## 1AC

### plan

The United States Supreme Courts should restrict the President’s war powers authority to indefinitely detain, on the grounds that the Geneva Conventions confer a private right of action.

### modeling

Advantage one is modeling

Judicial abstention from detention authority has obliterated the international credibility of the Supreme Court

Gruber, 11

(Law Prof-University of Colorado, “An Unintended Casualty of the War on Terror,” 27 Ga. St. U.L. Rev. 299)

As the dust of the Bush administration's war on terror settles, casualties are starting to appear on the legal battlefield. The United States' human rights reputation and the Supreme Court's international influence lay wounded in the wake of U.S. policies that flouted international law by advocating torture, suborning indefinite detention, and erecting irregular tribunals. Through declining citation, the courts of the world are telling the Supreme Court that if it does not respect international and foreign law, international and **foreign courts will not respect it.** Some might object that the Supreme Court should not be lumped with the Bush administration because in fact it handed down several opinions setting limitations on the administration's treatment of terror detainees. While these cases, notably Hamdan v. Rumsfeld, set forth domestic law limitations, their conspicuous effort to avoid giving the Geneva Conventions the force of law served to **confirm world opinion that the Supreme Court is "out of step**." This Essay demonstrates how the Court's avoidance of the treaty status issue in Hamdan not only contributed to the perception of American legal exceptionalism but also paved the way for the single most anti- international opinion in Supreme Court history, Medellin v. Texas. In Medellin, the Supreme Court adopted a legal stance that creates near impassable barriers to the domestic enforcement of treaties. Nonetheless, as President Obama ruminates on maintaining military tribunals and courts brace for another round of terrorism cases, the Supreme Court may yet have a chance to narrow the reach of Medellin, confirm the enforceability of the Geneva Conventions, and restore its international influence. The United States' war on terror has produced a lesser-discussed but **very important casualty: the international reputation of the Supreme Court.** Today, many scholars both within and outside the United States note the dwindling influence of the U.S. Supreme Court, as evidenced by declining worldwide citation. On September 17, 2008, the front page of the New York Times declared, "U.S. Court Is Now Guiding Fewer Nations." n1 The article observes that citations to the Canadian Supreme Court and European Court of Justice are on an upswing, especially in cases involving human rights, while, according to Professor Anne Marie Slaughter, "**We are losing one of the greatest bully pulpits we have ever had."** n2 The bottom line is that much of today's world views U.S. Supreme Court opinion as antiquated and out-of-step with modern constructions of global rights and obligations. n3 To be sure, several aspects of American legal practice garnered international disfavor even before the September 11 attacks, notably the nation's continued legal support for the death penalty. n4 Subsequently, the war on terror and its concurrent destruction of civil liberties, embrace of torture and indefinite detention, and contempt for international humanitarian law cemented the widespread view of America as the prototypical abuser of human rights rather than guarantor. n5 In short, the courts of the world are [\*301] saying that if the U.S. does not respect international and foreign law, international and foreign courts will not respect the U.S. n6 As President Obama recedes from his initial stance against ad hoc military justice n7 and federal courts prepare for another round of military tribunal challenges, n8 we should remain poignantly focused on the reputational damage caused by the Bush administration's "cowboy adventure into totalitarianism," n9 which was permitted to push forward even by "liberal" "obstructionist" Supreme Court decisions. n10 As we move into a new era of international relations and (hopefully) respect for human rights, the time is ripe to learn some lessons about what was and what was not decided in the Supreme Court terrorism cases. This Essay highlights how an unfortunate misstep in the seemingly internationalist Hamdan v. Rumsfeld n11 decision paved the way for a jurisprudence of hostility toward international law. In this way, **progressive Justices actually became complicit in the legal isolationist ideology so prevalent during the Bush era, which led the courts of the world to abandon the Supreme Court.** [\*302] I. A Globalist Court in an Age of Nationalism There can be little dispute that during the Bush administration years, especially those immediately following September 11, internationalism fell out of popular and political favor. Guantanamo, renditions, torture, and the unilateral invasion of Iraq served as stark examples of the United States' go-it-alone mentality regarding human rights and humanitarian law. This attitude was arguably a continuation of the administration's pre-September 11 "exceptionalist" n12 approach to human rights. n13 Foreign jurists and human rights supporters had already been shocked at President Bush's "unsigning" of the Rome Statute, thereby withdrawing support for the International Criminal Court, n14 and the United States' refusal to participate in international environmental regulation. n15 Of course, after September 11, as isolationist sentiment rose, America's acceptance of international law further decreased. Indeed, many Americans, including important legal actors, openly express contempt for international law and legal institutions. n16 In this view, international human rights law is a dirty phrase synonymous with loss of American sovereignty and radical liberal ideology. n17 Following September 11, isolationist sentiment intensified as society became increasingly averse to international law, foreign values, and [\*303] even foreigners. n18 Today, conservatives warn against the corrupting influence of foreign practices and characterize international law as a product of "elite" law professors who are not representative of the nation's views. n19 The body of international scholars has been described by even prominent law professors as either "feather boa-wearing" n20 liberal snobs intent on imposing patrician continental norms on ordinary American folk, n21 or worse, terrorism sympathizers. n22 One professor characterized the Supreme Court's citation of foreign and international sources as a product of "aristocratic" global "bonding" sessions at "Lake Como or the South of France." n23 However, if the executive's actions and public opinion confirmed to the world that the United States disdains international law, what about actions of the Supreme Court itself? In the early part of the decade it appeared that an emerging globalist Supreme Court attitude could provide a much-needed foil to the existence and perception of American legal exceptionalism. n24 Justices Breyer, Ginsburg, and former Justice O'Connor vocally extolled the importance of [\*304] international and comparative law in domestic constitutional jurisprudence. n25 In the 2003 decision Lawrence v. Texas, the Court cited international norms as part of its analysis striking down anti-sodomy laws. n26 In 2005, the Court took up the hotly-contested issue of the juvenile death penalty in Roper v. Simmons. n27 In a move that many conservatives saw, and continue to see, as an all-out assault on American values and sovereignty, the Court cited international sentiment as "confirmation" of its formal conclusion that putting juveniles to death is cruel and unusual. n28 Many, like Justice Ginsburg, believed that the Court's "'island' or 'lone ranger' mentality [was] beginning to change." n29 The Supreme Court was in the midst of a modest revolution, inching towards globalization despite great internal conflict n30 and external controversy. n31 At the same time, the Court was asked to [\*305] assess the parameters of the Bush administration's war on terror. Here, political sides had been quickly drawn regarding constitutional restraints on executive war- making power, n32 with conservatives generally arguing for unfettered or near limitless executive authority and liberals favoring significant congressional and judicial oversight. n33 Lurking in the substrata of the various civil liberties-versus-national security debates was a bubbling political polarization over the enforceability of international law. The Geneva Conventions n34 were arguably the greatest threat to the Bush administration's ability to wage the war on terror in any manner it saw fit, even greater than the Constitution. There is very little language in the Constitution regarding presidential war power, and the principle that during war the President can bypass other constitutional provisions is largely a creature of expert commentary and sparse case law. n35 Because the "law of war" is therefore extra-constitutional, it provided the Supreme Court a virtual tabula rasa [\*306] legal regime on which to scrawl its limitations (or non-limitations). n36 Thus, the Bush administration could reasonably hope to exploit the atmosphere of fear and hysteria surrounding September 11 in favor of an expansive judicial reading of constitutional war power. n37 By contrast, the Geneva Conventions lay out with clarity and great specificity how governments must treat prisoners of war, civilians, and others during times of armed conflict. n38 The treaty accordingly represented a significant potential restraint on how the Bush administration could treat detained Afghan and al Qaeda fighters. From the beginning, the Bush administration pursued a policy of "lawyering" the Conventions n39 and setting forth numerous textual arguments, from specious to plausible, as to why they do not apply to the Guantanamo detainees. n40 It was obviously important for public relations reasons that the administration find a way to convince the [\*307] public that it was in compliance with the Conventions, n41 but in the legal arena the administration advanced an argument for the wholesale jettisoning of the Geneva Conventions in domestic courts: "Non-self-execution." The administration claimed simply that as non-self-executing treaties, the Geneva Conventions could not be enforced by individuals in U.S. courts. n42 In turn, the formerly legalistic question of treaty execution became as highly politicized as the civil liberties-versus-national security debate. Of course, the question of treaty execution long predated the war on terror. The status of treaties is mentioned in the very text of the Constitution, in the Supremacy Clause, which declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." n43 During the early years of our republic, the fact of treaty supremacy was relatively apolitical and apparently accepted. n44 The period immediately following World War II saw a flurry of international legal activity and thrust the question of treaty supremacy into the foreground. n45 Since that time, there has been steadily growing hostility in certain legal, academic, and political circles to the concept that treaties created in part or whole by "foreign entities" are binding [\*308] domestic law. n46 Although a topic of moderate activity in lower courts, until the last few years the Supreme Court had said very little on the issue and had not adopted the position that treaties are generally non-self- executing. n47 It was upon this historical, political, and legal background that the Supreme Court rendered its 2006 decision in Hamdan v. Rumsfeld, invalidating Bush's military tribunals because they violated the Uniform Code of Military Justice (UCMJ). n48 The decision caused a feeling that can be fairly characterized as jubilation among progressives and internationalists. n49 Yale Law School dean and international lawyer Harold Koh declared that the Hamdan case "finally beg[a]n the much-needed process of turning the legal world right-side up again." n50 International law scholar George Fletcher dubbed Hamdan a new beginning for international law in the United States. n51 Perhaps, however, internationalists were advancing a premature "mission accomplished" declaration. Upon further examination, the Hamdan majority opinion is remarkable in its [\*309] judicial restraint. Although it invalidated Bush's tribunals, it did so on the narrow ground that they violate the UCMJ, a domestic statute that was about to be superseded by the Military Commissions Act (MCA). n52 Hamdan did not pronounce any significant constitutional limitations on presidential war power, n53 nor did it reach the overriding foreign relations question of treaty execution. n54 Hamdan indeed would have been one of the greatest internationalist victories had the Supreme Court been willing, after nearly fifty years of silence, to recognize the force of international law in the face of decades of growing post-World War II isolationism that pinnacled after September 11. Unfortunately, the Court appeared to fear weighing in on the issue and went to great lengths to stay mute on whether the Geneva Conventions constitute valid domestic law. The Hamdan majority's refusal to comment on the status of the Conventions left open a dangerous door for a divided Court, now politically polarized over the treaty execution issue, to finally adopt an isolationist stance toward treaty execution. This is the precise door the Court walked through with its March 25, 2008 decision, Medellin v. Texas. n55 What started out as fear of international human rights law in Hamdan went to loathing in Medellin, as the Court for the first time formally sanctioned the United States' ability to double deal in international relations. n56 But before discussing Medellin, two [\*310] preliminary questions call for examination. First, what is the status of treaties in U.S. domestic law? Second, why was Hamdan's approach to the Geneva Conventions harmful to the Supreme Court's international reputation?

The plan restores the image and influence of the Supreme Court—detention ruling key

Gruber, 11

(Law Prof-University of Colorado, “An Unintended Casualty of the War on Terror,” 27 Ga. St. U.L. Rev. 299)

V. A Second Chance for the Geneva Conventions

It appears likely that the Supreme Court will not rule on the domestic enforceability of the Geneva Conventions any time soon. Congress, through the MCA, has now set forth specific processes governing military trials of "alien unlawful combatants." These tribunals obviously comply with any constitutional mandate that military tribunals be established by both political branches of government. n178 The fact that Congress has approved the tribunals also [\*332] helps to satisfy Common Article 3's requirement of a "regularly constituted court." Indeed, the MCA proclaims itself to be in compliance with Common Article 3. n179 Experts, however, argue that in fact many of the procedures in the MCA are incompatible with Common Article 3's requirement that courts provide "all the judicial guarantees [which are] recognized as indispensable by civilized peoples." n180 Conceivably, then, a detainee subject to military trial under the MCA could assert that his Geneva rights are being violated. If such a case were to arrive at the Supreme Court, the Court would not be able to "backdoor" the Geneva Conventions through UCMJ Article 21, as it did in Hamdan, because the MCA expressly replaces the UCMJ where inconsistent. n181 Thus, **in order to enforce such a detainee's Geneva rights, the Court would have to decide the self- execution question.** Of course, the Supreme Court might simply find that the MCA complies with Common Article 3, rendering a decision on self-execution unnecessary, or strike down the tribunals on domestic grounds. Moreover, it could possibly bypass the self-execution question all together by holding that the MCA replaced contrary Geneva provisions as a "last-in-time" statute. n182 However, courts generally look for clear language before finding that a treaty has been superseded by statute. n183 Although the MCA does seek to stop [\*333] individual invocations of the Geneva Conventions in military trials, elsewhere it confirms that the Geneva Conventions retain the force of international law. n184 If the MCA is insufficiently clear to constitute an express repeal of Geneva, the novel question becomes whether Congress, without repealing a treaty, can "unexecute" it, that is, force it to become non-self- executing. n185 This is, however, a question the Court will not likely address, given that military tribunals are being phased out and the number of detainees is decreasing. Since the June 2008 decision in Boumediene v. Bush permitting detainees to bring habeas corpus petitions despite the MCA's habeas-stripping provisions, n186 district courts have demonstrated a willingness to release detainees. For example, the district court for the District of Columbia ordered the release of Boumediene and several others on the ground that the government failed to prove by a preponderance of the evidence that they were "enemy combatants." n187 Hundreds of other detainees have been released discretionarily and, as of the writing of this Essay in January 2010, only 196 remain. n188 On January 22, 2009, President Obama signed an Executive Order to shut down the Guantanamo facility [\*334] within a year and harmonize U.S. interrogation tactics with the Geneva Conventions. n189 The one terrorism detention case pending at the time before the Supreme Court that might have brought the Geneva Conventions back into play, Al-Marri v. Pucciarelli, n190 was rendered moot in February 2009 when President Obama transferred Al-Marri's case to the criminal system. n191 Still, recent events have served to revive the debate over military tribunals. The one-year deadline for closing Guantanamo has come and gone. n192 Moreover, President Obama, apparently under pressure from Congress, has retreated from his commitment to permanently close the Bush terrorism play- book. n193 He now endorses military trials, albeit under an apparently more civil-rights oriented version of Bush's commissions, n194 and supports indefinite detention of certain [\*335] terror suspects. n195 Meanwhile, trials under MCA procedures are on- going. n196 As a consequence, the possibility that the Supreme Court will have another opportunity to rule on Geneva's applicability to the war on terror still exists. If the occasion arises, the Supreme Court will have another chance to turn "the legal world right-side up again" n197 and to show that it is not a "lone ranger" n198 by affirming the domestic enforceability of the Geneva Conventions. Although Medellin may have created yet another legalistic barrier between the "war" detainees n199 and their human rights, the case leaves some room for a future decision giving effect to the Geneva Conventions. Conclusion As President Obama inches ever closer to embracing the "twilight zone" model of terrorism law, it would be wise to keep in mind the reputational harm the Bush administration's war on terror caused the United States. One human rights advocate warned the Obama administration, "The results of the cases [tried in military commissions] will be suspect around the world. It is a tragic mistake to continue them." n200 More than just a source of embarrassment, there are real consequences to America's sullied international reputation. Our experiments with "alternative" military justice not only affect [\*336] **our high court's world influence, they operatively prevent the U**nited **S**tates **from assuming a leadership role in defining and defending international human rights.** For example, in 2007, the Chinese government responded to the U.S. State Department's annual human rights report by stating that America had no standing to comment on others' human rights violations given its conduct of the war on terror. Specifically, the Chinese characterized the United States as "pointing the finger" at other nations while ignoring its "flagrant record of violating the Geneva Convention." n201 **Supreme Court validation of treaty law would no doubt help repair the international reputation of the United States**. n202 The lesson here is about fear and missed opportunity. Guantanamo stands as a stark reminder of the great importance of international humanitarian law during times of crisis. The Geneva Conventions were the very barrier between terrorism detainees and a government regime singularly committed to national security through any means possible. Unfortunately, when international law mattered most, even the liberal Supreme Court justices avoided cementing its legal status. By contrast, Medellin, a convicted murderer, was apparently afforded the full panoply of constitutional protections, and in all likelihood, his inability to confer with consular officials did not prejudice his case. Much less was at stake, and those on the Supreme Court critical of humanitarian law impediments to waging the war on terror could fashion anti-internationalist rules with little public fanfare or liberal resistance. Consequently, although Hamdan will likely go down in history as evidence of the Court's willingness to protect individual rights in the face of massive public fear and executive pressure, it also represents a failure to truly support the comprehensive [\*337] international regime governing war-time detention, a regime in which the United States long ago vowed to participate. But all may not be lost. The Supreme Court might have another chance to rule on the status of the Geneva Conventions, and Medellin leaves some wiggle room on self-execution. **If the Supreme Court is once again to be a beacon of judicial light, it must move beyond the xenophobic exceptionalism** of the Bricker past **and embrace the straightforward and fair principle that signed and ratified treaties are the law of the land.**

