# 1AC – Mary Wash

### 1AC – Internment

#### CONTENTION 1: INTERNMENT

#### The Internment Cases have not been analyzed by modern courts yet

Craig Green 11, Professor of Law, Temple University Beasley School of Law; John Edwin Pomfret Fellowship, Princeton University; J.D., Yale Law School, 2011, "Ending the Korematsu Era: An Early View from the War on Terror Cases," Northwestern University School of Law, Vol. 105, No. 3,www.law.northwestern.edu/lawreview/v105/n3/983/LR105n3Green.pdf

Korematsu’s Doctrinal History.— Despite Korematsu’s notoriety, some of its history is known only by experts. 30 My first project is to show that the Justices who decided Korematsu perceived that case differently than many modern observers do. In the 1940s, although race was important for some members of the Court, claims of military necessity overwhelmed the majority’s hesitation, and even the dissenting Justices were less committed to modern equal protection than is commonly recognized. 31 This specific contextual evidence about Korematsu is an important starting point for reinterpreting the Korematsu era as a whole. ¶ After the devastation of Pearl Harbor in December 1941, fears spread about other attacks that might be supported by spies and saboteurs within the United States. 32 President Roosevelt responded in February 1942 by authorizing the creation of military areas “from which any or all persons may be excluded” and in which “the right of any person to enter, remain in, or leave shall be subject to whatever restrictions [designated officials] may impose.” 33 To implement this order, Lieutenant General DeWitt split the entire Pacific Coast into military areas. 34 Congress then criminalized violations of any military-area regulations with a maximum punishment of $5000 and one year in prison. 35 ¶ Beginning on March 27, 1942, DeWitt ordered a “curfew” for alien Germans and Italians, and for all persons of Japanese ancestry throughout much of Arizona, California, Washington, and Oregon. 36 This was no ordinary curfew to keep people off the streets. DeWitt’s order was closer to house arrest, for it required regulated persons to be home from 8:00 p.m. to 6:00 a.m. and to be in their workplace, within five miles of home, or traveling between work and home at all other times. 37¶ Not six months after Pearl Harbor, DeWitt began ordering persons of Japanese ancestry to “evacuate” military zones, though that word was a euphemism as well. 38 Every family of Japanese ancestry had to report to Civil Control Stations or Assembly Centers, and appearance at such facilities was typically followed by indefinite confinement at Relocation Centers in Ida- ho, Utah, Arkansas, Wyoming, Arizona, Colorado, and remote parts of California. 39 For the large population of Japanese-Americans on the Pacific Coast, DeWitt’s orders must have seemed more like racially targeted imprisonment than evacuation.¶ The Supreme Court issued two decisions evaluating these governmental policies. In 1943, Hirabayashi upheld a defendant’s conviction for violating DeWitt’s curfew, and Korematsu in 1944 upheld a defendant’s conviction for violating DeWitt’s reporting requirement. 40 Both cases involved exactly the same claims of military necessity and exactly the same legal authorities. 41 Indeed, the government’s brief in Korematsu explicitly incorporated by reference much of the factual evidence that had been presented the year before in Hirabayashi. 42¶ The President’s core claim in both cases was that a racially homogenous wartime enemy was supported by a set of aliens and citizens in the United States who could not be individually identified. 43 To meet such dire asserted threats, the military claimed it was necessary to subject a racially determined mass of potential suspect s to curfews, reporting, and evacuation. The Court upheld such executive decisions, which Congress had approved ex ante, by a unanimous vote in Hirabayashi and by a six-vote majority in Korematsu. 44¶ To modern observers, Hirabayashi and Korematsu seem astonishingly misguided. Both involved explicit racial discrimination, and the government had no credible argument that such discrimination was needed to secure the homeland. 45 Twenty-first-century doctrine and legal culture typically require very strong justifications to support racial classifications. 46 Because the policies in Hirabayashi and Korematsu lacked such support, their racial discrimination would be unconstitutional today, and some modern analysts have not looked much further into the Court’s analysis.

#### The decisions are among the worst court decisions in history by every criteria---the social and human impact is incalculable

Erwin Chemerinsky 11, Dean and Distinguished Professor of La w, University of California, Irvine School of Law, April 1st, 2011, "Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated," Pepperdine Law Review, pepperdinelawreview.com/wp-content/plugins/bag-thumb/bag\_thumb885\_07\_chemerinsky\_camera\_ready.pdf

III. WHY KOREMATSU WAS ONE OF THE WORST DECISIONS IN HISTORY¶ Applying the criteria described above, there is no doubt that Korematsu belongs on the list of the worst Supreme Court rulings. First, in terms of the social and human impact, 110,000 Japanese-Americans, aliens, and citizens—and 70,000 were citizens—were uprooted from their life-long homes and placed in what President Franklin Roosevelt called “concentration camps.” 18 For many, if not most of them, their property was seized and taken without due process or compensation. They were incarcerated. The only determinate that was used in this process was race. William Manchester, in a stunning history of the twentieth century, The Glory and the Dream, gives this description:¶ Under Executive Order 9066, as interpreted by General De Witt, voluntary migration ended on March 27. People of Japanese descent were given forty-eight hours to dispose of their homes, businesses, and furniture; during their period of resettlement they would be permitted to carry only personal belongings, in hand luggage. All razors and liquor would be confiscated. Investments and bank accounts were forfeited. Denied the right to appeal, or even protest, the Issei thus lost seventy million dollars in farm acreage and equipment, thirty-five million in fruits and vegetables, nearly a half-billion in annual income, and savings, stocks, and bonds beyond reckoning.19¶ Manchester describes what occurred:¶ Beginning at dawn on Monday, March 30, copies of General De Witt’s Civilian Exclusion Order No. 20 affecting persons “of Japanese ancestry” were nailed to doors, like quarantine notices. It was a brisk Army operation; toddlers too young to speak were issued tags, like luggage, and presently truck convoys drew up. From the sidewalks soldiers shouted, “Out Japs!”—an order chillingly like [what] Anne Frank was hearing from German soldiers on Dutch pavements. The trucks took the internees to fifteen assembly areas, among them a Yakima, Washington, brewery, Pasadena’s Rose Bowl, and racetracks in Santa Anita and Tanforan. The tracks were the worst; there, families were housed in horse stalls.¶ . . . .¶ The President never visited these bleak garrisons, but he once referred to them as “concentration camps.” That is precisely what they were. The average family of six or seven members was allowed an “apartment” measuring twenty by twenty-five feet. None had a stove or running water. Each block of barracks shared a community laundry, mess hall, latrines, and open shower stalls, where women had to bathe in full view of the sentries. 20¶ The human impact of the actions of the United States government towards Japanese-Americans during World War II cannot be overstated. It is almost beyond comprehension that our government could imprison 110,000 people solely because of their race.**¶** In terms of the judicial reasoning, Korematsu was also a terrible decision. Interestingly, Korematsu is the first case where the Supreme Court used the language of “suspect” classifications. 21 The Court did not use the phrasing of “strict scrutiny,” which came later, but the Court certainly was implying that racial classifications warrant what later came to be referred to as strict scrutiny. 22 Strict scrutiny, of course, means that a government action will be upheld only if it is necessary to achieve a compelling government interest.

#### The cases present a flawed institutional and racist stance on indefinite detention---it was not based on military necessity, only racial discrimination

G. Edward White 11, Distinguished Professor of Law and University Professor, University of Virginia School of Law, December 2011, "Symposium: Supreme Mistakes: Determining Notoriety in Supreme Court Decisions," Pepperdine Law Review, 39 Pepp. L. Rev. 197, lexis nexis

II. Examples of Notorious Mistakes: A First Look¶ ¶ In the long history of Supreme Court jurisprudence, a small number of cases have been consistently identified as notorious mistakes by commentators. Those cases need to be distinguished from a much larger group of cases that were severely criticized at the time they were decided but over the years have secured a degree of acceptance. Martin v. Hunter's Lessee, n4 McCulloch v. Maryland, n5 Brown v. Board of Education, n6 and Miranda v. Arizona n7 are in the larger group of cases. The smaller group seems to include only a few cases, which appear to be distinguished by the fact that successive generations of commentators have continued to regard them as notorious. What gives those cases their notoriety? Perhaps a comparison of two cases regularly placed on the list of notorious mistakes will aid us in that inquiry.¶ [\*199] Dred Scott v. Sandford n8 and Korematsu v. United States n9 are likely to appear on nearly everyone's list of notorious mistakes. n10 Some sense of why can be gleaned from a characterization of Dred Scott by David Currie in 1985, and of Korematsu in a 1982 Congressional report on that case. Currie described Dred Scott as "bad policy and bad judicial politics ... [and] also bad law." n11 The Congressional report stated that Korematsu had been "overruled in the court of history." n12 Taken together, those characterizations of Dred Scott and Korematsu suggest that four characteristics have been attributed to notorious decisions: misguided outcomes, a flawed institutional stance on the part of the Court, deficient analytical reasoning, and being "on the wrong side" of history with respect to their cultural resonance.¶ The Dred Scott decision concluded that African-American slaves and their descendants were not "citizens of the United States" and hence ineligible to sue in the federal courts. n13 The decision further concluded that Congress could not outlaw slavery in federal territories because to do so would constitute an interference with the Fifth Amendment property rights of slaveholders. n14 The Korematsu decision allowed the federal government to evacuate American citizens of Japanese origin from the West Coast, where they were detained in internment centers during the course of World War II, even though the sole basis of their evacuation and detention was their national origin, and even though Americans of German or Italian extraction were not comparably treated**.** n15 Thus, Dred Scott committed the Court to the propositions that the Constitution protected the "rights" of humans to own other humans as property, and that African-Americans descended from slaves were a "degraded race" not worthy of United States citizenship, whereas Korematsu committed the Court to the proposition that American citizens of a particular ethnic origin could be summarily incarcerated by the government simply because of their ethnicity. Those [\*200] propositions, as policy statements, seem blatantly at odds with the foundational principles of American civilization that all persons are created equal and may not be arbitrarily deprived of their liberty by the state.¶ The outcomes reached in Dred Scott and Korematsu appear to suggest that the Court found the policies of slavery and discrimination on the basis of ethnicity to be constitutionally legitimate. The decisions could also be seen as reflecting an inappropriate institutional stance by the Court with respect to its role of determining the constitutionality of the actions of other branches of government.¶ In Dred Scott the Court was asked to decide whether an African-American slave who had been taken by his owner into a federal territory where slavery was not permitted, and then "voluntarily" returned to a slave state, could sue for his freedom in federal court. n16 A majority of the Court found that African-American slaves were ineligible to sue in federal court. n17 That finding made any inquiry into the constitutional status of slavery in the federal territories irrelevant to the decision, but Chief Justice Roger Taney's opinion, which was characterized as the "opinion of the court," went on to conclude that the Due Process Clause of the Fifth Amendment, which according to Taney protected the property rights of slave owners, prevented Congress from abolishing slavery in the territories. n18¶ The interaction of slavery and westward expansion has been recognized as one of the most deeply contested political issues of the antebellum period. The power of Congress to decide the status of slavery in federal territories had been acknowledged by supporters and opponents of slavery ever 1789, when Congress divided land acquired from Virginia, North Carolina, Pennsylvania, New York, and Connecticut into "northwest" and "southwest" portions, with the Ohio River serving as a boundary, and outlawed slavery in the northwest section while remaining silent on it in the southwest section. n19¶ As slavery became a polarizing national issue in the early nineteenth century, it was generally conceded that although the federal government had no power to abolish slavery in states, it appeared to retain that power in federal territories. n20 All of the political compromises related to the westward expansion of slavery that were fashioned by Congress between 1820 and 1850 proceeded on that assumption. Moreover, as the United States acquired a vast amount of new territory between 1803 and 1853, the attitude [\*201] of Congress toward slavery in portions of that territory was thought to foreshadow the attitude of residents of those portions when states formed from them sought to enter the Union. The process by which Congress gave permission to new states to enter the Union was heavily influenced by expectations about whether the states would be free or slave, and those expectations were influenced by Congress's treatment of slavery in the portions of territory from which prospective states were carved out. n21¶ By reaching out to decide the constitutional status of slavery in the federal territories in Dred Scott, the Taney Court treated the delicate balancing of free and slave territories, and free and slave states, as if it had been based on an erroneous assumption. Suddenly, Congress had no power to outlaw slavery in any federal territory. n22 That conclusion represented a dramatic intervention by the Court in an extremely sensitive political issue that Congress had sought to keep in equipoise. Moreover, the intervention was not necessary to the decision in Dred Scott.¶ Taney's conclusion that Congress had no power to outlaw slavery in the federal territories rested on two propositions. First, he announced that Congress's constitutional power to make rules and regulations for federal territories n23 extended only to territory within the United States in 1789. n24 Second, he maintained that the Due Process Clause of the Fifth Amendment protected property in slaves. n25 Both propositions were novel. Taney'sreading of the Territories Clause of the Constitution would have prevented Congress from exercising any of its enumerated powers outside the original thirteen states, n26 and Taney's interpretation of the Due Process Clause could not easily be squared with federal or state bans on the international or interstate slave trade, both of which were in place at the time of Dred Scott. n27¶ In short, Dred Scott can be seen as reaching a pernicious result, representing a categorical judicial resolution of an issue long regarded as deeply contested in the political branches of government, and resting on some dubious legal arguments. In addition, it was described as a mistake by [\*202] contemporaries, n28 the Republican Party adopted a platform in the 1860 election pledging to continue to outlaw slavery in federal territories in defiance of the decision, n29 and it was explicitly overruled by the Thirteenth and Fourteenth Amendments to the Constitution. n30¶ One could construct a similar analysis of the Korematsu decision. It gave constitutional legitimacy to the incarceration of large numbers of American residents of Japanese descent simply on the basis of their ethnicity. The internment program made no effort to distinguish aliens from citizens or Japanese loyal to the United States from those loyal to Japan. n31 Internments were of indefinite duration. They were often accompanied by the confiscation of property owned by Japanese residents. Detainees could not challenge their detentions through writs of habeas corpus. And even though Justice Hugo Black's opinion for the Court asserted that Japanese residents of the West Coast were "not [interned] because of [their] race" but "because we are at war with the Japanese Empire," n32 the United States was also at war with Germany and Italy at the time, and few residents of German or Italian descent were interned during the course of that war.¶ Whereas the Court's posture with respect to other branches of government in Dred Scott might be described as awkwardly interventionist, its institutional posture in Korematsu might be described as awkwardly supine. The Court in Korematsu merely posited that military authorities had determined that allowing Japanese to remain on the West Coast posed threats of espionage and sabotage because Japan might invade the West Coast, and that relocating all Japanese to internment centers was necessary because there was no easy way to distinguish "loyal" from "disloyal" members of the Japanese population. n33 Although the Korematsu majority maintained that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and courts "must subject them to the most rigid scrutiny," n34 it arguably did not subject the restrictions on Japanese residents of the West Coast to any scrutiny at all. It simply noted that exclusion of "the whole group [of Japanese]" n35 from the West Coast was justified because of military authorities' concerns about espionage and sabotage by the Japanese on the West Coast, and their inability to "bring about an immediate segregation of the disloyal from the loyal." n36 The [\*203] Korematsu majority made no effort to determine whether military authorities had attempted to ascertain the loyalty of particular Japanese, or whether they had attempted to detain Germans or Italians anywhere in the United States. Instead, it concluded that the military authorities who ordered Japanese residents on the West Coast to leave their homes and report to "Assembly Centers," the first stage in their internment, were **justified in doing so because they "considered that the need for action was great, and time was short."** n37¶ The legal arguments mounted by Black for the Korematsu majority were no more statured than those employed by Taney in Dred Scott. Although Black rhetorically endorsed strict scrutiny for acts restricting the civil rights of racial minorities, he failed to subject the internment policy to searching review while denying that the internment policy was racially motivated. Justice Robert Jackson pointed out in dissent that the standard of review implemented by Black's opinion - whether the military reasonably believed that one of its policies was justified by a grave, imminent danger to public safety - could not realistically be applied by courts. n38 Moreover, the Korematsu Court had not heard any evidence on what the military believed or whether they could distinguish loyal from disloyal Japanese. It would subsequently be revealed that most of the basis for the internment order rested on stereotyped assumptions about the "unassimilated" status of Japanese communities in America rather than on military necessity, and government officials concealed this evidence from the Court. n39¶ Part of the reason that Korematsu would be "overruled in the court of history" resulted from the Court's subsequent implementation of the strict scrutiny standard for racial classifications proposed by Black in a series of cases reviewing classifications of African-Americans on the basis of their race. n40 Once the Court began to put some teeth into its review of policies affecting the civil rights of racial minorities, its rhetorical posture in Korematsu appeared disingenuous. In addition, the factors that led to the internment policy being formulated and upheld (uninformed stereotyping of a racial minority by military and civilian officials and reflexive deference on the part of the Court to the decisions of military officials in times of war) suggested that unless the Court actually followed through on its promise to subject racial discrimination to exacting scrutiny, the Korematsu precedent [\*204] might become, as Jackson put it, "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." n41¶ III. Characteristics of "Mistaken" Decisions: A Further Analysis¶ ¶ Dred Scott and Korematsu thus share pernicious outcomes, a questionable institutional stance on the part of the Court, flawed legal reasoning, and, over time, a location on the wrong side of history. At first glance those criteria might appear to be useful baselines for identifying notorious Supreme Court decisions, but a closer look at the criteria suggests that three of them seem heavily dependent on the fourth.

