## 1NC

### 1

#### The executive of the United States should end the policy of arresting material witnesses in the so-called “war on terror” and announce that it considers such arrests unconstitutional.

#### Counterplan solves the case

Adrian Vermeule 7, Harvard law prof - AND - Eric Posner - U Chicago law, The Credible Executive, 74 U. Chi. L. Rev. 865

\*We do not endorse gendered language

The Madisonian system of oversight has not totally failed. Some- times legislators overcome the temptation to free ride; sometimes they invest in protecting the separation of powers or legislative preroga- tives. Sometimes judges review exercises of executive discretion, even during emergencies. But often enough, legislators and judges have no real alternative to letting executive officials exercise discretion un- checked. The Madisonian system is a partial failure; compensating mechanisms must be adopted to fill the area of slack, the institutional gap between executive discretion and the oversight capacities of other institutions. Again, the magnitude of this gap is unclear, but plausibly it is quite large; we will assume that it is. It is often assumed that this partial failure of the Madisonian sys- tem unshackles and therefore benefits ill-motivated executives. This is grievously incomplete. The failure of the Madisonian system harms the well-motivated executive as much as it benefits the ill-motivated one. Where Madisonian oversight fails, the well-motivated executive is a victim of his own power. Voters, legislators, and judges will be wary of granting further discretion to an executive whose motivations are un- certain and possibly nefarious. The partial failure of Madisonian over- sight thus threatens a form of inefficiency, a kind of contracting failure that makes potentially everyone, including the voters, worse off. Our central question, then, is what the well-motivated executive can do to solve or at least ameliorate the problem. The solution is for the executive to complement his (well-motivated) first-order policy goals with second-order mechanisms for demonstrating credibility to other actors. We thus do not address the different question of what voters, legislators, judges, and other actors should do about an executive who is ill motivated and known to be so. That project involves shoring up or replacing the Madisonian system to block executive dictatorship. Our project is the converse of this, and involves finding new mechanisms to help the well-motivated executive credibly distinguish himself as such. ¶ IV. EXECUTIVE SIGNALING: LAW AND MECHANISMS ¶ We suggest that the executive’s credibility problem can be solved by second-order mechanisms of executive signaling. In the general case, well-motivated executives send credible signals by taking actions that are more costly for ill-motivated actors than for well- motivated ones, thus distinguishing themselves from their ill- motivated mimics. Among the specific mechanisms we discuss, an important subset involves executive self-binding, whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors. Commitments themselves have value as signals of benign motivations. ¶ This departs from the usual approach in legal scholarship. Legal theory has often discussed self-binding by “government” or govern- ment officials. In constitutional theory, it is often suggested that consti- tutions represent an attempt by “the people” to bind “themselves” against their own future decisionmaking pathologies, or relatedly, that constitutional prohibitions represent mechanisms by which govern- ments commit themselves not to expropriate investments or to exploit their populations.72 Whether or not this picture is coherent,73 it is not the question we examine here, although some of the relevant consid- erations are similar.74 We are not concerned with binding the president so that he cannot abuse his powers, but with how he might bind himself or take other actions that enhance his credibility, so that he can generate support from the public and other members of the government. ¶ Furthermore, our question is subconstitutional: it is whether a well-motivated executive, acting within an established set of constitu- tional and statutory rules, can use signaling mechanisms to generate public trust. Accordingly, we proceed by assuming that no constitutional amendments or new statutes will be enacted. Within these con- straints, what can a well-motivated executive do to bootstrap himself to credibility? The problem for the well-motivated executive is to credibly signal his benign motivations. In general, the solution is to engage in actions that are less costly for good types than for bad types. ¶ We begin with some relevant law, then examine a set of possible mechanisms—emphasizing both the conditions under which they might succeed and the conditions under which they might not—and conclude by examining the costs of credibility. ¶ A. A Preliminary Note on Law and Self-Binding ¶ Many of our mechanisms are unproblematic from a legal per- spective, as they involve presidential actions that are clearly lawful. But a few raise legal questions; in particular, those that involve self- binding.75 Can a president bind himself to respect particular first-order policies? With qualifications, the answer is yes, at least to the same extent that a legislature can. Formally, a duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated, thereby establishing a new legal status quo.76 The legal authority to establish a new status quo allows a president to create inertia or political constraints that will affect his own future choices. In a practical sense, presidents, like legislatures, have great de facto power to adopt policies that shape the legal landscape for the future. A president might commit himself to a long-term project of defense pro- curement or infrastructure or foreign policy, narrowing his own future choices and generating new political coalitions that will act to defend the new rules or policies. More schematically, we may speak of formal and informal means of self-binding:

#### Counterplan maintains the benefits of a unitary executive while deterring overreach

Neal Katyal 6, prof, Georgetown law, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314

This Essay's proposed reforms reflect a more textured conception of the presidency than either the unitary executivists or their critics espouse. In contrast to the unitary executivists, I believe that the simple fact that the President should be in control of the executive branch does not answer the question of how institutions should be structured to encourage the most robust flow of advice to the President. Nor does that fact weigh against modest internal checks that, while subject to presidential override, could constrain presidential adventurism on a day-to-day basis. And in contrast to the doubters of the unitary executive, I believe a unitary executive serves important values, particularly in times of crisis. Speed and dispatch are often virtues to be celebrated.¶ Instead of doing away with the unitary executive, this Essay proposes designs that force internal checks but permit temporary departures when the need is great. Of course, the risk of incorporating a presidential override is that its great formal power will eclipse everything else, leading agency officials to fear that the President will overrule or fire them. But just as a filibuster does not tremendously constrain presidential action, modest internal checks, buoyed by reporting requirements, can create sufficient deterrent costs.¶ [\*2319] Let me offer a brief word about what this Essay does not attempt. It does not propose a far-reaching internal checking system on all presidential power, domestic and foreign. Instead, this Essay takes a case study, the war on terror, and uses the collapse of external checks and balances to demonstrate the need for internal ones. In this arena, public accountability is low - not only because decisions are made in secret, but also because they routinely impact only people who cannot vote (such as detainees). In addition to these process defects, decisions in this area often have subtle long-term consequences that short-term executivists may not fully appreciate. n9

### 2

#### Executive war powers authority is action pursuant to declared wars and commander in chief power

Mark J. Yost 89, JD from Georgetown Law School, “NOTE: Self Defense or Presidential Pretext? The Constitutionality of Unilateral Preemptive Military Action,” 78 Geo. L.J. 415, lexis

This note explores the limits of the President's war powers authority. Specifically, it analyzes whether the President, consistent with his constitutional grant of war powers, can order preemptive military action without congressional consultation. The preemptive air strike that President Reagan planned, but did not order, against the chemical weapons factory at Rabta, Libya provides the context for this discussion. Part I outlines the history of United States-Libyan relations and tracks the construction of the chemical weapons plant at Rabta. Part II discusses the various types of war that may [\*417] be waged under the Constitution. It argues that the Constitution provides for only three types of warmaking: (1) acts of war pursuant to a congressional declaration of war, n10 (2) acts of war authorized by statute, n11 and (3) acts of war pursuant to the President's self-defense power under the commander in chief clause and the executive power clause of article II. This Part then analyzes the factual circumstances attending the Rabta chemical weapons factory and concludes that because there was no congressional declaration of war and because no legislation authorized a preemptive military strike, the President constitutionally could have ordered a strike only under his self-defense power. It concludes by tracing the development of this presidential authority and analyzing the factors that have determined its scope.

#### Violation---the aff restricts material witness detention which is an authority centered on criminal proceedings---that’s distinct--- allowing the aff opens up the floodgates to a ton of non-war powers detention cases

Benjamin Wittes 11, senior fellow in Governance Studies at The Brookings Institution, 2011, “ARTICLE: Preventive Detention in American Theory and Practice,” Harvard National Security Journal, 2 Harv. Nat'l Sec. J. 85

The diverse statutes and regimes authorizing the preventive detention of individuals not convicted of a crime to prevent harms caused by that person range widely in purpose and subject matter:

. Wartime detention powers cover not merely prisoners of war and unlawful enemy combatants but also the nationals of countries against which the United States finds itself in a state of armed conflict;

. The Constitution's Suspension Clause specifically contemplates that Congress might in crises suspend normal constitutional presumptions limiting detention -- a power which has been invoked several times in American history;

. Detention authorities ancillary to the criminal justice system include both pretrial detention and the detention of material witnesses not even facing criminal charges;

. The immigration law permits the detention of aliens facing deportation and "arriving aliens" denied entry to the United States;

. State and federal laws permit the detention of the seriously mentally ill, when they pose a danger to themselves or to the public at large, as well as the detention of sex offenders even after they have completed their criminal sentences;

. State and federal statutes provide broad authority to quarantine people who have communicable diseases; and

. States and localities have a variety of protective custody powers, permitting the noncriminal detention -- often for their own protection -- of, among others, the intoxicated, alcoholics, drug addicts, the homeless, and pregnant drug users.

#### Vote negative

#### limits---including non-war-powers based areas of Prez power explodes limits because it could be detention etcfor literally any reason

#### ground---destroys negative ground because they can avoid authority disad links by framing the aff around non-war-powers based executive policies

### 3

#### Court interference in war powers collapses effective military policy and exec flex

Stephen F. Knott 13, professor of National Security Affairs at the United States Naval War College, 8/22/13, War by Lawyer, www.libertylawsite.org/2013/08/22/war-by-lawyer/

Terrorist attacks directed from abroad are acts of war against the United States, requiring a response by the nation’s armed forces under the direction of the commander-in-chief. Unity in the executive is critical to the conduct of war, as Alexander Hamilton noted in The Federalist, and war by committee, especially a committee of lawyers, brings to armed conflict the very qualities that are the antithesis of Publius’s “decision, activity, secrecy, and dispatch.” The American military, with the assistance of the American intelligence community, fulfill the constitutional mandate to provide for the common defense. The nation’s defense establishment is not the Internal Revenue Service or the Department of Health and Human Services; if one dislikes the social welfare policies of the Obama administration or disagrees with President Obama for whatever reason, that is all well and good, but true conservatives should reject the principle that judicial review is applicable to the conduct of national defense. The founders understood that the decision to use force, the most important decision any government can make, were non-judicial in nature and were to be made by the elected representatives of the people.

Nonetheless, for those weaned during an era when “privacy” was elevated to the be-all and end-all of the American experiment, the war power and related national security powers granted by the Constitution to the elected branches are trumped by modern notions of a limitless “right to privacy.” The civil liberties violations of the War on Terror are considered so egregious as to require the intervention of an appointed judiciary lacking any Constitutional mandate, and lacking the wherewithal, including information and staff, to handle sensitive national security matters. This is judicial activism at its worst and further evidence that the “political questions doctrine,” the idea of deferring to the elected branches of government on matters falling under their constitutional purview, is, for all practical purposes, dead (See the case of Totten vs. U.S., 1875, for an example of judicial deference to the elected branches on intelligence matters. This deference persisted until the late 20th century). Simply put, according to the Constitution and to almost 220 years of tradition, Congress and the President are constitutionally empowered, among other things, to set the rules regarding the measures deemed necessary to gather intelligence and conduct a war.

One of the latest demands from advocates of increased judicial oversight is for a “targeted killing court.” In a similar vein, Senator Marco Rubio has called for the creation of a “Red Team” review of any executive targeting of American citizens, which would include a 15 day review process – “decision, activity, secrecy, and dispatch” be damned. A 15 day review process of targeting decisions would horrify Alexander Hamilton and all the framers of the Constitution. No doubt our 16th President would be horrified as well – imagine Abraham Lincoln applying for targeting permits on American citizens suspected of assisting the Confederacy. (“Today, we begin a 15 day review of case #633,721, that of Beauregard Birdwell of Paducah, Kentucky.”) War by lawyer might in the not too distant future include these types of targeting decisions, followed by endless appeals to unelected judges. All of this is a prescription for defeat.

We are, sadly, almost at this point, for a new conception about war and national security has taken root in our increasingly legalistic society. We saw this during the Bush years when the Supreme Court for the first time in its history instructed the executive and legislative branches on the appropriate manner of treating captured enemy combatants. The Courts are now micromanaging the treatment of detainees at Guantanamo, to the point of reviewing standards for groin searches of captured Al Qaeda members. True conservatives understand the pitfalls of this legalism, especially of the ill-defined international variety. Conservatives should be especially alert to the dangers arising from elevating international law over the national interest as the standard by which to measure American conduct.

The legalistic approach to the war on terror now being endorsed by prominent conservatives would cede presidential authority to executive branch lawyers and to their brethren in the judiciary who are playing a role they were never intended to play. Michael Scheuer, the former head of the CIA’s unit charged with tracking down Osama bin Laden, observed that “at the end of the day, the U.S. intelligence community is palsied by lawyers, and everything still depends on whether the lawyers approve it or not.” This is as far removed from conducting war, as Hamilton described it, with decision and dispatch, and with the “exercise of power by a single hand,” as one can get. War conducted by the courts is not only unconstitutional, it is, to borrow a phrase from author Philip K. Howard, part of the ongoing drift toward the death of common sense.

#### We overwhelmingly control uniqueness---all federal courts are either siding with the executive’s terror policies through narrow rulings or declining to even hear the cases---past rulings are being distinguished

Jonathan L. Entin 12, Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations, 45 Case W. Res. J. Int'l L. 443

Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive's position, it generally has done so on relatively narrow grounds.¶ Consider the Espionage Act cases that arose during World War I. Schenck v. United States, n63 which is best known for Justice Holmes's [\*452] announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant's having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." n64 The circumstances in which the speech took place affected the scope of First Amendment protection: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." n65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort n66 and of Eugene Debs for a speech denouncing the war. n67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States, n68 but only Justice Brandeis agreed with his position. n69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes's opinions for the Court in the earlier cases. n70¶ Similarly, the Supreme Court rejected challenges to the government's war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs. n71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts. n72 In addition, the Court upheld the validity of the Japanese internment program. n73 Of course, the Court did limit the scope of the [\*453] program by holding that it did not apply to "concededly loyal" citizens. n74 But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated. n75 Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees. n76¶ The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region. n77 The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, n78 but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone. n79 The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges. n80¶ The picture in the post-2001 era is less clear. In three different cases the Supreme Court has rejected the executive branch's position, but all of those rulings were narrow in scope. For example, Hamdi v. Rumsfeld n81 held that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to have a neutral decision-maker determine the factual basis for his detention. There was no majority opinion, however, so the implications of the ruling were ambiguous to say the least. Justice O'Connor's plurality opinion for four members of the Court concluded that Congress had authorized the president to detain enemy combatants by passing the Authorization for Use of Military Force n82 and that the AUMF satisfied the statutory requirement of congressional authorization for the detention of U.S. [\*454] citizens. n83 Justice Souter, joined by Justice Ginsburg, thought that the AUMF had not in fact authorized the detention of American citizens as required by the statute, n84 which suggested that Hamdi should be released. But the Court would have been deadlocked as to the remedy had he adhered to his view of how to proceed. This was because Justices Scalia and Stevens also believed that Hamdi's detention was unlawful and that he should be released on habeas corpus, n85 whereas Justice Thomas thought that the executive branch had acted within its authority and therefore would have denied relief. n86 This alignment left four justices in favor of a remand for more formal proceedings, four other justices in favor of releasing Hamdi, and one justice supporting the government's detention of Hamdi with no need for a more elaborate hearing. To avoid a deadlock, therefore, Justice Souter reluctantly joined the plurality's remand order. n87¶ Hamdi was atypical because that case involved a U.S. citizen who was detained. The vast majority of detainees have been foreign nationals. In Hamdan v. Rumsfeld, n88 the Supreme Court ruled that the military commissions that the executive branch had established in the wake of the September 11 attacks had not been authorized by Congress and therefore could not be used to try detainees. n89 A concurring opinion made clear that the president could seek authorization from Congress to use the type of military commissions that had been established unilaterally in this case. n90¶ Congress responded to that suggestion by enacting the Military Commissions Act of 2006, n91 which sought to endorse the executive's detainee policies and to restrict judicial review of detainee cases. In Boumediene v. Bush, n92 the Supreme Court again rejected the government's position. First, the statute did not suspend the writ of [\*455] habeas corpus. n93 Second, the statutory procedures for hearing cases involving detainees were constitutionally inadequate. n94 At the same time, the Court emphasized that the judiciary should afford some deference to the executive branch in dealing with the dangers of terrorism n95 and should respect the congressional decision to consolidate judicial review of detainee cases in the District of Columbia Circuit. n96¶ Detainees who have litigated in the lower federal courts in the District of Columbia have not found a sympathetic forum. The U.S. Court of Appeals for the D.C. Circuit has not upheld a single district court ruling that granted any sort of relief to detainees, and the Supreme Court has denied certiorari in every post-Boumediene detainee case in which review was sought. n97 In only one case involving a detainee has the D.C. Circuit granted relief, and that case came up from a military commission following procedural changes adopted in the wake of Boumediene. n98 About a month after this symposium took place, in Hamdan v. United States n99 the court overturned a conviction for providing material support for terrorism. The defendant was the same person who successfully challenged the original military commissions in Hamdan v. Rumsfeld. n100 This very recent ruling emphasized that the statute under which he was prosecuted did not apply to offenses committed before its enactment. n101 It remains to be seen how broadly the decision will apply. [\*456] ¶ Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In Arar v. Ashcroft, n102 the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. n103 And in Mohamed v. Jeppesen Dataplan, Inc., n104 the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. n105 Unlike Arar, in which the defendants were federal officials, n106 this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. n107 Although at least four judges on the en banc courts dissented from both rulings, n108 the Supreme Court declined to review either case. n109

#### That decks effective executive responses to prolif, terror, and the rise of hostile powers---link threshold is low

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the unique [\*883] constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats. n16

The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22

 [\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation

Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations.

