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# **1AC**

## Observation 1: inherency

#### **Section 1021 of the 2011 NDAA affirms presidential authority to indefinitely detain those with connection to terrorism including United States citizens**

Horowitz 13 [Colby, JD candidate Fordham Law School, captain US army, "Creating a more meaningful detention statute: Lessons learned from Hedges v. Obama" Fordham Law Review, april]

Section 1021 is titled “Affirmation of Authority of the Armed Forces of

the United States to Detain Covered Persons Pursuant to the Authorization

for Use of Military Force.”94 This section “affirms that the authority of the

President to use all necessary and appropriate force pursuant to the [AUMF]

includes the authority for the Armed Forces of the United States to detain

covered persons . . . pending disposition under the law of war.”95 Section

1021 specifies two categories of “covered persons” that can be detained:

section 1021(b)(1) applies to those who “planned, authorized, committed,

or aided the terrorist attacks that occurred on September 11, 2001, or

harbored those responsible,” and section 1021(b)(2) applies to those who

were “a part of or substantially supported al-Qaeda, the Taliban, or

associated forces that are engaged in hostilities against the United States or

its coalition partners, including any person who has committed a belligerent

act or has directly supported such hostilities in aid of such enemy forces.”96

President Obama commented that, despite new language in the NDAA

that is not included in the AUMF, section 1021 “breaks no new ground and

is unnecessary.”97 The President’s interpretation is supported by a

subsection of section 1021 titled “Construction,” which states that

“[n]othing in this section is intended to limit or expand the authority of the

President or the scope of the [AUMF].”98 Another subsection, titled

“Authorities,” further limits section 1021 by declaring that “[n]othing in

this section shall be construed to affect existing law or authorities relating

to the detention of United States citizens, lawful resident aliens of the

United States, or any other persons who are captured or arrested in the

United States.”99

Although other statutes (like the DTA and MCA) have dealt with

executive detention, section 1021 of the NDAA is the first statute to

explicitly codify the President’s substantive authority to detain terrorist

suspects pursuant to the AUMF.100 As commentators have recognized, the

problem is that the meaning of section 1021 is far from clear.101 There are

two general views about the scope of section 1021. Some, including the

Chairman of the Senate Armed Services Committee, believe that it does

nothing new.102 Others view section 1021 as a dangerous expansion of the

power of executive detention beyond the scope of the AUMF.103

Regardless of whether section 1021 actually expands the President’s

substantive detention authority, both sides seem to agree on two things.

First, section 1021 is significant because irrespective of its precise meaning,

it is an explicit congressional affirmation of executive detention

practices.104 As will be discussed in the next section, congressional

approval can significantly expand the President’s war powers. Second,

section 1021 leaves open the possibility of indefinite detention of American

citizens.105 As mentioned above, section 1021(e) merely states that the law

remains unchanged regarding citizens, lawful resident aliens, or persons

captured in the United States. It does not affirmatively state that individuals

in these categories cannot be detained. The language of section 1021(e)

(also known as the Feinstein Amendment I) leaves the question of whether

American citizens can be indefinitely detained to the other branches.106

The Supreme Court recognized the right to detain an American citizen in

Hamdi107—a right, however, that appears to be against the policy of the

Obama Administration.108 As one Senator predicted, “[t]hese detention

provisions, even as they are amended, will present numerous constitutional

questions that the courts will inevitably have to resolve.”109

#### **Despite empty rhetoric of closing g’tmo. Obama continues to support indefinite detention**

Huskey 11 [Kristine, founder and former director of the national security clinic at the University of Texas School of law, "Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention" University of New Hampshire Law Review, 9(2)

That the Obama Administration is set to officially condone the

practice of indefinite military preventive detention should not come

as a surprise, as I believe it does to many.42 The clues have been

there all along, even as the White House was fervently advocating

for the closure of Guantanamo. First, the same 2009 executive order

calling for closure retains the option of continued detention without

trial on the table by specifically allowing the Guantanamo Review

Task Force—newly established to review each detainee’s case—to

reach a determination for a “disposition” other than transfer or prosecution.

43 Second, just months later, in an important speech on national

security, President Obama made it clear that detaining individuals

without trial may be a necessary last-choice option, and, to

that end, a preventive-detention regime was entirely acceptable:

We are not going to release anyone if it would endanger our

national security . . . . Where demanded by justice and national

security, we will seek to transfer some detainees to the

same type of facilities in which we hold all manner of dangerous

and violent criminals within our borders -- namely,

highly secure prisons that ensure the public safety.

. . . .

Now, finally, there remains the question of detainees at

Guantanamo who cannot be prosecuted yet who pose a clear

danger to the American people. . . . We’re going to exhaust

every avenue that we have to prosecute those at Guantanamo

who pose a danger to our country. But even when this

process is complete, there may be a number of people who

cannot be prosecuted for past crimes, in some cases because

evidence may be tainted, but who nonetheless pose a threat to

the security of the United States. . . .

. . . Having said that, we must recognize that these detention

policies cannot be unbounded. They can’t be based

simply on what I or the executive branch decide alone.

That’s why my administration has begun to reshape the standards

that apply to ensure that they are in line with the rule of

law. We must have clear, defensible, and lawful standards

for those who fall into this category. We must have fair procedures

so that we don’t make mistakes. We must have a

thorough process of periodic review, so that any prolonged

detention is carefully evaluated and justified.44

Third, in January 2010, the executively created Guantanamo Review

Task Force released its final report, indicating that there were

almost fifty men at Guantanamo who could neither be tried nor released

but who would be subject to detention and continuing “executive

review.”45

Now, recent reports confirm what has been quietly occurring all

along: The White House has been preparing an executive order that

sets forth a system of indefinite detention at Guantanamo and, potentially,

elsewhere.46 In short, this system would enable detainees to

challenge their detention on a regular basis by requiring a minimal

review every six months and then a more lengthy annual review before

an executive ‘parole-like’ review board made up of officials

from civilian and military agencies.47 Further, the pending executive

order envisions that the executive review board would have the authority

to release a detainee if appropriate.48 Of course, with the

NDAA 2011 restrictions in place, the review board’s authority to

order the release of any detainee at Guantanamo would be severely

restrained. It is important to note that such an executive review

process would not replace the habeas reviews required by the Supreme

Court in Boumediene, but would supplement it.49 In essence,

the executive review would weigh the necessity of the detention rather

than its lawfulness, which is what the federal courts have been

doing in the ongoing habeas hearings pursuant to Boumediene’s

mandate.50

## **Observation 2: Dimensions of Evil**

#### **The worst dimensions of evil are occurring at G’tmo.**

Ghoshray 11 [Saby, Dr., scholar in constitutional law, international law, capital jurisprudence, military tribunals etc. Wayne Law Review "GUANTANAMO: UNDERSTANDING THE NARRATIVE OF DEHUMANIZATION THROUGH THE LENS OF AMERICAN EXCEPTIONALISM AND DUALITY OF 9/11" Spring, 57 Wayne L. Rev. 163

What does Guantanamo have to do with such transmogrification of the U.S. legal framework as it relates to security detention? To understand Guantanamo from a deeper perspective we must go beyond legal representation. This perspective is largely absent in contemporary discourse, except one recent scholarship by Professor Muneer Ahmad, to whose article I owe an amount of intellectual debt. n84 This exploration requires us to carve out an existential phenomenological n85 space for [\*179] Guantanamo in our construct, rather than restricting Guantanamo with the hackneyed description of a physical detention facility. Extracting Guantanamo from a physical description of objects and persons interrelated by a set of laws is not easy. Guantanamo is nestled within a physical facility. It evolved in existence through legal representation, devoid of social constructs that expands its narrative. In establishing this legal representation, Guantanamo has been described by various monikers as "an anomalous zone," n86 or "a legal black hole," n87 or "a legal outer space." n88 When we hear Guantanamo, images of chained detainees, n89 or torture facilities, n90 or barbed wire fence impervious to the prying eye of the world, n91 are conjured up in our mind. Neither the imagery, nor the associated legal representations can give Guantanamo the deeper, more fundamental phenomenological ascendance--a vital ingredient for our collective construct to see the truth, and discern the comprehensive nature of this dark saga of human history.

[\*180] Thus, expounding upon humanity's fall from grace, I place Guantanamo at the same ontological space shared by the human desires and characteristics that formed the saga of Amistad described at the beginning of this article. At the ephemeral level, Guantanamo's announced reincarnation in 2002, n92 from being a temporary processing center for Haitian asylum seekers n93 to a detention center for terrorist detainees, n94 represents a mere physical facility's invigorative transformation. This transformation was sold to the larger public as a protection of humanity from manifest evil. n95 On a deeper level, however, [\*181] it represents a superpower's response to an existential threat to its security. In its response, the superpower must embark on whatever means necessary to ensure that security. n96 The providers of such a security mechanism have preference for the-end-to-the-means over means-to-the-end in their quest to conquer this manifest evil. For the most part, it seems the public, foreign and domestic, was content with the process. Percolating beneath this means-to-the-end have been two [\*182] ontological dimensions n97--perpetuation of evil n98 and dehumanization of individuals n99--that are the very manifestation of such evil, who are [\*184] occluded from the view of the general public for most of the time. n100 Indeed, thorough understandings of these underlying dimensions are needed for full appreciation of the narrative of Guantanamo.

#### Indefinite detention in G’tmo is resulting in torture and other horrendous human rights abuses

The Toronto Star 2013 (Suspects tortured after 9/11, panel finds; Damning report calls on Obama to close Guantanamo by 2014, lexisnexis, pg. A19)

**An independent task force issued a damning review of Bush-era interrogation practices** on Tuesday, **saying the highest U.S. officials bore ultimate responsibility for the "indisputable" use of torture, and it urged President** [Barack Obama](http://www.lexisnexis.com.lib-proxy.fullerton.edu/lnacui2api/search/XMLCrossLinkSearch.do?bct=A&risb=21_T17965556556&returnToId=20_T17965556559&csi=8286&A=0.7160687838671154&sourceCSI=9369&indexTerm=%23PE0009TJP%23&searchTerm=Barack%20Obama%20&indexType=P)**to close the Guantanamo detention camp by the end of 2014.**

In one of the most comprehensive studies of U.S. treatment of terrorism suspects, the panel concluded that never before had there been "the kind of considered and detailed discussions that occurred after Sept. 11 directly involving a president and his top advisers on the wisdom, propriety and legality of inflicting pain and torment on some detainees in our custody."

**"It is indisputable that the United States engaged in the practice of torture,"** the 11-member task force, assembled by the non-partisan Constitution Project think-tank, said in its 577-page report.

**The scathing critique of methods used under the Republican administration of former president** [George W. Bush](http://www.lexisnexis.com.lib-proxy.fullerton.edu/lnacui2api/search/XMLCrossLinkSearch.do?bct=A&risb=21_T17965556556&returnToId=20_T17965556559&csi=8286&A=0.7160687838671154&sourceCSI=9369&indexTerm=%23PE0009U6F%23&searchTerm=George%20W.%20Bush%20&indexType=P)**also sharpened the focus on the plight of inmates at Guantanamo, which Bush opened and his Democratic successor has failed to close.**

[Obama](http://www.lexisnexis.com.lib-proxy.fullerton.edu/lnacui2api/search/XMLCrossLinkSearch.do?bct=A&risb=21_T17965556556&returnToId=20_T17965556559&csi=8286&A=0.7160687838671154&sourceCSI=9369&indexTerm=%23PE0009TJP%23&searchTerm=Obama%20&indexType=P)**banned abusive interrogation techniques such as waterboarding when he took office in early 2009, but the military prison at the U.S. naval base in Cuba has remained an object of condemnation by human rights advocates**.

A clash between guards and prisoners at the Guantanamo Bay camp last weekend and the release of harrowing accounts by inmates about force-feeding of hunger strikers threw a harsh spotlight on the predicament of the inmates, many held without charge or trial for more than decade.

**The task force** called the indefinite detention of prisoners at Guantanamo "abhorrent and intolerable" and ca**lled for it to be closed by the end of 2014, when NATO's combat mission in Afghanistan is due to end and most U.S. troops will leave that country**.

The panel, which included leading politicians from both parties, two retired U.S. generals, and legal and ethics scholars, spent two years examining the U.S. treatment of suspected militants detained after the attacks of Sept. 11, 2001.

#### Indefinite detention at g’tmo perpetuates the worst forms of dehumanization.

Ghoshray 11 [Saby, Dr., scholar in constitutional law, international law, capital jurisprudence, military tribunals etc. Wayne Law Review "GUANTANAMO: UNDERSTANDING THE NARRATIVE OF DEHUMANIZATION THROUGH THE LENS OF AMERICAN EXCEPTIONALISM AND DUALITY OF 9/11" Spring, 57 Wayne L. Rev. 163

The framework supporting the concept of evil may be unstable on the surface, but it is incumbent upon us to understand the genesis of the theory of evil within the context of conquering the existential threat to security. The concept of evil has long been a staple for politicians and U.S. Administrations. n101 One need not look far to find the supporting evidence. n102 Once the personification of evil is complete, the framework of securing the populace from these threats becomes more efficient--as it then becomes the sacred duty of the U.S. Government to liberate American citizens and other citizens of the world from such evil. n103 This distorted sense of reality pervading the populace makes it easier for dehumanization to continue, as the existential evil must be destroyed at [\*185] any cost--a rationale used so craftily against the detainees at Guantanamo. Therefore, whatever the ends, a rationale can be created to justify the means to achieve them. It is now very easy to understand how this framework can create a distorted sense of reality. This distorted appearance that the American detention measures are divinely inspired, placing the righteous masses against the solitary figure of evil, allows for the dehumanization to continue. Under this very convenient scenario, n104 the governmental machinery wants the masses to believe that this world would be a much safer place--even if it means some "evil" humans are stripped of their human dignity. n105 What does systematic dehumanization do to other humans? Why have the conversations surrounding Guantanamo mostly left out the aspect of dehumanization? To me, systematic dehumanization is largely predicated on relegation of a section of humanity with minimal to no rights. However, for the time being, let us leave the rights discussion suspended for a later stage so that we can focus on developing a better comprehension of the shaping effect of Guantanamo as a phenomenological event on the broader U.S. detention framework. Now we will peel away Guantanamo's existential and psychological dimensions.

On the surface it seems the U.S. detention framework applied to detainees captured in war zones fighting U.S. forces has no ontological relationship with the detention framework applied to individual instances of terrorist detention. However, as long as the concept of Guantanamo is alive in the minds of the law enforcement community, no processing of a detainee can be decoupled, and thus, analyzed independent of Guantanamo. Because Guantanamo is an ontological space in itself, it pervades beyond individual events and engulfs anything and everything that falls within its ontological sphere of influence. This becomes apparent as we trace the genesis of Guantanamo further.

Guantanamo was created as a response to an unprecedented event. The response alternatives did not have a pre-codified legal framework. Rather, sets of alternative means of legal response have been abstracted [\*186] from the codified norms of international law and made to fit the desired goal. Unfortunately, a logical abstraction of the norms of international law would be contradictory to domestic aspirations n106 and thus would not be palatable for domestic consumption. n107 In addition, the U.S. Administration did not have the answers to all the possible legal outcomes that might emerge should a deterministic legal framework be applied vis-a-vis the terrorist detainees. n108 Thus, absent absolute clarity with respect to procedural steps, the Administration resorted to a nebulous framework, designed to be an all-encompassing legal vacuum adept at suspending procedural due process rights for the unforeseeable future, and yet, achieve the desired means to lock away the "evil." n109

It became clear as time passed that some detainees have no relationship to the crime they have been charged with, n110 yet allowing the justice mechanism to follow its logical contour was not an option for the Administration on two grounds. n111 First, the domestic political agenda was not conducive to the possibility of "release" of manifest "evil." n112 Second, the public has been sold the story of an existential threat and the valor of protection against such evil. n113 Releasing detainees held at Guantanamo will not only be monumentally embarrassing for the Administration, but also spear the bubble of the convenient narrative of good vs. evil.

[\*187] As a result, the government created more layers, as revealed through the litany of procedural framework including the Combatant Status Review Tribunal. n114 Despite their appearance of legal maturity, these procedures provided no deterministic outcome related to detention relief. In time both the Guantanamo detainees and domestic terror suspects became embroiled in prolonged detention--which matured into a systemic phenomenon. n115 In this way, the engulfing influence of Guantanamo grew out of its legal representation as a physical facility and evolved into the phenomenological space. In this newly minted space, Guantanamo began exerting its influence across the wide spectrum of the law enforcement community, which became subconsciously aware of its ontological existence. Whenever there is a perception of a threat, actual or manufactured, construction of evil becomes easier. This enables a construction of sending the terrorist to Guantanamo. n116 Guantanamo also provides law enforcement with the much needed flexibility to determine what means must be resorted to in order to guarantee a desired outcome. n117

#### Torture is a systematic oppression that kills agency and value to life. It’s a technique of perpetual dying.

**Wolfgang 1999** (German Philosopher, Anthropologist- professor at Universities of Gottingen & Erfurt. [Sofsky, "The endurance of impotence: The dynamics of persecutory violence," International Psychoanalysis Newsletter,)

The prisoners will be incarcerated or put into camps and, not rarely, are there subjected to torture. As a method of punitive and loyal justice, torture has a long prehistory which goes back to the early tyrannies. However, in the 20th century, torture has been systematized as a means of national persecution terror and been handed over to special units of the police, the military or the militia. Its executors have invented a multitude of new methods and have freed torture from the aims of finding the truth. Contrary to a widely held view, torture is not a means to extort confessions, information or proofs. Whatever may be declared the official aim, torture is not an instrument of interrogation, for the ultimate aim of torture is not to get the victim to talk but rather to silence him. The model of the duel, of a trial of strength of the will, is a bagatellization. Torture eliminates action and breaks the person through pain, panic and isolation. The victim is totally in the hands of the perpetrator and is at the mercy of his whims, rage, lust and destructive will. Any part of his body, any of his attitudes or stirrings can be used as a point of attack for the tormentors. Torture transforms the person into an organism, into a living piece of flesh. It tests physical reactions, generates pain and forces the tortured one to scream His insides are turned outwards, his language stifled in pain. The tortured person no longer experiences his body as a source of his own force for action. In the frenzy of pain, his own body itself becomes his enemy. It is his body which confronts him with the suffering from which he cannot escape, however much he grits his teeth. The mortal enemy is within himself, rages in his inside and destroys the final resistance. Torture is by no means restricted to external wounds. It splits the person through the centre into two parts. Since the victim's body becomes the accomplice of the torture, it destroys the somatic relation to himself and with it the foundation of his will, his speech, his soul, his psyche. Torture, therefore, is not a technique of killing but of perpetual dying. What torture is on a small scale, the concentration camp is on a large scale. It is not the sudden death which contains the meaning of this institution but the continuous presence of the torment. The camp is the central institution of persecutory terror in the 20th century. It serves the imprisonment of political enemies less than the transformation and extinction of those who are redundant. In the midst of society and set into a complex mesh of political and economical institutions, the concentration camp is a cosmos at the border of the social world, a universum of unparalleled destructivity

#### Dehumanization brings society to total damnation, this is the largest impact in the round

Fasching 1993 Professor of Religious Studies in the University of South Florida [Darrell J., Part II of The ethical challenge of Auschwitz and Hiroshima: Apocalypse or Utopia?, Chapter 4 "The Ethical Challenge of Auschwitz and Hiroshima to Technological Utopianism", part 4 "The Challenge of Auschwitz and Hiroshima: From Sacred Morality to Alienation and Ethics", Ebooks]

Although every culture is inherently utopian in its potentiality, the internal social dynamic through which its symbolic world-view is maintained as a sacred order has a tendency to transform it into a closed ideological universe (in Karl Mannheim's sense of the ideological; namely, a world-view that promises change while actually reinforcing the status quo) that tends to define human identity in terms advantageous to some and at the expense of others. Historically the process of dehumanization has typically begun by redefining the other as, by nature, less than human. So the Nazis did to the Jews, and European Americans did to the Native Americans, men have done to women, and whites to blacks. By relegating these social definitions to the realm of nature they are removed from the realm of choice and ethical reflection. Hence those in the superior categories need feel no responsibility toward those in the inferior categories. It is simply a matter of recognizing reality. Those who are the objects of such definitions find themselves robbed of their humanity. They are defined by and confined to the present horizon of culture and their place in it, which seeks to rob them of their utopian capacity for theonomous self-transcending self-definition. The cosmicization of social identities is inevitably legitimated by sacred narratives, whether religious or secular-scientific (e.g., the Nazi biological myth of Aryan racial superiority), which dehumanize not only the victims but also the victors. For to create such a demonic social order the victors must deny not only the humanity of the other who is treated as totally alien but also their own humanity as well. That is, to imprison the alien in his or her enforced subhuman identity (an identity that attempts to deny the victim the possibility of self-transcendence) the victor must imprison himself or herself in this same world as it has been defined and deny his or her own self-transcendence as well. The bureaucratic process that appears historically with the advent of urbanization increases the demonic potential of this process, especially the modern state bureaucracy organized around the use of the most efficient techniques to control every area of human activity. The result is, as Rubenstein reminds us, the society of total domination in which virtually nothing is sacred, not even human life. The heart of such a bureaucratic social order is the sacralization of professional roles within the bureaucratic structure such that technical experts completely identify themselves with their roles as experts in the use of techniques while totally surrendering the question of what those technical skills will be used for to the expertise of those above them in the bureaucratic hierarchy. It is no accident that the two cultures that drew the world into the cataclysm of World War II, Germany and Japan, were militaristic cultures, cultures that prized and valued the militaristic ideal of the unquestioningly obedient warrior. In these nations, the state and bureaucratic order became one and the same. As Lewis Mumford has argued, the army as an invention of urban civilization is a near-perfect social embodiment of the ideal of the machine. 37 The army brings mechanical order to near perfection in its bureaucratic structure, where human beings are stripped of their freedom to choose and question and where each individual soldier becomes an automaton carrying out orders always "from higher up" with unquestioning obedience.

