## 1NC

### 1

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

#### The NSC is the best option solves the stigma of detention while preserving national security.

Kimery, Homeland Security Today's Online Editor and Online Media Division manager, ‘9

[Anthony, 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)]

“The administration is now fully aware that this is a vastly complex issue – and one that requires a complex solution,” Sulmasy said.¶ “The President, in an eloquent speech at the National Archives in late May, identified there would be various options to consider for the detainees: diplomatic re-patriation, the use of military commissions, civilian Article III federal courts, and that he was still reviewing what to do with the 75-100 detainees that do not fit neatly in any of these regimes. That is where the National Security Court system provides the best, most pragmatic alternative for those difficult cases, as well as those inevitable future captures in the War on al Qaeda,” Sulmasy said.¶ Sulmasy continued: “Recent reports discuss the possibility of a hybrid court held on military bases within the US. Of course, I am delighted to hear of such ideas and progress. However, the nation needs to go further and create one court system that is best suited for this unique Al Qaeda fighter once captured. Rather than offering options to the detainees of either choosing a military commission or a civilian court, the National Security Court system provides one forum to attain the necessary balance between human rights, due process, and national security."¶ “We have to move forward, and recognize that the two existing paradigms – use of our traditional federal courts or the use of the law of war model (military commissions) – are simply jamming a square peg in a round hole. The administration now has the opportunity to statutorily create a legal system that best serves the needs of the nation, as well as the detainees.”¶ “The key distinction with my system from those now proposed by various commentators and scholars … is that the NSCS must be presumptively adjudicatory – and not used as a means of preventative detention,” Sulmasy said, noting that “the presumption should be to try, and if determined by the Commander-in-Chief and the military that such a trial would be either too risky or not possible, then as an exception such a decision can be made. This distinction is important and vital to ensure we fully support the rule of law, promote the national security, and still garner and maintain international support for our efforts.”

#### Due process collapses intelligence gathering --- sources dry up --- destroys the heart of counter-terror policy

Delery Et.al. ’12 - Principal Deputy, Assistant Attorney General, Civil Division, DOJ

Principal Deputy, Assistant Attorney General, Civil Division, STUART F. DELERY

Defendants' Motion to Dismiss, United States' Statement of Interest, Case 1:12-cv-01192-RMC Document 18 Filed 12/14/12 Page 1 of 58, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 12/14/2012

Third. Plaintiffs' claims raise the specter of disclosing classified intelligence information in open court. The D.C. Circuit has recognized that "the difficulties associated with subjecting allegations involving CIA operations and covert operatives to judicial and public scrutiny" are pertinent to the special factors analysis. Wilson, 535 F.3d at 710. In such suits, "'even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to close up like a clam."'1 Id. (quoting Tenet v. Doe, 544 U.S. 1,11 (2005)). And where litigation of a plaintiffs allegations "would inevitably require an inquiry into "classified information that may undermine ongoing covert operations,"\* special factors apply. Wilson, 535 F.3d at 710 (quoting Tenet, 544 U.S. at 11). See also Vance, 2012 WL 5416500 at "8 ("When the state-secrets privilege did not block the claim, a court would find it challenging to prevent the disclosure of secret information.11); Lebron, 670 F.3d at 554 (noting that the "chilling effects on intelligence sources of possible disclosures during civil litigation and the impact of such disclosures on military and diplomatic initiatives at the heart of counterterrorism policy1' are special factors); Arar, 585 F.3d at 576 (holding that the risk of disclosure of classified information is a special factor in the "extraordinary rendition" context).

#### Nuclear terrorism is possible and leads to extinction.

Dvorkin 12 (Major General (retired), doctor of technical sciences, professor, and senior fellow at the Center for International Security of the Institute of World Economy and International Relations of the Russian Academy of Sciences, Vladimir, The Center participates in the working group of the U.S.-Russia Initiative to Prevent Nuclear Terrorism, 9/21/12, "What Can Destroy Strategic Stability: Nuclear Terrorism is a Real Threat," belfercenter.ksg.harvard.edu/publication/22333/what\_can\_destroy\_strategic\_stability.html]

Hundreds of scientific papers and reports have been published on nuclear terrorism. International conferences have been held on this threat with participation of Russian organizations, including IMEMO and the Institute of U.S. and Canadian Studies. Recommendations on how to combat the threat have been issued by the International Luxembourg Forum on Preventing Nuclear Catastrophe, Pugwash Conferences on Science and World Affairs, Russian-American Elbe Group, and other organizations. The UN General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism in 2005 and cooperation among intelligence services of leading states in this sphere is developing.¶ At the same time, **these efforts fall short for a number of reasons, partly because various acts of nuclear terrorism are possible. Dispersal of radioactive material by detonation of conventional explosives (“dirty bombs”) is a method that is most accessible for terrorists. With the wide spread of radioactive sources, raw materials for such attacks have become much more accessible than weapons-useable nuclear material or nuclear weapons.** The use of **“**dirty bombs” will not cause many immediate casualties, but it **will result into long-term radioactive contamination, contributing to the spread of** panic and socio-economic destabilization**.**¶ Severe **consequences can be caused by sabotaging nuclear power plants, research reactors, and radioactive materials storage facilities. Large cities are especially vulnerable to such attacks. A large city may host dozens of research reactors with a nuclear power plant or a couple of spent nuclear fuel storage facilities and dozens of large radioactive materials storage facilities located nearby.** The past few years have seen significant efforts made to enhance organizational and physical aspects of security at facilities, especially at nuclear power plants. **Efforts have also been made to improve security culture. But these efforts do not preclude the possibility that** well-trained terrorists may be able to penetrate nuclear facilities**.**¶ **Some estimates show that sabotage of a research reactor in a metropolis may expose hundreds of thousands to high doses of radiation. A formidable part of the city would become uninhabitable for a long time**.¶ Of all the scenarios, it **is building an improvised nuclear device by terrorists that poses the maximum risk. There are no engineering problems that cannot be solved if terrorists decide to build a simple “gun-type” nuclear device.** **Information on the design of such devices, as well as implosion-type devices, is available in the public domain**. It is the acquisition of weapons-grade uranium that presents the sole serious obstacle. Despite numerous preventive measures taken, we cannot rule out the possibility that **such materials can be bought on the black market.** Theft of weapons-grade uranium is also possible**. Research reactor fuel is considered to be particularly vulnerable to theft, as it is scattered at sites in dozens of countries. There are about 100 research reactors in the world that run on weapons-grade uranium fuel, according to the International Atomic Energy Agency (IAEA).**¶ **A terrorist “gun-type” uranium bomb can have a yield of least 10-15 kt, which** is comparable to the yield of the bomb dropped on Hiroshima**.** **The explosion of such a bomb in a modern metropolis can kill and wound hundreds of thousands and cause serious economic damage. There will also be long-term sociopsychological and political consequences**.¶ The vast majority of states have introduced unprecedented security and surveillance measures at transportation and other large-scale public facilities after the terrorist attacks in the United States, Great Britain, Italy, and other countries. These measures have proved burdensome for the countries’ populations, but the public has accepted them as necessary. **A nuclear terrorist attack will make the public accept further measures meant to enhance control even if these measures significantly restrict the democratic liberties they are accustomed to. Authoritarian states could be expected to adopt even more restrictive measures**.¶ If a nuclear terrorist act occurs, **nations will delegate tens of thousands of their secret services’ best personnel to investigate and attribute the attack. Radical Islamist groups are among those capable of such an act.** We can imagine what would happen if they do so, **given the anti-Muslim sentiments and resentment that conventional terrorist attacks by Islamists have generated in developed democratic countries. Mass deportation of the non-indigenous population and severe sanctions would follow such an attack in what will cause violent protests in the Muslim world. Series of armed clashing terrorist attacks may follow. The prediction that Samuel Huntington has made in his book “**The Clash of Civilizations **and the Remaking of World Order” may come true**. Huntington’s book clearly demonstrates that it is not Islamic extremists that are the cause of the Western world’s problems. Rather there is a deep, intractable conflict that is rooted in the fault lines that run between Islam and Christianity. **This is especially dangerous for Russia because these fault lines run across its territory.** To sum it up, the political leadership of Russia has every reason to revise its list of factors that could undermine strategic stability.  BMD does not deserve to be even last on that list because its effectiveness in repelling massive missile strikes will be extremely low. BMD systems can prove useful only if deployed to defend against launches of individual ballistic missiles or groups of such missiles. Prioritization of other destabilizing factors—that could affect global and regional stability—merits a separate study or studies. But even without them I can conclude that nuclear terrorism should be placed on top of the list. The threat of nuclear terrorism is real, and a successful nuclear terrorist attack would lead to a radical transformation of the global order.  All of the threats on the revised list must become a subject of thorough studies by experts. States need to work hard to forge a common understanding of these threats and develop a strategy to combat them.

### 2

#### Michigan’s affirmative action ban in Schuette will remain in place now – Kennedy’s the swing vote and agrees with the power of the popular referendum.

Gringlas and Shahin 13 [Sam and Peter, Staff Reporters, “Ann Arbor reacts to monumental Supreme Court decisions”, 6-26-13, The Michigan Daily,

<http://www.michigandaily.com/news/supreme-court-same-sex-marriage-0?page=0,2>, RSR]

While the case concerns the legality of Michigan’s ban on affirmative action, it deals more directly with the power of popular referendum. Proposal 2 — which banned affirmative action — was adopted with 58 percent support in the 2006 election. In 2012, the Sixth Circuit Court sitting en banc ruled in favor of the Coalition to Defend Affirmative Action’s challenge to the referendum on the grounds that it violated the equal protection clause of the 14th Amendment. Justice Anthony Kennedy — the possible swing vote in Schuette — dissented in Hollingsworth Wednesday, indicating his strong respect for the power of the popular referendum. If he maintains a similar stance in Schuette and upholds the power of referendum, it is nearly impossible for the ban on affirmative action to be overturned by the court. The University is expected to file an amicus curiae brief with the court later this year in support of the ban’s invalidation. Fisher v. University of Texas, another affirmative action case decided on Monday , is unlikely to have an effect on Schuette. “Fisher probably doesn’t have direct implications for Schuette,” Primus said. “The Prop 8 case (Hollingsworth v. Perry) could. In the Prop 8 case, Justice Kennedy, in his dissent, takes a very strong position in favor of the dignity of referenda. The question in Schuette is about what can be done by referendum. If Justice Kennedy has a very approbative view of referenda, it would be difficult to imagine the Supreme Court striking down the referendum in Schuette.”

#### A decision regarding indefinite detention would spark massive backlash – past decisions and the status quo prove.

Devins 10 [Neal, Goodrich Professor of Law and Professor of Government, College of William & Mary,“Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants”, Journal of Constitutional Law, Vol. 12, No. 2, February 2010, RSR]

Throughout the course of its enemy combatant decision making, the Court has moved incrementally. In so doing, the Court has expanded its authority vis-A-vis the President. Obama administration efforts to moot al-Marri and to relocate Uighur detainees (thereby mooting that litigation) speak to the administration's desire to avoid Supreme Court rulings that might limit the scope of presidential power. Unlike the Bush administration (whose politically tone deaf arguments paved the way for anti-administration rulings), 84 the Obama administration understands that the Court has become a player in the enemy combatant issue. What is striking here, is that the Court never took more than it could get-it carved out space for itself without risking the nation's security or political backlash. Its 2004 and 2006 rulings provided ample opportunity for the President to pursue his enemy combatant initiative. Its 2008 ruling in Boumediene, while clearly constraining the political branches, reflected the views of the new Democratic majority in Congress and (to a lesser extent) the views of presidential candidates Obama and McCain. 8 Its decision to steer clear of early Obama-era disputes likewise avoids the risks of a costly backlash while creating incentives for the Obama administration to take judicial authority into account (by settling these cases outside of court).186 Put another way, by taking prevailing social and political forces into account, the Court was able to flex its muscles without meaningfully undermining the policy preferences of the President and Congress.

#### Controversial decisions burn capital – justices need to pick their fights.

Grosskopf and Mondak 98 [Anke (Assistant Prof of Political Science @ Long Island University) and Jeffrey (Professor of Political Science @ U of Illinois), 1998, “Do attitudes toward specific supreme court decisions matter? The impact of Webster and Texas v Johnson on Public Confidence in the Supreme Court” Political Research Quarterly, vol. 51 no 3 633-54]

The existence of a strong link between basic values and diffuse support does not necessarily preclude a role for specific decisions, particularly when we seek to understand how support comes to change over time (e.g., Caldeira and Gibson 1992: 658-61). We believe that any claim that the Supreme Court is fully immune to backlash against controversial decisions can be rejected on a prima facie level. First, consider the extreme case. Were the Supreme Court to make its occasional blockbusters-Brown v. Board of Education, Roe v. Wade, Texas v. Johnson, etc.-the norm by routinely ruling on the thorniest social questions, we see it as implausible that such actions would bring no cumulative impact on how people view the Court. Second, the Supreme Court's typical mode of operation suggests that justices themselves view institutional support as an expendable political capital (Choper 1980). That is, the Court recognizes its own political limitations, and thus justices pick their spots carefully when approaching potentially controversial cases. From this perspective, the apparent dominance of democratic values as a determinant of institutional support (e.g., Caldeira and Gibson 1992) means not that the Court is insulated from backlash, but that strategic justices tread cautiously so as to keep backlash to a minimum. Consequently, how and where we examine whether public response to Supreme Court decisions affects institutional support may shape what answer we find.

#### Judicial capital is key to uphold the ban – otherwise Kennedy will vote switch and stick with precedent to preserve Court legitimacy.

Smith 92 [Christopher E. Smith, Pol. Sci. Professor @ Akron, Fall 1992 “SUPREME COURT SURPRISE: JUSTICE ANTHONY KENNEDY'S MOVE TOWARD MODERATION” 45 Okla. L. Rev. 459]

There is, of course, no way to know with certainty why Justice Kennedy made his dramatic move toward moderation in highly publicized cases during the 1991 Term. Because it is highly unlikely that Justice Kennedy will ever forthrightly discuss his changing views, scholars must rely on the available evidence to analyze the motivations for and consequences of his move away from the Court's conservative bloc. It is clear that Justice Kennedy, more than any other Justice, altered his decisions and contradicted his previously stated positions in order to preserve precedents in cases concerning abortion and the Establishment Clause. Although there might be various explanations for this switch, the emphasis in his opinions on preserving doctrinal stability and the Court's legitimacy in the eyes of the public provides the strongest plausible explanation for the change in his judicial behavior. It is difficult to predict how Justice Kennedy will vote in future cases or if his move toward moderation will have lasting impact, particularly because new ap- pointments in the next few years may further alter the ideological balance of power on the Court. In any event, Justice Kennedy's decisions during the 1991 Term seem to confirm two important observations. First, Justices' decisions are obviously affected by a set of factors more complex than the mere sum of their judicial philosophies and policy preferences. As Justice Kennedy's actions demonstrate, the factors motivating a Justice's decisions can change from Term to Term. Justice Kennedy's obvious concern for the Court's legitimacy with respect to the abortion issue did not emerge until Roe was actually threatened with reversal during the tumult of a presidential election year. Second, this relatively quiet and unassuming Justice, who'is nearly always overshadowed by his more controversial and outspoken col- leagues, deserves additional scrutiny from scholars as an emerging "power broker" in the middle of the Supreme Court who can determine the out- comes of cases when the Court is deeply divided.

#### Upholding the ban is key to preserve states’ rights and federalism.

Bursch, et al 12 [John (Michigan Solicitor General); Bill Schuette (Attorney General); Eric Restuccia (Deputy Solicitor General); and Aaron Lindstrom (Assistant Solicitor General), “PETITION FOR A WRIT OF CERTIORARI”, November 2012, RSR]

Second, this case involves a constitutional amendment enacted by public initiative. As the Ninth Circuit explained, if a court “relies on an erroneous legal premise [to strike down a public initiative], the decision operates to thwart the will of the people in the most literal sense.” Wilson, 122 F.3d at 699. What the people of the state “willed to do is frustrated on the basis of principles that the people of the United States neither ordained nor established.” Id. “A system which permits [the courts] to block with the stroke of a pen what [millions of] residents voted to enact as law tests the integrity of our constitutional democracy.” Id. The same is true here. Using an equal-protection theory rejected by every federal and state court to consider it, the Sixth Circuit en banc majority struck down a constitutional amendment approved by more than two Michigan million voters. Within our federalist system, it is no small matter for a federal court to strike down a properly enacted state constitutional provision. See Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (“Federalism . . . allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”). That is why the United States Constitution generally does not meddle in the way that states choose to structure their government. See Sailors v. Bd. of Educ. of Kent Cnty., 387 U.S. 105, 109 (1967). Given the special respect that should be accorded to state constitutional provisions, certiorari is appropriate to review their annulment.

#### Federalism is key economic consolidation--which is vital for economic growth

Calebresi 95 (Stephen, Associate Professor, Northwestern University School of Law. B.A. 1980, J.D. 1983, Yale, “Reflections on United States v. Lopez: "A government of limited and enumerated powers: in defense of United States v. Lopez,” 94 Mich. L. Rev. 752, Michigan Law Review, December, lexis, AD: 7/5/9) LS

A third related advantage is that international federations can undertake a host of which there are significant economies of scale. This is one reason why federations can provide better for the common defense than can their constituent parts. Intercontinental ballistic missiles, nuclear-powered aircraft carriers and submarines, and B-2 stealth bombers tend to be expensive. Economies of scale make it cheaper for fifty states to produce one set of these items than it would be for fifty states to try to produce fifty sets. This is true even without factoring in the North American regional tensions that would be created if this continent had to endure the presence of fifty nuclear minipowers, assuming that each small state could afford to own at least one Hiroshima-sized nuclear bomb. Important governmental economies of scale obtain in other areas, as well, however, going well beyond national defense. For example, there are important economies of scale to the governmental provision of space programs, scientific and biomedical research programs, the creation of transportation infrastructure, and even the running of some kinds of income and wealth redistribution programs.

