# 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 detained at the U.S. government’s behest.

### 1AC Adventurism

#### Failure of the Court to rule on detention authority causes judicial abstention and presidential adventurism

Vaughns 13 (B.A. (Political Science), J.D., University of California, Berkeley, School of Law. Professor of Law, University of Maryland Francis King Carey School of Law.Of Civil Wrongs and Rights: Kiyemba v. Obama and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years After 9/11 ASIAN AMERICAN LAW JOURNAL [Volume 20:7])

After being reversed three times in a row in Rasul, Hamdan, and then Boumediene, the D.C. Circuit finally managed in Kiyemba to reassert, and have effectively sanctioned, its highly deferential stance towards the Executive in cases involving national security. In particular, the D.C. Circuit concluded that an order mandating the Uighurs’ release into the continental United States would impermissibly interfere with the political branches’ exclusive authority over immigration matters. But this reasoning is legal ground that the Supreme Court has already implicitly—and another three-judge panel of the D.C. Circuit more explicitly—covered earlier. As such, the Bush administration’s strategy in employing the “war” paradigm at all costs and without any judicial intervention, while unsuccessful in the Supreme Court, has finally paid off in troubling, and binding, fashion in the D.C. Court of Appeals, where, national security fundamentalism reigns supreme and the Executive’s powers as “Commander-in-Chief” can be exercised with little, if any, real check; arguably leading to judicial abstention in cases involving national security. The consequences of the Kiyemba decision potentially continue today, for example, with passage of the National Defense Authorization Act of 2012,246 which President Obama signed, with reservations, into law on December 31, 2011.247 This defense authorization bill contains detainee provisions that civil liberties groups and human rights advocates have strongly opposed.248 The bill’s supporters strenuously objected to the assertion that these provisions authorize the indefinite detention of U.S. citizens.249 In signing the bill, President Obama later issued a statement to the effect that although he had reservations about some of the provisions, he “vowed to use discretion when applying” them.250 Of course, that does not mean another administration would do the same, especially if courts abstain from their role as protectors of individual rights. In the years after 9/11, the Supreme Court asserted its role incrementally, slowly entering into the debate about the rights of enemy combatant detainees. This was a “somewhat novel role” for the Court.251 Unsurprisingly, in so doing, the Court’s intervention “strengthened detainee rights, enlarged the role of the judiciary, and rebuked broad assertions of executive power.”252 Also unsurprisingly, the Court’s decisions in this arena “prompted strong reactions from the other two branches.”253 This may be so because, as Chief Justice Rehnquist noted, the Court had, in the past, recognized the primacy of liberty interests only in quieter times, after national emergencies had terminated or perhaps before they ever began.254 However, since the twentieth century, wartime has been the “normal state of affairs.”255 If perpetual war is the new “normal,” the political branches likely will be in a permanent state of alert. Thus, it remains for the courts to exercise vigilance and courage about protecting individual rights, even if these assertions of judicial authority come as a surprise to the political branches of government.256 But courts, like any other institution, are susceptible to being swayed by influences external to the law. Joseph Margulies and Hope Metcalf make this very point in a 2011 article, noting that much of the post-9/11 scholarship mirrors this country’s early wartime cases and “envisions a country that veers off course at the onset of a military emergency but gradually steers back to a peacetime norm once the threat recedes, via primarily legal interventions.”257 This model, they state, “cannot explain a sudden return to the repressive wilderness just at the moment when it seemed the country had recovered its moral bearings.”258 Kiyemba is very much a return to the repressive wilderness. In thinking about the practical and political considerations that inevitably play a role in judicial decisionmaking (or non-decisionmaking, as the case may be), I note that the Court tends to be reluctant to decide constitutional cases if it can avoid doing so, as it did in Kiyemba. Arguably, this doctrine of judicial abstention is tied to concerns of institutional viability, in the form of public perception, and to concerns about respecting the separation of powers.259 But, as Justice Douglas once famously noted, when considering the separation of powers, the Court should be mindful of Chief Justice Marshall’s admonition that “it is a constitution we are expounding.”260 Consequently, “[i]t is far more important [for the Court] to be respectful to the Constitution than to a coordinate branch of government.”261 And while brave jurists have made such assertions throughout the Court’s history, the Court is not without some pessimism about its ability to effectively protect civil liberties in wartimes or national emergencies. For example, in Korematsu—one of the worst examples of judicial deference in times of crisis—Justice Jackson dissented, but he did so “with explicit resignation about judicial powerlessness,” and concern that it was widely believed that “civilian courts, up to and including his own Supreme Court, perhaps should abstain from attempting to hold military commanders to constitutional limits in wartime.”262 Significantly, even when faced with the belief that the effort may be futile, Justice Jackson dissented. As I describe in the following section, that dissent serves a valuable purpose. But, for the moment, I must consider the external influences on the court that resulted in that feeling of judicial futility.

#### Two Scenarios

#### First, the Africa Pivot

The Atlantic 10/6 “Are We Pivoting to Africa Rather Than Asia?” http://www.theatlantic.com/international/archive/2013/10/are-we-pivoting-to-africa-rather-than-asia/280318/

This weekend, the United States conducted two raids against militant Islamists in Tripoli, Libya and Barawe, Somalia. Though the action in Tripoli appeared to be more successful—FBI and CIA agents nabbed Abu Anas al-Liby, a suspected leader of Al Qaeda—the significance of both raids lies less in their immediate success and more in their implications for American involvement in Africa.¶ What was the purpose of the raids?¶ The raid in Libya this Saturday culminated in the arrest of al-Liby, who was on the most wanted terrorists list for his involvement in the 1998 bombings of American Embassies in Kenya and Tanzania.¶ Less official information is available concerning the purpose of the raid in Somalia. However, observers have suggested that this raid was tasked with the bringing the organizers of the recent Westgate Mall assault to justice. American government officials have confirmed that SEAL Team 6 was deployed to Barawe, Somalia, where they engaged in a firefight with militants before aborting the mission. No American casualties have been reported and it is estimated that seven people were killed in the exchange.¶ What is the significance of the raids for American military involvement in Africa?¶ North Africa has long seen a strong American military presence due to its proximity to America’s strategic partners in the Middle East, while East Africa cooperated with the United States in its efforts to stabilize Somalia, until the infamous Black Hawk down fiasco. The raids conducted this weekend suggest that the importance and nature of American involvement in the region is quickly changing.¶ Under the auspices of United States Africa Command, or AFRICOM, which has only been operating since 2008, American military posts in Africa may witness a change in mandate, in which they are more frequently understood as being on the frontlines of counter-terrorism policy, and less as bases from which to organize and launch action in the Arabian Peninsula and the Middle East. Though current AFRICOM missions are largely based on cooperative relationships and many of their programs emphasize the training of local participants, the change in the continent’s strategic importance may be linked to a rise in the sort of unilateral counter-terrorism policy undertaken this weekend.¶ What does this mean for American foreign policy?¶ Frequently relegated to the back-burner of American foreign policy, Africa is indeed rising in policy deliberations in Washington. This summer, President Obama made official visits to Senegal, South Africa, and Tanzania, with the aim of fostering political and economic partnerships with these countries. The cultivation of these political relationships and the increased military activity in Africa may suggest that an “African shift” will displace the “Asian pivot.”

#### Guarantees instability and war in the region – de-legitimizes governments and empowers terrorist networks

Muhammad 10/11 (2013; Jehron – freelance writer, expert in African affairs) “U.S. Gov't Destabilizing Africa through AFRICOM” http://www.finalcall.com/artman/publish/World\_News\_3/article\_100866.shtml