#### Additionally, Human rights protection prevents extinction

Annas et al 2 Edward R. Utley Prof. and Chair Health Law @ Boston U. School of Public Health and Prof. SocioMedical Sciences and Community Science @ Boston U. School of Medicine and Prof. Law @ Boston U. School of Law [George, Lori Andrews, (Distinguished Prof. Law @ Chicago-Kent College of Law and Dir. Institute for Science, Law, and Technology @ Illinois Institute Tech), and Rosario M. Isasa, (Health Law and Biotethics Fellow @ Health Law Dept. of Boston U. School of Public Health), American Journal of Law & Medicine, “THE GENETICS REVOLUTION: CONFLICTS, CHALLENGES AND CONUNDRA: ARTICLE: Protecting the Endangered Human: Toward an International Treaty Prohibiting Cloning and Inheritable Alterations”, 28 Am. J. L. and Med. 151, L/N]

The development of the atomic bomb not only presented to the world for the first time the prospect of total annihilation, but also, paradoxically, led to a renewed emphasis on the "nuclear family," complete with its personal bomb shelter. The conclusion of World War II (with the dropping of the only two atomic bombs ever used in war) led to the recognition that world wars were now suicidal to the entire species and to the formation of the United Nations with the primary goal of preventing such wars. n2 Prevention, of course, must be based on the recognition that all humans are fundamentally the same, rather than on an emphasis on our differences. In the aftermath of the Cuban missile crisis, the closest the world has ever come to nuclear war, President John F. Kennedy, in an address to the former Soviet Union, underscored the necessity for recognizing similarities for our survival:

[L]et us not be blind to our differences, but let us also direct attention to our common interests and the means by which those differences can be resolved . . . . For, in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children's future. And we are all mortal. n3

That we are all fundamentally the same, all human, all with the same dignity and rights, is at the core of the most important document to come out of World War II, the Universal Declaration of Human Rights, and the two treaties that followed it (together known as the "International Bill of Rights"). n4 The recognition of universal human rights, based on human dignity and equality as well as the principle of nondiscrimination, is fundamental to the development of a species consciousness. As Daniel Lev of Human Rights Watch/Asia said in 1993, shortly before the Vienna Human Rights Conference:

Whatever else may separate them, human beings belong to a single biological species, the simplest and most fundamental commonality before which the significance of human differences quickly fades. . . . We are all capable, in exactly the same ways, of feeling pain, hunger, [\*153] and a hundred kinds of deprivation. Consequently, people nowhere routinely concede that those with enough power to do so ought to be able to kill, torture, imprison, and generally abuse others. . . . The idea of universal human rights shares the recognition of one common humanity, and provides a minimum solution to deal with its miseries. n5

Membership in the human species is central to the meaning and enforcement of human rights, and respect for basic human rights is essential for the survival of the human species. The development of the concept of "crimes against humanity" was a milestone for universalizing human rights in that it recognized that there were certain actions, such as slavery and genocide, that implicated the welfare of the entire species and therefore merited universal condemnation. n6 Nuclear weapons were immediately seen as a technology that required international control, as extreme genetic manipulations like cloning and inheritable genetic alterations have come to be seen today. In fact, cloning and inheritable genetic alterations can be seen as crimes against humanity of a unique sort: they are techniques that can alter the essence of humanity itself (and thus threaten to change the foundation of human rights) by taking human evolution into our own hands and directing it toward the development of a new species, sometimes termed the "posthuman." n7 It may be that species-altering techniques, like cloning and inheritable genetic modifications, could provide benefits to the human species in extraordinary circumstances. For example, asexual genetic replication could potentially save humans from extinction if all humans were rendered sterile by some catastrophic event. But no such necessity currently exists or is on the horizon.

## **Plan**

#### In the National Defense Authorization Act of 2014, The United States Congress should repeal section 1021 of the 2012 National Defense Authorization Act and include consistent with the international Law of Armed Conflict and the Geneva Convention.

## Observation 3: Solvency

#### **AUMF isn’t the issue here. It is necessary for Congress to pass legislation that clarifies detention policy which limits executive authority**

Horowitz 13 [Colby, JD candidate Fordham Law School, captain US army, "Creating a more meaningful detention statute: Lessons learned from Hedges v. Obama" Fordham Law Review, april]

The AUMF is the foundational legal authorization for both the overall

fight against terrorism358 and post-9/11 executive detention.359 However,

the AUMF, which is over ten years old, makes no mention of detention,360

and lower courts are constantly reinterpreting it on a case-by-case basis

without meaningful guidance from Congress.361 This Note does not argue

that the AUMF itself should be repealed or replaced.362 Even if the AUMF

remains the background authorization for the use of force, Congress needs

to pass a specific detention statute that can be understood independent of

the AUMF.363 Congress failed to do this with section 1021 when it stated

that, “Nothing in this section is intended to limit or expand the authority of

the President or the scope of the [AUMF].”364 If a detention statute cannot

be interpreted independent of the AUMF, the statute will create more

confusion than clarity.365 A meaningful detention statute must establish

clear, fixed legal standards for detention. Relying on the AUMF allows

Congress to avoid including specific definitions and constraints on

executive detention. Congressional detention legislation must impose some

limits on executive power.

**Congress should create a statute of NDAA consistent with the international Law of Armed Conflict and the Geneva Convention.**

**Hammond 12** (Kate Hammond, JD Candidate, USC, Fall 2012, “THE NATIONAL DEFENSE AUTHORIZATION ACT AND THE UNBOUND AUTHORITY TO DETAIN: A CALL TO CONGRESS” 22 S. Cal. Interdis. L.J. 193) sbb

A. Who Can Be Detained for Providing Substantial Support Should Be Consistent with the Law of Armed Conflict¶ Assuming the law of armed conflict ("LOAC") applies in some way - whether by analogy or directly - to military¶ detention in the current conflict against al Qaeda and the Taliban,¶ n172¶ Congress should frame the executive's detention¶ authority so that it is consistent with the LOAC.¶ **The Third and Fourth Geneva Conventions contain specific provisions governing who may be detained, how they**¶ **must be treated while they are detained, and when they must be released**. **The Third Geneva Convention provides for the**¶ **detention of prisoners of war**. **Those who may be detained as prisoners of war generally include members of the armed**¶ **forces and** those who accompany the armed forces, such as¶ **Civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of**¶ **services responsible for the** [\*218] **welfare of the armed forces**, provided that they have received authorization, from¶ the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the¶ annexed model.¶ n173¶ **The Fourth Geneva Convention permits the detention of those who do not qualify as prisoners of war, but only if such**¶ **detention is "absolutely necessary for "imperative reasons of security.'**"¶ n174¶ This means that **individuals "must represent**¶ **a real threat to the state's security in the present or in the future**."¶ n175¶ Commentary on the Fourth Geneva Convention¶ concedes that it would not be possible to provide a precise definition of what a real threat to the state's security entails.¶ n176 Therefore, **determining whether someone needs to be detained for "imperative reasons of security" has been left**¶ **largely to government discretion**.¶ n177¶ **The International Committee of the Red Cross ("ICRC") and International Criminal Tribunal for the Former**¶ **Yugoslavia ("ICTY")** have provided insight on the issue. Both bodies agree that an individual providing direct¶ assistance to enemy forces can be detained for national security reasons.¶ n178¶ The ICTY suggests that an individual¶ providing assistance to enemy groups engaging in sabotage or espionage could be justifiably detained.¶ n179¶ The ICRC suggests that even those who only provide logistical support, and are not actual members of the group, can be lawfully¶ detained.¶ n180¶ However, **both** bodies **caution that** **mere association with the enemy group is not sufficient to justify**¶ **detention for security reasons**.¶ n181¶ **An individual may not be detained because the individual "is a national of, or**¶ **aligned with, an enemy party."**¶ n182¶ There must be some "individual nexus" between the individual and the enemy force.¶ n183 [\*219] Additionally, **detention "for the sole purpose of intelligence gathering" is not authorized for security**¶ **reasons**.¶ n184¶ **Thus, if Congress were to construct a statute consistent with the LOAC, then the statute could permit the executive**¶ **to detain individual members of enemy forces as well as those who provide substantial support**. However, those who¶ provide substantial support would have to be qualified - those who provide substantial support could only be detained if¶ the threat caused by such support renders detention "absolutely necessary" for "imperative reasons of security." Despite¶ this qualification, the detention authority would still sweep too broadly, as the determination of whether detention was¶ necessary for security reasons would be left within the executive's discretion. Therefore, consistent with the purposes of¶ detention, **Congress should further restrict who can be detained to include only those who cannot be adequately**¶ **prosecuted in the criminal justice system**.

#### **Gtmo is a jurisprudence black hole that destroys the possibility for the U.S. to change the way it treats detainees. We must close Gtmo to decouple it from American legal jurisprudence**

Ghoshray 11 [Saby, Dr., scholar in constitutional law, international law, capital jurisprudence, military tribunals etc. Wayne Law Review "GUANTANAMO: UNDERSTANDING THE NARRATIVE OF DEHUMANIZATION THROUGH THE LENS OF AMERICAN EXCEPTIONALISM AND DUALITY OF 9/11" Spring, 57 Wayne L. Rev. 163

Indeed, Guantanamo or a Guantanamo-like detention facility allows for the detainee to be thrown into a framework where his procedural due process rights can be temporarily or permanently suspended, depending on the desired outcome. n118 Time and repetition not only enabled the security apparatus of the state to develop the systematic methodology, but allowed the general construct to morph into a way of life, far removed from exception and initial quandary. Thus, Guantanamo started acting like a vacuum that would attract anything procedurally undefined, legally indefensible, theoretically nebulous, or deterministically uncertain. n119

Does that mean Guantanamo is a black hole, as the prevailing legal literature seems to suggest and the above characteristics support to some [\*188] extent? n120 Let me provide some interpretive gloss to an existing construct. From the broader characterization that law is opaque in a region due to its inability to penetrate the region to either bring the events under the law's ambit or develop adequate legal representation of entities within the region, it may justifiably be called a legal black hole. Normal practice of civilized society exists under guidance of law, by imparting a legal construct on any living or physical entity. Therefore, the legal commentators understood a suspension of law or its absence as a manifestation of a legal black hole within Guantanamo. n121 As the astronomical black hole is opaque to light, similarly, Guantanamo is revealed as somewhat opaque to legal illumination; hence, the characterization of a legal black hole. I see this characterization as only partially correct. The related conversation is surprisingly silent on the rest of the story--a story which makes Guantanamo more of a black hole. Let us borrow from physics to further illustrate.

Classical physics defines a black hole as the entity that has an enormous gravitational pull by means of which it attracts anything and everything that comes within its territory. n122 Thus, a black hole can be seen as a giant vacuum which will attract and inhale everything without ever disclosing the identity of the material it has devoured. I want to bring this physical manifestation of Guantanamo and place it within a legal context. Like an astronomical black hole devours all other celestial bodies surrounding it, n123 I see the phenomenological construct of Guantanamo attempting to devour any and all other legal events that share the same ontological space with it--that is, any alleged instances of terrorism involving American interests. This is where the correct representation of Guantanamo as a narrative of legal black hole must be understood. Attention must be given to the sweepingly overpowering phenomenon that has existed for more than a decade now, and with no end of attenuation in sight. Unless this specter of sending an individual [\*189] into Guantanamo goes away, it is very difficult to take the next step in America's detainee jurisprudence. Therefore, it is of utmost importance that Guantanamo be decoupled from the legal discourse within American jurisprudence.

This decoupling, however, is not possible without the proper closure of Guantanamo--not only a legally difficult proposition n124 but an event that has existential ramifications for the American domestic political agenda. n125 Like the way a black hole distorts the traversal path of celestial objects near its sphere of influence, I see Guantanamo distorting not only the constitutional curvature, n126 but also the possible trajectory of [\*191] any legal event. In order for a legal event to proceed to its logical conclusion, it must traverse forward, sometimes in a linear fashion, often times, however, embracing non-linearity. n127 But, if the trajectory can never decouple itself from a larger gravitational pull, it will never reach its logical legal conclusion. This is where the closure of Guantanamo has the most significant socio-legal phenomena, n128 the immediacy of which must be both internalized and achieved. I would submit that consistent detainee jurisprudence is not possible without adequate closure of Guantanamo--the anatomy of which I dissect below.

# **Extensions**

## 1AC extensions

### Inherency

#### **Section of the 1021 NDAA affirms presidential authority over detention authority**

Horowitz 13 [Colby, JD candidate Fordham Law School, captain US army, "Creating a more meaningful detention statute: Lessons learned from Hedges v. Obama" Fordham Law Review, april]

Challenges to executive detention normally come from detainees, and

usually in the form of habeas corpus petitions.1 But on January 13, 2012, a

group of writers and activists decided to preemptively challenge the scope

of indefinite executive detention.2 They specifically sought to enjoin

section 1021 of the National Defense Authorization Act for Fiscal Year

20123 (NDAA), claiming that this section violated their free speech,

associational, and due process rights. The plaintiffs feared that, even as

U.S. citizens, they might be locked away or sent to Guantanamo Bay for

exercising their free speech rights or engaging in political advocacy.

In section 1021 of the NDAA, Congress codified and affirmed the

executive branch’s detention authority for terrorist suspects.4 This authority

had previously derived from the Authorization for Use of Military Force of

20015 (AUMF), which was over ten years old and made no specific

mention of detention. Instead of providing clarity, however, the scope of

the authority granted by section 1021 is uncertain. On September 12, 2012,

Judge Katherine B. Forrest of the Southern District of New York ruled in

favor of the writers and activists and permanently enjoined a key portion of

section 1021, holding that it violated both the First and Fifth Amendments

of the Constitution.6

#### **The Bush administration has created a legal black hole with G’tmo. The president has unchecked authority to detain anyone the executive determines to be a threat to the U.S.**

Huskey 11 [Kristine, founder and former director of the national security clinic at the University of Texas School of law, "Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention" University of New Hampshire Law Review, 9(2)

Notwithstanding these legal precedents, numerous critics

complained that the Bush Administration had created a “legal

black hole” in which it could act with impunity.57 Had the

President ordered the detainees to be taken out and shot to

death, for example, there would have been no process with

which to hold him legally accountable if federal courts lacked

jurisdiction. The Bush Administration sought to allay this con‐

cern by declaring that the detainees would be treated humanely

and “consistent[ly]” with the Geneva Convention,58 but

subsequent disclosure of the abuses at Guantanamo cast doubt

on that declaration.

#### **The AUMF gives the president authorization to indefinitely detain everyone, even American Citizens**

Horowitz 13 [Colby, JD candidate Fordham Law School, captain US army, "Creating a more meaningful detention statute: Lessons learned from Hedges v. Obama" Fordham Law Review, april]

Since Congress omitted explicit geographical limitations in the AUMF,

some argue that the President can use force anywhere, including within the

United States.34 The congressional record also contained many references

to the AUMF’s worldwide scope.35 Thus, the AUMF leaves open the

American citizens was expressly approved by the Supreme Court36 but

remains highly controversial and is disfavored by the Obama

Administration.37

In addition, it is unclear how long the AUMF lasts or if there is any event

that can trigger its termination other than congressional repeal.38 This is

particularly significant for indefinite detention, because it means that

individuals might “be detained for a long time” or even their entire lives

without ever being tried.39 The Supreme Court stated that the authority to

detain under the AUMF lasts “for the duration of the relevant conflict,” and

thus members of the Taliban can only be detained while “United States

troops are still involved in active combat in Afghanistan.”40 The conflict

with Al Qaeda, however, is not limited to Afghanistan and is not likely to

end soon,41 and thus it is possible that members of Al Qaeda and other

related terrorist organizations can be detained without trial under the

AUMF for decades to come.

#### **Obama has lacked the political will to remove detainees from G’tmo**

Captain Gardiner 12 [Steven, United States Naval Reserve, U.S. Army War College, "Guantanamo detention facility-why is it still there?" March 22

The detained enemy combatants presently being held by the Joint Task Force have not been removed from Guantanamo Bay Naval Station and have not been placed in some other form of holding/detention facility, domestically or abroad, as directed by Executive Order 13492 (Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, signed 22 Jan 2009). The issue facing the current Administration is whether the impediments that have surfaced over the past ten years prove the impossibility of disestablishing the Joint Task Force, or has that Administration simply demonstrated a lack of political will.

#### **The Supreme backs up the president’s authority of indefinite detention under Hamdi v. Rumsfeld**

Horowitz 13 [Colby, JD candidate Fordham Law School, captain US army, "Creating a more meaningful detention statute: Lessons learned from Hedges v. Obama" Fordham Law Review, april]

Given the broad and vague language of the AUMF, it was initially

unclear whether the AUMF included the power of indefinite detention. In

Hamdi v. Rumsfeld, however, the Supreme Court definitively resolved the

issue when it held that the AUMF is explicit congressional authorization for

detention.42 The case involved Yaser Esam Hamdi, an American citizen

born in Louisiana who was detained for fighting with the Taliban in

Afghanistan after 9/11.43 Hamdi was originally held at Guantanamo Bay,

Cuba, but he was transferred to a naval brig in South Carolina after

authorities discovered he was an American citizen.44 The government

detained Hamdi as an “enemy combatant,”45 and Hamdi challenged his

detention in court.46

Justice O’Connor, writing for a four-Justice plurality,47 declared that

even though the AUMF does not mention detention, “[b]ecause detention to

prevent a combatant’s return to the battlefield is a fundamental incident of

waging war, in permitting the use of ‘necessary and appropriate force,’

Congress has clearly and unmistakably authorized detention.”48 In holding

that detention was fundamental to waging war, the Court evaluated a

domestic statute (the AUMF) in the context of international law principles

(the laws of war).49

#### Executive Power is blocked by Congress in releasing Detainees

**Knickerbocker 2013 (Brad, Obama renews push to close Guantanamo military prison, The Christian Science Monitor, 2013-07-17,** <http://search.proquest.com.lib-proxy.fullerton.edu/docview/1354535602?accountid=9840>)

President **Obama is renewing his stalled effort to close the military detention center at Guantanamo** Bay, Cuba. It was **a promise he made when he first ran for president, but one he couldn't keep when Congress began blocking funds for releasing or transferring hundreds of prisoners captured as part of the war on terror.**

In a speech at the National Defense University in Washington Thursday, Mr. **Obama said "Gitmo**," as it's known, "**has become a symbol around the world for an America that flouts the rule of law**."

**In addition to asking Congress to lift the restrictions on detainee transfers, the president listed several other steps he intends to take.**

"**I have asked the Department of Defense to designate a site in the United States where we can hold military commissions," he said. "I am appointing a new, senior envoy at the State Department and Defense Department whose sole responsibility will be to achieve the transfer of detainees to third countries.**

**"I am lifting the moratorium on detainee transfers to Yemen, so we can review them on a case-by-case basis," Obama continued. "To the greatest extent possible, we will transfer detainees who have been cleared to go to other countries. Where appropriate, we will bring terrorists to justice in our courts and military justice system. And we will insist that judicial review be available for every detainee."**

To buttress his argument for closing Gitmo, Obama noted that former President Bush had transferred some 530 detainees with Congress's support and also pointed out that Sen. John McCain (R) had agreed with Obama's position when the two ran against each other in 2008.

**There were about 245 prisoners at Guantanamo when Obama took office in 2009, and that has dropped to 166. But releases have slowed to a trickle under the congressional restrictions, including a ban on any of them being brought to the US. No prisoners have left Guantanamo this year. Among the 166 current inmates, nine have been charged with crimes or convicted, 24 are considered eligible for possible prosecution, 47 are considered too dangerous for release but are not facing prosecution, and 86 - more than half - have been cleared for transfer or release**, Reuters reports.

