## Weber RR 1AC

### Plan Text

#### Plan: The United States Congress should establish a National Security Court with exclusive jurisdiction over cases pursuant to Section 1021 of the National Defense Authorization Act for Fiscal Year 2012.

### Leadership

#### Contention 1: is Leadership

#### The plan’s external oversight on detention maintains hegemony---legitimacy is the vital internal link to global stability.

Knowles 9 (Robert, Acting Assistant Professor at NYU School of Law, Spring, “Article: American Hegemony and the Foreign Affairs Constitution”, 41 Ariz. St. L.J. 87, Lexis]

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424¶ The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429¶ In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.¶ The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436¶ Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438¶ At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440¶ The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige.¶ Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449¶ Conclusion¶ When it comes to the constitutional regime of foreign affairs, geopolitics has always mattered. Understandings about America's role in the world have shaped foreign affairs doctrines. But the classic realist assumptions that support special deference do not reflect the world as it is today. A better, more realist, approach looks to the ways that the courts can reinforce and legitimize America's leadership role. The Supreme Court's rejection of the government's claimed exigencies in the enemy combatant cases strongly indicates that the Judiciary is becoming reconciled to the current world order and is asserting its prerogatives in response to the fewer constraints imposed on the executive branch. In other words, the courts are moving toward the hegemonic model. In the great dismal swamp that is the judicial treatment of foreign affairs, this transformation offers hope for clarity: the positive reality of the international system, despite terrorism and other serious challenges, permits the courts to reduce the "deference gap" between foreign and domestic cases.

#### US benevolent hegemony is critical to global peace – material power is irrelevant and the alternative causes massive wars.

Kromah 9 (Lamii, Master Student in IR, February 2009, Lamii Moivi Kromah at the Department of International Relations

University of the Witwatersrand, “The Institutional Nature of U.S. Hegemony: Post 9/11”, http://wiredspace.wits.ac.za/bitstream/handle/10539/7301/MARR%2009.pdf?sequence=1]

A final major gain to the United States from the benevolent hegemony has perhaps been less widely appreciated. It nevertheless proved of great significance in the short as well as in the long term: the pervasive cultural influence of the United States.39 This dimension of power base is often neglected. After World War II the authoritarian political cultures of Europe and Japan were utterly discredited, and the liberal democratic elements of those cultures revivified. The revival was most extensive and deliberate in the occupied powers of the Axis, where it was nurtured by drafting democratic constitutions, building democratic institutions, curbing the power of industrial trusts by decartelization and the rebuilding of trade unions, and imprisoning or discrediting much of the wartime leadership. American liberal ideas largely filled the cultural void. The effect was not so dramatic in the "victor" states whose regimes were reaffirmed (Britain, the Low and Scandinavian countries), but even there the United States and its culture was widely admired. The upper classes may often have thought it too "commercial," but in many respects American mass consumption culture was the most pervasive part of America's impact. American styles, tastes, and middle-class consumption patterns were widely imitated, in a process that' has come to bear the label "coca-colonization."40 After WWII policy makers in the USA set about remaking a world to facilitate peace. The hegemonic project involves using political and economic advantages gained in world war to restructure the operation of the world market and interstate system in the hegemon's own image. The interests of the leader are projected on a universal plane: What is good for the hegemon is good for the world. The hegemonic state is successful to the degree that other states emulate it. Emulation is the basis of the consent that lies at the heart of the hegemonic project.41 Since wealth depended on peace the U.S set about creating institutions and regimes that promoted free trade, and peaceful conflict resolution. U.S. benevolent hegemony is what has kept the peace since the end of WWII. The upshot is that U.S. hegemony and liberalism have produced the most stable and durable political order that the world has seen since the fall of the Roman Empire. It is not as formally or highly integrated as the European Union, but it is just as profound and robust as a political order, Kant’s Perpetual Peace requires that the system be diverse and not monolithic because then tyranny will be the outcome. As long as the system allows for democratic states to press claims and resolve conflicts, the system will perpetuate itself peacefully. A state such as the United States that has achieved international primacy has every reason to attempt to maintain that primacy through peaceful means so as to preclude the need of having to fight a war to maintain it.42 This view of the post-hegemonic Western world does not put a great deal of emphasis on U.S. leadership in the traditional sense. U.S. leadership takes the form of providing the venues and mechanisms for articulating demands and resolving disputes not unlike the character of politics within domestic pluralistic systems.43 America as a big and powerful state has an incentive to organize and manage a political order that is considered legitimate by the other states. It is not in a hegemonic leader's interest to preside over a global order that requires constant use of material capabilities to get other states to go along. Legitimacy exists when political order is based on reciprocal consent. It emerges when secondary states buy into rules and norms of the political order as a matter of principle, and not simply because they are forced into it. But if a hegemonic power wants to encourage the emergence of a legitimate political order, it must articulate principles and norms, and engage in negotiations and compromises that have very little to do with the exercise of power.44 So should this hegemonic power be called leadership, or domination? Well, it would tend toward the latter. Hierarchy has not gone away from this system. Core states have peripheral areas: colonial empires and neo-colonial backyards. Hegemony, in other words, involves a structure in which there is a hegemonic core power. The problem with calling this hegemonic power "leadership" is that leadership is a wonderful thing-everyone needs leadership. But sometimes I have notice that leadership is also an ideology that legitimates domination and exploitation. In fact, this is often the case. But this is a different kind of domination than in earlier systems. Its difference can be seen in a related question: is it progressive? Is it evolutionary in the sense of being better for most people in the system? I think it actually is a little bit better. The trickle down effect is bigger-it is not very big, but it is bigger.45 It is to this theory, Hegemonic Stability that the glass slipper properly belongs, because both U.S. security and economic strategies fit the expectations of hegemonic stability theory more comfortably than they do other realist theories. We must first discuss the three pillars that U.S. hegemony rests on structural, institutional, and situational. (1) Structural leadership refers to the underlying distribution of material capabilities that gives some states the ability to direct the overall shape of world political order. Natural resources, capital, technology, military force, and economic size are the characteristics that shape state power, which in turn determine the capacities for leadership and hegemony. If leadership is rooted in the distribution of power, there is reason to worry about the present and future. The relative decline of the United States has not been matched by the rise of another hegemonic leader. At its hegemonic zenith after World War II, the United States commanded roughly forty five percent of world production. It had a remarkable array of natural resource, financial, agricultural, industrial, and technological assets. America in 1945 or 1950 was not just hegemonic because it had a big economy or a huge military; it had an unusually wide range of resources and capabilities. This situation may never occur again. As far as one looks into the next century, it is impossible to see the emergence of a country with a similarly commanding power position. (2) Institutional leadership refers to the rules and practices that states agree to that set in place principles and procedures that guide their relations. It is not power capabilities as such or the interventions of specific states that facilitate concerted action, but the rules and mutual expectations that are established as institutions. Institutions are, in a sense, self-imposed constraints that states create to assure continuity in their relations and to facilitate the realization of mutual interests. A common theme of recent discussions of the management of the world economy is that institutions will need to play a greater role in the future in providing leadership in the absence of American hegemony. Bergsten argues, for example, that "institutions themselves will need to play a much more important role.46 Institutional management is important and can generate results that are internationally greater than the sum of their national parts. The argument is not that international institutions impose outcomes on states, but that institutions shape and constrain how states conceive and pursue their interests and policy goals. They provide channels and mechanisms to reach agreements. They set standards and mutual expectations concerning how states should act. They "bias" politics in internationalist directions just as, presumably, American hegemonic leadership does. (3) Situational leadership refers to the actions and initiatives of states that induce cooperation quite apart from the distribution of power or the array of institutions. It is more cleverness or the ability to see specific opportunities to build or reorient international political order, rather than the power capacities of the state, that makes a difference. In this sense, leadership really is expressed in a specific individual-in a president or foreign minister-as he or she sees a new opening, a previously unidentified passage forward, a new way to define state interests, and thereby transforms existing relations. Hegemonic stability theorists argue that international politics is characterized by a succession of hegemonies in which a single powerful state dominates the system as a result of its victory in the last hegemonic war.47 Especially after the cold war America can be described as trying to keep its position at the top but also integrating others more thoroughly in the international system that it dominates. It is assumed that the differential growth of power in a state system would undermine the status quo and lead to hegemonic war between declining and rising powers48, but I see a different pattern: the U.S. hegemonic stability promoting liberal institutionalism, the events following 9/11 are a brief abnormality from this path, but the general trend will be toward institutional liberalism. Hegemonic states are the crucial components in military alliances that turn back the major threats to mutual sovereignties and hence political domination of the system. Instead of being territorially aggressive and eliminating other states, hegemons respect other's territory. They aspire to be leaders and hence are upholders of inter-stateness and inter-territoriality.49 The nature of the institutions themselves must, however, be examined. They were shaped in the years immediately after World War II by the United States. The American willingness to establish institutions, the World Bank to deal with finance and trade, United Nations to resolve global conflict, NATO to provide security for Western Europe, is explained in terms of the theory of collective goods. It is commonplace in the regimes literature that the United States, in so doing, was providing not only private goods for its own benefit but also (and perhaps especially) collective goods desired by, and for the benefit of, other capitalist states and members of the international system in general. (Particular care is needed here about equating state interest with "national" interest.) Not only was the United States protecting its own territory and commercial enterprises, it was providing military protection for some fifty allies and almost as many neutrals. Not only was it ensuring a liberal, open, near-global economy for its own prosperity, it was providing the basis for the prosperity of all capitalist states and even for some states organized on noncapitalist principles (those willing to abide by the basic rules established to govern international trade and finance). While such behaviour was not exactly selfless or altruistic, certainly the benefits-however distributed by class, state, or region-did accrue to many others, not just to Americans.50 For the truth about U.S. dominant role in the world is known to most clear-eyed international observers. And the truth is that the benevolent hegemony exercised by the United States is good for a vast portion of the world's population. It is certainly a better international arrangement than all realistic alternatives. To undermine it would cost many others around the world far more than it would cost Americans-and far sooner. As Samuel Huntington wrote five years ago, before he joined the plethora of scholars disturbed by the "arrogance" of American hegemony; "A world without U.S. primacy will be a world with more violence and disorder and less democracy and economic growth than a world where the United States continues to have more influence than any other country shaping global affairs”. 51 I argue that the overall American-shaped system is still in place. It is this macro political system-a legacy of American power and its liberal polity that remains and serves to foster agreement and consensus. This is precisely what people want when they look for U.S. leadership and hegemony.52 If the U.S. retreats from its hegemonic role, who would supplant it, not Europe, not China, not the Muslim world –and certainly not the United Nations. Unfortunately, the alternative to a single superpower is not a multilateral utopia, but the anarchic nightmare of a New Dark Age. Moreover, the alternative to unipolarity would not be multipolarity at all. It would be ‘apolarity’ –a global vacuum of power.53 Since the end of WWII the United States has been the clear and dominant leader politically, economically and military. But its leadership as been unique; it has not been tyrannical, its leadership and hegemony has focused on relative gains and has forgone absolute gains. The difference lies in the exercise of power. The strength acquired by the United States in the aftermath of World War II was far greater than any single nation had ever possessed, at least since the Roman Empire. America's share of the world economy, the overwhelming superiority of its military capacity-augmented for a time by a monopoly of nuclear weapons and the capacity to deliver them--gave it the choice of pursuing any number of global ambitions. That the American people "might have set the crown of world empire on their brows," as one British statesman put it in 1951, but chose not to, was a decision of singular importance in world history and recognized as such.54 Leadership is really an elegant word for power. To exercise leadership is to get others to do things that they would not otherwise do. It involves the ability to shape, directly or indirectly, the interests or actions of others. Leadership may involve the ability to not just "twist arms" but also to get other states to conceive of their interests and policy goals in new ways. This suggests a second element of leadership, which involves not just the marshalling of power capabilities and material resources. It also involves the ability to project a set of political ideas or principles about the proper or effective ordering of po1itics. It suggests the ability to produce concerted or collaborative actions by several states or other actors. Leadership is the use of power to orchestrate the actions of a group toward a collective end.55 By validating regimes and norms of international behaviour the U.S. has given incentives for actors, small and large, in the international arena to behave peacefully. The uni-polar U.S. dominated order has led to a stable international system. Woodrow Wilson’s zoo of managed relations among states as supposed to his jungle method of constant conflict. The U.S. through various international treaties and organizations as become a quasi world government; It resolves the problem of provision by imposing itself as a centralized authority able to extract the equivalent of taxes. The focus of the theory thus shifts from the ability to provide a public good to the ability to coerce other states. A benign hegemon in this sense coercion should be understood as benign and not tyrannical. If significant continuity in the ability of the United States to get what it wants is accepted, then it must be explained. The explanation starts with our noting that the institutions for political and economic cooperation have themselves been maintained. Keohane rightly stresses the role of institutions as "arrangements permitting communication and therefore facilitating the exchange of information. By providing reliable information and reducing the costs of transactions, institutions can permit cooperation to continue even after a hegemon's influence has eroded. Institutions provide opportunities for commitment and for observing whether others keep their commitments. Such opportunities are virtually essential to cooperation in non-zero-sum situations, as gaming experiments demonstrate. Declining hegemony and stagnant (but not decaying) institutions may therefore be consistent with a stable provision of desired outcomes, although the ability to promote new levels of cooperation to deal with new problems (e.g., energy supplies, environmental protection) is more problematic. Institutions nevertheless provide a part of the necessary explanation.56 In restructuring the world after WWII it was America that was the prime motivator in creating and supporting the various international organizations in the economic and conflict resolution field. An example of this is NATO’s making Western Europe secure for the unification of Europe. It was through NATO institutionalism that the countries in Europe where able to start the unification process. The U.S. working through NATO provided the security and impetus for a conflict prone region to unite and benefit from greater cooperation. Since the United States emerged as a great power, the identification of the interests of others with its own has been the most striking quality of American foreign and defence policy. Americans seem to have internalized and made second nature a conviction held only since World War II: Namely, that their own wellbeing depends fundamentally on the well-being of others; that American prosperity cannot occur in the absence of global prosperity; that American freedom depends on the survival and spread of freedom elsewhere; that aggression anywhere threatens the danger of aggression everywhere; and that American national security is impossible without a broad measure of international security. 57 I see a multi-polar world as one being filled with instability and higher chances of great power conflict. The Great Power jostling and British hegemonic decline that led to WWI is an example of how multi polar systems are prone to great power wars. I further posit that U.S. hegemony is significantly different from the past British hegemony because of its reliance on consent and its mutilaterist nature. The most significant would be the UN and its various branches financial, developmental, and conflict resolution. It is common for the international system to go through cataclysmic changes with the fall of a great power. I feel that American hegemony is so different especially with its reliance on liberal institutionalism and complex interdependence that U.S. hegemonic order and governance will be maintained by others, if states vary in size, then cooperation between the largest of the former free riders (and including the declining hegemonic power) may suffice to preserve the cooperative outcome. Thus we need to amend the assumption that collective action is impossible and incorporate it into a fuller specification of the circumstances under which international cooperation can be preserved even as a hegemonic power declines.58 If hegemony means the ability to foster cooperation and commonalty of social purpose among states, U.S. leadership and its institutional creations will long outlast the decline of its post war position of military and economic dominance; and it will outlast the foreign policy stumbling of particular administrations.59 U.S. hegemony will continue providing the public good that the world is associated with despite the rise of other powers in the system “cooperation may persist after hegemonic decline because of the inertia of existing regimes. Institutional factors and different logics of regime creation and maintenance have been invoked to explain the failure of the current economic regime to disintegrate rapidly in response to the decline of American predominance in world affairs.”60 Since the end of WWII the majority of the states that are represented in the core have come to depend on the security that U.S. hegemony has provided, so although they have their own national interest, they forgo short term gains to maintain U.S. hegemony. Why would other states forgo a leadership role to a foreign hegemon because it is in their interests; one particularly ambitious application is Gilpin's analysis of war and hegemonic stability. He argues that the presence of a hegemonic power is central to the preservation of stability and peace in the international system. Much of Gilpin's argument resembles his own and Krasner's earlier thesis that hegemonic states provide an international order that furthers their own self-interest. Gilpin now elaborates the thesis with the claim that international order is a public good, benefiting subordinate states. This is, of course, the essence of the theory of hegemonic stability. But Gilpin adds a novel twist: the dominant power not only provides the good, it is capable of extracting contributions toward the good from subordinate states. In effect, the hegemonic power constitutes a quasigovernment by providing public goods and taxing other states to pay for them. Subordinate states will be reluctant to be taxed but, because of the hegemonic state's preponderant power, will succumb. Indeed, if they receive net benefits (i.e., a surplus of public good benefits over the contribution extracted from them), they may recognize hegemonic leadership as legitimate and so reinforce its performance and position. During the 19th century several countries benefited from British hegemony particularly its rule of the seas, since WWII the U.S. has also provided a similar stability and security that as made smaller powers thrive in the international system. The model presumes that the (military) dominance of the hegemonic state, which gives it the capacity to enforce an international order, also gives it an interest in providing a generally beneficial order so as to lower the costs of maintaining that order and perhaps to facilitate its ability to extract contributions from other members of the system.