#### Economic collapse causes global nuclear war.

Friedberg and Schoenfeld, ‘8 (Aaron [Prof. Politics. And IR @ Princeton’s Woodrow Wilson School and Visiting Scholar @ Witherspoon Institute], and Gabriel, [Senior Editor of Commentary and Wall Street Journal], “The Dangers of a Diminished America”,

http://online.wsj.com/article/SB122455074012352571.html)

Then there are the dolorous consequences of a potential collapse of the world's financial architecture. For decades now, Americans have enjoyed the advantages of being at the center of that system. The worldwide use of the dollar, and the stability of our economy, among other things, made it easier for us to run huge budget deficits, as we counted on foreigners to pick up the tab by buying dollar-denominated assets as a safe haven. Will this be possible in the future? Meanwhile, traditional foreign-policy challenges are multiplying. The threat from al Qaeda and Islamic terrorist affiliates has not been extinguished. Iran and North Korea are continuing on their bellicose paths, while Pakistan and Afghanistan are progressing smartly down the road to chaos. Russia's new militancy and China's seemingly relentless rise also give cause for concern. If America now tries to pull back from the world stage, it will leave a dangerous power vacuum. The stabilizing effects of our presence in Asia, our continuing commitment to Europe, and our position as defender of last resort for Middle East energy sources and supply lines could all be placed at risk. In such a scenario there are shades of the 1930s, when global trade and finance ground nearly to a halt, the peaceful democracies failed to cooperate, and aggressive powers led by the remorseless fanatics who rose up on the crest of economic disaster exploited their divisions. Today we run the risk that rogue states may choose to become ever more reckless with their nuclear toys, just at our moment of maximum vulnerability. The aftershocks of the financial crisis will almost certainly rock our principal strategic competitors even harder than they will rock us. The dramatic free fall of the Russian stock market has demonstrated the fragility of a state whose economic performance hinges on high oil prices, now driven down by the global slowdown. China is perhaps even more fragile, its economic growth depending heavily on foreign investment and access to foreign markets. Both will now be constricted, inflicting economic pain and perhaps even sparking unrest in a country where political legitimacy rests on progress in the long march to prosperity. None of this is good news if the authoritarian leaders of these countries seek to divert attention from internal travails with external adventures.

### 3

#### Executive war power primacy now – Syria debate proves.

Posner, Kirkland & Ellis Professor, University of Chicago Law School, 9-3

[Eric, 9/3/13, Obama Is Only Making His War Powers Mightier, [www.slate.com/articles/news\_and\_politics/view\_from\_chicago/2013/09/obama\_going\_to\_congress\_on\_syria\_he\_s\_actually\_strengthening\_the\_war\_powers.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/09/obama_going_to_congress_on_syria_he_s_actually_strengthening_the_war_powers.html)]

¶ President Obama’s surprise announcement that he will ask Congress for approval of a military attack on Syria is being hailed as a vindication of the rule of law and a revival of the central role of Congress in war-making, even by critics. But all of this is wrong. Far from breaking new legal ground, President Obama has reaffirmed the primacy of the executive in matters of war and peace. The war powers of the presidency remain as mighty as ever.¶ It would have been different if the president had announced that only Congress can authorize the use of military force, as dictated by the Constitution, which gives Congress alone the power to declare war. That would have been worthy of notice, a reversal of the ascendance of executive power over Congress. But the president said no such thing. He said: “I believe I have the authority to carry out this military action without specific congressional authorization.” Secretary of State John Kerry confirmed that the president “has the right to do that”—launch a military strike—“no matter what Congress does.”¶ Thus, the president believes that the law gives him the option to seek a congressional yes or to act on his own. He does not believe that he is bound to do the first. He has merely stated the law as countless other presidents and their lawyers have described it before him.¶ The president’s announcement should be understood as a political move, not a legal one. His motive is both self-serving and easy to understand, and it has been all but acknowledged by the administration. If Congress now approves the war, it must share blame with the president if what happens next in Syria goes badly. If Congress rejects the war, it must share blame with the president if Bashar al-Assad gases more Syrian children. The big problem for Obama arises if Congress says no and he decides he must go ahead anyway, and then the war goes badly. He won’t have broken the law as he understands it, but he will look bad. He would be the first president ever to ask Congress for the power to make war and then to go to war after Congress said no. (In the past, presidents who expected dissent did not ask Congress for permission.)¶ People who celebrate the president for humbly begging Congress for approval also apparently don’t realize that his understanding of the law—that it gives him the option to go to Congress—maximizes executive power vis-à-vis Congress. If the president were required to act alone, without Congress, then he would have to take the blame for failing to use force when he should and using force when he shouldn’t. If he were required to obtain congressional authorization, then Congress would be able to block him. But if he can have it either way, he can force Congress to share responsibility when he wants to and avoid it when he knows that it will stand in his way.

#### Court interference decks the Executive flexibility prevents dealing with new crisis---link threshold is low.

Blomquist, Professor of Law, Valparaiso University School of Law, ‘10

[Robert, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881]

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the unique [\*883] constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats. n16 The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22 [\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations. (1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27 (2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28 (3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30 (4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32 (5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34 [\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39 Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

#### Effective executive response is key to prevent global crises --- specifically: Iranian nuclearization, North African terrorism, Russian aggression, and Senkaku conflict

Ghitis 13

[Frida, world affairs columnist for The Miami Herald and World Politics Review. A former CNN producer and correspondent, she is the author of *The End of Revolution: A Changing World in the Age of Live Television*. “World to Obama: You can't ignore us,” 1/22, http://www.cnn.com/2013/01/22/opinion/ghitis-obama-world]

And while Obama plans to dedicate his efforts to the domestic agenda, a number of brewing international crises are sure to steal his attention and demand his time. Here are a few of the foreign policy issues that, like it or not, may force Obama to divert his focus from domestic concerns in this new term.¶ Syria unraveling: The United Nations says more than 60,000 people have already died in [a civil war t](http://www.cnn.com/2013/01/02/world/meast/syria-civil-war/index.html)hat the West has, to its shame, done little to keep from spinning out of control. Washington[has warned](http://www.nytimes.com/2012/12/04/world/middleeast/nato-prepares-missile-defenses-for-turkey.html?_r=0" \t "_blank) that the use of chemical or biological weapons might force its hand. But the regime [may have already used them](http://www.reuters.com/article/2013/01/19/us-syria-chemical-newspaper-idUSBRE90I0JV20130119" \t "_blank). The West has failed to nurture a moderate force in the conflict. Now Islamist extremists are growing [more powerful](http://www.al-monitor.com/pulse/originals/2013/01/fighter-syria-aleppo-turkey.html" \t "_blank) within the opposition. The chances are growing that worst-case scenarios will materialize. Washington will not be able to endlessly ignore this dangerous war.¶ Egypt and the challenge of democracy: What happens in Egypt strongly influences the rest of the Middle East -- and hence world peace -- which makes it all the more troubling to see liberal democratic forces lose battle after battle for political influence against Islamist parties, and to hear blatantly [anti-Semitic speech](http://www.nytimes.com/2013/01/15/world/middleeast/egypts-leader-morsi-made-anti-jewish-slurs.html" \t "_blank) coming from the mouth of Mohammed Morsy barely two years before he became president.¶ Iran's nuclear program: Obama took office promising a new, more conciliatory effort to persuade Iran to drop its nuclear enrichment program. Four years later, he has succeeded in implementing international sanctions, but Iran has continued enriching uranium, leading [United Nations inspectors](http://news.yahoo.com/un-credible-evidence-iran-working-nuke-weapons-153544271.html" \t "_blank) to find "credible evidence" that Tehran is working on nuclear weapons. Sooner or later the moment of truth will arrive. If a deal is not reached, Obama will have to decide if he wants to be the president on whose watch a nuclear weapons race was unleashed in the most dangerous and unstable part of the world.¶ North Africa terrorism: A much-neglected region of the world is becoming increasingly difficult to disregard. In recent days, [Islamist extremists](http://edition.cnn.com/2013/01/18/opinion/ghitis-algeria-hostage-crisis/index.html?hpt=op_t1) took American and other hostages in Algeria and France sent its military to fight advancing Islamist extremists in Mali, a country that once represented optimism for democratic rule in Africa, now overtaken by militants who are potentially turning it into a staging ground for international terrorism.¶ Russia repression: As Russian President Vladimir Putin succeeds in [crushing opposition](http://www.france24.com/en/20121027-russian-opposition-leaders-detained-protest-navalny-udaltsov-vladimir-putin" \t "_blank) to his [increasingly authoritarian](http://www.freedomhouse.org/report/freedom-world/2013/russia" \t "_blank)rule, he and his allies are making anti-American words and policies their favorite theme. A recent ban on adoption of Russian orphans by American parents is only the most vile example. But Washington needs Russian cooperation to achieve its goals at the U.N. regarding Iran, Syria and other matters. It is a complicated problem with which Obama will have to wrestle.¶ Then there are the long-standing challenges that could take a turn for the worse, such as the Israeli-Palestinian conflict. Obama may not want to wade into that morass again, but events may force his hand.¶ And there are the so-called "black swans," events of low probability and high impact. [There is talk](http://www.economist.com/news/asia/21569757-armed-clashes-over-trivial-specks-east-china-sea-loom-closer-drums-war" \t "_blank) that China and Japan could go to war over a cluster of disputed islands.¶ A war between two of the world's largest economies could prove devastating to the global economy, just as a sudden and dramatic reversal in the fragile Eurozone economy could spell disaster. Japan's is only the hottest of many territorial disputes between China and its Asian neighbors. Then there's North Korea with its nuclear weapons.¶ We could see regions that have garnered little attention come back to the forefront, such as Latin America, where conflict could arise in a post-Hugo Chavez Venezuela.¶ The president -- and the country -- could also benefit from unexpectedly positive outcomes. Imagine a happy turn of events in Iran, a breakthrough between Israelis and Palestinians, the return of prosperity in Europe, a successful push by liberal democratic forces in the Arab uprising countries, which could create new opportunities, lowering risks around the world, easing trade, restoring confidence and improving the chances for the very agenda Obama described in his inaugural speech.¶ The aspirations he expressed for America are the ones he should express for our tumultuous planet. Perhaps in his next big speech, the State of the Union, he can remember America's leadership position and devote more attention to those around the world who see it as a source of inspiration and encouragement.¶ After all, in this second term Obama will not be able to devote as small a portion of his attention to foreign policy as he did during his inaugural speech.

#### Senkaku conflict is on the brink --- quick U.S. intervention is key to prevent global nuclear escalation.

Klare, Five College professor of peace and world security studies @ Hampshire College, ‘13

[Michael, He holds a Ph.D. from the Graduate School of the Union Institute. “The Next War”, 1/23, http://www.realclearworld.com/articles/2013/01/23/the\_next\_war\_100500.html]

Don't look now, but conditions are deteriorating in the western Pacific. Things are turning ugly, with consequences that could prove deadly and spell catastrophe for the global economy.¶ In Washington, it is widely assumed that a showdown with Iran over its nuclear ambitions will be the first major crisis to engulf the next secretary of defense -- whether it be former Senator Chuck Hagel, as President Obama desires, or someone else if he fails to win Senate confirmation. With few signs of an imminent breakthrough in talks aimed at peacefully resolving the Iranian nuclear issue, many analysts believe that military action -- if not by Israel, then by the United States -- could be on this year's agenda.¶ Lurking just behind the Iranian imbroglio, however, is a potential crisis of far greater magnitude, and potentially far more imminent than most of us imagine. China's determination to assert control over disputed islands in the potentially energy-rich waters of the East and South China Seas, in the face of stiffening resistance from Japan and the Philippines along with greater regional assertiveness by the United States, spells trouble not just regionally, but potentially globally.¶ Islands, Islands, Everywhere¶ The possibility of an Iranian crisis remains in the spotlight because of the obvious risk of disorder in the Greater Middle East and its threat to global oil production and shipping. A crisis in the East or South China Seas (essentially, western extensions of the Pacific Ocean) would, however, pose a greater peril because of the possibility of a U.S.-China military confrontation and the threat to Asian economic stability.¶ The United States is bound by treaty to come to the assistance of Japan or the Philippines if either country is attacked by a third party, so any armed clash between Chinese and Japanese or Filipino forces could trigger American military intervention. With so much of the world's trade focused on Asia, and the American, Chinese, and Japanese economies tied so closely together in ways too essential to ignore, a clash of almost any sort in these vital waterways might paralyze international commerce and trigger a global recession (or worse).¶ All of this should be painfully obvious and so rule out such a possibility -- and yet the likelihood of such a clash occurring has been on the rise in recent months, as China and its neighbors continue to ratchet up the bellicosity of their statements and bolster their military forces in the contested areas. Washington's continuing statements about its ongoing plans for a "pivot" to, or "rebalancing" of, its forces in the Pacific have only fueled Chinese intransigence and intensified a rising sense of crisis in the region. Leaders on all sides continue to affirm their country's inviolable rights to the contested islands and vow to use any means necessary to resist encroachment by rival claimants. In the meantime, China has increased the frequency and scale of its naval maneuvers in waters claimed by Japan, Vietnam, and the Philippines, further enflaming tensions in the region.¶ Ostensibly, these disputes revolve around the question of who owns a constellation of largely uninhabited atolls and islets claimed by a variety of nations. In the East China Sea, the islands in contention are called the Diaoyus by China and the Senkakus by Japan. At present, they are administered by Japan, but both countries claim sovereignty over them. In the South China Sea, several island groups are in contention, including the Spratly chain and the Paracel Islands (known in China as the Nansha and Xisha Islands, respectively). China claims all of these islets, while Vietnam claims some of the Spratlys and Paracels. Brunei, Malaysia, and the Philippines also claim some of the Spratlys.¶ Far more is, of course, at stake than just the ownership of a few uninhabited islets. The seabeds surrounding them are believed to sit atop vast reserves of oil and natural gas. Ownership of the islands would naturally confer ownership of the reserves -- something all of these countries desperately desire. Powerful forces of nationalism are also at work: with rising popular fervor, the Chinese believe that the islands are part of their national territory and any other claims represent a direct assault on China's sovereign rights; the fact that Japan -- China's brutal invader and occupier during World War II -- is a rival claimant to some of them only adds a powerful tinge of victimhood to Chinese nationalism and intransigence on the issue. By the same token, the Japanese, Vietnamese, and Filipinos, already feeling threatened by China's growing wealth and power, believe no less firmly that not bending on the island disputes is an essential expression of their nationhood.¶ Long ongoing, these disputes have escalated recently. In May 2011, for instance, the Vietnamese reported that Chinese warships were harassing oil-exploration vessels operated by the state-owned energy company PetroVietnam in the South China Sea. In two instances, Vietnamese authorities claimed, cables attached to underwater survey equipment were purposely slashed. In April 2012, armed Chinese marine surveillance ships blocked efforts by Filipino vessels to inspect Chinese boats suspected of illegally fishing off Scarborough Shoal, an islet in the South China Sea claimed by both countries.¶ The East China Sea has similarly witnessed tense encounters of late. Last September, for example, Japanese authorities arrested 14 Chinese citizens who had attempted to land on one of the Diaoyu/Senkaku Islands to press their country's claims, provoking widespread anti-Japanese protests across China and a series of naval show-of-force operations by both sides in the disputed waters.¶ Regional diplomacy, that classic way of settling disputes in a peaceful manner, has been under growing strain recently thanks to these maritime disputes and the accompanying military encounters. In July 2012, at the annual meeting of the Association of Southeast Asian Nations (ASEAN), Asian leaders were unable to agree on a final communiqué, no matter how anodyne -- the first time that had happened in the organization's 46-year history. Reportedly, consensus on a final document was thwarted when Cambodia, a close ally of China's, refused to endorse compromise language on a proposed "code of conduct" for resolving disputes in the South China Sea. Two months later, when Secretary of State Hillary Rodham Clinton visited Beijing in an attempt to promote negotiations on the disputes, she was reviled in the Chinese press, while officials there refused to cede any ground at all.¶ As 2012 ended and the New Year began, the situation only deteriorated. On December 1st, officials in Hainan Province, which administers the Chinese-claimed islands in the South China Sea, announced a new policy for 2013: Chinese warships would now be empowered to stop, search, or simply repel foreign ships that entered the claimed waters and were suspected of conducting illegal activities ranging, assumedly, from fishing to oil drilling. This move coincided with an increase in the size and frequency of Chinese naval deployments in the disputed areas.¶ On December 13th, the Japanese military scrambled F-15 fighter jets when a Chinese marine surveillance plane flew into airspace near the Diaoyu/Senkaku Islands. Another worrisome incident occurred on January 8th, when four Chinese surveillance ships entered Japanese-controlled waters around those islands for 13 hours. Two days later, Japanese fighter jets were again scrambled when a Chinese surveillance plane returned to the islands. Chinese fighters then came in pursuit, the first time supersonic jets from both sides flew over the disputed area. The Chinese clearly have little intention of backing down, having indicated that they will increase their air and naval deployments in the area, just as the Japanese are doing.¶ Powder Keg in the Pacific¶ While war clouds gather in the Pacific sky, the question remains: Why, pray tell, is this happening now?¶ Several factors seem to be conspiring to heighten the risk of confrontation, including leadership changes in China and Japan, and a geopolitical reassessment by the United States.¶ \* In China, a new leadership team is placing renewed emphasis on military strength and on what might be called national assertiveness. At the 18th Party Congress of the Chinese Communist Party, held last November in Beijing, Xi Jinping was named both party head and chairman of the Central Military Commission, making him, in effect, the nation's foremost civilian and military official. Since then, Xi has made several heavily publicized visits to assorted Chinese military units, all clearly intended to demonstrate the Communist Party's determination, under his leadership, to boost the capabilities and prestige of the country's army, navy, and air force. He has already linked this drive to his belief that his country should play a more vigorous and assertive role in the region and the world.¶ In a speech to soldiers in the city of Huizhou, for example, Xi spoke of his "dream" of national rejuvenation: "This dream can be said to be a dream of a strong nation; and for the military, it is the dream of a strong military." Significantly, he used the trip to visit the Haikou, a destroyer assigned to the fleet responsible for patrolling the disputed waters of the South China Sea. As he spoke, a Chinese surveillance plane entered disputed air space over the Diaoyu/Senkaku islands in the East China Sea, prompting Japan to scramble those F-15 fighter jets.¶ \* In Japan, too, a new leadership team is placing renewed emphasis on military strength and national assertiveness. On December 16th, arch-nationalist Shinzo Abe returned to power as the nation's prime minister. Although he campaigned largely on economic issues, promising to revive the country's lagging economy, Abe has made no secret of his intent to bolster the Japanese military and assume a tougher stance on the East China Sea dispute.¶ In his first few weeks in office, Abe has already announced plans to increase military spending and review an official apology made by a former government official to women forced into sexual slavery by the Japanese military during World War II. These steps are sure to please Japan's rightists, but certain to inflame anti-Japanese sentiment in China, Korea, and other countries it once occupied.¶ Equally worrisome, Abe promptly negotiated an agreement with the Philippines for greater cooperation on enhanced "maritime security" in the western Pacific, a move intended to counter growing Chinese assertiveness in the region. Inevitably, this will spark a harsh Chinese response -- and because the United States has mutual defense treaties with both countries, it will also increase the risk of U.S. involvement in future engagements at sea.¶ \* In the United States, senior officials are debating implementation of the "Pacific pivot" announced by President Obama in a speech before the Australian Parliament a little over a year ago. In it, he promised that additional U.S. forces would be deployed in the region, even if that meant cutbacks elsewhere. "My guidance is clear," he declared. "As we plan and budget for the future, we will allocate the resources necessary to maintain our strong military presence in this region." While Obama never quite said that his approach was intended to constrain the rise of China, few observers doubt that a policy of "containment" has returned to the Pacific.¶ Indeed, the U.S. military has taken the first steps in this direction, announcing, for example, that by 2017 all three U.S. stealth planes, the F-22, F-35, and B-2, would be deployed to bases relatively near China and that by 2020 60% of U.S. naval forces will be stationed in the Pacific (compared to 50% today). However, the nation's budget woes have led many analysts to question whether the Pentagon is actually capable of fully implementing the military part of any Asian pivot strategy in a meaningful way. A study conducted by the Center for Strategic and International Studies (CSIS) at the behest of Congress, released last summer, concluded that the Department of Defense "has not adequately articulated the strategy behind its force posture planning [in the Asia-Pacific] nor aligned the strategy with resources in a way that reflects current budget realities."¶ This, in turn, has fueled a drive by military hawks to press the administration to spend more on Pacific-oriented forces and to play a more vigorous role in countering China's "bullying" behavior in the East and South China Seas. "[America's Asian allies] are waiting to see whether America will live up to its uncomfortable but necessary role as the true guarantor of stability in East Asia, or whether the region will again be dominated by belligerence and intimidation," former Secretary of the Navy and former Senator James Webb wrote in the Wall Street Journal. Although the administration has responded to such taunts by reaffirming its pledge to bolster its forces in the Pacific, this has failed to halt the calls for an even tougher posture by Washington. Obama has already been chided for failing to provide sufficient backing to Israel in its struggle with Iran over nuclear weapons, and it is safe to assume that he will face even greater pressure to assist America's allies in Asia were they to be threatened by Chinese forces.¶ Add these three developments together, and you have the makings of a powder keg -- potentially at least as explosive and dangerous to the global economy as any confrontation with Iran. Right now, given the rising tensions, the first close encounter of the worst kind, in which, say, shots were unexpectedly fired and lives lost, or a ship or plane went down, might be the equivalent of lighting a fuse in a crowded, over-armed room. Such an incident could occur almost any time. The Japanese press has reported that government officials there are ready to authorize fighter pilots to fire warning shots if Chinese aircraft penetrate the airspace over the Diaoyu/Senkaku islands. A Chinese general has said that such an act would count as the start of "actual combat." That the irrationality of such an event will be apparent to anyone who considers the deeply tangled economic relations among all these powers may prove no impediment to the situation -- as at the beginning of World War I -- simply spinning out of everyone's control.¶ Can such a crisis be averted? Yes, if the leaders of China, Japan, and the United States, the key countries involved, take steps to defuse the belligerent and ultra-nationalistic pronouncements now holding sway and begin talking with one another about practical steps to resolve the disputes. Similarly, an emotional and unexpected gesture -- Prime Minister Abe, for instance, pulling a Nixon and paying a surprise goodwill visit to China -- might carry the day and change the atmosphere. Should these minor disputes in the Pacific get out of hand, however, not just those directly involved but the whole planet will look with sadness and horror on the failure of everyone involved.