#### Racism makes war and violence inevitable---it presents enemies as biologically inferior to justify their extermination

Eduardo Mendieta 2, PhD and Associate professor of Stonybrook School of Philosophy, April 25th, 2002, "'To make live and to let die' - Foucault on Racism,'" Meeting of the Foucault Circle, APA Central Division Meeting, Chicago, April 25th, 2002, www.stonybrook.edu/commcms/philosophy/people/faculty\_pages/docs/foucault.pdf

This is where racism intervenes, not from without, exogenously, but from within, constitutively. For the emergence of biopower as the form of a new form of political rationality, entails the inscription within the very logic of the modern state the logic of racism. For racism grants, and here I am quoting: “the conditions for the acceptability of putting to death in a society of normalization. Where there is a society of normalization, where is a power that is, in all of its surface and in first instance, and first line, a bio-power, racism is indispensable as a condition to be able to put to death someone, in order to be able to put to death others. The homicidal [meurtrière] function of the state, to the degree that the state functions on the modality of bio-power, can only be assured by racism “(Foucault 1997, 227). To use the formulations from his 1982 lecture “The Political Technology of Individuals” – which incidentally, echo his 1979 Tanner Lectures – the power of the state after the 18th century, a power which is enacted through the police, and is enacted over the population, is a power over living beings, and as such it is a biopolitics. And, to quote more directly, “since the population is nothing more than what the state takes care of for its own sake, of course, the state is entitled to slaughter it, if necessary. So the reverse of biopolitcs is thanatopolitics.” (Foucault 2000, 416). Racism, is the thanatopolitical technology, one same political rationality; the management of life, the life of a population, the tending to the continuum of life of a people.¶ And with the inscription of racism within the state of biopower, the long history of war that Foucault has been telling in these dazzling lectures has made a new turn: the war of peoples, a war against invaders, imperials colonizers, which turned into a war of races, to then turn into a war of classes has now turned into the war of a race, a biological unit, against its polluters and threats. Racism is the means by which bourgeois political power, biopower, rekindles the fires of war within civil society. Racism normalizes and medicalizes war. Racism makes war the permanent condition of society, while at the same time masking its weapons of death and torture. As I wrote somewhere else, racism banalizes genocide by making quotidian the lynching of suspect threats to the health of the social body. Racism makes the killing of the other, of others, an everyday occurrence by internalizing and normalizing the war of society against its enemies. To protect society entails we be ready to kill its threats, its foes, and if we understand society as a unity of life, as a continuum of the living, then these threats and foes are biological in nature.

#### Racism must be rejected in every instance

Albert Memmi 2k, Professor Emeritus of Sociology @ U of Paris, Naiteire, Racism, Translated by Steve Martinot, p. 163-165

The struggle against racism will be long, difficult, without intermission, without remission, probably never achieved. Yet, for this very reason, it is a struggle to be undertaken without surcease and without concessions. One cannot be indulgent toward racism; one must not even let the monster in the house, especially not in a mask. To give it merely a foothold means to augment the bestial part in us and in other people, which is to diminish what is human. To accept the racist universe to the slightest degree is to endorse fear, injustice, and violence. It is to accept the persistence of the dark history in which we still largely live. it is to agree that the outsider will always be a possible victim (and which man is not himself an outsider relative to someone else?. Racism illustrates, in sum, the inevitable negativity of the condition of the dominated that is, it illuminates in a certain sense the entire human condition. The anti-racist struggle, difficult though it is, and always in question, is nevertheless one of the prologues to the ultimate passage from animosity to humanity. In that sense, we cannot fail to rise to the racist challenge. However, it remains true that one’s moral conduit only emerges from a choice: one has to want it. It is a choice among other choices, and always debatable in its foundations and its consequences. Let us say, broadly speaking, that the choice to conduct oneself morally is the condition for the establishment of a human order, for which racism is the very negation. This is almost a redundancy. One cannot found a moral order, let alone a legislative order, on racism, because racism signifies the exclusion of the other, and his or her subjection to violence and domination. From an ethical point of view, if one can deploy a little religious language, racism is ‘the truly capital sin. It is not an accident that almost all of humanity’s spiritual traditions counsels respect for the weak, for orphans, widows, or strangers. It is not just a question of theoretical morality and disinterested commandments. Such unanimity in the safeguarding of the other suggests the real utility of such sentiments. All things considered, we have an interest in banishing injustice, because injustice engenders violence and death. Of course, this is debatable. There are those who think that if one is strong enough, the assault on and oppression of others is permissible. Bur no one is ever sure of remaining the strongest. One day, perhaps, the roles will be reversed. All unjust society contains within itself the seeds of its own death. It is probably smarter to treat others with respect so that they treat you with respect. “Recall.” says the Bible, “that you were once a stranger in Egypt,” which means both that you ought to respect the stranger because you were a stranger yourself and that you risk becoming one again someday. It is an ethical and a practical appeal—indeed, it is a contract, however implicit it might be. In short, the refusal of racism is the condition for all theoretical and practical morality because, in the end, the ethical choice commands the political choice, a just society must be a society accepted by all. If this contractual principle is not accepted, then only conflict, violence, and destruction will be our lot. If it is accepted, we can hope someday to live in peace. True, it is a wager, but the stakes are irresistible.

#### The Internment Case precedents make future internment likely

Nathan Watanabe 4, J.D. Candidate, University of Southern California Law School, 2004, "Internment, Civil Liberties, and a Nation in Crisis," Southern California Interdisciplinary Law Journal, 13 S. Cal. Interdisc. L. J. 2003-2004, Hein Online

The Internment Cases' Court failed to address the "necessity" aspect of heightened scrutiny. The Courts' analyses granted the government with far more "wiggle room" than any modern court would dare provide. The term "necessary" entails a close-fit between the government's means to achieving its compelling end; it cannot be substantially over or under- inclusive.66 For example, even if preventing terrorism represents a worthwhile pursuit, the government cannot exclude Arabs from large buildings as such a policy would be both substantially over-inclusive (because all Arabs are not terrorists) and under-inclusive (because all terrorists are not Arabs). Hirabayashi literally did not address the potential burdens and overbreadth of the military imposed curfew for Japanese Americans.67 On the other hand, Korematsu did briefly ponder the higher burden of being excluded from one's home versus being subject to a curfew.68 Despite mentioning these hardships, the Court seems to have merged the "means-ends fit" analysis with the "compelling interest" portion of heightened scrutiny as it completely dismisses the burdens as a necessary wartime hardship and part of maintaining national security.69 It did not independently address whether the hardships incurred by the Japanese Americans were so "overreaching" or "burdensome" that there had to exist a less restrictive alternative to bolster national security. If anything, the Korematsu majority's terse mention of the hardships appears almost perfunctory as shown in Justice Owen Robert's dissent.7° The Court's language in the Internment Cases also indicates a somewhat ambiguous definition of what exactly constitutes a "compelling government interest." Admittedly, judicial scrutiny represents a value judgment based on the totality of the circumstances, such that determining the level of deference owed to the government in scrutinizing its actions becomes a daunting task for the Court. Justice Stone, however, deployed his "newly forged" invention of heightened scrutiny before the legal community could explore its intricacies. As such, heightened scrutiny appeared before scholars characterized it as "strict in theory and fatal in fact.",71¶ Korematsu states that while "a pressing public necessity" may sometimes justify classification, "racial antagonism never can.72 Taken as they are, the words "pressing public necessity" imply absolutely anything the government finds to be gnawing at its heel. The only limitation the Court places on a "pressing public necessity" is the absence of any openly racist justifications. Within the context of the Court's analysis, one can find some rigidity to the "pressing public necessity" requirement as it explained the special circumstances of war and the dangers of an unascertainable number of enemy saboteurs among the Japanese American population.73 Then again, any justification can appear "necessary" with competent lawyering. The Court offered little on the basis of comparison to give teeth to the standard of review, basing most of its analysis on the equally ambiguous Hirabayashi case.74¶ Justice Stone's language in Hirabayashi seems to imply that the court's conception of "rigid scrutiny" is not necessarily rigid when compared to modern formulations of judicial scrutiny for facially racial classifications. The Court stated that it was "enough" that circumstances within the knowledge of the military afforded a "rational basis for the decision which they made.75 Modern "rational basis review" is extremely deferential to the government interest - so much so that any conceivable constitutional purpose, even if it is not the government's actual purpose, will justify upholding the law.76¶ Contextually, however, Justice Stone probably meant for this rational basis formulation to possess less government deference than the rubberstamp interpretation it holds today. Within the decision, he prefaced his application of the standard by generally condemning government racial classifications.77 It would not make sense logically to condemn a practice and then excuse it without any compelling justification. Furthermore, it is clear that the standard by which Justice Stone conducted his equal protection analysis followed his Carolene Products footnote, as it fell in stride with a series of post-Carolene dissents in which he appealed for greater minority protection.78¶ Although Stone offered precedents to further explicate the components of heightened scrutiny for racial classifications in Hirabayashi, the cases do little to elaborate on his original query posed in Carolene Products. Setting up the standard for heightened scrutiny, he listed Yick Wo v. Hopkins ("Yick Wo"), 79 Yu Cong Eng v. Trinidad ("Yu Cong Eng"), 80 and Hill v. Texas ("Hill") 81 as examples of racial classifications failing to meet the standard.82 However, he conceded that these precedents would be controlling, "were it not for the fact that the danger of espionage and sabotage, in time of war ... calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."83 Stone's language, "were it not for," seems to distinguish the use of heightened scrutiny altogether in the face of military necessity, and the decision itself fails to debate the validity of the government's justification or the means with which to achieve it.¶ Even the cases themselves shed little light on the intricacies of heightened scrutiny.84 Although the Court generally deplored the discriminatory results and application of the laws considered in those cases, its lengthy discussions on the merits of the government's purposes were unnecessary since, in all three cases, they were clearly discriminatory.85 Therefore, in Hirabayashi, Stone did not compare the government purpose of military necessity to any cases involving government purposes that were outright irrational. Consequently, the majority simply "shot from the hip" in making its value judgment.¶ Despite the circumstances under which they were decided, the Internment Cases have not been overruled and represent good law today. Some may argue that even without the formality of a Supreme Court ruling, lower courts have overturned the convictions of Gordon Hirabayashi and Fred Korematsu, placing the original decisions in jeopardy.86 In fact, a recent article in the Georgetown Immigration Law Journal commented that Korematsu is dead law in light of the 2001 Supreme Court decision, Zadvydas v. Davis.87 These criticisms, however, fail to actually phase out the Internment Cases' core legal analysis.¶ Lower courts overturned Hirabayashi and Korematsu's convictions on the basis of a factual error, but they did not overrule the legal analysis relied upon in the original Internment Cases. Hirabayashi and Korematsu challenged their convictions in the mid-1980s after the Commission on Wartime Relocation and Internment of Civilians ("CWRIC") unearthed a drove of information suggesting that the government knowingly suppressed and altered evidence during the original trial.88 Their cause of action, however, limited them to only challenging the factual errors leading to their convictions and not the law itself. Hirabayashi and Korematsu each petitioned the court under a writ of coram nobis, which allows petitioners to challenge a federal criminal conviction obtained by constitutional or fundamental error that renders a proceeding irregular and invalid.89 Although Korematsu argued that under current constitutional standards his conviction would not survive strict scrutiny, the Court dismissed his argument, noting that "the writ of coram nobis [is] used to correct errors of fact," and "[is] not used to correct legal errors and this court has no power, nor does it attempt, to correct any such errors."90 The court hearing Hirabayashi's coram nobis petition simply ignored the issue entirely.9' Although the Georgetown article interprets Zadvydas' reasoning to overrule the Internment Cases, the actual holding of the case is limited to modifying a post-removal-period detention statute, and, even if applied broadly, does not rule out the possibility of infinitely detaining "specially dangerous individuals."92 Zadvydas concerned a statute which allows the government to detain a deportable alien if it has not been able to secure the alien's removal during a 90-day statutory "removal period.93 The Court held that the statute implies a limit on the post-removal detention period, which the article interprets as an all-out ban on indefinite detentions of immigrants or citizens without due process.94 Factually, the Zadvydas statute applies to a procedurally narrower class of people than the Internment Orders (aliens adjudged to be deported versus aliens suspected of espionage) and appears to serve a less "urgent" purpose in "ensuring the appearance of aliens at future immigration proceedings" and "[p]reventing danger to the community.,95 Therefore, it may be argued that the two cases are not factually analogous. Even if they are, Zadvydas' holding itself does not preclude the possibility of indefinitely detaining particularly dangerous individuals without due process.96 The Court set aside this particular exception to the general rule, stating that such detainment is constitutionally suspect.97 The Zadvydas statute did not target dangerous individuals, such as terrorists; therefore, it did not fit within the exception because it broadly applied to even the most innocuous tourist visa violators.98 In Hirabayashi and Korematsu, the Court upheld the orders because the government, despite falsifying the evidence, convinced the Court that Japanese Americans and immigrants presented an acute danger to national security. Lastly, Zadvydas did not contain any references to either Internment Case, so it is probably safe to assume that the Court did not intend to overrule them in the process.¶ The greatest evidence, however, that the Internment Cases are still live precedents is that current cases still cite to them. Ninth Circuit decision Johnson v. State of California 99 cited to Hirabayashi on February 25, 2003, and American Federation of Government Employees (AFL-CIO) v. United States referred to Korematsu on March 29, 2002.0° Both cases used Hirabayashi and Korematsu as authority for strictly scrutinizing government racial classifications. Additionally, the United States Supreme Court cited the Internment Cases as authority on the relationship between strict scrutiny and race.'0' In fact, many cases have referred to the Internment Cases for this purpose, as they represent the Supreme Court's first formulation of heightened scrutiny. The scope of the Internment Cases' precedent, however, extends beyond simply establishing strict scrutiny for racial classifications, and includes the Supreme Court's commentary on the circumstances in which such "odious'1T2 measures are justifiable. The recalcitrant position that this justification occupies in Supreme Court case history poses the greatest threat to present-day civil liberties.¶ With respect to the current cases challenging the executive orders invoked in the wake of the September l1th attacks, Korematsu and Hirabayashi may offer virtually unlimited deference **to the government in its efforts to maintain national security in times of war.** Hirabayashi (upon which Korematsu based its analysis) characterized the war power of the federal government as the "power to wage war successfully" that "extends to every matter so related to war as substantially to affect its conduct, and embraces every phase of the national defense[.]"'103 By approving the wholesale detainment of an entire ethnic group in order to prevent potential sabotage, the Court provided the government a very wide berth in determining the neccesary actions in waging a successful war. Such a precedent ostensibly allows the government to use a "declaration of war" as a proxy for any action it sees fit. "War" then releases the government from any obligations to equal protection and other Constitutional rights. Thus, Padilla's characterization of the current terrorist scenario as one in which the President's war powers are invoked'04 renders Hirabayashi and Korematsu applicable.¶ The government has already crept toward the direction predicted by the Internment Cases. Prior to Hamdi and Padilla, Congress passed a joint resolution empowering the President to take all "necessary and appropriate" measures to prevent any future acts of terrorism against the United States.105 Hamdi itself implicitly acknowledged the Internment Cases' precedent in its explanation of the President's war power, by referencing the Supreme Court's tendency to defer to the political branches when "called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs."' Coincidentally, both Hamdi and Hirabayashi cite to Ex parte Quirin ("Quirin"), a case involving the due process rights of German saboteurs caught on American soil, to derive the broad authority given to the President during times of war.'07 Although Hamdi paid lip service to the idea that executive wartime authority is not unlimited,108 it also stated, "the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally."'109¶ Even if the President's war power is invoked, one might argue that in 1971 the legislature statutorily curtailed the President's discretionary power to detain citizens by first requiring an "Act of Congress."10 Although argued in the government's brief in the Korematsu coram nobis case as a pre-existing legislative barrier to future mass-internments, the statute does little to limit the Internment Cases' authority.' The legislature did, in fact, approve the executive order under which Korematsu was convicted.' 2 The government may have characterized this approval as an isolated incident that was repealed in 1976,13 but Hamdi and Padilla subsequently refuted any notion that occurences of congressional approval are few and far between. Both cases exempted President Bush's detainment executive order stating that the prior joint resolution granting the President "necessary and appropriate" authority constituted an "Act of Congress."' 14 Although in theory the 1971 statute makes it more difficult for the President to detain citizens by requiring congressional approval, the joint resolution that quickly followed the terrorist attacks demonstrates that Congress is not reluctant to give its authorization.¶ **The** broad presidential war authority precedent **established in the Internment Cases appears to act as an all-purpose compelling government interest, which may** allow the government to openly target ethnic and religious groups **associated with terrorism**. The current executive orders tiptoe around equal protection issues given that they do not specifically call for the detention of Arabs or Muslims. Even if the government detains a disproportionate number of people who are members of these groups, the government's actions are unchallengeable on these grounds without proof of a discriminatory purpose. Now, with Hirabayashi and Korematsu as accessible precedents, the government may openly profile suspect groups by entirely quashing the equal protection issue. Even if the government bases its correlations off of unreliable research tainted with racial prejudice, as long as the Court is unaware of these transgressions, the government can argue in the vein of Hirabayashi that such classifications are logically related to preserving national security. Though neither Hamdi nor Padilla involved an equal protection issue, their deference to government war authority foreshadows a Hirabayashi extension of that authority to facially racial classifications.¶ One factor hindering the use of the Internment Cases is that they were decided in a very different time and under a dated legal standard. The fact that the Internment Cases emerged under a less-developed form of strict scrutiny makes it less tenable that something as extreme as a full-scale exclusion and internment of an ethnic group will occur again. Moreover, it is always possible that the Hirabayashi and Korematsu Courts' ambiguity in defining a compelling interest may even limit the clout "national security" carries as an end-all government purpose.¶ Even with these historical and contextual roadblocks, cases decided after the Internment Cases effectively touched up their anachronistic blemishes. Adarand Constructors, Inc. v. Pena referred to Korematsu and Hirabayashi in delineating its standard of heightened scrutiny, confirming that the two previous cases did, in fact, employ some version of strict scrutiny at the time.1"5 Furthermore, Adarand explicitly rejected the long- held notion that "strict scrutiny is strict in theory, and fatal in fact," which although more of an academic characterization, highlights the surmountability of heightened scrutiny. Still, it is almost impossible for the government to intern an entire ethnic group because it is not narrowly tailored to, nor the least restrictive alternative for, the government's interest in protecting national security. This construction of strict scrutiny, however, does not rule out inconveniences slightly less than Internment and leaves open the possibility of, for example, mandatory baggage searches for all Arab-American airplane passengers. Furthermore, **there is always the possibility of a Court resorting to Korematsu's "balancing out" of the narrow tailoring requirement for "hardships are part of war, and war is an aggregation of hardships."**'17 Moreover, even if the Internment Cases' outdated methodology of judicial review precludes them from being applied in a modern equal protection analysis, it still does not affect the broad authority given the President to "wage war successfully." Indeed, no precedent explicitly bars uses of the Internment Cases**, and** in the crises- minded state of our present times, these relics of the past are factually analogous and legally applicable.

