## 1

#### The logic of the affirmative asks how war should be waged rather than if war should be waged at all—their methods only spark temporary interest in the military-industrial complex—it leads to free reign of the mentality of constant war

Lichterman 3

[Andrew, Program Director of the Western States Legal Foundation, Missiles of Empire: America’s 21st Century Global Legions, WSLF Information Bulletin, Fall 2003, http://www.wslfweb.org/nukes.htm]

Criticizing the Hubcaps while the Juggernaut Rolls On The U.S. military-industrial complex today is so immense as to defy comprehension. Even those few paying attention tend to focus on one small piece at a time. One month it may be proposals for nuclear weapons with certain new capabilities. Then the attention may shift to missile defense– but there too, only a small part of the program attracts public debate, with immense programs like the airborne laser proceeding almost invisibly. Proposals for the intensive militarization of space like the Space Plane come to light for a day or two, attracting a brief flurry of interest; the continuing, broad development of military space technologies, from GPS-aided guidance to radiation hardened microchips to space power generation, draw even less scrutiny. There is so broad a consensus among political elites supporting the constant refinement of conventional armaments that new generations of strike aircraft, Navy ships, and armored vehicles attract little notice outside industry and professional circles, with only spectacular cost overruns or technical failures likely to draw the occasional headline. A few Congresspeople will challenge one or another particularly extreme new weapon (e.g. the “Robust Nuclear Earth Penetrator”), but usually on narrow pragmatic grounds: we can accomplish the same “mission” with less risky or cheaper weapons. But the question of “why,” seldom is asked, only “how,” or “how much does it cost?” Most of the programs that constitute the military machine glide silently onward undisturbed, like the body of a missile submarine invisible below the deceptively small surfaces that rise above the sea. The United States emerged after both World War II and the Cold War as the most powerful state on earth-- the one with the most choices. The first time, all of this was still new. We could perhaps understand our ever deeper engagement with the machinery of death as a series of tragic events, of the inevitable outcome of fallible humans grappling with the titanic forces they had only recently unleashed, in the context of a global confrontation layered in secrecy, ideology, and fear. But this time around, since the end of the Cold War, we must see the United States as truly choosing, with every new weapon and every new war, to lead the world into a renewed spiral towards catastrophe. The past is written, but our understanding of it changes from moment to moment. The United States began the nuclear age as the most powerful nation on earth, and proclaimed the character of the “American Century” with the bombings of Hiroshima and Nagasaki, a cryptic message written in the blood of innocents. Its meaning has come clear over fifty years of technocratic militarism, punctuated by the deaths of millions in neo-colonial warfare and underscored always by the willingness to end the world rather than share power with anyone. The path ahead still can be changed, but we must begin with an understanding of where we are, and how we got here. In the United States, there is a very long way to go before we have a debate about the uses of military force that addresses honestly the weapons we have and seek to develop, much less about the complex social forces which impel the United States to maintain its extraordinary levels of forces and armaments. Most Americans don’t know what their government is doing in their name, or why. Their government, regardless of the party in power, lies about both its means and its ends on a routine basis. And there is nothing the government lies about more than nuclear weapons, proclaiming to the world for the last decade that the United States was disassembling its nuclear facilities and leading the way to disarmament, while rebuilding its nuclear weapons plants and planning for another half century and more of nuclear dominance.74 It is clear by now that fighting violence with yet more violence, claiming to stop the spread of nuclear weapons by threatening the use of nuclear weapons, is a dead end. The very notion of “enforcement,” that some countries have the right to judge and punish others for seeking “weapons of mass destruction,” has become an excuse for war making, a cover and justification for the power and profit agenda of secretive and undemocratic elites. The only solution that will increase the security of ordinary people anywhere is for all of us, in our respective societies, to do everything we can to get the most violent elements in our cultures– whether in or out of uniform– under control. In the United States, this will require far more than changing a few faces in Washington. We will need a genuine peace movement, ready to make connections to movements for ecological balance, and for social and economic justice, and by doing so to address the causes of war. Before we can expect others to join us, it must be clear that we are leaving the path of violence.

#### Awareness of militarism key – our internalized acceptance of war guarantees endless violence that ensures planetary destruction and structural violence

Lawrence 9

[Grant, “Military Industrial "War" Consciousness Responsible for Economic and Social Collapse,” OEN—OpEdNews, March 27]

As a presidential candidate, [Barack Obama](http://obama.senate.gov/) called [Afghanistan](http://en.wikipedia.org/wiki/War_in_Afghanistan_%282001%E2%80%93present%29) ''the war we must win.'' He was absolutely right. Now it is time to win it... Senators [John McCain](http://www.imdb.com/name/nm0564587/) and Joseph Lieberman [calling](http://www.miamiherald.com/opinion/inbox/story/960269.html) for an expanded war in Afghanistan "How true it is that war can destroy everything of value." Pope Benedict XVI [decrying](http://www.google.com/hostednews/afp/article/ALeqM5iuue8kE-e0lYZVFpt4RlbX4M_IEw) the suffering of Africa Where troops have been quartered, brambles and thorns spring up. In the track of great armies there must follow lean years. Lao Tzu on [War](http://www.sacred-texts.com/tao/salt/salt09.htm) As Americans we are raised on the utility of war to conquer every problem. We have a drug problem so we wage war on it. We have a cancer problem so we wage war on it. We have a crime problem so we wage war on it. Poverty cannot be dealt with but it has to be warred against. Terror is another problem that must be warred against. In the [United States](http://maps.google.com/maps?ll=38.8833333333,-77.0166666667&spn=10.0,10.0&q=38.8833333333,-77.0166666667%20%28United%20States%29&t=h), solutions can only be found in terms of wars. In a society that functions to support a massive military industrial war machine and empire, it is important that the terms promoted support the conditioning of its citizens. We are conditioned to see war as the solution to major social ills and major political disagreements. That way when we see so much of our resources devoted to war then we don't question the utility of it. The term "war" excites mind and body and creates a fear mentality that looks at life in terms of attack. In war, there has to be an attack and a must win attitude to carry us to victory. But is this war mentality working for us? In an age when nearly half of our tax money goes to support the war machine and a good deal of the rest is going to support the elite that control the war machine, we can see that our present war mentality is not working. Our values have been so perverted by our war mentality that we see sex as sinful but killing as entertainment. Our society is dripping violence. The violence is fed by poverty, social injustice, the break down of family and community that also arises from economic injustice, and by the managed media. The cycle of violence that exists in our society exists because it is useful to those that control society. It is easier to sell the war machine when your population is conditioned to violence. Our military industrial consciousness may not be working for nearly all of the life of the planet but it does work for the very few that are the master manipulators of our values and our consciousness. Rupert Murdoch, the media monopoly man that runs the "Fair and Balanced" [Fox Network](http://www.fox.com/), Sky Television, and [News Corp](http://www.newscorp.com/) just to name a few, [had](http://en.wikipedia.org/wiki/Rupert_Murdoch) all of his 175 newspapers editorialize in favor of the [Iraq war](http://en.wikipedia.org/wiki/Iraq_War). Murdoch snickers when [he says](http://www.newscorpse.com/ncWP/?p=341) "we tried" to manipulate public opinion." The Iraq war was a good war to Murdoch [because,](http://www.americanprogress.org/issues/2004/07/b122948.html) "The death toll, certainly of Americans there, by the terms of any previous war are quite minute." But, to the media manipulators, the phony politicos, the military industrial elite, a million dead Iraqis are not to be considered. War is big business and it is supported by a war consciousness that allows it to prosper. That is why more war in Afghanistan, the war on Palestinians, and the other wars around the planet in which the [military industrial complex](http://en.wikipedia.org/wiki/Military-industrial_complex) builds massive wealth and power will continue. The military industrial war mentality is not only killing, maiming, and destroying but it is also contributing to the present social and economic collapse. As mentioned previously, the massive wealth transfer that occurs when the American people give half of their money to support death and destruction is money that could have gone to support a just society. It is no accident that after years of war and preparing for war, our society is crumbling. Science and technological resources along with economic and natural resources have been squandered in the never-ending pursuit of enemies. All of that energy could have been utilized for the good of humanity, ¶ instead of maintaining the power positions of the very few super wealthy. So the suffering that we give is ultimately the suffering we get. Humans want to believe that they can escape the consciousness that they live in. But that consciousness determines what we experience and how we live. As long as we choose to live in "War" in our minds then we will continue to get "War" in our lives. When humanity chooses to wage peace on the world then there will be a flowering of life. But until then we will be forced to live the life our present war consciousness is creating.

#### The alternative is to reject the 1AC in favor of a pacifistic solution to problems.

#### The only way to solve is by adopting a pacifistic mindset—the shift away from militarism is key

Demenchonok 9

[Worked as a senior researcher at the Institute of Philosophy of the Russian Academy of Sciences, Moscow, and is currently a Professor of Foreign Languages and Philosophy at Fort Valley State University in Georgia, listed in 2000 Outstanding Scholars of the 21st Century and is a recipient of the Twenty-First Century Award for Achievement in Philosophy from the International Biographical Centre --Edward, Philosophy After Hiroshima: From Power Politics to the Ethics of Nonviolence and Co-Responsibility, February, American Journal of Economics and Sociology, Volume 68, Issue 1, Pages 9-49]

Where, then, does the future lie? Unilateralism, hegemonic political anarchy, mass immiseration, ecocide, and global violence—a Hobbesian bellum omnium contra omnes? Or international cooperation, social justice, and genuine collective—political and human—security? Down which path lies cowering, fragile hope?¶ Humanistic thinkers approach these problems from the perspective of their concern about the situation of individuals and the long-range interests of humanity. They examine in depth the root causes of these problems, warning about the consequences of escalation and, at the same time, indicating the prospect of their possible solutions through nonviolent means and a growing global consciousness. Today's world is in desperate need of realistic alternatives to violent conflict. Nonviolent action—properly planned and executed—is a powerful and effective force for political and social change. The ideas of peace and nonviolence, as expressed by Immanuel Kant, Leo Tolstoy, Mahatma Gandhi, Martin Luther King, and many contemporary philosophers—supported by peace and civil rights movements—counter the ~~paralyzing~~ fear with hope and offer a realistic alternative: a rational approach to the solutions to the problems, encouraging people to be the masters of their own destiny.¶ Fortunately, the memory of the tragedies of war and the growing realization of this new existential situation of humanity has awakened the global conscience and generated protest movements demanding necessary changes. During the four decades of the Cold War, which polarized the world, power politics was challenged by the common perspective of humanity, of the supreme value of human life, and the ethics of peace. Thus, in Europe, which suffered from both world wars and totalitarianism, spiritual-intellectual efforts to find solutions to these problems generated ideas of "new thinking," aiming for peace, freedom, and democracy. Today, philosophers, intellectuals, progressive political leaders, and peace-movement activists continue to promote a peaceful alternative. In the asymmetry of power, despite being frustrated by war-prone politics, peaceful projects emerge each time, like a phoenix arising from the ashes, as the only viable alternative for the survival of humanity. The new thinking in philosophy affirms the supreme value of human and nonhuman life, freedom, justice, and the future of human civilization. It asserts that the transcendental task of the survival of humankind and the rest of the biotic community must have an unquestionable primacy in comparison to particular interests of nations, social classes, and so forth. In applying these principles to the nuclear age, it considers a just and lasting peace as a categorical imperative for the survival of humankind, and thus proposes a world free from nuclear weapons and from war and organized violence.44 In tune with the Charter of the United Nations, it calls for the democratization of international relations and for dialogue and cooperation in order to secure peace, human rights, and solutions to global problems. It further calls for the transition toward a cosmopolitan order.¶ The escalating global problems are symptoms of what might be termed a contemporary civilizational disease, developed over the course of centuries, in which techno-economic progress is achieved at the cost of depersonalization and dehumanization. Therefore, the possibility of an effective "treatment" today depends on whether or not humankind will be able to regain its humanity, thus establishing new relations of the individual with himself or herself, with others, and with nature. Hence the need for a new philosophy of humanity and an ethics of nonviolence and planetary co-responsibility to help us make sense not only of our past historical events, but also of the extent, quality, and urgency of our present choices.

## 2

#### Obama has successfully fended off sanctions, FOR NOW, any lags create an aggressive push that will be veto proof

Rubin 2-7

(Jennifer, Washington Post. “Menendez’s blasts Obama’s Iran policy” 2-7-14 http://www.washingtonpost.com/blogs/right-turn/wp/2014/02/07/menendezs-blasts-obamas-iran-policy///wyoccd)

The administration has a big problem on Iran. It has for now successfully fended off sanctions, but in doing so it helped forge consensus about the flaws in its approach and set the scene for a major showdown with Congress when, as everyone but Secretary of State John Kerry expects, Iran refuses to agree to even minimal steps to dismantle its nuclear weapons program. In other words, it has set itself up for failure with no back-up plan.Thursday, Sen. Robert Menendez (D-N.J.), denied by his majority leader a vote on a sanctions bill that would pass with more than 70 votes, explained in detail the administration’s gross mishandling of negotiations. It is worth reading in full, but some portions deserve emphasis. After describing in detail the requirements the administration, the United Nations and former administration official Dennis Ross have confirmed are needed to prevent a nuclear-capable Iran, the New Jersey Democrat summed up the flaws in the interim deal:¶ Iran is insisting on keeping core elements of its programs – enrichment, the Arak heavy-water reactor, the underground Fordow facility, and the Parchin military complex. And, while they may be subject to safeguards — so they can satisfy the international community in the short-run – if they are allowed to retain their core infrastructure, they could quickly revive their program sometime in the future. At the same time, Iran is seeking to reverse the harsh international sanctions regimes against them. Bottom line: They dismantle nothing. We gut the sanctions.¶ Directly contradicting Kerry’s assurances, Menendez states:¶ Since the interim deal was signed there was an immediate effort by many nations – including many European nations — to revive trade and resume business with Iran. There have been recent headlines that the Russians may be seeking a barter deal that could increase Iran’s oil exports by 50 percent. That Iran and Russia are negotiating an oil-for-goods deal worth $1.5 billion a month — $18 billion a year – which would significantly boost Iran’s oil exports by 500,000 barrels a day in exchange for Russian goods . . . Iran’s economy is recovering. . . . Sanctions relief — combined with the “open for business sign” that Iran is posting — is paying returns.¶ And as for the potential for sanctions at the end of the six months, Menendez states definitively that this would be too late. It is quite an extraordinary assertion — in essence, that barring a miraculous negotiated solution, we’re now in the mode of “containment,” precisely what the president swore up and down he’d never allow:¶ My legislation – cosponsored by 59 Senators – would simply require that Iran act in good faith, adhering to the implementing agreement, not engage in new acts of terror against American citizens or U.S, property — and not conduct new ballistic missile tests with a range beyond 500 kilometers.¶ The legislation is not the problem. Congress is not the problem. Iran is the problem. We need to worry about Iran, not the Congress. We need to focus on Iran’s long history of deception surrounding its nuclear program and how this should inform our approach to reaching a comprehensive deal. . . .New sanctions are not a spigot that can be turned off-and-on as has been suggested.¶ Even if Congress were to take-up and pass new sanctions at the moment of Iran’s first breach of the Joint Plan of Action, there is a lag time of at least 6 months to bring those sanctions on line — and at least a year for the real impact to be felt.¶ This would bring us beyond the very short-time Iran would need to build a nuclear bomb, especially since the interim agreement does not require them neither to dismantle anything, and freezes their capability as it stands today.¶ So let everyone understand — if there is no deal we won’t have time to impose new sanctions before Iran could produce a nuclear weapon. . . .¶ The simple and deeply troubling fact is — Iran is literally weeks to months away from breakout, and the parameters of the final agreement — laid out in the Joint Plan of Action — do not appear to set Iran’s development-capacity back by more than a few weeks. [Emphasis added.]¶ He concludes, “The concerns I have raised here are legitimate. They are not — as the President’s press secretary has said – ‘war-mongering.’ . . . Iran says it won’t negotiate with a gun to its head. Well, I would suggest it is Iran that has put a nuclear gun to the world’s head. So, at the end of the day, name-calling is not an argument, nor is it sound policy. It is a false choice to say a vote for sanctions is equivalent to war-mongering. . . . The ball is in the Administration’s court, not in Congress’.”¶ So then, in the estimation of the Senate’s Democratic foreign affairs chairman the interim deal is fatally flawed, a final deal must achieve things Iran has no intention of giving us and it will be too late to pass sanctions in six months. He has in essence accused the president of setting us on a road to containment since the president and Senate Majority Leader Harry Reid will not permit a sanctions vote that is the last hope to bring Iran to heel.¶ I wonder what the point of the speech really was. Does he think Reid will bend? Does he have more Democrats on board to force a vote? Does he think sanctions proponents will say, ‘What a nice speech. He’ll be on the ball when the talks fail“? (But Menendez’s entire point was when the talks fail, it will be too late.)¶ In six-months, when the talks fail and/or another six-months are declared necessary for a deal, Congress then can try to restart sanctions, I suppose. But Menendez says that won’t be effective. The alternative is accepting a nuclear-capable Iran or an Israeli military strike. The latter is becoming the most likely scenario if Menendez’s assessment of the timeline is correct. Obama will therefore have brought about the one thing he was desperate to avoid — a Middle East war.

**An adverse Court ruling will cause Obama defiance – triggers a Constitutional showdown**

**Posner and Vermeule, 10** - \*professor of law at the University of Chicago AND \*\*professor of law at Harvard (Eric and Adrian, The Executive Unbound, p. 207-210)

The **9/11** attack **provided a reminder of just how extensive the president’s power is.** The executive claimed the constitutional authority to, in effect, use emergency powers. Because Congress provided redundant statutory authority, and **the Supreme Court has steadfastly refused to address the ultimate merits of the executive’s constitutional claims**, these claims were never tested in a legal or public forum. But **it is worth trying to imagine what would have happened if Congress had refused to pass the Authorization for Use of Military Force and the Supreme Court had ordered the executive to release detainees** in a contested case. We think that **the executive, backed up as it was by popular opinion, would have refused to obey**. And, indeed, **for just that reason, Congress would never have refused** its imprimatur **and the Supreme Court would never have stood in the executive’s way**. **The major check on the executive’s power to declare an emergency and to use emergency powers is—political**.