The cost of keeping prisoners at Guantanamo, as well as any threat that they might return to the battlefield, has been debated since the island prison began housing detainees viewed as enemy combatants.

#### **Obama wants to close G’tmo, but is unwilling to challenge his own authority or the phenomenological expance of Gtmo**

Ghoshray 11 [Saby, Dr., scholar in constitutional law, international law, capital jurisprudence, military tribunals etc. Wayne Law Review "GUANTANAMO: UNDERSTANDING THE NARRATIVE OF DEHUMANIZATION THROUGH THE LENS OF AMERICAN EXCEPTIONALISM AND DUALITY OF 9/11" Spring, 57 Wayne L. Rev. 163

Since announcing his candidacy, President Barack Obama emphasized his intention to close Guantanamo, n129 a sentiment echoed in a subsequent announcement by Attorney General Eric Holder. n130 Like the legal maneuverings surrounding the attempt to sanctify administrative actions at Guantanamo that, at times, revolved around legal fiction, n131 the [\*192] reality of physical closure has also remained more of a fiction. n132 The executive unilateralism that shaped the genesis and evolution of Guantanamo during the Bush Administration n133 was conspicuous by its absence during the formative years of the Obama Administration. Unfortunately, however, the early promise of the current Administration has not resulted in finding even a modicum of hope for the closure of Guantanamo. To be fair to the Obama Administration, although they have yet to achieve closure, it has not been because of lack of intention, but more so due to their inability to comprehend the nature of Guantanamo. n134 Much like everyone else, even this apparently well-intentioned Administration failed to internalize the phenomenological expanse of Guantanamo.

#### **The current legal framework provides little to no hope for gtmo detainees**

Ghoshray 11 [Saby, Dr., scholar in constitutional law, international law, capital jurisprudence, military tribunals etc. Wayne Law Review "GUANTANAMO: UNDERSTANDING THE NARRATIVE OF DEHUMANIZATION THROUGH THE LENS OF AMERICAN EXCEPTIONALISM AND DUALITY OF 9/11" Spring, 57 Wayne L. Rev. 163

Despite wide-spread extolling of the liberal idealism of American jurisprudence in the contemporary construct, the disconnected reality is revealed through the recent retrenchment of civil liberties. n77 Despite the series of Supreme Court opinions repeatedly sustaining detainees' constitutional rights to challenge the legality of detention through the writ of habeas corpus, n78 relief has been rare. Only in exceptional cases where the individual case of a particular detainee may have been leaked through the media, the Red Cross, or the individual's lawyers, does a glimmer of hope for procedural review arrive. Thus far, only a handful of detainees have found this hope. Indeed, this does not come as a harbinger of light outside Guantanamo, but provides a stark reminder of the continued darkness inside Guantanamo--that we must probe further for meaning and for clarity.

Setting aside the cases of detainees in Guantanamo, let us ponder for a moment the recent legal paradigms applied to various other terrorist detainees. From the Lackawanna Six, n79 to Ali Al-Tamimi, n80 to Nazibullah Zazi, n81 to Jihad Jane, n82 the applicable detention protocol and [\*178] the subsequent legal processes have gone on without any clear and concise direction. The panoply of these cases, some of which have already been adjudicated, and some waiting to go forward, provide a snapshot of the legal framework mired in conundrum and uncertainty. Neither the Department of Justice nor the prosecuting fraternity has any consistent direction for how to prosecute in most of these cases, which leaves complex hurdles for defense lawyers. Prosecutorial challenges set aside, from a rights perspective, the existing framework is quite nebulous for lawyers to navigate through. In the absence of clear guidelines, prosecutorial delays result in prolonged detention, or in some cases, preemptive pleading becoming the norm. n83 What is behind this confusing detention framework? Is there a single event or phenomenon that can explain it?

#### **Despite the Detainee Treatment Act, the executive remains with the authority to torture**

Posner 12 [Michael, President of Human Rights Watch, "Human rights in the post-September 11 environment" Seattle Journal for Social Justice: Vol. 5 Issue 1

These abuses prompted Congress to explicitly prohibit any cruel,

inhuman, and degrading treatment of detainees in the form of the Detainee

Treatment Act. Sponsored by Senator John McCain in 2005, it passed both

Houses of Congress by overwhelming margins.41 But when President Bush

signed the bill into law, he included a signing statement that purports to

leave open the possibility that members of the executive branch could still

authorize cruel, inhuman, and degrading treatment of detainees.42

### Dimensions of Evil

**The war on terror doesn’t have a defined end – indefinite war means indefinite detention.**

**Hammond 12** (Kate Hammond, JD Candidate, USC, Fall 2012, “THE NATIONAL DEFENSE AUTHORIZATION ACT AND THE UNBOUND AUTHORITY TO DETAIN: A CALL TO CONGRESS” 22 S. Cal. Interdis. L.J. 193) sbb

**In a traditional international armed conflict** - a conflict between two state actors - **it is well established that members of**¶ **the enemy forces may be detained until the end of the conflict**.¶ n17¶ **However, in a traditional international armed**¶ **conflict, this authority to detain is constrained**.¶ n18¶ Specifically, **the executive's authority to detain in these**¶ **circumstances is constrained by space, identifiable characteristics or actions of individuals, and time**.¶ n19¶ **With clearly**¶ **imposed restraints, there is less risk that the executive will erroneously detain individuals and less risk that detention**¶ **will last indefinitely**.¶ n20¶ As a result, **in** the case of a **traditional international armed conflict, it is usually unnecessary for**¶ **Congress to constrain the executive's authority**. **However, the current conflict against al Qaeda, the Taliban, and**¶ **associated forces is not a traditional international armed conflict - it is not a conflict with state actors**.¶ n21¶ Consequently,¶ **this conflict** [\*197] **lacks the characteristics of a traditional international armed conflict that would** ordinarily **constrain**¶ **the executive's authority to detain**, creating an increased risk that individuals will be erroneously detained.¶ n22¶ In the case of a traditional international armed conflict, there is generally a clear battle zone in which the enemy¶ forces engage in combat.¶ n23¶ This provides the executive with a clear geographical space in which to capture detainees.¶ Additionally, under the law of armed conflict, during combat military forces are obligated to distinguish themselves¶ from the civilian population.¶ n24¶ Even if individuals fail to distinguish themselves from the civilian population, they can¶ still be detained if they are actively engaged in combat.¶ n25¶ This provides the executive with observable attributes that¶ may be used to determine whom to detain - those fighting and those who have distinguished themselves as part of the¶ enemy force. Furthermore, the authority to detain ends when the conflict ends.¶ n26¶ **The end date may not be precisely**¶ **predictable, but it is certain that the conflict, and ultimately military detention, will eventually end**.¶ n27¶ **Because of these**¶ **restrictions, in a traditional international conflict setting, there is less risk that individuals will be detained erroneously**,¶ n28 less risk that the detention will last indefinitely,¶ n29¶ and consequently, less need to further constrain the executive's¶ detention authority.¶ In contrast, **the current conflict against al Qaeda and the Taliban is not a traditional international armed conflict and**¶ **thus lacks the conflict characteristics that constrain the executive's authority to detain**.¶ n30¶ The [\*198] executive's¶ authority to detain is not bound by any particular geographical space. **The current conflict lacks a defined battle zone** -terrorist attacks by al Qaeda and the Taliban can occur anywhere and at any time.¶ n31¶ In fact, **terrorist attacks by these**¶ **groups have occurred both within the United States and abroad**,¶ n32¶ and United States forces have attacked these groups¶ in Somalia, Yemen, Afghanistan, Pakistan, and Iraq.¶ n33¶ **The executive arguably has the authority to detain individuals**¶ **from potentially anywhere in the world**.¶ The executive's authority to detain is also not limited by the observable characteristics or actions of individuals.¶ **Neither the Taliban nor al Qaeda is a state actor for the purposes of international armed conflict** - both are non-state¶ actors.¶ n34¶ **Therefore, they are not bound to comply with the law of armed conflict**.¶ n35¶ Consequently, **they are not**¶ **obligated to distinguish themselves from the civilian population**.¶ n36¶ Moreover, terrorist attacks are not hand-to-hand¶ battles with clearly observable fighters and non-fighters further complicating the ability of the executive to distinguish¶ those who may be detained from those who are beyond the executive's purview.¶ n37¶ **The executive's authority to detain in the current conflict is also not restrained by time. Under current U.S. law,**¶ **individuals may be lawfully held in military detention until the end of the relevant conflict**.¶ n38¶ **In the present conflict**, as¶ articulated by the House of Representatives Armed Services Committee Report, **the United States is "engaged in an**¶ **armed conflict with al Qaeda, the Taliban, and associated forces."**¶ n39¶ **This means that the executive's detention**¶ **authority will end when the conflict with those enemies ends. This begs the question - when does a conflict against**¶ **[\*199] terrorist groups such as al Qaeda and the Taliban end?** The United States has and is fighting these enemies in¶ Page 3¶ 22 S. Cal. Interdis. L.J. 193, \*196¶ Iraq and Afghanistan, so **does the conflict end when U.S. combat in Iraq and Afghanistan ends**? **Or does it end when al**¶ **Qaeda, the Taliban, and associated forces have been completely defeated**? **Both of these potential end points fail to**¶ **provide a clear indication of when this conflict will end, suggesting that the executive's authority to detain could be**¶ **indefinite**.¶ Unfortunately, the ending of combat in Iraq and Afghanistan fails to provide a clear indication of when the conflict¶ against al Qaeda and the Taliban will end.¶ n40¶ One could assume that when U.S. combat in Iraq and Afghanistan ends,¶ the conflict with al Qaeda and the Taliban and the basis for justifying military detention would also end. However, in¶ this conflict, there is not a connection between the end of U.S. combat in Iraq and Afghanistan and the end of the¶ conflict with al Qaeda and the Taliban.¶ n41¶ For example, **U.S. combat ended in Iraq in December of 2011**.¶ n42¶ **Despite**¶ **the end of combat in Iraq, al Qaeda violence still remains prevalent within Iraq and officials believe that al Qaeda is**¶ **rebuilding** its training camps and regaining strength within the country.¶ n43¶ In Afghanistan, the United States plans to¶ end combat by 2014.¶ n44¶ Because the combat in Afghanistan is still ongoing, one could argue that the conflict with al¶ Qaeda and the Taliban will in fact be over in 2014. However, the U.S. plan to end combat by 2014 is based upon an¶ "arbitrary timetable" and political pressures, not the actual strength of al Qaeda or the Taliban.¶ n45¶ In fact, **even after**¶ **eleven years of U.S. combat, the Taliban still remains a "robust enemy"** and there is a [\*200] concern that the Taliban¶ will regain control of Afghanistan after the exit of U.S. troops.¶ n46¶ Thus, **because this conflict has been defined as a**¶ **conflict with al Qaeda and the Taliban and because those enemies will not be defeated by the end of U.S. combat in Iraq**¶ **and Afghanistan, the end of combat in Iraq and Afghanistan fails to provide an endpoint for the current conflict**.¶ n47¶ If the end of combat in Iraq and Afghanistan does not indicate the end of the underlying conflict, then the complete¶ defeat of al Qaeda and the Taliban would have to signal when this conflict will end. However, **the defeat of al Qaeda**¶ **and the Taliban also fails to provide a clear endpoint**.¶ n48¶ Al Qaeda and the Taliban are not state actors.¶ n49¶ This is a¶ conflict against an "ideology"¶ n50¶ - a conflict against a political and religious movement.¶ n51¶ **No enemy state exists with**¶ **which to negotiate a cease-fire or peace treaty**.¶ n52¶ Accordingly, **there is no enemy state that can bind the members of al**¶ **Qaeda and the Taliban to cease combat and end the conflict**.¶ n53¶ Thus, the seeming way to end the conflict against al¶ Qaeda and the Taliban would be to completely defeat those terrorist groups.¶ n54¶ However, assuming it is possible to¶ defeat terrorist groups like al Qaeda and the Taliban, **it will be difficult, if not impossible, to determine if the groups**¶ **have been completely defeated**.¶ n55¶ And, **even if the United States did effectively defeat these terrorist groups, that**¶ **defeat would not preclude new terrorist groups from forming and engaging in combat against the United States.**¶ **n56**¶ **Consequently, the United States could be engaged in conflict with al Qaeda, the Taliban, or associated forces for an**¶ **indefinite amount of time**.¶ n57¶ [\*201] Because this conflict lacks clear endpoints, **the decision to end the conflict will rest solely in the discretion**¶ **of the executive**.¶ n58¶ **This unchecked authority is particularly troubling for those detained during the current conflict**¶ **because the executive has a strong political incentive to continue the conflict against potentially undefeatable terrorist**¶ **forces. This creates the possibility of an indefinite conflict with indefinite military detention**.¶ n59¶ As demonstrated, the current conflict against al Qaeda and the Taliban lacks the characteristics present in a¶ traditional international armed conflict that constrain the executive's authority to detain. Consequently, **the current scope**¶ **of executive authority poses a great risk that individuals will be erroneously detained and that the detention will last**¶ **indefinitely.**¶ **n60**¶ **With potentially substantial deprivations of liberty at stake, Congress must act to constrain the**¶ **executive's detention authority**.

**Indefinite detention is totalitarian – historical examples**

**Rutherford 12** (The Rutherford Institute, amicus brief filed on behalf of appellee Christopher Hedges, et al, in Hedges v. Obama on Southern District of New York case number 12-cv-331, <https://www.rutherford.org/files_images/general/01-08-2013_NDAA_Brief.pdf>) sbb

**Allowing indefinite detention of individuals for political speech** -- **which**, as¶ described above, **this statute plainly allows** -- **is fundamentally at odds with our**¶ **free society**. Indeed, **leaving the NDAA provision unchecked represents a**¶ **dangerous step towards history repeating itself**. **Indefinite detention for** simply¶ exercising one’s **freedom of speech** and the elimination of procedures for judicial¶ review of detentions are not new ideas, but **were the hallmarks of some of the most**¶ **notorious totalitarian regimes in history**.¶ For example, **Maoist China relied on concepts similar to NDAA §**¶ **1021(b)(2) to detain citizens indefinitely -- even during “peacetime.**” There was a¶ paper façade of law, which did formally allow the “right of appeal,” but exercising¶ it was treated as an offense, “a demand for further punishment,” which may result in one’s sentence being doubled, for daring to doubt the wisdom of “the people.”4¶ **Millions were arrested without trial, and penal colonies were established** in the¶ frozen wastelands of Heilongjiang and in sparsely populated lands in the west: up¶ to half of the prisoners dispatched to these regions perished.5 Yet charges were¶ rarely specified. Victims were not actually sentenced, so there was no fixed term¶ for their detention, despite the fact that these victims had not been formally¶ stripped of their civil rights.6¶ Similarly, **after the Bolsheviks seized control of the Russian government, the**¶ **new regime institutionalized the notion of the “enemy of the people,” which in**¶ **practice included anyone whom the Communist Party deemed a threat. In other**¶ **words, anyone who provided “substantial support” to “associated groups,” known**¶ **as “undesirables,” were deemed an “enemy of the people.”** Vladimir Lenin signed¶ a decree that “all leaders of the Constitutional Democratic Party, a party filled with¶ enemies of the people, are hereby to be considered outlaws, and are to be arrested¶ immediately and brought before a revolutionary court.”7 While waiting for the new penal code to be drawn up, judges were granted tremendous latitude to assess¶ the validity of existing legislation “in accordance with revolutionary order and¶ legality,”8¶ a notion so vague that it encouraged all sorts of abuses.¶ **Indefinite detention was likewise a central feature of the Nazi regime**. In his¶ opening statement at the Nuremberg Trials, chief U.S. prosecutor Robert Jackson¶ highlighted how the Nazi government perverted the rule of law: “**Secret arrest and**¶ **indefinite detention**, without charges, without evidence, without hearing, without¶ counsel, **became the method of inflicting inhuman punishment on any whom the**¶ **Nazi police suspected or disliked**. No court could issue an injunction, or writ of¶ habeas corpus, or certiorari.”9¶ **The NDAA raises the specter of a government that, like these horrific**¶ **regimes, can round up innocent people and incarcerate them for life without a trial**¶ **-- leaving the Due Process Clause of the Constitution utterly meaningless.** A free¶ society simply is not possible if the Government circumvents long-established,¶ cherished rights and guarantees, and recognizes no limits on its power.

**NDAA massively expands war powers including indefinite detention of US citizens.**

**Kain 12** (Eric C. Kain, writing for Forbes Magazine, 2 Jan 2012, “President Obama Signed the National Defense Authorization Act - Now What?” <http://www.forbes.com/fdc/welcome_mjx.shtml>) sbb

Just as troubling, these laws suggest that **the legal apparatus available** to us¶ **is insufficient** to the task. **While due process may work for any other criminal**¶ **act, terrorism is unique and requires new and expanded powers that ignore**¶ **the Constitution**. **These powers are necessary until “hostilities end” – as**¶ **though terror itself can ever be extinguished**.¶ In the 1970′s the British government began passing a series of anti-terrorism¶ laws that did many of the same things the US government has done since¶ 9/11. At the time, detention without charge was expanded to seven days.¶ Various other powers of arrest and detention were written into law, and¶ these provisions were expanded gradually through the 1980′s as the British¶ government continued to wage its war against the Irish Republican Army.¶ Far from wiping these laws from the books when the IRA disarmed, many of¶ these laws were simply reinforced by the 2001 Anti-Terrorism, Crime and¶ Security Act and the 2005 Prevention of Terrorism Act.¶ **The problem with fighting a war on terror is that it’s in many ways a war on**¶ **ideas.** The IRA may have disbanded, but that didn’t stop terror from taking a¶ new shape in the form of Al-Qaeda. Britain’s struggle against Irish dissidents¶ may have been a good excuse for earlier anti-terror legislation, but Islamic¶ radicalism is just as potent a threat.¶ You Can’t Wage a War on an Idea¶ **In the United States the Cold War had barely ended before the threat of**¶ **terrorism replaced it and, in some ways, became an even more urgent reason**¶ **to expand government power at the expense of privacy and civil liberties**.¶ Unlike the Cold War, Americans have actually died in the War on Terror.¶ Also unlike the Cold War, **the enemy we face is not embodied in another**¶ **country or people**, but rather in a form.¶ **Terrorism is a tactic, not a state. It is used to create overreaction in its**¶ **targets**. **The initial reaction by the US government to the 9/11 attacks was**¶ **understandable but wrong-headed**. Over a decade after that national tragedy,¶ **the government is still overreacting**. **Each time we allow our fear to**¶ **undermine our freedom we concede to the very terrorists we hope to defeat**.¶ “**The legislation could** also **give future presidents the authority to throw**¶ **American citizens into prison for life without charges or a trial**,” **said Sen**.¶ Bernie **Sanders** in a statement. “**This bill also contains misguided provisions**¶ **that in the name of fighting terrorism essentially authorize the indefinite**¶ **imprisonment of American citizens without charges. While we must**¶ **aggressively pursue international terrorists and all of those who would do us**¶ **harm, we must do it in a way that protects the Constitution and the civil**¶ **liberties which make us proud to be Americans**.”

**2012 NDAA prevents Guantanamo Bay closure**

**Webster 12** (Stephen C. Webster, writing for Raw Story, 3 Jan 2012, “Constitutional attorney: Guantanamo ‘nearly impossible to close’ thanks to NDAA” <http://www.rawstory.com/rs/2012/01/03/constitutional-attorney-guantanamo-nearly-impossible-to-close-thanks-to-ndaa/>) sbb

**The U.S. military prison at Guantanamo Bay, Cuba will not be closing any time soon thanks to** President Barack Obama’s approval of the National Defense Authorization Act (**NDAA**), a constitutional attorney who’s represented terrorism suspects told Raw Story this week in an exclusive interview.¶ **Even though President Barack Obama made closing Guantanamo one of his core campaign promises in the lead-up to the presidential election in 2008, that promise now appears to be “nearly impossible” to fulfill thanks to provisions in the new laws, Baher Azmy, legal director of the Center for Constitutional Rights, explained**.¶ As an attorney, Azmy represented Murat Kurnaz, a German who was detained by Pakistani authorities and sold to the U.S. for a bounty. Kurnaz, who even the Federal Bureau of Investigation (FBI) thought was innocent, ended up in Guantanamo at age 19 as a suspected terrorist, and he stayed there for five years without ever facing a criminal charge. **Azmy also wrote briefings for the Supreme Court in Boumediene v. Bush, a case which challenged the right of the U.S. military to exclusively detain terrorism suspects**.¶ “**It has no real geographical limitation, it has no temporal limitation,” he said, summarizing key provisions in the NDAA. “It basically puts into law, into permanent law, the ability to indefinitely detain, outside of a constitutional justice system, individuals the president picks up anywhere in the world that the president thinks might have some connection to terrorism. The United States Congress, with the support of the president, has now put into law the possibility of indefinite detention, where the entire world, including the United States, is a battlefield**.”¶ But more than just giving the presidency more power to imprison terror suspects, the NDAA also strikes at Obama’s promise to close Guantanamo by limiting the executive’s authority to transfer prisoners.¶ **“[There are] really dangerous provisions here that would make it nearly impossible to close Guantanamo,” Azmy explained. “Congress has forbidden from transfering or releasing any detainees from Guantanamo to their home countries or third countries willing to take them as refugees unless the Defense Department can meet this exceedingly onerous certification requirement**. Basically, before anyone can be released, the Defense Department has to certify that the individual will not engage in any hostile acts when they are returned — something that the Defense Department cannot certify, which is why the FBI and [Defense Secretary] Leon Panetta vigorously opposed these provisions.¶ “The effect of that will make it virtually impossible to move people out of Guantanamo. Congress is basically shutting all of the detainees in.”¶ Azmy added that while Obama did add a signing statement which promises not to indefinitely detain without charge any American citizen, nothing in the law would “prevent President Romney from doing precisely the opposite.”¶ “**This legislation puts into law, into a legal architecture, authority for the president to do things that no president has ever been authorized to do before. It’s a scary day for civil liberties if we depend on the graces of the executive not to use power the Congress has given them**.”

