# 1AC Afghanistan

#### Advantage 1 is Afghanistan

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Multiple scenarios for escalation**

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

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

# 1AC Abstention

#### Advantage 2 is Abstention

#### Failure of the Supreme Court to substantively rule on detention authority causes judicial abstention on national security issues

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

Ruling on the Suspension clause gives a clear source of judicial review in military decisions- ensures precedent-setting

Garrett 12 (Brandon, Roy L. and Rosamund Woodruff Morgan Professor of Law, University of Virginia School of Law. HABEAS CORPUS AND DUE PROCESSCORNELL LAW REVIEW [Vol. 98:47] page lexis)

The relationship between the Suspension Clause and the Due Process Clause has sweeping implications for the detention of suspected terrorists and military engagements in multiple countries after September 11, 2001. In Boumediene v. Bush, the Supreme Court for the first time clearly gave the Suspension Clause independent force as an affirmative source of judicial power to adjudicate habeas petitions and as a source of meaningful process to prisoners in custody.15 As a consequence of this decision, Congress now cannot enact jurisdictions tripping legislation to deny executive detainees access to judicial review of the type that it has twice tried and failed to do in the past decade.16 A noncitizen detained as a national security threat may now have procedural rights to contest the detention.17 Even as the Executive has crafted nuanced positions on power and procedure for detaining persons for national security reasons, and even as Congress has adopted new detention-authorizing legislation,18 the judiciary continues to play a central role, though sometimes unwillingly and deferentially, in detention review.19 Apart from these specific developments, I argue that the reinvigorated Suspension Clause jurisprudence will continue to have ripple effects across all areas regulated by habeas corpus. What process must the government use to ensure that it detains the correct people? The traditional assumption was that the Due Process Clause provided the answers. Judges and scholars described a functional relationship in which due process supplied the rights while habeas provided the procedural means to vindicate them. Justice Antonin Scalia expressed this view in its starkest form in his INS v. St. Cyr dissent, arguing that the Suspension Clause “does not guarantee any content to (or even the existence of) the writ of habeas corpus.”20 Judges and scholars have long assumed that due process offers more protections than habeas corpus, or that the substance of habeas is coextensive with the Due Process Clause.21 Others have suggested that the Suspension Clause has a “structural” role, entwined with other individual rights guarantees.22 The U.S. government, in the wake of the September 11, 2001 attacks, adopted the view that noncitizens captured and detained abroad had no due process rights and thus no habeas remedy, and the D.C. Circuit agreed.23 In two cases that reshaped habeas jurisprudence, Hamdi v. Rumsfeld, decided in 2004,24 and Boumediene, decided in 2008,25 the Court connected the Suspension Clause and the Due Process Clause in a new way. Hamdi seemed to indicate that the Due Process Clause approach had triumphed. The Hamdi plurality applied the cost-benefit due process test from Mathews v. Eldridge26 to outline the procedural rights of citizens who challenge their detention.27 Following Hamdi, the precise scope of what due process required seemed the “looming question” for the future of executive detention.28 In response, the government hastily implemented administrative screening procedures for detainees, ostensibly to comply with the bare minimum that due process appeared to require.29 In Boumediene, the Court chose a different constitutional path. The Court did not discuss whether Guant´anamo detainees had due process rights, but instead held that the Suspension Clause independently supplies process to ensure review of executive detention.30 The Court put to rest the notion that the Suspension Clause is an empty vessel and regulates only the conditions for congressional suspension of the writ. Instead, the Court held that the Suspension Clause itself extended “the fundamental procedural protections of habeas corpus.”31 The Court’s view complements recent scholarship examining the common law origins of habeas corpus.32 However, while an- swering the Suspension Clause question, the ruling created another puzzle. The Court held that a prisoner should have a “meaningful opportunity” to demonstrate unlawful confinement, but it did not specify what process the Suspension Clause ensures, nor to what degree due process concerns influence the analysis.33 Lower court rulings elaborating on the process for reviewing detainee petitions have displayed confusion as to which sources to rely on.34 This Article tries to untangle this important knot.

Judicial abstention props up military adventurism and illegal arms sales

Scales and Spitz 12 (Ann Scales, prof at U Denver law school. Laura Spitz, prof at U Colorado Law School. The Jurisprudence of the Military-Industrial ComplexSeattle Journal for Social Justice Volume 1 | Issue 3 Article 51 10-11-2012)

First, our nation’s history and legitimacy rest upon a separation of military power from democratic governance. For that reason, the armed forces are subject to constitutional constraint. Second, however, as an aspect of separation of powers, courts try not to interfere in areas of foreign policy and military affairs. Often this is referred to as the “political question” doctrine, a determination that a matter is beyond the capabilities of judges. The strongest argument for this deference is that the political branches—or the military itself—have superior expertise in military matters. That may be true in some situations. I am not sure, for example, the Supreme Court would have been the best crowd to organize the invasion of Normandy. But what we now have is an increasingly irrational deference.7 Consider three cases: a. In Korematsu v. United States,8 the Supreme Court said the internment of Japanese-Americans at the beginning of 1942 was constitutional, based upon a military assessment of the possibility of espionage in preparation for a Japanese invasion of the United States. It turns out that the information provided by the military to the Supreme Court was falsified.9 But note two things: (1) the nation was in the midst of a declared world war, and (2) in subsequent less urgent circumstances, Korematsu would seem to argue strongly for military justifications to have to be based upon better, more reliable information than was offered there. b. In the 1981 case of Rostker v. Goldberg,10 the Supreme Court decided that it was constitutional for Congress to exclude women from the peacetime registration of potential draftees, even though both the Department of Defense and the Army Chief of Staff had testified that including women would increase military readiness. But Congress got the benefit of the military deference doctrine as a cover for what I think was a sinister political purpose—to protect the manliness of war—and the Supreme Court felt perfectly free to ignore what those with the real expertise had to say. c. Most recently, in Hamdi v. Rumsfeld,11 the Fourth Circuit held that a U.S. citizen who had been designated an “enemy combatant”12 could be detained indefinitely without access to counsel. In this case, however, not only is there no declared war,13 but also, the only evidence regarding Mr. Hamdi was a two-page affidavit by a Defense Department underling, Mr. Mobbs. Mobbs stated that Mr. Hamdi was captured in Afghanistan, and had been affiliated with a Taliban military unit. The government would not disclose the criteria for the “enemy combatant” designation, the statements of Mr. Hamdi that allegedly satisfied those criteria, nor any other bases for the conclusion of Taliban “affiliation.”14 And that is as good as the evidence for life imprisonment without trial has to be. Deference to the military has become abdication. In other words, what we presently have is not civilian government under military control, but something potentially worse, a civilian government ignoring military advice,15 but using the legal doctrine of military deference for its own imperialist ends. Third, the gigantic military establishment and permanent arms industry are now in the business of justifying their continued existences. This justification is done primarily, as you know, by retooling for post-Cold War enemies—the so-called “rogue states”—while at the same time creating new ones, for example by arming corrupt regimes in Southeast Asia.16 I was reminded of this recently when we went to see comedian Kate Clinton. She thought Secretary Powell had taken too much trouble in his presentation attempting to convince the Security Council that Iraq had weapons of mass destruction.17 Why not, she asked, “just show them the receipts?” Fourth, we have seen the exercise of extraordinary influence by arms makers on both domestic and foreign policy. For domestic pork barrel and campaign finance reasons, obsolete or unproven weapons systems continue to be funded even when the military does not want them!18 And, just when we thought we had survived the nuclear arms race nightmare, the United States has undertaken to design new kinds of nuclear weapons,19 even when those designs have little military value.20 Overseas, limitations on arms sales are being repealed, and arms markets that should not exist are being constantly expanded21 for the sake of dumping inventory, even if those weapons are eventually used for “rogue” purposes by rogue states. This system skews security considerations, and militarizes foreign policy. Force has to be the preferred option because other conduits of policy are not sufficiently well-funded. Plus, those stockpiled weapons have got to be used or sold so that we can build more. Fifth, enlarging upon this in a document entitled The National Security Policy of the United States, we were treated last September to “the Bush doctrine,” which for the first time in U.S. history declares a preemptive strike policy. This document states, “America will act against emerging threats before they are fully formed.”22 If they are only emerging and not fully formed, you may wonder, how will we know they are “threats”? Because someone in Washington has that perception, and when the hunch hits, it is the official policy of this country to deploy the military.23 All options—including the use of nuclear weapons—are always on the table.

#### Presidential adventurism causes nuclear war

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

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

#### Arms sales increase the probability of regional conflict and leads to US-Russia-China escalation

Klare 13 (Michael Klare is a professor of peace and world security studies at Hampshire College The Booming Global Arms Trade Is Creating a New Cold War http://www.motherjones.com/politics/2013/05/global-arms-trade-new-cold-war)

These are just some examples of recent arms deals (or ones under discussion) that suggest a fresh willingness on the part of the major powers to use weapons transfers as instruments of geopolitical intrusion and competition. The reappearance of such behavior suggests a troubling resurgence of Cold War-like rivalries. Even if senior leaders in Washington, Moscow, and Beijing are not talking about resurrecting some twenty-first-century version of the Cold War, anyone with a sense of history can see that they are headed down a grim, well-trodden path toward crisis and confrontation. What gives this an added touch of irony is that leading arms suppliers and recipients, including the United States, recently [voted](http://www.nytimes.com/2013/04/03/world/arms-trade-treaty-approved-at-un.html) in the U.N. General Assembly to approve the [Arms Trade Treaty](http://www.un.org/disarmament/ATT/) that was meant to impose significant constraints on the global trade in conventional weapons. Although the treaty has many loopholes, lacks an enforcement mechanism, and will require years to achieve full implementation, it represents the first genuine attempt by the international community to place real restraints on weapons sales. "This treaty won't solve the problems of Syria overnight, no treaty could do that, but it will help to prevent future Syrias," [said](http://www.nytimes.com/2013/04/03/world/arms-trade-treaty-approved-at-un.html) Anna MacDonald, the head of arms control for [Oxfam International](http://www.oxfam.org/) and an ardent treaty supporter. "It will help to reduce armed violence. It will help to reduce conflict." This may be the hope, but such expectations will quickly be crushed if the major weapons suppliers, led by the US and Russia, once again come to see arms sales as the tool of choice to gain geopolitical advantage in areas of strategic importance. Far from bringing peace and stability—as the proponents of such transactions invariably claim—each new arms deal now holds the possibility of taking us another step closer to a new Cold War with all the heightened risks of regional friction and conflict that entails. Are we, in fact, seeing a mindless new example of the old saw: that those who don't learn from history are destined to repeat it?

