean that the executive branch must respond to emergencies **long before the courts have an opportunity to weigh in**. Even if a court was able to respond quickly enough, it is not clear that we would want courts to adjudicate foreign affairs crises without the deliberation and opportunities for review that are essential aspects of their institutional competence. Therefore, courts should grant a higher level of deference to executive branch determinations in deciding whether to grant a temporary restraining order or a preliminary injunction in foreign affairs matters. Under the super-strong Curtiss-Wright deference scheme, the court should accept the executive branch interpretation unless Congress has specifically addressed the matter and the issue does not fall within the President's textually-specified Article I powers.¶ But there are limits. Although speed matters a great deal during crises, its importance diminishes over time and other institutional competences assume greater importance. When decisions made in response to emergencies are cemented into policy over the course of years, the courts' institutional capabilities - information-forcing and stabilizing characteristics - serve an important role in evaluating those policies. n394 Once a sufficient amount of time has passed, the amount of deference given to executive branch determinations should be reduced so that it matches domestic deference standards.¶ One of the core realist arguments for deference, the risk of collateral consequences, carries far less weight under a hegemonic model. Court decisions have consequences for third parties in the domestic realm all of the time. Given the hierarchical nature of U.S. hegemony, the response from other nations is likely to be more similar to the response by domestic parties than in the past. A typical example invoked by deferentialists involves a court decision - for example, recognizing the government of Taiwan - that angers the Chinese government. n395 Although such a scenario is not out of the question, there are several reasons why the consequences would not be as dire as often predicted by deferentialists. American military dominance [\*151] makes it highly unlikely that war would result from such an incident. n396 Moreover, China, too, cares about legitimacy and is far more likely to retaliate in some other way, possibly harming the United States' interests, but through means that would capture attention in the U.S. domestic realm, leading to accountability opportunities. Assuming that the decision is non-constitutional, the Chinese government could seek to have its preferred interpretation enacted into law.¶ Indeed, it is entirely possible that other nations would be content with conflicting decisions from different branches of the U.S. government. Suppose that the President roundly condemns the offensive court decision and declares the judge to be an "activist." If the damage done by the court decision was largely dignitary, an angry denouncement from the executive branch may be all that is needed. Past empires relied on multi-vocal signaling to maintain imperial rule. n397 But with the advent of globalization, intra-executive branch multi-vocality is much more difficult because advances in communication permit various parts of the "rim" to communicate with one another. n398 The American separation-of-powers system provides a way around this problem, allowing the U.S. government to "speak in different voices" at once.¶ C. Applying the Hegemonic Model: The Enemy Combatant Cases¶ In the wake of 9/11, the United States invaded Afghanistan and toppled the Taliban government. n399 Thousands of men, most captured by our allies in Pakistan and Afghanistan (but also many other places around the world), were transferred to U.S. custody and detained in a network of prisons stretching from Afghanistan to Eastern Europe to Asia to Guantanamo Bay, Cuba. n400 The President made an executive determination that all detainees held at Guantanamo were "enemy combatants," and that the law of armed conflict - specifically, the Geneva Conventions - did not apply to them. n401 [\*152] The detainees were deliberately held in places where they were thought to have no rights under the U.S. Constitution or any other domestic law. n402 In 2003, the United States invaded Iraq, disrupting relationships with allies and leading to a decline in support around the world for U.S. foreign policy. n403 Theories of American Empire became a hot topic of discussion in the time leading up to, and following, the Iraq invasion. n404 Meanwhile, the Guantanamo detainees began to file habeas claims and the litigation wound its way up to the Supreme Court. n405 The Abu Ghraib prison abuse scandal broke in May 2004, n406 a month before the Court decided Rasul, n407 which was the first enemy combatant case and appeared to herald a shift in the Court's approach to special deference.¶ The Court may be finally adjusting to the reality of American power. The U.S. has been a global hegemon since 1991 and has used military means to enforce international law norms: for example, the U.S.-led bombing of Serbia in 1998 halted ethnic cleansing in Kosovo. n408 But the scope and impact of America's projection of power since 9/11 has underscored the significance of its unique status. The classic realist view of the world - with great powers achieving a consensus that preserves a precarious balance of power - no longer fits. n409 Accordingly, the institutional competences most valued for achieving governmental effectiveness in foreign affairs in the classic realist world (with the exception of speed) have become less important, and other competences have become more important.