(FinalCall.com) - Thanks to the U.S. and its proxy-led interventions, instability in North Africa and the Middle East has spread to the African continent.¶ Violence, including the longstanding conflict (you might remember “Black Hawk Down”) in Somalia has spread to include Ethiopia, Uganda and most recent victim Kenya.¶ While global concern focuses on poison gas attacks in Syria, Iran’s alleged creation of nuclear weapons, and the coup of the first democratically- elected Egyptian president, “Libya has plunged unnoticed into its worst political and economic crisis since the defeat of Gadhafi two years ago,” according to The Independent, a UK based newspaper.¶ Not only have militias taken over the Libyan countryside and Libyan crude output gone down to a trickle, The Independent reported, “government authority is disintegrating in all parts of the country putting in doubt claims by American, British and French politicians that NATO’s military action in Libya in 2011 was an outstanding example of a successful foreign military intervention, which should be repeated in Syria.”¶ Caught off guard by America’s regime change initiative in Libya and instability it caused in places like Mali, the continent-wide African Union has yet to confront the growing footprint of AFRICOM, the U.S. Africa Command.¶ Why? It may have to do with AFRICOM’s ability to hide the real purpose of its presence in Africa.¶ According to TomDispatch.com, America’s military command “has been slipping, sneaking, creeping into Africa, deploying ever more facilities in ever more countries—and in a fashion so quiet, so covert, that just about no American (and African for that matter) has any idea this is going on.”¶ It could also be that the AU voice is muzzled since external donors (U.S. and European) funded African Union program costs in 2013 to the tune of $155.3 million or 56 percent of the total AU budget. The AU member states, according to Pambazuka.org, fund mostly operational costs, $122.8 million or 44 percent of the budget. Of this only $5.3 million “goes toward programs of the AU while 96 percent goes to operational costs,” said authors Janah Ncube and Achieng Maureen Akena.¶ Outgoing AU chairman Dr. Ping, during his last address to the executive council in 2012, said the AU has “little legitimacy in claiming marginalization in global politics when it is unable to be self-sustaining and depends on donors to support its programs,” reported Pambazuka.With the winding down of U.S. involvement in Afghanistan, ending the war in Iraq, and President Obama’s visit to Asia suggesting a rebalancing of U.S. military resources, AFRICOM’s increasing military presence, “out of the public earshot,” suggests “Africa is the battlefield of tomorrow, today,” wrote TomDispatch’s managing editor Nick Turse.¶ The increasing instability that is in the Middle East and North Africa is destined to plague the continent. The African Union, this author feels, should raise its voice wherever U.S. and European forces or proxies have intervened militarily. The interventions are deepening problems in nations and regions, creating refugees, increasing militia groups and creating more areas awash in weapons.¶ In the post 9/11 era and in the wake of U.S. “stability” operations in Africa which only accelerated during the Obama years, “militancy has spread, insurgent groups have proliferated, allies have faltered or committed abuses, terrorism has increased, the number of failed states has risen, and the continent has become more unsettled,” wrote Turse.¶ The recent massacre in a Kenyan suburb, inside an upscale shopping mall in Nairobi’s affluent Westlands area, is a case in point. Hooded gunmen claiming to be members of Al-Shaabab took responsibility for the attack in retaliation for Kenya’s role in the war against militants in Somalia. At least 72 people were killed.¶ The Somali group Al-Shaabab, according to news reports, “vowed in late 2011 to carry out a large-scale attack in Nairobi in retaliation for Kenya’s sending of troops into Somalia to fight” Islamic insurgents. AMISOM, the U.S. and European funded African Union Mission in Somalia, is to a large extent responsible for Kenya’s search and destroy incursions inside Somalia.¶ AMISOM has also used Ugandan troops. In 2010 over 60 persons, in three different suicide bomb attacks, were killed while watching the World Cup in Uganda. Al-Shabaab claimed responsibility. Yusef Sheikh Issa, an Al Shabaab commander in Somalia told the Associated Press, “Uganda is one of our enemies. Whatever makes them cry, makes us happy.”¶ If one looks deeply into what brought about the rise of Al-Shabaab you discover a U.S.-supported invasion by Ethiopia.¶ Ethiopia—following in the footsteps of the U.S.-sponsored Joint Operations Command that included the CIA—invaded Somalia under the cover of hunting for persons responsible for the bombings of U.S. embassies in Kenya and Tanzania. This invasion was the final nail in the coffin of the Islamic Courts Union, which was responsible for the closest Somalia has come to a stable government in recent history.¶ If a picture is worth a thousand words, what’s a map worth? Take the one created by TomDispatch that documents U.S. military outposts, construction, security cooperation, and deployments in Africa. “It looks,” according to Turse, “like a field of mushrooms after a monsoon.” U.S. current military involvement is found in “no fewer than 49 African nations,” he said.¶ President George W. Bush announced in 2007, the establishment of AFRICOM, a unified command for U.S. military forces in Africa. He said AFRICOM was being launched for purely peaceful reasons.¶ “Military aid and questionable trade” have always been the “the twin pillars” of America’s involvement in Africa.¶ “Imperial acquisition (or the acquisition of natural resources),” according to Crossedcrocodiles.com, “masquerades as humanitarian aid and manifests as the militarization of the continent through the U.S. Africa Command, AFRICOM.”¶ The late President Gadhafi utilized Libya’s oil wealth to block the spread of AFRICOM. With no deterrent equal to Gadhafi , the increased instability on the continent will continue.

#### Results in global nuclear war

Deutsch 2[Founder of the Rabid Tiger Project, A Political Risk Consulting and Related Research Firm (Rapid Tiger Project, http://www.rabidtigers.com/rtn/newsletterv2n9.html]

The Rabid Tiger Project believes that a nuclear war is most likely to start in Africa. Civil wars in the Congo (the country formerly known as Zaire), Rwanda, Somalia and Sierra Leone, and domestic instability in Zimbabwe, Sudan and other countries, as well as occasional brushfire and other wars (thanks in part to "national" borders that cut across tribal ones) turn into a really nasty stew. We've got all too many rabid tigers and potential rabid tigers, who are willing to push the button rather than risk being seen as wishy-washy in the face of a mortal threat and overthrown. Geopolitically speaking, Africa is open range. Very few countries in Africa are beholden to any particular power. South Africa is a major exception in this respect - not to mention in that she also probably already has the Bomb. Thus, outside powers can more easily find client states there than, say, in Europe where the political lines have long since been drawn, or Asia where many of the countries (China, India, Japan) are powers unto themselves and don't need any "help," thank you. Thus, an African war can attract outside involvement very quickly. Of course, a proxy war alone may not induce the Great Powers to fight each other. But an African nuclear strike can ignite a much broader conflagration, if the other powers are interested in a fight.

#### Second scenario is flashpoints in East Asia and with North Korea

Symonds 4-5-13 [Peter, leading staff writer for the World Socialist Web Site and a member of its International Editorial Board. He has written extensively on Middle Eastern and Asian politics, contributing articles on developments in a wide range of countries, “Obama’s “playbook” and the threat of nuclear war in Asia,” http://www.wsws.org/en/articles/2013/04/05/pers-a05.html]

The Obama administration has engaged in reckless provocations against North Korea over the past month, inflaming tensions in North East Asia and heightening the risks of war. Its campaign has been accompanied by the relentless demonising of the North Korean regime and claims that the US military build-up was purely “defensive”. However, the Wall Street Journal and CNN revealed yesterday that the Pentagon was following a step-by-step plan, dubbed “the playbook”, drawn up months in advance and approved by the Obama administration earlier in the year. The flights to South Korea by nuclear capable B-52 bombers on March 8 and March 26, by B-2 bombers on March 28, and by advanced F-22 Raptor fighters on March 31 were all part of the script.¶ There is of course nothing “defensive” about B-52 and B-2 nuclear strategic bombers. The flights were designed to demonstrate, to North Korea in the first instance, the ability of the US military to conduct nuclear strikes at will anywhere in North East Asia. The Pentagon also exploited the opportunity to announce the boosting of anti-ballistic missile systems in the Asia Pacific and to station two US anti-missile destroyers off the Korean coast.¶ According to CNN, the “playbook” was drawn up by former defence secretary Leon Panetta and “supported strongly” by his replacement, Chuck Hagel. The plan was based on US intelligence assessments that “there was a low probability of a North Korean military response”—in other words, that Pyongyang posed no serious threat. Unnamed American officials claimed that Washington was now stepping back, amid concerns that the US provocations “could lead to miscalculations” by North Korea.¶ However, having deliberately ignited one of the most dangerous flashpoints in Asia, there are no signs that the Obama administration is backing off. Indeed, on Wednesday, Defence Secretary Hagel emphasised the military threat posed by North Korea, declaring that it presented “a real and clear danger”. The choice of words was deliberate and menacing—an echo of the phrase “a clear and present danger” used to justify past US wars of aggression.¶ The unstable and divided North Korean regime has played directly into the hands of Washington. Its bellicose statements and empty military threats have nothing to do with a genuine struggle against imperialism and are inimical to the interests of the international working class. Far from opposing imperialism, its Stalinist leaders are looking for a deal with the US and its allies to end their decades-long economic blockade and open up the country as a new cheap labour platform for global corporations.¶ As the present standoff shows, Pyongyang’s acquisition of a few crude nuclear weapons has in no way enhanced its defence against an American attack. The two B-2 stealth bombers that flew to South Korea could unleash enough nuclear weapons to destroy the country’s entire industrial and military capacity and murder even more than the estimated 2 million North Korean civilians killed by the three years of US war in Korea in the 1950s.¶ North Korea’s wild threats to attack American, Japanese and South Korean cities only compound the climate of fear used by the ruling classes to divide the international working class—the only social force capable of preventing war.¶ Commentators in the international media speculate endlessly on the reasons for the North Korean regime’s behaviour. But the real question, which is never asked, should be: why is the Obama administration engaged in the dangerous escalation of tensions in North East Asia? The latest US military moves go well beyond the steps taken in December 2010, when the US and South Korean navies held provocative joint exercises in water adjacent to both North Korea and China.¶ Obama’s North Korea “playbook” is just one aspect of his so-called “pivot to Asia”—a comprehensive diplomatic, economic and military strategy aimed at ensuring the continued US domination of Asia. The US has stirred up flashpoints throughout the region and created new ones, such as the conflict between Japan and China over the disputed Senkaku/Diaoyu islands in the East China Sea. Obama’s chief target is not economically bankrupt North Korea, but its ally China, which Washington regards as a dangerous potential rival. Driven by the deepening global economic crisis, US imperialism is using its military might to assert its hegemony over Asia and the entire planet.¶ The US has declared that its military moves against North Korea are designed to “reassure” its allies, Japan and South Korea, that it will protect them. Prominent figures in both countries have called for the development of their own nuclear weapons. US “reassurances” are aimed at heading off a nuclear arms race in North East Asia—not to secure peace, but to reinforce the American nuclear monopoly.¶ The ratcheting-up of tensions over North Korea places enormous pressures on China and the newly-selected leadership of the Chinese Communist Party. An unprecedented public debate has opened up in Beijing over whether or not to continue to support Pyongyang. The Chinese leadership has always regarded the North Korean regime as an important buffer on its northeastern borders, but now fears that the constant tension on the Korean peninsula will be exploited by the US and its allies to launch a huge military build-up.¶ Indeed, all of the Pentagon’s steps over the past month—the boosting of anti-missile systems and practice runs of nuclear capable bombers—have enhanced the ability of the US to fight a nuclear war against China. Moreover, the US may not want to provoke a war, but its provocations always run the risk of escalating dangerously out of control. Undoubtedly, Obama’s “playbook” for war in Asia contains many more steps beyond the handful leaked to the media. The Pentagon plans for all eventualities, including the possibility that a Korean crisis could bring the US and China head to head in a catastrophic nuclear conflict.

