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#### Diplomatic attempts give Obama momentum for strikes when talks inevitable fail – Congressional approval key to that threat being credible

Davis, 9-12-’13 (Julie, “Hoyer Says Obama Could Strike Syria Without Congress Vote” Bloomberg, http://www.bloomberg.com/news/2013-09-12/hoyer-says-obama-could-strike-syria-without-congress-vote.html)

On Syria, Hoyer said only a brief window exists for Russia to prove that its bid to require Syria to give up its chemical arms stockpile to avert a U.S. military strike is “real” -- “certainly not longer than weeks.” If the effort fails, Hoyer added, Obama’s hand would be strengthened in taking military action if Congress explicitly empowered him to do so**.** “If we passed a resolution, he’d have a stronger hand,” Hoyer said. “But having said that, neither the Russians nor the Syrians ought to conclude that the president is without authority to act.” ‘Extra Mile’ The attempt at a diplomatic solution may also help Obama influence lawmakers to support a military strike, Hoyer said. “People would say, ‘Well, he went the extra mile, he reached out, he took the diplomatic course that people had been urging him to take -- and it didn’t work,’” Hoyer said. “And therefore under those circumstances, the only option available to us to preclude the further use of chemical weapons and to try to deter and degrade Syria’s ability to use them is to act.’” The Senate Foreign Relations Committee approved a resolution authorizing military force against Syria, and the Senate was prepared to vote on the measurer this week. The resolution appeared to face growing House opposition. Then, when the prospect of a negotiated settlement arose, Obama said in a national televised address on Sept. 10 that he was asking Congress to delay voting.

#### The aff is a political minefield

Michael Catalini, May 3, 2013, National Journal, “Political Barriers Stand Between Obama and Closing Guantanamo Facility” <http://www.nationaljournal.com/politics/political-barriers-stand-between-obama-and-closing-guantanamo-facility-20130503>

The last time President Obama tried to close the Guantanamo Bay detention center, Congress stopped him abruptly. The Senate did what it rarely does: It voted in bipartisan fashion, blocking his attempt at funding the closure.¶ Four years later, and the political barriers that blocked the president from closing the camp that now houses 166 detainees are as immovable as ever. Moving the prisoners to facilities in the U.S., a solution the administration suggested, proved to be a political minefield in 2009. Most Americans oppose closing the base, according to a polls, and congressional leaders have balked at taking action.¶ The Cuban camp is grabbing headlines again because of a hunger strike among the detainees. Nearly 100 have stopped eating, and the military is forcing them to eat by placing tubes through their noses, the Associated Press reported. The president reconfirmed his opposition to the camp, responding to a question about the recent hunger strikes at Guantanamo Bay with regret in his voice.¶ “Well, it is not a surprise to me that we've got problems in Guantanamo, which is why, when I was campaigning in 2007 and 2008 and when I was elected in 2008, I said we need to close Guantanamo. I continue to believe that we've got to close Guantanamo,” he said.¶ Obama blamed his failure to follow through on a campaign promise on lawmakers. “Now, Congress determined that they would not let us close it,” he said. Despite Obama’s desire to close the base and his pledge this week to “go back to this,” he touched on a political reality: Lawmakers are not inclined to touch the issue.¶ "The president stated that the reason Guantanamo has not closed was because of Congress. That's true," Majority Leader Harry Reid told reporters last month, declining to elaborate.¶ The stakes for Obama on this issue are high when it comes to his liberal base, who would like to see him display the courage of his convictions and close the camp. But the political will is lacking, outside a small contingent of lawmakers, including Sen. Dick Durbin of Illinois and five other liberal Democrats who sided with Obama in 2009, and left-leaning opinion writers.¶ Congressional Democrats, unlike Obama, will have to face voters again. And closing the camp is deeply unpopular. A Washington Post/ABC News poll in February 2012 showed that 70 percent of Americans wantedto keep the camp open to detain “terrorist suspects,” and in a 2009 Gallup Poll, a majority said they would be upset if it shut down. In 2009, the Senate voted 90-6 to block the president’s efforts at closing the camp. Obama had signed an order seeking to close the detention center, but the Senate’s vote denied the administration the $80 million needed to fund the closure. ¶ Closing the camp in Cuba and bringing the detainees into the United States grates against the political sensibilities of many lawmakers. Jim Manley, a Democratic strategist who served as Reid’s spokesman at the time, remembers the debate very well.¶ “I'm still not sure that there's much of an appetite among Democrats on the Hill to try and deal with this issue once and for all,” Manley said in an interview.

#### Will Pass and PC is Key

WSJ 9/8 http://online.wsj.com/article/SB10001424127887324094704579062930548599924.html

WASHINGTON—In a week poised to define his second term, President Barack Obama will mount an intensive campaign to promote a U.S. military strike on Syria as opposition rises in both Congress and across the country.¶ Mr. Obama will make his case repeatedly in coming days to Americans wary of opening a new military front in the Middle East, including in a battery of interviews set for Monday and a nationally televised address Tuesday evening. He also is sending aides to hold closed-door intelligence briefings for members of Congress about the alleged gassing deaths of more than 1,400 Syrian civilians by the forces of President Bashar al-Assad.¶ Mr. Obama's top challenge, as Congress returns Monday from summer recess, will be to find backing from enough lawmakers for a resolution authorizing a strike. He faces an unusual alliance seeking to block military action, one comprised of the president's closest allies among liberal Democrats—including members of the Congressional Black Caucus—and his most strident critics among Republicans.¶ The administration's argument is that the U.S. case that Mr. Assad's forces used chemical weapons in the Aug. 21 attack is now settled—an assertion that Mr. Assad denied in an interview with Charlie Rose of PBS and CBS.¶ ¶ "We are no longer debating whether it happened or whether it didn't happen," White House Chief of Staff Denis McDonough said on CNN, part of a blitz of television interviews Sunday. "Congress has an opportunity this week to answer a simple question: Should there be consequences for him for having used that material?"¶ Mr. Obama will also go to Capitol Hill Tuesday to meet with Senate Democrats, a Senate Democratic aide said.¶ The Senate is expected to vote this week on a resolution authorizing Mr. Obama to use force in Syria. The current resolution, which could be amended, backs a military mission designed, in part, to change the momentum of the Syrian civil war and set the stage for Mr. Assad's departure.¶ But it isn't clear whether Congress—particularly the House, where Mr. Obama faces a more ominous battle—will back such a measure. Many lawmakers have said they oppose the resolution as too broad, and their contention likely was bolstered during the recess as they heard constituents back home voice concern. The House isn't expected to vote before next week.¶ After a week of intense White House lobbying on Capitol Hill following Mr. Obama's surprise decision to seek authorization from Congress for a military strike, some lawmakers say they remain unsure who was responsible for the alleged chemical-weapons attack or remain unconvinced a strike would be the appropriate response.¶ Liberal Democrat Rep. Jim McGovern (D., Mass.) suggested the president withdraw the resolution. "I don't believe the support is there in Congress," he said on CNN.¶ Even those who have said they back a resolution express concern about the president's ability to pull off a successful vote. "It's an uphill slog from here," House Intelligence Committee Chairman Mike Rogers (R., Mich.) said Sunday on CBS, calling the administration's lobbying of lawmakers belated.¶ Mr. Rogers said the president should have called Congress back for a debate over Syria instead of leaving the country for the G-20 meetings last week in Russia. "It's very clear he's lost support in the last week," Mr. Rogers said.¶ White House officials, including Mr. Obama, have argued that if Congress fails to pass a resolution the U.S. will be seen as less credible on the international stage and adversaries such as Iran and the Lebanese-based militant political group Hezbollah would be emboldened.¶ Secretary of State John Kerry, in Paris to build support for strikes on Syria, grabs a seat for a meeting with other U.S. diplomats at the Tuileries Garden.¶ The White House has left open the possibility that Mr. Obama would proceed with military action if a vote in Congress fails. Administration officials also haven't ruled out presidential action if the House and Senate pass different resolutions yet are unable to agree on a compromise measure, but say it is too early to consider such a scenario.¶ Adding to Mr. Obama's challenges, Mr. Assad waded into the debate by denying in the interview with Mr. Rose that he had anything to do with the alleged chemical-weapons attack and saying he didn't even know whether one had taken place.¶ Mr. Assad refused to say whether Syria has chemical weapons, but he said any weapons would be under government control, Mr. Rose said in describing the interview that is scheduled to air Monday. At the same time, Mr. Assad repeated his suggestion that the Syrian opposition may have been behind the alleged attack, a charge the U.S. and opposition leaders deny. Additionally, Mr. Assad suggested there would be a response if the U.S. launches a strike, Mr. Rose said.¶ Part of the White House effort to persuade Congress to approve a strike includes trying to show that the president has a cadre of international support. U.S. Secretary of State John Kerry met with members of the European Union and Arab League over the weekend, and said that both groups support parts of the U.S. position. Neither, however, has explicitly endorsed U.S. military strikes.¶ Many lawmakers returning to Washington will attend their first classified briefings on Syria this week, raising hope among administration officials that intelligence information will sway undecided members. They likely will be shown graphic videos detailing the effects of the alleged chemical attack on victims.¶ Most lawmakers remain publicly undecided, while many Republican lawmakers have said they are leaning toward opposing military action. "The president has not made his case," one of them, Rep. Marsha Blackburn (R., Tenn.) said on CNN.¶ A strike is backed by both House Speaker John Boehner (R., Ohio) and House Majority Leader Eric Cantor (R., Va.).¶ The White House could get another boost from the American Israel Public Affairs Committee, an influential pro-Israel lobbying group that supports Mr. Obama's plans. The group is expected to meet with more than 300 lawmakers this week, according to an AIPAC official.¶ Underscoring the stakes for his presidency, Mr. Obama has done the kind of personal outreach to lawmakers he has been criticized for eschewing since taking office.¶ Administration officials say they have reached out to at least 85 senators and more than 165 House members. Vice President Joe Biden hosted a dinner Sunday night with a group of Republican senators that Mr. Obama attended. On Monday Mr. Kerry, Defense Secretary Chuck Hagel and National Security Adviser Susan Rice are scheduled to brief House members on U.S. intelligence assessments.

#### Congressional support key to credible US threat of force that stabilizes Syria and maintains US credibility\*\*

Washington Post, 9-9-’13 (“Threat of U.S. strikes needed to change Syria’s behavior” http://articles.washingtonpost.com/2013-09-09/opinions/41898820\_1\_chemical-weapons-government-forces-syrian-foreign-minister)

IT WOULD be wrong to dismiss a potential move by Syria to place its chemical weapons arsenal under international supervision — a possibility that suddenly appeared Monday when a seemingly offhand comment by Secretary of State John F. Kerry was seized upon by Russia. But it also would be foolish to forget how the regime of Bashar al-Assad has used previous diplomatic proposals to stall and sandbag international intervention while continuing to wage a merciless war against its population. If this initiative works, it will happen only because the regime and its patrons in Moscow are made to believe that the alternative is a devastating U.S. military strike. In tossing out the idea at a London news conference, Mr. Kerry said Mr. Assad “could turn over every single bit of his chemical weapons to the international community in the next week” before predicting that “he isn’t about to do it, and it can’t be done.” That was a realistic assessment both of Mr. Assad — who has never made a promise he did not break — and of the potential difficulty of establishing international control over stockpiles scattered across Syria, including at military bases that are crucial to the regime’s war-fighting. Mr. Kerry’s idea — gaffe, some said — was taken up within hours by Russia’s foreign minister, who said Syria should not only place its chemical weapons under international control but also agree to their eventual destruction by signing the treaty that bans them. Soon the U.N.secretary general, the British prime minister and some in Congress had embraced the idea, which the Syrian foreign minister said he “welcomes.” And no wonder: A monitoring plan not only would spare Damascus a U.S. strike that could tip the balance in its civil war but could also allow for endless dickering. Who will the inspectors be? How will they be protected on Syrian military bases? Will the United States be asked to forswear any intervention in the war in exchange? It’s worth remembering that when the United Nations attempted to broker a deal in March 2012, envoy Kofi Annan announced that Mr. Assad had accepted a six-point peace plan, including a cease-fire with U.N. monitors. Syrian forces were to pull back from urban areas, allow humanitarian assistance and begin releasing prisoners. Not one of those terms was respected. Government forces continued their bloody siege of cities such as Homs and Hama. Unable to carry out their mission, the monitors withdrew, and Mr. Annan resigned. There’s only one reason an initiative on chemical weapons might turn out differently: a credible threat of military action by the United States. That makes Congress’s vote on a resolution authorizing force all the more important. If the resolution is approved, the administration will have leverage to push through the Russian proposal. If one or both houses of Congress reject the authorization, the Assad regime can be expected to find a way to reject the deal or dodge compliance indefinitely. Meanwhile, the civil war will go on. Moscow and Damascus may calculate that the Assad regime has a better chance of surviving if both chemical weapons and the possibility of U.S. intervention are taken off the table. But the regime’s prolongation would be a disaster for Syria and U.S. interests in the Middle East. That’s why, whatever the outcome of the chemical-weapons initiative, Mr. Obama should keep his promise to step up support for Syrian rebels.

#### No strike crushes US global credibility that is necessary for global peace

Cohen 9/4, The International Herald Tribune, Red lines matter, p. 6

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Europe knows, and this city in particular, about the importance of American ''red lines.'' West Berlin, caught for more than four decades 100 miles within the Soviet occupation zone, survived on the credibility of the U.S. commitment to it, demonstrated by the Allied airlift in response to the Soviet blockade of 1948.¶ A shattered Europe became whole, free and prosperous under the shield of U.S. credibility. Article 5 of the North Atlantic Treaty spelled out that an armed attack against one member ''shall be considered an attack against them all.'' This was believable enough to deter a Soviet attack on Western Europe. ¶ American credibility in Asia has played a substantial part in the rapid but peaceful rise of China, a power shift of a kind that has seldom, if ever, occurred in world history without major conflict. China believes in the U.S. defense commitment to Japan, South Korea, the Philippines, Australia and New Zealand. America has been the offsetting power allaying the tensions of China's emergence.¶ It is the credibility of the United States as a European and Asian and Middle Eastern power that underwrites global security.¶ In the Americas, the crisis that began in October 1962 with the presentation of evidence to President John F. Kennedy of Soviet missile sites under construction in Cuba, 90 miles off the Florida coast, provided a stern test of U.S. credibility. Kennedy, like President Barack Obama over Syria, took his time before declaring: ''It shall be the policy of this nation to regard any nuclear missile launched from Cuba against any nation in the Western Hemisphere as an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the Soviet Union.'' In the end, Moscow backed down.¶ Syria is not part of Moscow's imperium in the way Cuba was, and Syria does not present anything resembling the threat to the United States of the Cuban missile crisis. Still, President Bashar al-Assad is Moscow's man and Syria has become a critical test of American power.¶ Nobody, to my knowledge, bequeathed Syria in perpetuity to the Assad family. But let's set that aside for the moment - and Hama, and the 100,000 dead of the past 30 months, and the more than two million refugees. It is not easy to overlook the crimes of a leader who will so slaughter and scatter his own. But let's try, because a global question of overriding importance has now arisen out of Syria.¶ That is the question of the enduring credibility of the American ''red lines'' that have been a foundation of the post-1945 world order.¶ Obama drew one last year on the use of chemical weapons in Syria. France has declared that the Aug. 21 chemical attack near Damascus ''could not have been ordered and carried out by anyone but the Syrian government,'' the same conclusion the U.S. government has reached. The gas, the munitions, the target, the intelligence and the history all point to the regime.¶ As for motive, it may as well be asked what motivation prompted Assad to acquiesce to the slaughter or dispersal of several million of his citizens.¶ Syria, in the words of Secretary of State John Kerry, speaking of the chemical attack, has become a ''moral obscenity.'' The man bearing ultimate responsibility for that obscenity is Assad.¶ Values cannot be all of foreign policy; perhaps they cannot even be a quarter of it; but a U.S. foreign policy stripped entirely of values is no longer American. U.S. authority is tied to its moral stature as a state of laws committed to freedom. It is equally tied to the credibility of its word. In Syria the two inextricable strands of U.S. foreign policy - values and realpolitik - have come together.¶ That is the kernel of the matter now before Congress. As Senator John McCain has said, a no vote in Congress on a U.S. military riposte to the chemical weapons attack would be ''catastrophic'' for the United States and its credibility in the world. If Assad can thumb his nose at America anyone can, including the Islamic Republic of Iran.¶ My initial response to Obama's decision to seek congressional support and to the long delay involved was that it betrayed a by-now familiar hesitancy. I have reconsidered: This is a necessary post-9/11 rebalancing from the dangerous ''unbound powers'' of the presidency of which Obama has spoken, powers that opened the way to the compromising of America's ''basic values'' to which he also alluded this year.

### 2

#### US Drone Strikes are decreasing

Pakistan News & Views 7/26/13 (“U.S Drones Strikes has Decreased Due To Its Criticism”, http://pakistannewsviews.com/u-s-drone-strikes-has-decreased-due-to-its-criticism/)

The tempo of CIA drone strikes in Pakistan has slowed significantly in recent months, and anonymous officials tell The Associated Press that the reason has to do with the public’s intensifying criticism of the program, which has reportedly killed hundreds of civilians since 2004. ¶ While the attacks are by no means stopping, their frequency has reached a low not seen since the secret program began in Pakistan, with 16 strikes occurring so far this year. That’s a far cry from the peak of 122 strikes in 2010, according to data from the New America Foundation; whose most recent estimates show those strikes killed 97 alleged “militants” and four “others” in 2013. Current and former intelligence officials tell AP that public scrutiny has led the program to be more focused on “high value” targets, supposedly dropping the controversial practice of “signature strikes,” which attack anonymous individuals based solely on behavior observed in the field.¶ The statements seem to be in line with those from President Obama, who said during a speech in May that he would roll back the CIA program and limit targets to those who constitute a “continuing, imminent threat.” But a Justice Department legal memo leaked prior to the speech broadly defines “imminent” to include any plot which “may or may not occur in the near future.” The administration has also defended its demonstrated ability to execute — without charge or trial — American citizens who fit that criteria.¶ The decreased number of strikes comes after massive public outrage in Pakistan, where the high court in Peshawar has ruled that US drone strikes constitute war crimes and violations of the country’s sovereignty. Ben Emmerson, the UN’s special rapporteur on civil rights, reached similar conclusions during his own investigation of the ongoing US drone campaign. In the past, Pakistani officials have publicly spoken out against drone strikes while secretly consenting to them behind closed doors. But anonymous US officials told the AP that the strikes decreased after Pakistani officials made it clear the attacks could not continue at the current rate, citing concerns over the civilian death toll.