(1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27

(2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28

(3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30

(4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32

(5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34

 [\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39

Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

### 4

#### Judges will get pay raises now, but Congress still has the ability to wreck salaries – key to judicial independence

Lyle Denniston, SCOTUSblog badass, covered the court for 54 years, National Constitution Center’s Adviser on Constitutional Literacy, 10-8-2012, “Major gain for judges’ independence,” Constitution Daily, http://blog.constitutioncenter.org/2012/10/major-gain-for-judges%E2%80%99-independence/

That has been, from the beginning, one of the ways the Founders guaranteed the independence of the federal judiciary (another was a promise of life tenure “during good behavior”). But for the past 34 years, federal judges have been pursuing a series of lawsuits, claiming that Congress has frequently acted in ways that – in real-dollar terms – reduced their pay, in violation of the Compensation Clause. The theory was that, if a federal judges’ pay remains constant, it will be eroded over time by the effects of inflation in money’s value. Last Friday, that legal struggle finally resulted in a historic constitutional victory for the judges – a victory that is likely to be tested in the Supreme Court before it could take final effect. The U.S. Court of Appeals for the Federal Circuit – a specialized court that decides claims for money from the federal government – ruled by a 10-2 vote that Congress has several times violated a promise made in 1989 to give federal judges an annual cost-of-living increase in their pay level. The decision does not mean that Congress has lost the power to set federal judges’ salary levels, or that it has a constitutional duty to give them a period, inflation-countering raise. But it does mean that Congress cannot promise a raise, and then break that promise, and that the lawmakers cannot take steps that reduce the value of a sitting judge’s salary scale. The judges’ fight has been a long-running labor for them and their lawyers, and the issue raises such fundamental constitutional questions that it has gone to the Supreme Court, in one form or another, three times. It almost certainly will return there again, because the Justice Department does not believe the judges have a valid claim that the Compensation Clause has been violated, and the Department has the authority to seek Supreme Court review. The Federal Circuit Court’s ruling in the judges’ favor (in the case of Beer v. U.S.) is a strong statement of support for judicial independence, and for the role that a secure salary plays in helping to protect that independence. In the Declaration of Independence, the court recalled, America’s revolutionary generation protested that the King of England had made judges depend upon his grace for their tenure and for their pay. Alexander Hamilton wrote in The Federalist Papers: “Next to permanence in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.”

#### Congress will backlash against the plan and cut judicial pay

Philip A. Talmadge, Justice, Washington State Supreme Court, Winter 1999, Seattle University Law Review, 22 Seattle Univ. L. R. 695, p. 701-704

The doctrine of judicial restraint has been encrusted in recent years with considerable ideological cant of both the left and the right. 17 The ideological discussion highlights particular political issues of the day. Many conservatives decry judicial activism with respect to the courts' role in racial desegregation in America or [\*702] reproductive rights issues. 18 Liberals complain today of judicial activism in property and economic issues. 19 But this doctrine need not be the captive of the left or the right. The doctrine itself has become "political" largely because it is not susceptible to rigorous and predictable definition. That the courts are not entirely trusted by the partisan branches of government to announce constitutional principles is illustrated by recent Washington legislation. In 1997, a bill was introduced in the Washington State House of Representatives with thirty-three sponsors. The bill challenged the doctrine of judicial review: "The doctrine of judicial review that the courts have the sole and final say in interpreting the Constitution on behalf of all three branches of government has been subject to serious analysis and criticism by scholars, jurists, and others for almost two hundred years." 20 The legislation's apparent intent was to undercut the finality and authority of judicial review of constitutional questions by permitting the legislature to disagree with a judicial interpretation of the Washington Constitution and to submit the issue to the voters in a statewide referendum. 21 [\*703] The sense that the courts are too powerful sometimes conflicts with direction to judges from the partisan branches to state their views more publicly. In 1997, twenty-two sponsors introduced in the Washington State House of Representatives a measure urging the Supreme Court to amend Canon 7 of the Code of Judicial Conduct to afford judges and judicial candidates the right to "speak freely and without fear of governmental retaliation, on issues that are not then before the court." 22 The United States Congress has also raised serious questions about judicial performance through a different methodology. The United States Senate's recent glacial pace in confirming nominees to judicial vacancies increases judicial workloads and instills trepidation in the minds of the nominees. 23 In recent legislation, 24 Congress [\*704] sought to restrain "judicial activism" by denying judges cost-of-living salary adjustments and limiting federal court jurisdiction. Various versions of the legislation would deny federal courts the power to release federal prisoners because of bad prison conditions and establish special procedures to hear challenges to state initiative measures. In summary, these issues illustrate the need for the courts continually to revisit and review the core constitutional functions of the judiciary. 25 Within the constitutional sphere, however, the courts should be active and the other branches of government constrained not to act unconstitutionally. The judiciary cannot "restrain" itself from declaring the enactments of legislative bodies violative of constitutional norms. The courts must vigorously protect individuals, particularly minorities, from majoritarian tyranny. But this protective role does not allow the courts to "constitutionalize" every controversy. Judicial self-restraint lends support to the legitimacy of judicial independence. In our system of separation of powers, achievement of the necessary balance between a judiciary vigorous within its constitutional sphere and independent of the partisan branches of government, and a judiciary restrained in its inclination to right every wrong, is no easy task. That necessary balance is, however, the essence of ordered liberty in the American constitutional system. Likewise, the other branches of government must regard the authority and independence of the judiciary by respecting judicial review, properly funding the courts, and avoiding the imposition of nonjudicial duties or ever-escalating caseloads. The fulfillment of separation of powers is found in the principles of restraint employed in the federal and state court systems.

#### Adequate funding for the judiciary is key to the rule of law – it’s watched internationally

Testimony of Associate Justice Anthony M. Kennedy before the United States Senate Committee on the Judiciary Judicial Security and Independence February 14, 2007 http://judiciary.senate.gov/testimony.cfm?id=2526&wit\_id=6070

The provision of judicial resources by Congress over the years is admirable in most respects. Your expeditious consideration of the pending court-security bill is just one example of your understanding of our needs. Our facilities have been, and are, the envy of the judiciaries of the several States and, indeed, of judges throughout the world. Our staff, our libraries, our electronic data systems, and our courthouses are excellent. These resources have been the special concern of Congress. Your interest, your oversight, and your understanding of our needs set a standard for our own States and for nations around the world. Just one example is the Federal Judicial Center. When visitors come to Washington, we recommend they observe it to learn how a successful judicial-education center functions. Those visitors are awed by what they see. As you know, the Center produces an elaborate series of programs for judicial education, under a small budget emphasizing turn-key projects. Around the world, the allocation of scarce resources to judiciaries is, to be candid, a tough sell. There are urgent demands for funds for defense; for roads and schools; for hospitals, doctors, and health care; and for basic utilities and necessities such as clean water. Even rich countries like our own find it hard to marshal the necessary resources for all these endeavors. What, then, is the reception an elected representative receives when he or she tells constituents the legislature has increased funding for judicial resources? The report, to be frank, is not likely to generate much excitement. Perhaps this is an educational failure on our part, for there is a proper response to this predictable public reaction. It is this: An efficient, highly qualified judiciary is part of the infrastructure necessary in any society that seeks to safeguard its freedom. A judiciary committed to excellence secures the Rule of Law; and the Rule of Law is a building block no less important to the advance of freedom and prosperity than infrastructure systems such as roads and utilities. Without a functioning, highly qualified, efficient judiciary, no nation can hope to guarantee its prosperity and secure the liberties of its people. The Committee knows that judges throughout the United States are increasingly concerned about the persisting low salary levels Congress authorizes for judicial service. Members of the federal judiciary consider the problem so acute that it has become a threat to judicial independence. This subject is a most delicate one and, indeed, is difficult for me to address. It is, however, an urgent matter requiring frank and open exchange of views. Please permit me to make some remarks on the subject.

#### That causes nuclear war [gender paraphrased].

Charles S. Rhyne, Founder and Senior Partner of Rhyne & Rhyne law firm. “Law Day Speech for Voice of America.” May 1, 1958. American Bar Association. http://www.abanet.org/publiced/lawday/rhyne58.html

In these days of soul-searching and re-evaluation and inventorying of basic concepts and principles brought on by the expansion of man’s vision to the new frontiers and horizons of outer space, we want the people of the world to know that we in America have an unshakable belief in the most essential ingredient of our way of life—the rule of law. The law we honor is the basis and foundation of our nation’s freedom and the freedom for the individual which exists here. And to Americans our freedom is more important than our very lives. The rule of law has been the bulwark of our democracy. It has afforded protection to the weak, the oppressed, the minorities, the unpopular; it has made it possible to achieve responsiveness of the government to the will of people. It stands as the very antithesis of Communism and dictatorship. When we talk about “justice” under our rule of law, the absence of such justice behind the Iron Curtain is apparent to all. When we talk about “freedom” for the individual, Hungary is recalled to the minds of all men. And when we talk about peace under law—peace without the bloodbath of war—we are appealing to the foremost desire of all peoples everywhere. The tremendous yearning of all peoples for peace can only be answered by the use of law to replace weapons in resolving international disputes. We in our country sincerely believe that [hu]mankind’s best hope for preventing the tragic consequences of nuclear-satellite-missile warfare is to persuade the nations of the entire world to submit all disputes to tribunals of justice for all adjudication under the rule of law. We lawyers of America would like to join lawyers from every nation in the world in fashioning an international code of law so appealing that sentiment will compel its general acceptance. Man’s relation to man is the most neglected field of study, exploration and development in the world community. It is also the most critical. The most important basic fact of our generation is that the rapid advance of knowledge in science and technology has forced increased international relationships in a shrunken and indivisible world. Men must either live together in peace or in modern war we will surely die together. History teachers that the rule of law has enabled [hu]mankind to live together peacefully within nations and it is clear that this same rule of law offers our best hope as a mechanism to achieve and maintain peace between nations. The lawyer is the technician in man’s relationship to man. There exists a worldwide challenge to our profession to develop law to replace weapons before the dreadful holocaust of nuclear war overtake our people.

### Case

The Court’s pursuing an incremental strategy in regards to War Powers now---the plan causes massive backlash and executive non-acquiescence

Neavl Devins 10, Goodrich Professor of Law and Professor of Government, College of William & Mary., Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, 12 U. Pa. J. Const. L. 491

Congress, the President, and the Court. Throughout the enemy combatant litigation, Congress signaled to the Court that it would go along with whatever ruling the Court made in these cases. In other words, contrary to the portrayal by academics and the news media of the Supreme Court's willingness to stand up to Congress and the executive branch, lawmakers repeatedly stood behind Court rulings limiting elected branch power. At the same time, as I will detail in the next Part, the Court pursued an incremental strategy - declining to test the boundaries of lawmaker acquiescence and, instead, issuing decisions that it knew would be acceptable to lawmakers. n85¶ The 2004 rulings in Hamdi and Rasul triggered anything but a backlash. In the days following the decisions, no lawmaker spoke on the House or Senate floor about the decision, and only a handful issued [\*508] press releases about the cases. n86 And while eight members of Congress signed onto amicus briefs backing administration policy, n87 Congress did not seriously pursue legislative reform on this issue until the Supreme Court had agreed to hear the Hamdan case. n88¶ When Congress enacted the Detainee Treatment Act (DTA) in December 2005, "lawmakers made clear that they did not see the DTA as an attack on either the Court or an independent judiciary." n89 Most significant, even though the DTA placed limits on federal court consideration of enemy combatant habeas petitions, lawmakers nevertheless anticipated that the Supreme Court would decide the fate of the President's military tribunal initiative. Lawmakers deleted language in the original bill precluding federal court review of Hamdan and other pending cases. n90 Lawmakers, moreover, depicted themselves as working collegially with the Court; several Senators, for example, contended that the "Supreme Court has been shouting to us in Congress: Get involved," n91 and thereby depicted Rasul as a challenge [\*509] to Congress, n92 "asking the Senate and the House, do you intend for ... enemy combatants ... to challenge their detention [in federal courts] as if they were American citizens?" n93 Lawmakers also spoke of detainee habeas petitions as an "abuse[]" n94 of the federal courts, and warned that such petitions might unduly clog the courts, n95 thus "swamping the system" n96 with frivolous complaints. n97 Under this view, the DTA's cabining of federal court jurisdiction "respects" the Court's independence and its role in the detainee process. n98¶ Following Hamdan, lawmakers likewise did not challenge the Court's conclusions that the DTA did not retrospectively bar the Hamdan litigation and that the President could not unilaterally pursue his military tribunal policy. n99 Even though the Military Commissions Act (MCA) eliminates federal court jurisdiction over enemy combatant habeas petitions, lawmakers depicted themselves as working in tandem with the Court. Representative Duncan Hunter (R. Cal.), who introduced the legislation on the House floor, said during the debates that the bill was a response to the "mandate of the Supreme Court that Congress involve itself in producing this new structure to prosecute terrorists." n100 And DTA sponsor Lindsey Graham stated: "The Supreme Court has set the rules of the road and the [\*510] Congress and the president can drive to the destination together." n101 Even lawmakers who expressed disappointment in the Court's ruling did not criticize the Court. Senator Sessions (R. Ala.), for example, blamed Hamdan's lawyers for misleading the Court about the legislative history of the DTA. n102¶ Debates over the MCA habeas provision, moreover, reveal that lawmakers thought that the Supreme Court was responsible for assessing the reach of habeas protections. Fifty-one Senators (fifty Republicans and one Democrat) voted against a proposed amendment to provide habeas protections to Guantanamo detainees. Arguing that enemy combatants possessed no constitutional habeas rights, n103 these lawmakers contended that they could eliminate habeas claims without undermining judicial authority. One of the principal architects of the MCA, Senator Lindsey Graham, put it this way: Enemy combatants have "a statutory right of habeas ... . And if [the Supreme Court finds] there is a constitutional right of habeas corpus given to enemy combatants, that is ... totally different ... and it would change in many ways what I have said." n104 Forty-eight Senators (forty-three Democrats, four Republicans, and one Independent) argued that the habeas-stripping provision was unconstitutional, that the courts would "clean it up," n105 and that Congress therefore should fulfill its responsibility to protect "that great writ." n106¶ When the Supreme Court agreed to rule on the constitutionality of the MCA, the Congress no longer supported the MCA's habeas-stripping provisions. Democrats had gained control of both Houses of Congress. Not surprisingly, there was next-to-no lawmaker criticism of Boumediene. In the week following the decision, no member [\*511] of the House, and only two Senators, made critical comments about the decision on the House or the Senate floor. n107¶ \* \* \* Supreme Court enemy combatant decisions were not out-of-step with prevailing social and political forces. Academics (including prominent conservatives), the media (again including conservative newspapers), former judges, and bar groups had all lined up against the administration. Interest groups too opposed the administration (including some conservative groups). Over the course of the enemy combatant litigation, the American people increasingly opposed the Bush administration. This opposition, in part, was tied to policy missteps (some of which implicated enemy combatant policy-making). These missteps were highly visible and contributed to widespread opposition to the Bush administration. For its part, Congress did not question the Court's role in policing the administration's enemy combatant initiative. By the time the Court decided Boumediene, voter disapproval of the President had translated into widespread opposition to the administration's enemy combatant initiative; a Democratic Congress supported habeas protections for enemy combatants and presidential candidates John McCain and Barack Obama called for the closing of Guantanamo Bay.¶ In the next part of this Essay, I will discuss the incremental nature of the Court's decision making. This discussion will provide additional support for the claims made in this section. Specifically, I will show that each of the Court's decisions was in sync with changing attitudes towards the Bush administration. More than that, Part II will belie the myth that Court enemy combatant decisions were especially consequential. Unlike newspaper and academic commentary about these cases, Court decision making had only a modest impact. Correspondingly, the Court never issued a decision that risked its institutional capital; the Court knew that its decisions would be followed by elected officials and that its decisions would not ask elected officials to take actions that posed some national security risk. [\*512] ¶ II. Judicial Modesty or Judicial Hubris: Making Sense of the Enemy Combatant Cases ¶ From 1952 (when the Supreme Court slapped down President Truman's war-time seizure of the steel mills) n108 until 2004 (when the Court reasserted itself in the first wave of enemy combatant cases), the judiciary largely steered clear of war powers disputes. n109 In part, the Court deferred to presidential desires and expertise. The President sees the "rights of governance in the foreign affairs and war powers areas" as core executive powers. n110 Correspondingly, the President has strong incentives to expand his war-making prerogatives. n111 For its part, the Court has limited expertise in this area, and, as such, is extremely reluctant to stake out positions that may pose significant national security risks. n112 The Court, moreover, is extremely reluctant to risk elected branch opprobrium. Lacking the powers of purse and sword, the Court cannot ignore the risks of elected branch non-acquiescence. n113¶ Against this backdrop, the Court's repudiation of the Bush administration's enemy combatant initiative appears a dramatic break from past practice. Academic and newspaper commentary back up this claim - with these decisions being labeled "stunning" (Harold [\*513] Koh), n114 "unprecedented" (John Yoo), n115 "breathtaking" (Charles Krauthammer), n116 "astounding" (Neal Katyal), n117 "sweeping and categorical" (New York Times), n118 and "historic" (Washington Post and Wall Street Journal). n119 Upon closer inspection, however, the Court's decisions are anything but a dramatic break from past practice. Part I detailed how Court rulings tracked larger social and political forces. In this Part, I will show how the Court risked neither the nation's security nor elected branch non-acquiescence. n120 The Court's initial rulings placed few meaningful checks on the executive; over time, the Court - reflecting increasing public disapproval of the President - imposed additional constraints but never issued a ruling that was out-of-sync with elected government preferences. Separate and apart from reflecting growing public and elected government disapproval of Bush administration policies, the Court had strong incentives to intervene in these cases. The Bush administration had challenged the Court's authority to play any role in national security matters. n121 This frontal assault on judicial power prompted the Court to stand up for its authority to "say what the law is." In Part III, I will talk about the Court's interest in protecting its turf - especially in cases implicating individual rights.¶ [\*514] Small Steps: Hamdi and Rasul. These decisions were a minimalist opening volley in Court efforts to place judicial limits on the Bush administration. While rejecting claims of executive branch unilateralism in national security matters, the Court said next-to-nothing about how it would police the President's enemy combatant initiative. Rasul simply held that Guantanamo Bay was a "territory over which the United States exercises exclusive jurisdiction and control," and, consequently, that the President's enemy combatant initiative is subject to existing habeas corpus legislation. n122 This ruling "avoided any constitutional judgment" and offered no guidance on "what further proceedings may become necessary" after enemy combatants filed habeas corpus petitions. n123 Hamdi, although ruling that United States citizens have a constitutional right to challenge their detention as an enemy combatant, placed few meaningful limits on executive branch detentions. Noting that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive," the Court ruled both that hearsay evidence was admissible, and that "the Constitution would not be offended by a presumption in favor of the Government's evidence." n124¶ The Bush administration, as John Yoo put it, saw the limited reach of Hamdi and Rasul as creating an "opportunity" for the administration to regain control over its detention policy. n125 In particular, the administration asked Congress to enact legislation that would limit federal court review of enemy combatant claims. The administration also launched Combatant Status Review Tribunals (CSRT) as a more formal substitute for unilateral executive determinations of a detainee's enemy combatant status. n126 Capitalizing on Rasul's failure to consider the constitutional dimensions of enemy combatant claims, CSRTs largely operated as a rubber stamp of administration determinations. In 2006, ninety-nine out of 102 detainees brought before CSRTs were designated as enemy combatants. n127 The Justice Department reconvened CSRTs to reconsider the remaining three cases [\*515] and, ultimately, the remaining three were determined to be enemy combatants. n128¶ Hamdi and Rasul were both "narrow, incompletely theorized [minimalist] decisions." n129 And while newspapers and academics focused their attention on the Court's open-ended declaration that "a state of war is not a blank check for the President," n130 the decisions did not meaningfully limit the executive. Well aware that Congress and the American people supported the President's military commission initiative, n131 the Court understood that a sweeping denunciation of administration policies might trigger a fierce backlash. n132 Moreover, by ruling that Congress had authorized the President's power to detain enemy combatants (through its post-9/11 Authorization for the Use of Military Force Resolution), and by suggesting that the Court would make use of pro-government presumptions when reviewing military commission decision making, the Court formally took national security interests into account. n133 Actions taken by the executive in response to these rulings underscore that the Court's de minimis demands neither risked national security nor executive branch non-acquiescence.¶ None of this is to say that the 2004 decisions were without impact. Following Rasul, for example, the administration understood that it needed to make use of some type of military court review - a requirement that may have impacted the military's handling of enemy combatants. At the same time, the Court did not issue a potentially debilitating blow to the Bush administration by decisively and resoundingly rejecting key elements of the administration's legal policy. n134 Instead, the Court simply carved out space for itself to review administration policy-making - without setting meaningful boundaries on what the administration could or could not do.