#### Korea war draws in every great power.

Stares and Wit 9 (Paul B., General John W. Vessey senior fellow for conflict prevention and director of the center for preventive action of CFR and Joel S., adjunct senior research fellow at the Weather head East Asia Institute at Columbia University and a visiting fellow at the US Korea Institute at John Hopkins, “Preparing for Sudden Change in North Korea”)

These various scenarios would present the United States and the neighboring states with challenges and dilemmas that, depending on how events were to unfold, could grow in size and complexity. Important and vital interests are at stake for all concerned. North Korea is hardly a normal country located in a strategic backwater of the world. As a nuclear weapons state and exporter of ballistic missile systems, it has long been a serious proliferation concern to Washington. With one of the world’s largest armies in possession of huge numbers of long-range artillery and missiles, it can also wreak havoc on America’s most important Asian allies––South Korea and Japan––both of which are home to large numbers of American citizens and host to major U.S. garrisons committed to their defense. Moreover, North Korea abuts two great powers—China and Russia––that have important interests at stake in the future of the peninsula. That they would become actively engaged in any future crisis involving North Korea is virtually guaranteed. Although all the interested powers share a basic interest in maintaining peace and stability in northeast Asia, a major crisis from within North Korea could lead to significant tensions and––as in the past–– even conflict between them. A contested or prolonged leadership struggle in Pyongyang would inevitably raise questions in Washington about whether the United States should try to sway the outcome.5 Some will almost certainly argue that only by promoting regime change will the threat now posed by North Korea as a global proliferator, as a regional menace to America’s allies, and as a massive human rights violator, finally disappear. Such views could gain some currency in Seoul and even Tokyo, though it seems unlikely. Beijing, however, would certainly look on any attempt to promote a pro-American regime in Pyongyang as interference in the internal affairs of a sovereign state and a challenge to China’s national interests. This and other potential sources of friction could intensify should the situation in North Korea deteriorate. The impact of a severe power struggle in Pyongyang on the availability of food and other basic services could cause tens and possibly hundreds of thousands of refugees to flee North Korea. The pressure on neighboring countries to intervene with humanitarian assistance and use their military to stem the flow of refugees would likely grow in these circumstances. Suspicions that the situation could be exploited by others for political advantage would add to the pressure to act sooner rather than later in a crisis. China would be the most likely destination for refugees because of its relatively open and porous border; its People’s Liberation Army (PLA) has reportedly developed contingency plans to intervene in North Korea for possible humanitarian, peacekeeping, and “environmental control” missions.6 Besides increasing the risk of dangerous military interactions and unintended escalation in sensitive borders areas, China’s actions would likely cause considerable consternation in South Korea about its ultimate intentions toward the peninsula. China no doubt harbors similar fears about potential South Korean and American intervention in the North.

#### Asian war goes nuclear---no defense---interdependence and squo institutions don’t check

Mohan 13, C. Raja distinguished fellow at the Observer Research Foundation in New Delhi, March 2013, Emerging Geopolitical Trends and Security in the Association of Southeast Asian Nations, the People’s Republic of China, and India (ACI) Region,” background paper for the Asian Development Bank Institute study on the Role of Key Emerging Economies, http://www.iadb.org/intal/intalcdi/PE/2013/10737.pdf

Three broad types of conventional conflict confront Asia. The first is the prospect of war between great powers. Until a rising PRC grabbed the attention of the region, there had been little fear of great power rivalry in the region. The fact that all major powers interested in Asia are armed with nuclear weapons, and the fact that there is growing economic interdependence between them, has led many to argue that great power conflict is not likely to occur. Economic interdependence, as historians might say by citing the experience of the First World War, is not a guarantee for peace in Asia. Europe saw great power conflict despite growing interdependence in the first half of the 20th century. Nuclear weapons are surely a larger inhibitor of great power wars. Yet we have seen military tensions build up between the PRC and the US in the waters of the Western Pacific in recent years. The contradiction between the PRC’s efforts to limit and constrain the presence of other powers in its maritime periphery and the US commitment to maintain a presence in the Western Pacific is real and can only deepen over time.29 We also know from the Cold War that while nuclear weapons did help to reduce the impulses for a conventional war between great powers, they did not prevent geopolitical competition. Great power rivalry expressed itself in two other forms of conflict during the Cold War: inter-state wars and intra-state conflict. If the outcomes in these conflicts are seen as threatening to one or other great power, they are likely to influence the outcome. This can be done either through support for one of the parties in the inter-state conflicts or civil wars. When a great power decides to become directly involved in a conflict the stakes are often very high. In the coming years, it is possible to envisage conflicts of all these types in the ACI region. ¶ Asia has barely begun the work of creating an institutional framework to resolve regional security challenges. Asia has traditionally been averse to involving the United Nations (UN) in regional security arrangements. Major powers like the PRC and India are not interested in “internationalizing” their security problems—whether Tibet; Taipei,China; the South China Sea; or Kashmir—and give other powers a handle. Even lesser powers have had a tradition of rejecting UN interference in their conflicts. North Korea, for example, prefers dealing with the United States directly rather than resolve its nuclear issues through the International Atomic Energy Agency and the UN. Since its founding, the involvement of the UN in regional security problems has been rare and occasional.¶ The burden of securing Asia, then, falls squarely on the region itself. There are three broad ways in which a security system in Asia might evolve: collective security, a concert of major powers, and a balance of power system.30 Collective security involves a system where all stand for one and each stands for all, in the event of an aggression. While collective security systems are the best in a normative sense, achieving them in the real world has always been difficult. A more achievable goal is “cooperative security” that seeks to develop mechanisms for reducing mutual suspicion, building confidence, promoting transparency, and mitigating if not resolving the sources of conflict. The ARF and EAS were largely conceived within this framework, but the former has disappointed while the latter has yet to demonstrate its full potential. ¶ A second, quite different, approach emphasizes the importance of power, especially military power, to deter one’s adversaries and the building of countervailing coalitions against a threatening state. A balance of power system, as many critics of the idea point out, promotes arms races, is inherently unstable, and breaks down frequently leading to systemic wars. There is growing concern in Asia that amidst the rise of Chinese military power and the perception of American decline, many large and small states are stepping up their expenditure on acquiring advanced weapons systems. Some analysts see this as a structural condition of the new Asia that must be addressed through deliberate diplomatic action. 31 A third approach involves cooperation among the great powers to act in concert to enforce a broad set of norms—falling in between the idealistic notions of collective security and the atavistic forms of balance of power. However, acting in concert involves a minimum level of understanding between the major powers. The greatest example of a concert is the one formed by major European powers in the early 18th century through the Congress of Vienna after the defeat of Napoleonic France. The problem of adapting such a system to Asia is the fact that there are many medium-sized powers who would resent any attempt by a few great powers to impose order in the region.32 In the end, the system that emerges in Asia is likely to have elements of all the three models. In the interim, though, there are substantive disputes on the geographic scope and the normative basis for a future security order in Asia.

#### Suspension clause solves.

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!”

In the wake of 9/11 and since the start of the War on Terror, the government – including the Obama administration – has justified its self-expanded powers with the security argument. The government, its supporters argue, requires such powers in order to adequately protect the American people. In other words, the President did not seek out expansion of powers because he wanted to; no, it was for the safety and wellbeing of the American people. To say the least, it is a difficult argument – that, we, the government, require greater discretion for your, the citizen’s, own good – to outright reject. After all, who doesn’t wish to feel safe, to feel protected, and well looked after? Are we to say, “No thanks, I’ll keep my freedom and take my chances with the terrorists.” Sure, some will; but the majority will not. Exploding bombs, collapsing skyscrapers, and the deaths of those we know are immediately cognizable and evoke strong emotional responses. Liberties, separation-of-powers concerns, on the other hand, are far less tangible and far more abstract. Yes, everybody can rally behind freedom as an idea; but when faced with the choice between continual fear and more restricted freedoms, most prefer to feel safe than sorry. As a result, our politics are skewed a certain way. As the greater public continually says, “Better safe than sorry,” in turn the government justifies its actions with “Better safe than sorry, that’s what America wants.” Put bluntly, this is not the case where the status quo is acceptable. We are not dealing with a situation in which we could or could not change – in which the wheel ain’t broke so don’t fix it. Preventive detention in the aftermath of emergency has time and time again shown itself to be abusive when allowed to be under the sole discretion of the executive. And in many ways, the practice is incompatible with our enduring values of freedom, transparency, due process, and minority protections. Remember, absolute power corrupts absolutely. Bruce Ackerman attempted with his emergency constitution to place it beneath the purview of the legislative branch, but as we have shown, such a solution does not adequately address the fundamental problem of preventive detention: mistaken imprisonment. Oftentimes, preventive paradigms cast broad dragnets which subsequently result in the imprisonment of countless innocents – that is, individuals of a targeted minority group, e.g. persons of Arab ancestry or Muslim faith. The national security theorists, the Jack Bauer enthusiasts, have tried to convince us that increased security is all we require in times of emergency – that everything else is secondary. Exceptional times call for exceptional measures. Rights can be recovered, but can lives? Can nations? The reality is, however, the terrorist threat is not nearly as grave as these security apologists make it out to be. Yes, a terrorist attack is undoubtedly tragic and may even result in the loss of thousands of lives; nonetheless, it is not capable of toppling or overtaking governments. Isolated terrorist attacks, in short, are not existential threats. Too often, the safety – bought at the price of liberty – the government offers is illusory. As Steven T. Wax observes, “The searches of baby strollers at airports does little or nothing for safety in the air and nothing at all for the safety of trains, trucks, shipping, and chemical and power plants.”20 We need to be smart about our security and not buy into the fallacy of the more intrusive security measures automatically leads to greater safety. Not to mention, as has been shown throughout this paper, rounding up people based on paranoia, profiling, or any other arbitrary reason, not only does nothing to help our security, but also harms us insofar as we fail to differentiate between the legitimate and the illegitimate. Indeed, such actions damage our integrity as a country that believes in the maxim “innocent until proven guilty,” as a country that believes there is more to life than feeling safe and secure in our physical and material being. We need to instead ask ourselves exactly how much freedom we are willing to give up in the name of increased security? We must keep in mind the long-term costs, and not just the short-term benefits, of granting our president, our law enforcement, and our military freer and freer reign. Small sacrifices inevitably accumulate, and subsequently can morph into much bigger sacrifices than we are actually willing to give up. Furthermore, we owe those harmed – those wrongly detained – better than just monetary compensation. They deserve more than a “sorry” or an “our mistake, here’s some cash to make you whole.” They warrant, at the very least, an apology which vows this is the last time we make this recurring mistake: “We sincerely apologize for your wrongful detention, we will do our very best to make sure this does not happen again.” And so, in arguing for a framework in which the Suspension Clause is the absolute minimum in the arena of preventive detention, we remain the most true to our American ideals.21 It is then, during times of crisis and emergency, the task of the judiciary – the most politically-insulated branch of government – to uphold the writ of habeas corpus in its constitutional form, i.e. the Suspension Clause, and thereby set the absolute minimum in times of exigency. It is the responsibility of judges to force the executive to justify his actions in a court of law as well as the court – domestic and international – of public opinion. Most importantly, it is the time-honored duty of this nation’s legal guardians to ensure that the ideals which informed our founding are not lost. In more colloquial terms, it is up to our judges – through the vehicle of habeas corpus – to be the good man in the storm. After all, in the age of terror, “[i]f anybody destroys our legacy of freedom, it will be us.”22 Thus, the upkeep and preservation of our freedom, our values and beliefs, is our responsibility – and ours alone. Indeed, by the time Al Maqaleh, or another case like it, comes before the Supreme Court of the United States, we – the people, the lawyers, the judges – should be prepared to not simply enforce the new habeas emergency paradigm by extending the writ to all those detained by the United States, but also to do better, with each subsequent generation, as a nation dedicated to an enduring legacy of freedom.