**US-Russia miscalculation causes extinction**

**Barrett et al. 1/6** (Anthony M. Barrett- Global Catastrophic Risk Institute, Seth D. Baum- Center for Research on Environmental Decisions, Columbia University, Kelly R. Hostetler- Department of Geography, Pennsylvania State University, 2013, “Analyzing and Reducing the Risks of Inadvertent Nuclear War Between the United States and Russia”, http://sethbaum.com/ac/fc\_NuclearWar.pdf)

War involving significant fractions of the U.S. and Russian nuclear arsenals, which are by far the largest of any nations, could have globally catastrophic effects such as severely reducing food production for years, 1,2,3,4,5,6 potentially leading to collapse of modern civilization worldwide and even the extinction of humanity. 7,8,9,10 Nuclear war between the US and Russia could occur by various routes, including accidental or unauthorized launch; deliberate first attack by one nation; and inadvertent attack. In an accidental or unauthorized launch or detonation, system safeguards or procedures to maintain control over nuclear weapons fail in such a way that a nuclear weapon or missile launches or explodes without direction from leaders. In a deliberate first attack, the attacking nation decides to attack based on accurate information about the state of affairs. In an inadvertent attack, the attacking nation mistakenly concludes that it is under attack and launches nuclear weapons in what it believes is a counterattack. 11,12 (Brinkmanship strategies incorporate elements of all of the above, in that they involve deliberate manipulation of the risk of otherwise unauthorized or inadvertent attack as part of coercive threats that “leave something to chance,” i.e., “taking steps that raise the risk that the crisis will go out of control and end in a general nuclear exchange.” 13,14 ) Over the years, nuclear strategy was aimed primarily at minimizing risks of intentional attack through development of deterrence capabilities, though numerous measures were also taken to reduce probabilities of accidents, unauthorized attack, and inadvertent war. 15,16,17 For purposes of deterrence, both U.S. and Soviet/Russian forces have maintained significant capabilities to have some forces survive a first attack by the other side and to launch a subsequent counter-attack. However, concerns about the extreme disruptions that a first attack would cause in the other side’s forces and command-and-control capabilities led to both sides’development of capabilities to detect a first attack and launch a counter-attack before suffering damage from the first attack. 18,19,20 Many people believe that with the end of the Cold War and with improved relations between the United States and Russia, the risk of East-West nuclear war was significantly reduced. 21,22 However, it has also been argued that inadvertent nuclear war between the United States and Russia has continued to present a substantial risk. 23,24,25,26,27,28,29,30,31,32,33 While the United States and Russia are not actively threatening each other with war, they have remained ready to launch nuclear missiles in response to indications of attack. 34,35,36,37,38 False indicators of nuclear attack could be caused in several ways. First, a wide range of events have already been mistakenly interpreted as indicators of attack, including weather phenomena, a faulty computer chip, wild animal activity, and control-room training tapes loaded at the wrong time. 39 Second, terrorist groups or other actors might cause attacks on either the United States or Russia that resemble some kind of nuclear attack by the other nation by actions such as exploding a stolen or improvised nuclear bomb, 40,41,42 especially if such an event occurs during a crisis between the United States and Russia. 43 A variety of nuclear terrorism scenarios are possible. 44 Al Qaeda has sought to obtain or construct nuclear weapons and to use them against the United States. 45,46,47 Other methods could involve attempts to circumvent nuclear weapon launch control safeguards or exploit holes in their security. 48,49 It has long been argued that the probability of inadvertent nuclear war is significantly higher during U.S.-Russian crisis conditions, 50,51,52,53 with the Cuban Missile Crisis being a prime historical example of such a crisis. 54,55,56,57,58 It is possible that U.S.-Russian relations will significantly deteriorate in the future, increasing nuclear tensions. 59 There are a variety of ways for a third party to raise tensions between the United States and Russia, making one or both nations more likely to misinterpret events as attacks. 60,61,62,63

#### Nuclear conflict with China is an EXISTENTIAL risk – causes nuclear winter

Wittner 11 (11/30/11 Dr. Lawrence, Prof of History Emeritus at SUNY Albany, “Is a Nuclear War with China Possible?”)

But what would that "victory" entail? An attack with these Chinese nuclear weapons would immediately slaughter at least 10 million Americans in a great storm of blast and fire, while leaving many more dying horribly of sickness and radiation poisoning. The Chinese death toll in a nuclear war would be far higher. Both nations would be reduced to smoldering, radioactive wastelands. Also, radioactive debris sent aloft by the nuclear explosions would blot out the sun and bring on a "nuclear winter" around the globe -- destroying agriculture, creating worldwide famine, and generating chaos and destruction. Moreover, in another decade the extent of this catastrophe would be far worse. The Chinese government is currently expanding its nuclear arsenal, and by the year 2020 it is [expected](http://www.nukestrat.com/china/Book-35-125.pdf) to more than double its number of nuclear weapons that can hit the United States. The U.S. government, in turn, has [plans](http://www.guardian.co.uk/world/2011/oct/30/nuclear-powers-weapons-spending-report) to spend hundreds of billions of dollars "modernizing" its nuclear weapons and nuclear production facilities over the next decade.

#### **Arms sales rapidly escalate Middle East war**

Cunningham 12 (Erin, Erin Cunningham is GlobalPost’s editor for the [Middle East](http://www.globalpost.com/internal/section-config/middle-east), [Africa](http://www.globalpost.com/internal/section-config/africa), [Afghanistan](http://www.globalpost.com/internal/section-config/afghanistan) and [Pakistan](http://www.globalpost.com/internal/section-config/pakistan). Erin has reported from the Middle East, South [Asia](http://www.globalpost.com/internal/section-config/asia) and the Balkans for five years, covering Kosovo's independence, the military surge in Afghanistan, protests in Cairo's [Tahrir Square](http://www.globalpost.com/internal/section-config/egypt), the first democratic elections in Tunisia, and Israeli military operations in Gaza. Small arms fuel Middle East conflicts http://www.globalpost.com/dispatch/news/regions/middle-east/121128/small-arms-middle-east-conflict-weapons)

From Libya to Syria, Yemen and the Gaza Strip, everything from shotguns and semi-automatic rifles to anti-tank and anti-aircraft weapons are making local and regional conflicts more lethal, scarring the societies where the weapons end up. And analysts say the problem is only getting worse. “Things have intensified since the Arab Spring,” said Martin Butcher, arms policy adviser at London-based Oxfam, about the region’s weapons trade. “There were particularly troubled hotspots in the Middle East, where illegal or grey market transfers were the norm,” he said, referring to a type of weapons transaction that may begin as legal but diverts arms to illegal end-markets. As the unrest spread, he said, so did the illicit weapons flows. “It’s starting to get worse,” he concluded. Long-term conflicts in the Middle East have helped flood the region with small arms. Some of the weapons arrive as bribes from Western governments to oppressive regimes for maintaining peace with Israel or are acquired by armed groups challenging state power, such as Kurdish separatists in Turkey and Iraq. Gathering comprehensive, accurate data on the region’s small arms trade is difficult because regional governments lack transparency. But according to the Congressional Research Service, the US Congress’s public policy research arm, the Middle East is the developing world’s largest arms market. The United States is the leading exporter of legal small arms to governments across the region. It sold $1.1 billion of weapons to Bahrain, Egypt and Yemen from 2005 to 2010. Some of the arms have ended up on the black market and in the hands of smugglers like Abu Ibrahim. His Bedouin kin in Sinai’s north have engaged in a low-intensity conflict with heavy-handed security forces for years. The conflict is fueled largely by the presence of illicit small arms, including recent shipments from post-Gaddafi Libya, where ordinary people joined rebels pillaging arsenals during the civil war. During the tumult that accompanied the Arab Spring, weakened or toppled governments in Egypt, Libya and Syria withdrew from borders and other guarded areas, giving up weapons stocks as they fled rebel fighters. Across the Sinai Peninsula — where police and intelligence forces recently retreated under fire from armed protesters — smugglers, Islamic militants, criminal networks and armed gangs are amassing even more weapons that have poured across Egypt’s porous border with Libya. Locals say that in addition to assault rifles, Soviet-made large-caliber machine guns, US-manufactured Glock pistols, Chinese shotguns, anti-tank weapons and rocket-propelled grenade launchers are all feeding the frequent armed confrontations between militants, locals and Egyptian security forces. “This has always been a passageway for wars,” Ibrahim said. “We’re not treated well by the authorities. If we were, we wouldn’t need weapons.” Illegal weapons shipments from Libya and Iran are helping fuel the full-scale civil war in Syria, where a peaceful uprising developed into an armed conflict that’s killed around 30,000 people, according to anti-government activists. Oxfam’s Butcher pointed to reports saying weapons are being shipped directly from Benghazi, the cradle of Libya’s uprising, to the rebel Free Syria Army via Lebanon. “It is absolutely clear that the sustained battle in Aleppo couldn’t possibly have happened without a large amount of arms coming in from outside,” he said. Syria’s largest city has been at the center of a pitched battle between the Free Syrian Army and the forces of President Bashar al-Assad for months. “There is a very steady flow of arms going in — from Lebanon, Iraq, Turkey and even Jordan,” said Nicolas Marsh, an arms researcher at the Norwegian Initiative for Small Arms Transfers, a coalition of civil society groups seeking to reduce armed violence. “If the opposition in Syria had run out of ammunition, they would have lost right away.” Illegal small arms can tilt the balance of power in some conflicts, but they often help entrench stalemates in which the breakdown of infrastructure and services increases perceptions of insecurity — and intensifies violence.

#### Middle East wars cause extinction

Russell, 9 (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.

# 1AC Plan Text

#### The United States federal judiciary should apply a clear statement principle to the statutorily defined indefinite detention war powers authority of the President of the United States on the grounds that executive indefinite detention violates the Suspension Clause.

# 1AC Solvency

#### Last is Solvency

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

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

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

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

#### Detention policy is incomprehensible in the status quo- only Supreme Court rulings send a clear judicial review test for lower court judges and spills over to effective Congressional policy

Garrett 12 (Brandon, Roy L. and Rosamund Woodruff Morgan Professor of Law, University of Virginia School of Law. HABEAS CORPUS AND DUE PROCESSCORNELL LAW REVIEW [Vol. 98:47] page lexis)

The Suspension Clause casts a broad shadow over the regulation of all forms of detention. It has exerted direct and indirect influence even in contexts where statutes largely supplant habeas corpus as the primary vehicle for judicial review. The Executive, courts, and Congress have long been concerned with avoiding Suspension Clause problems, and the Supreme Court’s own sometimes-carried-out warnings that it will narrowly interpret efforts to restrict judicial review to avoid potential Suspension Clause problems have, many years before Boumediene, helped to structure judicial review of detention. I have argued that the Suspension Clause explains why, as the Court put it in INS v. St. Cyr, “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”451 Post- Boumediene, judges may rely on the Suspension Clause more directly, and not just as a principle of constitutional avoidance. Understanding the Suspension Clause as affirmatively guaranteeing a right to habeas process to independently examine the authorization for a detention helps to explain habeas and constitutional doctrine across a range of areas. Why does habeas corpus sometimes provide access to process unavailable under the Due Process Clause, while sometimes due process provides more process than habeas would? At its core, habeas corpus provides judges with process in situations where the need for review of legal and factual questions surrounding detention is most pressing. This view of habeas process can be seen as related to the Court’s long line of decisions that guarantee a “right of access” to courts without clarifying the source of that “[s]ubstantive [r]ight.”452 In Boumediene, the Court grounded that right in the Suspension Clause. This basis for the right makes some sense of the varied nature of habeas review in which statutes and case law differ depending on the type of detention. Judicial review does not vary categorically; for example, immigration does not receive less review than postconviction or military detention habeas. Instead, judicial review varies within each category. This is the product of evolving executive detention policies, varying postconviction practice, and changes over time in federal statutes, some poorly conceived and some sensible. No one actor provides coherence to habeas practice at any time, and some of the statutes are notoriously Byzantine, poorly drafted, and illogical. Judges have long played, however, an important role in interpreting the writ (and the underlying constitutional rights). Indeed, for some time, the Supreme Court’s interventions have reinforced the role habeas plays, particularly in the executive detention context. In response to the Court’s habeas rulings, which generally avoid defining the precise reach of the Suspension Clause, Congress has drafted statutes to preserve judicial review of detentions in an effort to steer clear of Suspension Clause problems, with mixed results.