#### Detainee protections increase the incentives for kill rather than capture

Crandall 13 Carla, Law Clerk to the Honorable Carolyn Dineen King, U.S. Court of Appeals for the Fifth Circuit. J.D., J. Reuben Clark Law School, Brigham Young University. "If You Can't Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing,"Seton Hall Law Review: Vol. 43: Iss. 2, Article 3. http://erepository.law.shu.edu/shlr/vol43/iss2/3

But while these developments have been hailed as victories by civil libertarians, they have not come without significant cost. With increasing frequency, journalists and scholars have begun to document the marked expansion in the government’s use of drones to kill targets who purportedly pose a threat to U.S. national security.12 Though a few observers have intimated that there may be a causal connection between the increase in targeted killing and the growing dearth of unfettered detention options,13 the actual link between these phenomena has not been thoroughly explored. This Article fills that gap. Examining the connection between the government’s detention and targeted killing policies, this Article argues that attempts to remove the “stain” of Guantánamo Bay have created what might be an even greater crisis. Specifically, while civil libertarians have claimed success in executive and judicial efforts to grant detainees greater protections, this success has produced an unintended incentive for the government to kill rather than capture individuals involved in the war on terror. This perverse outcome has occurred not as a result of a foreseeable linear process whereby one phenomenon caused the other, but rather as an unanticipated reaction to changes thrust into the nonlinear dynamic systems14 of warfare and national security law.15 To uncover the relationship between the government’s detention and targeted killing programs, this Article invokes the insights of complex adaptive systems theory.16 While scholars have employed chaos and complexity theory to examine legal issues for some time,17 the more nuanced theory of complex adaptive systems is a relative newcomer.18 Nevertheless, scholars are increasingly making the case that the theory offers a useful means by which to understand the legal system and the effects that flow from changes introduced thereto.19 This Article explains and builds upon that work by arguing that legal policies regulating the war on terror actually implicate two systems—that of both warfare and law. Because these two systems “interact complexly with each other, as well as with all . . . other complex social and physical systems with which they are interconnected,”20 introducing even small changes into either of these complex adaptive systems can generate dramatic effects that are unforeseeable when the intervention initially is introduced.21 Within the context of the war on terror, altering detainee policies may have led to the unintended consequence of encouraging the government to dismiss the option of capturing high-value targets in favor of simply eliminating them with drones.22 This important insight suggests a broader one: thinking of war and national security law as interrelated complex adaptive systems can help policymakers, lawmakers, and judges gain a better appreciation of the practical consequences of their decision-making processes. 22 The law of unintended consequences suggests that well-intentioned efforts to attain a specific goal may actually produce results antithetical to the hoped for effect. See Frank B. Cross, Paradoxical Perils of the Precautionary Principle, 53 WASH. & LEE L. REV. 851, 862 (1996). To make these arguments, the Article proceeds as follows. Part II introduces the theory of complex adaptive systems and explains that law and war both exhibit properties of these systems. Part III provides a summary of significant post-9/11 legal developments related to war on terror detentions and interrogations, and describes how these developments gradually increased the protections afforded to detainees. Part IV argues that these efforts to protect the civil liberties of detainees may actually have had the perverse effect of encouraging targeted killing. More specifically, using complex adaptive systems theory, Part IV argues that the rise of the drone may be evidence of the adaptive and self-organizing properties inherent within the systems of law and war. Part V concludes that the government’s expanded use of drones is representative of an unexpected and unintended consequence that can arise as a result of human intervention into complex adaptive systems.

#### Drone strikes as is hurt U.S. credibility – lack of transparency, oversight and restrictions allow any bombing to be blamed on the U.S. – turns heg

Zenko 13, (Micah, fellow at the Council on Foreign Relations, with expertise in Conflict Prevention; US national security policy, military planning and operations and nuclear weapons policy. “Reforming U.S. Drone Strike Policies”, Council on Foerign Relations Special Report no. 65, January 2013 <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736>, pg15)

The problem with maintaining that drone strikes are covert is that both the American and international publics often misunderstand how drones are used. And in affected states, citizens often blame the United States for collateral damage that could have been caused by the host states’ own weapon systems. According to a recent report from Yemen: It’s extremely difficult to figure out who is responsible for any given strike. . . . It could be a manned plane from the Yemeni Air Force or the U.S. military. Or it could be an unmanned drone flown by the U.S. military or the CIA. . . . But no matter who launches a particular strike, Yemenis are likely to blame it on the Americans. What’s more, we found that many more civilians are being killed than officials acknowledge.37 Congressional oversight of drone strikes varies depending on whether the CIA or the U.S. military is the lead executive authority. The CIA, according to the chair of the Senate Select Committee on Intelligence, Senator Dianne Feinstein, meets its “fully and currently informed” legal obligations through “monthly in-depth oversight meetings to review strike records and question every aspect of the program.” 38 Individual JSOC strikes are not reported to the relevant armed services committees, but are covered under the broad special access program biannual reporting to Congress. According to senior staff members on the Senate Foreign Relations Committee and House Foreign Affairs Committee, many of their peers have little understanding of how drone strikes are conducted within the countries for which they are responsible for exercising oversight. Even serving White House officials and members of Congress repeatedly make inaccurate statements about U.S. targeted killings and appear to be unaware of how policies have changed over the past decade.39 At the same time, the judiciary committees have been repeatedly denied access to the June 2010 Office of Legal Counsel memorandum that presented the legal basis for the drone strike that killed U.S. citizen and alleged leader of AQAP Anwar al-Awlaki in September 2011.40 Finally, despite nearly ten years of nonbattlefield targeted killings, no congressional committee has conducted a hearing on any aspect of them.

### 3

#### Politics is Schmittian – congress and courts cannot effectively constrain the executive

Vermeule and Posner, 11 – Adrian Vermeule, prof of Law at Harvard University Law School, Eric A Posner., prof of Law at the University of Chicago Law School, Executive Unbound: After the Madisonian Republic, Oxford University Press 2011

Our thesis is that these modifications to liberal legalism fail. Either they do not go far enough to square with the facts, or they go so far as to effec­tively abandon the position they seek to defend. We live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity. As against liberal constitutional theorists like Janies Madison, Bruce Acker­man,1 and Richard Epstein,2 and liberal theorists of the rule of law like ..Albert Venn Dicey3 and David Dyzenhaus,4 we argue that in the modern administrative state the executive governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crisis. Whereas Madison is an exemplar of liberal legalism, particularly in the domain of constitutional theory, we draw upon the thought of the Weimar legal theorist Carl Schmitt. We do not agree with all of Schmitt’s views, by any means. To the. extent Schmitt thought that democratic poli­tics do not constrain the executive, or thought that in the administrative state the executive is not only largely unconstrained by law but also uncon­strained tout court, we disagree. Indeed, to the extent that Schmitt thought this, he fell into a characteristic error of liberal legalism, which equates lack of legal constraint with unbounded power. But Schmitt’s critical arguments against liberal legalism seem to us basically correct, at least when demysti­fied and rendered into suitably pragmatic and institutional terms. A central theme in Schmitt s work, growing outof Weimar’s running economic and security crises in the 1920s and early 1930s, involves the relationship between the classical rule-of-law state, featuring legislative enactment of general rules enforced by courts, and the administrative state, featuring discretionary authority and ad hoc programs, administered by the executive, affecting particular individuals and firms. The nub of Schmitt s view is the idea that liberal lawmaking institutions frame, general norms that are essentially “oriented to the past,” whereas “the dictates of modern interventionist politics cry out for a legal system conducive to a present- and future-oriented ‘steering’ of complex, ever-changing eco­nomic scenarios.”3 Legislatures and courts, then, are continually behind the pace of events in the administrative state; they play an essentially reac­tive and marginal role, modifying and. occasionally blocking executive policy initiatives, but rarely taking the lead. And in crises, the executive governs nearly alone, at least so far as law is concerned. In our view, the major constraints on the executive, especially in crises, do not arise from law or from the separation-of-powers framework defended by liberal legalists, but from politics and public opinion. Law and politics are hard to separate and lie on a continuum—elections, for example, are a complicated mix: of legal rules and political norms—but the poles are clear enough for our purposes, and the main constraints on the executive arise from the political end of the continuum. A central fallacy of liberal legalism, we argue, is the equation of a constrained executive with an executive constrained by law. The pressures of the administrative state loosen legal constraints, causing liberal legalists to develop tyrannophobia, or unjustified fear of dictatorship. They overlook the de facto political con­straints that have grown up and, to some degree, substituted for legal constraints on the executive.6 As the bonds of law have loosened, the bonds of politics have tightened their grip. The executive, “unbound” from the standpoint of liberal legalism, is in some ways more constrained than ever before. We do not claim that these political constraints necessarily cause the executive to pursue the public interest, however defined, or that they pro­duce optimal executive decision-making. We do claim that politics and public opinion at least block the most lurid forms of executive abuse, that courts and Congress can do no better, that liberal legalism goes wrong by assuming that a legally unconstrained executive is unconstrained overall, and that in any event there is no pragmatically feasible alternative to exec­utive government under current conditions. The last point has normative implications, because of the maxim “Ought implies can.” Executive gov­ernment is best in the thin sense that there is no feasible way to improve upon it, under the conditions of the administrative state.

#### Checks on detention or symbolic – rulings, precedents and attempts at oversight fail

Vermeule and Posner 11 Adrian Vermeule, prof of Law at Harvard University Law School, Eric A Posner., prof of Law at the University of Chicago Law School, *Executive Unbound: After the Madisonian Republic*, Oxford University Press 2011

What about the judges’ reaction? Here the picture fits a standard cyclical pattern in American history; courts remain quiet during the first flush of an emergency, and then reassert themselves, at least symbolically, as uncertainty fades and emotions cool. Between 2001 and 2004, the courts were conspicuously silent about counterterror policy. Indeed, in 200 3 the Supreme Court denied certiorari in a case questioning the con­stitutionality of closed hearings in deportation proceedings, despite the existence of a circuit split on the issue42—in tension with, the Court’s usual certiorari practice, and a clear example of Alexander Bickel’s “pas­sive virtues.”¶ in 2004, the Court for the first time reached the merits of a case about presidential authority over counterterror policy, in Hamdi v. Rumsfield.4i Despite initial impressions that the Court had asserted itself against execu­tive power, the administration won most of what it had wanted. Especially useful to the administration was the plurality’s holding that the AUMF authorized detention of alleged enemy combatants. Newspaper accounts and civil libertarians focused on a different holding, that constitutional due process might demand some minimum procedures to determine which detainees are actually enemy combatants. However, the main opin­ion conspicuously declined to require that judicial process be used, and the government constructed a system of administrative tribunals to make enemy combatant determinations.¶ By 2006, the Bush administration had lost a great deal, of credibility both at home and (especially) abroad, in part because of setbacks in Iraq, in part because of scandals, such as Abu Ghraib, and in part because of spectacular incompetence in the management of Hurricane Katrina. Moreover, with the passage of time and the absence of new terrorist attacks in the homeland, the sense of threat waned. Predictably, the judges reasserted themselves. In Hamdan v. Rumsfield in 2006, the Court held that the administrations mili­tary commissions set up to try alleged enemy combatants for war crimes violated relevant statutes and treaties. When Congress reacted by passing the Military Commissions Act in 2006, the Court went on to hold in 2008, in Boumediene v. Bush, that the statute violated the Suspension Clause of the Constitution by denying habeas corpus to detainees at Guantanamo Bay. Even in these cases, however, the Court did not actually order anyone released; in both cases, the result was simply more legal process. There remain sharp pragmatic limits on what courts are willing to do when faced with executive claims of security needs.¶ Those limits are underscored by recent systematic studies of the post- Boumediene litigation, in which Guantanamo detainees have brought habeas corpus petitions in federal court in the hopes of obtaining release.41 Although there are various ways to interpret the data, we will recount some undis­puted points:¶ (1)Overall, “less than four percent of releases from [Guantanamo] have followed a judicial order of release”.46 These numbers may under­state the in terrorem effect of judicial oversight, which might cause the government to release detainees in anticipation of litigation; but that hy­pothesis is belied by the low variation in the rate of releases over time, whose apparent insensitivity to the course of litigation in the courts sug­gests that the prime motor is internal bureaucratic imperatives rather than legal considerations or fear of judicial oversight.47 Moreover, the 4% figure may actually overstate the effect of judicial oversight, because in some fraction of that subset of cases the government would have released the detainee anyway, when the bureaucratic wheels stopped spinning. It seems safe to conclude that the overwhelming supermajority of releases occur because the government has no interest in holding individuals who are unlikely to be a threat, or because the government incurs political costs from holding detainees, or because the government happens to strike a deal with a foreign nation who will accept the detainee. Judicial oversight is a sideshow.¶ (2)Even in the cases in which the judges “order release,” the actual orders - with only two exceptions as of December 31, 2009—have turned out to be merely hortatory. The judges urge the government to negotiate with foreign nations to find a country willing to accept the detainee at issue,48 but stop short of ordering that the detainee be immediately allowed to walk through the gates of Guantanamo. The judges, leery of the political and policy consequences of ordering possible terrorists to be released, almost always pull their punches at the last second, despite what the head­line' report.¶ (3)Releases from Guantanamo slowed dramatically after 2008, when Boumediene was decided and President Obama was elected.4,9 This may be because the government has already released most of the harmless detainees, and is now down to the hard core of the dangerous. At the same time, however, the number of detainees at the government’s facility in Bagram, Afghanistan has swelled. An alternative (and not necessarily An inconsistent) hypothesis, then, is that Obama is not seriously constrained by what the judges are doing, but does face political imperatives to be tough on terrorism, resulting in fewer releases at Guantanamo and new detentions elsewhere. As we discuss in later chapters, presidents have more political freedom to act on their off-side. A conservative president like Nixon can strike a deal with Red China, while a liberal president like Obama can expand detention at Bagram while brushing aside complaints from civil-libertarian elites, whose carping gets no traction with the gen­eral public so long as detention is ordered by a president perceived in some general way to be sensitive to claims of liberty. On this hypothesis, the pat­tern of executive detention, over time, is fundamentally driven by political imperatives, not judicial orders or legal norms.

#### Restraints are just a façade that legitimate the executive while producing a rubber stamp model and normalize the state of excpetion while subjecting individuals to biopolitical control

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In considering the validity of control orders on accused terrorists or terrorist suspects, the courts have also adopted a procedural approach. Control orders, which fetter an individual's freedom of movement, communication and association in varying degrees of severity, are, as Humphreys has pointed out, clearly biopolitical strategies (2006: 687); as the name would suggest, the sovereign seeks to control homo sacer [\*171] through disciplinary techniques and continuous surveillance. Control orders reflect the central focus in modern democracies on 'bare life' as the 'political subject' (Agamben 1998: 123). In challenges mounted by accused terrorists to control orders, the courts have accepted that control orders are a valid component of the new legislative framework developed in response to the threat of terrorism. In a key constitutional decision in 2007, Thomas v Mowbray, the High Court of Australia upheld the validity of Division 104 of the Criminal Code, pursuant to which a federal magistrate had issued an interim control order against Jack Thomas within a week after his conviction was overturned by the Victorian Court of Appeal. Although then Australian Attorney-General Philip Ruddock claimed that 'the issue is about protecting the Australian community and not punishing a person for an offence' (Robinson & Davis 2006), the imposition of the control order looked like the latest attempt on the part of the state to identify Thomas publicly as a terrorist and impose special restrictions which isolated him, at least to a limited degree, from the rest of the community. As Kirby J noted, 'this sequence of events inevitably gave rise to an appearance, in the plaintiff's case, of action by the Commonwealth designed to thwart the ordinary operation of the criminal law and to deprive the plaintiff of the benefit of the liberty he temporarily enjoyed pursuant to the Court of Appeal's orders' (Thomas v Mowbray: [182]). In fact the control order was hardly the most effective way to protect the community from terrorism; if Thomas were indeed a sleeper agent it would have been more strategic to engage in covert surveillance and track down Thomas's associates. One commentator observed that the control order made Thomas 'an investigative dead end' (Hartcher 2006). The restrictions placed on Thomas's freedom of movement, association and communication were considerable, as were the authorised levels of state surveillance. He was expected to stay home between midnight and 5.00 am each day and to report to the police three times a week; he was also prevented from leaving Australia without police permission. The legislation was challenged on the [\*172] grounds, firstly, that there was no head of legislative power to support it, and secondly, as contrary to Chapter III of the Australian Constitution, which 'gives practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy' (Thomas v Mowbray: [61]). A significant consideration for the majority judges was the existence of a sequence of analogous court orders which curtailed the liberty of individuals but did not amount to detention (Thomas v Mowbray: [16], [79], [116]-[119]). However, such reasoning was rejected by Kirby J in his dissenting judgment, in which he described the impugned legislative provisions as 'unique', 'exceptional' and 'an attempt to break new legislative ground' (Thomas v Mowbray: [331]). Kirby J was scathing in his condemnation of the 'legal and constitutional exceptionalism' which, in his view, characterised the legislative scheme (Thomas v Mowbray: [388]). In particular, he deplored the subservience of the courts to the will of the executive: he stated that 'in effect, and in substance, the federal courts are rendered rubber stamps for the assertions of officers of the Executive government' (Thomas v Mowbray: [369]). Here we find a powerful judicial critique of legal grey holes in which the courts provide a facade of legality for the actions of the executive while the rule of law is undermined. Interestingly enough, one of the majority judges, Gleeson CJ, suggested that a problematic consequence of placing control orders outside the powers of the federal judiciary would be the consignment of this area to the executive, an outcome which would not be conducive to the protection of human rights (Thomas v Mowbray: [17]). However, the second dissenter, Hayne J, indicated that in his view legislation which conferred an equivalent power to issue control orders on the executive would not necessarily be valid (Thomas v Mowbray: [506]). In a sequence of English judgments which were handed down at approximately the same time as Thomas v Mowbray, the House of Lords looked at the legality of non-derogating control orders issued against six respondents suspected of, but certainly not charged with or prosecuted for, terrorist activity. A number of issues relating to the application of [\*173] the European Convention on Human Rights were considered by the court, and a detailed examination of these lies beyond the scope of this article. What was revealing, in exposing the biopolitical thrust of modern democracies, was the willingness on the part of the law lords to consider exactly how many hours of involuntary confinement to one's house amounted to a deprivation of liberty. Eighteen hours of confinement, and associated restrictions on movement, communication and visitors, were considered excessive by a narrow majority in the case of JJ (Secretary of State for the Home Department v JJ). However, a 14-hour curfew in the case of AF (Secretary of State for the Home Department v MB (FC); Secretary of State for the Home Department v AF (FC)) was not, nor was the 12-hour curfew imposed on E (Secretary of State for the Home Department v E). Lord Brown of Eaton-under-Heywood in particular was quite prepared to state that 'the acceptable limit was 16 hours [of confinement], leaving the suspect with 8 hours (admittedly in various respects controlled) liberty a day' (Secretary of State for the Home Department v JJ: [105]). The peculiarly biopolitical strategy of attaching electronic tags to suspected terrorists was also accepted by the law lords. The above discussion reveals that, in general, the courts are prepared to limit their scrutiny of dealings by the executive with accused terrorists to procedural reviews in which substantive issues are glossed over. The biopolitical tactics deployed by the state in supervising and controlling the movements and activities of accused terrorists have not been invalidated by the courts. The abundance of legal grey holes in this area lends support for Agamben's claim that the state of exception has now become the norm. However, somewhat surprisingly, in other forms of legal contests between the state and the accused terrorist, the rule of law has been applied. I turn now to the Australian terror trials.