¶ [\*153] Nonetheless, since 9/11, deferentialists have argued that the classic realist justifications for special deference apply with even more force to the war on terror. n410 This is the constitutional equivalent of a problem that has hobbled U.S. foreign policy in the twenty-first century - the persistence of Cold War paradigms in strategic thinking. Administration officials, in the early days after 9/11, tended to lump together terrorist groups such as al Qaeda and rogue states such as Iraq into one common existential enemy to occupy the position of the former Soviet Union. n411 The threat posed by al Qaeda is different because it cannot hope to remove the U.S. from its position as global hegemon - only another great power could do that. Instead, the terrorist threat presents a challenge of hegemonic management that can only be met by the combined effort of all branches of the U.S. government. In the enemy combatant cases, the Court seems to have recognized this shift and asserted its authority. But whether or not the enemy combatant cases were decided with these sorts of broad geopolitical concerns in mind, the changed hegemonic order justifies the jurisprudence.¶ The Bush Administration's detainee policy made clear that - due to America's power - the content of enforceable international law applicable to the detainees would largely depend on interpretation by the U.S. government. Under the classic realist paradigm, international law is less susceptible to judicial comprehension because it cannot be taken at face value; its actual, enforceable meaning depends on ever-shifting political dynamics and complex relationships among great powers. But in a hegemonic system, while enforceable international legal norms may still be political, their content is heavily influenced by the politics of one nation - the United States. n412 As an institution of that same government, the courts are well-positioned to understand and interpret international law that has been incorporated into U.S. law. Because the courts have the capacity to track international legal norms, there was no longer a justification for exceptional deference to the Administration's interpretation of the Geneva Conventions as applied to the detainees.¶ Professors Posner and Sunstein have argued for exceptional deference on the ground that, unless the executive is the voice of the nation in foreign affairs, other nations will not know whom to hold accountable for foreign policy decisions. n413 But the Guantanamo litigation demonstrated that American hegemony has altered this classic assumption as well. The [\*154] transparent and accessible nature of the U.S. government made it possible for other nations to be informed about the detainee policy and, conceivably, to have a role in changing it. The Kuwaiti government hired American attorneys to represent their citizens held at Guantanamo. n414 In the enemy combatant litigation, the government was forced to better articulate its detainee policies, justify the detention of each detainee, and permit attorney visits with the detainees. n415 Other nations learned about the treatment of their citizens through the information obtained by attorneys. n416¶ Although the political climate in the U.S. did not enable other nations to have an effect on detainee policy directly - and Congress, in fact, acted twice to limit detainees' access to the courts n417 - this was an exceptional situation. Foreign governments routinely lobby Congress for favorable foreign affairs legislation, and are more successful with less politically-charged issues. n418 Even "rogue states" such as Myanmar have their lobbyists in Washington. n419 In addition, foreign governments facing unfavorable court decisions can and do appeal or seek reversal through political channels. n420 The accessibility and openness of the U.S. government is not a scandal or weakness; instead, it strengthens American hegemony by giving other nations a voice in policy, drawing them into deeper relationships that serve America's strategic interests. n421 In the Guantanamo litigation, the courts served as an important accountability mechanism when the political branches were relatively unaccountable to the interests of other nations.¶ 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. n422 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 [\*155] accountability." n423 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." n424¶ 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. n425 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. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429¶ In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 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 [\*156] 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. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.¶ The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436¶ Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438¶ At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. **The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to** [\*157] **arrive at an effective detainee policy**. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440¶ The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige.¶ Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449¶ Conclusion¶ When it comes to the constitutional regime of foreign affairs, geopolitics has always mattered. Understandings about America's role in the world have shaped foreign affairs doctrines. But the classic realist assumptions that support special deference do not reflect the world as it is today. A better, more realist, approach looks to the ways that the courts can reinforce and legitimize America's leadership role. The Supreme Court's rejection of the government's claimed exigencies in the enemy combatant cases strongly indicates that the Judiciary is becoming reconciled to the current world order and is asserting its prerogatives in response to the fewer constraints imposed on the executive branch. In other words, the courts are moving toward the hegemonic model. In the great dismal swamp that is the judicial treatment of foreign affairs, **this transformation offers hope for clarity**: **the positive reality of the international system**, despite terrorism and other serious challenges, **permits the courts to reduce the "deference gap" between foreign and domestic cases**.