#### Correcting the past is a prerequisite to fixing the future---otherwise future racist policies are inevitable

Wendell L. Griffen 99, Judge for the Arkansas Court of Appeals, "RACE, LAW, AND CULTURE: A CALL TO NEW THINKING, LEADERSHIP, AND ACTION," University of Arkansas at Little Rock Law Review, 21 U. Ark. Little Rock L. Rev. 901, 1999, Lexis Nexis

We have yet to admit the racism that resulted in Chinese exclusion laws in the West and acknowledge the fact that similar treatment was not applied to immigrants from Europe. Somehow our obsession with power and notion of manifest destiny made us oblivious to the blatant racism practiced against the Mexican people of Texas, New Mexico, Colorado, and Arizona during the last century that resulted in the loss of millions of acres of land that had been owned for generations. We forcibly removed American citizens of Japanese ancestry from their homes, communities, work, and businesses during World War II and interned them like prisoners of war solely because of their ancestry. The United States Supreme Court sanctioned that blatant act of institutional racism in Korematsu v. United States, n3 just as it had sanctioned the institutional racism of slavery in Dred Scott v. Sanford, n4 and racial segregation in Plessy v. Ferguson. n5 Had the same reasoning been applied to American citizens of Italian and German ancestry, Joe DiMaggio and Dwight D. Eisenhower would have been interned. There was never a serious discussion about a threat to national security posed by having a person of German ancestry commanding Allied forces against the Third Reich, let alone being elected president within a decade of that war.¶ Unless and until we admit that racism produced these and countless other stubborn, stupid, and sick results we will not create a different society in the 21st Century. American law, history, economics, religion, social life, and culture have been so permeated by racism and racist thought for such a long time that nothing short of new thinking about that racism and its effects on our national life bodes real chance for producing racial equity in the new century.¶ Until American thinking about racism and racial justice is defined from the perspective of the historical victims of racism and racial injustice rather than from the perspective of the historical beneficiaries, we are doomed to [\*905] continue the sorry legacy of racism. We must shift our thinking about racism and racial justice from focusing on the benefits and comforts that have been enjoyed and may be reduced by racism's historical white beneficiaries to focusing on the costs, burdens, and consequences that have been suffered and will be endured by racism's historical non-white victims. We should admit that the new thinking is not likely to come from the same mindset that has produced so much of what we deem legitimate about American law and culture.¶ The prevailing thought in American law and culture regarding racism and racial injustice follows the ages-old presumption of white superiority over non-white people and what one social ethicist termed a belief in "the rightness of whiteness." n6 Thus, the very mindset that produced the theft of Native American land, enslavement of Africans, discrimination against people of Asian ancestry, and belittling of the Hispanic culture (including the Spanish language) has driven and continues to dominate American thinking about religion, government, law, economics, education, and societal life in general.

#### Its existence on the books allows for the justification of racially discriminatory war policy

Ilya Somin 13, Professor of Law at George Mason University School of Law; earned his B.A., Summa Cum Laude, at Amherst College, M.A. in Political Science from Harvard University, and J.D. from Yale Law School, March 13th, 2013, "Repudiating the Japanese Internment Decisions," www.volokh.com/2013/03/13/repudiating-the-japanese-internment-decisions/

I. The Case for Repudiation.¶ As Irons notes, the overwhelming majority of legal scholars and jurists now recognize that the Japanese internment cases were outrageous injustices. They are among the most reviled decisions in Supreme Court history. In 1988, Congress and President Ronald Reagan formally denounced the internment, apologized to the surviving victims, and enacted a law compensating them for their losses (albeit, inadequately, given that each was paid only $20,000 in compensation for some three years of imprisonment, and the loss of large amounts of income and property). The Supreme Court itself has made negative references to these cases in more recent decisions, but has never formally overruled any of them. While lawyers today would be ill-advised to rely on these cases in their arguments, they are technically still on the books, and could potentially be used as precedents in the future – especially if changes in public or elite opinion make racially discriminatory war policies more popular than they are now.

#### The precedent creates a loaded gun mentality adopted by president after president---it just takes one reckless one to exploit the decision

Craig Green 11, Professor of Law, Temple University Beasley School of Law; John Edwin Pomfret Fellowship, Princeton University; J.D., Yale Law School, 2011, "Ending the Korematsu Era: An Early View from the War on Terror Cases," Northwestern University School of Law, Vol. 105, No. 3,www.law.northwestern.edu/lawreview/v105/n3/983/LR105n3Green.pdf

B. “Tools Belong to the Man Who Can Use Them” 295¶ Another lesson from sixty years of wartime case law concerns the role of judicial precedent itself in guiding presidential action. Two viewpoints merit notice, each having roots in opinions by Justice Jackson. On one hand, consider his explanation in Korematsu for why courts must not approve illegal executive action:¶ A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion . . . show[s] that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. 296¶ This “loaded weapon” rhetoric is an orthodox element in analyzing Korematsu as a racist morality play. The passage is cited to show that Supreme Court precedents really matter and that racist errors retain their menacing power for generations. 297 Students are reminded that Korematsu was never directly overruled, thereby inviting the vivid nightmare that the Court’s ruling lies even now as a loaded weapon just waiting for some reckless President to grab and fire. 298

### 1AC – Solvency

#### CONTENTION 2: SOLVENCY

#### The federal judiciary should repudiate the Internment Cases officially---prevents devastating social and political conflicts

Peter Irons 13, Civil Rights Attorney, and professor emeritus of political science, "UNFINISHED BUSINESS: THE CASE FOR SUPREME COURT REPUDIATION OF THE JAPANESE AMERICAN INTERNMENT CASES," 2013, http://lawprofessors.typepad.com/files/case-for-repudiation-1.pdf-http://lawprofessors.typepad.com/files/case-for-repudiation-1.pdf

CONCLUSION¶ Over the past seven decades, many distinguished scholars and judges have implored the Court to repudiate the internment decisions. It seems appropriate to note the first and perhaps most distinguished of these voices: just months after the Korematsu decision in December 1944, Eugene V. Rostow, the justly esteemed professor and dean at Yale Law School, published an article in the Yale Law Journal entitled “The Japanese American Cases – A Disaster.” [24] In his article, which eviscerated the Court’s opinions in these cases as based on unsupported racial stereotypes (and without the benefit of the evidence of governmental misconduct discussed above), Professor Rostow wrote that those opinions, “[b]y their acceptance of ethnic differences as a criterion for discrimination . . . are a breach, potentially a major breach, in the principle of equality. Unless repudiated, they may encourage devastating and unforeseen social and political conflicts.” He continued: “In the political process of American life, these decisions were a negative and reactionary act. The Court avoided the risks of overruling the Government on an issue of war policy. But it weakened society’s control over military authority—one of those polarizing forces on which the organization of our society depends. And it solemnly accepted and gave the prestige of its support to dangerous racial myths about a minority group, in arguments which can be applied easily to any other minority in our society.” (emphasis added) Id. at 492.¶ “[T]hat the Supreme Court has upheld imprisonment on such a basis constitutes an expansion of military discretion beyond the limit of tolerance in democratic society. It ignores the rights of citizenship, and the safeguards of trial practice which have been the historical attributes of liberty. . . . What are we to think of our own part in a program which violates every democratic social value, yet has been approved by the Congress, the President and the Supreme Court?” Id. at 533.¶ Professor Rostow urged in 1945 that “the basic issues should be presented to the Supreme Court again, in an effort to obtain a reversal of these war-time cases. In the history of the Supreme Court there have been important occasions when the Court itself corrected a decision occasioned by the excitement of a tense and patriotic moment. After the Civil War, Ex parte Vallandigham was followed by Ex parte Milligan. The Gobitis case has recently been overruled by West Virginia v. Barnette. Similar public expiation in the case of the interment of Japanese Americans from the West Coast would be good for the Court, and for the country.” Id. Failing to heed Professor Rostow’s words in 1945 and in the years since then, the Court should now feel an obligation to provide the “expiation” for which he prophetically called.

#### The Courts have the sole duty and power to correct this mistake---repudiation would be effective

Peter Irons 13, Civil Rights Attorney, and professor emeritus of political science, "UNFINISHED BUSINESS: THE CASE FOR SUPREME COURT REPUDIATION OF THE JAPANESE AMERICAN INTERNMENT CASES," 2013, http://lawprofessors.typepad.com/files/case-for-repudiation-1.pdf-http://lawprofessors.typepad.com/files/case-for-repudiation-1.pdf

This essay presents the case for the Supreme Court to follow President Lincoln’s example by formally repudiating its decisions in the Japanese American internment cases, issuing a public statement acknowledging that these decisions were based upon numerous and knowing acts of governmental misconduct before the Court, and were thus wrongly decided. These acts of misconduct, documented and discussed herein, were committed by several high-ranking military and civilian officials (including the Solicitor General of the United States) before and during the pendency of the internment cases before the Supreme Court. Consequently, the Court was forced to rely in making its decisions on records and arguments that were fabricated and fraudulent. Sadly, the Court’s unquestioning acceptance of these tainted records, and its upholding of the criminal convictions of Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu, has left a stain on the Court’s integrity that requires the long overdue correction of public repudiation and apology, as both the legislative and executive branches of the federal government— to their credit—have now done.¶ Although this essay is directed to a general, and hopefully wide readership, it is primarily aimed at an audience of nine: the current justices of the Supreme Court, who have the inherent power to erase this stain on its record and to restore the Court’s integrity. Admittedly, a public repudiation of the Japanese American internment cases would be unprecedented, considering that the cases are technically moot, since the Solicitor General of the United States at the time, Charles Fried, did not ask the Court to review the decisions of the federal judges who vacated the convictions, pursuant to writs of error coram nobis [5] that were filed in all three cases in 1983 and decided in opinions issued in 1984, 1986, and 1987. The government’s decision to forego appeals to the Supreme Court left the victorious coram nobis petitioners in a classic Catch-22 situation: hoping to persuade the Supreme Court to finally and unequivocally reverse and repudiate the decisions in their cases, they were unable—as prevailing parties in the lower courts—to bring appeals to the Court.¶ The evidence of the government’s misconduct in these cases is clear and compelling, and rests on the government’s own records. It reveals that high government officials, including the Solicitor General, knowingly presented the Supreme Court with false and fabricated records, both in briefs and oral arguments, that misled the Court and resulted in decisions that deprived the petitioners in these cases of their rights to fair hearings of their challenges to military orders that were based, not on legitimate fears that they—and all Japanese Americans—posed a danger of espionage and sabotage on the West Coast, but rather reflected the racism of the general who promulgated the orders. As a result of the government’s misconduct in these cases, the integrity of the Supreme Court was compromised. With a full record of the government’s misconduct in these cases now before it, the Supreme Court has both the inherent power and duty to correct its tainted records through a public repudiation of the wartime decisions.

#### We must interrogate the Internment decisions to correct the precedents set for abuses of Presidential War powers---now is key

Craig Green 11, Professor of Law, Temple University Beasley School of Law; John Edwin Pomfret Fellowship, Princeton University; J.D., Yale Law School, 2011, "Ending the Korematsu Era: An Early View from the War on Terror Cases," Northwestern University School of Law, Vol. 105, No. 3,www.law.northwestern.edu/lawreview/v105/n3/983/LR105n3Green.pdf

IV. EPILOGUE : WHAT THE KOREMATSU ERA MEANS NOW¶ Iconic war powers precedents offer special interpretive challenges because such cases arise only infrequently from clustered factual circumstances that differ greatly from any other group of cases. The result is an uncommon risk that each generation of lawyers may forget or misread the wisdoms and follies of the past. This is what happened before 9/11. Lawyers, judges, scholars, and commentators had not adequately appreciated the Court’s unfortunate history surrounding World War II. As old issues resurfaced concerning detention and military commissions, executive lawyer and federal courts of appeals used Korematsu -era precedents (though not Korematsu itself) as “positive” precedents instead of “negative” ones. This was a mistake, as the modern Court has repeatedly held. This Article seeks to bolster safeguards against presidential abuse and, at long last, to limit the Korematsu era’s influence. But like everything else, such scholarship operates in a world of contingent circumstances where pens and ideas are only sometimes mightier than swords and the politics of war. 316¶ If my thesis is correct that the modern GWOT cases have undermined the Korematsu era’s institutional assumptions, the episodic nature of war powers cases creates pressure to solidify that interpretation quickly. Elections have delivered a President with an arguably different view of presidential power. 317 And several new Justices now occupy the high bench— with the especially notable departures of Justice Stevens, who personally witnessed the Korematsu era as a young man, 318 and Justice Souter, whose Hamdi concurrence showed exceptional insight in analyzing past examples of war powers. Our current cluster of wartime decisions might soon draw to a close, and if that happens, issues of executive detention and military commissions may once again drift out of focus.¶ All too soon, it may be hard to remember the political pressures heaped on the Court in 2004, when it said “no” for the first time to a popular, self- declared wartime President. As memories fade, the modern Court’s remarkable steps in rejecting Korematsu-era deference might be similarly forgotten or misconstrued. Rasul might become a case “just” about federal habeas statutes, Hamdi “just” a set of divided opinions about enemy combatants, Hamdan “just” an interpretation of the UCMJ, and Boumediene “just” a constitutional decision about Guantánamo Bay. For anyone who wishes to celebrate the Korematsu era’s end, the time to determine the recent war powers cases’ meaning is now. Otherwise, the Court’s subtle language and narrow holdings may allow future executive lawyers to deflect recent precedents and revive Korematsu-era principles that the 9/11 era has firmly and quietly laid to rest.