#### Loss of political capital causes Democrats flop and support sanctions

Kraushaar 1-22

(Josh Kraushaar, staff writer at the National Journal. “The Iran Deal Puts Pro-Israel Democrats in a Bind” 1-22-14 http://www.nationaljournal.com/magazine/the-iran-deal-puts-pro-israel-democrats-in-a-bind-20131122//wyoccd)

All of this puts Democrats, who routinely win overwhelming support from Jewish Americans on Election Day, in an awkward position. Do they stand with the president on politically sensitive foreign policy issues, or stake their own course? That difficult dynamic is currently playing out in Congress, where the Obama administration is resisting a Senate push to maintain tough sanctions against Iran. This week, Obama met with leading senators on the Banking and Foreign Relations committees to dissuade them from their efforts while diplomacy is underway. "There's a fundamental disagreement between the vast majority of Congress and the president when it comes to increasing Iran sanctions right now," said one Democratic operative involved in the advocacy efforts. "Pro-Israel groups, like AIPAC, try to do things in a bipartisan way; they don't like open confrontation. But in this instance, it's hard." That awkwardness has been evident in the lukewarm reaction from many of Obama's Senate Democratic allies to the administration's outreach to Iran. Senate Foreign Relations Committee Chairman Robert Menendez of New Jersey said last week he was concerned that the administration seems "to want the deal almost more than the Iranians." Normally outspoken Sen. Chuck Schumer of New York, a reliable ally of Israel, has been conspicuously quiet about his views on the negotiations. In a CNN interview this month, Democratic Rep. Debbie Wasserman Schultz of Florida, whose job as chairwoman of the Democratic National Committee is to defend the president, notably declined to endorse the administration's approach, focusing instead on Obama's past support of sanctions. This, despite the full-court press from Secretary of State John Kerry, a former congressional colleague. On Tuesday, after meeting with Obama, Menendez and Schumer signed a bipartisan letter to Kerry warning the administration about accepting a deal that would allow Iran to continue its nuclear program. The letter was also signed by Sens. John McCain, R-Ariz., Lindsey Graham, R-S.C., Susan Collins, R-Maine, and Robert Casey, D-Pa. Democrats, of course, realize that the president plays an outsized role in the policy direction of his party. Just as George W. Bush moved the Republican Party in a more hawkish direction during his war-riven presidency, Obama is nudging Democrats away from their traditionally instinctive support for the Jewish state. "I can't remember the last time the differences [between the U.S. and Israel] were this stark," said one former Democratic White House official with ties to the Jewish community. "There's now a little more freedom [for progressive Democrats] to say what they want to say, without fear of getting their tuchus kicked by the organized Jewish community." A Gallup survey conducted this year showed 55 percent of Democrats sympathizing with the Israelis over the Palestinians, compared with 78 percent of Republicans and 63 percent of independents who do so. A landmark Pew poll of American Jews, released in October, showed that 35 percent of Jewish Democrats said they had little or no attachment to Israel, more than double the 15 percent of Jewish Republicans who answered similarly. At the 2012 Democratic National Convention, many delegates booed a platform proposal supporting the move of the U.S. Embassy in Israel from Tel Aviv to Jerusalem. In 2011, Democrats lost Anthony Weiner's heavily Jewish, solidly Democratic Brooklyn House seat because enough Jewish voters wanted to rebuke the president's perceived hostility toward Israel. Pro-Israel advocacy groups rely on the mantra that support for Israel carries overwhelming bipartisan support, a maxim that has held true for decades in Congress. But most also reluctantly acknowledge the growing influence of a faction within the Democratic Party that is more critical of the two countries' close relationship. Within the Jewish community, that faction is represented by J Street, which positions itself as the home for "pro-Israel, pro-peace Americans" and supports the Iran negotiations. "Organizations that claim to represent the American Jewish community are undermining [Obama's] approach by pushing for new and harsher penalties against Iran," the group wrote in an action alert to its members. Some supporters of Israel view J Street with concern. "There's a small cadre of people that comes from the progressive side of the party that are in the business of blaming Israel first. There's a chorus of these guys," said a former Clinton administration foreign policy official. "But that doesn't make them the dominant folks in the policy space of the party, or the Hill." Pro-Israel activists worry that one of the ironies of Obama's situation is that as his poll numbers sink, his interest in striking a deal with Iran will grow because he'll be looking for any bit of positive news that can draw attention away from the health care law's problems. Thus far, Obama's diminished political fortunes aren't deterring Democrats from protecting the administration's prerogatives. Congressional sources expect the Senate Banking Committee, chaired by South Dakota Democrat Tim Johnson, to hold off on any sanctions legislation until there's a resolution to the Iranian negotiations. But if Obama's standing continues to drop, and if Israel doesn't like the deal, don't be surprised to see Democrats become less hesitant about going their own way.

#### Tanks Geneva and causes Israel strikes

**Leubsdorf, 1/22/14 –** former Washington Bureau chief of The Dallas Morning News (Carl, Dallas Morning News, “Hard-liners’ mischief-making threatens Iran nuke talks” <http://www.dallasnews.com/opinion/columnists/carl-p-leubsdorf/20140122-carl-leubsdorf-hard-liners-mischief-making-threatens-iran-nuke-talks.ece>)

The measure’s most dangerous provision, according to various published reports, reads as follows:¶ “If the government of Israel is compelled to take military action in legitimate self-defense against Iran’s nuclear weapon program, the United States should stand with Israel and provide in accordance with the law of the United States and the constitutional responsibility of Congress to authorize the use of military force, diplomatic and economic support to the Government of Israel in the defense of its territory, people and existence.”¶ While not requiring U.S. action, critics note the language suggests the mere existence of an Iranian “nuclear weapon program” would be sufficient to compel Israel to attack “in legitimate self-defense.” And it says the U.S. “should” provide such an Israeli attack with “military, diplomatic and economic support” according to U.S. laws and congressional constitutional responsibility.¶ In effect, that could enable the hard-liners who control the Israeli government to kill the talks or try to drag the United States into a war against Iran if they decide that Iranian compliance with the current agreement is insufficient to protect Israel.¶ The measure would also enable Congress to kill any agreement the West reaches with Iran by overriding Obama’s decision to waive existing sanctions.

#### Global war

-Strikes fail: intel gap and buried

-Iran second strike = nuclear

-Economy: stops oil

-Hegemony: Balancers

-Miscalc/Escalation: Forces on nuclear alter

**Reuveny, 10** – professor in the School of Public and Environmental Affairs at Indiana University (Rafael, “Unilateral strike could trigger World War III, global depression” Gazette Xtra, 8/7, - See more at: <http://gazettextra.com/news/2010/aug/07/con-unilateral-strike-could-trigger-world-war-iii-/#sthash.ec4zqu8o.dpuf>)

A unilateral Israeli strike on Iran’s nuclear facilities would likely have dire consequences, including a regional war, global economic collapse and a major power clash.¶ For an Israeli campaign to succeed, it must be quick and decisive. This requires an attack that would be so overwhelming that Iran would not dare to respond in full force.¶ Such an outcome is extremely unlikely since the locations of some of Iran’s nuclear facilities are not fully known and known facilities are buried deep underground.¶ All of these widely spread facilities are shielded by elaborate air defense systems constructed not only by the Iranians but also the Chinese and, likely, the Russians as well.¶ By now, Iran has also built redundant command and control systems and nuclear facilities, devloped early warning systems, acquired ballistic and cruise missiles and upgraded and enlarged its armed forces.¶ Because Iran is well-prepared, a single, conventional Israeli strike—or even numerous strikes—could not destroy all of its capabilities, giving Iran time to respond.¶ Unlike Iraq, whose nuclear program Israel destroyed in 1981, Iran has a second-strike capability comprised of a coalition of Iranian, Syrian, Lebanese, Hezbollah, Hamas, and, perhaps, Turkish forces. Internal pressure might compel Jordan, Egypt and the Palestinian Authority to join the assault, turning a bad situation into a regional war.¶ During the 1973 Arab-Israeli War, at the apex of its power, Israel was saved from defeat by President Nixon’s shipment of weapons and planes. Today, Israel’s numerical inferiority is greater, and it faces more determined and better-equipped opponents. After years of futilely fighting Palestinian irregular armies, Israel has lost some of its perceived superiority—bolstering its enemies’ resolve.¶ Despite Israel’s touted defense systems, Iranian coalition missiles, armed forces, and terrorist attacks would likely wreak havoc on its enemy, leading to a prolonged tit-for-tat.¶ In the absence of massive U.S. assistance, Israel’s military resources may quickly dwindle, forcing it to use its alleged nuclear weapons, as it had reportedly almost done in 1973.¶ An Israeli nuclear attack would likely destroy most of Iran’s capabilities, but a crippled Iran and its coalition could still attack neighboring oil facilities, unleash global terrorism, plant mines in the Persian Gulf and impair maritime trade in the Mediterranean, Red Sea and Indian Ocean.¶ Middle Eastern oil shipments would likely slow to a trickle as production declines due to the war and insurance companies decide to drop their risky Middle Eastern clients. Iran and Venezuela would likely stop selling oil to the United States and Europe.¶ From there, things could deteriorate as they did in the 1930s. The world economy would head into a tailspin; international acrimony would rise; and Iraqi and Afghani citizens might fully turn on the United States, immediately requiring the deployment of more American troops.¶ Russia, China, Venezuela, and maybe Brazil and Turkey—all of which essentially support Iran—could be tempted to form an alliance and openly challenge the U.S. hegemony.¶ Russia and China might rearm their injured Iranian protege overnight, just as Nixon rearmed Israel, and threaten to intervene, just as the U.S.S.R. threatened to join Egypt and Syria in 1973. President Obama’s response would likely put U.S. forces on nuclear alert, replaying Nixon’s nightmarish scenario.¶ Iran may well feel duty-bound to respond to a unilateral attack by its Israeli archenemy, but it knows that it could not take on the United States head-to-head. In contrast, if the United States leads the attack, Iran’s response would likely be muted.¶ If Iran chooses to absorb an American-led strike, its allies would likely protest and send weapons but would probably not risk using force.¶ While no one has a crystal ball, leaders should be risk-averse when choosing war as a foreign policy tool. If attacking Iran is deemed necessary, Israel must wait for an American green light. A unilateral Israeli strike could ultimately spark World War III.

## 3

#### Judicial deference to executive war powers high now

McCormack 13, Professor of Law at Utah

(8/20, Wayne, U.S. Judicial Independence: Victim in the “War on Terror”, today.law.utah.edu/projects/u-s-judicial-independence-victim-in-the-war-on-terror/

One of the principal victims in the U.S. so-called “war on terror” has been the independence of the U.S. Judiciary. Time and again, challenges to assertedly illegal conduct on the part of government officials have been turned aside, either because of overt deference to the Government or because of special doctrines such as state secrets and standing requirements. The judiciary has virtually relinquished its valuable role in the U.S. system of judicial review. In the face of governmental claims of crisis and national security needs, the courts have refused to examine, or have examined with undue deference, the actions of government officials.

**Enforcing Charming betsy in the context of foreign affairs undermines executive deference**

**Abebe and Posner 11** (Daniel and Eric, \* Assistant Professor and Kirkland & Ellis Professor, University of Chicago Law School, "The Flaws of Foreign Affairs Legalism," Virginia Journal of International Law, Volume 51, Issue 3, www.vjil.org/assets/pdfs/vol51/issue3/Abebe\_\_\_Posner.pdf)

Statutory Interpretation and the Charming Betsy Canon. **The Charming Betsy canon holds that courts should not interpret vague or ambiguo¶ ous statutes in a manner inconsistent with international law.64 Foreign ¶ affairs legalists generally support the expansive application** **of the ¶ Charming Betsy canon,** **even when it might conflict with traditional foreign affairs deference to** **executive interpretations of international law**,65¶ or require the use of international norms to interpret individual rights66¶ and constitutional protections.67 U.S. courts have been less consistent. ¶ For instance, in the recent case of Al-Bihani v. Obama,¶ 68 the U.S. Court ¶ of Appeals for the District of Columbia refused to interpret the Authorization for Use of Military Force69 in light of international law,70 greatly ¶ disappointing foreign affairs legalists.

#### Non-deferential judicial review kills military readiness

Chensey 9 (Robert M. is a Professor at University of Texas School of Law, NATIONAL SECURITY FACT DEFERENCE, VIRGINIA LAW REVIEW, 17 September 2009, http://www.virginialawreview.org/content/pdfs/95/1361.pdf, pg. 1426-1428)

Advocates of deference at times also emphasize the collateral ¶ consequences that non-deferential judicial review of executive ¶ branch factual judgments might have on related government operations or activities. On this view, the benefits of judicial review—¶ measured in terms of enforcement of separation of powers values ¶ or even enhancement of accuracy—in some circumstances may be ¶ outweighed by collateral costs entailed by the very process of nondeferential, or insufficiently deferential, review. ¶ When precisely does this argument come into play? Advocates ¶ of deference do not contend that collateral costs outweigh potential benefits in all national security related litigation. Indeed, the ¶ argument played no significant role in most of the examples surveyed in Part I. Most if not all judicial review of government action, after all, entails some degree of disruption to government operations. Government personnel, for example, often are obliged to ¶ spend some amount of time and resources participating, directly or ¶ indirectly, in the process of litigation, whether by serving as witnesses in a formal sense, gathering and reviewing documents, ¶ speaking informally with attorneys or investigators, and so forth. ¶ These litigation related activities to some extent are bound to disrupt the performance of ordinary government functions. ¶ But some such disruptions are more serious than others. Disruption of military activity, for example, may impose unusually high ¶ costs. So said Justice Jackson in Johnson v. Eisentrager,¶ 218 a postWorld War II decision denying habeas rights to a group of Ger-[page 1427] mans convicted of war crimes and detained in a U.S. controlled facility in Germany. Jackson gave many reasons for the decision, but ¶ placed particular emphasis on the undesirable practical consequences that would, in his view, follow from permitting any judicial ¶ review in this setting. These included: disruption of ongoing military operations, expenditure of scarce military resources, distraction of field commanders, harm to the prestige of commanders, and ¶ comfort to armed enemies.219 The government not surprisingly emphasized such concerns in the Hamdi litigation as well, though with ¶ much less success; and similar arguments continue to play a significant role today as courts grapple with still unresolved questions regarding the precise nature of habeas review of military determinations of enemy combatant status.220¶ But even in the enemy combatant setting, where disruption concerns arguably are near their zenith, this argument does not necessarily point in the direction of fact deference as the requisite solution. It did not persuade the Supreme Court in Hamdi to defer to ¶ the government’s factual judgment, nor did it do so in the more recent decision in Boumediene v. Bush dealing with noncitizen detainees held at Guantánamo. The impact of the argument in those ¶ cases instead was to prompt the Court to accept procedural innovations designed to ameliorate the impact of judicial review, rather ¶ than seeking to avoid that impact via deference.221 This is a useful ¶ reminder that even when the executive branch raises a legitimate ¶ concern in support of a fact deference argument, it does not follow ¶ automatically that deference is the only mechanism by which the ¶ judiciary can accommodate the concern. ¶ This leaves the matter of secrecy. Secrecy relates to the collateral consequences inquiry in the sense that failure to maintain secrecy with respect to national security information can have extralitigation consequences for government operations—as well as for [page 1428] individuals or even society as a whole—ranging from the innocuous ¶ to the disastrous. Without a doubt this is a significant concern. But, ¶ again, it is not clear that deference is required in order to address ¶ it. Preservation of secrecy is precisely the reason that the state secrets privilege exists, of course, and it also is the motive for the ¶ Classified Information Procedures Act, which establishes a process ¶ through which judges work with the parties to develop unclassified ¶ substitutes for evidence that must be withheld on secrecy ¶ grounds.222

#### Military readiness key to heg

Donnelly 3 (Thomas, resident fellow at AEI, The Underpinnings of the Bush Doctrine, February 1, <http://www.aei.org/article/foreign-and-defense-policy/the-underpinnings-of-the-bush-doctrine/>) ap

The preservation of today's Pax Americana rests upon both actual military strength and the perception of strength. The variety of victories scored by U.S. forces since the end of the cold war is testament to both the futility of directly challenging the United States and the desire of its enemies to keep poking and prodding to find a weakness in the American global order. Convincing would-be great powers, rogue states, and terrorists to accept the liberal democratic order--and the challenge to autocratic forms of rule that come with it--requires not only an overwhelming response when the peace is broken, but a willingness to step in when the danger is imminent. The message of the Bush Doctrine--"Don't even think about it!"--rests in part on a logic of preemption that underlies the logic of primacy.

**Solves escalation of global hotspots- retrenchment causes bickering internationally over leadership and prevents cooperation**

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For **if America falters**, the world is unlikely to be dominated by a single preeminent successor -- not even China. International uncertainty, **increased tension** among global competitors, **and** even outright **chaos** **would be** far more **likely** outcomes. While a sudden, massive crisis of the American system -- for instance, another financial crisis -- would produce a fast-moving chain reaction leading to global political and economic disorder**, a steady drift by America into** increasingly pervasive **decay** or endlessly widening warfare with Islam **would be unlikely to produce**, even by 2025, **an effective global successor**. No single power will be ready by then to exercise the role that the world, upon the fall of the Soviet Union in 1991, expected the United States to play: the leader of a new, globally cooperative world order. **More probable would be a protracted phase of rather inconclusive realignments of both global and regional power, with no** grand **winners and many more losers, in a setting of international uncertainty and even of potentially fatal risks to global well-being**. Rather than a world where dreams of democracy flourish, a Hobbesian world of enhanced national security based on varying fusions of authoritarianism, nationalism, and religion could ensue. RELATED 8 Geopolitically Endangered Species The leaders of the world's second-rank powers, among them **India, Japan, Russia, and** some **European countries, are already assessing the potential impact of U.S. decline** on their respective national interests. The Japanese, fearful of an assertive China dominating the Asian mainland, may be thinking of closer links with Europe. Leaders in India and Japan may be considering closer political and even military cooperation in case America falters and China rises. **Russia**, while perhaps engaging in wishful thinking (even schadenfreude) about America's uncertain prospects, **will almost certainly have its eye on the independent states of the former Soviet Union. Europe**, not yet cohesive, **would likely be pulled in several directions:** Germany and Italy toward Russia because of commercial interests, France and insecure Central Europe in favor of a politically tighter European Union, and Britain toward manipulating a balance within the EU while preserving its special relationship with a declining United States. **Others may move more rapidly to carve out their own regional spheres:** Turkey in the area of the old Ottoman Empire, Brazil in the Southern Hemisphere, and so forth. **None of these countries, however, will have the requisite combination of economic, financial, technological, and military power even to consider inheriting America's leading role.** China, invariably mentioned as America's prospective successor, has an impressive imperial lineage and a strategic tradition of carefully calibrated patience, both of which have been critical to its overwhelmingly successful, several-thousand-year-long history. China thus prudently accepts the existing international system, even if it does not view the prevailing hierarchy as permanent. It recognizes that success depends not on the system's dramatic collapse but on its evolution toward a gradual redistribution of power. Moreover, the basic reality is that **China is not yet ready to assume in full America's role in the world**. Beijing's leaders themselves have repeatedly emphasized that on every important measure of development, wealth, and power, China **will still be a modernizing and developing** state **several decades from now, significantly behind not only the United States but also Europe and Japan in the major per capita indices of modernity and national power**. Accordingly, **Chinese leaders have been restrained in laying any overt claims to global leadership.** At some stage, **however, a more assertive Chinese nationalism could arise** and damage China's international interests**. A swaggering, nationalistic Beijing would unintentionally mobilize a powerful regional coalition against itself.** None of China's key neighbors -- India, Japan, and Russia -- is ready to acknowledge China's entitlement to America's place on the global totem pole. **They might even seek support from a waning America to offset an overly assertive China. The resulting regional scramble could become intense, especially given the similar nationalistic tendencies among China's neighbors. A phase of acute international tension in Asia could ensue. Asia** of the 21st century **could then begin to resemble Europe of the 20th century -- violent and bloodthirsty.** At the same time, **the security of a number of weaker states** located geographically next to major regional powers also **depends on the international status quo reinforced by America's global preeminence** -- and would be made significantly more vulnerable in proportion to America's decline. The states in that exposed position -- **including Georgia, Taiwan, South Korea, Belarus, Ukraine, Afghanistan, Pakistan, Israel, and the greater Middle East** -- are today's geopolitical equivalents of nature's most endangered species. **Their fates are closely tied to the nature of the international environment left behind by a waning America, be it ordered and restrained or, much more likely, self-serving and expansionist. A faltering United States could also find its strategic partnership with Mexico in jeopardy.** America's economic resilience and political stability have so far mitigated many of the challenges posed by such sensitive neighborhood issues as economic dependence, immigration, and the narcotics trade. **A decline in American power, however, would likely undermine the health and good judgment of the U.S. economic and political systems. A waning United States would likely be more nationalistic, more defensive about its national identity, more paranoid about its homeland security, and less willing to sacrifice resources for the sake of others' development**. The worsening of relations between a declining America and an internally troubled Mexico could even give rise to a particularly ominous phenomenon: the emergence, as a major issue in nationalistically aroused Mexican politics, of territorial claims justified by history and ignited by cross-border incidents. **Another consequence of American decline could be a corrosion of the generally cooperative management of the global commons** -- **shared interests such as sea lanes, space, cyberspace, and the environment, whose protection is imperative to the long-term growth of the global economy and the continuation of basic geopolitical stability.** In almost every case, **the potential absence of a constructive and influential U.S. role would fatally undermine the essential communality of the global commons because the superiority and ubiquity of American power creates order where there would normally be conflict**. None of this will necessarily come to pass. Nor is the concern that America's decline would generate global insecurity, endanger some vulnerable states, and produce a more troubled North American neighborhood an argument for U.S. global supremacy. In fact, the strategic complexities of the world in the 21st century make such supremacy unattainable. But those dreaming today of America's collapse would probably come to regret it. And as **the world after America would be increasingly complicated and chaotic,** it is imperative that the United States pursue a new, timely strategic vision for its foreign policy -- or start bracing itself for a dangerous slide into global turmoil.