#### Court involvement in national security causes massive blowback that crushes judicial legitimacy

Robert M. Chesney 9, Professor, University of Texas School of Law, NATIONAL SECURITY FACT DEFERENCE, 95 Va. L. Rev. 1361

Judicial involvement in national security litigation, as noted at the outset, poses unusual risks for the judiciary as an institution. Such cases are more likely than most to involve claims of special, or even exclusive, executive branch authority. They are more likely than most to involve a perception - on the part of the public, the government, or judges themselves - of unusually high stakes. They are more likely than most to be in the media spotlight and hence in view of the public in a meaningful sense. These cases are, as a result of all this, especially salient as a political matter. And therein lies the danger for the courts. Because of these elements, an inappropriate judicial intervention in national security litigation is unusually likely to generate a response from the other branches or the public at large that might harm the institutional interests of the judiciary, either by undermining its prestige and authority or perhaps even by triggering some form of concrete political response.

#### Plan is circumvented---specifying “war on terror” in the ruling means the President could ignore the decision by asserting that specific detentions were outside the purview of the war on terror since it’s so ill defined and nebulous

#### Default to consequentialism---key to ethical government decisions

Michael Ignatieff 7, member of the independent international commission on Kosovo, chaired by Judge Richard Goldstone of South Africa. Former fellow at King’s College, Cambridge; École des Hautes Études, Paris; and St. Antony’s College, Oxford; and Visiting Prof of Human Rights Practice at Harvard, August 5, 2007, The New York Times, online: http://www.nytimes.com/2007/08/05/magazine/05iraq-t.html?ei=5090&en=cb304d04accc6df8&ex=1343966400&partner=rssuserland&emc=rss&pagewanted=all, accessed August 10, 2007

The unfolding catastrophe in [Iraq](http://topics.nytimes.com/top/news/international/countriesandterritories/iraq/index.html?inline=nyt-geo) has condemned the political judgment of a president. But it has also condemned the judgment of many others, myself included, who as commentators supported the invasion. Many of us believed, as an Iraqi exile friend told me the night the war started, that it was the only chance the members of his generation would have to live in freedom in their own country. How distant a dream that now seems.

Having left an academic post at Harvard in 2005 and returned home to Canada to enter political life, I keep revisiting the Iraq debacle, trying to understand exactly how the judgments I now have to make in the political arena need to improve on the ones I used to offer from the sidelines. I’ve learned that acquiring good judgment in politics starts with knowing when to admit your mistakes.

The philosopher Isaiah Berlin once said that the trouble with academics and commentators is that they care more about whether ideas are interesting than whether they are true. Politicians live by ideas just as much as professional thinkers do, but they can’t afford the luxury of entertaining ideas that are merely interesting. They have to work with the small number of ideas that happen to be true and the even smaller number that happen to be applicable to real life. In academic life, false ideas are merely false and useless ones can be fun to play with. In political life, false ideas can ruin the lives of millions and useless ones can waste precious resources. An intellectual’s responsibility for his ideas is to follow their consequences wherever they may lead. A politician’s responsibility is to master those consequences and prevent them from doing harm.

I’ve learned that good judgment in politics looks different from good judgment in intellectual life. Among intellectuals, judgment is about generalizing and interpreting particular facts as instances of some big idea. In politics, everything is what it is and not another thing. Specifics matter more than generalities. Theory gets in the way.

The attribute that underpins good judgment in politicians is a sense of reality. “What is called wisdom in statesmen,” Berlin wrote, referring to figures like Roosevelt and Churchill, “is understanding rather than knowledge — some kind of acquaintance with relevant facts of such a kind that it enables those who have it to tell what fits with what; what can be done in given circumstances and what cannot, what means will work in what situations and how far, without necessarily being able to explain how they know this or even what they know.” Politicians cannot afford to cocoon themselves in the inner world of their own imaginings. They must not confuse the world as it is with the world as they wish it to be. They must see Iraq — or anywhere else — as it is.

#### Preventing death is the first ethical priority because it’s irreversible

Zygmunt **Bauman,** University of Leeds Professor Emeritus of Sociology, 1995, Life In Fragments: Essays In Postmodern Morality, p. 66-71

The being‑for is like living towards‑the‑future: a being filled with anticipation, a being aware of the abyss between future foretold and future that will eventually be; it is this gap which, like a magnet, draws the self towards the Other,as it draws life towards the future, making life into an activity of overcoming, transcending, leaving behind. The self stretches towards the Other, as life stretches towards the future; neither can grasp what it stretches toward, but it is in this hopeful and desperate, never conclusive and never abandoned stretching‑toward that the self is ever anew created and life ever anew lived. In the words of M. M. Bakhtin, it is only in this not‑yet accomplished world of anticipation and trial, leaning toward stubbornly an‑other Other, that life can be lived ‑ not in the world of the `events that occurred'; in the latter world, `it is impossible to live, to act responsibly; in it, I am not needed, in principle I am not there at all." Art, the Other, the future: what unites them, what makes them into three words vainly trying to grasp the same mystery, is the modality of possibility. A curious modality, at home neither in ontology nor epistemology; itself, like that which it tries to catch in its net, `always outside', forever `otherwise than being'. The possibility we are talking about here is not the all‑too‑familiar unsure‑of‑itself, and through that uncertainty flawed, inferior and incomplete being, disdainfully dismissed by triumphant existence as `mere possibility', `just a possibility'; possibility is instead `plus que la reahte' ‑ both the origin and the foundation of being. The hope, says Blanchot, proclaims the possibility of that which evades the possible; `in its limit, this is the hope of the bond recaptured where it is now lost."' The hope is always the hope of *being fu filled,* but what keeps the hope alive and so keeps the being open and on the move is precisely its *unfu filment.* One may say that the paradox *of hope* (and the paradox of possibility founded in hope) is that it may pursue its destination solely through betraying its nature; the most exuberant of energies expends itself in the urge towards rest. Possibility uses up its openness in search of closure. Its image of the better being is its own impoverishment . . . The togetherness of the being‑for is cut out of the same block; it shares in the paradoxical lot of all possibility. It lasts as long as it is unfulfilled, yet it uses itself up in never ending effort of fulfilment, of recapturing the bond, making it tight and immune to all future temptations. In an important, perhaps decisive sense, it is selfdestructive and self‑defeating: its triumph is its death. The Other, like restless and unpredictable art, like the future itself, is a *mystery.* And being‑for‑the‑Other, going towards the Other through the twisted and rocky gorge of affection, brings that mystery into view ‑ makes it into a challenge. That mystery is what has triggered the sentiment in the first place ‑ but cracking that mystery is what the resulting movement is about. The mystery must be unpacked so that the being‑for may focus on the Other: one needs to know what to focus on. (The `demand' is *unspoken,* the responsibility undertaken is *unconditional;* it is up to him or her who follows the demand and takes up the responsibility to decide what the following of that demand and carrying out of that responsibility means in practical terms.) Mystery ‑ noted Max Frisch ‑ (and the Other is a mystery), is an exciting puzzle, but one tends to get tired of that excitement. `And so one creates for oneself an image. This is a loveless act, the betrayal." Creating an image of the Other leads to the substitution of the image for the Other; the Other is now fixed ‑ soothingly and comfortingly. There is nothing to be excited about anymore. I know what the Other needs, I know where my responsibility starts and ends. Whatever the Other may now do will be taken down and used against him. What used to be received as an exciting surprise now looks more like perversion; what used to be adored as exhilarating creativity now feels like wicked levity. Thanatos has taken over from Eros, and the excitement of the ungraspable turned into the dullness and tedium of the grasped. But, as Gyorgy Lukacs observed, `everything one person may know about another is only expectation, only potentiality, only wish or fear, acquiring reality only as a result of what happens later, and this reality, too, dissolves straightaway into potentialities'. Only death, with its finality and irreversibility, puts an end to the musical‑chairs game of the real and the potential ‑ it once and for all closes the embrace of togetherness which was before invitingly open and tempted the lonely self." `Creating an image' is the dress rehearsal of that death. But creating an image is the inner urge, the constant temptation, the *must* of all affection . . . It is the loneliness of being abandoned to an unresolvable ambivalence and an unanchored and formless sentiment which sets in motion the togetherness of being‑for. But what loneliness seeks in togetherness is an end to its present condition ‑ an end to itself. Without knowing ‑ without being capable of knowing ‑ that the hope to replace the vexing loneliness with togetherness is founded solely on its own unfulfilment, and that once loneliness is no more, the togetherness ( the being‑for togetherness) must also collapse, as it cannot survive its own completion. What the loneliness seeks in togetherness (suicidally for its own cravings) is the foreclosing and pre‑empting of the future, cancelling the future before it comes, robbing it of mystery but also of the possibility with which it is pregnant. Unknowingly yet necessarily, it seeks it all to its own detriment, since the success (if there is a success) may only bring it back to where it started and to the condition which prompted it to start on the journey in the first place. The togetherness of being‑for is always in the future, and nowhere else. It is no more once the self proclaims: `I have arrived', `I have done it', `I fulfilled my duty.' The being‑for starts from the realization of the bottomlessness of the task, and ends with the declaration that the infinity has been exhausted. This is the tragedy of being‑for ‑ the reason why it cannot but be death‑bound while simultaneously remaining an undying attraction. In this tragedy, there are many happy moments, but no happy end. Death is always the foreclosure of possibilities, and it comes eventually in its own time, even if not brought forward by the impatience of love. The catch is to direct the affection to staving off the end, and to do this against the affection's nature. What follows is that, if moral relationship is grounded in the being-for togetherness (as it is), then it can exist as a project, and guide the self's conduct only as long as its nature of a project (a not yet-completed project) is not denied. Morality, like the future itself, is forever not‑yet. (And this is why the ethical code, any ethical code, the more so the more perfect it is by its own standards, supports morality the way the rope supports the hanged man.) It is because of our loneliness that we crave togetherness. It is because of our loneliness that we open up to the Other and allow the Other to open up to us. It is because of our loneliness (which is only belied, not overcome, by the hubbub of the being‑with) that we turn into moral selves. And it is only through allowing the togetherness its possibilities which only the future can disclose that we stand a chance of acting morally, and sometimes even of being good, in the present.

#### Their Islamophobia claims are too sweeping --- our authors are epistemologically sound and the West isn’t inevitably tainted

Joppke 9, professor of politics – American University of Paris, PhD Sociology – Berkeley

(Christian, “Limits of Integration Policy: Britain and Her Muslims,” Journal of Ethnic and Migration Studies, Volume 35, Issue 3)

The Runnymede report defines Islamophobia as certain ‘closed’ views of Islam, which are distinguished from ‘open views’ in terms of eight binary oppositions, such as ‘monolithic/diverse’, ‘separate/interacting’, or ‘inferior/different’ (the first adjective always marking a ‘closed’, the second an ‘open’ view). This makes for an elastic definition of Islamophobia, with little that could not be packed into it. Consider the eighth binary opposition, ‘Criticism of West rejected/considered’. If ‘criticisms made by Islam of “The West” (are) rejected out of hand’, there is an instance of Islamophobia, the non-biased attitude being that ‘criticisms of “the West” and other cultures are considered and debated’. Is it reasonable to assume that people enter debate by putting their point of view to disposition? Under such demanding standards, only an advocate of Habermasian communicative rationality would go free of the charge of Islamophobia. However, the real problem is to leave unquestioned the exit position, ‘criticism of the West’. In being sweeping and undifferentiated, such a stance seems to be no less phobic than the incriminated opposite. If the point of the Runnymede report is to ‘counter Islamophobic assumptions that Islam is a single monolithic system’, it seems inconsistent to take for granted a similarly monolithic ‘criticism of “the West”’, which the ‘West’ is asked to ‘consider and debate’. There is a double standard here, in that ‘the West’ is asked to swallow what on the other side would qualify as phobia.

#### Islamophobia has zero causal explanatory power as a method and can’t solve it because it’s so nebulous

Bleich 11, professor of political science – Middlebury (Erik, “What Is Islamophobia and How Much Is There? Theorizing and Measuring an Emerging Comparative Concept,” American Behavioral Scientist, 55(12) p. 1581-1600)

Islamophobia is a widely used concept in public and scholarly circles. It was originally developed in the late 1990s and early 2000s by political activists, nongovernmental organizations (NGOs), public commentators, and international organizations to draw attention to harmful rhetoric and actions directed at Islam and Muslims in Western liberal democracies. For actors like these, the term not only identifies anti- Islamic and anti-Muslim sentiments, it also provides a language for denouncing them. In recent years, Islamophobia has evolved from a primarily political concept toward one increasingly deployed for analytical purposes. Researchers have begun using the term to identify the history, presence, dimensions, intensity, causes, and consequences of anti-Islamic and anti-Muslim sentiments. In short, Islamophobia is an emerging comparative concept in the social sciences. Yet, there is no widely accepted definition of the term. As a result, it is extremely difficult to compare levels of Islamophobia across time, location, or social group, or to levels of analogous categories such as racism, anti-Semitism, or xenophobia. Without a concept that applies across these comparative dimensions, it is also virtually impossible to identify the causes and consequences of Islamophobia with any precision.

#### No epistemology argument --- biases in certain writings don’t disprove the truth claims that we’ve supported with empirical evidence --- they link to their offense by essentializing all Western writing

Varisco 7 Reading orientalism: said and the unsaid (Google eBook) Dr. Daniel Martin Varisco is chair of anthropology and director of Middle Eastern and Central Asia studies at Hofstra University. He is fluent in Arabic and has lived in the Middle East (Yemen, Egypt, Qatar) for over 5 years since 1978. He has done fieldwork in Yemen, Egypt, Qatar, U.A.E. and Guatemala.