#### Statistical evidence shows US policy towards indefinite detention is both necessary and sufficient.

Welsh 11 (David, J.D. from the University of Utah. He is currently a doctoral student in the Eller School of Business at the University of Arizona where his research focuses on organizational fairness and ethics, "Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy”, 9 U.N.H. L. Rev. 261, March 2011]

Today, many individuals throughout the world question whether the United States has engaged in excess in response to the attacks of 9/11. A 2004 poll suggests that many people in France (57%), Germany (49%), and Britain (33%) felt that the United States overreacted in response to terrorism. n30 Among Middle Eastern countries, as many as three-fourths of individuals stated that the United States overreacted in the War on Terror. n31 Additionally, approximately two-thirds of citizens in France, Germany, Turkey, and Pakistan questioned the sincerity of the United States in the War on Terror. n32 Within the United States, nationwide confidence in the White House [\*267] dropped 40% between 2002 and 2004 while confidence in Congress fell by 25% during this period. n33 Although this worldwide drop in legitimacy is the result of multiple factors beyond the scope of this paper, such as the U.S. decision to invade Iraq, detention remains a controversial topic that continues to negatively affect global perceptions of the United States. Although this paper focuses specifically on the detention of suspected terrorists at the Guantanamo Bay Detention Camp (Guantanamo Bay), n34 this facility is but one of many detention centers holding suspected terrorists on behalf of the United States. n35 Today, approximately 250 prisoners (out of approximately 800) remain at this U.S.-run military base in Cuba that is outside U.S. legal jurisdiction. n36 However, it is critical to note that these 250 individuals represent a mere 1% of "approximately 25,000 detainees worldwide held directly or indirectly by or on behalf of the United States." n37 Prisoners have alleged torture, sexual degradation, religious persecution, n38 and many other specific forms of mistreatment while being detained. n39 In many detention facilities including Guantanamo Bay, Abu Ghraib, and Bagram, these allegations are substantiated by significant evidence and have gained worldwide attention. n40 [\*268] While some graphic and shocking cases of abuse have been brought to light, n41 a more typical example is the prosecution of sixteen-year-old Mohamed Jawad by Lt. Col. Darrel Vandeveld at Guantanamo Bay. n42 At first, the case against Jawad looked straightforward, as he had confessed to throwing a grenade that injured two U.S. soldiers and a translator in December 2002. n43 However, a deeper investigation "uncovered a confession obtained through torture, two suicide attempts by the accused, abusive interrogations, the withholding of exculpatory evidence from the defense," and other procedural problems. n44 Vandeveld discovered that the military had obtained confessions from two other individuals for the same offense; he ultimately left his post after attempts to provide "basic fair trial rights" failed. n45 In February 2006, the United Nations Working Group on Arbitrary Detention spoke out against international law and human rights violations at Guantanamo Bay, stating that the facility should be closed "without further delay." n46 This report paralleled earlier criticism from Amnesty International that Guantanamo Bay violates minimum standards for the treatment of individuals. n47 In response, the United States has argued that detainees are not prisoners of war but are rather "unlawful combatants" who are not entitled to the protections of the Geneva Convention because they do not act in accor [\*269] dance with the accepted rules of war. n48 Yet, regardless of the debatable legal merit of this argument, legitimacy is an "elusive quality" grounded in worldwide opinion that will not let the United States off the hook on a mere technicality when moral duties and international customs have been violated. n49 In the next section, I discuss the importance of legitimacy and the ways in which it has been undermined by U.S. conduct in the War on Terror. By understanding what drives global perceptions of U.S. legitimacy, current detention policies and their ramifications can be more accurately assessed and restructured. IV. Legitimacy: The Critical Missing Element in the War on Terror In the context of the War on Terror, legitimacy is the critical missing element under the current U.S. detention regime. Legitimacy can be defined as "a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just." n50 As far back as Plato and Aristotle, philosophers have recognized that influencing others merely through coercion and power is costly and inefficient. n51 Today, empirical evidence suggests that legitimacy, rather than deterrence, is primarily what causes individuals to obey the law. n52 Thus, while legal authorities may possess the immediate power to stop illegal action, long-term compliance requires that the general public perceives the law to be legitimate. n53 Terrorism is primarily an ideo [\*270] logical war that cannot be won by technology that is more sophisticated or increased military force. n54 While nations combating terrorism must continue to address immediate threats by detaining suspected terrorists, they must also consider the prevention of future threats by analyzing how their policies are perceived by individuals throughout the world. Ultimately, in the War on Terror, "the benefits to be derived from maximizing legitimacy are too important to neglect." n55 Over time, perceptions of legitimacy create a "reservoir of support" for an institution that goes beyond mere self-interest. n56 In the context of government: Legitimacy is an endorphin of the democratic body politic; it is the substance that oils the machinery of democracy, reducing the friction that inevitably arises when people are not able to get everything they want from politics. Legitimacy is loyalty; it is a reservoir of goodwill that allows the institutions of government to go against what people may want at the moment without suffering debilitating consequences. n57 The widespread acceptance of highly controversial decisions by the U.S. Supreme Court illustrates the power of institutional legitimacy. n58 The Court itself noted that it "cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees." n59 "The Court's power lies, rather, in its legitimacy . . . ." n60 For example, by emphasizing "equal treatment," "honesty and neutrality," "gathering information before decision making," and "making principled, or rule based, decisions instead of political decisions," the Court maintained [\*271] legitimacy through the controversial abortion case Planned Parenthood of Southeastern Pennsylvania v. Casey in 1992. n61 Thus, although approximately half of Americans oppose abortion, n62 the vast majority of these individuals give deference to the Court's ruling on this issue. n63 In the post-World War II era, the United States built up a worldwide reservoir of support based upon four pillars: "its commitment to international law, its acceptance of consensual decision-making, its reputation for moderation, and its identification with the preservation of peace." n64 Although some U.S. policies between 1950 and 2001 did not align with these pillars, on a whole the United States legitimized itself as a world superpower during this period. n65 In the 1980s, President Ronald Reagan spoke of America as a "shining city on a hill," suggesting that it was a model for the nations of the world to look to. n66 While the United States received a virtually unprecedented outpouring of support from the international community following 9/11, a nation's reservoir of support will quickly evaporate when its government overreacts. Across the globe, individuals have expressed a growing dissatisfaction with U.S. conduct in the War on Terror, and by 2006, even western allies of the United States lobbied for the immediate closure of Guantanamo Bay, calling it "an embarrassment." n67 Former Secretary of State Colin Powell proclaimed that "Guantanamo has become a major, major problem . . . in the way the world perceives America and if it were up to me I would close Guantanamo not tomorrow but this afternoon . . . ." n68 Similarly, [\*272] President Obama noted in his campaign that "Guantanamo has become a recruiting tool for our enemies." n69 Current U.S. detention policies erode each of the four pillars on which the United States established global legitimacy. In fact, critics have argued that the "United States has assumed many of the very features of the 'rogue nations' against which it has rhetorically--and sometimes literally--done battle over the years." n70 While legitimacy cannot be regained overnight, the recent election of President Barack Obama presents a critical opportunity for a re-articulation of U.S. detention policies. Although President Obama issued an executive order calling for the closure of Guantanamo Bay only two days after being sworn into office, n71 significant controversy remains about the kind of alternate detention system that will replace it. n72 In contrast to the current model, which has largely rendered inefficient decisions based on ad hoc policies, I argue for the establishment of a domestic terror court (DTC) created specifically to deal with the unique procedural issues created by a growing number of suspected terrorists.