#### The aff maintains the façade of a legal constaints – this swells executive power

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The examples cited in this section suggest not the formation of an utterly lawless regime, but, rather, within an order that continues to understand itself in terms of the categories provided by liberal contractarianism, the more insidious creation, multiplication, and institutionalization of what David Dyzenhaus calls "grey holes." Such holes are "spaces in which there are some legal constraints on executive action...but the constraints are so insubstantial that they pretty well permit government to do as it pleases."40 As such, they are more harmful to the rule of law than are outright dictatorial usurpations, first, because the provision of limited procedural protections masks the absence of any real constraint on executive power; and, second, because location of the authority to create such spaces within the Constitution implies that, in the last analysis, they bear ex ante authorization by the people. When created, in other words, they may receive but they do not require ratification, whether by Congress or by those whom its members are said to represent. What this means in effect is that the second Bush administration has dispensed with Jefferson's stipulation that extra-constitutional executive acts (or, rather, acts that Jefferson deemed to be outside those constitutionally permitted) require ex post facto ratification; and, in addition, that it has dispensed with Locke's contention that, however unlikely, at least in principle, specific exercises of extra-legal prerogative power (or, rather, acts that Locke deemed to be outside those legally permitted) are properly subject to revolutionary rejection. What one finds in the second Bush administration, then, is a denial of both models of accountability, combined with an aggressive commitment to the constitution of a security state that is liberal only in name. As it extends its reach, perfection of that state renders the prospect of popular repudiation of prerogative power ever more chimerical, and, indeed, renders recognition of the problematic character of its exercise ever less likely.

#### The alt is to reject the aff in favor of building a culture of resilience to check the executive

Vermeule and Posner 11 Adrian Vermeule, prof of Law at Harvard University Law School, Eric A Posner., prof of Law at the University of Chicago Law School, *Executive Unbound: After the Madisonian Republic*, Oxford University Press 2011

We do not yet live under a plebiscitary presidency. In such a system, the president has unchecked legal powers except for the obligation to submit to periodic elections. In our system, Congress retains the formal power to make law. It has subjected presidential lawmaking to complex procedures and bureaucratic checks,1 and it has created independent agencies over which the president in theory has limited control. The fed­eral courts can expect the executive to submit to their orders, and the Supreme Court retains certain quasi-lawmaking powers, which it exercises by striking down statutes and blocking executive actions. The federal system is still in place. State legal institutions retain considerable power over their populations. But these legal checks on executive authority (aside from the electoral constraint) have eroded considerably over the last two hundred years. Congress has delegated extensive powers to the executive. For new initia­tives, the executive leads and Congress follows. Congress can certainly slow down policymaking, and block bills proposed by the executive; but it cannot set the agenda. It is hard to quantify the extent of congressional control over regulatory agencies, but it is fair to say that congressional intervention is episodic and limited, while presidential control over both the executive and independent agencies is strong and growing stronger. The states increasingly exercise authority at the sufferance of the national government and hence the president. The federal courts have not tried to stop the erosion of congressional power and state power. Some commentators argue that the federal courts have taken over Con­gress’s role as an institutional check. It is true that the Supreme Court has shown little compunction about striking down statutes (although usually state statutes), and that it rejected some of the legal theories that the Bush administration used to justify its counterterrorism policies. However, the Court remains a marginal player. The Court ducked any legal rulings on counterterror policies until the 2004 Hamdi decision, and even after the Boumediene decision in 2008, no detainee has been released by final judicial order, from Guantanamo or elsewhere, except in cases where the government chose not to appeal the order of a district judge. The vast majority of detainees have received merely another round of legal process. Some speculate that judicial threats to release detainees have caused the administration to release them preemptively. Yet the judges would incur large political costs for actual orders to release suspected terrorists, and the government knows this, so it is unclear that the government sees the judi­cial threats as credible or takes them very seriously. The government, of course, has many administrative and political reasons to release detainees, quite apart from anything the courts do. So the executive submits to judi­cial orders in part because the courts are careful not to give orders that the executive will resist. In general, judicial opposition to the Bush administration’s counterter­rorism policies took the form of incremental rulings handed down at a gla­cial pace, none of which actually stopped any of the major counterterrorism tactics of that administration, including the application of military power against Al Qaeda, the indefinite detention of members of Al Qaeda, tar­geted assassinations, the immigration sweeps, even coercive interrogation. The (limited) modifications of those tactics that have occurred resulted not from legal interventions but from policy adjustments driven by changed circumstances and public opinion, and by electoral victory of the Obama administration. However, the Obama administration has mostly confirmed and in some areas even expanded the counterterrorism policies of the Bush administration. Strong executive government is bipartisan. The 9/11 attack provided a reminder of just how extensive the presi­dent’s power is. The executive claimed the constitutional authority to, in effect, use emergency powers. Because Congress provided redundant stat­utory authority, and the Supreme Court has steadfastly refused to address the ultimate merits of the executives constitutional claims, these claims were never tested in a legal or public forum. But it is worth trying to ima­gine what would have happened if Congress had refused to pass the Autho­rization for Use of Military Force and the Supreme Court had ordered the executive to release detainees in a contested case. We think that the execu­tive, backed up as it was by popular opinion, would have refused to obey. And, indeed, for just that reason, Congress would, never have refused its imprimatur and the Supreme Court would never have stood in the execu­tive’s way. The major check on the executives power to declare an emer­gency and to use emergency powers is—political. The financial crisis of 2008-2009 also revealed the extent of executive power. Acting together, the Fed, the Treasury, and other executive agencies spent hundreds of billions of dollars, virtually nationalizing parts of the financial system. Congress put up a fuss, but it could not make policy and indeed hardly even influenced policy. Congress initially refused to supply a blank check, then in world-record time changed its mind and gave the blank check, then watched helplessly as the administration adopted pol­icies different from those for which it said the legislation would be needed. Courts played no role in the crisis except to ratify executive actions in tension with the law.2 What, then, prevents the executive from declaring spurious emergencies and using the occasion to consolidate its power—or for that matter, consolidating its power during real emergencies so that it retains that power even after normal times return? In many countries, notably in Latin America, presidents have done just that. Citing an economic crisis, or a military threat, or congressional gridlock, executives have shut down independent media, replaced judges with their cronies, suppressed political opposition, and ruled by dictate. Could this happen in the United States? The answer is, very probably, no. The political check on the executive is real. Declarations of emergency not justified by publicly visible events would be met with skepticism. Actions said, to be justified by emergency would not be approved if the justification were not plausible. Separation of powers may be suffering through an enfeebled old age, but electoral democracy is alive and well. We have suggested that the historical developments that have under­mined separation of powers have strengthened democracy. Consider, for example, the communications revolution, which has culminated (so far) in the Internet Age. As communication costs decrease, the size of markets expand, and hence the scale of regulatory activity must increase. Localities and states lose their ability to regulate markets, and the national govern­ment takes over. Meanwhile, reduced communication costs increase the relative value of administration (monitoring firms and ordering them to change their behavior) and reduce the relative value of legislation (issuing broad-gauged rules), favoring the executive over Congress. At the same time, reduced communication costs make it easier for the public to mon­itor the executive. Today, whistleblowers can easily find an audience on the Internet,; people can put together groups that focus on a tiny aspect of the government s behavior; gigabytes of government data are uploaded onto the Internet and downloaded by researchers who can subject them to rigorous statistical analysis. It need not have worked out this way. Govern­ments can also use technology to monitor citizens for the purpose of suppressing political opposition. But this has not, so far, happened in the United States. Nixon fell in part because his monitoring of political enemies caused an overwhelming political backlash, and although the Bush administration monitored suspected terrorists, no reputable critic suggested that it targeted domestic political opponents. Our main argument has been methodological and programmatic: researchers should no longer view American political life through the Madisonian prism, while normative theorists should cease bemoaning the decline of Madisonianism and instead make their peace with the new political order. The center of gravity has shifted to the executive, which both makes policy and administers it, subject to weak constraints imposed by Congress, the judiciary, and the states. It is pointless to bewail these developments, and futile to argue that Madisonian structures should be reinvigorated. Instead, attention should shift to the political constraints on the president and the institutions through, which those political con­straints operate—chief among them elections, parties, bureaucracy, and the media. As long as the public informs itself and maintains a skeptical attitude toward the motivations of government officials, the executive can operate effectively only by proving over and over that it deserves the public s trust. The irony of the new political order is that the executive, freed from the bonds of law, inspires more distrust than in the past, and thus must enter ad hoc partnerships with political rivals in order to persuade people that it means well. But the new system is more fluid, allowing the executive to form those partnerships when they are needed to advance its goals, and not otherwise. Certain types of partnership have become recurrent pat­terns—for example, inviting a member of the opposite party to join the president’s cabinet. Others are likely in the future. In the place of the clockwork mechanism bequeathed to us by the Enlightenment thinking of the founders, there has emerged a more organic system of power sharing and power constraint that depends on shifting political alliances, currents of public opinion, and the particular exigencies that demand government action. It might seem that such a system requires more attention from the public than can reasonably be expected, but the old system of checks and balances always depended on public opinion as well. The centuries-old British parliamentary system, which operated in. just this way, should provide reason, for optimism. The British record on executive abuses, although hardly perfect, is no worse than the American record and arguably better, despite the lack of a Madisonian separation of legislative and executive powers

### 4

#### The president of the United States should apply the Geneva Conventions to persons detained in an Active Theater of War. The Executive Branch of the United States should create a Domestic Terror Court housed within the executive to resolve the legal status of detainees and create “executive v. executive” divisions as per our Katyal evidence to promote internal separation of powers via separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts.

#### The president can and should apply Geneva to current policies – gets modeled

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In late 2004, the Defense Department retracted the more permissive¶ guidelines for interrogation that were established in 2002. This too is a step¶ in the right direction, as is the adoption¶ of new Army guidelines for interrogation¶ in April 2005 that are more explicit¶ than previous guidelines about permitted¶ and prohibited practices and which¶ specifically bar many of the techniques¶ used in Abu Ghraib. The president should¶ affirm these policies and state clearly that¶ the Geneva conventions apply to all¶ combat situations and to all prisoners. In addition, the president and his¶ subordinates should publicly reaffirm the national and international laws¶ that prohibit torture and prisoner abuse. Secretary of State Condoleezza¶ Rice issued the administration’s clearest statement regarding U.S. adherence¶ to international laws proscribing torture in December 2005, stating that the¶ United States considers its obligations under the Convention Against Torture¶ and Other Cruel, Inhuman, and Degrading Treatment or Punishment¶ to “extend to U.S. personnel wherever they are, whether they are in the¶ United States or outside of the United States.”23 Questions remain, however,¶ about how the administration defines torture, and as a result, U.S. adherence¶ to national or international laws remains murky.

#### Presidential veto power and executive deference mean external restraints fail – internal separation of powers constrains the president and leads to better decision making

Katyal ’6 Neal Katyal, Professor of Law @ Georgetown, The Yale Law Journal, “Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within” 115 Yale L.J. 2314, 2006

After all, Publius's view of separation of powers presumes three branches with equivalent ambitions of maximizing their powers, yet legislative abdication is the reigning modus operandi. It is often remarked that "9/11 changed everything"; 2 particularly so in the war on terror, in which Congress has been absent or content to pass vague, open-ended statutes. The result is an executive that subsumes much of the tripartite structure of government. Many commentators have bemoaned this state of affairs. This Essay will not pile on to those complaints. Rather, it begins where others have left off. If major decisions are going to be made by the President, then how might separation of powers be reflected within the executive branch? The first-best concept of "legislature v. executive" checks and balances must be updated to contemplate second-best "executive v. executive" divisions. And this Essay proposes doing so in perhaps the most controversial area: foreign policy. It is widely thought that the President's power is at its apogee in this arena. By explaining the virtues of internal divisions in the realm of foreign policy, this Essay sparks conversation on whether checks are necessary in other, domestic realms. That conversation desperately needs to center on how best to structure the ever-expanding modern executive branch. From 608,915 employees working in agencies in 1930, 3 to 2,649,319 individuals in 2004, 4 the growth of the executive has not generated a systematic focus on internal checks. We are all fond of analyzing checks on judicial activism in the post-Brown, post-Roe era. So too we think of checks on legislatures, from the filibuster to judicial review. But [\*2317] there is a paucity of thought regarding checks on the President beyond banal wishful thinking about congressional and judicial activity. This Essay aims to fill that gap. A critical mechanism to promote internal separation of powers is bureaucracy. Much maligned by both the political left and right, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview. These benefits have been obscured by the now-dominant, caricatured view of agencies as simple anti-change agents. This Essay celebrates the potential of bureaucracy and explains how legal institutions can better tap its powers. A well-functioning bureaucracy contains agencies with differing missions and objectives that intentionally overlap to create friction. Just as the standard separation-of-powers paradigms (legislature v. courts, executive v. courts, legislature v. executive) overlap to produce friction, so too do their internal variants. When the State and Defense Departments have to convince each other of why their view is right, for example, better decision-making results. And when there is no neutral decision-maker within the government in cases of disagreement, the system risks breaking down. In short, the executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise). A chief aim of this Essay's proposal is to allow each to function without undermining the other. This goal can be met without agency competition - overlapping jurisdiction is simply one catalyzing agent. Other ideas deserve consideration, alongside or independent of such competition, such as developing career protections for the civil service modeled more on the Foreign Service. Executives of all stripes offer the same rationale for forgoing bureaucracy-executive energy and dispatch. 5 Yet the Founders assumed that massive changes to the status quo required legislative enactments, not executive decrees. As that concept has broken down, the risks of unchecked executive power have grown to the point where dispatch has become a worn-out excuse for capricious activity. Such claims of executive power are not limited to the current administration, nor are they limited to politicians. Take, for example, Dean Elena Kagan's rich celebration of presidential administration. 6 Kagan, herself a former political appointee, lauded the President's ability to trump bureaucracy. Anticipating the claims of the current administration, Kagan argued that the [\*2318] President's ability to overrule bureaucrats "energizes regulatory policy" because only "the President has the ability to effect comprehensive, coherent change in administrative policymaking." 7 Yet it becomes clear that the Kagan thesis depends crucially on oversight by the coordinate legislative branch (typically controlled by a party in opposition to the President). Without that checking function, presidential administration can become an engine of concentrated power. This Essay therefore outlines a set of mechanisms that create checks and balances within the executive branch. The apparatuses are familiar - separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts. But these restraints have been informally laid down and inconsistently applied, and in the wake of September 11 they have been decimated. 8 A general framework statute is needed to codify a set of practices. In many ways, the status quo is the worst of all worlds because it creates the facade of external and internal checks when both have withered. I. THE NEED FOR INTERNAL SEPARATION OF POWERS The treacherous attacks of September 11 gave Congress and the President a unique opportunity to work together. Within a week, both houses of Congress passed an Authorization for Use of Military Force (AUMF); 10 two months later they enacted the USA PATRIOT Act to further expand intelligence and law enforcement powers. 11 But Congress did no more. It passed no laws authorizing or regulating detentions for U.S. citizens. It did not affirm or regulate President Bush's decision to use military commissions to try unlawful belligerents. 12 It stood silent when President Bush accepted thinly reasoned legal views of the Geneva Conventions. 13 The administration was content to rely on vague legislation, and Congress was content to enact little else. 14 There is much to be said about the violation of separation of powers engendered by these executive decisions, but for purposes of this Essay, I want [\*2320] to concede the executive's claim - that the AUMF gave the President the raw authority to make these decisions. A democratic deficit still exists; the values of divided government and popular accountability are not being preserved. Even if the President did have the power to carry out the above acts, it would surely have been wiser if Congress had specifically authorized them. Congress's imprimatur would have ensured that the people's representatives concurred, would have aided the government's defense of these actions in courts, and would have signaled to the world a broader American commitment to these decisions than one man's pen stroke. Of course, Congress has not passed legislation to denounce these presidential actions either. And here we come to a subtle change in the legal landscape with broad ramifications: the demise of the congressional checking function. The story begins with the collapse of the nondelegation doctrine in the 1930s, which enabled broad areas of policymaking authority to be given to the President and to agencies under his control. That collapse, however, was tempered by the legislative veto; in practical terms, when Congress did not approve of a particular agency action, it could correct the problem. But after INS v. Chadha, 15 which declared the legislative veto unconstitutional, that checking function, too, disappeared. In most instances today, the only way for Congress to disapprove of a presidential decree, even one chock full of rampant lawmaking, is to pass a bill with a solid enough majority to override a presidential veto. The veto power thus becomes a tool to entrench presidential decrees, rather than one that blocks congressional misadventures. And because Congress ex ante appreciates the supermajority-override rule, its members do not even bother to try to check the President, knowing that a small cadre of loyalists in either House can block a bill. 16 For example, when some of the Senate's most powerful Republicans (John McCain, Lindsay Graham, and John Warner) tried to regulate detentions and trials at Guantanamo Bay, they were told that the President would veto any attempt to modify the AUMF. 17 The result is that once a court [\*2321] interprets a congressional act, such as the AUMF, to give the President broad powers, Congress often cannot reverse the interpretation, even if Congress never intended to give the President those powers in the first place. Senator McCain might persuade every one of the other ninety-nine Senators to vote for his bill, but that is of no moment without a supermajority in the House of Representatives as well. 18 At the same time, the executive branch has gained power from deference doctrines that induce courts to leave much conduct untouched - particularly in foreign affairs. 19 The combination of deference and the veto is especially insidious - it means that a President can interpret a vague statute to give himself additional powers, receive deference in that interpretation from courts, and then lock that decision into place by brandishing the veto. This ratchet-and-lock scheme makes it almost impossible to rein in executive power. All legislative action is therefore dangerous. Any bill, like Senator McCain's torture bill, can be derailed through compromise. A rational legislator, fearing this cascading cycle, is likely to do nothing at all. This expansion of presidential power is reinforced by the party system. When the political branches are controlled by the same party, loyalty, discipline, and self-interest generally preclude interbranch checking. That reluctance is exacerbated by a paucity of weapons that check the President. Post-Chadha, Congress only has weapons that cause extensive collateral damage. The fear of that damage becomes yet another reason why Congress is plagued with inertia. And the filibuster, the last big check in periods of single-party government, is useless against the host of problems caused by Presidents who take expansive views of their powers under existing laws (such as the AUMF). Instead of preserving bicameralism, Chadha has led to its subversion and "no-cameralism." A Congress that conducts little oversight provides a veneer of legitimacy to an adventurist President. The President can appeal to the historic sense of checks and balances, even if those checks are entirely compromised by modern political dynamics. With this system in place, it is no surprise that recent calls [\*2322] for legislative revitalization have failed. No successful action-forcing mechanisms have been developed; instead we are still in John Hart Ely's world of giving a "halftime pep-talk imploring that body to pull up its socks and reclaim its rightful authority." 20 It is time to consider second-best solutions to bring separation of powers into the executive. Bureaucracy can be reformed and celebrated (instead of purged and maligned), and neutral conflict-decision mechanisms can be introduced. Design choices such as these can help bring our government back in line with the principles envisioned by our Founders. 21