## 4

#### Text:  The Executive Branch of the United States should publicly declare that treaties ratified by the United States are restrictions on the war power authority of the president and the President of the United States should adhere to this policy.

#### Pres can self-bind

Posner and Vermeule 2010 [Eric A. , Professor of Law at the University of Chicago Law School and Editor of The Journal of Legal Studies; Adrian , Harvard Law Professor, The Executive Unbound: After the Madisonian Republic, Oxford Press, p. 138-139//wyo-sc]

Many of our mechanisms are unproblematic from a legal perspective, as they involve presidential actions that are clearly lawful. But a few raise legal questions; in particular, those that involve self-binding.59 Can a president bind himself to respect particular first-order policies? With qualifications, the answer is "yes, at least to the same extent that a legislature can." Formally, a duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated, thereby establishing a new legal status quo.60 The legal authority to establish a new status quo allows a president to create inertia or political constraints that will affect his own future choices. In a practical sense, presidents, like legislatures, have great de facto power to adopt policies that shape the legal landscape for the future. A president might commit himself to a long-term project of defense procurement or infrastructure or foreign policy, narrowing his own future choices and generating new political coalitions that will act to defend the new rules or policies. More schematically, we may speak of formal and informal means of selfbinding: 1. The president might use formal means to bind himself. This is possible in the sense that an executive order, if otherwise valid, legally binds the president while it is in effect and may be enforced by the courts. It is not possible in the sense that the president can always repeal the executive order if he can bear the political and reputational costs of doing so. 2. The president might use informal means to bind himself. This is not only possible but frequent and important. Issuing an executive rule providing for the appointment of special prosecutors, as Nixon did, is not a formal self-binding.61 However, there may be political costs to repealing the order. This effect does not depend on the courts' willingness to enforce the order, even against Nixon himself. Court enforcement makes the order legally binding while it is in place, but only political and reputational enforcement can protect it from repeal. Just as a dessert addict might announce to his friends that he is going on a no-dessert diet in order to raise the reputational costs of backsliding and thus commit himself, so too the repeal of an executive order may be seen as a breach of faith even if no other institution ever enforces it. In what follows, we will invoke both formal and informal mechanisms. For our purposes, the distinction between the authority to engage in de jure self-binding (legally limited and well-defined) and the power to engage in de facto self-binding (broad and amorphous) is secondary. So long as policies are deliberately chosen with a view to generating credibility, and do so by constraining the president’s own future choices in ways that impose greater costs on ill-motivated presidents than on well-motivated ones, it does not matter whether the constraint is formal or informal.

## S

#### Presidents circumvent courts

#### [1.] Obama invokes state secrets privilege on war powers and cases are dismissed

Deveraux 2010

[Ryan Devereaux is a freelance journalist and a Fall 2010 intern at The Nation., September 29th, 2010, Is Obama's Use of State Secrets Privilege the New Normal?, http://www.thenation.com/article/155080/obamas-use-state-secrets-privilege-new-normal#, uwyo//amp]

This is not the first time the Obama administration has invoked the state secrets privilege. On September 8, the United States Court of Appeals for the 9th Circuit dismissed another lawsuit filed by the ACLU in a narrow 6-to-5 decision. The defendant in the case was Jeppesen Dataplan, Inc. The ACLU claimed that Jeppesen, a subsidiary of Boeing Company, had knowingly provided flight services to the CIA to carry out its unlawful extraordinary rendition program. The plaintiffs in the case, Binyam Mohamed, Abou Elkassim Britel and Ahmed Agiza claim that they were flown to secret overseas locations and tortured at the behest of US intelligence agencies. Binyam Mohamed, in particular, told a story of brutal and degrading torture at the hands of Moroccan integrators working in conjunction with the US. Mohamed claims that he was regularly beaten unconscious, was cut 20 to 30 times on his genitals and on one occasion had hot stinging liquid poured into open wounds on his penis as he was being cut.

#### [2.] Bush ignored counterterrorism rulings

Posner and Vermeule 2010 [Eric A. , Professor of Law at the University of Chicago Law School and Editor of The Journal of Legal Studies; Adrian , Harvard Law Professor, The Executive Unbound: After the Madisonian Republic, Oxford Press, p. 204//wyo-sc]

In general, judicial opposition to the Bush administration's counterterrorism policies took the form of incremental rulings handed down at a glacial pace, none of which actually stopped any of the major counterterrorism tactics of that administration, including the application of military power against Al Qaeda, the indefinite detention of members of Al Qaeda, targeted assassinations, the immigration sweeps, even coercive interrogation. The (limited) modifications of those tactics that have occurred resulted not from legal interventions but from policy adjustments driven by changed circumstances and public opinion, and by electoral victory of the Obama administration. However, the Obama administration has mostly confirmed and in some areas even expanded the counterterrorism policies of the Bush administration. Strong executive government is bipartisan.

#### [3.] Warrantless surveillance proves

Congressional Record 2007

[Congressional Record, November 15th, 2007, House Debate on the RESTORE Act to Amend the FISA, <https://www.fas.org/irp/congress/2007_cr/h111507.html>, uwyo//amp]

The American people know all too well that this administration is now considered the most secretive in the history of our country. It has operated with unchecked power and without judicial or congressional oversight. We now know that the President went around the courts to conduct a program of warrantless surveillance of calls to Americans. We now know that the FBI abused the authorities granted under the PATRIOT Act improperly using National Security Letters to American businesses, including medical, financial and library records, instead of seeking a warrant from the court. In hundreds of signing statements, the President has quietly claimed he had the authority to set aside statutes passed by Congress.

## Charming Betsy

#### The DC Circuit DID NOT ISSUE A RULING ON THE CHARMING BETSY ISSUE – their aff is about the rant of one judge

Paust 12 (Jordan J. Paust Mike 26 Teresa Baker Law Center Professor, University of Houston. Spring, 2012, Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit Cornell International Law Journal 45 Cornell Int’l L.J. 367)

While denying a petition for rehearing en banc in Al-Bihani, the majority of judges of the D.C. Circuit declined “to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.”120 Judge Brown, however, berated the Executive for not accepting her prior dicta and continuing its “eager concession that international law does in fact limit the AUMF.”121 Of course, contrary to her injudicious rant against the use of binding laws of war, the Executive's position was guided by the Supreme Court's decision in Hamdi and was markedly correct.122¶ While still ignoring relevant Supreme Court decisions, Judge Brown apparently considered that the Charming Betsy rule is a mere “scholarly . . . intuition that domestic statutes do not stand on their own authority, but rather rest against the backdrop of international norms,”123 and that \*399 “[h]owever this intuition is phrased, perhaps the majority of judges on this court are apprehensive about unambiguously rejecting it.”124 It is more likely, however, that if they had addressed the use of international law to interpret the AUMF, the majority of judges would have preferred to be mindful of Hamdi and the Charming Betsy and Cook rules, as well as the many other Supreme Court decisions that support application of the rules, and to be mindful of their duty to follow clear and venerable Supreme Court precedent in contrast to apparent ideological sophistry that is manifestly contrary to Supreme Court case law.¶ In a surprising display of misinformation concerning the unyielding and overwhelming number of judicial and other decisions throughout the history of the United States regarding the fact that the President and all other members of the Executive branch are bound by the laws of war,125 the off-the-cuff, precatory remarks of Judge Brown about a supposed “unenforceability of international law norms as limits on the President's war-making authority,”126 a supposed “normal prerogative” of the President “to observe or abrogate international obligations,”127 a supposed lack of judicial power to “enforce non-self-executing or non-incorporated international law against the President,”128 and a supposed authority of the President to \*400 faithfully execute international law as “narrowly as he believes appropriate - consistent with international law or not”129 are dangerous. Judge Brown even berated the Executive for responding “ambivalently, adopting the questionable strategy of conceding Al-Bihani's point” that the laws of war create “judicially enforceable constraints on the President's war powers.”130 Numerous cases that are easily accessible by computer-assisted research prove Judge Brown's assertions to be wrong131 and allow recognition that the Executive's strategy in this instance appears to have been quite sensible and serving of the rule of law. In contrast, Judge Brown's astonishing assertions appear to suspiciously echo an ahistorical, anti-constitutional, and radical ideological blueprint for a commander-above-the-law theory proffered by certain discredited members of the Bush Administration that had encouraged serial criminality132--an infamous and extremist \*401 theory that, in any event, must be continually opposed in order to assure that the widely shared expectations of our Founders, Framers, and an overwhelming number of members of the judiciary, as well as the text and structure of our Constitution will continue to prevail under a government created and bound by law.

#### Tarnogorski says that it is not likely to sway judicial decisions in other cases and that it doesn’t affect our stance on international law

Tarnogorski 10 (Rafa? Tarnogórski is an analyst for the Polish Institute of International Affairs¶ USA and Laws of War (Al-Bihani v. Obama), http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c706023326lng=en26id=112282)

The significance of this appellate ruling extends beyond one specific case of a Yemeni petitioner kept in detention. Firstly, it could sway the direction of judicial decisions in similar cases—though this seems rather unlikely in view of the shift of the Obama administration’s stance on the treatment of enemy combatants and Supreme Court’s Hamdi v Rumsfeld (2004) and Boumediene v. Bush (2008) decisions. Secondly and more importantly, the court took a position on the powers of the U.S. presi- dent as the commander-in-chief under the 18 September 2001 Authorization for Use of Military Force against states, organizations and persons responsible for the terrorist attacks of 11 September 2001. The court found that these presidential prerogatives were not limited by the international laws of war, which had not been transposed as a whole into the domestic law. It is for the legislative branch, not for international law, to delineate the limits of the president’s constitutional powers to use armed force. These powers extend to leaving at the president’s discretion the detention of persons deemed to be enemy belligerents or supporters thereof.¶ The Al-Bihani v. Obama decision is consistent with the U.S. dualist stance on international law, as reflected, for instance, in the Supreme Court’s Medellin v. Texas ruling (2008). The United States respects binding international laws, but the extent of its commitment is at all times determined by the American sovereign. The ruling on Al-Bihani’s appeal does not amount to a permission to violate international law; it only means that international law does not constitute the basis for judicial deci- sions of a U.S. court. This judgment is without prejudice to the binding power of international humani- tarian law, yet it effectively restricts the application of international public law and contributes to cementing a negative image of the U.S. as a power given to opportunistic treatment of international standards

#### The aff is net worse for international legal instutions – prevents future negotiation of treaties and congressional invalidation of current ones

Adebe and Posner 11 (Daniel Abebe, Eric A. Posner, Assistant Professor and Kirkland & Ellis Professor, University of Chicago Law School. ,The Flaws of Foreign Affairs Legalism, 51 Va. J. Int'l L. 507, 527 (2011), Westlaw)

The executive has been the leading promoter of international law. It has negotiated and ratified (sometimes with the Senate's consent, sometimes with Congress's consent, and sometimes without legislative consent) thousands of treaties over the last sixty years,153 including the fundamental \*534 building blocks of the modern international legal system, such as the UN Charter, the GATT/WTO, the International Covenant for Civil and Political Rights, and the Genocide Convention. Through the U.S. State Department, the executive issues annual reports criticizing foreign countries for human rights violations, and the U.S. government has frequently, although not with complete consistency, issued objections when foreign countries violate human rights.154 The executive has also negotiated and signed other important treaties to which the Senate has withheld consent--including the Vienna Convention on the Law of Treaties, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Law of the Sea, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination Against Women, among others.155 The executive has also been instrumental in creating modern international institutions, including the UN Security Council, the GATT/WTO system, the World Bank, and the IMF.156¶ Much of what we said might seem too obvious to mention. One can hardly imagine the judiciary deciding on its own that the United States must create or join some new treaty regime. But these obvious points have been overlooked in the debate about the role of the judiciary in foreign affairs. Virtually everything the judiciary does in this area depends on prior executive action. Only the constitutional interpretation cases seem truly judge-initiated, for in these cases, the Court sometimes cites treaties that the United States has not ratified and sometimes cites the laws of foreign nations.¶ The claim that the judiciary can, and even does, play a primary role in the adoption of international law is puzzling. In almost all cases, the judiciary must follow the executive's lead. This also means that if the judiciary interprets treaties and other sources of international law in an aggressive way--in a way that the executive rejects--the executive may respond by being more cautious about negotiating treaties and adopting international law in the first place. This possible backlash effect has not been documented, but is plausible. As we discuss in the next section, fears of judicial enforcement of certain treaty obligations \*535 led to an effort by the Senate to ensure that those treaties would not have domestic legal effect.

#### Charming Betsy canon meaningless; does not require federal statute compliance

McGrail, 10

[Deputy Clerk, United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT No. 09-5051 GHALEB NASSAR AL-BIHANI, APPELLANT v. BARACK OBAMA,PRESIDENT OF THE UNITED STATES, ET AL., APPELLEES Appeal from the United States District Court for the District of Columbia (No. 1:05-cv-01312) On Petition for Rehearing En Banc, Filed: August 31, 2010, [http://www.cadc.uscourts.gov/internet/opinions.nsf/7D993FB6907397468525780700715176/$file/09-5051-1263353.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/7D993FB6907397468525780700715176/%24file/09-5051-1263353.pdf) //uwyo-baj]

But putting aside the preceding discussion (and the odd conceptual loop it creates), I reiterate that consulting international sources in that manner is not something judges have in their interpretive toolbox. The only generally applicable role for international law in statutory interpretation 11 is the modest one afforded by the Charming Betsy canon, which counsels courts, where fairly possible, to construe ambiguous statutes so as not to conflict with international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); see also Sampson v. Fed. Repub. of Germany, 250 F.3d 1145, 1152 (7th Cir. 2001).6 However, Judge Williams does not appear to confine international law to such a narrow space. By including international discourse among the traditional tools available to courts when interpreting statutes, Judge Williams is not limiting the application of international law to ambiguous statutory text. Generally, a statute’s text is only ambiguous if, after “employing traditional tools of statutory construction,” a court determines that Congress did not have a precise intention on the question at issue. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). It is at this point—analogous to Chevron Step Two— that the Charming Betsy canon has had any application in federal courts. But Judge Williams implies that international law should be consulted in the first instance to influence interpretation at the same level as traditional interpretive tools, making its use predicate to a finding of ambiguity. This implication has the secondary effect of eviscerating the limiting principle of the Charming Betsy canon that it only exerts a negative force on the meaning of statutes, pushing them away from meanings that would conflict with international law. Courts do not apply Charming Betsy as an affirmative indicator of statutory meaning. See, e.g., Sampson, 250 F.3d at 1152–53 (holding the Charming Betsy canon does not require “federal statutes [to be] read to reflect norms of international law”); Princz v. Fed. Repub. of Germany, 26 F.3d 1166, 1174 & n.1 (D.C. Cir. 1994) (rejecting dissent’s argument that statutes must be read “consistently with international law” and must be presumed to “incorporate[] standards recognized under international law,” Princz, 26 F.3d at 1183 (Wald, J., dissenting)). However, under Judge Williams’ method, I see no reason why courts would be bound by this rule, since traditional interpretive sources are normally viewed as indicative of affirmative meaning. These inconsistencies with the Charming Betsy canon make clear that Judge Williams’ proposal cannot possibly be correct. If it were, it would be a mystery why American jurisprudence would even bother to enunciate an interpretive canon like the Charming Betsy. Judge Williams’ approach would make that canon vestigial, foolish even—akin to a canon limiting the use of dictionaries.

#### 1ac card concedes single decisions don’t implicate Charming Betsy – no spillover

Crootoff  11
Rebecca Crootof, J.D. Yale Law School
Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon (April 5, 2011). Yale Law Journal. Available at SSRN: [http://ssrn.com/abstract=1803380](http://ssrn.com/abstract%3D1803380)
 The Charming Betsy Canon Encourages Domestic Courts’ Engagement with International Agreements and International Adoption

Conclusion There are legitimate reasons to celebrate and criticize Medellin’s reasoning. The case clarifies murky areas of domestic law, but it does so at the expense of the United States fulfilling its international commitments. However, those who rejoice in or bemoan Medellin’s seeming presumption in favor of non-selfexecution mistake the case’s import. While high-profile decisions like Medellin will draw fire, treaties’ influence in domestic jurisprudence remains largely unaffected.Treaties, eve self-executing treaties, are rarely used directly. Instead, in concert with the Charming Betsy canon, both self- and non-self-executing treaties serve as useful tools in statutory construction. Existing court practice reflects this understanding, and normative arguments support it. The limited application of the Charming Betsy canon results in relatively costless compliance with international law, accords with separation-of-powers principles by avoiding unintended and possibly undesirable breaches of international obligations, and allows domestic courts to engage with and influence developing norms. In giving meaning to U.S. international obligations while respecting the limits of international law in domestic jurisprudence, judicious application of the Charming Betsy canon in conjunction with non-self-executing treaties reconciles often-opposing interests.

