# 1AC

### 1AC Plan Text

#### The United States federal judiciary should apply a clear statement principle to presidential war powers authority that the Suspension Clause applies to individuals indefinitely detained at the will of the United States

### 1AC Legitimacy

#### Advantage 1 is Legitimacy

#### Two internal links

#### First is habeas hypocrisy

Yang ’11 (Christina – dissertation @ Emory, advised by Michael Sullivan - PhD, Vanderbilt University, 2000 JD, Yale Law School, 1998 “Reconstructing Habeas: Towards a New Emergency Scheme!”

“[The] concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely,”99 is the primary principle driving the District Court’s decision to attribute greater importance to the third factor – the site of apprehension. And insofar as this concern implicates serious separation-of-powers questions as it introduces the possibility of the political branches playing hide-and-seek with the judiciary, this third factor should be afforded greater weight. “[If] Congress and the president had the power to take control of a territory and then determine that U.S. law does not apply there,”100 it damages America’s long-held reputation as abiding by the rule of law in all situations, at all times. We are not a dictatorship, a fascist or a totalitarian state. The United States of America is, and has always been, a democracy. Yet we are a democratic state not because we happen to hold elections, but because we abide by – and believe in the importance of – the rule of law. This reputation is further harmed when the Executive consciously and purposely transfers detainees from one detention site to another – e.g. from Guantánamo to Bagram or to other CIA black-sites around the world – based on whether or not the U.S. Constitution applies. The rule of law, remember, “is the cornerstone of a modern democratic society, one that is run not on the whims of its leaders but by established rules.”101 Even if adherence to rule of law in times of crisis constrains or impedes executive action to some extent, it also forces the executive to justify its actions – thereby diminishing the risk of heinous mistakes made in the name of urgency. The extension of the writ to Bagram does not guarantee release for the detainee, but simply demands that the executive have reasonable reasons for the petitioner’s continued detention. What harm to security is being done when all habeas does is to protect against arbitrary executive action? Security is, in fact, only harmed when the courts fail to hold the executive accountable for his decisions.102 After all, al-Maqaleh does not advocate for its “malleable, multifactored test”103 to automatically afford habeas rights for all Bagram detainees. The Great Writ of Liberty, it appears, is not absolute but subject to limitation in certain contexts and based on pragmatic grounds. In this global war on terror, America cannot stand alone. But in the aftermath of 9/11, we have become more and more alone. “Once a leading exponent of the rule of law,” David Cole observes, “the United States is now widely viewed as a systematic and arrogant violator of the most basic norms of human rights law – including the prohibitions against torture, disappearances, and arbitrary detention.”104 We cannot afford to alienate our friends with our actions. This loss of legitimacy is not simply harmful because it paints us in hypocritical colors, but because it also leaves us more vulnerable to terrorist attack inasmuch our governmental abuses in the arena of detention “fuels the animus and resentment that inspire the attacks against us in the first place.”105 We only confirm what the terrorists have been saying all along. In the end, the fight against terrorism is fundamentally a battle for hearts and minds.106 The more we win over our enemies, the fewer enemies we have to be concerned about. But the battle is not won with money; it is not won with victory. It is won by a long term commitment to civil liberties and the rule of law – everything that America was once known to stand for – as well as proof that even in the short term, we will act with legitimacy, fairness, and within the constraints of law. “As any leader instinctively knows,” Cole advises, “it is far better to have people follow your lead because they view you as legitimate than to have to try to compel others by force to adhere to your will.”107 Our allies were once willing to aid us in our cause – for the cause, the fight against terrorism, is neither illegitimate nor unworthy of pursuit. They are more reluctant now because we have compromised our legitimacy – i.e., the sincerity of our reasons for fighting this fight – when we employ illegitimate means to reach our ends. We require the help of our allies; and so in order to keep them on our side, we need to maintain “our historic position of leadership in the global spread of the rule of law,” thus reminding them of the “virtue of [the] legal commitments they [too] have made.”108

#### Second is judicial deference

Robert Knowles 9, Acting Assistant Professor, New York University School of Law, Spring, “Article: American Hegemony and the Foreign Affairs Constitution”, 41 Ariz. St. L.J. 87, Lexis

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424 The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429 In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy. The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436 Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438 At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440 The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige. Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449 Conclusion When it comes to the constitutional regime of foreign affairs, geopolitics has always mattered. Understandings about America's role in the world have shaped foreign affairs doctrines. But the classic realist assumptions that support special deference do not reflect the world as it is today. A better, more realist, approach looks to the ways that the courts can reinforce and legitimize America's leadership role. The Supreme Court's rejection of the government's claimed exigencies in the enemy combatant cases strongly indicates that the Judiciary is becoming reconciled to the current world order and is asserting its prerogatives in response to the fewer constraints imposed on the executive branch. In other words, the courts are moving toward the hegemonic model. In the great dismal swamp that is the judicial treatment of foreign affairs, this transformation offers hope for clarity: the positive reality of the international system, despite terrorism and other serious challenges, permits the courts to reduce the "deference gap" between foreign and domestic cases.

#### The only alternative is great power wars – withdraw or loss of cred collapses the international order

Kromah 9, Masters Student in IR [February 2009, Lamii Moivi Kromah at the Department of International Relations

University of the Witwatersrand, “The Institutional Nature of U.S. Hegemony: Post 9/11”, http://wiredspace.wits.ac.za/bitstream/handle/10539/7301/MARR%2009.pdf?sequence=1]

A final major gain to the United States from the benevolent hegemony has perhaps been less widely appreciated. It nevertheless proved of great significance in the short as well as in the long term: the pervasive cultural influence of the United States.39 This dimension of power base is often neglected. After World War II the authoritarian political cultures of Europe and Japan were utterly discredited, and the liberal democratic elements of those cultures revivified. The revival was most extensive and deliberate in the occupied powers of the Axis, where it was nurtured by drafting democratic constitutions, building democratic institutions, curbing the power of industrial trusts by decartelization and the rebuilding of trade unions, and imprisoning or discrediting much of the wartime leadership. American liberal ideas largely filled the cultural void. The effect was not so dramatic in the "victor" states whose regimes were reaffirmed (Britain, the Low and Scandinavian countries), but even there the United States and its culture was widely admired. The upper classes may often have thought it too "commercial," but in many respects American mass consumption culture was the most pervasive part of America's impact. American styles, tastes, and middle-class consumption patterns were widely imitated, in a process that' has come to bear the label "coca-colonization."40 After WWII policy makers in the USA set about remaking a world to facilitate peace. The hegemonic project involves using political and economic advantages gained in world war to restructure the operation of the world market and interstate system in the hegemon's own image. The interests of the leader are projected on a universal plane: What is good for the hegemon is good for the world. The hegemonic state is successful to the degree that other states emulate it. Emulation is the basis of the consent that lies at the heart of the hegemonic project.41 Since wealth depended on peace the U.S set about creating institutions and regimes that promoted free trade, and peaceful conflict resolution. U.S. benevolent hegemony is what has kept the peace since the end of WWII. The upshot is that U.S. hegemony and liberalism have produced the most stable and durable political order that the world has seen since the fall of the Roman Empire. It is not as formally or highly integrated as the European Union, but it is just as profound and robust as a political order, Kant’s Perpetual Peace requires that the system be diverse and not monolithic because then tyranny will be the outcome. As long as the system allows for democratic states to press claims and resolve conflicts, the system will perpetuate itself peacefully. A state such as the United States that has achieved international primacy has every reason to attempt to maintain that primacy through peaceful means so as to preclude the need of having to fight a war to maintain it.42 This view of the post-hegemonic Western world does not put a great deal of emphasis on U.S. leadership in the traditional sense. U.S. leadership takes the form of providing the venues and mechanisms for articulating demands and resolving disputes not unlike the character of politics within domestic pluralistic systems.43 America as a big and powerful state has an incentive to organize and manage a political order that is considered legitimate by the other states. It is not in a hegemonic leader's interest to preside over a global order that requires constant use of material capabilities to get other states to go along. Legitimacy exists when political order is based on reciprocal consent. It emerges when secondary states buy into rules and norms of the political order as a matter of principle, and not simply because they are forced into it. But if a hegemonic power wants to encourage the emergence of a legitimate political order, it must articulate principles and norms, and engage in negotiations and compromises that have very little to do with the exercise of power.44 So should this hegemonic power be called leadership, or domination? Well, it would tend toward the latter. Hierarchy has not gone away from this system. Core states have peripheral areas: colonial empires and neo-colonial backyards. Hegemony, in other words, involves a structure in which there is a hegemonic core power. The problem with calling this hegemonic power "leadership" is that leadership is a wonderful thing-everyone needs leadership. But sometimes I have notice that leadership is also an ideology that legitimates domination and exploitation. In fact, this is often the case. But this is a different kind of domination than in earlier systems. Its difference can be seen in a related question: is it progressive? Is it evolutionary in the sense of being better for most people in the system? I think it actually is a little bit better. The trickle down effect is bigger-it is not very big, but it is bigger.45 It is to this theory, Hegemonic Stability that the glass slipper properly belongs, because both U.S. security and economic strategies fit the expectations of hegemonic stability theory more comfortably than they do other realist theories. We must first discuss the three pillars that U.S. hegemony rests on structural, institutional, and situational. (1) Structural leadership refers to the underlying distribution of material capabilities that gives some states the ability to direct the overall shape of world political order. Natural resources, capital, technology, military force, and economic size are the characteristics that shape state power, which in turn determine the capacities for leadership and hegemony. If leadership is rooted in the distribution of power, there is reason to worry about the present and future. The relative decline of the United States has not been matched by the rise of another hegemonic leader. At its hegemonic zenith after World War II, the United States commanded roughly forty five percent of world production. It had a remarkable array of natural resource, financial, agricultural, industrial, and technological assets. America in 1945 or 1950 was not just hegemonic because it had a big economy or a huge military; it had an unusually wide range of resources and capabilities. This situation may never occur again. As far as one looks into the next century, it is impossible to see the emergence of a country with a similarly commanding power position. (2) Institutional leadership refers to the rules and practices that states agree to that set in place principles and procedures that guide their relations. It is not power capabilities as such or the interventions of specific states that facilitate concerted action, but the rules and mutual expectations that are established as institutions. Institutions are, in a sense, self-imposed constraints that states create to assure continuity in their relations and to facilitate the realization of mutual interests. A common theme of recent discussions of the management of the world economy is that institutions will need to play a greater role in the future in providing leadership in the absence of American hegemony. Bergsten argues, for example, that "institutions themselves will need to play a much more important role.46 Institutional management is important and can generate results that are internationally greater than the sum of their national parts. The argument is not that international institutions impose outcomes on states, but that institutions shape and constrain how states conceive and pursue their interests and policy goals. They provide channels and mechanisms to reach agreements. They set standards and mutual expectations concerning how states should act. They "bias" politics in internationalist directions just as, presumably, American hegemonic leadership does. (3) Situational leadership refers to the actions and initiatives of states that induce cooperation quite apart from the distribution of power or the array of institutions. It is more cleverness or the ability to see specific opportunities to build or reorient international political order, rather than the power capacities of the state, that makes a difference. In this sense, leadership really is expressed in a specific individual-in a president or foreign minister-as he or she sees a new opening, a previously unidentified passage forward, a new way to define state interests, and thereby transforms existing relations. Hegemonic stability theorists argue that international politics is characterized by a succession of hegemonies in which a single powerful state dominates the system as a result of its victory in the last hegemonic war.47 Especially after the cold war America can be described as trying to keep its position at the top but also integrating others more thoroughly in the international system that it dominates. It is assumed that the differential growth of power in a state system would undermine the status quo and lead to hegemonic war between declining and rising powers48, but I see a different pattern: the U.S. hegemonic stability promoting liberal institutionalism, the events following 9/11 are a brief abnormality from this path, but the general trend will be toward institutional liberalism. Hegemonic states are the crucial components in military alliances that turn back the major threats to mutual sovereignties and hence political domination of the system. Instead of being territorially aggressive and eliminating other states, hegemons respect other's territory. They aspire to be leaders and hence are upholders of inter-stateness and inter-territoriality.49 The nature of the institutions themselves must, however, be examined. They were shaped in the years immediately after World War II by the United States. The American willingness to establish institutions, the World Bank to deal with finance and trade, United Nations to resolve global conflict, NATO to provide security for Western Europe, is explained in terms of the theory of collective goods. It is commonplace in the regimes literature that the United States, in so doing, was providing not only private goods for its own benefit but also (and perhaps especially) collective goods desired by, and for the benefit of, other capitalist states and members of the international system in general. (Particular care is needed here about equating state interest with "national" interest.) Not only was the United States protecting its own territory and commercial enterprises, it was providing military protection for some fifty allies and almost as many neutrals. Not only was it ensuring a liberal, open, near-global economy for its own prosperity, it was providing the basis for the prosperity of all capitalist states and even for some states organized on noncapitalist principles (those willing to abide by the basic rules established to govern international trade and finance). While such behaviour was not exactly selfless or altruistic, certainly the benefits-however distributed by class, state, or region-did accrue to many others, not just to Americans.50 For the truth about U.S. dominant role in the world is known to most clear-eyed international observers. And the truth is that the benevolent hegemony exercised by the United States is good for a vast portion of the world's population. It is certainly a better international arrangement than all realistic alternatives. To undermine it would cost many others around the world far more than it would cost Americans-and far sooner. As Samuel Huntington wrote five years ago, before he joined the plethora of scholars disturbed by the "arrogance" of American hegemony; "A world without U.S. primacy will be a world with more violence and disorder and less democracy and economic growth than a world where the United States continues to have more influence than any other country shaping global affairs”. 51 I argue that the overall American-shaped system is still in place. It is this macro political system-a legacy of American power and its liberal polity that remains and serves to foster agreement and consensus. This is precisely what people want when they look for U.S. leadership and hegemony.52 If the U.S. retreats from its hegemonic role, who would supplant it, not Europe, not China, not the Muslim world –and certainly not the United Nations. Unfortunately, the alternative to a single superpower is not a multilateral utopia, but the anarchic nightmare of a New Dark Age. Moreover, the alternative to unipolarity would not be multipolarity at all. It would be ‘apolarity’ –a global vacuum of power.53 Since the end of WWII the United States has been the clear and dominant leader politically, economically and military. But its leadership as been unique; it has not been tyrannical, its leadership and hegemony has focused on relative gains and has forgone absolute gains. The difference lies in the exercise of power. The strength acquired by the United States in the aftermath of World War II was far greater than any single nation had ever possessed, at least since the Roman Empire. America's share of the world economy, the overwhelming superiority of its military capacity-augmented for a time by a monopoly of nuclear weapons and the capacity to deliver them--gave it the choice of pursuing any number of global ambitions. That the American people "might have set the crown of world empire on their brows," as one British statesman put it in 1951, but chose not to, was a decision of singular importance in world history and recognized as such.54 Leadership is really an elegant word for power. To exercise leadership is to get others to do things that they would not otherwise do. It involves the ability to shape, directly or indirectly, the interests or actions of others. Leadership may involve the ability to not just "twist arms" but also to get other states to conceive of their interests and policy goals in new ways. This suggests a second element of leadership, which involves not just the marshalling of power capabilities and material resources. It also involves the ability to project a set of political ideas or principles about the proper or effective ordering of po1itics. It suggests the ability to produce concerted or collaborative actions by several states or other actors. Leadership is the use of power to orchestrate the actions of a group toward a collective end.55 By validating regimes and norms of international behaviour the U.S. has given incentives for actors, small and large, in the international arena to behave peacefully. The uni-polar U.S. dominated order has led to a stable international system. Woodrow Wilson’s zoo of managed relations among states as supposed to his jungle method of constant conflict. The U.S. through various international treaties and organizations as become a quasi world government; It resolves the problem of provision by imposing itself as a centralized authority able to extract the equivalent of taxes. The focus of the theory thus shifts from the ability to provide a public good to the ability to coerce other states. A benign hegemon in this sense coercion should be understood as benign and not tyrannical. If significant continuity in the ability of the United States to get what it wants is accepted, then it must be explained. The explanation starts with our noting that the institutions for political and economic cooperation have themselves been maintained. Keohane rightly stresses the role of institutions as "arrangements permitting communication and therefore facilitating the exchange of information. By providing reliable information and reducing the costs of transactions, institutions can permit cooperation to continue even after a hegemon's influence has eroded. Institutions provide opportunities for commitment and for observing whether others keep their commitments. Such opportunities are virtually essential to cooperation in non-zero-sum situations, as gaming experiments demonstrate. Declining hegemony and stagnant (but not decaying) institutions may therefore be consistent with a stable provision of desired outcomes, although the ability to promote new levels of cooperation to deal with new problems (e.g., energy supplies, environmental protection) is more problematic. Institutions nevertheless provide a part of the necessary explanation.56 In restructuring the world after WWII it was America that was the prime motivator in creating and supporting the various international organizations in the economic and conflict resolution field. An example of this is NATO’s making Western Europe secure for the unification of Europe. It was through NATO institutionalism that the countries in Europe where able to start the unification process. The U.S. working through NATO provided the security and impetus for a conflict prone region to unite and benefit from greater cooperation. Since the United States emerged as a great power, the identification of the interests of others with its own has been the most striking quality of American foreign and defence policy. Americans seem to have internalized and made second nature a conviction held only since World War II: Namely, that their own wellbeing depends fundamentally on the well-being of others; that American prosperity cannot occur in the absence of global prosperity; that American freedom depends on the survival and spread of freedom elsewhere; that aggression anywhere threatens the danger of aggression everywhere; and that American national security is impossible without a broad measure of international security. 57 I see a multi-polar world as one being filled with instability and higher chances of great power conflict. The Great Power jostling and British hegemonic decline that led to WWI is an example of how multi polar systems are prone to great power wars. I further posit that U.S. hegemony is significantly different from the past British hegemony because of its reliance on consent and its mutilaterist nature. The most significant would be the UN and its various branches financial, developmental, and conflict resolution. It is common for the international system to go through cataclysmic changes with the fall of a great power. I feel that American hegemony is so different especially with its reliance on liberal institutionalism and complex interdependence that U.S. hegemonic order and governance will be maintained by others, if states vary in size, then cooperation between the largest of the former free riders (and including the declining hegemonic power) may suffice to preserve the cooperative outcome. Thus we need to amend the assumption that collective action is impossible and incorporate it into a fuller specification of the circumstances under which international cooperation can be preserved even as a hegemonic power declines.58 If hegemony means the ability to foster cooperation and commonalty of social purpose among states, U.S. leadership and its institutional creations will long outlast the decline of its post war position of military and economic dominance; and it will outlast the foreign policy stumbling of particular administrations.59 U.S. hegemony will continue providing the public good that the world is associated with despite the rise of other powers in the system “cooperation may persist after hegemonic decline because of the inertia of existing regimes. Institutional factors and different logics of regime creation and maintenance have been invoked to explain the failure of the current economic regime to disintegrate rapidly in response to the decline of American predominance in world affairs.”60 Since the end of WWII the majority of the states that are represented in the core have come to depend on the security that U.S. hegemony has provided, so although they have their own national interest, they forgo short term gains to maintain U.S. hegemony. Why would other states forgo a leadership role to a foreign hegemon because it is in their interests; one particularly ambitious application is Gilpin's analysis of war and hegemonic stability. He argues that the presence of a hegemonic power is central to the preservation of stability and peace in the international system. Much of Gilpin's argument resembles his own and Krasner's earlier thesis that hegemonic states provide an international order that furthers their own self-interest. Gilpin now elaborates the thesis with the claim that international order is a public good, benefiting subordinate states. This is, of course, the essence of the theory of hegemonic stability. But Gilpin adds a novel twist: the dominant power not only provides the good, it is capable of extracting contributions toward the good from subordinate states. In effect, the hegemonic power constitutes a quasigovernment by providing public goods and taxing other states to pay for them. Subordinate states will be reluctant to be taxed but, because of the hegemonic state's preponderant power, will succumb. Indeed, if they receive net benefits (i.e., a surplus of public good benefits over the contribution extracted from them), they may recognize hegemonic leadership as legitimate and so reinforce its performance and position. During the 19th century several countries benefited from British hegemony particularly its rule of the seas, since WWII the U.S. has also provided a similar stability and security that as made smaller powers thrive in the international system. The model presumes that the (military) dominance of the hegemonic state, which gives it the capacity to enforce an international order, also gives it an interest in providing a generally beneficial order so as to lower the costs of maintaining that order and perhaps to facilitate its ability to extract contributions from other members of the system.