In sum, the essential argument of Orientalism is that a pervasive and endemic Western discourse of Orientalism has constructed "the Orient," a representation that Said insists not only is perversely false but prevents the authentic rendering of a real Orient, even by Orientals themselves. Academicized Orientalism is thus dismissed, in the words of one critic, as "the magic wand of Western domination of the 0rient."283i The notion of a single conceptual essence of Orient is the linchpin in Said's polemical reduction of all Western interpretation of the real or imagined geographical space to a single and latently homogeneous discourse. Read through Orientalism and only the Orient of Western Orientalism is to be encountered; authentic Orients are not imaginable in the text. The Orient is rhetorically available for Said simply by virtue of not really being anywhere. Opposed to this Orient is the colonialist West, exemplified by France, Britain, and the United States. East versus West, Occident over Orient: this is the debilitating binary that has framed the unending debate over Orientalism. A generation of students across disciplines has grown up with limited challenges to the polemical charge by Said that scholars who study the Middle East and Islam still do so institutionally through an interpretive sieve that divides a superior West from an inferior East. Dominating the debate has been a tiresome point/counterpoint on whether literary critic Edward Said or historian Bernard Lewis knows best. Here is where the dismissal of academic Orientalism has gone wrong. Over and over again the same problem is raised. Does the Orient as several generations of Western travelers, novelists, theologians, politicians, and scholars discoursed it really exist? To not recognize this as a fundamentally rhetorical question because of Edward Said is, nolo contendere, nonsense. No serious scholar can assume a meaningful cultural entity called "Orient" after reading Said's Orientalism; some had said so before Said wrote his polemic. Most of his readers agreed with the thrust of the Orientalism thesis because they shared the same frustration with misrepresentation. There is no rational retrofit between the imagined Orient, resplendent in epic tales and art, and the space it consciously or unwittingly misrepresented. However, there was and is a real Orient, flesh-and-blood people, viable cultural traditions, aesthetic domains, documented history, and an ongoing intellectual engagementwith the past, present, and future. What is missing from Orientalism is any systematic sense of what that real Orient was and how individuals reacted to the imposing forces that sought to label it and theoretically control it. ASLEEP IN ORIENTALISM'S WAKE I have avoided taking stands on such matters as the real, true or authentic Islamic or Arab world. —EDWARD SAID, "ORIENTALISM RECONSIDERED" Orientalism is frequently praised for exposing skeletons in the scholarly closet, but the book itself provides no blueprint for how to proceed.=84 Said's approach is of the cut-and-paste variety—a dash of Foucauldian discourse here and a dram of Gramscian hegemony there—rather than a howto model. In his review of Orientalism, anthropologist Roger Joseph concludes: Said has presented a thesis that on a number of counts is quite compelling. He seems to me, however, to have begged one major question. If discourse, by its very metanature, is destined to misrepresent and to be mediated by all sorts of private agendas, how can we represent cultural systems in ways that will allow us to escape the very dock in which Said has placed the Orientalists? The aim of the book was not to answer that question, but surely the book itself compels us to ask the question of its author.a85 Another cultural anthropologist, Charles Iindholm, criticizes Said's thesis for its "rejection of the possibility of constructing general comparative arguments about Middle Eastern cultures.286 Akbar Ahmed, a native Pakistani trained in British anthropology, goes so far as to chide Said for leading scholars into "an intellectual cul-de- sac."287 For a historian's spin, Peter Gran remarks in a favorable review that Said "does not fully work out the post-colonial metamorphosis."288 As critic Rey Chow observes, "Said's work begs the question as to how otherness—the voices, languages, and cultures of those who have been and continue to be marginalized and silenced— could become a genuine oppositional force and a usable value." Said's revisiting and reconsidering of Orientalism, as well as his literary expansion into a de-geographicalized Culture and Imperialism, never resolved the suspicion that the question still goes begging. There remains an essential problem. Said's periodic vacillation in Orientalism on whether or not the Orient could have a true essence leads him to an infinity of mere representations, presenting a default persuasive act by not representing that reality for himself and the reader. If Said claims that Orientalism created the false essence of an Orient, and critics counterclaim that Said himself proposes a false essence of Orientalism, how do we end the cycle of guilt by essentialization? Is there a way out of this epistemologieal morass? If not a broad way to truth, at least a narrow path toward a clearing? With most of the old intellectual sureties now crumbling, the prospect of ever finding a consensus is numbing, in part because the formidably linguistic roadblocks are—or at least should be—humbling. The history of philosophy, aided by Orientalist and ethnographic renderings of the panhumanities writ and unwrit large, is littered with searches for meaning. Yet, mystical ontologies aside, the barrier that has thus far proved unbreachable is the very necessity of using language, reducing material reality and imaginary potentiality to mere words. As long as concepts are essential for understanding and communication, reality—conterminous concept that it must be—will be embraced through worded essences. Reality must be represented, like it or not, so how is it to be done better? Neither categorical nor canonical Truth" need be of the essence. One of the pragmatic results of much postmodern criticism is the conscious subversion of belief in a singular Truth" in which any given pronouncement could be ascribed the eternal verity once reserved for holy writ. In rational inquiry, all truths are limited by the inescapable force of pragmatic change. Ideas with "whole truth" in them can only be patched together for so long. Intellectual activity proceeds by characterizing verbally what is encountered and by reducing the complex to simpler and more graspable elements. A world without proposed and debated essences would be an unimaginable realm with no imagination, annotation without nuance, activity without art. I suggest that when cogito ergo sum is melded with "to err is human," essentialization of human realities becomes less an unresolvable problem and more a profound challenge. Contra Said's polemical contentions, not all that has been created discursively about an Orient is essentially wrong or without redeeming intellectual value. Edward Lane and Sir Richard Burton can be read for valuable firsthand observations despite their ethnocentric baggage. Wilfrid and Anne Blunt can be appreciated for their moral suasion. TheJ 'accuse of criticism must be tempered constructively with the louche of everyday human give-and-take. In planed biblical English, it is helpful to see that the beam in one's own rhetorical eye usually blocks appreciation of the mote in the other's eye. Speaking truth to power a la Said's oppositional criticism is appealing at first glance, but speaking truths to varieties of ever-shifting powers is surely a more productive process for a pluralistic society. As Richard King has eloquently put it, "Emphasis upon the diversity, fluidity and complexity within as well as between cultures precludes a reification of their differences and allows one to avoid the kind of monadic essentialism that renders cross-cultural engagement an a priori impossibility from the outset."2?0 Contrasted essentialisms, as the debate over Orientalism bears out, do not rule each other out. Claiming that an argument is essentialist does not disprove it; such a ploy serves mainly to taint the ideas opposed and thus tends to rhetorically mitigate opposing views. Thesis countered by antithesis becomes sickeningly cyclical without a willingness to negotiate synthesis. The critical irony is that Said, the author as advocate who at times denies agency to authors as individuals, uniquely writes and frames the entire script of his own text. Texts, in the loose sense of anything conveniently fashioned with words, become the meter for Said's poetic performance. The historical backdrop is hastily arranged, not systematically researched, to authorize the staging of his argument. The past becomes the whiggishly drawn rationale for pursuing a present grievance. As the historian Robert Berkhofer suggests, Said "uses many voices to exemplify the stereotyped view, but he makes no attempt to show how the new self/other relationship ought to be represented. Said's book does not practice what it preaches multiculturally."29i Said's method, Berkhofer continues, is to "quote past persons and paraphrase them to reveal their viewpoints as stereotyped and hegemonic." Napoleon's savants, Renan's racism, and Flaubert's flirtations serve to accentuate the complicity of modern-day social scientists who support Israel. Orientalism is a prime example of a historical study with one voice and one viewpoint. Some critics have argued in rhetorical defense of Said that he should not be held accountable for providing an alternative. The voice of dissent, the critique (of Orientalism or any other hegemonic discourse) does not need to propose an alternative for the critique to be effective and valid," claim Ashcroft and Ahluwalia.29= Saree Makdisi suggests that Said's goal in Orientalism is "to specify the constructedness of reality" rather than to "unmask and dispel" the illusion of Orientalist discourse.=93 Timothy Brennan argues that Said's aim is not to describe the "brute reality" of a real Orient but rather to point out the "relative indifference" of Western intellectuals to that reality.=94 Certainly no author is under an invisible hand of presumption to solve a problem he or she wishes to expose. Yet, it is curious that Said would not want to suggest an alternative, to directly engage the issue of how the "real" Orient could be represented. He reacts forcefully to American literary critics of the "left" who fail to specify the ideas, values, and engagement being urged.=95 If, as Said, insists "politics is something more than liking or disliking some intellectual orthodoxy now holding sway over a department of literature,"=9'6 then why would he not follow through with what this "something more" might be for the discourse he calls Orientalism? As Abdallah Laroui eloquently asks, "Having become concerned with an essentially political problem, the Arab intelligentsia must inevitably reach the stage where it passes from diagnosis of the situation to prescription of remedial action. Why should I escape this rule?"=97 This is a question that escapes Edward Said in Orientalism, although it imbues his life work as an advocate against ethnocentric bias.

#### Every study of credible social theories concludes consequentialism is good---Scientific studies of biology, evolution, and psychology prove that deontological proclivities are only illogical layovers from evolution

Greene 10 Joshua Greene Associate Professor of the Social Sciences Department of Psychology Harvard University "The Secret Joke of Kant’s Soul" published in Moral Psychology: Historical and Contemporary Readings, accessed: www.fed.cuhk.edu.hk/~lchang/material/Evolutionary/Developmental/Greene-KantSoul.pdf

What turn-of-the-millennium science is telling us is that human moral judgment is not a pristine rational enterprise, that our moral judgments are driven by a hodgepodge of emotional dispositions, which themselves were shaped by a hodgepodge of evolutionary forces, both biological and cultural. Because of this, it is exceedingly unlikely that there is any rationally coherent normative moral theory that can accommodate our moral intuitions. Moreover, anyone who claims to have such a theory, or even part of one, almost certainly doesn't. Instead, what that person probably has is a moral rationalization.

It seems then, that we have somehow crossed the infamous "is"-"ought" divide. How did this happen? Didn't Hume (Hume, 1978) and Moore (Moore, 1966) warn us against trying to derive an "ought" from and "is?" How did we go from descriptive scientific theories concerning moral psychology to skepticism about a whole class of normative moral theories? The answer is that we did not, as Hume and Moore anticipated, attempt to derive an "ought" from and "is." That is, our method has been inductive rather than deductive. We have inferred on the basis of the available evidence that the phenomenon of rationalist deontological philosophy is best explained as a rationalization of evolved emotional intuition (Harman, 1977).

Missing the Deontological Point

I suspect that rationalist deontologists will remain unmoved by the arguments presented here. Instead, I suspect, they will insist that I have simply misunderstood what Kant and like-minded deontologists are all about. Deontology, they will say, isn't about this intuition or that intuition. It's not defined by its normative differences with consequentialism. Rather, deontology is about taking humanity seriously. Above all else, it's about respect for persons. It's about treating others as fellow rational creatures rather than as mere objects, about acting for reasons rational beings can share. And so on (Korsgaard, 1996a; Korsgaard, 1996b). This is, no doubt, how many deontologists see deontology. But this insider's view, as I've suggested, may be misleading. The problem, more specifically, is that it defines deontology in terms of values that are not distinctively deontological, though they may appear to be from the inside. Consider the following analogy with religion. When one asks a religious person to explain the essence of his religion, one often gets an answer like this: "It's about love, really. It's about looking out for other people, looking beyond oneself. It's about community, being part of something larger than oneself." This sort of answer accurately captures the phenomenology of many people's religion, but it's nevertheless inadequate for distinguishing religion from other things. This is because many, if not most, non-religious people aspire to love deeply, look out for other people, avoid self-absorption, have a sense of a community, and be connected to things larger than themselves. In other words, secular humanists and atheists can assent to most of what many religious people think religion is all about. From a secular humanist's point of view, in contrast, what's distinctive about religion is its commitment to the existence of supernatural entities as well as formal religious institutions and doctrines. And they're right. These things really do distinguish religious from non-religious practices, though they may appear to be secondary to many people operating from within a religious point of view.

In the same way, I believe that most of the standard deontological/Kantian self-characterizatons fail to distinguish deontology from other approaches to ethics. (See also Kagan (Kagan, 1997, pp. 70-78.) on the difficulty of defining deontology.) It seems to me that consequentialists, as much as anyone else, have respect for persons, are against treating people as mere objects, wish to act for reasons that rational creatures can share, etc. A consequentialist respects other persons, and refrains from treating them as mere objects, by counting every person's well-being in the decision-making process. Likewise, a consequentialist attempts to act according to reasons that rational creatures can share by acting according to principles that give equal weight to everyone's interests, i.e. that are impartial. This is not to say that consequentialists and deontologists don't differ. They do. It's just that the real differences may not be what deontologists often take them to be.

What, then, distinguishes deontology from other kinds of moral thought? A good strategy for answering this question is to start with concrete disagreements between deontologists and others (such as consequentialists) and then work backward in search of deeper principles. This is what I've attempted to do with the trolley and footbridge cases, and other instances in which deontologists and consequentialists disagree. If you ask a deontologically-minded person why it's wrong to push someone in front of speeding trolley in order to save five others, you will get characteristically deontological answers. Some will be tautological: "Because it's murder!" Others will be more sophisticated: "The ends don't justify the means." "You have to respect people's rights." But, as we know, these answers don't really explain anything, because if you give the same people (on different occasions) the trolley case or the loop case (See above), they'll make the opposite judgment, even though their initial explanation concerning the footbridge case applies equally well to one or both of these cases. Talk about rights, respect for persons, and reasons we can share are natural attempts to explain, in "cognitive" terms, what we feel when we find ourselves having emotionally driven intuitions that are odds with the cold calculus of consequentialism. Although these explanations are inevitably incomplete, there seems to be "something deeply right" about them because they give voice to powerful moral emotions. But, as with many religious people's accounts of what's essential to religion, they don't really explain what's distinctive about the philosophy in question.

## 2NC

### 2NC Solves Self-Restraint

#### Self restraint solves better than the aff

Adrian Vermeule 7, Harvard law prof - AND - Eric Posner - U Chicago law, The Credible Executive, 74 U. Chi. L. Rev. 865

As we noted earlier, legal scholars rarely note the problem of executive credibility, preferring to dwell on the problem of aggrandize- ment by ill-motivated presidents. Ironically, this assumption that presidents seek to maximize power has obscured one of the greatest constraints on aggrandizement, namely, the president’s own interest in maintaining his credibility. Neither a well-motivated nor an ill- motivated president can accomplish his goals if the public does not trust him.34 This concern with reputation may put a far greater check on the president’s actions than do the reactions of the other branches of the government.

#### The counterplan utilizes internal separations of power---the functional result is the same as the aff

Nathan Sales 12, Assistant Professor of Law, George Mason, Self-Restraint and National Security, JOURNAL OF NATIONAL SECURITY LAW & POLICY, 6:227

As we’ve seen, certain officials within military and intelligence agencies – general counsels, legal advisors, and other watchdogs – are responsible for ensuring that national security operations comply with the relevant domestic and international legal requirements. These players intervene to rule out missions they believe would cross a legal line. But sometimes they go beyond that basic function – ensure compliance with the law, full stop – and reject operations that, while lawful, are thought to be undesirable on policy grounds. That is, they impose self-restraints that are stricter than the applicable laws. Why?

One way to answer that question is to consider the individual and institutional incentives that color the behavior of military and intelligence officials. Looking at the government’s national security apparatus through the lens of public choice theory (especially the idea that bureaucrats are rationally self interested actors who seek to maximize their utility152) and basic agency relationships (e.g., the relationships between senior policymakers and the subordinates who act on their behalf153) reveals a complex system in which power is distributed among a number of different nodes. The executive branch “is a ‘they,’ not an ‘it.’”154 The national security community in particular is subdivided into various semi- autonomous entities, each of which promotes its own parochial interests within the system and, in so doing, checks the like ambitions of rival entities;155 the government thus is subject to what Neal Katyal has called the “internal separation of powers.”156 These basic insights into how military and intelligence agencies operate suggest several possible explanations for why self-restraint occurs. As elaborated in this Part, such constraints might result from systematic asymmetries in the expected value calculations of senior policymakers and their lawyers. In addition, as explained in Part IV, self-restraint might occur due to bureaucratic empire building by officials who review operations for compliance with domestic and international law.

A. A Simple Framework

One possible explanation for why the government stays its own hand is expected value asymmetry. This reluctance to push the envelope is a rational and predictable response to powerful bureaucratic incentives. Officials tend to be cautious because the costs they expect to incur as a result of forward-leaning and aggressive action usually are greater than the expected benefits. Similarly, government employment rules and other mechanisms make it easier to internalize onto individual bureaucrats the costs of a failed operation than the benefits of a successful one.157 National security players typically have more to lose from boldness than to gain, and that asymmetry inclines them to avoid risky behavior.158 While all members of the national security community experience some cost-benefit asymmetry, senior policymakers and their lawyers seem especially cautious. Attorneys who review proposed operations for legality therefore look askance at risky missions. They tend to veto proposals that, while legal, could inspire propaganda campaigns by adversaries, expose officials to ruinous investigations, or worse. The result is self-restraint – officials rule out operations that they regard as lawful because of fears they will prove too costly.

### AT Agamben

#### Numerous cultural and historical factors have gone into the sovereign—that means their turn is inevitable and there is no broader impact

Halit Tagma 09, Professor of Political Science, Arizona State , “Homo Sacer vs. Homo Soccer Mom: Reading Agamben and Foucault in the War on Terror,” Alternatives: Global, Local, Political, Vol. 34, No. 4 (Oct.-Dec. 2009), pp. 407-435

Sovereign decisions are always already informed by historical and cultural understandings as to who counts as a member of the "good species." The "good species," "the inside," and the body politic have been constructed by colonial discourse. As Roxanne Doty has pointed out, colonial discourse has had a vital role in the construction of Western nations. She further points out that race, religion, and other marks of difference have played an important role in national classification.94 The treatment of faraway people as inferior and exotic has played an important role in nation building in its classic sense. Therefore, who counts as a citizen, a "legitimate" member of a "legitimate" nation, is the product and effect of centuries of interaction of the West with its others. Understood in this sense, sovereign decisions (whether made at the top or bottom level) are informed and shaped by a cultural and colonial history. This is neglected in Agamben's grand analysis of Western politics. Therefore, sovereign power needs the classification, hierarchization, and othering provided by a regime of truth in order to conduct its violent power. Only certain types of people could be rendered as bare life and thrown into a zone of indistinction. Understood this way, it is easier to comprehend the "smooth" production of homines sacri out of Middle Eastern subjects.¶ In the early stages of the war in Afghanistan, as Michael Ratner and Ellen Ray point out, tens of thousands of people were collected by the Northern Alliance.95 Among the collected were ordinary foreign aid workers, refugees, and probable fighters of the Taliban regime. They were sold from $50 to $5,000 per head to Coalition Forces.96 Even though there was no real investigation based on tangible and concrete evidence, some these captives were flown to Guantánamo. As Fox points out, if the prisoners were wearing a Casio brand watch, this meant an higher prize in the eyes of the interrogators, as it signaled that the prisoner was a probable AI Qaeda bombmaker.97 The small difference between wearing a Casio watch in some parts of the world, as opposed to others, is at the ground level what makes it possible for a body to be become a homo sacer. They can then be flown off to an unknown place to face an unknown future that get read and interpreted by petty sovereigns. Such differences in- form the decisions that render bodies as homo sacer, which are thrown into a zone of indistinction. In the modern age, no doubt, Agamben would argue that even the body of a soccer mom - an obedient national flag-waving subject - has entered into political and strategic calculations. However, the soccer mom is not exposed to the violence of homo sacer. Regimes of truth and disciplines produce hierarchically ordered subject positions, and this is an aspect of biopower. The theoretical priority that Agamben gives to sovereign power is reversed when it is shown that biopower makes it possible for the petty agents of the state to conduct sovereign violence. Sovereign power is informed and shaped by biopower.

#### The state of exception can be contained

Jennifer Mitzen 11, PhD, University of Chicago, Associate Professor of Political Science at Ohio State University, Michael E. Newell, “Crisis Authority, the War on Terror and the Future of Constitutional Democracy,” PDF

But what Agamben has potentially overlooked is the conversation between the government, public and media concerning the state of exception. Waever’s desecuritization theory tells us that it is possible for continued debate and media coverage to desecuritize a threat in whole or in part (Waever, 1995). As the War on Terror progressed, more academics and government officials began to speak out against the usefulness of interrogations, the reality of the terrorist threat and the morality of the administration’s policies. Some critics suggested that the terrorist threat was not as imminent as the Administration made it appear, and that “…fears of the omnipotent terrorist…may have been overblown, the threat presented within the United States by al Qaeda greatly exaggerated” (Mueller, 2006). Indeed, as Mueller points out, there have been no terrorist attacks in the United States five years prior and five years after September 11th. The resignation of administration officials, such as Jack Goldsmith, who, it was later learned, sparred with the administration over Yoo’s torture memos, their wiretapping program and their trial of suspected terrorists also contributed to this shift in sentiment (Rosen, 2007). The use of the terms “torture,” and “prisoner abuse,” that began to surface in critical media coverage of the War on Terror framed policies as immoral. As the public gradually learned more from media coverage, academic discourse, and protests from government officials, the administration and its policies saw plummeting popularity in the polls. Two-thirds of the country did not approve of Bush’s handling of the War on Terror by the end of his presidency (Harris Poll) and as of February 2009 two-thirds of the country wanted some form of investigation into torture and wiretapping policies (USA Today Poll, 2009).¶ In November 2008 a Democratic President was elected and Democrats gained substantial ground in Congress partly on promises of changing the policies in the War on Terror. Republican presidential nominees, such as Mitt Romney, who argued for the continuance of many of the Bush administration’s policies in the War on Terror, did not see success at the polls. Indeed, this could be regarded as Waever’s “speech-act failure” which constitutes the moment of desecuritization (Waever, 1995). In this sense, Agamben’s warning of “pure de-facto rule” in the War on Terror rings hollow because of one single important fact: the Bush administration peacefully transferred power to their political rivals after the 2008 elections. The terrorist threat still lingers in the far reaches of the globe, and a strictly Agamben-centric analysis would suggest that the persistence of this threat would allow for the continuance of the state of exception. If Agamben was correct that the United States was under “pure de-facto rule” then arguably its rulers could decide to stay in office and to use the military to protect their position. Instead, Bush and his administration left, suggesting that popular sovereignty remained intact.