**2013 NDAA further restricts Obama’s ability to move Guantanamo Bay prisoners.**

**ACLU 13** (American Civil Liberties Union, 3 Jan 2013, “Obama Jeopardizes Ability to Close Guantanamo While Raising Discrimination Concerns in the Military” <http://www.aclu.org/national-security/updated-ndaa-prevents-closing-guantanamo-could-lead-claims-right-discriminate>) sbb

WASHINGTON – **President Obama has signed the National Defense Authorization Act, which jeopardizes his ability to meet his promise to close the military prison at Guantanamo Bay during his presidency**. The law also contains a troubling provision compelling the military to accommodate the conscience, moral principles, or religious beliefs of all members of the armed forces without accounting for the effect an accommodation would have.¶ **The NDAA restricts Obama’s ability to transfer detainees for repatriation or resettlement in foreign countries or to prosecute them in federal criminal court**. Originally set to expire on March 27, **the transfer restrictions have been extended through Sept. 30**. As recently as October, Obama reiterated his commitment to close Guantanamo. Currently, 166 prisoners remain at the prison camp.¶ "President Obama has utterly failed the first test of his second term, even before inauguration day. **His signature means indefinite detention without charge or trial, as well as the illegal military commissions, will be extended**,” said Anthony Romero, executive director of the American Civil Liberties Union. "He also has jeopardized his ability to close Guantanamo during his presidency. Scores of men who have already been held for nearly 11 years without being charged with a crime--including more than 80 who have been cleared for transfer--may very well be imprisoned unfairly for yet another year. **The president should use whatever discretion he has in the law to order many of the detainees transferred home, and finally step up next year to close Guantanamo and bring a definite end to indefinite detention**."

**Obama has been trying unsuccessfully to shut Guantanamo Bay down for years.**

**Klaidman 13** (Daniel Klaidman, writing for Newsweek, 15 May 2013, “How Gitmo imprisoned Obama” <http://www.thedailybeast.com/newsweek/2013/05/15/how-gitmo-imprisoned-obama.html>) sbb

**THROUGHOUT HIS presidency, pleas for action on Guantánamo from civil libertarians, friends, and top advisers have reportedly tugged at Obama’s conscience**. But **politics and a weary fatalism subsumed action nearly every time**. **One recent plea**, two sources told Newsweek, **came from Hillary Clinton**, **who**, just before she left office in January 2013, **sent a two-page confidential memo to Obama about Guantánamo**. Clinton had, during her years in the administration, occasionally jumped into the fray to push her colleagues to do more on the issue. One of those occasions was at a White House meeting of Obama’s national-security principals in August 2010. “We are throwing the president’s commitment to close Guantánamo into the trash bin,” she chastised White House aides, according to three participants in the meeting. “We are doing him a disservice by not working harder on this.” But at the end of the day, Clinton had little leverage to get the White House to act. Now, **in one of her last moves as secretary of State, she was making a final effort to prod her boss to do more**. Her memo was replete with practical suggestions for moving ahead on Gitmo. Chief among them: **Obama needed to appoint a high-level official to be in charge of the effort, someone who had clout and proximity to the Oval Office**. Further, **Clinton argued that Obama could start transferring the 86 detainees who’d already been cleared for release**. (Congress has imposed onerous restrictions on the administration’s ability to transfer Gitmo detainees—including a stipulation that the secretary of Defense certify that detainees sent to other countries would not engage in acts of terrorism. In her memo, Clinton pointed out that the administration could use “national-security waivers” to circumvent the restriction.) The Clinton missive perturbed White House aides, who viewed it as an attempt to put them on the spot, according to a senior administration official. It’s unclear how Obama himself reacted to the memo; there’s no evidence that it spurred him to action. (The White House declined to comment for this story.) But **whether or not the memo played a role in changing the president’s thinking, the mere fact that Clinton felt the need to write it was noteworthy, because it suggested the degree to which Guantánamo, four years into the Obama presidency, remained an irritant for her—and for many other high-level administration officials** as well. The road to that point had been long, winding, and largely counterproductive. **Obama’s approach to Gitmo had begun idealistically: on his second day in office, in January 2009, he signed an executive order directing the facility to be closed in a year**. A month later, at his first State of the Union address, he spoke stirringly on the issue. “There is no force in the world more powerful than America,” Obama said. “That is why I have ordered the closing of the detention facility at Guantánamo Bay, and will seek swift and certain justice for captured terrorists—because living our values doesn’t make us weaker, it makes us safe and it makes us stronger.” **But one of his very first tactical moves on Guantánamo backfired spectacularly. Obama’s plan to bring to the United States a handful of detainees—Chinese Uighurs who were cleared by the courts—caused a political furor. Obama pulled the plug on the plan, and Congress soon began passing measures to restrict transfers out of Gitmo**. For Obama’s political advisers, **the episode demonstrated that the toxic politics of terrorism could overwhelm the administration’s domestic agenda**; for civil libertarians, it was an ominous sign that Obama lacked the political will to aggressively engage Congress on one of their core concerns. Even some of Obama’s top national-security aides were frustrated with the White House’s timid approach toward Congress. John Brennan—then Obama’s counterterrorism czar, now his CIA chief—believed the administration needed to show more backbone in its dealings with Congress, according to a source who spoke with him at the time. Brennan’s outrage was fueled by the knowledge that many detainees, who were still at Guantánamo after years of detention, had no record of terrorism**. A few weeks after the Uighur debacle, Obama made his first attempt to save his faltering Guantánamo policy: in a sweeping address at the National Archives, he laid out a detailed plan for closing the prison. But in the end, however eloquent, it was only a speech. It did not, in any measurable way, push the policy forward.** **Things only got worse from there.** On Christmas Day 2009, the so-called underwear bomber attempted to bring down a plane over Detroit—a plot that was directed by al Qaeda’s Yemen affiliate. The frightening near miss took a powerful psychic toll on the White House, which was still dogged by the perception that Democrats were weak on national security. Obama became convinced that he could not send any of the nearly 100 Yemeni detainees at Gitmo back to their home country, for fear they would link up with extremists and begin plotting attacks against America. Suddenly, the fate of the Yemenis was another giant obstacle to closing the prison. Then came the unraveling of Attorney General Eric Holder’s plans to try some Gitmo detainees, including 9/11 mastermind Khalid Sheikh Mohammed, in New York. Obama had initially backed Holder’s decision. But when it blew up in Congress, he seemed to equivocate. His own chief of staff, Rahm Emanuel, actually worked behind the scenes with Republican senators to undermine Holder’s initiative, according to multiple sources with knowledge of the episode. Once the plan cratered, **lawmakers smelled blood. They began passing ever more restrictive legislation tying the administration’s hands on Guantánamo.** **For much of the past few years, without any signal that Obama was going to fight on Gitmo, the policy drifted**. Daniel Fried, the veteran State Department official in charge of resettling detainees, was transferred to a different position. Even the steps Obama took to move things forward were of a highly limited nature. One of those steps came in March 2011, when Obama issued an executive order designed to solve a thorny problem. Forty-eight of the detainees could not be prosecuted, either for lack of evidence or because they had been tortured—yet they were nonetheless considered too dangerous to release. This meant they had to be held in indefinite detention, a prospect that troubled Obama. His compromise, issued via executive order, was to set up Periodic Review Boards—administrative bodies that would allow such prisoners to challenge their incarceration, including by presenting new evidence.

**Recent movement to close Gitmo**

**Sacks 13** (Sam Sacks, a political commentator and journalist, the last five years spent covering politics in Washington, DC, writing for RT.com, 23 May 2013, “NDAA debate: US programming the war machine” http://rt.com/op-edge/ndaa-programming-war-machine-674/) sbb

**With the current hunger strike at Guantanamo now well beyond 100 days, there’s been renewed attention on the facility on both ends of Pennsylvania Avenue**.¶ **At the end of April**, President **Obama once again promised to close the facility**. According to White House Press Secretary Jay Carney, **the President will put forward his new plan to close Gitmo in Thursday’s speech**.¶ In last year’s NDAA, Congress put up a series of restrictions on transferring prisoners out of Gitmo. Those will all be addressed again in the coming weeks and months. And **there’s recently been a new push in Congress to close Gitmo**.¶ Sen. Carl Levin (D-MI) wrote a letter to the White House urging the President to use a “national security waiver” to transfer the 86 Gitmo prisoners who’ve been cleared for release or transfer. Also, Sen. Dianne Feinstein wrote to the White House asking them to “¶ revisit the decision to halt [Guantanamo] transfers to Yemen .” And Rep. Jim Moran (D-VA) held a rare hearing on Capitol Hill about Gitmo, alleging that torture has taken place at the facility and that it needs to be closed.¶ Republicans, including Sen. John McCain (R-AZ) and Rep. Buck McKeon (R-CA), have suggested they may be willing to revisit the issue of closing Guantanamo, but have bemoaned the White House’s lack of a clear plan on how to close it. And **considering the Pentagon has recently asked for $450 million to renovate Gitmo, there are legitimate questions about just how serious the White House is when it comes to closing the facility**.¶ The coming NDAA debate will also address issues related to a missile defense shield on the East coast, changes to how the military responds to sexual assault and recommendations on how to better secure diplomatic missions around the world.

### Solvency

#### **Key solvency ev**

Frakt 12 [David, cum laude Harvard law School, Visiting Professor of law at University of Pittsburgh, "Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo"

But Congress can and should be blamed for hypocrisy. Although legislators on the right expressly claimed that the President’s adoption of two of the central pillars of the Bush Administration’s detention policies, (military commissions and indefinite detention), vindicated the Bush-era approach to detainee issues, they have prevented the President from following another important Bush Administration policy, namely, the transfer or release of innocent and low risk detainees. President Bush transferred, on average, 75 detainees per year out of Guantanamo over the 7 years from January 2002 to January 2009. Due in large part to Congressional restrictions, President Obama has yet to transfer 75 detainees in more than 3 years.

In the end, even though there is much to criticize about the President’s handling of Guantanamo, there is a critical distinction when it comes to moral blameworthiness between the President and the Congress -- the President is trying to do the right thing, however haltingly, and Congress is not. The President has made good faith efforts to release and resettle as many detainees as he can, consistent with national security. He recognizes that the Guantanamo detainees, whatever the basis for their detention, are real human beings who have experienced great hardship and suffering. The same cannot be said of the Republican-dominated Congress, which along with some Democrats who are fearful of being labeled as soft on terrorists regard detainees as tools to be exploited for political gain. The blanket condemnation of all Guantanamo detainees and the exaggerated statements about the threats they pose to domestic security even while they are incarcerated demonstrate the unfortunate political truth that it is always easy to demonize those who have no constituency to defend them and there is no political price to be paid for holding them up to scorn.

While many Congress members of both parties pay lip service to national security and express fear of recidivism, these concerns do not justify holding scores of men who have been determined to pose little or no risk to the United States in perpetual detention, however improved the current conditions at Guantanamo may be. It should not be forgotten that the primary reason for closing Guantanamo in the first place was national security. Guantanamo symbolized all of the excesses of the Bush Administration’s arbitrary and cruel detention and interrogation policies, and its continued operation provided a potent recruiting tool to our enemies abroad. By forcing the President to keep Guantanamo open, Congress has provided our enemies with priceless propaganda to help them recruit the next generation of jihadists. With tens of thousands of troops still deployed to a hostile environment in Afghanistan and continued active recruitment of potential terrorists among disaffected youths throughout the world, maintenance of even a more humane Guantanamo facility is deeply troubling and potentially far more dangerous to our troops and Americans in general than the potential harm in releasing a few dozen detainees to a score of countries, mostly far from the battlefield. The argument that Congress is protecting Americans from detainees who might return to the fight doesn’t bear scrutiny. Even if we accept the highest estimate of recidivism, only 1 in 4 released detainees have returned to jihadist or insurgent activities over the course of several years after their release; that would mean approximately 20-22 of those detainees cleared for release might also be expected to engage or re-engage in such activities in the coming years. Given the thousands of fighters that we are facing, this is simply a negligible added risk. But the potential benefits of resettling or sending home the remaining detainees cleared for release is enormous. If the majority of these men are, as the Guantanamo Review Task Force suggested, low level Taliban foot soldiers, what better way to jump-start the effort to engage in peace talks with the Taliban than with a large-scale prisoner transfer?

The scores of detainees awaiting transfer are, in essence, political prisoners, held not because of their beliefs, but as pawns in a political chess match between the President and Congress. The President would like to send them home and Congress won’t let him. In my book, that makes them Prisoners of Congress.

#### **Congress has constitutional authority to limit Presidents Indefinite Detention authority**

Hains 11 [William JD from BYU, law clerk for the Honorable Frederic Voros Jr., BYU Law Review, "Challenging the Executive: The Constitutionality of Congressional Regulation of the President's wartime detention policies" lexis]

The authority to detain enemies in a time of war has long been viewed as an important war power of the government. n118 As a war power, presidential detention authority would derive from the Commander-in-Chief Clause if its source is constitutional. History suggests that Congress also has concurrent detention authority. During the 1798-1800 Quasi-War with France, for example, Congress passed several laws authorizing detention of French captives, setting conditions on detention, and authorizing the [\*2306] exchange or release of prisoners. n119 The regulations passed in the Quasi-War demonstrate the understanding of Congress that it had authority to regulate detention, but this history does not clearly reveal the source of that authority. n120 Possible sources of congressional detention authority include the Captures Clause, the power of the purse, and the Law of Nations Clause. n121

#### **Congress is essential to limit the President’s detention authority**

Horowitz 13 [Colby, JD candidate Fordham Law School, captain US army, "Creating a more meaningful detention statute: Lessons learned from Hedges v. Obama" Fordham Law Review, april]

Congressional legislation is essential to define and limit the executive’s

detention authority, but section 1021 of the NDAA has failed to achieve this

purpose. This Note examines ambiguities and uncertainties in current

detention law and recommends ways to create a more meaningful detention

statute. Part I focuses on the AUMF, the four major post-9/11 Supreme

Court decisions regarding executive detention, and the 2012 NDAA. Part I

also establishes a framework for evaluating the separation of powers

between Congress and the President on national security issues using the

Supreme Court’s famous decision in Youngstown Sheet & Tube Co. v.

Sawyer.7 Part II examines how the D.C. District and Circuit Courts

struggled to define important detention terms during the flood of habeas

corpus litigation coming from Guantanamo Bay after 2008. These terms

were eventually codified in section 1021 of the NDAA. Part III uses Judge

Forrest’s decision in Hedges v. Obama as a vehicle for exploring the issues

with section 1021. Finally, Part IV recommends ways to define and clarify

key terms and provisions in section 1021. The goal of this part is to create a

more meaningful detention statute that provides clear congressional

guidance on the scope of detention authority to both the executive and the

courts.

#### **Congress is necessary to check the abuses of Presidential authority with indefinite detention**

Horowitz 13 [Colby, JD candidate Fordham Law School, captain US army, "Creating a more meaningful detention statute: Lessons learned from Hedges v. Obama" Fordham Law Review, april]

Congress has an important role in determining the scope of the

President’s war powers. This is particularly true in the area of executive

indefinite detention, where there is a high risk for abuse if left unchecked.

In section 1021 of the NDAA, Congress failed to define or limit the

President’s detention authority. Section 1021 repeats the executive’s

interpretation of detention authority verbatim, and it fails to clarify any

important terms. A new congressional detention statute is necessary to

provide clear and meaningful guidance to both the President and the courts.

#### **Congress has the authority to limit the President’s power over detainees**

Frakt 12 [David, cum laude Harvard law School, Visiting Professor of law at University of Pittsburgh, "Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo"

Barron and Lederman make it clear that Congress had extensive power to regulate the detention of wartime prisoners, and provided a Constitutional road map to do so through the use of appropriations bills. Although they did not squarely address the right of Congress to limit the scope of the President’s discretion to release detainees, it is implicit in their discussion that Congress does have this power. Applying the Barron/Lederman and Lobel “concurrent constitutional authority over wartime detention” approach to the legislative restrictions imposed by Congress on the transfer and release of detainees in the 2011 NDAA, one commentator concluded that all of the restrictions are constitutional. It is a striking irony that the strategy mapped out by Barron and Lederman to encourage Congress to curb the war policies of the prior President have been expertly utilized to hamstring the policies of the President whom they advised.

#### **The NDAA 2011 provisions are constitutional based on concurrent authority**

Hains 11 [William JD from BYU, law clerk for the Honorable Frederic Voros Jr., BYU Law Review, "Challenging the Executive: The Constitutionality of Congressional Regulation of the President's wartime detention policies" lexis]

The provisions of the 2011 National Defense Authorization Act in question are not constrained by any constitutionally mandated activities. Therefore, the following Part will first examine potential express restrictions on the authority of Congress, ultimately concluding that the Act does not violate any express restrictions. This Part will then consider the scope of presidential and congressional detention authority. In their responses to Congress, President Obama and Attorney General Holder suggest that the detention restrictions challenge three fundamental presidential powers: prosecutorial discretion, war powers, and foreign affairs powers. n88 This Part will therefore review the scope of any constitutional authority for both the President and Congress in each of these categories. This discussion reveals that the political branches have concurrent authority over wartime detention; therefore, the restrictions in the 2011 National Defense Authorization Act are constitutional.

### Second, Human Rights Credibility

#### First, Human rights credibility---now is key to set the global standard for human rights protection

Suzanne Nossel 12 is executive director of Amnesty International USA, "Time for a Reset on Human Rights," 11-7-12, www.foreignpolicy.com/articles/2012/11/07/time\_for\_a\_reset\_on\_human\_rights?page=0,1, DOA: 7-22-13, Y2K

In 2008, Barack Obama's election thrilled many human rights activists. For eight years under George W. Bush, the U.S. government had used torture, held hundreds in long-term detention without trial, and committed abuses at wartime prisons such as Iraq's Abu Ghraib. Rights advocates hoped -- and, based on many of Obama's election-season remarks, reasonably expected -- that the unlawful renditions, secret prisons, and unfair trials would give way to a new American commitment the Constitution and international law. Although Obama faced truculent political opposition in his first term, his weak record on human rights cannot be explained away by economic exigencies or even congressional defiance. Obama now openly embraces the concept of a global "war on terror" as grounds to override international human rights norms and reinterpret the Constitution. Osama Bin Laden's killing was not only the chief talking point of his campaign but a synecdoche for his approach to the terrorist threat, one in which the administration writes its own rules. Although preventing attacks on U.S. soil represents an important human rights victory, this should not overshadow the worrisome direction of U.S. human rights policy and its long-term consequences. If the president's legacy is to include reclaiming U.S. human rights credibility, he needs to face up to his troubling record, and fix it. The Obama administration has led in some areas of human rights policy; examples include advancing gay and lesbian rights, bolstering U.N. human rights mechanisms, and promoting Internet freedom. But where human rights norms are pitted against counterterrorism tactics, it has fallen down. Blocked by Congress, Obama broke his first-term promise to close Guantánamo. Four years later, that failure barely seems to register as a disappointment; 167 men languish in the prison, including 55 who are cleared for release but have not been transferred. Recent weeks have revealed details of an Orwellian "disposition matrix" -- a kill list of top terrorist targets that keeps getting longer. The administration claims the authority to kill those named, anytime and anywhere, based on secret information and unreviewable judgments. The administration has declared any man killed by a drone to be an enemy terrorist, and defends such killings regardless of resulting civilian casualties. With the U.S. withdrawing from Afghanistan, these extraordinary powers are detached from any major battlefield or conventional war. The administration is now backed into claiming that a war exists because it has convinced itself it cannot function without a broad license to kill. Short of al Qaeda suing for peace, this war may never end. The administration's reshaping of the concept of war risks undoing over 100 years of evolution of the laws of war, and the protections those laws have delivered. The next four years will define whether this rewriting of the rules becomes a bipartisan "new normal" in the United States, and implicit permission for the rest of the world to sidestep human rights. Absent swift progress to close Guantánamo, the men now held will likely die there of old age decades from now, since no future president is likely to renew Obama's ill-fated pledge to close the facility. And even if the Guantánamo detainees are transferred to a U.S. prison, bringing indefinite detention onshore, it is hard to fathom the practice will not be used again to deal with future threats. The bipartisan affirmation of drone use will make those weapons routine for the United States and any other government with a kill list of its own.