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#### No offense – legitimacy determines power and withdraw guarantees extinction

Knowles ‘9 (Robert, Acting assistant Professor, New York University School of Law, “American Hegemony and the Foreign Affairs Constitution,” Arizona State Law Journal, 41 Ariz. St. L.J. 87, October)

International relations scholars are still struggling to define the current era. The U.S.-led international order is unipolar, hegemonic, and, in some ways, imperial. In any event, this order diverges from traditional realist assumptions in important respects. It is unipolar, but stable. It is more hierarchical. The U.S. is not the same as other states; it performs unique functions in the world and has a government open and accessible to foreigners. And the stability and legitimacy of the system depends more on successful functioning of the U.S. government as a whole than it does on balancing alliances crafted by elite statesmen practicing realpolitik. “[W]orld power politics are shaped primarily not by the structure created by interstate anarchy but by the foreign policy developed in Washington.”368 These differences require a new model for assessing the institutional competences of the executive and judicial branches in foreign affairs. One approach would be to adapt an institutional competence model using insights from a major alternative theory of international relations – liberalism. Liberal IR theory generally holds that internal characteristics of states – in particular, the form of government – dictate states behavior, and that democracies do not go to war against one another.369 Liberalists also regard economic interdependence and international institutions as important for maintaining peace and stability in the world.370 Dean Anne-Marie Slaughter has proposed a binary model that distinguishes between liberal, democratic states and non-democratic states.371 Because domestic and foreign issues are “more convergent” among liberal democracies, Slaughter reasons, the courts should decide issues concerning the scope of the political branches’ powers.372 With respect to non-liberal states, the position of the U.S. is more “realist,” and courts should deploy a high level of deference.373 A strength of Dean Slaughter’s binary approach is that it would tend to reduce the uncertainty in foreign affairs adjudication. Professor Nzelibe has criticized this approach because it would put courts in the difficult position of determining which countries are liberal democracies.374 But even if courts are capable of making these determinations, they would still face the same dilemmas adjudicating controversies regarding non-liberal states. Where is the appropriate boundary between foreign affairs and domestic matters? How much discretion should be afforded the executive when individual rights and accountability values are at stake? To resolve these dilemmas, an institutional competence model should be applicable to foreign affairs adjudication across the board. In constructing a new realist model, it is worth recalling that the functional justifications for special deference are aimed at addressing problems of a particular sort of role effectiveness—which allocation of power among the branches will best achieve general governmental effectiveness in foreign affairs. In the 21st Century, America’s global role has changed, and the best means of achieving effectiveness in foreign affairs have changed as well. The international realm remains highly political—if not as much as in the past— but it is American politics that matters most. If the U.S. is truly an empire— and in some respects it is—the problems of imperial management will be far different from the problems of managing relations with one other great power or many great powers. Similarly, the management of hegemony or unipolarity requires a different set of competences. Although American predominance is recognized as a salient fact, there is no consensus among realists about the precise nature of the current international order.375 The hegemonic model I offer here adopts common insights from the three IR frameworks—unipolar, hegemonic, and imperial—described above. First, the “hybrid” hegemonic model assumes that the goal of U.S. foreign affairs should be the preservation of American hegemony, which is more stable, more peaceful, and better for America’s security and prosperity, than the alternatives. If the United States were to withdraw from its global leadership role, no other nation would be capable of taking its place.376 The result would be radical instability and a greater risk of major war.377 In addition, the United States would no longer benefit from the public goods it had formerly produced; as the largest consumer, it would suffer the most. Second, the hegemonic model assumes that American hegemony is unusually stable and durable.378 As noted above, other nations have many incentives to continue to tolerate the current order.379 And although other nations or groups of nations—China, the European Union, and India are often mentioned—may eventually overtake the United States in certain areas, such as manufacturing, the U.S. will remain dominant in most measures of capability for decades to come. In 2025, the U.S. economy is projected to be twice the size of China’s.380 The U.S. accounted for half of the world’s military spending in 2007 and holds enormous advantages in defense technology that far outstrip would-be competitors.381 Predictions of American decline are not new, and they have thus far proved premature.382 Third, the hegemonic model assumes that preservation of American hegemony depends not just on power, but legitimacy.383 All three IR frameworks for describing predominant states—although unipolarity less than hegemony or empire—suggest that legitimacy is crucial to the stability and durability of the system. Although empires and predominant states in unipolar systems can conceivably maintain their position through the use of force, this is much more likely to exhaust the resources of the predominant state and to lead to counter-balancing or the loss of control.384 Legitimacy as a method of maintaining predominance is far more efficient. The hegemonic model generally values courts’ institutional competences more than the anarchic realist model. The courts’ strengths in offering a stable interpretation of the law, relative insulation from political pressure, and power to bestow legitimacy are important for realizing the functional constitutional goal of effective U.S. foreign policy. This means that courts’ treatment of deference in foreign affairs will, in most respects, resemble its treatment of domestic affairs. Given the amorphous quality of foreign affairs deference, this “domestication” reduces uncertainty. The increasing boundary problems caused by the proliferation of treaties and the infiltration of domestic law by foreign affairs issues are lessened by reducing the deference gap. And the dilemma caused by the need to weigh different functional considerations—liberty, accountability, and effectiveness—against one another is made less intractable because it becomes part of the same project that the courts constantly grapple with in adjudicating domestic disputes.

### 1AC Iraq

#### Advantage 2 is Iraq

#### Judicial intervention into detention is inevitable but court ruling will determine the role that they play

Chesney 13, Law Prof at UT (November, Robert, BEYOND THE BATTLEFIELD, BEYOND AL QAEDA: THE DESTABILIZING LEGAL ARCHITECTURE OF COUNTERTERRORISM, 112 Mich. L. Rev. 163)

The government will not be able to simply ride out the legal friction generated by the fragmentation of al Qaeda and the shift toward shadow war. Those trends do not merely shift unsettled questions of substantive law to the forefront of the debate; they also greatly increase the prospects for a new round of judicial intervention focusing on those substantive questions. 1. Military Detention Consider military detention first. Fresh judicial intervention regarding the substantive law of detention is a virtual certainty. It will come in connection with the lingering Guantanamo population, and it will come as well in connection with any future detainees taken into custody on a long-term basis, regardless of where they might be held. a. Existing Guantanamo Detainees Most of the existing Guantanamo detainees have already had a shot at habeas relief, and many lost on both the facts and the law. But some of them can and will pursue a second shot, should changing conditions call into question the legal foundation for the earlier rulings against them. n202 The first round of Guantanamo habeas decisions depended in almost every instance on the existence of a meaningful tie to ongoing hostilities in Afghanistan, as did the Supreme Court's 2004 decision in Hamdi. Indeed, Justice O'Connor in Hamdi was at pains to caution that at some point in the future this baseline condition making LOAC relevant could unravel. n203 The declining U.S. role in combat operations in Afghanistan goes directly to that point. This decline will open the door to a second wave of Guantanamo[Gitmo] litigation, with detainees arguing that neither LOAC nor the relevant statutory authorities continues to apply. This argument may or may not succeed on the merits. At first blush, the NDAA FY12 would seem to present a substantial obstacle to the detainees. That statute expressly codifies detention authority as to members (and supporters) of al Qaeda, the Afghan Taliban, and "associated forces," n204 thus grounding detention authority directly in domestic law rather than requiring courts to impute such authority into the 2001 AUMF by implication from LOAC (as the Supreme Court had to do in [\*214] Hamdi itself). But it is not quite so simple. The same section of the NDAA FY12 relinks the question of detention authority to LOAC after all. It specifies that statutory detention authority as an initial matter exists solely "pending disposition under the law of war." n205 And although it then lists long-term military detention as a possible disposition option, the statute specifically defines this authority as "detention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." n206 A court confronted with this language might interpret it in a manner consistent with the government's borderless-conflict position, such that the drawdown in Afghanistan would not matter. But it might not. The repeated references to the "law of war" in the statute--that is to LOAC--might lead at least some judges to conduct a fresh field-of-application analysis regarding the extent to which LOAC remains applicable in light of the drawdown, and judges might then read the results back into the NDAA FY12. I am not saying that this is the likely outcome or that any such analysis would necessarily reject the government's borderless-conflict position. I am just saying that judges eventually will decide these matters without real guidance from Congress (unless Congress clarifies its intentions in the interim). Note, too, that any such judicial interpretations may well have far broader implications than just the fate of the particular detainee in question; a ruling that LOAC has no application in a given situation would cast a long shadow over any other LOAC-based actions the U.S. government might undertake in the same or similar contexts (including targeting measures). Regardless of what occurs in Afghanistan, the existing Guantanamo detainee population might also find occasion to come back to court should the decline of the core al Qaeda organization continue to the point where it can plausibly be described as defunct. In such a case, it is likely that at least some current al Qaeda detainees would revive their habeas petitions in order to contend that the demise of the organization also means the demise of detention authority over members of the defunct group. This argument would be particularly likely to come from those who were held on the ground of membership in al Qaeda but who the government had not shown to have been otherwise involved in hostile acts. This would be a challenging argument to make; the government would surely respond that al Qaeda would no longer be defunct if some of its members were set free. But setting that possible response aside, such a petition could compel the government to litigate the question of whether the continuing existence of various "franchises," like AQAP or al-Shabaab, suffices to preserve detention authority over al Qaeda members. That is, such a challenge could lead a judge to weigh in on the organizational boundary question.