#### Next, blanket indefinite detention violates the Geneva Convention – doesn’t differentiate between types of combatants nor the different durations of conflict.

Murphy 7 (Law Professor at George Washington University Law School, “Evolving Geneva Convention Paradigms in the¶ 'War on Terrorism': Applying the Core Rules to the¶ Release of Persons Deemed 'Unprivileged¶ Combatants'”, GW Law Faculty Publications & Other Works, 2007, RSR]

The general assertion that all detainees at Guantánamo Bay may be detained for the “duration¶ of hostilities” is doubtful. First, that assertion may be overbroad in covering all persons detained¶ worldwide in the “war on terrorism.” While detention of persons on the battlefield in Afghanistan,¶ whether the person is associated with the Taliban or with Al Qaeda, seems fairly to fall within the¶ scope of the evolving laws of war, the detention of persons outside Afghanistan who are suspected¶ of connections to global terrorism is more problematic. The laws of war operate within temporal and¶ geographic realms; considerable attention is given to when it can be said that an “armed conflict”¶ has arisen and ended, and to where it is that protected persons are located (in enemy territory, in¶ occupied territory, in neutral territory, etc.) These rules do not fit well the new paradigm of an armed¶ conflict between a state and a non-state actor that is transnational in nature, especially when that nonstate actor is not a centralized organization. Links to Al Qaeda may be found in numerous countries,¶ not because the indigenous factions there are actively engaged in a coordinated fight against the¶ United States, but because Al Qaeda attracts movements that seek to reduce Western influence in their countries or region, be it Somalia, Algeria, or elsewhere.135 A principal architect of the radical¶ thinking that came to characterize Al Qaeda, Abu Musab al-Suri, has written that Al Qaeda is not¶ an organization, it is not a group, nor do we want it to be. . . . It is a call, a reference, a¶ methodology.”136 If that is correct, it becomes very strained to view all persons suspected of ties to¶ Al Qaeda as unlawful combatants engaged in an armed conflict with the United States. It would be¶ as if, during the Cold War, the United States decided to treat all persons suspected of being¶ communists as combatants because communist groups were fighting the United States in places like¶ Vietnam or Korea.¶ While it may be the case that Al Qaeda persons detained outside Afghanistan fall within the¶ same rules at those detained on the battlefield, it may also be the case that the rules are different.¶ Perhaps in recognition of this fact, the Supreme Court in Hamdi, after stating the general principle¶ of the law of war that detention may last no longer than active hostilities, went on to note that “[i]f¶ the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed¶ the development of the law of war, that understanding may unravel.”137 Indeed, the Court appears¶ to have been influenced by the fact that Hamdi allegedly took up arms with the Taliban and that¶ active fighting against Taliban forces remained ongoing in Afghanistan. ¶ If Al Qaeda suspects picked up in places other than the battlefield in Afghanistan are not¶ regarded as combatants under the laws of war, then they would fall under the same rules that apply¶ to any transnational criminal; they could be arrested and tried in regular courts for transnational¶ crime, and otherwise could be closely monitored by law enforcement authorities. They could not,¶ however, simply be detained without trial indefinitely.¶ Second, even if one assumes that all the detainees at Guantánamo Bay should be treated¶ alike, the general assertion that they may be detained for the “duration of hostilities” still is¶ problematic. That general assertion appears based on Article 118 of Geneva Convention III¶ (“[p]risoners of war shall be released and repatriated without delay after the cessation of active¶ hostilities”), and perhaps on the analogous Article 133 of Geneva Convention IV (any internment¶ of civilians “shall cease as soon as possible after the close of hostilities”). Persons who have been¶ prosecuted in accordance with the conventions, of course, may be held even after the cessation of¶ hostilities, but they remain under the protections of the conventions until the completion of their sentences and their release.¶ The sentiment expressed by the 1949 Geneva Convention provisions in favor of expeditious¶ release after the cessation of hostilities was animated by the problems that were experienced prior¶ to 1949. The 1907 Hague Regulations138 and the 1929 Geneva Conventions on Prisoners of War139¶ were interpreted as allowing a detaining power not to repatriate until either the conclusion of an¶ armistice agreement or even a final peace agreement. Since those agreements might take months or¶ even years after the cessation of active hostilities, the repatriation of millions of prisoners of war in¶ both the world wars were considerably delayed.140 Consequently, the1949 Geneva Conventions (and¶ Protocol I) sought to detach the issue of repatriation from the conclusion of a formal agreement, and¶ instead tie the matter to core justification for detention—i.e., whether the individual would pose a¶ threat to the detaining power after release. In this sense, the obligation became a unilateral one¶ imposed on the detaining power, and not one contingent on some formal of consent from the¶ opposing belligerent. For the 1949 Geneva Conventions, the threat no longer existed once the¶ hostilities were over.¶ Yet, regardless of the duration of the conflict, Geneva Convention III and Geneva Convention¶ IV are oriented toward an individualized assessment of the circumstances arising with respect to¶ individual POWs and civilian internees. Under Geneva Convention III, a detaining power may¶ release a particular POW on “parole or promise,”141 and may also “conclude agreements with a view¶ to the direct repatriation or interment in a neutral country of able-bodied prisoners of war who have¶ undergone a long period of captivity.”142 Likewise, the standard set forth in Geneva Convention IV¶ for release of civilian internees is not tied to the cessation of hostilities; it provides that civilian¶ internees “shall be released by the Detaining Power as soon as the reasons which necessitated his¶ internment no longer exist.”143

#### US Failure to adhere to Geneva undermines the entire Geneva regime

Beard 7 (Jack, Lecturer at UCLA former Deputy General Counsel at the D.o.D., “The Geneva Boomerang: The Military Commissions Act of 2006 And US Counterterror operations,” The American Journal of International Law, KM]

At a fundamental level, unilateral revision of the Geneva Conventions by the United States undermines the credibility of the U.S. commitment to the existing Geneva regime. In an international setting that lacks effective external enforcement mechanisms, allowing the easy violation of agreements, a state may seek to send a signal of credible commitment to other states by constraining its own ability to act in ex ante legal structures, institutions, or procedures that reduce ex post incentives for such noncompliance. n58 A legislative act that restrains or makes it [\*66] costly to exercise such discretionary power and reduces the attractiveness of breaching an agreement can serve such a signaling function. n59 To the extent, however, that the MCA is perceived as unilaterally revising key obligations in the Geneva Conventions and providing the president with the discretion to issue further reinterpretations, it undermines the credible commitment of the United States to other states in the international community. n60 And to the extent that the U.S. commitment is perceived as increasingly less credible, theory suggests that other countries are unlikely to maintain the stringency of their own commitments.

#### The Geneva Conventions are key to prevent the development and use of chemical and biological weapons.

GCSP 5 [Geneva Centre for Security Policy, “Biological and Chemical Weapons Seminar,” June 2005, http://www.gcsp.ch/e/meetings/Security\_Challenges/WMD/Meeting\_Conf/2005/BC%20Weapons%20Seminar/summary.htm, KM]

On 9-10 June 2005, the GCSP hosted an international seminar initiated by France and Switzerland on the occasion of the 80th anniversary of the signing of the Geneva Protocol prohibiting the Use of Chemical and Bacteriological Weapons in collaboration with the United Nations Institute for Disarmament Research (UNIDIR). Over 100 participants attended the event, representing 39 States Parties, 8 UN agencies and the European Union, 12 non-governmental organisations and 10 media organisations. Ambassador Raimund Kunz, Head of the Directorate of Security Policy of the Swiss Defence Department, and Ambassadors François Rivasseau and Jürg Streuli, respectively the French and Swiss Permanent Representatives to the Conference on Disarmament, opened the seminar. The first session considered the historical background to the adoption of the 1925 Geneva Protocol and why its prohibition was extended to include bacteriological weapons, and the philosophical and ethical reasons for preserving humankind from the scourge of weapons of mass destruction. The second session considered the current situation and why there is a continuing threat from biological weapons, including from non-State actors, as well as the measures that should be taken to counter this threat, including inter-governmental cooperation through Interpol. The WHO presented the global health response to epidemics, caused naturally, accidentally or deliberately, and the International Organisation for Animal Health (OIE) described its policies to prevent or cure animal epidemics. The session also considered the implications of industrial and scientific developments in biology and biotechnology as well as legal and ethical measures in relation to bio-security. The third session examined the possible responses of international law, including the classical rules of humanitarian law relating to poisoning and the deliberate spread of disease as related to modern responsibilities, and responses that could be based on traditional instruments of disarmament, namely the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention. The final session considered emergency responses to the threat of biological and chemical weapons. The French Head of the MFA Disarmament Unit took stock of the implementation of the Chemical Weapons Convention and the UK Permanent Representative to the Conference on Disarmament, President of the Biological and Toxin Weapons Convention Review Process, envisaged what the States Parties to the Convention might do at the Sixth Review Conference in 2006. Then the seminar considered the actions taken by groups of States such as the G8 (Global Partnership against Weapons of Mass Destruction) and the European Union (Common Strategy on the Non-Proliferation of WMD) to strengthen the regimes prohibiting chemical and biological weapons, as well as the implementation of the UN Security Council Resolution 1540 (2004). Thanks in particular to the active presence of NGOs, think tanks and journalists, the seminar was lively with a rich debate following the presentations that covered much ground and led to the recognition of a number of conclusions and points for further consideration: The 1925 Geneva Protocol was the cornerstone of a multilateral regime that now, through the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention, totally prohibits not only the use but also the production and possession of both chemical and biological weapons.