Africa models detention

PILPG 8, the Public International Law & Policy Group (PILPG), is a global pro bono law firm that provides legal assistance to foreign governments and international organizations on the negotiation and implementation of peace agreements, the drafting and implementation of post-conflict constitutions, and the creation and operation of war crimes tribunals. PILPG also assists states with the training of judges and the drafting of legislation, “brief of the public international law & policy group as amicus curiae in support of petitioners”, <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuPILPG.authcheckdam.pdf>

The precedent of this Court has a significant impact on rule of law in foreign states. Foreign governments, in particular foreign judiciaries, notice and follow the example set by the U.S. in upholding the rule of law. As foreign governments and judiciaries grapple with new and challenging issues associated with upholding the rule of law during times of conflict, U.S. leadership on the primacy of law during the war on terror is particularly important.

Recent decisions of this Court have reaffirmed the primacy of rule of law in the U.S. during the war on terror. As relates to the present case, a number of this Court’s decisions, most notably Boumediene v. Bush, 128 S.Ct. 2229 (2008), have established clear precedent that Guantanamo detainees have a right to petition for habeas corpus relief. Despite a clear holding from this Court in Boumediene, the Court of Appeals sought in Kiyemba v. Obama to narrow Boumediene to such a degree as to render this Court’s ruling hollow. 555 F.3d 1022 (D.C. Cir. 2009). The present case is thus a test of both the substance of the right granted in Boumediene and the role of this Court in ensuring faithful implementation of its prior decisions.

Although this Court’s rulings only have the force of law in the U.S., foreign governments will take note of the decision in the present case and use the precedent set by this Court to guide their actions in times of conflict. PILPG has advised over two dozen foreign states on peace negotiations and post-conflict constitution drafting, as well as all of the international war crimes tribunals. Through providing pro bono legal assistance to foreign governments and judiciaries, PILPG has observed the important role this Court and U.S. precedent serve in promoting rule of law in foreign states.

In Uganda, for example, the precedent established by this Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and Boumediene, influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In Nepal, this Court has served as a model for the nascent judiciary. In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. And in the South Sudan peace process, the Sudan People’s Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of enforceability of previous adjudicative decisions in the Abyei Arbitration, one of the most important and contentious issues in the ongoing implementation of the peace agreement.

Foreign judges also follow the work of this Court closely. In a number of the judicial training programs PILPG has conducted, foreign judges have asked PILPG detailed questions about the role of this Court in upholding rule of law during the war on terror.

A review of foreign precedent confirms how closely foreign judges follow this Court. In numerous foreign states, and in the international war crimes tribunals, judges regularly cite the precedent of this Court to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own legal systems.

Given the significant influence of this Court on foreign governments and judiciaries, a decision in Kiyemba implementing Boumediene will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict.

Judicial independence key to sustainable democracy in Africa

Abuya, 10

(Law Prof-University of Nairobi, “Can African States Conduct Free and Fair Presidential Elections?” 8 Nw. U. J. Int'l Hum. Rts. 122, Spring)

**An independent judiciary is an essential ingredient in free and fair elections**. Julius Nyerere, a former president of Tanzania, argued that **unless judges perform their work "properly, none of the objectives of [a] democratic society" can be met**. n234 Accordingly, **any initiative that seeks to reform the electoral process in Africa must** also **focus on the judicial system, due to the central role** n235 that **courts play in the resolution of electoral disputes in particular and the promotion and protection of democracy in general**. Any person who is dissatisfied with the result of a presidential election can challenge it in domestic courts. Special courts are established in most African countries to handle such claims. n236 This section first discusses the process of challenging the results of a presidential election. It then evaluates some of the factors that cast doubt on the ability of courts to handle electoral disputes in accordance with due process considerations. A. Process Multiple procedures dictate the process of challenging the election of a president. Once the EMB declares the results of the vote, any unsatisfied person can challenge this outcome in court within a specified period of time. n237 Essentially, election petitions involve determining the "validity" n238 of a poll. The burden of proof is on the person who lodges the application to demonstrate that there was an irregularity in the electoral process. n239 The burden a petitioner must meet is a balance of probability, not beyond a reasonable doubt. n240 Those election petitions that fail to meet this burden are dismissed with costs. n241 Any aggrieved person can appeal the decision of the electoral court to an appellate court. n242 Only questions of law can be raised on appeal in Zimbabwe. n243 In Kenya, by contrast, because the law is silent on the scope of issues that an appellant can advance, administrative law principles apply. n244 Therefore, an aggrieved party could appeal the [\*151] decision of an electoral court on grounds that the decision maker erred either in law or in fact. Where it allows the appeal, the appellate court refers the petition back to the electoral court if it made an error of law. Under such circumstances the electoral court must re-adjudicate the challenge based on the guidance the appellate court provided. For those cases where an appellate court finds that the electoral court made an error of fact, it refers the matter to the EMB directly, with an order, for instance, to recount votes. n245 The mandate of an electoral court is limited to determining whether the law was complied with. Therefore, if the court determines that a person was unduly elected, judges can only order the EMB to re-tally votes. Judges cannot declare that a particular presidential candidate won the election. n246 This authority rests solely with the EMB. B. Challenges Although the process appears straightforward in theory, several problems have arisen in practice. This subsection evaluates issues surrounding the independence and impartiality of courts and their ability to deliver justice promptly in election petitions. 1. Independence and Impartiality As guardians of their countries' constitutions n247 and the rights of individuals, judges must uphold the law at all times. This rule stems from the principle of separation of powers. Under this doctrine, the three arms of government--legislative, executive, and judicial--are required to be autonomous in their work. This requires each arm to guard itself from undue influence by the others. n248 The separation of powers is crucial in any constitutional state. n249 Judicial independence is particularly important, as without it, it would be difficult for an individual to ensure the protection of his or her human rights from infringement by the state. n250 Indeed, **judicial independence is the "lifeblood of constitutionalism**." n251 [\*152] P 63 Furthermore, the independence of the judiciary from the other arms of government plays a central role in preserving and promoting the integrity of courts. n252 Independence also ensures that disputes are adjudicated based on their factual and legal merits, not on political considerations. In other words, judges should be free to act on their "own convictions, without any apprehension of personal consequences" to themselves. n253 Charles Montesquieu claims that in comparison to the power of the other arms of government, the power of the judiciary is "next to nothing." n254 However, this claim underestimates the pivotal role that judges play in the protection and promotion of voting rights. In particular, they are charged with the responsibility of adjudicating the "validity" n255 of a presidential election. An objective decision maker must ensure not only that justice is done, but also that it is seen to be done. He or she must grant effective remedy to a person whose rights and freedoms have been violated. n256 Moreover, confidence in the legal process is critical if such a person is to seek redress in the judicial system. People, especially those who are aggrieved, must have a sense that electoral courts will act independently and determine petitions based on well-established domestic and international legal principles. As the Australian High Court once stated, "the appearance of independence preserves public confidence in the judicial branch" n257 as well as in the law. In other words, public perception of bias by the judiciary should be minimized, if not eliminated altogether. The parties to a petition and members of the public should be confident that justice prevailed. The opposition parties in Kenya and Zimbabwe employed two distinct approaches in the wake of the flawed presidential election. Whereas the opposition party in Kenya refused to seek relief in court, its counterpart in Zimbabwe chose to pursue a judicial remedy. An evaluation of these approaches ultimately reinforces the argument that an independent judiciary is an essential tool for democracy. a) Writing Off the Judiciary: The "We Will Not Go to Court" Route As one would have expected, the main opposition party in Kenya, the Orange Democratic Movement ("ODM"), challenged the outcome of the 2007 presidential election. n258 Although one also would have expected the ODM to seek relief within the local legal framework, n259 the party refused to ventilate its grievance in "Kibaki's courts," thus expressing a total lack of confidence in Kenya's judiciary to resolve any challenge to [\*153] the election results independently and impartially. The ODM viewed the courts as an instrument of the state that could not objectively adjudicate any petition that involved the sitting president. n260 Thus, the ODM believed that the solution to the flawed presidential poll lay in engaging the government through peaceful protests rather than through litigation. Their supporters took their dissatisfaction with the election results to the streets. In response, the government declared that it would deal decisively with any unauthorized or unlawful demonstration. It also argued that any aggrieved person should seek relief in court: "Elections are over and our Constitution does say that once the Electoral Commission has declared the results those are the results that we accept. If we have any disputes, the normal way of resolving them is ... by petitioning the High Court." n261 Interestingly, the Vice President of Kenya, Kalonzo Musyoka, who was a contender for the presidency in the 2007 election, echoed this viewpoint: "I am a lawyer. I can even take instructions. And I can argue for [the ODM]." n262 Some commentators expressed similar sentiments. Peter Kagwanja, President of the Africa Policy Institute, claimed that the domestic legal framework was the proper forum for resolving electoral disputes. n263 Kagwanja asserted that "giant strides" had been made since Kenya's independence in 1963 to set up "a functioning modern" judicial system. n264 Thus, people must respect court decisions, "however sleazy" they may be. n265 To support this assertion, Kagwanja cited the U.S. Supreme Court decision in Bush v. Gore, n266 where the central issue was the tallying of votes in the state of Florida. Bush has been the subject of wide discussion, n267 and courts in Kenya could have drawn from the rich jurisprudence that decision has generated. However, the assertion by Kagwanja is narrow in the sense that he ignores the vital role that confidence in the judiciary and court system plays in the litigation process. Indeed, courts worldwide have underscored the value of public confidence on the judiciary. In their dissent in Bush, Justices Breyer and Stevens describe belief in the judiciary as the foundation of the rule of law. n268 Canadian n269 and Australian n270 courts have also acknowledged that public perception is a core component of the justice system. In the words of Justice Katju of the Indian Supreme Court: [\*154] It is of upmost importance for the public to have confidence in the judiciary. The role of the judiciary is to resolve disputes amicably. Without it, people may use violence to resolve differences. To avoid this, the judiciary must be independent. This is an inherent trait. If a judge is independent and knows the law, the losing party is likely to be pacified. He or she will be content, notwithstanding the fact that he or she has lost the action. n271 **Data from Africa** n272 and elsewhere n273 **demonstrate the importance of public trust in the judiciary**. People engage the judiciary because they have faith in the court system, n274 and they believe their disputes will be resolved based on legal principles. In addition, they trust that judges will be independent and not favor any party. n275 Absent this trust, it is doubtful that presidential candidates would ever seek relief in domestic courts. Kenya's judiciary has undergone a number of developments, including a transformation from an all-white bench at the time of independence to a bench comprised of native-born judges today. However, courts in Kenya and Zimbabwe do not have a reputation of fairness and independence. Survey data suggest that many citizens do not trust that courts and judges in Africa are autonomous in their work. In a survey conducted in 2006 and 2007 among thirty-two African countries, including Kenya and Zimbabwe, the Gallup Organization found that just over half of those polled (fifty-three percent) expressed confidence in the judiciary in their country. n276 Moreover, a number of studies have established that courts in Kenya and Zimbabwe cannot discharge their mandates impartially and independently. For instance, in its 2008 report, the Fund for Peace, a nonprofit research and education organization, described the judiciary in Kenya and Zimbabwe as "weak" n277 and "poor," n278 respectively. The 2008 report of the Waki [\*155] Commission observed that Kenya's judiciary had "acquired the notoriety of losing the confidence and trust of [its clientele] because of the perception that it is not independent." n279 Legal practitioners argue that public confidence in the Kenyan judiciary has "virtually collapsed." n280 Simply put, the judiciary in Kenya and Zimbabwe is facing a crisis of confidence.

African rule of law solves multiple zoonotic diseases

Aluwong, lecturer in department of veterinary public health and preventive medicine at Ahmadu Bello University, 2010

(“Emerging diseases and implications for Millennium Development Goals in Africa by 2015 – an overview,” *Veterinaria Italiana*, 46 (2), http://www.te.izs.it/vet\_italiana/2010/46\_2/137.pdf)

Emerging diseases can occur anywhere in the world and the consequences can be severe. Based on experience to date, it is difficult to predict the origin or the nature of future emerging diseases. Recently, new emerging diseases have in some instances demonstrated that they originate primarily where there are high concentrations of different animal species, often in close contact with people (2). As human lifestyles change due to advancing technologies, increasing populations and changing social behaviour, new diseases emerge, while those that have been controlled in the past sometimes tend to re-emerge. Emerging diseases can be defined as infections that are new occurrences in a susceptible population or are rapidly increasing in incidence or geographic range (16). About 75% of the emerging diseases that have affected humans in the past 10 years are caused by pathogens originating from animals and/or their products (29). Approximately 60% of these diseases are zoonoses, including recent examples, such as H1N1 (commonly referred to as ‘swine flu’), avian influenza, severe acute respiratory syndrome (SARS), Ebola haemorrhagic fever and probably human immunodeficiency virus/acquired immune deficiency syndrome (HIV/AIDS). Some of the most important factors that have contributed to an increase in emerging diseases are as follows:

▪ expansion of the human population

▪ climate change

▪ globalisation of trade

▪ increasing movement of animal species, civil unrest/wars, microbial evolution and ecological disruption (16).