#### US rule of law leadership on indefinite detention solves Iraqi civil war

Scharf et al 9, PILPG Managing Director [Professor Michael P. Scharf is the PILPG Managing Director, John Deaver Drinko — Baker & Hostetler Professor of Law and Director of the Frederick K. Cox International Law Center at the Case Western Reserve University School of Law, “BRIEF OF THE PUBLIC INTERNATIONAL LAW & POLICY GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS”, www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_PetitionerAmCuPILPG.authcheckdam.pdf]

As the foregoing examples illustrate, foreign governments rely on the precedent set by the U.S. and this Court when addressing new and complex issues in times of conflict. Finding for the Petitioners in the present case will reaffirm this Court’s leadership in promoting respect for rule of law in foreign states during times of conflict. B. Foreign Judges Follow U.S. and Supreme Court Leadership in Times of Conflict. In addition to its work advising foreign governments, PILPG has been and continues to be involved in a number of judicial training initiatives in foreign states. These initiatives aim to foster independent and fair judicial systems in transitional and post-conflict states throughout Central and Eastern Europe, Africa, and the Middle East. In these trainings, PILPG frequently relies on the work of this Court to illustrate and promote adherence to the rule of law. In 2004, for example, PILPG led a week-long training session for Iraqi judges in Dubai on due process and civil liberties protections to institute in the new post-Saddam legal system. The training was seen as an important step toward the democratization of Iraq, and something that would hasten the ability of the U.S. to withdraw its troops from Iraq. On the second day of the training program, local and international media published the leaked photos of the abuses at Abu Ghraib. The Iraqi judges would not allow the training sessions to continue until PILPG answered to their satisfaction questions about whether the U.S. judicial system could ensure that the perpetrators would be brought to justice, that the victims would be able to bring suit for their injuries, and that the abuses would be halted. When PILPG returned for another training session several months later, the Iraqi judges had mixed reactions to the prosecutions of the Abu Ghraib perpetrators. Some judges perceived the U.S. Prosecutions of the perpetrators as not aggressive enough, which left the Iraqi judges with the impression that the U.S. was not leading by example. Although other Iraqi judges appreciated and sought to follow the U.S. example to try those responsible for abuses before an independent tribunal, it was clear that Abu Ghraib temporarily set back U.S. efforts to establish rule of law in Iraq. A year later, in 2005, PILPG conducted training sessions for the Iraqi high tribunal judges who would be presiding over the trial of Saddam Hussein and other former leaders of the ba’athist regime. Even more than the human rights training of ordinary Iraqi judges discussed above, the successful operation of the Iraqi high tribunal was seen as critical to suppressing the spread of sectarian violence and heading off a full-scale civil war in Iraq. The objectives of the tribunal were twofold. First, the tribunal sought to bring those most responsible for the atrocities committed under the Ba’athist regime before an independent panel of judges to be tried under international standards of justice. Second, the tribunal sought to establish a model for upholding and implementing rule of law in Iraq and to demonstrate that the need for rule of law is greatest in response to the gravest atrocities. During the training sessions, the Iraqi judges requested guidance on controlling disruptive defendants in the courtroom. Specifically, the judges asked whether they could bind and gag the defendants in the courtroom as they understood had been done to the defendants in the 1969 “Chicago Seven” trial in the U.S. PILPG explained that the U.S. Court of Appeals had ultimately overturned the convictions in that case, in part because of the mistreatment of the defendants in the courtroom. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972). This information persuaded the Iraqi judges to seek less draconian means of control in the trial of Saddam Hussein, which was televised gavel to gavel in Iraq. See generally Michael Newton and Michael Scharf, Enemy of the State: The Trial and Execution of Saddam Hussein (2008). Foreign judicial interest in U.S. respect for rule of law during the war on terror is not limited to Iraqi judges. In 2006, PILPG conducted sessions in a weeklong rule of law training program in Prague for fifty judges from former Soviet Bloc countries in Eastern Europe. At the start of the first session, one of the judges asked “Sobriaetes’ li vi goverit’ o slone v komnate?,” which translates to “Are you going to be addressing the elephant in the room?” Michael P. Scharf, The Elephant in the Room: Torture and the War on Terror, 37 Case W. Res. J. Int’l L. 145, 145 (2006). The question referred to the so-called “White House Torture Memos,” released just before the training session began, which asserted that Common Article 3 of the 1949 Geneva Conventions was not applicable to detainees held at Guantanamo Bay and which provided justification for Military Commissions whose procedures would not meet the Geneva standards. Id. at 145-46. The group of judges asked PILPG to explain “how representatives of the United States could expect to be taken seriously in speaking about the importance of human rights law when the United States itself has recently done so much that is contrary to that body of law in the context of the so-called ‘Global War on Terror.’” Id. at 145. PILPG addressed judges’ concerns by explaining that the President’s decision to establish Military Commissions via Executive Order, and whether those Commissions had to comport with the Geneva Conventions, was currently being reviewed by this Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and that the Executive Branch would be bound to follow the holding of this Court. Scharf, supra, at 148. Foreign judges closely follow the work of this Court and the example set by the U.S. Government in upholding the rule of law during the war on terror. As these examples illustrate, when the U.S. upholds the rule of law, foreign judges are more likely to follow.

#### Data proves Iraqi civil war is inevitable—only strong systems of governance can stabilize the country

Cordesman and Khazai 9/9, Arleigh Burke Chair in Strategy at CSIS

[09/09/13, Anthony H. Cordesman holds the Arleigh A. Burke Chair in Strategy at CSIS, and Sam Khazai is an Associate at CSIS,, “Violence in Iraq: The Growing Risk of Serious Civil Conflict”, https://csis.org/files/publication/120718\_Iraq\_US\_Withdrawal\_Search\_SecStab.pdf]

Iraq is a nation with great potential and its political divisions and ongoing low-level violence do not mean it cannot succeed in establishing stability, security, and a better life for its people. Iraq cannot succeed, however, by denying its growing level of violence and the responsibility of Iraq’s current political leaders for its problems. There are gaps in the data on Iraq’s current level of violence, its causes, and the responsibility of given actors. The data are still good enough, however, to warn that Iraq may be moving back to a level of civil conflict that will amount to a serious civil war. There is also substantial reporting to show that Iraq’s violence is not simply the product of extremists and terrorist groups. Iraq’s growing violence is also the result of the fact that Iraq is the scene of an ongoing struggle to establish a new national identity: one that can bridge across the deep sectarian divisions between its Shi’ites and Sunnis as well as the ethnic divisions between its Arabs and its Kurds and other minorities. Improving the quality and focus of Iraqi efforts at counterterrorism and internal security is a key priority, but it Iraq cannot end its violence through force or repression. Iraq’s leaders must build a new structure of political consensus. They must build an effective structure of governance, and social order that sharply reduces the problems caused by the mix of dictatorship, war, sanctions, occupation, and civil conflict that began in the 1970s and create the kind of national government that can give democracy real meaning and serve the needs of all the Iraqi people.. Iraq must also deal with deep underlying problems. It must cope with a steadily growing population, and diversify an economy that is so dependent on petroleum exports that they provide some 95% of its government revenues. If Iraq’s leaders fail, try to deal with this mix of political divisions and structural problems by denial, or continue their present factional struggles; the end result will be to delay Iraq’s progress by every year their present search for self-advantage continues. What is far worse is that their failures may cause a new major civil war or even divide the country.

#### Strengthened judicial independence is key to solve that – addresses alt causes

Pimental and Anderson 13, Associate and Assistant Professors of Law

[June 2013, David Pimentel is Visiting Associate Professor of Law, Ohio Northern University; Brian Anderson is a Reference Librarian and Assistant Professor, also at Ohio Northern University, “Judicial Independence in Post-Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy”, http://works.bepress.com/cgi/viewcontent.cgi?article=1013&context=david\_pimentel]

Contemporary Iraq is facing the full range of challenges that come with post-conflict transitional justice. That includes the backward-looking issues of restorative and retributive justice, for the atrocities and mass human rights violations they suffered during the Saddam Hussein regime and the conflict that followed his downfall.1 It also includes the forward-looking efforts, “paving the road toward peace and reconciliation” and establishing a functional state, characterized by the Rule of Law, in the society torn apart by conflict.2 Among the critical institutions demanding attention in the post-conflict reconstruction is the judiciary, particularly the need for an independent judiciary.3 There is increasing recognition that a functional legal system, one that protects rights and redresses wrongs, is vital to restoring the peace and stability to a war-torn society. Only with such a sound legal system— and a fair, impartial and independent judiciary—will people trust their disputes to the state, and refrain from the vigilante score-settling that signals the breakdown of the Rule of Law.

#### Global nuclear war

Morgan 7 (Former member of the British Labour Party Executive Committee, 3/4, "Better another Taliban Afghanistan, than a Taliban NUCLEAR Pakistan!?" http://www.electricarticles.com/display.aspx?id=639)

The nightmare that is now Iraq would take on gothic proportions across the continent. The prophesy of an arc of civil war over Lebanon, Palestine and Iraq would spread to south Asia, stretching from Pakistan to Palestine, through Afghanistan into Iraq and up to the Mediterranean coast. Undoubtedly, this would also spill over into India both with regards to the Muslim community and Kashmir. Border clashes, terrorist attacks, sectarian pogroms and insurgency would break out. A new war, and possibly nuclear war, between Pakistan and India could not be ruled out. Atomic Al Qaeda Should Pakistan break down completely, a Taliban-style government with strong Al Qaeda influence is a real possibility. Such deep chaos would, of course, open a “Pandora's box” for the region and the world. With the possibility of unstable clerical and military fundamentalist elements being in control of the Pakistan nuclear arsenal, not only their use against India, but Israel becomes a possibility, as well as the acquisition of nuclear and other deadly weapons secrets by Al Qaeda. Invading Pakistan would not be an option for America. Therefore a nuclear war would now again become a real strategic possibility. This would bring a shift in the tectonic plates of global relations. It could usher in a new Cold War with China and Russia pitted against the US.

### 1AC Afghanistan

#### Advantage 3 is Afghanistan

#### Afghanistan will implement indefinite detention policies- their judiciary is modeled on the United States

Rodgers 12 (Chris Rogers is a human rights lawyer for the Open Society Foundations specializing in human rights and conflict in Afghanistan and Pakistan, May 14, “Karzai's bid for a dictatorial detention law”, http://afpak.foreignpolicy.com/posts/2012/05/14/karzais\_bid\_for\_a\_dictatorial\_detention\_law)

As part of the agreement to transfer control of Bagram, the Afghan government is creating the authority to hold individuals without charge or trial for an indefinite period of time on security grounds-a power it has never before said it needed. While such "administrative detention" regimes are permissible under the laws of war, this new detention power is being established in order to hand over a U.S. detention facility, not because changes in the conflict have convinced Afghan officials that it is necessary. A surge in U.S. detention operations like night raids has driven the prison population to over 3,000 detainees, most of whom the United States lacks evidence against for prosecution under Afghans law. Because the Afghan constitution, like the United States', protects individuals from being detained without charge or trial, the Afghan government needs a new detention law, which is now being modeled on deeply problematic U.S. detention policies and practices. As a result, Bagram's real legacy may be the establishment of a detention regime that will be ripe for abuse in a country with pervasive corruption and weak rule of law. Despite potentially far-reaching consequences, the development of this new detention power has been hidden from public view. When I met with leading Afghan lawyers and civil society organizations in Kabul several weeks ago, few knew that the government was proposing to create a new, non-criminal detention regime. Their reaction was disbelief and dismay. None had even seen a copy of the proposed regime, which the Afghan government has not made public and is trying to adopt by presidential fiat. The Open Society Foundations recently obtained a copy of the proposed detention regime, and after review, we have found what it details deeply troubling. The proposed changes leave open critical questions about the nature and scope of this proposed detention regime, which if left unanswered make it ripe for abuse. Who can be held in administrative detention and for how long? Where will it apply? When will the government cease to have this power? How will the government ensure it will not be abused to imprison the innocent or suppress political opposition? Most alarming is the failure to address the serious, long-term risks posed by such a regime. From apartheid South Africa to modern day China, administrative detention regimes adopted on security grounds have too often been used as tools of repression. In Egypt, the former government used administrative detention for decades to commit gross human rights violations and suppress political opposition, relying on a state of emergency declared in 1958, and nominally lifted only after last year's revolution. Across the border in Pakistan, the draconian Frontier Crimes Regulations are another stark reminder of the long, dark shadow that such legal regimes can cast. The ongoing imposition of these British, colonial-era laws, which among other things legalize collective punishment and detention without trial, are cited by many as a key driver of the rise of militancy in the tribal areas of Pakistan. But there is still time for the United States to avoid this legacy in Afghanistan. If the Afghan government cannot be dissuaded from adopting an administrative detention regime, then the United States should urge the Afghan government to include provisions that limit its scope and reduce its vulnerability to abuse. First, a ‘sunset' provision should be adopted, which would impose a time limit on such powers, or require an act by the Afghan Parliament to extend their duration. Second, the regime should be limited to individuals currently held by the United States at Bagram prison. There is no clear reason why the handover of Bagram detainees requires the creation of a nation-wide administrative detention regime. More generally, the scope of who can be detained must be clearly defined and limited. Third, detainees must have right to counsel as well as access to the evidence used against them in order to have a meaningful opportunity to challenge their detention-a fundamental right in international law. At present it seems the government will follow the well-documented due process shortfalls of the U.S. model. The United States and its Afghan partners must be honest about the serious, long-term risks of establishing an administrative detention regime in Afghanistan-particularly one that lacks clear limits and is democratically unaccountable. Protection from arbitrary or unlawful deprivation of life or liberty is at the constitutional core of the United States, and is essential to lasting stability and security in Afghanistan. Living up to the President's promise of responsibly ending the war in Afghanistan requires defending, not betraying this principle.

Indefinite detention erodes faith in the rule of law and ruins the Afghan judiciary

ICG 10 (International Crisis Group, November 17, “REFORMING AFGHANISTAN’S BROKEN JUDICIARY”, http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afghanistans%20Broken%20Judiciary.ashx)

U.S. detention policy has frequently been cited by Afghan and international legal experts as one of the chief obstacles to restoring balance to the Afghan justice system and citizens’ faith in the rule of law.233 The operation of parallel U.S.-controlled prisons has been problematic from the start. Thousands of Afghans have been detained since the start of Operation Enduring Freedom in 2001 without recourse to trial or the means to challenge their detention. Abuse of prisoners at the U.S.-run Bagram Theatre Internment Facility in the early years of its operation under the Bush administration has been well documented, including the use of harsh interrogation techniques that resulted in the deaths of two Afghans.234 Extrajudicial detentions at Bagram have eroded support for foreign troops and for many Afghans – Pashtuns in particular – stand as a symbol of oppression. Like its sister facility at the U.S. military base in Guantanamo, Cuba, the Bagram prison has provided much grist for Taliban propaganda mills.235 U.S. officials under the Obama administration appear to have begun to recognise that extrajudicial detentions have negatively impacted Afghan perceptions of the rule of law. In January 2009, the U.S. government announced plans to close the facility at Guantanamo and to re-evaluate its detainee programs overall. A U.S. federal district court ruling in April 2009 concluding that non-Afghan detainees held at the Bagram facility have a right to challenge their detention in American courts has hastened the need to find solutions to the legal conundrum posed by the extrajudicial status of prisoners at Bagram.236 In September 2009, the U.S. Department of Defense adopted a new framework for evaluating the status of detainees in U.S. facilities in Afghanistan. Responsibility for detainee policy and operations now falls to Task Force 435, an interagency unit under joint military-civilian leadership whose mission is to bring detention and rule of law practices in line with U.S. strategic goals in Afghanistan. The old Bagram facility has since been replaced by the more modern Detention Facility in Parwan (DFIP), which opened in 2009 at the edge of the Bagram military base. Under this new policy, new detainee review board (DRB) procedures were adopted to bring detention practices in Afghanistan more in line with U.S. and international law. They replaced the Unlawful Enemy Combatant Review Boards, which had been generally deemed inadequate because they afforded detainees few, if any, opportunities to challenge their arrest or to review evidence in cases brought against them in closed hearings. Under the new procedures, a military panel determines if a detainee has been properly captured and poses a future threat to the Afghan government or international security forces. Although the U.S. government is careful not to characterise the proceedings as legal or adversarial in the sense that a trial might be, detainees are allowed to some extent to present their version of events with the help of a U.S.-assigned “personal representative”. Hundreds of detainees have had their cases reviewed since the new review procedures were adopted and a number have been released because of insufficient evidence that they posed a threat to the Afghan government.237 These new guidelines are an important step forward, but they are far from replicating internationally recognised fair trial standards. A number of other actions must be taken to make U.S. detention policy more transparent, humane and fair and to bring it in line with international law. Specifically, U.S. investigation and intelligence gathering standards must be improved and the review board process must incorporate a more vigorous mechanism that allows detainees to review and challenge evidence brought against them, including measures for classified evidence. Transition to Afghan control of specially designated detainees will also necessitate a re-evaluation of classification procedures both at the point of capture and across agencies – both Afghan and U.S. The current process of declassifying information is far too cumbersome and there is a demand for greater clarity on the rules of transfer of information from coalition and Afghan sources to Afghan government sources.238 Changes in declassification policy will necessitate a serious review of current Afghan law and investigative practices and procedures employed by the Afghan National Directorate of Security and other security organs. In January 2010, the U.S. and Afghan government signed a memorandum of understanding calling for the DFIP to pass from U.S. to Afghan control in July 2011. By that time, review proceedings should be conducted entirely by Afghan judges and prosecutors; an Afghan judge in the Parwan provincial courts has already reviewed a number of detainee cases.239 The U.S. has set up a rule of law centre at the new facility with a view to training Afghan legal professionals to build cases against the roughly 1,100 detainees housed at the prison. The training and transition are important first steps toward dismantling the parallel legal systems that have co-existed uneasily in Afghanistan since the start of the U.S. military engagement. The transition could entail some tricky procedural challenges in terms of potential conflicts between Afghan courts and U.S. military authorities over the danger posed by “highrisk” detainees.240 This and other issues should be clarified before the transition in 2011.

