# 2AC

## AT Afghanistan

#### Their argument relies on false realist assumptions – credibility gained from the courts outweighs hard power gained from the executive

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)

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.440 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.”441 As Justice Kennedy’s majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches.442 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.”443 The restoration of habeas corpus in Boumediene may help begin to counter-act this loss of prestige.

## AT Iraq

### 2AC Rendition Turn

#### ERP rulings undermine US heg and CT operations

Winkler ‘8 (Matteo - Visiting Scholar 2007, Uppsala University Law School; LL.M. 2007, Yale Law School;¶ Ph.D. 2007, Bocconi University, Milan, Italy; Attorney-at-Law, Milan, Italy; J.D. Catholic University of Sacred Heart, Milan, Italy) “When Extraordinary Means Illegal: International Law and European Reaction to the United States Rendition Program”

A. Foreign policy and the courts¶ Traditionally, domestic courts have little room to question a¶ government's maneuvers in its relations with other states. The¶ ERP, however, has broken with this classical picture of domestic¶ constitutional structure."M Because foreign policy remains a strict¶ prerogative of the executive branch in most constitutional systems¶ - with some intervention by Parliament - the courts' interference¶ with ERP cases is likely to raise serious questions of domestic¶ legitimacy within the United States as well as in all other¶ concerned countries. Several examples are illustrative. First, consider the Abu Omar case. Apparently, the CIA¶ agents acted with the placet of the Italian secret service, the¶ SISMI.67 Some SISMI members, including a director, were¶ indicted for the -abduction¶ The Italian government strongly opposed any declassification¶ of the information related to the incident, and appealed the release¶ of classified information to the Constitutional Court.6 9 The judge,¶ however, denied the appeal, and allowed the case to go to trial. 7¶ Furthermore, while the Italian penal code provides for trial in¶ absentia,7' the arrest warrant issued by the Milan Court is valid¶ throughout the entire European Union, pursuant to the so-called¶ "European arrest warrant" approved in 2002,172 despite the fact¶ that many European countries do not support a trial in absentia."'¶ Second, in the El-Masri case, both the Federal District Court¶ of East Virginia17' and the Fourth Circuit Court of Appeals¶ determined that the state secret privilege applied to discovery¶ sought by plaintiff and consequently dismissed the case.¶ According to the appellate court, details of the ERP must remain¶ secret because the interests of U.S. national security so require."¶ Nevertheless, the German authorities initiated investigations¶ about El-Masri's abduction.77 In late January 2007, a criminal¶ court in Minich issued an arrest warrant for several CIA agents¶ supposedly involved in the incident.7 7 Reportedly, the Frankfurt¶ airport and the U.S. airbase at Ramstein had been used for flights associated with the ERP.'79 Like the Italian arrest warrant, the¶ German warrant is valid in all European states.¶ Third, in the Arar case, the Canadian policy against terrorism¶ received a strong and polemic rebuff by an ad hoc commission,¶ elected by the Canadian legislature and presided over by Justice¶ Dennis O'Connor (Arar Commission)."' The Arar Commission¶ was required to inquire into the factual circumstances of Arar's¶ deportation to Syria, and to recommend potential reforms for the¶ Canadian security services. The Arar Commission issued a total¶ of four reports,8'3 and ultimately recommended, among other¶ things: (1) the rigorous separation of the intelligence agencies¶ from those of law-enforcement, like the Royal Canadian Mounted¶ Police (RCMP);'" (2) a strengthening of the cooperation and¶ information-sharing process both within and between the¶ intelligence and law enforcement agencies; " and (3) the¶ introduction of "clearly established policies respecting screening¶ for relevance, reliability and accuracy and . . . relevant laws respecting personal information and human rights."'" These¶ policies, subsequently outlined in the Fourth Report,n must be¶ attached as a caveat to any information shared with foreign¶ agencies." Most importantly, if foreign agencies made "improper¶ use" of the information provided by Canadian agencies, "a formal¶ objection should be made to the foreign agency and the foreign¶ minister of the recipient country."'89 The Arar Commission further¶ stated that "it is essential that there be a proper and professional¶ assessment of the reliability of information ... received ... from¶ countries with questionable human rights records."' 