# 2AC

## at: legitimacy

#### Double bind- either the environment is resilient or its destruction is inevitable

Lazarus ‘10 (Richard J. Lazarus, prof of law at Georgetown University Law Center, “Human Nature, the Laws of Nature, and the Nature of Environmental Law” 24 VA. ENVTL. L.J. 231-261, January 2010)

Some environmental pollution is, of course, unavoidable. Basic human life requires the consumption of the surrounding natural environment. While the First Law of Thermodynamics provides for the conservation of energy (and classical physics for the conservation Of mass),16 the Second Law provides for the inevitable increases in entropy that result from human activity. The term "entropy" refers to the degree of disorder in a system. For instance, as energy is transformed from one form to another, some energy is lost as heat; as the energy decreases, the disorder in the system, and hence the entropy, increases. IS Natural resource destruction and environmental contamination is a form of entropy. Disorder in the ecosystem is increased when common resources such as air and water are polluted. Disorder is likewise increased whenever complex natural resources are broken down into smaller parts. In consuming natural resources to provide the basic necessities of energy, food, shelter, and clothing, humankind necessarily increases entropy in parts of the ecosystem in the form of polluted global resources and destroyed natural resources. Fundamental human biological processes compel it. Human life depends, as life does in many animals, on a series of chemical reactions within the cells of the human body capable of breaking down complex chemical compounds such as glucose into its component parts of carbon dioxide and water.19 The technical name of the necessary biochemical process for the breakdown of glucose is carbohydrate catabolism, which itself consists of three major stages: glycosis, citric acid cycle (known as the "Krebs cycle") and phosphorylation.20 For the purposes of this essay, however, what is important for the nonscientific reader to understand is how these many biochemical processes ultimately depend on the breaking down of more complex and ordered chemical compounds into less complex and more disordered chemical elements. Some natural resource destruction and environmental pollution are necessarily implicated by such processes. As energy is transformed from one form to another, natural resources are consumed and contamination of existing natural resources results. To the extent, moreover, that it is human nature to seek to survive, it is human nature to undertake activities that cause such natural resource destruction and environmental pollution. That central threshold proposition should be noncontroversial. What is no doubt more controversial is whether it is similarly human nature to consume the natural environment in a nonsustainable fashion. Garrett Hardin's classic article "The Tragedy of the Commons," published in Science in 1968,21 offers a disturbing answer to that question. Although Hardin's central thesis is well-known, it is worth emphasis here by repetition: The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy. As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd?" . .. [T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another. .. But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit-in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.22 Hardin describes his thesis in the limited context of human nature faced with a pasture for animal grazing, but it all too easily extends with potentially catastrophic results to many contemporary environmental settings. The expansive reach of modern technology has turned the once seemingly infinite into the finite. Populations of ocean fisheries can be irreversibly destroyed. Underground aquifers of drinking water supplies can be forever lost. And, of course, potentially destructive global climate change may occur from increased loadings of carbon to the atmosphere from anywhere in the globe. Modern technology also has its limits, as the nation was tragically reminded in the aftermath of Hurricane Katrina this past year. Modern technology allowed for the development of a major metropolitan area where nature, standing alone, would have precluded any such possibility. New Orleans was largely below sea level and existed only by grace of a complex series of levees designed to keep water from flowing along its natural course. Even when properly constructed, such levees are no match, however, for the enormous force of hurricanes like Katrina, especially when thousands of acres of surrounding wetlands, which might have otherwise provided some natural protection from flood waters, are filled to satisfy ever-rising demands for residential, commercial, and industrial development. The upshot: the devastation of a city, the loss of human life, and the destruction of an invaluable aquatic ecosystem by floodwaters laden with toxic contaminants.23 Hardin's central insight regarding the implications of human nature for the natural environment extends much further, however, than to just the potential tragic destruction of resource commons. Each of the individual actors in Hardin's proffered tragedy cause ruin to all because of their inability to look beyond the here and now. They perceive well their own, present short-term needs. They are unable to apprehend and take into account the longerterm implications for individual persons at other times or in other places. Even if presented by information detailing those broader spatial and temporal impacts, they would be unable on their own to temper their own immediate actions as necessary to avoid the resource common's tragic destruction. The risks facing New Orleans have been well-known for decades. Yet, short-term needs always trumped government's willingness and ability to expend the massive resources necessary to guard against long-term, low-risk events, even if of potentially catastrophic consequences.z4 More recent research into behavioral psychology and human cognitive biases offers contemporary confirmation of Hardin's basic thesis. Experimental research shows that humans strongly favor avoidance of immediate costs over less immediate, longerterm, and distant risks. Dubbed by some a "myopia" bias, scientists argue that a strong basic desire to avoid immediate costs is present throughout nature and is deeply rooted in evolutionary biology.25 Others similarly argue that human genetic evolution has systematically favored consumerism and materialism, *i.e.,* the so-called "selfish gene. "26 When, over thousands of years ago, human beings relied on hunting and gathering to get their next meal, long-term planning was of little value. After all, without a means of preserving food, there was little reason to plan. It was better to consume what one found when one found it, especially when there was no assurance that more would be found tomorrow. "Our brains were built for a world in which the currency of the day did lose value over time. Put simply: food rotS."27 "[N]ature created within us a short-sighted set of moral instincts."28 Selfish shortsightedness and materialism became dominant tendencies in the competition with other species for survival. "Rather than leave some precious energy lying around to mold or be stolen, put it in your stomach and have your body convert the food into an energy savings account. "29 The drive for survival arguably extended to the production of heirs-survival by the passing of genes to one's children-and the accumulation of material wealth often seen as a necessary prerequisite for successful reproduction. *3D* And, "even though wealth may not relate to babies in an industrialized world, our instincts come from a time when concerns over material possessions were crucial."31 One commentator has gone so far as to suggest, provocatively, that "[h]uman failings, such as those that some call the Seven Deadly Sins, may all derive from our evolutionary traps. "32