### Solvency

#### Plan doesn’t solve – we don’t detain any personnel

#### Personnel are employees

Mirriam Webster 13 ("Personnel." Merriam-Webster.com. Merriam-Webster, n.d. Web. 29 Sept. 2013. <http://www.merriam-webster.com/dictionary/personnel>)

1¶ a : a body of [persons](http://www.merriam-webster.com/dictionary/persons) usually employed (as in a factory or organization) ¶ b personnel plural : [persons](http://www.merriam-webster.com/dictionary/persons) ¶ 2¶ : a division of an organization concerned with personnel

#### Restrictions cause Obama to claim detention power under article 2 – Broadens detention

McAuliff 13 (Michael, Covers Congress and politics for The Huffington Post, “AUMF Repeal Bill Would End Extraordinary War Powers Granted After 9/11”, 6/10/13, <http://www.huffingtonpost.com/2013/06/10/aumf-repeal-bill-war-powers_n_3416689.html>)

But without the AUMF in force, Congress and the administration would have to decide how to deal with prisoners of war in the absence of a specific war. While dozens of captives at Guantanamo are cleared to be released, many are deemed threats to the United States who cannot be tried or let go. "That is the most difficult kernel to pop," said Schiff. "There is still a remaining group of people for whom the evidence is either highly classified or highly problematic because it was a product of torture. And that problem remains to be solved." Simply freeing those Guantanamo detainees is not an option, he said. "There will be a need for continued detention, even after the expiration of the AUMF," Schiff said, citing a World War II precedent for handling prisoners of war. "I don't know that the authority to detain enemy combatants would end with AUMF. But I do think that Guantanamo ought to come to an end, ideally to match up with the expiration of the AUMF in about 18 months," he said. Schiff's effort comes amid the recent revelations of the breadth of the National Security Agency's ability to spy on Americans -- an authority that stems from a separate law also inspired by the 2001 terror attacks, the PATRIOT Act. It also comes as observers on both the left and right have expressed greater suspicion of the executive branch's use of power in targeting reporters, whistleblowers and conservative groups. Schiff, a member of the House Intelligence Committee, said the broader debate provides "context" for his measure, but evaluating the AUMF and the type of force Congress allows the president to use in the war on terror is a separate, if equally difficult, matter. "There's probably a more substantial consensus that the existing AUMF is outdated and probably should be replaced," he said. "There's a lot less consensus about what should come after." Ending the AUMF, he said, would either force Congress to grapple with that question -- and confront the defacto policy of perpetual war -- or allow the president to grow even more powerful. "If we authorize a new and more limited AUMF, we are nonetheless continuing a war footing," Schiff said. "On the other hand, if we don't and the president takes these actions under his Article II power [of the Constitution], then we're broadening the power of the presidency to act unilaterally."

#### The executive won’t comply – empirically proven with FISA court.

Schneier, Contributor, ‘5

[Bruce, “Uncle Sam is Listening”, Salon, 12-20-5,

<http://www.s-security.it/pdf/Uncle%20Sam%20is%20Listening.pdf>, RSR]

When President Bush directed the National Security Agency to secretly eavesdrop on American ¶ citizens, he transferred an authority previously under the purview of the Justice Department to the ¶ Defense Department and bypassed the very laws put in place to protect Americans against ¶ widespread government eavesdropping. The reason may have been to tap the NSA's capability for ¶ data mining and widespread surveillance. ¶ Illegal wiretapping of Americans is nothing new. In the 1950s and '60s, in a program called "Project ¶ Shamrock," the NSA intercepted every single telegram coming in or going out of the United States. ¶ It conducted eavesdropping without a warrant on behalf of the CIA and other agencies. Much of ¶ this became public during the 1975 Church Committee hearings and resulted in the now famous ¶ Foreign Intelligence Surveillance Act (FISA) of 1978. ¶ The purpose of this law was to protect the American people by regulating government ¶ eavesdropping. Like many laws limiting the power of government, it relies on checks and balances: ¶ one branch of the government watching the other. The law established a secret court, the Foreign ¶ Intelligence Surveillance Court (FISC), and empowered it to approve national-security-related ¶ eavesdropping warrants. The Justice Department can request FISA warrants to monitor foreign ¶ communications as well as communications by American citizens, provided that they meet certain ¶ minimal criteria. ¶ The FISC issued about 500 FISA warrants per year from 1979 through 1995, a rate that has slowly ¶ increased since -- 1,758 were issued in 2004. The process is designed for speed and even has ¶ provisions by which the Justice Department can wiretap first and ask for permission later. In all that ¶ time, only four warrant requests were ever rejected, all in 2003. (We don't know any details, of ¶ course, as the court proceedings are secret.) ¶ FISA warrants are carried out by the FBI, but in the days immediately after the terrorist attacks, ¶ there was a widespread perception in Washington that the FBI wasn't up to dealing with the new ¶ threats -- they couldn't uncover plots in a timely manner. So, instead, the Bush administration ¶ turned to the NSA. It had the tools, the expertise, the experience, and so was given the mission The NSA's ability to eavesdrop on communications is exemplified by a technological capability ¶ called Echelon. Echelon is the world's largest information "vacuum cleaner," sucking up a ¶ staggering amount of voice, fax and data communications -- satellite, microwave, fiber-optic, ¶ cellular and everything else -- from all over the world: an estimated 3 billion communications per ¶ day. These communications are then processed through sophisticated data-mining technologies, ¶ which look for simple phrases like "assassinate the president" as well as more complicated ¶ communications patterns. Supposedly Echelon only covers communications outside of the United States. Although there is no ¶ evidence that the Bush administration has employed Echelon to monitor communications to and ¶ from the U.S., this surveillance capability is probably exactly what the president wanted and may ¶ explain why the administration sought to bypass the FISA process of acquiring a warrant for ¶ searches. ¶ Perhaps the NSA just didn't have any experience submitting FISA warrants, so Bush unilaterally ¶ waived that requirement. And perhaps Bush thought FISA was a hindrance -- in 2002 there was a ¶ widespread but false belief that the FISC got in the way of the investigation of Zacarias Moussaoui ¶ (the presumed "20th hijacker") -- and bypassed the court for that reason.

#### Civilian courts fail—laundry list of reasons

Sulmasy 9 (Glenn Sulmasy Chairman, Department of Humanities, Professor of Law US Coast Guard Academy “The Need for a National Security Court System” Journal of Civil Rights and Economic Development, Issue 4, Vol. 23, Article 5 Spring 2009)

There are some, many of whom are here today at St. John's Law School¶ for this symposium, who advocate the use of the current civilian court¶ system to try these suspects.13 The civilian court system as established in¶ Article III of the Constitution, however, is not the appropriate system to¶ adjudicate these hybrid cases. There are numerous substantive and¶ procedural problems with trying terror suspects in Article III courts.¶ Constitutional Criminal Procedure¶ Applications of the Fourth and Fifth Amendments to the War on al¶ Qaeda are prime examples of reasons why this construct is as unworkable¶ as the military commissions have been (albeit for very different reasons).¶ Combat officers in Afghanistan and Iraq are not police officers - nor¶ should they ever be required to function in this capacity. They are there¶ overseas to fight and win wars. It is unreasonable to expect soldiers to¶ issue Miranda warnings to detainees, or require them to obtain search¶ warrants before searches or seizing evidence. Simply, such law¶ enforcement requirements are not issues on the mind of soldiers fighting¶ stateless enemies in Iraq and Afghanistan who have evidence that could be¶ used for prosecutions later. Although these concerns would be unthinkable¶ seven years ago, since the Court's Boumedienel4 decision, it is debatable¶ whether other Constitutional rights would be afforded to these suspects.¶ American soldiers should be concerned with combating the enemy, not¶ with providing Miranda statements upon the initiation of battle, or storming¶ an al Qaeda safe house and the subsequent detention of suspected terrorists.¶ Such notions are ludicrous.¶ Juries¶ Furthermore, consider the jury issues associated with trying the alleged¶ international terrorists in our Article III courts. Imagine the attempts made¶ to empanel an unbiased jury for any of these cases. A "jury of your peers"¶ in accordance with U.S. jurisprudence for trying Khalid Sheik-Mohamed¶ would be impossible within the continental United States. Additionally,¶ any juries would require lifetime protective details.¶ Judges¶ Also, it appears ill advised to use traditional Article III judges to make¶ determinations on such matters of nuanced and niche areas of the law, such¶ as the law of armed conflict, intelligence law, human rights law, etc. In¶ other areas of so called "niche law" - immigration, bankruptcy - we have¶ created separate court systems with specialized judges presiding. The¶ reality is that not all U.S. district court judges have the experience in the¶ law of war, intelligence law, international law, human rights, etc., that¶ would be required to properly conduct a trial for an alleged enemy of the United States (and part of an ongoing armed conflict). If we are serious¶ about using a civilian system to try the detainees, we need judges that are¶ versed in these areas of the law to preside.¶ Protective Details¶ Also, like the jury issues, the impractical reality of protecting judges has¶ emerged. The issues of judge protection may sound mundane right now,¶ but they are considerable in terms of cost and time, becoming more¶ important within the realistic framework of 21 t century jurisprudence.¶ Few would contend with the fact that judges trying these suspects would be¶ targets for future terrorist attacks. Using the existing district courts across¶ the country would require the adoption of new security procedures, massive¶ structural overhauls, additional security personnel, and the expenditure of¶ large amounts of money that the federal government does not have.¶ Civilian Prisons¶ Not only would the trial of these suspects in district courts present major¶ problems, the actual physical detention of these suspects using domestic¶ prisons is also highly problematic. It seems unlikely that many members of¶ Congress would actually volunteer to have these detainees moved from¶ Guantanamo Bay to their legislative districts. In fact, in July of 2007, the¶ Senate voted 94 to 3 to not move the detainees into the United States. 15

### Legitimacy

#### Focus on credibility causes terrible policy.

Jonathan Mercer 8/28, 2013, associate professor of political science at the University of Washington in Seattle and a Fellow at the Center for International Studies at the London School of Economics. Bad Reputation, 28 August 2013, www.foreignaffairs.com/articles/139376/jonathan-mercer/bad-reputation

Even if Assad were so simpleminded, the administration’s critics are wrong to suggest that the president should have acted sooner to protect U.S. credibility. After the red line was first crossed, Obama could have taken the United States to war to prevent Assad from concluding that an irresolute Obama would not respond to any further attacks -- a perception on Syria’s part that seems to have now made a U.S. military response all but certain. But going to war to prevent a possible misperception that might later cause a war is, to paraphrase Bismarck, like committing suicide out of fear that others might later wrongly think one is dead.

It is also possible that the United States did not factor into Assad’s calculations. A few months before the United States invaded Iraq, Saddam Hussein’s primary concerns were avoiding a Shia rebellion and deterring Iran. Shortsighted, yes, but also a good reminder that although the United States is at the center of the universe for Americans, it is not for everyone else. Assad has a regime to protect and he will commit any crime to win the war. Finally, it is possible that Assad never doubted Obama’s resolve -- he just expects that he can survive any American response. After all, if overthrowing Assad were easy, it would already have been done.

Instead of worrying about U.S. credibility or the president’s reputation, the administration should focus on what can be done to reinforce the longstanding norm against the use of weapons of mass destruction.

#### The aff is not sufficient – 1AC Vaughn says the rule of law—touted by the United States throughout the world since the end of World War II— has been “steadily undermined . . . since we began the so-called ‘War on Terror. No reason plan solves other aspects of the war on terror. Their Welsh ev confirms it when it cites polls that deal with the overall response to the war on terror. Cites things like the war in Iraq.

#### Soft power fails – persuasion is difficult, the US isn’t trusted and hard power trumps.

Kroenig et. al, ‘10

[Matthew (assistant professor of Government at Georgetown University and a Stanton Nuclear Security Fellow at the Council on Foreign Relations), Melissa McAdam (Ph.D. candidate in political science at the University of California), Steven Weber (professor of political science at the University of California), December 2010, “Taking Soft Power Seriously”, Comparative Strategy, 29: 5, 412 – 431

<http://www.matthewkroenig.com/Kroenig_Taking%20Soft%20Power%20Seriously.pdf>, RSR]

Foreign policy actors have many reasons to experiment with soft power, not merely because its use can be less costly than hard power. But, soft power comes with its own quite striking limitations. Our research suggests that soft power strategies will be unlikely to succeed except under fairly restrictive conditions. It may very well be, then, that the U.S. foreign policy elite is at risk of exaggerating the effectiveness of soft power (rather than underutilizing it) as a tool of foreign policy. After all, international communication is fraught with difﬁculties, persuading people to change ﬁrmly held political views is hard, and individual attitudes are often thought to have an insigniﬁcant role in determining international political outcomes. Soft power, therefore, will probably be considered a niche foreign policy option useful for addressing a small fraction of the problems on Washington’s foreign policy agenda. Analysts who suggest that soft power can easily be substituted for hard power or who maintain that soft power should provide an overarching guide to the formulation of U.S. foreign policy are badly mistaken. It is not conducive to good policy to employ the idea of soft power as a way of arguing against the use of military force, for example.