These and other current issues suggest that emerging diseases may not only continue to occur, but have the potential of increasing the rate of their emergence. These observations call for closer integration of veterinary, medical and environmental communities, along with relentless education of the general public and policy-makers on the African continent.

Complexity of factors underlying infectious disease emergence

Microbial evolution

The emergence of some disease is due to the natural evolution of micro-organisms. For example, a new serotype of Vibrio cholerae, designated 0139, appears to be nearly identical to the strain that most commonly causes cholera epidemics, Vibrio cholerae 01, except that it has gained the ability to produce a capsule (8). The consequence of the new serotype is that even people who have immunity against the earlier strain are susceptible to the new one. Resistance to the effects of antimicrobial drugs is contributing to the re-emergence of many diseases, including malaria.

*[CONTINUES… full article available… typing out the entire PDF is a nightmare…]*

The principal Millennium Development Goal that interfaces with emerging diseases is Millennium Development Goal No. 6, which is combating HIV/AIDS, malaria, and other diseases. These other diseases mentioned in the sixth goal of the Millennium Development Goals include emerging diseases. Ensuring environmental sustainability is another goal of the Millennium Development Goals that also interfaced with emerging diseases. This includes livestock and environmental issues, such as land, water, air, biodiversity and ecosystems. Therefore, the mitigation of emerging disease outbreaks in Africa could largely contribute to achieving the Millennium Development Goals in Africa by 2015. For, as the saying goes, 'a healthy population is a productive population'. When there is complete eradication of microbial infectious agents in Africa, other Millennium Development Goals such as the eradication of extreme poverty and hunger, the reduction of child mortality, achieving universal primary education etc., will be reached. However, good governance and rule of law on the continent of Africa must be a pre-requisite for the attainment of the Millenium Development Goals by 2015.

New and strategic areas for partnerships within the global ‘One Health’ movement should be scientifically explored in Africa. The lessons of the recent past have taught us to expect the reoccurrence of emerging infections at any time and/or any place. Therefore, there is an urgent need to strengthen research, investigation and disease control partnerships among animal health and public health experts.

Emerging infectious diseases do not have boundaries, that is, they occur and can spread to other continents of the world. It is therefore pertinent to adopt a global collaborative agenda that focuses on the surveillance, prevention and control of emerging and re-emerging infectious diseases of animal origin. This should include the following components: the areas of wildlife biology, ecology, virology, ▪ integrated research agenda food safety, food and animal production, ▪ interdisciplinary zoonotic disease research centres ▪ infrastructural development; work force

development ▪ improved international coordination/cooper- ation and focus oriented.

*[CONTINUES… full article available… typing out the entire PDF is a nightmare…]*

The responses of OIE member countries to a questionnaire on emerging zoonoses overwhelmingly acknowledged the impact of emerging zoonoses and their likely continued resurgence (18). A large number of member countries reported that they had experienced incidents of emerging and re-emerging diseases, along with the emergence of antimicrobial-resistant pathogens, and noted the importance of strengthening and improving surveillance, research and training to ensure or to build the capacity to address these persistent threats.

The mitigation of emerging diseases on the continent of Africa will help to attain the Millennium Development Goals but the entrenchment of good democracy and rule of law must be a ’sine qua non’ of the various governments of African countries. Another key point is the need for stronger partnerships with national and international animal and public health organisations, academic institutions, private practitioners in animal and public health and non-governmental organisations to meet the ensuing challenges. The OIE and the FAO must continue to be involved in their response to the needs of member countries and the changing demands and opportunities associated with emerging infections. Of paramount importance to this transformation will be the formation and strengthening of partnerships, mobilisation of resources and the development of a global intersectoral approach in tackling zoonotic threats.

New zoonotic diseases cause extinction – different from past diseases

Quammen, award-winning science writer, long-time columnist for *Outside* magazine, writer for National Geographic, Harper's, Rolling Stone, the New York Times Book Review and others, 9/29/2012

(David, “Could the next big animal-to-human disease wipe us out?,” The Guardian, pg. 29, Lexis)

Infectious disease is all around us. It's one of the basic processes that ecologists study, along with predation and competition. Predators are big beasts that eat their prey from outside. Pathogens (disease-causing agents, such as viruses) are small beasts that eat their prey from within. Although infectious disease can seem grisly and dreadful, under ordinary conditions, it's every bit as natural as what lions do to wildebeests and zebras. **But conditions aren't always ordinary**.

Just as predators have their accustomed prey, so do pathogens. And just as a lion might occasionally depart from its normal behaviour - to kill a cow instead of a wildebeest, or a human instead of a zebra - so a pathogen can shift to a new target. **Aberrations occur**. When a pathogen leaps from an animal into a person, and succeeds in establishing itself as an infectious presence, sometimes causing illness or death, the result is a zoonosis.

It's a mildly technical term, zoonosis, unfamiliar to most people, but it helps clarify the biological complexities behind the ominous headlines about swine flu, bird flu, Sars, emerging diseases in general, and the threat of a global pandemic. It's a word of the future, destined for heavy use in the 21st century.

Ebola and Marburg are zoonoses. So is bubonic plague. So was the so-called Spanish influenza of 1918-1919, which had its source in a wild aquatic bird and emerged to kill as many as 50 million people. All of the human influenzas are zoonoses. As are monkeypox, bovine tuberculosis, Lyme disease, West Nile fever, rabies and a strange new affliction called Nipah encephalitis, which has killed pigs and pig farmers in Malaysia. Each of these zoonoses reflects the action of a pathogen that can "spillover", crossing into people from other animals.

Aids is a disease of zoonotic origin caused by a virus that, having reached humans through a few accidental events in western and central Africa, now passes human-to-human. This form of interspecies leap is not rare; about 60% of all human infectious diseases currently known either cross routinely or have recently crossed between other animals and us. Some of those - notably rabies - are familiar, widespread and still horrendously lethal, killing humans by the thousands despite centuries of efforts at coping with their effects. Others are new and inexplicably sporadic, claiming a few victims or a few hundred, and then disappearing for years.

**Zoonotic pathogens can hide**. The least conspicuous strategy is to lurk within what's called a reservoir host: a living organism that carries the pathogen while suffering little or no illness. When a disease seems to disappear between outbreaks, it's often still lingering nearby, within some reservoir host. A rodent? A bird? A butterfly? A bat? To reside undetected is probably easiest wherever biological diversity is high and the ecosystem is relatively undisturbed. The converse is also true: ecological disturbance causes diseases to emerge. Shake a tree and things fall out.

Michelle Barnes is an energetic, late 40s-ish woman, an avid rock climber and cyclist. Her auburn hair, she told me cheerily, came from a bottle. It approximates the original colour, but the original is gone. In 2008, her hair started falling out; the rest went grey "pretty much overnight". This was among the lesser effects of a mystery illness that had nearly killed her during January that year, just after she'd returned from Uganda.

Her story paralleled the one Jaap Taal had told me about Astrid, with several key differences - the main one being that Michelle Barnes was still alive. Michelle and her husband, Rick Taylor, had wanted to see mountain gorillas, too. Their guide had taken them through Maramagambo Forest and into Python Cave. They, too, had to clamber across those slippery boulders. As a rock climber, Barnes said, she tends to be very conscious of where she places her hands. No, she didn't touch any guano. No, she was not bumped by a bat. By late afternoon they were back, watching the sunset. It was Christmas evening 2007.

They arrived home on New Year's Day. On 4 January, Barnes woke up feeling as if someone had driven a needle into her skull. She was achy all over, feverish. "And then, as the day went on, I started developing a rash across my stomach." The rash spread. "Over the next 48 hours, I just went down really fast."

By the time Barnes turned up at a hospital in suburban Denver, she was dehydrated; her white blood count was imperceptible; her kidneys and liver had begun shutting down. An infectious disease specialist, Dr Norman K Fujita, arranged for her to be tested for a range of infections that might be contracted in Africa. All came back negative, including the test for Marburg.

Gradually her body regained strength and her organs began to recover. After 12 days, she left hospital, still weak and anaemic, still undiagnosed. In March she saw Fujita on a follow-up visit and he had her serum tested again for Marburg. Again, negative. Three more months passed, and Barnes, now grey-haired, lacking her old energy, suffering abdominal pain, unable to focus, got an email from a journalist she and Taylor had met on the Uganda trip, who had just seen a news article. In the Netherlands, a woman had died of Marburg after a Ugandan holiday during which she had visited a cave full of bats.

Barnes spent the next 24 hours Googling every article on the case she could find. Early the following Monday morning, she was back at Dr Fujita's door. He agreed to test her a third time for Marburg. This time a lab technician crosschecked the third sample, and then the first sample.

The new results went to Fujita, who called Barnes: "You're now an honorary infectious disease doctor. You've self-diagnosed, and the Marburg test came back positive."

The Marburg virus had reappeared in Uganda in 2007. It was a small outbreak, affecting four miners, one of whom died, working at a site called Kitaka Cave. But Joosten's death, and Barnes's diagnosis, implied a change in the potential scope of the situation. That local Ugandans were dying of Marburg was a severe concern - sufficient to bring a response team of scientists in haste. But if tourists, too, were involved, tripping in and out of some python-infested Marburg repository, unprotected, and then boarding their return flights to other continents, the place was not just a peril for Ugandan miners and their families. It was also an international threat.

The first team of scientists had collected about 800 bats from Kitaka Cave for dissecting and sampling, and marked and released more than 1,000, using beaded collars coded with a number. That team, including scientist Brian Amman, had found live Marburg virus in five bats.

Entering Python Cave after Joosten's death, another team of scientists, again including Amman, came across one of the beaded collars they had placed on captured bats three months earlier and 30 miles away.

"It confirmed my suspicions that these bats are moving," Amman said - and moving not only through the forest but from one roosting site to another. Travel of individual bats between far-flung roosts implied circumstances whereby Marburg virus might ultimately be transmitted all across Africa, from one bat encampment to another. It voided the comforting assumption that this virus is strictly localised. And it highlighted the complementary question: why don't outbreaks of Marburg virus disease happen more often? Marburg is only one instance to which that question applies. Why not more Ebola? Why not more Sars?

In the case of Sars, the scenario could have been very much worse. Apart from the 2003 outbreak and the aftershock cases in early 2004, it hasn't recurred. . . so far. Eight thousand cases are relatively few for such an explosive infection; 774 people died, not 7 million. Several factors contributed to limiting the scope and impact of the outbreak, of which humanity's good luck was only one. Another was the speed and excellence of the laboratory diagnostics - finding the virus and identifying it. Still another was the brisk efficiency with which cases were isolated, contacts were traced and quarantine measures were instituted, first in southern China, then in Hong Kong, Singapore, Hanoi and Toronto. If the virus had arrived in a different sort of big city - more loosely governed, full of poor people, lacking first-rate medical institutions - **it might have burned through a much larger segment of humanity**.

One further factor, possibly the most crucial, was inherent in the way Sars affects the human body: symptoms tend to appear in a person before, rather than after, that person becomes highly infectious. That allowed many Sars cases to be recognised, hospitalised and placed in isolation before they hit their peak of infectivity. With influenza and many other diseases, the order is reversed. That probably helped account for the scale of worldwide misery and death during the 1918-1919 influenza. And that infamous global pandemic occurred in the era before globalisation. Everything nowadays moves around the planet faster, including viruses. **When the Next Big One comes**, **it will** likely **conform to the** same perverse pattern as the **1918 influenza**: high infectivity preceding notable symptoms. That will help it move through cities and airports like an angel of death.

The Next Big One is a subject that disease scientists around the world often address. The most recent big one is Aids, of which the eventual total bigness cannot even be predicted - about 30 million deaths, 34 million living people infected, and with no end in sight. Fortunately, not every virus goes **airborne** from one host to another. If HIV-1 could, you and I might already be dead. If the **rabies** virus could, it **would be the most horrific pathogen on the planet**. The influenzas are well adapted for airborne transmission, which is why a new strain can circle the world within days. The Sars virus travels this route, too, or anyway by the respiratory droplets of sneezes and coughs - hanging in the air of a hotel corridor, moving through the cabin of an aeroplane - and that capacity, combined with its case fatality rate of almost 10%, is what made it so scary in 2003 to the people who understood it best.

Human-to-human transmission is the crux. That capacity is what separates a bizarre, awful, localised, intermittent and mysterious disease (such as Ebola) from a global pandemic. Have you noticed the persistent, low-level buzz about avian influenza, the strain known as H5N1, among disease experts over the past 15 years? That's because avian flu worries them deeply, though it hasn't caused many human fatalities. Swine flu comes and goes periodically in the human population (as it came and went during 2009), sometimes causing a bad pandemic and sometimes (as in 2009) not so bad as expected; but avian flu resides in a different category of menacing possibility. It worries the flu scientists because they know that H5N1 influenza is extremely virulent in people, with a high lethality. As yet, there have been a relatively low number of cases, and it is poorly transmissible, so far, from human to human. It'll kill you if you catch it, very likely, but you're unlikely to catch it except by butchering an infected chicken. But if H5N1 mutates or reassembles itself in just the right way, if it adapts for human-to-human transmission, it could become the biggest and fastest killer disease since 1918.

It got to Egypt in 2006 and has been especially problematic for that country. As of August 2011, there were 151 confirmed cases, of which 52 were fatal. That represents more than a quarter of all the world's known human cases of bird flu since H5N1 emerged in 1997. But here's a critical fact: those unfortunate Egyptian patients all seem to have acquired the virus directly from birds. This indicates that the virus hasn't yet found an efficient way to pass from one person to another.

Two aspects of the situation are dangerous, according to biologist Robert Webster. The first is that Egypt, given its recent political upheavals, may be unable to staunch an outbreak of transmissible avian flu, if one occurs. His second concern is shared by influenza researchers and public health officials around the globe: with all that mutating, with all that contact between people and their infected birds, the virus could hit upon a genetic configuration making it highly transmissible among people.

"As long as H5N1 is out there in the world," Webster told me, "**there is the possibility of disaster**. . . There is the theoretical possibility that it can acquire the ability to transmit human-to-human." He paused. "And then God help us."

We're unique in the history of mammals. No other primate has ever weighed upon the planet to anything like the degree we do. In ecological terms, we are almost paradoxical: large-bodied and long-lived but grotesquely abundant. **We are an outbreak**.

**And here's the thing about outbreaks**: **they end**. In some cases they end after many years, in others they end rather soon. In some cases they end gradually, in others they end with a crash. In certain cases, they end and recur and end again. Populations of tent caterpillars, for example, seem to rise steeply and fall sharply on a cycle of anywhere from five to 11 years. The crash endings are dramatic, and for a long while they seemed mysterious. What could account for such sudden and recurrent collapses? One possible factor is infectious disease, and viruses in particular.