### 2NC Deference Impact

#### Causes nuclear war and bioterror---exec flex is key to successful fourth-gen warfare

Zheyao Li 9, J.D. candidate, Georgetown University Law Center, 2009; B.A., political science and history, Yale University, 2006. This paper is the culmination of work begun in the "Constitutional Interpretation in the Legislative and Executive Branches" seminar, led by Judge Brett Kavanaugh, “War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare,” 7 Geo. J.L. & Pub. Pol'y 373 2009 WAR POWERS IN THE FOURTH GENERATION OF WARFARE

A. The Emergence of Non-State Actors

Even as the quantity of nation-states in the world has increased dramatically since the end of World War II, the institution of the nation-state has been in decline over the past few decades. Much of this decline is the direct result of the waning of major interstate war, which primarily resulted from the introduction of nuclear weapons.122 The proliferation of nuclear weapons, and their immense capacity for absolute destruction, has ensured that conventional wars remain limited in scope and duration. Hence, "both the size of the armed forces and the quantity of weapons at their disposal has declined quite sharply" since 1945.123 At the same time, concurrent with the decline of the nation-state in the second half of the twentieth century, non-state actors have increasingly been willing and able to use force to advance their causes. In contrast to nation-states, who adhere to the Clausewitzian distinction between the ends of policy and the means of war to achieve those ends, non-state actors do not necessarily fight as a mere means of advancing any coherent policy. Rather, they see their fight as a life-and-death struggle, wherein the ordinary terminology of war as an instrument of policy breaks down because of this blending of means and ends.124 It is the existential nature of this struggle and the disappearance of the Clausewitzian distinction between war and policy that has given rise to a new generation of warfare. The concept of fourth-generational warfare was first articulated in an influential article in the Marine Corps Gazette in 1989, which has proven highly prescient. In describing what they saw as the modem trend toward a new phase of warfighting, the authors argued that: In broad terms, fourth generation warfare seems likely to be widely dispersed and largely undefined; the distinction between war and peace will be blurred to the vanishing point. It will be nonlinear, possibly to the point of having no definable battlefields or fronts. The distinction between "civilian" and "military" may disappear. Actions will occur concurrently throughout all participants' depth, including their society as a cultural, not just a physical, entity. Major military facilities, such as airfields, fixed communications sites, and large headquarters will become rarities because of their vulnerability; the same may be true of civilian equivalents, such as seats of government, power plants, and industrial sites (including knowledge as well as manufacturing industries). 125 It is precisely this blurring of peace and war and the demise of traditionally definable battlefields that provides the impetus for the formulation of a new. theory of war powers. As evidenced by Part M, supra, the constitutional allocation of war powers, and the Framers' commitment of the war power to two co-equal branches, was not designed to cope with the current international system, one that is characterized by the persistent machinations of international terrorist organizations, the rise of multilateral alliances, the emergence of rogue states, and the potentially wide proliferation of easily deployable weapons of mass destruction, nuclear and otherwise. B. The Framers' World vs. Today's World The Framers crafted the Constitution, and the people ratified it, in a time when everyone understood that the state controlled both the raising of armies and their use. Today, however, the threat of terrorism is bringing an end to the era of the nation-state's legal monopoly on violence, and the kind of war that existed before-based on a clear division between government, armed forces, and the people-is on the decline. 126 As states are caught between their decreasing ability to fight each other due to the existence of nuclear weapons and the increasing threat from non-state actors, it is clear that the Westphalian system of nation-states that informed the Framers' allocation of war powers is no longer the order of the day. 127 As seen in Part III, supra, the rise of the modem nation-state occurred as a result of its military effectiveness and ability to defend its citizens. If nation-states such as the United States are unable to adapt to the changing circumstances of fourth-generational warfare-that is, if they are unable to adequately defend against low-intensity conflict conducted by non-state actors-"then clearly [the modem state] does not have a future in front of it.' 128 The challenge in formulating a new theory of war powers for fourthgenerational warfare that remains legally justifiable lies in the difficulty of adapting to changed circumstances while remaining faithful to the constitutional text and the original meaning. 29 To that end, it is crucial to remember that the Framers crafted the Constitution in the context of the Westphalian system of nation-states. The three centuries following the Peace of Westphalia of 1648 witnessed an international system characterized by wars, which, "through the efforts of governments, assumed a more regular, interconnected character."' 130 That period saw the rise of an independent military class and the stabilization of military institutions. Consequently, "warfare became more regular, better organized, and more attuned to the purpose of war-that is, to its political objective."' 1 3' That era is now over. Today, the stability of the long-existing Westphalian international order has been greatly eroded in recent years with the advent of international terrorist organizations, which care nothing for the traditional norms of the laws of war. This new global environment exposes the limitations inherent in the interpretational methods of originalism and textualism and necessitates the adoption of a new method of constitutional interpretation. While one must always be aware of the text of the Constitution and the original understanding of that text, that very awareness identifies the extent to which fourth-generational warfare epitomizes a phenomenon unforeseen by the Framers, a problem the constitutional resolution of which must rely on the good judgment of the present generation. 13 Now, to adapt the constitutional warmarking scheme to the new international order characterized by fourth-generational warfare, one must understand the threat it is being adapted to confront. C. The Jihadist Threat The erosion of the Westphalian and Clausewitzian model of warfare and the blurring of the distinction between the means of warfare and the ends of policy, which is one characteristic of fourth-generational warfare, apply to al-Qaeda and other adherents of jihadist ideology who view the United States as an enemy. An excellent analysis of jihadist ideology and its implications for the rest of the world are presented by Professor Mary Habeck. 133 Professor Habeck identifies the centrality of the Qur'an, specifically a particular reading of the Qur'an and hadith (traditions about the life of Muhammad), to the jihadist terrorists. 134 The jihadis believe that the scope of the Qur'an is universal, and "that their interpretation of Islam is also intended for the entire world, which must be brought to recognize this fact peacefully if possible and through violence if not."' 135 Along these lines, the jihadis view the United States and her allies as among the greatest enemies of Islam: they believe "that every element of modern Western liberalism is flawed, wrong, and evil" because the basis of liberalism is secularism. 136 The jihadis emphasize the superiority of Islam to all other religions, and they believe that "God does not want differing belief systems to coexist."' 37 For this reason, jihadist groups such as al-Qaeda "recognize that the West will not submit without a fight and believe in fact that the Christians, Jews, and liberals have united against Islam in a war that will end in the complete destruction of the unbelievers.' 138 Thus, the adherents of this jihadist ideology, be it al-Qaeda or other groups, will continue to target the United States until she is destroyed. Their ideology demands it. 139 To effectively combat terrorist groups such as al-Qaeda, it is necessary to understand not only how they think, but also how they operate. Al-Qaeda is a transnational organization capable of simultaneously managing multiple operations all over the world."14 It is both centralized and decentralized: al-Qaeda is centralized in the sense that Osama bin Laden is the unquestioned leader, but it is decentralized in that its operations are carried out locally, by distinct cells."4 AI-Qaeda benefits immensely from this arrangement because it can exercise direct control over high-probability operations, while maintaining a distance from low-probability attacks, only taking the credit for those that succeed. The local terrorist cells benefit by gaining access to al-Qaeda's "worldwide network of assets, people, and expertise."' 42 Post-September 11 events have highlighted al-Qaeda's resilience. Even as the United States and her allies fought back, inflicting heavy casualties on al-Qaeda in Afghanistan and destroying dozens of cells worldwide, "al-Qaeda's networked nature allowed it to absorb the damage and remain a threat." 14 3 This is a far cry from earlier generations of warfare, where the decimation of the enemy's military forces would generally bring an end to the conflict. D. The Need for Rapid Reaction and Expanded Presidential War Power By now it should be clear just how different this conflict against the extremist terrorists is from the type of warfare that occupied the minds of the Framers at the time of the Founding. Rather than maintaining the geographical and political isolation desired by the Framers for the new country, today's United States is an international power targeted by individuals and groups that will not rest until seeing her demise. The Global War on Terrorism is not truly a war within the Framers' eighteenth-century conception of the term, and the normal constitutional provisions regulating the division of war powers between Congress and the President do not apply. Instead, this "war" is a struggle for survival and dominance against forces that threaten to destroy the United States and her allies, and the fourth-generational nature of the conflict, highlighted by an indiscernible distinction between wartime and peacetime, necessitates an evolution of America's traditional constitutional warmaking scheme. As first illustrated by the military strategist Colonel John Boyd, constitutional decision-making in the realm of war powers in the fourth generation should consider the implications of the OODA Loop: Observe, Orient, Decide, and Act. 44 In the era of fourth-generational warfare, quick reactions, proceeding through the OODA Loop rapidly, and disrupting the enemy's OODA loop are the keys to victory. "In order to win," Colonel Boyd suggested, "we should operate at a faster tempo or rhythm than our adversaries." 145 In the words of Professor Creveld, "[b]oth organizationally and in terms of the equipment at their disposal, the armed forces of the world will have to adjust themselves to this situation by changing their doctrine, doing away with much of their heavy equipment and becoming more like police."1 46 Unfortunately, the existing constitutional understanding, which diffuses war power between two branches of government, necessarily (by the Framers' design) slows down decision- making. In circumstances where war is undesirable (which is, admittedly, most of the time, especially against other nation-states), the deliberativeness of the existing decision-making process is a positive attribute. In America's current situation, however, in the midst of the conflict with al-Qaeda and other international terrorist organizations, the existing process of constitutional decision-making in warfare may prove a fatal hindrance to achieving the initiative necessary for victory. As a slow-acting, deliberative body, Congress does not have the ability to adequately deal with fast-emerging situations in fourth-generational warfare. Thus, in order to combat transnational threats such as al-Qaeda, the executive branch must have the ability to operate by taking offensive military action even without congressional authorization, because only the executive branch is capable of the swift decision-making and action necessary to prevail in fourth-generational conflicts against fourthgenerational opponents.

### UQ---Courts Deferential

#### Court deference is at an all-time high --- most recent cases prove

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

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

#### We overwhelmingly control uniqueness---all federal courts are either siding with the executive’s terror policies through narrow rulings or declining to even hear the cases--

Jonathan L. Entin 12, Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations, 45 Case W. Res. J. Int'l L. 443

Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive's position, it generally has done so on relatively narrow grounds.¶ Consider the Espionage Act cases that arose during World War I. Schenck v. United States, n63 which is best known for Justice Holmes's [\*452] announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant's having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." n64 The circumstances in which the speech took place affected the scope of First Amendment protection: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." n65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort n66 and of Eugene Debs for a speech denouncing the war. n67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States, n68 but only Justice Brandeis agreed with his position. n69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes's opinions for the Court in the earlier cases. n70¶ Similarly, the Supreme Court rejected challenges to the government's war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs. n71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts. n72 In addition, the Court upheld the validity of the Japanese internment program. n73 Of course, the Court did limit the scope of the [\*453] program by holding that it did not apply to "concededly loyal" citizens. n74 But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated. n75 Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees. n76¶ The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region. n77 The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, n78 but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone. n79 The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges. n80¶ The picture in the post-2001 era is less clear. In three different cases the Supreme Court has rejected the executive branch's position, but all of those rulings were narrow in scope. For example, Hamdi v. Rumsfeld n81 held that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to have a neutral decision-maker determine the factual basis for his detention. There was no majority opinion, however, so the implications of the ruling were ambiguous to say the least. Justice O'Connor's plurality opinion for four members of the Court concluded that Congress had authorized the president to detain enemy combatants by passing the Authorization for Use of Military Force n82 and that the AUMF satisfied the statutory requirement of congressional authorization for the detention of U.S. [\*454] citizens. n83 Justice Souter, joined by Justice Ginsburg, thought that the AUMF had not in fact authorized the detention of American citizens as required by the statute, n84 which suggested that Hamdi should be released. But the Court would have been deadlocked as to the remedy had he adhered to his view of how to proceed. This was because Justices Scalia and Stevens also believed that Hamdi's detention was unlawful and that he should be released on habeas corpus, n85 whereas Justice Thomas thought that the executive branch had acted within its authority and therefore would have denied relief. n86 This alignment left four justices in favor of a remand for more formal proceedings, four other justices in favor of releasing Hamdi, and one justice supporting the government's detention of Hamdi with no need for a more elaborate hearing. To avoid a deadlock, therefore, Justice Souter reluctantly joined the plurality's remand order. n87¶ Hamdi was atypical because that case involved a U.S. citizen who was detained. The vast majority of detainees have been foreign nationals. In Hamdan v. Rumsfeld, n88 the Supreme Court ruled that the military commissions that the executive branch had established in the wake of the September 11 attacks had not been authorized by Congress and therefore could not be used to try detainees. n89 A concurring opinion made clear that the president could seek authorization from Congress to use the type of military commissions that had been established unilaterally in this case. n90¶ Congress responded to that suggestion by enacting the Military Commissions Act of 2006, n91 which sought to endorse the executive's detainee policies and to restrict judicial review of detainee cases. In Boumediene v. Bush, n92 the Supreme Court again rejected the government's position. First, the statute did not suspend the writ of [\*455] habeas corpus. n93 Second, the statutory procedures for hearing cases involving detainees were constitutionally inadequate. n94 At the same time, the Court emphasized that the judiciary should afford some deference to the executive branch in dealing with the dangers of terrorism n95 and should respect the congressional decision to consolidate judicial review of detainee cases in the District of Columbia Circuit. n96¶ Detainees who have litigated in the lower federal courts in the District of Columbia have not found a sympathetic forum. The U.S. Court of Appeals for the D.C. Circuit has not upheld a single district court ruling that granted any sort of relief to detainees, and the Supreme Court has denied certiorari in every post-Boumediene detainee case in which review was sought. n97 In only one case involving a detainee has the D.C. Circuit granted relief, and that case came up from a military commission following procedural changes adopted in the wake of Boumediene. n98 About a month after this symposium took place, in Hamdan v. United States n99 the court overturned a conviction for providing material support for terrorism. The defendant was the same person who successfully challenged the original military commissions in Hamdan v. Rumsfeld. n100 This very recent ruling emphasized that the statute under which he was prosecuted did not apply to offenses committed before its enactment. n101 It remains to be seen how broadly the decision will apply. [\*456] ¶ Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In Arar v. Ashcroft, n102 the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. n103 And in Mohamed v. Jeppesen Dataplan, Inc., n104 the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. n105 Unlike Arar, in which the defendants were federal officials, n106 this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. n107 Although at least four judges on the en banc courts dissented from both rulings, n108 the Supreme Court declined to review either case. n109

### Link---Spillover (Courts Decisions)

#### Deference is stable now but the plan sets the stage for escalating judicial intervention

John O’Connor 7, Former officer in the Marine Corp and Judge Advocate; JD, U Maryland Law School. Statistics and the Military Deference Doctrine: a Response to Professor Lichtman, 66 Md. L. Rev. 668, Lexis

As I have written elsewhere, one of the most important aspects of the military deference doctrine, and one that many commentators misunderstand,176 is that the military deference doctrine is not a venerable doctrine that has existed since the early days of the Republic. 177 Indeed, a review of the Court’s military deference jurisprudence could lead one to the conclusion that the doctrine was more or less the brainchild of Chief Justice Rehnquist, who wrote virtually every important military deference decision that the Court has issued.178 While notions of stare decisis may militate against a retreat from the military deference doctrine by the Court, the fact remains that the doctrine is one of fairly recent vintage, which was developed and perpetuated mainly through judicial opinions written by a Justice who is no longer on the Court. Moreover, while stare decisis is a nice concept in the abstract, that doctrine did not prevent the Court from radically changing its approach to constitutional challenges to military practices twice before. Therefore, **it is not out of the realm of possibility that the military deference doctrine could recede in importance** with personnel changes on the Court. This could occur through an express overruling of the doctrine, through decisions narrowing the doctrine’s application, or through a moresubtle process whereby the Court continues to pay lip service to its need to defer to political branch judgments but nevertheless **accords little or no actual deference to the policy determinations of Congress and the President.**

But early indications from the Roberts Court, with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O’Connor, respectively, provide reason to believe that the military deference doctrine will continue to be a robust feature of the Court’s military jurisprudence, at least in the near term. In FAIR, the first “military” case decided by the Roberts Court, the Court upheld the Solomon Amendment against a constitutional challenge and, in so doing, began its constitutional analysis by extolling the virtues of the military deference doctrine when Congress legislates pursuant to its constitutional power to raise and support armies:

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Congress’ power in this area “is broad and sweeping,” and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in Rostker, “judicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies.179

While it is always dangerous to draw conclusions from a single case, all participating members of the Court—Justice Alito did not participate—joined Chief Justice Roberts’s opinion, which invoked the military deference doctrine as its first step in constitutional analysis once the Court resolved what the statute in fact provided.180 Moreover, this is a case that could have been decided on a number of grounds, such as a pure Spending Clause or First Amendment basis, 181 without invoking the military deference doctrine, and the Court’s prominent reliance on the military deference doctrine to support its decision suggests that there is no move afoot to eradicate the doctrine, explicitly or through subtle narrowing. For his part, Justice Alito noted prominently in his confirmation hearing that he had joined a conservative Princeton alumni group because, as an alumnus who attended Princeton on an ROTC scholarship, he was unhappy that the school had decided to abolish the campus ROTC program.182 While, again, predicting judicial attitudes based on personal history is always a risky proposition, Justice Alito’s background makes him seem like an unlikely candidate to take up the sword against the military deference doctrine, particularly when every other member of the Court joined an opinion applying it in FAIR.