90¶ The clear aim of these recommendations is to prevent¶ Canadian agencies from using information obtained by torture or¶ human rights abuses. "¶ ' The Arar Commission's findings on the¶ conduct of the RCMP triggered a negative public reaction, which¶ convinced the government to publicly acknowledge, by formal¶ apology, the RCMP's mistakes in Arar and to award the victim¶ over ten million Canadian dollars in compensation for damages¶ incurred because of the RCMP's misinformation."n Although the¶ American Arar Court, defending the secrecy of the ERP,¶ continued to maintain that "the need for much secrecy can hardly¶ be doubted,"'9'3 Canada decided to inform the public of the U.S.¶ governmental agencies' questionable behavior and to conduct a¶ complete investigation on the relevant facts and remedies of the¶ case.' 4 A formal protest by the Canadian Prime Minister to¶ Secretary of State Condoleezza Rice also followed.'9 ¶ Finally, the Boumediene case is worthy of mention. In October 2001, the police of the Federation of Bosnia-Herzegovina arrested Lakhdar Boumediene and five other people (the Algerian Six) on the charge of having planned an assault on the U.S. and British embassies in Sarajevo." Among them, five had obtained Bosnian citizenship, and one was a resident under permission." On January 17, 2002, the investigative judge of the Bosnian Federation's Supreme Court ordered their release due to a lack of grounds for further detention.9 The court delivered the order that afternoon; that evening, the Chamber of Human Rights of Bosnia- Herzegovina (CHR) issued an interim order to prevent the detainees' transfer.' Nevertheless, the police handed over the¶ 9¶ prisoners to U.S. forces." In late January, the U.S. government¶ declared that it had detained the six men in Guantanamo.20'¶ On October 12, 2002, the CHR determined that police removed the Algerian Six illegally, and that the Bosnian government violated the European Convention of Human Rights. Subsequently, the CHR ordered Bosnian State and¶ Federation authorities to undertake a number of measures to counteract the violations, such as the annulment of the removal order.2 ' The fact that the Bosnian government disregarded two¶ different orders from domestic courts obviously exacerbated the¶ conflict between powers. The CHR instructed the government to "use all diplomatic channels in order to protect the basic rights of¶ the applicants, taking all possible steps to establish contacts with¶ the applicants and to provide them with consular support,"2¶ ' 0 and¶ to "prevent the death penalty from being pronounced against and¶ executed on the applicants.....¶ In addition to the judicial and the executive branches, the¶ conflict also involved the legislature. On May 11, 2004, the House¶ of Representatives of the Parliament of Bosnia-Herzegovina¶ adopted a report by a parliamentary Commission for Human¶ Rights, Immigration, Refugees and Asylum.' In 2005, the same¶ body demanded the Council of Ministers of Bosnia and¶ Herzegovina to urge the U.S. government to release the Bosnian¶ detainees held at Guantanamo .' Finally, Boumediene's attorneys¶ filed a petition before the European Court of Human Rights,¶ citing the CHR decision of 2002, in support of their argument that¶ Bosnia-Herzegovina breached the European Convention of¶ Human Rights."¶ Initially, it is possible to infer from these examples that a¶ nation's foreign policy is no longer the strict prerogative of the¶ executive branch or the parliament. Although this is a domestic¶ constitutional issue, it triggers relevant political effects at the¶ international level. By incriminating U.S. citizens acting in their¶ official capacity, other national courts may embarrass and strain¶ possibly already delicate relations with the United States. Indeed,¶ the questioning of various international and domestic courts raises¶ serious doubts about the legitimacy of a government's behavior in¶ cooperating with the ERP, especially in the eyes of the public. It¶ also destabilizes the U.S. government's efforts in the global war on¶ terror, and may even potentially delegitimize the U.S. government¶ itself.