#### Mulltilatiralism fails; Europe’s weak economy and politics; US want for unilateralism; Russo-Chinese block in UN

Grant, 12

[Charles, is director of the Center for European Reform and the author of the C.E.R. report “Russia, China and global governance.” “Multilateralism à la Carte,” The NYT, April 16, 2012, <http://www.nytimes.com/2012/04/17/opinion/multilateralism-a-la-carte.html?_r=0> //uwyo-baj]

Many problems cannot be solved without international cooperation, yet “multilateralism” — the system of international institutions and rules intended to promote the common good — appears to be weakening. The G-20 has become a talk shop; the Doha round of trade liberalization is moribund; the U.N. climate change talks have achieved very little. We seem to be moving toward a world of balance-of-power politics, competing alliances and unilateral actions.¶ One reason for these trends is that Europe, always the biggest supporter of international institutions, is economically, diplomatically and militarily weak; another is that the United States has over the past 20 years become relatively weaker and more prone to unilateralism.¶ A third reason is that the emerging and re-emerging powers — Russia and China in particular — tend to be cynical about international institutions: They see them as Western creations that promote Western interests, though they use them when it suits their purposes.¶ Both implacably opposed to American hegemony, Russia and China are willing to deploy their vetoes on the Security Council to thwart U.S. objectives. Their strong attachment to state sovereignty makes them allergic to humanitarian intervention, as they made clear when vetoing Security Council resolutions that would have criticized the Syrian regime for killing protesters.

#### Treaties are a shoddy patchwork system with no enforcement.

Stark 02, Visiting Professor of Law at Hofstra Law School, 2002 [Barbara, Violations of Human Dignity' and Postmodern International Law, 27 Yale J. Int'l L. 315, Summer]

Unlike domestic law, international law remains fragmentary: there is no Supreme Court to reconcile warring districts, no legislature to fill in doctrinal gaps. Indeed, international "law -making" is often so contentious that no law is made at all; in many areas there are more gaps than law. International law is unapologetically "discontinuous"; the decisions of the International Court of Justice have no precedential value, and those of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are similarly ad hoc. Treaty law applies only to the specific subject the particular treaty addresses and is binding only on the parties to the treaty. While customary international law ("CIL") applies more broadly, states may persistently dissent from CIL and exempt themselves from its coverage. Many of the broad general principals that comprise CIL, moreover, such as the duty to avoid harm to neighboring states, prove difficult to apply in specific cases.

## Warming

**No ozone impact**

**Ridley 12** [Matt Ridley, columnist for The Wall Street Journal and author of *The Rational Optimist: How Prosperity Evolves,* 8/17, “Apocalypse Not: Here’s Why You Shouldn’t Worry About End Times”, http://www.wired.com/wiredscience/2012/08/ff\_apocalypsenot/all/]

The threat to the ozone layer came next. In the 1970s scientists discovered a decline in the concentration of ozone over Antarctica during several springs, and the Armageddon megaphone was dusted off yet again. The blame was pinned on chlorofluorocarbons, used in refrigerators and aerosol cans, reacting with sunlight. The disappearance of frogs and an alleged rise of melanoma in people were both attributed to ozone depletion. So too was a supposed rash of blindness in animals: Al Gore wrote in 1992 about blind salmon and rabbits, while The New York Times reported “an increase in Twilight Zone-type reports of sheep and rabbits with cataracts” in Patagonia. But all these accounts proved incorrect. The frogs were dying of a fungal disease spread by people; the sheep had viral pinkeye; the mortality rate from melanoma actually leveled off during the growth of the ozone hole; and as for the blind salmon and rabbits, they were never heard of again.¶ There was an international agreement to cease using CFCs by 1996. But the predicted recovery of the ozone layer never happened: The hole stopped growing before the ban took effect, then failed to shrink afterward. The ozone hole still grows every Antarctic spring, to roughly the same extent each year. Nobody quite knows why. Some scientists think it is simply taking longer than expected for the chemicals to disintegrate; a few believe that the cause of the hole was misdiagnosed in the first place. Either way, the ozone hole cannot yet be claimed as a looming catastrophe, let alone one averted by political action.

**Can’t solve climate – too fast, stays in the air, and cuts won’t happen.**

David G. **Victor et al 12,** Professor at the School of International Relations and Pacific Studies at the University of California, San Diego, May/Jun (with Charles F. Kennel and Veerabhadran Ramanathan, Foreign Affairs, Vol. 91 Issue 3)

FOR MORE than two decades, diplomats have struggled to slow global warming. They have negotiated two major treaties to achieve that goal, the 1992 UN Framework Convention on Climate Change and the 1997 Kyoto Protocol. And last year, at the UN Climate Change Conference in Durban, South Africa, they agreed to start talking about yet another treaty. A small group of countries, including Japan and the members of the European Union, now regulate their emissions in accord with the existing agreements. But most states, including the largest emitters of greenhouse gases, China and the United States, have failed to make much progress. As a result, total **emissions** of carbon dioxide, the leading long-term cause of global warming, **have risen by more than 50 percent** since the 1980s **and are poised to rise by more than 30 percent** in the next two to three decades.¶ **The ever-increasing quantity of emissions** could **render moot the aim** that has guided international climate diplomacy for nearly a decade: **preventing the global temp**erature **from rising by** more than **two degrees** Celsius above its preindustrial level. In fact, in the absence of significant international action, **the planet is now on track to warm by at least 2.5 degrees** during the current century -- and **maybe** even **more**. The known effects of this continued warming are deeply troubling: rising sea levels, a thinning Arctic icecap, extreme weather events, ocean acidification, loss of natural habitats, and many others. Perhaps even more fearsome, however, are the effects whose odds and consequences are unknown, such as the danger that melting permafrost in the Arctic could release still more gases, leading to a vicious cycle of still more warming.¶ All these risks are rising sharply because the traditional approach to international climate diplomacy has failed. For too long, climate science and policymaking have focused almost exclusively on emissions of carbon dioxide, most of which come from burning fossil fuels. **Weaning** the planet **off fossil fuels has proved difficult**, partly because expensive and rapid shifts to new energy systems could have negative effects on the competitiveness of modern economies. What is more, **carbon dioxide** inconveniently **remains** in the atmosphere **for centuries**, and so **even** keeping carbon dioxide **at current levels would require deep cuts** sustained over many decades -- **with economic consequences** that states are unlikely to be willing to bear unless they are confident that their competitors will do the same. No permanent solution to the climate problem is feasible without tackling carbon dioxide, but **the** economic and geophysical **realities of** carbon dioxide **emissions** almost **guarantee** political **gridlock.**

**An international solution to global warming is impossible – entrenched interests in key stakeholders mean that no agreement will ever be reached**

**Rachman 11** (Gideon Rachman, Financial Times chief foreign affairs commentator, Zero-Sum Future, 2011, pp 203-204)

As for the Americans themselves, faced with foreign suggestions that America's love affair with the open road would have to be modified, **President** George W. **Bush was fond of replying that "the American way of life is not negotiable**." Barack **Obama might not be that blunt, but he too knows that it would be electoral suicide to impose huge new environmental costs on the American economy** while apparently giving China a free pass. **It was this impasse that helped to cause the Copenhagen climate talks to** fail. **There will be efforts to revive a global climate deal, but they all risk falling foul of the same zero-sum economic logic**. **Most of the** proposed global **deals** on climate change **envisage the United States and Europe essentially bribing the developing world** to cut carbon emissions by funding the transfer of technology. **But any such deal will be very tough to sell politically in the United States with America running record budget deficits and China sitting on more than $2 trillion worth of reserves**. **Even if some sort of global climate deal is reached, it will just be the first of many such negotiations** as both global warming and technology advance. **The trouble is that agonizing global negotiations are likely to deliver an agreement that falls well short of what scientific advice deems to be necessary-and any such deal will, in any case, prove to be almost impossible to monitor and enforce. That in turn will ensure that climate change continues to be a major source of tension within the international system**.

## 2NC/R

#### The fight is nowhere close to finished—pressure is still there and it is only a matter of time—Obama needs to maintain PC

Starks 1-28

(Tim, Roll Call staff. “Fate of Iran Sanctions Bill Rests Largely With Reid” 1-28-14 http://www.rollcall.com/news/fate\_of\_iran\_sanctions\_bill\_rests\_largely\_with\_reid-230448-1.html?pg=3//wyoccd)

Though momentum has stalled for a Senate vote on the Iran sanctions bill, Bloomfield notes that AIPAC has positioned itself well as Obama pursues a final Iran nuclear accord.¶ “They’ve already got 59 co-sponsors,” he said. “The administration and Reid are on notice. That’s not chopped liver.”¶ While some observers see the momentum for the bill as having stalled, others contend that it will continue to build over time, owing to some national opinion polls that point to Obama’s position weakening and damaging remarks from Iranian officials.¶ Reid “is responsible for keeping the chamber Democratic in the fall and I think he knows that the longer he puts off a vote, the more politically untenable his position becomes,” said a senior Senate aide.¶ The stance by Rouhani “bolsters the case for this legislation as possibly the last best hope to pressure the Iranians to dismantle their nuclear program before military action becomes the only available option,” the aide said. “Clearly, without the threat of future sanctions, Iran will not dismantle its infrastructure, which means either Iran one day gets the bomb or targeted military strikes destroy Iran’s nuclear infrastructure first.” Dubowitz also warned of the potential for Reid’s and the president’s position to backfire.¶ “The consequences for the White House of blocking the bill, and attacking senators as warmongers, are that the White House will own the failure if Iran refuses to reach an acceptable deal and ends up with the capacity for a nuclear weapons breakout,” Dubowitz said. “Reid, too, will be complicit in this failure if he is perceived as standing against the majority of his colleagues.”¶ Reid’s office did not answer a request for comment.

**Obama has perceptually won the battle over sanctions—but it is close and pressure is mounting**

**Crittenden 2-5**

(Michael, Wall Street Journal. “Congress Eases Standoff With White House Over Iran Sanctions” 2-5-14 https://mail.google.com/mail/u/0/#inbox/1440308321fc2858//wyoccd)

WASHINGTON—**The Obama administration appeared to be prevailing in its effort to persuade lawmakers to give U.S. diplomacy with Iran a chance, but faced continued skepticism from senators** at a hearing Tuesday.¶ **Senior aides said pressure on Senate leaders to allow a vote on new sanctions has eased in recent weeks, as lawmakers gauge the effectiveness of an interim deal reached in November between Iran and world powers.**¶ **But while many lawmakers said they were willing to give diplomacy time to work, Democrats and Republicans alike said the stakes were high if talks** fail.¶ "**If these negotiations fail, there are two grim alternatives, a nuclear Iran, or war, or perhaps both,"** **said** Sen. Richard **Durbin** (D., Ill.), a Senate Foreign Relations Committee member.¶ **The White House and lawmakers have wrestled over the issue for months. Many in Congress support new sanctions, while the administration insists such a step would disrupt high-level negotiations with Tehran**. A six-month deal provides Iran with relief from international sanctions in exchange for enhanced inspections and Tehran's agreement to halt or roll back parts of its nuclear program.¶ Sen. Robert Menendez (D., N.J.), chairman of the Senate Foreign Relations Committee, argued the agreement provides Iran with economic benefits that outpace what Western governments have received in return. He said he remained concerned Iran would never agree to fully put aside its nuclear ambitions.¶ "I am convinced that we should only relieve pressure on Iran in return for verifiable concessions that will fundamentally dismantle Iran's nuclear program," Mr. Menendez said.¶ A top State Department official argued that any move by the U.S. to impose new sanctions would risk unraveling the international talks. "It is crucial we give diplomacy a chance to succeed," Wendy Sherman, the State Department undersecretary of political affairs, told the Foreign Relations panel.¶ President Barack Obama and his administration have urged lawmakers to hold off on additional actions. Mr. Obama vowed in his State of the Union address to veto any bill "that threatens to derail these talks."¶ **Lawmakers have bristled at some of the White House criticism, particularly the suggestion that those seeking more sanctions were in favor of war**. Sen. Timothy **Kaine** (D., Va.), addressing those complaints Tuesday, **said that those who support new sanctions "are not pro-war and those that oppose it are not soft on Iran or anti-Israel."**¶ **"We all want exactly the same thing…we all will prefer if we can get to that diplomatically,**" Mr. Kaine said.¶ Ms. Sherman, stepping back from the more strident administration language, agreed.¶ "**I don't believe anyone prefers war," she said, calling the two sides' positions a difference over tactics.**

#### We control time frame and magnitude – deal failure draws in global powers and goes nuclear within months

PressTV 11/13

Global nuclear conflict between US, Russia, China likely if Iran talks fail, 11/13/13,<http://www.presstv.ir/detail/2013/11/13/334544/global-nuclear-war-likely-if-iran-talks-fail/>

A global conflict between the US, Russia, and China is likely in the coming months should the world powers fail to reach a nuclear deal with Iran, an American analyst says.¶ “If the talks fail, if the agreements being pursued are not successfully carried forward and implemented, then there would be enormous international pressure to drive towards a conflict with Iran before [US President Barack] Obama leaves office and that’s a very great danger that no one can underestimate the importance of,” senior editor at the Executive Intelligence Review Jeff Steinberg told Press TV on Wednesday. ¶ “The United States could find itself on one side and Russia and China on the other and those are the kinds of conditions that can lead to miscalculation and general roar,” Steinberg said. ¶ “So the danger in this situation is that if these talks don’t go forward, we could be facing a global conflict in the coming months and years and that’s got to be avoided at all costs when you’ve got countries like the United States, Russia, and China with” their arsenals of “nuclear weapons,” he warned.

**That draw in causes global nuclear conflict – draws in Russia and China AND leads to the detonation of CBW’s**

**Morgan 09**

[Dennis Ray Morgan, Hankuk University of Foreign Studies- South Korea, 10 July 2009, World on fire: two scenarios of the destruction of human civilization and possible extinction of the human race, Futures 41 (2009) 683–693, uwyo//amp]

**Given the present day predicament regarding Iran’s attempt to become a nuclear power, particular attention should be given to one of Moore’s scenarios depicting nuclear war that begins through an attack on Iran’s supposed nuclear facilities**. According to Seymour Hersh [12] **the nuclear option against Iran has, in fact, been discussed** by sources in the Pentagon as a viable option. As Hersh reports, **according to a former intelligence officer, the lack of ‘‘reliable intelligence leaves military planners, given the goal of totally destroying the sites, little choice but to consider the use of tactical nuclear weapons. ‘Every other option, in the view of the nuclear weaponeers, would leave a gap,’** the former senior intelligence official said. ‘Decisive is the key word of the Air Force’s planning. **It’s a tough decision. But we made it in Japan**.’’ [12].10 The official continues to explain **how White House and Pentagon officials are considering the nuclear option for Iran, ‘‘Nuclear planners go through extensive training** and learn the technical details of damage and fallout - we’re talking about mushroom clouds, radiation, mass casualties, and contamination over years. This is not an underground nuclear test, where all you see is the earth raised a little bit. **These politicians don’t have a clue, and whenever anybody tries to get it out – remove the nuclear option – they’re shouted down’’** [12]. Understandably, some members of the Joint Chiefs of Staff were not comfortable about consideration of the nuclear option in a first strike, and some officers have even discussed resigning. Hersh quotes the former intelligence officer as saying, ‘‘Late this winter, the Joint Chiefs of Staff sought to remove the nuclear option from the evolving war plans for Iran - without success. The White House said, ‘Why are you challenging this? The option came from you’’’ [12]. **This scenario has gained even more plausibility since a January 2007 Sunday Times report [13] of an Israeli intelligence leak that Israel was considering a strike against Iran, using low-yield bunker busting nukes to destroy Iran’s supposedly secret underground nuclear facilities. In Moore’s scenario, non-nuclear neighboring countries would then respond with conventional rockets and chemical, biological and radiological weapons. Israel then would retaliate with nuclear strikes on several countries, including a pre-emptive strike against Pakistan, who then retaliates with an attack not only on Israel but pre-emptively striking India as well. Israel then initiates the ‘‘Samson option’’ with attacks on other Muslim countries, Russia, and possibly the ‘‘anti-Semitic’’ cities of Europe. At that point, all-out nuclear war ensues as the U.S. retaliates with nuclear attacks on Russia and possibly on China** as well.11 Out of the four interrelated factors that could precipitate a nuclear strike and subsequent escalation into nuclear war, probably the accidental factor is one that deserves particular attention since its likelihood is much greater than commonly perceived. In an article, ‘‘20 Mishaps that Might Have Started a Nuclear War,’’ Phillips [14] cites the historical record to illustrate how an accident, misinterpretation,or false alarm could ignite a nuclear war. Most of these incidents occurred during a time of intense tension between the U.S. and the Soviet Union in the Cuban Missile Crisis, but other mishaps occurred during other times, with the most recent one in 1995. Close inspection of each of these incidents reveals how likely it is that an ‘‘accident’’ or misinterpretation of phenomena or data (‘‘glitch’’) can lead to nuclear confrontation and war. In his overall analysis, Phillips writes: The probability of actual progression to nuclear war on any one of the occasions listed may have been small, due to planned ‘‘failsafe’’ features in the warning and launch systems, and to responsible action by those in the chain of command when the failsafe features had failed. However, the accumulation of small probabilities of disaster from a long sequence of risks adds up to serious danger. There is no way of telling what the actual level of risk was in these mishaps but if the chance of disaster in every one of the 20 incidents had been only 1 in 100, it is a mathematical fact that the chance of surviving all 20 would have been 82%, i.e. about the same as the chance of surviving a single pull of the trigger at Russian roulette played with a 6- shooter. With a similar series of mishaps on the Soviet side: another pull of the trigger. If the risk in some of the events had been as high as 1 in 10, then the chance of surviving just seven such events would have been less than 50:50. [14]12 **Aggression in the Middle East along with the willingness to use low-yield ‘‘bunker busting’’ nukes by the U.S. only increases the likelihood of nuclear war and catastrophe in the future. White House and Pentagon policy-makers are seriously considering the use of strategic nuclear weapons against Iran**. As Ryan McMaken explains, **someone at the Pentagon who had . . .not yet completed the transformation into a complete sociopath leaked the ‘Nuclear Posture Review’ which outlined plans for a nuclear ‘end game’ with Iraq, Iran, Libya, North Korea, and Syria, none of which possess nuclear weapons. The report also outlined plans to let the missiles fly on Russia and China** as well, even though virtually everyone on the face of the Earth thought we had actually normalized relations with them. **It turns out, much to the surprise of the Chinese and the Russians, that they are still potential enemies in a nuclear holocaust.**

**2NC- AT Impact D**

**No defense—Israeli anxiety is extreme and even defensive measures escalate**

Ehud **Eiran 13** is an Assistant Professor at the University of Haifa and an Affiliate of the Middle East Negotiation Initiative at the Program on Negotiation, Harvard Law School. Eiran is also a former Assistant to the Foreign Policy Advisor to Israel’s Prime Minister. The Sum of all Fears: Israel’s Perception of a Nuclear-Armed Iran, <http://live.belfercenter.org/files/thesumofallfears.pdf>, The Washington Quarterly • 36:3 pp. 7789

First, **Israel not only has a particular view of the threat posed by** the military dimension of **the Iranian nuclear program**, **it also has an independent means of taking action** **to alleviate its fears**. Although Israel is less capable than the United States, **if Israel were to launch strikes on Iran** to set back the nuclear program, **the effects would ripple across the region and beyond**. Meir Dagan, former head of Israel’s external intelligence agency, the Mossad, warned a number of times that an Israeli attack on Iran would ‘‘ignite a regional war.’’1

Second, **Israel’s anxieties over Iran could produce a series of defensive moves and escalating responses which spiral out of control in a manner that neither side intends**. **As the history of war and conflict in the Middle East from** the June **1967** Six-Day War **to** the November 2012 round of **violence between Israel and the Gaza-based Hamas reminds us**, the **Middle East is a tinderbox where a few sparks could all too easily ignite a major conflagration**.