#### court ruling triggers observer effect – shifts presidential policy to favor court rulings to save face

Deeks 10/21 (2013, Ashley – Law Prof @ U of VA) “Courts Can Influence National Security Without Doing a Single Thing” http://www.newrepublic.com/article/115270/courts-influence-national-security-merely-watching

While courts rarely intervene directly in national security disputes, they nevertheless play a significant role in shaping Executive branch security policies. Let’s call this the “observer effect.” Physics teaches us that observing a particle alters how it behaves. Through psychology, we know that people act differently when they are aware that someone is watching them.¶ In the national security context, the “observer effect” can be thought of as the impact on Executive policy-setting of pending or probable court consideration of a specific national security policy. The Executive’s awareness of likely judicial oversight over particular national security policies—an awareness that ebbs and flows—plays a significant role as a forcing mechanism. It drives the Executive to alter, disclose, and improve those policies before courts actually review them.¶ Take, for example, U.S. detention policy in Afghanistan. After several detainees held by the United States asked U.S courts to review their detention, the Executive changed its policies to give detainees in Afghanistan a greater ability to appeal their detention—a change made in response to the pending litigation and in an effort to avoid an adverse decision by the court. The Government went on to win the litigation. A year later, the detainees re-filed their case, claiming that new facts had come to light. Just before the government’s brief was due in court, the process repeated itself, with the Obama Administration revealing another rule change that favored the petitioners. Exchanges between detainees and their personal representatives would be considered confidential, creating something akin to the attorney-client privilege. Thus we see the Executive shifting its policies in a more rights-protective direction without a court ordering it to do so.¶ Other examples of the observer effect abound. In 2005, the Executive decided to reveal the processes by which it negotiated “diplomatic assurances” to return Guantanamo detainees to foreign countries, in an effort to fend off court decisions delaying those returns. The Government might well have won in court even without these revelations – the precedents suggested that it would have—but it hedged its bets by persuading the courts that it had in place a thorough process to ensure that the United States did not expose detainees to likely mistreatment in the receiving country.¶ Here’s another example: in the face of some adverse lower court decisions (which the Government ultimately won on appeal), the Government curtailed its own use of the “state secrets” privilege. That’s a privilege the government may invoke when a lawsuit raises legal challenges that cannot be proven or defended without disclosing information that would jeopardize U.S. national security. And the Government altered the policies pursuant to which it uses secret evidence to deport aliens, due in part to critical language in court decisions, even though the Government likely would have won the cases on the merits.¶ When should we expect to see the observer effect? In general, we should look for three things. First, there must be a triggering event. This ranges from the filing of a non-frivolous case, to some indication from a court that it may reach the merits of a case (i.e., ordering briefing on an issue, or rejecting the government’s motion for summary judgment), to the court’s consideration of the issue on the merits. The observer effect most clearly comes into play when a court becomes seized with a national security case after an extended period of judicial non-involvement in security issues, such as when federal courts started to consider the type of person the Executive lawfully may detain on the battlefield. The observer effect then kicks in to influence the Executive’s approach to the policy being challenged in the triggering case, as well as to future (or other pre-existing) Executive policies in the vicinity of that triggering case.¶ Second, future uncertainty plays a critical role in eliciting the observer effect. In some cases, the question for the Executive will be whether a court will conclude that it can or should exercise jurisdiction over a case. In other cases, Executive uncertainty will exist when it is not obvious what law will govern the dispute at issue, or where there is little precedent to guide the courts in resolving the dispute. It is this uncertainty that leaves the Executive with doubt about whether it will win the case, and that creates incentives for the Executive to alter its policies in anticipation of litigation or its outcome. After all, there are real advantages to the Executive in retaining the power to shape these national security policies, even under a potentially watchful eye of the courts.¶ The third factor that helps secure the observer effect’s operation is the likelihood of future litigation on related issues. If a court declines to defer to the Executive in a particular case, that decision is unlikely to create an observer effect if the Executive has confidence that the factual and legal questions at issue in that case will not arise again. In contrast, when the Executive perceives that a set of policies is likely to come under sustained litigation (and thus under the potential oversight of multiple judges over time), it is more likely to concertedly review—and alter—those policies.¶ When these three elements are present, the observer effect is likely to come into play. How does the Executive react? The Executive attempts to maximize the total value of two elements: a sufficiently security-focused policy and unilateral control over national security policymaking. To achieve this goal, the Executive often is willing to cede some ground on the first element to retain the second element. The Executive therefore often responds to the presence of these three elements by shifting its policy to a position that gives it greater confidence that the courts would uphold it if presented with a challenge to that policy. This does not mean that it will establish or revise its policy to a point at which it has full confidence that a court will deem the policy acceptable. Instead, the Executive has strong incentives to take a gamble: all it needs to do is establish a policy that is close enough to what a court would find acceptable that it alters the court’s calculation about whether to engage on the merits. It is, in short, a governmental game of chicken.¶ I don’t want to suggest that a potentially adverse decision by a court is the sole driver of Executive policy-making. While courts may be one important audience for national security policies, there are many other audiences, including Congress, the general public, the media, and elites. Proving what causes the Executive to select or modify a particular policy is notoriously difficult because many factors and influences usually coalesce to produce government policy. But important pressures are brought to bear by an increased Executive awareness of possible court intervention, especially because courts have the power to rewrite national security policies in a way that members of the public and the media do not.¶ One important lesson to draw from the observer effect is that it matters what signals the courts and the Executive send to each other and how they send them. When courts hear cases on the merits or when Justices issue statements related to denials of certiorari, they have the opportunity to initiate a dialogue with the Executive—whether or not the courts ultimately defer to the Executive’s position. That dialogue allows the courts to gesture at acceptable and unacceptable policy choices, while the Executive gauges which policies to adopt and how large of a “cushion” to build into those policies to avoid future adverse decisions. For instance, when Justice Kennedy (along with two other Justices) concurred in the denial of certiorari in a case called Padilla v. Hanft, his concurrence implied that the Court would step in to hear the case if the Executive, which had shifted Jose Padilla from military custody to civilian custody, re-detained Padilla as an enemy combatant. This allowed the Court to send a strong signal to the Executive about a national security policy that the Court would have a hard time upholding.¶ The observer effect has real-world implications for national security policy changes on the horizon. For example, if Congress attempts to establish judicial oversight of the Executive branch’s targeted killing program, it is useful to understand the nuanced ways in which the Executive can and does respond to potential—but somewhat uncertain—judicial oversight and decisions, even those that stop short of adjudicating issues on the merits. In shedding light on the Executive/judicial relationship, the observer effect should inform Congressional considerations in crafting such a court.¶ It is true that courts have decided only a limited number of substantive issues in the national security arena, notwithstanding the continuing proliferation of litigation. However, important substantive policy changes have occurred since 2002—changes due not to the direct sunlight of court orders, but to the shadow cast by the threat or reality of court decisions on Executive policymaking in related areas of activity. Court decisions, particularly in the national security realm, have a wider ripple effect than many recognize because the Executive has robust incentives to try to preserve security issues as its sole domain. In areas where the observer effect shifts Executive policies closer to where courts likely would uphold them, demands for deference by the Executive turn out to be more modest than they might seem if considered from the isolated vantage of a single case at a fixed point in time. It remains critical for courts to police the outer bounds of Executive national security policies, but they need not engage systematically to have a powerful effect on the shape of those policies and, consequently, the constitutional national security order.

### 1AC Leadership

#### Scenario 2 is leadership – two internal links

#### First is rendition – US practices destroy international coalitions and undermine warfighting

Biden ‘7 (Speaking for US Senate Committee on Foreign Relations) “EXTRAORDINARY RENDITION, EXTRATERRITORIAL DETENTION, AND TREATMENT OF ¶ DETAINEES: RESTORING OUR MORAL CREDIBILITY AND STRENGTHENING OUR ¶ DIPLOMATIC STANDING” http://www.gpo.gov/fdsys/pkg/CHRG-110shrg40379/html/CHRG-110shrg40379.htm