#### Bioweapons cause extinction – new advances in biotech

Myhrvold 13 (Nathan, former Chief Technology Officer at Microsoft, founder of Intellectual Ventures—one of the largest patent holding companies in the world, “Strategic Terrorism: A Call to Action”, The Lawfare Research Paper Series Research paper NO . 2, http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf]

**Biotech**nology **is advancing so rapidly** that **it is hard to**  **keep track of all** **the new potential threats**. Nor is it clear that anyone is even trying. In addition to lethality and drug resistance, many other parameters can be played with, given that the infectious power of an epidemic depends on many properties, including the length of the latency period during which a person is contagious but asymptomatic. Delaying the onset of serious symptoms allows each new case to spread to more people and thus makes the virus harder to stop. This dynamic is perhaps best illustrated by HIV , which is very difficult to transmit compared with smallpox and many other viruses. Intimate contact is needed, and even then, the infection rate is low. The balancing factor is that HIV can take years to progress to AIDS , which can then take many more years to kill the victim. What makes HIV so dangerous is that infected people have lots of opportunities to infect others. This property has allowed HIV to claim more than 30 million lives so far, and approximately 34 million people are now living with this virus and facing a highly uncertain future.15 A virus genetically engineered to infect its host quickly, to generate symptoms slowly—say, only after weeks or months—and to spread easily through the air or by casual contact would be vastly more devastating than HIV . It could silently penetrate the population to unleash its deadly effects suddenly. This type of epidemic would be almost impossible to combat because most of the infections would occur before the epidemic became obvious. **A technologically sophisticated terrorist group could**  **develop** such **a virus and kill a large part of humanity with it**. **Indeed, terrorists may not have to develop it themselves:**  **some scientist may** do so first and publish the details. **Given the rate at which biologists are making discoveries** about viruses and the immune system, **at some point in**  **the near future**, **someone may create artificial pathogens**  **that could** drive the human race to extinction. Indeed, a detailed species-elimination plan of this nature was openly proposed in a scientific journal. The ostensible purpose of that particular research was to suggest a way to extirpate the malaria mosquito, but similar techniques could be directed toward humans.16 When I’ve talked to molecular biologists about this method, they are quick to point out that it is slow and easily detectable and could be fought with biotech remedies. If you challenge them to come up with improvements to the suggested attack plan, however, they have plenty of ideas. **Modern biotechnology** **will soon be capable**, if it is not already, **of bringing about the demise of the human race**— or at least of killing a sufficient number of people to end high-tech civilization and set humanity back 1,000 years or more. **That terrorist groups could achieve this level of technological**  **sophistication may seem far-fetched, but** keep in mind **that it takes only a handful of individuals to accomplish**  **these tasks**. Never has lethal power of this potency been accessible to so few, so easily. Even more dramatically than nuclear proliferation, **modern biological science has frighteningly undermined the correlation between the lethality of a weapon and its cost**, a fundamentally stabilizing mechanism throughout history. **Access to extremely lethal**  **agents**—lethal enough to exterminate Homo sapiens—**will**  **be available to anybody with a solid background in biology,**  **terrorists included**. The 9/11 attacks involved at least four pilots, each of whom had sufficient education to enroll in flight schools and complete several years of training. **Bin Laden had a degree**  **in civil engineering**. Mohammed Atta attended a German university, where he earned a master’s degree in urban planning—not a field he likely chose for its relevance to terrorism. **A future set of terrorists could** just as **easily be**  **students of molecular biology who enter their studies innocently**  **enough but later put their skills to homicidal use**. Hundreds of universities in Europe and Asia have curricula sufficient to train people in the skills necessary to make a sophisticated biological weapon, and hundreds more in the United States accept students from all over the world. **Thus it seems likely that sometime in the near future a** **small band of terrorists**, or even a single misanthropic individual, **will overcome our best defenses and do something**  **truly terrible, such as fashion a bioweapon that could kill millions or even billions of people**. Indeed, **the creation of such weapons within the next 20 years seems to be a virtual certainty**. The repercussions of their use are hard to estimate. One approach is to look at how the scale of destruction they may cause compares with that of other calamities that the human race has faced.

#### A national security court would solve US compliance with Geneva - allows for oversight to review the individual detentions

McCarthy and Velshi 9 [Andrew (Director of the Center for Law & Counterterrorism at the Foundation for the Defense of Democracies) and Alykhan (staff attorney at the Center for Law & Counterterrorism, where he focuses on the international law of armed conflict and the use of force), “We Need a National Security Court”, Submission for AEI, 2009, RSR]

The NSC would oversee a new process for ¶ monitoring and reviewing the detention of alien enemy combatants captured by our ¶ military (and allied forces) outside U.S. territory and detained wherever the military ¶ chooses to detain them (including within the United States). The district court division of ¶ the NSC would perform, primarily, a monitoring function. As already noted, judicial ¶ review would principally proceed at the appellate level, as it now does under the DTA ¶ and MCA. The process would work as follows. Within a reasonable time after capture, the ¶ Justice Department would report to the NSC the fact that an alleged unlawful combatant ¶ had been captured in a particular theater of combat and was being detained.69¶ Presumptively within one year of capture, the military would hold a CSRT pursuant to ¶ the procedures currently in place.70 Assuming the detainee is designated an alien enemy¶ combatant, the appeal process would proceed, first in the military system and, ultimately, ¶ to the appellate tribunal of the NSC. ¶ Review in the NSC would proceed in a manner similar to that envisioned by the ¶ MCA. In creating the NSC, Congress would (a) make a finding that aliens who are nonU.S. persons (i.e., who are neither American citizens nor lawful permanent resident aliens ¶ of the United States) have no entitlements under the Constitution, and (b) provide that ¶ such aliens have no enforceable entitlements against detention during wartime under any ¶ U.S. statute or treaty if found by a properly constituted CSRT to be enemy combatants. ¶ Consequently, review in the NSC would be limited to challenging compliance at the ¶ appellant’s CSRT with the military’s standards and procedures for CSRTs. To avoid the empirical problem of judicial activism, the Congress would make clear that the grounds it ¶ has set forth are the only available grounds for judicial review.71¶ In connection with each certified combatant, the Justice Department would also ¶ certify to the NSC (at the district court level) that hostilities were ongoing in the war on ¶ terror, that hostilities were ongoing in the theater of combat relevant to the particular ¶ enemy combatant (which, of course, will not necessarily be the place where the ¶ combatant was captured), and that it was in the national security interest of the United ¶ States that the combatant continue to be held because of the likelihood that he would ¶ resume operations against the United States if released. The CSRT determination would ¶ be reviewed annually, as would DOJ’s certification.¶ The government’s certification would be unreviewable as long as the executive ¶ branch represented that combat operations were still ongoing in the theater which was the ¶ predicate (or were the predicates) for finding the particular detainee an alien enemy ¶ combatant. Here, it is worth pausing to rehearse that, once prospects for useful ¶ intelligence have been exhausted, the sole justification for holding enemy combatants is ¶ to prevent them from rejoining the battle. While it is often observed that the global war ¶ on terror may go on indefinitely, this does not mean it will go on throughout the world ¶ indefinitely. ¶ Of course, some detainees will be a credible threat to join the battle wherever it ¶ rages. However, the evidence that would make such a threat credible will frequently ¶ provide grounds for charging the terrorist-combatant with war crimes and prosecuting ¶ him – such that it will not be necessary to detain him interminably merely as an enemy ¶ combatant (which is the principal international objection to current U.S. policy). Other ¶ detainees will only be credible local threats, and will not be a continuing national security ¶ challenge for the United States once combat operations have been completed in the place ¶ where they were captured. Such combatants should be repatriated once combat operations ¶ in their region have wound down (and it bears mention here that the United States has, in fact, released hundreds of combatants from Guantanamo Bay).72 Moreover, as progress is ¶ made in the war on terror, and particularly if functioning governments replace tyrannical ¶ regimes, it will increasingly be possible to repatriate combatants with the confidence that ¶ they will be treated appropriately (including by prosecution, if grounds exist) by the new ¶ governments in their home countries (or in countries where they have committed crimes). ¶

### Increased Scrutiny

#### Contention 2: is Increased Scrutiny

#### Increased scrutiny over detention has resulted in a shift to drones and renditions.

Goldsmith 9 (Jack, Professor of Law at Harvard and member of the Hoover Institution Task Force on National Security and Law, assistant attorney general in the Bush administration, 5/31/09, “The Shell Game on Detainees and Interrogation,” <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/29/AR2009052902989.html>]

(Also makes the claim that Obama would rather detain in the first place.)

The cat-and-mouse game does not end there. As detentions at Bagram and traditional renditions have come under increasing legal and political scrutiny, the Bush and Obama administrations have relied more on other tactics. They have secured foreign intelligence services to do all the work -- capture, incarceration and interrogation -- for all but the highest-level detainees. And they have increasingly employed targeted killings, a tactic that eliminates the need to interrogate or incarcerate terrorists but at the cost of killing or maiming suspected terrorists and innocent civilians alike without notice or due process.¶ There are at least two problems with this general approach to incapacitating terrorists. First, it is not ideal for security. Sometimes it would be more useful for the United States to capture and interrogate a terrorist (if possible) than to kill him with a Predator drone. Often the United States could get better information if it, rather than another country, detained and interrogated a terrorist suspect. Detentions at Guantanamo are more secure than detentions in Bagram or in third countries.¶ The second problem is that terrorist suspects often end up in less favorable places. Detainees in Bagram have fewer rights than prisoners at Guantanamo, and many in Middle East and South Asian prisons have fewer yet. Likewise, most detainees would rather be in one of these detention facilities than be killed by a Predator drone. We congratulate ourselves when we raise legal standards for detainees, but in many respects all we are really doing is driving the terrorist incapacitation problem out of sight, to a place where terrorist suspects are treated worse.¶ It is tempting to say that we should end this pattern and raise standards everywhere. Perhaps we should extend habeas corpus globally, eliminate targeted killing and cease cooperating with intelligence services from countries that have poor human rights records. This sentiment, however, is unrealistic. The imperative to stop the terrorists is not going away. The government will find and exploit legal loopholes to ensure it can keep up our defenses.¶ This approach to detention policy reflects a sharp disjunction between the public's view of the terrorist threat and the government's. After nearly eight years without a follow-up attack, the public (or at least an influential sliver) is growing doubtful about the threat of terrorism and skeptical about using the lower-than-normal standards of wartime justice.¶ The government, however, sees the terrorist threat every day and is under enormous pressure to keep the country safe. When one of its approaches to terrorist incapacitation becomes too costly legally or politically, it shifts to others that raise fewer legal and political problems. This doesn't increase our safety or help the terrorists. But it does make us feel better about ourselves.