V. Conclusion

This Article is by no means an attempt to catalogue every military deference case decided by the Court, or to discuss every nuance in its application. n183 It is important, however, that the doctrine be understood, both in terms of the facts surrounding its development and the limited scope of the doctrine as evidenced by the framework in which it is applied. Professor Lichtman's article on the military deference doctrine is thought provoking in that it challenges the orthodoxy by which the military deference doctrine is viewed - through the lens of time rather than through the lens of subject matter irrespective of time. n184 Ultimately, however, I have come to the conclusion that Professor Lichtman's analysis of the military deference doctrine is flawed in several important respects, all of which result in a fundamental misunderstanding [\*706] of the doctrine. In my estimation, the principal flaws in Professor Lichtman's analysis include: focusing on "win-loss" records rather than on the analytical framework in which those wins and losses occurred; failing to perceive that the military deference doctrine should - and does - apply only to a narrow category of "military" cases; incorrectly casting the military deference doctrine as a longstanding and relatively stable doctrine that has only subtly evolved since the early twentieth century; determining that subject matter, rather than timing, is the proper variable around which to organize an analysis of military deference decisions; and concluding that the military deference doctrine does not - and should not - apply to statutes and regulations burdening civilians instead of military personnel.

The military deference doctrine is, at once, both historically immature and limited, yet potent when applicable. After the disruption that occurred in the course of the Court's prior rejection of the doctrine of noninterference, the Court ultimately landed on the military deference doctrine as an appropriate analytical framework, where applicable, in the mid-1970s, and the Court has largely remained in the same place with its military jurisprudence ever since. The Court's rejection of its noninterference policy beginning in the mid-1950s likely came about as a result of what the Court perceived as overreaching by the political branches in subjecting persons - military and civilian - to courts-martial in a willy-nilly fashion. If the military deference doctrine were to recede in importance in the future, it would be a good bet that it happens because some collection of Supreme Court Justices perceives that Congress and the President are overreaching in the exercise of their constitutional powers to raise armies and regulate the armed forces. At present, though, there is no sign that such an upheaval is anywhere on the horizon.

#### The aff spills over and guts broader executive war powers.

Green 9Craig, Associate Professor, Temple Law School; University Fellowship, Princeton History Department; J.D., Yale Law School, “Ending the Korematsu Era: A Modern Approach ,” http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=roger\_craig\_green

Another lesson from sixty years of wartime cases concerns the role of precedent itself in guiding presidential action. Two viewpoints merit special notice, with each having roots in opinions by Justice Jackson. On one hand is his explanation in Korematsu that 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.270 This “loaded weapon” idea is orthodox in analysis of Korematsu as a racist morality play. The passage is cited as evidence that Supreme Court precedents really matter, and that tragically racist errors retain their menacing power throughout the decades.271 Students are reminded that Korematsu has never been directly overruled, thereby inviting imagination that Korematsu itself is a loaded weapon just waiting for a President to grasp and fire.272 This conventional approach is incomplete. As we have seen, the first and decisive precedent supporting World War II’s racist policies was not Korematsu but Hirabayashi; thus, Jackson himself helped to “load” the doctrinal “weapon” over which he worried just a year later.273 Jackson’s willingness to eviscerate Hirabayashi in Korematsu only exemplifies (as if anyone could doubt it) that no Supreme Court decision can fiat a legal principle “for all time.”274 Past cases can be overruled, disfavored, ignored, or reinterpreted if the Court finds reason to do so, and this is effectively what has happened to Korematsu and Hirabayashi themselves in the wake of Brown, the civil rights era, and other modern history.275 Korematsu was a direct “repetition” of Hirabayshi’s racism for “expand[ed]” purposes, yet it only launched these two cases farther toward their current pariah status.276 A second perspective on war-power precedents is Jackson’s Youngstown concurrence, which rejected President Truman’s effort to seize steel mills and maintain output for the Korean War.277 Jackson’s opinion ends with selfreferential pessimism about judicial authority itself: I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.278 This “no illusion” realism about presidential authority views judicial limitations on the President as contingent on Congress’s political wisdom and responsiveness — without any bold talk about precedents as “loaded weapons” or stalwart shields. On the contrary, if taken seriously, Jackson’s opinion almost suggests that judicial decisions about presidential wartime activities are epiphenomenal: When Congress asserts its institutional prerogatives and uses them wisely, the executive might be restrained, but the Court cannot do much to swing that political balance of power. Jackson’s hardnosed analysis may seem intellectually bracing, but it understates the real-world power **of judicial precedent to shape what is politically possible**.279 Although Presidents occasionally assert their willingness to disobey Supreme Court rulings, actual disobedience of this sort is vanishingly rare and would carry grave political consequences.280 Even President Bush’s repeated losses in the GWOT did not spur serious consideration of noncompliance, despite strong and obvious support from a Republican Congress.281 Likewise, from the perspective of strengthening presidential power, Korematsu-era precedents clearly emboldened President Bush in his twenty-first-century choices about Guantanamo and military commissions.282 The modern historical record thus shows that judicial precedent can both expand and limit the operative sphere of presidential action. Indeed, the influence of judicial precedent is stronger than a court-focused record might suggest. The past sixty years have witnessed a massive bureaucratization and legalization of all levels of executive government.283 From the White House Counsel, to the Pentagon, to other entities addressing intelligence and national security issues, lawyers have risen to such high levels of governmental administration that almost no significant policy is determined without multiple layers of internal legal review.284 And these executive lawyers are predominantly trained to think — whatever else they may believe — that Supreme Court precedent is authoritative and binding.285 Some middle ground seems therefore necessary between the “loaded weapon” and “no illusion” theories of precedent. Although Supreme Court decisions almost certainly influence the scope of presidential war powers, such practical influence is neither inexorable nor timeless. A more accurate theory of war-power precedents will help explain why it matters that American case law includes a reservoir of Korematsu-era decisions supporting excessive executive war power, and will also suggest how lawyers, judges, and scholars might eviscerate such rulings’ force. Korematsu is the kind of iconic negative precedent that few modern lawyers would cite for its legal holding. Yet even as Korematsu’s negative valence is beyond cavil, the breadth and scope of that negativity are not clear. Everyone knows that Korematsu is wrong, yet like other legal icons — Marbury, Dred Scott, Lochner, Erie, and Brown — its operative meaning is debatable. Just as Korematsu was once an authoritative precedent and is now discredited, this Article has sought to revise Korematsu’s cultural meaning even further, transforming it from an isolated and irrelevant precedent about racial oppression to a broadly illuminating case about how courts supervise presidential war powers.

### 2NC Link / UQ

#### The SQ is goldilocks---it carves out enough room for judicial review of War Powers to solve Court influence, but doesn’t impose any meaningful checks on the Executive so it allows for flexibility---the plan sends a signal of judicial over-reach that causes political blowback

Neavl Devins 10, Goodrich Professor of Law and Professor of Government, College of William & Mary., Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, 12 U. Pa. J. Const. L. 491

In Part III of this Essay, I will argue that the Court's actions in the first year of the Obama administration are cut from the same cloth as its decision to intervene in Bush-era disputes. As this section has suggested, the Court has never risked national security or executive branch non-acquiescence in its enemy combatant decision making. Moreover, as I argued in Part I, Court decision making in this area has largely tracked social and political forces. For reasons I will now detail, the Court's decisions both to steer clear of this issue in the spring and summer of 2009 and its fall 2009 decision to hear the Uighur petition match past Court practices. Throughout the enemy combatant dispute, the Court has found ways to expand its authority without risking an institutionally costly backlash.¶ III. Conclusion: The Past Is Prologue¶ Supreme Court interventions in the enemy combatant disputes never pushed the limits of what was acceptable to the political [\*523] branches of government. The Court, instead, maximized its authority by moving incrementally and expanding judicial power in ways generally acceptable to the political branches. This was true of Bush-era decision making and there is no reason to think that the Court will depart from past practices during the Obama administration.¶ Consider, for example, the Court's March 2009 decision to back away from a case involving Bush administration efforts to detain a legal resident without charges. After agreeing - in December 2008 - to hear a challenge to the Bush administration's detention of Ali Saleh Kahlah al-Marri at a South Carolina Navy brig, the Court sided with the Obama administration and removed the case from its docket. n170 The administration had claimed the case was moot because - in February 2009 - it formally filed federal criminal charges against al-Marri (so that he would be tried in federal court and not held indefinitely at a military base). n171 Mr. Marri's lawyers objected, arguing (unsuccessfully) that the administration could subsequently relocate him to a military base and, consequently, the Court should still resolve his legal challenge. n172¶ The Court's decisions to hear and then moot al-Marri are readily understandable. The Fourth Circuit had upheld the Bush administration in al-Marri and - when agreeing to hear the case - the Justices had good reason to slap down the Bush administration for their continuing efforts to sidestep federal court review over enemy combatant policy-making. Not only had the Court taken a strong stand in favor of judicial review in Boumediene and other decisions, but the November 2008 election of Barack Obama and the Democratic Congress further solidified the Court's position with elected officials and the American people. And, with none of the eighteen amicus briefs in the case supporting the Bush administration, n173 a Court ruling against [\*524] Bush administration actions would have further buoyed the Court's status with academics and other interest groups. By March 2009, however, there was no good reason to ask the new administration to sort out its views on the al-Marri detention. Candidate Obama had campaigned against the Bush administration efforts to fence out federal courts from war-on-terror litigation. Indeed, when asking the Court to moot the case, the Obama administration told the Justices that it was willing to have the Fourth Circuit ruling vacated (showing "that the government is not attempting to preserve its victory while evading review"). n174 Against this backdrop, there was simply no reason for the Justices to force the Obama administration to formally disavow or embrace Bush administration legal arguments. An Obama administration decision disavowing Bush administration arguments would not strengthen the Court's position vis-a-vis the executive (as the Obama Justice Department had already conceded the Court's authority to vacate the lower court ruling); an administration decision supporting Bush administration arguments would set the stage for a costly battle between the Court and the new administration. A decision on the merits, moreover, would have opened the Court up to charges of judicial over-reaching. In its brief seeking to moot al-Marri, the government argued that keeping the case alive "would lead only to an advisory opinion with no real-world impact on any individual" and that the Court should not reach out to decide "in a hypothetical posture" "complex constitutional questions" about the line where "national security policy and the Constitution intersect." n175¶ The Court's participation in Kiyemba likewise displays the Court's sensitivity to its status vis-a-vis the other branches and to the risks of unnecessarily interjecting itself in national security policy. This was true of both the June 2009 decision to hold over the appeal of the Uighur petitioners and the October 2009 decision to hear the case (but to schedule oral arguments so as to delay any decision until the summer of 2010). n176¶ June 2009 was too early for the Court to enter this dispute. Even though petitioners cast the case as an opportunity for the Court to defend its turf (suggesting that Boumediene had become an empty shell and it was up to the Court to give meaning to the decision), n177 [\*525] the Court well understood the costs of entering this dispute. At that time, the Obama administration and Democratic Congress were sorting out their policy priorities on Guantanamo, Bagram detainees, and much more. Correspondingly, the Court had reason to think that a ruling demanding the relocation of Uighur detainees to the United States would not sit well with either the administration or Congress. Not only did the Obama administration oppose the relocation of the Uighurs to the United States, n178 Congress enacted legislation in June 2009 that severely limited the President's power to move Guantanamo detainees to the United States or resettle them in another country. n179¶ By holding the issue over, however, the Court gave the Obama administration time both to sort out its policy priorities and to relocate the Uighur detainees (and, in so doing, to try to moot the case). n180 In its brief opposing certiorari, the Obama administration made clear that it was trying both to close Guantanamo and to relocate the Uighur petitioners and asked the Court to respect the "efforts of the political Branches to resolve issues relating to petitioners and other individuals located at Guantanamo Bay." n181 Furthermore, the decision to hold the case over bought the Court time to see how the enemy combatant issue would play out among politicians, interest groups, the media, and the American people. As Part I reveals, Court enemy combatant decisions track social and political forces. As Part II reveals, the Court has moved incrementally - advancing its authority to say "what the law is" without risking backlash or national security.¶ The Court's October 2009 decision to hear Kiyemba does not break from this pattern. By scheduling oral arguments for spring 2009, the Court both provided elected government with additional time to settle this issue and provided itself with an opportunity to calibrate its decision making against the backdrop of elected government action and other subsequent developments. n182 More than that, [\*526] since Boumediene only decided the threshold issue that enemy combatants were entitled to habeas corpus relief, Kiyemba is a good vehicle for the Court to provide some details on how habeas proceedings should be conducted. In particular, there is little prospect that the decision will impact the rights on many Guantanamo detainees. By the summer of 2010, Guantanamo may be closed; if not, most detainees who prevail in habeas proceedings are likely to have been relocated to another country. Moreover, Kiyemba raises a quite narrow issue, namely, whether federal courts can mandate that Guantanamo detainees be relocated to the United States if no foreign nation will take them. n183 In other words, there is next to no prospect that Kiyemba will result in the type of scrutinizing judicial review that might raise national security risks (assuming, of course, that the Court will rule against the administration). Instead, Kiyemba seems likely to further tighten judicial control over the executive - but only in a very modest way.¶ Throughout the course of its enemy combatant decision making, the Court has moved incrementally. In so doing, the Court has expanded its authority vis-a-vis the President. Obama administration efforts to moot al-Marri and to relocate Uighur detainees (thereby mooting that litigation) speak to the administration's desire to avoid Supreme Court rulings that might limit the scope of presidential power. Unlike the Bush administration (whose politically tone deaf arguments paved the way for anti-administration rulings), n184 the Obama administration understands that the Court has become a player in the enemy combatant issue.¶ What is striking here, is that the Court never took more than it could get - it carved out space for itself without risking the nation's security or political backlash. Its 2004 and 2006 rulings provided ample opportunity for the President to pursue his enemy combatant initiative. Its 2008 ruling in Boumediene, while clearly constraining the political branches, reflected the views of the new Democratic majority in Congress and (to a lesser extent) the views of presidential candidates Obama and McCain. n185 Its decision to steer clear of early Obama-era [\*527] disputes likewise avoids the risks of a costly backlash while creating incentives for the Obama administration to take judicial authority into account (by settling these cases outside of court). n186 Put another way, by taking prevailing social and political forces into account, the Court was able to flex its muscles without meaningfully undermining the policy preferences of the President and Congress.¶ I, of course, recognize that the Court's willingness to engage the executive and, in so doing, to nullify a signature campaign of the Bush administration, is a significant break from the judiciary's recent practice of steering clear of disputes tied to unilateral presidential war making. n187 At the same time, I see the Court's willingness to challenge, and not defer, as not at all surprising. The Bush administration made arguments that backed the Court into a corner. The Court could either bow at the altar of presidential power, or it could find a way to slap the President down. It is to be expected that the Court chose to find a way to preserve its authority to "say what the law is." n188 The Justices, after all, have incentives to preserve the Court's role in our system of checks and balances - especially when their decisions enhance their reputations with media and academic elites. n189 This is true of the Supreme Court in general, and arguably more true of the current Court - given its penchant to claim judicial supremacy and given the importance of these institutional concerns to the Court's so-called swing Justices. n190 It is also noteworthy that the enemy combatant cases were at the very core of the judicial function. At oral arguments in Hamdan, Justice Kennedy emphasized the importance of habeas corpus relief, n191 suggesting that limitations on habeas relief would "threaten[] the status of the judiciary as a co-equal partner of the legislature and the executive." n192¶ [\*528] One final comment on the nature of the dialogue that took and is taking place between the three branches on the enemy combatant issue: Throughout the Bush-era, these cases were anything but a constitutional dialogue. The executive persisted in making the same argument, and, as its political fortunes diminished, the Court carved over more and more issue space for itself. For its part, the Bush-era Congress played no meaningful role - it simultaneously backed the executive while signaling to the Court that it would support judicial invalidation of executive initiatives. With a new administration in place, there is reason to think that the inter-branch dynamic will change. The Obama administration has advanced its policies while pursuing a less confrontational course; avoiding absolutist arguments and trying to steer clear of an adverse Supreme Court ruling. In so doing, the administration has yet to launch the type of broadsides that challenge the foundations of judicial authority. Up until now, the Court has responded in kind, leaving the administration breathing room to pursue its policies without a Supreme Court pronouncement on the scope of presidential power. It is a matter of pure speculation whether this pattern will continue. At the same time, there is good reason to think that the Court will follow the path it has laid down in Bush-era cases, taking social and political forces into account so as to protect its turf without risking national security or elected government backlash.

## 1NR

### A2 Used for WOT

#### Here’s an example---teams could restrict immigration detention because it was used in the past to detain the Uighurs in the Kiyemba cases

Hernandez 11 [Ernesto A. Hernandez, Professor of Law at the Chapman University School of Law, former Professor of IR and Political Science at the Universidad Javeriana in Colombia, “Kiyemba, Guantanamo, and Immigration Law : An Extraterritorial Constitution in a Plenary Power World,” 2 UC IRVINE LAW REV. 194-245, http://works.bepress.com/cgi/viewcontent.cgi?article=1028&context=ernesto\_hernandez]

Kiyemba I , II , and III show how immigration law doctrines, in particular but not limited to plenary powers, justify detention even after they have been found to be unlawful by a district court and long after the executive has ceased classifying detainees as enemy combatants. While certiorari petitions and appellate review of Kiyemba cases focus on habeas doctrine, immigration law operates as a fallback to keep detention legal, even if it is indefinite. This doctrinal quagmire is the product of factual complexities presented by the detention of these Uighurs. The executive and judiciary argue that the detainees are choosing not to accept the limited resettlement options provided and that this keeps them on the base. But it is the U.S. government that placed these men in this situation after so many years. Executive choices to detain Uighurs on Guantánamo, rather than choices made by the Uighurs, created these problems. In this regard, Kiyemba detainees differ greatly from many aliens in most immigration law cases, who chose to enter the United States. Given this factual and legal impasse, the executive, consistent with historical practice, employs immigration law as an instrument to detain aliens and deny rights protections in times of national security. Foreign policy objectives, in this case the War on Terror, set the stage for this treatment of aliens. Here the foreign nationals are Uighurs resisting China, caught in the Afghanistan conflict, and brought by the United States government to Cuba.