Finally, as President Obama’s March 2013 visit to Israel demonstrated, **Israel’s fears of Iran have become an inescapable and urgent concern for U.S. policy** in the Middle East. Given the U.S.—Israeli friendship, President Obama will need to pay close attention to these sensitivities toward Iran. **A clear understanding of Israeli perceptions of Iran will remain essential** to U.S. policy toward Tehran.

**Any attack leads to maximum destruction possible—Iran will retaliate and will not relent**

**Berman 2-4**

(Lazar, Times of Israel. “Iran warns: ‘No boundary to response’ if US strikes” 2-4-14 http://www.timesofisrael.com/iran-warns-no-boundary-to-response-if-us-strikes//wyoccd)

**Iran ramped up its rhetoric against the United States over the weekend even as Western powers began easing sanctions on the Islamic Republic**, saying that the country would **“recognize no boundary for its response” if America exercised its military option**.¶ Get The Times of Israel's Daily Edition by email ¶ and never miss our top stories FREE SIGN UP!¶ **“The US military option is of no care to us,”** said Iranian Revolutionary Guards Corps deputy commander Hossein Salami in a televised interview Saturday night, according to the semi-official Iranian Fars news agency. “**They can use this option but should take the responsibility for its destructive consequences too**.”¶ “The US can have different scenarios against Iran, including air, missile and limited ground incursion,” Salami added. “**All these scenarios have been identified, all possibilities have been studied and we have complete intelligence superiority in all these cases and operational strategies.**”¶ Salami was apparently responding to a January 23rd Al Arabiya interview, in which US Secretary of State John Kerry said that if Iran continues enrichment of uranium beyond permitted levels or breaks out toward a nuclear weapons capability, **“then the military option that is available to the United States is ready and prepared to do what it would have to do**.”¶Shortly after Salami’s interview, Defense Minister Hossein Dehgan adopted a similar tone during a ceremony marking the return from exile of Islamic Republic founder Ruhollah Khomeini, Fars reported.¶ “**The world’s arrogant powers are today scared of Iran’s high defensive capabilities and for the same reason their style of sanctions and threats are changed everyday,”** said Dehgan**.¶ This is not the first time senior Iranian defense officials derided the US military threat. Last week, IRGC Navy Commander Ali Fadavi joined the criticism, saying, “The military option is a laughable subject. Even John Kerry’s children snicker at it.”¶ Despite the rhetoric coming from Tehran’s defense establishment, Iran and the P5+1 are scheduled to hold a new round of talks in Vienna on February 18 in a bid to discuss a comprehensive solution to Tehran’s contested nuclear program.¶ Iran signed the interim deal in November with the P5+1 group — Britain, China, France, Russia, the United States and Germany — and began implementing the agreement on January 20.¶ Under the agreement, which is to last six months, Iran committed to limit its uranium enrichment to five percent, halting production of 20 percent-enriched uranium.¶ In return, the European Union and the United States have eased crippling economic sanctions on Iran.**

**Both the US and Israel will strike if talks collapse**

**Kearn, 1/19/14** - Assistant Professor, St. John’s University (David, Huffington Post, “The Folly of New Iran Sanctions,” <http://www.huffingtonpost.com/david-w-kearn/the-folly-of-new-iran-san_b_4619522.html>)

Nonetheless, this debate has effectively been made moot by official U.S. and Israeli policies. **The clear commitment of** the **Obama** administration **to thwart Tehran from acquiring a nuclear weapon has been in place for some time**. **Containment is not an option, and military force will** ostensibly **be used to prevent an Iranian nuclear weapon from becoming operational**. Despite this commitment, **the Israeli government has consistently expressed its willingness to act alone to stop an Iranian bomb even without U.S. support**. While hardliners in Tel Aviv and Washington may not agree, these are both credible threats that the regime in Tehran must take seriously. Thus**, the situation confronting Iran and the world is either the peaceful negotiated solution to the nuclear question, or the high likelihood of another destructive, costly war** in a region already torn apart by conflict.¶ The current sanctions bill in the Senate is not about providing President Obama and Secretary Kerry with greater leverage in the negotiations. The Iranian delegation has made clear that it views any such sanctions as an indication of bad faith that will wreck the process and undo any progress made to this point. With the interim agreement set to go into effect next week, this is clearly not the time for the Senate to usurp the authority of the commander-in-chief and his chief diplomat. Taking their respective rationales at face value, the Democratic members of the Senate supporting the sanctions legislation may have good intentions to provide a stronger "bad cop" to Secretary Kerry's "good cop" in Geneva. This is short-sighted. **New sanctions will not only play into the narrative of hard-liners in Iran** who don't want agreement, **it will also isolate the United States from its negotiating partners and likely cripple the cohesive united front that has seemingly emerged throughout the talks**. In doing so, **it is most likely to fulfill the wishes of hardliners in Israel and the U**nited **S**tates that simply don't want an agreement and refuse to take any "yes" for an answer. However, **with a failure of negotiations, military conflict is much more likely**.

### UQ O/V Link

**3.] New wave of Republican pressure will force a vote and sway people on the fence, consistent PC is key**

**Rogin 2-5**

(Josh, Daily Beast. “GOP Will Force Reid to Save Obama’s Iran Policy—Over and Over Again” 2-5-14 http://www.thedailybeast.com/articles/2014/02/05/gop-will-force-reid-to-save-obama-s-iran-policy-over-and-over-again.html//wyoccd)

**The Republican Senate caucus is planning to use every parliamentary trick in the book to push Senate Majority Leader Harry Reid to allow a floor vote on a new Iran sanctions bill that the Obama administration strenuously opposes**.¶ **The Obama White House has succeeded in keeping most Democrats in line against supporting quick passage** of the “Nuclear Weapon Free Iran Act,” **which currently has 59 co-sponsors, including 13 Democrats. Reid has faithfully shelved the bill**, pending the outcome of negotiations between Iran and the world’s major powers—the so-called “P5+1.”¶ “**But tomorrow, Republicans plan to respond by using an array of floor tactics—including bringing up the bill and forcing Reid to publicly oppose it—as a means of putting public pressure on Reid and Democrats who may be on the fence.**¶ **Now we have come to a crossroads**. Will the Senate allow Iran to keep its illicit nuclear infrastructure in place, rebuild its teetering economy and ultimately develop nuclear weapons at some point in the future?” 42 GOP senators wrote in a letter sent to Reid late Wednesday and obtained by The Daily Beast. “The answer to this question will be determined by whether you allow a vote on S. 1881, the bipartisan Nuclear Weapon Free Iran Act, which is cosponsored by more than half of the Senate.”¶ **The GOP letter calls on Reid to allow a vote on the bill during the current Senate work period**—in other words, before the chamber’s next recess. Senate GOP aides said that until they get a vote, **GOP senators are planning to use a number of procedural tools at their disposal to keep this issue front and center for Democrats. Since the legislation is already on the Senate’s legislative calendar, any senator can bring up the bill for a vote at any time and force Democrats to publicly object.** ¶ **Senators can also try attaching the bill as an amendment to future bills under consideration.** Senate Minority Leader Mitch McConnell has been a harsh critic of Reid’s shelving of the bill, so he could demand a vote on it as a condition of moving any other legislation.¶ If those amendments are blocked by Reid, Senators can then go to the floor and make speech after speech calling out Reid for ignoring a bill supported by 59 senators—and calling on fence-sitting Democrats to declare their position on the bill.¶ “This letter is a final warning to Harry Reid that if Democrats want to block this bipartisan legislation, they will own the results of this foreign policy disaster,” one senior GOP senate aide said.¶ The Republican senators believe, based on recent polls, that the majority of Americans support moving forward with the Iran sanctions bill now. They also believe that if Reid did allow a vote, the bill would garner more than the 59 votes of its co-sponsors and that Democrats vulnerable in 2014 races would support it, pushing the vote total past a veto-proof two-thirds supermajority.¶ “I stand with the majority of Americans who want Iran’s illicit nuclear infrastructure dismantled before economic sanctions are lifted,” Sen. Mark Kirk, one of the bill’s sponsors, told The Daily Beast. “The American people deserve a vote on the bipartisan Nuclear Weapon Free Iran Act.”¶ Besides McConnell and Kirk, other senators prepared to lead the effort to demand a vote on the bill include Marco Rubio and Lindsey Graham.¶ The bill would do three things: reimpose existing sanctions suspended under the interim agreement if Iran cheats on its commitments; ensure that a final agreement must require Iran to dismantle its illicit nuclear infrastructure; and threaten to impose additional economic sanctions in the future should Iran cheat on its commitments or fail to agree to a final deal that dismantles its nuclear infrastructure.¶ Last week, Iranian President Hassan Rouhani told CNN’s Fareed Zakaria (Iranian President Hassan Rouhani told CNN’s Fareed Zakaria) that Iran would never dismantle centrifuges under any circumstances. Iran’s top nuclear negotiator said last month that interim steps Iran has taken to curtail its nuclear activities could be reversed within one day.¶ During his State of the Union address last month, President Obama pledged to veto the bill if it reached his desk. Speaking with CNN’s Jake Tapper Wednesday, Secretary of State John Kerry urged the senate not to pass the measure.¶ “I believe it’s a mistake now to break faith with a negotiating process when you’re in the middle of the process. The United States of America agreed, together with our P5+1 allies, with Russia, China, France, Great Britain, Germany, all of them agreed that during the time we’re negotiating, we would not increase sanctions,” said Kerry. “**Now, our word has to mean something, too. If we’re going to negotiate, we don’t want to be responsible for now creating a dynamic where we destroy the negotiations… so they can blame us for not getting there.”**

**[4.] Sanctions bill is by no means dead—Republican pressure is driving a wedge between dems and Obama—Needs PC to keep the bill from a vote AND even if it does he needs to keep undecided dems on his side**

**Stoil 2-6**

(REBECCA SHIMONI STOIL, Times of Israel. “Republicans said set to push Iran bill to a vote” 2-6-14 http://www.timesofisrael.com/republicans-said-set-to-push-iran-bill-to-a-vote//wyoccd)

WASHINGTON — **After days in which political insiders here tried to write the obituary for the Senate bill that would impose additional sanctions on a recalcitrant Iran, Republican senators were poised Thursday to renew their push on the legislation.** In a letter, **Senate Republicans called on** Senate Majority Leader Harry **Reid** (D-NV**) to allow the bill, which has driven a wedge between some Democrats and the administration, to come to a vote**.¶ The Daily Beast reported that Republican senators were planning on utilizing procedural tools on Thursday to pressure Reid into allowing the bipartisan Nuclear Weapon Free Iran Act to be voted upon. The Obama administration has been adamant in its opposition to the legislation, which was initiated in December by Senators Mark Kirk (R-IL) and Robert Menendez (D-NJ).¶ **The bill currently has 59 co-sponsors, hovering just below a veto-proof majority in the upper house. While 13 Democrats support the bill, a number have chosen to sit on the fence in a struggle that pits the administration against powerful lobbying groups such as AIPAC**.¶ **Although the bill is on the Senate calendar, Reid has refused thus far to schedule a vote on the legislation, which has driven a wedge among Democrats who hold a thin majority in the upper house.** In their letter, Senate Republicans called on Reid to bring the bill to a vote – not just because of the significance of the legislation itself, but as a matter of democratic principle.¶ “**You have already taken unprecedented steps to take away the rights of the minority in the Senate,”** the senators wrote to Reid. “**Please do not take further steps to take away the rights of a bipartisan majority as well.”**¶ In the letter, the senators also noted that “**the American people – Democrats and Republicans alike – overwhelmingly support this legislation.”**¶ **Senators can use the floor to publicly call out Reid and the Democratic leadership for refusing to allow a vote**, or can tack the bill on as an amendment to other pieces of legislation deemed important by the Senate leadership. They can also refuse to support legislation if the bill is not brought to a vote.¶ In last week’s State of the Union address, President Barack Obama warned that “if this Congress sends me a new sanctions bill now that threatens to derail these talks, I will veto it.”¶ Supporters say the bill reinforces rather than undermines presidential authority by allowing the president to waive future sanctions either by certifying Iranian compliance with the interim agreement with Iran reached in Geneva late last year, or in the event that a final agreement is reached. At the same time, it sets basic terms for a deal, mandating that a final arrangement must dismantle Iran’s nuclear infrastructure.¶ The bill’s reported demise came following repeated lobbying efforts both by the administration as well as by a coalition of lobbying groups including J Street, Americans for Peace Now, the National Iranian American Council, the American Security Project and the Atlantic Council, coordinated under the leadership of the Ploughshares Fund.¶ Under pressure from the administration, at least four Democratic co-sponsors of the bill, including Chris Coons (D-DE), Kirsten Gillibrand (D-NY), Joe Manchin (D-WV), and Richard Blumenthal (D-CT) all have indicated that they are willing to put the bill on ice – at least for the time being.¶ In an interview with MSNBC last month, Manchin said that he “did not sign it with the intention that it would ever be voted upon or used upon while we were negotiating.”¶ Saying that it would be good to “give peace a chance,” Manchin said he co-sponsored the bill “because I wanted to make sure the president had a hammer if he needed it and showed them how determined we were to do it and use it if we had to.”¶ **Republicans will attempt to force Democrats to stake a position on record, creating a catch-22 situation for the Democratic legislators who will have to vote against a bill they co-sponsored or go against a Democratic administration**.¶ Iran on January 20 stopped enriching uranium to 20 percent and started neutralizing its existing stockpile of that grade — just steps away from weapons material — in order to fulfill commitments reached under an interim deal in Geneva. The US and the European Union also lifted some sanctions in response to the Iranian moves.¶ The interim Geneva accord will last for six months as Iran and the six-nation group — the five permanent members of the UN Security Council plus Germany — negotiate a final deal. Those talks are to start February 18 in Vienna.

### Link

**Obama’s appointments give him a judicial legacy**

**Reuters 8/5/10** ("Senate approves Obama nominee Kagan to top court," http://webcache.googleusercontent.com/search?q=cache:8oM3T-dMCDYJ:www.reuters.com/article/idUSTRE6744YW20100805+obama+kagan+supreme+court+2+appointees&cd=3&hl=en&ct=clnk&gl=us)

(Reuters)—President Barack **Obama's nomination of** Elena **Kagan to the Supreme Court won Senate approval** on Thursday, **his second appointment to the court that decides abortion, death penalty and other contentious cases.** The Democratic-led Senate voted largely along party lines, 63-37, to confirm the former Harvard Law School dean as the fourth female justice in U.S. history and the 112th high court member. Kagan was Obama's solicitor general, arguing government cases before the Supreme Court, when he named her in May as his choice to replace the retiring liberal Justice John Paul Stevens. The 50-year-old Kagan, who will be the third woman on the current court, is not expected to change the ideological balance of power on the closely divided panel, which for years has been dominated by a 5-4 conservative majority. All Democratic senators but one voted for her, two independent senators voted for her and five Republicans voted for her. All other Republican senators opposed her nomination. OBAMA'S JUDICIAL LEGACY **Kagan becomes Obama's second** lifetime **appointee on the** nine-member Supreme **Court, allowing him to reshape the court and leave a judicial legacy** that could last long after he leaves office. U.S. appeals court Judge Sonia **Sotomayor was confirmed last year** by a 68-31 vote as the first Hispanic Supreme Court justice. **The two appointments underscore an effort by Obama to move the court to the left after** Republican President George W. **Bush nominated a pair of conservative judges** to the bench.

**Courts are not insulated from politics – congressional and presidential appointments have turned courts into politicized bodies**

**Harrison**, Lecturer in Law, **05**

(Lindsay Harrison, Lecturer in Law at the University of Miami School of Law "Does the Court Act As "Political Cover" for the Other Branches?"11-18-2005 <http://legaldebate.blogspot.com/2005/11/does-court-act-as-political-cover-for.html>)

Does the Court Act as "Political Cover" for the Other Branches? **While the Supreme Court may have historically been able to act as political cover for the President and/or Congress, that is not true in a world post-Bush v. Gore. The Court is seen today as a politicized body**, and especially now that we are in the era of the Roberts Court, **with a Chief Justice hand picked by the President and approved by the Congress**, it is highly unlikely that **Court action will** not, at least to some extent, **be blamed on** and/**or credited to the President and Congress**. The Court can still get away with a lot more than the elected branches since people don't understand the technicalities of legal doctrine like they understand the actions of the elected branches; this is, in part, because the media does such a poor job of covering legal news. Nevertheless**, it is preposterous to argue that the Court is entirely insulated from politics, and equally preposterous to argue that** Bush and the **Congress would not receive at least a large portion of the blame for a Court ruling** that, for whatever reason, received the attention of the public.