#### Starting with US policy is key- perception of hypocrisy replicates indefinite detention

Eviatar 12 (Daphne Eviatar Law and Security Program Human Rights First, 1-9, “The Latest Skirmish in Afghanistan: Hate to Say We Told You So”, http://www.humanrightsfirst.org/2012/01/09/the-latest-skirmish-in-afghanistan-hate-to-say-we-told-you-so/)

Responsibility begins with due process. As we wrote in our report in May, based on our observations of the hearings given to detainees at the U.S.-run detention facility at Bagram: “the current system of administrative hearings provided by the U.S. military fails to provide detainees with an adequate opportunity to defend themselves against charges that they are collaborating with insurgents and present a threat to U.S. forces.” As a result, the U.S. hearings “fall short of minimum standards of due process required by international law.” For President Karzai, that’s an argument that the U.S. should immediately turn the thousands of detainees it’s holding over to the government of Afghanistan. But that would do little to solve the problem. TheUnited Nations reported in October that Afghanistan’s intelligence service systematically tortures detainees during interrogations. The U.S. government cannot hand prisoners over to the Afghans if they’re likely to be tortured, according to its obligations under international law. And unfortunately, as we also noted in our report, the Afghan justice system, although improving with the growing introduction of defense lawyers, is still hardly a model of due process. Still, unlike the United States, at least Afghan law does not permit detention without criminal charge, trial and conviction. The United States hasn’t exactly proven itself the best model for the Afghan justice system. Restoring U.S. credibility is going to be key to our ability to withdraw from Afghanistan without it becoming a future threat to U.S. national security. The U.S. government can’t credibly insist that the Afghans improve their justice system and treatment of detainees if the U.S. military doesn’t first get its own detention house in order. Whether for the sake of international law, U.S. credibility, or merely to improve relations with the Karzai government, upon which U.S. withdrawal from Afghanistan depends, the U.S. military needs to start providing real justice to the thousands of prisoners in its custody.

#### Strong Afghan judiciary key to post-drawdown strategy

ICG 10 (International Crisis Group, November 17, “REFORMING AFGHANISTAN’S BROKEN JUDICIARY”, http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afghanistans%20Broken%20Judiciary.ashx)

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

#### That’s key to long-term stability

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

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

#### Post-drawdown Afghan state collapse leads to nuclear war

Cronin 13 (Audrey Kurth Cronin is Professor of Public Policy at George Mason University and author of How Terrorism Ends and Great Power Politics and the Struggle over Austria. Thinking Long on Afghanistan: Could it be Neutralized? Center for Strategic and International Studies The Washington Quarterly • 36:1 pp. 55\_72 http://dx.doi.org/10.1080/0163660X.2013.751650)

With ISAF withdrawal inevitable, a sea change is already underway: the question is whether the United States will be ahead of the curve or behind it. Under current circumstances, key actions within Afghanistan by any one state are perceived to have a deleterious effect on the interests of other competing states, so the only feasible solution is to discourage all of them from interfering in a neutralized state. As the United States draws down over the next two years, yielding to regional anarchy would be irresponsible. Allowing neighbors to rely on bilateral measures, jockey for relative position, and pursue conflicting national interests without regard for dangerous regional dynamics will result in a repeat of the pattern that has played out in Afghanistan for the past thirty years\_/except this time the outcome could be not just terrorism but nuclear war.

#### Multiple scenarios for escalation

Rubin, 11 (Joel, Director of Policy and Government Affairs, Ploughshares Fund, former congressional aide and diplomat, fellow at the State Department in both Near Eastern Affairs and Political-Military Affairs, Master’s degree in Public Policy and Business Administration from Carnegie Mellon University and a Bachelor’s degree in Politics from Brandeis University, Huffington Post, 77/2011, http://www.huffingtonpost.com/joel-rubin/middle-east-nuclear-threat\_b\_891178.html)

The national security calculus of keeping U.S. forces in Afghanistan has shifted. Any gains that we made from keeping 100,000 American soldiers in harm's way are now questionable, especially since al Qaeda has been dealt a significant blow with the killing of Osama bin Laden. President Obama's decision to end the surge by late next year only reinforces this reality. Yet many of the underlying sources of conflict and tension in South and Central Asia will remain after an American withdrawal. In a region that has deep experience on nuclear matters -- with nuclear aspirant Iran bordering Afghanistan on one side and nuclear-armed Pakistan and India on the other -- the United States must take into account the potential for regional nuclear insecurity caused by a poorly executed drawdown in Afghanistan. As much as we may like to, we can't just cut and run. So as the United States draws down its forces, we must take care to leave stable systems and relationships in place; failure to do so could exacerbate historic regional tensions and potentially create new national security risks. It is therefore essential that Washington policymakers create a comprehensive nuclear security strategy for the region as part of its Afghanistan withdrawal plans that lays the groundwork for regional stability. We have only to look to our recent history in the region to understand the importance of this approach. In the 1980s, the U.S. supported the Mujahedeen against the Soviet Union. When that conflict ended, we withdrew, only to see the rise of al Qaeda -- and its resultant international terrorism -- in the 1990s because we didn't pull out responsibly from Afghanistan. Our choices now in Afghanistan will determine the shape of our security challenges in the region for the foreseeable future. And we can't afford for nuclear weapons to become to South and Central Asia in the 21st century what al Qaeda was in the 1990s to Afghanistan. To avoid such an outcome, several key objectives must be included in any Afghanistan withdrawal plan. First, current levels of regional insecurity -- which already are extremely high -- will continue to drive tensions, and quite possibly conflict, amongst the regional powers. Therefore, we must ensure the implementation of a regional approach to military withdrawal. These efforts must bring all relevant regional players to the table, particularly the nuclear and potentially nuclear states. Iran and all the countries bordering Afghanistan must be part of this discussion. Second, the United States must be mindful to not leave a governance vacuum inside Afghanistan. While it is clear that the current counter-insurgency policy being pursued in Afghanistan is not working at a pace that meets either Western or Afghan aspirations, it is still essential that Afghanistan not be allowed to implode. We do not need 100,000 troops to do this, and as the Afghanistan Study Group has recommended, credible political negotiations that emphasize power-sharing and political reconciliation must take place to keep the country intact while the United States moves out. Third, while the rationale for our presence in Afghanistan -- to defeat al Qaeda -- has dissipated, a major security concern justifying our continued involvement in the region -- potential nuclear conflict between India and Pakistan -- will remain and may actually rise in importance. It is crucial that we keep a particularly close eye on these programs to ensure that all is done to prevent the illicit transfer or ill-use of nuclear weapons. Regardless of American troop levels in Afghanistan, the U.S. must maximize its military and intelligence relationships with these countries to continue to both understand their nuclear intentions and help prevent potential conflict. We must avoid a situation where any minor misunderstanding or even terrorist act, as happened in Mumbai in 2008, does not set off escalating tensions that lead to a nuclear exchange. Ultimately, the U.S. will one day leave Afghanistan -- and it may be sooner than anyone expects. The key here is to leave in a way that promotes regional stability and cooperation, not a power vacuum that could foster proxy conflicts. To ensure that our security interests are protected and that the region does not get sucked in to a new level of insecurity and tension, a comprehensive strategy to enhance regional security, maintain a stable Afghanistan, and keep a watchful eye on Pakistan and India is essential. Taking such steps will help us to depart Afghanistan in a responsible manner that protects our security interests, while not exacerbating the deep strategic insecurities of a region that has the greatest risk of arms races and nuclear conflict in the world.

### 1AC Solvency

#### SCOTUS should extend the writ – the precedents exist already

Siegel ’12 (Ashley - J.D., Boston University School of Law, 2012; B.A. Philosophy and Political Science, Simmons College, 2007) “SOME HOLDS BARRED: EXTENDING EXECUTIVE DETENTION HABEAS LAW BEYOND GUANTANAMO BAY”

The September 11, 2001, terrorist attacks have had a radical impact on the United States and the world. The subsequent war on terror changed the face of modern warfare and created novel legal issues that test the boundaries of separation of powers and sovereignty doctrines. This has been particularly true in the detainee and prisoner-of-war context. With the United States’ detention of prisoners in Guantanamo Bay, the Supreme Court and lower federal courts have been forced to grapple with petitions to extend habeas protection to alien detainees held by the United States in offshore facilities. Federal courts have started to provide some guidance as to when a war-on- terror detainee might be afforded habeas rights. In Boumediene v. Bush,9 the Supreme Court held that the Suspension Clause applied to Guantanamo detainees, giving federal courts jurisdiction to hear detainee habeas petitions.10 The Supreme Court analyzed three factors that contributed to its decision to extend the Suspension Clause – the citizenship and status of the detainee and the adequacy of the process that determined that status, the “nature of the sites where apprehension and then detention took place,” and the “practical obstacles” faced in resolving the prisoner’s invocation of the writ – but acknowledged that those factors might not be exhaustive and that they might apply differently depending on the factual scenario.11 In Al Maqaleh v. Gates, the U.S. Court of Appeals for the D.C. Circuit reiterated the Supreme Court’s explanation that the Boumediene factors were not exhaustive.12 The court of appeals applied the factors set forth in Boumediene to deny habeas rights to alien detainees held by the United States at Bagram Air Force Base in Bagram, Afghanistan.13 The court of appeals explained that one factor against extending habeas rights to the detainees was that the United States did not have de facto control over Bagram in the same way it had over Guantanamo Bay.14 Although denying the prisoner’s claim, the court emphasized that lack of de facto control over a detainment facility was not decisive; it was merely one factor to consider.15 Thus, the Boumediene factors potentially allow claims to be brought by foreign detainees held offshore in circumstances distinguishable from Bagram. Another context of extraterritorial detention might also help answer the question of what rights alien detainees held by foreign governments possess. In Arar v. Ashcroft,16 the Second Circuit dealt not with a habeas petition but with a Torture Victim Prevention Act civil tort claim against the U.S. government for its extraordinary rendition of the petitioner.17 The Second Circuit reviewed the case of a Canadian and Syrian dual citizen who was detained in the United States en route to Canada.18 The U.S. government detained Arar, who the government claimed was a suspected terrorist, for a week in the United States before removing him to Syria.19 In Syria, Arar was detained for over a year by the Syrian government, interrogated, and tortured.20 The Second Circuit, however, concluded that Arar’s claim ultimately failed because Arar had not established a close enough relationship between the U.S. and Syrian governments to implicate the United States in any activity beyond “encouragement.”21 Yet questions remain about what might result should a detainee establish a more significant relational tie between two such actor- governments. This Note explores the novel area of law extending habeas rights to war-on- terror detainees, the past precedents that may suggest what direction the jurisprudence will take, and how the jurisprudence should resolve the case of a foreign detainee held by a foreign government at the behest of the United States. Part I reviews habeas law from its historical roots to its modern application in executive detention cases brought about by the United States’ detention of aliens at Guantanamo Bay. Part II examines alien detention abroad apart from the habeas context. Part III explores the likelihood and appropriateness of extending the Boumediene line of cases to scenarios of alien detainees held abroad by foreign governments at the behest of the United States. The Supreme Court has recently demonstrated a greater willingness to exert its power in the national security realm, no longer giving broad deference to the Executive’s wartime powers.22 The Supreme Court in this realm appears to take a functionalist, case-by-case approach that leaves open the possibility that the Court will exert itself in different executive detention contexts. Given the vital, fundamental individual rights implicated by executive detention, the Supreme Court should continue to actively review the actions of the legislative and executive branches. Further, based on the reasoning supporting its past precedents, the Court should extend jurisdiction to detainees held by foreign nations at the behest of the U.S. government.

#### Applying a clear statement principle solves- significantly restricts detention authority

Sarah Erickson-Muschko (J.D., Georgetown University Law Center) June 2013 “Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States” 101 Geo. L.J. 1399, Lexis