#### Internal checks comparatively solve better and don’t link to politics

Metzger ‘9, Gillian E. Metzger, Professor of Law @ Columbia Law School, “The Interdependent Relationship Between Internal and External Separation of Powers” 59 Emory L.J. 423, Emory Law Journal, 2009

Several bases exist for thinking that internal separation of powers mechanisms may have a comparative advantage. First, internal mechanisms [\*440] operate ex ante, at the time when the Executive Branch is formulating and implementing policy, rather than ex post. As a result, they avoid the delay in application that can hamper both judicial and congressional oversight. 76 Second, internal mechanisms often operate continuously, rather than being limited to issues that generate congressional attention or arise in the form of a justiciable challenge. 77 Third, internal mechanisms operate not just at the points at which policy proposals originate and are implemented but also at higher managerial levels, thus addressing policy and administration in both a granular and systemic fashion. In addition, policy recommendations generated through internal checks may face less resistance than those offered externally because the latter frequently arise after executive officials have already decided upon a policy course and are more likely to take an adversarial form. 78 Internal mechanisms may also gain credibility with Executive Branch officials to the extent they are perceived as contributing to more fully informed and expertise-based decisionmaking. 79

### Intel Sharing

**Allies are becoming reluctant to provide the US with intelligence and are questioning intelligence-sharing agreements**

**Daskal & Vladeck, 13** – (Jennifer Daskal is a fellow at Georgetown’s Center on National Security and the Law and an adjunct professor at Georgetown Law Center. Stephen I. Vladeck is a professor of law and the Associate Dean for Scholarship at American University Washington College of Law. This paper was sponsored in part by the Open Society Foundations, AFTER THE AUMF, http://www.lawfareblog.com/wp-content/uploads/2013/05/After-the-AUMF-Final.pdf)

Other counterproductive consequences include the risks of further destabilizing already unstable regimes, increased international condemnation, and the very real possibility of reduced counterterrorism cooperation as a result. Already, there are indications that some key allies are nervous about providing the United States with intelligence information that might be used as a basis for drone strikes.52 In fact, Germany reportedly restricted the type of information it can pass on to its American counterparts in response to concerns about its intelligence being used to support what it deemed to be illegitimate drone strikes.53

**Leads to participating countries info to get leaked, used against it and deliberately mislead people**

**Lelewel, 9** – (November 18, 2009, “NTERNATIONAL INTELL¶ IGENCE COOPERATION I¶ N COUNTER¶ -¶ TERRORISM¶ -¶ CAUSES, COMPLICATION¶ S AND CONSEQUENCES¶ ,” Graduate School of Arts and Sciences¶ of Georgetown University¶ , <http://repository.library.georgetown.edu/bitstream/handle/10822/553538/lelewelStefan.pdf?sequence=1>)

57¶ Despite all these obstacles, international intelligence cooperation¶ can¶ still takes place¶ on¶ a¶ basic¶ level,¶ but certain costs are likely to¶ occur for the¶ participating countries.¶ The most¶ common fear is that “the intelligence exchanged, or knowledge acquired, through the¶ relationship will be compromised or passed on to a third party without the originator‟s¶ consent¶ .¶ ”¶ 58¶ The intelligence exchanged through such a relationship could also be misused¶ for unintended purposes¶ and valuable sources could be lost¶ .¶ 59¶ In the worst case, a state¶ that is currently considered an ally will become an enemy or adversary and use¶ information or data against the other state.¶ 60¶ The involvement of a third country would¶ also¶ bear the risk of “circular reporting¶ ,”¶ meaning that when any piece of data may be¶ passed amongst all parties involved, it might be, when received by the originating nation¶ ,¶ considered a validation for what might have been only a tentative assumption in the first¶ place. Additionally¶ ,¶ the problem of one side deliberately misleading and ally to gain an¶ unwarranted¶ quid pro quo¶ arises. This would¶ then¶ mean that a piece of intelligence that¶ was passed from one country to a second¶ would be used by that country in liaison with a¶ third. The second country would let the third believe that it was the originator of the¶ intelligence in order to gain advantage

**Counter-terror cooperation is a one way street that causes countries to stop sharing information because the US isn’t as diligent in sharing its info – these are necessary to intelligence activities**

Rosenau, 4 – (RAND Corporation Washington Office, “Liaisons Dangereuses? Transatlan

tic Intelligence Cooperation

and the Global War on Terrorism ,” <http://www2.warwick.ac.uk/fac/soc/pais/people/aldrich/vigilant/04b.rosenau-liaisons-dangereuses.pdf>)

The United States regularly shares high -grade intelligence with the G5 countries (that is, Britain, France, Spain, Germany, an d Italy), but appears much less willing to do so with other nations. 36 In the words of one European official, “[i]f you call sharing a one-way street, then we share information. [The United States] wants what we have immediately and demands it. But if we ask for something, it can take months before we even get an initial reply.” 37 Relationships between US intelligence and the services of non-European countries, such as those in th e Arab world, are likely to be similarly one- sided, at least with respect to the most sensitive intelligence. As argued earlier, liaison is based on the belief that such arrangements serve one’s interest, so presumably even aone-way exchange of high-grade intelligence with the United States is worthwhile, provided the Americans give something of comparable value in return. That said, the United States will have to do more if it expects to maintain and expand its liaison relationships, particularly in the Arab world. According to Desmond Ball, the United must be “much more forthcoming in sharing its intelligence, in order to both persuade Arab authorities of the validity of US indictments and to assist them in their domestic counter-terrorist activities—and in the proc ess revealing aspects of US capabilities.

**Fails –**

**A. Organizational Problems**

**Lelewel, 9** – (November 18, 2009, “NTERNATIONAL INTELL¶ IGENCE COOPERATION I¶ N COUNTER¶ -¶ TERRORISM¶ -¶ CAUSES, COMPLICATION¶ S AND CONSEQUENCES¶ ,” Graduate School of Arts and Sciences¶ of Georgetown University¶ , <http://repository.library.georgetown.edu/bitstream/handle/10822/553538/lelewelStefan.pdf?sequence=1>)

Organizational p¶ roblems, referring to¶ differences in the domestic bureaucratic¶ structure of individual states¶ that¶ can make¶ international cooperation more difficult¶ , might occur¶ as well¶ . Examples for this could be¶ some countries combining intelligence and security service and others not, or the¶ different roles different actors¶ play in each country.

**B. Organizational problems**

**Lelewel, 9** – (November 18, 2009, “NTERNATIONAL INTELL¶ IGENCE COOPERATION I¶ N COUNTER¶ -¶ TERRORISM¶ -¶ CAUSES, COMPLICATION¶ S AND CONSEQUENCES¶ ,” Graduate School of Arts and Sciences¶ of Georgetown University¶ , <http://repository.library.georgetown.edu/bitstream/handle/10822/553538/lelewelStefan.pdf?sequence=1>)

Legal problems might¶ also¶ arise¶ when restrictions apply for one country using certain kinds of information from another¶ country that might not be usable under its domestic law.

**C. Technical problems**

**Lelewel, 9** – (November 18, 2009, “NTERNATIONAL INTELL¶ IGENCE COOPERATION I¶ N COUNTER¶ -¶ TERRORISM¶ -¶ CAUSES, COMPLICATION¶ S AND CONSEQUENCES¶ ,” Graduate School of Arts and Sciences¶ of Georgetown University¶ , <http://repository.library.georgetown.edu/bitstream/handle/10822/553538/lelewelStefan.pdf?sequence=1>)

56¶ Finally,¶ technical problems,¶ resulting from the inability to combine different intelligence databases,**¶** would be an¶ obstacle to cooperation¶ . Other areas of problems are a lack of secure means of¶ communicating classified information¶ , the possible violation of human right by one side,¶ or simple sounding issues such as different spellings of Arabic names in different¶ countries.

#### No risk of nuclear terrorism – technically impossible\*\*\*

Michael, Professor Nuclear Counterprolif and Deterrence at Air Force Counterprolif Center, ’12 (George, March, “Strategic Nuclear Terrorism and the Risk of State Decapitation” Defence Studies, Vol 12 Issue 1, p 67-105, T&F Online)

Despite the alarming prospect of nuclear terrorism, the obstacles to obtaining such capabilities are formidable. There are several pathways that terrorists could take to acquire a nuclear device. Seizing an intact nuclear weapon would be the most direct method. However, neither nuclear weapons nor nuclear technology has proliferated to the degree that some observers once feared. Although nuclear weapons have been around for over 65 years, the so-called nuclear club stands at only nine members. 72 Terrorists could attempt to purloin a weapon from a nuclear stockpile; however, absconding with a nuclear weapon would be problematical because of tight security measures at installations.¶ Alternatively, a terrorist group could attempt to acquire a bomb through an illicit transaction, but there is no real well-developed black market for illicit nuclear materials. Still, the deployment of tactical nuclear weapons around the world presents the risk of theft and diversion. 73 In 1997, the Russian General, Alexander Lebed, alleged that 84 ‘suitcase’ bombs were missing from the Russian military arsenal, but later recanted his statements. 74 American officials generally remain unconvinced of Lebed’s story insofar as they were never mentioned in any Soviet war plans. 75 Presumably, the financial requirements for a transaction involving nuclear weapons would be very high, as states have spent millions and billions of dollars to obtain their arsenals. 76 Furthermore, transferring such sums of money could raise red flags, which would present opportunities for authorities to uncover the plot. When pursuing nuclear transactions, terrorist groups would be vulnerable to sting operations. 77¶ Even if terrorists acquired an intact nuclear weapon, the group would still have to bypass or defeat various safeguards, such as permissive action links (PALs), and safing, arming, fusing, and firing (SAFF) procedures. Both US and Russian nuclear weapons are outfitted with complicated physical and electronic locking mechanisms. 78 Nuclear weapons in other countries are usually stored partially disassembled, which would make purloining a fully functional weapon very challenging. 79¶ Failing to acquire a nuclear weapon, a terrorist group could endeavor to fabricate its own Improvised Nuclear Device (IND). For years, the US government has explored the possibility of a clandestine group fabricating a nuclear weapon. The so-called Nth Country Experiment examined the technical problems facing a nation that endeavored to build a small stockpile of nuclear weapons. Launched in 1964, the experiment sought to determine whether a minimal team –in this case, two young American physicists with PhDs and without nuclear-weapons design knowledge –could design a workable nuclear weapon with a militarily significant yield. After three man-years of effort, the two novices succeeded in a hypothetical test of their device. 80 In 1977, the US Office of Technology Assessment concluded that a small terrorist group could develop and detonate a crude nuclear device without access to classified material and without access to a great deal of technological equipment. Modest machine shop facilities could be contracted for purposes of constructing the device. 81¶ Numerous experts have weighed in on the workability of constructing an IND. Hans Bethe, the Nobel laureate who worked on the Manhattan Project, once calculated that a minimum of six highly-trained persons representing the right expertise would be required to fabricate a nuclear device. 82 A hypothetical scenario developed by Peter Zimmerman, a former chief scientist for the Arms Control and Disarmament Agency, and Jeffrey G. Lewis, the former executive director of the Managing the Atom Project at Harvard University’s Belfer Center for Science and International Affairs, concluded that a team of 19 persons could build a nuclear device in the United States for about $10 million. 83¶ The most crucial step in the IND pathway is acquiring enough fissile material for the weapon. According to some estimates, roughly 25 kilograms of weapons-grade uranium or 8 kilograms of weapons-grade plutonium would be required to support a self-sustaining fission chain reaction. 84 It would be virtually impossible for a terrorist group to create its own fissile material. Enriching uranium, or producing plutonium in a nuclear reactor, is far beyond the scope of any terrorist organization. 85 However, the International Atomic Energy Agency (IAEA), which maintains a database, confirmed 1,562 incidents of smuggling encompassing trade in nuclear materials or radioactive sources. Fifteen incidents involved HEU or plutonium. 86 Be that as it may, according to the IAEA, the total of all known thefts of HEU around the world between 1993 and 2006 amounted to less than eight kilograms, far short of the estimated minimum 25 kilograms necessary for a crude improvised nuclear device. 87 An amount of fissile material adequate for a workable nuclear device would be difficult to procure from one source or in one transaction. However, terrorists could settle on less demanding standards. According to an article in Scientific American, a nuclear device could be fabricated with as little as 60 kilograms of HEU (defined as concentrated to levels of 20 percent for more of the uranium 235 isotope). 88 Although enriching uranium is well nigh impossible for terrorist groups, approximately 1,800 tons of HEU was created during the Cold War, mostly by the United States and the Soviet Union. 89 Collective efforts, such as the Cooperative Threat Reduction program, the G-8 Partnership against the Spread of Weapons of Mass Destruction, and the Nuclear Suppliers Group, have done much to secure nuclear weapons and fissile materials, but the job is far from complete. 90 And other problems are on the horizon. For instance, the number of nuclear reactors is projected to double by the end of the century, though many, if not most, will be fueled with low-enriched uranium (LEU). With this development, comes the risk of diversion as HEU and plutonium stockpiles will be plentiful in civilian sectors. 91¶ Plutonium is more available around the world than HEU and smuggling plutonium would be relatively easy insofar as it commonly comes in two-pound bars or gravel-like pellets. 92 Constructing an IND from plutonium, though, would be much more challenging insofar as it would require the more sophisticated implosion-style design that would require highly trained engineers working in well-equipped labs. 93 But, if an implosion device does not detonate precisely as intended, then it would probably be more akin to a radiological dispersion device, rather than a mushroom. Theoretically, plutonium could be used in a gun-assembly weapon, but the detonation would probably result in an unimpressive fizzle, rather than a substantial explosion with a yield no greater than 10 to 20 tons of TNT, which would still be much greater than one from a conventional explosive. 94¶ But even assuming that fissile material could be acquired, the terrorist group would still need the technical expertise to complete the required steps to assemble a nuclear device. Most experts believe that constructing a gun-assembly weapon would pose no significant technological barriers. 95 Luis Alvarez once asserted that a fairly high-level nuclear explosion could be occasioned just by dropping one piece of weapons-grade uranium onto another. He may, however, have exaggerated the ease with which terrorists could fabricate a nuclear device. 96¶ In sum, the hurdles that a terrorist group would have to overcome to build or acquire a nuclear bomb are very high. If states that aspire to obtain nuclear capability face serious difficulties, it would follow that it would be even more challenging for terrorist groups with far fewer resources and a without a secure geographic area in which to undertake such a project. The difficulty of developing a viable nuclear weapon is illustrated by the case of Saddam Hussein’s Iraq, which after 20 years of effort and over ten billion dollars spent, failed to produce a functional bomb by the time the country was defeated in the 1991 Gulf War. 97 Nevertheless, the quality of a nuclear device for a non-state entity would presumably be much lower as it would not be necessary to meet the same quality standards of states when fabricating their nuclear weapons. Nor would the device have to be weaponized and mated with a delivery system.¶ In order to be successful, terrorists must succeed at each stage of the plot. With clandestine activities, the probability of security leaks increases with the number of persons involved. 98 The plot would require not only highly competent technicians, but also unflinching loyalty and discipline from the participants. A strong central authority would be necessary to coordinate the numerous operatives involved in the acquisition and delivery of the weapon. Substantial funding to procure the materials with which to build a bomb would be necessary, unless a weapon was conveyed to the group by a state or some criminal entity. 99 Finally, a network of competent and dedicated operatives would be required to arrange the transport of the weapon across national borders without detection, which could be challenging considering heightened security measures, including gamma ray detectors. 100 Such a combination of steps spread throughout each stage of the plot would be daunting. 101¶ As Matthew Bunn and Anthony Wier once pointed out, in setting the parameters of nuclear terrorism, the laws of physics are both kind and cruel. In a sense, they are kind insofar as the essential ingredients for a bomb are very difficult to produce. However, they are also cruel in the sense that while it is not easy to make a nuclear bomb, it is not as difficult as believed once the essential ingredients are in hand. 102 Furthermore, as more and more countries undergo industrialization concomitant with the diffusion of technology and expertise, the hurdles for acquiring these ingredients are now more likely to be surmounted, though HEU is still hard to procure illicitly. In a global economy, dual-use technologies circulate around the world along with the scientific personnel who design and use them. 103 And although both the US and Russian governments have substantially reduced their arsenals since the end of the Cold War, many warheads remain. 104 Consequently, there are still many nuclear weapons that could fall into the wrong hands.

### Deference

#### a) Overturned the first two Supreme Court cases that attempted to limit indefinite detention

Nikkel 12, 2012, J.D. Candidate, 2012, William S. Boyd School of Law, Las Vegas; B.A., 2009, University of Nevada, Reno. Nevada Law Journal. Spring 2012. The Author would like to thank Professor Christopher L. Blakesley, Professor Terrill Pollman, and the Nevada Law Journal staff for helping with the research and writing of this Note.) Web, Lexis Nexis.