### new

Advantage two is Geneva

Ruling on a private right of action is key to enforcement of the Conventions

Gruber, 11

(Law Prof-Colorado, Courts and Terrorism: Nine Nations Balance Rights and Security, “*One More Casualty of the "War on Terror,"* ed. Volcansek, P. 33-50)

So when it comes to the Geneva Conventions, **the analysis should actually be quite simple. Geneva provides wartime detainees with a laundry list of individual rights** (e.g., Third Geneva Convention, arts. 5-7,14,84- 85,98,1o5-o6, 1 z9-30). There are several sources from which to **derive Guantanamo prisoners' private right to enforce the Geneva Conventions**, and the most obvious is the federal habeas corpus statute. This statute provides that prisoners who are in custody "in violation of the Constitution or laws or treaties of the United States" may file petitions in federal court seeking their release (z8 U.S.C. S 2.2.41). As a consequence, Guantanamo detainees should be **permitted to challenge their detention on the ground that such custody violates the Geneva Conventions' dictates**. The exceptionalist approach is not very simple because it is a product of ongoing legal obfuscation and even trickery (Vazquez, 1995). Understanding what this approach enables is important. A rule that nullifies treaties as domestic law operatively allows the United States and, for example, the United Kingdom, Canada, and Australia, to sign international human rights agreements and purport to support individual rights, while simultaneously divesting those agreements of any ability to actually give rights to individuals (Paust, 1993). Even worse, such a rule makes old human rights and humanitarian treaties, which were signed in good faith by past administrations, **easy to ignore by future administrations** hostile to those rights (Gruber, 2007). Indeed the Bush administration hid behind the cloak of non-self-execution in its insistence that the Geneva Conventions did not provide individual rights to Guantanamo detainees. To trace the origin of the exceptionalist approach to self-execution, one must go back to the 1829 case, Foster v. Neilson, that involved a dispute over land rights under a treaty between Spain and the United States (2.7 U.S. 2.53 ). In the treaty, the United States agreed that certain land transfers that had occurred between Spain and individuals "shall be ratified." The Supreme Court, not wanting the transfers to he legally valid — some say for political and racial reasons (Richardson, woo) — interpreted the "shall be ratified" phrase in quite a bizarre manner. The Court construed the word "shall" to mean that the United States had not intended the land transfers to be validated by the treaty but only to promise that the transfers would become valid if Congress passed a law ratifying them (Foster, 2.7 U.S. 253, at 314-15). The Court opined that when "parties engage to perform a particular act ... the legislature must execute the contract before it can become a rule for the Court" (Id. at 314). By this analysis, the Court basically made the treaty illusory because the president, of course, cannot force Congress to pass legislation. In essence, under the Court's interpretation, the United States promised Spain exactly nothing. Realizing this, the Court four years later reinterpreted the treaty to say that the treaty itself validated the land grants (United States v. Percheman, 32 U.S. 51, 69 (1833)). Today, treaty exceptionalists take the above Foster language as generally signifying that there are two classes of treaties, self-executing and non-self-executing, and that most treaties are non-self-executing. Immediately after Foster, however, things changed very little. Courts continued to view treaties as valid federal law, enforcing those that conferred individual rights (Paust, 1988) and only refusing to allow individual lawsuits when the treaties clearly created solely "horizontal" obligations between nations (e.g., Edye v. Robertson (Head Money Cases), I t z U.S. 580, 598-99 (1884)). Yet with World War II came the birth of the international human rights era, including the U.S. signing of the UN Charter and consideration of the proposed Genocide Convention. One California court of appeals case, Sei Fujii v. State (217 P.zd 481 (Cal. Dist. Ct. App. 195o)), and some U.S. Supreme Court concurring opinions in Oyama v. California (33z U.S. 633 (1948)) relied on the UN Charter to strike down the racially discriminatory Alien Land Law. 3 These cases were enough to concern conservative politicians that international law might spell an end to southern racial segregation. In 1951, Republican senator John Bricker introduced a draft constitutional amendment — dubbed the "Bricker Amendment" — to make all treaties unenforceable in the absence of implementing legislation.4 Rather than admit to the underlying segregationist purpose, "Brickerites" defended the amendment as being compelled by the principle of American domestic sovereignty. One supporter stated that the amendment marked the "line between those Americans who believe in the preservation of national sovereignty and those who believe that our national independence should yield to some kind of world authority" (Holman, 1954). The Bricker Amendment eventually failed to pass, and Bricker abandoned his efforts after securing assurances from the White House that the president would not sign the Genocide Convention (Henkin, 1995). Nonetheless, that historical moment was instrumental in creating a national discourse pitting international law against American sovereignty. Subsequently, lower court opinions started to chip away at treaty enforceability by creating a supercharged self-execution doctrine. Among other things, courts began to require specific language on domestic enforceability or other evidence of drafter intent regarding self-execution before finding a treaty enforceable a garttia-De La Rosa v. United States, 417 1:.3d 145, 15o (1st C. zoo5)). These legal maneuvers to thwart treaty law might seem facially reasonable, but on further examination, they are quite unsound. A court declaring a treaty that clearly confers individual rights non-self-executing because there is no specific language saying that signatories are bound to enforce those rights is akin to a court refusing to enforce federal legislation unless bill drafters add a provision stating, "And we really mean it." The situation resembles a court's refusing to enforce a contract unless the parties put in a provision stating, "This contract is enforceable." Lower courts have set up other hurdles to treaty enforceability by creating doctrines such as the presumption that treaties create only obligations between nations and do not create individual rights, even where treaty language expressly discusses treatment of individuals (Hamdan v. Rumsfeld, 415 F.3d 33, 38 (D.C. Cir. zoos)). Many of these anti-internationalist opinions originate from conservative jurists who express dismay at the inefficiency and expense of domestic human rights treaty litigation (Tel- Oren v. Libyan Arab Republic, 726 F.zd at 809 n.16, 8 to (D.D.C. 1981) (Bork, J., concurring)). Perhaps one could think that this lower court jurisprudence bound the Supreme Court to avoid finding the Geneva Conventions self-executing, However, it did not. The Supreme Court has ruled in a handful of treaty cases over the last 200 years, nearly always finding the treaty at issue self-executing without regard to specific language on domestic enforceability or drafter intent regarding self-execution (Gruber, zoo7; Sloss, 2006). Justice Breyer summed up the body of Supreme Court treaty cases as recognizing "(I ) a treaty obligated the United States to treat foreign nationals in a certain manner; (z) the obligation had been breached by the Government's conduct; and (3) the foreign national could therefore seek redress for that breach in a judicial proceeding, even though the treaty did not specifically mention judicial enforcement" (Sanchez-Llamas v. Oregon, 12.6 S. Ct. z696 ( zoo6) (Breyer, J., dissenting)). The question then becomes, Did the Supreme Court have other valid reasons for exercising restraint on the Geneva enforceability issue in Hamdan? A careful examination of Hamdan's claims for relief and the Court's Common Article 3 analysis warrant an answer in the negative. HAMDAN AND INTERNATIONAL LAW Hamdan and other detainees had precisely argued that their Geneva rights were being violated, both by the Bush's military tribunal process and the manner of their detention. They specifically requested that the Court enforce their Geneva rights and release them or modify the circumstances of their custody. The most natural course of action would have been for the Court to engage in a simple two-step inquiry: (1) Do the detainees have enforceable rights under the Geneva Convention?; and ( 2) Were these rights violated? The Court clearly answered the second question, opining that Bush's tribunal procedures violated Common Article 3 (Hamdan, 126 S. Ct., at 2796). It accordingly found that the tribunal procedures were legally invalid. Amazingly, however, the Court was able to invalidate the tribunals without addressing the issue of whether the detainees had enforceable Geneva rights in the first place. How was it possible that the Supreme Court found the tribunals to violate the Geneva Convention and struck them down while simultaneously avoiding addressing whether the detainees could enforce rights under the Geneva Conventions? Justice Stevens cleverly but unfortunately did inter- pretive gymnastics to attain this result. The Court asserted that Common Article 3 applied to Hamdan, not because the Geneva Conventions are a valid source of enforceable individual rights, but because Common Article 3 is silently incorporated by domestic legislation, specifically the Uniform Code of Military Justice, to U.S.C. $ 8ot et seq. (195o)) (UCMJ). The provision of the UCMJ on which the Court relied actually does not men- tion the Geneva Conventions and only briefly refers to the international law of war. Article 2i of the UCMJ states, "The provisions of this chapter conferring jurisdiction upon courts martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may he tried by military commissions, provost courts, or other military tribunals" (id. at 5 821). The Court interpreted this provision as a domestic statutory requirement that Bush's tribunals comport with international law, including Geneva Common Article 3 (Hamdan, 126 S. Ct., at 2796-98). Essentially, the Court treated the UCMJ as "executing" legislation. The problem with the Court's analysis is that the legislative history of and expert consensus on Article z I do not support this conclusion. Historians and experts are in fair agreement that Arti- cle 2 t, whose predecessor provision was passed long before the Geneva Conventions, was meant only to ensure that the military courts-martial authorized under the UCMJ would not disturb any preexisting power of the president to convene executive wartime tribunals. It was not meant to require such tribunals to comport with international law (Silliman, zoos; Stocking, 2003). The Supreme Court obviously felt that the only way to give detainees Geneva rights was to read them into a domestic statute that really had nothing to do with Geneva. By doing so, the Court put the detainees' fates in the hands of Congress, which was about to pass the Military Commissions Act, 120 Stat. z600 (z006); codified at to U.S.C. § 948(a) et seq. (MCA). This act essentially places a legislative stamp of approval on Bush's military tribunal process. The MCA's tribunal procedures are only slightly more protective than those of Bush's tribunals, but the MCA nonetheless declares itself in compliance with Common Article 3 (Id. at § 948(b)(►). It further states that detainees may not invoke the Geneva Con- ventions as a substantive source of rights in litigation (Id. at 948(b)(g)). The Supreme Court was well aware that any international-law-like protection culled from the UCMJ would soon be replaced by the MCA's contempt for international law. As a consequence, although Hamdan might be seen as a momentary civil libertarian victory because it applied Geneva's substantive restraints to Bush's tribunals, **the case proved far less momentous as an indicator of U.S. participation in a worldwide human rights regime**. To the contrary, by all appearances the Court acted **deliberately to avoid securing Geneva law supremacy**. Nonetheless, there is the possibility that the Court's silence on treaty status in Hamdan was merely overprotective but misguided judicial restraint. However, Jordan Paust points out that, although the Court's treatment of Geneva may seem just "normal judicial caution ... , when a judge realizes that every violation of the laws of war is a war crime... such caution in the face of international crime is less than satisfying" (1988: 832.). Yet one could still hope that the avoidance in Hamdan was not an indicator of things to come. MEDELLIN AND THE GENEVA CONVENTION Unfortunately, any such hope was clearly dashed on March 25, zoo8, when the Court rendered its decision in Medellin v. Texas denying foreign nationals the right to vindicate Vienna Convention claims in U.S. courts ('z8 S. Ct. 1346). The Vienna Convention on Consular Relations, to which the United States is a party, guarantees foreign nationals arrested in signatory countries the right to meet with consular officials (zi U. S. T. 77, T. I. A. S. No. 681o). The petitioner, Medellin, a Mexican national, had been arrested for murder in Texas, and state officials did not give him the opportunity to confer with Mexican consular officials. He was convicted and sentenced to death. Medellin raised the issue of Texas's violation of the Vienna Convention in his state habeas corpus appeal. The state court dismissed his habeas appeal on procedural grounds because i Medellin had not raised the Vienna Convention issue in a timely manner during direct appeal. Thus, the state court disposed of Medellin's habeas petition without ever reaching the issue of whether the Vienna Convention creates enforceable domestic rights (Medellin, 12.8 S. Ct., at t 3 54-56). In dismissing Medellin's Vienna Convention claims on procedural grounds, the Texas court was acting in a manner approved by the U.S. Supreme Court. In a zoo6 case, Sanchez-Llamas v. Oregon (458 U.S. 3313), the Court held that, even if the Vienna Convention was self- executing, it would nonetheless be subject to state procedural rules. Although this opinion has been highly criticized by internationalists (Quigley, zoo8), it is unnecessary to discuss the merits of that deci- sion to assess the actions the Court took subsequently in Medellin. It is important to note that the International Court of Justice (ICJ) had considered the very same issue and reached the opposite conclusion in Case Concerning Avena and Other Mexican Nationals, 2004 ICJ 12 ("Avena"). The ICJ held that defendants like Medellin could enforce II their Vienna rights despite having defaulted in state court and that the United States had an obligation to conduct special hearings to determine whether Mexican nationals denied relief on default grounds had in fact 2. been prejudiced by violation of the Vienna Conventions. After the Avena decision, President Bush issued a memorandum stating that the United \*, States "would discharge its international obligations" under Avena "by having State courts give effect to the decision" (Medellin, iz8 S. Ct., at 1356). Medellin asserted that he had a right to a hearing as provided by Avena and the presidential memorandum. Thus, the Supreme Court was called on to decide whether the Avena decision constituted "binding federal law" that Medellin could invoke as a source of substantive rights (Id.). The United States is a signatory to two conventions that bear on the question of the force of the Avena ruling. The Optional Protocol to the Vienna Convention provides that disputes regarding Vienna Convention interpretation fall under the compulsory' jurisdiction of the ICJ (Art. I, 21 U.S.T., at 3 z6), and the United Nations Charter requires signatory nations to "undertake to comply" with ICJ rulings (59 Stat. toy t art. 94( )). Justice Roberts, writing for the majority, concluded that neither of these agreements required Texas to comply with the ICJ's decision (Medellin, I z8 S. Ct., at 136o). There are two notable aspects about the analysis underlying this conclusion. First, the Medellin opinion represents the first unequivocal endorsement by the Supreme Court of the principle that treaties, including those involving individual rights, are unenforceable unless a court can find an express intent-to-self-execute manifested by a clear statement (Id. at 1337). Justice Breyer, in dissent, criticized this move, calling it "misguided" that the "majority looks for language about `self-execution' in the treaty itself and ... erects 'clear statement' presumptions designed to help find an answer" (Id. at t 38o (Breyer, J., dissenting)). Second, the opin- ion characterizes treaties as "primarily" horizontal compacts between nations (Id. at 1357). This comes dangerously close to creating a pre- sumption that treaties are by their nature not sources of individual rights and thereby erecting "legalistic hurdles that can threaten" the application of existing treaties and negotiation of new ones (Id. at i381-82. (Breyer, J., dissenting)). One of the Court's apparent guiding principles was the defense of American sovereignty (Id. at 1364). Indeed, many assert that U.S. law must incorporate a strong self-execution doctrine to preserve America's ability to make its own laws and independent judgments without bowing to the authority of a world court (Yoo, 1999a; Yoo 1999b)• Although this argument may have some surface appeal, it is in fact misleading. U.S. treaty law already contains many mechanisms to preserve sovereignty, such that adopting an isolationist stance toward self-execution is simply not required. For example, under the "last-in-time rule," Congress always has the option to pass domestic legislation abrogating or superseding the terms of a treaty (Whitney v. Robertson, 12.4 U.S. 19o, i94 (1 888)). Moreover, the executive retains the political option to withdraw from treaties. In fact, after the decision in Aveiza, the United States did withdraw from the Optional Protocol (Medellin, 1z8 S. Ct., at 1354). Thus, the exceptionalist approach to self-execution is not essential for the preservation of sovereignty. The primary achievements of the exceptionalist approach were to allow the United States to sign treaties that are obligations in name only and to permit the U.S. government to create the appearance of respect for individual rights while completely denying individuals a remedy. Nevertheless, hope springs eternal, and there is a saving grace to Medellin. Although purporting to support a bright-line distinction between non-self-executing and self-executing treaties based on some vague notion of drafter intent-to-self-execute, what the Medellin majority did in large part was merely interpret the scope of the substantive obliga- tions contained within the Optional Protocol and the UN Charter, The Court held that the Optional Protocol's directive that parties "submit" to the authority of the ICJ only required signatories to send cases to the ICJ and appear for a hearing. According to Justice Roberts, this provision was not intended to require parties actually to adhere to the judgments substantively (Id. at 1358). Regarding the UN Charter, the Court opined that "undertake to comply" only signifies that the United States will make some effort to create mechanisms for complying with ICJ judgments, not that the United States would actually comply (Id. at 1358-59). In essence, Justice Roberts interprets the UN Charter's language on the ICJ the same way the Foster Court interpreted the Spanish treaty. The Medellin majority's analysis renders the UN Charter language on the ICJ so much fluff because it does not actually bind the signatories to recognize ICJ judgments in any way. Of course, one might completely disagree with Roberts' interpretation of these two documents, as Justice Breyer vehemently and articulately did in the dissent (Id. at 1384-85 (Breyer, J., dissenting)). However, the optimistic aspect of the analysis is that Roberts does not assert that the Optional Protocol and UN Charter do require the United States to comply with ICJ judgments, but the treaties are nonetheless non-self-executing and unenforceable. This assertion may leave a bit of ground to argue that, despite his general ruminations on specific intent-to-self-execute, what Roberts means by non-self-executing is simply that the treaty at issue does not grant the individual litigant substantive rights. Perhaps, there is still some room to assert that a treaty that clearly grants individuals rights, like the Geneva Conventions, is by its very nature self-executing. INTERNATIONAL LAW'S FUTURE IN THE UNITED STATES The question remains whether the Court will eventually address whether the Geneva Conventions are a source of substantive rights to the Guantanamo and other terrorism detainees. Congress, through the Military Commissions Act (MCA), has now set forth specific processes governing military trials of "alien unlawful combatants." Several scholars contend that the MCA's delineated procedures do not comply with the requirements of the Geneva Conventions (B. Davis, zoo8; Franklin, zoo8), and .1the question of the construction of the term "enemy combatant" remains. If American courts interpret this term to encompass more than just Al Qaeda and Taliban forces captured on the battlefield, then military commissions could be authorized for persons considered civilians under international law. By stating that "kilo alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights" (MCA S 948(b)(g)), the MCA itself clearly signals that Congress did not intend for terrorism detainees to be able to invoke the Geneva Conventions. Indeed, this language may provide the means once again to bypass the self-execution issue should the question of terrorism detainees' Geneva rights come before the Supreme Court again. As mentioned earlier, Congress always retains the ability to supersede a treaty, and a later statute will take precedence over an earlier ratified treaty. Here, the Court could strike the question of Geneva's self-executing status by finding that the Geneva Conventions have been operatively abrogated by the MCA and are no longer U.S. law at all. However, courts generally look for clear language before finding a treaty has been superseded by statute (Vazquez, 2.007). Although the MCA clearly prohibits individual invocations of the Geneva Conventions in military tribunals, elsewhere it seems to assume that the Geneva Conventions do retain the force of law. For example, the MCA states, "A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions" (MCA 948(b)(f)). If the MCA is found insufficiently clear to constitute an express repeal of Geneva, it raises the novel question of whether Congress, without repealing a treaty, can "un-execute" it; that is, retroactively force it to he non-self-executing (Vazquez,2007).• This is, however, a question the Court is unlikely to reach. Although in Summer 2008, the Court affirmed the ability of Guantanamo detainees to challenge their detention and designation as enemy combatants in U.S. courts, despite the contrary dictates of the MCA (Boumediene v. Bush, tz8 S. Ct. 2229), the detainees' Geneva claims may never reach the Supreme Court again. The D.C. federal district court liberated several detainees, including Boumediene, on the ground that the government had failed to prove by a preponderance of the evidence that they were "enemy combatants" (Boumediene v. Bush, 579 F. Supp.zd 191 (zoo8)). Hun- dreds of other detainees have been discretionarily released, and currently only more than 2 0 0 remain. On January 22, 2009, President Obama signed an Executive Order shutting down the Guantanamo facility within a year and harmonizing U.S. interrogation tactics with the Geneva Conventions ("Obama Signs Order," 2009), even though the deadline was not met. Consequently, the Supreme Court will almost certainly never have another chance to speak on whether Guantanamo prisoners had the right to enforce their Geneva Convention rights. However, one case currently pending in front of the Supreme Court has the potential to raise the question of the status of the Geneva Conventions and other international instruments in U.S. courts. The Court recently granted certiorari in Al-Marri v. Pucciarelli (129 S. Ct. 68o (zoo8)), a case involving a U.S. citizen who is being militarily detained as an "enemy combatant." Although the government claims to have information that Al-Marri planned to engage in acts of international terrorism involving wartime U.S. targets, it has not alleged that Al-Marri was ever an actual w a fighter against the United States in Afghanistan or any other theater (AI-Marri v. Pucciarelli, 534 F•3d z.t3, zzo (4th Cir. zoo8)). Al-Marri's primary arguments are that his military detention violates the U.S. Constitution's guarantee of due process of law (Id. at 2 2 1 ) and is contrary to domestic statutes, including the USA PATRIOT Act (Id. at z41). However, at least one amicus brief filed during the course of the litigation urged that Al-Marri's military detention violates both U.S.-ratified treaty law, including the International Covenant on Civil and Political Rights, and customary international law (Brief, Amici Curiae of Human Rights First and Human Rights Watch, Al-Marri v. Wright (zoo6)). Although this creates a small possibility that the treaty execution issue might he addressed, on review, the Court would very likely choose one of the many domestic avenues toward resolution of the case. In addition, President Obama issued a memorandum asking the Supreme Court to delay hearing the AI-Marri case until he can review the matter. He stated that although he believes Al-Marri "is clearly a dangerous individual," he would like to have a chance "to properly review the evidence against him" before any Supreme Court review is undertaken ("Obama Signs Order," zoo9). If President Obama elects to reverse Bush's designation of Al-Marri as an enemy combatant, the entirety of the Supreme Court case will be moot. As a consequence, the U.S. Supreme Court appears to have succeeded in artfully avoiding the question of the enforceability of international law during an era in which the American government has pushed war powers past the limit of modern civilized norms. The Court sidestepped the issue of treaty enforcement at a time when an understanding and an acceptance of the international laws of war are more important than ever. Thus, the Court missed the opportunity to "turn the legal world right again" (Koh, zoo6) and to show that it is not a "lone ranger" (Ginsburg, zoo4**). To the many individuals detained as "enemies" around the world, the Geneva Conventions represent the best or only legal avenue for relief. Indeed, experts suggest that the U.S. government's adoption of legal frameworks and philosophies that place unbounded executive discretion over international law set the stage for the human rights abuses in Abu Ghraib and Guantanamo** (Fisher, zoo6a).Scholars also widely recognize that the legal approval of the use of Guantanamo as an off-shore prison and the twilight-zone status of terrorism detainees have **engendered worldwide criticism of and** even **disdain for the U**nited **S**tates (Kielsgard, zoo6). One celebrated academic noted that the "dumb fiasco" of **Guantanamo has created a "world-wide outcry of repugnance for this cowboy adventure into totalitarianism**" (Amster- dam, zoo4: 415). More than just a source of embarrassment, America's sullied international reputation has real consequences. In 2007, the Chinese government responded to the U.S. State Department's annual human rights report by stating that America had no standing to comment on other nations' human rights violations given its conduct of the "War on Terror." Specifically, the Chinese characterized the United States as "pointing the finger" at other nations while ignoring its "flagrant record of violating the Geneva Convention in systematically abusing prisoners during the Iraqi War and the War in Afghanistan" (Cody, zoo7). **Supreme Court validation of treaty law would no doubt have helped repair the international reputation of the U**nited **S**tates. As one scholar writes, **"An unequivocal cue from the Supreme Court about the importance of international and comparative standards would have sent an important human rights message and may have averted controversy and embarrassment resulting from executive policies**" (Little, zoo6). Of course, **courts' achieving compliance with treaties**, whether by direct or indirect means, **is most important for the U.S. reputation internationally. We now have a president who seeks to restore the global standing** of the United States, **to adhere to international norms, and to be a part of the international evolution of individual rights. Unfortunately, Supreme Court precedents have long shelf lives, and the treatment of international law in Hamdan and Medellin will likely outlast** the **Obama** administration. **If the U**nited **S**tates **is once again to assert leadership in human rights, acceptance of international law on the political front is not sufficient; judicial movement must accompany the political. For America to participate in the modern global governance regime,** political branches of government must be willing to ratify human rights conventions, and **the judiciary must be willing to embrace a rule of law that treats such agreements as binding and enforceable. Unless the Supreme Court is willing to sound the death knell to the self-execution doctrine, the Court will remain perceived as much more of a lone ranger than as a world team player.**