plan solves internal link better- its an easier way for the court to assert its role- your evidence concedes the court need to enforce the rule of law

#### 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

#### Single decisions don’t hurt legit

Keck 10 - graduated cum laude with a BA from the George Washington University and received his MBA with high honors from the University of Chicago Booth School of Business ( The most activist supreme court in history the road to modern judicial conservatism / Thomas M. Keck. Uchicago book)

In sum, liberal and Democratic support for the Court took a temporary hit from Bush v. Gore, but it quickly rebounded and is likely to remain strong over the long term, in large part because Justices O’Connor and Anthony Kennedy have preserved so much of the Warren Court legacy. The election decision has been roundly criticized, but most contemporary American liberals remain firmly committed to a vigorous independent judiciary as an important bulwark of liberty. All Bush v. Gore appears to have done is to solidify the commitment of contemporary conservatives to this same principle, thus making even less likely the development of an influential political constituency for curbing the Court. Just as the Marshall Court expanded federal judicial power in the early years of the nineteenth century by issuing decisions that “swelled (or at least did not diminish) the ranks of influential politicians who favored that power” (Graber 1999:39), so too with the O’Connor Court in the early years of the twenty-first. The current Court’s continued willingness to exercise its power on behalf of liberal as well as conservative ends has tended to reinforce support for judicial power among political elites.

#### Legitimacy is tanked already

Rosen 12 (Jeffrey – Legal Affairs Editor at New Republic, “The Supreme Court Has a Legitimacy Crisis, But Not For the Reason You Think “, 2012, http://www.tnr.com/article/politics/103987/the-supreme-court-has-legitimacy-crisis-not-the-reason-you-think)