#### **Continued detainees held at Guantanamo undermines the U.S.’s Human Rights Credibility**

Daskal 7 [Jennifer, senior counterterrorism counsel at the Human Rights Watch, "How to Close Gutantanamo World Policy Journal Fall 24/3]

The United States has long prided itself on its efforts to promote freedom, democracy, and human rights around the world. Yet it now finds these efforts sidetracked by easy-and often true-attacks on the United States' own integrity. "Take Guantanamo for example," exclaimed Robert Mugabe, Zimbabwe's autocratic President, in a statement before the 62nd session of the U.N. General Assembly. "Can the international community accept being lectured by this man on the provisions of the Universal Declaration of Human Rights? Definitely not!"17 Mugabe is not alone. A long list of leaders-including Russian president Vladimir Putin, Bashar Assad of Syria, and Iran's Mahmoud Ahmadinejad-have pointed to Guantanamo to deflect attention from human rights abuses in their own countries.18

U.S. diplomats in several countries have told Human Rights Watch of being unable to challenge state-authorized round-ups and detentions without trial because of Guantanamo. When Human Rights Watch raised concern about U.S. silence over arbitrary detentions in Malaysia, a senior State Department official replied, "With what we're doing in Guantanamo, we're on thin ice to push."19 Allies that have long looked to the United States as a standard-bearer on human rights now find themselves instead issuing reports and public statements decrying the indefinite detention without charge of hundreds of men in Guantanamo.

The finger-pointing is justified. The continued detention of hundreds of detainees without charge at Guantanamo undermines U.S. moral authority, is in disregard of international human rights and humanitarian law, and is bad counterterrorism policy. It hurts-not helps-the fight against terror.

#### Closing Gitmo is key to Obama Human Rights Credibility

BBC News 2013 (Qatari editorial Obama, Congresss to work plan to close Guantanamo, BBC Monitoring Middle East, 2013-05-06, Text of report in English by Qatari newspaper Gulf Times website on 3 May[Editorial: "Uproar growing as Guantanamo decision hangs fire"]

**A renewed demand to close Guantanamo prison welled up** this week **as the US deployed extra medical staff to help with the force feedings of detainees who are on a hunger strike.**

**More than half of the 166 prisoners remaining in the prison have joined the three-month-old hunger strike**, according to media reports.

**The hunger strike has re-focused attention on the controversial prison, which President Barrack Obama pledged to close early in his administration. That effort failed, however, when members of [US] Congress resisted the transfer of terror suspects to the US.**

At a news conference on Tuesday [30 April], Obama made his first remarks on the prison in some time when he renewed his commitment to close it.

**"I continue to believe that we've got to close Guantanamo," he said. "I think it is critical for us to understand that Guantanamo is not necessary to keep America safe."**

Just one day later, calls to close the prison went out from a broad array of groups -from special human rights rapporteurs at the UN and Inter-American Commission on Human Rights to Human Rights Watch, the American Civil Liberties Union, the Centre for Justice and International Law (CEJIL) and the Centre for Constitutional Rights (CCR).

Suspected Al-Qa'idah and other terrorism-related detainees have been held at the prison since 2002 without being charged or facing trial.

**Twenty-one of them are currently being tube-fed, and five are in hospital under observation for non-life threatening conditions. The US Navy recently sent an additional 40 medical personnel to keep prisoners alive,** according to media reports.

US military leaders have empathized with the feelings of hopelessness and desperation among the prisoners. Gen John Kelly, commander of the US Southern Command and the officer responsible for the prison, said in March that the hunger strikers were deeply frustrated over Obama's silence on the fate of the controversial prison.

"They had ... great optimism that Guantanamo would be closed," Kelly told a congressional panel. "They were devastated when the president ... backed off -at least their perception -of closing the facility."

**At the White House** on Wednesday [1 May], **spokesman Jay Carney admitted that keeping Guantanamo open was not "in the interests of our national security," adding that it is "a recruitment tool for extremists".**

**It is true that Congress has made closing the prison difficult**. **But Obama is the one who put his legacy on the line by promising to close it within days of assuming office. Both will now have to work out a plan to close the chapter.**

# 2AC/1AR blocks

## A/T Executive Order CP

### 2AC

#### The CP is an Agent counterplan- They moot the 1ac with no 2ac recourse due to lack of comparative solvency evidence between congress and the executive. This is a voter for fairness and competitive equity

#### No solvency: Congressional authorization is key and CP can’t solve flex because it isn’t binding

Myers’ 9

[Zach Myers, JD Candidate, 2014, Georgetown University Law Center.

<http://zcmyers.blogspot.com/2009/01/yoo-vs-fisher-on-presidential-war.html> ETB]

Yoo is correct in asserting that institutional flexibility is necessary in dealing with rising globalization. Ironically, he looks for this flexibility in anachronistic models of international law – i.e. John Locke’s international state of nature. Flexibility is necessary so far as it empowers law makers and the executive to enforce international law, which is the essential element in stabilizing the rising global order. Furthermore, this seemingly extra-constitutional law must be binding to be effective. Fisher is correct, insofar, as he agrees with Jackson’s opinion that “The Presidents power is at its lowest ebb’ when he takes measures incompatible with the expressed or implied will of Congress (p. 265).” Essentially, Curtiss-Wright correctly established that “[t]he president might act in internal affairs without congressional authority, but not that [s]he might act contrary to an act of Congress.” Since both Fisher and Yoo agree that treaties are at least in part an act of legislation, then the basic understanding of the relationship between legislative and executive roles should control. Yoo resoundingly fails to create saliency with his constitutional foreign policy framework. Fisher does a slightly better job by requiring the executive to execute Congressional foreign policy directives.  
Yoo’s textual analysis, however, trumps Fisher’s. Fisher is forced to awkwardly adopt the extra-constitutional Presidential power to “repel sudden attacks” in order to justify his framework. Without this extra-textual assertion, Fisher’s framework would render the President completely helpless in the face of an actual emergency (Yoo p. 159). This would be exactly the opposite of the Framer’s intentions. When they wrote the constitution, they set up a government specifically in order to deal with attacks – such as Shay’s rebellion – which threatened to throw the nation into disarray.  
To a large degree the opinions in Hamdi vs. Rumsfeld support Fisher’s view of the proper structuring of US foreign policy. The plurality says that “detention of individuals falling into the category we’re considering is so fundamental and accepted… as to be an exercise of the ‘necessary and appropriate force’ authorized by the AUMF (p. 518)” The plurality shows some deference towards the implied powers of the executive branch – point Yoo – but by not directly addressing the question of Presidential power in the absence of Congressional authority, the plurality tacitly accepts Fisher’s understanding of Presidential war power only in cases of Congressional authorization. Secondly, all the justices, with the exception of Thomas, agree that the President does need Congressional authorization to indefinitely detain citizens. The inquiry naturally devolves, then, to whether the AUMF was properly authorized the suspension of habeas corpus rights. In response, even the somewhat conciliatory plurality concludes that the implied power of the executive does not provide sufficient legal ground for “perpetual detention” of Hamdi (p. 521). “We have long since made it clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens (p. 537).” This undermines somewhat Yoo’s assertion that the executive can use force without the authorization of Congress.

#### Cross apply the Horowitz and Hammond evidence. Both arguments conclude that the reason g’tmo continues to be in existence is because of Congressional laws. The CP doesn’t remove these laws, thus its unconstitutional. That’s 100 percent solvency deficit.

#### Perm do both the plan and the counterplan: Permutation is the only thing that can give an executive order the power of law and prevent roll back

Leanna Anderson (clerk for H.R. Lloyd, U.S. Magistrate) Hastings Constitutional Law Quarterly 2002

To be challengeable, an executive order must have the force and effect of law. Under the United States Code, federal court jurisdiction is limited to "federal questions." "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." For federal courts to have jurisdiction over a civil action challenging an executive order, the order must have the "force and effect of law." There are two different branches of analysis under this requirement. First, if the order is issued in accordance with Congressional statutory mandate or delegation, the order has the force and effect of law. However, if the order is not based on an express Congressional grant of authority, federal courts may either look for an implied Congressional basis for the order or find that no statutory basis exists so that the order does not have the force and effect of law.

#### XO’s cause tyranny

Sterling 2k

[John A. Sterling is the Executive Director of Law and Liberty, a non-profit foundation for education in the public interest with its main office in Chesapeake, Virginia. John is an adjunct professor at Tidewater Community College in Chesapeake, VA. 31 U. West. L.A. L. Rev. 99. ETB]

Executive Orders are not inherently evil and, subject to the same checks and balances to which the entire federal apparatus is subject, may be used to effectively administer public policy through the administrative agency. History and prudence agree that, absent such controls, administrative rule-making promulgated by executive order is tyranny. It is no less tyranny because some people have not yet felt its sting. The Republic was anchored in the fundamental principles of the Constitution whereby the democratic political process maintained effective control of the rudder. Once the anchor is lost, the great ship of state is bound for shipwreck on the reefs of self-destruction. Part Two will look at the  [\*117]  Executive Orders of Presidents Kennedy through Clinton to see how far we have drifted and ponder whether, if it be possible, we may set a truer course.

#### The impact is value to life – moral side constraint

Petro, Wake Forest Professor in Toledo Law Review, 1974

(Sylvester, Spring, page 480)

However, one may still insist, echoing Ernest Hemingway - "I believe in only one thing: liberty." And it is always well to bear in mind David Hume's observation: "It is seldom that liberty of any kind is lost all at once." Thus, it is unacceptable to say that the invasion of one aspect of freedom is of no import because there have been invasions of so many other aspects. That road leads to chaos, tyranny, despotism, and the end of all human aspiration. Ask Solzhenitsyn. Ask Milovan Dijas. In sum, if one believed in freedom as a supreme value and the proper ordering principle for any society aiming to maximize spiritual and material welfare, then every invasion of freedom must be emphatically identified and resisted with undying spirit.

#### CP will get rolled back by future presidents

Friedersdorf 13

(CONOR FRIEDERSDORF, staff writer, “Does Obama Really Believe He Can Limit the Next President's Power?” MAY 28 2013, <http://www.theatlantic.com/politics/archive/2013/05/does-obama-really-believe-he-can-limit-the-next-presidents-power/276279/>, KB)

Obama doesn't seem to realize that his legacy won't be shaped by any perspicacious limits he places on the executive branch, if he ever gets around to placing any on it. The next president can just undo those "self-imposed" limits with the same wave of a hand that Obama uses to create them. His influence in the realm of executive power will be to expand it. By 2016 we'll be four terms deep in major policy decisions being driven by secret memos from the Office of Legal Counsel. The White House will have a kill list, and if the next president wants to add names to it using standards twice as lax as Obama's, he or she can do it, in secret, per his precedent.

#### Double bind - either the CP can’t solve because there is no funding or it causes Congress to act which magnifies the link to politics

Moe and Howell 99

Terry M. Moe (Professor of Political Science at Stanford University) and William G. Howell (Graduate Student of Political Science at Stanford University) December 1999 “Unilateral Action and Presidential Power: A Theory,” Presidential Studies Quarterly

There is one crucial consideration, however, that we have yet to discuss and that gives Congress a trump card of far-reaching consequence. This is the fact that Congress has the constitutional power to appropriate money--which means that, to the extent that unilateral actions by presidents require congressional funding, presidents are dependent on getting Congress to pass new legislation that at least implicitly (via appropriations) supports what they are doing. When appropriations are involved, in other words, presidents cannot succeed by simply preventing Congress from acting. They can only succeed if they can get Congress to act--which, of course, is much more difficult and gives legislators far greater opportunities to shape or block what presidents want to do.

#### Links to politics – immense opposition to bypassing debate

Hallowell 13

(Billy Hallowell, writer for The Blaze, B.A. in journalism and broadcasting from the College of Mount Saint Vincent in Riverdale, New York and an M.S. in social research from Hunter College in Manhattan, “HERE’S HOW OBAMA IS USING EXECUTIVE POWER TO BYPASS LEGISLATIVE PROCESS” Feb. 11, 2013, <http://www.theblaze.com/stories/2013/02/11/heres-how-obamas-using-executive-power-to-bylass-legislative-process-plus-a-brief-history-of-executive-orders/>, KB)

“In an era of polarized parties and a fragmented Congress, the opportunities to legislate are few and far between,” Howell said. “So presidents have powerful incentive to go it alone. And they do.”¶ And the political opposition howls.¶ Sen. Marco Rubio, R-Fla., a possible contender for the Republican presidential nomination in 2016, said that on the gun-control front in particular, Obama is “abusing his power by imposing his policies via executive fiat instead of allowing them to be debated in Congress.”¶ The Republican reaction is to be expected, said John Woolley, co-director of the American Presidency Project at the University of California in Santa Barbara.¶ “For years there has been a growing concern about unchecked executive power,” Woolley said. “It tends to have a partisan content, with contemporary complaints coming from the incumbent president’s opponents.”

### 1AR

#### Extend agents counter plans bad. They are uniquely abusive on this resolution since it involves checking presidential authority. If the neg. can fiat the president to do it then we can never win. Don’t buy their arguments. There is no lit. base that the President can do the plan without Congress. Vote aff on fairness and competitive equity

#### Extend 2ac 2. The Myers 9 evidence concludes the CP isn’t binding, thus it doesn’t solve our case impacts. This means the aff is always a superior option to the CP

#### The 2ac 3 contends that the CP is unconstitutional because it doesn’t repeal repel 1021 of the NDAA. That means the President is violating the law this is a 100 percent solvency take out. Extend our Horowitz and Hammond from the 1AC that says Congressional action is necessary.

#### Extend the perm do both. This provides the best solvency. Their answers against the perm are generic and don’t apply to our Anderson evidence. The only way to ensure solvency is through the permutation. The perm also resolves the links to the DA since both the President and Congress are to blame.

#### Extend Our Tyranny term. The 2ac 5. XO’s result in unchecked power. This allows presidents to abuse entire populations, this destroys all value to live. This outweighs any small possible link they could have to their DA

#### Extend 2ac 6. The first thing the next president will do is to reverse the CP. That means the CP has zero solvency past 2016. The aff is always a better option

#### Extend 2ac 7 and 8. The CP will link more to politics than the Plan or the perm, because Congress will be upset that the president violated the law and side stepped them.

## A/T S.C. Counterplan

#### The federal Courts don’t have jurisdiction over Guantanamo – the President has the authority and power to address the issue.

Frommer 13

(Frederic, USA Today, 7.16.13, “US Judge Turns Down Bid to End Gitmo Force-Feeding”, <http://www.usatoday.com/story/news/world/2013/07/16/judge-rules-on-gitmo-force-feeding/2521535/>,

WASHINGTON (AP) — A federal judge Tuesday turned down a bid by three Guantanamo Bay detainees on a hunger strike to stop the government from force-feeding them. Judge Rosemary M. Collyer ruled that she doesn't have jurisdiction in the case, because Congress has removed Guantanamo detainees' treatment and conditions of confinement from the purview of federal courts. She said there was "nothing so shocking or inhumane in the treatment" that would raise a constitutional concern. Collyer, an appointee of President George W. Bush, wrote that even if she did have jurisdiction, she would deny the detainees' motion for an injunction. While the effort is framed as a motion to stop force-feeding, the prisoners' "real complaint is that the United States is not allowing them to commit suicide by starvation," she wrote. She said that the United States cannot allow a person in custody to die of self-inflicted starvation, and that numerous courts have recognized the government's duty to prevent suicide and to provide life-saving nutritional and medical care to people in custody. The three men, Shaker Aamer, Nabil Hadjarab and Ahmed Belbacha, have all been cleared for release but remain at Guantanamo. Jon Eisenberg, one of the attorneys for the detainees, said Collyer was wrong when she said the detainees are demanding a right to commit suicide. "She has misunderstood the purpose of the hunger strike. It's not to commit suicide, it's to protest indefinite detention," he said. As to her conclusion that there was nothing inhumane about force-feeding, Eisenberg said, "Human rights advocates, medical ethicists and religious leaders say otherwise." He said the lawyers were considering an appeal. Another judge, Gladys Kessler, turned down a similar case last week, also concluding that she lacked jurisdiction. But she called force-feeding a "painful, humiliating and degrading process." Kessler, who was appointed by President Bill Clinton, wrote that there is one person who does have the authority to address the issue — and then quoted a recent speech from President Barack Obama in which he criticized the force-feeding of the prisoners at Guantanamo as he said he would renew his efforts to close the prison. "The president of the United States, as commander in chief, has the authority — and power — to directly address the issue of force-feeding of the detainees at Guantanamo Bay," she wrote. Lawyers for prisoners say the most recent hunger strike began in February as a protest of conditions and their indefinite confinement at the U.S. base in Cuba.As of Tuesday, the military said, a little under half of the 166 detainees were participating in the hunger strike.

#### **Supreme court is unwilling to handle indefinite detention cases**

Horowitz 13 [Colby, JD candidate Fordham Law School, captain US army, "Creating a more meaningful detention statute: Lessons learned from Hedges v. Obama" Fordham Law Review, april]

This part examines how the D.C. District and Circuit courts struggled

with the legal boundaries of detention while evaluating the habeas corpus

petitions of detainees from 2008 to 2012. It focuses on how the D.C. courts

analyzed what would become the three criteria for detention in section

1021(b)(2) of the NDAA: (1) being “part of” Al Qaeda or the Taliban;

(2) “substantially support[ing]” Al Qaeda or the Taliban; and (3) being part

of “associated forces” of Al Qaeda or the Taliban.143

The Supreme Court has not decided the merits of a detention case since

Boumediene in 2008.144 Additionally, in 2011 the Supreme Court denied

certiorari to six different Guantanamo detainee cases appealed from the

D.C. Circuit.145 As a result of its continued abstention, the Supreme Court

has had little impact in shaping the substantive parameters of executive

detention.146

**Only Congress can be effective – court rulings fail**

**Hammond 12** (Kate Hammond, JD Candidate, USC, Fall 2012, “THE NATIONAL DEFENSE AUTHORIZATION ACT AND THE UNBOUND AUTHORITY TO DETAIN: A CALL TO CONGRESS” 22 S. Cal. Interdis. L.J. 193) sbb

III. **CONGRESS IS IN THE BEST POSITION TO CHECK THE EXECUTIVE'S DETENTION AUTHORITY**¶ As demonstrated in Part II, **without congressional boundaries the executive will have virtually unchecked detention**¶ **authority**. Looking forward, **one might speculate that either the executive or the courts will check the executive's**¶ **detention authority that has been placed within the NDAA. However, this is not the case**. **The executive has little**¶ **incentive to check the authority to detain. In fact, the executive has an incentive to over-detain. The courts have also**¶ **been unable to constrain the executive's authority**. Legal precedent involving the executive's detention authority¶ demonstrates that **the courts have supported a broad interpretation of the detention authority**. Similarly, if a court were¶ to utilize tools of statutory construction to interpret the NDAA in a new detainee case, **the court would inevitably**¶ **support a broad, deferential interpretation of the executive's detention authority**. **Congress**, on the other hand, could¶ constrain the executive's authority by passing laws and providing guidelines that will be able to ensure that the¶ executive's authority is constrained within appropriate boundaries.¶ [\*205]¶ A. The Executive's Incentive to Over-Detain¶ The executive branch has little incentive to restrain its authority to detain - **the executive has an incentive to over-detain**¶ **suspected terrorists**.¶ n91¶ **Terrorist attacks present the executive with an unpredictable and severe threat. Faced with such**¶ **a tremendous threat, the executive is likely to "err on the side of the detention."**¶ n92¶ If an individual is erroneously¶ detained and subsequently released, the executive's "error is invisible."¶ n93¶ However, if an individual is not detained or¶ erroneously released and proceeds to cause harm, "the error will be emblazoned across the front pages."¶ n94¶ **It is**¶ **politically more desirable for the executive to push the boundaries of the detention authority than to risk suffering the**¶ **"accusatory political backlash for having failed to take sufficient action."**¶ n95¶ The Bush Administration's detention polices provide a striking example of the executive's propensity to over-detain¶ in the face of a terrorist threat. In the first two years after the September 11 terrorist attacks, over 5000 individuals were¶ detained.¶ n96¶ To this day, some of these detained individuals remain missing.¶ n97