Using Geneva for detention authority key to global cooperation on terror

Beard, 7

(Law Prof-UCLA & Former General Counsel-DOD, “The Geneva Boomerang: The Military Commissions Act of 2006 And U.S. Counterterror Operations,” 101 A.J.I.L. 56, January, Lexis)

III. POLITICAL BOOMERANGS: BEYOND GUANTANAMO BAY Political boomerangs are likely to be caused by the MCA's negative impact on U.S. efforts to combat terrorism that require international cooperation related to criminal matters, the use of critical foreign facilities, and foreign state approval of key aspects of U.S. counterterror operations. To be successful, finding, tracking, fighting, capturing, detaining, interrogating, transferring, extraditing, and trying terrorists often require an extraordinary level of international cooperation. At one time, many U.S.-sponsored activities in this area enjoyed considerable international support and could be discreetly undertaken on foreign soil with little scrutiny. This situation has changed **dramatically** as a result of highly publicized reports of the mistreatment of detainees in U.S. custody, the detention of suspected terrorists in secret prisons, and the seizure and subsequent rendition of persons to states where they may be subject to torture or harsh interrogation techniques. The active support or quiet complicity of several European states in these actions continues to be investigated and criticized by the European Parliament, [\*70] the Council of Europe, and individual European parliaments, n76 and may lead to criminal charges against U.S. intelligence officers and responsible government officials in some European states. n77 These developments have generally served to undermine public support in European and other states for cooperative activities with the United States concerning detainees, as evidenced by the recent remarks of the legal adviser of the U.S. Department of State who conceded that trying to explain U.S. detention policies to foreign audiences was "clearly an uphill battle." n78 It is into this highly charged and mistrustful environment that the military commissions sanctioned by the MCA are being introduced, against a backdrop of intense skepticism regarding the fairness and independence of military courts generally. n79 This skepticism prompted some countries, immediately after President Bush authorized the use of military commissions, to threaten to refuse to extradite suspected terrorists to the United States without assurances that they would be tried in civilian courts. n80 The attempt by Congress in the MCA to reinterpret or revise Geneva Convention obligations and law of war principles seems more likely to increase, rather than to reduce, such skepticism on the part of foreign governments. The United States, of course, will continue to argue that even though its military commissions do not afford unlawful combatants all the same protections that its own military personnel enjoy in regular courts-martial, the commissions' proceedings are fundamentally fair and do not deserve the nefarious reputation associated with military trials elsewhere. Unfortunately, MCA provisions stripping suspected terrorists in military proceedings of habeas corpus rights leading to their prolonged detention without charges or trial n81 are reminiscent of the practices of other countries in states of emergency that are often associated with serious violations of human rights, including torture and cruel, inhuman, and degrading treatment or punishment. n82 The principal place of detention and interrogation of suspected Qaeda terrorists, the U.S. Naval Base Guantanamo Bay (Guantanamo), has been the primary focus of legal attention because of the Bush administration's unsuccessful argument that its location on foreign soil denied detainees access to U.S. courts. Although Guantanamo remains under Cuban sovereignty, the Supreme Court in Rasul v. Bush recognized that United States authorities effectively [\*71] exercise control over the territory for purposes of habeas corpus rights. n83 An equally important, but less recognized, aspect of Guantanamo is its insulated legal status compared to other overseas U.S. military facilities. The conditions at Guantanamo are characterized by the complete independence of U.S. activities there from the jurisdiction or ultimate control of the host state. Even long-established U.S. bases in Europe, which provide key airfields, ports, and other facilities that support many U.S. counterterror operations and that enjoy the benefit of numerous post--World War II concessions by the host states, are not legal zones in which all U.S. activities occurring there are exempt from the host state's jurisdiction, control, and ultimate sovereignty. n84 To support military and intelligence operations and other defense-related activities around the world, the United States has entered into a wide range of different types of international agreements with foreign states. Only in the most exceptional cases like Guantanamo, however, have sovereign states relinquished complete jurisdiction or control over their respective territories as regards American operations that might take place there. Depending on the international agreement that governs the facility, host states exercise varying degrees of jurisdiction and control over activities and persons there. n85 Although many of these agreements address the status of U.S. military and civilian personnel in that state by significantly restricting local criminal and civil jurisdiction over them and by providing various rights and privileges, rarely do such agreements exempt all U.S. activities there from the ultimate sovereignty of that state. The desire of states to reject any model similar to the one represented by Guantanamo and to ensure continued sovereignty over facilities where U.S. military forces are present is so great that even the term "U.S. base" is rarely found in contemporary agreements. Instead, host governments are more likely to grant only certain limited rights of access to, and usage of, designated "locations" or "facilities." n86 [\*72] Under these circumstances, the ability of U.S. military authorities to engage in a wide range of activities at overseas facilities related to the detention, interrogation, trial, or transfer of accused terrorists without any involvement by local authorities may face serious, long-term difficulties. Differing views by host or supporting governments regarding U.S. compliance with local and international legal obligations thus may not be easily ignored. To the extent that the MCA raises questions about U.S. obligations under the Geneva Conventions, the law of war, and related human rights treaties with respect to the treatment and military trial of detainees, new complications for U.S. counterterror operations **at foreign facilities** will present themselves. The growing protests of European officials over clandestine activities related to the detention and transfer of suspected terrorists that are alleged to have occurred on their territories also suggest that informal secret operations may become more difficult to conduct and that U.S. actions in this area are more likely to be **publicly entangled** with the competing legal requirements of some foreign jurisdictions. Even states that lack a strong human rights record may have an interest in asserting their control and sovereignty over U.S. military activities on their soil and seek to avoid complications that result from the use of their territories for widely criticized types of detainee treatment. Finally, no matter what foreign territory in which they occur, operations involving detainees are not immune from legal problems and protests generated by the perceived mistreatment of nationals of the foreign states that are supporting those operations. Another complication for U.S. military forces caused by the adverse reactions of states to MCA-sanctioned activities **is their impact on a wide variety of cooperative military activities that support counterterror operations** but do not necessarily involve U.S. facilities overseas. The projection of military power to potentially every part of the globe so as to conduct these operations has many implications: U.S. naval vessels require critical transit rights and access to ports; U.S. military aircraft require overflight and landing rights; and ground, air, and naval forces depend on an international network of logistic support activities, in many cases requiring fuel, ammunition, and other supplies to be pre-positioned in foreign countries. These and other requirements make most major U.S. military operations dependent on significant levels of foreign state authorization and international cooperation. For this reason, legal disputes with foreign states regarding the status, treatment, detention, trial, **and transfer of detainees have the potential dramatically to undercut various important U.S. antiterror operations**. IV. CONCLUSION If the struggle against terrorism involves more than just military engagements and is also a war of ideas, American support for law and international legal principles appears to constitute a key part of that war. However, the United States has additional incentives for eschewing efforts like those in the MCA **that minimize the role of international law and reinterpret or revise obligations under** the Geneva Conventions and the law of war with a view to combating [\*73] terrorism. To find them, it need look no farther than its own interests in obtaining essential international cooperation for its current counterterror operations **and in being able to rely in future conflicts on the existing law of war regime, rather than in handing future adversaries an ill-conceived legal model to use against it in those conflicts.**