**Indefinite detention is insufficient—loads of alt causes**

Thomas **Hilde 09**, professor at the University of Maryland School of Public Policy, “Beyond Guantanamo. Restoring U.S. Credibility on Human Rights,” Heinrich Böll Foundation, http://www.boell.org/downloads/hbf\_Beyond\_Guantanamo\_Thomas\_Hilde(2).pdf

The first step required by law is a formal investigation of abuse. The **investigations** by the U.S. Department of Justice **must be legitimate and comprehensive or the U.S. will be faced with investigations by the governments of other countries**, including the NATO allies, who are obligated to do so by international law. However, as Mark Drumbl writes of international accountability for atrocities, “**the accountability process remains narrowly oriented to incarceration** following liberal criminal trials. **It is not a broader process that is yet comfortable with meaningful restorative initiatives, indigenous values, qualified amnesties, reintegrative shaming, the needs of victims, reparations, collective or foreign responsibilities, distributive justice, or pointed questions regarding the structural nature of violence in the international system**… **With pronouncement of sentence comes a rush to closure, absolution for the acquiescent, and the evaporation of collective responsibility.**”42 A clearer legal understanding of the contours and details of the torture regime is necessary before making concrete policy decisions holding into the indefinite future. The point that Drumbl underscores, however, is that **to render account involves much more than litigation.**

**Zero data supports the resolve or credibility thesis**

Jonathan **Mercer 13**, associate professor of political science at the University of Washington in Seattle and a Fellow at the Center for International Studies at the London School of Economics, 5/13/13, “Bad Reputation,” <http://www.foreignaffairs.com/articles/136577/jonathan-mercer/bad-reputation>

Since then, **the debate about** what to do in **Syria has been sidetracked by discussions of** how central reputation is to deterrence, and whether protecting it is worth going to war. ¶ There are two ways to answer those questions: through evidence and through logic. The first approach is easy. **Do leaders assume** that **other leaders who have been irresolute in the past** will be irresolute in the future **and that**, therefore, **their threats are not credible?** No; broad and deep evidence dispels that notion. In studies of the various political crises leading up to World War I and of those before and during the Korean War, I found that leaders did indeed worry about their reputations. But their worries were often mistaken. ¶ For example, when North Korea attacked South Korea in 1950, U.S. Secretary of State Dean Acheson was certain that America’s credibility was on the line. He believed that the United States’ allies in the West were in a state of “near-panic, as they watched to see whether the United States would act.” He was wrong. When one British cabinet secretary remarked to British Prime Minister Clement Attlee that Korea was “a rather distant obligation,” Attlee responded, “Distant -- yes, but nonetheless an obligation.” For their part, the French were indeed worried, but not because they doubted U.S. credibility. Instead, they feared that American resolve would lead to a major war over a strategically inconsequential piece of territory. Later, once the war was underway, Acheson feared that Chinese leaders thought the United States was “too feeble or hesitant to make a genuine stand,” as the CIA put it, and could therefore “be bullied or bluffed into backing down before Communist might.” In fact, Mao thought no such thing. He believed that the Americans intended to destroy his revolution, perhaps with nuclear weapons. ¶ Similarly, Ted **Hopf, a professor of political science** at the National University of Singapore, has **found** that **the Soviet Union did not think the U**nited **S**tates **was irresolute for abandoning Vietnam**; instead, **Soviet officials were surprised that Americans would sacrifice so much for something the Soviets viewed as tangential to U.S. interests**. And, **in his study of Cold War showdowns**, **Dartmouth** College **professor** Daryl **Press found reputation to have been** unimportant. During the Cuban Missile Crisis, the Soviets threatened to attack Berlin in response to any American use of force against Cuba; **despite a long record of Soviet bluff and bluster over Berlin**, **policymakers in the U**nited **S**tates took these threats seriously. As **the record shows**, reputations do not matter.

#### Hegemony is dead and unsustainable – other nations are already ignoring or challenging the US and fiscal troubles trump.

Kanin and Meyer, ‘12

[David (Adjunct Professor of International Studies at John Hopkins) and Steven (Fellow at the Center for Public Justice), “America’s Outmoded Security Strategy," Current History, January]

One implication of all this is that the United ¶ States cannot sustainably afford the financial costs ¶ of engaging the world as it has in the past. The ¶ amounts that the United States has spent on wars ¶ in Iraq and Afghanistan are so enormous, and have ¶ been handled so poorly, that it is difficult to calculate the exact expenditures. In 2010 the economists Joseph Stiglitz and Linda Bilmes estimated ¶ that the cost of American involvement in Iraq ultimately will exceed $3 trillion. Pentagon officials, ¶ according to USA Today, say the war in Afghanistan has been costing about $10 billion a month.¶ Meanwhile, the US sovereign debt is around $14 ¶ trillion and growing. Americans hold the majority ¶ of this debt, but foreign entities hold a significant ¶ amount of it, including more than $1 trillion held ¶ by China. Although the corrosive effects of this debt ¶ are well known theoretically and intellectually, no ¶ serious effort is being made to come to grips with ¶ it. Since the end of the cold war, US administrations ¶ have remained engaged in the hubristic extension ¶ of American power with little consideration for the ¶ devastating financial costs of the effort.¶ A second implication of US decline is that Washington now lacks the power to dictate how others ¶ must act. When scholars argue that there is no alternative to US hegemony, they ignore an essential ¶ fact: that the emergence of economic and military ¶ rivals already has removed—permanently—America’s ability to dictate global economic and security ¶ structures and norms.¶ There will be no more Dumbarton Oaks diktats; no more US-led global security forums. ¶ Dwight Eisenhower in 1956 turned Britain’s behavior on a dime when he threatened the pound ¶ during the Suez crisis, but American presidents ¶ have lost this ability forever. NATO is an anachronism, a hollowed-out relic of the cold war. It survives not on account of legitimate security needs ¶ but rather as what Otto von Bismarck called a ¶ “sentimental alliance.” ¶ The “unipolar moment” celebrated by the commentator Charles Krauthammer was in fact not ¶ much more than that—a moment. Some of America’s subsequent decline can be understood in ¶ relative terms, as other global actors have gained ¶ wealth, power, and influence. China, India, and ¶ Brazil are most frequently cited as the next great ¶ economic (and perhaps political and military) ¶ powers, but the rapid development of other countries, regions, businesses, terrorist groups, and ¶ proliferating nonstate entities adds significantly to ¶ the relative loss of US power and influence.¶ Certainly, the United States retains some global ¶ fascination because of its “otherness,” but this too ¶ is a wasting asset. People know Americans better now. Some nations have suffered American ¶ bombings, others have witnessed US mistakes first ¶ hand, and even many of America’s friends shake ¶ their heads in disbelief at successive administrations’ nonstrategic and oscillating approaches to ¶ frustrating or dangerous trends. China’s Hu Jintao, ¶ Russia’s Vladimir Putin, and assorted radical Islamists—worlds away in culture and outlook—are ¶ not intimidated by US power.¶ The decline of American power and influence ¶ is not merely relative. It is also absolute, in part ¶ because of the debilitating fiscal mess that the ¶ country has created for itself. Gone forever are the ¶ heady days when the United States could afford ¶ to rebuild a damaged continent or fund a military ¶ budget as large as the rest of the world’s combined.¶ Never again, moreover, can America use its geographic position as a shield against hostile military ¶ powers or intrusion from outside economic forces. ¶ The current state of technology and the interdependence of the global economy simply will not ¶ allow this. The presence of more than 11 million ¶ illegal aliens in the United States testifies to America’s vulnerability to forces beyond its control. The combination of relative and absolute decline has led to a growing propensity among others to push back, or simply to ignore US demands ¶ and “leadership.” This reaction is palpable, for ¶ example, in Pakistan’s reluctance to heed US insistence that it do more to fight the Taliban.

#### Smooth decline now - fighting to maintain power causes conflict.

Quinn, 11

[Adam, Lecturer in International Studies at the University of Birmingham, having previously worked at the University of Leicester and the University of Westminster alongside his graduate studies at the LSE. His chief area of interest is the role of national history and ideology in shaping US grand strategy, “The art of declining politely: Obama’s prudent presidency and the waning of American power”, International Affairs 87:4 (2011) 803–824,

http://www.chathamhouse.org/sites/default/files/87\_4quinn.pdf]

As noted in the opening passages of this article, the narratives of America’s decline and Obama’s restraint are distinct but also crucially connected. Facing this incipient period of decline, America’s leaders may walk one of two paths. Either the nation can come to terms with the reality of the process that is under way and seek to finesse it in the smoothest way possible. Or it can ‘rage against the dying of the light’, refusing to accept the waning of its primacy. President Obama’s approach, defined by restraint and awareness of limits, makes him ideologically and temperamentally well suited to the former course in a way that, to cite one example, his predecessor was not. He is, in short, a good president to inaugurate an era of managed decline. Those who vocally demand that the President act more boldly are not merely criticizing him; in suggesting that he is ‘weak’ and that a ‘tougher’ policy is needed, they implicitly suppose that the resources will be available to support such a course. In doing so they set their faces against the reality of the coming American decline. 97 If the United States can embrace the spirit of managed decline, then this will clear the way for a judicious retrenchment, trimming ambitions in line with the fact that the nation can no longer act on the global stage with the wide latitude once afforded by its superior power. As part of such a project, it can, as those who seek to qualify the decline thesis have suggested, use the significant resources still at its disposal to smooth the edges of its loss of relative power, preserving influence to the maximum extent possible through whatever legacy of norms and institutions is bequeathed by its primacy. The alternative course involves the initiation or escalation of conflictual scenarios for which the United States increasingly lacks the resources to cater: provocation of a military conclusion to the impasse with Iran; deliberate escalation of strategic rivalry with China in East Asia; commitment to continuing the campaign in Afghanistan for another decade; a costly effort to consistently apply principles of military interventionism, regime change and democracy promotion in response to events in North Africa. President Obama does not by any means represent a radical break with the traditions of American foreign policy in the modern era. Examination of his major foreign policy pronouncements reveals that he remains within the mainstream of the American discourse on foreign policy. In his Nobel Peace Prize acceptance speech in December 2009 he made it clear, not for the first time, that he is no pacifist, spelling out his view that ‘the instruments of war do have a role to play in preserving the peace’, and that ‘the United States of America has helped underwrite global security for more than six decades with the blood of our citizens and the strength of our arms’. 98 In his Cairo speech in June the same year, even as he sought distance from his predecessor with the proclamation that ‘no system of government can or should be imposed by one nation on any other’, he also endorsed with only slight qualification the liberal universalist view of civil liberties as transcendent human rights. ‘I … have an unyielding belief that all people yearn for certain things,’ he declared. ‘The ability to speak your mind and have a say in how you are governed; confidence in the rule of law and the equal administration of justice; government that is transparent and doesn’t steal from the people; the freedom to live as you choose. These are not just American ideas.’ 99 His Westminster speech repeated these sentiments. Evidently this is not a president who wishes to break signally with the mainstream, either by advocating a radical shrinking of America’s military strength as a good in itself or by disavowing liberal universalist global visions, as some genuine dissidents from the prevailing foreign policy discourse would wish. 100 No doubt sensibly, given the likely political reaction at home, it is inconceivable that he would explicitly declare his strategy to be one of managed American decline. Nevertheless, this is a president who, within the confines of the mainstream, embraces caution and restraint to the greatest extent that one could hope for without an epochal paradigm shift in the intellectual framework of American foreign policy-making. 101 In contemplating the diminished and diminishing weight of the United States upon the scales of global power, it is important not to conflate the question of what will be with that of what we might prefer. It may well be, as critics of the decline thesis sometimes observe, that the prospect of increased global power for a state such as China should not, on reflection, fill any westerner with glee, whatever reservations one may have held regarding US primacy. It is also important not to be unduly deterministic in projecting the consequences of American decline. It may be a process that unfolds gradually and peacefully, resulting in a new order that functions with peace and stability even in the absence of American primacy. Alternatively, it may result in conflict, if the United States clashes with rising powers as it refuses to relinquish the prerogatives of the hegemon, or continues to be drawn into wars with middle powers or on the periphery in spite of its shrinking capacity to afford them. Which outcome occurs will depend on more than the choices of America alone. But the likelihood that the United States can preserve its prosperity and influence and see its hegemony leave a positive legacy rather than go down thrashing its limbs about destructively will be greatly increased if it has political leaders disposed to minimize conflict and consider American power a scarce resource—in short, leaders who can master the art of declining politely. At present it seems it is fortunate enough to have a president who fits the bill.

#### Hegemonic retrenchment’s key to avoid great power war---maintaining unipolarity’s self-defeating which internal link-turns their offense.

(Conflict is inevitable. It’s only a question of escalation)

Montiero, Assistant Professor of Political Science at Yale University, ‘12

[Nuno, “Unrest Assured: Why Unipolarity is Not Peaceful,” International Security, Winter 2012, Vol. 36, No. 3, p. 9-40]

From the perspective of the overall peacefulness of the international system, then, no U.S. grand strategy is, as in the Goldilocks tale, “just right.”116 In fact, each strategic option available to the unipole produces significant conflict. Whereas offensive and defensive dominance will entangle it in wars against recalcitrant minor powers, disengagement will produce regional wars among minor and major powers. Regardless of U.S. strategy, conflict will abound. Indeed, if my argument is correct, the significant level of conflict the world has experienced over the last two decades will continue for as long as U.S. power remains preponderant.¶ From the narrower perspective of the unipole’s ability to avoid being involved in wars, however, disengagement is the best strategy. A unipolar structure provides no incentives for conflict involving a disengaged unipole. Disengagement would extricate the unipole’s forces from wars against recalcitrant minor powers and decrease systemic pressures for nuclear proliferation. There is, however, a downside. Disengagement would lead to heightened conflict beyond the unipole’s region and increase regional pressures for nuclear proliferation. As regards the unipole’s grand strategy, then, the choice is between a strategy of dominance, which leads to involvement in numerous conflicts, and a strategy of disengagement, which allows conflict between others to fester.¶ In a sense, then, strategies of defensive and offensive dominance are self-defeating. They create incentives for recalcitrant minor powers to bolster their capabilities and present the United States with a tough choice: allowing them to succeed or resorting to war in order to thwart them. This will either drag U.S. forces into numerous conflicts or result in an increasing number of major powers. In any case, U.S. ability to convert power into favorable outcomes peacefully will be constrained.117¶ This last point highlights one of the crucial issues where Wohlforth and I differ—the benefits of the unipole’s power preponderance. Whereas Wohlforth believes that the power preponderance of the United States will lead all states in the system to bandwagon with the unipole, I predict that states engaged in security competition with the unipole’s allies and states for whom the status quo otherwise has lesser value will not accommodate the unipole. To the contrary, these minor powers will become recalcitrant despite U.S. power preponderance, displaying the limited pacifying effects of U.S. power.¶ What, then, is the value of unipolarity for the unipole? What can a unipole do that a great power in bipolarity or multipolarity cannot? My argument hints at the possibility that—at least in the security realm—unipolarity does not give the unipole greater influence over international outcomes.118 If unipolarity provides structural incentives for nuclear proliferation, it may, as Robert Jervis has hinted, “have within it the seeds if not of its own destruction, then at least of its modification.”119 For Jervis, “[t]his raises the question of what would remain of a unipolar system in a proliferated world. The American ability to coerce others would decrease but so would its need to defend friendly powers that would now have their own deterrents. The world would still be unipolar by most measures and considerations, but many countries would be able to protect themselves, perhaps even against the superpower. . . . In any event, the polarity of the system may become less important.”120¶ At the same time, nothing in my argument determines the decline of U.S. power. The level of conflict entailed by the strategies of defensive dominance, offensive dominance, and disengagement may be acceptable to the unipole and have only a marginal effect on its ability to maintain its preeminent position. Whether a unipole will be economically or militarily overstretched is an empirical question that depends on the magnitude of the disparity in power between it and major powers and the magnitude of the conflicts in which it gets involved. Neither of these factors can be addressed a priori, and so a theory of unipolarity must acknowledge the possibility of frequent conflict in a nonetheless durable unipolar system.¶ Finally, my argument points to a “paradox of power preponderance.”121 By putting other states in extreme self-help, a systemic imbalance of power requires the unipole to act in ways that minimize the threat it poses. Only by exercising great restraint can it avoid being involved in wars. If the unipole fails to exercise restraint, other states will develop their capabilities, including nuclear weapons—restraining it all the same.122 Paradoxically, then, more relative power does not necessarily lead to greater influence and a better ability to convert capabilities into favorable outcomes peacefully. In effect, unparalleled relative power requires unequaled self-restraint.

#### Barnett evidence is correlation without causation. Other things like the spread of globalization, presence of nuclear weapons, etc. could also explain the decline.

#### No impact to heg – best data goes neg.

Fettweis, Department of Political Science at Tulane University, ‘11

[Christopher, 9/26/11, Free Riding or Restraint? Examining European Grand Strategy, Comparative Strategy, 30:316–332, EBSCO]

It is perhaps worth noting that there is no evidence to support a direct relationship between the relative level of U.S. activism and international stability. In fact, the limited data we do have suggest the opposite may be true. During the 1990s, the United States cut back on its defense spending fairly substantially. By 1998, the United States was spending $100 billion less on defense in real terms than it had in 1990. 51 To internationalists, defense hawks and believers in hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities,” argued Kristol and Kagan, “doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace.” 52 On the other hand, if the paciﬁc trends were not based upon U.S. hegemony but a strengthening norm against interstate war, one would not have expected an increase in global instability and violence. The verdict from the past two decades is fairly plain: The world grew more peaceful while the United States cut its forces. No state seemed to believe that its security was endangered by a less-capable United States military, or at least none took any action that would suggest such a belief. No militaries were enhanced to address power vacuums, no security dilemmas drove insecurity or arms races, and no regional balancing occurred once the stabilizing presence of the U.S. military was diminished. The rest of the world acted as if the threat of international war was not a pressing concern, despite the reduction in U.S. capabilities. Most of all, the United States and its allies were no less safe. The incidence and magnitude of global conﬂict declined while the United States cut its military spending under President Clinton, and kept declining as the Bush ramped the spending back up. No complex statistical analysis should be necessary to reach the conclusion that the two are unrelated. Military spending ﬁgures by themselves are insufﬁcient to disprove a connection between overall U.S. actions and international stability. Once again, one could presumably argue that spending is not the only or even the best indication of hegemony, and that it is instead U.S. foreign political and security commitments that maintain stability. Since neither was signiﬁcantly altered during this period, instability should not have been expected. Alternately, advocates of hegemonic stability could believe that relative rather than absolute spending is decisive in bringing peace. Although the United States cut back on its spending during the 1990s, its relative advantage never wavered. However, even if it is true that either U.S. commitments or relative spending account for global paciﬁc trends, then at the very least stability can evidently be maintained at drastically lower levels of both. In other words, even if one can be allowed to argue in the alternative for a moment and suppose that there is in fact a level of engagement below which the United States cannot drop without increasing international disorder, a rational grand strategist would still recommend cutting back on engagement and spending until that level is determined. Grand strategic decisions are never ﬁnal; continual adjustments can and must be made as time goes on. Basic logic suggests that the United States ought to spend the minimum amount of its blood and treasure while seeking the maximum return on its investment. And if the current era of stability is as stable as many believe it to be, no increase in conﬂict would ever occur irrespective of U.S. spending, which would save untold trillions for an increasingly debt-ridden nation. It is also perhaps worth noting that if opposite trends had unfolded, if other states had reacted to news of cuts in U.S. defense spending with more aggressive or insecure behavior, then internationalists would surely argue that their expectations had been fulﬁlled. If increases in conﬂict would have been interpreted as proof of the wisdom of internationalist strategies, then logical consistency demands that the lack thereof should at least pose a problem. As it stands, the only evidence we have regarding the likely systemic reaction to a more restrained United States suggests that the current peaceful trends are unrelated to U.S. military spending. Evidently the rest of the world can operate quite effectively without the presence of a global policeman. Those who think otherwise base their view on faith alone.