The first challenges to the detention program came in the form of Rasul and Hamdi, both decisions handed down on June 28, 2004, by the Supreme Court.93 Sixteen detainees—two British, two Australian, and twelve Kuwaiti citizens—brought the Rasul action, seeking a writ of habeas corpus in federal court.94 In the 6 to 3 Rasul decision, the Supreme Court held Guant´anamo prisoners could challenge the lawfulness of their detention in federal court because Cuba’s “ultimate sovereignty” over the base did not preclude access.95 On the other hand, in Hamdi, a plurality of the Court found the government could detain an American citizen as an enemy combatant pursuant to the AUMF, but had to offer him the opportunity to challenge the factual basis for his detention with the benefit of a fair hearing before a neutral tribunal and access to counsel.96 Justice O’Connor’s plurality opinion warned “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”97 O’Connor thought the war against the Taliban closely resembled wars of the past, and the president’s traditional war powers likely did not apply in the war against al Qaeda or in conflicts against other non-state actors.98 Furthermore, as critical as the Government’s interest may have been in addressing immediate threats to national security, “history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”99 O’Connor concluded enemy combatant proceedings should be carefully tailored to alleviate “their uncommon potential to burden the Executive at a time of ongoing military conflict.”100 Therefore, the Court attempted to strike a balance in Rasul and Hamdi: although the president could detain unlawful combatants, the administration needed to provide basic due process for captured persons. In response to the Rasul and Hamdi decisions, the government responded twofold to limit due process for Guant´anamo detainees: first with the Combatant Status Review Tribunal (“CSRT”)101 and then with the Detainee Treatment Act of 2005 (“DTA”).102 A mere nine days after the Rasul and Hamdi decisions, allowed Guant´anamo detainees to contest their designations as enemy combatants. 103 The CSRT allowed the detainees to consult a “personal representative” (a military officer “with the appropriate security clearance”) to review “any reasonably available information” possessed by the Department of Defense regarding the detainee’s classification.104 After a preparation and consultation period of thirty days, the Department of Defense would convene a tribunal, composed of three neutral commissioned military officers, to review the detainee’s status.105 However, the rules of evidence did not apply and the tribunal allowed admission of hearsay.106 The detainee could only call “reasonably available” witnesses and the memo created a rebuttable presumption in favor of the government’s evidence.107 Therefore, although the executive branch complied with the Court’s mandate for a neutral tribunal before which detainees could challenge their classifications as “enemy combatants,” the limited due process protections led to criticism that the CSRTs were not in place to discover the truth about the detainees, but rather to prolong their detentions.108 Anticipating more judicial challenges from Guant´anamo detainees due to the shortcomings of the CSRT process, Congress finally entered the fray on December 30, 2005, by passing the Detainee Treatment Act.109 The Act amended 28 U.S.C § 2241, the federal habeas statute, and stripped federal courts of their jurisdiction to hear habeas petitions filed by detainees.110 Couched in language about prohibiting “cruel, inhuman, or degrading treatment” of persons in the United States’ custody,111 the Act codified Wolfowitz’s CSRT memo112 and provided, “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guant´anamo Bay, Cuba.”113

#### When the courts responded to give more rights, Congress stripped that decision of meaning too.

Nikkel 12, 2012, J.D. Candidate, 2012, William S. Boyd School of Law, Las Vegas; B.A., 2009, University of Nevada, Reno. Nevada Law Journal. Spring 2012. The Author would like to thank Professor Christopher L. Blakesley, Professor Terrill Pollman, and the Nevada Law Journal staff for helping with the research and writing of this Note.) Web, Lexis Nexis.

The DTA threw pending habeas claims by Guant´anamo detainees, like that of Salim Ahmed Hamdan (allegedly Osama bin Laden’s chauffer and bod-yguard),114 into chaos because it was unclear if pending claims could still be heard by federal courts.115 The Supreme Court, in its 5 to 3 Hamdan v. Rumsfeld decision, found the DTA did not retroactively strip habeas jurisdiction over pending cases.116 Furthermore, the Court invalidated the system of military tribunals the Bush administration created in the wake of 9/11 because the system violated Article 3 of the Geneva Conventions.117 The administration modeled these tribunals after those President Roosevelt used to try the prisoners in Quirin and Eisentrager, but the new tribunals lacked the express authorization from Congress, either by statute or declaration of war.118 At President Bush’s behest, Congress responded yet again, this time in the form of the Military Commissions Act of 2006 (“MCA”), which scholars have called “a harsh rebuke of the Hamdan court.”119 In order to provide President Bush with the “tools he need[ed] to protect [the] country” by allowing military tribunals to provide swift justice for terrorists and to combat future attacks,120 Section 7 of the MCA struck the DTA’s amendment to the federal habeas statute and inserted a new subsection:¶ [N]o court, justice, or judge shall have jurisdiction to hear or consider an application¶ for a writ of habeas corpus filed by or on behalf of an alien detained by the United¶ States who has been determined by the United States to have been properly detained¶ as an enemy combatant or is awaiting such a determination.121¶ The MCA avoided the pitfalls of Hamdan’s challenge by ensuring that its¶ provisions would apply to pending cases as well.122 The Act also defined new¶ offenses the Commission could try,123 permitted testimony obtained through¶ coercive techniques,124 and even prohibited combatants from invoking the protections¶ of the Geneva Conventions.125 The jurisdiction-stripping provisions of¶ the MCA triggered Suspension Clause concerns, setting the stage for¶ Boumediene, the principal case in the Guant´anamo litigation.

#### Stripping guts the case solvency and turns the case—all rights protections would go completely unenforced—trampling meaningful rights:

Barry W. Lynn, 2004 bachelor's degree at Dickinson College, theology degree from Boston University School of Theology, minister in the United Church of Christ, of the Washington, D.C. bar, law degree from Georgetown University Law Center, the Executive Director of Americans United for Separation of Church and State, 20**04**[“Congress and Court Stripping: Just Keep Your Shirts On” Church and State Magazine, May]

Another measure, the misnamed "Constitution Restoration Act of 2004," was written by former Alabama Supreme Court Chief Justice Roy Moore and his allies. It would ban all cases challenging state-sponsored acknowledgement of "God as the sovereign source of law, liberty, or government." For good measure, it would also retroactively overturn all existing rulings in this area and establish a mechanism for impeaching federal judges who dare to uphold church-state separation! One wonders if the legislators who wrote these bills slept through high school civics class. The separation of powers means that the U.S. government consists of three co-equal branches: the president, the Congress and the courts. Congress does not have the power, through simple legislation, to decimate the authority of the courts over issues dealing with the Bill of Rights. Such power would rapidly make the courts superfluous. Whenever a judge ruled in a manner that displeased a legislator, a court-stripping bill would be drawn up and passed. Pretty soon the courts would be nothing but a rubber-stamp **body for Congress**. Some members of Congress might want that, but it would be a disaster for American democracy. Courts exist to make hard decisions. When lawmakers overstep their bounds and infringe on constitutional rights, courts are there to pull them back. Without the judiciary to protect us, Americans would quickly be at the mercy of the momentary whims of the majority. Our rights would be trampled on.

#### No causality between hegemony and peace

-this card is really good

Fettweis 11 Christopher, Professor of Political Science @ Tulane, Dangerous Times?: The International Politics of Great Power Peace, pg. 172-174

The primary attack on restraint, or justification of internationalism, posits that if the United States were to withdraw from the world, a variety of ills would sweep over key regions and eventually pose threats to U.S. security and/or prosperity. These problems might take three forms (besides the obvious if remarkably unlikely, direct threats to the homeland.). generalized chaos, hostile imbalances in Eurasia, and/or failed states. Historian Arthur Schlesinger was typical when he worried that restraint would mean "a chaotic, violent, and ever more dangerous planet." All of these concerns either implicitly or explicitly assume that the presence of the United States is the primary reason for international stability, and if that presence were withdrawn chaos would ensue. In other words, they depend upon hegemonic-stability logic. Simply stated, the hegemonic stability theory proposes that international peace is only possible when there is one country strong enough to make and enforce a set of rules. At the height of Pax Romana between 27 BC and 180 AD, for example, Rome was able to bring unprecedented peace and security to the Mediterranean. The Pax Britannica of the nineteenth century brought a level of stability to the high seas. Perhaps the current era is peaceful because the United States has established a de facto Pax Americana where no power is strong enough to challenge its dominance, and because it has established a set of rules that are generally in the interests of all countries to follow. Without a benevolent hegemon, some strategists fear, instability may break out around the globe.."'. Unchecked conflicts could cause humanitarian disaster and, in today's interconnected world, economic turmoil that would ripple throughout global financial markets. If the United States were to abandon its commitments abroad, argued Art, the world would "become a more dangerous place' and, sooner or later, that would 'redound to America's detriment."' If the massive spending that the United States engages in actually provides stability in the international political and economic systems, then perhaps internationalism is worthwhile. There are good theoretical and empirical reasons, however, to believe that U.S hegemony is not the primary cause of the current era of stability. First of all, the hegemonic-stability argument overstates the role that the United States plays in the system. No country is strong enough to police the world on its own. The only way there can he stability in the community of great powers is if self-policing occurs, if states have decided that their interests are served by peace. if no pacific normative shift had occurred among the great powers that was filtering down through the system, then no amount of international constabulary work by the United States could maintain stability. Likewise, if it is true that such a shift has occurred, then most of what the hegemon spends to bring stability would be wasted. The 5 percent of the world's population that live in the United States simply could not force peace upon an unwilling 95. At the risk of beating the metaphor to death, the United States maybe patrolling a neighborhood that has already rid itself of crime. Stability and unipolarity may be simply coincidental. In order for U.S. hegemony to he the reason for global stability, the rest of the world would have to expect reward for good behavior and fear punishment for bad. Since the end of the Cold War, the United States has not always proven to he especially eager to engage in humanitarian interventions abroad. Even rather incontrovertible evidence of genocide has not been sufficient to inspire action. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. Ethiopia and Eritrea are hardly the only states that could go to war without the slightest threat of U.S. intervention. Since most of the world today is free to fight without U.S. involvement, something else must be at work. Stability exists in many places where no hegemony is present. Second, the limited empirical evidence we have suggests that there is little connection between the relative level of U.S. activism and international stability. During the 1990s the United States cut back on its defense spending fairly substantially. By 1998 the United States was spending $100 billion less on defense in real terms than it had in 1990,72 To internationalists, defense hawks, and other believers in hegemonic stability, this irresponsible peace dividend" endangered both national and global security. "No serious analyst of American military capabilities;' argued Kristol and Kagan, 'doubts that the defense budget has been cut much too far to meet America's responsibilities to itself and to world peac&'73 If the pacific trends were due not to U.S. hegemony but a strengthening norm against interstate war, however, one would not have expected an increase in global instability and violence. The verdict from the past two decades is fairly plain: The world grew' more peaceful while the United States cut its forces. No state seemed to believe that its security was endangered by a less-capable Pentagon, or at least none took any action that would suggest such a belief. No militaries were enhanced to address power vacuums; no security dilemmas drove mistrust and arms races; no regional balancing occurred once the stabilizing presence of the U.S. military was diminished. The rest of the world acted as if the threat of international war was not a pressing concern, despite the reduction in U.S. capabilities. The incidence and magnitude of global conflict declined while the United States cut its military spending under President Clinton, and it kept declining as the Bush Administration ramped spending back up. No complex statistical analysis should be necessary to reach the conclusion that the two are unrelated. It is also worth noting for our purposes that the United States was no less safe.

### Solvency

#### Even if the president has to rely on risky legal grounds – no court will ever rule against him on national security affairs and even if they did, the executive would circumvent them

Vermeule 9 \*Adrian, John H. Watson, Jr. Professor of Law, Harvard Law School. Harvard Law Review, 122 Harv. L. Rev. 1095, February

4. Standards Versus Grey Holes. - A particular clarification about grey holes is also necessary. A conventional legal perspective would hold that administrative law is, of course, composed of both "rules" and "standards" in the sense in which these terms are used in legal theory. 35 And on this perspective, it is unsurprising that where the relevant law creates standards, judges will increase deference to the executive when administrative action touches on sensitive matters of national security and foreign relations, or as emergencies arise. No one thinks that liberal legalism is inconsistent with standards, as opposed to rules, or that it prohibits all judicial deference to the executive, or that it requires judges to redecide all administrative decisions. Is the claim that our administrative law is Schmittian just a claim that it contains standards, or that judges sometimes defer to agencies? No. A "standard" in the legal theorist's sense is merely a potential grey hole, and the sort of deference that liberal-legalist judges are usually willing to afford is not enough to bring a grey hole into being either. My suggestion is that the standards inherent in administrative law are best understood as adjustable parameters, in which the intensity of review can be dialed up or down. When (and only when) it is dialed down far enough, the apparent availability of judicial review becomes a sham or facade, and a grey hole arises. It is hard to specify, in the abstract, when exactly this occurs, or how deferential review must be to create a grey hole. But it is not necessary to specify that in the abstract. If the examples in Part II are convincing - the proof must be in the pudding - then the reality is that in certain domains, and with respect to certain questions, it is an inescapable fact that judges applying the adjustable parameters of our administrative law have upheld executive or administrative action on such deferential terms as to make legality a pretense. In such cases, judicial review is itself a kind of legal fiction and the outcome of judicial review is a foregone conclusion - not something that is compatible, even in theory, with the banal liberal-legalist observations that administrative law contains standards and permits deference. II. The Black and Grey Holes of Administrative Law I will lay the groundwork for the later theoretical discussion with an overview of decisions by the federal courts of appeals in cases at the intersection of administrative law and national security, especially after 9/11. It is important to be clear about what this overview is intended [\*1107] to show. I do not attempt to prove an empirical hypothesis to the effect that administrative law in the courts of appeals has become more deferential after 9/11, although that may well be true. The examples of law-free zones and sham review I will examine are not evidence of some further hypothesis; rather they are themselves the facts to be established. They show that administrative law in operation contains substantial black and grey holes built into its working structure - that our administrative law is in this sense substantially Schmittian. Not as Schmittian as possible, but much more so than the various camps of rule-of-law theorists and administrative law theorists think is true or desirable.

## 2NC

### OV

#### The aff is an outgrowth of a very particular Americanized version of liberal subjectivity. What makes sense according to the aff has it’s own unique history. The aff’s muscular conceptions of liberalism – were borne from learning lessons in opposition to the Nixonian logic of war and the Cold War. Today, these liberal illusions have coalesced to form a new liberal subjectivity which legitimizes wars for democracy and doctrines of pre-emption as a ‘new internationalism’

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A universalist liberal ideology has been re-asserted. It is not only neo-con hawks or Blairite opportunists that now legitimise wars for democracy. Alarmingly, it is a generation of political thinkers who opposed the Nixonian logic of war (wars to show that a country can ‘credibly’ fight a war to protect its interests1), and those humbled by the anticolonial struggles of liberation from previous incarnations of European superiority that are renewing spurious civilizational discourses. This ‘muscular liberalism’ has found its voice at the moment of a global political debate about the legality and effectiveness of ‘just wars’ – so called ‘wars for democracy’ or ‘humanitarian war’. The new political alignment of the liberal left emerged in the context of discussions about the ‘use of force’ irrespective of UN Security Council endorsement or the sovereign state’s territorial integrity, such as in Kosovo – but gained rapid momentum in response to attacks in New York City and Washington on September 11, 2001. Parts of the liberal left have now aligned themselves with neoconservative foreign policies, and have joined what they believe is a new anti-totalitarian global struggle – the ‘war on terror’ or the battle against Islamist fundamentalism. One task of this essay, then, is to identify this new formation of the liberal left. Much horror and suffering has been unleashed on the world in the name of the liberal society which must endure. However, when suicide bombing and state-terror are compared, the retort is that there is no moral equivalence between the two. Talal Asad in his evocative book, On Suicide Bombing, has probed the horror that is felt about suicide bombing in contrast to state violence and terror.2 What affective associations are formed in the reaction to suicide bombing? What does horror about suicide bombing tell us about the constitution of inter-subjective relations? In this essay I begin to probe these questions about the relation between death, subjectivity, and politics. I want to excavate below the surface oppositions of good deaths and bad, justifiable killing and barbarism, which have been so central to left liberal arguments. As so much is riding on the difference between ‘our good war’ and ‘their cult of death’, it seems apt to examine and undo the opposition. The muscular liberal left projects itself as embodying the values of the ‘West’, a geo-political convergence that is regularly opposed to the ‘East’, ‘Muslims’, or the ‘Islamic World’. I undo this opposition, arguing that thanatopolitics, a convergence of death, sacrifice, martyrdom and politics, is common to left liberal and Islamist political formations. How does death become political for left liberals and Islamist suicide bombers? In the case of the latter, what is most immediately apparent is how little is known about the politics and politicization of suicide bombers. Suicide bombers are represented as a near perfect contrast to the free, autonomous, self-legislating liberal subject – a person overdetermined by her backward culture, oppressive setting, and yet also empty of content, and whose death can have no temporal political purchase. The ‘suicide bomber’ tends to be treated by the liberal left as a trans-historical ‘figure’, usually represented as the ‘Islamo-fascist’ or the ‘irrational’ Muslim.3 The causes of suicide bombing are often implicitly placed on Islam itself – a religion that is represented as devoid of ‘scepticism, doubt, or rebellion’ and thus seen as a favourable setting for totalitarianism.4 The account of the suicide bomber as neo-fascist assassin supplements a lack – that is, that the association of suicide bombing with Islam explains very little. The suicide bomber is thus made completely familiar as totalitarian fascist, or wholly other as “[a] completely new kind of enemy, one for whom death is not death”.5 So much that is written about the suicide bomber glosses over the unknown with political subjectivities, figures, and paradigms (such as fascism) which are familiar enough to be vociferously opposed. By drawing the suicide bomber into a familiar moral register of ‘evil’, political and historical relations between victim and perpetrator are erased.6 In the place of ethnographically informed research the ‘theorist’ or ‘public intellectual’ erases the contingency of the suicide bomber and reduces her death to pure annihilation, or nothingness. The discussion concludes by undoing the notion of the ‘West’, the very ground that the liberal left assert they stand for. The ‘West’ is no longer a viable representation of a geo-political convergence, if it ever was. Liberal discourse has regarded itself as the projection of the ‘West’ and its enlightenment. But this ignores important continuities between Islam, Christianity, and contemporary secular formations. The current ‘clash of monotheisms’, I argue after J-L Nancy, reveals a crisis of sense, authority, and meaning which is inherent to the monotheistic form. An increasingly globalised world is made up of political communities and juridical orders that have been ‘emptied’ of authority and certainty. This crisis of sense conditions the horror felt by the supposedly rational liberal in the face of Islamist terrorism. Horror at terrorism is then the affective bond that sustains a grouping that otherwise suffers the loss of a political project with a definite end. The general objective of this essay is to challenge the unexamined assumptions about politics and death that circulate in liberal left denunciations of Islamic fascism. The horror and fascination with the figure of the suicide bomber reveals an unacknowledged affective bond that constitutes the muscular liberal left as a political formation. This relies on disavowing the sacrificial and theological underpinnings of political liberalism itself – and ignores the continuities between what is called the ‘West’ and the theologico-political enterprise of monotheism. Monotheism is not the preserve of something called the ‘West’, but rather an enterprise that is common to all three Religions of the Book. The article concludes by describing how the writings of Jean-Luc Nancy on monotheism offer liberal left thinkers insights for rethinking the crisis of value that resulted from the collapse of grand emancipatory enterprises as well as the fragmentation of politics resulting from a focus on political identification through difference. I opened with a reference to the ‘liberal left’. Of course the ‘liberal left’ signifies a vast and varied range of political thinking and activism – so I must clarify how I am deploying this term. In this essay the terms ‘liberal left’ or ‘muscular liberal’ are used interchangeably. Paul Berman and Nick Cohen, whose writing I will shortly refer to, are exemplars of the new political alignment who self-identify as ‘democrats and progressives’, but whose writings feature bellicose assertions about the superiority of western models of democracy, and universal human rights.7 Among this liberal left, democracy and freedom become hemispheric and come to stand for the West. More generally, now, the ‘liberal left’ can be distinguished from political movements and thinkers who draw inspiration from a Marxist tradition of thought with a socialist horizon. The liberal left I am referring to would view the Marxist tradition as undervaluing democratic freedoms and human rights. Left liberals also tend to dismiss the so called post-Marxist turn in European continental philosophy as ‘postmodern relativism’.8 PostMarxists confronted the problem of the ‘collective’ – addressing the problem of masses and classes as the universal category or agent of historical transformation. This was a necessary correction to all the disasters visited on the masses in the name of a universal working class. The liberal state exploited these divisions on the left. It is true that a left fragmented through identity politics or the politics of difference were reduced to group based claims on the state. However, liberal multiculturalism was critiqued by anti-racist and feminist thinkers as early as the 1970s for ignoring the structural problems of class or as yet another nation-building device. The new formation of the muscular liberal left have only just discovered the defects of multiculturalism. The dismissal of liberal multiculturalism is now code for ‘too much tolerance’ of ‘all that difference’. The liberal left, or muscular liberal, as I use these terms, should not be conflated with the way ‘liberal’ is generally used in North America to denote ‘progressive’, ‘pro-choice’, open to a multiplicity of forms of sexual expression, generally ‘tolerant’, or ‘left wing’ (meaning socialist). It might be objected that it is not the liberal left, but ‘right wing crazies’ driven by Christian evangelical zeal combined with neo-liberal economic strategies that have usurped a post-9/11 crime and security agenda to mount a global hegemonic enterprise in the name of a ‘war on terror’. It might also be said that this is nothing new – global expansionist enterprises such as 18th and 19th century colonialism mobilised religion, science, and theories of economic development to secure resources and justify extreme violence where necessary. Global domination, it might be argued, has always been a thanatopolitical enterprise. So what’s different now? What is crucial, now, is that the entire spectrum of liberalism, including the ‘rational centre’, is engaged in the kind of mindset whereby a destructive and deadly war is justified in the name of protecting or establishing democracy, the rule of law, and human rights. It might then be retorted that this ‘rational centre’ of liberalism have ‘always’ been oriented in this way. That is partly true, but it is worth recalling that the liberal left I have in mind is the generation that came of age with opposition to the war in Vietnam, other Indo-Chinese conflagrations, and the undoing of empire. This is a left that observed the Cold War conducted through various ‘hot wars’ in Africa, Central and Latin America, and South East Asia and thus at least hoped to build a ‘new world order’ of international law and multilateralism. This is a left that was resolved, by the 1970s, not to repeat the error of blindly following a scientific discourse that promised to produce a utopia – whether this was ‘actually existing socialism’ or the purity of ‘blood and soil’. But now, a deadly politics, a thanatopolitics, is drawn out of a liberal horror and struggle against a monolithically drawn enemy called Islamic fundamentalism. What is new is that Islam has replaced communism/fascism as the new ‘peril’ against which the full spectrum of liberalism is mobilized. Islamist terrorism and suicide bombers, a clash between an apparently Islamic ‘cult of death’ versus modern secular rationality has come to be a central preoccupation of the liberal left. In the process, as Talal Asad has eloquently pointed out, horror about terrorism has come to be revealed as one way in which liberal subjectivity and its relation to political community can be interrogated and understood.9 Moreover, the potential for liberal principles to be deployed in the service of legitimating a doctrine of pre-emption as the ‘new internationalism’ is significant. The first and second Gulf Wars, according to the liberal left, are then not wars to secure control over the supply of oil, or regional and global hegemony, as others on the left might argue, but anti-fascist, anti-totalitarian wars of liberation fought in the name of ‘democracy’. Backing ‘progressive wars’ for ‘freedom and democracy’, those who self-identify as a left which is reasserting liberal democratic principles start by asking questions such as: “Are western freedoms only for westerners?”.10 In the process, freedom becomes ‘western’, and its enemy an amorphous legion behind an unidentifiable line between ‘west’ and the rest (the ‘Muslim world’). The ‘war for democracy’ waged against ‘Islamist terrorism’ and Muslim fundamentalism is the crucible on which the new alignment of the liberal left is forged.