Rendition is the practice of detaining a terrorist ¶ operative in a foreign country and transferring him or her to ¶ the United States or to another foreign country. It has proved ¶ to be an effective way to take terrorists off the street and ¶ collect, on occasion, some valuable information.¶ But the U.S. Government's use of rendition has been ¶ extremely controversial. Foreign governments have criticized ¶ the practice because it operates outside the rule of law and ¶ has allegedly been used to transfer suspects to countries that ¶ torture or mistreat them or to seek extraterritorial prisons, ¶ in countries where we have listed the countries as abusing the ¶ human rights of their fellow citizens.¶ As a result, the current rendition program has taken a toll ¶ on the relationships with some of our closest foreign partners. ¶ Consider the following: Italy has indicted 26 Americans for ¶ their alleged role in a rendition. Germany has issued arrest ¶ warrants for an additional 13 United States intelligence ¶ officers. The Canadian Government Commission has censured the ¶ United States for rendering a Canadian-Syrian dual-citizen to ¶ Syria, where he was allegedly tortured. The Counsel of Europe ¶ and the European Union have each issued reports critical of the ¶ United States Government's rendition program and the European ¶ countries' involvement in, or complicity with, that program.¶ Sweden and Switzerland have each initiated investigations ¶ of us, as well. Just yesterday, the United Kingdom issued a ¶ report on the United States rendition program, concluding that ¶ it would have, ``serious implications,'' for future ¶ intelligence relationships between the United States and the ¶ United Kingdom, one of our most important partners.¶ Rendition as currently practiced, in my view, is ¶ undermining our moral credibility and standing abroad and, more ¶ importantly, I guess in the minds of the real politik crowd of ¶ which I occasionally consider myself one, weakening, weakening ¶ the coalition with foreign governments, the very governments ¶ that we need if we're going to be able to combat international ¶ terrorism. We also put our intelligence officers at risk by not ¶ providing them with clear guidelines to govern their conduct.¶ As one of the witnesses today recently wrote, ``Successful ¶ counterterrorism depends in part on convincing the world that ¶ there is no moral equivalency between the terrorist and the ¶ government they oppose. When the United States muddies those ¶ waters, this distinction begins to blur.''¶ More ominous, the controversial aspects of the U.S. ¶ Government use of renditions have been used by propagandists ¶ and recruiters to fuel and sustain international terrorist ¶ organizations with a constant stream of new recruits. That's ¶ not my judgment, that's the judgment of many in the ¶ intelligence community.¶ Allegations of U.S. lawlessness and mistreatment make their ¶ job easier--that is the recruiters--adding a refrain to the ¶ recruitment pitch, and increasing the receptivity of their ¶ target audience. Our counterterrorism authorities have not ¶ only--our counterterrorism authorities should not only thwart ¶ attacks, take dangerous terrorists off the street, and bring ¶ them to justice--these authorities should also strengthen ¶ international coalitions, win the hearts and minds of Muslim ¶ populations that are--would otherwise be prepared to cooperate ¶ with us and help diminish, if not deprive, recruitment, the ¶ narrative that they now have.¶ In our long-term effort to stem the tide of international ¶ terrorism, our commitments to the rule of law and individual ¶ rights and civil liberties are among our most formidable ¶ weapons, in my view. They are what unite foreign governments ¶ behind us in effective antiterrorism coalitions. They are what ¶ unite public opinion in this country in support of our ¶ counterterrorism efforts. They are what prevent the recruitment ¶ of the next generation of international terrorists, or at least ¶ slow it up.¶ If we continue to pursue a rendition program ungoverned by ¶ law, without sufficient safeguards and oversight, we will take ¶ individual terrorists off the streets at the expense of foreign ¶ coalitions that are significantly more consequential long term ¶ and essential to our efforts to combat international terrorism ¶ at the expense of facilitating the recruitment of a new ¶ generation of terrorists who are just as dangerous--and what we ¶ know from the intelligence report--far more numerous.¶ There is not a tradeoff--this is not a tradeoff I believe ¶ we have to make. We can have a robust and agile rendition ¶ capacity governed by the rule of law and subject to sufficient ¶ safeguards and oversight. In this way, we can take terrorists ¶ off the streets, while at the same time strengthening our ¶ standing and credibility among foreign governments and the ¶ global community and diminishing the recruitment efforts of ¶ tomorrow's--for tomorrow's terrorist.

#### Independently, changing the framework for detention is key to US-EU relations

Smith 7 (JULIANNE, DIRECTOR AND SENIOR FELLOW, EUROPE PROGRAM, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, April 17, “EXTRAORDINARY RENDITION IN U.S. COUNTERTERRORISM POLICY: THE IMPACT ON TRANSATLANTIC RELATIONS”, http://archives.republicans.foreignaffairs.house.gov/110/34712.pdf)

As a European analyst, who spends a considerable amount of time in Europe meeting with policymakers and addressing a variety of public audiences, I can confirm that the issue of extraordinary rendition, along with press revelations about secret prisons in Europe, have cast a rather dark shadow on our relationship with our European allies. While transatlantic intelligence and law enforcement cooperation does continue, European political leaders are coming under increasing pressure to distance themselves from the United States. Over time, I do believe that this could pose a threat to joint intelligence activity with our European allies. Now it is well known that America’s image in Europe has declined quite steadily over the last couple of years, and some of the reasons for that were cited earlier this afternoon, in part due to the decision of the United States to go to Iraq, human rights abuses at Abu Ghraib and allegations of torture at Guantanamo bay. But we seemed to move away from some of these dark days in the transatlantic relationship as we moved into 2005, as both sides of the Atlantic I think, both Europe and the United States, made a conscious effort to renew transatlantic ties. When it was alleged, however, later in 2005—at the end of 2005 that the United States was detaining top terror suspects in socalled ‘‘black sites’’ in eight countries and that the CIA was flying terror suspects between secret prisons and countries in the Middle East that have been known to torture detainees, the United States image in Europe took another dive. On the particular issues of rendition, as we have heard earlier, Europeans appear to have two primary concerns, one, Washington’s unwillingness to grant due process to terror suspects and, two, violation of suspects’ human rights during interrogation. Now the allegations that have been submitted and the resulting investigation by the European Parliament have in many ways in my mind confirmed Europeans’ worst fears. Many Europeans, particularly at the public level, believe that they have plenty of evidence right now to prove a long-suspected gap between United States stated policies and U.S. action. As a result, U.S. promises not to torture terror suspects and to uphold the fundamental pillars of international law are no longer seen as credible. The question is, does any of this matter? President Bush has noted on several occasions that making policy is not a popularity contest, and he is right about that. But when political leads in other countries start to feel that standing shoulder to shoulder with the United States is a political liability, I think that low favorability ratings can indeed hinder America’s ability to solve global challenges with its many partners and allies around the world; and I would cite a couple of reasons for this. First, as we have seen with the tensions over the issue of rendition, this particular issue has put unnecessary strain, in my mind, on what has been, in many cases, a very positive relationship. In fact, it is distracting the two sides from the core task at hand; and that is, of course, combating terrorism. Second, as I mentioned earlier, European political leaders are under pressure from their publics to keep the United States at arm’s length. I don’t know that this pressure will ever halt counterterrorism cooperation with our European allies in full or certainly not in the near term, but there are signs that negative public opinion is making it more difficult for our European allies to cooperate with the United States. One only has to look at the latest European responses to United States requests for more support in Afghanistan to find one such example. Finally, I would point out that the United States and Europe are facing a long list of challenges above and beyond terrorism, things like energy security, nonproliferation, brewing regional crises, Darfur; and the list goes on and on. In many of these areas, the United States are asking—we are asking Europe to do more. But differences in our counterterrorism relationship with Europe have affected our relationship at other levels. Again, negative public sentiment toward the United States will never succeed in halting our cooperation with Europe entirely, but it does make asking for greater European support in other areas that much more challenging. Just to conclude, I would point out—and I feel very strongly— that Europe is one of America’s most important partners in combating radical extremism, and there is certainly no shortage of success stories in the many things we have done together, particularly over the past 6 years in this area. But I do feel—again based on my experience traveling back and forth to Europe on a regular basis—that this relationship that we share is currently played with mistrust and divisions over strategy and tactics.

#### EU relations are at a key turning point---cementing strategic partnership prevents extinction

Dr. Yannis A. Stivachtis 10, Director, International Studies Program, Virginia Polytechnic Institute & State University, “THE IMPERATIVE FOR TRANSATLANTIC COOPERATION,” online: http://www.rieas.gr/research-areas/global-issues/transatlantic-studies/78.html

There is no doubt that US-European relations are in a period of transition, and that the stresses and strains of globalization are increasing both the number and the seriousness of the challenges that confront transatlantic relations. ¶ The events of 9/11 and the Iraq War have added significantly to these stresses and strains. At the same time, international terrorism, the nuclearization of North Korea and especially Iran, the proliferation of weapons of mass destruction (WMD), the transformation of Russia into a stable and cooperative member of the international community, the growing power of China, the political and economic transformation and integration of the Caucasian and Central Asian states, the integration and stabilization of the Balkan countries, the promotion of peace and stability in the Middle East, poverty, climate change, AIDS and other emergent problems and situations require further cooperation among countries at the regional, global and institutional levels. ¶ Therefore, cooperation between the U.S. and Europe is more imperative than ever to deal effectively with these problems. It is fair to say that the challenges of crafting a new relationship between the U.S. and the EU as well as between the U.S. and NATO are more regional than global, but the implications of success or failure will be global. ¶ The transatlantic relationship is still in crisis, despite efforts to improve it since the Iraq War. This is not to say that differences between the two sides of the Atlantic did not exist before the war. Actually, post-1945 relations between Europe and the U.S. were fraught with disagreements and never free of crisis since the Suez crisis of 1956. Moreover, despite trans-Atlantic proclamations of solidarity in the aftermath of 9/11, the U.S. and Europe parted ways on issues from global warming and biotechnology to peacekeeping and national missile defense. ¶ Questions such as, the future role of NATO and its relationship to the common European Security and Defense policy (ESDP), or what constitutes terrorism and what the rights of captured suspected terrorists are, have been added to the list of US-European disagreements. ¶ There are two reasons for concern regarding the transatlantic rift. First, if European leaders conclude that Europe must become counterweight to the U.S., rather than a partner, it will be difficult to engage in the kind of open search for a common ground than an elective partnership requires. Second, there is a risk that public opinion in both the U.S. and Europe will make it difficult even for leaders who want to forge a new relationship to make the necessary accommodations.¶ If both sides would actively work to heal the breach, a new opportunity could be created. A vibrant transatlantic partnership remains a real possibility, but only if both sides make the necessary political commitment.

#### Second is habeas litigation – Habeas rights specifically bolster US credibility – the plan’s court action solves

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.

#### That’s key to maintain heg and solves the need for executive flex---legitimacy is the vital internal link to global stability

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.

#### key to global peace—the alternative is major power wars that escalate

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.