**Article III courts fail to solve -- empirics**

**Hammond 12** (Kate Hammond, JD Candidate, USC, Fall 2012, “THE NATIONAL DEFENSE AUTHORIZATION ACT AND THE UNBOUND AUTHORITY TO DETAIN: A CALL TO CONGRESS” 22 S. Cal. Interdis. L.J. 193) sbb

**In 2008, the Supreme Court held that Article III courts have jurisdiction over habeas corpus petitions from non-citizens**¶ **detained at Guantanamo Bay** in Cuba.¶ n61¶ Justice Kennedy concluded that habeas relief was necessary for detainees to¶ protect personal liberty and to maintain the separation of powers.¶ n62¶ Thus, **habeas relief served two very important**¶ **functions: it secured the fundamental American value of liberty and created a device for the courts to constrain the** **broad detention authority of the executive**.¶ n63¶ Courts would be able to use habeas corpus petitions to assure that the¶ executive's detention authority was complying with applicable laws.¶ n64¶ However, **despite Justice Kennedy's attempt to**¶ **constrain the executive's broad detention authority, the ability of habeas review to constrain the executive's detention**¶ **authority and to prevent erroneous detentions is questionable at best**.¶ n65¶ [\*202] **Empirical studies have questioned the effectiveness of habeas litigation to release those who have been**¶ **erroneously detained**.¶ n66¶ For example, **during the year immediately following the Supreme Court's 2008 ruling, one**¶ **would expect the number of released detainees to increase**. However, **there was no noticeable increase in detainee**¶ **releases**.¶ n67¶ Rather, **the number of detainees released remained similar to the amount released prior to habeas**¶ **availability**.¶ n68¶ **This suggests that habeas litigation did not contribute to the release of erroneously held detainees**.¶ n69¶ Rather, **those who were released through habeas litigation would most likely have been released eventually** by the¶ executive **without judicial interference**.¶ n70¶ In fact, the majority of detainee releases are executed without judicial order.¶ **During the year after the Supreme Court's decision in 2008, over 60 percent of releases were done without judicial**¶ **order**.¶ n71¶ This evidence suggests that **releases due to judicial orders from habeas corpus proceedings may just be**¶ **substitutes for executive releases**.¶ n72¶ Additionally, the procedures and evidentiary rules used by the courts during detainee habeas proceedings are highly¶ deferential to the government and the executive's decision to detain. During detainee habeas proceedings, the¶ government only has to prove that the detainee is being held lawfully by a preponderance of evidence.¶ n73¶ This¶ evidentiary standard is far less demanding than the "beyond a reasonable doubt" evidentiary standard employed in¶ criminal proceedings.¶ n74¶ The "preponderance of evidence" standard is also more attainable for the government because¶ the government is permitted to use hearsay evidence during proceedings.¶ n75¶ Additionally, a court may not evaluate¶ pieces of evidence independently. Rather, a court must evaluate all of the evidence collectively and must determine¶ whether the evidence, as a whole and in context, supports a [\*203] lawful detention.¶ n76¶ This allows the government to¶ compile numerous pieces of questionable evidence that when looked at individually do not support a lawful detention,¶ but when looked at as a whole support a reasonable inference that the detention is lawful.¶ n77¶ In addition, the¶ government must only prove that a detainee is being held lawfully at the moment of the habeas proceeding.¶ n78¶ The¶ government is not required to prove that the government had sufficient evidence to justify the detention at the moment¶ of capture.¶ n79¶ This means that the government is permitted to gather evidence after capture in order to prove that the¶ detention is lawful.¶ n80¶ Furthermore, even if a detainee is able to succeed at both the trial and appellate level, the release orders issued by¶ the trial courts do not command physical release.¶ n81¶ Rather, most of the orders "require the government to engage in¶ "all necessary and appropriate diplomatic steps to facilitate' release."¶ n82¶ This suggests that, even in cases where the¶ detainees are illegally detained, the courts are hesitant to question and restrict the executive's authority.¶ n83¶ Finally, it should be noted that **not all detainees are entitled to habeas corpus review in Article III courts**. **Detainees**¶ **held at Bagram Air Force Base in Afghanistan are not permitted to challenge their detention** in Article III courts.¶ n84¶ **Detainees held at Bagram are only entitled to "rudimentary hearings."**¶ n85¶ At these hearings, **three "field grade" military**¶ **officers** - not impartial decision makers - **determine if the detention of the detainee is lawful**.¶ n86¶ Also, while at the¶ hearings, **detainees are afforded virtually no procedural protections: they have no right to adequate representation, no**¶ **right to confront witnesses, and evidence used against the detainees is often classified**.¶ n87¶ Consequently, **some**¶ **detainees in Bagram have been "imprisoned for eight years or more without charge or trial,** [\*204] **based largely on**¶ **evidence they have never seen and with no meaningful opportunity to defend themselves.**"¶ n88¶ Interestingly, **the number**¶ **of detainees held at Bagram increased after the Supreme Court's ruling in 2008.**¶ **n89**¶ **This suggests that the executive has**¶ **been able to evade serious review by the courts and further exacerbates the risk of erroneous indefinite detention.**¶ n90¶ Thus, because of the relatively low evidentiary burden imposed upon the government in habeas corpus proceedings,¶ the discretionary nature of judicial release orders, and the lack of habeas corpus review for all detainees, **Article III**¶ **courts do not provide an effective check on the executive's detention authority**. Similarly, the characteristics that are¶ present in a traditional armed conflict that serve to constrain the executive's authority are absent in this present conflict.¶ Page 5¶ 22 S. Cal. Interdis. L.J. 193, \*201¶ **Consequently, it is imperative for Congress to place adequate checks on the executive's detention authority**.

**SCOTUS unlikely to restrict -- higher courts overturn district rulings to restrict powers**

**Hammond 12** (Kate Hammond, JD Candidate, USC, Fall 2012, “THE NATIONAL DEFENSE AUTHORIZATION ACT AND THE UNBOUND AUTHORITY TO DETAIN: A CALL TO CONGRESS” 22 S. Cal. Interdis. L.J. 193) sbb

**The courts** also **fail to constrain the executive's detention authority**. A careful examination of the judiciary's past¶ interpretation of the executive's authority to detain demonstrates that **the court endorses a broad interpretation, and is quick to defer to the executive's decisions**. In future cases, **with the detention authority now placed within the statutory text of the NDAA, courts may be called upon to use statutory interpretation tools to discern an interpretation of the executive's detention authority. However, the use of statutory interpretation tools - such as consulting the legislative history of the NDAA and canons of statutory construction - would again lead to a highly deferential interpretation and would uphold the broad detention authority of the executive**. [\*206] 1. The Courts' Past Decisions Have Been Deferential to the Executive's Detention Authority **A look at the District of Columbia Circuit's treatment of past habeas corpus detainee cases demonstrates that the courts support a deferential and broad interpretation of the executive's authority to detain**. n98 **The circuit has effectively expanded the scope of the executive's detention authority and has reduced the evidentiary burdens placed on the government to justify detention**. In March 2009, the Obama Administration issued a definition of the scope of the executive's detention authority. Page 6 22 S. Cal. Interdis. L.J. 193, \*204 n99 The Obama Administration defined its detention authority as the power to detain individuals "who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." n100 This is the same definition that Congress included in the NDAA. n101 Shortly after the Obama Administration issued its definition, the District of Columbia Circuit began applying it to cases. In 2009, **the District of Columbia District Court issued two separate opinions that placed considerable restrictions on the scope of the executive's detention authority.** n102 **In Gherebi v. Obama, the court held that the authority to detain would only extend to those who were members of the enemy forces.** n103 Thus, those who provided "substantial support" could only be [\*207] detained if they were members of the enemy forces. n104 **The court also further restricted the executive's detention authority by holding that only those who received and executed orders from the command structure of the enemy organization would qualify as members of the enemy forces**. n105 Similarly, in Hamlily v. Obama, the court affirmed that those who were members of the enemy forces were only those who received and executed orders from the command structure. n106 However, **in Hamlily the court went one step further than Gherebi and expressly rejected "the concept of "substantial support' as an independent basis for detention**." n107 Thus, **after Gherebi and Hamlily, the court had effectively restricted the executive's detention authority - those who provided independent support could not be detained and only those who received and executed orders from the command structure could be detained as members of the enemy force**. n108 **Despite the district court's restrictions on the scope of the executive's detention authority, the District of Columbia Circuit court reversed both of the restrictions** in Al-Bihani v. Obama. n109 The court in Al-Bihani rejected the requirement that those who could be detained as members of enemy forces were only those who received and executed orders from the command structure. n110 **The court also rejected the restriction that those who provided substantial support could only be detained if they were members of the enemy forces**. n111 Because the detention of Al-Bihani was justified because he was part of enemy forces, the rejection of the substantial support restriction was technically dicta. n112 However, the use of substantial support as an independent basis for detention has been affirmed in statute [\*208] by the NDAA and in dicta in subsequent circuit court decisions. n113 The circuit has not yet evaluated a habeas petition involving a detention based solely upon substantial support, so what specific actions would be sufficient to constitute substantial support still remains unclear. n114 However, given the circuit court's deferential interpretation of the executive's detention authority, it seems likely that the court will continue to endorse a broad interpretation of the executive's detention authority. The way in which the District of Columbia Circuit evaluates the government's evidence in detainee habeas corpus proceedings has also failed to restrict the executive's detention authority. **In Al-Adahi v. Obama, the District of Columbia District Court found that the petitioner traveled to Afghanistan, met with Osama bin Laden, stayed at an al Qaeda guesthouse, and trained at an al Qaeda military camp. n115 The district court evaluated each piece of evidence independently and concluded that no piece of evidence was sufficient on its own to prove that Al-Adahi was a part of, or substantially supported, an enemy; thus Al-Adahi was not lawfully detained. n116 The circuit court reversed, concluding that the district court improperly evaluated the evidence.** n117 The circuit court held that the evidence must be considered in its entirety. n118 **The court explained that it is irrelevant that a particular piece of evidence viewed independently is insufficient to justify a detention; rather, if the evidence viewed as a collective whole supports an inference that petitioner was more likely than not part of an enemy force or provided substantial support to enemy forces, then the detention is lawful**. n119 Subsequent circuit court opinions have affirmed this approach. n120 **By looking at evidence in its entirety and basing conclusions on whether all of the evidence supports an inference that the detention is lawful, the circuit court has effectively expanded the scope of [\*209] the detention authority**, and the "government can be expected to prevail [in detainee habeas corpus proceedings] more frequently." n121 It is also unlikely that the Supreme Court will grant certiorari to evaluate the scope of the executive's detention authority. n122 In light of recent denials of certiorari, the Supreme Court seems hesitant to question the choices of the executive in the detainee context. n123 In any case, even if the Supreme Court does grant certiorari, **it is unlikely that the Supreme Court will support a narrow interpretation of the executive's detention authority**. n124 **Justices Roberts, Scalia, Thomas, and Alito will likely support a broad interpretation of the executive's detention authority and Justice Kagan would likely be recused from the proceedings, due to her former role as Solicitor General**. n125 Thus, **it seems likely that the broad interpretation of the executive's detention authority endorsed by the District of Columbia Circuit will continue to govern**.

**Judicial review alone is not sufficient to resolve the issues of indefinite detention**

**Failing to institutionalize independent judicial review of detention** ¶ **decisions directly resulted in the significant number of detainees held** ¶ **indefinitely. If there are no criteria for determining what actions pose a threat** ¶ **to American national security, the detentions are reflective of an approach best** ¶ **described as “round up the usual suspects.**” This is not a policy; it is a tragic ¶ reality of the past ten years. Indefinite detention perhaps sounds attractive, for ¶ it removes from the zone of combat—indefinitely—individuals suspected of ¶ involvement in terrorism. The qualifier “perhaps” is essential to the discussion, ¶ for the inherent unconstitutionality of indefinite detention has a pervasive ¶ effect on U.S. counterterrorism. Furthermore, **the dearth of articulated criteria** ¶ **for initial detention and subsequent remand alike inevitably guarantees that** ¶ **individuals have been wrongly detained precisely because threat has not been** ¶ **defined.** ¶ While Judge Bates’ decision was of the utmost importance—more than any ¶ Supreme Court holding addressing counterterrorism in the past eight years, ¶ save Boumediene—it has not resulted either in a significant re-articulation of ¶ U.S. policy nor in the granting of habeas corpus to thousands of detainees.72¶ Aside from its decision in Boumediene, **the Supreme Court has failed to** ¶ **articulate the rights granted to suspected terrorists. Similarly, Congress has** ¶ **failed to articulate these rights through its constitutionally granted oversight** ¶ **powers. It is essential to balance—or maximize—the legitimate rights of the** ¶ **individual with the equally legitimate national security rights of the state**. ¶ Furthermore, Judge Bates’ decision seeks to move beyond the amorphousness ¶ that has defined much of the debate over the last ten years.73¶ **While it has been suggested that habeas hearings satisfactorily provide** ¶ **detainees “their day in court,” the measure does not establish a rights-based** ¶ **counterterrorism regime. Though habeas hearings enable the detainee to come** ¶ **before a judge, the process is fundamentally flawed both because the detention** ¶ **(original and remand) was not premised on carefully delineated criteria, and** ¶ **because adjudication of personal responsibility is not in the offing.** The ¶ combination represents a significant failure with respect to establishing and ¶ maintaining a due process regime. That failure is compounded as we turn our ¶ attention to the interrogation of detainees.

## A/T Close G’tmo CP

#### **Closing G’tmo alone isn’t enough. Must also end indefinite detention**

Huskey 11 [Kristine, founder and former director of the national security clinic at the University of Texas School of law, "Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention" University of New Hampshire Law Review, 9(2)

On the other hand, the closing of the Guantanamo detention

facility—while ending the perceived excesses of the Bush Administration—

would not be inconsistent with continuing detention

of suspected al Qaeda fighters as enemy combatants.

Humane detention for purely preventative incapacitation, with

appropriate due process standards to verify the combatant

status of each detainee, could take place anywhere that the detainees

are not exposed to battlefield attacks.118

#### **Transferring G’tmo detainees would not solve and would violate the Geneva Convention**

Huskey 11 [Kristine, founder and former director of the national security clinic at the University of Texas School of law, "Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention" University of New Hampshire Law Review, 9(2)

Transferring military detainees to a prison facility would

likely violate the Third Geneva Convention, if it were to apply.

The Third Geneva Convention forbids the interning of prisoners

of war in “penitentiary establishments (prisons, penitentiaries,

convict prisons, etc.) to undergo disciplinary punishment

therein.”126 At present, Camp Delta, the Guantanamo detention

facility, consists of numerous camps with different levels of security.

Camp 4’s dormitory units are “aimed at enabling a limited

number of captives the opportunity to interact with one another.”

127 Camp 4 detainees can play sports, chess, cards, and

other games; eat together; and have access to books and magazines.

128 Camp 4 fairly resembles a prisoner of war camp.129

Granted, one might argue that the transfer proposal was not for

the purpose of punishment, but those detainees being housed in

Camp 4 would have experienced a severely negative change in

conditions of confinement. The Third Geneva Convention also

obligates the Detaining Power (that is, the U.S.) to intern prisoners

of war “under conditions as favorable as those for the forces

of the Detaining Power who are billeted in the same area.”130

## A/T ICJ CP

#### **The ICJ lacks credibility to be effective**

Rabkin 12 [Jeremy, Prof at George Mason Law School, "War without end? Legal wrangling without end" Case Western Reserve Journal of International Law" Vol 45]

The International Court of Justice (ICJ) tried to square this circle

in the Nicaragua case: There is a customary law of armed conflict, the

ICJ found, even if it seems to be frequently violated.29 Governments

confirm their support for that law when they claim their actions are

not covered or are distinguishable, rather than denying the existence

of any rules.30 That may not convince skeptics that there is enough

law for an international tribunal to decide particular disputes based

on that law.31 But as Goldsmith and Levinson note, there are many

domestic constitutional issues that remain comparably unsettled.

## A/T ICC

#### **ICC lacks legitimacy or authority**

Rabkin 12 [Jeremy, Prof at George Mason Law School, "War without end? Legal wrangling without end" Case Western Reserve Journal of International Law" Vol 45]

There is now an International Criminal Court (ICC), which has been operating in The Hague since 2002.41 Since the 1990s, a number of states have claimed universal jurisdiction to prosecute the most extreme human rights violators.42 But there is still no actual precedent for the prosecution of government officials from a major power by an external jurisdiction. Legal institutions are in place that might enable such a prosecution but it is surely not by mere chance that no such case has yet been pursued.

The ICC has turned out to be a very weak institution, completing only one prosecution in its first decade.43 States can exempt themselves from its jurisdiction—at least for potential crimes within their own borders—if they simply decline to ratify the ICC treaty.44 Not only the United States, but Russia, China, India, Turkey, Brazil, and dozens of others have declined to ratify. In principle, ratifying states are pledged to extradite anyone indicted by the court that can be found within their borders.45 In practice, states have broad discretion not to extradite, since the court has no means of penalizing states that fail to cooperate. For the same reason, the court cannot assure that witnesses will come forward or that necessary documents are produced.

## A/T Delay CP

#### **Delay counterplan will have zero solvency**

Coquillette 13 [Dan, Professor at Boston College of Law & visiting prof. at Harvard Law School, NY Times "The prisoners at Guantanamo and the rule of law" Jan. 11]

Waiting to close Guantánamo until the end of the war against Al Qaeda, as Jennifer Daskal

argues, faces two major hurdles.

First, what incentives are there for the administration to declare an end to this war in the

near term? For one thing, such a declaration would undermine one legal foundation of

America’s drone policy. Even if correct, such a declaration would face tremendous political

blowback.

Second, let’s assume that the administration declares the war over. What, then, is more

likely: the United States releases four dozen prisoners who “couldn’t be prosecuted” but

are “too dangerous to be transferred or released,” or Congress and President Obama agree

to a domestic legal framework to hold these people indefinitely at Guantánamo, even in

the absence of war with Al Qaeda?

My bet would be the latter, even if it would violate international law.

## A/T To DA’s

### A/T Shutdown DA 2AC

#### **Non Unique: Government shutdown nearly inevitable**

Chicago Tribune Sept. 27 ["No clear path as government shutdown looms" http://www.chicagotribune.com/news/chi-government-shutdown-20130927,0,2822735.story

House Republicans refused to give in to President Barack Obama's demand for straightforward bills to run the government beyond Sept. 30 and to increase borrowing authority to avoid a historic default.

In a direct challenge to Obama, they said they will seek not only a one-year delay in the full implementation of the national healthcare law known as "Obamacare" in return for raising the debt ceiling, but also seek a Republican wish-list of tax measures, energy bills, regulatory proposals and spending cuts that Democrats have already refused to endorse.

President Barack Obama has said he will not negotiate over the debt ceiling at all.

Treasury Secretary Jack Lew has informed Congress that the government will exhaust its borrowing authority by Oct. 17, after which it could default on its loans.

The move does not bode well for prompt resolution of these fiscal battles that could lead to a government shutdown on October 1 and a default in mid-October. Precious time will be consumed on both issues as they bounce back and forth between the Republican-controlled House and the Democratic Senate, with each party anxious to make the other look uncompromising and thus responsible for any economic damage that might occur.

Furthermore, House Republicans will not accept a temporary government spending bill the Senate is poised to pass to avert federal agency shutdowns, House Speaker John Boehner warned.

#### **No PC: Syria is taking all Obama’s political capital away**

National Review 9-30 ["The Week" lexis]

For the Obama administration, big speeches are like the morning-after pill, an emergency prophylactic. Realizing that he may no longer be his own best advertisement, President Obama deputized former president Clinton to deliver a speech on Obamacare. Why the world needs another speech on the misnamed Affordable Care Act is unclear, but the administration is foundering, its political capital experiencing devaluation from its bumbling on Syria, and there remain serious legal and political challenges to the realization of the Democrats' thoroughly muddled health-care vision: so, a speech. President Clinton gave an unusually dull performance, which set conspiratorial types atwitter with intimations that this was an attempt to distance the Clinton brand from the struggling administration, but the more direct explanation is that there is very little that may be persuasively said in favor of the ACA. The main claims of its supporters -- that those satisfied with their current coverage will be allowed to keep it, that it will achieve near-universal coverage, that it will reduce insurance premiums -- are in the aggregate no longer defensible.