Failing to articulate habeas standards for lower court judges makes indefinite detention inevitable and triggers your disads

Sparrow 11 (Indefinite Detention After Boumediene: Judicial Trailblazing in Uncharted and Unfamiliar Territory SUFFOLK UNIVERSITY LAW REVIEW [Vol. XLIV:261 p lexis Tyler Sparrow is an associate in the Securities Department, and a member of the Litigation and Enforcement Practice Group]

This section will argue that the current guidance on detainee habeas corpus actions offered by the Supreme Court as well as the Executive and Legislative branches is vague and inadequate.100 Because of this inadequacy, federal district court judges cannot proceed with any confidence that their judgments will stand, nor can the litigants form any reasonable predictions from the case law.101 This section will then examine how more definitive Supreme Court precedent would help to unify the case law dealing with detainee habeas corpus actions.102 Finally, this section will argue that adoption of legislation clearly addressing the substantive scope of the government’s detention authority would clarify the law for the public, the federal courts, and most importantly those detained without charge.103 The Supreme Court’s holding in Boumediene was limited to the constitutional issues regarding Guantanamo detainees’ access to the writ of habeas corpus, leaving all questions of procedure and substantive scope-ofdetention authority to the lower federal courts.104 This lack of guidance has drawn criticism from legal scholars and federal judges alike.105 A group of noted legal scholars observed that, in holding Guantanamo detainees were entitled to seek the writ of habeas corpus, the Supreme Court “gave only the barest sketch of what such proceedings should look like, leaving a raft of questions open for the district and appellate court judges.”106 Furthermore, the Obama Administration has stated that it will not seek further legislation from Congress to justify or clarify its detention authority.107 This lack of guidance has led to disparate results in detainee habeas corpus actions with similar facts, based not on the merits of the cases, but rather on which particular judge hears the petition.108 B. Need for Supreme Court Precedent Addressing Standards and Procedure for Detainee Habeas Corpus Actions The Supreme Court’s refusal to address the substantive scope of the government’s detention authority in Boumediene has left the task to federal district court judges, who are free to apply whichever standard they see fit, regardless of its disparity from the standard being applied down the hall of the very same courthouse.109 For instance, it is up to the district judges whether to analyze detention authority under the rubric of “substantial support” for the Taliban and/or Al Qaeda, or the rubric pertaining to being a “part of” either of these groups.110 There are also differing opinions as to when, and how long, a detainee’s relationship with the Taliban and/or Al Qaeda must have existed to justify detention, under either the “part of” or “substantial support” rationales.111 Differing judicial approaches can also be seen in the weight of evidence required to justify detention, as well as how to treat hearsay and evidence obtained in the face of coercion.112 This creates a situation where neither the government nor the detainee “can be sure of the rules of the road in the ongoing litigation, and the prospect that allocation of a case to a particular judge may prove dispositive on the merits can cut in either direction.”113 The Supreme Court has the opportunity to unify these divergent paths by finally ruling on questions such as the substantive scope of the government’s detention authority, the standard and weight of evidence required for continued detention, whether a relationship with the Taliban and/or Al Qaeda can be sufficiently vitiated, and the reliability of hearsay evidence and statements made under coercion.114

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## detention pic

#### no terminal impact- not a voting issue

#### Isolated instances of renaming fail to create change

Schram 95 (Sanford F., Associate Professor of Political Science at Macalester College, former Visiting Professor at the La Follette Institute of Public Affairs at the University of Wisconsin and Visiting Affiliate at the Institute for Research on Poverty at the University of Wisconsin, “Discourses of Dependency: The Politics of Euphemism,” Words of Welfare: The Poverty of Social Science and The Social Science of Poverty, Published by The University of Minnesota Press, ISBN 0816625778, p. 21-23)

The deconstruction of prevailing discursive structures helps politicize the institutionalized practices that inhibit alternative ways of constructing social relations.5 Isolated acts of renaming, however, are unlikely to help promote political change if they are not tied to interrogations of the structures that serve as the interpretive context for making sense of new terms.6 This is especially the case when renamings take the form of euphemisms designed to make what is described appear to be consonant with the existing order. In other words, the problems of a politics of renaming are not confined to the left, but are endemic to what amounts to a classic American practice utilized across the political spectrum.7 Homeless, welfare, and family planning provide three examples of how isolated instances of renaming fail in their efforts to make a politics out of sanitizing language. [end page 21] Reconsidering the Politics of Renaming Renaming can do much to indicate respect and sympathy. It may strategically recast concerns so that they can be articulated in ways that are more appealing and less dismissive. Renaming the objects of political contestation may help promote the basis for articulating latent affinities among disparate political constituencies. The relentless march of renamings can help denaturalize and delegitimate ascendant categories and the constraints they place on political possibility. At the moment of fissure, destabilizing renamings have the potential to encourage reconsideration of how biases embedded in names are tied to power relations.8 Yet isolated acts of renaming do not guarantee that audiences will be any more predisposed to treat things differently than they were before. The problem is not limited to the political reality that dominant groups possess greater resources for influencing discourse. Ascendant political economies, such as liberal postindustrial capitalism, whether understood structurally or discursively, operate as institutionalized systems of interpretation that can subvert the most earnest of renamings.9 It is just as dangerous to suggest that paid employment exhausts possibilities for achieving self-sufficiency as to suggest that political action can be meaningfully confined to isolated renamings.10 Neither the workplace nor a name is the definitive venue for effectuating self-worth or political intervention.11 Strategies that accept the prevailing work ethos will continue to marginalize those who cannot work, and increasingly so in a post­ industrial economy that does not require nearly as large a workforce as its industrial predecessor. Exclusive preoccupation with sanitizing names overlooks the fact that names often do not matter to those who live out their lives according to the institutionalized narratives of the broader political economy, whether it is understood structurally or discursively, whether it is monolithically hegemonic or reproduced through allied, if disparate, practices. What is named is always encoded in some publicly accessible and ascendent discourse. 12 Getting the names right will not matter if the names are interpreted according to the institutionalized insistences of organized society.13 Only when those insistences are relaxed does there emerge the possibility for new names to restructure daily practices. Texts, as it now has become notoriously apparent, can be read in many ways, and they are most often read according to how prevailing discursive structures provide an interpretive context for reading them.14 The meanings implied by new names of necessity [end page 22] overflow their categorizations, often to be reinterpreted in terms of available systems of intelligibility (most often tied to existing institutions). Whereas renaming can maneuver change within the interstices of pervasive discursive structures, renaming is limited in reciprocal fashion. Strategies of containment that seek to confine practice to sanitized categories appreciate the discursive character of social life, but insufficiently and wrongheadedly. I do not mean to suggest that discourse is dependent on structure as much as that structures are hegemonic discourses. The operative structures reproduced through a multitude of daily practices and reinforced by the efforts of aligned groups may be nothing more than stabilized ascendent discourses.15 Structure is the alibi for discourse. We need to destabilize this prevailing interpretive context and the power plays that reinforce it, rather than hope that isolated acts of linguistic sanitization will lead to political change. Interrogating structures as discourses can politicize the terms used to fix meaning, produce value, and establish identity. Denaturalizing value as the product of nothing more than fixed interpretations can create new possibilities for creating value in other less insistent and injurious ways. The discursively/structurally reproduced reality of liberal capitalism as deployed by power blocs of aligned groups serves to inform the existentially lived experiences of citizens in the contemporary postindustrial order.16 The powerful get to reproduce a broader context that works to reduce the dissonance between new names and established practices. As long as the prevailing discursive structures of liberal capitalism create value from some practices, experiences, and identities over others, no matter how often new names are insisted upon, some people will continue to be seen as inferior simply because they do not engage in the same practices as those who are currently dominant in positions of influence and prestige. Therefore, as much as there is a need to reconsider the terms of debate, to interrogate the embedded biases of discursive practices, and to resist living out the invidious distinctions that hegemonic categories impose, there are real limits to what isolated instances of renaming can accomplish.

#### Perm do the counterplan – counterplans must be functionally and textually competitive, limits out delay and the should pic

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#### Judicial review prevents their worst impacts- ensures presidential restraint and destroys the jurisprudential model for arms sales that escalate conflict

#### Try or die for Afghanistan- us engagement inevitable- only question of effectiveness- stable government prevents worse US intervention and escalating regional conflict

#### Deconstructing law fails to regulate detention

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

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

#### Perm do the plan and all non mutually exclusive parts of the alt- we defend the plan text but not the reps

#### Pragmatic reasoning is correct- prior questions cause policy failure

Kratochwil, IR Prof @ Columbia, 8 [Friedrich Kratochwil is Assistant Professor of International Relations at Columbia University, Pragmatism in International Relations “Ten points to ponder about pragmatism” p11-25]

Firstly, a pragmatic approach does not begin with objects or “things” (ontology), or with reason and method (epistemology), but with “acting” ( *prattein*), thereby preventing some false starts. Since, as historical beings placed in a specific situations, we do not have the luxury of deferring decisions until we have found the “truth”, we have to act and must do so always under time pressures and in the face of incomplete information. Precisely because the social world is characterised by strategic interactions, what a situation “is”, is hardly ever clear *ex ante*, because it is being “produced” by the actors and their interactions, and the multiple possibilities are rife with incentives for (dis)information. This puts a premium on quick diagnostic and cognitive shortcuts informing actors about the relevant features of the situation, and on leaving an alternative open (“plan B”) in case of unexpected difficulties.

 Instead of relying on certainty and universal validity gained through abstraction and controlled experiments, we know that completeness and attentiveness to detail, rather than to generality, matter.