#### The plan is necessary to ensure other race based policies are repudiated

Frank H. Wu 2, Professor of Law, Howard University, September 2002, "Profiling in the Wake of September 11," Justice Magazine, http://www.americanbar.org/publications/criminal\_justice\_magazine\_home/crimjust\_cjmag\_17\_2\_japanese.html

The condemnation of the internment may lead to the condoning of milder measures in the classical fallacy of false alternatives. Anything short of an internment is compared to the internment, as if to say it could be worse and so there is no cause for complaint. To be fair, racial profiling can be carried out in a much milder form than internment camps. To be precise, the current secret detentions are best likened to the apprehension of hundreds of Japanese Americans, German Americans, and Italian Americans and the curfews and other measures that preceded the internment itself.¶ In that context, the conclusion that the internment was wrong is not enough. The reasons it was wrong must be articulated again. As lawyers well know, the rationale may be as important as the result by itself in comprehending the meaning of legal authority. What is constitutional is not necessarily advisable. Technically, for all the contempt directed at the Supreme Court’s internment cases, it is worth noting that the decisions have never been repudiated and actually have been followed consistently. Indeed, Chief Justice William H. Rehnquist penned a book a few years ago intimating that if a similar matter were to come before the Court again he would not expect it do otherwise. (William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime (Knopf 1998).)

#### Only courts can signal that future internment will be avoided

David A. Harris 11, Professor of Law, University of Pittsburgh School of Law, Winter 2011, "On the Contemporary Meaning of Korematsu: 'Liberty Lies in the Hearts of Men and Women,'" Missouri Law Review, Volume 76, Number 1, law.missouri.edu/lawreview/files/2012/11/Harris.pdf

Despite these criticisms, **Americans cannot depend on these cases to tell them what a court would do if faced with another attack and a plan for internment**. None of the Guantanamo cases relied upon, or even expressed any relation to, the law of equal protection; doctrinally, they rested on the President’s executive and wartime powers. And perhaps more important than what these cases struck down is what they did allow. The best example is Hamdi, in which Justice O’Connor famously refused to grant the executive virtually unlimited constitutional power in wartime. 148 Hamdi actually allows the executive to hold American citizens indefinitely, without charges or trial, as enemy combatants. 149 While some minimal degree of process is due, 150 the bottom line is that the Court conceded this power to the President with very little in the way of checks or balances. Similarly, in Hamdan , the Court ruled that only Common Article Three of the Geneva Conventions, the most basic set of protections available, applied to enemy combatants at Guantanamo. 151 Hamdan also found that it would be procedurally adequate for military commissions, if modified, to try these prisoners. 152 ¶ If there is a relationship between the enemy combatants cases and what the Court might do if faced with a Korematsu decision again, it is that the Court in these cases largely – even if not entirely – deferred to the power of the executive. One can see the enemy combatant cases as a counterweight to Korematsu only by blinding oneself to the fact that the enemy combatant cases allowed indefinite detention of American citizens in the name of national security, with only minimal due process available. Thus, rather than signaling that the Court would stand in the way of another internment, a plausible reading of **these cases indicates that the Court has, at the very least,** left the door open for it**.**

### Plan

#### The United States federal judiciary should restrict the use of the Internment Cases as a basis for war authorization of Presidential detention without charge during conflict because of overreliance on military necessity.

### 1AC – Impact Framing

#### CONTENTION 3: IMPACT FRAMING

#### Overreliance on utility principles to justify executive detention power turns the lesser evil into the greater by obliterating restraints on the conduct of war – balancing legal checks and balances with security is necessary to create optimal outcomes for both

Richard Ashby Wilson 5, the Gladstein Distinguished Chair of Human Rights and Director of the Human Rights Institute at the University of Connecticut, Human Rights in the War on Terror, p. 19-21

Michael Ignatieff’s ‘lesser evil’ ethics and overreliance on a consequentialist ethics place him much closer to the anti-rights philosophical tradition of utilitarianism than the liberal tradition of human rights. Philosophically and politically, utilitarian consequentialism is about as far from an ethics of human rights as one can travel, and this is borne out in the DOJ memo’s dramatic bolstering of executive power and the sweeping away of the rights of prisoners of war. Jonathan Raban might have a point in suggesting that Ignatieff has become the ‘in-house philosopher’ of the ‘terror warriors’ (2005: 22). Lesser evil reasoning makes a virtue out of lowering accepted standards and surrendering safeguards on individual liberties. In the hands of government officials, it enables unrestrained presidential authority and a disregard for long-standing restraints on the conduct of war. Anyone remotely familiar with the history of twentieth-century Latin America will also be accustomed to ‘lesser evil’ excuses for human rights abuses, given their pervasiveness in the National Security Doctrine of numerous military dictatorships. Ignatieff is aware that a lesser evil ethics can take us down a slippery slope: ‘If a war on terror may require lesser evils, what will keep them from slowly becoming the greater evil? The only answer is democracy itself . . . The system of checks and balances and the division of powers assume the possibility of venality or incapacity in one institution or the other’ (2004: 10-11). This argument now seems rather credulous. Evidence gathered from Abu Ghraib, Guantanamo Bay and U.S. prisons in Afghanistan suggests that torture, the keeping of ‘ghost detainees’ and other violations of the Geneva Conventions were endemic within the system of military custody. By the time government officials weakly diverted blame to by denouncing a few low-ranking ‘bad apples’ in the 272nd Military Police Company, the damage had already been done, to the prisoners and to America’s standing in Iraq and the world. Even if the connection between a lesser evil ethics and a disregard for prisoners’ human rights is coincidental rather than intrinsic, lesser evil advocates have been wildly overconfident about the probity of government and the ability of democratic institutions to monitor closely the boundary between coercion and torture. The evidence points to the contrary view; that the executive branch, at the very least, fostered a legal setting in which prisoner abuse could flourish and excluded any congressional oversight. The monitoring procedures that were in place did not prevent such abuse from becoming widespread and symptomatic. The ‘lesser evil’ moral calculus that simplifies difficult decision making in an ‘age of terrorism’ is a little more complicated for others, and the DOJ memo should have at least demonstrated an awareness that the standard necessity defence case has been challenged comprehensively in jurisprudence and moral philosophy. In the 1970s, the late philosopher Bernard Williams carried out a critique of utilitarianism’s philosophy of the law so devastating that he concluded ‘the simple-mindedness of utilitarianism disqualifies it totally…the day cannot be far off in which we hear no more of it’ (1973: 150). Alas, this was the only part of Williams’ critique that was wide of the mark, since utilitarianism will probably always appeal to those longing for greater executive power. Williams examines a scenario analogous to the necessity defence cases found in the DOJ memo. He considers the case of a man, Jim, who is dropped into a South American village where he is the guest of honor. There, a soldier, Pedro, presents him with the dilemma of intentionally killing one man and saving another nineteen souls, whom Pedro was about to execute. Williams finds the utilitarian answer, that obviously Jim should kill one man to save nineteen, inadequate on a number of grounds. Generally stated, Williams’ position is that utilitarianism ignores individual integrity in its quest for the general good and it neglects the point that each of us are morally responsible for what we do, not what others do. Jim is responsible for his own actions and his not killing one man is not causal to Pedro’s subsequent killing of twenty. To advise Jim to torture or kill the one to save the many is to treat Jim as an impersonal and empty channel for effects in the world, or in Williams’ words, as a janitor of a system of values whose role is not to think or feel, but just to mop up the moral mess. The utilitarian perspective portrays an anxiety about the long-term psychological effects on the agent, say, a person’s feelings or remorse for an act of murder, as self-indulgent. It ignores the life projects to which Jim is committed, and his obligations to friends and family to act in a certain way It treats these commitments as irrational and of no consequence in its moral calculus of the greater good. In this critique, utilitarianism, of the kind that has characterized the legal counsel to President Bush in the ‘war on terror’, ignores individual moral agency and strips human life of what makes it worthwhile. Seeing persons as ends in themselves and not as means to other ends corresponds with a Kantian defence of human rights and liberal democracy more generally. In the struggle against Islamist terrorists, we are well advised to temper our desire for good consequences (which can seldom be predicted in advance) with an equal concern with intentions and integrity of motives. Consequences matter and integrity and good intentions are not in themselves sufficient. Yet developing an approach that is not overreliant on consequentialism and which foregrounds human agency, motivations and intentions could provide enduring grounds for defending human rights in the present climate. It could better equip us with the fundamental ethical principles to go about recombining human rights and security, and work through more carefully which suspensions of ordinary domestic laws and international rule of law are defensible, and which are not.

#### Specificity reduces the probability of their predictions because of the conjunctive fallacy and reduces the ability to cope with the highest magnitude impacts

Eliezer Yudkowsky 6, 8/31. Singularity Institute for Artificial Intelligence Palo Alto, CA. “Cognitive biases potentially affecting judgment of global risks, Forthcoming in Global Catastrophic Risks, eds. Nick Bostrom and Milan Cirkovic, singinst.org/upload/cognitive- biases.pdf

The conjunction fallacy similarly applies to futurological forecasts. Two independent sets of professional analysts at the Second International Congress on Forecasting were asked to rate, respectively, the probability of "A complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983" or "A Russian invasion of Poland, and a complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983". The second set of analysts responded with significantly higher probabilities. (Tversky and Kahneman 1983.) In Johnson et. al. (1993), MBA students at Wharton were scheduled to travel to Bangkok as part of their degree program. Several groups of students were asked how much they were willing to pay for terrorism insurance. One group of subjects was asked how much they were willing to pay for terrorism insurance covering the flight from Thailand to the US. A second group of subjects was asked how much they were willing to pay for terrorism insurance covering the round-trip flight. A third group was asked how much they were willing to pay for terrorism insurance that covered the complete trip to Thailand. These three groups responded with average willingness to pay of $17.19, $13.90, and $7.44 respectively. **According to probability theory,** adding additional detail **onto a story** mustrender the story less probable. It is less probable that Linda is a feminist bank teller than that she is a bank teller, since all feminist bank tellers are necessarily bank tellers. Yet **human psychology seems to follow the rule that** adding an additional detail can make the story more plausible**.** People might pay more for international diplomacy intended to prevent nanotechnological warfare by China, than for an engineering project to defend against nanotechnological attack from any source. The second threat scenario is less vivid and alarming, but the defense is more useful because it is more vague. More valuable still would be strategies which make humanity harder to extinguish without being specific to nanotechnologic threats - such as colonizing space, or see Yudkowsky (this volume) on AI. Security expert Bruce Schneier observed (both before and after the 2005 hurricane in New Orleans) that the U.S. government was guarding specific domestic targets against "movie-plot scenarios" of terrorism, at the cost of taking away resources from emergency-response capabilities that could respond to any disaster. (Schneier 2005.) **Overly detailed reassurances can also create** false perceptions of safety: "X is not an existential risk and you don't need to worry about it, because A, B, C, D, and E"; where the failure of any one of propositions A, B, C, D, or E potentially extinguishes the human species. "We don't need to worry about nanotechnologic war, because a UN commission will initially develop the technology and prevent its proliferation until such time as an active shield is developed, capable of defending against all accidental and malicious outbreaks that contemporary nanotechnology is capable of producing, and this condition will persist indefinitely." Vivid, specific scenarios **can inflate our probability estimates of security, as well as misdirecting defensive investments into needlessly narrow or implausibly detailed risk scenarios**. More generally, **people tend to** overestimate conjunctive probabilities **and** underestimate disjunctive probabilities. (Tversky and Kahneman 1974.) That is, people tend to overestimate the probability that, e.g., seven events of 90% probability will all occur. Conversely, people tend to underestimate the probability that at least one of seven events of 10% probability will occur. Someone judging whether to, e.g., incorporate a new startup, must evaluate the probability that many individual events will all go right (there will be sufficient funding, competent employees, customers will want the product) while also considering the likelihood that at least one critical failure will occur (the bank refuses a loan, the biggest project fails, the lead scientist dies). This may help explain why only 44% of entrepreneurial ventures survive after 4 years. (Knaup 2005.) Dawes (1988, p. 133) observes: 'In their summations lawyers avoid arguing from disjunctions ("either this or that or the other could have occurred, all of which would lead to the same conclusion") in favor of conjunctions. Rationally, of course, disjunctions are much more probable than are conjunctions.' **The scenario of** humanity going extinctin the next century **is a** disjunctive event**.** It could happen as a result of any of the existential risks discussed in this book - or some other cause which none of us foresaw. Yet for a futurist, disjunctions make for an awkward and unpoetic-sounding prophecy.

#### Deciding on the basis of the 1% risk calculation erodes priority-setting & triggers paralysis when action is needed.

David Meskill 9, professor at Colorado School of Mines and PhD from Harvard, “The "One Percent Doctrine" and Environmental Faith,” Dec 9, <http://davidmeskill.blogspot.com/2009/12/one-percent-doctrine-and-environmental.html>

Tom Friedman's piece today in the Times on the environment (http://www.nytimes.com/2009/12/09/opinion/09friedman.html?\_r=1) is one of the flimsiest pieces by a major columnist that I can remember ever reading. He applies Cheney's "one percent doctrine" (which is similar to the environmentalists' "precautionary principle") to the risk of environmental armageddon. But this doctrine is both intellectually incoherent and practically irrelevant. It is intellectually incoherent because it cannot be applied consistently in a world with many potential disaster scenarios. In addition to the global-warming risk, there's also the asteroid-hitting-the-earth risk, the terrorists-with-nuclear-weapons risk (Cheney's original scenario), the super-duper-pandemic risk, etc. Since each of these risks, on the "one percent doctrine," would deserve all of our attention, we cannot address all of them simultaneously. That is, even within the one-percent mentality, we'd have to begin prioritizing, making choices and trade-offs. But why then should we only make these trade-offs between responses to disaster scenarios? Why not also choose between them and other, much more cotidien, things we value? Why treat the unlikely but cataclysmic event as somehow fundamentally different, something that cannot be integrated into all the other calculations we make? And in fact, this is how we behave all the time. We get into our cars in order to buy a cup of coffee, even though there's some chance we will be killed on the way to the coffee shop. We are constantly risking death, if slightly, in order to pursue the things we value. Any creature that adopted the "precautionary principle" would sit at home - no, not even there, since there is some chance the building might collapse. That creature would neither be able to act, nor not act, since it would nowhere discover perfect safety. Friedman's approach reminds me somehow of Pascal's wager - quasi-religious faith masquerading as rational deliberation (as Hans Albert has pointed out, Pascal's wager itself doesn't add up: there may be a God, in fact, but it may turn out that He dislikes, and even damns, people who believe in him because they've calculated it's in their best interest to do so). As my friend James points out, it's striking how descriptions of the environmental risk always describe the situation as if it were five to midnight. It must be near midnight, since otherwise there would be no need to act. But it can never be five \*past\* midnight, since then acting would be pointless and we might as well party like it was 2099. Many religious movements - for example the early Jesus movement - have exhibited precisely this combination of traits: the looming apocalypse, with the time (just barely) to take action.