#### Thumpers Obama is using is capital on a variety of issues. Non unique’s the DA

USA Today, 9-23 ["Obama Swamped by several crises; shows frustration over gun laws during tribute" lexis]

Among the emerging domestic crises on his plate: The White House is pushing forward with implementation of Obama's signature health care law in the face of a Republican call for repeal; the federal government appears headed toward a shutdown at the beginning of next month; and Obama and the House GOP are at loggerheads over raising the nation's debt limit.

At the same time, Obama is trying to maintain pressure on Syria's Bashar Assad, whose regime the U.S. intelligence community deemed responsible for a chemical attack last month in his worn-torn country that left more than 1,400 dead.

The president is also trying to take advantage of a diplomatic opening -- created by the installation of a new, more moderate president in Iran -- to persuade Tehran to abandon its nuclear weapons program. Obama and Iran's new president, Hasan Rouhani, will attend this week's annual meeting of the United Nations General Assembly.

1. **Turn: Winners win**

Michael **Hirsh**, chief correspondent for National Journal, **2-7**-2013, “There’s No Such Thing as Political Capital,” National Journal, http://www.nationaljournal.com/magazine/there-s-no-such-thing-as-political-capital-20130207

Naturally, any president has practical and electoral limits. Does he have a majority in both chambers of Congress and a cohesive coalition behind him? Obama has neither at present. And unless a surge in the economy—at the moment, still stuck—or some other great victory gives him more momentum, it is inevitable that the closer Obama gets to the 2014 election, the less he will be able to get done. Going into the midterms, Republicans will increasingly avoid any concessions that make him (and the Democrats) stronger. But the abrupt emergence of the immigration and gun-control issues illustrates how suddenly shifts in mood can occur and how political interests can align in new ways just as suddenly. Indeed, the pseudo-concept of political capital masks a larger truth about Washington that is kindergarten simple: You just don’t know what you can do until you try. Or as Ornstein himself once wrote years ago, “**Winning wins**.” In theory, and in practice, depending on Obama’s handling of any particular issue, even in a polarized time, he could still deliver on a lot of his second-term goals, depending on his skill and the breaks. Unforeseen catalysts can appear, like Newtown. Epiphanies can dawn, such as when many Republican Party leaders suddenly woke up in panic to the huge disparity in the Hispanic vote. Some political scientists who study the elusive calculus of how to pass legislation and run successful presidencies say that political capital is, at best, **an empty concept**, and that almost nothing in the academic literature successfully quantifies or even defines it. “It can refer to a very abstract thing, like a president’s popularity, but there’s no mechanism there. That makes it kind of useless,” says Richard Bensel, a government professor at Cornell University. Even Ornstein concedes that the calculus is far **more complex** than the term suggests. Winning on one issue often **changes the calculation for the next** issue; there is never any known amount of capital. “The idea here is, if an issue comes up where the conventional wisdom is that president is not going to get what he wants, and he gets it, then each time that happens, it changes the calculus of the other actors” Ornstein says. “If they think he’s going to win, they may change positions to get on the winning side. It’s a bandwagon effect.”

1. **The DA is not intrinsic to our affirmative. They cannot prove a link.**

#### **Case Outweighs the DA**

Ghoshray 11 [Saby, Dr., scholar in constitutional law, international law, capital jurisprudence, military tribunals etc. Wayne Law Review "GUANTANAMO: UNDERSTANDING THE NARRATIVE OF DEHUMANIZATION THROUGH THE LENS OF AMERICAN EXCEPTIONALISM AND DUALITY OF 9/11" Spring, 57 Wayne L. Rev. 163

What do I mean by closure of Guantanamo? On the surface, it might seem that I am referring to the closure of Guantanamo as a physical facility, an eventuality which will mean bringing the existing detainees under a deterministic and predictable legal framework. In reality, however, this closure must be seen as the closure of a phenomenon, one which extends beyond the physical limit of a detention facility and exists in the metaphysical construct of people. Although the closure of the actual detention facility is a necessary event, it is not necessarily a sufficient one to achieve the closure of Guantanamo in the truest sense. n135 Therefore, when referring to the closure of Guantanamo, we must separate the physical detention unit from its phenomenological whole, as the closure of the smaller physical subset does not automatically guarantee the closure of the greater phenomenon. In my view, the broader phenomenon of Guantanamo arrived at our ontological [\*193] experience when the detention facility began its new manifestation post-9/11. n136

While a victory on paper for the human rights lawyers and progressive legal activists might center on the physical closure of the detention facility, there might never be an end to the complex phenomenon called Guantanamo. The closure of the phenomenon requires a complete understanding of the non-physical aspect centering on acknowledging the existence of a much deeper ontological representational space. This representational space straddles both the physical and philosophical dimensions as it exists in the juncture between socio-legal and domestic political spheres. In this shared space, manifestation of the two entities, Guantanamo and 9/11, become synonymous as they travel through a continuum to create a unique duality. It seems in our minds that we cannot think of 9/11 without Guantanamo, and alternatively, we cannot think of Guantanamo without 9/11. Given the depth and the indelible mark 9/11 has imprinted both in American history and in the American psyche, it is vitally important to decouple the ontological existence of Guantanamo from its metaphysical duality of 9/11. This is because, in a unique way, the deep wound of 9/11 and the existential threat it carries with it provides the American psyche with the relief that comes from this unique phenomenological evolution of Guantanamo--through its interplay between evil and its conquest. n137 The pursuit of this conquest, unbeknownst to its ardent consumers, forgets the meaning of dehumanization n138 as it is carefully cloaked under the interplay. Therefore it is vitally important to understand Guantanamo both through its more expansive manifestation and its consequences, intended or unintended.

### A/T Shutdown DA 1AR

#### **Government shutdown is coming**

LA Times Sept. 26 [As GOP infighting persists, threat of government shutdown heightens" http://www.latimes.com/nation/la-na-government-shutdown-20130927,0,1894931.story

WASHINGTON — Options for keeping the federal government open narrowed Thursday as some of the most conservative Republicans in the House rebuffed proposals from Speaker John A. Boehner, who had aimed to break a stalemate over the federal budget.

The opposition from conservatives to any measures that fall short of their goals of cutting federal spending or dismantling President Obama's healthcare law left the Ohio Republican with little room to maneuver as a Monday night deadline approached for providing money to keep federal agencies running.

The administration has already started plans for a possible shutdown and intends to notify federal employees Friday about whether they will be furloughed if nonessential functions are halted.

Boehner emerged from a closed-door Republican strategy session trying to drag the president into a broader debate over fiscal policy as it became clear that Congress was running out of time. "The president says, 'I'm not going to negotiate,'" the speaker said. "Well, I'm sorry, but it just doesn't work that way."

#### **Obama has not political capital. He is using it all on Iran**

South China Morning Post, Sept. 27 ["World powers, Iran agree to pursue nuclear talks after meeting" http://www.scmp.com/news/world/article/1319452/world-powers-iran-agree-pursue-nuclear-talks-after-meeting

The pair's meeting was remarkable for its symbolism. It showed that US President Barack Obama and his newly elected Iranian counterpart, Hassan Rowhani, are prepared to risk considerable political capital in a diplomatic initiative that could encounter resistance at home and from foreign allies.

**Empirics prove – wins cause bandwaggoning**

David Michael **Green**, professor of political science at Hofstra University, 6-11-**2010**, “The Do-Nothing 44th President,” <http://www.opednews.com/articles/The-Do-Nothing-44th-Presid-by-David-Michael-Gree-100611-648.html>

Moreover, **there is a** continuously evolving and **reciprocal relationship between presidential boldness and achievement**. In the same way that **nothing breeds success like success, nothing sets the president up for achieving** his or **her next goal better than succeeding** dramatically on the last go around. **This is** absolutely **a matter of perception**, and **you can see it** best **in the way** that **Congress** and especially the Washington press corps **fawn over bold** and intimidating **presidents** **like** **Reagan** and George W. Bush. The political teams surrounding these presidents understood the psychology of power all too well. They knew that by simultaneously **creating a steamroller effect** and feigning a clubby atmosphere for Congress and the press, **they could leave such hapless hangers-on** **with only one remaining way to pretend to preserve their dignities**. **By jumping on board the freight train, they could be given the illusion** of being next to power, **of** **being part of the winning team**. And so, with virtually the sole exception of the now retired Helen Thomas, this is precisely what they did.

**Winners win**

**Marshall and Prins 11** (BRYAN W, Miami University and BRANDON C, University of Tennessee & Howard H. Baker, Jr. Center for Public Policy, “Power or Posturing? Policy Availability and Congressional Influence on U.S. Presidential Decisions to Use Force”, Sept, Presidential Studies Quarterly 41, no. 3)

**Presidents rely heavily on Congress in converting their political capital into real policy success. Policy success not only shapes the reelection prospects of presidents, but it also builds the president’s reputation for political effectiveness and fuels the prospect for subsequent gains in political capital** (Light 1982). Moreover, the president’s legislative success in foreign policy is correlated with success on the domestic front. On this point, some have largely disavowed the two-presidencies distinction while others have even argued that foreign policy has become a mere extension of domestic policy (Fleisher et al. 2000; Oldfield and Wildavsky 1989) **Presidents implicitly understand that there exists a linkage between their actions in one policy area and their ability to affect another**. The use of force is no exception; in promoting and protecting U.S. interests abroad, presidential decisions are made with an eye toward managing political capital at home (Fordham 2002).

**Extend the DA is not intrinsic. The plan and government shutdown can happen at the same time.**

(in case they make this a voter)

This isn’t a voter. Our argument is testing the legitimacy of the link for the DA. We are not taking any ground.

## A/T Separation of Powers

#### **Vagueness in the NDAA undermines SOP**

Horowitz 13 [Colby, JD candidate Fordham Law School, captain US army, "Creating a more meaningful detention statute: Lessons learned from Hedges v. Obama" Fordham Law Review, april]

A vague and unclear detention statute harms the separation of powers

between the three branches. As Justice Jackson’s widely accepted

Youngstown framework explains,351 executive war powers are relational to

Congress, and the judiciary decides what Congress has or has not

authorized—thus all three branches have a role. Vague statutes enhance the

power of the judiciary at the expense of the legislature for two reasons.

First, vague statutes make congressional intent unclear and give the courts

significant discretion to determine if the President is in Zone 1, 2, or 3.352

Second, vague statutes invite close judicial scrutiny because they

demonstrate to the courts that the political process has failed.353 Thus,

vague congressional authorizations that attempt to delegate broad authority

to the President can be counterproductive because, instead of empowering

the President, they actually empower the courts.354

## A/T Economic DA’s

#### Gitmo hurts the economy: Expensive to house detainees.

**Knickerbocker 2013 (Brad, Obama renews push to close Guantanamo military prison, The Christian Science Monitor, 2013-07-17,** <http://search.proquest.com.lib-proxy.fullerton.edu/docview/1354535602?accountid=9840>)

An investigative report by **The Miami Herald termed Guantanamo "the most expensive prison on earth."**

**The total annual cost of housing a single prisoner there per year, according to this report, is $800,000 - far more than the average annual cost per individual in the federal prison system - $28,284 - or the $38,091 per year in the "supermax" prison in Colorado.**

This week, **the Pentagon asked Congress for more than $450 million for maintaining and upgrading Guantanamo.**

### AT: They are terrorists

#### U.S. Detains individuals at Gitmo that have no connection to terrorists

Center for Constitutional Rights,2006 ***(***Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba. Center for Constitutional Rights,2006)

**The U.S. military has openly acknowledged that many of the men at Guantánamo do not**

**belong there.**In October 2004, Brigadier **General Martin Lucenti**, then-deputy commander of the military task force that runs the detention center at Guantánamo**, stated:“[o]f the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries . . . Most of these guys weren’t fighting. They were running.”**13 General Lucenti’s comments reportedly have been echoed by an active duty Guantánamo interrogator, who stated that **“the U.S. is holding dozens of prisoners at the U.S. Navy Base at Guantánamo who have no meaningful connection to al-Qaida or the Taliban and is denying them access to legal representation. . . . There are a large number of people at Guantánamo who shouldn’t be there.”**14 In January 2005, Brigadier General Jay Hood, then base commander at Guantánamo, admitted,“[s]ometimes, we just didn’t get the right folks.”15 These statements, and other recent findings,16 contradict the sweeping pronouncements of high level U.S. officials, including President Bush and Secretary of Defense Donald Rumsfeld, that Guantánamo prisoners are the “worst of the worst.”

## A/T Biopower

1. **Link turn. Agamben’s criticism advances examination of the state of exception and therefore confronts the most pressing issues of biopolitical violence of the day.**

**Guantanamo bay is the most important place to confront biopolitics and Agamben’s criticism engages in this confrontation.**

**Pease, 03** (Donald E. Pease, the Avalon Foundation Chair of the Humanities at Dartmouth College, “The Global Homeland State: Bush's Biopolitical Settlement”, Duke University Press, boundary 2 30.3 (2003) 1-18, rm)

**The detention camps were in a realm beyond good and evil, where abduction and execution were naturalized by a mythology that rendered them exempt from tests of reality**. Mythological structures of exceptions to legal categories doubled back tautologically to reinforce the state's adoption of an unprecedented power as the exception to its own rules. And the public entered this realm beyond good and evil when they were bound as witnesses to the formation of persons outside the existing juridical categories and refused the basic dignities of legal process. **The people ratified the power of the state to declare itself an exception to its own rule by participating visually in the construction of persons who were construed as exceptions to the human condition**. The fact that the spectacle of the "justice" we brought to our enemies took place at Guantanamo Bay requires some brief explanation. Bush anticipated the state's usage of this space as the staging ground for the state's violation of the Geneva Conventions with the phrase "except for one Sunday in 1941" as the historical location of the sole exception to the United States' exemption from foreign attack. But that attack did not exactly take place on U.S. soil. On December 7, 1941, Hawaii was not a state: Pearl Harbor was officially designated, like Guantanamo Bay, Cuba, as an unincorporated territory. The exceptional nature of the attacks that took place on this unintegrated territory of Pearl Harbor on December 7, 1941, supplied the state with a metaphoric precedent for its choice of a comparable space to produce its [End Page 14] exceptions to the rules of law and war. **The Justice Department referred to Guantanamo Bay's exceptional status as an unincorporated territorial possession of the United States to justify its contention that as a "foreign territory" it lay outside the jurisdiction of any U.S. court. It was the extraterritorial status of Guantanamo Bay, its exemption from the juridical reach of any state or nation, that enabled the emergency state to demonstrate its monopoly over the exception there**. But the act of transferring these "enemies" to Guantanamo Bay brought about the magical transformation in the condition of the persons interned there. **By rendering them at once stateless and countryless, the act of transporting them to Guantanamo Bay set the internees beyond the pale of humanity**. The very same gesture that placed them outside the condition of territorial belonging provided the mytho-logic for the deprivation of their human rights. They were interned at Guantanamo Bay because they lacked the protection of human rights, and they lacked human rights because they were displaced at Guantanamo Bay. The transfer of these "unlawful combatants" from Afghanistan to Guantanamo Bay rendered what was undecidable in Bush's musing over whether "we bring our enemies to justice or bring justice to our enemies" juridically practicable. At Guantanamo Bay, the state produced persons who were exceptions to the laws that protected the due process rights of citizens and exceptions as well to the Geneva Conventions that endowed prisoners of war with the right to refuse to respond to interrogation. **Stripped of the rights of citizens and the rights of prisoners of war, these persons were reduced to the status of unprotected bios. As the embodiments of animated flesh whose lives the state could terminate according to decisions that were outside juridical regulation, these unlawful combatants were invoked by the state to justify its positioning of itself as an exception to the rule of law.** The emergency state arrogated to itself its power to operate beyond the jurisdiction of the laws that regulated the world of nations through this production of persons it could hold without due process and that it could kill without being accused of murder. 10 The detention camps erected at Guantanamo Bay by the Halliburton Company occupied a realm outside the law in which the emergency state's [End Page 15] practices were naturalized by a mythology that rendered them exempt from critical scrutiny. The mythological structures that accompanied the state's fashioning of exceptions to legal categories triggered a recursive operation that reinforced the state's exercise of the power to fashion exceptions to its own rules. The people ratified the power of the state to declare itself an exception to its own rule by participating visually in the construction of persons who were construed as exceptions to the human condition. The emergency state invoked the terrorists' recourse to unlawful combat as the pretext for the state's violation of the laws regulating due process and the rules regulating the conduct of war. The state violated its own rules, that is to say, in the name of protecting them against a force that was said to operate according to different rules. In order to protect the rule of law as such from this alien legality, the state declared itself the occupant of a position that was not subject to the rules it must protect. **As Attorney General John Ashcroft explained, in order to protect the entirety of the law against attack, the state transgressed its own laws. All concerns of ethics, human rights, due process, constitutional hierarchies, and the division of governmental power were subordinated to this urgent eschatological mission**. The vacuum opened up by the vanishing of objective reality into the singularity of Ground Zero was thereby filled in by the mythologized reality in which the emergency state erected its eschatological version of realpolitik, and the forcible detention of unlawful combatants made complementary sense. **With its undisclosed abductions of persons within the territorial nation-state, the Bush administration shifted its war on terrorism from the Afghan desert to the bodies of persons it suspected of domestic terrorism**. Ignoring the time-consuming details of due process, the state condensed the juridical-penal process into the moment of abduction wherein accusation, judgment, and punishment coincided. The terrorist may have supplied the state's official rationale, but the detainee was in fact the cause and effect of the state of emergency. The state, which had victimized these detainees through the removal of all of their legal rights, magically transformed itself into the potential target of its victims when it constructed them as the unlawful enemies of the state. Because the state of emergency is not subject to the rules of law that it enforces, it inhabits a realm that is quite literally beyond good and evil. After September 11, civil rights groups estimated that more than a thousand terrorist suspects were disappeared into a juridical maze, where they were denied lawyers, beaten by guards and fellow inmates, subjected to sensory deprivation, and forced to take lie detector tests. Current immigration laws [End Page 16] permit indefinite detainment laws, so no criminal charges were required to warrant the abductees' internment. Their guilt could not be proven, so this "transfer" of detainees to Camp X-Ray was a euphemism for extrajudicial measures. The spectacle of detainees disappearing into the maze of an unaccountable juridical system and into the cages at Guantanamo Bay did not impose a mythology on the public so much as it encouraged the formation of a society of captivated spectators who agreed to the abridgment of their civil liberties in exchange for the spectacle of persons utterly stripped of all rights and liberties and rendered subject to the full power of the law. Guantanamo Bay constituted not a contradiction but an exception to the national mythopoesis. **The public, in its role as audience for these productions, implicitly endorsed such rites of passage through the acceptance of a discourse of legalized illegality crystallized in phrases such as "enemy combatants," "material witness," and "persons of interest."**

1. **Perm: engage in our poetic challenge to the state of exception while engaging in a Foucauldian analysis. There’s no reason why the two are mutually exclusive. All of our Pease evidence uses a Foucauldian strategy combined with Agamben’s work to critique Guantanamo. Prefer the specificity of this author over theirs.**

**Guantnaamo is the best starting point to criticize the global state of exception**

**Gregory, 06** (Derek Gregory, Professor at the Department of Geography of the University of British Columbia, “THE BLACK FLAG: GUANTÁNAMO BAY AND THE SPACE OF EXCEPTION,” Swedish Society for Anthropology and Geography, <http://geographicalimaginations.files.wordpress.com/2012/07/gregory-the-black-flag-guantanamo-and-the-space-of-exception.pdf>, rm)