### 2AC Whistleblowers Turn

#### Deference to the executive encourages whisteblowers, the media, and other countries to backlash – causes volatile restrictions of policy and worse intel leaks and even more judicial restrictions

Marguilies ‘10 Peter, Professor of Law, Roger Williams University, “Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law” IOWA LAW REVIEW Vol. 96:195

The categorical-deference approach also fails to acknowledge that those stymied by the lack of formal redress can substitute for litigation other paths that pose greater danger. For example, consider the perspective of the official who leaks a document, not to advance a personal agenda, but to focus public attention on government policy.170 Whistleblowers of this kind, like Daniel Ellsberg, who leaked the Pentagon Papers to the New York Times, 171 are advancing a constitutional vision of their own in which senior officials have strayed from the limits of the original understanding.172 If the courts and Congress do not work to restore the balance, the whistleblower engages in self-help. Because leakers are risk-seekers who believe the status quo is unacceptable, they lack courts’ interest in safeguarding sensitive information. Policy shaped by blowback from leaks is far more volatile than policy reacting to judicial precedent.173 Similarly, the media has a constitutional role to play that includes investigative reporting. The media will step up its efforts if other institutions like courts take a more deferential stance.174 When government hides information, the media’s sense of its own role leads to greater distrust of government and a willingness to both uncover and publish more information. On some occasions, the First Amendment will oblige us to tolerate journalists’ disclosure of operational details of covert programs.175 Journalists will understandably view government’s claims that information is sensitive with greater skepticism when government has methodically locked down information in other settings. Similarly, shutting off damage suits regarding terrorism issues leaves other kinds of litigation, including litigation the government has initiated. Journalists and activists will seek to scrutinize and mobilize around these cases, even if the avenue of civil suits is closed. Indeed, activism may be distorted in these other venues when they are the only game in town. For example, journalists may be more inclined to credit even outlandish claims made by some lawyers on behalf of detainees when the government has a track record of concealing information.176 While some might argue that courts should not speculate about future conduct of third parties, a court that makes empirical predictions about the effect of liability should not selectively ignore major unintended consequences of its holding. There are parallel developments in international law. Some countries have prosecuted criminal cases against American agents who allegedly were complicit in extraordinary renditions. In Italy, a number of American government employees and personnel were convicted in absentia because of legal action generated by popular pressure.177 U.S. public-interest organizations, like the Center for Constitutional Rights, have encouraged these assertions of universal jurisdiction. These prosecutions occurred because of officials’ sense that they were above the law. Judicial remedies available in the United States can check these officials, thereby reducing the incidence and impact of universal-jurisdiction proceedings in the future.

## AT Security

#### 6. Perm do the plan and all non-competitive parts of the alt – Refusing to use the state empowers its worst aspects

Barbrook, 97-professor at the Hypermedia Research Centre at the University of Westminster, 1997  (Richard, message to a list serve, http://www.nettime.org/Lists-Archives/nettime-l-9706/msg00034.html)

I thought that this position is clear from my remarks about the ultra-left posturing of the 'zero-work' demand. In Europe, we have real social problems of deprivation and poverty which, in part, can only be solved by state action. This does not make me a statist, but rather an anti-anti-statist. By opposing such intervention because they are carried out by the state, anarchists are tacitly lining up with the neo-liberals. Even worse, refusing even to vote for the left, they acquiese to rule by neo-liberal parties.   I deeply admire direct action movements. I was a radio pirate and we provide server space for anti-roads and environmental movements. However, this doesn't mean that I support political abstentionism or, even worse, the mystical nonsense produced by Hakim Bey. It is great for artists and others to adopt a marginality as a life style choice, but most of the people who are economically and socially marginalised were never given any choice. They are excluded from society as a result of deliberate policies of deregulation, privatisation and welfare cutbacks carried out by neo-liberal governments. During the '70s, I was a pro-situ punk rocker until Thatcher got elected. Then we learnt the hard way that voting did change things and lots of people suffered if state power was withdrawn from certain areas of our life, such as welfare and employment. Anarchism can be a fun artistic pose. However, human suffering is not.