#### Judicial action is a meaningful restraint, and debating judicial prez powers restraints is good

Serrano and Minami, ‘03 (Susan, Project Director, Equal Justice Society; J.D. 1998, William S. Richardson School of Law, University of Hawai', partner, Minami, Lew & Timaki, Asian Law Journal, Korematsu v. United States: A "Constant Caution" in a Time of Crisis, p. Lexis)

Today, a broadly conceived political identity is critical to the defense of civil liberties. In 1942, Japanese Americans stood virtually alone, without allies, and suffered the banishment of their entire race. Forty years later, Japanese Americans, supported by Americans of all colors, were able to extract an apology and redress from a powerful nation. That lesson of the need for political empowerment was made even more obvious after September 11, 2001, when Arab and Muslim American communities, politically isolated and besieged by hostility fueled by ignorance, became targets of violence and discrimination. In the aftermath of September 11, Japanese Americans knew from history that the United States, which turned on them in 1942, could repeat itself in 2001. Therefore, on September 12, 2001, the Japanese American Citizens' League, the oldest Asian American civil rights organization in the country, immediately issued a press release warning against racial discrimination against Arab and Muslim Americans and supporting their  [**[\*49]**](http://www.lexis.com/research/retrieve?_m=bee887063044547ab12532f483726d11&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAk&_md5=f0e31afba24c7755402ea0ead0b3cfb6&focBudTerms=%2522serrano%2522%20and%20%2522minami%2522%20and%20%2522korematsu%2522&focBudSel=all)  civil rights.n60 Other Japanese American individuals and groups have offered their friendship, political support, and solidarity with Arab and Muslim Americans. Japanese Americans also knew from their Redress experience that political power was the strongest antidote. The coram nobis legal teams understood the political dimensions of their cases and adopted a course of litigation that would discredit the Wartime Cases by undermining the legal argument that the Supreme Court had legitimized the World War II exclusion and detention. This impaired (though did not overturn) the value of Korematsu, Hirabayashi, and Yasui as legal precedents for mass imprisonments of any definable racial group without due process. The even larger vision of these cases, however, was the long-term education of the American public. Many still believed (and continue to believe) that there were valid reasons for incarcerating Japanese Americans en masse: the coram nobis cases strongly refuted that notion and boldly illuminated the essentially political nature of the judicial system. In doing so, the coram nobis cases have contributed to the public's education about the frailty of civil rights and the evanescence of justice in our courts. As such, these cases highlight the need for continuing political activism and constant vigilance to protect our civil rights. In today's climate of fear and uncertainty, we must engage ourselves to assure that the vast national security regime does not overwhelm the civil liberties of vulnerable groups. This means exercising our political power, making our dissents heard, publicizing injustices done to our communities as well as to others, and enlisting allies from diverse communities. Concretely, this may mean joining others' struggles in the courts, Congress, schools and union halls; organizing protests against secret arrests, incarcerations, and deportations; building coalitions with other racial communities; writing op-ed essays or letters to politicians; launching media campaigns; donating money; and writing essays and articles.n61 Through these various ways, "our task is to compel our institutions, particularly the courts, to be vigilant, to "protect all.'" n62 The lesson of the Wartime Cases and coram nobis cases taken together is not that the government may target an entire ethnic group in the name of national security; the cases teach us instead that civil rights and liberties are best protected by strongly affirming their place in our national character, especially in times of national crisis. As Fred Korematsu avowed nearly twenty years ago, we must not let our governmental  **[[\*50]](http://www.lexis.com/research/retrieve?_m=bee887063044547ab12532f483726d11&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVtz-zSkAk&_md5=f0e31afba24c7755402ea0ead0b3cfb6&focBudTerms=%2522serrano%2522%20and%20%2522minami%2522%20and%20%2522korematsu%2522&focBudSel=all)**  institutions mistreat another racial group in such a manner again. To do this, we must "collectively [turn] the lessons learned, the political and economic capital gained, the alliances forged and the spirit renewed, into many small and some grand advances against continuing harmful discrimination across America."n63 We must become, as Professor Yamamoto has argued, "present-day social actors, agents of justice, because real, hard injustices are occurring all around us every day to Asian Americans and other racial communities and beyond." n64

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#### CP can’t solve arms sales- it will be struck down in the court in the squo due to executive preference

#### Doesn’t solve the aff:

#### 1- Rule of Law- the CP’s regulation is insufficient to result in Afghan modeling- SCOTUS action is key- that’s ICG and eviatar

#### More Evidence

Pearlstein 3 (Deborah N.- Deputy Director of the U.S. Law and Security Program at the Lawyers Committee for Human Rights, and a Visiting Fellow at the Stanford University Center for Democracy, Development and the Rule of Law, , “The Role of the Courts in Protecting Civil Liberties and Human Rights for the Post-9/11 United States”, 2nd Pugwash Workshop on Terrorism: External and Domestic Consequences of the War on Terrorism, <http://www.pugwash.org/reports/nw/terrorism2003-pearlstein.htm>)

In each of the historical examples just given, the judiciary ultimately played a critical role in evaluating the legality of executive action. In the Civil War case, Lambdin Milligan, who had led armed uprisings against Union forces in Indiana, appealed his military tribunal prosecution to the U.S. Supreme Court. In Ex Parte Milligan (1865), the U.S. Supreme Court held Milligan's military prosecution unconstitutional, holding that as long as the civilian "courts are open and their process unobstructed, . . . they can never be applied to civilians in states which have upheld the authority of the government." In Ex Parte Quirin (1942), the Supreme Court reviewed the military prosecution of the German army spies for violations of the laws of war and concluded that it was within the executive's power. Unlike the civilian subject to military justice in Ex Parte Milligan, the Quirin defendants were members of the army of a nation with which the United States was in declared war. And critically, Congress had expressly authorized military commission trials for the offenses for which they were accused. The Supreme Court likewise upheld the exclusion of Japanese-Americans from their homes in Korematsu v. United States (1944), explaining: "Korematsu was not excluded from the military area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, and finally, because Congress, reposing its confidence in this time of war in our military leaders - as inevitably it must - determined that they should have the power to do just this."¶ As these examples demonstrate, the U.S. Supreme Court has not always acted to enforce positive legal protections in favor of the individual against the government's exercise of 'wartime' power. Nonetheless, the Court's structural involvement conveyed a critical political message that executive power remained subject to the rule of law. In addition, the Court's published majority opinions clarified the nature of the executive action taken in response to perceived wartime threats, providing a basis for comparative analysis of subsequent executive conduct. In vigorous and public dissenting opinions accompanying each decision, minority justices gave expression to the strong opposing arguments on the resolution of the legal questions presented. Perhaps most important, the judicial decisions provided Congress, legal scholars, and the American public a means for understanding and, in the relative calm of post-war decision-making, for reevaluating the political wisdom of the challenged actions. Thus, for example, a federal court eventually granted a writ of coram nobis in Mr. Korematsu's case as a result of executive misrepresentations. (Korematsu v. United States (N.D. Cal. 1984)). In 1971, to rein in what was by then broadly recognized as executive excesses, Congress passed 18 U.S.C. § 4001(a), providing: "No citizen shall be . . . detained by the United States except pursuant to an Act of Congress." And in 1988, Congress awarded reparations to the remaining survivors and descendants of those interned during World War II as a result of the military exclusion order.

#### Strong rule of law solves war

Ken Kersch ‘6(8/8/2006 The Supreme Court And International Relations Theory, Kersch\* Assistant Professor of Politics, Princeton University)

Liberal theories of international relations hold that international peace and prosperity are advanced to the degree that the world’s sovereign states converge on the model of government anchored in the twin commitment to democracy and the rule of law.52 Liberal “democratic peace” theorists hold that liberal democratic states anchored in rule of law commitments are less aggressive and more transparent than other types of states.53 When compared with nonliberal states, they are thus **much better at cooperating** with one another in the international arena.54 Because they share a marketoriented economic model, moreover, international relations liberals believe that liberal states hewing to the rule of law will become increasingly interdependent economically.55 As they do so, they will come to share a common set of interests and ideas, which also **enhances the likelihood of cooperation**.56 Many foreign policy liberals—sometimes referred to as “liberal internationalists”— emphasize the role that effective multilateral institutions, designed by a club or community of liberal-democratic states, play in facilitating that cooperation and in anchoring a peaceful and prosperous liberal world order.57 The liberal foreign policy outlook is moralized, evolutionary, and progressive. Unlike realists, who make no real distinctions between democratic and non-democratic states in their analysis of international affairs, liberals take a clear normative position in favor of democracy and the rule of law.58 Liberals envisage the spread of liberal democracy around the world, and they seek to advance the world down that path.59 Part of advancing the cause of liberal peace and prosperity involves encouraging the spread of liberal democratic institutions within nations where they are currently absent or weak.60 Furthermore, although not all liberals are institutionalists, most liberals believe that effective multilateral institutions play an important role in encouraging those developments.61 To be sure, problems of inequities in power between stronger and weaker states will exist, inevitably, within a liberal framework.62 “But international institutions can nonetheless help coordinate outcomes that are in the long-term mutual interest of both the hegemon and the weaker states.”63 Many foreign policy liberals have emphasized the **importance of the judiciary** in helping to bring about an **increasingly** **liberal world order**. To be sure, the importance of an independent judiciary to the establishment of the rule of law within sovereign states has long been at the core of liberal theory.64 Foreign policy liberalism, however, commonly emphasizes the role that judicial globalization can play in promoting democratic rule of law values throughout the world.65 Post-communist and post-colonial developing states commonly have weak commitments to and little experience with liberal democracy, and with living according to the rule of law, as enforced by a (relatively) apolitical, independent judiciary.66 In these emerging liberal democracies, judges are often subjected to intense political pressures.67 International and transnational support can be a life-line for these judges**.** It can encourage their professionalization, enhance their prestige and reputations, and draw unfavorable attention to efforts to challenge their independence.68 In some cases, support from foreign and international sources may represent the most important hope that these judges can maintain any sort of institutional power—a power essential to the establishment within the developing sovereign state of a liberal democratic regime, the establishment of which liberal theorists assume to be in the best interests of both that state and the wider world community.69 Looked at from this liberal international relations perspective, judicial globalization seems an unalloyed good. To many, it will appear to be an imperative.70 When judges from well-established, advanced western democracies enter into conversations with their counterparts in emerging liberal democracies, they help enhance the status and prestige of judges from these countries. This is not, from the perspective of either side, an affront to the sovereignty of the developing nation, or to the independence of its judiciary. It is a win-win situation which actually strengthens the authority of the judiciary in the developing state.71 In doing so, it works to strengthen the authority of the liberal constitutional state itself. Viewed in this way, judicial globalization is a way of strengthening national sovereignty, not limiting it: it is part of a state-building initiative in a broader, liberal international order A liberal foreign policy outlook will look favorably on travel by domestic judges to conferences abroad (and here in the United States) where judges from around the world can meet and talk.73 It will not view these conferences as “junkets” or pointless “hobnobbing.” These meetings may very well encourage judges from around the world to increasingly cite foreign precedent in arriving at their decisions. **Judges in emerging democracies will use these foreign precedents to help shore up their domestic status and independence**. They will also avail themselves of these precedents to lend authority to basic, liberal rule-of-law values for which, given their relative youth, there is little useful history to appeal to within their domestic constitutional systems. Judges in established democracies, on the other hand, can do their part to enhance the status and authority of independent judiciaries in these emerging liberal democratic states by showing, in their own rulings, that they read and respect the rulings of these fledgling foreign judges and their courts (even if they do not follow those rulings as binding precedent).74 They can do so by according these judges and courts some form of co-equal status in transnational “court to court” conversations.75 It is worth noting that mainstream liberal international relations scholars are increasingly referring to the liberal democratic international order (both as it is moving today, and indeed, as read backward to the post-War order embodied in the international institutions and arrangements of NATO, Bretton Woods, the International Monetary Fund, the World Bank, and others) as a “constitutional order,” and, in some cases, as a “world constitution.”76 No less a figure than Justice Breyer—in a classic articulation of a liberal foreign policy vision—has suggested that one of the primary questions for American judges in the future will involve precisely the question of how to integrate the domestic constitutional order with the emerging international one.77

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#### 2- Abstention- only court action constrains obama and provides a role for the judiciary- internal executive review fails

#### Here’s evidence to support that- even Obama would ignore it

Posner 11 - Kirkland & Ellis Professor, University of Chicago Law School (Eric A. Posner, “Deference To The Executive In The United States After September 11: Congress, The Courts, And The Office Of Legal Counsel”, http://www.harvard-jlpp.com/wp-content/uploads/2012/01/PosnerFinal.pdf)

In the early years of the Bush Administration, the Office of Legal Counsel (OLC), an office within the Department of Jus‐ tice, issued a series of memoranda arguing that certain counter‐ terrorism practices—including surveillance of U.S. citizens and coercive interrogation—did not violate the law. 37 These memos were later leaked to the public, causing an outcry. 38 In 2011, the head of the OLC told President Obama that continued U.S. military presence in Libya would violate the War Powers Act. The President disregarded this advice, relying in part on contrary advice offered by other officials in the government.