### Democracy

#### Plan can’t solve leadership —too many alt causes and institutional barriers

Nossel 2008(Suzanne, Guardian Staff, November 19, "Closing Gitmo is just the beginning", http://www.guardian.co.uk/commentisfree/cifamerica/2008/nov/19/obama-guantanamo-human-rights)

While abuses carried out as part of the fight against terrorism cost the US its position of leadership on human rights issues globally, regaining that status will require more than just bringing counter-terrorism tactics in line with international norms. While the Bush administration hailed democracy and freedom as centrepieces of its foreign policy, in practice it tended to sideline human rights considerations within its important bilateral relationships.¶ To cite just a few examples, disregard for human rights has contributed to a culture of lawlessness in Pakistan's tribal areas. Despite $10-12bn in mostly military US aid to Pakistan since 2001, civilians affected by the current conflict are left defenceless in squalid, disease-infested camps – some of which the UN refugee agency cannot reach – where their frustration with the US-led war effort only grows. As part of its effort to stabilise this strategically vital region, the US must invest in building institutions that support the rule of law and ensuring that approaches to security uphold human rights. In neighbouring Afghanistan, the US needs to take immediate steps to reduce civilian casualties in military operations, and to press for an end to corruption, which is both fuelling the conflict and undermining popular faith in democratic governance.¶ In contemplating political agreements to end the conflict the US must avoid strengthening the hands of the region's most brutal warlords. While human rights will not be the sole consideration governing multi-faceted relationships with foreign governments, the new administration needs to affirm their place on the agenda and work with like-minded voices to press for progress.¶ The US also has work to do in terms of strengthening the international human rights infrastructure. The Bush administration distanced itself from the international human rights community by failing to ratify key treaties and absenting itself from new institutions of human rights enforcement. The next administration must demonstrate in tangible ways that the US is prepared to cooperate with others in building and strengthening mechanisms to protect and advance human rights in the 21st century. Its absence from key forums and debates has created space for spoilers who seek to vitiate existing human rights norms and prevent new ones from taking hold.¶ In 2005 the UN adopted a new norm, the "responsibility to protect", affirming the duty of states to protect their own populations, and the obligation of the international community to step in when they won't do so. But the new norm has flunked its first test in [Darfur](http://www.guardian.co.uk/world/2008/nov/12/sudan), where the government has suborned rampant human rights abuses and the international community has failed to intervene effectively. Working with allies to build broad-based support for rigorous human rights enforcement is a long-term project that needs to start right away. Necessary steps also include re-engaging with the international criminal court, a body that has begun to prove itself as a vital instrument of international accountability for war crimes. ¶ Building US credibility on human rights will be a long-term project requiring a steady hand against the buffeting forces of foreign policy reality. Done right, the wider human rights agenda could make closing Guantánamo look like the easy part.

#### No internal link between Kiyemba and Supreme Court influence. Supreme court abdication on other issues like the CBW treaties, the voting rights act, etc. are alt causes.

#### No one models US courts.

Versteeg, Associate Professor at the University of Virginia School of Law, ‘13

[Mila, Model, Resource, or Outlier? What Effect Has the U.S. Constitution Had on the Recently Adopted Constitutions of Other Nations?, 29 May 2013, www.heritage.org/research/lecture/2013/05/model-resource-or-outlier-what-effect-has-the-us-constitution-had-on-the-recently-adopted-constitutions-of-other-nations]

Unsurprisingly, attempting to gauge one constitution’s “influence” on another involves various conceptual and methodological challenges. To illustrate, a highly generic constitution may be generic because others have followed its lead, because it has modeled others, or simply by coincidence. That said, if two constitutions are becoming increasingly dissimilar, by definition, one cannot be following the other. That is, neither is exerting influence on the other (at least not in a positive way).¶ This is the phenomenon we observed in comparing the U.S. Constitution to the rest of the world; based on the rights index, the U.S. has become less similar to the world since 1946 and, with a current index of 0.30, is less similar now than at any point during the studied period. This phenomenon has occurred even among current American allies; among countries in regions with close cultural and historic ties to the U.S. (namely, Latin America and Western Europe); and among democracies. Only among common law countries is constitutional similarity higher than it was after World War II, but even that similarity has decreased since the 1960s.¶ Rights provisions are not the only constitutional elements that have lost favor with the rest of the world; structural provisions pioneered by American constitutionalism—such as federalism, presidentialism, and judicial review—have also been losing their global appeal.¶ For instance, in the early 20th century, 22 percent of constitutions provided for federalistic systems, while today, just 12 percent do.¶ A similar trend has occurred for presidentialism, another American innovation. Since the end of World War II, the percentage of countries employing purely presidential systems has declined, mainly in favor of mixed systems, which were a favorite of former Soviet bloc countries.¶ Finally, though judicial review is not mentioned in the U.S. Constitution, it has proved the most popular American structural innovation. But though the popularity of judicial review in general has exploded over the past six decades, most countries have opted for the European style of review (which designates a single, constitutional court which alone has the power to nullify laws inconsistent with the constitution) over the American model (in which all courts are empowered to strike unconstitutional laws). In 1946, over 80 percent of countries exercised American-style constitutional review; today, fewer than half do.¶ Reasons for the Decline¶ It appears that several factors are driving the U.S. Constitution’s increasing atypicality. First, while in 2006 the average national constitutions contained 34 rights (of the 60 we identify), the U.S. Constitution contains relatively few—just 21—and the rights it does contain are often themselves atypical.¶ Just one-third of constitutions provide for church and state separation, as does the U.S. Establishment Clause, and only 2 percent of constitutions (including, e.g., Mexico and Guatemala) contain a “right to bear arms.” Conversely, the U.S. Constitution omits some of the most globally popular rights, such as women’s rights, the right to social security, the right to food, and the right to health care.¶ These peculiarities, together with the fact that the U.S. Constitution is both old and particularly hard to amend, have led some to characterize the Constitution as simply antiquated or obsolete.

#### Friendly democracies can decipher between good and bad US norms, and authoritarian nations don’t care either way .

John O. McGinnis 7, Professor of Law, Northwestern University School of Law. \*\* Ilya Somin \*\* Assistant Professor of Law, George Mason University School of Law. GLOBAL CONSTITUTIONALISM: GLOBAL INFLUENCE ON U.S. JURISPRUDENCE: Should International Law Be Part of Our Law? 59 Stan. L. Rev. 1175

The second benefit to foreigners of distinctive U.S. legal norms is information. The costs and benefits of our norms will be visible for all to see. n268 Particularly in an era of increased empirical social science testing, over time we will be able to analyze and identify the effects of differences in norms between the United States and other nations. n269 Such diversity benefits foreigners as foreign nations can decide to adopt our good norms and avoid our bad ones.¶ The only noteworthy counterargument is the claim that U.S. norms will have more harmful effects than those of raw international law, yet other nations will still copy them. But both parts of this proposition seem doubtful. First, U.S. law emerges from a democratic process that creates a likelihood that it will cause less harm than rules that emerge from the nondemocratic processes [\*1235] that create international law. Second, other democratic nations can use their own political processes to screen out American norms that might cause harm if copied.¶ Of course, many nations remain authoritarian. n270 But our norms are not likely to have much influence on their choice of norms. Authoritarian states are likely to select norms that serve the interests of those in power, regardless of the norms we adopt. It is true that sometimes they might cite our norms as cover for their decisions. But the crucial word here is "cover." They would have adopted the same rules, anyway. The cover may bamboozle some and thus be counted a cost. But this would seem marginal compared to the harm of allowing raw international law to trump domestic law.

#### Democratization doesn’t solve war – history proves.

Kupchan, Professor of International Affairs at Georgetown University, ‘11

[Charles A, April, “Enmity into Amity: How Peace Breaks Out,”

<http://library.fes.de/pdf-files/iez/07977.pdf>]

Second, contrary to conventional wisdom, democracy is not a necessary condition for stable peace. Although liberal democracies appear to be better equipped to fashion zones of peace due to their readiness to institu­tionalize strategic restraint and their more open societies – an attribute that advantages societal integration and narrative/identity change – regime type is a poor predic­tor of the potential for enemies to become friends. The Concert of Europe was divided between two liberalizing countries (Britain and France) and three absolute monar­chies (Russia, Prussia, and Austria), but nevertheless pre­served peace in Europe for almost four decades. Gen-eral Suharto was a repressive leader at home, but after taking power in 1966 he nonetheless guided Indonesia toward peace with Malaysia and played a leading role in the founding of ASEAN. Brazil and Argentina embarked down the path to peace in 1979 – when both countries were ruled by military juntas. These findings indicate that non-democracies can be reliable partners in peace and make clear that the United States, the EU, and de­mocracies around the world should choose enemies and friends on the basis of other states’ foreign policy behav-ior, not the nature of their domestic institutions.

#### Multiple major conflicts disprove DPT.

Rosato, Department of Political Science at Notre Dame, 11

[Sebastian, “The Handbook on the Political Economy of War”, Google Books]

Despite imposing these definitional restrictions, proponents of the democratic peace cannot exclude up to five major wars, a figure which, if confirmed, would invalidate the democratic peace by their own admission (Ray 1995, p. 27). The first is the War of 1812 between Britain and the United States. Ray argues that it does not contradict the claim because Britain does not meet his suffrage requirement. Yet this does not make Britain any less democratic than the United States at the time where less than half the adult population was eligible to vote. In fact, as Layne (2001, p. 801) notes, "the United States was not appreciably more democratic than un re formed Britain." This poses a problem for the democratic peace; if the United States was a democracy, and Ray believes it was, then Britain was also a democracy and the War of 1812 was an inter-democratic war. The second case is the American Civil War. Democratic peace theorists believe the United States was a democracy in 1861, but exclude the case on the grounds that it was a civil rather than interstate war (Russett 1993, pp. 16-17). However, a plausible argument can be made that the United States was not a state but a union of states, and lhat this was therefore a war between states rather than within one. Note, for example, that the term "United States" was plural rather than singular at the time and the conflict was known as the "War Between the States."7 This being the case, the Civil War also contradicts the claim. The Spanish-American and Boer wars constitute two further exceptions to the rule. Ray excludes the former because half of the members of Spain's upper house held their positions through hereditary succession or royal appointment. Yet this made Spain little different to Britain, which he classifies as a democracy at the time, thereby leading to the conclusion that the Spanish-American War was a war between democracies. Similarly, it is hard to accept his claim that the Orange Free State was not a democracy during the Boer War because black Africans were not allowed to vote when he is content to classify the United States as a democracy in the second half of the nineteenth century (Ray 1993, pp. 265, 267; Layne 2001. p. 802). In short, defenders of the democratic peace can only rescue their core claim through the selective application of highly restrictive criteria. Perhaps the most important exception is World War I, which, by virtue of the fact that Germany fought against Britain, France, Italy, Belgium and the United States, would count as five instances of war between liberal states in most analyses of the democratic peace.9 As Ido Oren (1995, pp. 178-9) has shown. Germany was widely considered lo be a liberal slate prior to World War I: "Germany was a member of a select group of the most politically advanced countries, far more advanced than some of the nations that are currently coded as having been 'liberal\* during that period." In fact, Germany was consistently placed toward the top of that group, "either as second only to the United States ... or as positioned below England and above France." Moreover, Doyle\*s assertion that the case ought to be excluded because Germany was liberal domestically, but not in foreign affairs, does not stand up to scrutiny. As Layne (1994, p. 42) points out, foreign policy was "insulated from parliamentary control" in both France and Britain, two purportedly liberal states (see also Mearsheimer 1990, p. 51, fn. 77; Layne 2001, pp. 803 807). Thus it is difficult to classify Germany as non-liberal and World War I constitutes an important exception to the finding.

## 2NC

### CP

#### NCS solves the Gitmo stigma while allowing for convictions of terrorists.

Richardson, Instructor at Savannah State University, ‘10

[Christie, “The Creation of Judicial¶ Compromise: Prosecuting Detainees¶ in a National Security Court System¶ in Guantanamo Bay, Cuba”, The Homeland Security Review, Vol. 4, No. 2, Summer 2010, RSR]

Exercising Article I, Section 8, Clause 9 of the Constitution, Congress¶ could initiate the protocol to adjudicate war crimes by creating a new¶ legal system, utilizing resources already in place to save time and taxpayer¶ money while keeping the detainees in a safe location. If it did so,¶ Congress would need to clarify that not all acts of terrorism would be¶ prosecuted in an NSCS, as its jurisdiction would be limited to criminal¶ detainees. An oversight committee would also need to be developed¶ within the DOJ to remove the "Gitmo stigma" of potential detainee¶ abuse, various intelligence seeking practices, and lack of detainee rights, in order to implement the federal and military court systems in¶ an NSCS.¶ Attorney General Holder has been roundly criticized regarding his¶ desire to move the Guantanamo detainees to the mainland U.S. for¶ prosecution. On November 12, 2009, Attorney General Holder announced¶ his decision to provide Khalid Shaikh Mohammed (KSM) and¶ four other detainees involved in the September 11, 2001 terrorist attacks¶ with all the rights afforded to American citizens by putting them¶ on trial in the U.S. federal court system. Even now, it is unclear if KSM's¶ confession for his actions in the September 11, 2001 terrorist attacks¶ will be admitted into court. If an NSCS is formed, there is a strong possibility¶ that his confession will be admitted into court, especially if¶ convicted, during the death penalty phase. If KSM is brought to the¶ United States for trial, the federal government must accept that it is¶ increasing the possibility of his acquittal either by a jury or by a technicality.¶ If he were tried in an NSCS, his acquittal by a jury would be a¶ moot point, as there would be no jury, and the possibility of his acquittal¶ on account of a technicality would be greatly decreased.

#### Most qualified experts vote for the hybrid terror court.

Sulmasy, Commander and associate professor of law at the U.S. Coast Guard Academy, ‘9

[Glenn, The National Security Court System: A Natural Evolution of Justice in an Age of Terror, Oxford University Press, 2009, RSR]

Others in academia and within think tanks have now come to agree this is the way to proceed. Professor Harvey Rishikof, Brookings scholar Ben Wittes, Professor Ken Anderson, columnist Stuart Taylor, national security law expert Andy McCarthy, and others have recognized and now advocate for some specialized court. Even here, some differences emerge. To me, the most noteworthy proponent of some type of specialized court is Professor Neal Katyal of Georgetown Law School - the same law professor who represented Hamdan before the Supreme Court in 2006 (and still represented Hamdan in his habeas proceedings and during his military commission). His support for the new system is important to show that someone actually litigating the cases before military commissions has come to realize that neither the existing civilian court system nor the military commissions adequately meet the balance between justice and national security. 33

#### Independently, the plan reinvigorates due process in detention.

Guiora, Professor of Law, S.J. Quinney College of Law, University of Utah, ‘12

[Amos, "Due Process and Counterterrorism", Emory International Law Review, Vol. 26, www.law.emory.edu/fileadmin/journals/eilr/26/26.1/Guiora.pdf]

While the public safety exception has been recommended as applicable to counterterrorism as justification for denying Miranda protections to post-9/11 detainees, 111 the danger of trampling on individual rights outweighs information that interrogators may conceivably receive. The rule of law is at its most vulnerable in the interrogation setting; to that extent, while public safety may be perceived as beneficial to society, the possible gain is, at best, short term with long-term dangers looming in the offing.¶ V. JUDICIAL FORUMS¶ The fundamental premise is that detainees must be afforded the opportunity to be brought before a court of law for purpose of adjudication of their guilt or innocence. Whether the paradigm adopted is the criminal law or a hybrid, the guiding principle must be trial rather than the abyss of permanent indefinite detention. While various proposals and articles have been put forth, 112 resolution has eluded decision-makers. The Bush Administration’s attempt 113 to establish military commissions was roundly criticized. 114 While subsequent instructions prepared by the Department of Defense 115 were intended to mollify the chorus of criticism, the practical reality is the commissions have been widely viewed as an overwhelming failure. 116 Neither in their original inception nor subsequent tweaking were rules, procedures, and criteria adequately delineated with respect to suspect (and subsequently, defendant) rights. 117 Nevertheless, the largely acknowledged failure of the military commissions has not resulted in the establishment of a viable alternative.¶ To that end, in addition to the military commissions, there are three options for bringing individuals suspected of involvement in terrorism before a court of law: treaty-based international terror court, Article III civilian court, and a national security court. While I have advocated the establishment of the latter, the other options have also garnered significant—and justified—public support. 118 The critical question, in determining which option most effectively meets rule of law requirements, is whether the due process rights of the defendant are protected. That question, however, cannot be asked nor answered in a vacuum, nor absolutely; for the reality of terrorism/counterterrorism is that legitimate operational realities justify minimizing certain rights, otherwise protected. 119 In particular, with respect to the trial process, protecting confidential sources is an absolute state requirement, and to that end, denying the defendant the right to confront all witnesses is legitimate. 120 Although controversial and suggestive of a rights minimization regime, bringing a suspected terrorist to trial requires submitting confidential information to the court. 121¶ While introducing classified information denies the defendant the right to confront his accuser, it is a reality of operational counterterrorism. 122 Similarly, in the American criminal law paradigm, the defendant has the right to a trial by a jury of his peers. 123 While proponents of Article III courts say they are appropriate for suspected terrorists, the critical question—yet to be resolved— is whether all individuals detained post-9/11 are to be tried. To the point: while President Obama promised to close Guantanamo, the issue extends significantly beyond the detention center in Cuba. 124 According to senior military commanders, the United States, directly and indirectly, detains approximately 25,000 detainees in detention centers in Iraq and Afghanistan in addition to Guantanamo. 125¶ While some have suggested that the Iraqi and Afghan judiciaries are appropriate forums for adjudicating guilt of detainees presently detained in both countries, significant and sufficient doubt has been raised regarding objectivity and judicial fairness. 126 Precisely because the Bush Administrations have ordered the American military to engage in Iraq and Afghanistan in accordance with the Authorization to Use Military Force resolution passed by Congress, the United States bears direct responsibility for ensuring adjudication in a court of law premised on the “rule of law.” 127 Simply put: core principles of due process and fundamental fairness demand the United States ensure resolution of individual accountability.¶ While imposing American judicial norms on Iraq and Afghanistan raise legitimate international law questions regarding violations of national sovereignty, the continued denial of due process raises questions and concerns no less legitimate. History suggests there is no perfect answer to this question; similarly, both basic legal principles and fundamental moral considerations suggest that in a balancing analysis the scale must tip in favor of trial, regardless of valid sovereignty and constitutional concerns. While justice is arguably not blind, continued detention of thousands of suspects without hope of trial is a blight on society that violates core due process principles.¶ Regardless of which proposal above is adopted, the fundamental responsibility is to articulate and implement a judicial policy facilitating trial before an impartial court of law. That is the minimum due process obligation owed the detainee. ¶ VI. MOVING FORWARD¶ Due process is the essence of a proper judicial process; denial of due process, whether in interrogation or trial, violates both the Constitution and moral norms. Denying suspects and defendants due process protections results in counterterrorism measures antithetical to the essence of democracies. While threats posed by terrorism must not be ignored, there is extraordinary danger in failing to carefully distinguish between real and perceived threats. Casting an extraordinarily wide net results in denying the individual rights; similarly, there is no guarantee that such an appr oach contributes to effective operational counterterrorism. Extending constitutional privileges and protections to non- citizens does not threaten the nation-state; rather, it illustrates the already slippery slope. In proposing that due process be an inherent aspect of counterterrorism, I am in full accordance with Judge Bates’ holding. The time has come to implement his words in spirit and law alike; habeas hearings are an important beginning but do not ensure adjudication of individual accountability. Determining innocence or guilt is essential to effective counterterrorism predicated on the rule of law.