## AT Due Process

#### Ruling on the Suspension clause creates more meaningful judicial review

**Garrett, Virginia law professor, 2012** (Brandon, “Habeas Corpus and Due Process”, 11-20, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2008746, ldg)

Congress and the Executive have largely accommodated, in the wake of Boumediene, a system in which judicial review plays a central role in detention cases, even if judges remain deferential both to congressional authorization for detention and executive procedures for screening and release of detainees.57 The Suspension Clause may facilitate this equilibrium better than a due process approach, which would focus more on procedure and less on substance. A judge asking whether the Due Process Clause was violated focuses on the minimal adequacy of general procedures, which may not necessarily require a judicial process. A judge asking whether the Suspension Clause was violated asks a different question: whether the process preserves an adequate and effective role for federal judges to independently review authorization of each individual detainee. The specific question for the judge is whether a person is in fact detained lawfully, which is a fundamental question of substance. Despite connections between habeas corpus and due process, the habeas judge’s preoccupation with authorization instead of procedure suggests important reasons for the concepts to remain separate. Habeas corpus and due process can share an inverse relationship,58 meaning that the Suspension Clause can continue to do its work standing alone.

## AT Politics

#### No chance Obama passes his agenda

Middletown Press, 3/20/14, http://www.middletownpress.com/opinion/20140320/obama-goes-solo-in-his-second-term

But whatever the genuine merits of such criticism, the era of sweeping legislation — at least barring some midterm election miracle — is over for now. Pragmatically, the best Obama can do over the next three years is to offer an alternative policy vision, as he recently outlined in his 2015 budget — one that stands no chance of congressional passage; sign executive orders that are as impactful as possible; and use the White House as a bully pulpit to promote a vision of American society that may wind up being fulfilled only after he has left office.

#### Healthclare glitch kills polcap.

Saptkin 3-21 - Inquirer Staff Writer (Donhttp://www.philly.com/philly/health/healthcare-exchange/20140321\_A\_glitch\_in\_Obamacare\_Marketplace\_that\_no\_one\_noticed.html, Last updated: Friday, March 21, 2014, A glitch in Obamacare marketplace no one noticed)

Nearly six months after the disastrous launch of Healthcare.gov, with the website running smoothly and more than five million people signed up as open enrollment heads to a close, a new glitch has come to light: Incorrect poverty-level guidelines are automatically telling what could be tens of thousands of eligible people they do not qualify for subsidized insurance. The error in the federal marketplace primarily affects households with incomes just above the poverty line in states like Pennsylvania that have not expanded Medicaid. The mistake raises the price of their insurance by thousands of dollars, making insurance so unaffordable many may just give up and go without. The error, which The Inquirer discovered while running scores of income scenarios through Healthcare.gov, again raises questions about the site's accuracy that made daily headlines in early winter and that have cost President Obama considerable political capital.

#### Minimum wage

NECN Politics, 3/18/14, http://www.necn.com/03/18/14/President-Obama-continues-push-to-raise-/landing\_politics.html?blockID=864013&feedID=11106

President Obama continues push to raise minimum wage. (NECN: Alison King, Washington) - As he looks toward the midterm elections, President Obama has latched onto a minimum wage increase to $10.10 an hour, as a winning proposal that could help Democrats hold onto seats in Congress this fall.

#### 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.

#### Climate Change thumps the link

CNN 2/18/14 “5 reasons why climate change is back in the news” http://www.cnn.com/2014/02/18/politics/climate-change-5-things/index.html?iref=storysearch

1) Obama walks the talk¶ The President had pledged action on climate change since before he entered the Oval Office five years ago, and he renewed his commitment in his second inaugural address as well as last month's State of the Union address.¶ However, he spent his first-term political capital on stimulus programs in response to the recession and then health care reforms, instead of carbon cap legislation sought by his liberal base.¶ Faced with relentless Republican opposition to his agenda in a divided Congress, Obama promised to take more executive action in 2014 to get around what Democrats call an obstructionist GOP strategy.¶ He also brought on stronger voices for combating climate change, including Kerry, who became secretary of state last year, and John Podesta, a former chief of staff to President Bill Clinton who headed the liberal Center for American Progress think tank.¶ "Before there were certainly many people in the administration, including the President, who had a public commitment to the notion of doing something about climate change," noted David Goldston, the director of government affairs at the Natural Resources Defense Council, a major environmental group. "Now there's a plan. ... They are ready to move."¶ In his first term, Obama set tougher emissions standards for cars and trucks and on Tuesday, he instructed environmental and transportation agencies to work on the next round of higher gas mileage requirements for big trucks that he said comprise 4% of all vehicles on the road but cause 20% of their carbon pollution.¶ The presidential moves don't require congressional approval, unlike a new $1 billion climate change preparedness fund that Obama proposed last week. With elections coming in November, congressional approval of such a funding proposal looks impossible.¶ "There's no way on Earth he's going to get $1 billion out of this Congress to do anything, let alone fight climate change," USA Today columnist Kirsten Powers told "Fox News Sunday."