#### no offense- Collapse causes lash-out─

Goldstein ‘7 (Avery, Professor of Global Politics and International Relations @ University of Pennsylvania, “Power transitions, institutions, and China's rise in East Asia: Theoretical expectations and evidence,” Journal of Strategic Studies, Volume 30, Issue 4 & 5 August)

Two closely related, though distinct, theoretical arguments focus explicitly on the consequences for international politics of a shift in power between a dominant state and a rising power. In War and Change in World Politics, Robert Gilpin suggested that peace prevails when a dominant state’s capabilities enable it to ‘govern’ an international order that it has shaped. Over time, however, as economic and technological diffusion proceeds during eras of peace and development, other states are empowered. Moreover, the burdens of international governance drain and distract the reigning hegemon, and challengers eventually emerge who seek to rewrite the rules of governance. As the power advantage of the erstwhile hegemon ebbs, it may become desperate enough to resort to the ultima ratio of international politics, force, to forestall the increasingly urgent demands of a rising challenger. Or as the power of the challenger rises, it may be tempted to press its case with threats to use force. It is the rise and fall of the great powers that creates the circumstances under which major wars, what Gilpin labels ‘hegemonic wars’, break out.13 Gilpin’s argument logically encourages pessimism about the implications of a rising China. It leads to the expectation that international trade, investment, and technology transfer will result in a steady diffusion of American economic power, benefiting the rapidly developing states of the world, including China. As the US simultaneously scurries to put out the many brushfires that threaten its far-flung global interests (i.e., the classic problem of overextension), it will be unable to devote sufficient resources to maintain or restore its former advantage over emerging competitors like China. While the erosion of the once clear American advantage plays itself out, the US will find it ever more difficult to preserve the order in Asia that it created during its era of preponderance. The expectation is an increase in the likelihood for the use of force – either by a Chinese challenger able to field a stronger military in support of its demands for greater influence over international arrangements in Asia, or by a besieged American hegemon desperate to head off further decline. Among the trends that alarm those who would look at Asia through the lens of Gilpin’s theory are China’s expanding share of world trade and wealth (much of it resulting from the gains made possible by the international economic order a dominant US established); its acquisition of technology in key sectors that have both civilian and military applications (e.g., information, communications, and electronics linked with the ‘revolution in military affairs’); and an expanding military burden for the US (as it copes with the challenges of its global war on terrorism and especially its struggle in Iraq) that limits the resources it can devote to preserving its interests in East Asia.14 Although similar to Gilpin’s work insofar as it emphasizes the importance of shifts in the capabilities of a dominant state and a rising challenger, the power-transition theory A. F. K. Organski and Jacek Kugler present in The War Ledger focuses more closely on the allegedly dangerous phenomenon of ‘crossover’– the point at which a dissatisfied challenger is about to overtake the established leading state.15 In such cases, when the power gap narrows, the dominant state becomes increasingly desperate to forestall, and the challenger becomes increasingly determined to realize the transition to a new international order whose contours it will define. Though suggesting why a rising China may ultimately present grave dangers for international peace when its capabilities make it a peer competitor of America, Organski and Kugler’s power-transition theory is less clear about the dangers while a potential challenger still lags far behind and faces a difficult struggle to catch up. This clarification is important in thinking about the theory’s relevance to interpreting China’s rise because a broad consensus prevails among analysts that Chinese military capabilities are at a minimum two decades from putting it in a league with the US in Asia.16 Their theory, then, points with alarm to trends in China’s growing wealth and power relative to the United States, but especially looks ahead to what it sees as the period of maximum danger – that time when a dissatisfied China could be in a position to overtake the US on dimensions believed crucial for assessing power. Reports beginning in the mid-1990s that offered extrapolations suggesting China’s growth would give it the world’s largest gross domestic product (GDP aggregate, not per capita) sometime in the first few decades of the twentieth century fed these sorts of concerns about a potentially dangerous challenge to American leadership in Asia.17 The huge gap between Chinese and American military capabilities (especially in terms of technological sophistication) has so far discouraged prediction of comparably disquieting trends on this dimension, but inklings of similar concerns may be reflected in occasionally alarmist reports about purchases of advanced Russian air and naval equipment, as well as concern that Chinese espionage may have undermined the American advantage in nuclear and missile technology, and speculation about the potential military purposes of China’s manned space program.18 Moreover, because a dominant state may react to the prospect of a crossover and believe that it is wiser to embrace the logic of preventive war and act early to delay a transition while the task is more manageable, Organski and Kugler’s powertransition theory also provides grounds for concern about the period prior to the possible crossover.19

### 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

[marked]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

# 2AC

## AT T

#### w/m – Al-Maqaleh v. gates decision would be ruled on the grounds that it violates the suspension clause

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

b. Executive Manipulation A second factor that deserves inclusion into the Boumediene test would analyze whether the executive branch transferred the detainee into an active theater of war following apprehension. This factor would guard against potential executive manipulation by transferring detainees into an active theater of war, thereby distorting Boumediene’s third factor—practical obstacles in extending the Suspension Clause. Interestingly, the D.C. Circuit in Al Maqaleh even invited the Supreme Court to modify the three-factor test by adding “manipulation by the Executive.”130 Maintaining the current three-factor test risks executive manipulation by transferring detainees beyond the reach of the Suspension Clause. In Boumediene, Justice Kennedy briefly noted that, had Guantanamo Bay been located within an active theater of war, the practical obstacles would weigh against extending the Suspension Clause protections to the detainees.131 In Al Maqaleh, all four Bagram detainees were allegedly captured beyond Afghanistan and later transferred into the Afghanistan theater.132 Relying on Justice Kennedy’s statement in Boumediene, the D.C. Circuit held that the third factor weighed “overwhelmingly” in favor of not extending the Suspension Clause to the Bagram detainees because Bagram remained in an active theater of war.133 Thus, once the government transfers a detainee into an active theater, the practical-obstacles factor, considered a “primary driver” under the habeas test,134 is greatly affected.

#### Judicial intervention into detention is inevitable – a wave of lawsuits is on the way

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 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.

## AT PQD

#### The aff only operates within established judicial authority

Chow 11, JD from Cardozo

(Samuel, THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS, www.cjicl.com/uploads/2/9/5/9/2959791/cjicl\_19.3\_chow\_note.pdf)

Additionally, there are ever-present concerns surrounding separation of powers. The degree to which the Court is concerning itself with foreign relations issues is unprecedented, which means any application of a balancing test would be usurping powers of the political branches that were traditionally exercised without the possibility of judicial participation. There is a general hesitation in potentially augmenting the courts authority in terrorist detentions. Yet, separation-of-powers concerns must be reconciled with the opposing, though equally compelling, counter-part—our government's system of checks and balances. Since the ideal of our tripartite government system is one where areas of authority are clearly defined, an augmentation of jurisdiction by the courts may seem suspicious. However, the idea of an unchecked Executive with the authority to indefinitely detain individuals (who the government itself has determined have no legal basis for detention) is equally, if not more so, disquieting. Moreover, the historical role of habeas courts as the final arbiter of a detention's legality provides a legitimate counter-argument that it is in fact the Executive that is intruding upon the judiciary's traditional authority. It does so by appropriating itself as the sole source of a functional remedy, thereby interfering with the courts habeas authority.

#### Their DA already happened

Kaufman 8, Marc Kaufman is a staff writer at the Washington Post, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/03/AR2008010303887.html

A federal judge yesterday severely limited the Navy's ability to use mid-frequency sonar on a training range off the Southern California coast, ruling that the loud sounds would harm whales and other marine mammals if not tightly controlled. ¶ The decision is a blow to the Navy, which has argued that it needs the flexibility to train its sonar operators without undue restrictions. In her decision, however, U.S. District Judge Florence-Marie Cooper said the Navy could conduct productive training under the limitations, which she said were required under several environmental laws.

#### No link, the plan doesn’t violate the political question doctrine, and Guantanimo habeas litigation makes the link non-unique

Vladeck 13 (Steve Vladeck is a professor of law and the associate dean for scholarship at American University Washington College of Law, “Whats Really Wrong With the Targeted Killing White Paper” http://www.lawfareblog.com/2013/02/whats-really-wrong-with-the-targeted-killing-white-paper/)

First, many of us who argue for at least some judicial review in this context specifically don’t argue for ex ante review for the precise reasons the white paper suggests. Instead, we argue for ex post review–in the form of damages actions after the fact, in which liability would only attach if the government both (1) exceeded its authority; and (2) did so in a way that violated clearly established law. Whatever else might be said about such damages suits, they simply don’t raise the interference concerns articulated in the white paper, and so one would have expected some distinct explanation for why that kind of judicial review shouldn’t be available in this context. All the white paper offers, though, is its more general allusion to the political question doctrine. Which brings me to… Second, and in any event, the suggestion that lawsuits arising out of targeted killing operations against U.S. citizens raise a nonjusticiable political question is almost laughable–and is the one part of this white paper that really does hearken back to the good ole’ days of the Bush Administration (I’m less sold on any analogy based upon the rest of the paper). Even before last Term’s Zivotofsky decision, in which the Supreme Court went out of its way to remind everyone (especially the D.C. Circuit) of just how limited the political question doctrine really should be, it should’ve followed that uses of military force against U.S. citizens neither “turn on standards that defy the judicial application,” nor “involve the exercise of a discretion demonstrably committed to the executive or legislature.” Indeed, in the context of the Guantánamo habeas litigation, courts routinely inquire into the very questions that might well arise in such a damages suit, e.g., whether there is sufficient evidence to support the government’s conclusion that the target is/was a senior operational leader of al Qaeda or one of its affiliates… Don’t get me wrong: Any suit challenging a targeted killing operation, even a post hoc damages action, is likely to run into a number of distinct procedural concerns, including the difficulty of arguing for a Bivens remedy; the extent to which the state secrets privilege might preclude the litigation; etc. But those are the arguments that the white paper should’ve been making–and not a wholly unnuanced invocation of the political question doctrine in a context in which it clearly does not–and should not–apply.