#### Hybrid terror court solves US moral authority – provides the appearance of enhanced justice.

Sulmasy, Commander and associate professor of law at the U.S. Coast Guard Academy, ‘9

[Glenn, The National Security Court System: A Natural Evolution of Justice in an Age of Terror, Oxford University Press, 2009, RSR]

A specialized terrorist court, such as the national security legal apparatuses already employed in other nations confronting terrorism, is the key to remedying this dilemma. Other nations, such as France, Great Britain, and Turkey, have acknowledged that legal cases against terrorists are extraordinary and need to be handled differently from standard criminal prosecutions or even military tribunals. All struggled with how best to create their distinct systems. If properly constructed, a national security court system in the United States will help this country begin to regain its position of moral authority in world affairs. At the minimum, it will bolster national and international support for the United States that has eroded over the past few years. It would be a fresh start and one that demonstrates the country’s recognition that changes in how we fight our “war on terror” are necessary. This new system would provide the appearance of enhanced justice, as well as real justice, to the detainees and resilience to an adjudication process that has been admittedly unsuccessful.

#### The hybrid court reassures allies by strengthening the rule of law.

Rishikof, professor of law and former chair of the Department of ¶ National Security Strategy, National War College, ‘2

[Harvey, “A New Court for Terrorism”, The New York Times, 6-8-2002,

<http://www.nytimes.com/2002/06/08/opinion/a-new-court-for-terrorism.html>, RSR]

A national security court, with its trials as open as possible, would give our allies needed reassurance, though the court would need to forgo the death penalty in order to ensure our allies would extradite terrorists. Having a specialized court would also make it possible for us to designate and fortify an existing federal courthouse to hold terrorism trials, which would improve security for all participants. A specialized judicial bench could also travel to locations like Camp X-Ray to conduct hearings.¶ The people we are fighting do not fit into our traditional legal classifications. We can continue to improvise our way through, compromising our federal criminal procedures and alienating our allies, or we can demonstrate our commitment to the rule of law by creating an institution that can handle new challenges without damaging our constitutional principles.

#### Plan establishes a framework to limit judicial creativity to preserve executive flexibility.

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.

### Case

#### Soft power fails – empirics go neg.

Greenwald 10 (Abe, associate editor of COMMENTARY, “The Soft-Power Fallacy”, July/August, [http://www.commentarymagazine.com/viewarticle.cfm/the-soft-power-fallacy-15466?page=2](http://www.commentarymagazine.com/viewarticle.cfm/the-soft-power-fallacy-15466?page=2" \t "_blank))

Like Francis Fukuyama’s essay “The End of History,” soft-power theory was a creative and appealing attempt to make sense of America’s global purpose. Unlike Fukuyama’s theory, however, which the new global order seemed to support for nearly a decade, Nye’s was basically refuted by world events in its very first year. In the summer of 1990, a massive contingent ofSaddam Hussein’s forces invaded Kuwait and effectively annexed it as a province of Iraq. Although months earlier Nye had asserted that “geography, population, and raw materials are becoming somewhat less important,” the fact is that Saddam invaded Kuwait because of its geographic proximity, insubstantial military, and plentiful oil reserves. Despite Nye’s claim that “the definition of power is losing its emphasis on military force,” months of concerted international pressure, including the passage of a UN resolution, failed to persuade Saddam to withdraw. In the end, only overwhelming American military power succeeded in liberating Kuwait. The American show of force also succeeded in establishing the U.S. as the single, unrivaled post–Cold War superpower. Following the First Gulf War, the 1990s saw brutal acts of aggression in the Balkans: the Bosnian War in 1992 and the Kosovo conflicts beginning in 1998. These raged on despite international negotiations and were quelled only after America took the lead in military actions. It is also worth noting that attempts to internationalize these efforts made them more costly in time, effectiveness, and manpower than if the U.S. had acted unilaterally. Additionally, the 1990s left little mystery as to how cataclysmic events unfold when the U.S. declines to apply traditional tools of power overseas. In April 1994, Hutu rebels began the indiscriminate killing of Tutsis in Rwanda. As the violence escalated, the United Nations’s peacekeeping forces stood down so as not to violate a UN mandate prohibiting intervention in a country’s internal politics. Washington followed suit, refusing even to consider deploying forces to East-Central Africa. By the time the killing was done, in July of the same year, Hutus had slaughtered between half a million and 1 million Tutsis. And in the 1990s, Japan’s economy went into its long stall, making the Japanese model of a scaled down military seem rather less relevant. All this is to say that during the presidency of Bill Clinton, Nye’s “intangible forms of power” proved to hold little sway in matters of statecraft, whilemodes of traditional power remained as critical as ever in coercing other nations and affirming America’s role as chief protector of the global order. If the Clinton years posed a challenge for the efficacy of soft power, the post-9/11 age has exposed Nye’s explication of the theory as something akin to academic eccentricity. In his book, Nye mentioned “current issues of transnational interdependence” requiring “collective action and international cooperation.” Among these were “ecological changes (acid rain and global warming), health epidemics such as AIDS, illicit trade in drugs, and terrorism.” Surely a paradigm that places terrorism last on a list of national threats starting with acid rain is due for revision. For what stronger negation of the soft-power thesis could one imagine than a strike against America largely inspired by what Nye considered a great “soft power resource”: namely, “American values of democracy and human rights”? Yet Ayman al-Zawahiri, al-Qaeda’s second-in-command, had in fact weighed in unequivocally on the matter of Western democracy: “Whoever claims to be a ‘democratic-Muslim,’ or a Muslim who calls for democracy, is like one who says about himself ‘I am a Jewish Muslim,’ or ‘I am a Christian Muslim’—the one worse than the other. He is an apostate infidel.” With a detestable kind of clarity, Zawahiri’s pronouncement revealed the hollowness at the heart of the soft-power theory. Soft power is a fine policy complement in dealing with parties that approve of American ideals and American dominion. But applied to those that do not, soft power’s attributes become their opposites. For enemies of the United States, the export of American culture is a provocation, not an invitation; self-conscious “example-setting” in areas like nonproliferation is an indication of weakness, not leadership; deference to international bodies is a path to exercising a veto over American action, not a means of forging multilateral cooperation.

#### Third, everything is a hard power question.

Rachman 9 [Gideon Rachman is the Economist's bureau chief in Brussels, June 1 http://www.ft.com/cms/s/0/e608b556-4ee0-11de-8c10-00144feabdc0.html]

¶ Barack **Obama is a soft power president. But the world keeps asking** him **hard power questions**.¶ **From** North **Korea to Guantánamo** Bay, from **Iran to Afghanistan**, Mr Obama is confronting a range of vexing **issues** that **cannot be charmed** out of existence.¶ The problem is epitomised by the US president’s trip to the Middle East this week. Its focal point will be a much-trailed speech in Cairo on Thursday June 4, in which he will directly address the Muslim world.¶ The Cairo speech is central to Mr Obama’s efforts to rebuild America’s global popularity and its ability to persuade – otherwise known as soft power. The president has been trying out potential themes for the speech on aides and advisers for months. He is likely to emphasise his respect for Islamic culture and history, and his personal links to the Muslim world. He will suggest to his audience that both the US and the Islamic world have, at times, misjudged and mistreated each other – and he will appeal for a new beginning.¶ George W. Bush launched a military offensive in the Middle East. Mr Obama is launching a charm offensive.¶ There is plenty to be said for this approach. Mr Bush embroiled America in a bloody war in Iraq that strengthened Iran and acted as a recruiting sergeant for America’s enemies. Mr Obama’s alternative strategy is based on diplomacy, engagement and empathy.¶ Mr Bush had a shoe thrown at him in his last appearance in the Middle East. So if Mr Obama receives his customary standing ovation in Cairo, that will send a powerful symbolic message. But the president should not let the applause go to his head. Even if his speech is a success, the same foreign-policy problems will be sitting in his in-tray when he gets back to the Oval Office – and they will be just as dangerous as before.¶ In particular, there is chatter in official Washington that the Israelis may be gearing up to attack Iran’s nuclear facilities before the end of the year. The Obama administration is against any such move and it is normally assumed that Israel would not dare to pull the trigger without the go-ahead from Washington – not least because the Israelis would have to fly across US-controlled airspace to get to their targets. But the Americans do not have a complete veto over Israel’s actions. One senior US official asks rhetorically: “What are we going to do? Shoot down their planes?”¶ A conflict between Israel and Iran would scatter the Obama administration’s carefully laid plans for Middle East peace to the winds. It would also make talk of improving American soft power around the world seem beside the point. The immediate task would be to prevent a wider regional war.¶ In the meantime, the US will press on with the effort to achieve **peace between** the **Israelis and the Palestinians**. But even that goal **is unlikely** to be advanced much by Mr Obama’s trip to the Middle East. Many in the audience in Cairo and in the wider Islamic world will want and even expect the new president to lay out a complete vision for a peace settlement and to apply unambiguous pressure on Israel. **For** reasons of **domestic politics, diplomacy and timing**, Mr **Obama is** highly **unlikely** to do this.¶ Yet while his Arab audience may be disappointed by what he has to say about the Middle East peace process, Mr Obama is already facing an increasingly tense relationship with the new Israeli government. The administration has now clashed openly with the Israelis over the Netanyahu government’s tolerance of expanded settlements in occupied Palestinian land.¶ Mr Obama is also running up against the limits of soft power elsewhere. Closing the prison camp at Guantánamo was meant to be the ultimate tribute to soft power over hard power. The **Obama** team **argued consistently that the damage** that **Guantánamo did** to America’s image in the world **outweighed any security gains** from holding al-Qaeda prisoners there. **Yet**, faced with the backlash against releasing the remaining 240 prisoners or imprisoning them in the US, the **Obama** administration has **back-tracked**. It is not clear whether Guantánamo will be closed on schedule or what will happen to the riskier-sounding prisoners, who may still be held indefinitely. The much-criticised military trials are likely to be revived.¶ **In Afghanistan**, Mr **Obama is trying a mixture of hard and soft power**. There will be a military surge – but also a “civilian surge”, designed to build up civil society and governance in Afghanistan. Old hands in Washington are beginning to shake their heads and mutter about Vietnam.¶ Mr Obama’s preferred tools of diplomacy, **engagement and charm do not seem to be of much use with** Kim Jong-il of North **Korea**, either. The North Koreans have just tested a nuclear weapon – leaving the Obama administration scratching its head about what to do.¶ The president’s charisma and rhetorical skill are real diplomatic assets. If Mr Obama can deploy them to improve America’s image and influence around the world, that is all to the good. There is nothing wrong with trying to re-build American “soft power”.¶ The danger is more subtle. It is that President Yes-we-can has raised exaggerated hopes about the pay-off from engagement and diplomacy. In the coming months it will become increasingly obvious that **soft power** also **has its limits**.

#### Court politics – it’s a question of institutional will - judges recognize political constraints to unpopular decisions in wartime – so the aff might fiat the plan and cost the court capital, but they can’t fiat adherence to precedent by subsequent courts who can find clear statutory authorization in anything– who have strong reasons not to conform – the history of court crisis politics proves.

Posner and Vermeule, /7

[Eric (Kirkland and Ellis Professor of Law at the University of Chicago Law School) and Adrian (professor at Harvard Law School), Terror in the Balance: Security, Liberty, and the Courts p. 48-49]

More simply, the massive number and scope of statutory delegations since the New Deal, especially in areas impinging upon national security and foreign policy, means that there is almost always a statute lurking somewhere in the picture. Judges have considerable discretion to read statutes more or less broadly, or at higher or lower levels of generality, so as to suggest that Congress has authorized the executive action. Consider the plurality opinion in Hamdi v. United States,58 which arguably stretched a general congressional authorization to use military force by reading it to authorize detention of U.S. citizens alleged to be enemy combatants, despite the presence of an earlier statute requiring that detention be specifically authorized.59 A similar example is Hamdi’s predecessor, Ex parte Quirin,60 in which the Court relied upon a general and nonexplicit statutory provision to find congressional authorization for the president to try by military commission U.S. citizens accused of being enemy combatants. Clearest of all is Dames & Moore v. Regan,61 which threw a set of largely inapposite statutes into a blender and mixed up an authorization for the president to suspend claims pending in the U.S. courts against a foreign nation. Many other cases touching on war, the military, or foreign affairs are similar.62 As political scientists Terry Moe and William Howell put it:¶ The Court can issue rulings favorable to presidents, but justify its decisions by appearing to give due deference to the legislature. . . . Congress’s collective action problems, combined with the zillions of statutes already on the books, make it entirely unclear what the institution’s “will” is—and this gives the Court tremendous scope for arguing that, almost whatever presidents are doing, it is consistent with the “will of Congress.” . . . [E]ven when presidents are quite vague (as they frequently are) about the constitutional and statutory provisions that supposedly justify their unilateral actions, the courts have actively sought out and creatively construed justifying provisions in the law, provisions that presidents did not even employ on their own behalf.63¶ If judges strain to find statutory authorization for executive action in times of emergency, why do they do so? As we explain in subsequent chapters, there is an institutional dilemma facing judges who must review the executive’s emergency policies; the problem is that the judges lack the competence to evaluate those policies. The judges know that the executive might be acting opportunistically or from bad motives, but they also know that the policy might be a vitally necessary security measure, or was not authorized because Congress moved too slowly. Worst of all, the judges know that they do not know which of these possibilities is actually the case; they cannot sort opportunism from executive vigor. In a situation of this sort, the judges will be powerfully tempted to defer, while also finding some relevant statute to suggest that Congress too has approved the policy. The finding of statutory authorization, however strained, is largely costless to the judges, reassures the public by denying that the executive is running around without a leash, and preserves the principle of statutory authorization for a future day on which the judges might rouse themselves to apply it seriously. The point is not that judges are acting out of disreputable motives: quite the opposite. On our view, judges tend to defer because there is usually little else that even the most public-spirited of judges can do. The stakes are too high and the judges’ information is too poor.¶

#### Judicial abstention is the norm – this takes out ALL of aff solvency. Don’t give them durable fiat.

Bradley and Morrison, ‘13

[Curtis (William Van Alstyne Professor of Law, Duke Law School) and Trevor (Liviu Librescu Professor of Law, Columbia Law School), “PRESIDENTIAL POWER, HISTORICAL PRACTICE, AND LEGAL CONSTRAINT”, 113 Colum. L. Rev. 1097, Lexis]

If courts routinely reviewed contested issues of presidential power, they could decide whether and when to credit historical practice in this area. They could also decide whether novel presidential assertions of authority were justified, before such assertions became established practice. But judicial review in this area is anything but routine. Courts obviously do review issues of presidential power in some instances, especially when individual rights are perceived to be at stake, as both Youngstown and the series of Supreme Court decisions concerning the "war on terror" illustrate. n49 When individual rights are not directly implicated, [\*1110] however, courts often abstain from addressing questions surrounding the allocation of authority between Congress and the President.¶ Judicial abstention is particularly common in the foreign affairs area. Consider, for example, the question of whether the President is constitutionally required to obtain congressional authorization before initiating military hostilities. Despite numerous presidential initiations of hostilities without congressional authorization in the post-World War II period, courts have generally refused to consider the issue. n50 Courts have similarly avoided addressing whether Presidents must obtain congressional or senatorial approval before terminating a treaty, n51 and whether and to what extent Presidents may use executive agreements in lieu of treaties. n52¶ Courts invoke a variety of doctrines in support of this abstention. They enforce general standing requirements strictly, and, at least since the Supreme Court's 1997 decision in Raines v. Byrd, n53 they typically find that individual members of Congress lack standing to challenge presidential action. n54 Some lower courts also invoke ideas of "political ripeness," pursuant to which they will not intervene in interbranch disputes until the affected branch has exhausted its own political resources to address the purported problem, a requirement that is rarely if ever satisfied. n55 Another potential barrier to judicial review is the political question [\*1111] doctrine, which the lower courts apply with some frequency in the foreign affairs area. n56¶ Academic defenders of this judicial abstention have argued either that the political branches have adequate resources to protect their interests, n57 or that the courts lack sufficient competence to resolve separation of powers issues, especially in the foreign affairs and national security areas. n58 Other scholars have bemoaned this abstention as an abdication of the judicial role and have blamed it for contributing to what they perceive to be an undesirable growth in executive power in the modern era. n59 The bottom line is that many issues of presidential power are resolved, if at all, outside the courts. Moreover, even when the courts do intervene, they are likely to give significant deference to patterns of governmental practice, especially if the patterns are longstanding and appear to reflect interbranch agreement. n60¶ [\*1112] ¶ C. Skepticism About Legal Constraint¶ The general posture of judicial abstention in this area raises questions about whether presidential power is truly subject to legal constraints. It is often easier - or at least more familiar - to talk meaningfully about law if there is a reasonable prospect that the actions in question will face judicial review. Because the courts are unlikely to intervene in many con-troversies relating to presidential power - and because any such intervention is likely to be deferential to the actions of the political branches - some scholars are inclined to say that Presidents face (or will soon face) virtually no constraints at all. Part of the concern here is that Congress by itself often seems either unable or unwilling to provide adequate checks on executive power. Compounding the problem, in the view of some scholars, is that institutional arrangements within the executive branch are not able to constrain presidential decisionmaking. Bruce Ackerman, for example, claims to identify a range of developments in "politics and communications, bureaucratic and military organization," as well as "executive constitutionalism," that threaten to turn the presidency into "a vehicle for demagogic populism and lawlessness." n61

## 1NR

### Flex DA

#### Disad outweighs the AFF – Senkaku conflict escalation is likely in the status quo. Rising tensions between China and Japan. Only strong signal via the US can delay conflict. Outweighs on timeframe.