These two events neatly encapsulate the dilemma for the OLC, and indeed all the President’s legal advisers. If the OLC tries to block the President from acting in the way he sees fit, it takes the risk that he will disregard its advice and marginalize the institution. If the OLC gives the President the advice that he wants to hear, it takes the risk that it will mislead him and fail to prepare him for adverse reactions from the courts, Congress, and the public.

Many scholars, most notably Professor Jack Goldsmith, argue that the OLC can constrain the executive. 39 The underlying idea here is that even if Congress and the courts cannot constrain the executive, perhaps offices within the executive can. The opposite view, advanced by Professor Bruce Ackerman, is that the OLC is a rubber stamp. 40 I advocate a third view: The OLC does not constrain the executive but enables him to accomplish goals that he would not otherwise be able to accomplish. It is more accurate to say that the OLC enables rather than constrains.

#### Perm do both

## prez powers

#### Abstention no-links the disad- courts condition deference on executive following procedure. you don't have ev that the courts

#### The abstention advantage outweighs and solves the disadvantage

POSNER 2011 - Kirkland & Ellis Professor, University of Chicago Law School (Eric A. Posner, “Deference To The Executive In The United States After September 11: Congress, The Courts, And The Office Of Legal Counsel”, <http://www.harvard-jlpp.com/wp-content/uploads/2012/01/PosnerFinal.pdf>)

The larger and more striking point of the example is that, even during emergencies, when the stakes are high and time is of the essence, agents should follow rules rather than improvise. In this way, agents should be constrained.^^ This argument has potentially radical implications. Recall that the conventional objection to deference is that the risk of executive abuse exceeds the benefits of giving the executive a free hand to counter al Qaeda. Professor Holmes argues—although at fimes he hedges—that in fact the benefits of giving the President a free hand are zero: A constrained executive, like a constrained medical technician, is more effective than an unconstrained executive. If the benefits of lack of constraint are zero, then the deference thesis is clearly wrong. Constraints both prevent executive abuses such as violations of civil liberties and ensure that counterterrorism policy is most effective.

Suspension clause ruling avoids the link, prevents snowballing and maintains review

Garrett 12 (Brandon, Roy L. and Rosamund Woodruff Morgan Professor of Law, University of Virginia School of Law. HABEAS CORPUS AND DUE PROCESSCORNELL LAW REVIEW [Vol. 98:47] page lexis)

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

#### Plan destroys cred

David Welsh 11, J.D. from the University of Utah, “Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy”, http://law.unh.edu/assets/images/uploads/publications/unh-law-review-vol-09-no2-welsh.pdf

The Global War on Terror 1 has been ideologically framed as a struggle between the principles of freedom and democracy on the one hand and tyranny and extremism on the other. 2 Although this war has arguably led to a short-term disruption of terrorist threats such as al-Qaeda, it has also damaged America’s image both at home and abroad. 3 Throughout the world, there is a growing consensus that America has “a lack of credibility as a fair and just world leader.” 4 The perceived legitimacy of the United States in the War on Terror is critical because terrorism is not a conventional threat that can surrender or can be defeated in the traditional sense. Instead, this battle can only be won through legitimizing the rule of law and undermining the use of terror as a means of political influence. 5 ¶ Although a variety of political, economic, and security policies have negatively impacted the perceived legitimacy of the United States, one of the most damaging has been the detention, treatment, and trial (or in many cases the lack thereof) of suspected terrorists. While many scholars have raised constitutional questions about the legality of U.S. detention procedures, 6 this article offers a psychological perspective of legitimacy in the context of detention.

## court ptix

#### Normal means is the DC circuit court acting and SCOTUS denying cert to make the aff a law- no link to the DA

Horowitz 13 (J.D. Candidate, 2014, Fordham University School of Law. Captain, U.S. Army, participating in the Funded Legal Education Program, April, “SYMPOSIUM: THE GOALS OF ANTITRUST: NOTE: CREATING A MORE MEANINGFUL DETENTION STATUTE: LESSONS LEARNED FROM HEDGES V. OBAMA”, Lexis)

This part examines how the D.C. District and Circuit courts struggled with the legal boundaries of detention while evaluating the habeas corpus petitions of detainees from 2008 to 2012. It focuses on how the D.C. courts analyzed what would become the three criteria for detention in section 1021(b)(2) of the NDAA: (1) being "part of" Al Qaeda or the Taliban; (2) "substantially supporting" Al Qaeda or the Taliban; and (3) being part of "associated forces" of Al Qaeda or the Taliban. n143 The Supreme Court has not decided the merits of a detention case since Boumediene in 2008. n144 Additionally, in 2011 the Supreme Court denied certiorari to six different Guantanamo detainee cases appealed from the [\*2872] D.C. Circuit. n145 As a result of its continued abstention, the Supreme Court has had little impact in shaping the substantive parameters of executive detention. n146 The substantive law of executive detention has been primarily created by the D.C. District Court and the D.C. Circuit as they evaluate habeas corpus petitions from detainees held at Guantanamo Bay. n147 As the law has evolved since 2008, the D.C. courts have often applied different or changing standards, and some believe that "the D.C. Circuit's opinions almost uniformly favor the government." n148 Additionally, some commentators have expressed concerns about "the habeas process as a lawmaking device" and fear that the standards established by the D.C. Courts are "interim steps" or "a kind of draft" until the Supreme Court eventually steps in to resolve the issues. n149 The judges of the D.C. courts recognize that they are creating law. In their opinions, they have often commented on the lack of guidance from the Supreme Court n150 and their significant role in shaping substantive detention law with each decision. n151 The subsections below focus on the three detention criteria listed in section 1021(b)(2) of the NDAA. Although these criteria were codified in the NDAA in late 2011, the D.C. courts struggled with their meaning in the years after the Boumediene decision in 2008. As one court admitted in [\*2873] 2010, "much of what our Constitution requires for this context remains unsettled." n152

#### Non-unique- Bond will win now

Ramsey, 9-9 -- University of San Diego Hugh and Hazel Darling Foundation Professor of Law

[Michael, International & Comparative Law Programs, "Another Notable Amicus Brief in Bond v. United States," 9-9-13, blog.tenthamendmentcenter.com/category/constitution/treaty-power/#.Uj2vrdJwobs, accessed 9-21-13, mss]

I suspect that the Supreme Court may be interested in a narrow decision **in favor of** Ms. **Bond**, to avoid reaching the significant federalism questions that would arise if the Convention is interpreted to apply to the very localized conduct at issue in the case. One way to do that is to read the treaty narrowly not to reach local conduct.

#### Capital is bulletproof

Gibson 12 (James L. Gibson, Sidney W. Souers Professor of Government (Department of Political Science), Professor of African and African-American Studies, and Director of the Program on Citizenship and Democratic Values (Weidenbaum Center on the Economy, Government, and Public Policy) at Washington University in St. Louis; and Fellow at the Centre for Comparative and International Politics and Professor Extraordinary in Political Science at Stellenbosch University (South Africa), 7/15/12, “Public Reverence for the United States Supreme Court: Is the Court Invincible?”, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107587>)

Political scientists and legal scholars continue to be obsessed with the so-called countermajoritarian dilemma created by the United States Supreme Court’s lack of accountability, particularly when coupled with its immense policy-making powers. Especially when the Supreme Court makes decisions that seem to fly in the face of public preferences—as in Kelo v. New London 1 and Citizens United v. Federal Election Commission 2—concerns about the function of the institution within American democracy sharpen. Indeed, some seem to believe that by making policies opposed by the majority of the American people the Court undermines its fundamental legitimacy, its most valuable political capital. The underlying assumption of these worries about the Supreme Court’s legitimacy is that dissatisfaction with the Court’s decisions leads to the withdrawal, or at least diminution, of support for the institution. So when the Court decides a high profile case like Citizens United in a widely unpopular direction, it is logical to assume that the Court’s legitimacy suffers. Again, the assumption is that legitimacy flows from pleasing decisions, but it is undermined by displeasing decisions. At least some empirical evidence directly contradicts this assumption. In what is perhaps the most salient and politically significant decision of the last few decades, the Supreme Court’s decision in Bush v. Gore 3 effectively awarded the presidency to George W. Bush. One might have expected that this decision would undermine the Court’s legitimacy, at least with Democrats and probably with African-Americans as well. Yet several empirical research projects have indicated that, if anything, the Court’s legitimacy was boosted by this decision, even among Democrats and African-Americans. 4 Bush v. Gore had great potential to chip away at the Court’s legitimacy—it was a deeply divided 5-4 decision; divided by the justices’ partisanships as well; it extended the Court’s authority into an area of law in which the Court had generally deferred to the states; the decision was severely criticized by some, with many in the legal academy describing the decision as a “self-inflicted wound”; 5 and, of course, it was a decision of immense political importance. If Bush v. Gore did not subtract from the Court’s institutional legitimacy, it is difficult to imagine less momentous decisions undermining judicial legitimacy. Political scientists have been studying the legitimacy of the Supreme Court for decades now, and several well-established empirical findings have emerged. The findings relevant to the countermajoritarian dilemma can be summarized in a series of nutshells: ● The Supreme Court is the most legitimate political institution within the contemporary United States. Numerous studies have shown that the American mass public extends great legitimacy to the Court; typically, Congress is depicted as being dramatically less legitimate than the Supreme Court. Indeed, some have gone so far as to describe the Supreme Court as “bulletproof,” and therefore able to get away with just about any ruling, no matter how unpopular. And indeed, the United States Supreme Court may be one of the most legitimate high courts in the world.