Last week, a New York Times/CBS poll found that only 44 percent of Americans approve of the Supreme Court’s job performance and 75 percent say the justices are sometimes influenced by their political views. But although the results of the poll were striking, commentators may have been too quick to suggest a direct link between the two findings. In the Times article on the poll, for example, Adam Liptak and Allison Kopicki suggested that the drop in the Court's 66 percent approval ratings in the late 1980s “could reflect a sense that the court is more political, after the ideologically divided 5-to-4 decisions in Bush v. Gore and Citizens United.” At the beginning of his tenure, Chief Justice John Roberts said that he subscribed to a similar theory. “I do think the rule of law is threatened by a steady term after term after term focus on 5-4 decisions,” Roberts told me. But a new study by Nathaniel Persily of Columbia Law School and Stephen Ansolabehere of Harvard suggests that the relationship between the Court’s declining approval ratings and increased perceptions of the Court’s partisanship may be more complicated than the New York Times and the Chief Justice suggest. According to the study, Americans already judge the Court according to political criteria: They generally support the Court when they think they would have ruled the same way as the justices in particular cases, or when they perceive the Court overall to be ruling in ways that correlate with their partisan views. If this finding is correct, the most straightforward way for the Court to maintain its high approval ratings is to hand down decisions that majorities of the public agree with. And, like its predecessors, the Roberts Court has, in fact, managed to mirror the views of national majorities more often than not. In a 2009 survey, Persily and Ansolabehere found that the public strongly supported many of the Supreme Court’s recent high-profile decisions, including conservative rulings recognizing gun rights and upholding bans on partial birth abortions, as well as liberal rulings upholding the regulation of global warming and striking down a Texas law banning sex between gay men. But if the public agrees with most of the Court's decisions, why is it more unpopular than ever? Part of the answer has to do with the fact that there are a handful of high profile decisions on which the Court is out of step with public opinion, including the Kelo decision allowing a local government to seize a house under eminent domain and the Boumediene case extending habeas corpus to accused enemy combatants abroad, and recent First Amendment decisions protecting unpopular speakers, such as funeral protesters, manufacturers of violent video games, and corporations (in the Citizens United case.) All of these decisions were unpopular with strong majorities of the public. But Persily and Ansolabehere also found that even decisions that closely divide the public can lead to a decrease in the Court’s approval rating over time, by increasing the perception among half the public that the Court is out of step with its partisan preferences. Bush v. Gore is perhaps the clearest example. In the short term, the Court’s overall approval ratings didn’t suffer: Republicans liked the decision, while Democrats didn’t, and the two effects canceled each other out. But Persily and his colleagues found that ten years later, Bush v. Gore continues to define the Court for many citizens, destroying confidence in the Court among Democrats while reinvigorating it among Republicans. Since an important component of the Court’s overall approval rating is whether Americans perceive themselves to be in partisan agreement with the Court as an institution, Bush v. Gore has led to a statistically significant decline in approval among Democrats as a whole.

#### Enforcing controversial decisions builds legitimacy

Law 9 (David S., Professor of Law and Political Science – Washington University, “A Theory of Judicial Power and Judicial Review”, Georgetown Law Journal, March, 97 Geo. L.J. 723, Lexis)

Part IV of this Article discusses a counterintuitive implication of a coordination-based account of judicial power. Conventional wisdom suggests that courts secure compliance with their decisions by drawing upon their store of legitimacy, which is undermined by decisions that are unpopular, controversial, or lack intellectual integrity. [**25**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n25) Part IV argues that precisely the opposite is true: an unpopular or unpersuasive decision can, in fact, enhance a court's power in future cases, as long as it is obeyed. Widespread compliance with a decision that is controversial, unpopular, or unpersuasive serves only to strengthen the widely held expectation that others comply with judicial decisions. This expectation, in turn, is self-fulfilling: those who expect others to comply with a court's decisions will find it strategically prudent to comply themselves, and the aggregate result will, in fact, be widespread compliance. Part IV illustrates these strategic insights--and the Supreme Court's apparent grasp of them--by contrasting  [\*734]  *Bush v. Gore* [**26**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n26) with *Brown v. Board of Education* [**27**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n27) and *Cooper v. Aaron*. [**28**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n28)

## at: obama circumvents

#### Clear statement requirement solves- no circumvention

Landau 9 (Joseph, Associate-in-Law, Columbia Law School. MUSCULAR PROCEDURE: CONDITIONAL DEFERENCE IN THE EXECUTIVE DETENTION CASES Washington Law Review Vol. 84:661, 2009)