## Iraq

### Rule of Law

#### Alt causes outweighs the plan’s signal

Kleinfeld, Carnegie Endowment, 9/4/2013

(Rachel, http://carnegieendowment.org/2013/09/04/how-to-advance-rule-of-law-abroad/glfa)

These issues are not new, nor are they going away. The United States alone has attempted to improve the domestic rule of law within other countries for over one hundred years, since the era when it created police constabularies in multiple Latin American states to reduce civil strife in the decades following the Mexican-American War. **Modern rule-of-law-building programs began to proliferate** in numbers and expenditure after **the Cold War**. Today, numerous nongovernmental organizations (**NGOs**), private and nonprofit **contractors**, **international organizations** such as the World Bank, **and bilateral donors** from the United Kingdom to Japan **work on rule-of-law** reforms. In the U.S. government, **seven cabinet-level departments and 28 agencies**, **bureaus**, **and offices have worked on rule-of-law** issues in over 184 countries.¶ The various actors and agencies have conflicting aims and strategies that often undermine one another and overwhelm small local governments. Moreover, programs frequently fail. This is not good news for efforts that are important to so many high-level foreign policy goals.

## Afghanistan

### Courts

#### Can’t solve Afghan judiciary—human capacity is prerequisite and doesn’t exist

ICG 10

International Crisis Group, November 17, “REFORMING AFGHANISTAN’S BROKEN JUDICIARY”, <http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afghanistans%20Broken%20Judiciary.ashx>

A substantial course correction is needed to restore the rule of law in Afghanistan. Protecting citizens from crime and abuses of the law is elemental to state legitimacy. Most Afghans do not enjoy such protections and their access to justice institutions is extremely limited. As a result, appeal to the harsh justice of the Taliban has become increasingly prevalent. In those rare instances when Afghans do appeal to the courts for redress, they find uneducated judges on the bench and underpaid prosecutors looking for bribes. Few judicial officials have obtained enough education and experience to efficiently execute their duties to uphold and enforce the law. Endemic problems with communications, transport, infrastructure and lack of electricity mean that it is likely that the Afghan justice system will remain dysfunctional for some time to come. Restoring public confidence in the judiciary is critical to a successful counter-insurgency strategy. The deep-seated corruption and high levels of dysfunction within justice institutions have driven a wedge between the government and the people. The insurgency is likely to widen further if Kabul does not move more swiftly to remove barriers to reform. The first order of business must be to develop a multi-year plan aimed at comprehensive training and education for every judge and prosecutor who enters the system. Pay-and-rank reform must be implemented in the attorney general’s office without further delay. Building human capacity is essential to changing the system. Protecting that capacity, and providing real security for judges, prosecutors and other judicial staff is crucial to sustaining the system as a whole. The international community and the Afghan government need to work together more closely to identify ways to strengthen justice institutions. A key part of any such effort will necessarily involve a comprehensive assessment of the current judicial infrastructure on a province-byprovince basis with a view to scrutinising everything from caseloads to personnel performance. This must be done regularly to ensure that programming and funding for judicial reform remains dynamic and responsive to real needs. More emphasis must be placed on public education about how the system works and where there are challenges. Transparency must be the rule of thumb for both the government and the international community when it comes to publishing information about judicial institutions. Little will change without more public dialogue about how to improve the justice system.

# 1NR

## CP

#### Emperics prove released detainees will return to the jihad against America

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| David Edwards and Joe Byrne January 27, 2009 |

Gitmo recruited thousands of terrorists, says US interrogator

<http://rawstory.com/news/2008/Gitmo_recruited_thousands_of_terrorists_says_0127.html>