III. EXISTING SCHOLARSHIP ON THE CLEAR STATEMENT RULE: THE FOCUS ON INDIVIDUAL STATUS

Many scholars have advanced arguments regarding the application of a clear statement principle to the AUMF. 133 Two specific arguments have been made [\*1419] about the applicability of a clear statement principle in the context of U.S. territory, both of which focus on the status of the individual as the triggering factor. Professors Richard Fallon and Daniel Meltzer argue that a clear statement principle applies when U.S. citizens are detained on U.S. territory. 134 This argument is based on statutory grounds, namely the theory that the Non-Detention Act triggers the clear statement requirement. 135 This argument is perfectly sound in that respect. However, it is incomplete in that it does not address the constitutional grounds for imposing a clear statement rule: the Due Process Clause of the Fifth Amendment, which applies to all persons, including noncitizens. 136 Reading the AUMF and the NDAA 2012 together to allow for the indefinite military detention without trial of individuals arrested on U.S. territory would be inconsistent with the constitutional prohibition on depriving a person of liberty without due process of law. Professors Curtis Bradley and Jack Goldsmith offer the most comprehensive constitutionally based argument for when and how to apply a clear statement principle. Their position is that courts should apply a clear statement requirement "when the President takes actions under the AUMF that restrict the liberty of noncombatants in the United States," but not when such actions only restrict the liberty of combatants. 137 Looking to the three World-War-II-era decisions discussed in Part II, they conclude that Endo and Duncan stand for the proposition that liberty interests trump the President's commander-in-chief authority when the President's actions are unsupported by historical practice in other wars and affect the constitutional rights of U.S. citizens who are not combatants. 138 In this context, "the canon protecting constitutional liberties prevails." 139 In contrast, the authors point to Quirin to show that "the Court did not demand a clear statement before concluding that the U.S. citizen enemy combatant in that case could be subject to a military commission trial in the United States even though neither the authorization to use force nor the authorization for military commissions specifically mentioned U.S. citizens." 140 In such a case, the authors contend that a clear statement requirement protecting civil liberties is not required because "the presidential action involves a traditional wartime function exercised by the President against an acknowledged enemy combatant or enemy [\*1420] nation." 141 In this context, "the President's Article II powers are at their height, and the relevant liberty interests (and thus the need for a liberty-protecting clear statement requirement) are reduced (or nonexistent)." 142 Despite its level of detail, Bradley and Goldsmith's clear statement principle will likely never be of much help to courts construing the AUMF. By basing their clear statement requirement on the distinction between combatants and noncombatants, they fail to resolve the key interpretive question: namely, how to construe the AUMF to avoid grave constitutional concerns where an individual's status as an enemy combatant is in dispute. Their interpretation accommodates a broad reading of Quirin. However, in Quirin, nobody disputed that the detainees were in fact unlawful enemy combatants under long-standing law-of-war principles. In contrast, a court reviewing the classification of an individual as an "enemy combatant" under the AUMF and NDAA 2012 must determine what it means to be "part of" or provide "substantial[] support[]" to al-Qaeda or an "associated force[]" or otherwise to commit a "belligerent act." 143 The question of how to construe these terms lies at the core of detainee litigation, 144 and the provisions in the NDAA 2012 failed to clarify their meaning. Bradley and Goldsmith acknowledge that the AUMF is silent on the point of "what institutions or procedures are appropriate for determining whether a person captured and detained on U.S. soil is in fact an enemy combatant." 145 However, they fail to address how this ambiguity impacts the application of their clear statement principle. Their framework is therefore of no real help to courts that must first determine whether an individual was properly deemed to be an "enemy combatant" before determining whether the clear statement rule applies to thee AUMF. The clear statement rule thus fails to fulfill its core purpose of resolving statutory ambiguity in a manner that avoids serious constitutional questions. In addition to failing to resolve the due process questions surrounding the [\*1421] "enemy combatant" determination, Bradley and Goldsmith's argument does not resolve the core separation of powers concern: namely, whether, and if so under what conditions, it is constitutionally permissible for the President to apply martial law in place of the criminal justice system on U.S. territory despite the absence of any compelling need to do so. In short, their argument assumes that such an application of law-of-war principles on U.S. territory, outside of the battlefield context, would be a legitimate exercise of the President's war powers in the context of counterterrorism. This is hard to square with the Milligan Court's powerful statements to the contrary. 146 IV. MOVING BEYOND INDIVIDUAL STATUS: THE CONSTITUTION APPLIES IN THE UNITED STATES This Note argues that the clear statement principle applies to the AUMF detention authority whenever it is invoked to detain individuals arrested within the United States--at least where the enemy combatant question is in dispute. The principal trigger for application of the clear statement principle should not be an individual's status but rather the presumption that constitutional rights and restraints apply on U.S. territory. Courts therefore should dispense with the enemy combatant inquiry under these circumstances. This Note posits that such a construction is required to preserve the constitutionality of the AUMF. This constitutional default rule presumes that Congress has not delegated power to the executive branch to circumvent due process protections wholesale, and that it has not altered the traditional boundaries between military and civilian power on U.S. territory. Any departure from this baseline at least requires a clear manifestation of congressional intent. As evinced by the divisions in Congress over passage of the detention provisions in the NDAA 2012, there is no consensus as to the breadth of the detention power afforded to the executive branch under the AUMF. Courts should therefore not presume that the statute authorizes application of martial law to circumvent otherwise applicable constitutional restraints and due process rights. By making the jurisdictional question--civilian versus military--the trigger for the clear statement principle, the judiciary would properly place the impetus on Congress to clearly define and narrowly circumscribe the conditions under which the executive may use military jurisdiction to detain individuals on U.S. territory. This is the only way to ensure that our nation's political representatives have adequately deliberated and reached a consensus with respect to delegating powers to the executive branch where such delegation would have the consequence of displacing, in a wholesale fashion, constitutional protections. For all its controversy, § 412 of the USA PATRIOT Act of 2001 provides an example of where Congress has provided for executive detention under circumstances that are arguably sufficiently detailed to satisfy a clear statement [\*1422] requirement. 147 Absent this level of clarity, where the President purports to use the AUMF to detain militarily on U.S. territory, courts must presume that constitutional rights and restraints apply and are not displaced by martial law. A. DUE PROCESS CONCERNS One of the most basic rights accorded by the Constitution is the fundamental right to be free from deprivations of liberty absent due process of law. The AUMF must be read with the gravity of this fundamental right in mind. As the Court made clear in Endo, where fundamental due process rights are at stake, ambiguous wartime statutes are to be construed to allow for "the greatest possible accommodation of the liberties of the citizen." 148 Courts "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." 149 This includes statutes that would otherwise "exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions . . . ." 150 B. THE SUSPENSION CLAUSE The Suspension Clause lends further constitutional support to applying a clear statement requirement to the AUMF detention authority on U.S. territory. The Suspension Clause gives Congress the emergency power to suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." 151 As Fallon and Meltzer observe, this Clause--and the limited circumstances in which it may be invoked--suggest, or even explicitly affirm, "the presumptive rule that when the civilian courts remain capable of dealing with threats posed by citizens, those courts must be permitted to function." 152 To interpret the AUMF as congressional authorization to displace the civilian system and apply military jurisdiction on U.S. territory would "render that [\*1423] emergency power essentially redundant." 153 The Suspension Clause also underscores that the right to be free from the arbitrary deprivation of physical liberty is one of the most central rights that the Constitution was intended to protect. C. THE LACK OF MILITARY NECESSITY The lack of military necessity for applying law-of-war principles on U.S. territory further supports the construction of the AUMF to avoid displacing civilian law with law of war in the domestic context. The Supreme Court long ago declared that martial law may not be applied on U.S. territory when civilian law is functioning and "the courts are open and their process unobstructed." 154 Instead, "[t]he necessity [for martial law] must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." 155 In the absence of such necessity, "[w]hen peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty . . . ." 156 The past ten years have shown that there is no need to stretch law-of-war principles in the AUMF to reach U.S. territory. The exigencies associated with an active battlefield, which were critical to the Hamdi plurality's interpretation of the AUMF, 157 are simply not present in the United States. Instead, "American law enforcement agencies . . . continue to operate within the United States. These agencies have a powerful set of legal tools, adapted to the criminal process, to deploy within the United States against . . . suspected [terrorists], and the civilian courts remain open to impose criminal punishment." 158 Indeed, for more than a decade since the 9/11 attacks, domestic law enforcement agencies have carried the responsibility for domestic counterterrorism and have successfully thwarted several terrorism plots. 159 Civilian courts have adjudicated the prosecution of suspected terrorists captured on U.S. territory under [\*1424] federal laws. 160 The experience of the past decade shows that the civilian system is up to the task, and there is no military exigency that justifies curtailing constitutional protections and applying military authority in the domestic context. 161 Accordingly, the circumstances that the Supreme Court found to justify the use of the military authority under the AUMF to capture and indefinitely detain Hamdi, who was found armed on the active battlefield in Afghanistan, do not extend to persons captured on U.S. territory. The manner in which the government handled the Padilla and al-Marri cases further demonstrates the lack of military necessity. In both cases, the government abandoned its position that national security imperatives demanded that they continue to be held in military custody; both were transferred to federal custody and ultimately convicted of federal crimes carrying lengthy prison terms. 162 The Supreme Court's precedent in Quirin neither requires, nor can it be fairly read to justify, a different conclusion. First, the issue of indefinite military detention without trial was not before the Court in that case. Second, the status of the Nazis in Quirin as enemy combatants was undisputed, in contrast to that of individuals who are "part of" or "substantially support" al-Qaeda or "associated forces." 163 Third, the Court in Quirin went "out of its way to say that the Court's holding was extremely limited," encompassing only the precise factual circumstances before it. 164 Finally, Quirin itself is shaky precedent, as evidenced by the Court's own subsequent statements and as elaborated in numerous scholarly commentaries on the case. 165 As Katyal and Tribe observe: Quirin plainly fits the criteria typically offered for judicial confinement or reconsideration: It was a decision rendered under extreme time pressure, with respect to which there are virtually no reliance interests at stake, and where the statute itself has constitutional dimensions suggesting that its construction should be guided by relevant developments in constitutional law. 166 [\*1425] This case therefore should not be read as foreclosing the application of a clear statement principle to the AUMF as applied on U.S. territory where an individual's status as an enemy combatant is in dispute. CONCLUSION The AUMF is ambiguous: it does not specify whether it reaches individuals captured on U.S. territory, and Congress declined to resolve this question when it enacted § 1021 of the NDAA 2012. If a future administration invokes the AUMF as authority to capture and hold persons on U.S. territory in indefinite military detention, it will be left to the courts to determine whether this is constitutional. Courts should resolve this question by applying a clear statement requirement. This Note has argued that the trigger for this clear statement requirement is not the individual's status but rather the presumption that constitutional rights and restraints apply on U.S territory. Courts should apply this default presumption regardless of an individual's citizenship status, and it should apply even where the government claims that the individual is an "enemy combatant," at least where that determination is subject to dispute. This Note has argued that this method of statutory interpretation is constitutionally required. "[B]y extending to all 'persons' within the Constitution's reach such guarantees as . . . due process of law, the Constitution constrains how our government may conduct itself in bringing terrorists to justice." 167 If these constraints are to remain meaningful, these guarantees require, at the very least, that courts presume that constitutional guarantees prevail where congressional intent is unclear. The past ten years have shown that our criminal justice system is capable of thwarting terrorist attacks and bringing terrorists to justice while still preserving the safeguards of liberty that are fundamental to our system of justice. "[T]hese safeguards need, and should receive, the watchful care of those [e]ntrusted with the guardianship of the Constitution and laws." 168

#### Plan solves – judiciary review and habeas rights

Sidhu 11 [2011, Dawinder S. Sidhu, J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania, Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict”, NATIONAL SECURITY LAW BRIEF, Vol. 1, Issue 1 http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1003&context=nslb]

The “Great Wall” The writ of habeas corpus enables an individual to challenge the factual basis and legality of his detention,91 activating the judiciary’s review function in the separation of powers scheme.92 Because the writ acts to secure individual liberty by way of the judicial checking of unlawful executive detentions, the writ has been regarded as a bulwark of liberty. The Supreme Court has observed, for example, that “There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus . . . .”93 The writ is seen as a vital aspect of American jurisprudence, and an essential element of the law since the time of the Framers.94 The United States is a conspicuous actor in the world theater, subject to the interests and inclinations of other players, and possessing a similar, natural desire to shape the global community in a manner most favorable to its own objects. The tendency to attempt to inﬂuence others is an inevitable symptom of international heterogeneity and, at present, the United States is mired in an epic battle with fundamentalists bent on using terrorism as a means to repel,95 if not destroy, America.96 American success in foreign policy depends on the internal assets available to and usable by the United States, including its soft power. The law in America is an aspect of its national soft power. In particular, the moderates in the Muslim world—the intended audience of America’s soft power— may ﬁnd attractive the American constitutional system of governance in which 1) the people are the sovereign and the government consists of merely temporary and recallable agents of the people, 2) federal power is diffused so as to diminish the possibility that any branch of the government, or any of them acting in tandem, can infringe upon the liberty of the people, 3) structural protections notwithstanding, the people are entitled to certain substantive rights including the right to be free of governmental interference with respect to religious exercise, 4) the diversity of interests inherent in its populace is considered a critical safeguard against the ability of a majority group to oppress the minority constituents, 5) the courts are to ensure that the people’s rights to life, liberty, and property are not abridged, according to law, by the government or others, and 6) individuals deprived of liberty have available to them the writ of habeas corpus to invoke the judiciary’s checking function as to executive detention decisions. The Constitution, in the eyes of Judge Learned Hand, is “the best political document ever made.”97 If the aforementioned constitutional principles are part of the closest approximation to a just and reasoned society produced by man, surely they may have some persuasive appeal to the rest of the world, including moderate Muslims who generally live in areas less respectful of minority rights and religious pluralism. Such reverence is to be expected and warranted only if the United States has remained true to these constitutional principles in practice, and in particular, in its behavior in the aftermath of the 9/11 attacks, when national stress is heightened and the option of deviating from such values in favor of an expedient “law of necessity” similarly tempting.98 The extent to which the United States has remained true to itself as a nation of laws—and thus may credibly claim such legal soft power—is the subject of the next section. II. THE COURTS AND SOFT POWER The Judiciary In Wartime The United States has been charged with being unfaithful to its own laws and values in its prosecution of the post-9/11 campaign against transnational terrorism. With respect to its conduct outside of the United States, following 9/11, America has been alleged to have tortured captured individuals in violation of its domestic and international legal obligations,99 and detained individuals indeﬁ nitely without basic legal protections.100 Closer to home, the United States is thought to have proﬁ led Muslims, Arabs, and South Asians in airports and other settings,101 conducted immigration sweeps targeting Muslims,102 and engaged in mass preventative detention of Muslims in the United States,103 among other things. These are serious claims. The mere perception that they bear any resemblance to the truth undoubtedly impairs the way in which the United States is viewed by Muslims around the world, including Muslim-Americans, and thus diminishes the United States’ soft power resources.104 The degree to which they are valid degrades the ability of the United States to argue persuasively that it not only touts the rule of law, but exhibits actual ﬁ delity to the law in times of crisis. These claims relate to conduct of the executive and/or the legislature in the aftermath of the 9/11 attacks. This Article is concerned, however, with the judiciary, that is whether the courts have upheld the rule of law in the post-9/11 context—and thus whether the courts may be a source of soft power today (even if the other branches have engaged, or are alleged to have engaged, in conduct that is illegal or unwise). As to the courts, it is my contention that the judiciary has been faithful to the rule of law after 9/11 and as such should be considered a positive instrument of American soft power. Prior to discussing post-9/11 cases supporting this contention, it is important to provide a historical backdrop to relationship between the courts and wartime situations because judicial decision-making in cases implicating the wars in Afghanistan and Iraq does not take occur on a blank slate, despite the unique and modern circumstances of the post-9/11 conﬂ ict.

#### Suspension Clause application solves without sacrificing military missions

Nelson ’11 (Luke - B.A., University of Minnesota Duluth, 2007; J.D. Candidate, University of New Hampshire School of Law, 2011) “Territorial Sovereignty and the Evolving Boumediene Factors: Al Maqaleh v. Gates and the Future of Detainee Habeas Corpus Rights” http://law.unh.edu/assets/images/uploads/publications/unh-law-review-vol-09-no2-nelson.pdf

Lastly, Al Maqaleh presents another opportunity for the Supreme Court to provide further guidance on the practical-obstacles factor. As mentioned earlier, the inherent deficiency of a multi-factored, functional test is its arbitrary and unequal application.144 The Boumediene Court’s deficient guidance on the practical-obstacles factor only exacerbates this problem. Unquestionably, deference to the President and military leaders regarding decisions on military necessity, operations in an active theater of war, and reasonable detention of enemy combatants should not be circumvented. However, questions remain regarding the risk of executive manipulation of the Boumediene test.145 For instance, one question is the effect on the practical-obstacles analysis when a detainee is captured beyond an active theater of war and later transported into an active theater for detention. This scenario played out in Al Maqaleh. In our current “Global War on Terrorism,” another lingering question is the actual boundaries of an active theater of war.146 A detainee should not be denied Suspension Clause protections because the government transported him into an active theater where the Suspension Clause would arguably not reach. Furthermore, another question is the effect of military necessity and the military mission on the practicalobstacles factor. These questions require that a delicate and fine line be drawn. On one hand are the surest safeguards of liberty and the separation of powers check on the executive.147 On the other hand is the importance of the military mission and executive deference in international conflict policy decisions. The answer to these questions must include some level of deference to the legitimate needs of the armed forces in advancing the military mission148 but also address the pertinent constitutional issues that cannot be overlooked. Safe to say, the writ of habeas corpus is one of these pertinent constitutional issues. However, as the Boumediene Court recognized, the executive branch is entitled to a “reasonable period of time” before a court will entertain a habeas corpus petition from a detainee.149 This reasonable period of time is necessary to allow the military to screen and review the detainee and determine the detainee’s combatant status.150 This balance between the military mission and an individual’s surest safeguard of liberty will allow the courts to maintain a practical, functional, and detainee-by-detainee, detention-site-by-detention-site application of the habeas test that the Boumediene Court envisioned.

# 2AC

## Heg

US will always act like a hegemon—might as well be effective.