#### Specifically, status quo ambiguity causes this shit - the aff’s Congressional statute is key to reverse that.

Chertoff 11 (Michael, Former Secretary of the Department of Homeland Security,

THE DECLINE OF JUDICIAL DEFERENCE ON NATIONAL SECURITY, Rutgers Law Review, 3 February 2011, http://www.rutgerslawreview.com/wp-content/uploads/archive/vol63/Issue4/Chertoff\_Speech\_PDF.pdf, pg. 1125-1128]

So, where has this left us? It has left us in a puzzling situation. ¶ In a decision called Al-Bihani in the D.C. Circuit in 2010, Judge ¶ Janice Rogers Brown talked about the consequences—practical ¶ consequences—of having habeas review in Guantánamo as it affects ¶ the battlefield.42 And what she said is that the process at the tail end ¶ is now impacting the front end because when you conduct combat ¶ operations, you now have to worry about collecting evidence.43¶ A somewhat darker analysis has been put forward by Ben Wittes ¶ who has recently written a book called Detention and Denial, where ¶ he argues that the courts have now created an incentive system to ¶ kill rather than capture.44 And much of the law of war over the years ¶ was designed to move away from the “give no quarter” theory, where ¶ you killed everybody at the battlefield, into the theory of you would ¶ rather capture than kill. And his point, and you can agree or ¶ disagree with it, is that you have now actually loaded it the other ¶ way; you have pushed it in the direction of kill rather than capture.45 We have complete uncertainty now in the standards to be ¶ applied in the individual cases. If you read Ben Wittes‟s book ¶ Detention and Denial, he will details about ten or twelve district ¶ court cases where literally on the same facts you get different ¶ answers.46 And it is not that the district judges are not doing their ¶ best, but they have no guidance. There is no standard, and no one ¶ has offered them a standard.¶ We now have litigation about Bagram Air Force Base in ¶ Afghanistan.47 It was absolutely predictable when Boumediene was ¶ decided that the next case would be against Bagram Airbase. I do ¶ not know how it is going to come out at the end. I think it is still in ¶ the district court, but I will tell you, the logic—now they may have ¶ stopped the logic of Guantánamo—the logic of Boumediene certainly ¶ raises questions about Bagram. How do you wind up having habeas ¶ in Bagram? And then what is going to happen when you are in a ¶ forward firebase? Are you going to have habeas cases there? No one¶ knows, but the big problem is that the battlefield commanders do not ¶ know either; that is a serious operational problem.¶ In many ways, it is absolutely a great example of what the Court ¶ in Eisentrager predicted.48 When you go down this path, you are ¶ going to actually have real operational problems with warfighting. ¶ But of course, we are not in 1950 now; we are actually in active ¶ operations.¶ Finally, and I find this really to be the most interesting ¶ contemporary question posed by this series of issues, the press ¶ reports—and I cannot verify this, I am not confirming it, but I am ¶ assuming it to be true—the press reports that President Obama has ¶ authorized the killing of Anwar al-Aulaki, the American citizen in ¶ Yemen who is, in my mind for quite good reason, believed to be a ¶ major recruiter and operation leader for al-Qaeda.49 I want to be ¶ clear: I am perfectly okay with that, and I think it is exactly the right ¶ decision, so I do not want to be misunderstood. But I will say that if ¶ you read the decision and logic of Boumediene that is a very puzzling ¶ situation for al-Aulaki. Because if you need court permission to ¶ detain somebody, and if you need court permission to wiretap ¶ somebody, how can you kill that person without court permission? But that is what warfighting is. You cannot fight a war without that. ¶ There is current litigation on this issue where people are purporting ¶ to represent al-Aulaki‟s family.50 It has been tossed out, but we are ¶ just at the early stages. And frankly, I think we are going to see ¶ more of this.51 I have been reading that there are debates taking ¶ place about this. They are holding a moot court, I believe, on this ¶ issue.¶ A lot of interesting comments can be made about where we find ¶ ourselves, where the current administration finds itself if you believe ¶ the al-Aulaki allegations to be true. But to me, what it suggests is ¶ that when you abruptly change the attitude of deference—and I ¶ think you must look at Boumediene as an abrupt change—the ¶ consequences become unpredictable and very serious. And there is a ¶ reason that judges and courts in the past forswore from doing that. ¶ We may be seeing some of this play out. How it ends is difficult to ¶ predict. ¶ Before I take a few minutes of questions, let me conclude by ¶ making sure I do not cast blame only on the Court, because it is not ¶ the Court‟s fault. This is something where everybody was complicit in ¶ putting us in this situation—all three branches of government. The ¶ fact is, I was here about seven or eight years ago in 2003, at Rutgers, ¶ not here in this particular building but across the street where they ¶ have a campus, and I gave a talk. I had just left as head of the ¶ criminal division, and I said we have kind of put a lot of things ¶ together in a jerry-built way. We need to have a sustainable legal ¶ architecture that is going to make this a framework that we are ¶ comfortable with over a long period of time. Congress has to get ¶ involved—the executive branch has to go to Congress. It is seven ¶ years later, and we have not done it. So that, to me, is a failure of ¶ both branches. For the executive branch, the failure to push ¶ Congress on this has been a mistake. It has led to, for example, a lot ¶ of delay in setting up the administrative process for dealing with ¶ these detainees. Frankly, I think that was a strategic error that more ¶ or less baited the Court into doing what the Court did. I come from ¶ the old school of believing that whatever you think the right answer ¶ is, you do not want to test the limit of what you think it is if you can ¶ avoid it. You want to go into court with the strongest possible position, and you want to be the most modest and incremental in ¶ asking for power because that is how you maximize your chance to ¶ win. I do not think the executive branch was wise in pushing the ¶ envelope on this. That included also delaying the process for years. ¶ There was a lot of internal back and forth on that. It is unfortunate ¶ that the delaying impulse won. I think that some of the processes put ¶ in place in the first couple of rounds were overly scanty—it was more ¶ parsimonious than it should have been and than it needed to be. And ¶ this comes to the point: do not tempt fate. So the executive branch, by ¶ delaying and being parsimonious with how it handled these cases, ¶ essentially begged the Court—not literally but functionally—to get ¶ involved and to step into this. And that is historically, of course, ¶ what courts do.¶ Congress has never stepped up to the plate on this—other than ¶ the jurisdiction stripping in the Detainee Treatment Act and the ¶ Military Commissions Act.52 Even there, in terms of looking at what ¶ habeas might be and writing the kind of complex procedures you ¶ would need to really build the process for detaining people, Congress ¶ still has not stepped up to do that. There are people like Senator ¶ Lindsey Graham of South Carolina who are constantly out there ¶ saying that both parties should work together to identify a solution, ¶ but I have not seen the action taken yet. So, in a way, I have to say in ¶ defense of the decision in Boumediene, at some point when the Court ¶ sees that neither branch is addressing the problem, where there is a ¶ serious issue of balancing security and liberty, and where we are ¶ uncomfortable about the idea of just locking people up indefinitely ¶ without having some confidence that we can review it, the courts are ¶ going to step in. And that leads to the old adage that hard cases ¶ make bad law.¶ The best result, in my mind, would be for the executive branch ¶ and Congress to sit down and put together, like they did with the ¶ Debt Commission now, a plan that talks about how we deal with ¶ detaining people when we are not going to put them in a criminal ¶ case or in a military commission. What is the process of review? ¶ What should the procedural rights be? What should the standard be? ¶ And what is the ultimate target that the judge has to find? I would ¶ hope that if we got that kind of comprehensive and robust statute ¶ that the courts would back off and would give the deference that has ¶ traditionally been good both for the executive and for the courts when ¶ dealing with these kinds of sensitive national security issues.

#### Scenario 1 is Drones

#### US drone use is creating an international drone arms race —how the US drone uses its drones sets a precedent

Farley 11 (Robert, Assistant Professor at the Patterson School of Diplomacy and International Commerce at the University of Kentucky, Oct. 12, 2011, World Politics Review, “Over the Horizon: U.S. Drone Use Sets Global Precedent”, <http://www.worldpoliticsreview.com/articles/10311/over-the-horizon-u-s-drone-use-sets-global-precedent>]

Is the world about to see a "drone race" among the United States, China and several other major powers? Writing in the New York Times, Scott Shane argued that just such an arms race is already happening and that it is largely a result of the widespread use of drones in a counterterror role by the United States. Shane suggests that an international norm of drone usage is developing around how the United States has decided to employ drones. In the future, we may expect that China, Russia and India will employ advanced drone technologies against similar enemies, perhaps in Xinjiang or Chechnya. Kenneth Anderson agrees that the drone race is on, but disagrees about its cause, arguing that improvements in the various drone component technologies made such an arms race inevitable. Had the United States not pursued advanced drone technology or launched an aggressive drone campaign, some other country would have taken the lead in drone capabilities. So which is it? Has the United States sparked a drone race, or was a race with the Chinese and Russians inevitable? While there's truth on both sides, on balance Shane is correct. Arms races don't just "happen" because of outside technological developments. Rather, they are embedded in political dynamics associated with public perception, international prestige and bureaucratic conflict. China and Russia pursued the development of drones before the United States showed the world what the Predator could do, but they are pursuing capabilities more vigorously because of the U.S. example. Understanding this is necessary to developing expectations of what lies ahead as well as a strategy for regulating drone warfare. States run arms races for a variety of reasons. The best-known reason is a sense of fear: The developing capabilities of an opponent leave a state feeling vulnerable. The Germany's build-up of battleships in the years prior to World War I made Britain feel vulnerable, necessitating the expansion of the Royal Navy, and vice versa. Similarly, the threat posed by Soviet missiles during the Cold War required an increase in U.S. nuclear capabilities, and so forth. However, states also "race" in response to public pressure, bureaucratic politics and the desire for prestige. Sometimes, for instance, states feel the need to procure the same type of weapon another state has developed in order to maintain their relative position, even if they do not feel directly threatened by the weapon. Alternatively, bureaucrats and generals might use the existence of foreign weapons to argue for their own pet systems. All of these reasons share common characteristics, however: They are both social and strategic, and they depend on the behavior of other countries. Improvements in technology do not make the procurement of any given weapon necessary; rather, geostrategic interest creates the need for a system. So while there's a degree of truth to Anderson's argument about the availability of drone technology, he ignores the degree to which dramatic precedent can affect state policy. The technologies that made HMS Dreadnought such a revolutionary warship in 1906 were available before it was built; its dramatic appearance nevertheless transformed the major naval powers' procurement plans. Similarly, the Soviet Union and the United States accelerated nuclear arms procurement following the Cuban Missile Crisis, with the USSR in particular increasing its missile forces by nearly 20 times, partially in response to perceptions of vulnerability. So while a drone "race" may have taken place even without the large-scale Predator and Reaper campaign in Pakistan, Yemen and Somalia, the extent and character of the race now on display has been driven by U.S. behavior. Other states, observing the effectiveness -- or at least the capabilities -- of U.S. drones will work to create their own counterparts with an enthusiasm that they would not have had in absence of the U.S. example. What is undeniable, however, is that we face a drone race, which inevitably evokes the question of arms control. Because they vary widely in technical characteristics, appearance and even definition, drones are poor candidates for "traditional" arms control of the variety that places strict limits on number of vehicles constructed, fielded and so forth. Rather, to the extent that any regulation of drone warfare is likely, it will come through treaties limiting how drones are used. Such a treaty would require either deep concern on the part of the major powers that advances in drone capabilities threatened their interests and survival, or widespread revulsion among the global public against the practice of drone warfare. The latter is somewhat more likely than the former, as drone construction at this point seems unlikely to dominate state defense budgets to the same degree as battleships in the 1920s or nuclear weapons in the 1970s. However, for now, drones are used mainly to kill unpleasant people in places distant from media attention. So creating the public outrage necessary to force global elites to limit drone usage may also prove difficult, although the specter of "out of control robots" killing humans with impunity might change that. P.W. Singer, author of "Wired for War," argues that new robot technologies will require a new approach to the legal regulation of war. Robots, both in the sky and on the ground, not to mention in the sea, already have killing capabilities that rival those of humans. Any approach to legally managing drone warfare will likely come as part of a more general effort to regulate the operation of robots in war. However, even in the unlikely event of global public outrage, any serious effort at regulating the use of drones will require U.S. acquiescence. Landmines are a remarkably unpopular form of weapon, but the United States continues to resist the Anti-Personnel Mine Ban Convention. If the United States sees unrestricted drone warfare as being to its advantage -- and it is likely to do so even if China, Russia and India develop similar drone capabilities -- then even global outrage may not be sufficient to make the U.S. budge on its position. This simply reaffirms the original point: Arms races don't just "happen," but rather are a direct, if unexpected outcome of state policy. Like it or not, the behavior of the United States right now is structuring how the world will think about, build and use drones for the foreseeable future. Given this, U.S. policymakers should perhaps devote a touch more attention to the precedent they're setting.