#### A vibrant public sphere is ONLY WAY to check gross forms of national security utilitarianism

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Penn State Law Review, Summer, 113 Penn St. L. Rev. 55

The classic Frankfurt School diagnosis of American culture is grim and pessimistic. Jurgen Habermas rebels against the pessimism that pervades Dialectic of the Enlightenment, but he does not repudiate the essential diagnosis found there, though he surely seeks to deepen it with what he regards as a more nuanced investigation into the true roots of Enlightenment rationality. 157 For our purposes, to this observation of humanity's destructive fetish with means-ends rationality, we may add Habermas's emphasis on the public sphere as an optimistic source of rationality. 158 In the idealized vision that Habermas presents, the public sphere consists of voluntary associations dedicated to promoting unconstrained rational interchange among free and equal participants of good will. 159 It is in the public sphere, if truly healthy (free from the [\*93] distortions of domination), that the common good can be gleaned. 160 It is in the public sphere that government overreaching can be checked and averted. 161 On this view, world public opinion, cultivated within vibrant public spheres that somehow escape the distortions of governmental and corporate propaganda, may function, in this post-Cold War era that has bled into the Age of Terror, as the only potential countervailing force to the dominant super-power, the United States. What a vibrant public sphere provides are tools to resist naturalistic illusions undergirding social institutions and practices that preserve and promote spheres of inequality and regimes of domination, but that seem to be socially necessary. The idea here is well-rehearsed in the literature of critical theory: that which is socially constructed is made to appear fixed and natural; that which serves narrow interests of power and privilege is made to appear to serve everyone. 162 A culture beholden to means-ends thinking is a culture that has lost its capacity for critical theorizing, and such a culture is, as a result, at the mercy of its illusions. A vibrant public sphere that successfully exposes illusions, which conceal unhealthy conditions for society, is crucial to social change, for the exposing of such illusions is exactly what loosens the screws that keep unworthy social institutions intact. 163 A vibrant public sphere is the environment for rendering institutions malleable and open to change, which is why thinkers from Kant to Habermas regard "the public sphere as the definitive institution of democracy." 164

#### ---rule of law help make the public complacent in in empire building and make them believe in american hegemony and benevolence---it causes a constant state of militarism and prescence around the globe that’s cause blowback by other countries

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The corruption of Enlightenment culture through consumerism is what makes U.S. empire-building both possible and necessary: possible, because the citizenry are beguiled by the myth of American benevolence and exceptionalism - America as a normative concept; and necessary, because global hegemony is crucial to maintaining consumerism itself, which has its stranglehold on us precisely to the degree that it advances the narrow material interests of the privileged and powerful. 214 At the level of rhetoric, radical Islamists pursue a form of jihadism that attacks our Enlightenment ideals because what they see is the dark side of that project, with its decadence, consumerism, and associated drive to destroy traditional ways of life and to dominate the world. Islamic terrorists are post-modernists in that sense, motivated in part by the meta-narrative of globalization in which the United States (and to a lesser extent, Europe) takes on the role of "privileged vanguard of an evolutionary process that applies to all nations." 215 Globalization, with the advent of instantaneous [\*107] global communication, heightens this fundamentalist revulsion and thereby further provokes spasms of violence. 216 We may be seduced by the imagery of the religious fanatic spilling out from a madrasas in Pakistan or Saudi Arabia, existing on the far periphery of our gadget-filled consumeristic world, indoctrinated to despise the West, and recruited and trained by Al Qaeda to become a killing machine. But that jihadist is a product of an intricate web of commerce that is rapidly deluding people from non-Western cultures of their traditions and forms of life, leading them into a cycle of wage labor and the pursuit of some modicum of consumer power, a cycle resting atop manufactured desires for those creature comforts and distractions that today seduce much of the world's population. All this is why we ought to understand Hamdi, more broadly, as an early feature of a jurisprudence of globalization. Globalization produces not only a jurisprudence of globalized commerce, but it also produces a jurisprudence of detention - Hamdi being foundational in that development. That jurisprudence of detention produced by pax Americana globalization circles back to reform our domestic juridical understanding of detention. Guantanamo Bay as a detention site is not merely a feature of our so-called war on terror; it is another feature of an entire carceral system that stretches back to the seventeenth century and that Foucault powerfully dissects in Discipline and Punish. 217 This is why Hamdi, by blessing Guantanamo-style detention with a veil of administrative decency, ought to be linked to a reality that this article gestures at, a portrait of consumerist decadence that is poisoning our culture and driving our foreign policy 218 - and has for over a half century - to the point where we are on a collision course with fundamentalism of all sorts. 219 The juridical response to this collision course is the rationalistic message to do it better, to accomplish the detention for the sake of preserving life with greater regard for the tragedy of making a mistake. Hamdi stands for an invigoration of a carceral system flourishing within a biopower-world, where the regulatory function of the law operates on the simplest binary opposition - the dangerous and the normal - and where the "normal" has become the Western consumer. [\*108] When lonely voices in Western culture lament that we are at war with ourselves, we might do well to understand it, at least in part, in precisely these terms, "for it is a sad fact that Western consumerism explodes like a land mine in the midst of the most disadvantaged layers of the world population." 220 That intensive, exploding consumerism either elicits from those who feel themselves outside the globalization promise a defeatist and dark spiritual reaction that history has taught is violence-prone, 221 or it becomes "a kind of intellectual sedative that lulls and distracts its Third World victims while rich countries cripple them, ensuring that they will never be able to challenge the imperial powers." 222 The gaping, echoing silence in Hamdi is this crucial fact: "We are witnessing a real resistance to empire." The instrumentalist side of Enlightenment thought, the Weberian nightmare of disenchantment with the world, and the narrowly tailored quest for administrative effectiveness, where sacredness is lost to the shallow seductiveness of regulatory success, technological achievement, and the spirit-killing hyperreality that is its telos, is the cognitive scaffolding of an empire that must always and everywhere use or threaten to use military force to guarantee the conditions for the functioning of the world market, all the while masking its violence with rule-of-law rhetoric. 224 That militarized management of the global order has and will inevitably produce the blowback of terrorism, with the capture of "enemy combatants" who must be detained on the instrumental logic of security that chokes off the life-affirming values undergirding civil liberties and rights we once thought sacred to our identity as a nation. Trial by jury, the highest vitalizing expression of those life-affirming values, is sacrificed for the sake of a global policing [\*109] operation that finds its raison d'etre in the preservation and spreading of a system-world consumerist way of being.

### FW

#### It misconceives the idea of authority and where it comes from---they believe that it emanates from the legal norms butthe state has been coopted by specialized interests--the focus on debate should be how culture elements can create change to combat normalization of violence caused by the military-industrial-state

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In addition, as the state is hijacked by the financial-military-industrial complex, the “most crucial decisions regarding national policy are not made by representatives, but by the financial and military elites.”53 Such massive inequality and the suffering and political corruption it produces point to the need for critical analysis in which the separation of power and politics can be understood. This means developing terms that clarify how power becomes global even as politics continues to function largely at the national level, with the effect of reducing the state primarily to custodial, policing, and punishing functions—at least for those populations considered disposable. The state exercises its slavish role in the form of lowering taxes for the rich, deregulating corporations, funding wars for the benefit of the defense industries, and devising other welfare services for the ultra-rich. There is no escaping the global politics of finance capital and the global network of violence it has produced. Resistance must be mobilized globally and politics restored to a level where it can make a difference in fulfilling the promises of a global democracy. But such a challenge can only take place if the political is made more pedagogical and matters of education take center stage in the struggle for desires, subjectivities, and social relations that refuse the normalizing of violence as a source of gratification, entertainment, identity, and honor. War in its expanded incarnation works in tandem with a state organized around the production of widespread violence. Such a state is necessarily divorced from public values and the formative cultures that make a democracy possible. The result is a weakened civic culture that allows violence and punishment to circulate as part of a culture of commodification, entertainment, distraction, and exclusion. In opposing the emergence of the United States as both a warfare and a punishing state, I am not appealing to a form of left moralism meant simply to mobilize outrage and condemnation. These are not unimportant registers, but they do not constitute an adequate form of resistance .What is needed are modes of analysis that do the hard work of uncovering the effects of the merging of institutions of capital, wealth, and power, and how this merger has extended the reach of a military-industrial-carceral and academic complex, especially since the 1980s. This complex of ideological and institutional elements designed for the production of violence must be addressed by making visible its vast national and global interests and militarized networks, as indicated by the fact that the United States has over 1,000 military bases abroad.54 Equally important is the need to highlight how this military-industrial-carceral and academic complex uses punishment as a structuring force to shape national policy and everyday life. Challenging the warfare state also has an important educational component. C. Wright Mills was right in arguing that it is impossible to separate the violence of an authoritarian social order from the cultural apparatuses that nourish it. As Mills put it, the major cultural apparatuses not only “guide experience, they also expropriate the very chance to have an experience rightly called ‘our own.’”55 This narrowing of experience shorn of public values locks people into private interests and the hyper-individualized orbits in which they live. Experience itself is now privatized, instrumentalized, commodified, and increasingly militarized. Social responsibility gives way to organized infantilization and a flight from responsibility. Crucial here is the need to develop new cultural and political vocabularies that can foster an engaged mode of citizenship capable of naming the corporate and academic interests that support the warfare state and its apparatuses of violence, while simultaneously mobilizing social movements to challenge and dismantle its vast networks of power. One central pedagogical and political task in dismantling the warfare state is, therefore, the challenge of creating the cultural conditions and public spheres that would enable the U.S. public to move from being spectators of war and everyday violence to being informed and engaged citizens.Unfortunately, major cultural apparatuses like public and higher education, which have been historically responsible for educating the public, are becoming little more than market-driven and militarized knowledge factories. In this particularly insidious role, educational institutions deprive students of the capacities that would enable them not only to assume public responsibilities, but also to actively participate in the process of governing. Without the public spheres for creating a formative culture equipped to challenge the educational, military, market, and religious fundamentalisms that dominate U.S. society, it will be virtually impossible to resist the normalization of war as a matter of domestic and foreign policy. Any viable notion of resistance to the current authoritarian order must also address the issue of what it means pedagogically to imagine a more democratically oriented notion of knowledge, subjectivity, and agency and what it might mean to bring such notions into the public sphere. This is more than what Bernard Harcourt calls “a new grammar of political disobedience.”56 It is a reconfiguring of the nature and substance of the political so that matters of pedagogy become central to the very definition of what constitutes the political and the practices that make it meaningful. Critical understanding motivates transformative action, and the affective investments it demands can only be brought about by breaking into the hardwired forms of common sense that give war and state-supported violence their legitimacy. War does not have to be a permanent social relation, nor the primary organizing principle of everyday life, society, and foreign policy. The war of all-against-all and the social Darwinian imperative to respond positively only to one’s own self-interest represent the death of politics, civic responsibility, and ethics, and set the stage for a dysfunctional democracy, if not an emergent authoritarianism. The existing neoliberal social order produces individuals who have no commitment, except to profit, disdain social responsibility, and loosen all ties to any viable notion of the public good. This regime of punishment and privatization is organized around the structuring forces of violence and militarization, which produce a surplus of fear, insecurity, and a weakened culture of civic engagement—one in which there is little room for reasoned debate, critical dialogue, and informed intellectual exchange. Patricia Clough and Craig Willse are right in arguing that we live in a society “in which the production and circulation of death functions as political and economic recovery.”57 The United States understood as a warfare state prompts a new urgency for a collective politics and a social movement capable of negating the current regimes of political and economic power, while imagining a different and more democratic social order. Until the ideological and structural foundations of violence that are pushing U.S. society over the abyss are addressed, the current warfare state will be transformed into a full-blown authoritarian state that will shut down any vestige of democratic values, social relations, and public spheres. At the very least, the U.S. public owes it to its children and future generations, if not the future of democracy itself, to make visible and dismantle this machinery of violence while also reclaiming the spirit of a future that works for life rather than death—the future of the current authoritarianism, however dressed up they appear in the spectacles of consumerism and celebrity culture. It is time for educators, unions, young people, liberals, religious organizations, and other groups to connect the dots, educate themselves, and develop powerful social movements that can restructure the fundamental values and social relations of democracy while establishing the institutions and formative cultures that make it possible. Stanley Aronowitz is right in arguing that: the system survives on the eclipse of the radical imagination, the absence of a viable political opposition with roots in the general population, and the conformity of its intellectuals who, to a large extent, are subjugated by their secure berths in the academy [and though] we can take some solace in 2011, the year of the protester…it would be premature to predict that decades of retreat, defeat and silence can be reversed overnight without a commitment to what may be termed “a long march” through the institutions, the workplaces and the streets of the capitalist metropoles.58 The current protests among young people, workers, the unemployed, students, and others are making clear that this is not—indeed, cannot be—only a short-term project for reform, but must constitute a political and social movement of sustained growth, accompanied by the reclaiming of public spaces, the progressive use of digital technologies, the development of democratic public spheres, new modes of education, and the safeguarding of places where democratic expression, new identities, and collective hope can be nurtured and mobilized. Without broad political and social movements standing behind and uniting the call on the part of young people for democratic transformations, any attempt at radical change will more than likely be cosmetic.