### WM

#### Contextual “we meet” arguments are bad---intent to define outweighs

Eric Kupferbreg 87, University of Kentucky, Senior Assistant Dean, Academic & Faculty Affairs at Northeastern University, College of Professional Studies Associate Director, Trust Initiative at Harvard School of Public Health 1987 “Limits - The Essence of Topicality” http://groups.wfu.edu/debate/MiscSites/DRGArticles/Kupferberg1987LatAmer.htm

Often, field contextual definitions are too broad or too narrow for debate purposes. Definitions derived from the agricultural sector necessarily incorporated financial and bureaucratic factors which are less relevant in considering a 'should' proposition. Often subject experts' definitions reflected administrative or political motives to expand or limit the relevant jurisdiction of certain actors. Moreover, field context is an insufficient criteria for choosing between competing definitions. A particularly broad field might have several subsets that invite restrictive and even exclusive definitions. (e.g., What is considered 'long-term' for the swine farmer might be significantly different than for the grain farmer.) Why would debaters accept definitions that are inappropriate for debate? If we admit that debate is a unique context, then additional considerations enter into our definitional analysis.

#### Wartime and criminal detention powers are conceptually distinct

Benjamin Wittes 11, senior fellow in Governance Studies at The Brookings Institution, 2011, “ARTICLE: Preventive Detention in American Theory and Practice,” Harvard National Security Journal, 2 Harv. Nat'l Sec. J. 85

I. Wartime and Emergency Detention Powers

It is useful to begin with a working definition of preventive detention, a term that rings ominous to the American ear but which is, in fact, usefully descriptive. Preventive detention, for present purposes, includes any detention of a person by state or federal authorities that is (1) not pursuant to conviction of a crime and (2) undertaken in order to prevent some future harm. Preventive detention may occur within the criminal justice system or outside of it, and the harms it seeks to avoid include harm to individuals, to the state, or even to the subject of detention himself. In other words, we include under the rubric of preventive detention any situation in which government locks up an unconvicted person (or a person who has completed his or her criminal sentence) to prevent some future harm either to a person or to some important governmental interest. The wartime powers of the military offer some of the most vivid -- though far from the only -- examples of preventive detention authorized in American law.

A. The Enemy Combatant

Despite the post-September 11 controversies over counterterrorism detentions, the power to capture and hold enemy combatants has not traditionally been a subject of dispute. The Supreme Court has made this clear: "by universal agreement and practice, [these powers] are important incident[s] of war." n7 As the power to detain the enemy derives from and inheres in the larger power to wage war, it exists even in the absence of an [\*91] explicit statutory authorization to detain. n8 However, what was once a plenary power over a captured adversary, in modern American practice, is meaningfully constrained by international law, domestic regulation, and -- to a lesser but growing degree -- judicial decisions.

Philosophically, the Supreme Court has explained, the power to detain derives from, and is limited by, the assumption that:

[t]he alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign. n9

The soldier, it is thus presumed, will continue to engage in armed hostilities against the United States as long as a state of war makes it his duty to do so. The natural corollary is that once the sovereign to which he owes his allegiance ceases to be at war with the United States, his duty to make war ceases and the preventive rationale for detention evaporates.

1. Requirements for Detainability

In brief, the required conditions for detention of the combatant are twofold: First, that a state of armed conflict exists; n10 and second, that a member of the enemy forces is captured and identified as such. n11 Prisoners [\*92] of war n12 may be detained for the duration of hostilities but, in the absence of allegations of war crimes, are immune from criminal process for their acts of combat. n13 Unprivileged belligerents -- i.e., persons who have committed a belligerent act but do not meet the conditions for prisoner of war status n14 -- may similarly be detained for the duration of hostilities but may also face trial for their unprivileged belligerent acts (for example, the killing of soldiers) and for violations of the law of war. n15 The authority to detain the prisoner of war ends upon the cessation of hostilities, n16 though punitive detention beyond the cessation of hostilities is permitted where the detainee has been tried and convicted of unprivileged belligerent acts or violations of the law of war. n17

 [\*93] 2. Historical Evolution of Enemy Combatant Detention

a. Development of the International Law of Combatant Detention

Enemy combatant detention is as old as warfare -- and wartime detention illustrates pointedly the tendency of detention authorities to narrow over time. In premodern times, the victor's power over the captured enemy was plenary. Male prisoners were killed, while captured women and children could be adopted as full members of the victorious tribe. n18 Once the development of settled agricultural settlements and the concomitant need for manpower made slaves a valuable commodity, captives in warfare (including civilians) were enslaved and became the chattel of the victor, n19 though the prisoners could still be killed at the whim or convenience of their masters. n20 The maxim inter arma silent leges suggests that the Romans did not consider their wartime conduct subject to law. n21 According to Grotius, "[t]he right of putting prisoners of war to death, was so generally received a maxim, that the Roman Satirist has founded an adage upon it, and said, 'that when you can sell a prisoner for a slave, it would be absurd to kill him.'" n22

By medieval times, the code of chivalry required feudal knights to respect the lives of captured adversaries, but only those of noble status. As [\*94] such, one scholar writes, "the 'artillerymen' of that time such as archers and crossbowmen [were] regarded with contempt by the aristocracy, and were sometimes subjected to wholesale massacres." n23 Nor did civilians qualify for any protection under the feudal code until the emergence of royal regulations of the conduct of war in the fourteenth century, n24 though enslavement of Christian prisoners was forbidden in 1179 by the Third Lateran Council. n25 Instead, captors derived economic value from prisoners of war by demanding a ransom for their release, especially prisoners of high birth. Interestingly, prisoners for whom ransom was sought were not always detained; they could be "released on parole forbidding them to take part in hostilities against the captor until ransom was paid." n26 Ransom, which occurs in the Iliad as a feature of Greek wartime practice, n27 was still common in the seventeenth century; Grotius notes that the right to detain prisoners for ransom was sometimes "allowed to the individuals, who took them, except where the prisoners were personages of extraordinary rank," in which case they were considered prisoners of the state. n28

In the first half of the seventeenth century, treaties first began to provide for the ransom-free release of all prisoners at the cessation of hostilities, a practice that came to predominate by the eighteenth century. n29 For example, in Article 24 of the 1785 Treaty of Amity and Commerce between Prussia and the United States, the parties pledged to "prevent the destruction of prisoners of war" by forgoing such practices as "sending them into distant and inclement countries," "crouding them into close and noxious places," confining them in "dungeons, prison-ships, [or] prisons," or putting them in irons or other physical restraints. It also required that they be "lodged in barracks as roomly and good as are provided by the party in whose power they are for their own troops," be allowed to receive [\*95] packages and send mail, and that a "commissary of prisoners" be granted access to the soldiers to ensure their well-being. n30 In the provisions of this treaty, one can see the outlines of the later requirements of the Third Geneva Convention.

In the second half of the nineteenth century, countries began passing national legislation on the treatment of prisoners. By far the most famous and influential was the American "Lieber Code," issued to United States armies in the field by order of the Secretary of War on April 24, 1863, as General Order No. 100. The Lieber Code, drafted by German immigrant, former soldier, and Columbia law professor Francis Lieber, was copied by Prussia, France, and Great Britain and strongly influenced the subsequent Hague and Geneva Conventions. n31 Lieber's code "was the first instance in western history in which the government of a sovereign nation established formal guidelines for its army's conduct toward its enemies." n32 For present purposes, the Code is significant because it defined the classes of combatants entitled to prisoner of war status n33 and provided that "[p]risoners of war are [\*96] subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety." n34 The Code's requirements thus incorporate the core limitation that, as noted above, is characteristic of modern preventive detention regimes in American law: that detention is only permissible to the extent necessary to prevent future harms. The Lieber Code also required that prisoners be provided with "plain and wholesome food" and "treated with humanity," n35 and that the Union Army provide captured wounded enemies with medical treatment. n36 However, the Code did allow that "[a]ll prisoners of war are liable to the infliction of retaliatory measures" and entitled "a commander . . . to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners." n37

The first major set of international conventions codifying these detention powers were the Hague Conventions of 1899 and 1907. These required that prisoners of war "be humanely treated" and could "only be confined as an indispensable measure of safety." n38 It set forth detailed requirements for the upkeep n39 and conditions of confinement of prisoners of war. Finally, it required that "[a]fter the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible." n40 After World War I, the Hague regime was augmented by the adoption of the Geneva Convention of July 27, 1929 Relative to the Treatment of [\*97] Prisoners of War. Article 3 of the Convention provided, in general terms, that "[p]risoners of war have the right to have their person and their honor respected," foreshadowing Common Article 3 of the Geneva Conventions of 1949. It listed the rights and obligations of POWs in great detail and for the first time prohibited reprisals against them, n41 which was an important innovation. n42

Despite these interwar international legal developments, the Second World War proved to be a nadir for humanitarian law of all varieties, and the regulations governing the treatment of prisoners of war was no exception. Germany and Japan committed grotesque violations of their international obligations with regard to captured enemy combatants as a matter of official policy, as amply documented by the postwar tribunals. On the basis of this wartime experience, it was determined that an upgraded convention on the treatment of prisoners of war was needed. The result was the Geneva Conventions of 1949.

b. Combatant Detention in American Wars

This wartime power to detain the enemy is not merely hypothetical. Rather, its development has been driven by a long history of actual American practice, featuring the detention of vast numbers of enemy personnel dating back to the founding. n43 In the Revolutionary War, "the Continental Army, various state militias, and naval forces captured more than 14,000" British and Hessian soldiers and sailors. n44 While the exact number is unclear, thousands more were taken in the War of 1812, though more prisoners were taken by the British than the Americans. n45 Vast numbers of Union and Confederate prisoners were held prisoner by the other side during the Civil War, and thousands died [\*98] in squalid and neglected prison camps. Union forces took 220,000 Confederate prisoners, of whom more than 26,000 died in captivity; Confederate forces took 211,400 Union prisoners, of whom more than 30,000 died in captivity. n46 Of the tens of thousands of Union prisoners who died in Confederate hands, more than 12,000 died in the infamous Andersonville, Georgia prison camp, over only nine months that that facility was in operation. n47 During the Spanish-American War, U.S. forces in Cuba captured more than 23,000 Spanish soldiers at the surrender of Santiago. n48 They were then shipped back to Spain at American expense, in accordance with the terms of surrender, as were the 14,000 Spaniards taken prisoner after the surrender of the Spanish garrison at Manila. n49

During World War I the United States initially served as a "Protecting Power," trusted by both sides to inspect camps and distribute supplies to prisoners. n50 Once it entered the war, General Pershing's American Expeditionary Force began to take large numbers of German POWs, capturing 62,952 during 1917-18. n51 By the signing of the November 11, 1918 armistice, the United States held 48,280 Germans in makeshift prisons, with the balance turned over to the British or French. n52 The number of Germans captured in World War II was far vaster. Between 3 and 5 million Germans were taken prisoner by U.S. forces during the war, n53 of whom more than 425,000 were sent to the United States. n54 Because of the general unwillingness of Japanese soldiers to surrender, among other factors, U.S. forces took fewer than [\*99] 20,000 Japanese prisoners in the Pacific theater and sent only 5,000 to the United States for confinement there. n55

More than 150,000 North Korean and Chinese soldiers were taken prisoner by UN forces in the Korean War. n56 During the Vietnam War, "American commanders abdicated responsibility for POW treatment by turning virtually all captives over to the care of the South Vietnamese government . . . ." n57 By the end of U.S. involvement, the South Vietnamese army "held 37,540 POWs, including 9,971 [North Vietnamese Army] and 26,928 Vietcong." n58 In the 1991 Gulf War, coalition forces took 69,822 Iraqi POWs; 60,000 of these were captured by the United States, the largest number of POWs taken by any nation's combat forces since World War II. n59 Iraqi prisoners were eventually turned over to Saudi Arabia for detention. n60 More than 80,000 Iraqi soldiers were captured during the initial invasion phase of Operation Iraqi Freedom in March-April of 2003. n61 Together, these figures illustrate the prodigious use the U.S. government has made of this power over the generations.

3. Conclusion

The legal power to detain the enemy combatant neatly illustrates several of the general currents running through preventive detention in American practice. First, as this overview shows, the power is not so much an exception to a broad constitutional norm as a track that runs [\*100] parallel to the criminal justice system, operating according to its own distinctive rules, which evolved without reference to criminal justice norms. Importantly, these rules have not functioned as a slippery slope by which narrow detention powers have grown in scope and menace to liberty over time. Rather, to the contrary, broad authorities to capture, kill, and ransom prisoners have narrowed over centuries of refinement and now focus on detaining under humane and respectful conditions only those people whom it is necessary to detain, and only for as long as detention remains necessary.

B. The Enemy Alien

American law does not stop at permitting the long-term detention of the enemy fighter. A lesser known authority, still in force, also authorizes the detention of the nationals of countries with which the United States finds itself at war. This power, like the power to detain enemy combatants, is overtly preventive in nature and not especially discriminating. And like the power to detain the combatant, it evolved from far broader powers to hold prisoners in wartime.

1. Requirements for Detainability

The President's wartime authority for dealing with alien citizens of enemy powers is set out in Chapter 3 of Title 50 of the U.S. Code, colloquially known as the Alien Enemies Act (or the Enemy Aliens Act). Specifically, 50 U.S.C. § 21 authorizes the President to detain an alien under the following circumstances: First, a state of war or threatened hostilities must exist, and not just any such state will do. The powers are triggered only in case of "a declared war between the United States and any foreign nation or government, or [an] invasion or predatory incursion . . . attempted, or threatened against the territory of the United States by any foreign nation or government . . . ." n62 By the statute's terms, they could not be invoked in a conflict with a non-state actor. Nor could the Act's powers be activated in a conflict with a state that has not attacked or threatened attack on the United States, absent a formal declaration of war. n63 In [\*101] practice, the law has been invoked in circumstances of declared war only. Second, the subjects must be "natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward . . . ." n64

The statute on its own requires no individualized determination of dangerousness or threat. The government may subject even qualifying aliens who demonstrate no active hostility to measures instituted pursuant to the law. Merely by being from a particular country, people are "liable to be apprehended, restrained, secured, and removed as alien enemies." n65 The statute authorizes the President to determine "the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety." n66 Under the statute, the President must make a public proclamation to trigger these authorities. n67 Sections 22 to 24 discuss ancillary procedures tasking federal judges and marshals to assist with implementing measures under the Act, but they do not constrain the President's discretion under § 21. n68 Judicial review has historically been limited to assessing whether the conditions for detainability listed above have been met, and whether the detention [\*102] complies with the terms of the presidential proclamation triggering the Act. n69

2. Historical Roots and Evolution of Alien Enemy Detention

As noted above, the President's power to detain alien enemies during wartime rests on explicit statutory authority -- not, in contrast to combatant detention, as an incident to the political branches' constitutional war powers. n70 This section first describes the history of that statute, the Alien Enemies Act of 1798. It then considers the historical roots of the power to detain enemy aliens during wartime and the permissibility of this practice under modern international law.

a. The History of the Alien Enemies Act

The alien enemies authorities have a rather disreputable origin. They were originally enacted in 1798 along with three other statutes, known collectively as the Alien and Sedition Acts. n71 Only the alien enemies provision has endured, and largely intact. Other than a 1918 amendment striking out language restricting the section's application to males only, n72 there have been no significant revisions.

 [\*103] The Act has also seen a great deal of use over the decades and survived repeated judicial challenges. James Madison detained British citizens under the Alien Enemies Act during the War of 1812. On February 23, 1813, his State Department issued an order by which "enemy aliens, residing or being within forty miles of tide water, were required . . . to retire to such places, beyond that distance from the tide water" to a place designated by federal Marshals. n73 Marshals were authorized to arrest enemy aliens who did not comply with the order. n74

In World War I, thousands of enemy aliens were interned under the Act. (Many others were detained and deported under immigration authorities.) On April 6, 1917, President Wilson issued a proclamation invoking the Alien Enemies statute with regard to German citizens in the United States. n75 The proclamation established rules restricting the conduct of German aliens n76 and provided that an enemy alien who violated any regulation, "or of whom there is reasonable ground to believe that he is [\*104] about to violate, any regulation duly promulgated by the President" was "subject to summary arrest . . . and confinement . . . ." n77 Subsequent regulations extended the restrictions to citizens of Austria-Hungary n78 and required alien enemies to register and carry on their persons at all times their registration cards. n79 After the statute was amended in 1918 to apply to women as well as men, Wilson issued another proclamation requiring female enemy aliens to comply with the regulations. n80 In total, "fewer than 6,000 of [the] enemy alien population, which included 480,000 Germans, and [over 3.5 million] Austro-Hungarians," were interned, of whom more than half were released on parole. n81 David Cole puts the number of enemy aliens arrested during WWI at 6,300 and says that of those, 2,300 were held in internment camps. n82

In one poignant case underscoring the harsh nature of detention authority under the act, a federal district judge in Mississippi denied a writ of habeas corpus to one Willis Fronklin, a 19 year-old man who had immigrated to the United States from Hamburg when he was 4. n83 The judge wrote that "[u]nder [the Alien Enemies Act] the discretion is vested in the President to determine the manner and degree of restraint to which alien enemies will be subjected." He "excluded all evidence of any acts or utterances with reference to the loyalty of petitioner," reasoning that "the only question for determination on this hearing is whether he is a citizen of the United States or is a German alien enemy. Despite the fact that Fronklin had lived in Mississippi for 15 years and had no memory of Germany, the judge pronounced him "a German alien enemy," concluding that he did not believe that "this action of the President, exercised in the manner provided by law, is subject to review by the courts." n84

Following the Japanese attack on Pearl Harbor, the Roosevelt administration immediately invoked the act once again. On December 8, 1941, Roosevelt issued proclamations as required under the statute, [\*105] regarding German, Japanese, and Italian enemy aliens. n85 The proclamations vested "the power of arrest, detention and internment of alien enemies in the Canal Zone," Hawaii, and the Philippines in the military commanders of those territories, and provided that "in the continental United States, Alaska, Puerto Rico and the Virgin Islands" "[a]lien enemies deemed dangerous to the public peace or safety of the United States by the Attorney General or the Secretary of War . . . are subject to summary apprehension." n86 Aliens arrested under this authority were "subject to confinement in such place of detention as may be directed by the officers responsible. . . ." n87 The proclamations also provided extensive restrictions on the conduct and movement of enemy aliens. A subsequent proclamation in January 1942 transferred authority over alien enemies in the continental United States from the Attorney General to the Secretary of War. n88