A Pentagon report that 61 former inmates from Guantanamo Bay have "returned to the battlefield" doesn't seem to be scaring anyone. Matthew Alexander, a former senior interrogator in Iraq, told Keith Olbermann last night on MSNBC's *Countdown* that Guantanamo Bay is a persuasive argument for al-Qaeda in recruitment of fighters in Iraq. Matthew Alexander led the team of interrogators who found Abu Musab al-Zarqawi in August 2006. Since returning from Iraq, he has been outspoken about the tactics that the US military uses to interrogate prisoners. His book, *How to Break A Terrorist*, outlines his experience with the "deeply flawed, ineffective, un-American way the US military conducts interrogations in Iraq." The Pentagon report on former Gitmo inmates returning to terrorism has been the subject of much debate since its release. Only 18 former inmates are listed as "confirmed recidivists"; the remaining 43 are listed as "suspected," although the basis of suspicion isn't definitively documented. The activity of one "confirmed recidivist" amounts to being interviewed in a documentary about Guantanamo Bay. Seton Hall University law professor Mark Denbeaux published a [report](http://law.shu.edu/administration/public_relations/press_releases/2009/shl_defense_dept_wrong_on_gtmo.htm) on Jan. 15 pointing out that the Pentagon has altered its figures on "terrorist recidivism" multiple times, with the latest figure being the most egregiously inaccurate. Denbeaux [spoke to MSNBC host Rachel Maddow](http://rawstory.com/news/2008/Olbermann_debunks_released_Gitmo_detainee_propaganda_0123.html) at the beginning of the month. "Once again, they've failed to identify names, numbers, dates, times, places, or acts upon which their report relies," the professor asserts. "Every time they have been required to identify the parties, the DOD has been forced to retract their false IDs and their numbers. They have included people who have never even set foot in Guantanamo--much less were they released from there." Last night, Olbermann asked Matthew Alexander why the Pentagon would use the idea of former Gitmo inmates engaging in terrorism to try to keep the prison open. "Whether [the number of detainees that are suspected terrorists] is 68 or 100, that number pales in comparison to the number of fighters that have been recruited to al-Qaeda because of Guantanamo," Alexander responded. "That number would be in the thousands. The number one reason that I consistently heard while in Iraq that foreign fighters gave for coming there was 'torture and abuse occurring in Abu Ghraib and Guantanamo'... If we seriously want to undercut one of al-Qaeda's best recruiting tools, the best thing to do would be to close Guantanamo Bay."

#### Recent operations in Somalia spell a new era in US CT strategy- more captures and less drone operations will ramp up the use of federal courts in terror trials

Goldsmith ’13
Thoughts About the Obama Administration’s Counterterrorism Paradigm in Light of the Al-Liby and Ikrima Operations http://www.lawfareblog.com/2013/10/thoughts-about-the-obama-administrations-counterterrorism-paradigm-in-light-of-the-al-liby-and-ikrima-operations/

Mary DeRosa and Marty Lederman, both of whom were senior national security lawyers in the Obama administration, have a helpful if somewhat hopeful post at Just Security on the significance of the recent al-Liby and Ikrima capture operations. The post is long, but I would summarize it as follows (this is my summary, not theirs): These two operations exemplify the approach to counterterrorism that the President emphasized in his May 23 NDU speech, which has these elements: (1) The use of drones outside the Afghan theater – which will be their predominant use once we exit Afghanistan – will be more constrained because force protection concerns will be diminished; (2) Strong preference for capture over kill operations when feasible; (3) Extraordinary efforts to avoid civilian casualties; (4) Strong preference for Article III trials; (4) Continuing focus on al Qaeda and associated forces; (5) Continuing reliance on the AUMF; (6) Focus on interdicting future threats to U.S. persons; (7) Compliance with international law (including sovereignty norms); (8) Preference for military operations over (I assume) CIA operations.