#### Iran prolif and Russian aggression are all other external impacts – I’ll impact them here.

#### Iranian prolif causes extinction.

Shavit 12

[Ari, A senior correspondent at Haaretz Newspaper and a member of its editorial board and writer for the NY Times. Published by the NY Times “The Bomb and the Bomber” March 12 <http://www.nytimes.com/2012/03/22/opinion/the-bomb-and-the-bomber.html>]

*If Iran goes nuclear it will change our world.* An Iranian atom bomb will force Saudi Arabia, Turkey and Egypt to acquire their own atom bombs. Thus a multipolar nuclear arena will be established in the most volatile region on earth. Sooner or later, this unprecedented development will produce a nuclear event. The world we know will cease to be the world we know after Tehran, Riyadh, Cairo or Tel Aviv become the 21st century’s Hiroshima. An Iranian bomb will bring about universal nuclear proliferation. Humanity’s greatest achievement since 1945 was controlling nuclear armament by limiting the number of members in the exclusive nuclear club. This unfair arrangement created a world order that guaranteed relative world peace. But if Iran goes nuclear and the Middle East goes nuclear so will the Third World. If the ayatollahs are allowed to have Robert Oppenheimer’s deadly toy, every emerging power in Asia and Africa will be entitled to have it. The 60-year-old world order that guaranteed world peace will collapse. An Iranian atom bomb will give radical Islam overwhelming influence. Once nuclear, the rising Shiite power will dominate Iraq, the Gulf and international oil prices. It will spread terror, provoke conventional wars and destabilize moderate Arab nations. As Iranian nuclear warheads will jeopardize Israel, they will imperil Europe. For the first time, hundreds of millions of citizens of free societies will live under the shadow of the nuclear might of religious fanatics. The union of ultimate fundamentalism with the ultimate weapon will imbue the world we live in with a hellish undertone. *If Israel strikes Iran it will change our world.* An Israeli attack on Iran’s nuclear facilities will create the most dramatic international crisis of the post-cold war era. As the Jewish state and the Shiite republic exchange blows, the Middle East will be rattled. Tensions will rise between pro-Iranian Russia, China and India and anti-Iranian United States, Britain, France and Germany. As oil prices soar higher (to $250-$300 a barrel), financial markets will panic and the world economy will experience a real setback. An Israeli attack on Iran’s nuclear facilities will unleash a regional war whose consequences might be catastrophic. Iran will strike back with all it has: Hezbollah, Hamas, Shahab missiles, strategic surprises. Iran will block the Strait of Hormuz and call upon all Muslims to come to its rescue. Although most Arab regimes will be secretly supportive of the Israeli operation, the Arab masses might rise. Throughout the world, millions of Muslims will see the attack on Iran as an attack on their own dignity and pride. The religious struggle provoked by the Israeli action might go on for decades. An Israeli attack on Iran’s nuclear facilities might drag the United States into war. Israel has limited air power. Israeli cities are threatened by 200,000 rockets. If an Iranian-led counteroffensive sets Tel Aviv ablaze and kills thousands of Israeli civilians, the U.S. will feel obliged to intervene. Rather than initiate a well-planned and internationally backed American surgical strike on Iran’s nuclear project, America will become captive of an Israeli-Iranian war spiraling out of control. After getting out of the Iraqi mud and while trying to pull out of the Afghan desert, America will be bogged down by a highly charged and highly priced conflict with the Islamic Republic. The pivotal international issue the West has faced in the first 12 years of the 21st century has been Iran. The cardinal strategic challenge of the last decade has been how to prevent two threats: (an Iranian) bomb and (an Israeli) bombing. Yet the West failed to rise to the challenge in time. For years it made every possible mistake. First President George W. Bush focused on Iraq rather than Iran. Then President Barack Obama wasted precious time on idle diplomacy. Britain and France tried their best but the European Union dragged its feet before taking decisive action. The economic sanctions that should have been activated 10 years ago were activated only last year. The crippling sanctions that should have been imposed back in 2005 are yet to be imposed. The assertive-diplomacy track was not seriously pursued when it could have been effective. The creative-political-solution track was never really explored. Western leadership did not endorse a comprehensive, resourceful, consistent and tough third-way-strategy that could prevent Bomb and Bombing. Now we are witnessing a shift. Terrified by the prospect of an imminent Israeli strike, decision makers and opinion leaders in the United States and Europe have Iran on their mind. Last week Tehran was cut off from the SWIFT bank-transfer network. By July, all E.U. nations will stop purchasing Iranian oil. Yet all this is too little too late. Within nine months the Iranians will be immune to an Israeli air strike. By Christmas, Israel will lose the military capability to stop the Shiite bomb. As it will be existentially threatened, the Jewish State will feel obliged to take action. So the summer of 2012 now seems to be the summer of last opportunity. If in the coming months crippling sanctions are not imposed on Iran and Israel doesn’t get substantial guarantees that will ensure its future, anything might happen. All hell might break loose. If the West doesn’t get its act together at this very last moment, it might soon face the dire consequences of its own impotence.

#### Russian aggression goes nuclear.

Blank, Research Professor of National Security Affairs at the Strategic Studies Institute of the U.S. Army War College, ‘9

[Dr. Stephen, March 2009, “Russia And Arms Control: Are There Opportunities For The Obama Administration?,” online: http://www.strategicstudiesinstitute.army.mil/pdffiles/pub908.pdf]

Proliferators or nuclear states like China and Russia can then deter regional or intercontinental attacks either by denial or by threat of retaliation.168 Given a multipolar world structure with little ideological rivalry among major powers, it is unlikely that they will go to war with each other. Rather, like Russia, they will strive for exclusive hegemony in their own “sphere of influence” and use nuclear instruments towards that end. However, wars may well break out **between major powers and weaker “peripheral” states** or between peripheral and semiperipheral states given their lack of domestic legitimacy, the absence of the means of crisis prevention, the visible absence of crisis management mechanisms, and their strategic calculation that asymmetric wars might give them the victory or respite they need.169 Simultaneously,¶ The states of periphery and semiperiphery have far more opportunities for political maneuvering. Since war remains a political option, these states may find it convenient to exercise their military power as a means for achieving political objectives. Thus international crises may increase in number. **This has** two important implications for the use of WMD. First, **they may be** used deliberately to offer a decisive victory **(or in** Russia’s case**, to achieve “intra-war escalation control**”—author170) to the striker, **or for defensive purposes when imbalances in military capabilities are significant**; and second, crises increase the possibilities of inadvertent or accidental wars involving WMD.171¶ Obviously nuclear proliferators or **states that are expanding their nuclear arsenals like Russia can exercise a great influence upon world politics if they chose to defy the prevailing consensus and use their weapons** not as defensive weapons, as has been commonly thought, but **as offensive weapons to threaten other states** and deter nuclear powers. Their decision to go either for cooperative security and strengthened international military-political norms of action, or for individual national “egotism” will critically affect world politics. For, as Roberts observes,¶ But if they drift away from those efforts [to bring about more cooperative security], the consequences could be profound. At the very least, **the** effective functioning of **inherited** mechanisms of world order, such as the special responsibility of the “great powers” in the management of the interstate system, especially problems of armed aggression, under the aegis of collective security, could be significantly impaired. Armed with the ability to defeat an intervention, or impose substantial costs in blood or money on an intervening force or the populaces of the nations marshaling that force, **the newly empowered tier could** bring an end to collective security operations, undermine the credibility of alliance commitments by the great powers, [undermine guarantees of extended deterrence by them to threatened nations and states] **extend alliances of their own**, **and** perhaps make wars of aggression on their neighbors or their own people.172

#### Unipolarity doesn’t lead to systemic peace – their ev. confuses correlation for causation.

Legro, professor of politics and Randolph P. Compton Professor in the Miller Center at the University of Virginia, ‘11

[Jeffrey, Sell unipolarity? The future of an overvalued concept in International Relations Theory and the Consequences of Unipolarity, p. EBook]

Such a view, however, is problematic. What seems increasingly clear is that the role of polarity has been overstated or misunderstood or both. This is the unavoidable conclusion that emerges from the penetrating chapters in this volume that probe America’s current dominant status (unipolarity) with the question “does the distribution of capabilities matter for patterns of international politics?”3 Despite the explicit claim that “unipolarity does have a profound impact on international politics”4 what is surprising is how ambiguous and relatively limited that influence is across the chapters. The causal impact of unipolarity has been overvalued for three fundamental reasons. The first is that the effects of unipolarity are often not measured relative to the influence of other causes that explain the same outcome. When the weight of other factors is considered, polarity seems to pale in comparison. Second, rather than being a structure that molds states, polarity often seems to be the product of state choice. Polarity may be more outcome than cause. Finally, while international structure does exist, it is constituted as much by ideational content as by material capabilities. Again polarity loses ground in significance.

#### Presidential flexibility enables effective crisis response --- statutory restrictions/judicial review prevents this.

John Yoo 9, Emanuel S. Heller Professor of Law @ UC-Berkeley Law, visiting scholar @ the American Enterprise Institute, former Fulbright Distinguished Chair in Law @ the University of Trento, served as a deputy assistant attorney general in the Office of Legal Council at the U.S. Department of Justice between 2001 and 2003, received his J.D. from Yale and his undergraduate degree from Harvard, “Crisis and Command,” E-Book

Understanding the contingency of our current circumstances brings us back to where we began, the purpose of the executive. As originally conceived, the need for the executive arose to respond to unforeseen dangers, unpredictable circumstances, and emergencies. It was given the virtues of speed, secrecy, vigor, and decisiveness to most effectively marshal society's resources in a time of crisis. The executive could correct for the instability, fractiousness, and inability to organize and decide (caused by what we today think of as transaction costs of a republican legislature) under time pressure. If the circumstances demand, the executive can even go beyond the standing laws in order to meet a greater threat to the nation's security.¶ It remains an open question whether the Constitution incorporated this prerogative. Hamilton believed that Article II's vesting of the executive power in the President necessarily included the ability to meet any challenge. To him, this power ought to "exist without limitation because" the "circumstances that endanger the safety of nations are infinite." There was no prerogative in the Lockean mold, only a President with open-ended powers in time of emergency. This broad conception of the executive underpinned the broader Hamiltonian program. A President of broad powers would guide the national government by developing proposals, managing legislation, and vigorously enforcing the law and setting foreign policy. In contrast, Jefferson believed that the President's ability to access the prerogative existed independent of the Constitution. To him, the natural right of self-preservation allowed the President to act beyond the Constitution itself when defending the nation. Whereas Locke believed that the executive would have to appeal to the heavens in the event of an exercise of the prerogative, Jefferson believed that an appeal to the nation was in order.¶ The prerogative allowed Jefferson to keep his devotion to a strict interpretation of the Constitution. If the prerogative could serve as a safety valve when emergency placed the government under stress, the Constitution would need no stretching. The government's powers would remain limited, rather than permanently extended, and individual liberty and hopefully state sovereignty would be preserved. The process for confirming the executive's use of the prerogative, an appeal to the people, advanced Jefferson's agenda to make the President the democratic representative of the nation as a whole. Jefferson did not believe that the approval of Congress or the courts alone was necessary, except insofar as they represented the will of the people.¶ History suggests that Hamilton had the better argument. The prerogative faces serious, perhaps fatal problems, chief of which is that it requires the executive to violate the Constitution. If the people bless executive lawbreaking, then they undermine the very purpose of the Constitution to bind future majorities. Although faced with the most serious threats to the nation's security, Lincoln and FDR did not claim a right to act outside the Constitution. While Lincoln suggested on several occasions that it might be necessary to violate the Constitution to save the nation, he never invoked the prerogative. In fact, he carefully argued that his every action, from using force against secession to the Emancipation Proclamation, was justified by his constitutional authorities. Roosevelt, too, never claimed the prerogative, and justified his actions by his authority as Commander-in-Chief. By the Cold War, the debate seemed to be over -- the Constitution accommodated the need to respond to extraordinary events through the President's executive power.¶ At first glance, it might appear that this understanding of the Constitution could only work to the benefit of the President. It allows him to claim a reservoir of power to meet any serious threat to the national security. But subordinating the prerogative to the law may have come with costs as well -- it has raised public expectations of the President to the point where no mere mortal can satisfy them. If the President has the constitutional authority to respond to any emergency, then the failure of the government to meet the latest national problem must be his fault.¶ A second effect may be the unwillingness of Presidents since FDR to challenge the Supreme Court. Presidents no longer claim an independent right to interpret the Constitution differently from the judiciary, giving up the inheritance of Jefferson, Jackson, Lincoln, and Roosevelt. There are understandable political reasons for this, but perhaps a deeper constitutional explanation lies in presidential adoption of the Hamiltonian theory of the executive. If the President accesses extraordinary power from the Constitution, he may seek judicial approval in order to address concerns that he is interpreting the Constitution solely for his own benefit. It is not clear whether this bargain is to the long-term benefit of the institution; abdicating the right to interpret the Constitution, in light of the President's obligation to enforce the laws, ultimately places the definition of his duties and powers solely in the hands of another branch. Presidents may have only won themselves the freedom to act in the short term, but they have left the long-term success in the hands of others.¶ The fundamental question of the prerogative lends presidential power a tragic quality. Due to the Constitution's design, the political system has great difficulty responding to unforeseen circumstances, fast-moving events, or decisions that require technical expertise or run high political risks. It will fall to the President to act at these times, which most often arise where the nation's foreign relations and national security are at stake. In exercising their constitutional powers, Presidents by definition act against the web of congressional statutes, court decisions, agency regulations, and interest groups that make up the political status quo. Invocation of executive authority is guaranteed to trigger a sharp response by the supporters of the governing regime.

#### Empirics prove --- broad powers are critical to guide the nation through existential threats

John Yoo 9, Emanuel S. Heller Professor of Law @ UC-Berkeley Law, visiting scholar @ the American Enterprise Institute, former Fulbright Distinguished Chair in Law @ the University of Trento, served as a deputy assistant attorney general in the Office of Legal Council at the U.S. Department of Justice between 2001 and 2003, received his J.D. from Yale and his undergraduate degree from Harvard, “Crisis and Command,” Book, p. 329-30

FDR’s second challenge became another constant of the postwar world. The Soviet Union replaced Germany and Japan as the central national security threat – its nuclear weapons could have destroyed the United States in minutes, it enjoyed superiority in conventional forces, and it could project its influence globally. FDR’s successors did not have to worry about isolationism. Truman convinced Congress to cooperate in placing the United States in a permanent state of mobilization, unprecedented in American history, to counter the Soviet threat. His successors kept the United States committed to the strategy of containment over a period far longer – 45 years – than any “hot” war. While they sometimes turned to Congress for support, Presidents continued to dispatch the military into hostilities abroad on their authority, a prospect with even more dangerous consequences in a nuclear age. During the Cold War, the United States transformed its role from the arsenal of democracy to the guardian of the free world. Without recognizing broad constitutional powers in the Presidency, the United States could not have prevailed, and without Congress’s consistent provision of resources for the military and security agencies, the Presidents could not have succeeded. ¶ For guiding the nation safely through an existential threat unlike any the United States had ever faced, Presidents Truman, Eisenhower, and Regan rank among our ten greatest Presidents. This pattern has mistakenly led some to believe that war produces great Presidents. Not all Presidents, however, were up to the challenge of the Cold War. President Kennedy found his moment in the Cuban Missile Crisis but led the nation into Vietnam, where Lyndon Johnson’s ambitions foundered.

#### Judicial interference undermines executive decision-making.

Posner and Vermeule, ‘7

[Eric (Kirkland and Ellis Professor of Law at the University of Chicago Law School) and Adrian (professor at Harvard Law School), Terror in the Balance: Security, Liberty, and the Courts p. 30-31]

As a matter of fact, this baseline picture is almost certainly incorrect. Government does not always act rationally; sometimes government officials enjoy agency slack and use it to engage in self-dealing, opportunism, or other welfare-reducing actions; sometimes government officials act as tightly constrained agents for the majority and enact policies that oppress minorities. But the baseline picture helps us to clarify the position we will defend: government is not more likely to do these things during emergencies than during normal times, whereas courts are less able to police such behavior during emergencies than during normal times. This is an empirical and institutional claim, which we shall support in every succeeding chapter, not a conceptual claim. If courts were perfectly informed and well motivated, then they might weed out bad emergency policies chosen by irrational or ill-motivated governments. But we just do not have courts of that sort. In particular cases, judges may do better than government at assessing the relative likelihood of threats to security and liberty or the overall costs of particular policies. But this will be wholly fortuitous, and judges who think they have guessed better than government may guess worse instead. Judges are generalists, and the political insulation that protects them from current politics also deprives them of information,33 especially information about novel security threats and necessary responses to those threats. If government can make mistakes and adopt unjustified security measures, then judges can make mistakes as well, sometimes invalidating justified security measures.¶ On this comparative institutional view, there is no general reason to think that judges can do better than government at balancing security and liberty during emergencies. Constitutional rules do no good, and some harm, if they block government’s attempts to adjust the balance as threats wax and wane. When judges or academic commentators say that government has wrongly assessed the net benefits or costs of some security policy or other, they are amateurs playing at security policy, and there is no reason to expect that courts can improve upon government’s emergency policies in any systematic way.

#### The link is big--- Courts are uniquely bad at conducting the WOT

Wittes 2008 (Benjamin Wittes, Senior Fellow in Governance Studies at the Brookings Institution, where he is the Research Director in Public Law, and Co-Director of the Harvard Law School, “The Necessity and Impossibility of Judicial Review,” in Law and the Long War, https://webspace.utexas.edu/rmc2289/National%20Security%20and%20the%20Courts/Law%20and%20the%20Long%20War%20%20Chapter%204.pdf)

Yet the case against a dominant role for the judiciary in designing the legal architecture of the conflict is a strong one. The risks of a big judicial footprint the war on terrorism are significant, far more significant than those who keen to leverage judicial power as a counterweight to executive power acknowledge. What's more, the judiciary's capacity to design the kind of creative policies America needs in this conflict is exceptionally limited. Even as a check on the executive branch, the courts have proven erratic, useful more in spurring congressional action than in the restraint they have imposed themselves-for notwithstanding the popular mythology, they have not yet imposed much actual restraint. This is not to say that judges have no role in overseeing the legal architecture of the war. But their proper role is not everything that human rights advocates imagine it to be. And critically, it is not a leading role in the design of the architecture but, rather, an important one in the fabric of that architecture as designed by others.