The executive detention cases of the past several years have prompted renewed debate over the proper scope of judicial deference to the executive branch’s claimed need to limit individual liberties during times of crisis. Some theorists argue that courts should resolve large policy questions raised by individual challenges to assertions of executive power.1 Others believe that courts should decide as little as possible, asking only whether executive action is grounded within statutory authority.2 However, a number of the post-9/11 national security decisions have accomplished a great deal without following either approach. In these cases, the Supreme Court and a number of lower courts have put procedural devices to surprisingly “muscular” uses. The decisions illustrate a rare but critical assertion of procedural law where the political branches fail to legislate or properly implement substantive law. This is “muscular procedure”—the invocation of a procedural rule to condition deference on coordinate branch integrity. The cases provide a framework for understanding the role of judicial review in the post-9/11 executive detention decisions, with implications for other fields of law as well.3 Many commentators have criticized the Supreme Court’s executive detention decisions as “merely” procedural rulings, pointing out that the Court has generally addressed itself to questions about adjective law or the ground rules of litigation: whether the Court has jurisdiction; whether detainees can access the courts; and whether the government is required to provide discovery, and if so, how much.4 Far fewer decisions have resolved substantive questions such as the scope of executive power and the content of individual liberty—that is, whom the Executive can hold and for how long, and the specific constitutional protections that apply. But regardless of whether a particular decision turns on “process” or “substance”—an age-old distinction that resists clear definition5—courts have affected the law of national security in profound ways by explicitly requiring the political branches to adhere to a judicially imposed standard of transparency and deliberation. In individual cases, rulings about seemingly mundane procedural issues such as discovery and evidentiary standards have accelerated the release of enemy combatant detainees who were held at Guantánamo Bay years after being cleared of any wrongdoing.6 More broadly, procedural devices have been used to smoke out and put in check Congress’s lack of oversight of the executive branch and its misguided interpretations and implementation of authorizing legislation.7 In a number of these cases, courts have resolved the merits of an enemy combatant8 challenge by scrutinizing the Executive’s adherence \ to baseline procedural safeguards—rejecting determinations based on absolute secrecy, innuendo, tentativeness, or multiple levels of hearsay, while affirming executive branch decisions satisfying minimal standards of reliability.9 In the process, the judiciary has rebuffed the President’s extreme interpretations of vague authorizing legislation,10 reexamined inadequately reasoned decisions by various arms of the executive branch in implementing a congressional delegation,11 and stimulated legislative action where Congress has failed to oversee executive decision-making through the legislative process.12 Throughout these decisions, procedure functions as a corrective to decision-making by one (or both) of the political branches that, if left undisturbed, would violate a judicially imposed standard requiring lucid, intelligible procedures.

## at: congress circumvents

#### Empirically denied

Adam Litpak (Writer for the New York Times) August 20, 2012 “In Congress’s Paralysis, a Mightier Supreme Court” http://www.nytimes.com/2012/08/21/us/politics/supreme-court-gains-power-from-paralysis-of-congress.html

 The Supreme Court does not always have the last word. Sure, its interpretation of the Constitution is the one that counts, and only a constitutional amendment can change things after the justices have acted in a constitutional case. But much of the court’s work involves the interpretation of laws enacted by Congress. In those cases, the court is, in theory at least, engaged in a dialogue with lawmakers. Lately, though, that conversation has become pretty one-sided, thanks to the legislative paralysis brought on by Congressional polarization. The upshot is that the Supreme Court is becoming even more powerful. Here is the way things are supposed to work. In cases concerning the interpretation of ambiguous federal statutes, the justices give their best sense of what the words of the law mean and how they apply in the case before them. If Congress disagrees, all it needs to do is say so in a new law. The most prominent recent example of this dynamic was Ledbetter v. Goodyear Tire and Rubber Company, the 2007 ruling that said Title VII of the Civil Rights Act of 1964 imposed strict time limits for bringing workplace discrimination suits. In her dissent, Justice Ruth Bader Ginsburg reminded lawmakers that on earlier occasions they had overridden what she called “a cramped interpretation of Title VII.” “Once again,” she wrote, “the ball is in Congress’s court.” Congress responded with the Lilly Ledbetter Fair Pay Act of 2009, which overrode the 2007 decision. This sort of back and forth works only if Congress is not paralyzed. An overlooked consequence of the current polarization and gridlock in Congress, a new study found, has been a huge transfer of power to the Supreme Court. It now almost always has the last word, even in decisions that theoretically invite a Congressional response. “Congress is overriding the Supreme Court much less frequently in the last decade,” Richard L. Hasen, the author of the study, said in an interview. “I didn’t expect to see such a dramatic decline. The number of overrides has fallen to almost none.” The few recent overrides of major decisions, including the one responding to the Ledbetter case, were by partisan majorities. “In the past, when Congress overturned a Supreme Court decision, it was usually on a nonpartisan basis,” said Professor Hasen, who teaches at the University of California, Irvine. In each two-year Congressional term from 1975 to 1990, he found, Congress overrode an average of 12 Supreme Court decisions. The corresponding number fell to 4.8 in the decade ending in 2000 and to just 2.7 in the last dozen years. “Congressional overruling of Supreme Court cases,” Professor Hasen wrote, “slowed down dramatically since 1991 and essentially halted in January 2009.” Tracking legislative overrides is not an exact science, as some fixes may be technical and trivial. And there may be other reasons for the decline, including drops in legislative activity generally and in the Supreme Court’s docket. But scholars who follow the issue say that Professor Hasen has discovered something important. “Particularly since the 2000 elections, there has been a big falloff in overrides,” said William N. Eskridge Jr., a law professor at Yale and the author of a seminal 1991 study on which Professor Hasen built his own. “It gives the Supreme Court significantly more power and Congress significantly less power.” Richard H. Pildes, a law professor at New York University, said the findings were further proof that “the hyperpolarization of Congress is the single most important fact about American governance today.” It is, he said, a phenomenon that has “been building steadily over the last 30 years and is almost certainly likely to be enduring for the foreseeable future.” “The assumption,” he added, “has long been that when the court interprets a federal statute, Congress can always come back in and fix the statute if it disagrees with the court. Now, however, the court’s decisions are likely to be the last word, not the first word, on what a statute means.”