The FBI had prepared a "custodial detention list" of "potentially dangerous" Germans, Italians and Japanese citizens in the United States, and on the night of December 7 immediately arrested "the most dangerous" of them. n89 More than 9,000 such persons were detained over the next few months. n90 Roosevelt initially considered interning all German nationals in the United States, but was dissuaded by Attorney General Francis Biddle. n91 Biddle established more than 100 Enemy Alien Hearing Boards to conduct individualized determinations concerning each enemy alien taken into custody. n92 Of the 9,121 detainees, the Boards determined that 4,132 should be interned, 3,716 paroled, and 1,273 released. n93 As the war progressed, the number of enemy aliens interned gradually decreased, as larger numbers [\*106] were paroled or released altogether. n94 These figures do not include the 40,000 Japanese citizens and 70,000 U.S. citizens of Japanese ancestry living in the western United States who were forced into internment camps during the war. n95 Those detentions were not conducted pursuant to the statutory enemy alien authorities discussed here. Rather, they took place under Executive Order 9066, n96 which authorized the creation of military exclusion districts at the discretion of the Secretary of War and military commanders. n97

The World War II era also saw direct Supreme Court consideration of the constitutionality of detention under the Act, in the 1948 case of Ludecke v. Watkins. n98 In Ludecke, the Court, in an opinion by Justice Frankfurter, authorized the removal pursuant to a proclamation n99 issued under the Act of a German citizen, n100 even though the action took place after the cessation of hostilities. The Court held that the Act precluded judicial review of the President's actions within the broad discretionary realm granted him by the statute. n101 It also rejected the claim that the power expired with active hostilities, noting that "power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops." n102 And the Court upheld the constitutionality of the Act against a due process challenge: "The Act is almost as old as the Constitution, and it [\*107] would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights." n103

Despite Ludecke's blow to judicial review of presidential actions within the authority granted by the Act, other cases from the era support the proposition that "habeas will lie to challenge the detainee's status as an enemy alien," in addition to the conformity of lower officials' actions with the President's proclamations (as in Lockington's Case). n104 In 1952, for example, the Court rejected the removal under a proclamation of President Truman's, which had authorized removal of interned alien enemies, of a German national who had, at that point, been interned for a decade. n105 The court held that "[t]he statutory power of the Attorney General to remove petitioner as an enemy alien" had ended with the 1951 joint resolution terminating the state of war with Germany. n106

Finally, it is worth noting that the length of detention under the Act could be very substantial. According to J. Gregory Sidak, "for the ten Alien Enemy Act cases from World War II that are reported in the United States Reports, Federal Reports, or Federal Supplement, and for which the published decisions contain discussion of the relevant dates . . . the average length of time between the alien's arrest and the issuance of the highest court order concerning his petition for a writ of habeas corpus was 2,095 days, with actual times ranging from a low of 1,065 days to a high of 3,702 days." n107

b. Historical Evolution of the Power to Detain Alien Enemies in Wartime

Again, the Enemy Aliens Act is best understood as a narrowed variant of an age-old wartime power: to detain the civilian nationals of belligerent states. Under Roman law, "civilians of enemy nationality living [\*108] in the territory of belligerent states" were "treated as slaves." n108 In the seventeenth century, they were "regarded as prisoners of war." n109 By the eighteenth and nineteenth centuries, states had begun signing treaties to protect civilians abroad in the event of war. For example, the aforementioned 1785 treaty between the United States and Prussia provided, in case of war, for the free and unmolested departure of merchants with their property and for the unmolested continuance "in their respective employments" of "all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen unarmed . . . ." n110 Article 26 of Jay's Treaty, concluded in 1794 by the United States and Great Britain, provided that "[i]f at any Time a Rupture should take place (which God forbid) between His Majesty and the United States," merchants and other citizens of each country residing in the other's territory were to be allowed to remain and continue their trade unmolested. "[I]n case their Conduct should render them suspected," they could be removed, but were to be allowed twelve months to depart, unless they had violated the law. n111

By 1914, the "liberal concept," that resident citizens of hostile belligerents "were not to be interned" unless necessary, was sufficiently well established by general and consistent practice that, according to the Commentary to the 1949 Convention, the authors of the Hague Regulations of 1907 felt no need to explicitly endorse it. n112 Nonetheless, as one contemporary commentator noted -- anticipating states' practices during both World War I and World War II -- "[n]otwithstanding the general practice of civilized nations to allow alien enemies an option of remaining in the belligerent's territory during good behavior, or of withdrawing within a specified period, neither the detention nor the expulsion of such persons would be a breach of international law." n113 In the 1930s, the International Committee of the Red Cross prepared a Draft Convention on the rights of such persons in wartime and the conditions [\*109] under which they could be interned, n114 but its entry into force was prevented by the outbreak of World War II in 1939. n115 And World War II, of course, proved a major setback for the humane and enlightened treatment of such persons, as countries interned widely, often under appalling conditions.

Today, it is international law, more than American constitutional law, that constrains the detention of enemy aliens. The Fourth Geneva Convention n116 provides various legal rights for "protected persons," which under Article 4 of the Convention generally includes persons of foreign nationality (or stateless persons) in the territory of a belligerent power. n117 The Convention provides that protected persons have the right to "leave the territory at the outset of, or during, a conflict, unless their departure is contrary to the national interests of the State." n118 The Convention makes clear that:

Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment . . . . n119

 [\*110] And it insists as well that "[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." n120 According to the authoritative Commentary,

the mere fact that a person is a subject of an enemy power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualification, represents a real threat to its present or future security. n121

While the above provisions concern enemy aliens on a hostile power's own territory, the Convention also provides for the detention of civilian protected persons in occupied territory -- a power of which the United States has made prodigious use in Iraq. n122 Internment is permitted: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment." n123

3. Conclusion

 [\*111] In short, like the power to detain enemy soldiers, the power to detain enemy civilians was not carved out as an exception to criminal justice norms, but evolved parallel to them from a far broader authority. That authority remains broad in American statutory and constitutional law, but has narrowed considerably over time in international law to focus only on those aliens whose detention security genuinely requires. Importantly, this power has evolved to include a limiting mechanism for determining which aliens the state needs to, and thus may, detain. This multi-pronged trigger includes both objective characteristics and individualized judgments of dangerousness and threat on the part of the detainee. That is, statutory law requires that the subject be a national of a state at war with the United States, while international law requires an individualized judgment that the threat posed by the person makes detention absolutely necessary.

C. Suspension of Habeas Corpus

The Constitution does not merely coexist with centuries-old international law authorities to detain enemy soldiers and citizens. It also contains its own express contemplation of wartime suspension of the constitutional mechanisms that otherwise limit executive detention. The Suspension Clause, Article I, § 9, cl. 2, provides that: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." n124 The provision is framed in terms of its negative content: It prohibits Congress, under virtually all circumstances, from removing the protection of the writ. Its location in Article I Section 9 also provides structural evidence of its negative purpose. n125 But the Clause also contains what Justice Scalia has called a "safety valve, the Constitution's only 'express provision for exercise of extraordinary authority because of a crisis.'" n126 In providing for the authority to suspend the writ in cases of "rebellion or invasion," it foresees [\*112] and makes possible (though not necessarily legal) n127 detentions that it would not otherwise tolerate. n128

1. The Import and Mechanics of Suspension

Whether suspension in itself creates any specific detention authority, or merely removes the habeas vehicle that enables judicial policing of executive detention not pursuant to law, has been a subject of some debate. n129 Thus, it may not be accurate to call suspension a legal authority for preventive detention. But suspension at a minimum creates a state in which executive detentions that a habeas court would otherwise terminate may continue unimpeded. Moreover, permitting such detentions to occur is the presumptive intent of a legislature that suspends (or an executive who purports to suspend) habeas corpus. Thus, it is probably safer to speak of an implied provision made for emergency executive detention by the Suspension Clause, rather than the Suspension Clause as a legal authority for preventive detention.

 [\*113] Scholars generally accept that the power to invoke the Suspension Clause lies with Congress. n130 The clause's location in Article I strongly suggests this reading, and the Framers had as a model the English system, "in which exclusive suspension powers resided in Parliament." n131 An open question is whether Congress's determination that a rebellion or invasion exists, and that the public safety requires suspension, is judicially reviewable. Justice Story wrote that "[i]t would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the [\*114] right to judge whether exigency had arisen must exclusively belong to that body." n132 Yet several modern scholars argue that one or both of the predicate requirements for suspension do not constitute political questions committed by the Constitution to the Congress. n133

2. Historical Origins and Evolution of the Suspension Power

a. Historical and Conceptual Roots

The habeas guarantee in Anglo-American law emerged out of the "constitutional struggles of the seventeenth century as a remedy against political arrests by the King's council and ministers." n134 In 1640, in response to the abuses of Charles I, the Habeas Corpus Act of 1640 abolished "conciliar courts," including the infamous Star Chamber,

and specifically provided that anyone imprisoned by order of the King of Council should have habeas corpus and be brought before the court without delay with the cause of imprisonment shown. The judges were required to pronounce upon the legality of the detention . . . and bail, discharge or remand the prisoner accordingly. n135

"The struggle between subject and crown" in that century "culminated in the Habeas Corpus Act of 1679, described by Blackstone as [\*115] a 'second magna carta, and stable bulwark of our liberties.'" n136 The Act prescribed various procedures for asserting one's right to habeas corpus n137 in order "to ensure that prisoners entitled to relief would not be thwarted by procedural inadequacy." n138

The English system, the model for the framers of the U.S. Constitution, "accommodated [times of national emergency] by allowing legislative suspension of the writ of habeas corpus for brief periods." n139 Justice Scalia, dissenting in Hamdi, quotes Blackstone:

And yet sometimes, when the state is in real danger, even this [i.e., executive detention] may be a necessary measure. But the happiness of our constitution is that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing. . . . In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with it[s] liberty for a while, in order to preserve it for ever. n140

This quotation from Blackstone describes with striking accuracy the incidents of U.S. historical practice that followed, suggesting how little the core elements of this power have changed over the centuries. n141 Perhaps this is attributable to the fact that the Clause is by its terms a nonspecific remedy reserved for periods of extreme national necessity, a condition that exists (when it does exist) without reference to particular social conditions or mores. This distinguishes the suspension power from other, more specific [\*116] preventive detention authorities, which are tailored to the particular public policy challenges of the era in which they are crafted and face obsolescence as those conditions change.

b. Suspension in American Historical Experience

In some sense, the Suspension Clause can be said to follow the larger pattern we describe in this article: It is a narrow detention mechanism that represents the linear descendant of a traditionally broader one. Executive detention under suspension of habeas corpus, after all, is the modern descendant of a theoretically plenary royal authority to detain subjects as necessary to maintain the peace of the realm. n142 American law has banished that power almost entirely -- but not quite. It reserved, in the Suspension Clause, that portion that the Framers deemed necessary: a carve-out from the usual rules, to be invoked only in the worst of times. And throughout American history, political authorities have invoked it more or less in that spirit.

This history began even before the Constitution was written. In 1786, the outbreak of Shays' Rebellion in western Massachusetts prompted the legislature to pass an "Act for Suspending the Privilege of Habeas Corpus." n143 The Act authorized the Governor to order law enforcement [\*117] officers to apprehend and detain "any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires shall be restrained of their personal liberty . . . any Law, Usage or Custom to the contrary notwithstanding." n144

Two decades later, the Aaron Burr conspiracy prompted President Jefferson to seek in 1807 suspension of the writ in order to suppress the plot. n145 This suspension, the first attempted under the federal Constitution, was far narrower than that enacted by Massachusetts in response to Shays' Rebellion. The proposed bill "was limited to persons' charged on oath with treason, misprision of treason, or other high crime or misdemeanor, endangering the peace, safety, or neutrality of the United States." n146 The suspension would have been temporally limited to three months, "and no longer." n147 The Senate passed the bill, but the measure aroused great skepticism in the House of Representatives, n148 and was rejected 113 to 19. n149

 [\*118] The first true suspension of the writ under the federal Constitution took place during the Civil War. At the outset of the war, President Lincoln initially "purported to suspend habeas corpus without congressional authorization." n150 In April 1861, with Baltimore in a state of civil disorder, Lincoln issued orders to General Winfield Scott for the pacification of Maryland. The orders instructed that should Union forces "find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally, or through an officer in command at the point where the resistance occurs, are authorized to suspend the writ." n151 This order was not made public. And Chief Justice Taney complained upon hearing of it that "[n]o official notice has been given to the courts of justice or to the public by proclamation or otherwise that the President claimed this power." n152

The arrest of John Merryman brought the issue to a head in the courts. Merryman was a convinced secessionist who "spoke out vigorously against the Union and in favor of the South," and "followed this by recruiting a company of soldiers to serve in the Confederate Army." n153 In response to Merryman's petition for a writ of habeas corpus, Chief Justice Taney (sitting as a circuit judge) ordered Union General George Cadwalader to produce Merryman in federal court in Maryland. When Cadwalader defied the order, arguing that he had been "duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety," Taney expressed surprise that the President even claimed the power to suspend habeas: "I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of Congress." n154 Taney eventually declared Merryman's detention unlawful and transmitted his opinion to Lincoln, who more or less ignored it, though Merryman was shortly thereafter released. n155

 [\*119] Lincoln also issued multiple orders authorizing suspension along various critical rail lines in 1861. n156 During a two year period of Lincoln's unilateral suspension of the writ, Congress "actively debated . . . whether formally to authorize the President to suspend the writ." n157 While it considered the matter, Union officers acting under the President's orders "arrested thousands of prisoners, many on nothing more than suspicion of disloyalty." n158

In 1863, "to the relief of Republicans of a more theoretical bent than Lincoln," Congress finally passed legislation authorizing the suspension of habeas. n159 The Act authorized the President to suspend the writ "whenever, in his judgment, the public safety may require it . . . in any case throughout the United States." n160 The Act, however, did strictly qualify the authority with regard to persons arrested in areas where civilian courts were operating. n161 Finally, it "made compliance with any presidential order a defense" against suits alleging wrongful searches, seizures, arrests or imprisonment. n162 Lincoln subsequently issued a proclamation under the statute, declaring that:

 [\*120] in the judgment of the President, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military . . . officers of the Union . . . hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy . . . . n163

Lincoln was not entirely sanguine about the numerous extralegal detentions occurring under his orders. In a May 17, 1863 memo, he said, "Unless the necessity for these arbitrary arrests is manifest, and urgent, I should prefer they cease." n164

In the wake of the Civil War, during Reconstruction, Congress again authorized the President to suspend the writ in the South. The Ku Klux Klan had initiated a reign of terror, using "murders, whipping attacks, and rapes" to intimidate its opponents and undermine federal authority. n165 President Grant requested legislation authorizing suspension in order to "break[] through the secretive veil that protected the organization's structure and composition." n166

In March 1871, Congress passed the so-called Ku Klux Klan Act, n167 Section 4 of which provided:

[W]henever in any State . . . unlawful combinations . . . shall be organized and armed, and so numerous and powerful as to be able, by violence, to overthrow or set at defiance the constituted authorities of such state, and of the United States within such State . . . and whenever . . . the conviction of such offenders and the preservation of the public safety shall become in such district impracticable . . . such combinations shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under [\*121] the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of habeas corpus, to the end that such rebellion may be overthrown (emphasis added).

President Grant employed the new authorities in a vigorous campaign to root out the Klan in "a key . . . stronghold -- the South Carolina upcountry." n168 Federal troops rounded up suspected Klan members in massive sweeps, based solely "on their presumed membership in the Klan." n169 Few were actually prosecuted; many were detained for intelligence gathering purposes -- that is, to elicit information of value to the campaign to restore order. n170

Congress next authorized the suspension of the writ in 1902, in the law establishing a temporary civil government for the Philippines. The law contained a provision modeled on the Suspension Clause n171 and was invoked in 1905, when the Governor, with the approval of the Philippine Commission (as required by the statute) suspended the writ n172 in response to "organized bands of ladrones . . . terrifying the law-abiding and inoffensive people of" the provinces of Cavite and Batangas. n173 Nine months later, in October 1905, Philippine Governor Luke Wright revoked the suspension in the affected provinces, noting that "the ladrone bands . . . have been practically destroyed and the members thereof killed or captured . . . so that the necessity for the continuance of the suspension of the writ of habeas corpus in the aforesaid provinces . . . no longer exists." n174

 [\*122] Similarly, "the Hawaiian Organic Act of 1900 . . . provided that the Governor of Hawaii could suspend the writ in case of rebellion or invasion (or threat thereof)." n175 Interestingly, the Act did not require the approval of any Commission or consultative body in the case of a gubernatorial suspension, as the Philippine Act did. It did, however, provide that the Governor's power to suspend habeas or place the territory under martial law existed only "until communication can be had with the President and his decision thereon made known." n176 This suggests that the gubernatorial suspension provision was intended as a mere interim measure necessitated by Hawaii's distance from the mainland United States, rather than indicating specific intent to vest broad power in the Governor. n177 In any event, the provision was invoked, and the writ suspended, by the Governor on December 7, 1941, immediately after the Japanese attack on Pearl Harbor. n178 The President then approved the action on December 9th. n179

On a number of recent occasions, particularly in the context of post-September 11 counterterrorism, Congress has sought to limit the availability of federal habeas corpus. These legislative efforts have targeted post-conviction habeas, n180 particularly in the capital context, and in immigration cases. n181 They have also included two enactments designed to eliminate federal habeas jurisdiction over detentions at Guantánamo Bay, Cuba. n182 In some instances, the courts have tolerated these measures; in others, they have not. We do not treat such efforts here, as Congress did not invoke its acknowledged suspension power in these cases, and the government rested the underlying detention on some other source of legal authority.

 [\*123] 3. Conclusion

In short, while the Suspension Clause is not itself a preventive detention authority, it is a permission within the Constitution itself under certain circumstances -- circumstances narrower than they traditionally were -- to create a state in which preventive executive detentions may occur without habeas review. It has been used at several points in American history to accomplish just that, albeit always on a temporary basis in periods of genuine emergency.

II. Criminal Justice Authorities

Not all preventive detention authorities are extrinsic to the criminal justice system. At least two major ones are embedded within it. Opponents of preventive detention are often tempted to ignore both pretrial detention and the holding of material witnesses as somehow not counting because they take place within the four corners of the larger criminal justice system, which represents the hallmark of legitimacy -- but this is a mistake. These powers involve the authority to lock up people who, even when indicted, benefit from a presumption of innocence. They take place for overtly preventive, non-punitive reasons -- either to protect the community or to prevent flight of people either accused of a crime or whose testimony is required for either a trial of some other person or for consideration by a grand jury. And they take place in the face of a textual (though cryptic) constitutional prohibition against excessive bail. Notwithstanding the constitutional promise of speedy trial, pretrial detention can sometimes persist for surprisingly long periods of time. n183