#### 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.

#### The plan pacifies the base and gets their support

Goldsmith and Wittes 9, Prof at Law School ex-assistant attorney general and senior fellow at Brookings [12/22/09, Jack Goldsmith teaches at Harvard Law School and served as an assistant attorney general in the Bush administration. Benjamin Wittes, a former Post editorial writer, is a senior fellow at the Brookings Institution and the editor of "Legislating the War on Terror: An Agenda for Reform." Both are members of the Hoover Institution's Task Force on National Security and Law, “A role judges should not have to play”, http://articles.washingtonpost.com/2009-12-22/opinions/36890191\_1\_detention-policy-judges-judicial-system]

Congress has avoided these issues for a number of reasons. Initially, it was a combination of the Bush administration's failure to seek congressional help and lawmakers' natural inclination to avoid taking responsibility for hard decisions for which they might later be held accountable. More recently, the Obama administration has been loath to spend any more political capital than necessary in cleaning up what it views as its predecessor's messes. Instead of dealing with detention policy proactively, it has largely adopted the Bush approach of grinding out detention policy in the courts. Ironically, the president's political base seems to prefer his adoption of the Bush approach -- an approach liberals previously decried -- to any effort to write detention rules and limitations into statutory law.

#### Plan’s bipartisan---previous proposals prove support

Nick Sibilla 12, "Bipartisan effort to ban indefinite detention, amend the NDAA", May 18, www.constitutioncampaign.org/blog/?p=7479#.UjHhXz8uhuk

Democrats and Tea Party Republicans are advocating a new proposal to ban indefinite detention on American soil. After President Obama signed the National Defense Authorization Act (NDAA) last year, anyone accused of being a terrorist, committing any “belligerent act” or even providing “material support,” can now be detained indefinitely by the military without a trial. This includes American citizens.¶ Fortunately, a bipartisan coalition is working to stop the NDAA. Congressmen Adam Smith (D-WA), a Ranking Member of the House Armed Services Committee, and Justin Amash (R-MI), who Reason magazine called “the next Ron Paul,” have sponsored an amendment to the latest defense authorization bill, currently on the House floor.¶ If adopted, the Smith-Amash Amendment would make three significant changes to the NDAA. First, it would amend Section 1021 (which authorizes indefinite detention) to ensure that those detained will not be subject to military commissions, but civilian courts established under Article III of the Constitution. As Congressman Smith put it, this would “restore due process rights.”¶ Second, the Smith-Amash Amendment would ban “transfer to military custody:”¶ No person detained, captured, or arrested in the United States, or a territory or possession of the United States, may be transferred to the custody of the Armed Forces for detention…¶ Finally, their amendment would repeal Section 1022 of the NDAA, which mandates military custody for those accused of foreign terrorism.¶ Both Smith and Amash have criticized the NDAA. Amash blasted the NDAA as “one of the most anti-liberty pieces of legislation of our lifetime.” In a letter urging his Republican colleagues to support the amendment, Amash writes:¶ A free country is defined by the rule of law, not the government’s whim. Americans demand that we protect their right to a charge and trial.¶ Meanwhile, in an interview with The Hill, Smith was concerned about the potential abuses of power:¶ It is very, very rare to give that amount of power to the president [and] take away any person’s fundamental freedom and lock them up without the normal due process of law…Leaving this on the books is a dangerous threat to civil liberties.¶ The Smith-Amash Amendment is expected to be voted on later this week. So far, it has 60 co-sponsors in the House. Meanwhile, Senators Mark Udall (D-CO) and Patrick Leahy (D-VT) have introduced a similar bill in the Senate.