The court will rule on all of the things

Pieklo 9/17 ([Jessica Mason Pieklo](http://rhrealitycheck.org/author/jessica-pieklo/), Senior Legal Analyst, RH Reality Check. “6 Supreme Court Cases to Watch This Term” http://rhrealitycheck.org/article/2013/09/17/six-supreme-court-cases-to-watch-this-term/)

The United States Supreme Court term begins in October, and while the entire docket has not yet been set, already it’s shaping up to be a historic term, with decisions on abortion protests, legislative prayer, and affirmative action, just to name a few. Here are the key cases we’re keeping an eye on as the term starts up. 1. Cline v. Oklahoma Coalition for Reproductive Justice The Supreme Court looks poised to re-enter the abortion debate, and it could do so as early as this year if it takes up Cline, the first of the recent wave of state-level restrictions to reach the high court. Cline involves a [challenge to an Oklahoma statute](http://rhrealitycheck.org/article/2013/06/28/scotus-poised-to-enter-medical-abortion-ban-debate/) that requires abortion-inducing drugs, including [RU-486](http://rhrealitycheck.org/tag/ru-486/), to be administered strictly according to the specific Food and Drug Administration labeling despite the fact that new research and best practices make that labeling out of date. Such “off-label” use of drugs is both legal and widespread in the United States as science, standards of care, and clinical practice often supercede the original FDA label on a given drug. In the case of cancer drugs, for example, the American Cancer Society [notes](http://www.cancer.org/treatment/treatmentsandsideeffects/treatmenttypes/chemotherapy/off-label-drug-use) that “New uses for [many] drugs may have been found and there’s often medical evidence from research studies to support the new use [even though] the makers of the drugs have not put them through the formal, lengthy, and often costly process required by the FDA to officially approve the drug for new uses.” Off-label use of RU-486 is based on the most recent scientific findings that suggest lower dosages of the drug and higher rates of effectiveness when administered in conjunction with a follow-up drug (Misoprostol). According to trial court findings, the alternative protocols are safer for women and more effective. But, according to the state and defenders of the law, there is great uncertainty about these off-label uses and their safety. When the issue reached the supreme court of Oklahoma, the court held in a very brief opinion that the Oklahoma statute was facially invalid under [Planned Parenthood v. Casey](http://www.oyez.org/cases/1990-1999/1991/1991_91_744). In Casey, a plurality of justices held that a state may legitimately regulate abortions from the moment of gestation as long as that regulation does not impose an undue burden on a woman’s right to choose an abortion. Later, in [Gonzales v. Carhart](http://www.oyez.org/cases/2000-2009/2006/2006_05_380), a majority of the Supreme Court, led by Justice Anthony Kennedy, interpreted Casey to allow state restrictions on specific abortion procedures when the government “reasonably concludes” that there is medical uncertainty about the safety of the procedure and an alternative procedure is available. Cline, then, could present an important test on the limits of Casey and whether, under Gonzales, the Court will permit states to ban medical abortions. But it’s not entirely clear the Court will actually take up Cline. At the lower court proceedings, the challengers argued that the Oklahoma statute bars the use of RU-486’s follow-up drug (Misoprostol) as well as the use of Methotrexate to terminate an ectopic pregnancy. If so, the statute then bars both any drug-induced abortion and eliminates the preferred method for ending an ectopic pregnancy. Attorneys defending the restriction deny the law has those effects, and do not argue that if it did such restrictions would be constitutional. With this open question of state law—whether the statute prohibits the preferred treatment for ectopic pregnancies—the Supreme Court told the Oklahoma Supreme Court those disputed questions of state law. So a lot depends on how the Oklahoma Supreme Court proceeds. Should the Oklahoma Supreme Court hold that the Oklahoma statute is unconstitutional because it prohibits the use of Misoprostol and Methotrexate, this case could be over without the Supreme Court weighing in. But if the Oklahoma Supreme Court invalidates the law insofar as it prohibits alternative methods for administering RU-486, the Supreme Court will almost certainly take a look. 2. Town of Greece v. Galloway The Roberts Court is set to weigh in on the issue of when, and how, [government prayer](http://rhrealitycheck.org/article/2013/05/24/reason-for-concern-as-roberts-court-agrees-to-hear-government-prayer-case/) practices can exist without violating the Establishment Clause’s ban on the intermingling of church and state. In [Marsh v. Chambers](http://www.oyez.org/cases/1980-1989/1982/1982_82_23), the Supreme Court upheld Nebraska’s practice of opening each legislative session with a prayer, based largely on an unbroken tradition of that practice dating back to the framing of the Constitution. In Marsh, the Court adopted two apparent limits to a legislative prayer practice: The government may not select prayer-givers based on a discriminatory motive, and prayer opportunities may not be exploited to proselytize in favor of one religion or disparage another. Prior to 1999, the town of Greece, New York, opened every legislative session with a moment of silence. Then, in 1999 and at the request of the town’s supervisor, the town switched to opening its legislative sessions with a prayer. Nearly all of those prayers were delivered by Christian clergy members and, unlike other city councils, there was no requirement that the prayers be inclusive or non-denominational. City officials selected speakers off a list of local religious leaders provided by the Greece Chamber of Commerce. From 1999 through 2007, Christians delivered every single invocation prayer, in part because the list provided by the area Chamber of Commerce included only Christian religious officials despite the fact that other denominations exist in the community. The practice was challenged by a group of citizens who argued it violated the Establishment Clause. The U.S. Court of Appeals for the Second Circuit acknowledged that the Town of Greece had not violated either of Marsh’s limits in its practices, but still invalidated the town’s practices. Applying the “reasonable observer” standard drawn from [County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter](http://www.oyez.org/cases/1980-1989/1988/1988_87_2050), the court concluded that a reasonable observer would view the town as endorsing Christianity over other religions, because its process of composing a list of prayer-givers from clergy within its geographic boundaries and volunteers virtually guaranteed the person delivering the prayer would be a Christian, because most of the prayers contained uniquely Christian references, and because prayer-givers invited participation and town officials participated in the prayers. The reasonable observer test appears headed for a fall. In County of Alleghany, Justice Kennedy in his dissent criticized the reasonable observer test as insensitive to traditions and unworkable for governments and courts to apply. He argued that religious accommodations are consistent with the Establishment Clause as long as they do not coerce attendance at, or participation in, a religious observance, or directly fund religion. Justice Kennedy’s perspective is an important one. To begin with, the makeup of the Court is different now than the last time it considered these issues. Justice Sandra Day O’Connor has been replaced by Justice Samuel Alito, for example, and the Court has veered hard to the right. It is conceivable then that the Court could view this case as an opportunity to abandon, or at least reconsider and revise, the reasonable observer test. If so, the decision could affect not only the constitutionality of legislative prayers, but also all religious accommodations, including the public display of religious symbols. It could also offer a glimpse into the Court’s thinking on another religious accommodation likely to come before it this term: the challenges under the [Religious Freedom Restoration Act](http://www.law.cornell.edu/uscode/text/42/chapter-21B) to the [contraception benefit](http://rhrealitycheck.org/tag/birth-control-benefit/) in the Affordable Care Act. 3. McCullen v. Coakley Regardless of whether or not the Supreme Court ultimately takes up Cline v. Oklahoma Coalition for Reproductive Justice, the Court will take up the issue of abortion clinic protests in [McCullen v. Coakley](http://www.scotusblog.com/case-files/cases/mccullen-v-coakley/), a challenge that looks at the constitutionality of Massachusetts’ clinic buffer zone law. The last time the Supreme Court looked at the issue of clinic buffer zones was in [Hill v. Colorado](http://www.oyez.org/cases/1990-1999/1999/1999_98_1856). In Hill, the Court held that a law limiting protest and “sidewalk counseling” within eight feet of a person entering a health-care facility in order to protect persons entering the facility from unwanted speech did not violate the First Amendment. Critical to the Court’s decision in Hill was its conclusion that the prohibition was content neutral because it arguably prevented both pro-choice and anti-choice speakers from entering the eight-foot zone. The Massachusetts statute at issue in McCullen takes a different approach to get to the same purpose as the law upheld in Hill. The Massachusetts law prohibits anyone from entering a public sidewalk within 35 feet of a reproductive health-care facility, but exempts from that buffer employees of the facility acting within the scope of employment. The Massachusetts statute raises questions not resolved in Hill, including whether the employee exemption renders the Massachusetts statute content-based, meaning that it places a limitation on free speech depending on the subject matter, since arguably employees can use the exemption to deliver pro-choice messages. The Massachusetts statute differs in two other potentially significant differences also. First it applies only to reproductive health-care facilities, making its abortion-specific purpose more apparent, and has a larger buffer zone, making conversational speech more difficult. Ultimately, this case may end up being more about whether the Supreme Court sympathizes with anti-abortion protestors rather than the differences between the Massachusetts statute and Hill. In Hill, the justices in the majority were especially sympathetic to the plight of patients who want to undergo a private medical procedure in peace, without being subjected to the emotional turmoil of confrontational protests. The dissenters in Hill now find themselves in the conservative majority under the Roberts Court, a fact that could drive the outcome here. In Hill, conservative justices like Antonin Scalia ignored the plight of patients and instead accused the majority of creating a special brand of reduced First Amendment protection for abortion protesters that would be viewed as intolerable if applied to any other speaker. And that perspective shift—from concerns over patients’ rights to concerns over protesters’ rights—could make all the difference in this case. 4. McCutcheon v. Federal Election Commission If you thought Citizens United was bad, just wait until you hear about [McCutcheon v. Federal Election Commission](http://www.scotusblog.com/case-files/cases/mccutcheon-v-federal-election-commission/) (FEC). In [Citizens United v. FEC](http://www.oyez.org/cases/2000-2009/2008/2008_08_205), the Court held that restrictions on independent campaign expenditures that prohibited corporations from direct election spending violate the First Amendment. As bad as that decision was, it left intact the underlying holding in [Buckley v. Valeo](http://www.oyez.org/cases/1970-1979/1975/1975_75_436) that Congress may limit campaign contributions on the reasoning that limits on campaign contributions are thought to impinge less on First Amendment freedoms and have a stronger nexus to preventing corruption. At issue in McCutcheon is this underlying holding in Buckley when the Court considers the constitutionality of federal aggregate contribution limits—that is, the total amount that can be contributed to all candidates, party committees, or political action committees (PACs). Those are in contrast to base limits on candidate contributions that set limits on individual donations. In Buckley, the Court summarily upheld aggregate contribution limits as a means of preventing circumvention of the base limits on candidate contributions. The rationale was that, without aggregate limits, persons could circumvent the base limits on candidate contributions through massive un-earmarked contributions to political committees likely to contribute to a person’s favored candidate. The Roberts Court appears eager to take up aggregate limits because they limit not only the amount a person can contribute to a candidate, but the number of persons to whom a person can make a full base-level contribution. These kinds of restrictions appear all but certain to fall in a post-Citizens United world. At the time Buckley was decided, there were no base limits on party committees or PACs. Now there are. If the Supreme Court feels those new base limits adequately address the risk of circumvention that justified Buckley’s upholding aggregate contribution limits, then by Supreme Court logic there’s no reason to keep the aggregate limits in place. The Obama administration is defending the aggregate limits, arguing it is just as easy now to circumvent the base limits as when Buckley was decided, which is why the aggregate limits are necessary. Given the slow unwind of campaign finance law by the Roberts Court, it seems unlikely they will be persuaded by the Obama administration’s reasoning. 5. Schuette v. Coalition to Defend Affirmative Action If the Roberts Court appears set on dismantling individual contribution limits, it also appears set to strike another blow to affirmative action plans. Last summer, in [Fisher v. University of Texas at Austin](http://www.law.cornell.edu/supct/cert/11-345), the Court held that universities have limited authority to consider race in admissions to further diversity. At issue in [Schuette](http://www.scotusblog.com/case-files/cases/schuette-v-coalition-to-defend-affirmative-action/) is whether or not Michigan violated the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public university admissions decisions. In 2006, Michigan voters approved the Michigan Civil Rights Initiative (MCRI), a measure that amended the state constitution to prohibit all use of race in public university admissions, as well as in public contracting and employment. A coalition of African-American student groups, faculty members, and public-sector labor unions immediately challenged the MCRI as a violation of the Fourteenth Amendment. In answering that question, the Court will have to tackle the restricting doctrine. Under the restricting doctrine, a state may not remove authority to decide a racial issue from one political entity and lodge it in another when doing so creates a more burdensome political hurdle. The Court has applied that doctrine only twice, first in [Hunter v. Erickson](http://holmes.oyez.org/cases/1960-1969/1968/1968_63), to invalidate a reallocation of authority over the decision to prohibit racial discrimination in housing, and then in [Washington v. Seattle School District No. 1](http://www.oyez.org/cases/1980-1989/1981/1981_81_9), to invalidate a reallocation of authority over the decision whether to bus students to achieve racial integration in the schools. The question before the Roberts Court is whether the political restructuring doctrine invalidates the MCRI. The Sixth Circuit Court of Appeals held that it did, because affirmative action is a racial issue of particular concern to racial minorities, and it is more difficult for minorities to obtain favorable action through the constitutional amendment process. In defending the MCRI, Michigan argues the political restructuring doctrine applies to reallocations of authority over measures to ensure equal opportunity, not those that give racial preference. It’s difficult to see the distinction, especially given the connection between graduating college and economic opportunity, but it is a distinction Michigan stands by. Michigan also argues that the political restructuring doctrine should not apply to admission decisions made by unelected university officials because they are not part of any “political process” as envisioned in earlier decisions. Should the Court accept Michigan’s argument, voters in any state dissatisfied with the affirmative action policies at their state universities could follow Michigan’s lead and vote to eliminate them through constitutional amendment. On the other hand, a decision finding the MCRI did in fact violate equal protection guarantees of the 14th Amendment would protect current policies from falling victim to voter dissatisfaction like in Michigan. 6. Township of Mount Holly v. Mount Holly Gardens Citizens in Action The Supreme Court is also poised to gut federal housing discrimination protections when it considers [whether to limit the federal housing discrimination law](http://www.scotusblog.com/case-files/cases/mount-holly-v-mt-holly-gardens-citizens-in-action-inc/) to cases of actual and proven bias against racial minorities. Mount Holly, New Jersey, argues it cannot be held liable for housing discrimination for redeveloping a depressed neighborhood and reducing the number of homes that are available to African Americans and Latinos. Specifically, the Roberts Court will examine whether the Fair Housing Act forbids actions by cities or mortgage lenders that have a “discriminatory effect” on racial minorities. According to census data, Mount Holly has a white majority. The town council decided that one neighborhood of about 330 homes was “in need of redevelopment.” Known as Mount Holly Gardens, this neighborhood was home to most of the Black and Latino residents in the town. The town council then voted to buy all the homes in the Gardens area for prices ranging from $32,000 to $49,000. They were to be replaced with new homes ranging from $200,000 to $250,000. In 2008, a community group representing the Gardens residents sued the city, arguing that its redevelopment plan was discriminatory and illegal because it would have a disparate impact on low-income African Americans and Latinos. City officials counter that they were not trying to displace minorities—rather, they were trying to improve a blighted part of town, not engage in illegal discrimination. Furthermore, they claim, the [Fair Housing Act](http://www.justice.gov/crt/about/hce/title8.php) does not cover these kinds of discrimination claims. Given the Roberts Court’s willingness to severely restrict the scope of other key pieces of civil rights legislation, like Title VII and the Voting Rights Act, there’s plenty of reason to believe the Fair Housing Act is the next to get gutted. In addition to these high-profile challenges, the Supreme Court will also look at whether individual government workers can be held liable for [age discrimination claims](http://www.scotusblog.com/case-files/cases/madigan-v-levin/), whether or not federal labor laws allow employees to [change clothes at work](http://www.scotusblog.com/case-files/cases/sandifer-v-united-states-steel-corporation/), and the extent of President Obama’s [recess appointment powers](http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-noel-canning/). In many ways, the Roberts Court is picking up right where it left off last term—with an eye toward narrowing as much as possible the reach and effect of the greatest achievements of the civil rights movement.