US is key to global Geneva enforcement—otherwise US troops and contractors are at risk

Beard, 7

(Law Prof-UCLA & Former General Counsel-DOD, “The Geneva Boomerang: The Military Commissions Act of 2006 And U.S. Counterterror Operations,” 101 A.J.I.L. 56, January, Lexis)

Images depicting the mistreatment of Iraqi detainees by U.S. personnel at the Abu Ghraib prison prompted calls in the U.S. Congress for the enactment of clearer and more humane standards to govern the detention and interrogation of persons in U.S. custody. n49 While many commentators suggested that these graphic images of detainee abuse would lead to the mistreatment of captured U.S. personnel, some legal scholars have argued that the logic behind such claims is dubious. n50 In examining states' compliance with obligations under the law of war, these scholars question implicit assumptions about the conditions of symmetry and reciprocity that make such obligations genuinely self-enforcing, and enable and motivate states to keep conflicts limited. n51 Whether or not individual violations of the law of war by a state in a particular conflict produce immediate and traceable reciprocal action by other states, an act of Congress that officially attempts to reinterpret or revise key obligations under the Geneva Conventions and the law of war presents more complex and overarching law-related problems. As a powerful state with worldwide military interests, the United States has had strong incentives to participate in formulating, supporting, and strengthening the Geneva Conventions and the law of war. Beyond promoting the rule of law, encouraging the proper treatment of captured U.S personnel, and serving larger humanitarian purposes, the observance of obligations under the law of war is viewed by the U.S. military as **fundamentally advancing** U.S. military objectives. n52 For these reasons, the United States has generally resisted taking official actions with respect to law of war obligations and rights that would undermine the long-term American interests in maintaining the existing law of war regime. It is thus not surprising that the Bush administration has already been forced to withdraw some "aggressive" interpretations of Geneva Convention obligations in light of their potential long-term negative impact on U.S operations. For example, President Bush decided on January 18, 2002, that the Geneva Conventions were inapplicable to Afghanistan's Taliban regime [\*65] largely on the basis of memorandums from the Department of Justice arguing that it was a "failed state" or nothing more than a militant group of terrorists. n53 While accepting the Department of Justice's conclusion that he had the authority "to suspend [the Third Geneva Convention] as between the United States and Afghanistan," the president ultimately declined to exercise that authority and determined that the Geneva Conventions did apply to the conflict with the Taliban. n54 This reevaluation of the complete inapplicability of the Geneva Conventions took place in the context of memorandums to the president from the Department of State emphasizing the negative impact of such an action on long-term U.S. interests. n55 While captured Taliban fighters could properly be determined not to have fulfilled the four prerequisites of lawful belligerency and thus not to have qualified as prisoners of war (POWs), n56 the issuance of sweeping pronouncements about the inapplicability of the Geneva Conventions to foreign countries by attaching labels to those countries would undermine the overall U.S. commitment to the Conventions and serve as a dangerous precedent in future conflicts. Such actions also make little sense for the U.S. government, as it has often taken a broad view of the different types of conflicts and enemies that can give rise to demands that captured U.S. soldiers be accorded POW status. n57 At a fundamental level, unilateral revision of the Geneva Conventions by the United States **undermines the credibility of the U.S. commitment to the existing Geneva regime.** In an international setting that lacks effective external enforcement mechanisms, allowing the easy violation of agreements, a state may seek to send a signal of credible commitment to other states by constraining its own ability to act in ex ante legal structures, institutions, or procedures that reduce ex post incentives for such noncompliance. n58 A legislative act that restrains or makes it [\*66] costly to exercise such discretionary power and reduces the attractiveness of breaching an agreement can serve such a signaling function. n59 To the extent, however, that the MCA is perceived as unilaterally revising key obligations in the Geneva Conventions and **providing the president with the discretion to issue further reinterpretations**, it **undermines the credible commitment of the U**nited **S**tates **to other states in the international community**. n60 And to the extent that the U.S. commitment is perceived as increasingly less credible, theory suggests that other countries are unlikely to maintain the stringency of their own commitments. As for the future assertion of particular legal rights or obligations, the revisions of the Geneva Conventions officially sanctioned by the MCA may impede or estop the United States **from taking legal positions that it has previously relied on to support its operations and protect its personnel from violations of the law of war**. Furthermore, in adopting a statute that incorporates a flawed approach to the law of war to advance immediate U.S. objectives against terrorism, Congress may have inadvertently offered adversaries of the United States **a legal model for future conflicts, with attendant negative consequences for U.S. operations** and personnel. In spite of the inherent risks for the United States that are associated with unilaterally reinterpreting or revising the Geneva Conventions, the MCA nonetheless does so. **By redefining the concept of combatancy, for example, the MCA may have created a particularly destructive legal boomerang**. Prior to the MCA's enactment, the U.S. government had sought carefully to maintain the distinction between combatants and noncombatants, not only for the purpose of preserving key law of war principles but also in a self-interested effort to prevent large numbers of U.S. civilians and contractors who support U.S. operations from becoming legitimate targets under the law of war. This effort appears to be particularly important as private contractors assume an increasingly significant role in supporting U.S. operations in countries such as Iraq. n61 Current DoD regulations reflect considerable diligence in attempting to distinguish such contractors from combatants, in part by defining as "indirect" the role played by private contractors who provide communications support, transport munitions and other supplies, [\*67] maintain military equipment, and furnish various security and logistic services. n62 Such concerns, along with interests in attending to command-and-control issues, are reflected in DoD regulations aimed at preventing contractors from becoming too closely associated with or involved in "major combat operations" that are "ongoing or imminent." n63 Rather than expecting accredited contractors who accompany and support U.S. forces to be treated as unlawful combatants in the event that they are captured in an armed conflict, DoD regulations presume they will be entitled to POW status under the Third Geneva Convention as "[p]ersons who accompany the armed forces without actually being members thereof." n64 Such status for civilians, however, remains contingent under the Third Geneva Convention on their not actively or directly participating in hostilities. Although legal risks may be associated with any civilian activity that closely supports combat operations, the fact that a civilian contributes in some general way to the war effort or is employed by or accompanies the armed forces does not turn him into a combatant. n65 This statement has long been widely accepted as a formulation of the current rules, at least before Congress expanded the definition of combatancy in the MCA and risked confusing this extraordinarily key distinction upon which the United States has long relied. n66

Failure to lead on Geneva causes global hotspot escalation

Koh, dean of Yale Law School and professor of international agreement, 9/20/2004

(Harold, “On America's Double Standard,” http://prospect.org/article/americas-double-standard)

When the United States holds Taliban detainees at Guantanamo Bay, Cuba, without Geneva Convention hearings, then decries the failure of others to accord Geneva Convention protections to their American prisoners, it supports a double standard. When George W. Bush tries to “unsign” the International Criminal Court (ICC) treaty that Bill Clinton signed in 2000, yet expects other nations to honor signed treaties, he does the same. When U.S. courts ignore an International Court of Justice decision enjoining American execution of foreign nationals, even as we demand that other countries obey international adjudications that favor American interests, the United States is using its vast power and wealth to promote a double standard. In these and other instances, the United States proposes that a different rule should apply to itself than to the rest of the world. U.S. officials say that they must act to protect our security and to avoid unacceptable constraints on national prerogative. But to win the illusion of unfettered sovereignty, they are actually undermining America's capacity to participate in international affairs. Over the past two centuries, the United States has become party not just to a few treaties but to a global network of closely interconnected treaties enmeshed in multiple frameworks of international institutions. Unilateral administration decisions to bend or break one treaty commitment thus rarely end the matter; rather, they usually trigger **vicious cycles of treaty violation**. Repeated insistence on a double standard creates the damaging impression of a United States contemptuous of both its treaty obligations and its treaty partners, even as America tries to mobilize those same partners to help it solve problems it simply cannot solve alone -- most obviously, the war against global terrorism, but also the postwar construction of Iraq, the Middle East crisis, and the renewed nuclear militarization of North Korea. \* \* \* Historically, American administrations have tended to distance and distinguish themselves from the rest of the international community; human-rights advocates have often condemned this “American exceptionalism.” But while the promotion of double standards is indeed corrosive, not all forms of exceptional American behavior are equally harmful. America's distinctive rights culture, for example, sometimes sets it apart. Due to our particular history, some human rights, such as the norm of nondiscrimination based on race or First Amendment protections for speech and religion, have received far greater emphasis and judicial protection in the United States than in Europe. But our distinctive rights culture is not fundamentally inconsistent with universal human-rights values. Nor is America genuinely exceptional because it sometimes uses different labels to describe synonymous concepts. When I appeared before the UN Committee Against Torture in Geneva, Switzerland, to defend the first U.S. report on U.S. compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, I was asked the reasonable question of why the United States does not “maintain a single, comprehensive collation of statistics regarding incidents of torture and cruel, inhuman or degrading treatment or punishment,” a universally understood concept. My answer, in effect, was that we applied different labels, not different standards. The myriad bureaucracies of the federal government, the 50 states, and the territories did gather statistics regarding torture and cruel, inhuman, or degrading treatment, but we called that practice different things, including “cruel and unusual punishment,” “police brutality,” “section 1983 actions,” applications of the exclusionary rule, violations of civil rights under color of state law, and the like. Refusing to accept the internationally accepted term reflected national quirkiness, somewhat akin to our continuing use of feet and inches rather than the metric system. A third form of American exceptionalism, our penchant for non-ratification (or ratification with reservations) of international treaties, is more problematic -- but for the United States, not for the world. For example, it is a huge embarrassment that only two nations in the world -- the United States and Somalia, which until recently did not have an organized government -- have not ratified the international Convention on the Rights of the Child. But this is largely our loss. In no small part because of its promiscuous failure to ratify a convention with which it actually complies in most respects, the United States rarely gets enough credit for the large-scale moral and financial support that it actually gives to children's rights around the world. In my view, by far the most dangerous and destructive form of American exceptionalism is the assertion of double standards. For by embracing double standards, the United States invariably ends up not on the higher rung but on the lower rung with horrid bedfellows -- for example, such countries as Iran, Nigeria, and Saudi Arabia, the only other nations that have not in practice either abolished or declared a moratorium on the imposition of the death penalty on juvenile offenders. This appearance of hypocrisy sharply weakens America's claim to lead globally through moral authority. More important, by opposing global rules in order to loosen them for our purposes, the United States can end up -- as it has done with the Geneva Conventions -- undermining the legitimacy of the rules themselves, just when we need them most.

Collapse of Geneva causes global war

Ratner, 8

(Law Prof-Michigan, “Think Again: Geneva Conventions,” 2/19, http://www.foreignpolicy.com/articles/2008/02/19/think\_again\_geneva\_conventions?page=0,6)

“No Nation Flouts the Geneva Conventions More than the United States” That’s absurd. When bullets start flying, rules get broken. The degree to which any army adheres to the Geneva Conventions is typically a product of its professionalism, training, and sense of ethics. On this score, U.S. compliance with the conventions has been admirable, far surpassing many countries and guerrilla armies that routinely ignore even the most basic provisions. The U.S. military takes great pride in teaching its soldiers civilized rules of war: to preserve military honor and discipline, lessen tensions with civilians, and strive to make a final peace more durable. Contrast that training with Eritrea or Ethiopia, states whose ill-trained forces committed numerous war crimes during their recent border war, or Guatemala, whose army and paramilitaries made a policy of killing civilians on an enormous scale during its long civil conflict. More importantly, the U.S. military cares passionately that other states and nonstate actors follow the same rules to which it adheres, because U.S. forces, who are deployed abroad in far greater numbers than troops from any other nation, are **most likely to be harmed if the conventions are discarded**. Career **U.S. military commanders and lawyers have** **consistently opposed the various reinterpretations of the conventions** by politically appointed lawyers in the Bush White House and Justice Department for precisely this reason. It is enormously important that the United States **reaffirms its commitment to the conventions, for the sake of the country’s reputation and that of the conventions**. Those who rely on the flawed logic that because al Qaeda does not treat the conventions seriously, neither should the United States fail to see not only **the chaos the world will suffer in exchange for these rules**; they also miss the fact that the United States will have traded basic rights and protections harshly learned through thousands of years of war for the nitpicking decisions of a small group of partisan lawyers huddled in secret. Rather than advancing U.S. interests by following an established standard of behavior in this new type of war, the United States—and any country that chooses to abandon these hard-won rules—risks basing its policies on narrow legalisms. In losing sight of the crucial protections of the conventions, the United States **invites a world of wars in which laws disappear**. And **the horrors of such wars would far surpass anything the war on terror could ever deliver.**

Geneva checks WMD escalation

Koplow, professor of law at Georgetown, Spring 2005

(David A., “Tangled Up in Khaki and Blue,” 36 Geo. J. Int’l L., Lexis)