Kagan 7 **–** Senior Associate at the Carnegie Endowment for International Peace, Robert “End of Dreams, Return of History” Policy Review (http://www.hoover.org/publications/policyreview/8552512.html#n10

Finally, there is the United States itself**. As a matter of national policy** stretching back **across** numerous **administrations**, Democratic and Republican, liberal and conservative, **Americans** have **insisted on preserving** regional **predominance** in East Asia; the Middle East; the Western Hemisphere; until recently, Europe; and now, increasingly, Central Asia. This was its goal after the Second World War, and since the end of the Cold War, beginning with the first Bush administration and continuing through the Clinton years, the United States did not retract but expanded its influence eastward across Europe and into the Middle East, Central Asia, and the Caucasus. Even as it maintains its position as the predominant global power, it is also engaged in hegemonic competitions in these regions with China in East and Central Asia, with Iran in the Middle East and Central Asia, and with Russia in Eastern Europe, Central Asia, and the Caucasus. The United States, too, is more of a traditional than a postmodern power, and though **Americans** are loath to acknowledge it, they generally **prefer their** global **place as “No. 1” and are**  equally **loath to relinquish it**. Once having entered a region, whether for practical or idealistic reasons, they are remarkably slow to withdraw from it until they believe they have substantially transformed it in their own image. They profess indifference to the world and claim they just want to be left alone even as they seek daily to shape the behavior of billions of people around the globe. The jostling for status and influence among these ambitious nations and would-be nations is a second defining feature of the new post-Cold War international system. Nationalism in all its forms is back, if it ever went away, and so is international competition for power, influence, honor, and status. American predominance prevents these rivalries from intensifying — its regional as well as its global predominance. Were the United States to diminish its influence in the regions where it is currently the strongest power, the other nations would settle disputes as great and lesser powers have done in the past: sometimes through diplomacy and accommodation but often through confrontation and wars of varying scope, intensity, and destructiveness. One novel aspect of such a multipolar world is that most of these powers would possess nuclear weapons. That could make wars between them less likely, or it could simply make them more catastrophic. It is easy but also dangerous to underestimate the role the United States plays in providing a measure of stability in the world even as it also disrupts stability. For instance, the United States is the dominant naval power everywhere, such that other nations cannot compete with it even in their home waters. They either happily or grudgingly allow the United States Navy to be the guarantor of international waterways and trade routes, of international access to markets and raw materials such as oil. Even when the United States engages in a war, it is able to play its role as guardian of the waterways. In a more genuinely multipolar world, however, it would not. Nations would compete for naval dominance at least in their own regions and possibly beyond. Conflict between nations would involve struggles on the oceans as well as on land. Armed embargos, of the kind used in World War i and other major conflicts, would disrupt trade flows in a way that is now impossible. Such order as exists in the world rests not only on the goodwill of peoples but also on American power. Such order as exists in the world rests not merely on the goodwill of peoples but on a foundation provided by American power. Even the European Union, that great geopolitical miracle, owes its founding to American power, for without it the European nations after World War ii would never have felt secure enough to reintegrate Germany. Most Europeans recoil at the thought, but even today Europe’s stability depends on the guarantee, however distant and one hopes unnecessary, that the United States could step in to check any dangerous development on the continent. In a genuinely multipolar world, that would not be possible without renewing the danger of world war. People who believe greater equality among nations would be preferable to the present American predominance often succumb to a basic logical fallacy. They believe the order the world enjoys today exists independently of American power. They imagine that in a world where American power was diminished, the aspects of international order that they like would remain in place. But that’s not the way it works. International order does not rest on ideas and institutions. It is shaped by configurations of power. The international order we know today reflects the distribution of power in the world since World War ii, and especially since the end of the Cold War. A different configuration of power, a multipolar world in which the poles were Russia, China, the United States, India, and Europe, would produce its own kind of order, with different rules and norms reflecting the interests of the powerful states that would have a hand in shaping it. Would that international order be an improvement? Perhaps for Beijing and Moscow it would. But it is doubtful that it would suit the tastes of enlightenment liberals in the United States and Europe. The current order, of course, is not only far from perfect but also offers no guarantee against major conflict among the world’s great powers. Even under the umbrella of unipolarity, regional conflicts involving the large powers may erupt. War could erupt between China and Taiwan and draw in both the United States and Japan. War could erupt between Russia and Georgia, forcing the United States and its European allies to decide whether to intervene or suffer the consequences of a Russian victory. Conflict between India and Pakistan remains possible, as does conflict between Iran and Israel or other Middle Eastern states. These, too, could draw in other great powers, including the United States. Such conflicts may be unavoidable no matter what policies the United States pursues. But they are more likely to erupt if the United States weakens or withdraws from its positions of regional dominance. This is especially true in East Asia, where most nations agree that a reliable American power has a stabilizing and pacific effect on the region. That is certainly the view of most of China’s neighbors. But even China, which seeks gradually to supplant the United States as the dominant power in the region, faces the dilemma that an American withdrawal could unleash an ambitious, independent, nationalist Japan. In Europe, too, the departure of the United States from the scene — even if it remained the world’s most powerful nation — could be destabilizing. It could tempt Russia to an even more overbearing and potentially forceful approach to unruly nations on its periphery. Although some realist theorists seem to imagine that the disappearance of the Soviet Union put an end to the possibility of confrontation between Russia and the West, and therefore to the need for a permanent American role in Europe, history suggests that conflicts in Europe involving Russia are possible even without Soviet communism. If the United States withdrew from Europe — if it adopted what some call a strategy of “offshore balancing” — this could in time increase the likelihood of conflict involving Russia and its near neighbors, which could in turn draw the United States back in under unfavorable circumstances. It is also optimistic to imagine that a retrenchment of the American position in the Middle East and the assumption of a more passive, “offshore” role would lead to greater stability there. The vital interest the United States has in access to oil and the role it plays in keeping access open to other nations in Europe and Asia make it unlikely that American leaders could or would stand back and hope for the best while the powers in the region battle it out. Nor would a more “even-handed” policy toward Israel, which some see as the magic key to unlocking peace, stability, and comity **in the Middle East**, obviate **the need to come to Israel ’s aid** if its security became threatened. That commitment, **paired with** the American **commitment to protect** strategic **oil supplies** for most of the world, practically **ensures a heavy American military presence** in the region, both on the seas and on the ground. The subtraction of American power from any region would not end conflict but would simply change the equation. In the Middle East, competition for influence among powers both inside and outside the region has raged for at least two centuries. The rise of Islamic fundamentalism doesn’t change this. It only adds a new and more threatening dimension to the competition, which neither a sudden end to the conflict between Israel and the Palestinians nor an immediate American withdrawal from Iraq would change. The alternative to American predominance in the region is not balance and peace. It is further competition. The region and the states within it remain relatively weak. A diminution of American influence would not be followed by a diminution of other external influences. One could expect deeper involvement by both China and Russia, if only to secure their interests. 18 And one could also expect the more powerful states of the region, particularly Iran, to expand and fill the vacuum. **It is doubtful** that **any** American **administration would voluntarily take actions that could shift the balance of power** in the Middle East further **toward Russia, China, or Iran. The world hasn’t changed that much.** An American withdrawal from Iraq will not return things to “normal” or to a new kind of stability in the region. It will produce a new instability, one likely to draw the United States back in again. The alternative to American regional predominance in the Middle East and elsewhere is not a new regional stability. In an era of burgeoning nationalism, the future is likely to be one of intensified competition among nations and nationalist movements. Difficult as it may be to extend American predominance into the future, no one should imagine that a reduction of American power or a retraction of American influence and global involvement will provide an easier path.

Decline makes your impacts worse—US lash-out.

Shapiro et al 9 – Robert, professor of political science at Columbia University and acting director of Columbia’s Institute for Social and Economic Research and Policy, Jack Snyder is a professor of international relations in the Department of Political Science and the Arnold A. Saltzman Institute of War and Peace Studies at Columbia University, Yaeli Bloch-Elkon is a lecturer/assistant professor of political science and communications at Bar Ilan University, Israel, and an associate research scholar at the university’s Begin-Sadat Center for Strategic Studies (besa) and at Columbia University’s Institute for Social and Economic Research and Policy, “Free Hand Abroad, Divide and Rule at Home”, World Politics, 61.1, Jan, MUSE

Plausible as these arguments may be, the opposite case may be equally plausible. States that are under intense **international pressure** may be especially vulnerable to myth-ridden foreign policies. Hostile encirclements **heighten** the **enemy** **images**, bunker mentalities, **and double standards in perception** that are **common in** competitive relationships of all kinds, especially in international relations.11 **Nationalist** and garrison-state **ideologies are** **reinforced**. Likewise, Charles **Kupchan argues** that **declining empires** typically **adopt strategic ideologies of aggressive forward defense** in an attempt **to mask** the truth about their growing **weakness from** their **opponents**.12 In contrast, diplomatic historians commonly applaud the pragmatism of powerful off-shore balancers, whose privileged position grants them the freedom to be selective and fact driven and to wait for developments to play out before committing troops. Whether powerful, unconstrained states are more ideological than weaker or highly constrained states depends greatly on their domestic politics, not simply on their position in the international system.13

Warming not a threat to hege.

Kagan 8 – Resident Scholar with the American Enterprise Institute, Frederick, Finding Our Way: Debating American Grand Strategy, Center for a New American Security, June, http://www.cnas.org/files/documents/publications/FlournoyBrimley\_Finding%20Our%20Way\_June08.pdf

In recent years it has become clear that the problem of climate change will play an increasing role in the formulation and execution of American economic strategy, a key part of U.S. grand strategy. The relative priority given to climate change in Europe, the United States, China, and elsewhere has introduced new strains into international relations and added further complexity to the problems of modernizing developing states. The **challenge of climate change** in the coming decades **is** likely to be **indirect**—global **weather trends are unlikely to affect the** **U**nited **S**tates **dramatically and directly in** any time frame appropriate for developing **grand strategy**, nor is it likely that any conceivable combination of American and global policies will affect such trends very much in the coming decades. The determination to address climate change, however, will place additional burdens on the American (and the global) economy, add distortions to the market, and contribute to international tensions. **Climate change is not**, as many Europeans would have it, **the preeminent security challenge of our era**, but neither can it be left out of consideration in the development and execution of grand strategy.

## AT T- Judicial Restriction

#### 1. W/M – suspension clause is a restriction on WPA

Natelson 8/19/13 (After a quarter of a century as Professor of Law at the University of Montana, he recently retired to work full time at Colorado's Independence Institute.) “Where is the Power to Suspend Habeas Corpus?” http://blog.tenthamendmentcenter.com/2013/08/where-is-the-power-to-suspend-habeas-corpus/#.UmL\_E5TwIic

The Constitution’s Suspension Clause (Art. I, Section 9, cl. 2) limits when the writ of habeas corpus can be suspended. But the Constitution doesn’t seem to grant the federal government power to suspend the writ in the first place. Why not? And why limit a power never given?¶ In an Aug. 17 Wall Street Journal piece, constitutional law professor Nicholas Quinn Rosenkrantz infers that Congress has the sole suspension authority from the structure of the constitutional text. He writes:¶ “Since the Suspension Clause appears in Article I of the Constitution, which is predominately about the powers of Congress, there is a strong argument that only Congress can suspend the habeas writ.”¶ He concludes that when President Abraham Lincoln suspended the writ, he probably intruded on Congress’s prerogative, and thereby exceeded his constitutional authority. (Professor Rosenkrantz also gives Lincoln credit for trying to cure the constitutional defect.)¶ This is largely correct, but the organization of the text is not the sole reason. When read in legal and historical context, the language of the Constitutiondoes give the federal government authority to suspend the writ.¶ Here’s why: At the time of the Founding, suspending habeas was a recognized incident of war powers—repeatedly resorted to both by Parliament and by the Continental Congress. When the Constitution granted Congress authority to declare war, this grant carried with it the incidental power to suspend the writ. (The Necessary and Proper Clause confirmed this.) For more on that, see my book The Original Constitution: What It Actually Said and Meant, pp. 106-07.¶ The President’s power to serve as commander-in-chief also carried with it incidental authority to suspend the writ. (The Necessary and Proper Clause doesn’t apply to the President, but for other reasons the doctrine of incidental powers does.) However, the President’s suspension authority was limited to the actual theater of war. See p. 134.¶ Thus, Professor Rosenkranz was correct to conclude that Lincoln exceeded this authority by suspending the writ over large areas outside the war theater.

#### 2. We meet – Habeas corpus is a judicial restriction

Justice Kennedy ‘8 (Speaking in the Context of Bomedine v. Bush which dealt with presidential authority to deny HC to indef detentions) “LAKHDAR BOUMEDIENE, ET AL., PETITIONERS 06–1195 v. GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ET AL. KHALED A. F. AL ODAH, NEXT FRIEND OF FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS 06–1196 v. UNITED STATES ET AL. ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT” http://www.law.cornell.edu/supct/pdf/06-1195P.ZO

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the Constitution.” Murphy v. Ramsey, 114 U. S. 15, 44 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court’s recogni tion that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say “what the law is.” Marbury v. Madison, 1 Cranch 137, 177 (1803). These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

#### 3. Restriction means a limit or qualification, and includes conditions on action

CAA 8,COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT A, STATE OF ARIZONA, Appellee, v. JEREMY RAY WAGNER, Appellant., 2008 Ariz. App. Unpub. LEXIS 613

P10 The term "restriction" is not defined by the Legislature for the purposes of the DUI statutes. See generally A.R.S. § 28-1301 (2004) (providing the "[d]efinitions" section of the DUI statutes). In the absence of a statutory definition of a term, we look to ordinary dictionary definitions and do not construe the word as being a term of art. Lee v. State, 215 Ariz. 540, 544, ¶ 15, 161 P.3d 583, 587 (App. 2007) ("When a statutory term is not explicitly defined, we assume, unless otherwise stated, that the Legislature intended to accord the word its natural and obvious meaning, which may be discerned from its dictionary definition."). P11 The dictionary definition of "restriction" is "[a] limitation or qualification." Black's Law Dictionary 1341 (8th ed. 1999). In fact, "limited" and "restricted" are considered synonyms. See Webster's II New Collegiate Dictionary 946 (2001). Under these commonly accepted definitions, Wagner's driving privileges were "restrict[ed]" when they were "limited" by the ignition interlock requirement. Wagner was not only [\*7] statutorily required to install an ignition interlock device on all of the vehicles he operated, A.R.S. § 28-1461(A)(1)(b), but he was also prohibited from driving any vehicle that was not equipped with such a device, regardless whether he owned the vehicle or was under the influence of intoxicants, A.R.S. § 28-1464(H). These limitations constituted a restriction on Wagner's privilege to drive, for he was unable to drive in circumstances which were otherwise available to the general driving population. Thus, the rules of statutory construction dictate that the term "restriction" includes the ignition interlock device limitation.

#### 4. Predictable ground – limits restrictions to current presidential action that’s already rooted in the literature

#### 5. CI leads to a race to limit out the aff – prefer reasonability

#### 6. Potential abuse isn’t a voter – this round doesn’t set a precedent

## AT XO

#### No precedence, congress and courts can overturn or eliminate executive orders.

William G. Howell, Associate Prof Gov Dep @ Harvard 2005(Unilateral Powers: A Brief

Overview; Presidential Studies Quarterly, Vol. 35, Issue: 3, Pg 417)

Plainly, presidents cannot institute every aspect of their policy agenda by decree. The checks and balances that define our system of governance are alive, though not always well, when presidents contemplate unilateral action. Should the president proceed without statutory or constitutional authority, the courts stand to overturn his actions, just as Congress can amend them, cut funding for their operations, or eliminate them outright. (4) Even in those moments when presidential power reaches its zenith--namely, during times of national crisis--judicial and congressional prerogatives may be asserted (Howell and Pevehouse 2005, forthcoming; Kriner, forthcoming; Lindsay 1995, 2003; and see Fisher's contribution to this volume). In 2004, as the nation braced itself for another domestic terrorist attack and images of car bombings and suicide missions filled the evening news, the courts extended new protections to citizens deemed enemy combatants by the president, (5) as well as noncitizens held in protective custody abroad. (6) And while Congress, as of this writing, continues to authorize as much funding for the Iraq occupation as Bush requests, members have imposed increasing numbers of restrictions on how the money is to be spent.

### 2AC Links to Politics

#### Links to politics – immense opposition to bypassing debate

Hallowell 13

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

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

## AT Politics

### Thumper- Resilience Fund

#### Climate Resilience Fund thumps

Politico 2/14/14 http://www.politico.com/morningenergy/0214/morningenergy13021.html

OBAMA TO PROPOSE BILLION-DOLLAR CLIMATE RESILIENCE FUND: President Barack Obama will ask Congress to set up a $1 billion “Climate Resilience Fund” in his proposed budget next month. Obama travels to Fresno, Calif., today to discuss the drought plaguing most of California and the Western U.S. and to announce new administration actions, including the proposed billion-dollar fund. According to the White House, the fund would go to research on the projected impacts of climate change, help communities prepare for climate change’s effects and fund “breakthrough technologies and resilient infrastructure.”