#### 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.”

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## CP

#### Solving habeas opens door to changing due process.

Vladeck 14 - Professor of law and the associate dean for scholarship at American University Washington College of Law (Steve, http://www.lawfareblog.com/2014/03/habeas-and-the-military-commissions-after-aamer/, March 21st 2014)

I’ve already written at some length about the D.C. Circuit’s decision last month in Aamer v. Obama, in which a divided panel held that the Guantánamo detainees may challenge the conditions of their confinement through habeas petitions, notwithstanding the language of the jurisdiction-stripping provisions of the Military Commissions Act of 2006. As Judge Tatel explained, the Supreme Court’s 2008 decision in Boumediene v. Bush—which invalidated the MCA provision that specifically foreclosed habeas jurisdiction (28 U.S.C. § 2241(e)(1))—necessarily vitiated the entire habeas-stripping provision. Thus, even in cases (perhaps like Aamer) where the petitioner’s entitlement to habeas is not protected by the Suspension Clause, Boumediene nevertheless restores the statutory habeas jurisdiction of the federal courts to the pre-MCA status quo. As I wrote shortly after the decision came down, this holding, if left unchallenged by the U.S. government, could be immensely significant for future Guantánamo detainee habeas cases—especially the Hatim (genital search / counsel access) case already argued before the D.C. Circuit. But the more I’ve thought about it, the more Aamer may also have significant repercussions for the military commissions, as well. Indeed, as I explain below the fold, Aamer not only settles the (less significant) availability of post-conviction collateral Article III review of the commissions via habeas; it may also open the door to (more significant) pre-conviction review of the commissions in at least some cases, as well.

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#### Obama believes he is constrained by statute – won’t circumvent

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We accept that the President’s lawyers search for legal arguments to justify presidential action, that they find the President’s policy preferences legal more often than they do not, and that the President sometimes disregards their conclusions. But the close attention the Executive pays to legal constraints suggests that the President (who, after all, is in a good position to know) believes himself constrained by law. Perhaps Posner and Vermeule believe that the President is mistaken. But we think, to the contrary, it represents the President’s recognition of the various constraints we have listed, and his appreciation that attempting to operate outside the bounds of law would trigger censure from Congress, courts, and the public.

#### Rights demands and legal strategies prevent state violence—habeas specific

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[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65]