#### Obama has chosen article III courts as the preferred venue to try terrorist suspects captured in the War on TerrorSUSAN CRABTREE **OCTOBER** 14, 2013High-profile terror suspect taken to N.Y. to face trialhttp://washingtonexaminer.com/high-profile-terror-suspect-taken-to-n.y.-to-face-trial/article/2537222The [Obama](http://washingtonexaminer.com/section/barack-obama) administration Monday on transferred an alleged top [al Qaeda](http://washingtonexaminer.com/section/al-qaeda) figure captured by U.S. special forces to [New York](http://washingtonexaminer.com/section/new-york) to face charges in federal court. **The move is likely to revive debate about whether suspected** [**terrorists**](http://washingtonexaminer.com/section/terrorism) **should be tried in civilian or military courts.** Abu Anas al-Libi, a suspect in the 1998 bombings of U.S. embassies in [Kenya](http://washingtonexaminer.com/section/kenya) and Tanzania that killed 224 civilians, was captured by the U.S. Army Delta Force in Tripoli, [Libya](http://washingtonexaminer.com/section/libya) on Oct. 5. He was then whisked onto a Navy ship in the in the Mediterranean Sea where he was questioned by U.S. intelligence officials. U.S. Attorney Preet Bharara, the chief federal prosecutor for Manhattan, said the military handed al-Libi to U.S. civilian law enforcement over the weekend and he was brought directly to the New York area. He is expected to appear before a judge on Tuesday. The move is sure to draw sharp opposition from Republicans in Congress, who believe such a high-profile terrorist suspect should be sent to the U.S. prison at [Guantanamo Bay](http://washingtonexaminer.com/section/guantanamo-bay) for indefinite interrogations and detention. Republican Sens. [Lindsey Graham](http://washingtonexaminer.com/section/lindsey-graham), S.C., [Saxby Chambliss](http://washingtonexaminer.com/section/saxby-chambliss), Ga., and Kelly Ayotte, N.H., have strongly opposed the prospect of trying al-Libi in criminal court. They argue that al-Libi, who was once a close confidant of Osama bin Laden, should be sent to Guantanamo Bay to be interrogated by military intelligence officials for as long as needed and question if his brief interrogation at sea was sufficient.

## DA

#### Nuclear Iran kills U.S. hegemony – emboldens enemies and weakens alliances

Takeyh and Lindsay, 10

[James M. Lindsay, Senior Vice President, Director of Studies, and Maurice R. Greenberg Chair, Ray Takeyh, Senior Fellow for Middle Eastern Studies “After Iran Gets the Bomb Containment and Its Complications,” March/April 2010, <http://www.cfr.org/publication/22182/after_iran_gets_the_bomb.html>]

 The dangers of Iran's entry into the nuclear club are well known: emboldened by this development, Tehran might multiply its attempts at subverting its neighbors and encouraging terrorism against the United States and Israel; the risk of both conventional and nuclear war in the Middle East would escalate; more states in the region might also want to become nuclear powers; the geopolitical balance in the Middle East would be reordered; and broader efforts to stop the spread of nuclear weapons would be undermined. The advent of a nuclear Iran—even one that is satisfied with having only the materials and infrastructure necessary to assemble a bomb on short notice rather than a nuclear arsenal—would be seen as a major diplomatic defeat for the United States. Friends and foes would openly question the U.S. government's power and resolve to shape events in the Middle East. Friends would respond by distancing themselves from Washington; foes would challenge U.S. policies more aggressively.

Such a scenario can be avoided, however. Even if Washington fails to prevent Iran from going nuclear, it can contain and mitigate the consequences of Iran's nuclear defiance. It should make clear to Tehran that acquiring the bomb will not produce the benefits it anticipates but isolate and weaken the regime. Washington will need to lay down clear "redlines" defining what it considers to be unacceptable behavior—and be willing to use military force if Tehran crosses them. It will also need to reassure its friends and allies in the Middle East that it remains firmly committed to preserving the balance of power in the region.

Containing a nuclear Iran would not be easy. It would require considerable diplomatic skill and political will on the part of the United States. And it could fail. A nuclear Iran may choose to flex its muscles and test U.S. resolve. Even under the best circumstances, the opaque nature of decision-making in Tehran could complicate Washington's efforts to deter it. Thus, it would be far preferable if Iran stopped—or were stopped—before it became a nuclear power. Current efforts to limit Iran's nuclear program must be pursued with vigor. Economic pressure on Tehran must be maintained. Military options to prevent Iran from going nuclear must not be taken off the table.