### Thumper- ME Focus

#### No PC for domestic wins

WSJ 2/14/14 “After Muted Triumphs at Home, Obama Seeks Progress Abroad” http://blogs.wsj.com/washwire/2014/02/14/after-muted-triumphs-at-home-obama-seeks-progress-abroad/

The White House arguably had one of its best weeks in what seems like a very long time. Yet you’d hardly know it.¶ That’s mainly because after the fierce, partisan battles of the last five years, President Barack Obama‘s victories now often manifest the status quo.¶ It’s a reality that seems set to define Mr. Obama’s domestic legislative agenda for the remainder of his term, and one he probably would have found hard to imagine during his 2008 campaign. As a candidate, Mr. Obama regularly chastised the “status quo.” Now his White House sometimes considers it a triumph.¶ There are two cases in point from this week: the debt limit and the health-care law.¶ The administration announced that some 3.3 million people signed up for health-care coverage under the new law as of January. It was much-welcome news for a White House that has been for months digging out from its botched rollout of the law.¶ The House and Senate also passed a so-called clean debt-limit increase, meaning it came with no legislative demands or spending cuts attached that Republicans have insisted on in the past. There were no eleventh-hour negotiations or default countdown clocks like in previous battles. The votes happened pretty much drama-free, save some remarkable GOP infighting in the Senate.¶ A White House that spent much of its energy, and political capital, in 2013 trying to create that very scenario had a relatively stoic reaction. “An end to that kind of brinksmanship for now is a very welcome thing,” White House press secretary Jay Carney said before adding: “It says something about the expectations that the American people have of Congress that people notice when Congress actually doesn’t do direct harm to the economy.”¶ Yet in another sign it’s a second term, the status quo that the White House claims as a victory at home falls short of Mr. Obama’s foreign-policy goals.¶ That’s in part why the president is spending Valentine’s Day on a sprawling Palm Springs, Calif., resort with plans for multiple rounds of golf and some quality time with…the king of Jordan.¶ Mr. Obama is beginning to turn his sights on foreign policy more than we’ve seen recently. It’s a typical shift for presidents in their final years in office. But for Mr. Obama, it may be the one area where he can achieve significant goals.¶ In September, during a speech at the United Nations, Mr. Obama outlined his top three focal points on foreign policy in his second term – Iran, Syria and Middle East peace.¶ Now that U.S. policy with each has reached an important moment – talks with Iran over a long-term nuclear deal begin next week, a deadline is approaching in Middle East peace talks, and Syria continues to deteriorate – the president plans to get more personally involved in the process.¶ That’s where King Abdullah II of Jordan comes in. He’s Mr. Obama’s first in a string of sit-downs with leaders from the region.¶ Mr. Obama has little to hope for in a robust legislative agenda this year, particularly now that House Speaker John Boehner (R., Ohio) has cast doubt on any passage of immigration reform. The White House’s emphasis on executive action so far hasn’t yielded the kind of major change Mr. Obama initially arrived in Washington promising.¶ He’s expected to get more aggressive in his use of executive action, and is likely to attempt big strides on climate change. But in the meantime, he’s often content with the status quo.

### No PC- Dems

#### Election cycle and no PC kill passage

WSJ 2/14/14 “After Muted Triumphs at Home, Obama Seeks Progress Abroad” http://blogs.wsj.com/washwire/2014/02/14/after-muted-triumphs-at-home-obama-seeks-progress-abroad/

Republican leaders stepped up to move the president’s request forward and ensure efficiency in an era of divided government this time, but don’t expect it to last. even though Democrats have a long list of agenda items they would like to tackle before the midterm election. The wish list includes: increasing the minimum wage to $10.10, extending long-term unemployment insurance and sending a comprehensive immigration bill to the president’s desk before November. But even after Democrats managed to pass a debt ceiling bill without any policy strings attached, they aren’t in a stronger position to lobby for their legislation. Congress remains in an election cycle, which typically slows the body's appetite for passing new laws and hinders bipartisan cooperation. House aides confirmed Boehner won’t be adopting the debt ceiling strategy to pass a comprehensive immigration bill anytime soon.¶ “This doesn’t create any real political capital for Democrats,” says Sarah Binder, a congressional expert at the Brookings Institution. “It simply needed to be done.”

#### Obama is going it alone - PC is low and irrelevent.

Bakersfield Opinion 1-28 (http://www.bakersfieldcalifornian.com/opinion/our-view/x172376914/Obama-warns-hes-willing-to-go-it-alone, Obama warns he's willing to go it alone, January 28th 2014)

President Obama sent a clear message to the nation's notoriously do-nothing Congress Tuesday during his sixth State of the Union address: Be prepared to act on a litany of domestic issues -- or I will. Strong words from a president who just wrapped up his most tumultuous year yet in Washington, D.C., and is no lock to recover enough political capital to push through a focused, social-heavy policy agenda over the next 12 months. Despite doubts and dwindling poll numbers, however, Obama said he plans to hit the ground running, as he made clear Tuesday night, laying out a commitment to rein in income inequality in the U.S. The public is, for the most part, behind him: A recent Pew Research Center survey reveals many Americans agree that the nation's economy "unfairly favors the wealthy." The president won't lessen the gap between the haves and have-littles all by himself, but his words Tuesday night make it clear he'll carry that flag forward. "Today, after four years of economic growth, corporate profits and stock prices have rarely been higher, and those at the top have never done better. But average wages have barely budged. And inequality has deepened. Upward mobility has stalled," Obama said. "The cold, hard fact is that even in the midst of recovery, too many Americans are working more than ever just to get by, let alone get ahead. And too many still aren't working at all." On other economic fronts, the president already has set out on his own. Obama announced an executive order that raises the minimum wage to $10.10 an hour for federal contract workers, an increase that would take effect at the beginning of 2015 -- with or without congressional approval. But he'll need legislative help for part two of his plan to increase the federal minimum wage -- a boost for all low-income workers, also to $10.10 an hour. He'll have to negotiate the most maligned, divided Congress in decades to reach a deal -- a task the president might not have made any easier thanks to a handful of charged statements on climate change, immigration, gun control and Republican attempts to repeal Obamacare. But Obama made it clear Tuesday night that he has no problem sidestepping Congress. "Some (proposals) require congressional action, and I'm eager to work with all of you. But America does not stand still, and neither will I," Obama said. "So wherever and whenever I can take steps without legislation to expand opportunity for more American families, that's what I'm going to do." When Obama delivered his last State of the Union address one year ago, he stood tall following an impressive re-election victory over Mitt Romney three months earlier. What a difference a year makes. Gone now is much of Obama's swagger, the consequence of his having lost a great deal of the public's trust. The president has seen his approval ratings plummet -- into the low-40 percent range -- thanks to a slow (but steady) economic recovery and a flubbed rollout of the Affordable Care Act. Little, if any, progress has been made on immigration reform and gun violence management, and the ongoing crisis in Syria has made Obama appear weak, in some eyes, on the world stage. Now, Obama will look to further his policies without Congressional disruption, a course of action not without hazards. Five years into his presidency, this commander-in-chief, renowned for his soaring rhetoric, must make good on his ambitious vision. Apparently, he'll pursue it own his own, if necessary.

#### PC failing now –

Josh Rogin, Daily Beast, 1/11/14, http://www.thedailybeast.com/articles/2014/01/11/inside-the-white-house-war-on-dems.html

The White House is now openly declaring that Senate Democrats who support new sanctions against Iran are idling for war, but their campaign to pressure their own party members has been going on for months and has done little to dissuade Democrats from supporting sanctions. The White House brought their fight with Congressional Democrats out in the open Thursday evening when National Security Staff member Bernadette Meehan sent an incendiary statement lashing out at pro-sanctions Democrats to a select group of reporters, accusing them of being in favor of a strike on Iran.

#### Pol cap with dems alienate them.

Josh Rogin, Daily Beast, 1/11/14, http://www.thedailybeast.com/articles/2014/01/11/inside-the-white-house-war-on-dems.html

That explanation glosses over the fact that the Obama administration worked against several sanctions measures Congress has passed in recent years, despite claiming credit for those sanctions after the fact.¶ Regardless, both Democrats who support the administration and those who support Menendez told The Daily Beast that the White House’s tactic of going after their own party’s legislators is over-the-top and ineffective, alienating allies, creating bad will on Capitol Hill, and wasting political capital the administration may need on this issue down the road.¶ “The White House has clearly overreached in calling Democratic supporters of the Menendez-Kirk bill warmongers,” one senior Democratic Congressional aide said. “These are Democrats, some who have been in public service for decades and have long supported increasing sanctions against Iran. It’s just not credible and not helpful for them to use such extreme language when it’s clearly not true.”

#### Reid won’t allow a vote

OKeefe Washington Post, 1/10/14, http://www.washingtonpost.com/politics/support-for-iran-sanctions-bill-nears-filibuster-proof-majority/2014/01/10/33efdaee-7a2c-11e3-af7f-13bf0e9965f6\_story.html

There are no plans for Senate Majority Leader Harry M. Reid (D-Nev.) to allow a vote on any proposal in the near future, the aides said, but if a bill moves forward, it could complicate negotiations with Iran over its nuclear program.

#### Obama spending pol cap on Gitmo now.

Klaidman 13 - (Daniel, http://www.thedailybeast.com/articles/2013/12/12/congress-cooperates-obama-pushes-hard-and-closing-gitmo-has-a-chance.htmlhttp://www.thedailybeast.com/articles/2013/12/12/congress-cooperates-obama-pushes-hard-and-closing-gitmo-has-a-chance.html, Congress Cooperates, Obama Pushes Hard, and Closing Gitmo Has a Chance, 12-12-13)

But it is also the case that the Guantanamo stalemate began to give way to progress because of a resolute push by Obama as well as a willingness to spend political capital that was not always present during the president’s first term. Obama drove his advisers hard and pushed them to regularly update him on progress. And crucially, he made sure that his team engaged Congress, both to win the cooperation of lawmakers but also to signal that closing Guantanamo was one of the highest priorities of his second term. Obama first signaled his re-commitment to closing Gitmo last April during a press conference when he was asked about a hunger strike at the prison that had spread to about 100 inmates. Speaking with intensity, the president pledged to rededicate himself to the challenge of shuttering the prison. “Guantanamo is not necessary to keep us safe,” he said, tapping at the lectern. “It is expensive. It is inefficient . . . It is a recruitment tool for extremists. It needs to be closed. I’m going to back at this,” he said.

#### Plan is an olive branch

McLaughlin 8/9 (Seth- Washington Times Staff Writer, 2013, “Rand Paul: GOP can grow base by opposing indefinite detention”, http://www.washingtontimes.com/news/2013/aug/9/rand-paul-gop-can-grow-base-opposing-indefinite-de/)

Sen. Rand Paul says that one of the ways he can bring more minority and younger voters into the party is to push back against indefinite detention.¶ Speaking with Bloomberg Businessweek, Mr. Paul, a likely 2016 presidential candidate, said this week that young blacks and Hispanics have a sense of justice and often mistrust government.¶ “So one of the big issues that I’ve fought here is getting rid of the provision called indefinite detention,” the Kentucky Republican said. “This is the idea that an American citizen could be accused of a crime, held indefinitely without charge, and actually sent from America to Guantanamo Bay and kept forever. I think there is something in that message of justice and a right to a trial by jury and a right to a lawyer that resonate beyond the traditional Republican Party and will help us to grow the Republican Party with the youth.”¶ Mr. Paul has argued that his libertarian brand of politics can help the GOP reach out to young voters and minorities who have supported Democrats in recent elections.

#### Court shields and prevent backlash—star this card

Stimson 9 [09/25/09, Cully Stimson is a senior legal fellow at the Heritage Foundation and an instructor at the Naval Justice School former American career appointee at the Pentagon. Stimson was the Deputy Assistant Secretary of Defense for Detainee Affairs., “Punting National Security To The Judiciary”, http://blog.heritage.org/2009/09/25/punting-national-security-to-the-judiciary/]

So what is really going on here? To those of us who have either served in senior policy posts and dealt with these issues on a daily basis, or followed them closely from the outside, it is becoming increasingly clear that this administration is trying to create the appearance of a tough national-security policy regarding the detention of terrorists at Guantanamo, yet allow the courts to make the tough calls on releasing the bad guys. Letting the courts do the dirty work would give the administration plausible cover and distance from the decision-making process. The numbers speak for themselves. Of the 38 detainees whose cases have been adjudicated through the habeas process in federal court in Washington, 30 have been ordered released by civilian judges. That is close to an 80 percent loss rate for the government, which argued for continued detention. Yet, how many of these decisions has this administration appealed, knowing full well that many of those 30 detainees should not in good conscience be let go? The answer: one. Letting the courts do it for him gives the president distance from the unsavory release decisions. It also allows him to state with a straight face, as he did at the Archives speech, “We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people.” No, the president won’t release detainees; he’ll sit back and let the courts to do it for him. And the president won’t seek congressional authorization for prolonged detention of the enemy, as he promised, because it will anger his political base on the Left. The ultra-liberals aren’t about to relinquish their “try them or set them free” mantra, even though such a policy threatens to put terrorists back on the battlefield. Moreover, the president would have to spend political capital to win congressional authorization for a prolonged detention policy. Obviously, he would rather spend that capital on other policy priorities. Politically speaking, it is easier to maintain the status quo and let the detainees seek release from federal judges. The passive approach also helps the administration close Gitmo without taking the heat for actually releasing detainees themselves.

#### Political capital’s irrelevant and winners win—

Hirsch 2-7-13. Michael Hirsh “There’s No Such Thing as Political Capital.” chief correspondent for National Journal. He also contributes to 2012 Decoded. Hirsh previously served as the senior editor and national economics correspondent for Newsweek, based in its Washington bureau. [http://www.nationaljournal.com/magazine/there-s-no-such-thing-as-political-capital-20130207]

The point is not that “political capital” is a meaningless term. Often it is a synonym for “mandate” or “momentum” in the aftermath of a decisive election—and just about every politician ever elected has tried to claim more of a mandate than he actually has. Certainly, Obama can say that because he was elected and Romney wasn’t, he has a better claim on the country’s mood and direction. Many pundits still defend political capital as a useful metaphor at least. “It’s an unquantifiable but meaningful concept,” says Norman Ornstein of the American Enterprise Institute. “You can’t really look at a president and say he’s got 37 ounces of political capital. But the fact is, it’s a concept that matters, if you have popularity and some momentum on your side.” The real problem is that the idea of political capital—or mandates, or momentum—is so poorly defined that presidents and pundits often get it wrong. “Presidents usually over-estimate it,” says George Edwards, a presidential scholar at Texas A&M University. “The best kind of political capital—some sense of an electoral mandate to do something—is very rare. It almost never happens. In 1964, maybe. And to some degree in 1980.” For that reason, political capital is a concept that misleads far more than it enlightens. It is distortionary. It conveys the idea that we know more than we really do about the ever-elusive concept of political power, and it discounts the way unforeseen events can suddenly change everything. Instead, it suggests, erroneously, that a political figure has a concrete amount of political capital to invest, just as someone might have real investment capital—that a particular leader can bank his gains, and the size of his account determines what he can do at any given moment in history. Naturally, any president has practical and electoral limits. Does he have a majority in both chambers of Congress and a cohesive coalition behind him? Obama has neither at present. And unless a surge in the economy—at the moment, still stuck—or some other great victory gives him more momentum, it is inevitable that the closer Obama gets to the 2014 election, the less he will be able to get done. Going into the midterms, Republicans will increasingly avoid any concessions that make him (and the Democrats) stronger. But the abrupt emergence of the immigration and gun-control issues illustrates how suddenly shifts in mood can occur and how political interests can align in new ways just as suddenly. Indeed, the pseudo-concept of political capital masks a larger truth about Washington that is kindergarten simple: You just don’t know what you can do until you try. Or as Ornstein himself once wrote years ago, “Winning wins.” In theory, and in practice, depending on Obama’s handling of any particular issue, even in a polarized time, he could still deliver on a lot of his second-term goals, depending on his skill and the breaks. Unforeseen catalysts can appear, like Newtown. Epiphanies can dawn, such as when many Republican Party leaders suddenly woke up in panic to the huge disparity in the Hispanic vote. Some political scientists who study the elusive calculus of how to pass legislation and run successful presidencies say that political capital is, at best, an empty concept, and that almost nothing in the academic literature successfully quantifies or even defines it. “It can refer to a very abstract thing, like a president’s popularity, but there’s no mechanism there. That makes it kind of useless,” says Richard Bensel, a government professor at Cornell University. Even Ornstein concedes that the calculus is far more complex than the term suggests. Winning on one issue often changes the calculation for the next issue; there is never any known amount of capital. “The idea here is, if an issue comes up where the conventional wisdom is that president is not going to get what he wants, and he gets it, then each time that happens, it changes the calculus of the other actors” Ornstein says. “If they think he’s going to win, they may change positions to get on the winning side. It’s a bandwagon effect.”