#### Lack of US-led norms cause Chinese drone aggression in maritime disputes---that increases tensions.

Bodeen 13 (Christopher, writer for the Huffington Post, May 3rd, 2013, "China's Drone Program Appears To Be Moving Into Overdrive," Huffington Post, www.huffingtonpost.com/2013/05/03/china-drone-program\_n\_3207392.html]

BEIJING -- Determined to kill or capture a murderous Mekong River drug lord, China's security forces considered a tactic they'd never tried before: calling a drone strike on his remote hideaway deep in the hills of Myanmar.¶ The attack didn't happen – the man was later captured and brought to China for trial – but the fact that authorities were considering such an option cast new light on China's unmanned aerial vehicle program, which has been quietly percolating for years and now appears to be moving into overdrive.¶ Chinese aerospace firms have developed dozens of drones, known also as unmanned aerial vehicles, or UAVs. Many have appeared at air shows and military parades, including some that bear an uncanny resemblance to the Predator, Global Hawk and Reaper models used with deadly effect by the U.S. Air Force and CIA. Analysts say that although China still trails the U.S. and Israel, the industry leaders, its technology is maturing rapidly and on the cusp of widespread use for surveillance and combat strikes.¶ "My sense is that China is moving into large-scale deployments of UAVs," said Ian Easton, co-author of a recent report on Chinese drones for the Project 2049 Institute security think tank.¶ China's move into large-scale drone deployment displays its military's growing sophistication and could challenge U.S. military dominance in the Asia-Pacific. It also could elevate the threat to neighbors with territorial disputes with Beijing, including Vietnam, Japan, India and the Philippines. China says its drones are capable of carrying bombs and missiles as well as conducting reconnaissance, potentially turning them into offensive weapons in a border conflict.¶ China's increased use of drones also adds to concerns about the lack of internationally recognized standards for drone attacks. The United States has widely employed drones as a means of eliminating terror suspects in Pakistan and the Arabian Peninsula.¶ "China is following the precedent set by the U.S. The thinking is that, `If the U.S. can do it, so can we. They're a big country with security interests and so are we'," said Siemon Wezeman, a senior fellow at the arms transfers program at the Stockholm International Peace Research Institute in Sweden, or SIPRI.¶ "The justification for an attack would be that Beijing too has a responsibility for the safety of its citizens. There needs to be agreement on what the limits are," he said.¶ Though China claims its military posture is entirely defensive, its navy and civilian maritime services have engaged in repeated standoffs with ships from other nations in the South China and East China seas. India, meanwhile, says Chinese troops have set up camp almost 20 kilometers (12 miles) into Indian-claimed territory.

#### That leads to US-Sino nuclear war and extinction.

Fisher 11 (Max, foreign affairs writer and editor for the Atlantic, MA in security studies from Johns Hopkins, Oct 31 2011, “5 Most Likely Ways the U.S. and China Could Spark Accidental Nuclear War,” <http://www.theatlantic.com/international/archive/2011/10/5-most-likely-ways-the-us-and-china-could-spark-accidental-nuclear-war/247616>]

Neither the U.S. nor China has any interest in any kind of war with one other, nuclear or non-nuclear. The greater risk is an accident. Here's how it would happen. First, an unforeseen event that sparks a small conflict or threat of conflict. Second, a rapid escalation that moves too fast for either side to defuse. And, third, a mutual misunderstanding of one another's intentions.¶ This three-part process can move so quickly that the best way to avert a nuclear war is for both sides to have absolute confidence that they understand when the other will and will not use a nuclear weapon. Without this, U.S. and Chinese policy-makers would have to guess -- perhaps with only a few minutes -- if and when the other side would go nuclear. This is especially scary because both sides have good reason to err on the side of assuming nuclear war. If you think there's a 50-50 chance that someone is about to lob a nuclear bomb at you, your incentive is to launch a preventative strike, just to be safe. This is especially true because you know the other side is thinking the exact same thing. In fact, even if you think the other side probably won't launch an ICBM your way, they actually might if they fear that you're misreading their intentions or if they fear that you might over-react; this means they have a greater incentive to launch a preemptive strike, which means that you have a greater incentive to launch a preemptive strike, in turn raising their incentives, and on and on until one tiny kernel of doubt can lead to a full-fledged war that nobody wants.¶ The U.S. and the Soviet Union faced similar problems, with one important difference: speed. During the first decades of the Cold War, nuclear bombs had to be delivered by sluggish bombers that could take hours to reach their targets and be recalled at any time. Escalation was much slower and the risks of it spiraling out of control were much lower. By the time that both countries developed the ICBMs that made global annihilation something that could happen within a matter of minutes, they'd also had a generation to sort out an extremely clear understanding of one another's nuclear policies. But the U.S. and China have no such luxury -- we inherited a world where total mutual destruction can happen as quickly as the time it takes to turn a key and push a button.¶ The U.S. has the world's second-largest nuclear arsenal with around 5,000 warheads (first-ranked Russia has more warheads but less capability for flinging them around the globe); China has only about 200, so the danger of accidental war would seem to disproportionately threaten China. But the greatest risk is probably to the states on China's periphery. The borders of East Asia are still not entirely settled; there are a number of small, disputed territories, many of them bordering China. But the biggest potential conflict points are on water: disputed naval borders, disputed islands, disputed shipping lanes, and disputed underwater energy reserves. These regional disputes have already led to a handful of small-scale naval skirmishes and diplomatic stand-offs. It's not difficult to foresee one of them spiraling out of control. But what if the country squaring off with China happens to have a defense treaty with the U.S.?¶ There's a near-infinite number of small-scale conflicts that could come up between the U.S. and China, and though none of them should escalate any higher than a few tough words between diplomats, it's the unpredictable events that are the most dangerous. In 1983 alone, the U.S. and Soviet Union almost went to war twice over bizarre and unforeseeable events. In September, the Soviet Union shot down a Korean airliner it mistook for a spy plane; first Soviet officials feared the U.S. had manufactured the incident as an excuse to start a war, then they refused to admit their error, nearly pushing the U.S. to actually start war. Two months later, Soviet spies misread an elaborate U.S. wargame (which the U.S. had unwisely kept secret) as preparations for an unannounced nuclear hit on Moscow, nearly leading them to launch a preemptive strike. In both cases, one of the things that ultimately diverted disaster was the fact that both sides clearly understood the others' red lines -- as long as they didn't cross them, they could remain confident there would be no nuclear war.¶ But the U.S. and China have not yet clarified their red lines for nuclear strikes. The kinds of bizarre, freak accidents that the U.S. and Soviet Union barely survived in 1983 might well bring today's two Pacific powers into conflict -- unless, of course, they can clarify their rules. Of the many ways that the U.S. and China could stumble into the nightmare scenario that neither wants, here are five of the most likely. Any one of these appears to be extremely unlikely in today's world. But that -- like the Soviet mishaps of the 1980s -- is exactly what makes them so dangerous.

#### Scenario 2 is Rendition

#### Rendition results in massive allied backlash that guts counter terrorism cooperation.

Huq 6 (Aziz, associate counsel at the Brennan Center for Justice at the New York University School of Law, “Extraordinary Rendition and the Wages of Hypocrisy”, World Policy Journal, Spring 2006, RSR]

Mearsheimer’s analysis may well be true in regard to relations between states. But in the context of counterterrorism operations against nonstate actors, domestic political pressure matters. Popular discontent and official investigations of U.S. misconduct on foreign soil have led to diplomatic pressure on Washington, and foreign governments have restricted intelligence and police cooperation with U.S. agencies. A further concern is that extraordinary rendition takes advantage of lawless elements in state intelligence and security services in receiving countries, as well as the gaps between different legal systems in which the legal protection of rights is unclear. As former CIA agent Reuel Marc Gerecht observes, by lending legitimacy to these holdouts against the rule of law, extraordinary rendition “works against the growth of democracy in the Middle East,” which is “the only sure way of breaking bin Ladenism.”22 Consider first the diplomatic consequences of extraordinary rendition. In the “world of stark and harsh competition” depicted by Mearsheimer, states red in tooth and claw do not have time to pause and ruminate on the morality of counterterrorism coopera- tion, let alone sanction their allies for over- reaching: “All states are forced to seek the same goal: maximum relative power.”23 But disputes over extraordinary rendition have resulted in tangible setbacks for the United States. For example, in 2005, Foreign Minister Ben Bot suggested that the Dutch contribution to NATO deployments in Afghanistan would be jeopardized if American officials “continue[d] to beat around the bush” on the matter of black sites. In 2003, Turkish prime minister Recep Tayyip Erdogan refused to allow U.S. troops to be stationed on its border with Iraq out of a fear of public backlash against what was seen in Turkey as an illegal war. To be sure, the Turkish reaction did not concern extraordi- nary rendition and black sites, but it reflect- ed the view of the Turkish public that the United States does not play by the same in- ternational rules as everyone else. (A popular recent Turkish motion picture casts Ameri- cans as villains for the unlawful invasion of Iraq and the torture of detainees there.) In Germany, too, a groundswell of public opinion opposed to Iraq invasion as illegal nearly stymied efforts by former chancellor Gerhard Schröder to accord the United States overfly rights.24 Notwithstanding a shared vulnerability to al-Qaeda and its sympathizers, European governments have seen the advantage in yielding to public protests over extraordinary rendition. Their objections to extraordinary rendition are a way of seizing moral high ground, a valuable position as European governments try to foster good relations with their substantial Muslim communities, a task complicated by the recent dispute over cartoons first published in the Danish newspaper Jyllands-Posten that in- cited widespread unrest in the Middle East and Asia. Reflecting on growing European resistance to American counterterrorism positions, the writer Robert Kagan has observed that “ideals and self-interest frequently collide, and Europe’s assaults on the legitimacy of U.S. dominance may also become an effective way of constraining and controlling the superpower.” European positions on extraordinary rendition, in short, reflect a confluence of domestic electoral self-interest and international advantage. Even if Mearsheimer is correct that states act only out of narrowly conceived “national security” motives, institutions and laws may be seen as the best way of furthering that end. Deterioration in the tenor and amicability of alliances may be incremental. But each small setback directly harms American counterterrorism efforts. Given America’s diminished reputation, other countries become less likely to accede to Washington’s requests for aid. Resistance from allies furthermore undercuts Washington’s ability to set the international agenda by establishing shared goals and values.25 Extraordinary rendition has also made cooperation between U.S. and European police and intelligence agencies more difficult. Faced with public pressure over news reports that European intelligence services were collaborating with U.S. agents in extraordinary renditions, European police and judiciaries have limited the scope of counterterrorism cooperation. For example, when Swedish television reported that Swedish police had handed over to the CIA two Egyptian asylum seekers who were sent back to Egypt (where one of the men was later al- legedly tortured and tried and sentenced to 25 years in prison by a military tribunal), the resulting public outcry forced the Swedish police to issue regulations requiring that any prisoner transfer be conducted by Swedish officials.26 Resistance to intelligence and law enforcement cooperation with the United States comes from institutional sources too. As noted, the British House of Lords in De- cember 2005 prohibited the use of possibly coerced evidence in political asylum and deportation matters, rejecting the claim, made by Eliza Manningham-Buller, head of Britain’s security intelligence service MI5, that such tainted evidence was a vital source of intelligence. Manningham-Buller argued that eliminating use of this evidence would cut off one avenue for the apprehension and transfer of suspected terrorists.27 German prosecutors have faced serious difficulties prosecuting alleged co-conspirators in the 9/11 plot due to American refusals to share exculpatory evidence from captured senior al-Qaeda leaders held at black sites. Mounir el-Motassadeq’s 2003 conviction as an accessory to the murder of the 9/11 victims was overturned on appeal because the U.S. government had declined to produce captured senior al-Qaeda members to testify at his trial. In his 2005 re- trial, however, the United States provided some evidence from its interrogations at black sites, enough at least for Motassadeq to be convicted of a lesser charge of belonging to al-Qaeda. He was acquitted of the original conspiracy charge, however. Another German resident, Abdelghani Mzoudi, was acquitted of complicity in the 9/11 plot in 2004 due to American refusals to pass on evidence from interrogations at black sites.28 In another case, public prosecutors in Milan initiated an investigation into the actions of CIA agents who in February 2003 snatched an Egyptian cleric, Osama Moustafa Hassan Nasr, from the streets of Milan in broad daylight. As a university student, Nasr had joined Jamaat al-Islamiya, a loose coalition of Islamists who had hewed to violence even as Egypt’s Muslim Brother- hood turned to political participation in the mid-1980s. When the state cracked down on Jamaat al-Islamiya, Nasr fled first to Al- bania, then to Germany, and finally to Italy, settling in Milan. After his kidnapping, Nasr’s wife and two children had no word of him until April 2005, when they received a letter from him, mailed from Alexandria in Egypt. The kidnapping—“the inspiration of the CIA station chief in Rome, who wanted to play a more active role in taking suspected terrorists off the street”—was undertaken without full Italian cooperation.29 In June 2005, Milan prosecutor Arman- do Spataro issued arrest warrants charging 22 alleged CIA operatives with the kidnap- ping. Because these warrants are valid throughout Europe under EU rules, the per- sons named in them are subject to arrest if they enter any European country. Spataro explained that Nasr had been the subject of an ongoing Italian investigation, and that his kidnapping by the CIA had “seriously damaged counterterrorism efforts in Italy and Europe.... In fact, if [Nasr] had not been kidnapped, he would now be in prison, subject to a regular trial, and we would have probably identified his other accomplices.” To make matters worse, a month after the kidnapping, the CIA had misleadingly re- ported to its Italian counterpart that Nasr had fled to the Balkans on his own volition. Revelations that the CIA operatives involved in the kidnapping had stayed in luxury ho- tels in Milan, Florence, and Venice before and after the kidnapping, racking up more than $100,000 in bills, added to the im- pression that the operation had been conceived in a reckless and foolish manner.30