#### Independently, the imposition of sanctions will destroy relationships with key allies and credibilty

Yochi Dreazen and John Hudson Friday, November 15, 2013 Obama Admin: More Iran Sanctions Will Fracture Anti-Nuke Alliance

<http://thecable.foreignpolicy.com/posts/2013/11/15/obama_admin_more_iran_sanctions_will_fracture_anti_nuke_alliance>

The Obama administration has spent weeks asking Congress to hold off on imposing new sanctions to avoid giving Tehran a reason to walk away from the current nuclear talks. On Friday, the administration rolled out a new rationale. They warned that the measures could harm Washington's relationships with its key foreign allies as well. The White House's willingness to unfreeze billions of dollars in Iranian money in exchange for Iranian concessions on its nuclear program has sparked skepticism -- and in some cases outright anger -- on Capitol Hill. The White House has launched a full-on lobbying blitz to reassure wavering lawmakers, and the efforts began paying off Friday as key senators who had either raised skepticism about the wisdom of holding off new sanctions or kept silent came out in support of the administration position. Sen. John McCain, a leading Iran hawk, told the BBC that he's skeptical of talks with Iran but willing to give the administration a "couple of months" before supporting additional sanctions. Sen. Dianne Feinstein (D-CA), meanwhile, said she strongly opposed putting additional punitive measures in place against Tehran amid the delicate diplomatic negotiations. "The purpose of sanctions was to bring Iran to the negotiating table, and they have succeeded in doing so," she said. "Tacking new sanctions onto the defense authorization bill or any other legislation would not lead to a better deal. It would lead to no deal at all."

### Uq

#### Key senators still pushing Iran sanctions bill – Obama pc key to avoiding sanctions that would disrupt the nuclear deal.

MalayMail, 2-7 Sceptical of Iran, US senator revives sanctions push FEBRUARY 7, 2014UPDATED: FEBRUARY 07, 2014 02:04 PM

- See more at: http://www.themalaymailonline.com/world/article/skeptical-of-iran-us-senator-revives-sanctions-push#sthash.bui1LQk2.dpuf

WASHINGTON, Feb 7 — An influential US senator sought today to revive a push for sanctions to curb Iran’s nuclear ambitions, arguing that calling for new penalties is not war-mongering as suggested by the White House. Senator Robert Menendez, a Democrat, went on the offensive in a marathon floor speech outlining his distrust of the Iranian regime, saying he was “deeply sceptical” of Teheran’s intention to adhere to an interim agreement with world powers over its nuclear programme. Menendez, chairman of the powerful Senate Foreign Relations Committee, is lead sponsor of a bill that would trigger sanctions if Iran walks away from the interim deal, which eases existing economic penalties in return for Teheran freezing its nuclear programme. “In my view, Iran’s strategy, consistent with their past approaches that have brought them to a nuclear threshold state, is to use these negotiations to mothball its nuclear infrastructure programme just long enough to undo the international sanctions regime,” Menendez said. Iran insists its nuclear drive is purely peaceful, but Menendez warned that it has refused to destroy any of its centrifuges, and was “weeks to months away from breakout” uranium enrichment capacity to produce a bomb should it ever resume the programme. “Let everyone understand: if there is no deal we won’t have time to impose new sanctions before Iran could produce a nuclear weapon.” Menendez’s legislation has support from 59 senators in the 100-member chamber. But Obama has threatened a veto and several Democrats who favor the bill have since stepped back from a possible damaging vote against their own leader. And Iranian officials have warned that new sanctions legislation could kill the negotiations. Earlier in the day, 42 Republicans wrote to Senate Majority Leader Harry Reid, who controls the chamber’s schedule, pressing for a vote. But Menendez distanced himself from that tactic, saying “we cannot be pressured by a partisan letter into forcing a vote.”

#### Obama PC key to keep sanctions off the table

Tehran Times, 2-7-14 tehrantimes.com/politics/113947-bill-clinton-aipac-urge-delay-on-iran-sanctions

Led by Sens. Mark Kirk and Menendez, a large bipartisan group of senators has been pushing legislation to drastically limit Iran’s ability to export petroleum if the Islamic Republic breaks the conditions of an interim agreement or abandons a permanent nuclear deal with global powers. It also would require a dramatic rollback of Iran’s nuclear program as a condition for further lifting existing sanctions. But the White House is increasingly urging Senate Democrats who back the bill to avoid acting until after the six-months of negotiations play out. After Obama made a similar case during his State of the Union address, several Democrats who back the sanctions bill — like Sen. Chris Coons of Delaware — privately urged party leaders to postpone a vote for now. “I think most of us feel these negotiations should have a chance,” Senate Majority Whip Dick Durbin said Thursday. As Democrats toned down their rhetoric, Republicans have increasingly pushed Senate Majority Leader Harry Reid to schedule a vote on the issue, including in a Thursday letter to the Nevada Democrat, which was signed by 42 GOP senators. “Now we have come to a crossroads,” the Republicans wrote in the letter spearheaded by Kirk. “Will the Senate allow Iran to keep its … nuclear infrastructure in place… or will the Senate stand firm on behalf of the American people and insist that any final agreement with Iran must dismantle the (country’s) nuclear infrastructure…?”