**Specifically true in context of dems- our I/L**

**Calabresi, 2008**

[Massimo, TIME, 6-26, “Obama's Supreme Move to the Center Washington” Thursday, http://www.time.com/time/politics/article/0,8599,1818334,00.html]

When the Supreme Court issues rulings on hot-button issues like gun control and the death penalty in the middle of a presidential campaign, Republicans could be excused for thinking they'll have the perfect opportunity to paint their Democratic opponent as an out-of-touch social liberal. But while Barack Obama may be ranked as one of the Senate's most liberal members, his reactions to this week's controversial court decisions showed yet again how he is carefully moving to the center ahead of the fall campaign. On Wednesday, after the Supreme Court ruled that the death penalty was unconstitutional in cases of child rape, Obama surprised some observers by siding with the hardline minority of Justices Scalia, Thomas, Roberts and Alito. At a press conference after the decision, Obama said, "I think that the rape of a small child, six or eight years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances the death penalty is at least potentially applicable, that that does not violate our Constitution." Then Thursday, after Justice Scalia released his majority opinion knocking down the city of Washington's ban on handguns, Obama said in a statement, "I have always believed that the Second Amendment protects the right of individuals to bear arms, but I also identify with the need for crime-ravaged communities to save their children from the violence that plagues our streets through common-sense, effective safety measures. The Supreme Court has now endorsed that view." John McCain's camp wasted no time in attacking, with one surrogate, conservative Senator Sam Brownback of Kansas, calling Obama's gun control statement "incredible flip-flopping." McCain advisor Randy Scheunemann was even tougher in a conference call Thursday. "What's becoming clear in this campaign," Scheunemann said, is "that for Senator Obama the most important issue in the election is the political fortunes of Senator Obama. He has demonstrated that there really is no position he holds that isn't negotiable or isn't subject to change depending on how he calculates it will affect his political fortunes." Politicians are always happy to get a chance to accuse opponents of flip-flopping, but McCain's team may be more afraid of Obama's shift to the center than their words betray. Obama has some centrist positions to highlight in the general election campaign on foreign policy and national security, social issues and economics. His position on the child rape death penalty case, for example, is in line with his record in Illinois of supporting the death penalty. He is on less solid ground on the gun ban as his campaign said during the primary that he believed the D.C. law was constitutional. A top legal adviser to Obama says both cases are consistent with his previous positions. "I don't see him as moving in his statements on the death penalty or the gun case," says Cass Sunstein, a former colleague of Obama's at the University of Chicago. Sunstein says Obama is "not easily characterized" on social issues, and says the Senator's support for allowing government use of the Ten Commandments in public, in some cases, is another example of his unpredictability on such issues. On the issue of gun control, he says Obama has always expressed a belief that the Second Amendment guarantees a private right to bear arms, as the court found Thursday. But Obama's sudden social centrism would sound more convincing in a different context. Since he wrapped up the primary earlier this month and began to concentrate on the independent and moderate swing voters so key in a general election, Obama has consistently moved to the middle. He hired centrist economist Jason Furman, known for defending the benefits of globalization and private Social Security accounts, to the displeasure of liberal economists. On Father's Day, Obama gave a speech about the problem of absentee fathers and the negative effects it has on society, in particular scolding some fathers for failing to "realize that what makes you a man is not the ability to have a child — it's the courage to raise one." Last week, after the House passed a compromise bill on domestic spying that enraged liberals and civil libertarians, Obama announced that though he was against other eavesdropping compromises in the past, this time he was going to vote for it. Whether Obama's new centrist sheen is the result of flip-flopping or reemphasizing moderate positions, the Supreme Court decisions have focused attention again on the role of the court in the campaign season. McCain himself is vulnerable to charges of using the Supreme Court for political purposes. Earlier this month, when the court granted habeas corpus rights to accused terrorist prisoners at Guantanamo Bay, McCain attacked the opinion in particularly harsh language, though advisers say closing the prison there is high on his list of actions to rehabilitate America's image around the world. Liberals are hoping that despite Obama's moderate response to the Supreme Court decisions, the issues alone will rally supporters to him. "What both of these decisions say to me is that the Supreme Court really is an election-year issue," says Kathryn Kolbert, president of People For the American Way. "We're still only one justice away from a range of really negative decisions that would take away rights that most Americans take for granted," she says. And Obama's run to the center surely won't stop conservatives from using the specter of a Democratic-appointed Supreme Court to try to rally support. "Its pretty clear that if he's elected and Justice Scalia or Kennedy retires that he's going to appoint someone who's very likely to reverse [the gun control decision]," says Eugene Volokh, a professor at the UCLA School of Law. Given how Obama has been responding to the recent Supreme Court decisions, however, you're not likely to hear him talking about appointing liberal justices much between now and November.

**The President has institutional incentives to resist encroachments on authority even if he agrees with the policy**

**Posner and Vermeule, 8 -** \*professor of law at the University of Chicago AND \*\*professor of law at Harvard (Eric and Adrian, “Constitutional Showdowns” 156 U. Pa. L. Rev. 991, lexis)

**In many** historical **cases, Congress and the President agree about the policy outcome but disagree about lines of authority**. For example, suppose that the executive branch has made a controversial decision, and a suspicious Congress wants the relevant executive officials to testify about their role in that decision. The President believes that Congress has no right to compel the officials to testify, whereas Congress believes that it has such a right. However, the President, in fact, does not mind if the officials testify because he believes that their testimony will reveal that the decision was made in good faith and for good reasons. [\*1016] **The President's problem is that**, if he allows the officials to testify, **Congress** and the public **might interpret his acquiescence as recognition that Congress has the power to force executive officials** to testify. If he refuses to allow the officials to testify, then he preserves his claim of executive privilege but loses the opportunity to show that the decision was made in good faith. In addition, he risks provoking a constitutional impasse in which Congress could eventually prevail - if, as we have discussed, public constitutional sentiment turns out to reject executive privilege in these circumstances. Congress faces similar dilemmas, for example, when it approves of officials nominated by the President for an agency or commission but wants to assert the power in general to impose restrictions on appointments. Political agents have long relied on a middle way to avoid the two extremes of acquiescence, on the one hand, and impasse, on the other. They acquiesce in the decision made by the other agent while claiming that their acquiescence does not establish a precedent. Or, equivalently, they argue that their acquiescence was a matter of comity rather than submission to authority. Are such claims credible? Can one avoid the precedential effect of an action by declaring that it does not establish a precedent - in effect, engaging in "ambiguous acquiescence"? The answer to this question is affirmative as long as the alternative explanation for the action is in fact credible. If, for example, observers agree that the President benefits from the testimony of executive officials, then his acquiescence to a congressional subpoena has two equally plausible explanations: that he independently benefits from the testimony, or that he believes that public constitutional sentiment rejects executive privilege. The response is thus ambiguous, and Congress may be no wiser about what will happen in the future when the President does not wish to permit officials to testify because their testimony would harm him or executive branch processes. If so, the ambiguous nature of the action does not establish a focal point that avoids an impasse in the future. On the other hand, if the President's claim that he benefits from the testimony is obviously false, then his authority will be accordingly diminished. This is why ambiguous acquiescence is not a credible strategy when the President and Congress disagree about the policy outcome. If the President thinks the war should continue, Congress thinks the war should end, and the President acquiesces to a statute that terminates the war, then he can hardly argue that he is acting out of comity. He could only be acting because he lacks power. But an agent can lack authority in more complicated settings where no serious [\*1017] policy conflict exists. If the President makes officials available for testimony every time Congress asks for such testimony, and if the testimony usually or always damages the President, then his claim to be acting out of comity rather than lack of authority eventually loses its credibility. Repeated ambiguous acquiescence to repeated claims over time will eventually be taken as unambiguous acquiescence and hence a loss of authority. For this reason, **a President who cares about maintaining his constitutional powers will need to refuse** to allow people to testify even when testimony would be in his short-term interest.

## Case

#### Treaties can’t solve warming-mildest requirements and singular government approaches are better

Bakalar 05

(Nicholas, National Geographic News. “Global Treaties Ineffective Against Warming, Experts Say” 9-15-05 http://news.nationalgeographic.com/news/2005/09/0915\_050915\_warming.html//wyoccd)

Wide-ranging international treaties like the Kyoto Protocol may not be the best ways to battle global warming, according to three California scientists. Arguing that global treaties are only as effective as their least willing signatories, the team says that climate change is better fought from the bottom up.¶ Countries, regional partnerships, U.S. states, and even individual private firms, the scientists believe, can establish various controls to limit climate-changing activities—and many already have. There are hundreds of independent policies at work now contributing to the effort to limit carbon dioxide emissions, the main cause of climate change.¶ The European Union, for example, limits emissions from about 12,000 industrial plants. And the United Kingdom and World Bank have established emissions-credit trading systems. Under these plans plants that exceed emissions limits may buy emissions "credits" from plants that emit relatively little greenhouse gas.¶ The United States government famously rejects greenhouse gas limitations. The U.S. nevertheless has at least two dozen firms that have imposed their own limits. And the rejection of binding limitations at the federal level has not stopped nine northeastern U.S. states from collaborating on their own plan to cap carbon dioxide emissions from power plants.¶ Lowest Common Denominator¶ The authors of the new article, which will be published tomorrow in the journal Science, point out that international treaties tend toward the mildest binding measures, since such measures are always the easiest for everyone to agree upon.¶ The more countries that sign on to a treaty, the less stringent the terms become, because everyone has to be accommodated, the authors say. "A system that originates from the top," they write, "takes the speed of its least ambitious nation."¶ The authors see a different, and more effective, approach, one that is already underway: Make nonbinding agreements on goals at the international level and let each nation create its own climate-enhancing projects to meet them.¶ These projects can take various forms: commitments to control emissions, funding for scientific research into cleaner energy sources, or policies that make populations more resistant to climate change, for example.¶ Not all experts agree that this is the most effective approach.¶ A. Denny Ellerman is a senior lecturer with the Center for Energy and Environmental Policy Research at the Massachusetts Institute of Technology in Cambridge. Invoking Mao Zedong's motto encouraging many ideas from many sources, Ellerman calls the bottom-up tactic the "let a thousand flowers bloom" method, and he remains skeptical. It sounds appealing to say that everyone will do positive things," he said. "But are they really doing them or just claiming they are? Acting together is fine, but what are we agreeing to do? That's the problem.¶ "How do you develop some sort of standard and structure beyond just voluntarism?" Ellerman said. International Treaties: Symbolism Over Substance?¶ David G. Victor is the lead author on the new paper and director of the Program on Energy and Sustainable Development at Stanford University in Palo Alto, California. He says that the grassroots approach is less a recommendation than a description of what is in fact happening.¶ "The real heavy lifting," he said, "gets done by national governments and markets, not international treaties." These treaties are not irrelevant, but they don't push nations into changing their behavior. Instead, he said, they "codify what is already happening at the ground level."¶

#### No punishment for non-compliance means treaties cant solve warming

Randerson 08

(James Randerson is assistant national news editor. “Why environmental treaties don't work” 12-9-08 http://www.theguardian.com/science/blog/2008/feb/18/whyenvironmentaltreatiesdon//wyoccd)

Despite numerous international agreements on every conceivable aspect of the global environment, eco problems are getting worse not better. According to Prof Larry Susskind - a distinguished expert on disputes between governments over the environment - this is because the way international treaties are put together is fundamentally flawed.¶ "Almost none of the treaties, some of which have been in effect for decades have achieved what they were set up to achieve," said Susskind, who runs the MIT Harvard Public Disputes Programme.¶ The alphabet soup of big international treaties like those on climate (UNFCC), endangered species (http://www.cites.org/), and wetlands (RAMSAR), have all promised much, but delivered little.¶ He argued in a lecture to the American Association for the Advancement of Science's annual meeting in Boston on Saturday that there is a fundamental problem in the way these agreements are set up. There are no penalties, for example, for signing a treaty but not ratifying it, or for ratifying it but not complying.¶ In a Science Extra podcast interview he told me how the process of treaty-making and treaty enforcement could be modified to make environmental agreements more effective.

**Warming won’t cause extinction**

**Barrett ‘7** (Scott, Professor of natural resource economics @ Columbia University, “Why Cooperate? The Incentive to Supply Global Public Goods, introduction”, 2007)

First, **climate change does not threaten the survival of the human species.**5 If unchecked, it will cause other species to become extinction (though **biodiversity is being depleted now due to other reasons**). **It will alter critical ecosystems** (though **this is also happening now**, and **for reasons unrelated to climate change**). It will reduce land area as the seas rise, and in the process displace human populations. “**Catastrophic” climate change is** possible, but **not certain.** Moreover, and unlike an asteroid collision, **large changes** (**such as sea level rise** of, say, ten meters) **will likely take centuries to unfold, giving societies time to adjust.** “Abrupt” climate change is also possible, and will occur more rapidly, perhaps over a decade or two. However, **abrupt climate change** (such as a weakening in the North Atlantic circulation), though potentially very serious, **is unlikely to be ruinous.** Human-induced climate change is an experiment of planetary proportions, and we cannot be sur of its consequences. **Even in a worse case scenario**, however, global **climate change is not the equivalent of the** Earth being hit by **mega-asteroid.** Indeed, **if it were as damaging as this, and if we were sure that it would be this harmful**, then **our incentive to address this threat would be overwhelming.** The challenge would still be more difficult than asteroid defense, but we would have done much more about it by now.

**There is no impact-no runaway warming**

**McGrath ’13** (Matt McGrath, Environment correspondent, BBC News, “Climate slowdown means extreme rates of warming 'not as likely'”, http://www.bbc.co.uk/news/science-environment-22567023, May 19, 2013)

**Scientists say the recent downturn in the rate of global warming will lead to lower temperature rises in the short-term. Since 1998**, **there has been a**n unexplained "**standstill**" in the heating of the Earth's atmosphere. **Writing in Nature Geoscience, the researchers say this will reduce predicted warming in the coming decades.** But long-term, the expected temperature rises will not alter significantly. “Start Quote The most **extreme projections are looking less likely**

than before” **Dr Alexander Otto University of Oxford The slowdown** in the expected rate of global warming has **been studied for several years** now. Earlier this year, the UK Met Office lowered their five-year temperature forecast. But this new paper gives the clearest picture yet of how any slowdown is likely to affect temperatures in both the short-term and long-term. An international team of researchers looked at how the last decade would impact long-term, equilibrium climate sensitivity and the shorter term climate response. Transient nature Climate sensitivity looks to see what would happen if we doubled concentrations of CO2 in the atmosphere and let the Earth's oceans and ice sheets respond to it over several thousand years. Transient climate response is much shorter term calculation again based on a doubling of CO2. **The Intergovernmental Panel on Climate Change reported in 2007 that the short-term temperature rise would most likely be 1-3C (1.8-5.4F). But in this new analysis, by only including the temperatures from the last decade, the projected range would be 0.9-2.0C.** Ice The report suggests that warming in the near term will be less than forecast "**The hottest** of the **models** in the medium-term, they **are** actually looking **less likely or inconsistent with the data from the last decade alone," said Dr Alexander Otto from the University of Oxford.** "The most **extreme projections are** looking **less likely** than before."

## Charming Betsy

#### Current multilateral institutions can’t keep up with international problems

Holmes, 10

[Kim R. Holmes, Ph.D., Vice President for Foreign and Defense Policy Studies and Director of the Kathryn and Shelby Cullom Davis Institute for International Studies at The Heritage Foundation, “Smart Multilateralism and the United Nations,” The Heritage Foundation, September 21, 2010, <http://www.heritage.org/research/reports/2010/09/smart-multilateralism-when-and-when-not-to-rely-on-the-united-nations> //uwyo-baj]

With the growing threat that a rogue regime or terrorists will obtain weapons of mass destruction, Washington simply cannot afford to rely on the U.N. for the security of the free world. America must strengthen its alliances and pursue alternative arrangements with new allies that better enable it to respond to today’s challenges. Topping the list should be developing a new, more flexible security arrangement, a truly global alliance that would include only those states deeply committed to liberty. Free nations have far more in common than what divides them politically, militarily, or geographically. NATO is simply too slow, too divided, and too parochial to become that institution.

#### The aff is net worse for international legal instutions – prevents future negotiation of treaties and congressional invalidation of current ones

Adebe and Posner 11 (Daniel Abebe, Eric A. Posner, Assistant Professor and Kirkland & Ellis Professor, University of Chicago Law School. ,The Flaws of Foreign Affairs Legalism, 51 Va. J. Int'l L. 507, 527 (2011), Westlaw)

The executive has been the leading promoter of international law. It has negotiated and ratified (sometimes with the Senate's consent, sometimes with Congress's consent, and sometimes without legislative consent) thousands of treaties over the last sixty years,153 including the fundamental \*534 building blocks of the modern international legal system, such as the UN Charter, the GATT/WTO, the International Covenant for Civil and Political Rights, and the Genocide Convention. Through the U.S. State Department, the executive issues annual reports criticizing foreign countries for human rights violations, and the U.S. government has frequently, although not with complete consistency, issued objections when foreign countries violate human rights.154 The executive has also negotiated and signed other important treaties to which the Senate has withheld consent--including the Vienna Convention on the Law of Treaties, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Law of the Sea, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination Against Women, among others.155 The executive has also been instrumental in creating modern international institutions, including the UN Security Council, the GATT/WTO system, the World Bank, and the IMF.156¶ Much of what we said might seem too obvious to mention. One can hardly imagine the judiciary deciding on its own that the United States must create or join some new treaty regime. But these obvious points have been overlooked in the debate about the role of the judiciary in foreign affairs. Virtually everything the judiciary does in this area depends on prior executive action. Only the constitutional interpretation cases seem truly judge-initiated, for in these cases, the Court sometimes cites treaties that the United States has not ratified and sometimes cites the laws of foreign nations.¶ The claim that the judiciary can, and even does, play a primary role in the adoption of international law is puzzling. In almost all cases, the judiciary must follow the executive's lead. This also means that if the judiciary interprets treaties and other sources of international law in an aggressive way--in a way that the executive rejects--the executive may respond by being more cautious about negotiating treaties and adopting international law in the first place. This possible backlash effect has not been documented, but is plausible. As we discuss in the next section, fears of judicial enforcement of certain treaty obligations \*535 led to an effort by the Senate to ensure that those treaties would not have domestic legal effect.

#### Charming Betsy canon meaningless; does not require federal statute compliance

McGrail, 10

[Deputy Clerk, United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT No. 09-5051 GHALEB NASSAR AL-BIHANI, APPELLANT v. BARACK OBAMA,PRESIDENT OF THE UNITED STATES, ET AL., APPELLEES Appeal from the United States District Court for the District of Columbia (No. 1:05-cv-01312) On Petition for Rehearing En Banc, Filed: August 31, 2010, [http://www.cadc.uscourts.gov/internet/opinions.nsf/7D993FB6907397468525780700715176/$file/09-5051-1263353.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/7D993FB6907397468525780700715176/%24file/09-5051-1263353.pdf) //uwyo-baj]

But putting aside the preceding discussion (and the odd conceptual loop it creates), I reiterate that consulting international sources in that manner is not something judges have in their interpretive toolbox. The only generally applicable role for international law in statutory interpretation 11 is the modest one afforded by the Charming Betsy canon, which counsels courts, where fairly possible, to construe ambiguous statutes so as not to conflict with international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); see also Sampson v. Fed. Repub. of Germany, 250 F.3d 1145, 1152 (7th Cir. 2001).6 However, Judge Williams does not appear to confine international law to such a narrow space. By including international discourse among the traditional tools available to courts when interpreting statutes, Judge Williams is not limiting the application of international law to ambiguous statutory text. Generally, a statute’s text is only ambiguous if, after “employing traditional tools of statutory construction,” a court determines that Congress did not have a precise intention on the question at issue. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). It is at this point—analogous to Chevron Step Two— that the Charming Betsy canon has had any application in federal courts. But Judge Williams implies that international law should be consulted in the first instance to influence interpretation at the same level as traditional interpretive tools, making its use predicate to a finding of ambiguity. This implication has the secondary effect of eviscerating the limiting principle of the Charming Betsy canon that it only exerts a negative force on the meaning of statutes, pushing them away from meanings that would conflict with international law. Courts do not apply Charming Betsy as an affirmative indicator of statutory meaning. See, e.g., Sampson, 250 F.3d at 1152–53 (holding the Charming Betsy canon does not require “federal statutes [to be] read to reflect norms of international law”); Princz v. Fed. Repub. of Germany, 26 F.3d 1166, 1174 & n.1 (D.C. Cir. 1994) (rejecting dissent’s argument that statutes must be read “consistently with international law” and must be presumed to “incorporate[] standards recognized under international law,” Princz, 26 F.3d at 1183 (Wald, J., dissenting)). However, under Judge Williams’ method, I see no reason why courts would be bound by this rule, since traditional interpretive sources are normally viewed as indicative of affirmative meaning. These inconsistencies with the Charming Betsy canon make clear that Judge Williams’ proposal cannot possibly be correct. If it were, it would be a mystery why American jurisprudence would even bother to enunciate an interpretive canon like the Charming Betsy. Judge Williams’ approach would make that canon vestigial, foolish even—akin to a canon limiting the use of dictionaries.