#### Traditional risk calculus locks in unlimited executive control---democratic controls are the best check on decision-making that sacrifices the whole world for power

Dr. Mary O’Brien 2k, Ph.D, environmental scientist and activist, 2000, (“Making Better Environmental Decisions,” Pg-xvii-xviii

This book is based on the understanding that it is not acceptable for people to tell you that the harms to which they will subject you and the world are safe or insignificant. You deserve to know good alternative to those harms, and you deserve to help decide which alternative will be chosen. Underlying this book, however, is a less explicitly stated personal belief, namely that we humans will never dredge up enough will to alter our habitual, destructive ways of behaving toward each other and the world unless we simultaneously employ information and emotion and a sense of relationship to others—other species, other cultures, and other generations. Using this information while divorced from emotion and using information while insulated from connection to a wide net of others are how destruction of the Earth is being accomplished. Risk assessment of narrow options is a classic example of using certain bits of information in such a way as to exclude feeling and to artificially sever connections of parts to the whole. Risk assessment rips you (and others) out of connection to the rest of the world and reduces you (if you are even considered at all in the risk assessment) to a number. You are then consigned to damage or death or “risk,” depending on how your number is shuffled around in models, assumptions, and formulas enduring “risk management.” Assessment of the pros and cons of a range of reasonable alternatives allows the connection to remain. The cultural emotions connected to a given alternative, for instance, can be a pro or a con, and may be both, depending on which sector of the community you inhabit. An advantage or a disadvantage of a given alternative can be social, religious, economic, scientific, or political. Risk assessment is one of the major methods by which parts (corporations such as Monsanto or Hyundai, “private land owners,” industrial nations) can act on their wants at the expense of wholes (eg, whole communities and countries, or the seventh generation from now) without appearing to be doing so. Risk assessment lets them appear simply “scientific” or “rational” as they numerically estimate whether or how many deaths or what birth defects will be caused, and ignore other regions of human experience that also matter to people. Always, some groups of humans will be trying to exercise their power at the expense of the whole. Decisions arrived at from risk assessment can be homicidal, biocidal, and suicidal, but they are made every day. Risk assessment is a premier process by which illegitimate exercise of power is justified. The stakes of installing alternatives to risk assessment, therefore, are the whole Earth (just as are the stakes of fashioning democratic control over corporations, or of requiring changes in behavior of those who have wreaked irreparable damage). Installing alternatives assessment is one step in the struggle to use information, feeling, and a sense of relationship to others to stop social-environmental madness.

**Constitutional constraints on the executive solves priority setting and increases the capacity to respond to large magnitude events without reducing true flexibility**

Stephen **Holmes 9**, Walter E. Meyer Professor of Law, New York University School of Law, “The Brennan Center Jorde Symposium on Constitutional Law: In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror”, April, California Law Review, 97 Calif. L. Rev. 301, Lexis

Policymakers misunderstand worst-case reasoning when they use it to hide from themselves and others the opportunity costs of their risky choices. The commission of this elementary fallacy by Vice President Cheney and other architects of the U.S. response to 9/11 has been extensively documented by Ron Suskind. n46 Allocating national-security resources without paying attention to opportunity costs is equivalent to spending binges under soft budget constraints, an arrangement notorious for its unwelcome consequences. One cannot reasonably multiply "the magnitude of possible harm from an attack" (for example, a nuclear sneak attack by al Qaeda using WMD supplied by Saddam Hussein) by the low "probability of such an attack" n47 and then conclude that one must act immediately to preempt that remote threat without [\*322] first scanning the horizon and inquiring about other low-probability catastrophic events that are equally likely to occur. One cannot say that a one-percent possibility of a terrifying Saddam-Osama WMD handoff justifies placing seventy percent of our national-security assets in Iraq. But this seems to be how the Bush administration actually "reasoned," perhaps because of its go-it-alone fantasies, as if scarce resources were not a problem. Or, perhaps those responsible for national security during the Bush years succumbed to commission bias, namely, the overpowering feeling, in the wake of a devastating attack, that inaction is intolerable. This uncontrollable urge to act is often experienced in emergencies, namely, in situations where decision makers need to do something but do not know what to do.¶ Among President Bush's many unfortunate bequests to President Obama is the desperate "readiness" problem that afflicts the American military, overstretched in Iraq and Afghanistan and therefore unprepared to meet a third crisis elsewhere in the world. This problem was a direct result of the Bush administration's failure to take scarcity of resources and opportunity costs into account. What secret and unaccountable executive action made possible, it turns out, was not flexible adaptation to the demands of the situation but rather profligacy, arbitrariness and a failure to set priorities in a semi-rational way. Defenders of the half-truth that the capacity to adapt is increased when rules are bent or broken seem to have a weak grasp of the elementary distinction between flexibility and arbitrariness.¶ The Founders, by contrast, understood quite well the difference between the flexible and the arbitrary. The ground rules for decision making that they built into the American constitutional structure were meant to maximize the first while minimizing the second. From their perspective, therefore, the question "Can there be too much power to fight terrorism?" is poorly formulated. The right question to ask is: can there be too much arbitrary executive action in the United States' armed struggle with al Qaeda, potentially wasting scarce resources that could be more usefully deployed in another way? And the answer to this second question is obviously "yes."

# 2AC

### AT: Vacated

#### Korematsu has not been overruled yet---it still serves as authority for rulings

David A. Harris 11, Professor of Law, University of Pittsburgh School of Law, Winter 2011, "On the Contemporary Meaning of Korematsu: 'Liberty Lies in the Hearts of Men and Women,'" Missouri Law Review, Volume 76, Number 1, law.missouri.edu/lawreview/files/2012/11/Harris.pdf

C. Not So Fast: Korematsu Is Not Dead After All ¶ But a closer look reveals that what Mark Twain once said of himself 52 also goes for Korematsu: reports of Korematsu ’s death have been greatly exaggerated. To put the matter in the legal vernacular, Korematsu remains “good law” – a case that continues to stand as governing law, and which has never actually been overruled. In fact, Korematsu continues to serve as authority for Supreme Court rulings well into the present era. It retains more vitality than most observers either realize or admit, and, for that and other reasons discussed here, the case has continuing relevance.

## Solvency

### 2AC Circumvention

#### Obama would comply with the court

Stephen I. Vladeck 9, Professor of Law and Associate Dean for Scholarship at American University Washington College of Law, senior editor of the peer-reviewed Journal of National Security Law and Policy, Supreme Court Fellow at the Constitution Project, and fellow at the Center on National Security at Fordham University School of Law, JD from Yale Law School, 3-1-2009, “The Long War, the Federal Courts, and the Necessity / Legality Paradox,” http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=facsch\_bkrev

Moreover, even if one believes that suspensions are unreviewable, there is a critical difference between the Suspension Clause and the issue here: at least with regard to the former, there is a colorable claim that the Constitution itself ousts the courts from reviewing whether there is a “Case[ ] of Rebellion or Invasion [where] the public Safety may require” suspension––and even then, only for the duration of the suspension.179 In contrast, Jackson’s argument sounds purely in pragmatism—courts should not review whether military necessity exists because such review will lead either to the courts affirming an unlawful policy, or to the potential that the political branches will simply ignore a judicial decision invalidating such a policy.180 Like Jackson before him, Wittes seems to believe that the threat to liberty posed by judicial deference in that situation pales in comparison to the threat posed by judicial review. ¶ The problem is that such a belief is based on a series of assumptions that Wittes does not attempt to prove. First, he assumes that the executive branch would ignore a judicial decision invalidating action that might be justified by military necessity.181 While Jackson may arguably have had credible reason to fear such conduct (given his experience with both the Gold Clause Cases182 and the “switch in time”),183 a lot has changed in the past six-and-a-half decades, to the point where I, at least, cannot imagine a contemporary President possessing the political capital to squarely refuse to comply with a Supreme Court decision. But perhaps I am naïve.184

## T

### 2AC T – Subsets

#### We meet---plan is across the board since we can’t use Korematsu for indefinite detention

**C/I – Substantial means a large amount**

**Dictionary.com 12**

sub·stan·tial   [suhb-stan-shuhl] Show IPA adjective 1. of ample or considerable amount, quantity, size, etc.: a substantial sum of money.

**Reasonability is uniquely applicable to determining whether an aff is substantial**

Linda **Stadler 93** “NOTE: Corrosion Proof Fittings v. EPA: Asbestos in the Fifth Circuit--A Battle of Unreasonableness ” Tulane Environmental Law Journal Summer, 1993 6 Tul. Envtl. L.J. 423

n3 Matthew J. McGrath, Note, Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking, 54 GEO. WASH. L. REV. 541, 546 n.30 (1986), (quoting H.R. REP. NO. 1980, 79th Cong., 2d Sess. 45 (1945)), reprinted in ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 11, 233, 279 (1945). The substantial evidence standard does however possess some ambiguity as to the definition of "substantial." See, e.g., Chemical Mfrs. Ass'n v. EPA, 899 F.2d 344, 359 (5th Cir. 1990) (stating that "'substantial' is an **inherently imprecise** word"). However, 'substantial' is generally **held to a reasonableness** standard, i.e., would a **reasonable mind** accept it as adequate to support a conclusion. E.g., Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

### 2AC T – WPA

#### Judicial review is a statutory restriction

Mortenson 11, Julian Davis Assistant Professor, University of Michigan Law School, “Review: Executive Power and the Discipline of History Crisis and Command: The History of Executive Power from George Washington to George W. Bush John Yoo. Kaplan, 2009. Pp vii, 524,” Winter 2011, University of Chicago Law Review 78 U. Chi. L. Rev. 377

At least two of Yoo's main examples of presidential power are actually instances of presidential deference to statutory restrictions during times of great national peril. The earliest is Washington's military suppression of the Whiskey Rebellion (III, pp 66-72), a domestic disturbance that Americans viewed as implicating adventurism by European powers and threatening to dismember the new nation. n60 The Calling Forth Act of 1792 n61 allowed the President to mobilize state militias under federal control, but included a series of mandatory procedural checks--including judicial [\*399] approval--that restricted his ability to do so. n62 Far from defying these comprehensive restrictions at a moment of grave crisis, Washington satisfied their every requirement in scrupulous detail. He issued a proclamation ordering the Whiskey Rebels to disperse. n63 When they refused to do so, he submitted a statement to Justice James Wilson of the Supreme Court describing the situation in Pennsylvania and requesting statutory certification. n64 Only when Wilson issued a letter precisely reciting the requisite statutory language (after first requiring the President to come back with authentication of underlying reports and verification of their handwriting n65) did Washington muster the troops. n66 Washington's compliance with statutory restrictions on his use of force continued even after his forces were in the field. Because Congress was not in session when he issued the call-up order, Washington was authorized by statute to mobilize militias from other states besides Pennsylvania--but only "until the expiration of thirty days after the commencement of the ensuing [congressional] session." n67 When it became clear that the Pennsylvania campaign would take longer than that, Washington went back to Congress to petition for extension of the statutory time limit that would otherwise have required him to [\*400] disband his troops. n68 Far from serving as an archetypal example of presidential defiance, the Whiskey Rebellion demonstrates exactly the opposite. FDR's efforts to supply the United Kingdom's war effort before Pearl Harbor teach a similar lesson. During the run-up to America's entry into the war, Congress passed a series of Neutrality Acts that supplemented longstanding statutory restrictions on providing assistance to foreign belligerents. Despite these restrictions, FDR sent a range of military assistance to the future Allies. n69 Yoo makes two important claims about the administration's actions during this period. First, he claims the administration asserted that "[a]ny statutory effort by Congress to prevent the President from transferring military equipment to help American national security would be of 'questionable constitutionality'" (III, p 300). Second, he suggests that American military assistance in fact violated the neutrality statutes (III, pp 295-301, 310, 327-28).

#### War powers authority refers to the President’s overall power over national defense and warmaking---includes the plan

Manget 91 Fred F, Assistant General Counsel with the CIA, "Presidential War Powers", 1991, media.nara.gov/dc-metro/rg-263/6922330/Box-10-114-7/263-a1-27-box-10-114-7.pdf

The President's war powers authority is actually a national defense power that exists at all times, whether or not there is a war declared by Congress, an armed conflict, or any other hostilities or fighting. In a recent case the Supreme Court upheld the revocation of the passport of a former CIA employee (Agee) and rejected his contention that certain statements of Executive Branch policy were entitled to diminished weight because they concerned the powers of the Executive in wartime. The Court stated: "History eloquently attests that grave problems of national security and foreign policy are by no means limited to times of formally declared war. " 3 ; Another court has said that the war power is not confined to actual engagements on fields of battle only but embraces every aspect of national defense and comprehends everything required to wage war successfully. 3 H A third court stated: "It is-and must be-true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means . "39 ¶ Thus, the Executive Branch's constitutional war powers authority does not spring into existence when Congress declares war, nor is it dependent on there being hostilities. It empowers the President to prepare for war as well as wage it, in the broadest sense. It operates at all times.

#### Authority is what the president may do not what the president can do

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

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

## CP

### 2AC Executive CP (Top Shelf)

#### Future presidents prevent solvency

Harvard Law Review 12, "Developments in the Law: Presidential Authority," Vol. 125:2057, www.harvardlawreview.org/media/pdf/vol125\_devo.pdf

The recent history of signing statements demonstrates how public opinion can effectively check presidential expansions of power by inducing executive self-binding. It remains to be seen, however, if this more restrained view of signing statements can remain intact, for **it relies on the promises of one branch — indeed of one person — to enforce and maintain the separation of powers**. To be sure, President Obama’s guidelines for the use of signing statements contain all the hallmarks of good executive branch policy: transparency, accountability, and fidelity to constitutional limitations. Yet, in practice, this apparent constraint (however well intentioned) may amount to little more than voluntary self-restraint. 146 Without a formal institutional check, it is unclear what mechanism will prevent the next President (or President Obama himself) from reverting to the allegedly abusive Bush-era practices. 147 Only time, and perhaps public opinion, will tell.

#### Exec fiat is a voter---avoids the core topic question by fiating away Obama’s behavior in the squo---no comparative lit means the neg wins every debate

Victor Hansen 12, Professor of Law, New England Law, New England Law Review, Vol. 46, pp. 27-36, 2011, “Predator Drone Attacks”, February 22, 2012, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009313>, PDF

Any checks on the President’s use of drone attacks must come domestically. In the domestic arena the two options are either the courts or Congress. As discussed above, the courts are institutionally unsuited and incapable of providing appropriate oversight. Congress is the branch with the constitutional authority, historical precedent, and institutional capacity to exercise meaningful and effective oversight of the President’s actions.