### PC

#### Obama retains political capital on foreign policy

**Ziaberi, 1/24/14** ­ - interview with Kaveh Afrasiabi, the author of several books on Iran’s foreign policy and a former advisor of Center for Strategic Research (Kourosh, “Congress New Sanctions Bill Scuttles the Geneva Deal” Iran Review, <http://www.iranreview.org/content/Documents/Congress-New-Sanctions-Bill-Scuttles-the-Geneva-Deal.htm>)

Q: Can we interpret the conflicts and disputes between the White House and the Congress as a power struggle which has manifested itself in the nuclear standoff? Is it that the complexity of the decision-making hierarchy in the United States has resulted in a conflict between the government and the two chambers of the Congress?

A: Well, certainly this can be viewed from many different angles, such as the ‘checks’ and balance’ and Congressional role in foreign policy, not to mention traditional party politics. Since the Clinton Administration, Congress has organically inserted itself in the Iran policy and even more so during the “Obama era,” as a result of which White House’s moves on Iran are subject to intense congressional scrutiny. But, given Secretary John Kerry’s long tenure in the Senate, compared to the first Obama administration, I would say that the second Obama administration has a greater sway on Congress’s foreign policy input, otherwise the Geneva deal would not have survived the criticisms.

#### Loss of cred is the only override scenario

**The Economist, 1/14/14** (“Mr Obama’s Iran problem” <http://www.economist.com/news/united-states/21594295-congress-not-helping-president-deal-islamic-republic-mr-obamas-iran-problem>)

Now Iran is again causing angst in Washington. Barack Obama faces acute, bipartisan scepticism in Congress, after his envoys joined other world powers in brokering an interim nuclear agreement with the Islamic Republic. This is due to take effect on January 20th, easing international sanctions in exchange for slowing Iran’s nuclear work, and buying time for a more comprehensive deal. At the time of writing 59 of 100 senators say they back a proposal to hold extra sanctions over Iran’s head, despite warnings from Mr Obama that if Congress votes for new sanctions Iran may abandon the talks. That means Senate sceptics are not far from the two-thirds majority they need to override Mr Obama’s threat of a veto. (The Republican-controlled House of Representatives strongly backs tougher sanctions, either because members think the Iranians are bluffing about walking out, or because their favoured Iran strategy involves regime change.) Team Obama has let rip, asserting that passing new sanctions—even ones whose bite is suspended—will wreck talks, shatter international unity over Iran and trigger a “march toward war”. A National Security Council staffer said that if some members of Congress want military action against Iran, “they should be upfront with the American public and say so.”

Some of the forces at work have changed little since 2007. Friends such as Israel and allies such as Saudi Arabia still believe that Iran is a rogue power that will always break nuclear promises. Many members of Congress sincerely loathe Iran’s regime, partly because it sponsors terrorism and tortures dissidents, but also, perhaps, because of a sense that Iran bested America in the battle for influence in post-Saddam Iraq. If the Iranian government of President Hassan Rohani presents a smiling face to the world, many American lawmakers see that as a trick or as a sign that existing tough sanctions have worked, making it imperative to keep a boot on the regime’s neck, while reminding Iran that fresh cheating will be punished.

Another constant is domestic politics, especially in a mid-term election year. An influential pro-Israel group, the American Israel Public Affairs Committee (AIPAC), has been lobbying members of Congress to keep the pressure on Iran. So have members of the People’s Mujahedeen of Iran (often known by the Persian acronym MEK), a group with a violent past whose opposition to the Iranian regime has nonetheless earned it allies in Congress. Lastly, cynicism remains a lodestar. Democratic leaders in the Senate are not rushing to put plans for extra sanctions to a vote, and insiders say that suits some senators very well. For such opportunists, co-sponsoring a sanctions bill that goes nowhere is an ideal outcome: it avoids hard foreign-policy trade-offs, while warding off attack ads that call them soft on Iran.