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#### 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

Critiques of democracy promotion lead to worse alternatives and rely on bad methodoloigy

Youngs 11 – Richard Youngs, President, Fundación para las Relaciones Internacionales y el Diálogo Exterior, a think tank based in Madrid; Assistant Professor of Politics & International Studies at the University of Warwick, January 2011, “Misunderstanding the Maladies of Liberal Democracy Promotion,” online: <http://www.fride.org/download/WP106_Liberal_Democracy2_jan11.pdf>

Democracy promotion has lost traction around the world. This atrophy has myriad causes and a range of consequences. One of its results is that calls have become more audible for a fundamental rethink of what type of ‘democracy’ should be supported in different regions. Many now chorus the view that the ‘democracy’ in ‘democracy promotion’ requires re-examination. Most critics of international policies berate Western governments for an inflexible and inappropriate adherence to a specific form of ‘liberal democracy’. They are right to take democracy promoters to task for the many unduly narrow ways in which they conceive political reform. But it is not convincing to argue that democracy promotion’s most serious problem today is its excessive adherence to a ‘liberal’ form of democracy. This critique fails to grasp the way in which democracy support policies have evolved and confuses what is entailed in meeting local demands for reform in nondemocratic states. The routine admonishments cast at Western governments under the now standard critique of liberal democracy do not weather the scrutiny of empirical evidence. They risk becoming widely accepted myths that have little grounding in reality. Democracy promoters do not overwhelmingly prioritise the procedural over the social and substantive elements of reform; they do not seek deliberately to hollow out the state; they do not conflate economic with political liberalisation; they are not brow-beaten into backing façade democracyby multinational companies; they are not fixated with elections; and they are not completely unreceptive to alternative forms of representation.The problem with democracy promotion lies not in its unbending and overly zealous imposition of liberal norms. Rather, its most serious pathology is governments’ failure to defend core liberal norms in a way that would allow local variations in and choices over democratic reform - along with genuine civic empowermentand emancipation - to flourish. Current criticisms of the democracy agenda risk pushing policy deliberations inexactlythe opposite direction to their required improvement.

## congress

#### Doesn’t solve the aff:

#### 1- Rule of Law- SCOTUS decisions are modeled by Afghanistan, and key to rule of law protection- that’s Eviatar and Hecht

#### 2- abstention- congressional ruling doesn’t institute a role for the judiciary- makes presidential circumvention and adventurism inevitable

#### Perm do both

#### CP doesn’t solve and links to the net-benefit- Congressional statues would be reviewed by the Supreme Court, but wouldn’t be effective and would take years to solidify

Eviatar 10 (Daphne- Senior Associate in Human Rights First’s Law and Security Program, June 10, “Judges to Congress: Don't Legislate Indefinite Detention”, http://www.huffingtonpost.com/daphne-eviatar/judges-to-congress-dont-l\_b\_607801.html)