A second crucial principle of international humanitarian law is that of discrimination or distinction: a valid weapon must be designed and employed in a fashion that enables it to be sufficiently precise, to attack only legitimate targets. It must differentiate, for example, between civilians and combatants, between a fighting force and those who are exempt from attack (e.g., medical personnel, individuals who are [\*746] surrendering, or those already rendered hors de combat). n137 In some large measure, the inability to be sufficiently precise -- the fact that they target wide areas or cannot be adequately focused on belligerents -- underpins the general antipathy to chemical or biological weapons (which may drift uncontrollably from a battlefield into a city), n138 to anti-personnel landmines (which may remain active for years, exploding when triggered by a farmer tilling a field, long after the soldiers have marched away), n139 and to nuclear weapons (which generate such massive destruction that even distant non-combatants are inevitably implicated). n140 Corollary to these substantive standards is the procedural obligation for each country to carefully assess the legitimacy of each of its weapons. n141 Under Protocol I Additional to the 1949 Geneva Conventions, n142 a country is required, before deploying -- and certainly before using -- a new type of weapon, to evaluate in good faith its conformity with the applicable rules of humanitarian law. It must ascertain, inter alia, that the device will not conflict with any applicable arms control treaty, that it will not cause unnecessary suffering, and that it can be deployed in an acceptably discriminatory fashion. The United States, for example, routinely subjects new weapons proposals to legal scrutiny [\*747] both at the stage where research and development are being undertaken and at the end of the evolutionary process, when production and deployment would be authorized. n143 Non-lethal weapons from lasers to pepper spray to acoustic waves have undergone and survived this gauntlet. n144

European backlash to detention blocks extradition

Hayes, 12

(“Interpreting the New Language of the National Defense Authorization Act: A Potential Barrier to the Extradition of High Value Terror Suspects,” 58 Wayne L. Rev. 567, Summer, Lexis)

As this Note reveals, these modifications are crucial because they allow the United States to continue to provide assurances necessary to secure the extradition of known terrorists. Viewed another way, this codification greatly hampers both federal law enforcement and the Obama Administration in their respective roles in the fight against terrorism, making it more difficult for the United States to treat terror suspects on a case-by-case basis. In order to bring some of the most sought-after terrorists to justice, the United States must continue to provide and uphold assurances to her European allies that the terror suspects being extradited to the United States will not be subjected to inhuman or degrading treatment and will be given a fair and impartial trial. Without these assurances, **the U.K. and Europe will not likely** [\*578] **extradite the currently detained high-value terror suspects** to the United States. 1. The Procedural Shortcomings Amount to a Lack of Due Process, and the 2009 MCA Falls Short in Correcting Deficiencies As mentioned earlier, the Obama Administration sought many changes to the highly criticized 2006 MCA. But even with the 2009 modifications, the use of military tribunals under the MCA and AUMF still fails to meet international human rights standards for a fair and impartial trial, most notably because of the lack of independence and impartiality. n64 The importance of a tribunal being independent and [\*579] impartial is such that it "requires that judges be both de facto impartial and independent as well as appear to be impartial and independent." n65 Two more glaring deficiencies in military tribunals include the lack of the presumption of innocence and denial of access to the writ of habeas corpus. In Combatant Status Review Tribunals (CSRT), which are precursors to a detainee's trial by military commission, instead of a presumption of innocence favoring the defendant, there is a rebuttable presumption in favor of the government's evidence. n66 CSRTs provide a rebuttable presumption that the government's evidence submitted to determine whether the detainee is an enemy combatant is genuine and accurate. n67 To date, detained persons held in the United States have relied on habeas corpus to show that their detention is not in accord with due process, n68 but this important check still does not exist for detainees held under U.S. control outside of the United States. n69 Other procedural deficiencies with the military commission process include deprivation of the right to counsel (particularly in the beginning stages), the right to be informed (with most restrictions to information surrounding classified information, with classification being determined by the prosecution), the right to be present (the prosecution may exclude the detainee from his own hearing for reasons of national security, as determined by the prosecution), the requirement for equality (detainees are usually denied requests to call witnesses and in 89% "of the tribunals, no evidence whatsoever was presented on the detainee's behalf"), and the admittance of coerced evidence. n70 The 2009 MCA made slight improvements to some of these deficiencies by stating that "the defense shall have a reasonable opportunity to obtain witnesses and evidence," and by entirely barring the "use of statements obtained through cruel, inhuman or degrading treatment." n71 However, the new witness and evidence requirements of the 2009 MCA fall short of meeting the requirements of equal opportunity among the parties. In addition, the bar to improperly obtained statements [\*580] does not apply to former CSRTs. n72 Ensuring due process, access to counsel, and access to all proceedings and all evidence are critical guarantees that must be provided to offer a fair trial. n73 As it stands, military commissions, despite some marked improvements, are not likely to meet the standards necessary to establish the right to a fair trial as set forth in Article 6 of the Convention. 2. European Court Insight on Article 6 Compliance What are the expectations of the European Court relative to Article 6 compliance? In twenty-two years of jurisprudence handed down from the European Court since Soering, the court never found an expulsion, until 2012, that violated Article 6 despite the claim's repeated assertion. n74 As Soering established, the European Court demands a showing of a "real risk of a flagrant denial of justice" to invoke a claim under Article 6. n75 This means that the claimant must meet a higher burden under Article 6 than Article 3; but in "assessing whether this test has been met, the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases." n76 The court stated that the Article 6 test is a "stringent test of unfairness" and that a "flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself." n77 In defining flagrant denial of justice, the court noted that it is: Synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein. Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included: conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge; [\*581] a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed; and deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country. n78 On January 17, 2012 in Othman (Abu Qatada), the court determined that evidence obtained by torture would amount to a flagrant denial of justice invoking Article 6. n79 The court went further to state that similar considerations may apply in a case that presented evidence obtained by other forms of ill-treatment that fall short of torture as well. n80 In addition to the guidelines for Article 6 that Othman now provides, the European Court previously made clear that the guarantees of a right to a fair trial apply to all types of judicial proceedings, even those deemed administrative. n81 Moreover, the court has stated that special proceedings, such as military court-martial, may "be subject to Article 6 scrutiny because of the serious criminal nature of the crime with which the defendant had been accused." n82 Thus, it is safe to assume that military tribunals, as well as their administrative precursors, CSRTs, are very likely to amount to a flagrant denial of justice under Article 6. III. Analysis of How the NDAA Affects Extradition Understanding how the European Court views Article 6 compliance and the current perceptions of the U.S. military tribunal system, one can surmise that the European Court is likely to block extradition if a suspect will face trials in a military tribunal. Current cases demonstrate how [\*582] terror suspects have successfully employed Article 3 to deter extradition, and forecast the future use of Article 6. n83 These cases indicate that it would be wise for the United States to continue to grant assurances that terror suspects will not be at risk of the death penalty, military detention, or trial by military commission. How the U.S. government interprets and applies the language of the NDAA, specifically Sections 1021 and 1022, n84 will **prove pivotal in the fight to win extradition** of these known terror suspects and ultimately bring them to justice. A. Recent Extradition Cases Recent cases of terror suspects invoking Article 3 to fight extradition to the United States exemplify how the European Court may respond to Article 6 claims. These cases provide insight into how the United States should proceed with regard to statutory interpretation of the NDAA, particularly when requesting extradition of terror suspects. 1. Al-Fawwaz, Bary, and Eidarous Have Successfully Thwarted Extradition Since 1998 Using Article 3 Three terror suspects, who were arrested in London in the late 1990s, have successfully fought extradition for over a decade using Article 3. Khalid al-Fawwaz, alleged not only to be an al-Qaeda member, but also one of Osama bin Laden's key lieutenants, n85 was indicted for the 1998 U.S. embassy bombings in East Africa which killed 224 people and injured more than 4,500. n86 Adel Abdel Bary and Ibrahim Eidarous, both alleged members of Egyptian Islamic Jihad, operated alongside al-Fawwaz in the London al-Qaeda cell, n87 and were subsequently arrested "on an extradition warrant following a request from the United States" in 1999 for their involvement in the bombings. n88 For several years, al-Fawwaz, Bary, and Eidarous successfully fought extradition through a [\*583] series of appeals within the U.K. n89 In 2008, the U.K. Secretary of State issued warrants for their extradition to the United States, finding that the U.S. government met the prima facie case and provided reliable assurances. n90 Thus, the men would not be at "risk of the death penalty, indefinite detention or trial by a military commission." n91 Eidarous was diagnosed with advanced cancer, put on house-arrest, and subsequently died in 2008. n92 In 2009, al-Fawwaz and Bary began their final appeal against the 2008 findings of the Secretary of State, with the British High Court of Justice finding no breach of Article 3, and al-Fawwaz's claim for breach of Article 6 unsubstantiated. n93 They soon appealed to the European Court and the case is still pending. n94 [\*584] If the United States does not uphold the original assurances provided in 2004, the European Court could deny extradition of these long-sought-after terror suspects, destroying an otherwise perfect record of honoring the assurances the United States has provided to the U.K. and her European allies. The implications would **disrupt the ultimate goal of bringing wanted terrorists to justice.** It is imperative that the United States maintain the assurances as provided in 2004 and demonstrate that the new statutory language of the NDAA does not impede the President from dealing with each terror suspect case on an individual basis and as necessary to continue to effectively fight the war on terrorism.

Alternative is release into Europe

Kris, 11

(Former Assistant Attorney General for National Security at the U.S. Department of Justice, “Law Enforcement as a Counterterrorism Tool”, 6/15, http://jnslp.com//wp-content/uploads/2011/06/01\_David-Kris.pdf)

Finally, the criminal justice system may help us obtain important cooperation from other countries. That cooperation may be necessary if we want to detain suspected terrorists or otherwise accomplish our national security objectives. Our federal courts are well-respected internationally. There are well-established, formal legal mechanisms that allow the transfer of terrorism suspects to the United States for trial in federal court, and for the provision of information to assist in law enforcement investigations – i.e., extradition and mutual legal assistance treaties (MLATs). Our allies around the world are comfortable with these mechanisms, as well as with more informal procedures that are often used to provide assistance to the United States in law enforcement matters, whether relating to terrorism or other types of cases. Such cooperation can be critical to the success of a prosecution, and in some cases can be the only way in which we will gain custody of a suspected terrorist who has broken our laws.184 In contrast, many of our key allies around the world are not willing to cooperate with or support our efforts to hold suspected terrorists in law of war detention or to prosecute them in military commissions. While we hope that over time they will grow more supportive of these legal mechanisms, at present many countries would not extradite individuals to the United States for military commission proceedings or law of war detention. Indeed, some of our extradition treaties explicitly forbid extradition to the United States where the person will be tried in a forum other than a criminal court. For example, our treaties with Germany (Article 13)185 and with Sweden (Article V(3))186 expressly forbid extradition when the defendant will be tried in an “extraordinary” court, and the understanding of the Indian government pursuant to its treaty with the United States is that extradition is available only for proceedings under the ordinary criminal laws of the requesting state.187 More generally, the doctrine of dual criminality – under which extradition is available only for offenses made criminal in both countries – and the relatively common exclusion of extradition for military offenses not also punishable in civilian court may also limit extradition outside the criminal justice system.188 Apart from extradition, even where we already have the terrorist in custody, many countries will not provide testimony, other information, or assistance in support of law of war detention or a military prosecution, either as a matter of national public policy or under other provisions of some of our MLATs. These concerns are not hypothetical. During the last Administration, the United States was obliged to give assurances against the use of military commissions **in order to obtain extradition of several terrorism suspects** to the United States.190 There are a number of terror suspects currently in foreign custody who likely would not be extradited to the United States by foreign nations if they faced military tribunals.191 In some of these cases, it might be necessary for the foreign nation to release these suspects if they cannot be extradited because they do not face charges pending in the foreign nation.

Makes Europe a safe-haven

Sharfstein, 2

(Associate, Strumwasser & Woocher, “European Courts, American Rights: Extradition and Prison Conditions”, 67 Brooklyn L. Rev. 719, Spring, Lexis)

A. The Increasing Importance of Extradition The "vast majority" of people suspected of involvement in the September 11 terrorist attacks have been arrested or are being sought overseas. n13 Although the United States has [\*725] actively bypassed formal extradition with secret, informal procedures in numerous cases of suspected terrorists, n14 the war on terrorism shows unequivocally what has become increasingly true over the past two decades: that extradition is an essential tool for prosecutors in the United States. The rising tide of people and goods across borders and the ascendance of global technologies such as the Internet have blurred the line between domestic and international criminal enforcement. From terrorism to drug trafficking to price fixing, multinational conspiracies have taken root in the fertile soil of an ever-smaller world. n15 For technology-driven crimes such as telemarketing fraud, international boundaries often separate [\*726] perpetrators and victims. n16 Even when criminals live in the same country as their victims, more fugitives from justice have managed to flee across national borders. n17 Since the Department of Justice's Office of International Affairs was created in 1979 to facilitate and rationalize extradition procedures, n18 the number of extradition requests made and received by the United States has skyrocketed. n19 Well before September 11, American policy makers had emphasized the rising threat of international crime and the crucial role of extradition in fighting it. n20 In October 1995, President Bill Clinton issued Presidential Decision Directive 42, ordering U.S. government agencies to intensify international crime-fighting efforts, and in a speech to the United Nations General Assembly, he urged "every country" to endorse "a declaration which would first include a no sanctuary pledge, so that we could say together to organized criminals, terrorists, drug traffickers and smugglers, you have nowhere to [\*727] run and nowhere to hide." n21 In an October 1997 memorandum to all U.S. Attorneys, Attorney General Janet Reno praised federal prosecutors for "going the extra mile" to obtain the international extradition of fugitives. "Your need to obtain the international extradition of fugitives [is] more important than ever," she wrote. n22 Six months later, a report developed by the Departments of Justice, State, and Treasury outlined a comprehensive strategy to fight international crime. In a chapter entitled "Denying Safe Haven to International Criminals," the report described how the Departments of State and Justice were aggressively renegotiating extradition treaties to "seek[] the broadest possible extradition obligations . . . ." n23

Failure to prosecute is the root cause

Rivkin, 2

Associate Fellow of The Nixon Center & Partner-Baker & Hostetler LLP, “A House Divided? War, Extradition, and the Atlantic Alliance, PART II”, The National Interest, 10/9 http://nationalinterest.org/article/a-house-divided-war-extradition-and-the-atlantic-alliance-part-ii-2137?page=1 (BJN)

Indeed, one can argue that, given the nature of this conflict, law enforcement operations have become just another version of low-intensity warfare. The current idiosyncratic European attitudes do more than just impede the U.S. ability to successfully prosecute this conflict; they pose **a major threat to European security** as well. To the extent that European attitudes towards extradition remain unchanged while the U.S. continues to uproot various terrorist support structures around the world, **Europe might well become a magnet for Al-Qaeda,** the Taliban and its terrorist allies. This is, in fact, a perennial feature of warfare; when a success by one side on a particular front causes the enemy to shift his resources to the less well defended areas. Unrealistic European law-enforcement attitudes may well make European capitals more attractive to terrorists than the warrens of Mogadishu or the slums of Sudan. In fact, recent investigations by German and Dutch authorities have already uncovered **dozens** of Al-Qaeda cells and demonstrated that many of the September 11 operatives spent considerable amounts of time in Europe.