#### Courts key to prevent executive exploitation of legal loopholes

Robert Bejesky 13, M.A. Political Science (Michigan), M.A. Applied Economics (Michigan), LL.M. International Law (Georgetown), "ARTICLE: Dubitable Security Threats and Low Intensity Interventions as the Achilles' Heel of War Powers," Mississippi College Law Review 32 Miss. C. L. Rev. 9, Lexis

In tracing the involvement of the Supreme Court during the shift of war powers over the past half-century, the judiciary's role has been quite docile even though it plays a critical role as the official interpreter of the Constitution and can be a decision-maker to resolve disputes between the political branches. U.S. courts have affirmed the consensus view of congressional dominance in war powers and have never migrated from it. Moreover, in accepting certiorari and deciding cases, courts have affirmed that the Framers intended the judiciary to have a meaningful role in adjudicating separation of powers altercations involving foreign and military affairs. n450 The Court regularly accepted certiorari of war powers questions for nearly 190 years, but it became hesitant to examine the scope of the Commander-in-Chief authority n451 on political question, standing, ripeness, and mootness grounds after dozens of cases challenged presidential power over the Vietnam War. n452¶ The Court denied certiorari to draftees who challenged the constitutionality of the Vietnam War and the Gulf of Tonkin Resolution. n453 Perhaps most disconcerting about the Court's failure to address the claims is [\*63] that Congress repealed the Gulf of Tonkin Resolution after the war, n454 which would seem to merit challenges if one construes that there was a lack of authority when government officials drafted citizens, deployed troops to Vietnam, and waged war with an eventual revoke of authority. Commentators have vociferously argued that the Court should have addressed Vietnam War questions. n455 In a statement to Congress as the Vietnam War was ending, Senator Fulbright remarked: "Insofar as the consent of this body is said to derive from the Gulf of Tonkin Resolution, it can only be said that the resolution, like any other contract based on misrepresentation, in my opinion is null and void." n456 Justice Douglas maintained that "the question of an unconstitutional war is neither academic nor 'political.' " n457¶ The new precedent favoring abstention on cases involving use of force has continued. In the 1980s, members of Congress challenged President Reagan's limited use of the military in undeclared conflicts, but courts dismissed the cases as political questions. n458 In 1990, fifty-four members of Congress filed a case against President Bush for troop buildups in the Persian Gulf prior to the 1991 Gulf War, but the court dismissed the case as unripe. n459 The court assuredly did not reject authority to hear the case but noted that the judiciary should be used to decide the case or controversy on the constitutional provision "if the Congress decides that United States forces should not be employed in foreign hostilities, and if the Executive does not of its own volition abandon participation in such hostilities." n460 Congress enacted the Authorization for Use of Military Force Against Iraq Resolution months later. n461 Petitioners challenged President Clinton's airstrikes in Kosovo, but the court refused to hear the case. n462 Based on the ripeness doctrine, the federal court dismissed a suit brought by military families and members of Congress against George Bush in 2003 to enjoin military force against Iraq. n463¶ [\*64] It is possible for the judiciary to assist in "setting precedent right" and to ensure that Congress discharges constitutional responsibilities by either accepting or rejecting a proposed military action. n464 However, if there is no impasse and the court system does not address an issue or disputes are settled by political branch negotiation, the Court precedent that affirms the original understanding of constitutional war powers may be neglected when there are novel factual scenarios involving military action. With ambiguity, the Attorney General's Office of Legal Council ("OLC") and White House council could liberally construe precedent and potentially amplify the president's authority vis-a-vis Congress. n465 If the Executive abides by the legal advice and implements a controversially assertive action, Congress does not annul the action or fails to punish, reprimand, or officially denounce a presidential transgression, and the judiciary cashiers the issue, the situation may impart apparent precedent countenancing presidential expansionism even if Congress is in accord with the action. Without congressional assent, a future presidential action may be illegitimate or unconstitutional when premised on faulty precedent, and proponents of expanding presidential power may simply ignore faulty premises. These have been the dynamics of the judiciary's role in the separation of powers question over the past forty years, and this circumstance was abundantly clear during the Bush Administration.¶ Objective understandings of war powers were lost when hand-selected legal advisers provided sweeping, unreserved, and blatantly biased opinions. The Bush Administration "relied upon lawyers to pen justifications for controversial government activities" that derogated the law. n466 For example, just two weeks after 9/11, OLC advisor John Yoo furnished a legal memo contending that the President possessed "'independent and plenary' authority to 'use military force abroad.'" n467 Former OLC attorney Bruce Fein explains:¶ [\*65] ¶ OLC's customary role was to provide neutral legal advice to other agencies or Congress on constitutional issues ... It seems OLC is now acting as retained counsel to agencies to present [the] best defense of their actions from the perspective of an advocate, not as an impartial lawyer. n468¶ The judiciary is not reluctant to become involved in issues subsidiary to the use of force. The Court not only decided war power cases such as Hamdi v. Rumsfeld, n469 Rasul v. Bush, n470 Hamdan v. Rumsfeld n471 and Boumediene v. Bush, n472 but the decisions contradicted legal advice on detention and interrogation that was provided by Bush Administration attorneys. n473 In Hamdan, the Court held that the judiciary has the final authority to interpret treaties relating to the conduct of war, which meant that the Court was asserting authority to curtail the President's use of discretion as Commander-in-Chief as it relates to treaty interpretation. n474¶ Even with the dynamics of judicial abstention generally on use of force questions, there have been numerous opportunities to use force over the past several decades but not to use systematic presidential unilateralism. This may suggest that the WPR does normally function effectively as a warning to presidents and that it has not been considerably abused. n475 For example, presidents have expressly or impliedly upheld § 5(b) by observing the time limitations, n476 and as the prelude to the timeframe running, presidents have habitually provided notice and updates in accordance with § 3. n477 Nonetheless, there were some uses of force that may have violated the WPR. For example, President Obama's bombing operations on Libya were quite akin to President Clinton's bombing operations on Yugoslavia, but it is unclear whether these operations fall within the parameters of the WPR and whether unilateral bombing is a use of the military that would require a full vote count from Congress under the Constitution.¶ [\*66] ¶ IV. Conclusion¶ ¶ Based on the text of the Constitution, consensus, and practice up until the Korean War, Congress must authorize the President to use the military as Commander-in-Chief, who makes troop deployment decisions and authorizes military action to execute the war effort. n478 The Constitution enumerates that Congress funds, legislates over, and otherwise provides for the military and that the president is the caretaker of the military during peacetime. n479 Once Congress authorizes the President to deploy military force, Congress cannot interfere with the President's execution of orders but can limit, condition, and parameterize the use of force - and has. n480 The Framers agreed that this model of keeping the powers of war outside presidential prerogative was in the best interest of American democracy and the rest of the world. n481¶ The problem began with the Korean War because President Truman dispatched US soldiers into combat, without congressional assent, against a communist foe shortly after McCarthyism's witch hunts began terrorizing U.S. citizens suspected of holding communist beliefs. Red Scare II silenced Americans and members of Congress as Truman contended that he had the prerogative to deploy troops anywhere in the world without congressional authorization. If an underlying threat basis is incapable of being justified, shields criticism of government, is cognitively related to a use of force, and is later virtually universally condemned as an unnecessary overreaction, then the ramifications of that disgraceful period - such as presidential unilateralism in war powers - should also be purged. About a decade later, the Vietnam War was yet another disaster that led Congress to annul the Gulf of Tonkin Resolution and enact the War Powers Resolution ("WPR") to clarify the text of the Constitution and original intent.¶ The informational requirements of the War Powers Resolution have largely been adhered to, and all major uses of force since the WPR was adopted have been approved by Congress before presidents ordered the use of military force. However, there have been minor operations, including bombing and missile strikes by Reagan, Bush Sr., Clinton, and Obama, that did not place substantial numbers of U.S. troops in combat yet lacked an official congressional assent prior to the actions. The major uncertainty involves a President's use of secrecy through the national security apparatus or covert operations that could possibly amount to use of force under [\*67] the Constitution but would likely be permitted under the National Security Act. The major outlier to constitutional behavior was the second Bush Administration from 2001 to 2008. In this Administration, Congress provided two authorizations to the President to use force - the 2001 response to those who aided and abetted 9/11 and the 2002 Authorization for the Use of Force Against Iraq - but the Administration instead used the intelligence apparatus to craft conditions for war and to take some actions allegedly based on the Commander-in-Chief authority that violated congressional prerogatives. Likewise, President Bush used the intelligence apparatus to create an aura of endless threats that was a less intense form of McCarthyism. n482¶ With judicial hesitation to accept certiorari on use of force questions after the Vietnam War and without clear precedent in the face of controversy over separation of powers issues, advice from the President's legal counsel may expand into the arena of so-called inherent presidential authority in war powers. Blatantly biased legal advisory memos that contain faulty premises and reasoning, classified under national security protections until controversial actions are already taken, should not be regarded as legitimate opinions or considered precedent to expand presidential powers. The ingenuousness of this process and its ability to expand presidential power in a manner consistent with right-wing ideology are pellucid.

### Links to Ptix

#### Links to politics through bypassing debate

Billy Hallowell 13, writer for The Blaze, B.A. in journalism and broadcasting from the College of Mount Saint Vincent in Riverdale, New York and an M.S. in social research from Hunter College in Manhattan, “HERE’S HOW OBAMA IS USING EXECUTIVE POWER TO BYPASS LEGISLATIVE PROCESS” Feb. 11, 2013, <http://www.theblaze.com/stories/2013/02/11/heres-how-obamas-using-executive-power-to-bylass-legislative-process-plus-a-brief-history-of-executive-orders/>

“In an era of polarized parties and a fragmented Congress, the opportunities to legislate are few and far between,” Howell said. “So presidents have powerful incentive to go it alone. And they do.”¶ And the political opposition howls.¶ Sen. Marco Rubio, R-Fla., a possible contender for the Republican presidential nomination in 2016, said that on the gun-control front in particular, Obama is “abusing his power by imposing his policies via executive fiat instead of allowing them to be debated in Congress.”¶ The Republican reaction is to be expected, said John Woolley, co-director of the American Presidency Project at the University of California in Santa Barbara.¶ “For years there has been a growing concern about unchecked executive power,” Woolley said. “It tends to have a partisan content, with contemporary complaints coming from the incumbent president’s opponents.”

### AT: Prez Powers NB

#### Judicial involvement is key to the credibility of detention decisions

Matthew C Waxman 9, Professor of Law; Faculty Chair, Roger Hertog Program on Law and National Security, “Legislating the War on Terror: An Agenda for Reform”, November 3, Book

Judicial review can help safeguard liberty and enhance the credibility at home and abroad of administrative detention decisions by ensuring the neutrality of the decisionmaker and publicly certifying the legality of the detention in question. Most calls for reform of existing detention laws start with a 47 strong role for courts. Some commentators believe that a special court is needed, perhaps a “national security court” made up of designated judges who would build expertise in terrorism cases over time. 16 Others suggest that the Foreign Intelligence Surveillance Court already has judges with expertise in handling sensitive intelligence matters and mechanisms in place to ensure secrecy, so its jurisdiction ought to be expanded to handle detention cases. 17 Still others insist that specialized terrorism courts are dangerous; the legitimacy of a detention system can best be ensured by giving regular, generalist judges a say in each decision. ¶ Adversarial process and access to attorneys can help further protect liberty and enhance the perceived legitimacy of detention systems. As with judicial review, however, proposals tend to split over how best to organize and ensure that process. Some argue that habeas corpus suits are the best check on administrative detention. 18 Others argue that administrative detention decisions should be contested at an early stage by a lawyer of the detainee’s choosing. 19 Still others recognize an imperative need for secrecy and deep expertise in terrorism and intelligence matters that calls for designating a special “defense bar” operated by the government on detainees’ behalf.¶ The issue of secrecy runs in tension with a third common element of procedural and institutional reform proposals: openness and transparency. The Bush administration’s approach was considered by some to be prone to error in part because of its excessive secrecy and hostility to the prying courts and Congress as well as to the press and advocacy groups. Critics and reformists argue that hearings should be open or at least partially open and that judgments should be written so that they can be scrutinized later by the public or congressional oversight committees; that, they claim, would help put pressure on the executive branch to exercise greater care in deciding which detention cases to pursue and put pressure on adjudicators to act in good faith and with more diligence.¶ These three elements of procedural design reform— judicial review, adversarial process, and transparency— may help reduce the likelihood of mistakes and restore the credibility of detention decisionmaking. Rarely, though, do the discussions pause long on the antecedent question of what it is that the courts— however constituted— will evaluate. Judicial review of what? A meaningful opportunity to contest what with the assistance of counsel? Transparent determinations of what?

### AT: Indo Pak

#### No Indo-Pak war

Mutti 9— Master’s degree in International Studies with a focus on South Asia, U Washington. BA in History, Knox College. over a decade of expertise covering on South Asia geopolitics, Contributing Editor to Demockracy journal (James, 1/5, Mumbai Misperceptions: War is Not Imminent, http://demockracy.com/four-reasons-why-the-mumbai-attacks-wont-result-in-a-nuclear-war/)

Fearful of imminent war, the media has indulged in frantic hand wringing about Indian and Pakistani nuclear arsenals and renewed fears about the Indian subcontinent being “the most dangerous place on earth.” As an observer of the subcontinent for over a decade, I am optimistic that war will not be the end result of this event. As horrifying as the Mumbai attacks were, they are not likely to drive India and Pakistan into an armed international conflict. The media frenzy over an imminent nuclear war seems the result of the media being superficially knowledgeable about the history of Indian-Pakistani relations, of feeling compelled to follow the most sensationalistic story, and being recently brainwashed into thinking that the only way to respond to a major terrorist attack was the American way – a war. Here are four reasons why the Mumbai attacks will not result in a war: 1. For both countries, a war would be a disaster. India has been successfully building stronger relations with the rest of the world over the last decade. It has occasionally engaged in military muscle-flexing (abetted by a Bush administration eager to promote India as a counterweight to China and Pakistan), but it has much more aggressively promoted itself as an emerging economic powerhouse and a moral, democratic alternative to less savory authoritarian regimes. Attacking a fledgling democratic Pakistan would not improve India’s reputation in anybody’s eyes. The restraint Manmohan Singh’s government has exercised following the attacks indicates a desire to avoid rash and potentially regrettable actions. It is also perhaps a recognition that military attacks will never end terrorism. Pakistan, on the other hand, couldn’t possibly win a war against India, and Pakistan’s military defeat would surely lead to the downfall of the new democratic government. The military would regain control, and Islamic militants would surely make a grab for power – an outcome neither India nor Pakistan want. Pakistani president Asif Ali Zardari has shown that this is not the path he wants his country to go down. He has forcefully spoken out against terrorist groups operating in Pakistan and has ordered military attacks against LeT camps. Key members of LeT and other terrorist groups have been arrested. One can hope that this is only the beginning, despite the unenviable military and political difficulties in doing so. 2. Since the last major India-Pakistan clash in 1999, both countries have made concrete efforts to create people-to-people connections and to improve economic relations. Bus and train services between the countries have resumed for the first time in decades along with an easing of the issuing of visas to cross the border. India-Pakistan cricket matches have resumed, and India has granted Pakistan “most favored nation” trading status. The Mumbai attacks will undoubtedly strain relations, yet it is hard to believe that both sides would throw away this recent progress. With the removal of Pervez Musharraf and the election of a democratic government (though a shaky, relatively weak one), both the Indian government and the Pakistani government have political motivations to ease tensions and to proceed with efforts to improve relations. There are also growing efforts to recognize and build upon the many cultural ties between the populations of India and Pakistan and a decreasing sense of animosity between the countries. 3. Both countries also face difficult internal problems that present more of a threat to their stability and security than does the opposite country. If they are wise, the governments of both countries will work more towards addressing these internal threats than the less dangerous external ones. The most significant problems facing Pakistan today do not revolve around the unresolved situation in Kashmir or a military threat posed by India. The more significant threat to Pakistan comes from within. While LeT has focused its firepower on India instead of the Pakistani state, other militant Islamic outfits have not. Groups based in the tribal regions bordering Afghanistan have orchestrated frequent deadly suicide bombings and clashes with the Pakistani military, including the attack that killed ex-Prime Minister Benazir Bhutto in 2007. The battle that the Pakistani government faces now is not against its traditional enemy India, but against militants bent on destroying the Pakistani state and creating a Taliban-style regime in Pakistan. In order to deal with this threat, it must strengthen the structures of a democratic, inclusive political system that can also address domestic problems and inequalities. On the other hand, the threat of Pakistani based terrorists to India is significant. However, suicide bombings and attacks are also carried out by Indian Islamic militants, and vast swaths of rural India are under the de facto control of the Maoist guerrillas known as the Naxalites. Hindu fundamentalists pose a serious threat to the safety of many Muslim and Christian Indians and to the idea of India as a diverse, secular, democratic society. Separatist insurgencies in Kashmir and in parts of the northeast have dragged on for years. And like Pakistan, India faces significant challenges in addressing sharp social and economic inequalities. Additionally, Indian political parties, especially the ruling Congress Party and others that rely on the support of India’s massive Muslim population to win elections, are certainly wary about inflaming public opinion against Pakistan (and Muslims). This fear could lead the investigation into the Mumbai attacks to fizzle out with no resolution, as many other such inquiries have. 4. The international attention to this attack – somewhat difficult to explain in my opinion given the general complacency and utter apathy in much of the western world about previous terrorist attacks in places like India, Pakistan, and Indonesia – is a final obstacle to an armed conflict. Not only does it put both countries under a microscope in terms of how they respond to the terrible events, it also means that they will feel international pressure to resolve the situation without resorting to war. India and Pakistan have been warned by the US, Russia, and others not to let the situation end in war. India has been actively recruiting Pakistan’s closest allies – China and Saudi Arabia – to pressure Pakistan to act against militants, and the US has been in the forefront of pressing Pakistan for action. Iran too has expressed solidarity with India in the face of the attacks and is using its regional influence to bring more diplomatic pressure on Pakistan.