#### 1ac card concedes single decisions don’t implicate Charming Betsy – no spillover

Crootoff  11
Rebecca Crootof, J.D. Yale Law School
Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon (April 5, 2011). Yale Law Journal. Available at SSRN: [http://ssrn.com/abstract=1803380](http://ssrn.com/abstract%3D1803380)
 The Charming Betsy Canon Encourages Domestic Courts’ Engagement with International Agreements and International Adoption

Conclusion There are legitimate reasons to celebrate and criticize Medellin’s reasoning. The case clarifies murky areas of domestic law, but it does so at the expense of the United States fulfilling its international commitments. However, those who rejoice in or bemoan Medellin’s seeming presumption in favor of non-selfexecution mistake the case’s import. While high-profile decisions like Medellin will draw fire, treaties’ influence in domestic jurisprudence remains largely unaffected.Treaties, eve self-executing treaties, are rarely used directly. Instead, in concert with the Charming Betsy canon, both self- and non-self-executing treaties serve as useful tools in statutory construction. Existing court practice reflects this understanding, and normative arguments support it. The limited application of the Charming Betsy canon results in relatively costless compliance with international law, accords with separation-of-powers principles by avoiding unintended and possibly undesirable breaches of international obligations, and allows domestic courts to engage with and influence developing norms. In giving meaning to U.S. international obligations while respecting the limits of international law in domestic jurisprudence, judicious application of the Charming Betsy canon in conjunction with non-self-executing treaties reconciles often-opposing interests.

#### The part of *al-Bihani* dealing with Charming Betsy is dicta and there has not been a single case using it as support- if they can’t win a substantial solvency claim to their influence arguments than there is no chance of their impact

Vladeck 11 (Stephen I. Vladeck, Professor of Law, American University Washington College of Law. Thanks to Bobby Chesney, Amanda Frost, Jon Hafetz, Marty Lederman, and Ben Wittes for incredibly useful discussions and comments; to Kristin Makar and the editors of the Seton Hall Law Review for the invitation to participate in this Symposium and for their patience; and to Jason Thelen for research assistance., The D.C. Circuit After Boumediene, 41 Seton Hall L. Rev. 1451, 1456 (2011), Westlaw)

In light of these holdings, a concerted effort was made to ask the entire D.C. Circuit to rehear Al-Bihani en banc. Formally, the court of appeals disagreed.64 But in a curious statement co-authored by the court's seven active judges other than Judges Brown and Kavanaugh (the two active judges on the Al-Bihani panel), the judges explained that¶ we decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.65¶ In other words, even while declining to rehear the case en banc, the rest of the D.C. Circuit effectively converted Al-Bihani's controversial international law holding into dicta, a result that drew relatively sharp objections from Judge Brown (largely on process grounds)66 and Judge Kavanaugh (on substance).67 Perhaps as a result, in April 2011, the Supreme Court denied certiorari.68¶ The (non-)en banc maneuvering in Al-Bihani therefore left open the question of whether international law should bear on the scope of the AUMF, a point to which the court of appeals has not yet returned.69 One might also have assumed that the panel's MCA-based \*1464 analysis of the scope of detention power was also vitiated by the (non-)en banc order, since the panel might not have looked to domestic law if international law provided useful criteria. Nevertheless, a different three-judge panel (Judges Henderson, Williams, and Randolph) reaffirmed the MCA-grounded reading of the AUMF in February 2011 in their remand order in Hatim v. Gates.70 As that panel wrote:¶ [T]he district court ruled that the military could detain only individuals who were “part of” al-Qaida or the Taliban . . . . That ruling is directly contrary to Al-Bihani v. Obama, which held that “those who purposefully and materially support” al-Qaida or the Taliban could also be detained.71¶ In other words, to whatever extent the rest of the D.C. Circuit had mooted the international law discussion in Al-Bihani, Hatim suggests that it remains enough in a habeas case for the government to show that a detainee, though not “part of” al Qaeda or the Taliban, “purposefully and materially supported” them.72¶ To be sure, there has not yet been a single case in which detention authority ultimately rested solely on support, rather than membership. But given both (1) the open questions surrounding “material support” as a basis for the exercise of military jurisdiction73 and (2) the extent to which the scope of the AUMF has relevance far afield of Guantánamo detention cases,74 this distinction matters--and quite a bit, at that.

#### The Al-Bihani decision is only one case in an extremely limited context and is not consistent with the general approach taken by district courts

Dehn 10 (Major John C. Dehn is an Assistant Professor in the Department of Law, US Military Academy, West Point, NY. He currently teaches International Law and Constitutional and Military Law. He is writing in his personal capacity and his views do not necessarily represent the views of the Department of Defense, the US Army, or the US Military Academy.~ The Relevance of International Law to (the Substantive and Procedural Rules of) Preventive Detention in Armed Conflict – A Rejoinder to Al-Bihanihttp://opiniojuris.org/2010/01/29/the-relevance-of-international-law-to-the-substantive-and-procedural-rules-of-preventive-detention-in-armed-conflict-E28093-a-rejoinder-to-al-bihani/)

The post-Boumediene habeas litigation has raised concerns regarding whether the courts are equipped to determine the substantive and procedural rules governing preventive detention pursuant to the Authorization for the Use of Military Force of 18 September 2001 (AUMF). Before the January 5th D.C. Circuit panel opinion in Al-Bihani v. Obama, no court had questioned the relevance of international laws governing war to the issue.¶ I believe that the courts are certainly competent to determine these issues so long as they observe applicable international law in construing the AUMF. The panel opinion’s suggestion that international law is irrelevant to the preventive detention inquiry ignores over 200 years of precedent in this area.¶ Contrary to the general approach taken by the district courts, the al-Bihani panel concluded:¶ [A]ll of [al-Bihani’s claims] rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the internationallaws of war. This premise is mistaken. There is no indication in the AUMF, the Detainee Treatment Act of 2005…, or the MCA of 2006 or 2009, that Congress intended the internationallaws of war to act as extra-textual limiting principles for the President’s war powers under the AUMF. Mem. Op. at 7.¶ Concurring with the panel opinion, Judge Brown said:¶ The Supreme Court in Boumediene and Hamdi charged this court and others with the unprecedented task of developing rules to review the propriety of military actions during a time of war, relying on common law tools. We are fortunate this case does not require us to demarcate the law’s full substantive and procedural dimensions. But as other more difficult cases arise, it is important to ask whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation. Concur. Op. at 1.¶ Another D.C. district court judge is reported to have expressed similar concerns from the bench regarding the conduct of the courts and the need for congressional action:¶ “It is unfortunate that the legislative branch of our government and the executive branch have not moved more strongly to provide uniform, clear rules and laws for handling these cases.” He noted that his fellow judges hearing detainee cases essentially created “different rules and procedures … different rules of evidence … [and] substantive law.¶ Interestingly, this “unprecedented task” is not unprecedented at all. Early in U.S. history, federal courts determined the rights of individuals against the U.S. government in prize cases and faced precisely these problems. Prize cases involved the capture and condemnation of the ships and commercial cargo of enemy nationals (and also of U.S. nationals engaging in commerce with them) in congressionally designated general or limited (a.k.a. “partial”, or “quasi”) wars. While prize captures are no longer permitted by international law, its case law is instructive to preventive detention questions.¶ Similar to Boumediene but much earlier in our nation’s history, the Supreme Court somewhat (but less) controversially found that the constitutional and statutory grants of admiralty jurisdiction conferred jurisdiction over prize cases on the federal courts. In The Amiable Nancy, 16 U.S. 546, 557-58 (1818) the Court stated that “[t]he jurisdiction of the district court to entertain this suit, by virtue of its general admiralty and maritime jurisdiction, and independent of the special provisions of the prize act of the 26th of June 1812…has been so repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt.” With frequent conflict between our fledgling country and both England and France, the federal courts became deeply involved in this then-significant aspect of armed conflict.¶ Identifying the ships or property of enemy nationals on the high seas was often difficult. Ships would cloak their affiliation and throw log books and other evidence overboard when approached. Crew members were frequently unavailable to the courts or lacked specific knowledge.¶ The federal courts were uncertain what substantive and procedural rules to use in this unique legal environment. Writing for the Court in The Schooner Adeline, 13 U.S. 244, 284 (1815)(emphasis added), Justice Story attempted to assist them by clarifying that:¶ “No proceedings can be more unlike than those in the Courts of common law and in the admiralty. In prize causes, in an especial manner, the allegations, the proofs and the proceedings are, in general, modelled [sic] upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose. The Court of prize is emphatically a Court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country.”¶ Just two years later, the Supreme Court added an appendix to a very cursory opinion in The London Packet, 15 U.S. 371 (1817) (appendix), which began:¶ I[n] the Appendix to the first volume of these Reports… a summary sketch was attempted of the practice in prize causes in some of its most important particulars. It has been suggested that a more enlarged view of the principles and practice of prize courts might be useful, and in case of a future war, save much embarrassment to captors and claimants. With this view the following additional sketch is submitted to the learned reader.¶ The Court then provided, in what might be viewed as in part an advisory opinion on the law and in part a promulgation of rules of procedure, to deliver a heavily referenced mini-treatise (32 Lexis© download pages!) of the internationalrules governing prize practice, including substantive rules, evidentiary standards and modes of proof.¶ The panel opinion in al-Bihani both embraces and ignores this tradition. The above discussed and related precedent lends support to the Supreme Court’s belief, expressed in both Hamdi and Boumediene, that the procedures to be used in preventive detention habeas cases related to armed conflict need not be the same as would govern domestic habeas litigation. This view was heartily embraced by the al-Bihani panel. Mem. Op. at 14-25.¶ With that said, the panel also ignores this history by suggesting that international laws regulating war are irrelevant to its inquiry into which individuals are subject to indefinite detention. The Supreme Court has consistently stated precisely the opposite of this view. In Talbot v. Seeman, 5 U.S. 1, 28 (1801), Chief Justice Marshall stated that “Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.” (emphasis added) Just three years later in Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804), when finding – against the determination of a U.S. naval commander – that a certain vessel and its cargo were not subject to condemnation as prize, Justice Marshall again clarified that “that an act of Congress [in this case, the authority to engage in limited hostilities/armed conflict against France] ought never to be construed to violate the law of nations if any other possible construction remains….”¶ Nearly 100 years later in the prize case of The Paquete Habana, 175 U.S. 677, 700 (1900), the Supreme Court reaffirmed the notion that “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations….” (emphasis added) And in United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 318 (1936) the Supreme Court noted that “operations of the nation in …[foreign] territory must be governed by treaties, international understandings and compacts, and the principles of international law.”¶ As I note in a draft article, now posted on SSRN (comments on this still very rough-in-spots draft are welcome), the Supreme Court has consistently “implied from …[congressional authorization to engage in general or limited armed conflict] a scope of authority consistent with the congressional act and any relevant international law. Indeed, the application of Charming Betsy to a congressional declaration of war or other AUMF necessarily yields this result.”¶ My research reveals that this same approach also permeates Supreme Court precedent and U.S. practice withregard to laws of war on land both extraterritorially and, to a less certain extent, territorially. What is clear in this long line of precedent is that the Court does not always “make” domestic federal common law from international law, it applies or observes existing international law in appropriate cases in the absence of an applicable domestic law or other controlling public act of the government. In other words, as Paquete Habana, 175 U.S. at 700, attempted to make clear, international law “must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”¶ Additionally, customary international laws governing war were not applied “by analogy” in non-international armed conflict. The U.S. view was that they also governed the U.S. Civil War and other non-international armed conflicts, a view gradually taking hold in the international community after the ICTY appellate decision in Prosecutor v. Tadic. In Winthrop’s treatise, though, there is a clear implication that U.S. practice also established a domestic common law of war in purely internal armed conflicts.¶ No doubt, the panel opinion’s authors align with those who believe that Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) requires state law to govern cases in federal courts “[e]xcept in matters governed by the Federal Constitution or by acts of Congress” – taking this to mean that international law may never provide a rule of decision in a federal court unless implemented by the states or federal political branches. After extensive research into this understanding of Erie, it is clear that both pre- and post-Erie Supreme Court precedent contradicts such claims with regard to international laws governing armed conflict. (I will present this and its theoretical basis in forthcoming scholarship.)¶ It is equally clear from above-cited cases and related precedent (as the al-Bihani opinion noted) that Congress may establish national policy that violates international law. If that happens, this federal law must be applied by U.S. courts. However, Charming Betsy-related precedent also requires the courts to determine either that Congress’s intent to do so is expressly stated, or that such intent can be clearly implied from enacting a law irreconcilable with applicable international law. See e.g.Dehn, Why Article 5 Status Determinations are not ‘Required’ at Guantánamo, 6 J. INT’L CRIM. JUST. 371 (2008)(discussing related precedent and its effect on the Military Commissions Act of 2006 when compared to Articles 4 & 5 of the Geneva Convention Relative to the Treatment of Prisoners of War).¶ The al-Bihani opinion completely reverses this longstanding approach. Effectively overturning the Charming Betsy as if it were the fictitious Poseidon cruise ship, it requires a finding of congressional intent to comply with international laws governing armed conflict before the court will look to them when interpreting the AUMF and related statutes. One hopes an en banc rehearing will right the ship, sparing the district courts from being forced to reorient to this topsy-turvy legal environment and claw their way to daylight.¶ Whether one views Charming Betsy as a canon of statutory construction or as a conflict of laws decision, international law is clearly relevant to interpreting the scope of preventive detention authority granted by the AUMF. It is relevant both to the general nature of war powers exercised and to any particular limits on those powers. It is unlikely that the Supreme Court would issue another mini-treatise appendix to an opinion outlining the rules, though the precedent for doing so exists. Thus, the courts must continue their difficult but not insurmountable task by determining and observing the content of relevant international law in preventive detention habeas proceedings.

#### This aff is made up – their internal link card saying the decision “reverses” the doctrine operates under the assumption that Charming betsy is – and this is a direct quote – “alive in modern jurisprudence”

Walsh – their author – 10 (Cara Maureen Walsh J.D. Candidate 2010, Vanderbilt University Law School. Al-Bihani, Not So Charming October, 2010 Vanderbilt Journal of Transnational Law 43 Vand. J. Transnat’l L. 1151)

For more than two hundred years, the Supreme Court has held that international law informs U.S. law, particularly in the context of international humanitarian law.19 In 1801, the Court held that “Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.”20 More famously, the Court explicitly ruled three years later, in Murray v. Schooner Charming Betsy, that domestic legislation “ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country.”21 This principle came to be known as the Charming Betsy doctrine.¶ \*1155 Under Charming Betsy, courts deciding between different plausible interpretations of a law must presume that the text complies with the United States' obligations under binding treaties and accepted principles of customary international law.22 Supreme Court cases have consistently followed this doctrine.23 For example, at the turn of the last century, the Court explicitly integrated customary international law into its ruling in Paquete Habana.24 In that case, the Court assessed the legality of the U.S. Navy's seizure of two coastal fishing vessels during the Spanish-American War in the absence of controlling domestic law.25 The Court affirmed that U.S. courts should analyze the question under principles of international law.26 Under these principles, “coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.”27 Thus, because international law did not permit the Navy's seizure of The Paquete Habana, the Court held that the seizure was illegal.28¶ Of course, the political branches retain the power to disregard international law, at least insofar as U.S. courts are concerned. Under Charming Betsy, a “controlling executive or legislative act or judicial decision” forecloses courts from considering international law.29 Congress can thus prevent courts from considering international law by clearly stating that it intends a piece of domestic legislation to contravene international law.30 And, to the extent the President acts pursuant to executive authority rather than congressional authorization, Charming Betsy is unnecessary because courts do not need to construe any law.31 Thus, courts only employ Charming Betsy when the President acts pursuant to congressional authorization that does not clearly contravene international law.32 In \*1156 such cases, courts use Charming Betsy to say “what the law is,”33 and courts “refuse to automatically defer to the executive, even when its views are clear and those of Congress are not.”34 This means that they will “occasionally use the canon to defeat the interpretation offered by the government.”35¶ Charming Betsy remains alive in modern jurisprudence. The Supreme Court has not overruled the doctrine and has explicitly considered it as recently as 2004.36 The Court's post-September 11 opinions have also been consistent with the doctrine.37 For example, in Hamdi v. Rumsfeld, the Court determined that the AUMF permitted the government to hold a U.S. citizen captured in a foreign country as an enemy combatant, in part because international law permitted the detention.38 Similarly, in Hamdan v. Rumsfeld, the Court declined to defer to the Executive's view of the Geneva Conventions and, instead, undertook its own analysis that extended the protections of Common Article 3 to those detainees.39¶ In light of the doctrine's continued viability, courts should, if possible, interpret domestic laws to comply with the United States' international law obligations.40 Congress must intentionally deviate from international law to foreclose this method of interpretation.41 And, though the President may authoritatively interpret international law when acting pursuant to executive authority, courts may disagree with the Executive's interpretation of international law when it acts pursuant to legislation such as the AUMF.42