#### 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.

#### Preserving the judicial right to due process enhances productive executive flex—unrestrained flex is worse for decision making

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

In the face of an unprecedented national-security threat, individual rights, far from invariably interfering with the effectiveness of the executive branch, may sometimes serve a vitally pragmatic function. Those who deny this possibility, in principle, misunderstand due process as a rigid restraint. Laws that discipline executive decision making should not be understood as laying down sharp lines between the permitted and the forbidden. Besides being a personal liberty, a suspect's right to challenge the evidence against him is simultaneously a duty of the government to provide a plausible rationale for its requests to apply coercive force. A right that is enforceable against the government is best understood not as a rigid limit, therefore, but as a rebuttable presumption. In this framework, rights demarcate provisional no-go zones into which government entry is prohibited unless and until an adequate justification can be given for government action. If the executive branch violates a right that it is usually required to respect, it has to give a reason why.¶ This is how legal rights contribute to a democratic culture of justification. A private right is neither a non-negotiable value nor an insurmountable barrier, but rather a trip-wire and a demand for government explanation of its actions. The rights of the accused are therefore the obligations of the prosecution. Before criminally punishing an individual, the executive must give reasons why such punishment is deserved before a judicial tribunal that can refuse consent. Here lies the difference between a constitutional executive and an absolute monarch: the former must give reasons for his actions, while the latter can simply announce tel est mon plaisir. n72¶ For analogous reasons, it is one-sided and even obscurantist to describe habeas corpus, on balance, as a gratuitous hindrance to effectiveness in counterterrorism. It can occasionally involve risks, but habeas does not "tie the government's hands." Like the traditional charge-or-release rule, habeas simply forces the executive to give plausible reasons for its actions. Such a right is a spur, therefore, not a rein. It may sometimes appear to be a roadblock, [\*333] obstructing effective action, but it is also an incentive to take reasonable care, aimed at increasing the likelihood of intelligent decision making even under enormous pressure and time constraints. Abolishing such incentives will not guarantee intelligent, focused, and effective government action.¶ Advocates of executive discretion in the war on terror are perfectly right to point out that legal restrictions on the executive can occasionally impede effective action. But their analysis is one-sided and too narrowly focused; they need to add that the absence of legal restrictions on the executive, in turn, can encourage irresponsible, profligate, and self-defeating choices. The genuine challenge of counterterrorism is to balance the two symmetrical risks, not to pretend that following rules is risky while circumventing rules is not.¶ An administration that is legally exempted from providing reasons for its actions also has a weak incentive to develop and implement a coherent overall policy. One reason why the United States was able to treat various terrorist suspects in its custody (Salim Ahmed Hamdan, Yaser Hamdi, David Hicks, John Walker Lindh, Khaled al-Masri, Zacarias Moussaoui, Jose Padilla, and Mohammad al-Qahtani) in incomprehensibly erratic and inconsistent ways may have been that it was never forced to explain publicly, or perhaps even behind closed doors, exactly what it was doing. The Bush administration also allocated scarce resources behind a veil of national-security secrecy - that is, without having to explain the security-security tradeoffs it was making. The outcomes, as they have gradually come to light, do not look even vaguely pragmatic.¶ That violations of personal liberty can, under some conditions, severely damage national security is also relevant to the dispute about trying terrorist suspects before Article III courts (or before ordinary military courts-martial). That national security could be damaged by open trials has been frequently alleged. And the possibility cannot be ruled out. But advocates of executive discretion rarely mention the potential damage to national security of closed or partially closed trials and the potential strategic benefits of open and visibly fair trials. This is unfortunate because a fully public trial of mass murdering zealots, using visibly fair procedures, would provide an exceptional opportunity to rivet the attention of the world on the heinous acts and twisted mentality of the jihadists; this is something that no procedure that looks rigged, where Muslim defendants appear in any way railroaded, can possibly do.¶ Transparent judicial procedures, although they may be costly along some dimensions, can also help convince domestic and foreign onlookers that decisions of guilt and innocence are being made responsibly, not arbitrarily. They can vindicate tough counterterrorism policies and refute the allegation that authorities are exaggerating the threat to national security. Public willingness to cooperate with counterterrorism efforts depends on public confidence in the essential fairness of law-enforcement authorities. n73 Such [\*334] confidence is especially vital for managing a threat, such as Islamist terrorists with access to WMD, that is likely to endure for decades, if not longer.¶ Even more, the transcripts of past public trials of Islamic terrorists have provided a trove of open-source and relatively reliable information that independent scholars and analysts have used to help the country make sense of the motives and operational techniques of the enemy. Many dots will remain unconnected if such information is reserved for the exclusive perusal of a few individuals with high security clearances operating in isolation from outside criticism.¶ Yes, wholly public trials may possibly expose the sources and methods of U.S. counterterrorism agencies. n74 But the alternative, trials conducted on the basis of undisclosed information, will likely cause equivalent damage, due to the perverse incentives that they engender. Once again, the tacit tradeoff here involves security versus security. One predictable motive for reluctance to hold a trial in open court might be the embarrassing untrustworthiness of sources and shoddiness of investigative methods. Expecting a closed trial, in effect, investigators and prosecutors have a much weaker incentive to take reasonable care to ferret out reliable information and to use dependable techniques for ascertaining the facts. This is how executive discretion can erode executive professionalism. If terrorism investigators and prosecutors fail to take reasonable care, they will then need secrecy not for the respectable reason that secrecy protects security, but for the discreditable reason that secrecy conceals the illicit shortcuts of investigators who are subjectively convinced, on no compelling grounds, that their guesses and hunches are always totally right. Those who imagine the possible security benefits of such deviations from ordinary standards of due process are not completely mistaken. They have simply over-generalized a partial perspective, unjustifiably ignoring the equally likely possibility of security losses.¶ Subjectively, without any doubt, a president and his entourage can experience congressional and judicial oversight as an annoying hindrance to free and "flexible" action, just as a prosecutor can experience independent trial judges, discovery rules, defense attorneys, and public trials as obstacles to putting away "obviously guilty" suspects. But rules can be subjectively experienced as disabling restraints when, on balance, they actually serve to facilitate adaptation to reality. That is how shield laws and whistleblower laws ideally function, for example. n75 Double-blind tests, as mentioned earlier, work [\*335] in a similar way, allowing the system of scientific research to make progress and adapt to reality, even if individual researchers feel to some extent hemmed in by the system's constraints.¶ The executive branch's obligation to give reasons for its actions is built into the American legal system, both at the micro-level of criminal trials and at the macro-level of checks and balances. To hinder the fatal slide from flexibility to arbitrariness, from expediency to recklessness, the U.S. legal and constitutional system requires the executive branch to test the factual premises of the use of force in some sort of adversarial process. This is the most important way in which due process can enhance governmental performance.¶ To illustrate how some form of adversarial process might have been useful in the war on terror, we need only consider the possibility that either a serious congressional inquiry before going to war in Iraq or a semi-public trial of Khalid Sheikh Mohammed would have discredited the myth of an Osama-Saddam connection, one of the principal delusions that pumped up public support for a misbegotten war.¶ And what were the consequences of brushing aside the presumption of innocence and worries about mistaken identity at Guantanamo Bay, where hundreds of detainees have now spent seven years in administrative detention without the detaining authority having to explain why? By failing to provide even perfunctory individualized hearings, that is, by failing to select with minimal care among individuals delivered for a fee to the American authorities in Afghanistan and elsewhere, the U.S. government (I exaggerate to make my point) sent the first 700 "stunt doubles" who came into its custody to the detention-and-interrogation center in Cuba, thereby misspending our scarce interrogation capacities on individuals of minimal or no intelligence value. n76 And Guantanamo is not the only situation in which jettisoning traditional rules for presumed tactical gains has proved strategically self-defeating.¶ As Shakespeare's Iago and Othello memorably illustrate, pre-constitutional and therefore legally unconstrained power wielders are notoriously vulnerable to being manipulated by disinformation. Today's advocates of a "monarchical" swelling of presidential discretion tend to underestimate this particular cost of acting with excessive secrecy and [\*336] dispatch. n77 Besides contracting individual rights, a loosening of evidentiary standards can simultaneously harm national security by encouraging liars to clog the system with disinformation and false leads and discouraging honest people from reporting what they observe. If authorities begin shipping suspects to prison camps, where they are held incommunicado, without double-checking the alleged evidence, they unwittingly create incentives for malicious or self-serving witnesses to swarm out of the woodwork. (Call this "the elasticity of supply" of informants with hidden agendas.) Contrariwise, well-intentioned people will hesitate to communicate their observations of suspicious activity next door, lest an innocent neighbor be incarcerated for years on the basis of misperceptions that could easily have been dispelled in court.

## AT Con Ammend

#### Constitutional amendments are a voting issue—never happens and no advocate prove its not a germaine or legitimate opportunity cost

Baker 10

[Director of the Con Law Center at Drake, 10 Widener J. Pub. L. 1]

There is a reason that there have been only 27 amendments over more than 200 years: Constitutional amendments must have the sustained and one-sided support of great majorities in the Congress and across the states. Very few issues ever garner such importance and support.