Rights as Resistance.—Habeas corpus, whose history has been explored exhaustively by others,297 translates as ―show me the body,‖ and captures the communitarian, corporeal, and testimonial dimensions of not just rights claims, but citizenship. For a judge to order the government to produce a defendant for the purposes of considering the legality of his detention is to recognize the defendant‘s a priori membership in the community. To require that the defendant himself—his corpus—be produced, and not just reasons for his detention proffered, is to acknowledge the physicality and inescapably human experience of an otherwise abstract liberty interest. And to permit the defendant to not only attend his own hearing, but to speak on his own behalf, is to credit his standing as an actor and agent. Taken together, the communitarian, corporeal, and testimonial bespeak a shared concern: human dignity. It is this human dignity, the human as distinguished from the merely biological, with which Arendt was fundamentally concerned. For Arendt, rights are indispensable to humanity, a protective membrane poised between the state and the individual. What she saw, and Giorgio Agamben has recently revived,298 is the idea that a confrontation between the state and the individual unmediated by rights reduces the individual to bare life, or naked life,299 which is life without humanity. It is this unmediated, unmitigated confrontation that both requires and enables the rendering of the human inhuman, animal, and savage.300 It is this rights-free confrontation that permits torture—the hand of the state encumbered by no law other than the laws of physics. And it is this unmediated confrontation that permits the transmogrification of a child into a terrorist. For Arendt, to be a citizen is to be human, and to be anything else is merely, and barely, life. The conception of rights as a bare protection interposed between the individual and state violence is intuitively familiar to the anti-death penalty advocate301 and to criminal defense lawyers generally. But the American legal embodiment of citizenship as rights is Dred Scott.302 While Scott was suing for his freedom from slavery, the case turned upon his citizenship. The Supreme Court found that Scott was not a ―citizen of a State,‖ and therefore, under the jurisdictional limits of Article III of the Constitution, could not bring suit in federal court.303 Thus, the case removed Scott‘s right even to be heard, by removing him from the polity. Like the Guantánamo prisoners, he had no right to have rights, and the negation of his political citizenship condemned him to the unmitigated violence of slavery. The denial of habeas to Omar and the other prisoners similarly placed them outside the communitarian consent that rights require. This expulsion from the polity authorizes the expulsion from humanity that torture represents. Here, we must remember that this expulsion was prefigured by the state iconography that placed the prisoners outside the realm of human understanding, and therefore outside of humanity itself.304 Stripped of the mediation of rights, Guantánamo reveals the essential and inescapable violence of law. Politics may dictate who is entitled to mediation and what form it will take, but all are subject to the force of the state that, fundamentally, animates law. The demand for rights is a plea to blunt state force, and not to fundamentally reorganize the structure of power. With this understanding of rights in mind, I return to the litigation strategy we adopted in Omar‘s case. By invoking rights, we sought recognition of Omar in a polity of significance. In this way, rights hailed Omar into the community, though his admission would depend upon community consent. As Arendt‘s analysis suggests, the demand for recognition is tantamount to a claim to humanity. To be human, to rise above biological existence and to secure political and social life, requires rights. And yet, once more, this bid was subject to political forces. No amount of rights-claiming could overcome a political will to deny the prisoners‘ humanity. In light of this, our strategy can be understood in a third way: rights as resistance. By this account, the rights claim sought not to escape the violence of the state, but to make that violence more costly to the state. To continue its brutal regime at Guantánamo, the government first would have to do violence to rights;

 to lay its hands on Omar again, the state would have to crash through his rights claims. Rather than avoid the state‘s confrontation with the individual, this strategy seeks to expose it. The onus then shifts from the prisoner trying to establish the existence of rights to the state establishing their nonexistence, from the individual establishing harm done to the state justifying its own violence. In some respects, this strategy has worked. So long as it could avoid any discussion of Guantánamo, as it long attempted to do, the government could enact violence without political cost. But rights claims force the government into discourse in which the violence of the state is put on display and must be justified. The claim of rights itself may interpose a membrane between the state and the individual even if the right itself ultimately is found not to exist. Thus, our rights-based strategy could be understood as interposing a protective membrane between Omar and the state. In this way, we wanted to mediate, and moderate, the relationship between the state and Omar, with the hope of ultimately transforming the relationship from one of potentate and biological mass to one more recognizable as warden and prisoner. This was a form of resistance to Omar‘s mistreatment, which required the state either to stop its violence or to engage in it in the public forum of the court. This approach had some success, as the worst of the mistreatment of Omar and the other prisoners stopped once the government was forced to grapple with it in the daylight of federal court.305 And yet, Omar‘s other fundamental material conditions—indefinite detention, and trial before a substandard tribunal—remained the same, just as the fundamentals of Guantánamo have remained largely the same for the hundreds of other prisoners. At the end of the day, I believe our approach has not proven more successful because the fundamental question of political citizenship has not been resolved in the prisoners‘ favor, and as I have argued, the success of even first-order rights depends upon a priori political membership. When I have rehearsed these arguments for others, particularly lawyers, the response I have often gotten is that we did the best that we could, and that there was no alternative. To argue the existence of rights, and to do so forcefully, is to fulfill the professional obligation of a lawyer. But this strikes me as too weak a conception of professional obligation. I believe that the rights-based approach has been worthy and necessary, but not merely because it was a form of last-resort lawyering. Rather, the rightsbased lawyering has performed an essential role of mounting resistance to the unbridled exercise of state violence, essential not because there is nothing else to be done, but because of the opportunities and potentialities that resistance creates. This is consistent with what Scott Cummings has termed ―constrained legalism,‖ 306 for it capitalizes on what law can accomplish, even as it recognizes what law cannot.