It is in the face of contradictions such as these that **many commentators have seen Guantánamo Bay as an iconic example of that paradoxical space which Giorgio Agamben describes as ‘the state of exception’**. In what follows I examine this characterization in detail, and pay particular attention to the tortured geographies that wind in and out of the war prison. I begin with a summary account of Agamben’s argument, but while I will be critical of a number of his formulations I intend this article primarily as a critique of the Bush administration’s political theology rather than Agamben’s political philosophy. **Agamben’s account turns on the rotations between sovereign power, the state of exception and bare life**. 2 It is a sophisticated thesis, drawing on a heterodox group of European thinkers – Benjamin, Foucault, Heidegger and Schmitt – and relying on a series of argumentation sketches plucked from classical, medieval and early modern law to establish the modalities of sovereign power. **Its pivot is the dismal ﬁgure of homo sacer, a position Agamben says was conferred by archaic Roman law upon those who could not be sacriﬁced according to ritual (because they were outside divine law: their deaths were of no value to the gods**) **but who could be killed with impunity** (**because they were outside juridical law**: their lives were of no value to their contemporaries). Critics have treated Agamben’s reading as partial and partisan: ‘extravagant’ according to one and ‘a myth’ according to another. 3 But his purpose is neither textual nor historical. Instead, he projects this ﬁgure into the present, as a sort of cipher or bearer of what he calls ‘bare life’, by making two moves. First, **Agamben argues that homo sacer emerges at the point where sovereign power suspends the law, whose absence thus falls over a zone not merely of exclusion but of abandonment**. **The production of such a space – the state of exception – is central to Agamben’s account of modern biopolitics. This space is produced through a speech-act, or more accurately a decision in the sense of ‘a cut in life’, that is at once performative and paradoxical**. It is performative because **it draws a boundary between politically qualiﬁed life and merely existent life exposed and abandoned to violence: ‘bare life’**. ‘However sacred man is,’ Benjamin wrote in his Critique of Violence, ‘there is no sacredness in his condition, in his bodily life vulnerable to injury by his fellow men’. 4 If this remark is read as bodily life made vulnerable to injury (through a sovereign decision) then it becomes clear that **bare life is at once ‘immediately politicized but nevertheless excluded from the polis’.** 5 The cut that severs bare life from politically qualiﬁed life is paradoxical, however, and all forms of life are thereby made precarious, because the boundary it enacts is mobile, oscillating: in a word (Agamben’s word) indistinct. This is necessary not a contingent condition, moreover, and crucially affects both time and space. First, the exception implies a non-linear temporality: ‘The exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, ﬁrst constitutes itself as a rule’. Second, **the exception – literally that which is ‘taken outside’ – is effected through a distinctive spatiality. For the exception ‘cannot be included in the whole of which it is a member and cannot be a member of the whole in which it is always already included’.** **The mapping of such a space requires a topology**, Agamben concludes, because only a twisted cartography of power is capable of folding such propriety into such perversity. 6 Second, **Agamben argues that in the contemporary world the state of exception has become the rule**. Writing while Hitler’s armies advanced on Paris, Benjamin had warned that ‘the “state of emergency” in which we live is not the exception but the rule’, and Agamben endorses and enlarges this claim. 7 Although he notes that concentration camps ﬁrst emerged in colonial spaces of exception in Cuba and South Africa, he passes over these (and the colonial architectures of power that produced them) to focus on Nazi concentration camps and, in particular, Auschwitz. **He treats the concentration camp as ‘the materialization of the state of exception’, ‘the pure, absolute and impassable biopolitical space’ in which juridical rule and bare life enter into ‘a threshold of indistinction’**, through which ‘law constantly passes over into fact and fact into law, and in which the two planes become indistinguishable’. Unlike Foucault, who identiﬁed the Third Reich as a paroxysmal space in which sovereign power and biopolitics coincided, however, **Agamben insists that none of this is a rupture from the project of modernity.** On the contrary, his narrative is teleological, and **he identiﬁes the camp as ‘the hidden paradigm of the political space of modernity’, and suggests that its operations have been unfurled to such a degree that today, through the multiplication of the camp as a carceral archipelago, the state of exception has ‘reached its maximum worldwide deployment’.** By this means that **sovereign power has produced both an intensiﬁcation and a proliferation of bare life**. If this seems exorbitant, Agamben is perfectly undeterred. **‘The normative aspect of law can thus be obliterated and contradicted with impunity**,’ he continues, **through a constellation of sovereign power and state violence that ‘nevertheless still claims to be applying the law’**. In such a circumstance, he concludes, **the camp has become ‘the new biopolitical nomos of the planet’ and ‘the juridico-political system [has transformed] itself into a killing machine’. 8** As Agamben has developed this critique it is, above all, the ‘war on terror’ that has come to be in his sights. He argues that **the locus par excellence of this new state of exception is the US Naval Station at Guantánamo Bay**, where from January 2002 men and boys captured during the US invasion of Afghanistan have been imprisoned. **He draws parallels between the legal status of prisoners in this camp and prisoners in Auschwitz: their situations**, so he says, are formally – ‘paradigmatically’ – **equivalent**. **Prisoners of a war on terror who are denied the status of prisoners of war, Agamben argued that their legal status is erased**. **They are not legal subjects but ‘legally unnameable and unclassiﬁable being[s**]’, **‘the object of a pure de facto rule’ or a ‘raw power’ whose modalities are ‘entirely removed from the law and from judicial oversight’. In the detainee at Guantánamo, he concludes, ‘bare life reaches its maximum indeterminacy’**. 9

#### Viewing bio-power as monolithic renders resistance impossible. Case is crucial first step in breaking down the power relations that agamben critiques

Michael Hardt, Literature @ Duke, 2000, Theory and Event, 4.3, p Muse

But still none of that addresses the passivity you refer to. For that we have to look instead at Agamben’s notions of life and biopower. Agamben uses the term “naked life” to name that limit of humanity, the bare minimum of existence that is exposed in the concentration camp. In the final analysis, he explains, modem sovereignty rules over naked life and biopower is this power to rule over life itself What results from this analysis is not so much passivity, I would say, but powerlessness. There is no figure that can challenge and contest sovereignty. Our critique of Agamben’s (and also Foucault’s) notion of biopower is that it is conceived only from above and we attempt to formulate instead a notion of biopower from below, that is, a power by which the multitude itself rules over life. (In this sense, the notion of biopower one finds in some veins of ecofeminism such as the work of Vandana Shiva, although cast on a very different register, is closer to our notion of a biopower from below.) What we are interested in finally is a new biopolitics that reveals the struggles over forms of life.

#### Agamben’s alternative entrenches violence and destroys and hope for real political change

Paolo Virno, “General intellect, exodus, multitude,” in Archipelago number 54, June, 2002

Agamben is a thinker of great value but also, in my opinion, a thinker with no political vocation. Then, when Agamben speaks of the biopolitical he has the tendency to transform it into an ontological category with value already since the archaic Roman right. And, in this, in my opinion, he is very wrong-headed. The problem is, I believe, that the biopolitical is only an effect derived from the concept of labor-power. When there is a commodity that is called labor-power it is already implicitly government over life. Agamben says, on the other hand, that labor-power is only one of the aspects of the biopolitical; I say the contrary: over all because labor power is a paradoxical commodity, because it is not a real commodity like a book or a bottle of water, but rather is simply the potential to produce. As soon as this potential is transformed into a commodity, then, it is necessary to govern the living body that maintains this potential, that contains this potential. Toni (Negri) and Michael (Hardt), on the other hand, use biopolitics in a historically determined sense, basing it on Foucault, but Foucault spoke in few pages of the biopolitical - in relation to the birth of liberalism - that Foucault is not a sufficient base for founding a discourse over the biopolitical and my apprehension, my fear, is that the biopolitical can be transformed into a word that hides, covers problems instead of being an instrument for confronting them. A fetish word, an "open doors" word, a word with an exclamation point, a word that carries the risk of blocking critical thought instead of helping it. Then, my fear is of fetish words in politics because it seems like the cries of a child that is afraid of the dark..., the child that says "mama, mama!", "biopolitics, biopolitics!". I don't negate that there can be a serious content in the term, however I see that the use of the term biopolitics sometimes is a consolatory use, like the cry of a child, when what serves us are, in all cases, instruments of work and not propaganda words.

# Neg

### **A/T Inherency**

#### **Congress has already imposed restrictions on the President’s authority in indefinite detention**

Hains 11 [William JD from BYU, law clerk for the Honorable Frederic Voros Jr., BYU Law Review, "Challenging the Executive: The Constitutionality of Congressional Regulation of the President's wartime detention policies" lexis]

The Ghailani verdict and the DNI report served as rallying cries for the President's opponents. Using its appropriations power, Congress determined to stop prosecutions and significantly tighten controls on the transfer and release of detainees to other countries. In the 2011 National Defense Authorization Act, Congress prohibited the use of any funds authorized under the Act "to transfer, release, or assist in the transfer or release [of Guantanamo Bay detainees] to or within the United States, its territories, or possessions ... ." n26 Unlike previous restrictions, however, this prohibition did not include an exception for prosecution. n27 While the Act does not explicitly prohibit prosecution, a blanket prohibition on transfer to the United States has the same effect - and was intended to do so. n28 Furthermore, the prohibition appears to restrict the executive branch as a whole, even though the provision is limited to Department of Defense funds. If the Department of Justice or another executive department were to transfer detainees, it would [\*2289] likely need the assistance of the Department of Defense, which has custody over the Guantanamo Bay detainees. The Act prohibits such assistance. n29

The Act also severely limits the transfer of detainees to other countries. It does so by limiting potential host countries and effectively setting the essential terms of any negotiations to transfer detainees. Before using any funds "available to the Department of Defense" to transfer a detainee overseas, the Secretaries of Defense and State must certify to Congress thirty days in advance that the receiving state (1) is not a sponsor of terrorism; (2) "maintains effective control" over its detention facilities; (3) is not "facing a threat that is likely to substantially affect its ability to exercise control over the individual"; (4) has agreed to "ensure" that the detainee cannot "threaten the United States, its citizens, or its allies in the future"; (5) "has taken such steps as the Secretary determines are necessary to ensure that the individual cannot engage or reengage in any terrorist activity"; and (6) has agreed to share intelligence information with the United States. n30 Without a waiver from the Secretary of Defense that the transfer "is in the national security interests of the United States," all transfers are prohibited whenever "there is a confirmed case of any" former Guantanamo Bay detainee having "subsequently engaged in any terrorist activity" after transfer to that country. n31 One exception to all of these restrictions is the transfer of detainees in accordance with an order from a habeas court. n32

Coupled with the unwillingness of many countries to take detainees, these conditions make it almost impossible to transfer detainees who have not been ordered released through the habeas [\*2290] process. n33 President Obama opposed these restrictions, but he signed the bill into law because the restrictions were a small part of a much larger bill authorizing funding for the military. n34 In his signing statement, however, President Obama stated that the restrictions on transferring detainees to the United States "represent[] a dangerous and unprecedented challenge to critical executive branch authority" over prosecution of Guantanamo detainees and could ultimately "undermine[] our Nation's counterterrorism efforts ... [and] harm our national security." n35 He asserted that the restrictions on transfers to other countries "interfere" with the President's foreign policy and national security authority to make "consequential" decisions "in the context of an ongoing armed conflict." n36 He stated that the President "must have the ability to act swiftly and to have broad flexibility in conducting our negotiations with foreign countries." n37

## Courts CP

**Courts are ideally located for creating the most effective check on executive power**

**Pearlstein 05 (Deborah, Visiting Scholar, Woodrow Wilson School for Public and International Affairs, Princeton University; Director, U.S. Law and¶ Security Program, Human Rights First. A.B., 1993 Cornell University; J.D., 1998 Harvard Law School; Clerk to Justice John Paul Stevens,¶ U.S. Supreme Court, 1999-2000, “ Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture” , Indiana Law Journal¶ Fall, 2005¶ 81 Ind. L.J. 1255)**

**Despite the overwhelming weight of historical opinion and popular punditry that the courts are not well suited**¶ (because of competence or habit) to play an active role in [\*1290] constraining executive power in times of¶ emergency, **the courts have turned out to be among the most effective actors in actually changing the course of**¶ **executive policy since September 11. The Supreme Court's engagement in detention cases related to the "war on**¶ **terror"--over vigorous executive branch objection n140 --is the most visible example**. The **Supreme Court's 2004**¶ **decision in Hamdi v. Rumsfeld--regarding the legality of indefinitely detaining a U.S. citizen captured on a battlefield in**¶ **Afghanistan--led to the quickly negotiated release of a detainee the President had argued was a danger to the national**¶ **security of the United States. n141 The Court's decision the same Term in Rasul v. Bush led hundreds of detainees at**¶ **Guantanamo Bay to gain access to U.S.** **attorneys. n142 It was this newfound access that helped bring about the**¶ **exposure of abusive practices at Guantanamo as the lawyers released the stories told by their clients, n143 about**¶ **ongoing harsh conditions of detention, n144 and about the hunger strike a number of detainees were undertaking by the**¶ **end of 2005. n145 And the Court's evident general willingness to engage the government on its assertions of**¶ **power--regardless of the outcome in the particular case--had in itself an effect on the [\*1291] day-to-day conduct of**¶ **detainee operations that, without Court involvement, would not have come to be**. n146

**Courts as actor – must interpret AUMF and NDAA.**

**CRS 12** (Congressional Research Service, authored by Jennifer K Elsea and Michael John Garcia, 11 Dec 2012, “The National Defense Authorization Act for FY2012: Detainee Matters” <http://www.fas.org/sgp/crs/natsec/R42143.pdf>) sbb

**Section 1021 does not expressly clarify whether U.S. citizens or lawful resident aliens may be** ¶ **determined to be “covered persons.”** The potential application of an earlier version of Section ¶ 1021 found in S. 1867 (in that bill numbered Section 1031) to U.S. citizens and other persons ¶ within the United States was the subject of significant floor debate. **An amendment that would** ¶ **have expressly barred U.S. citizens from long-term military detention on account of enemy** ¶ **belligerent status was considered and rejected**.72 Ultimately, **an amendment was adopted that** ¶ **added the following proviso: “Nothing in this section shall be construed to affect existing law or** ¶ **authority relating to the detention of United States citizens**, lawful resident aliens of the United ¶ States, or any other persons who are captured or arrested in the United States.”73¶ **This language**, which remains in the final version of the act,74 along with a separate clause which ¶ provides that nothing in Section 1021 “is intended to limit or expand the authority of the ¶ President or the scope of the Authorization for the Use of Military Force,” **makes clear that the** ¶ **provision is not intended to either expand or limit the executive’s existing authority to detain U.S.** ¶ **citizens** and resident aliens, as well as other persons captured in the United States. **Such** ¶ **detentions have been rare and subject to substantial controversy, without achieving definitive** ¶ **resolution in the courts. While** the Supreme Court in **Hamdi recognized that persons captured** ¶ **while fighting U.S. forces in Afghanistan could be militarily detained in the conflict with Al** ¶ **Qaeda potentially for the duration of hostilities, regardless of their citizenship, the circumstances** ¶ **in which persons captured in the United States may be subject to preventive military detention have not been definitively adjudicated**.75 Section 1021 does not attempt to clarify the ¶ circumstances in which a U.S. citizen, lawful resident alien, or other person captured within the ¶ United States may be held as an enemy belligerent in the conflict with Al Qaeda. Consequently, **if** ¶ **the executive branch decides to hold such a person under the detention authority affirmed in** ¶ **Section 1021, it is left to the courts to decide whether Congress meant to authorize such detention** ¶ **when it enacted the AUMF in 2001**.

## Executive Order CP

Heightened due process in issues of indefinite detention relies on change within the executive.

**Robertson 12 (Cassandra Burke, \* Associate Professor, Case Western Reserve University School of Law. For helpful inspiration, discussions, and suggestions, I thank¶ Jonathan Adler, Peter Burke, Jonathan Entin, Amos N. Guiora, Jessie Hill, Sharona Hoffman, Jacqui Lipton, Peter Margulies, Thom¶ Robertson, Michael Scharf, Mano Singham, Johanna Staral, Jan Stets, and Bob Strassfeld. “DUE PROCESS IN THE AMERICAN IDENTITY”, Alabama Law Review¶ 64 Ala. L. Rev. 255)**

Some have argued that **heightened due process could rely on executive branch procedures rather than the¶ judiciary.** As Attorney General Holder has noted, "**'Due process' and 'judicial process' are not one and the same,¶ particularly when it comes to national security. The Constitution guarantees due process, not judicial process**." n145¶ Additionally, **some scholars have suggested that targeted killings may comport with due process as long as the¶ executive branch conducts an "independent, impartial, prompt, and (presumptively) public investigation of its legality."¶** **n146 While Holder and other scholars may be right as a matter of constitutional law, they are not accounting for the fact¶ that many citizens do indeed equate "due process" with "judicial process" n147 --the idea "that law, in an intensely¶ legalistic society, [is] enough**." n148 **To the extent that the nation relies on executive-level due process, it will have to be¶ especially transparent in those procedures to persuade its citizens that their country still embraces due process values**.¶ n149 Thus, **publicly available guidelines and procedures are important, n150 and it is also important that legal counsel is¶ kept in the loop on the decision-making process--even if some of the lawyers offer a view that restricts executive power.**

**Heightened due process can prevent the cognitive bias that exists in security discourse**

**Robertson 12 (Cassandra Burke, \* Associate Professor, Case Western Reserve University School of Law. For helpful inspiration, discussions, and suggestions, I thank¶ Jonathan Adler, Peter Burke, Jonathan Entin, Amos N. Guiora, Jessie Hill, Sharona Hoffman, Jacqui Lipton, Peter Margulies, Thom¶ Robertson, Michael Scharf, Mano Singham, Johanna Staral, Jan Stets, and Bob Strassfeld. “DUE PROCESS IN THE AMERICAN IDENTITY”, Alabama Law Review¶ 64 Ala. L. Rev. 255)**

**Providing a higher level of due process can guard against cognitive biases that cause us to overestimate the risks of¶ events that are catastrophic and outside our direct control--two hallmarks of the terrorist threat.** n154 **First, the risk of a¶ terrorist strike is perceived as a more short-term and immediate risk than the potential harm to judicial process in the¶ long run, and "in a period of crisis, long-term costs are easily overshadowed by perceived short-term gains**." n155¶ **Second, the terrorist threat raises existential fears--it "threatens to change the way we experience our lives, draining¶ meaning from relationships of trust and community, and coloring life with the awful hues of suspicion, intimidation,¶ and fear." n156 Thus, we are predisposed to misjudge the risk of terrorism in a due process calculus, and as a result, "we¶ have all too often" realized only with hindsight that we overestimated the potential emergency "after civil liberties have¶ been sacrificed at the altar of national security." n157 By maintaining and even increasing traditional elements of¶ procedural due process, we may offset [\*285] this cognitive bias to some degree by forcing a more reasoned analysis¶ of long-term risks. n158¶**

**Heightened due process creates institutional legitimacy**

**Robertson 12 (Cassandra Burke, \* Associate Professor, Case Western Reserve University School of Law. For helpful inspiration, discussions, and suggestions, I thank¶ Jonathan Adler, Peter Burke, Jonathan Entin, Amos N. Guiora, Jessie Hill, Sharona Hoffman, Jacqui Lipton, Peter Margulies, Thom¶ Robertson, Michael Scharf, Mano Singham, Johanna Staral, Jan Stets, and Bob Strassfeld. “DUE PROCESS IN THE AMERICAN IDENTITY”, Alabama Law Review¶ 64 Ala. L. Rev. 255)**

**In addition to guarding against cognitive bias, heightened due process may also increase institutional legitimacy¶ over time**. This benefit would not be immediate; nevertheless, as Professor Lawrence Solum has noted, **even a**¶ **consequentialist approach to due process need not confine itself to a calculation of only the most obvious or short-term**¶ **costs and benefits**. n159 Instead, **it should account for more far-reaching effects, including political legitimacy. n160**¶ **And a respect for procedural justice, in particular, can increase institutional legitimacy; as scholars have noted,**¶ **"procedural fairness plays a key role in shaping the legitimacy that citizens grant to government authority."**

### Politics

#### **Obama Will push to close G’tmo but it will take a significant amount of political capital**

Huskey 11 [Kristine, founder and former director of the national security clinic at the University of Texas School of law, "Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention" University of New Hampshire Law Review, 9(2)

What does all this say about the future of Guantanamo and, concomitantly,

preventive detention? It is clear that the Administration

faces an uphill battle if it intends to pursue closure of the prison

camp. In addition, there is no doubt that the Administration believes

that the physical presence of Guantanamo is a national security concern

and that it should at least keep stating publicly that the prison

should close. As recently as December 2010, President Obama expressed

the continued desire to close Guantanamo, saying it has

“‘become a symbol’ and a recruiting tool for ‘al Qaeda and jihadists.’”

39 At the same time, however, it has become increasingly clear

(or, clearer in my opinion), that the Obama Administration has no

intention of ending long-term preventive detention regardless of

what happens to the Guantanamo prison. In the same speech in December,

Obama also stated, “I think we can do just as good of a job

housing [detainees] somewhere else.”40 Furthermore, recent reports

of an impending executive order on preventive detention confirm

that the Administration is actively considering the establishment of a

detention regime beyond the current detention regime at Guantanamo.

## Movements DA

#### **Movements of human rights groups are making great gains to solve Human rights abuses. The aff disrupts this work**

Posner 12 [Michael, President of Human Rights Watch, "Human rights in the post-September 11 environment" Seattle Journal for Social Justice: Vol. 5 Issue 1

On a parallel track, there has been an extraordinary proliferation of

nongovernmental human rights organizations around the world. Twentyfive

years ago, there were a very small number of human rights

organizations outside of Western Europe and North America. But now the

creation of these local human rights groups—in almost every country in the

world—has provided a powerful response to arguments by governments

that demands for respect for human rights are an improper interference by

outsiders in their domestic affairs. The world has come a long way toward

creating international baseline standards for the protection of human rights.

Yet today we face an unexpected challenge that threatens to undermine this

progress. It is the assertion by the U.S. government and others that, after

the September 11 attacks, the world has been engaged in a “global war

against terrorism” where international human rights rules simply do not

apply.