## debt ceiling gsu

#### Economy instability doesn’t affect international security

Barnett ‘9 (Thomas P.M. Barnett, senior managing director of Enterra Solutions LLC, “The New Rules: Security Remains Stable Amid Financial Crisis,” 8/25/2009, http://www.aprodex.com/the-new-rules--security-remains-stable-amid-financial-crisis-398-bl.aspx)

When the global financial crisis struck roughly a year ago, the blogosphere was ablaze with all sorts of scary predictions of, and commentary regarding, ensuing conflict and wars -- a rerun of the Great Depression leading to world war, as it were. Now, as global economic news brightens and recovery -- surprisingly led by China and emerging markets -- is the talk of the day, it's interesting to look back over the past year and realize how globalization's first truly worldwide recession has had virtually no impact whatsoever on the international security landscape. None of the more than three-dozen ongoing conflicts listed by GlobalSecurity.org can be clearly attributed to the global recession. Indeed, the last new entry (civil conflict between Hamas and Fatah in the Palestine) predates the economic crisis by a year, and three quarters of the chronic struggles began in the last century. Ditto for the 15 low-intensity conflicts listed by Wikipedia (where the latest entry is the Mexican "drug war" begun in 2006). Certainly, the Russia-Georgia conflict last August was specifically timed, but by most accounts the opening ceremony of the Beijing Olympics was the most important external trigger (followed by the U.S. presidential campaign) for that sudden spike in an almost two-decade long struggle between Georgia and its two breakaway regions. Looking over the various databases, then, we see a most familiar picture: the usual mix of civil conflicts, insurgencies, and liberation-themed terrorist movements. Besides the recent Russia-Georgia dust-up, the only two potential state-on-state wars (North v. South Korea, Israel v. Iran) are both tied to one side acquiring a nuclear weapon capacity -- a process wholly unrelated to global economic trends. And with the United States effectively tied down by its two ongoing major interventions (Iraq and Afghanistan-bleeding-into-Pakistan), our involvement elsewhere around the planet has been quite modest, both leading up to and following the onset of the economic crisis: e.g., the usual counter-drug efforts in Latin America, the usual military exercises with allies across Asia, mixing it up with pirates off Somalia's coast). Everywhere else we find serious instability we pretty much let it burn, occasionally pressing the Chinese -- unsuccessfully -- to do something. Our new Africa Command, for example, hasn't led us to anything beyond advising and training local forces. So, to sum up: \* No significant uptick in mass violence or unrest (remember the smattering of urban riots last year in places like Greece, Moldova and Latvia?); \* The usual frequency maintained in civil conflicts (in all the usual places); \* Not a single state-on-state war directly caused (and no great-power-on-great-power crises even triggered); \* No great improvement or disruption in great-power cooperation regarding the emergence of new nuclear powers (despite all that diplomacy); \* A modest scaling back of international policing efforts by the system's acknowledged Leviathan power (inevitable given the strain); and \* No serious efforts by any rising great power to challenge that Leviathan or supplant its role. (The worst things we can cite are Moscow's occasional deployments of strategic assets to the Western hemisphere and its weak efforts to outbid the United States on basing rights in Kyrgyzstan; but the best include China and India stepping up their aid and investments in Afghanistan and Iraq.) Sure, we've finally seen global defense spending surpass the previous world record set in the late 1980s, but even that's likely to wane given the stress on public budgets created by all this unprecedented "stimulus" spending. If anything, the friendly cooperation on such stimulus packaging was the most notable great-power dynamic caused by the crisis. Can we say that the world has suffered a distinct shift to political radicalism as a result of the economic crisis? Indeed, no. The world's major economies remain governed by center-left or center-right political factions that remain decidedly friendly to both markets and trade. In the short run, there were attempts across the board to insulate economies from immediate damage (in effect, as much protectionism as allowed under current trade rules), but there was no great slide into "trade wars." Instead, the World Trade Organization is functioning as it was designed to function, and regional efforts toward free-trade agreements have not slowed. Can we say Islamic radicalism was inflamed by the economic crisis? If it was, that shift was clearly overwhelmed by the Islamic world's growing disenchantment with the brutality displayed by violent extremist groups such as al-Qaida. And looking forward, austere economic times are just as likely to breed connecting evangelicalism as disconnecting fundamentalism. At the end of the day, the economic crisis did not prove to be sufficiently frightening to provoke major economies into establishing global regulatory schemes, even as it has sparked a spirited -- and much needed, as I argued last week -- discussion of the continuing viability of the U.S. dollar as the world's primary reserve currency. Naturally, plenty of experts and pundits have attached great significance to this debate, seeing in it the beginning of "economic warfare" and the like between "fading" America and "rising" China. And yet, in a world of globally integrated production chains and interconnected financial markets, such "diverging interests" hardly constitute signposts for wars up ahead. Frankly, I don't welcome a world in which America's fiscal profligacy goes undisciplined, so bring it on -- please! Add it all up and it's fair to say that this global financial crisis has proven the great resilience of America's post-World War II international liberal trade order.

#### debt ceiling inevitable

CNN Money 9/12/13 ("The Never-Ending Charade of Debt Ceiling Fights")

Lawmakers are tied up in knots over increasing the debt ceiling this fall. But they eventually will. The only question is how messy the process will be.¶ Why assume they'll raise it? Because they have no real choice if they want to avoid a U.S. default. A default would hurt the economy and markets, and most lawmakers know this. That's why they regularly raise the debt ceiling before it comes to that.¶ In fact, since 1940, Congress has effectively approved 79 increases to the debt ceiling. That's an average of more than one a year.