For months now, certain commentators and legislators have been arguing that Congress needs to pass a new law authorizing the indefinite detention without charge or trial of suspected terrorists and their supporters.¶ On its face, that would seem to violate some basic tenets of the U.S. Constitution. But the U.S. government is already detaining hundreds of suspects captured abroad at Guantanamo Bay and elsewhere. The question is whether Congress should expand that authority and define it in more detail.¶ Writers such as Benjamin Wittes of the Brookings Institution and lawmakers such as Senator Lindsey Graham of South Carolina argue that even though hundreds of people have been detained over the last eight years at Guantanamo Bay, the law that justifies their detention or mandates their release isn't clear, and Congress needs to step in and make new rules.¶ In fact, as a new report issued today by 16 former federal judges makes clear, that's nonsense. The people in the best position to decide when military detention is legal are already doing just that. The new report, published by Human Rights First and the Constitution Project, explains exactly how that process is working -- and demonstrates that it's actually working very well. Responding to a series of habeas corpus petitions, where Guantanamo detainees have asked the federal court to review the legality of their detentions, federal district court judges in Washington, D.C., have already issued written opinions concerning 50 different detainees that set out the legal standard for indefinite wartime detention, and which cases do and do not meet it.¶ The claim by Wittes and Graham that judges are somehow overstepping their bounds and usurping the role of Congress reflects a fundamental misunderstanding of how the federal courts and judges work. In fact, the courts are doing just what they're supposed to do: interpret the law.¶ The reason judges are so well-situated to explain the contours of U.S. detention authority is because, according to judicial rulings, the right to detain arises out of existing laws, including the Authorization for Use of Military Force against Terrorists, or AUMF, passed by Congress in 2001; the traditional law of war; and the U.S. Constitution.¶ Traditionally, a government at war can detain fighting members of the enemy's forces, under humane conditions, until the war is over. Although that authority is less clear when the government is fighting a loose coalition of insurgent forces around the world rather than another country, the Supreme Court has said that at least in some circumstances, pursuant to the AUMF, the United States can detain enemy fighters seized on the battlefield.¶ It's the Supreme Court's rulings on the subject, combined with the law of war and the mandates of the U.S. Constitution, that highly experienced federal judges have been applying to the habeas corpus cases that have come before them. Applying those rulings, they've developed a clear and consistent body of law that explains what kind of evidence the government needs to have amassed against a suspected insurgent to justify his military detention.¶ Under the D.C. District Court's rulings, for example, Fouad Al Rabiah, a 43-year-old, 240-pound, Kuwaiti Airways executive with a long history of volunteering for Islamic charities who'd been discharged from compulsory military service in Kuwait due to a knee injury, and who suffered from high blood pressure and chronic back pain, did not meet the requirement of being "part of" or having "substantially supported" al Qaeda, the Taliban or associated forces. Although seized while attempting to leave Afghanistan in 2001, by the time of Al Rabiah's hearing, even the government had decided the witnesses who claimed he'd helped al Qaeda weren't credible. The government's own interrogators didn't believe his "confessions," which the court determined had been coerced and were "entirely incredible."¶ On the other hand, Fawzi Al Odah, also Kuwaiti, did meet the law's detention standards. The same judge found that he'd attended a Taliban training camp, learned to use an AK-47, traveled with other armed fighters on a route common to jihadists, and took directions from Taliban leaders - all making it more likely than not that he was a member of Taliban fighting forces.¶ Still, despite the courts' careful analysis in these cases, Congress could step in and write its own new law on indefinite detention. But how can any one statute possibly address all the vastly different factual scenarios, many spanning several countries and decades, that constitute the government's claims that any particular individual is detainable? What's more, any new law will still have to meet the requirements of the U.S. Constitution, and the Supreme Court gets the ultimate say on that. Any new statute passed by Congress, then, would likely be challenged as soon as it's applied, causing more confusion about what the law really is until the U.S. Supreme Court weighs in on that new statute several years later.¶ The federal judges of the D.C. District Court and Court of Appeals are already way ahead of that game. In addition to the trial court opinions, the appellate court recently issued its own opinion setting out the law of detention and the government's constitutional authority. That decision may be appealed to the Supreme Court, whose opinion would set out the binding standard that every judge and future U.S. administration will have to follow.¶ The upshot of all this is that if Congress legislates some new detention standard now, it will actually take a lot longer to get a clearly-defined and binding law that guides the government than it would if Congress just let the courts continue to play the role they're supposed to: deciding the legality of government detention.¶ Wittes, Graham and others may secretly be hoping that Congress will legislate in this area anyway and try to expand the government's indefinite detention autuhority beyond Guantanamo Bay to reach even suspects arrested on U.S. soil. But that would create a whole new constitutional firestorm, resulting in exactly the opposite of what they say they're after: a clear and reliable statement of the law.