## AT Schmitt

#### Preserving the judicial right to due process enhances productive executive flex—unrestrained flex is worse for decision making

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

In the face of an unprecedented national-security threat, individual rights, far from invariably interfering with the effectiveness of the executive branch, may sometimes serve a vitally pragmatic function. Those who deny this possibility, in principle, misunderstand due process as a rigid restraint. Laws that discipline executive decision making should not be understood as laying down sharp lines between the permitted and the forbidden. Besides being a personal liberty, a suspect's right to challenge the evidence against him is simultaneously a duty of the government to provide a plausible rationale for its requests to apply coercive force. A right that is enforceable against the government is best understood not as a rigid limit, therefore, but as a rebuttable presumption. In this framework, rights demarcate provisional no-go zones into which government entry is prohibited unless and until an adequate justification can be given for government action. If the executive branch violates a right that it is usually required to respect, it has to give a reason why.¶ This is how legal rights contribute to a democratic culture of justification. A private right is neither a non-negotiable value nor an insurmountable barrier, but rather a trip-wire and a demand for government explanation of its actions. The rights of the accused are therefore the obligations of the prosecution. Before criminally punishing an individual, the executive must give reasons why such punishment is deserved before a judicial tribunal that can refuse consent. Here lies the difference between a constitutional executive and an absolute monarch: the former must give reasons for his actions, while the latter can simply announce tel est mon plaisir. n72¶ For analogous reasons, it is one-sided and even obscurantist to describe habeas corpus, on balance, as a gratuitous hindrance to effectiveness in counterterrorism. It can occasionally involve risks, but habeas does not "tie the government's hands." Like the traditional charge-or-release rule, habeas simply forces the executive to give plausible reasons for its actions. Such a right is a spur, therefore, not a rein. It may sometimes appear to be a roadblock, [\*333] obstructing effective action, but it is also an incentive to take reasonable care, aimed at increasing the likelihood of intelligent decision making even under enormous pressure and time constraints. Abolishing such incentives will not guarantee intelligent, focused, and effective government action.¶ Advocates of executive discretion in the war on terror are perfectly right to point out that legal restrictions on the executive can occasionally impede effective action. But their analysis is one-sided and too narrowly focused; they need to add that the absence of legal restrictions on the executive, in turn, can encourage irresponsible, profligate, and self-defeating choices. The genuine challenge of counterterrorism is to balance the two symmetrical risks, not to pretend that following rules is risky while circumventing rules is not.¶ An administration that is legally exempted from providing reasons for its actions also has a weak incentive to develop and implement a coherent overall policy. One reason why the United States was able to treat various terrorist suspects in its custody (Salim Ahmed Hamdan, Yaser Hamdi, David Hicks, John Walker Lindh, Khaled al-Masri, Zacarias Moussaoui, Jose Padilla, and Mohammad al-Qahtani) in incomprehensibly erratic and inconsistent ways may have been that it was never forced to explain publicly, or perhaps even behind closed doors, exactly what it was doing. The Bush administration also allocated scarce resources behind a veil of national-security secrecy - that is, without having to explain the security-security tradeoffs it was making. The outcomes, as they have gradually come to light, do not look even vaguely pragmatic.¶ That violations of personal liberty can, under some conditions, severely damage national security is also relevant to the dispute about trying terrorist suspects before Article III courts (or before ordinary military courts-martial). That national security could be damaged by open trials has been frequently alleged. And the possibility cannot be ruled out. But advocates of executive discretion rarely mention the potential damage to national security of closed or partially closed trials and the potential strategic benefits of open and visibly fair trials. This is unfortunate because a fully public trial of mass murdering zealots, using visibly fair procedures, would provide an exceptional opportunity to rivet the attention of the world on the heinous acts and twisted mentality of the jihadists; this is something that no procedure that looks rigged, where Muslim defendants appear in any way railroaded, can possibly do.¶ Transparent judicial procedures, although they may be costly along some dimensions, can also help convince domestic and foreign onlookers that decisions of guilt and innocence are being made responsibly, not arbitrarily. They can vindicate tough counterterrorism policies and refute the allegation that authorities are exaggerating the threat to national security. Public willingness to cooperate with counterterrorism efforts depends on public confidence in the essential fairness of law-enforcement authorities. n73 Such [\*334] confidence is especially vital for managing a threat, such as Islamist terrorists with access to WMD, that is likely to endure for decades, if not longer.¶ Even more, the transcripts of past public trials of Islamic terrorists have provided a trove of open-source and relatively reliable information that independent scholars and analysts have used to help the country make sense of the motives and operational techniques of the enemy. Many dots will remain unconnected if such information is reserved for the exclusive perusal of a few individuals with high security clearances operating in isolation from outside criticism.¶ Yes, wholly public trials may possibly expose the sources and methods of U.S. counterterrorism agencies. n74 But the alternative, trials conducted on the basis of undisclosed information, will likely cause equivalent damage, due to the perverse incentives that they engender. Once again, the tacit tradeoff here involves security versus security. One predictable motive for reluctance to hold a trial in open court might be the embarrassing untrustworthiness of sources and shoddiness of investigative methods. Expecting a closed trial, in effect, investigators and prosecutors have a much weaker incentive to take reasonable care to ferret out reliable information and to use dependable techniques for ascertaining the facts. This is how executive discretion can erode executive professionalism. If terrorism investigators and prosecutors fail to take reasonable care, they will then need secrecy not for the respectable reason that secrecy protects security, but for the discreditable reason that secrecy conceals the illicit shortcuts of investigators who are subjectively convinced, on no compelling grounds, that their guesses and hunches are always totally right. Those who imagine the possible security benefits of such deviations from ordinary standards of due process are not completely mistaken. They have simply over-generalized a partial perspective, unjustifiably ignoring the equally likely possibility of security losses.¶ Subjectively, without any doubt, a president and his entourage can experience congressional and judicial oversight as an annoying hindrance to free and "flexible" action, just as a prosecutor can experience independent trial judges, discovery rules, defense attorneys, and public trials as obstacles to putting away "obviously guilty" suspects. But rules can be subjectively experienced as disabling restraints when, on balance, they actually serve to facilitate adaptation to reality. That is how shield laws and whistleblower laws ideally function, for example. n75 Double-blind tests, as mentioned earlier, work [\*335] in a similar way, allowing the system of scientific research to make progress and adapt to reality, even if individual researchers feel to some extent hemmed in by the system's constraints.¶ The executive branch's obligation to give reasons for its actions is built into the American legal system, both at the micro-level of criminal trials and at the macro-level of checks and balances. To hinder the fatal slide from flexibility to arbitrariness, from expediency to recklessness, the U.S. legal and constitutional system requires the executive branch to test the factual premises of the use of force in some sort of adversarial process. This is the most important way in which due process can enhance governmental performance.¶ To illustrate how some form of adversarial process might have been useful in the war on terror, we need only consider the possibility that either a serious congressional inquiry before going to war in Iraq or a semi-public trial of Khalid Sheikh Mohammed would have discredited the myth of an Osama-Saddam connection, one of the principal delusions that pumped up public support for a misbegotten war.¶ And what were the consequences of brushing aside the presumption of innocence and worries about mistaken identity at Guantanamo Bay, where hundreds of detainees have now spent seven years in administrative detention without the detaining authority having to explain why? By failing to provide even perfunctory individualized hearings, that is, by failing to select with minimal care among individuals delivered for a fee to the American authorities in Afghanistan and elsewhere, the U.S. government (I exaggerate to make my point) sent the first 700 "stunt doubles" who came into its custody to the detention-and-interrogation center in Cuba, thereby misspending our scarce interrogation capacities on individuals of minimal or no intelligence value. n76 And Guantanamo is not the only situation in which jettisoning traditional rules for presumed tactical gains has proved strategically self-defeating.¶ As Shakespeare's Iago and Othello memorably illustrate, pre-constitutional and therefore legally unconstrained power wielders are notoriously vulnerable to being manipulated by disinformation. Today's advocates of a "monarchical" swelling of presidential discretion tend to underestimate this particular cost of acting with excessive secrecy and [\*336] dispatch. n77 Besides contracting individual rights, a loosening of evidentiary standards can simultaneously harm national security by encouraging liars to clog the system with disinformation and false leads and discouraging honest people from reporting what they observe. If authorities begin shipping suspects to prison camps, where they are held incommunicado, without double-checking the alleged evidence, they unwittingly create incentives for malicious or self-serving witnesses to swarm out of the woodwork. (Call this "the elasticity of supply" of informants with hidden agendas.) Contrariwise, well-intentioned people will hesitate to communicate their observations of suspicious activity next door, lest an innocent neighbor be incarcerated for years on the basis of misperceptions that could easily have been dispelled in court.

#### Doesn’t turn the case – can’t reverse decisions

**Devins ’06** (Neal, Prof of Law and Prof of Government @ College of William & Mary,  May, 90 Minn. L. Rev. 1337 ln)

Fourth, jurisdiction-stripping measures do not nullify Supreme Court rulings (or, for that matter, any court ruling). Consequently, since proponents of court-stripping cannot count on state courts to back their policy agenda, these bills may not accomplish all that much. **131** Accordingly, interest groups may be better off pursuing their substantive agenda through funding bans, constitutional amendments, the enactment of related legislation, and the appointment of judges and Justices. Court-curbing measures, in contrast, seem more a rhetorical rallying call than a roadmap for change.

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

Ahmad 9, Professor of Law [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.

# 1AR

Not just friend enemy

There is Friend-Enemy-Other - they obscure

Brewer 2007 (Joe Brewer, M.S. in Atmospheric Science from the University of Illinois, “The Coming Biofuels Disaster,” http://www.rockridgeinstitute.org/research/rockridge/coming-biofuels-disaster.html)

**A central dichotomy during the cold war was the distinction between friendly states and enemy states. These words apply the Nation as Person metaphor to** this selection of categories to **paint the world as being filled with state actors** who are either with us or against us. **An alternative** set of categories, suggests Jeff Huysmans, **is** the dichotomy of **friend and stranger**. ([9](http://www.rockridgeinstitute.org/research/rockridge/shifting-the-climate-of-security.html#note9)) **A stranger may not be an enemy,** but can still be a security concern. Consider the consequence of sea-level rise that is expected as the Earth's atmosphere continues to warm. Moderate estimates suggest that over 100 million people will be displaced worldwide as their water reserves are contaminated with salt from the ocean and their homes submerge. Many of these environmental **refugees** will be forced to migrate into neighboring countries where their presence threatens the orderly functioning of regional economies. These people **are not an invading army of enemies**, as some immigration reformists suggest. Shooting them is not an appropriate remedy to the crisis. **They are strangers who** have **fall**en **victim** to climate change. This frame does not make sense with the metaphor that a Nation is a Person. Refugees in exodus are small bands of individuals and families struggling to survive in the absence of national protection. Shifting the frame to strangers allows us to separate security concerns from the outdated approach that deals solely with interactions at the level of nations. The *stranger* frame is morally neutral. This moral neutrality is a threat to conservative authority, which is why there has been so much effort in the past to paint strangers as something to be feared. **The salient feature of a stranger is that your relationship** with him or her **is not known. This does not require the** assumption accompanying the **enemy frame, which is that the person is** against you and thus is **inherently bad.** A stranger can become a friend much more easily than an enemy can. Care needs to be taken to ensure that people who are actually strangers are not presumed to be enemies. When we frame security as an issue of human life and dignity, we will immediately call the enemy frame into question. Emphasis is given to the shared attribute of human worth. Reactions of fear will be tempered with feelings of compassion for people we recognize as worthy of dignified treatment who have little control over their circumstances.