#### WMD terrorism is feasible and dangerous – top experts agree

Bunn et al 13 (Bunn, Matthew, Valentin Kuznetsov, Martin B. Malin, Yuri Morozov, Simon Saradzhyan, William H. Tobey, Viktor I. Yesin, and Pavel S. Zolotarev. "Steps to Prevent Nuclear Terrorism." Paper, Belfer Center for Science and International Affairs, Harvard Kennedy School, October 2, 2013, Matthew Bunn. Professor of the Practice of Public Policy at Harvard Kennedy School andCo-Principal Investigator of Project on Managing the Atom at Harvard University’s Belfer Center for Science and International Affairs. • Vice Admiral Valentin Kuznetsov (retired Russian Navy). Senior research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, Senior Military Representative of the Russian Ministry of Defense to NATO from 2002 to 2008. • Martin Malin. Executive Director of the Project on Managing the Atom at the Belfer Center for Science and International Affairs. • Colonel Yuri Morozov (retired Russian Armed Forces). Professor of the Russian Academy of Military Sciences and senior research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, chief of department at the Center for Military-Strategic Studies at the General Staff of the Russian Armed Forces from 1995 to 2000. • Simon Saradzhyan. Fellow at Harvard University’s Belfer Center for Science and International Affairs, Moscow-based defense and security expert and writer from 1993 to 2008. • William Tobey. Senior fellow at Harvard University’s Belfer Center for Science and International Affairs and director of the U.S.-Russia Initiative to Prevent Nuclear Terrorism, deputy administrator for Defense Nuclear Nonproliferation at the U.S. National Nuclear Security Administration from 2006 to 2009. • Colonel General Viktor Yesin (retired Russian Armed Forces). Leading research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences and advisor to commander of the Strategic Missile Forces of Russia, chief of staff of the Strategic Missile Forces from 1994 to 1996. • Major General Pavel Zolotarev (retired Russian Armed Forces). Deputy director of the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, head of the Information and Analysis Center of the Russian Ministry of Defense from1993 to 1997, section head - deputy chief of staff of the Defense Council of Russia from 1997 to 1998.<http://belfercenter.ksg.harvard.edu/publication/23430/steps_to_prevent_nuclear_terrorism.html>]

I. Introduction In 2011, Harvard’s Belfer Center for Science and International Affairs and the Russian Academy of Sciences’ Institute for U.S. and Canadian Studies published “The U.S. – Russia Joint Threat Assessment on Nuclear Terrorism.” The assessment analyzed the means, motives, and access of would-be nuclear terrorists, and concluded that the threat of nuclear terrorism is urgent and real. The Washington and Seoul Nuclear Security Summits in 2010 and 2012 established and demonstrated a consensus among political leaders from around the world that nuclear terrorism poses a serious threat to the peace, security, and prosperity of our planet. For any country, a terrorist attack with a nuclear device would be an immediate and catastrophic disaster, and the negative effects would reverberate around the world far beyond the location and moment of the detonation. Preventing a nuclear terrorist attack requires international cooperation to secure nuclear materials, especially among those states producing nuclear materials and weapons. As the world’s two greatest nuclear powers, the United States and Russia have the greatest experience and capabilities in securing nuclear materials and plants and, therefore, share a special responsibility to lead international efforts to prevent terrorists from seizing such materials and plants. The depth of convergence between U.S. and Russian vital national interests on the issue of nuclear security is best illustrated by the fact that bilateral cooperation on this issue has continued uninterrupted for more than two decades, even when relations between the two countries occasionally became frosty, as in the aftermath of the August 2008 war in Georgia. Russia and the United States have strong incentives to forge a close and trusting partnership to prevent nuclear terrorism and have made enormous progress in securing fissile material both at home and in partnership with other countries. However, to meet the evolving threat posed by those individuals intent upon using nuclear weapons for terrorist purposes, the United States and Russia need to deepen and broaden their cooperation. The 2011 “U.S. - Russia Joint Threat Assessment” offered both specific conclusions about the nature of the threat and general observations about how it might be addressed. This report builds on that foundation and analyzes the existing framework for action, cites gaps and deficiencies, and makes specific recommendations for improvement. “The U.S. – Russia Joint Threat Assessment on Nuclear Terrorism” (The 2011 report executive summary): • Nuclear terrorism is a real and urgent threat. Urgent actions are required to reduce the risk. The risk is driven by the rise of terrorists who seek to inflict unlimited damage, many of whom have sought justification for their plans in radical interpretations of Islam; by the spread of information about the decades-old technology of nuclear weapons; by the increased availability of weapons-usable nuclear materials; and by globalization, which makes it easier to move people, technologies, and materials across the world. • Making a crude nuclear bomb would not be easy, but is potentially within the capabilities of a technically sophisticated terrorist group, as numerous government studies have confirmed. Detonating a stolen nuclear weapon would likely be difficult for terrorists to accomplish, if the weapon was equipped with modern technical safeguards (such as the electronic locks known as Permissive Action Links, or PALs). Terrorists could, however, cut open a stolen nuclear weapon and make use of its nuclear material for a bomb of their own. • The nuclear material for a bomb is small and difficult to detect, making it a major challenge to stop nuclear smuggling or to recover nuclear material after it has been stolen. Hence, a primary focus in reducing the risk must be to keep nuclear material and nuclear weapons from being stolen by continually improving their security, as agreed at the Nuclear Security Summit in Washington in April 2010. • Al-Qaeda has sought nuclear weapons for almost two decades. The group has repeatedly attempted to purchase stolen nuclear material or nuclear weapons, and has repeatedly attempted to recruit nuclear expertise. Al-Qaeda reportedly conducted tests of conventional explosives for its nuclear program in the desert in Afghanistan. The group’s nuclear ambitions continued after its dispersal following the fall of the Taliban regime in Afghanistan. Recent writings from top al-Qaeda leadership are focused on justifying the mass slaughter of civilians, including the use of weapons of mass destruction, and are in all likelihood intended to provide a formal religious justification for nuclear use. While there are significant gaps in coverage of the group’s activities, al-Qaeda appears to have been frustrated thus far in acquiring a nuclear capability; it is unclear whether the the group has acquired weapons-usable nuclear material or the expertise needed to make such material into a bomb. Furthermore, pressure from a broad range of counter-terrorist actions probably has reduced the group’s ability to manage large, complex projects, but has not eliminated the danger. However, there is no sign the group has abandoned its nuclear ambitions. On the contrary, leadership statements as recently as 2008 indicate that the intention to acquire and use nuclear weapons is as strong as ever.

#### A nuclear terror attack results in extinction – equivalent to a full scale nuclear war.

Toon 7 (Owen B., chair of the Department of Atmospheric and Oceanic Sciences at CU-Boulder, et al., April 19, 2007, “Atmospheric effects and societal consequences of regional scale nuclear conflicts and acts of individual nuclear terrorism,” online: http://climate.envsci.rutgers.edu/pdf/acp-7-1973-2007.pdf]

To an increasing extent, people are congregating in the world’s great urban centers, creating megacities with populations exceeding 10 million individuals. At the same time, advanced technology has designed nuclear explosives of such small size they can be easily transported in a car, small plane or boat to the heart of a city. We demonstrate here that a single detonation in the 15 kiloton range can produce urban fatalities approaching one million in some cases, and casualties exceeding one million. Thousands of small weapons still exist in the arsenals of the U.S. and Russia, and there are at least six other countries with substantial nuclear weapons inventories. In all, thirty-three countries control sufficient amounts of highly enriched uranium or plutonium to assemble nuclear explosives. A conflict between any of these countries involving 50-100 weapons with yields of 15 kt has the potential to create fatalities rivaling those of the Second World War. Moreover, even a single surface nuclear explosion, or an air burst in rainy conditions, in a city center is likely to cause the entire metropolitan area to be abandoned at least for decades owing to infrastructure damage and radioactive contamination. As the aftermath of hurricane Katrina in Louisiana suggests, the economic consequences of even a localized nuclear catastrophe would most likely have severe national and international economic consequences. Striking effects result even from relatively small nuclear attacks because low yield detonations are most effective against city centers where business and social activity as well as population are concentrated. Rogue nations and terrorists would be most likely to strike there. Accordingly, an organized attack on the U.S. by a small nuclear state, or terrorists supported by such a state, could generate casualties comparable to those once predicted for a full-scale nuclear “counterforce” exchange in a superpower conflict. Remarkably, the estimated quantities of smoke generated by attacks totaling about one megaton of nuclear explosives could lead to significant global climate perturbations (Robock et al., 2007). While we did not extend our casualty and damage predictions to include potential medical, social or economic impacts following the initial explosions, such analyses have been performed in the past for large-scale nuclear war scenarios (Harwell and Hutchinson, 1985). Such a study should be carried out as well for the present scenarios and physical outcomes.