## DA

### 2AC Drone Shift DA

#### Drone Shift Locked-In

Jay Lefkowitz 13, senior lawyer and former domestic policy advisor to President George W. Bush and John O'Quinn, former DOJ official in the Bush administration, Financial Times, "Drones are no substitute for detention", March 4, www.ft.com/cms/s/0/dae6552c-84c2-11e2-891d-00144feabdc0.html#axzz2dZnIVyqb

Memo to all those critics of Guantánamo Bay: beware what you wish for. The nomination of John Brennan to head the CIA was put on hold, in no small part because of the growing debate over the use of drone strikes to kill suspected high-value al-Qaeda operatives and other alleged terrorists. President Barack Obama’s administration defends these strikes as “legal”, “ethical”, “wise” and even “humane”. Opponents characterise them as an aggrandisement of executive power in which the president becomes judge, jury and executioner. Sound familiar? It should – because it parallels the debate over the policy of detaining terrorist suspects at Guantánamo that punctuated most of George W. Bush’s time in office.¶ In the past four years, there has been a dramatic shift from detention to drone strikes as the tool of choice for removing al-Qaeda operatives from the field of battle. They have reportedly been used more than 300 times in Pakistan alone by the Obama administration, at least six times more than under Mr Bush. They inevitably come with collateral damage. Meanwhile, not one detainee has been transferred to Guantánamo, and the US has largely outsourced the running of the detention facility at Bagram air base to the Afghan government. Rather than capture enemies and collect valuable information, this administration prefers to pick them off. In short, every successful drone strike is another wasted intelligence-gathering opportunity.¶ Lost amid recent hysteria over the drone programme is the question of why – when detention produces little collateral damage – there appears to be little appetite for capturing and questioning suspects. The answer: it poses hard choices for an administration fearful of the criticism directed at its predecessors – one that in effect abandoned its efforts to close Guantánamo, and came round largely to defending Bush-era policies regarding detention, but only very reluctantly.¶ Detention requires the government to decide: when is a detainee no longer a threat? Should they be tried, and where? When, where and how can they can be repatriated? What intelligence can be shared with a court or opposing counsel? And, one of the hardest questions of all: what if you release a detainee and they take up arms again?¶ On top of that, it raises questions about intelligence-gathering, a primary mission at Guantánamo. Indeed, it has been widely reported that intelligence from detainees helped lead the US to Osama bin Laden. But how is it to be gathered? What techniques are permissible? Moreover, accusations of torture are easily made – it is literally part of the al-Qaeda play book to do so – but hard to debunk without compromising intelligence.¶ By contrast, drone strikes are easy. With a single key stroke, a suspected enemy is eliminated once and for all, with no fuss, no judicial second-guessing and no legions of lawyers poised to challenge detention. Indeed, one of the unintended consequences of the criticism of Guantánamo is to make drone strikes more attractive than detention for removing al-Qaeda operatives from the field of battle.¶ Yet, even as potential intelligence assets are bombed out of existence, the information trail from detainees captured 10 years ago grows cold. At the same time, al-Qaeda evolves and expands. What could we have learnt from even a handful of the high-value operatives killed in drone strikes?¶ We do not dispute that use of drones against al-Qaeda is a legitimate part of the president’s powers as commander-in-chief, and we have doubts about some proposals that purport to circumscribe that authority. But it is clear this administration is using them as a substitute for capture, detention and intelligence-gathering. The current debate highlights the need for Congress and the administration to refocus their efforts on developing a sensible, sustainable policy for detention of foreign enemy combatants – in which enemies are safely held far from US soil, intelligence is actively gathered and justice promptly administered through military courts – instead of taking the easy way out.

#### No link

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

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

### AT: SCS

#### Economics prevent conflict escalation

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

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

### 2AC Deference

#### No deference now---Hamdi and Hamdan pounds

Martin S. Leitner 11, Professor of International Law, Fordham Law School, Judicial Foreign Relations Authority, 2011,

“After 9/11,” http://www.nylslawreview.com/wordpress/wp-content/uploads/2011/08/Flaherty-56-1.pdf

For a time the forces of judicial isolationism appeared to have gained traction and may yet carry the day. It is all the more surprising, then, that the Supreme Court reasserted the judiciary’s traditional foreign affairs role in the areas in which its opponents assert deference is most urgent—national security, terrorism, and war. Yet so far, in every major case arising out of 9/11, the Court has rejected the position staked out by the executive branch, even when supported by Congress. At critical points, moreover, each of these rejections involved the Court reclaiming its primacy in legal interpretation, an area in which advocates of judicial deference have appeared to make substantial progress. The Court nonetheless rejected deference in statutory construction in Rasul v. Bush. 16 It took the same tack with regard to treaties in Hamdan v. Rumsfeld.17 It further rejected deference in constitutional interpretation in both Hamdi v. Rumsfeld18 and Boumediene v. Bush. 19 Together, these cases represent a stunning reassertion of the judiciary’s proper role in foreign relations. Whether reassertion will mean restoration, however, still remains to be seen.

#### Judicial review establishes credibility---key to make soft and hard power effective

Dr. Barak Mendelsohn 10, Ph.D., assistant professor of political science at Haverford College and a senior fellow of FPRI. Author of Combating Jihadism: American Hegemony and Interstate Cooperation in the War on Terrorism, June 2010, "The Question of International Cooperation in the War on Terrorism", <http://www.fpri.org/enotes/201006.mendelsohn.cooperationwarterror.html>

Going against common conceptions, I argue that the United States sought to advance more than what it viewed as simply its own interest. The United States stands behind multiple collaborative enterprises and should be credited for that. Nevertheless, sometimes it has overreached, sought to gain special rights other states do not have, or presented strategies that were not compatible with the general design of the war on terrorism, to which most states subscribed. When it went too far, the United States found that, while secondary powers could not stop it from taking action, they could deny it legitimacy and make the achievement of its objectives unattainable. Thus, despite the common narrative, U.S. power was successfully checked, and the United States found the limitations of its power, even under the Bush administration. Defining Hegemony Let me begin with my conception of hegemony. While the definition of hegemony is based on its material aspects—the preponderance of power—hegemony should be understood also a part of a social web comprised of states. A hegemon relates to the other states in the system not merely through the prism of power balances, but through shared norms and a system of rules providing an umbrella for interstate relations. Although interstate conflict is ubiquitous in international society and the pursuit of particularistic interests is common, the international society provides a normative framework that restricts and moderates the hegemon's actions. This normative framework accounts for the hegemon's inclination toward orderly and peaceful interstate relations and minimizes its reliance on power. A hegemon’s role in the international community relies on legitimacy. Legitimacy is associated with external recognition of the hegemon’s right of primacy, not just the fact of this primacy. States recognize the hegemon’s power, but they develop expectations that go beyond the idea that the hegemon will act as it wishes because it has the capabilities to do so. Instead, the primacy of the hegemon is manifested in the belief that, while it has special rights that other members of the international society lack, it also has a set of duties to the members of the international society. As long as the hegemon realizes its commitment to the collective, its position will be deemed legitimate. International cooperation is hard to achieve. And, in general, international relations is not a story of harmony. A state’s first inclination is to think about its own interests, and states always prefer doing less over doing more. The inclination to pass the buck or to free ride on the efforts of others is always in the background. If a hegemon is willing to lead in pursuit of collective interests and to shoulder most of the burden, it can improve the prospects of international cooperation. However, even when there is a hegemon willing to lead a collective action and when states accept that action is needed, obstacles may still arise. These difficulties can be attributed to various factors, but especially prominent is the disagreement over the particular strategy that the hegemon promotes in pursuing the general interest. When states think that the strategy and policies offered by the hegemon are not compatible with the accepted rules of “rightful conduct” and break established norms, many will disapprove and resist. Indeed, while acceptance of a hegemon’s leadership in international society may result in broad willingness to cooperate with the hegemon in pursuit of shared interests it does not guarantee immediate and unconditional compliance with all the policies the hegemon articulates. While its legitimacy does transfer to its actions and grants some leeway, that legitimacy does not justify every policy the hegemon pursues—particularly those policies that are not seen as naturally deriving from the existing order. As a result, specific policies must be legitimated before cooperation takes place. This process constrains the hegemon’s actions and prevents the uninhibited exercise of power.

#### Judicial review increases the legitimacy of gov flex---prevents more intrusive crackdowns

Benjamin Wittes 8, is a Senior Fellow in Governance Studies at the Brookings Institution, where he is the Research Director in Public Law, 2008, “The Necessity and Impossibility of Judicial Review,” https://webspace.utexas.edu/rmc2289/National%20Security%20and%20the%20Courts/Law%20and%20the%20Long%20War%20%20Chapter%204.pdf

WE COME, then, to the question of what judicial review ought to look like in the war on terror if one accepts that it should exist more robustly than the administration prefers but should not be of an unbridled or general nature, as human rights advocates wish to see. The answer is conceptually simple, though devilishly complicated in operation: Judicial review should be designed for the relatively narrow purpose of holding the executive to clearly articulated legislative rules, not to the often vague standards of international legal instruments that have not been implemented through American law. Judges should have an expanded role in the powers of presidential preemption in the antiterrorism arena, for the judiciary is essential to legitimizing the use of those powers. Without them, the powers themselves come under a barrage of criticism which they cannot easily withstand. And eventually the effort to shield them from judicial review fails, and the review that results from the effort is more intrusive, more suspicious, and less accommodating of the executive's legitimate need for operational flexibility. Judges, in other words, should be a part of the larger rules the legislature will need to write to govern the global fight against terrorism. Their role within these legal regimes will vary-from virtually no involvement in cases of covert actions and overseas surveillance to extensive involvement in cases of long-term detentions. The key is that the place of judges within those systems is not itself a matter for the judges to decide. The judiciary must not serve as the designer of the rules.

#### Ruling on war powers doesn’t affect PQD because it’s justified based on legal voids---and it prevents future judicial meddling---Boumediene proves

Lawyer Kristen L. Richer 11, graduated from University of California, Santa Barbara, B.A., 2006, Order of the Coif, Florence Allen Scholar New York University School of Law, J.D., 2010, Senior Notes Editor, New York University Law Review, is now employed by Patterson Belknap Webb & Tyler LLP, March 14th, 2011, "The Functional Political Question Doctrine and the Justiciability of Employee Tort Suits Against Military Service Contractors," New York University Law Review, Vol. 85, No. 2, 2010

B. The Legal Void Inquiry¶ As part of the political question analysis, courts analyze a matter to determine whether there is a regulatory gap that requires judicial intervention, that is, a legal void. A legal void might occur in one of two manners. The first occurs where the political branches have failed to regulate, whether through inadvertent omission or intentional design.38 In such instances, courts will step in to establish the rule of law. The second way, far more common, occurs where a coordinate branch has regulated a field, but courts find that regulation unconstitutional because it inadequately protects the relevant constitutional interests at stake or because it is beyond the scope of permissible regulation by that branch.¶ Often such inadequate regulation is present when the coordinate branches have perverse incentives to under-regulate or they are ill equipped to impose structural limitations. In these instances, judicial review serves two purposes. First, it can impose substantive standards that accord with constitutional requirements. Second, and more importantly, it can police the outer bounds of political power, thereby realigning the coordinate branches’ incentives to regulate according to constitutional standards and, in the long term, lessening the need for judicial review.¶ Consider, as an example, Justice Brennan’s majority opinion in Baker. The Tennessee apportionment scheme presented a canonical example of a legal void. Because the case involved the apportionment of legislative districts, a process crucial to the functioning of political elections, abstention would have left the issue in the hands of the Tennessee legislature, which had every incentive to gerrymander and disenfranchise certain populations in order to ensure its own reelection. The citizens dissatisfied with the system were sufficiently disenfranchised that neither an election nor an attempt at a constitutional amendment would afford any means of political remedy.39 While a formal or narrow institutional capacity–focused approach would have acknowledged that a political branch was better equipped to handle the matter, the Court recognized based on a functional analysis that a judicial remedy was a necessary structural check on the enforcement of constitutional voting interests under the Equal Protection Clause.40 To put it differently, concerns about manageability and standard setting aside, the Court held that prudence dictated that the judiciary intervene because it was the only branch with the proper incentives to do so. Thus, to Justice Brennan, functional concerns regarding the structural maintenance of the separation of powers and the system of checks and balances trumped concerns regarding the court’s institutional capacity to decide the matter.¶ Two more recent instances of the Court’s taking the Legal Void approach are the controversial decisions in Bush v. Gore41 and Boumediene v. Bush.42 Both cases present compelling examples of the sort of logistical manageability problems that could have implicated the Baker factors and barred justiciability. Yet, in both instances, the Court found no political question, recognizing the presence of a legal void and the need for judicial cure.¶ The Court’s 2000 decision in Bush v. Gore was shocking for many, largely because of what was at stake: the presidential election.43 The Court’s decision, which held that the Florida Supreme Court’s order to recount ballots was a violation of the Equal Protection Clause, decided the election in favor of George W. Bush and in so doing ignited academic debate across the country. Liberals wondered whether the Equal Protection Clause supported such a reading and whether the Court had any business involving itself in a case so fraught with politics.44 Many argued that Bush v. Gore was a classic instance in which formal delegation and functional concerns as to manageability and institutional capacity counseled against judicial intervention.45 A closer look, however, reveals that the Court’s actions can be more appropriately understood as an application of the Legal Void Inquiry.¶ Many acknowledged that there was a pressing need for some resolution of the election, whatever the outcome.46 For over a month, tensions had run high as the election stalled and the nation awaited announcement of its new president. Resolution from within the political branches was arguably unattainable, with Congress and the nation split so clearly along political lines. With the political branches at a standstill, only the Court was positioned to act quickly to resolve a political, structural defect that was paralyzing the nation and drawing increased attention in the international community.47 It was due to these circumstances that prudence gave way to necessity, and the Legal Void Inquiry model governed.¶ Seven years later, the Court again allowed necessity to overcome the Baker factors, filling the void left when Congress and the Executive failed to regulate adequately detainee treatment at Guantanamo Bay. In Boumediene v. Bush, the Court ruled that limiting detainees’ process to military commissions was a constitutionally inadequate alternative to the writ of habeas corpus, and that, as a result, access to the federal courts could not be denied.48 In doing so, the Court bypassed the functional considerations regarding manageability that might otherwise have militated against judicial involvement. The case was notable on two fronts. First, the fact that detainee treatment is so closely tied to the exercise of military discretion would normally have dictated judicial abstention in recognition of the coordinate branches’ superior expertise in the realm of military affairs and national security.49 Second, Congress had made it abundantly clear in the years preceding Boumediene that it did not want the judiciary involved in such determinations. Congress attempted to strip the Court of jurisdiction over detainees’ habeas claims through the Detainee Treatment Act of 200550 and the Military Commission Act of 2006.51 Indeed, it was only in the wake of a barrage of reports and testimony regarding the failings of the military commission system that Congress had set up as an alternative to habeas review that the Court acted.52 Boumediene presented the Court with a legal void— one that Congress and the Executive had intentionally created to evade Article III judicial review.53 In reasserting its power, the Court acted to ensure individual rights and to impose a structural check on the coordinate branches.**¶** In the wake of Bush v. Gore and Boumediene, many wondered whether the existence of a legal void was all the Court needed to decline review under the political question doctrine. In each case, the Court’s decision to grant review left unclear whether concerns about institutional capacity held any weight in the inquiry.54

#### Continued unfettered deference ensures adventurism and global instability

Ann Scales 12, University of Denver Sturm College of Law, and Laura Spitz, University of Colorado Law School, 2012, “The Jurisprudence of the Military-Industrial Complex”, Seattle Journal for Social Justice, <http://digitalcommons.law.seattleu.edu/sjsj/vol1/iss3/51>