### Permutation

#### Permutation still links and doesn’t make sense---the alt rejects the aff for its faith in legal structures and the idea that it can create change---this isn’t true and turns solvency because it depletes public activism

Gordon, 87 **–** (Robert. Prof Law @ Stanford Univ. “Unfreezing Legal Reality: Critical Approaches to Law” Florida State University Law Review, Vol 15 No 3. 1987, lexis)

Now a central tenet of CLS work has been that the ordinary discourses of law -- debates over legislation, legal arguments, administrative and court decisions, lawyers' discussions with clients, legal commentary and scholarship, etc. -- all contribute to cementing this feeling, at once despairing and complacent, **that** things must be the way they are **and that major changes could only make them worse. Legal discourse accomplishes this in many ways. First by endlessly repeating the claim that law and the other policy sciences have perfected a set of rational techniques and institutions that have come about as close as we are ever likely to get to solving the problem of domination in civil society**. Put another way, **legal discourse paints an** idealized fantasy of order according to which legal rules **and procedures have so structured relations among people that such** relations may primarily be understood as instituted by their consent**, their free and rational choices. Such coercion as apparently remains may be explained as the result of necessity -- either natural** necessities (such as scarcity or the limited human capacity for altruism) **or social** necessities. For example, in a number of the prevailing discourses, the ordinary hierarchies of workplace domination and subordination are explained: (1) by reference to the contractual agreement of the parties and to their relative preferences for responsibility versus leisure, or risk taking versus security; (2) by the natural distribution of differential talents and skills (Larry Bird earns more as a basketball player because he is better); and (3) by the demands of efficiency in production, which are said to require extensive hierarchy for the purposes of supervision and monitoring, centralization of investment decisions, and so forth. **There are always some residues of clearly unhappy [\*199] conditions -- undeserved deprivation, exploitation, suffering -- that cannot be explained in any of these ways. The discourses of law are perhaps most resourceful in dealing with these residues, treating them as, on the whole, readily reformable within the prevailing political options for adjusting the structures of ordinary practices -- one need merely fine tune the scheme of regulation**, or deregulation, **to correct them**. But the prevailing discourse has its cynical and worldly side, and its tragic moments, to offset the general mood of complacency. In this mood it resignedly acknowledges that beyond the necessary minimum and the reformable residues of coercion and misery there is an irreducible, intractable remainder -- due to inherent limits on our capacity for achieving social knowledge, or for changing society through deliberate intervention, or for taking collective action against evil without suffering the greater evil of despotic power. These discourses of legal and technical rationality, of rights, consent, necessity, efficiency, and tragic limitation, are of course discourses of power -- not only for the obvious reasons that law's commands are backed by force and its operations can inflict enormous pain, but because to have access to these discourses, to be able to use them or pay others to use them on your behalf, is a large part of what it means to possess power. Further, they are discourses that -- although often partially constructed, or extracted as concessions, through the pressure of relatively less powerful groups struggling from below -- **in habitual practice** tend to express the interests and the perspectives of the powerful people who use them. The discourses have some of the power they do because some of their claims sound very plausible, though many do not. The claim, for example, that workers in health-destroying factories voluntarily "choose," in any practical sense of the term, the risks of the workplace in return for a wage premium, is probably not believed by anyone save those few expensively trained out of the capacity to recognize what is going on around them. In addition, both the plausible and implausible claims are backed up in the cases of law and of economics and the policy sciences by a quite formidable-seeming technocratic apparatus of rational justification -- suggesting that the miscellany of social practices we happen to have been born into in this historical moment is much more than a contingent miscellany. It has an order, even if sometimes an invisible one; it makes sense. The array of legal norms, institutions, procedures, and doctrines in force, can be rationally derived from the principles of regard for individual autonomy, utilitarian [\*200] efficiency or wealth creation, the functional needs of social order or economic prosperity, or the moral consensus and historical traditions of the community. There are several general points CLS people have wanted to assert against these discourses of power. First, the discourses have helped to structure our ordinary perceptions of reality so as to systematically exclude or repress alternative visions of social life, both as it is and as it might be. One of the aims of CLS methods is to try to dredge up and give content to these suppressed alternative visions. Second, the discourses fail even on their own terms to sustain the case for their relentlessly apologetic conclusions. Carefully understood, they could all just as well be invoked to support a politics of social transformation instead. n3 Generally speaking, the CLS claims under this heading are **that the rationalizing criteria appealed to (of autonomy, functional utility, efficiency, history, etc.) are far too indeterminate to justify any conclusions about the inevitability or desirability of particular current practices;** such claims, when unpacked, again and again turn out to rest on some illegitimate rhetorical move or dubious intermediate premise or empirical assumption. Further, the categories, abstractions, conventional rhetorics, reasoning modes and empirical statements of our ordinary discourses in any case so often misdescribe social experience as not to present any defensible pictures of the practices that they attempt to justify. Not to say of course that there could be such a thing as a single correct way of truthfully rendering social life as people live it, or that CLS writers could claim to have discovered it. But the commonplace legal discourses often produce such seriously distorted representations of social life that their categories regularly filter out complexity, variety, irrationality, unpredictability, disorder, cruelty, coercion, violence, suffering, solidarity and self-sacrifice. n4 [\*201] Summing up: The purpose of CLS as an intellectual enterprise is to try to thaw out, or at least to hammer some tiny dents on, the frozen mind sets induced by habitual exposure to legal practices -- by trying to show how normal legal discourses contribute to freezing, and to demonstrate how problematic these discourses are.

### Link

#### Trials---these are just mechanisms to grant victories to the sovereign power

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While certainly important to advocates of political liberalism, these legal benefits disregard the subjectivization of supposedly dangerous, inhuman terrorists as enemy combatants before the law through the mechanisms of sovereignty. Butler notes that subjects of juridical structures "are, by virtue of being subject to them, formed, defined, and reproduced in accordance with the requirements of those structures."xxxv Similarly, Agamben argues that bestowal of rights functions as "a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves."xxxvi Observing that any mode of legal representation, even when viewed as "liberating" from the standpoint of political liberalism, reinforces those normative structures given juridical force by sovereignty, both Butler and Agamben compel us to consider how Hamdi, by granting due process rights to enemy combatants, grants victory to the sovereign power it supposedly wards off. Because satisfaction with political liberalism further legitimizes the operations of sovereignty and thus enables and perpetuates homopolitical violence, only a more radical critique of Hamdi may contest the interpellation as "enemy combatants" of those figured as dangerous, inhuman terrorists and ultimately disrupt the sovereign operations of homopolitics.xxxvii

### 2NC Alt – International Law

#### Nations respond to behavior -- not legal standards

Roberts 13 (Kristin, When the Whole World Has Drones, National Journal, 21 March 2013, http://www.nationaljournal.com/magazine/when-the-whole-world-has-drones-20130321, da 8-1-13) PC

But even without raising standards, tightening up drone-specific restrictions in the standing control regime, or creating a new control agreement (which is never easy to pull off absent a bad-state actor threatening attack), just the process of lining up U.S. policy with U.S. practice would go a long way toward establishing the kind of precedent on use of this technology that America—in five, 10, or 15 years—might find helpful in arguing against another’s actions. A not-insignificant faction of U.S. defense and intelligence experts, Dennis Blair among them, thinks norms play little to no role in global security. And they have evidence in support. The missile-technology regime, for example, might be credited with slowing some program development, but it certainly has not stopped non-signatories—North Korea and Iran—from buying, building, and selling missile systems. But norms established by technology-leading countries, even when not written into legal agreements among nations, have shown success in containing the use and spread of some weapons, including land mines, blinding lasers, and nuclear bombs. Arguably more significant than spotty legal regimes, however, is the behavior of the United States. “History shows that how states adopt and use new military capabilities is often influenced by how other states have—or have not—used them in the past,” Zenko argued. Despite the legal and policy complexity of this issue, it is something the American people have, if slowly, come to care about. Given the attention that Rand Paul’s filibuster garnered, it is not inconceivable that public pressure on drone operations could force the kind of unforeseen change to U.S. policy that it did most recently on “enhanced interrogation” of terrorists. The case against open, transparent rule-making is that it might only hamstring American options while doing little good elsewhere—as if other countries aren’t closely watching this debate and taking notes for their own future policymaking. But the White House’s refusal to answer questions about its drone use with anything but “no comment” ensures that the rest of the world is free to fill in the blanks where and when it chooses.

### Drones Uniqueness

#### Drone strikes are less utilized in the status quo, and are killing record low levels of civilians-

Cahall 13 (Bailey, research associate with the National Security Studies Program at the New America Foundation, July 2nd 2013, New report says CIA drone strikes in Pakistan at an all-time low, afpak.foreignpolicy.com/posts/2013/07/02/report\_cia\_drone\_strikes\_in\_pakistan\_at\_all\_time\_low

A new report released by the Bureau of Investigative Journalism on Monday notes that the number of reported civilian deaths caused by the CIA's drone campaign in Pakistan is at an all-time low (ET). The drone strikes are at their lowest level since early 2008, and the average number of people killed in each strike has also fallen sharply over the last few years. Similar data from the New America Foundation shows that, to date, there have been 13 drone strikes in Pakistan and 82 people have been killed, down from the record 122 strikes and 849 people killed in 2010. Peter Bergen and Jennifer Rowland have written repeatedly about the sharply falling civilian casualty rate for the past year on CNN.com.

## 1NR

### Deferrence

#### Stripping guts the case solvency and turns the case—all rights protections would go completely unenforced—trampling meaningful rights:

Barry W. Lynn, 2004 bachelor's degree at Dickinson College, theology degree from Boston University School of Theology, minister in the United Church of Christ, of the Washington, D.C. bar, law degree from Georgetown University Law Center, the Executive Director of Americans United for Separation of Church and State, 20**04**[“Congress and Court Stripping: Just Keep Your Shirts On” Church and State Magazine, May]

Another measure, the misnamed "Constitution Restoration Act of 2004," was written by former Alabama Supreme Court Chief Justice Roy Moore and his allies. It would ban all cases challenging state-sponsored acknowledgement of "God as the sovereign source of law, liberty, or government." For good measure, it would also retroactively overturn all existing rulings in this area and establish a mechanism for impeaching federal judges who dare to uphold church-state separation! One wonders if the legislators who wrote these bills slept through high school civics class. The separation of powers means that the U.S. government consists of three co-equal branches: the president, the Congress and the courts. Congress does not have the power, through simple legislation, to decimate the authority of the courts over issues dealing with the Bill of Rights. Such power would rapidly make the courts superfluous. Whenever a judge ruled in a manner that displeased a legislator, a court-stripping bill would be drawn up and passed. Pretty soon the courts would be nothing but a rubber-stamp **body for Congress**. Some members of Congress might want that, but it would be a disaster for American democracy. Courts exist to make hard decisions. When lawmakers overstep their bounds and infringe on constitutional rights, courts are there to pull them back. Without the judiciary to protect us, Americans would quickly be at the mercy of the momentary whims of the majority. Our rights would be trampled on.

### Counter Terror

#### Dropped no internal link to terror

#### Call the pepsi challenge-

#### 1. daskal and vladeck says allies are reluctant to provide info – it specifically says Germany – it’s in their constitution to restrict information that is used to support terror

#### 2. Our Rosenau evidence is specific to Europe – says one way street

#### The United States regularly shares high -grade intelligence with the G5 countries (that is, Britain, France, Spain, Germany, an d Italy), but appears much less willing to do so with other nations. 36 In the words of one European official, “[i]f you call sharing a one-way street, then we share information. [The United States] wants what we have immediately and demands it. But if we ask for something, it can take months before we even get an initial reply.” 37

#### Extend the misleading turn – circular reporting is used to validate bad intelligence – again not a question of the EU

#### He reads a south eastern “add-on” –

#### 1. this is a not an add-on, it is an FYI that attacks were prevented two years ago

#### 2. there is no reason why the aff is key to this

**European countries curtail information because of legal reasons – this info is bad because countries lie and exaggerate**

Aydinli, 10 – (Ersel, Executive Director of the Turkish Fulbright Commission and Associate Professor in the Department of International Relations at Bilkent University “Emerging Transnational (In)security Governance,” <http://www.politicalscience.uncc.edu/jwalsh/bilkent.pdf>)

. Countries in western Europe, North Africa, the Persian Gulf, and South and Southeast Asia are able to collect intelligence that the United States is unable to gather, and can engage in mutually beneficial intelligence-sharing with the United States.4 But some of these states also have powerful reasons to defect from promises to share intelligence with the United States. As the next section details, European governments face legal challenges to some of their foreign intelligence activities. Domestic political pressures prompt some states in the Middle East and Europe to curtail collaboration with the United States. Some countries contain religious or nationalist groups or elements of the government apparatus that are less enthusiastic about taking effective action against al Qaeda. Governments may have conflicting interests with the United States on other issues that lead them to minimize counter-terrorism cooperation. Putative counter-terror allies of the United States may decline to take effective action against al Qaeda to avoid retali-ation by the group. Some may have poorly-developed or corrupt police, judicial, and intelligence bureaucracies that are unable to take such effective action in the first place. Other governments may wish to exaggerate the effectiveness of their action against and the accuracy of their intelligence on al Qaeda in order to win the approval and support of the United States.5 These cross-cutting motives pose an important challenge for the United States because less than full cooperation and intelligence sharing is very difficult for it to detect. All intelligence agencies seek to ensure that their sources of information remain secret. This involves strictly limiting the distribution of such information among government officials and carefully controlling its dissemination to foreign governments. But these security measures also make it very hard for the recipients of shared intelligence to verify its accuracy. The problem for the United States is that some of the states that have the most valuable intelligence on al Qaeda are also those with the strongest incen¬tives to defect from agreements to share such intelligence.

**That’s key to solve terror**

Aydinli, 10 – (Ersel, Executive Director of the Turkish Fulbright Commission and Associate Professor in the Department of International Relations at Bilkent University “Emerging Transnational (In)security Governance,” <http://www.politicalscience.uncc.edu/jwalsh/bilkent.pdf>)

Accurate intelligence allows the government to bring to bear its police, military, and other resources to disrupt a terrorist group's activities. As Derek Reveron puts it, "the war on terror requires high levels of intelligence to identify a threat relative to the amount of force required to neutralize it. This fact elevates intelligence in importance and places it on the frontline against terrorism."1 Intelligence is most useful for elements of counter-terrorism policy that aim to disrupt such groups' recruitment, financing, security of operations, bases, movement of personnel, and so on, through actions of military, police, intelligence, and judicial arms of the state. Intelligence is also very useful for internal or homeland security if it can identify likely targets that should be better protected against attack. Operational intelligence is less important for policies aimed at reducing support for terrorist groups by, for example, promoting economic development or democracy. However, analysis that draws on secret intelligence might assist policymakers in better implementing such policies by, for example, accurately specifying the grievances that motivate terrorist groups and their supporters.

**This is particularly true in the context of Germany**

**Lelewel, 9** – (Stefan, Graduate School of Arts and Sciences of Georgetown University, “INTERNATIONAL INTELL IGENCE COOPERATION I N COUNTER - TERRORISM - CAUSES, COMPLICATION S AND CONSEQUENCES,” <http://repository.library.georgetown.edu/bitstream/handle/10822/553538/lelewelStefan.pdf?sequence=1>)

For instance, confessions made under torture in one country might not be valid in a trial in another jurisdiction. Additionally, the strict separation of law enforcement and intelligence activities in countries such as Germany can provide obstacles when sharing intelligence among other states. National organization will often vary due to historical experience, administrative structure and political architecture. Yves Boyer (2006): Intelligence Cooperation and Homeland Security. In: Esther Brimmer (ed.): Tra nsforming Homeland Security – U.S. and European Approaches , Center for Transatlantic

**US and EU fight over intel over killings – they refuse to cshare info – reverse causal ev**

**McGill and Gray, 12 –** (\*\*Anna, School of Graduate and Continuing Studies in Diplomacy

Norwich University, Summer, Global Security studies, Challenges to International Counterterrorism Intelligence

Sharing,” <http://globalsecuritystudies.com/McGill%20Intel%20Share.pdf>)

Prior to a May 2002 summit, the US and EU were at a disagreement over the death penalty. The EU’s aversion to capital punishment led it to not only hesitate from sharing information but deny requests for extradition unless the US would guarantee that the individual in question would not face the death penalty. The 2002 summit didhowever bring both the US and EU to at least agree in principle to a treaty on extradition and Mutual Legal Assistance Treaty (MLAT) and both parties ratified the treaties in 2003 . The extradition treaty allowed fo r a blanket policy for European nations to “grant extradition on the condition that the death penalty will not be imposed” and the MLAT provided enhanced capability to gather and exchange information (Bensahel 49

**Detention policies mean that Europe is forced to backdown**

Aydinli, 10 – (Ersel, Executive Director of the Turkish Fulbright Commission and Associate Professor in the Department of International Relations at Bilkent University “Emerging Transnational (In)security Governance,” <http://www.politicalscience.uncc.edu/jwalsh/bilkent.pdf>)

European governments do face pressure to defect from intelligence-sharing with the United States in cases that involve violations of human rights. Europe has a highly developed set of human rights laws, robust international monitoring and enforcement through domestic legal processes as well the European Court of Human Rights and, on some issues, the European Union, and politically important domestic constituents that place a high priority on compliance with these laws. Human rights concerns have made it more difficult for European governments to cooperate with certain practices concerning the detention and treatment of suspected terrorists and the sharing of personal data. An important objective of United States counter-terrorism policy has been to kill or to capture and interrogate senior al Qaeda members and other Islamic terrorist leaders. In many cases, this goal can only be met with the active cooperation or at least the acquiescence of states in which suspects circulate. Cooperation with these policies has been con¬troversial in Europe. Many have objected to the treatment of detainees in facilities under American control in Guantanamo Bay, Afghanistan, Iraq, and secret prisons elsewhere. Transatlantic tension has been strongest on issues that directly involve European countries' territory or residents. These include the extra-judicial deten¬tion by the United States of suspects in Europe and their transferal or "rendition" elsewhere (one report estimates that this has occurred over a hundred times), the use of landing facilities in Europe on well over 1200 occasions to transport sus¬pects to third countries, and secret, American-run prisons believed to be located in countries in eastern Europe that have recently joined the European Union.20

Relations, p. 159

### OV

#### Nuclear war

James A. **Russell,** Senior Lecturer, National Security Affairs, Naval Postgraduate School, ‘9 (Spring) “Strategic Stability Reconsidered: Prospects for Escalation and Nuclear War in the Middle East” IFRI, Proliferation Papers, #26, http://www.ifri.org/downloads/PP26\_Russell\_2009.pdf

Strategic stability in the region is thus undermined by various factors: (1) asymmetric interests in the bargaining framework that can introduce unpredictable behavior from actors; (2) the presence of non-state actors that introduce unpredictability into relationships between the antagonists; (3) incompatible assumptions about the structure of the deterrent relationship that makes the bargaining framework strategically unstable; (4) perceptions by Israel and the United States that its window of opportunity for military action is closing, which could prompt a preventive attack; (5) the prospect that Iran’s response to pre-emptive attacks could involve unconventional weapons, which could prompt escalation by Israel and/or the United States; (6) the lack of a communications framework to build trust and cooperation among framework participants. These systemic weaknesses in the coercive bargaining framework all suggest that escalation by any the parties could happen either on purpose or as a result of miscalculation or the pressures of wartime circumstance. Given these factors, it is disturbingly easy to imagine scenarios under which a conflict could quickly escalate in which the regional antagonists would consider the use of chemical, biological, or nuclear weapons. It would be a mistake to believe the nuclear taboo can somehow magically keep nuclear weapons from being used in the context of an unstable strategic framework. Systemic asymmetries between actors in fact suggest a certain increase in the probability of war – a war in which escalation could happen quickly and from a variety of participants. Once such a war starts, events would likely develop a momentum all their own and decision-making would consequently be shaped in unpredictable ways. The international community must take this possibility seriously, and muster every tool at its disposal to prevent such an outcome, which would be an unprecedented disaster for the peoples of the region, with substantial risk for the entire world.