## debt ceiling

#### Your link evidence is a reason that obama wont push the plan- not tied to him

#### 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.

#### No econ impact, threats overblown

Rodrigo Campos (writer for Reuters) September 20, 2013 “U.S. stocks needn't fret about a government shutdown” http://www.reuters.com/article/2013/09/20/us-usa-stocks-weekahead-idUSBRE98J10K20130920

Investors may be tempted to shy away from stocks in the next week or two as the latest version of the fiscal follies plays out in Washington.¶ It's understandable. The prospect of a government shutdown or, worse, default on the federal debt, rekindles memories of 2011 when Washington's infighting prompted the loss of the United States' triple-A credit rating and was a primary driver behind the stock market's last full-on correction.¶ The sense from Wall Street analysts this time, however, is that the current drama is likely to feature more bluster than bravado and contains overblown threats.¶ "Looking back at the pattern that has emerged since the debt ceiling fiasco back in 2011, the Republican leadership got the message that if there is a government shutdown, most likely their party is going to get blamed," said Brian Jacobsen, chief portfolio strategist at Wells Fargo Funds Management in Menomonee Falls, Wisconsin.¶ "They're going to be very sensitive to that public sentiment as we get closer to a midterm election year" in 2014, Jacobsen said.¶ "In spite of all the brinkmanship being talked about ... there will be a deal and then we will move on," said Stephen Massocca, managing director at Wedbush Equity Management in San Francisco.¶ This autumn's standoff comes with two separate but related deadlines.¶ First, failure to come up with a budget deal by the end of the month risks a federal government shutdown starting October 1. Then, by mid-October lawmakers must vote to raise the federal debt ceiling to prevent a default.¶ The posturing has been under way for weeks. In the latest move, the Republican-controlled House of Representatives passed legislation on Friday to fund federal agencies through mid-December but also inserted a provision killing President Barack Obama's landmark healthcare overhaul.¶ Democrats, who control the Senate, have said they will strip out that provision when the bill comes before the Senate, most likely next week.¶ Wall Street players are sanguine about events unfolding in Washington.¶ EMPTY THREAT¶ "Uncertainty will probably rise ahead of these events, but we think this is likely to be short-lived and probably less severe than some other recent episodes," said a Goldman Sachs research note.¶ In fact, the current episode could prove to be an empty threat, like the so-called "fiscal cliff," last December. After weeks of dire predictions of big tax hikes and draconian spending cuts if no deal was reached, lawmakers came to a last-minute accord, and the market kicked into high gear for 2013. The S&P 500 is up more than 22 percent year to date on a total return basis, including re-invested dividends.¶ "While we could get a pullback on worries about the debt ceiling and the continuing resolution, my guess is it will go the same way as the fiscal cliff went - a bunch of sound and fury signifying nothing," said Jeffrey Saut, chief investment strategist at Raymond James Financial in St. Petersburg, Florida.¶ "If the market pulls back on (Washington) worries, I think it's a buy," said Saut.¶ As the budget battle heats up, the lack of angst among investors was reflected in a fall in the CBOE Volatility Index .VIX, Wall Street's favorite measure of fear. It ticked down to 13.12 on Friday and has posted three straight weeks of losses for a total drop in that period of 23 percent.¶ Next week on Wall Street, the widely followed Dow Jones industrial average .DJI will open Monday with three new components as Goldman Sachs (GS.N), Visa (V.N) and Nike (NKE.N) replace Bank of America (BAC.N), Hewlett-Packard (HPQ.N) and Alcoa (AA.N).

#### debt ceiling raise 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.

#### detention debate in congress inevitable- NDAA vote this fall

Obsburn 9/11 (C. Dixon Obsburn Law and Security Program[Twelve Years Later: 9/11 Demands Justice, Not GTMO](http://www.humanrightsfirst.org/2013/09/11/twelve-years-later-911-demands-justice-not-gtmo/) <http://www.humanrightsfirst.org/2013/09/11/twelve-years-later-911-demands-justice-not-gtmo/>)

Congress has taken note.  The Senate is set to debate Guantanamo again when the National Defense Authorization Act hits the Senate floor this fall.  The bill reported out of committee removes restrictions on transfers from Guantanamo to the United States for prosecution, incarceration or medical treatment.  The bill also permits transfers for purposes of repatriation or resettlement so long as the Secretary of Defense notifies Congress and takes steps to mitigate the risks associated with transfers.  There are some fresh factors that may convince Members of Congress that it is finally time to close Guantanamo