## 2AC: Capitalism

### 2AC Plan Focus

#### the plan causes lawless militarism and violence

Charles Kels, attorney for the Department of Homeland Security and a major in the Air Force Reserve, 12/6/12, THe Perilous Position of the Laws of War, harvardnsj.org/2012/12/the-perilous-position-of-the-laws-of-war/

The real nub of the current critique of U.S. policy, therefore, is that the Bush administration’s war on terror and the Obama administration’s war on al Qaeda and affiliates constitute a distinction without a difference. The latter may be less rhetorically inflammatory, but it is equally amorphous in application, enabling the United States to pursue non-state actors under an armed conflict paradigm. This criticism may have merit, but it is really about the use of force altogether, not the parameters that define how force is applied. It is, in other words, an ad bellum argument cloaked in the language of in bello.¶ LOAC is apolitical. Adherence to it does not legitimize an unlawful resort to force, just as its violation—unless systematic—does not automatically render one’s cause unjust. The answer for those who object to U.S. targeted killing and indefinite detention is not to apply a peace paradigm that would invalidate LOAC and undercut the belligerent immunity of soldiers, but to direct their arguments to the political leadership regarding the decision to use force in the first place. Attacking LOAC for its perceived leniency and demanding the “pristine purity” of HRL in military operations is actually quite dangerous and counterproductive from a humanitarian perspective, because there remains the distinct possibility that the alternative to LOAC is not HRL but “lawlessness.” While there are certainly examples of armies that have acquitted themselves quite well in law enforcement roles—and while most nations do not subscribe to the strict U.S. delineation between military and police forces—the vast bulk of history indicates that in the context of armed hostilities, LOAC is by far the best case scenario, not the worst.¶ Transnational terrorist networks pose unique security problems, among them the need to apply preexisting legal rubrics to an enemy who is dedicated to undermining and abusing them. Vital to meeting this challenge—of “building a durable framework for the struggle against al Qaeda that [draws] upon our deeply held values and traditions”—is to refrain from treating the deeply-ingrained tenets of honorable warfare as a mere mechanism for projecting force. The laws of war are much more than “lawyerly license” to kill and detain, subject to varying levels of application depending upon political outlook. They remain a bulwark against indiscriminate carnage, steeped in history and tried in battle.

#### Plan Focus—ballot is a yes/no vote to plan. We only have to defend our instance of action. That’s key to predictable aff offense—we can’t predictably generate offense external to defense of plan means at worst we get to weigh the aff.

#### Top Level Solely acting outside the realm of the law fails to provide a solution- institutions are inevitable and key to reform detention policies

Jenks and Talbot-Jensen 11 (INDEFINITE DETENTION UNDER THE LAWS OF WAR Chris Jenks\* & Eric Talbot Jensen\*\* Lieutenant Colonel, U.S. Army Judge Advocate General's Corps. Presently serving as the Chief of the International Law Branch, Office of The Judge Advocate General, Washington D.C. The views expressed in this Article are those of the author and not The Judge Advocate General's Corps, the U.S. Army, or the Department of Defense. \*\* Visiting Assistant Professor, Fordham Law School. The authors wish to thank Sue Ann Johnson for her exceptional research and editing skills, and the organizers and attendees at both the 3rd Annual National Security Law Jtinior Faculty Workshop at the University of Texas School of Law, where we first discussed the ideas for this article, and the Stanford Law and Policy Review National Defense Symposium, where we first presented the finished product. STANFORD LAW & POLICY REVIEW [Vol. 22:1] Page Lexis)

Those who would deconstruct the law of war as applied to detention stemming from armed conflict with non state actors may achieve victory, but in an academic, and, practically speaking, pyrrhic sense. Arguing that the Geneva Conventions for Prisoners and Civilians do not, on their face, apply to members of al-Qaeda or the Taliban may be correct, and in more than one way. But in so arguing, the deconstructionist approach removes a large portion of intemationally recognized and accepted provisions for regulating detention associated with armed conflict—^the Geneva Conventions—^while leaving the underlying question of how to govern detention unanswered. At some point, even the deconstmctionist must shift to positivism and propose an altemative, an altemative we submit would inevitably resemble that which is already extant in the law of war. Moreover, while there has been discussion about the strained application of the Geneva Conventions and Additional Protocols to states combating transnational terrorism, attempts at a new convention have gained little traction. Our approach is more an attempt at pragmatism than radicalism—there are individuals currently detained, purportedly indefinitely and under the law of war. Yet despite years of such detention, two administrations have provided little if any information on what exactly such detention means, how and by what it is govemed, and if and how it ends. Conflating aspects of intemationally recognized law of war conventions allows for a transparent process that could be promulgated now. Whether for the up to fifty or so individuals currently detained at Guantanamo or for those who may be detained in the future, we posit that the law of war provides a legitimate model for indefinite detention. And, as the Walsh Report recognized,^' the longer detainees are held, the more concern for their individual situations must be given. We therefore analyze the complete protections provided by the law of war and advocate that all of them, over time and to varying degrees, be applied to the detainees in Guantanamo. In this way, detention under the laws of war can provide a humane system of indefinite detention that strikes the right balance between the security of the nation and the rights of individuals

#### with the evil they criticize

**Issac 2**—Professor of Political Science at Indiana-Bloomington, Director of the Center for the Study of Democracy and Public Life, PhD from Yale (Jeffery C., Dissent Magazine, Vol. 49, Iss. 2, “Ends, Means, and Politics,” p. Proquest)

As a result, the most important political questions are simply not asked. It is assumed that U.S. military intervention is an act of "aggression," but no consideration is given to the aggression to which intervention is a response. The status quo ante in Afghanistan is not, as peace activists would have it, peace, but rather terrorist violence abetted by a regime--the Taliban--that rose to power through brutality and repression. This requires us to ask a question that most "peace" activists would prefer not to ask: What should be done to respond to the violence of a Saddam Hussein, or a Milosevic, or a Taliban regime? What means are likely to stop violence and bring criminals to justice? Calls for diplomacy and international law are well intended and important; they implicate a decent and civilized ethic of global order. But they are also vague and empty, because they are not accompanied by any account of how diplomacy or international law can work effectively to address the problem at hand. The campus left offers no such account. To do so would require it to contemplate tragic choices in which moral goodness is of limited utility. Here what matters is not purity of intention but the intelligent exercise of power. Power is not a dirty word or an unfortunate feature of the world. It is the core of politics. Power is the ability to effect outcomes in the world. Politics, in large part, involves contests over the distribution and use of power. To accomplish anything in the political world, one must attend to the means that are necessary to bring it about. And to develop such means is to develop, and to exercise, power. To say this is not to say that power is beyond morality. It is to say that power is not reducible to morality. As writers such as Niccolo Machiavelli, Max Weber, Reinhold Niebuhr, and Hannah Arendt have taught, an unyielding concern with moral goodness undercuts political responsibility. The concern may be morally laudable, reflecting a kind of personal integrity, but it suffers from three fatal flaws: (1) It fails to see that the purity of one's intention does not ensure the achievement of what one intends. Abjuring violence or refusing to make common cause with morally compromised parties may seem like the right thing; but if such tactics entail impotence, then it is hard to view them as serving any moral good beyond the clean conscience of their supporters; (2) it fails to see that in a world of real violence and injustice, moral purity is not simply a form of powerlessness; it is often a form of complicity in injustice. This is why, from the standpoint of politics--as opposed to religion--pacifism is always a potentially immoral stand. In categorically repudiating violence, it refuses in principle to oppose certain violent injustices with any effect; and (3) it fails to see that politics is as much about unintended consequences as it is about intentions; it is the effects of action, rather than the motives of action, that is most significant. Just as the alignment with "good" may engender impotence, it is often the pursuit of "good" that generates evil. This is the lesson of communism in the twentieth century: it is not enough that one's goals be sincere or idealistic; it is equally important, always, to ask about the effects of pursuing these goals and to judge these effects in pragmatic and historically contextualized ways. Moral absolutism inhibits this judgment. It alienates those who are not true believers. It promotes arrogance. And it undermines political effectiveness.

#### Shocks to the system are the ONLY propensity for conflict—liberal norms have eradicated warfare and structural violence—every field study proves

JOHN HORGAN 9 is Director of the Center for Science at Stevens Institute of Technology, former senior writer at Scientific American, B.A. from Columbia and an M.S. from Columbia “The End of the Age of War,” Dec 7, http://www.newsweek.com/id/225616/page/1

The economic crisis was supposed to increase violence around the world. The truth is that we are now living in one of the most peaceful periods since war first arose 10 or 12 millennia ago. The relative calm of our era, say scientists who study warfare in history and even prehistory, belies the popular, pessimistic notion that war is so deeply rooted in our nature that we can never abolish it. In fact, war seems to be a largely cultural phenomenon, which culture is now helping us eradicate. Some scholars now even cautiously speculate that the era of traditional war—fought by two uniformed, state-sponsored armies—might be drawing to a close. "War could be on the verge of ceasing to exist as a substantial phenomenon," says John Mueller, a political scientist at Ohio State University.¶ That might sound crazy, but consider: if war is defined as a conflict between two or more nations resulting in at least 1,000 deaths in a year, there have been no wars since the U.S. invasion of Iraq in 2003 and no wars between major industrialized powers since World War II. Civil wars have also declined from their peak in the early 1990s, when fighting tore apart Rwanda, the Balkans, and other regions. Most armed conflicts now consist of low-level guerrilla campaigns, insurgencies, and terrorism—what Mueller calls the "remnants of war."¶ These facts would provide little comfort if war's remnants were nonetheless killing millions of people—but they're not. Recent studies reveal a clear downward trend. In 2008, 25,600 combatants and civilians were killed as a direct result of armed conflicts, according to the University of Uppsala Conflict Data Program in Sweden. Two thirds of these deaths took place in just three trouble spots: Sri Lanka (8,400), Afghanistan (4,600), and Iraq (4,000).¶ Uppsala's figures exclude deaths from "one-sided conflict," in which combatants deliberately kill unarmed civilians, and "indirect" deaths from war-related disease and famine, but even when these casualties are included, annual war-related deaths from 2004 to 2007 are still low by historical standards. Acts of terrorism, like the 9/11 attacks or the 2004 bombing of Spanish trains, account for less than 1 percent of fatalities. In contrast, car accidents kill more than 1 million people a year.¶ The contrast between our century and the previous one is striking. In the second half of the 20th century, war killed as many as 40 million people, both directly and indirectly, or 800,000 people a year, according to Milton Leitenberg of the University of Maryland. He estimates that 190 million people, or 3.8 million a year, died as a result of wars and state--sponsored genocides during the cataclysmic first half of the century. Considered as a percentage of population, the body count of the 20th century is comparable to that of blood-soaked earlier cultures, such as the Aztecs, the Romans, and the Greeks.¶ By far the most warlike societies are those that preceded civilization. War killed as many as 25 percent of all pre-state people, a rate 10 times higher than that of the 20th century, estimates anthropologist Lawrence Keeley of the University of Illinois. Our ancestors were not always so bellicose, however:

there is virtually no clear-cut evidence of lethal group aggression by humans prior to 12,000 years ago. Then, "warfare appeared in the evolutionary trajectory of an increasing number of societies around the world," says anthropologist Jonathan Haas of Chicago's Field Museum of Natural History. He attributes the emergence of warfare to several factors: growing population density, environmental stresses that diminished food sources, and the separation of people into culturally distinct groups. "It is only after the cultural foundations have been laid for distinguishing 'us' from 'them,' " he says, "that raiding, killing, and burning appear as a complex response to the external stress of environmental problems."¶ Early civilizations, such as those founded in Mesopotamia and Egypt 6,000 years ago, were extremely warlike. They assembled large armies and began inventing new techniques and technologies for killing, from horse-drawn chariots and catapults to bombs. But nation-states also developed laws and institutions for resolving disputes nonviolently, at least within their borders. These cultural innovations helped reduce the endless, tit-for-tat feuding that plagued pre-state societies.¶ A host of other cultural factors may explain the more recent drop-off in international war and other forms of social violence. One is a surge in democratic rather than totalitarian governance. Over the past two centuries democracies such as the U.S. have rarely if ever fought each other. Democracy is also associated with low levels of violence within nations. Only 20 democratic nations existed at the end of World War II; the number has since more than quadrupled. Yale historian Bruce Russett contends that international institutions such as the United Nations and the European Union also contribute to this "democratic peace" phenomenon by fostering economic interdependence. Advances in civil rights for women may also be making us more peaceful. As women's education and economic opportunities rise, birthrates fall, decreasing demands on governmental and medical services and depletion of natural resources, which can otherwise lead to social unrest.¶ Better public health is another contributing factor. Over the past century, average life spans have almost doubled, which could make us less willing to risk our lives by engaging in war and other forms of violence, proposes Harvard psychologist Steven Pinker. At the same time, he points out, globalization and communications have made us increasingly interdependent on, and empathetic toward, others outside of our immediate "tribes."¶ Of course, the world remains a dangerous place, vulnerable to disruptive, unpredictable events like terrorist attacks. Other looming threats to peace include climate change, which could produce droughts and endanger our food supplies; overpopulation; and the spread of violent religious extremism, as embodied by Al Qaeda. A global financial meltdown or ecological catastrophe could plunge us back into the kind of violent, Hobbesian chaos that plagued many pre--state societies thousands of years ago. "War is not intrinsic to human nature, but neither is peace," warns the political scientist Nils Petter Gleditsch of the International Peace Research Institute in Oslo.¶ So far the trends are positive. If they continue, who knows? World peace—the dream of countless visionaries and -beauty--pageant -contestants—or something like it may finally come to pass.

# 1AR

#### Warming is inevitable.

Gelbspan 7— American writer and activist. He has written two books relating to global warming, Ross, It’s too late to stop climate change, argues Ross Gelbspan — so what do we do now?, Grist, 12-11, http://grist.org/article/beyond-the-point-of-no-return/

But even assuming the wildest possible success of their initiatives — that humanity decided tomorrow to replace its coal- and oil-burning energy sources with noncarbon sources — it would still be too late to avert major climate disruptions. No national energy infrastructure can be transformed within a decade.¶ All these initiatives address only one part of the coming reality. They recall the kind of frenzied scrambling that is characteristic of trauma victims — a frantic focus on other issues, any other issues — that allows people to avoid the central take-home message of the trauma: in this case, the overwhelming power of inflamed nature.¶ Within the last two years, a number of leading scientists — including Rajendra Pachauri, head of the Intergovernmental Panel on Climate Change (IPCC), British ecologist James Lovelock, and NASA scientist James Hansen — have all declared that humanity is about to pass or already has passed a “tipping point” in terms of global warming. The IPCC, which reflects the findings of more than 2,000 scientists from over 100 countries, recently stated that it is “very unlikely” that we will avoid the coming era of “dangerous climate change.”¶