#### Power projection is irrelevant if we aren’t credible – It’s the only way to make deterrence work – They destroy our hegemony

Pulse Review 7-6-9 (founded by an Air Force Academy graduate with a MA in Unconventional Warfare from the American Military University Review, “Why We Are Called the Paper Tiger,” http://pulsereview.com/?p=1111)

What we perceive is what we believe. When other nations perceive that America will not act in its interests, they perceive us as a paper tiger. The reader may note that the “Paper Tiger” rhetoric has been absent as of late. After all, other nations perceived us conquering one country, sustaining operations in another, and persuading several other countries to sit down and play nice. Whatever other nations consider us, a paper tiger is not one of them currently. We built our credibility by doing what we said we would do. Credibility, is the lynch pin of international relations. It creates the difference between diplomatic lip service and statements that actually effect change. Some nations have a great deal of credibility - there is little doubt they will do what they threaten. The Chinese are an example of this, as was the former Soviet Union. Other nations vary in credibility. As Americans, we have seen our national credibility oscillate wildly. No matter what our credibility is, America sustains a very strong ability to project power. Other nations understand that our credibility is is a function of our will, and our will shifts. These shifts in will to enforce our decisions create credibility issues. North Korea is a credibility issue, as is Iran. Both nations routinely ignore international declarations in ostentatious ways, like launching missiles, or stating they plan to become nuclear powers. Most nations break international law in one way or another. Some do it fairly overtly, such as the Chinese claiming exorbitant swaths of sea lanes as their territory. Still others are mostly suspected of breaking the law through assassinations or other nefarious acts. When the international community, and America, tell[s] a country not to do something, and don’t [doesn’t] back their words with actions, credibility is lost. Any parent, schoolteacher, drill sergeant, or leader of any sort clearly understands the issue. No repercussions equates to tacit acceptance of the actions. A clear failure of actions to follow words undermines the credibility of the words. When words fail, actions tend to become necessary. This is the innate reason that words must carry weight. It is far better to deter a nation from doing something, than to revert to the use force to stop that nation further down the path. Pay now, or pay later, with interest. This applies to credit cards, education, physical fitness, and international affairs. When America says “Stop, or I will stop you” if the words do not stop the nation, America will have to act to protect its interests, potentially at a greater cost, later. It is better to stop something with words than with actions, for words are far cheaper. Words are cheap, but their credibility is bought with blood and treasure. When a nation maintains the credibility of its words, the long term cost is less. North Korea is a case in point. The international community has gotten to the point where maintaining the dysfunctional regime is preferable to ending it. If North Korea destabilizes (pretend with me that it is stable for the moment), the South will be in dire peril. Between the military and economic consequences, the South will potentially be destabilized itself. Millions of refugees with nothing more than the clothes on their back, malnourished, uneducated, and in need of a great deal of care, will come South - assuming South Korea can even take care of itself in the aftermath of potential armed conflict. The reason we don’t act now is the hope that North Korea will somehow get better, or the desire to let it be someone else’s problem. Hope is neither a plan nor a strategy. Passing the buck is not a legitimate strategy either. In the bitter, unfortunate end, North Korea must either become a legitimate state, or meet the end of illegitimate states. The question is, how much harm will North Korea inflict on the world beforehand? Paper Tigers and fallen nations go hand in hand. When other nations, or non-state actors (Bin Laden) perceive America as a Paper Tiger, they end up provoking America beyond endurance, and reap what they sow a thousand fold. As Americans, we end up paying far more than we should due to the wild oscillation of credibility we routinely engage in. If we don’t want other nations to perceive us as paper tigers and act accordingly, we have to maintain our credibility. It is better for everyone involved — especially us.

#### Credibility is just as important as resources – Even if they improve military strength, they don’t solve the terminal impact.

Gerson, Anaylst – Strategic Initiatives Group, 9 (Michael, Research Analyst in the Strategic Initiatives Group at CAN, participated in the conceptual development and drafting of the Navy's maritime strategy, member of the Nuclear Posture Review, lecturer at George Washing University & NYU, B.A. in History from University of Texas, M.A. in International Relations from the University of Chicago, “Conventional Deterrence In the Second Nuclear Age,” Parameters, Autumn, http://www.carlisle.army.mil/usawc/Parameters/Articles/09autumn/gerson.pdf)

Credibility, according to Sir Lawrence Freedman, is the “magic ingredient” of deterrence.44 Deterrence credibility is a function of an adversary’s assessment of a nation’s military capability and political resolve. For deterrence to be credible, an adversary has to believe that the United States has both the military capability and the political willpower to carry out its announced objectives.45 Of all the concepts and theories associated with deterrence, the issue of how to demonstrate or signal credibility has been the dominant theme in academic and policy literature. Whereas in the nuclear context discussions about deterrence credibility have centered on political willpower and resolve, in conventional deterrence the issue of credibility has focused on the military capabilities component of the credibility equation. The almost exclusive emphasis on resolve for credible nuclear deterrence and on capabilities for credible conventional deterrence is the result of the inherent differences between nuclear and conventional weapons. There is little doubt that nuclear weapons are extremely destructive. The pertinent question for credible nuclear deterrence is not whether one can inflict significant costs for unwanted actions (assuming, of course, that the nuclear forces are survivable and there are appropriate command, control, and communications), but rather whether one will use nuclear weapons, since the execution of the threat might risk retaliation in kind. As Herman Kahn argued, in the nuclear are na “credibility depends on being willing to accept the other side’s retaliatory blow. It depends on the harm he can do, not the harm we can do.”46 In the conventional setting, it has been advocated that the situation is essentially reversed. Given the comparatively limited power of conventional weapons, an adversary may doubt whether conventional forces are capable of denying a rapid victory or inflicting the associated costs that outweigh the benefits of aggression. As Richard Harknett explains: The nature of conventional forces invites skepticism at a level that few deterrence theorists have emphasized—that of capability. Due to the contestable nature of conventional forces, it is a state’s capability to inflict costs that is most likely to be questioned by a challenger. In a conventional environment, the issue of credibility is dominated by suspicions about the capability to inflict costs rather than on the decision to inflict costs . . . . In the end, a state evaluating a conventional deterrent can assume that the deterrer will retaliate. The pertinent question is how costly that response will be.47 The importance of the credibility of US conventional capabilities remains relevant. Future adversaries may discount conventional threats in the mistaken belief that they could circumvent US forces via a fait accompli strategy or otherwise withstand, overcome, or outmaneuver the United States on the conventional battlefield. But a singular focus on the capabilities part of the credibility equation misses the critical importance of an adversary’s judgment of US political resolve. In future conventional deterrence challenges, perceptions of US political willpower are likely to be as important for deterrence credibility as military capabilities.

### Uniqueness

#### Vote is NEXT WEEK

Chicago Tribune 9/11 http://www.chicagotribune.com/news/chi-obama-syria-20130911,0,5719759.story

U.S. lawmakers said the Senate could start voting as soon as next week on a resolution to authorize military force if efforts to find a diplomatic solution fail. Obama has struggled for support in Congress for the plan.

#### Vote NEXT WEEK credible threat of force is NECESSARY for diplomacy to solve

Chicago Tribune 9/11 http://www.chicagotribune.com/news/chi-obama-syria-20130911,0,5719759.story

Lawmakers said on Wednesday the Senate could start voting on a resolution to authorize the use of military force against Syria as soon as next week if efforts to find a diplomatic solution to the crisis fall short.¶ A resolution authorizing strikes against Syria had been expected to come before the full Senate for a vote this week. But it was delayed after President Barack Obama asked lawmakers to wait for the outcome of a Russia-backed diplomatic initiative under which Syria would give up its chemical weapons.¶ Senators said on Wednesday they would move ahead with a vote if necessary, saying they felt the continued threat of force would pressure Syrian President Bashar al-Assad.¶ "That would be a decision made with the administration on strategy as to the timing of Senate action. I think it could be next week... I would not rule out next week," Senator Ben Cardin, a senior Democratic member of the Senate Foreign Relations Committee, told reporters.¶ Republicans and Democrats on the Senate Foreign Relations panel held separate meetings on Wednesday so committee leaders could assess members' attitudes about events in Syria.¶ Afterward, members said they expected it would be at least a few days before the Senate decided what steps to take next as they await the outcome of Secretary of State John Kerry's meeting with Russian Foreign Minister Sergei Lavrov in Geneva on Thursday and Friday, and any action at the United Nations.¶ "Right now the focus is on Geneva and the United Nations, and I want to make certain that we don't do anything that's going to derail a constructive, diplomatic approach to solving this problem," said committee member Richard Durbin, the No. 2 Democrat in the Senate.¶ Lawmakers also continued to work on an amendment to the authorization taking into account the Russia-backed plan. Among other things, the amendment would set strict time limits for Assad to hand over his weapons and authorize strikes if he fails to do so.¶ "There's a strong belief that keeping the credible use of military force is very necessary, and that to the extent that we consider any language, that that must be a prevalent part," said Democratic Senator Robert Menendez, the committee chairman, who is working with the group of eight other senators on the amendment.

### Link

#### 1. Restrictions on detention cost PC –

#### Plan hugely unpopular with Republicans.

Michael Crowley, May 24, 2013, Time, “Can Obama End the War on Terror?” <http://swampland.time.com/2013/05/24/can-obama-end-the-war-on-terror/>

But while Obama has an obviously sincere desire to bring the war against al Qaeda to a close and close the books on Guantanamo, however, he also lacks the power to make these things happen on his own. The future of the terror war that Obama inherited from George W. Bush and Dick Cheney depends on some very open questions:¶ Will Republicans Play Along? The initial GOP response to Obama’s speech was skeptical. “The theme of the speech was that this war is winding down… [but] the enemy is morphing and spreading, there are more theaters of conflict today than in several years,” said GOP Senator Lindsey Graham of South Carolina. “The President’s speech today will be viewed by terrorists as a victory,” declared Saxby Chambliss of Georgia.¶ Some of Obama’s plans require no Republican sign-off—he can change the rules governing drone strikes, for instance, by presidential directive. And he can transfer the dozens of Yemeni detainees at the camp who have been cleared for release back to their home country on his own. But fully shuttering Gitmo will require him to win Congress’s permission to move dozens of the camp’s 166 inmates from Cuba into the U.S., something now barred by law. At the moment, some Republicans seem no more interested in helping him than they did when Obama first proposed this idea in 2009. “GITMO must stay open for business,” Chambliss said Thursday. Others are more amenable, though still skeptical: House Armed Services Chairman Buck McKeon, who would play a lead role in any Congressional action, calls himself “open to a proposal from the president, but that plan has to consist of more than political talking points.”¶ Obama also said that he wants Congress to revisit the Authorization for Use of Military Force, the law it passed a few days after the September 11 attacks authorizing the broad use of force to fight al Qaeda and its allies; the president suggested he might like to see the law repealed eventually. Many Republicans like it just fine, and would oppose efforts to limit its scope

#### It’s a partisan battle.

Howell, 7/25 (“GOP resists new attempt to shutter Guantanamo” The Washington Times. 7/25/2013. Web, Acc 8/15/2013. http://www.washingtontimes.com/news/2013/jul/25/gop-resists-new-attempt-to-shutter-guantanamo/?page=all#pagebreak

[Congress](http://www.washingtontimes.com/topics/congress/) sent strong signals this week that President Obama’s 5-year-old vow to close [Guantanamo Bay prison](http://www.washingtontimes.com/topics/guantanamo-bay-prison/) is far from coming to fruition, as partisan camps drew battle lines over whether the facility in [Cuba](http://www.washingtontimes.com/topics/cuba/) bottles up terrorists or simply breeds more abroad.¶ [Senate](http://www.washingtontimes.com/topics/senate/) Democrats held a hearing on closing the detention center this week, but it was their first since 2009 and revealed little agreement between Mr. Obama’s party and conservatives. In the House, lawmakers shot down a measure that would clear the way for transferring prisoners off the island. ¶ Almost a dozen years after the [Bush administration](http://www.washingtontimes.com/topics/bush-administration/) set up the detention center on the U.S. naval base in the wake of [the terrorist attacks on Sept. 11, 2001](http://www.washingtontimes.com/topics/september-11-2001-attacks/), Mr. Obama redoubled his efforts this spring to close the facility as many of its 166 detainees refused food for weeks, protesting conditions there and their prolonged detention.¶ But Republicans say the [Obama administration](http://www.washingtontimes.com/topics/barack-obama/) is ignoring the realities of the war on terrorism and have put the brakes on plans to provide for the release or transfer of detainees to maximum-security prisons in the U.S.¶ [Sen. James M. Inhofe](http://www.washingtontimes.com/topics/james-m-inhofe/), Oklahoma Republican, said Guantanamo is “one of the few good deals that we have in government.”¶ “I think we pay $4,000 a year, and [[Cuba](http://www.washingtontimes.com/topics/cuba/)’s communist government] doesn’t collect about half the time,” he said Thursday at a [Senate Armed Services Committee](http://www.washingtontimes.com/topics/united-states-senate-committee-on-armed-services/) hearing.¶ But Democrats contend the U.S. is losing hundreds of millions of dollars in operation costs — roughly $2.7 million per detainee each year in [Cuba](http://www.washingtontimes.com/topics/cuba/) compared to $78,000 at a high-security facility in the United States — and ceding its moral high ground, as terrorism suspects are detained without charges or trial.¶ Their detention, coupled with the practice of force-feeding those on hunger strike, is fostering ill-will abroad and serves as a recruitment tool for terrorists, they said.¶ To some lawmakers, the debate is over the nuts and bolts of how to close the base.¶ “We still don’t have a coherent plan from the [administration](http://www.washingtontimes.com/topics/barack-obama/),” [Sen. John McCain](http://www.washingtontimes.com/topics/john-mccain/), Arizona Republican, said Thursday. “What about those who we can’t bring to trial or can’t release? Where will they go back to if they’re released? All of these are questions that need to be answered.”¶ A legislative aide said one of the first meetings that [Mr. McCain](http://www.washingtontimes.com/topics/john-mccain/) and Sen. Lindsey Graham, South Carolina Republican, had with president-elect Obama in 2008 was about Guantanamo. But, [Mr. McCain](http://www.washingtontimes.com/topics/john-mccain/) said, “they were pushed by the left so far that they really couldn’t ever come up with a coherent plan.”¶ The American Civil Liberties Union said the [administration](http://www.washingtontimes.com/topics/barack-obama/) can back up its rhetoric by immediately transferring 86 prisoners who have been cleared to be repatriated to a foreign nation.¶ Christopher Anders, the ACLU’s senior legislative counsel, said the [Obama administration](http://www.washingtontimes.com/topics/barack-obama/) has a good track record of making sure these detainees are imprisoned, monitored or rehabilitated in their new countries.¶ “No one’s going to be dropped off at the airport with $20 in their pockets,” he said.¶ [Senate](http://www.washingtontimes.com/topics/senate/) Armed Services Chairman Carl Levin, Michigan Democrat, noted Thursday his committee inserted a series of Guantanamo reforms into a defense-spending bill that will come to the [Senate](http://www.washingtontimes.com/topics/senate/) floor.¶ The provisions would make it easier to transfer detainees to U.S. detention centers, or to foreign nations if they are unlikely to re-engage in terrorist activity. It also provides for the temporary transfer of detainees to Defense Department medical facilities ” to prevent death or significant imminent harm.”¶ But lawmakers in the Republican-led House on Tuesday, on a 247-175 vote, defeated an amendment from [Rep. James P. Moran](http://www.washingtontimes.com/topics/james-p-moran/), Virginia Democrat, that would have permitted the release or transfer of Guantanamo detainees to the U.S. or foreign nations if the secretary of defense signed off on certain conditions.¶ In a policy statement, the White House condemned a section of the House defense spending bill that would prohibit the modification or creation of a facility in the United States to house the detainees — a provision that [Mr. Moran](http://www.washingtontimes.com/topics/james-p-moran/) had tried to strip from the bill.¶ “The U.S. should not stand for indefinite detention,” a spokeswoman for [Mr. Moran](http://www.washingtontimes.com/topics/james-p-moran/) said Thursday. “It’s un-American and against our founding principle of justice.”

#### Congress JUST VOTED to keep Gitmo open- plan is an epic reversal

Michael McAuliff, June 14, 2013, “Guantanamo Bay To Stay Open As House Blocks Bill To Close Infamous Prison,” <http://www.huffingtonpost.com/2013/06/14/guantanamo-bay-close_n_3438347.html>

A worsening hunger strike and a fresh plea by President Barack Obama to close the Guantanamo Bay prison fell on deaf ears in Congress Friday, as the House of Representatives voted to keep the increasingly infamous jail open.¶ The House voted to make it harder for Obama to begin shifting inmates, adding a restriction to the National Defense Authorization Act of 2014 that bars any of the roughly 56 prisoners who have been cleared by military and intelligence officials to be sent to Yemen from being transferred there for one year. Some 30 other Gitmo inmates of the 166 kept there have also been cleared for release.

#### That undermines the credibility of Syria strikes.

Gaskell, 6/14 **–** (Stephanie, “DOD brass has long urged caution on Syria,”

<http://www.politico.com/story/2013/06/department-of-defense-syria-92829.html#ixzz2eCkK8lqN>)

The White House’s plan to step up American involvement in Syria might be the very thing its top military commanders has been warning against for months — a foray into a long, messy war. In hearings, speeches and interviews, Defense Secretary Chuck Hagel and Joint Chiefs Chairman Gen. Martin Dempsey have been deeply skeptical every time they’ve been asked about potential U.S. involvement in Syria. What kind of weapons would the United States provide to the rebels and what happens if they fall into the wrong hands? Will the U.S. and its allies establish a no-fly zone and if so, how robust would it be? Would U.S. intervention just create a proxy war in the region? Read more: http://www.politico.com/story/2013/06/department-of-defense-syria-92829.html#ixzz2eCkDGRwD Washington better know those answers before it acts, they’ve warned. (Also on POLITICO: Obama's Syria slow walk) “We have an obligation and responsibility to think through the consequences of direct U.S. military action in Syria,” Hagel said on Capitol Hill in the spring. Since the White House announced Thursday that the United States would begin providing lethal aid to the rebels but did not specify any details for military operations, military leaders remain in planning mode. Defense officials told POLITICO on Friday that they have a wide range of options for military action in Syria, and President Barack Obama has not asked the Pentagon for any specific plan yet. But intervening in Syria isn’t just dependent on the U.S. military — the National Security Council, the State Department and the Central Intelligence Agency are all at the table, too, searching for a way to end the two-year conflict that threatens to destabilize the Middle East. “Beyond Syria, this has always been an enduring feature of the civilian-military split over perceptions of what limited military force can achieve,” said Micah Zenko, a fellow at the Council on Foreign Relations. “They advise the president, but the military planning process is really an iterative dialogue between combatant commanders and Joint Staff planners and the White House. The military is just loath to undertake limited interventions that have no clear strategic objective [and] are loaded with political and operational constraints.” The bottom line, he said, is that although military commanders will always execute their orders, there’s a reason the top brass — from the O-6 colonels and captains to their generals and admirals — has been so reluctant to get involved. “I’ve never spoken to any at the O-5 level or above who thinks intervening in Syria is a good idea,” Zenko said. “But, yes, they’ll develop options forever until the president authorizes them to execute one of them, and then they will, faithfully.”