#### 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.

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#### tea party republicans block debt ceiling

The New Repulic 9/19/13 (Noam Scheiber, Senior Edtior, "Obama May Yet Bail Boehner Out on the Budget. That Would be a Historic Mistake")

To see this, you have to understand the psychology of the average House Tea Partier. These are people who have spent the last two-and-a-half years demanding an apocalyptic showdown with Obama, only to have their leaders defer it again and again. When the debt limit needed to be raised this past March, for example, Boehner [persuaded](http://www.politico.com/story/2013/01/the-gops-48-hour-debt-ceiling-makeover-86591.html) his loonies that they’d be much better off postponing the confrontation until the government funding fight. Now that the moment of truth is here, Boehner is telling his folks to put the fight off yet again.¶ Not surprisingly, the Tea Partiers aren’t really going for it. They want to pass legislation that will defund Obamacare, and they want to do it by attaching it to the bill that keeps the government open past September 30. They don’t really believe Boehner when he says he’ll give them their shot a few weeks later, when the debt ceiling needs lifting, if they just hold their fire this one last time. Those suspicions are why Boehner is going to be hard-pressed to pass a clean CR with only Republican votes. The Tea Partiers will see it as the latest in a long history of capitulations.

#### **Plan is an olive branch**

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

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

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#### The plan leads to the CP- but congress acting alone can’t solve extraterritorial rights or regulate detention

Azmy 10 (Professor of Law, Seton Hall Law School. The author was counsel to Murat Kurnaz, one of the petitioners in Boumediene v. Bush, and participated in much of the briefing in the preand post-Boumediene litigation Executive Detention, Boumediene, and the New Common Law of HabeasIOWA LAW REVIEW [2010])

Thus the opinions of the plurality and Justice Souter interpreted silence or ambiguity in the AUMF differently. This, of course, produced a significant practical consequence: the plurality upheld a novel and questionable use of executive power—a judgment that even led some commentators to conclude that Hamdi represented a significant victory for the Bush Administration.43 Yet, despite proposing differing outcomes, O’Connor’s plurality and Souter’s concurrence fall methodologically within the Youngstown framework: each opinion looks to whether Congress delegated the executive action (though the two employ meaningfully different burdens of proof), and each can claim that a coordinate branch of government supported its decision to uphold or reject the asserted lawful delegation of power. Moreover, both the plurality and the Souter concurrence concluded that, while Congress may have authorized the detention of “enemy combatants” such as Hamdi—i.e. persons who actually engaged in hostilities in a zone of combat44—judicial supervision of Hamdi’s habeas petition and scrutiny of the Executive’s “enemy combatant” classification must be meaningful, and not just a rubber-stamp of the Executive’s claimed superior institutional judgment.45 Thus, drawing upon common-law balancing principles it developed in the due-process context, the Court insisted that Hamdi “receive notice of the factual basis for his [enemy combatant] classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” In Rasul, the Court held that U.S. courts had jurisdiction under the habeas statute, 28 U.S.C. § 2241, to hear petitions filed by detainees held in Guantanamo, despite the Government’s protest that the United States did not exercise formal sovereignty over that territory.47 The Court deemed inapplicable a canon of judicial construction which presumes that statutes do not reach extraterritorially.48 Because of Guantanamo’s peculiar status as a territory over which the United States exercises “complete jurisdiction and control,” it is functionally a part of U.S. territory.49 Justice Stevens’s majority opinion was relatively opaque about whether the habeas statute (1) was limited to the arguably unique territorial status of Guantanamo, as much of the Court’s rhetoric seemed to suggest, or (2) could extend to all locations where U.S. forces hold foreign prisoners, meaning the courts have personal jurisdiction over respondents50—in Justice Scalia’s prophecy, “to the four corners of the earth.”51 Scholars have variously viewed the Court’s attempt to harmonize the habeas statute’s unlimited provision for habeas jurisdiction with the peculiar circumstances of the Administration’s detention policy as “distort[ed]”52 or “entirely plausible.”53 Nevertheless, the Court’s interpretation appears consistent with the Triad’s functionalist perspective, by rejecting the talismanic significance of sovereignty or citizenship rules and by ensuring that Congress and the judiciary together have a role in checking executive-branch operations. More fundamentally, the Court signaled to the Executive that it could not locate detention operations completely outside the constraints of law.54

#### 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 will do it

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.