#### Plan solves –

#### First, plan would preserve the intelligence value of detention by recognizing the executive nature of warfighting.

McCarthy and Velshi 9 [Andrew (Director of the Center for Law & Counterterrorism at the Foundation for the Defense of Democracies) and Alykhan (staff attorney at the Center for Law & Counterterrorism, where he focuses on the international law of armed conflict and the use of force), “We Need a National Security Court”, Submission for AEI, 2009, RSR]

What is an asset in the criminal justice system, however, would be a liability in a system whose priority is not justice for the individual but the security of the American people. That liability, though, can be satisfactorily rectified by clear procedural rules which underscore that the overriding mission – into which the judicial function is being imported for very limited purposes – remains executive and military. The default position of the criminal justice system would not carry over to a system conceived for enemies of the United States – i.e., terrorist operatives who would not be facing NSC trials in the first place absent a finding, tested by judicial review, that they were alien enemy combatants. ¶ In such a system, the opportunities for judicial creativity would be limited by being plainspoken and unapologetic in enabling legislation about the fact that the defendants are not Americans but those who mean America harm; that the task of federal judges is not to ensure that defendants are considered as equals to our government before the bar of justice, but merely to ensure that they are not capriciously convicted of war crimes by the same branch of government that is prosecuting the war; that if credible and convincing evidence supports the allegations, the system’s preference is that defendants be convicted and harshly sentenced; and that the authority of judges is enumerated and finite – if the rules as promulgated do not expressly provide for the defendant to have particular relief, the judge is powerless to direct it. In short, the system would curb judicial excess by the recognition, which underlies the military justice system, that prosecuting war remains a quintessentially executive endeavor; in the NSC, judges would be a check against arbitrariness but they would not have any general supervisory authority over the conduct of proceedings and they would not be at liberty to create new entitlements by analogizing to ordinary criminal proceedings.

#### Second, plan solves rendition pressures by accommodating concerns from all sides to prevent forum shopping.

Kimery 9 (Anthony, Homeland Security Today's Online Editor and Online Media Division manager draws on 30 years of experience and extensive contacts as he investigates homeland security, counterterrorism and border security, citing Glenn Sulmasy, first permanent commissioned military law professor at the Coast Guard Academy, where he is a Professor of Law teaching international, constitutional, and criminal law, "The Case For A 'National Security Court'", December 3, [www.hstoday.us/blogs/the-kimery-report/blog/the-case-for-a-national-security-court/a9333d82c11cecd35e74c8c0b65c2698.html](http://www.hstoday.us/blogs/the-kimery-report/blog/the-case-for-a-national-security-court/a9333d82c11cecd35e74c8c0b65c2698.html)]

However, in interviews with HSToday.us, Sulmasy argued that “we have to be aware that the issue of captured fighters will not go away once GITMO is closed - it will continue with the Bagram detainees and other inevitable captures in the generational conflict against international terrorism.” So, “rather than creating opportunities for ‘forum shopping’ - either employing military commissions for some and civilian courts for others - the nation needs ‘one’ system - a hybrid system that meets all needs associated with the unique legal status of these detainees” – and all future combatants captured or arrested in the WOAQ, Sulmasy argues. Sulmasy insists that a National Security Court “offers the United States a ‘way out’ of GITMO-like problems” in the future. In the July 2007 HSToday.us report, Toward a Homeland Security Court for Captured Terrorists, Sulmasy’s ideas about how best to resolve the dilemma GITMO and the Military Commissions Act (MCA) created were first discussed in detail. They are rooted in the spacious realization that the war on terrorism inherently presents complex new legalities as a consequence of the unparalleled, un-conventional war on terrorists - and it is a war. Sulmasy says the approach he proposes would not only restore respect for America’s system of justice and legitimize the judicial handling of WOAQ prisoners, but it would serve as a template for other nations to emulate.

### Solvency

#### Contention 3 is solvency

#### The court preserves national security while sending an international signal

Sulmasy 6 (Commander and associate professor of law at the U.S. Coast Guard Academy,

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Article I judges with law of armed conflict expertise would proceed¶ over the trials. Theses judges will be appointed by the President and¶ possess the educational background necessary to determine the lawfulness¶ of intelligence gathering, terrorist surveillance, and other necessary areas in¶ the field of terrorism and homeland security. Several scholars, advocating¶ against judicial intervention in the war, correctly note that those who are¶ making such decisions now are not necessarily versed in this unique area of¶ the law.43 Whether you agree or disagree, the nature of this war seems to¶ necessitate judicial intervention more than has been custom or standard in¶ previous U.S. military wars and operations. As it stands now, the system¶ allows for judges who have no background in warfare or national security¶ to intervene, hear, and decide cases with little or no understanding of the¶ issues because they are beyond the scope of their expertise.4 The threat¶ we face demands these procedures as a minimum requirement.¶ Prosecutors, assigned by the Department of Justice (hereinafter¶ referred to as "DOJ") would represent the government and exercise¶ prosecutorial discretion on whether or not to proceed in cases. Oversight¶ would be conducted by the Chief, Criminal Division of DOJ. 45 The powers¶ of these prosecutors, as in other nations, would be great, but they would¶ still operate under the ethical rules standard for all U.S. government¶ attorneys.¶ Judge advocates (military lawyers) would serve as government¶ provided defense counsel. This group would be similar to what has been¶ provided for the detainees in the military commissions. The judge¶ advocates would be made available by the Department of Homeland Security46 and the Department of Defense. Initially, a pool of ten judge¶ advocates would serve on defense teams. If desired, the accused may¶ employ, at his expense, civilian counsel as long as they have requisite¶ classified document clearance(s). This would ensure alleged international¶ terrorists with a defense capable of handling their cases. Further, this¶ would help satisfy some international concern about lack of representation.¶ As a result of the sensitive nature of intelligence gathering and¶ methods employed as well as ensuring such hearings do not become¶ propaganda tools for the enemy,47 the trials would be closed to the public.¶ Reasons for closed trials include disallowing access to the media, an action¶ that was not taken in the trials of the perpetrators of the World Trade¶ Center bombings in 1993 and the recent Moussaoui case.48 However,¶ representatives from several appointed NGO's and the United Nations¶ would be permitted to attend as "observers" to ensure fairness of the trial¶ and to witness the procedural protections expected of a nation dedicated to¶ upholding the rule of law.¶ The trials would be held on military bases located within the¶ continental United States. This would keep the detainees held in a location¶ that is secure, like GITMO, but with less controversy. This would, in part,¶ also remove some of the international concerns about the detention centers¶ located in GITMO. Under this proposal, our own armed forces, alleged¶ and convicted criminals, are held at the same location as the terrorist. Fort¶ Leavenworth in Kansas, or even Fort Belvoir in Washington D.C., would¶ be appropriate locations to detain, try, and imprison persons accused of¶ engaging in international terror. Since Eisentrager has been essentially¶ overruled by recent cases, 49 the extraterritoriality needs are no longer¶ applicable and, in essence, are moot.50¶ As noted previously, military brigs are the most appropriate place to detain accused terrorists because it is both a secure place and it affords the¶ same protection against abuse given to those in the U.S. service members¶ who are tried, convicted, and sentenced under the UCMJ by courts-martial.¶ Having the detainees alongside members of the U.S. military would go a¶ long way toward reducing international concerns of torture and unfair¶ tribunals. In addition, it seems as though keeping the detainees within our¶ nation would provide an additional appearance of process and certainly¶ remove the taint of being held in the base at GITMO. Remaining¶ consistent with the theme of the homeland security courts being a hybrid,¶ any appeals would go through the Courts of Appeals of the Armed Forces¶ (CAAF)." This limited right of appeal would ensure the cases were heard¶ by an outside panel of judges versed in military law, the laws of war, and¶ have some background in the procedural nuances of national security law.¶ Appellate counsel would be provided by Air Force, Coast Guard, Navy-¶ Marine Corps, and the Army.¶ Under this system, the death penalty would still be an authorized¶ punishment. This penalty would only be authorized in those cases deemed¶ egregious enough and ones that severely impact the homeland security of¶ the United States. Certain aggravating factors would have to be developed¶ and codified to distinguish between what cases are appropriate for a life¶ sentence or those better suited as capital cases. Recognizing that this¶ would still cause concern among our European and other international¶ colleagues, this proposal certainly requires further elaboration prior to¶ implementation.

#### Congressional action is the only way to make the executive accountable – empirically proven, the court will back them up and preserves executive flexibility.

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Just as the Commander-in-Chief power is not preclusive with respect to detainee transfers in general (sections 1026 through 1028), the ¶ President’s foreign affairs powers are also not preclusive with respect ¶ to transfers to foreign countries (section 1028). The Court has long ¶ recognized that the President’s foreign affairs powers go beyond those ¶ explicitly granted in the Constitution and that the President has a ¶ unique role as “the sole organ of the federal government in the field of ¶ international relations.”59 Yet the Court has not held that the President enjoys preclusive power over the whole foreign affairs arena;60¶ nor has it ever invalidated an act of Congress as infringing upon the ¶ President’s foreign affairs power.61 Even strong foreign affairs ¶ presidentialists concede that Congress retains those powers granted by ¶ the constitutional text.62 Congress’s constitutionally granted foreign affairs powers include not only those facially related to foreign affairs — ¶ such as ratifying treaties, confirming ambassadors, and regulating foreign commerce63 — but also those that clearly affect foreign relations, ¶ such as declaring and regulating war.64 History and custom also support ¶ the constitutionality of congressional restrictions on detainee transfers to ¶ foreign states.65 Congress has long helped shape immigration and deportation policies,66 and — most relevant for the detainee-transfer con- text— has regulated extradition, both by treaty and by legislation.67¶ As the Court has recognized, extradition is “not confided to the Executive in the absence of treaty or legislative provision.”68¶ Despite Congress’s constitutional authority to regulate detainee ¶ transfers, President Obama’s policy criticisms of the specific restrictions in the NDAA were valid. The statute eliminates the flexibility to try Guantánamo detainees in civilian courts (a practice used to ¶ great effect by the Bush administration with other terrorism suspects69), makes it impossible to close Guantánamo Bay,70 and abandons many of the detainees whom the administration no longer views ¶ as dangerous but is barred by statute from transferring.71¶ Nevertheless, Congress’s general involvement in detention policy ¶ may be positive for its own sake, even if it missteps in individual cases. ¶ Congress not only legitimates and helps make accountable executive ¶ branch actions,72 but it is also the only branch capable of fashioning a ¶ comprehensive legal regime for military detention of terrorist suspects.73 In addition, institutional constraints such as the bicameralism ¶ requirement and the presidential veto74 limit the potential damage of ¶ congressional meddling in tactical wartime decisions.75 Although the ¶ President is right to work with Congress to repeal the problematic ¶ NDAA provisions,76 he should respect its role in this policy arena and ¶ neither ignore the restrictions nor interpret them out of existence in the ¶ name of avoiding constitutional difficulties.77 Just because a congressional policy choice is wrong does not make it unconstitutional.