#### Courts shield

Whittington 5 Keith E., Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, shifting blame for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

#### GOP blocks the budget

Politico 9/12/13 (Burgress Everett and Jake Sherman, "Shutdown Deja Vu on Hill")

But passing a CR is proving to be quite nettlesome. Boehner, Majority Leader Eric Cantor (R-Va.) and Majority Whip Kevin McCarthy (R-Calif.) have roughly 30 members who reject any CR that doesn’t defund Obamacare. Conservatives revolted against a government-funding bill that included a non-binding resolution to chip away at the law. And House Appropriations Chairman Hal Rogers (R-Ky.) said Thursday he hadn’t yet been updated by the speaker on a path forward.¶ -- Immigration

#### **Tea party republicans love the aff**

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

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

# 1AR

## 1AR Econ

#### No rally-around-the-flat effect- political suicide for leaders

Boehmer ‘2 (Charles Boehmer, Ph.D. in Political Science @ Penn. State University, Department of Political Science, Aassistant professor in the Department of Political Science at the University of Texas at El Paso, “Domestic Crisis and Interstate Conflict: The Impact of Economic Crisis, Domestic Discord, and State Efficacy on the Decision to Initiate Interstate Conflict”, <http://isanet.ccit.arizona.edu/noarchive/boehmer.html>, March 24, 2002)

Many studies of diversionary conflict argue that lower rates of economic growth should heighten the risk of international conflict. Yet, we know that militarized interstate conflicts are generally rare events, whereas lower rates of growth are not. A growing body of literature shows that regime changes are also associated with lower rates of economic growth. The question then becomes which event, militarized interstate conflict or regime change, is the most likely to occur following lower rates of economic growth and domestic discord? Moreover, do higher rates of growth lead to international peace and domestic stability? This paper examines how economic conditions jointly affect the probability of both militarized interstate conflict and regime transition. Diversionary theory claims that leaders seek to divert attention away from domestic problems such as a bad economy and political scandals, or to garner increased support prior to elections. Leaders then supposedly externalize discontented domestic sentiments onto other nations, sometimes as scapegoats based on the similar in-group/out-group dynamic found in the research of Simmel (1955) and Coser (1956), where foreign countries are blamed for domestic problems. This process is said to involve a “rally-round-the-flag” effect, where a leader can expect a short-term boost in popularity with the threat or use of force (Mueller 1973; Blechman and Kaplan 1978). Scholarship on diversionary conflict has focused most often on the American case[1] but recent studies have sought to identify this possible behavior in other countries.[2] The Falklands War is often a popular example of diversionary conflict (Levy and Vakili 1992). Argentina was clearly reeling from rising inflation and unemployment associated with economic contraction and a foreign debt crisis. It is plausible that a success in the Falklands War may have helped to rally support for the then current Galtieri regime, although history shows us that Argentina lost the war and the ruling regime was removed from power. How many other attempts to use diversionary tactics befall a similar outcome? Theories of diversionary conflict usually emphasize the potential benefits of diversionary tactics, although few pay equal attention to the prospective costs associated with such behavior. While it is not contentious to claim that leaders typically seek to remain in office, whether they can successfully manipulate public opinion regularly during periods of domestic unpopularity through their states’ participation in foreign militarized conflicts is a question open for debate. Furthermore, there appears to be a logical disconnect between diversionary theories and extant studies of domestic conflict and regime change. Again, lower rates of economic growth are purported to increase the risk of both militarized interstate conflicts (and internal conflicts) as well as regime changes (Bloomberg and Hess 2002). This implies that if leaders do in fact undertake diversionary conflicts, many may still be thrown from the seat of power (especially if the outcome is defeat to a foreign enemy). Diversionary conflict would thus seem to be a risky gambit.

#### Empirics go neg

Boehmer ‘2 (Charles Boehmer, Ph.D. in Political Science @ Penn. State University, Department of Political Science, Aassistant professor in the Department of Political Science at the University of Texas at El Paso, “Domestic Crisis and Interstate Conflict: The Impact of Economic Crisis, Domestic Discord, and State Efficacy on the Decision to Initiate Interstate Conflict”, http://isanet.ccit.arizona.edu/noarchive/boehmer.html, March 24, 2002)

Finally, the diversionary literature typically ignores the potential difference between a short-term economic shock and more prolonged periods of economic growth or stagnation. For example, the Great Depression seemed to compound American isolationism in a way that a single year of economic contraction could not. Only Russett (1987, 1990) and Miller (1995,1999) adequately tap into the dynamic effect of economic conditions on socio-political variables through the use of measures of economic growth or misery longer than a single-year lag. Perhaps manifest domestic conflicts appear only after prolonged exposure to economic stagnation. Diversionary conflict theory does not present a dynamic picture of how economic growth could be related to domestic unrest and interstate conflict. I believe that prolonged periods of economic growth or stagnation should reduce the uncertainty leaders face regarding their domestic support and the need or ability to become involved in interstate conflicts. After prolonged economic decline, citizen views or behavior should become more apparent to leaders, while prolonged growth should increase their popularity and possibly reduce resistance to involvement in foreign conflicts. In summary, I expect that higher rates of economic growth will increase the probability of militarized interstate conflict while reducing the risk of regime transition. In instances where states experience both regime transitions and militarized interstate conflicts in the same year, I expect that lower rates of economic growth will raise the probability of a regime transition to occur first. I also expect that higher levels of economic development and democracy will reduce both militarized conflict and regime transitions. Finally, while I expect domestic conflict to decrease the risk of a militarized interstate conflict, it should have its strongest effect in increasing the probability of a regime transition.

## 1AR Debt Ceiling Inev

#### The debate ceiling will inevitably be raised – it’s a formality

Hertig 9/15/13 (Alyssa, Politics for Policy Mic, "Debt Ceiling 2013: We Will Raise the Debt Ceiling, Even Though 55% Of Americans Don't Want To")

The debt ceiling was [first imposed](http://www.washingtonpost.com/blogs/fact-checker/post/history-lesson-why-did-congress-create-a-national-debt-limit/2013/01/13/21114db8-5db8-11e2-9940-6fc488f3fecd_blog.html) in 1917 amid cries for accountability before President Woodrow Wilson led the United States into World War I. Before the debt-ceiling raise in 2011, James K. Galbraith summarized in Salon:¶ "The debt ceiling was first enacted in 1917. Why? The date tells all: we were about to enter the Great War. To fund that effort, the Wilson government needed to issue Liberty Bonds. This was controversial, and the debt ceiling was cover, passed to reassure the rubes that Congress would be “responsible” even while the country went to war. It was, from the beginning, an exercise in bad faith and has remained so every single second to the present day."¶ It has been raised dozens of times since its inception and 14 times since the turn of the century. It is a meaningless formality.¶ Despite the unpopularity of another raise and demands for a stricter budget (as the Reason-Rupe survey also demonstrates), we will see faux sparks fly between Democrats and Republicans in October, but ultimately the ceiling will be raised.

#### Obama can unilaterally borrow money –

Koffler 9/20/13 (Keith, White House Reporter, "Expert: Obama Could Seize Power of Purse From Congress")

Writing in [the Wall Street Journal,](http://online.wsj.com/article/SB10001424127887324665604579079560388679906.html?KEYWORDS=William+Galston) William Galston, a scholar on governance at the Brookings Institution, said President Obama is probably permitted – and even required – to borrow money himself in order to pay off debts coming due and avoid defaulting, whether Congress approves or not.¶ Writes Galston:¶ The precise constitutional issue is the relation between the two terse sentences that define and delimit authority over government borrowing. Article I, section 8, provides (in part) that “The Congress shall have Power . . . To borrow money on the credit of the United States.”¶ The other key constitutional provision is section 4 of the 14th Amendment, which provides (in part) that “The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions . . . shall not be questioned . . . ”¶ The most plausible reading of the Constitution allows him—in fact requires him—to do what is necessary to avoid defaulting on the public debt, whatever Congress may do or fail to do. But the Constitution does not allow him to treat all existing statutory programs on a par with the public debt—if doing so would require him to issue new debt above and beyond what is needed to pay the principal and interest on existing debt.¶ Obama appears to agree.

## 1AR Court Thumpers

#### Hedges appeal coming out- the court will rule on INDEFINITE DETENTION

RT 9/3 (Supreme Court to rule on fate of indefinite detention for Americans under NDAA http://rt.com/usa/ndaa-scotus-hedges-suit-359/)

The United States Supreme Court is being asked to hear a federal lawsuit challenging the military’s legal ability to indefinitely detain persons under the National Defense Authorization Act of 2012, or NDAA. According to Pulitzer Prize-winning journalist Chris Hedges — a co-plaintiff in the case — attorneys will file paperwork in the coming days requesting that the country’s high court weigh in on Hedges v. Obama and determine the constitutionality of a controversial provision that has continuously generated criticism directed towards the White House since signed into law by President Barack Obama almost [two years ago](http://rt.com/trends/national-defense-authorization-act-indefinite-detention/) and defended adamantly by his administration in federal court in the years since.

#### Recently released NSA decision thumps all links

Gallagher 9/17 (Ryan, slate magazine. How the Surveillance Court Ruled the NSA's Domestic Snooping Was Legal http://www.slate.com/blogs/future\_tense/2013/09/17/claire\_eagan\_fisc\_how\_surveillance\_court\_ruled\_the\_nsa\_s\_domestic\_snooping.html)

The secret court that oversees NSA surveillance has declassified documents that reveal for the first time the legal justification for the spy agency’s daily collection of virtually all Americans’ phone records. On Tuesday, a previously top-secret opinion and order signed off by Foreign Intelligence Surveillance Court Judge Claire Eagan was [published](http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf). The opinion, dated Aug. 29, shows how the court decided to deem the NSA’s mass collection of domestic phone records constitutional and in line with section 215 of the Patriot Act, which allows the government to secretly grab so-called “business records.” The NSA’s operation of a vast database storing metadata on millions of calls made by Americans daily was [first revealed](http://www.slate.com/blogs/future_tense/2013/06/06/nsa_verizon_phone_records_national_security_agency_order_collects_metadata.html) by the Guardian in June, based on documents leaked by former NSA contractor Edward Snowden. The release of the court opinion and order on the phone records program comes after a declassification review of the secret legal files was conducted, primarily due to the huge backlash prompted by Snowden’s leaks. The opinion shows that the court is relying on a Supreme Court case from 1979 to conclude that the bulk collection of phone records is not a violation of the Fourth Amendment, which protects against unreasonable searches and seizures. In [Smith v. Maryland](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=442&invol=735), at issue was the warrantless monitoring of a robbery suspect’s phone calls. The Supreme Court judges in Smith found that the monitoring was permissible because “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties” and that they doubted “people in general entertain any actual expectation of privacy in the numbers they dial.” Grounded in the same logic, the newly released FISC opinion states: In sum, because the application at issue here concerns only the production of call detail records or "telephone metadata" belonging to a telephone company, and not the contents of communications, Smith v. Maryland compels the conclusion that there is no Fourth Amendment impediment to the collection. Furthermore, for the reasons stated in [REDACTED] and discussed above, this Court finds that that the volume of records being acquired does not alter this conclusion. Aside from the bizarre redaction here, which appears to have censored a crucial detail for inexplicable reasons, the reliance on Smith v. Maryland is contentious. The 1979 case concerned the monitoring of a single individual, already a criminal suspect, for a period of only a few days. The NSA’s metadata program involves the daily mass collection of billions of phone records from millions of Americans not suspected of committing any crime. These records can be mined using sophisticated software that draws relationships between people, and they can be used to conduct retrospective surveillance of people dating back several years. This raises constitutional questions that were simply not a consideration in the Maryland case more than three decades ago. Notably, the opinion also indicates that no company that was ordered to turn over the bulk metadata has challenged its legality in the court, despite having the ability to do so. The publication of the legal documents will add fuel to the already simmering debate about the phone records program, which several lawmakers have blasted since it was revealed in June. According to the ACLU, there are at least 19 NSA-related bills are pending in Congress, with some of them aimed at reforming and effectively shutting down the phone records database in its current form. Last week, [separately released documents](http://www.slate.com/blogs/future_tense/2013/09/11/dni_surveillance_documents_show_how_badly_nsa_managed_phone_database.html) about the phone records program showed how the NSA had unlawfully violated court rules governing the use of the database, while providing the court false information about how it was being operated for a period of almost three years.