Yet at least one big thing is new: a widespread belief, certainly among Republicans, that Mr Obama is in exactly the opposite position to Mr Bush. Plenty of people in the world doubt his willingness to use force, even to prevent Iran from building a nuclear bomb on his watch. If Congress is willing to risk scuppering talks with Iran at this early stage, a big part of the explanation is that Mr Obama is suffering a crisis of presidential credibility. That crisis dates back, most acutely, to his failure to secure congressional approval for promised strikes on Syria for using chemical weapons. Put bluntly, Washington critics think Mr Obama talks endlessly and wields only sticks small enough to be delivered by drone.

### Link

#### Having to defend authority derails the current agenda

Kriner 10 Douglas L. Kriner (assistant professor of political science at Boston University) “After the Rubicon: Congress, Presidents, and the Politics of Waging War”, University of Chicago Press, Dec 1, 2010, page 68-69.

While congressional support leaves the president’s reserve of political capital intact, congressional criticism saps energy from other initiatives on the home front by forcing the president to expend energy and effort defending his international agenda. Political capital spent shoring up support for a president’s foreign policies is capital that is unavailable for his future policy initiatives. Moreover, any weakening in the president’s political clout may have immediate ramifications for his reelection prospects, as well as indirect consequences for congressional races.59 Indeed, Democratic efforts to tie congressional Republican incumbents to President George W. Bush and his war policies paid immediate political dividends in the 2006 midterms, particularly in states, districts, and counties that had suffered the highest casualty rates in the Iraq War. 60 In addition to boding ill for the president’s perceived political capital and reputation, such partisan losses in Congress only further imperil his programmatic agenda, both international and domestic. Scholars have long noted that President Lyndon Johnson’s dream of a Great Society also perished in the rice paddies of Vietnam. Lacking the requisite funds in a war-depleted treasury and the political capital needed to sustain his legislative vision, Johnson gradually let his domestic goals slip away as he hunkered down in an effort first to win and then to end the Vietnam War. In the same way, many of President Bush’s highest second-term domestic proprieties, such as Social Security and immigration reform, failed perhaps in large part because the administration had to expend so much energy and effort waging a rear-guard action against congressional critics of the war in Iraq.61 When making their cost-benefit calculations, presidents surely consider these wider political costs of congressional opposition to their military policies. If congressional opposition in the military arena stands to derail other elements of his agenda, all else being equal, the president will be more likely to judge the benefits of military action insufficient to its costs than if Congress stood behind him in the international arena.

#### An adverse Court ruling will cause Obama defiance – triggers a Constitutional showdown

Posner and Vermeule, 10- \*professor of law at the University of Chicago AND \*\*professor of law at Harvard (Eric and Adrian, The Executive Unbound, p. 207-210)

The 9/11 attack provided a reminder of just how extensive the president’s power is. The executive claimed the constitutional authority to, in effect, use emergency powers. Because Congress provided redundant statutory authority, and the Supreme Court has steadfastly refused to address the ultimate merits of the executive’s constitutional claims, these claims were never tested in a legal or public forum. But it is worth trying to imagine what would have happened if Congress had refused to pass the Authorization for Use of Military Force and the Supreme Court had ordered the executive to release detainees in a contested case. We think that the executive, backed up as it was by popular opinion, would have refused to obey. And, indeed, for just that reason, Congress would never have refused its imprimatur and the Supreme Court would never have stood in the executive’s way. The major check on the executive’s power to declare an emergency and to use emergency powers is—political.

#### Defending presidential powers costs capital

Pushaw, 04 --- Prof at Pepperdine Law (Fall 2004, Robert J., Missouri Law Review, “SYMPOSIUM: Defending Deference: A Response to Professors Epstein and Wells,” 69 Mo. L. Rev. 959))

More recently, the Court denied President Truman's claim of implied Article II power to unilaterally seize and operate domestic steel mills to ensure production of arms for the Korean War n51 and invalidated President Bush's indefinite detention of suspected terrorists. n52 The Court apparently concluded that the wars against Korea and terrorism posed less immediate and serious threats, and that in any event both Presidents had gone constitutionally overboard in their responses without specific congressional authorization. Left unsaid was that Truman in 1952 and Bush in 2004 lacked the popularity and political capital to disregard the Court's orders.