Professor Ralph Steinhardt has distilled these principles into a general three-step process.43 First, courts should determine the meaning and status of any relevant provision of international law.44 Second, if “nothing in the statute explicitly repudiates [international \*1157 law], or if an inconsistency between the norm and the statute can be resolved, the court should adopt the interpretation that preserves the maximum scope for both.”45 Finally, if courts face an “unavoidable and irreducible [conflict, they] should refer to the supremacy axioms such as the latter-in-time rule and doctrines of justiciability to resolve the conflict.”46 Though the last step postulates an unusually strong view of the doctrine, Steinhardt's formulation nevertheless provides a useful structural analysis of Charming Betsy.¶ B. Charming Betsy After the Military Commissions Act¶ Following the Supreme Court's decision in Hamdan, Congress attempted to strip jurisdiction over detainee habeas petitions from U.S. courts by passing the MCA.47 Section 7 of the MCA purports to suspend the jurisdiction of courts to consider habeas corpus applications “filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”48 The Court found this provision unconstitutional as applied to Guantánamo Bay detainees.49¶ Other MCA provisions also limit the rights of detainees in U.S. courts. MCA § 5 provides that “[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus [proceedings] . . . in any court of the United States or its States or territories.”50 Similarly, MCA § 6 expressly grants the President authority “to interpret the meaning and application of the Geneva Conventions” and to “promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”51¶ These provisions could cast doubt on the ability of courts to consider the Geneva Conventions. Due to the constitutional issues this might raise, however, it seems far more likely that the MCA seeks only to foreclose the rights of litigants to rely on the Geneva Conventions as a causes of action.52 This would not affect the ability \*1158 of courts to look at the Geneva Conventions under the Charming Betsy doctrine.53¶ 1. Constitutional Issues Raised by Precluding the Courts from Looking to the Geneva Conventions¶ Congress has the authority to pass domestic legislation that expressly violates international law.54 Yet, the MCA does not purport to violate the Geneva Conventions or deny their applicability. Rather, it references them several times, implying that they govern the President's actions.55¶ Interpreting the MCA to preclude the courts from considering the Geneva Conventions is therefore constitutionally dubious for at least two reasons. First, the Constitution grants the Judicial Branch, not the Executive Branch, the power to interpret the law.56 As the Supreme Court recently confirmed in Hamdan, the Judiciary's power to interpret the law in a manner contrary to executive interpretation extends to international law, insofar as international law informs domestic legislation.57 Reading the MCA to assert that the Geneva Conventions govern the Executive, while also granting the Executive unreviewable power to interpret the Geneva Conventions, thus runs counter to the long-established principle of judicial review established by Marbury v. Madison.58¶ Second, permitting Congress simultaneously to assert that the Geneva Conventions govern and to deny any judicial oversight of this assertion destroys Congress's own political accountability.59 As international law scholar Deborah Pearlstein points out, “Congress cannot simply ask the courts to ignore certain laws just because it is too afraid to bear the political consequences of taking them off the books.”60 Instead, principles of accountability and transparency require that Congress write laws as it intends them to be enforced by the courts.61 These concerns strongly suggest that courts should avoid interpreting the MCA as precluding them from considering the Geneva Conventions.¶ \*1159 2. Issues Raised by the Military Commissions Act § 5¶ Neither text nor legislative history supports interpreting MCA § 5 as preventing courts from considering the Geneva Conventions. The section forbids an individual from “invok[ing]” the Geneva Conventions.62 It does not mention judicial interpretation.63 Furthermore, the Act's sponsor, Senator John McCain, stated that Congress intended § 5(a) to “eliminate any private right of action against our personnel based on a violation of the Geneva Conventions.”64 Congress also passed the MCA in the wake of Hamdan v. Rumsfeld, in which the Supreme Court came close to addressing whether the Geneva Conventions are self-executing,65 raising a strong inference that Congress wished to assert its view on the matter.66¶ In Hamdan, a divided Supreme Court held that the military commissions established by the President in 2001 to try enemy combatants were illegal.67 The President created the commissions through military order, relying on the AUMF, his power as commander in chief, and §§ 821 and 826 of the Uniform Code of Military Justice (UCMJ).68 The Court found, however, that the commissions had not been authorized by the AUMF and that they in fact violated embedded congressional restrictions on the use of military commissions under the UCMJ.69¶ First, the Court found that the military commissions were not authorized under UCMJ Article 31 because their rules deviated from the rules used for courts-martial.70 Next, the Court determined that UCMJ Article 21 required any commission convened under its authority to comply with international humanitarian law.71 The \*1160 Court found that international humanitarian law necessarily included the Geneva Conventions and that the procedures utilized by the military commissions were deficient by those standards.72 Therefore, the Court held that the UCMJ did not authorize the government to try Hamdan by military commission.73¶ By relying on the Geneva Conventions, the Supreme Court overruled the lower court's assertion that “the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court.”74 However, the Court expressly based its determination on the statutory provision of UCMJ Article 21 and declined to determine whether the Geneva Conventions in and of themselves conferred any enforceable rights.75 The self-executing nature of the Geneva Conventions therefore remained an open question.76 MCA § 5(a) most likely constitutes an attempt to ensure that the Conventions are not treated as self-executing by the courts.77¶ Leaving aside questions over whether the MCA would actually have the power to turn a potentially self-executing treaty into a non-self-executing one,78 the provision does not affect the ability of the courts to consider the Geneva Conventions under Charming Betsy.79 The Charming Betsy doctrine treats international law as an interpretive tool, not as source of enforceable rights.80 Whether an individual can invoke the Conventions in courts is irrelevant to the doctrine's application.¶ Moreover, the Supreme Court has never suggested that the doctrine distinguishes between self-executing and non-self-executing treaties.81 Though the Court has arguably exhibited some reluctance regarding principles derived from newer, non-self-executing treaties, such as the International Covenant on Civil and Political Rights (ICCPR),82 this reluctance does not always extend to international \*1161 humanitarian law.83 This may be because international humanitarian law “offers a particularly well-defined body of treaty and custom-based norms,” which “has the dual advantage of providing a clearer background norm against which Congress can authorize the use of force as well as providing some limits on the scope of relevant norms that courts can employ.”84 Indeed, the Charming Betsy case itself involved the laws of war.85 It thus seems unlikely that the Supreme Court would develop a sudden aversion to looking at these laws as an interpretive guide.¶ 3. Delegated Interpretations¶ Section 6(a)(3) of the MCA expressly authorizes the President, pursuant to an executive order published in the Federal Register, to interpret the Geneva Conventions.86 A Congressional Research Service (CRS) report interprets this to mean that “Presidential interpretations of the Conventions are deemed authoritative (if published and concerning non-grave breaches) as a matter of U.S. law to the same degree as other administrative regulations, though judicial review of such interpretations might be more limited.”87 Though the President has thus far defined his detention authority in a court brief, rather than an executive order,88 § 6(a)(3) seems to indicate Congress's desire as to who should interpret the Conventions.89¶ The CRS report further asserts that § 6(a)(3) precludes “any judicial challenge to the interpretation and application of the Conventions except in criminal proceedings.”90 As discussed above, interpreting the MCA to block judicial oversight of the President's interpretation and application of the Geneva Conventions raises serious concerns over accountability.91 This is particularly true when \*1162 the President acts pursuant to congressional legislation that requires compliance with the Geneva Conventions.92¶ More fundamentally, although the Judiciary should defer to the Executive in matters of national security in most instances,93 habeas corpus petitions raise issues of individual liberty that weigh against absolute deference to executive legal interpretation, even when the petitions intersect with national security concerns.94¶ Courts naturally defer to the Executive on issues of national security when these decisions “respect the nation, not individual rights.”95 Such questions are “entrusted to the executive, [and] the decision of the executive is conclusive.”96 Yet, to the extent that individual liberty is at stake, and the Supreme Court has already recognized that this is the case at Guantánamo Bay,97 it is the constitutional prerogative of the courts to say what the law is.98 These cases fall into what Professors Derek Jinks and Neal Katyal refer to as the “executive-constraining zone”99 precisely because they involve the law, not policy. As the “[l]aw must regulate the executive,”100 courts hearing detainee habeas corpus petitions should evaluate the viability of the Executive's interpretation of the Geneva Conventions, particularly when Congress purports to require that the President comply with them.¶ The Chevron101 doctrine presents a natural solution. Courts use Chevron to determine the authority of administrative regulations when Congress delegates lawmaking power to the Executive.102 Section 6(a)(3) of the MCA is an obvious delegation of lawmaking power.103 In combination with constitutional concerns over entirely stripping interpretive jurisdiction from the courts, this makes applying Chevron to presidential interpretations of the Geneva Conventions logical. As Curtis Bradley notes, “Congress stated expressly in the MCA that it is delegating authority to the executive ‘to interpret the meaning and application of the Geneva Conventions,’ \*1163 and courts give Chevron deference in the analogous situation in which Congress delegates interpretive authority to administrative agencies.”104¶ The Chevron doctrine derives from the 1984 case Chevron v. Natural Resources Defense Council, in which an environmental group challenged an Environmental Protection Agency (EPA) rule interpreting the Clean Air Act.105 The EPA had interpreted the term “stationary source” in the Clean Air Act to apply to entire plants, rather than to a single smokestack.106 Termed a “bubble concept,” this allowed companies to measure pollution levels based on an entire plant's emissions rather than individual emissions from each smokestack.107 The Natural Resources Defense Council challenged the interpretation, and the lower court held that the bubble concept was “inappropriate” in light of the Clean Air Act's purpose of improving air quality.108¶ The Supreme Court disagreed.109 Instead, it held that the court should have deferred to the EPA's interpretation.110 It then established the basic tenets of the Chevron doctrine.111 Under Chevron, when an agency promulgates regulations, courts must apply a multipart test to determine whether it will defer to the agency's statutory interpretation.112 First, courts must determine “whether Congress has directly spoken to the precise question at issue.”113 If the intent of Congress is clear, that is the end of the matter.114 But, if Congress's intent is unclear, courts still may not “simply impose [their] own construction on the statute.”115 Instead, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”116 Courts must give an agency's interpretation of a statute “controlling weight unless [it is] arbitrary, capricious, or manifestly contrary” to terms of that statute.117¶ Applying Chevron to interpretations of detainee habeas corpus proceedings would require courts to examine international law. Courts would defer to the Executive's interpretation of these \*1164 principles if no general consensus existed regarding their meaning and the Executive's interpretation was reasonable.118 Thus, the Executive would not be able to circumvent international law, but would be accorded judicial deference in areas of the law that remain unresolved. Assuming that the relevant principle of international law was well-agreed upon, courts would not need to independently interpret international law.119 However, if the law was in dispute, courts would have to interpret the law on their own in order to evaluate the Executive's compliance with the AUMF.120 In the context of general foreign relations law, some scholars argue that courts should apply Chevron “to allow the executive branch to resolve issues of international comity, at least when the underlying statute is unclear,”121 and to permit the Executive to interpret ambiguous laws in ways that “defeat the international relations principles.”122 By contrast, Chevron deference in the instant situation requires the Executive to follow international law.¶ Chevron-style deference to executive interpretation of international law, which encompasses both written treaties and unwritten principles, may challenge courts. However, international humanitarian law, which is the body of law at issue in the detainee hearings, “offers a particularly well-defined body of treaty and custom-based norms”123--norms to which the Supreme Court has repeatedly referred.124 It thus seems unlikely that lower courts would be unable to adequately apply a Chevron-style test in these cases.¶ Moreover, applying Chevron-style deference to debated principles of international law would in fact ease any putative burdens Charming Betsy might place on courts, because it permits the Executive to choose between plausible interpretations. This balances the need to “generally defer to the executive on the ground that resolving ambiguities requires judgments of policy and principle, and \*1165 the fact that the foreign policy expertise of the executive places it in the best position to make those judgments,”125 with the need to check the Executive's power over individuals.126¶ Like Steinhardt's three-part approach to Charming Betsy,127 a Chevron-style approach to Charming Betsy should also proceed in three steps. First, courts should look at binding domestic sources of law, such as Supreme Court precedent and the language of the AUMF, to determine issues that remain open to interpretation. For example, binding precedent interpreting the AUMF authorizes the President to detain “pursuant to the laws of war”128 and confirms that the conflict between United States and al-Qaeda is a non-international armed conflict governed by international humanitarian law.129 Regardless of disputes over the accuracy of these decisions,130 Court precedent binds the lower courts and the Executive.¶ Second, lower courts should examine the Geneva Conventions and other principles of international law. Rather than making their own pronouncements as to the nature of these laws, courts should only examine them for their clarity or ambiguity, which could be determined by the strength of international consensus regarding their meaning. To the extent the laws are clear, the legality of the President's actions should also be clear. Third, to the extent that the laws are ambiguous, courts should analyze them to decide whether the President's interpretation is reasonably permissible. Courts should defer to a reasonable interpretation, but overrule an arbitrary one.¶ \*1166 III. Al-Bihani v. Obama¶ The President currently claims “authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks,” as well as those “who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.”131 This authority is expressly pursuant to the AUMF, as construed “in light of law-of-war principles that inform the understanding of what is ‘necessary and appropriate.”’132¶ Courts disagree on the legality of the President's claimed authority.133 A key point of dispute has been whether the President has authority to detain those who have “substantially supported the Taliban, al-Qaida, or associated forces.”134 Some courts have accepted this authority as consistent with international law.135 Others have rejected it.136 But, prior to Al-Bihani, no district court had questioned the relevance of international law itself to the decision.137 That will probably change after Al-Bihani, with potentially devastating consequences for detainee habeas petitions relying on those well-established principles.¶ \*1167 A. Background and Facts¶ Ghaleb Nassar Al-Bihani is a Yemeni citizen who has been held by the U.S. government at Guantánamo Bay since 2002.138 Prior to his detention, Al-Bihani was a member of the 55th Arab Brigade, a paramilitary group allied with the Taliban that fought against the Northern Alliance,139 a loosely allied group of Taliban opposition fighters.140 Al-Bihani worked as a cook and carried a Brigade-issued weapon that he never fired in combat.141 Following the October 2001 invasion of Afghanistan, Al-Bihani and the 55th Brigade retreated and eventually surrendered to the Northern Alliance.142 The Alliance handed Al-Bihani over to U.S. forces in 2002.143 The United States subsequently transferred Al-Bihani to Guantánamo Bay for detention and interrogation.144¶ Al-Bihani first petitioned for habeas corpus in 2004.145 However, the district court lacked jurisdiction to hear his claim until 2006, when the Supreme Court decided Boumediene.146 Soon after that ruling, the district court reviewed and denied Al-Bihani's petition, holding that the government had authority to detain an individual “who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”147 The court found that, based on Al-Bihani's own admissions, it was “more probable than not” that he was “part of or supporting” Taliban forces.148 The court thus held that the government had lawfully detained Al-Bihani.149¶ Al-Bihani appealed.150 On appeal, Al-Bihani advanced several international law-based arguments. First, he argued that international humanitarian law did not authorize his initial detention because he belonged to a volunteer militia, not a state \*1168 military.151 He argued that, under international law, civilians who do not directly participate in hostilities cannot be detained.152¶ Second, Al-Bihani argued that the 55th Arab Brigade lacked any opportunity to declare its neutrality in the fight against the United States.153 Therefore, he argued, the United States could not continue to detain him.154 Third, Al-Bihani argued that, even assuming international law permitted his initial detention, the United States must now free him unless it had evidence that he remained dangerous, because the conflict in which he had participated had ended.155 Finally, as the majority opinion characterized the argument, Al-Bihani presented “a type of ‘clean hands' theory,”156 asserting that any authority the government might have had to detain him “is undermined by its failure to accord him the prisoner-of-war status to which he believes he is entitled by international law.”157

The Government responded that the AUMF authorized the President to detain al-Qaeda and Taliban-affiliated forces and that “each of the acts Al-Bihani performed was part of a course of conduct in which Al-Bihani traveled to Afghanistan to engage in jihad, joined an enemy brigade, and provided services to the brigade on the front lines under the command of Al-Qaida and Taliban leaders.”158 It argued that “Al-Bihani did not simply participate in a war between the United States and the country of Afghanistan,” but in a conflict between the United States and “the joint forces of al-Qaeida, the Taliban, and associated forces.”159 Furthermore, the Government asserted its continued power to detain Al-Bihani, as the “conflict in which Al-Bihani was captured has not ended.”160 It noted that whether hostilities have ended is a political question, and provided a country report detailing the state of war in Afghanistan.161 Finally, it criticized Al-Bihani's “clean hands” theory, pointing out that it was based solely on the dissenting opinion of Justice Souter in Hamdi.162

**<THEIR CARD STARTS>**

\*1169 B. The Court's Legal Reasoning

First, the appeals court panel found that international law could not limit the President's power to detain Al-Bihani.163 Noting that Al-Bihani's claims “rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war,” the court flatly asserted that “[t]his premise is mistaken. There is no indication in the AUMF, the Detainee Treatment Act of 2005 . . . or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF.”164

#### Nobody is following al-Bihani – they’re just being hyperbolic

Vladeck 11 (Stephen I. Vladeck, Professor of Law, American University Washington College of Law. Thanks to Bobby Chesney, Amanda Frost, Jon Hafetz, Marty Lederman, and Ben Wittes for incredibly useful discussions and comments; to Kristin Makar and the editors of the Seton Hall Law Review for the invitation to participate in this Symposium and for their patience; and to Jason Thelen for research assistance., The D.C. Circuit After Boumediene, 41 Seton Hall L. Rev. 1451, 1456 (2011), Westlaw)

Ultimately, my thesis is that, while it smacks of hyperbole to refer to the D.C. Circuit as being engaged in a collective effort to subvert Boumediene, it is equally unconvincing to assert that the entire court of appeals has faithfully administered the Supreme Court's commands \*1456 in these cases.30 Instead, as I hope to show in the pages that follow, the most troubling aspects of the court's post-Boumediene jurisprudence can all be traced to some combination of four jurists, in particular: the aforementioned Judges Kavanaugh, Randolph and Silberman, along with Judge Janice Rogers Brown. Whether the rest of the D.C. Circuit is reaching the correct results in other cases is beyond the ambit of this Essay; for present purposes, my central conclusion is that, in their opinions and their rhetoric, these four jurists are effectively fighting a rear-guard action while their colleagues coalesce around substantive and procedural rules that are materially consistent with what little guidance the Supreme Court has provided in these cases--and, as importantly, that have the general endorsement of virtually all of the district judges and the executive branch. That is by no means to commend these decisions, but rather to suggest that, if nothing else, fealty to precedent is not one of their shortcomings.

## Solvency

#### [1.] Prez will get hawks to pass legislation that overwhelms court rulings

Mahler 2008

[Johnathan Mahler, writer for the NYT, June 15th, 2008, Why This Court Keeps Rebuking This President, <http://www.nytimes.com/2008/06/15/weekinreview/15mahler.html?pagewanted=all>, uwyo//amp]

The 2006 Hamdan case concerned the military commissions that President Bush established at Guantánamo Bay to try some detainees in the aftermath of 9/11. Here the court’s majority went further. It found that by creating the commissions without asking Congress to agree, the president had overstepped his authority under the Constitution’s separation of powers. Moreover, it held that the president was obligated to honor America’s commitments under the Geneva Conventions. In response, the administration succeeded in getting Congress to authorize the military commissions and stripping the Guantánamo detainees of the right to habeas corpus. Which brings us to last week’s ruling in Boumediene — and the 5-4 decision to restore that ancient right.

#### [2.] Outweighs durability of fiat-Prez will comply where it suits his/her policies and ignore the court when it doesn’t

Risen & Lichtblau 2005

[JAMES RISEN and ERIC LICHTBLAU, December 16th, 2005, Bush Lets U.S. Spy on Callers Without Courts, <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0>, uwyo//amp]

WASHINGTON, Dec. 15 - Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials. Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said. The agency, they said, still seeks warrants to monitor entirely domestic communications.