#### Courts will have an inconsistent application of precedent.

Posner and Vermeule, 10- \*professor of law at the University of Chicago AND \*\*professor of law at Harvard (Eric and Adrian, **The Executive Unbound**, p. 52-54)

¶ THE COURTS¶ We now turn from Congress to the courts, the other main hope of liberal legalism. In both economic and security crises, courts are marginal participants. Here two Schmittian themes are relevant: that courts come too late to the crisis to make a real difference in many cases, and that courts have pragmatic and political incentives to defer to the executive, whatever the nominal standard of review. The largest problem, underlying these mechanisms, is that courts possess legal authority but not robust political legitimacy. Legality and legitimacy diverge in crisis conditions, and the divergence causes courts to assume a restrained role. We take up these points in turn.¶ The Timing of Review¶ A basic feature of judicial review in most Anglo-American legal systems is that courts rely upon the initiative of private parties to bring suits, which the courts then adjudicate as “cases and controversies” rather than as abstract legal questions. This means that there is always a time lag, of greater or lesser duration, between the adoption of controversial government measures and the issuance of judicial opinions on their legal validity ensures that courts are less likely to set precedents while crises are hot, precedents that will be warped by the emotions of the day or by the political power of aroused majorities.70¶ Delayed review has severe costs, however. For one thing, courts often face a fait accompli. Although it is sometimes possible to strangle new programs in the crib, once those measures are up and running, it is all the more difficult for courts to order that they be abolished. This may be because new measures create new constituencies or otherwise entrench themselves, creating a ratchet effect, but the simpler hypothesis is just that officials and the public believe that the measures have worked well enough. Most simply, returning to the pre-emergency status quo by judicial order seems unthinkable; doing so would just re-create the conditions that led the legislature and executive to take emergency measures in the first place.¶ For another thing, even if courts could overturn or restrict emergency measures, by the time their review occurs, those measures will by their nature already have worked, or not. If they have worked, or at least if there is a widespread sense that the crisis has passed, then the legislators and public may not much care whether the courts invalidate the emergency measures after the fact. By the time the courts issue a final pronouncement on any constitutional challenges to the EESA, the program will either have increased liquidity and stabilized financial markets, or not. In either case, the legal challenges will interest constitutional lawyers, but will lack practical significance.¶ Intensity of Review¶ Another dimension of review is intensity rather than timing. At the level of constitutional law, the overall record is that courts tend to defer heavily to the executive in times of crisis, only reasserting themselves once the public sense of imminent threat has passed. As we will discuss in chapter 3, federal courts deciding administrative cases after 9/11 have tended to defer to the government’s assertion of security interests, although more large number work is necessary to understand the precise contours of the phenomenon. Schmitt occasionally argued that the administrative state would actually increase the power of judges, insofar as liberal legislatures would attempt to compensate for broad delegations to the executive by creating broad rights of judicial review; consider the Administrative Procedure Act (APA), which postdates Schmitt’s claim. It is entirely consistent with the broader tenor of Schmitt’s thought, however, to observe that the very political forces that constrain legislatures to enact broad delegations in times of crisis also hamper judges, including judges applying APA-style review. While their nominal power of review may be vast, the judges cannot exercise it to the full in times of crisis.¶ Legality and Legitimacy¶ At a higher level of abstraction, the basic problem underlying judicial review of emergency measures is the divergence between the courts’ legal powers and their political legitimacy in times of perceived crisis. As Schmitt pointed out, emergency measures can be “exceptional” in the sense that although illegal, or of dubious legality, they may nonetheless be politically legitimate, if they respond to the public’s sense of the necessities of the situation.71 Domesticating this point and applying it to the practical operation of the administrative state, courts reviewing emergency measures may be on strong legal ground, but will tend to lack the political legitimacy needed to invalidate emergency legislation or the executive’s emergency regulations. Anticipating this, courts pull in their horns.¶ When the public sense of crisis passes, legality and legitimacy will once again pull in tandem; courts then have more freedom to invalidate emergency measures, but it is less important whether or not they do so, as the emergency measure will in large part have already worked, or not. The precedents set after the sense of crisis § Marked 11:10 § has passed may be calmer and more deliberative, and thus of higher epistemic quality—this is the claim of the common lawyers, which resembles an application of the Madisonian vision to the courts—but the public will not take much notice of those precedents, and they will have little sticking power when the next crisis rolls around.

#### c.) Spillover –

#### Deference stable now - restricting President’s war powers sets the stage for escalating judicial intervention.

O’Connor, Former officer in the Marine Corp and Judge Advocate, ‘7

[John, JD, U Maryland Law School. Statistics and the Military Deference Doctrine: a Response to Professor Lichtman, 66 Md. L. Rev. 668, Lexis]

¶ As I have written elsewhere, one of the most important aspects of the military deference doctrine, and one that many commentators misunderstand,176 is that the military deference doctrine is not a venerable doctrine that has existed since the early days of the Republic. 177 Indeed, a review of the Court’s military deference jurisprudence could lead one to the conclusion that the doctrine was more or less the brainchild of Chief Justice Rehnquist, who wrote virtually every important military deference decision that the Court has issued.178 While notions of stare decisis may militate against a retreat from the military deference doctrine by the Court, the fact remains that the doctrine is one of fairly recent vintage, which was developed and perpetuated mainly through judicial opinions written by a Justice who is no longer on the Court. Moreover, **while stare decisis is a nice concept in the abstract, that doctrine did not prevent the Court from radically changing its approach** to constitutional challenges to military practices twice **before**. Therefore, **it is not out of the realm of possibility that the military deference doctrine could recede in importance** with personnel changes on the Court. This could occur through an express overruling of the doctrine, through decisions narrowing the doctrine’s application, or through a moresubtle process whereby the Court continues to pay lip service to its need to defer to political branch judgments but nevertheless **accords little or no actual deference to the policy determinations of Congress and the President. ¶** But **early indications from the Roberts Court**, with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O’Connor, respectively, **provide reason to believe that the military deference doctrine will continue to be a** robust feature of the Court’s military jurisprudence, **at least in the near term**. In FAIR, **the first “military” case decided by the Roberts Court**, the Court upheld the Solomon Amendment against a constitutional challenge and, in so doing, **began its constitutional analysis by extolling the virtues of the military deference doctrine** when Congress legislates pursuant to its constitutional power to raise and support armies: ¶ The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Congress’ power in this area “is broad and sweeping,” and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in Rostker, “judicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies.179 ¶ While it is always dangerous to draw conclusions from a single case, **all participating members of the Court**—Justice Alito did not participate—**joined Chief Justice Roberts’s opinion, which** invoked the military deference doctrine as its first step **in constitutional analysis** once the Court resolved what the statute in fact provided.180 Moreover, **this** is a **case** that **could have been decided on a number of grounds**, such as a pure Spending Clause or First Amendment basis, 181 **without invoking the military deference doctrine, and the Court’s prominent reliance on the military deference doctrine to support its decision suggests that there is no move afoot to eradicate the doctrine, explicitly or through subtle narrowing.** For his part, Justice Alito noted prominently in his confirmation hearing that he had joined a conservative Princeton alumni group because, as an alumnus who attended Princeton on an ROTC scholarship, he was unhappy that the school had decided to abolish the campus ROTC program.182 While, again, predicting judicial attitudes based on personal history is always a risky proposition, Justice Alito’s background makes him seem like an unlikely candidate to take up the sword against the military deference doctrine, particularly when every other member of the Court joined an opinion applying it in FAIR. ¶ V. Conclusion ¶ This Article is by no means an attempt to catalogue every military deference case decided by the Court, or to discuss every nuance in its application. n183 It is important, however, that the doctrine be understood, both in terms of the facts surrounding its development and the limited scope of the doctrine as evidenced by the framework in which it is applied. Professor Lichtman's article on the military deference doctrine is thought provoking in that it challenges the orthodoxy by which the military deference doctrine is viewed - through the lens of time rather than through the lens of subject matter irrespective of time. n184 Ultimately, however, I have come to the conclusion that Professor Lichtman's analysis of the military deference doctrine is flawed in several important respects, all of which result in a fundamental misunderstanding [\*706] of the doctrine. In my estimation, the principal flaws in Professor Lichtman's analysis include: focusing on "win-loss" records rather than on the analytical framework in which those wins and losses occurred; failing to perceive that the military deference doctrine should - and does - apply only to a narrow category of "military" cases; incorrectly casting the military deference doctrine as a longstanding and relatively stable doctrine that has only subtly evolved since the early twentieth century; determining that subject matter, rather than timing, is the proper variable around which to organize an analysis of military deference decisions; and concluding that the military deference doctrine does not - and should not - apply to statutes and regulations burdening civilians instead of military personnel.¶ The military deference doctrine is, at once, both historically immature and limited, yet potent when applicable. After the disruption that occurred in the course of the Court's prior rejection of the doctrine of noninterference, the Court ultimately landed on the military deference doctrine as an appropriate analytical framework, where applicable, in the mid-1970s, and the Court has largely remained in the same place with its military jurisprudence ever since. The Court's rejection of its noninterference policy beginning in the mid-1950s likely came about as a result of what the Court perceived as overreaching by the political branches in subjecting persons - military and civilian - to courts-martial in a willy-nilly fashion. If the military deference doctrine were to recede in importance in the future, it would be a good bet that it happens because some collection of Supreme Court Justices perceives that Congress and the President are overreaching in the exercise of their constitutional powers to raise armies and regulate the armed forces. At present, though, there is no sign that such an upheaval is anywhere on the horizon.

#### Judicial oversight won’t have constraints

Andrew McCarthy 09, Director of the Center for Law & Counterterrorism at the Foundation for the Defense of Democracies. From 1985 through 2003, he was a federal prosecutor at the U.S. Attorney’s Office for the Southern District of New York, and was the lead prosecutor in the seditious conspiracy trial against Sheikh Omar Abdel Rahman and eleven others, described subsequently. AND Alykhan Velshi, a staff attorney at the Center for Law & Counterterrorism, where he focuses on the international law of armed conflict and the use of force, 8/20/09, “Outsourcing American Law,” AEI Working Paper, http://www.aei.org/files/2009/08/20/20090820-Chapter6.pdf

2. While alien enemy combatants, who are neither U.S. citizens nor lawful aliens, have no rights under the U.S. constitution, judicial oversight of their cases without thoughtful consideration of the standards and procedures under which those cases should proceed, is a prescription for turning those cases into full-blown criminal trials. Even the Rasul decision recognized the inarguable point that persons who are neither citizens nor aliens lawfully resident in the United States do not enjoy the protections of our Constitution, including its habeas corpus provision. The majority argued that the alien combatants’ right of access to U.S. courts for the purpose of challenging their detention under habeas corpus was statutory (i.e., derived from the federal habeas statute, 28 U.S.C., 2241 et seq.).26¶ This distinction, though seemingly salient, proved in the event to be of little moment. Regardless of their lack of constitutional entitlements, experience shows that once alien combatants are permitted access to our courts, judges, under the rubric of due process, will effectively treat them as if they are every bit as vested as citizens with substantive and procedural protections – even in wartime and regardless of the what this portends for national security. Only firm instructions to the contrary could have bucked this inevitability. The Supreme Court’s decision in Rasul failed to provide any guidance to lower courts, and the guidance provided in this regard by Congress since late 2005 has been insufficient.¶ Some explanation is in order here. In the other 2004 Supreme Court case noted above, Hamdi v. Rumsfeld, at issue was the very different scenario of the rights of American citizens captured and detained in the course of fighting against the U.S. in wartime. The Justice Department did not dispute that such citizen combatants had a constitutional right to file habeas claims. To the contrary, at issue were the questions whether they could compel a judicial review of the executive’s decision to detain, and how searching that review should be. The case is instructive for present purposes because the court, in holding that judicial review was available, also indicated that the habeas proceedings in connection with U.S. citizens would be very deferential to the executive branch, to the point of indicating that a military determination would be accepted by the court as long as the citizen combatant had received adequate notice and a meaningful opportunity in the military proceeding to contest his detention.27¶ Of course, the entitlement of alien enemy combatants – assuming they have any rights (other than the right not to be tortured, which is provided by both U.S. and international law28) – should be dramatically less substantial than the very limited rights the Supreme Court accorded to American citizens in Hamdi. Predictably, however, that is not what developed in the district courts when they considered alien combatants detained at Guantanamo Bay on the basis of a decision, Rasul, which opened the courthouse doors but gave district judges no substantive or procedural guidance. Until Congress finally stepped in and put a stop to the experiment, the trajectory was toward an array of judicially fashioned rights approximating not merely those of citizens but, indeed, those accorded to American criminal defendants.

#### Asian war goes nuclear - no defense - interdependence and institutions don’t check.

Mohan, distinguished fellow at the Observer Research Foundation in New Delhi, ‘13

[C. Raja, March 2013, Emerging Geopolitical Trends and Security in the Association of Southeast Asian Nations, the People’s Republic of China, and India (ACI) Region,” background paper for the Asian Development Bank Institute study on the Role of Key Emerging Economies, <http://www.iadb.org/intal/intalcdi/PE/2013/10737.pdf>]

Three broad types of conventional conflict confront Asia. The first is the prospect of war between great powers. Until a rising PRC grabbed the attention of the region, there had been little fear of great power rivalry in the region. The fact that all major powers interested in Asia are armed with nuclear weapons, and the fact that there is growing economic interdependence between them, has led many to argue that great power conflict is not likely to occur. Economic interdependence, as historians might say by citing the experience of the First World War, is not a guarantee for peace in Asia. Europe saw great power conflict despite growing interdependence in the first half of the 20th century. Nuclear weapons are surely a larger inhibitor of great power wars. Yet we have seen military tensions build up between the PRC and the US in the waters of the Western Pacific in recent years. The contradiction between the PRC’s efforts to limit and constrain the presence of other powers in its maritime periphery and the US commitment to maintain a presence in the Western Pacific is real and can only deepen over time.29 We also know from the Cold War that while nuclear weapons did help to reduce the impulses for a conventional war between great powers, they did not prevent geopolitical competition. Great power rivalry expressed itself in two other forms of conflict during the Cold War: inter-state wars and intra-state conflict. If the outcomes in these conflicts are seen as threatening to one or other great power, they are likely to influence the outcome. This can be done either through support for one of the parties in the inter-state conflicts or civil wars. When a great power decides to become directly involved in a conflict the stakes are often very high. In the coming years, it is possible to envisage conflicts of all these types in the ACI region. ¶ Asia has barely begun the work of creating an institutional framework to resolve regional security challenges. Asia has traditionally been averse to involving the United Nations (UN) in regional security arrangements. Major powers like the PRC and India are not interested in “internationalizing” their security problems—whether Tibet; Taipei,China; the South China Sea; or Kashmir—and give other powers a handle. Even lesser powers have had a tradition of rejecting UN interference in their conflicts. North Korea, for example, prefers dealing with the United States directly rather than resolve its nuclear issues through the International Atomic Energy Agency and the UN. Since its founding, the involvement of the UN in regional security problems has been rare and occasional.¶ The burden of securing Asia, then, falls squarely on the region itself. There are three broad ways in which a security system in Asia might evolve: collective security, a concert of major powers, and a balance of power system.30 Collective security involves a system where all stand for one and each stands for all, in the event of an aggression. While collective security systems are the best in a normative sense, achieving them in the real world has always been difficult. A more achievable goal is “cooperative security” that seeks to develop mechanisms for reducing mutual suspicion, building confidence, promoting transparency, and mitigating if not resolving the sources of conflict. The ARF and EAS were largely conceived within this framework, but the former has disappointed while the latter has yet to demonstrate its full potential. ¶ A second, quite different, approach emphasizes the importance of power, especially military power, to deter one’s adversaries and the building of countervailing coalitions against a threatening state. A balance of power system, as many critics of the idea point out, promotes arms races, is inherently unstable, and breaks down frequently leading to systemic wars. There is growing concern in Asia that amidst the rise of Chinese military power and the perception of American decline, many large and small states are stepping up their expenditure on acquiring advanced weapons systems. Some analysts see this as a structural condition of the new Asia that must be addressed through deliberate diplomatic action. 31 A third approach involves cooperation among the great powers to act in concert to enforce a broad set of norms—falling in between the idealistic notions of collective security and the atavistic forms of balance of power. However, acting in concert involves a minimum level of understanding between the major powers. The greatest example of a concert is the one formed by major European powers in the early 18th century through the Congress of Vienna after the defeat of Napoleonic France. The problem of adapting such a system to Asia is the fact that there are many medium-sized powers who would resent any attempt by a few great powers to impose order in the region.32 In the end, the system that emerges in Asia is likely to have elements of all the three models. In the interim, though, there are substantive disputes on the geographic scope and the normative basis for a future security order in Asia.

#### Escalation and accidents makes war very likely.

Max Fisher 11, 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.

#### The structure of Congress inherently favors delay and inaction --- that’s awful for crisis response

John Yoo 4, Emanuel S. Heller Professor of Law @ UC-Berkeley Law, visiting scholar @ the American Enterprise Institute, former Fulbright Distinguished Chair in Law @ the University of Trento, served as a deputy assistant attorney general in the Office of Legal Council at the U.S. Department of Justice between 2001 and 2003, received his J.D. from Yale and his undergraduate degree from Harvard, “War, Responsibility, and the Age of Terrorism,” UC-Berkeley Public Law and Legal Theory Research Paper Series, http://works.bepress.com/cgi/viewcontent.cgi?article=1015&context=johnyoo

In order to weigh the advantages of the Congress-first approach, it is also important to understand its potential costs. The costs may not be obvious, since grounding the use of force in ex ante congressional consent bears a close resemblance to the process for enacting legislation. The legislative process increases the costs of government action. It is heavily slanted against the enactment of legislation by requiring the concurrence not just of the popularly elected House but also the state-representing Senate and the President. This raises decision costs by increasing the delay needed to get legislative concurrence, requiring an effort to coordinate between executive and legislature, and demanding an open, public discussion of potentially sensitive information. Decision costs are not encapsulated merely in the time-worn hypotheticals that ask whether the President must go to Congress for permissions to launch a preemptive strike against a nation about to launch its own nuclear attack. Rather, these decision costs might arise from delay in using force that misses a window of opportunity, or one in which legislative discussion alerts an enemy to a possible attack, or the uncertainty over whether congressional authorization will be forthcoming.