So, what is the jurisprudence of the military-industrial complex? The short answer is this: the military-industrial complex has arrived at a comfy situation where it is either exempt from the rule of law, or else gets to make every decision that informs what the rule of law would require in a given situation. It is kind of like having your cake and eating it with the Lord. Eisenhower could have no idea how huge, seamless, and synergistic this complex would become, including not just weapons manufacture, but virtually all relations of law, production, and populations in the world. I am going to take a couple of minutes to spell out how the military side of this complex presently works, erasing boundaries with industrial interests, and indeed, with any other legally recognized interests at all. First, our nation’s history and legitimacy rest upon a separation of military power from democratic governance. For that reason, the armed forces are subject to constitutional constraint. Second, however, as an aspect of separation of powers, courts try not to interfere in areas of foreign policy and military affairs. Often this is referred to as the “political question” doctrine, a determination that a matter is beyond the capabilities of judges. The strongest argument for this deference is that the political branches—or the military itself—have superior expertise in military matters. That may be true in some situations. I am not sure, for example, the Supreme Court would have been the best crowd to organize the invasion of Normandy. But what we now have is an increasingly irrational deference. 7 Consider three cases: a. In Korematsu v. United States, 8 the Supreme Court said the internment of Japanese-Americans at the beginning of 1942 was constitutional, based upon a military assessment of the possibility of espionage in preparation for a Japanese invasion of the United States. It turns out that the information provided by the military to the Supreme Court was falsified. 9 But note two things: (1) the nation was in the midst of a declared world war, and (2) in subsequent less urgent circumstances, Korematsu would seem to argue strongly for military justifications to have to be based upon better, more reliable information than was offered there. b. In the 1981 case of Rostker v. Goldberg , 10 the Supreme Court decided that it was constitutional for Congress to exclude women from the peacetime registration of potential draftees, even though both the Department of Defense and the Army Chief of Staff had testified that including women would increase military readiness. But Congress got the benefit of the military deference doctrine as a cover for what I think was a sinister political purpose—to protect the manliness of war—and the Supreme Court felt perfectly free to ignore what those with the real expertise had to say . c. Most recently, in Hamdi v. Rumsfeld , 11 the Fourth Circuit held that a U.S. citizen who had been designated an “enemy combatant” 12 could be detained indefinitely without access to counsel. In this case, however, not only is there no declared war, 13 but also, the only evidence regarding Mr. Hamdi was a two-page affidavit by a Defense Department underling, Mr. Mobbs. Mobbs stated that Mr. Hamdi was captured in Afghanistan, and had been affiliated with a Taliban military unit. The government would not disclose the criteria for the “enemy combatant” designation, the statements of Mr. Hamdi that allegedly satisfied those criteria, nor any other bases for the conclusion of Taliban “affiliation.” 14 And that is as good as the evidence for life imprisonment without trial has to be. Deference to the military has become abdication. In other words, what we presently have is not civilian government under military control, but something potentially worse, a civilian government ignoring military advice, 15 but using the legal doctrine of military deference for its own imperialist ends. Third, the gigantic military establishment and permanent arms industry are now in the business of justifying their continued existences. This justification is done primarily, as you know, by retooling for post-Cold War enemies—the so-called “rogue states ”—while at the same time creating new ones, for example by arming corrupt regimes in Southeast Asia. 16 I was reminded of this recently when we went to see comedian Kate Clinton. She thought Secretary Powell had taken too much trouble in his presentation attempting to convince the Security Council that Iraq had weapons of mass destruction. 17 Why not, she asked, “just show them the receipts?” Fourth, we have seen the exercise of extraordinary influence by arms makers on both domestic and foreign policy. For domestic pork barrel and campaign finance reasons, obsolete or unproven weapons systems continue to be funded even when the military does not want them! 18 And, just when we thought we had survived the nuclear arms race nightmare, the United States has undertaken to design new kinds of nuclear weapons, 19 even when those designs have little military value. 20 Overseas, limitations on arms sales are being repealed, and arms markets that should not exist are being constantly expanded 21 for the sake of dumping inventory, even if those weapons are eventually used for “rogue” purposes by rogue states. This system skews security considerations, and militarizes foreign policy. Force has to be the preferred option because other conduits of policy are not sufficiently well-funded. Plus, those stockpiled weapons have got to be used or sold so that we can build more.

### 2AC Debt Ceiling DA

#### Won’t pass---GOP irrational

Paul Krugman 10/1, Professor of Economics and International Affairs at Princeton, “Commentary: Rebels without a clue,” http://www.rutlandherald.com/article/20131001/OPINION04/710019982

No sane political system would run this kind of risk. But we don’t have a sane political system; we have a system in which a substantial number of Republicans believe that they can force President Barack Obama to cancel health reform by threatening a government shutdown, a debt default, or both, and in which Republican leaders who know better are afraid to level with the party’s delusional wing. For they are delusional, about both the economics and the politics.¶ On the economics: Republican radicals generally reject the scientific consensus on climate change; many of them reject the theory of evolution, too. So why expect them to believe expert warnings about the dangers of default? Sure enough, they don’t: The GOP caucus contains a significant number of “default deniers,” who simply dismiss warnings about the dangers of failing to honor our debts.¶ Meanwhile, on the politics, reasonable people know that Obama can’t and won’t let himself be blackmailed in this way, and not just because health reform is his key policy legacy. After all, once he starts making concessions to people who threaten to blow up the world economy unless they get what they want, he might as well tear up the Constitution. But Republican radicals — and even some leaders — still insist that Obama will cave in to their demands.¶ So how does this end? The votes to fund the government and raise the debt ceiling are there, and always have been: Every Democrat in the House would vote for the necessary measures, and so would enough Republicans. The problem is that GOP leaders, fearing the wrath of the radicals, haven’t been willing to allow such votes. What would change their minds?

#### The DA is not intrinsic – it’s within the agential ambit of the USFG to do the plan and pass debt ceiling

#### Fiat means the plan passes instantaneously and doesn’t cost capital

#### PC low and fails for fiscal fights

Greg Sargent 9-12, September 12th, 2013, "The Morning Plum: Senate conservatives stick the knife in House GOP leaders," Washington Post, factiva

All of this underscores a basic fact about this fall's fiscal fights: Far and away the dominant factor shaping how they play out will be the divisions among Republicans. There's a great deal of chatter (see Senator Bob Corker for one of the most absurd examples yet) to the effect that Obama's mishandling of Syria has diminished his standing on Capitol Hill and will weaken him in coming fights. But those battles at bottom will be about whether the Republican Party can resolve its internal differences. Obama's "standing" with Republicans -- if it even could sink any lower -- is utterly irrelevant to that question.¶ The bottom line is that, when it comes to how aggressively to prosecute the war against Obamacare, internal GOP differences may be unbridgeable. Conservatives have adopted a deliberate strategy of deceiving untold numbers of base voters into believing Obamacare will be stopped outside normal electoral channels. Central to maintaining this fantasy is the idea that any Republican leader who breaks with this sacred mission can only be doing so because he or she is too weak and cowardly to endure the slings and arrows that persevering against the law must entail. GOP leaders, having themselves spent years feeding the base all sorts of lies and distortions about the law, are now desperately trying to inject a does of reality into the debate by pointing out that the defund-Obamacare crusade is, in political and practical terms alike, insane. But it may be too late. The time for injecting reality into the debate has long since passed.

#### Courts shield

Whittington 5 Keith E., Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, shifting blame for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

#### Obama won’t push the plan---it restricts his authority so he wouldn’t expend PC

NYT 12 – Becker and Shane – NYT Staff

Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will, By JO BECKER and SCOTT SHANE, Published: May 29, 2012, New York Times, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&\_r=0

Walking out of the Archives, the president turned to his national security adviser at the time, Gen. James L. Jones, and admitted that he had never devised a plan to persuade Congress to shut down the prison.¶ “We’re never going to make that mistake again,” Mr. Obama told the retired Marine general.¶ General Jones said the president and his aides had assumed that closing the prison was “a no-brainer — the United States will look good around the world.” The trouble was, he added, “nobody asked, ‘O.K., let’s assume it’s a good idea, how are you going to do this?’ “¶ It was not only Mr. Obama’s distaste for legislative backslapping and arm-twisting, but also part of a deeper pattern, said an administration official who has watched him closely: the president seemed to have “a sense that if he sketches a vision, it will happen — without his really having thought through the mechanism by which it will happen.”¶ In fact, both Secretary of State Hillary Rodham Clinton and the attorney general, Mr. Holder, had warned that the plan to close the Guantánamo prison was in peril, and they volunteered to fight for it on Capitol Hill, according to officials. But with Mr. Obama’s backing, his chief of staff, Rahm Emanuel, blocked them, saying health care reform had to go first.

#### Congress has already passed detention legislation---pounds DA

Janet Cooper Alexander 13, professor of law at Stanford University, March 21st, 2013, "The Law-Free Zone and Back Again," Illinois Law Review, [illinoislawreview.org/wp-content/ilr-content/articles/2013/2/Alexander.pdf](http://illinoislawreview.org/wp-content/ilr-content/articles/2013/2/Alexander.pdf)

Congress also passed legislation requiring suspected members of al- Qaeda or “associated forces” to be held in military custody, again making it difficult to prosecute them in federal court. The bill as passed contained some moderating elements, including the possibility of presidential waiver of the military custody requirement, 7 recognition of the FBI’s ability to interrogate suspects, 8 and a disclaimer stating that the statute was not intended to change existing law regarding the authority of the President, the scope of the Authorization for Use of Military Force, 9 or the detention of U.S. citizens, lawful residents, or persons captured in the United States. 10 All the while, Republican presidential hopefuls were vying to see who could be the most vigorous proponent of indefinite detention, barring trials in civilian courts, and reinstating a national policy of interrogation by torture.¶ 11¶ During the same period, the D.C. Circuit issued a series of decisions that effectively reversed the Supreme Court’s habeas decisions of 2004 and 2008. 12 The Supreme Court’s failure to review these decisions has left detainees with essentially no meaningful opportunity to challenge their custody. ¶ Thus, a decade that began with the executive branch’s assertion of sole and exclusive power to act unconstrained by law or the other branches ended, ironically, with Congress asserting its power to countermand the executive branch’s decisions, regardless of detainee claims of legal rights, in order to maintain those law-free policies. And although the Supreme Court had blocked the Bush administration’s law-free zone strategy by upholding detainees’ habeas rights, the D.C. Circuit has since rendered those protections toothless.

#### All their link args are non-unique

NPR 9/21, “Have Obama's Troubles Weakened Him For Fall's Fiscal Fights?” http://www.ideastream.org/news/npr/224494760

President Obama has had a tough year. He failed to pass gun legislation. Plans for an immigration overhaul have stalled in the House. He barely escaped what would have been a humiliating rejection by Congress on his plan to strike Syria.¶ Just this week, his own Democrats forced Larry Summers, the president's first choice to head the Federal Reserve, to withdraw.¶ Former Clinton White House aide Bill Galston says all these issues have weakened the unity of the president's coalition.¶ "It's not a breach, but there has been some real tension there," he says, "and that's something that neither the president nor congressional Democrats can afford as the budget battle intensifies."¶ Obama is now facing showdowns with the Republicans over a potential government shutdown and a default on the nation's debt. On Friday, the House voted to fund government operations through mid-December, while also defunding the president's signature health care law — a position that's bound to fail in the Senate.¶ As these fiscal battles proceed, Republicans have been emboldened by the president's recent troubles, says former GOP leadership aide Ron Bonjean.

### AT: Econ = War

#### No econ decline war---best and most recent data

Daniel W. Drezner 12, Professor, The Fletcher School of Law and Diplomacy, Tufts University, October 2012, “The Irony of Global Economic Governance: The System Worked,” <http://www.globaleconomicgovernance.org/wp-content/uploads/IR-Colloquium-MT12-Week-5_The-Irony-of-Global-Economic-Governance.pdf>

The final outcome addresses a dog that hasn’t barked: the effect of the Great Recession on cross-border conflict and violence. During the initial stages of the crisis, multiple analysts asserted that the financial crisis would lead states to increase their use of force as a tool for staying in power.37 Whether through greater internal repression, diversionary wars, arms races, or a ratcheting up of great power conflict, there were genuine concerns that the global economic downturn would lead to an increase in conflict. Violence in the Middle East, border disputes in the South China Sea, and even the disruptions of the Occupy movement fuel impressions of surge in global public disorder. ¶ The aggregate data suggests otherwise, however. The Institute for Economics and Peace has constructed a “Global Peace Index” annually since 2007. A key conclusion they draw from the 2012 report is that “The average level of peacefulness in 2012 is approximately the same as it was in 2007.”38 Interstate violence in particular has declined since the start of the financial crisis – as have military expenditures in most sampled countries. Other studies confirm that the Great Recession has not triggered any increase in violent conflict;

the secular decline in violence that started with the end of the Cold War has not been reversed.39 Rogers Brubaker concludes, “the crisis has not to date generated the surge in protectionist nationalism or ethnic exclusion that might have been expected.”40¶ None of these data suggest that the global economy is operating swimmingly. Growth remains unbalanced and fragile, and has clearly slowed in 2012. Transnational capital flows remain depressed compared to pre-crisis levels, primarily due to a drying up of cross-border interbank lending in Europe. Currency volatility remains an ongoing concern. Compared to the aftermath of other postwar recessions, growth in output, investment, and employment in the developed world have all lagged behind. But the Great Recession is not like other postwar recessions in either scope or kind; expecting a standard “V”-shaped recovery was unreasonable. One financial analyst characterized the post-2008 global economy as in a state of “contained depression.”41 The key word is “contained,” however. Given the severity, reach and depth of the 2008 financial crisis, the proper comparison is with Great Depression. And by that standard, the outcome variables look impressive. As Carmen Reinhart and Kenneth Rogoff concluded in This Time is Different: “that its macroeconomic outcome has been only the most severe global recession since World War II – and not even worse – must be regarded as fortunate.”42

# 1AR

### Harris Votes Aff

#### Internment is still possible

David A. Harris 11, Professor of Law, University of Pittsburgh School of Law, Winter 2011, "On the Contemporary Meaning of Korematsu: 'Liberty Lies in the Hearts of Men and Women,'" Missouri Law Review, Volume 76, Number 1, law.missouri.edu/lawreview/files/2012/11/Harris.pdf

Despite these criticisms, **Americans cannot depend on these cases to tell them what a court would do if faced with another attack and a plan for internment**. None of the Guantanamo cases relied upon, or even expressed any relation to, the law of equal protection; doctrinally, they rested on the President’s executive and wartime powers. And perhaps more important than what these cases struck down is what they did allow. The best example is Hamdi, in which Justice O’Connor famously refused to grant the executive virtually unlimited constitutional power in wartime. 148 Hamdi actually allows the executive to hold American citizens indefinitely, without charges or trial, as enemy combatants. 149 While some minimal degree of process is due, 150 the bottom line is that the Court conceded this power to the President with very little in the way of checks or balances. Similarly, in Hamdan , the Court ruled that only Common Article Three of the Geneva Conventions, the most basic set of protections available, applied to enemy combatants at Guantanamo. 151 Hamdan also found that it would be procedurally adequate for military commissions, if modified, to try these prisoners. 152 ¶ If there is a relationship between the enemy combatants cases and what the Court might do if faced with a Korematsu decision again, it is that the Court in these cases largely – even if not entirely – deferred to the power of the executive. One can see the enemy combatant cases as a counterweight to Korematsu only by blinding oneself to the fact that the enemy combatant cases allowed indefinite detention of American citizens in the name of national security, with only minimal due process available. Thus, rather than signaling that the Court would stand in the way of another internment, a plausible reading of **these cases indicates that the Court has, at the very least,** left the door open for it**.**

### AT: Korematsu Dead

#### Korematsu still matters

Jennifer K. Elsea 13, Legislative Attorney, CRS, “Detention of U.S. Persons as Enemy Belligerents”, July 25, http://www.fas.org/sgp/crs/natsec/R42337.pdf

The Japanese internment program has since been widely discredited, 201 the convictions of some persons for violating the orders have been vacated, 202 and the victims have received compensation, 203 but the constitutionality of detention of citizens during war who are deemed dangerous has never expressly been ruled per se unconstitutional. 204 In the cases of citizens of other ethnic backgrounds who were interned or otherwise subject to restrictions under Executive Order 9066, courts played a role in determining whether the restrictions were justified, sometimes resulting in the removal of restrictions. 205 Because these persons were afforded a limited hearing to determine their dangerousness, a court later ruled that the Equal Protection Clause of the Constitution did not require that they receive compensation equal to that which Congress granted in 1988 to Japanese-American internees. 206

### 1AR – Substantial = Arbitrary

#### No definition of substantial—their interp is arbitrary

David Jakubowitz 4 \* J.D. Candidate, St. John's University School of Law, NOTE: "HELP, I'VE FALLEN AND CAN'T GET UP!" NEW YORK'S APPLICATION OF THE SUBSTANTIAL FACTOR TEST, Spring, 2004 18 St. John's J.L. Comm. 593 lexis

As a consequence, no clear legal standard exists on how to interpret "substantial" and the determination of substantial factor is based solely on the varying subjective lay-opinions of jurors. n134 Therefore, in the interests of honesty and accuracy, the "substantial factor" test should be renamed the "subjective factor" test in order to more precisely describe the process of how causation is analyzed. n135