Allows terrorists to target and successfully strike the US

Whitehair, 10

(Security Studies MA-Georgetown, “A Place to Hide: Popular Support and Terrorist Safe-Havens,” 11/19, http://repository.library.georgetown.edu/bitstream/handle/10822/553428/WhitehairJuliaC.pdf?sequence=1)

Given U.S. efforts to shut down traditional safe havens and the attention given in recent years to homegrown terrorist cells in the United States and Europe, policymakers likely will have to confront questions about safe havens within healthy states. Terrorism **experts** and policymakers with counterterrorism portfolios have already raised Europe as a persistent source of terrorism targeting the United States. Michael Scheuer in his testimony before members of Congress called the European Union “the earth’s single largest terrorist safe haven” and “a major, consistent, and invulnerable source of terrorist threat to the United States.”5 Former Director of Central Intelligence Porter Goss in 2005 and former U.S. Coordinator for Counterterrorism Ambassador Harry A. Crumpton in 2006 testified about the persistent threat to the United States from terrorists based in Europe.6 Senators Lieberman and Collins of the Senate Committee on Homeland Security and Governmental Affairs spoke of an increase in homegrown terror cells and attacks with roots in the United States.7

Causes NATO strikes in Pakistan

Karon, 10

(10/6, Columnist-Time, “Why a Terrorist Strike on Europe Risks Geopolitical Meltdown” http://content.time.com/time/world/article/0,8599,2023847,00.html)

Bad as they are, right now, relations between the U.S. and Pakistan could get a whole lot worse if a feared Mumbai-style terrorist plot materializes in Europe. One reason for the fraying of ties is the dramatic escalation in the Obama Administration's drone war in Pakistan's tribal areas. September saw more missiles fired from drone aircraft than any month on record, purportedly aimed at disrupting possible terrorist attacks planned for European cities — fear of which has also prompted travel alerts by the U.S. and allied governments. And the campaign has not relented. Pakistani officials claim that eight suspected militants of German citizenship were killed in a drone strike on a Waziristan mosque on Monday. The drone attacks have fueled outrage on Pakistan's streets, and presumably within its armed forces too. The anger has only grown with news of Pakistani soldiers killed as the U.S. pursues Afghan Taliban fighters fleeing into Pakistan (last Thursday, such a chase resulted in the death of three Pakistani soldiers). Pakistani authorities appeared to be sending out a warning by closing their Khyber Pass border with Pakistan, choking off the main supply line to the NATO mission in Afghanistan. And militants kept up their own retaliation on Wednesday by destroying NATO-contracted fuel trucks for the sixth time in a week. But tensions could rise from both ends, should a successful attack be staged in Europe. Explaining the recent terrorism-threat alerts and travel advisories announced for European cities, security officials have been widely quoted in the media suggesting that intelligence points to a coordinated attack, originating in Pakistan, that would see gunmen deployed to wreak havoc on the streets of major European cities in the way that they did in the Indian city of Mumbai two years ago. Drone attacks have reportedly been stepped up in the hope of disrupting that plot, allegedly revealed by a captured German of Afghan descent. Following the Mumbai massacre, carried out by the Pakistan-based jihadist group Lashkar-e-Taiba, the U.S. had to work hard to restrain India from retaliating by bombing facilities in Pakistan used by the various Kashmir jihadist groups long cultivated by Pakistani intelligence — mindful of the danger that such an action could provoke a war between the nuclear-armed neighbors. But if Western cities were the target of a successful strike, it would be NATO that would be under pressure to respond. Indeed, according to Bob Woodward's book Obama's Wars, Obama's National Security Adviser General Jim Jones told Pakistan's President Asif Ali Zardari that if Faisal Shahzad (the Pakistani-American sentenced to life imprisonment in New York City on Tuesday) had succeeded in his attempt to bomb Times Square last year, the U.S. "would [have] been forced to do things Pakistan would not like." Woodward wrote that retribution would entail the bombing of "up to 150 known terrorist safe havens inside Pakistan." If Jones' warning, as reported by Woodward, is to be taken seriously, it's not hard to deduce that a series of attacks in Europe that emanate from Pakistan would force a similar response.

Causes US-China war

Tarpley, 11

(AB Princeton 1966, summa cum laude and Phi Beta Kappa; Fulbright Scholar at University of Turin, Italy; MA in humanities from Skidmore College; and Ph.D. in early modern history from the Catholic University of America, “US, Pakistan Near Open War; Chinese Ultimatum Warns Washington Against Attack,” 5/21, http://tarpley.net/2011/05/21/us-pakistan-near-open-war-chinese-ultimatum-warns-washington-against-attack/

China has officially put the United States on notice that Washington’s planned attack on Pakistan will be interpreted as an act of aggression against Beijing. This blunt warning represents the first known strategic ultimatum received by the United States in half a century, going back to Soviet warnings during the Berlin crisis of 1958-1961, and indicates the grave danger of general war growing out of the US-Pakistan confrontation. “Any Attack on Pakistan Would be Construed as an Attack on China” Responding to reports that China has asked the US to respect Pakistan’s sovereignty in the aftermath of the Bin Laden operation, Chinese Foreign Ministry spokesperson Jiang Yu used a May 19 press briefing to state Beijing’s categorical demand that the “sovereignty and territorial integrity of Pakistan must be respected.” According to Pakistani diplomatic sources cited by the Times of India, China has “warned in unequivocal terms that **any attack on Pakistan** would be construed as an attack on China.” This ultimatum was reportedly delivered at the May 9 China-US strategic dialogue and economic talks in Washington, where the Chinese delegation was led by Vice Prime Minister Wang Qishan and State Councilor Dai Bingguo.1 Chinese warnings are implicitly backed up by that nation’s **nuclear missiles**, including an estimated 66 ICBMs, some capable of striking the United States, plus 118 intermediate-range missiles, 36 submarine-launched missiles, and numerous shorter-range systems. Support from China is seen by regional observers as critically important for Pakistan, which is otherwise caught in a pincers between the US and India: “If US and Indian pressure continues, Pakistan can say ‘China is behind us. Don’t think we are isolated, we have a potential superpower with us,’” Talat Masood, a political analyst and retired Pakistani general, told AFP.2

Extinction

Wittner 11 (Lawrence S. Wittner, Emeritus Professor of History at the State University of New York/Albany, Wittner is the author of eight books, the editor or co-editor of another four, and the author of over 250 published articles and book reviews. From 1984 to 1987, he edited Peace & Change, a journal of peace research., 11/28/2011, "Is a Nuclear War With China Possible?", [www.huntingtonnews.net/14446](http://www.huntingtonnews.net/14446))

While nuclear weapons exist, there remains a danger that they will be used. After all, for centuries national conflicts have led to wars, with nations employing their deadliest weapons. The current deterioration of U.S. relations with China might end up providing us with yet another example of this phenomenon. The gathering tension between the United States and China is clear enough. Disturbed by China’s growing economic and military strength, the U.S. government recently challenged China’s claims in the South China Sea, increased the U.S. military presence in Australia, and deepened U.S. military ties with other nations in the Pacific region. According to Secretary of State Hillary Clinton, the United States was “asserting our own position as a Pacific power.” But need this lead to nuclear war? Not necessarily. And yet, there are signs that it could. After all, both the United States and China possess large numbers of nuclear weapons. The U.S. government threatened to attack China with nuclear weapons during the Korean War and, later, during the conflict over the future of China’s offshore islands, Quemoy and Matsu. In the midst of the latter confrontation, President Dwight Eisenhower declared publicly, and chillingly, that U.S. nuclear weapons would “be used just exactly as you would use a bullet or anything else.” Of course, China didn’t have nuclear weapons then. Now that it does, perhaps the behavior of national leaders will be more temperate. But the loose nuclear threats of U.S. and Soviet government officials during the Cold War, when both nations had vast nuclear arsenals, should convince us that, even as the military ante is raised, nuclear saber-rattling persists. Some pundits argue that nuclear weapons prevent wars between nuclear-armed nations; and, admittedly, there haven’t been very many—at least not yet. But the Kargil War of 1999, between nuclear-armed India and nuclear-armed Pakistan, should convince us that such wars can occur. Indeed, in that case, the conflict almost slipped into a nuclear war. Pakistan’s foreign secretary threatened that, if the war escalated, his country felt free to use “any weapon” in its arsenal. During the conflict, Pakistan did move nuclear weapons toward its border, while India, it is claimed, readied its own nuclear missiles for an attack on Pakistan. At the least, though, don’t nuclear weapons deter a nuclear attack? Do they? Obviously, NATO leaders didn’t feel deterred, for, throughout the Cold War, NATO’s strategy was to respond to a Soviet conventional military attack on Western Europe by launching a Western nuclear attack on the nuclear-armed Soviet Union. Furthermore, if U.S. government officials really believed that nuclear deterrence worked, they would not have resorted to championing “Star Wars” and its modern variant, national missile defense. Why are these vastly expensive—and probably unworkable—military defense systems needed if other nuclear powers are deterred from attacking by U.S. nuclear might? Of course, the bottom line for those Americans convinced that nuclear weapons safeguard them from a Chinese nuclear attack might be that the U.S. nuclear arsenal is far greater than its Chinese counterpart. Today, it is estimated that the U.S. government possesses over five thousand nuclear warheads, while the Chinese government has a total inventory of roughly three hundred. Moreover, only about forty of these Chinese nuclear weapons can reach the United States. Surely the United States would “win” any nuclear war with China. But what would that “victory” entail? A nuclear attack by China would immediately slaughter at least 10 million Americans in a great storm of blast and fire, while leaving many more dying horribly of sickness and radiation poisoning. The Chinese death toll in a nuclear war would be far higher. Both nations would be reduced to smoldering, radioactive wastelands. Also, radioactive debris sent aloft by the nuclear explosions would blot out the sun and bring on a “nuclear winter” around the globe—destroying agriculture, creating worldwide famine, and generating chaos and destruction.

Europe key to terrorist nuclear acquisition---takes-out their generic defense

Ferguson, 4

(Scientist in Residence-Center for Nonproliferation Studies, Monterey Institute of International Studies, “The threat of nuclear terrorism in Europe”, 2/6 http://www.eurozine.com/articles/2004-06-02-ferguson-en.html)

A nuclear terrorist act anywhere is a nuclear terrorist act everywhere. In particular, a terrorist-detonated nuclear weapon in a European city will impact on American security. Conversely, a terrorist-constructed crude nuclear bomb exploded in an American city will have repercussions for European security. Nuclear weapon explosions are the most devastating form, or face, of nuclear terrorism. The four recognized faces of nuclear terrorism are: Terrorists could seize an intact nuclear weapon and bypass its security features, thus activating it. Terrorists could acquire, through theft, purchase, or diversion, weapons-usable fissile material (either highly enriched uranium or plutonium) and build a crude nuclear weapon, or improvised nuclear device (IND). Terrorists could attack or sabotage nuclear facilities, such as commercial nuclear power plants or research reactors, to cause a release of radioactivity. Terrorists could acquire and release radioactive materials, such as commercial radioactive sources used in medicine, research, and industry, to fuel radiological dispersal devices (RDDs) – one type of which is popularly known as a "dirty bomb," or release radiation through other mechanisms, such as radiation emission devices. Understanding Nuclear Terrorists While most terrorist groups are not motivated to unleash nuclear terror, at least one terrorist network - al Qaeda - has expressed strong interest in acquiring weapons of mass destruction. Al Qaeda operatives and their brethren in like-minded organizations have spread their web across numerous countries. According to a January report by The Observer , Islamic militants have built up an extensive network in Europe since 11 September 2001, using Great Britain as a logistical hub and nerve center. In recent years, Islamic extremists have expanded eastward into Bulgaria, the Czech Republic, Poland, and Romania. Terrorist cells have become rooted in Austria, France, and Germany and have recruited new members in these and other countries. Intelligence officials have warned that labeling all of these groups as al Qaeda misses the complexity behind the terrorist network. While most of the cells follow a similar agenda as al Qaeda, few directly hold their allegiance to this organization. The current focus on Islamic extremist groups should not blind us from seeing other terrorist organizations that would covet nuclear means of destruction. For example, Aum Shinrikyo, an apocalyptic cult with no ties to Islamic extremism, sought out nuclear weapons and released deadly sarin gas in a 1995 chemical attack in the Tokyo subway system. Despite the growth of terrorist cells in Europe, one must not assume that they will ultimately go nuclear. Climbing the escalation ladder to acts of nuclear terror requires leaping over several barriers. Regardless of the nuclear terror act under consideration, the terrorist group must be motivated to conduct extreme levels of violence and to venture into unconventional methods of attack. While a terrorist organization with a well-defined constituency would most likely not want to alienate its constituency with a nuclear act, groups that have weak or non-existent ties to constituencies would not face as many moral or political constraints. For example, the Chechen rebels, a national-separatist group, depend strongly on their supporters within Chechnya. In contrast, the character and agenda of al Qaeda, a political-religious terrorist network, make this organization apparently less concerned about directly harming constituents. The final barriers for a terrorist group to cross are technical in nature. The group would have to acquire the nuclear assets. If the group decided to attack a nuclear power plant, it would have to identify a vulnerable nuclear facility. The organization would have to develop or hire the skills needed to build and detonate a weapon or to sabotage a nuclear facility. Finally, the group would have to be able to deliver the attack without being detected during the development or completion phase. Vulnerable Nuclear and Radiological Assets in Europe Tactical nuclear weapons: Though intact nuclear weapons tend to be well-guarded, some are more susceptible than others to falling into the hands of terrorists. Most experts believe that portable so-called tactical nuclear weapons (TNWs) are more vulnerable to terrorist seizure than are strategic nuclear weapons. TNWs are designed for nuclear-war fighting or battlefield use. As such, they tend to be more portable than their strategic cousins. In Europe, concerns over loose nuclear weapons have focused on the thousands of Russian TNWs that are in various physical conditions and under varying security storage and use. The United States also maintains about 150-180 TNWs in about six NATO countries. While European politicians want to keep the issue of NATO's nuclear weapons out of public view, they need to take steps to reassure Russia that nuclear arms will not be deployed in new NATO-member states. This confidence building measure could serve as a way toward achieving more openness about how to improve the security of Russian TNWs. Uranium: Of the two types of weapons-usable nuclear material, highly enriched uranium (HEU) poses the greatest concern, because it can be used in the simplest nuclear bomb - a gun-type device - to produce a high-yield explosion. Most weapons experts agree that a well-funded terrorist group could build a gun-type bomb, which simply slams two pieces of HEU together inside a gun barrel. The major barrier to stopping construction of such a device is access to HEU. Research sites in Bulgaria, the Czech Republic, Hungary, Poland, Romania, and Yugoslavia have HEU, supplied mostly from Russia. Over the past several years, experts have warned that HEU from these sites could find its way to terrorists. The December 1994 seizure of almost three kilograms of weapons-usable HEU in the Czech Republic highlighted this danger. Since the fall of the Soviet Union, there have been many incidents of illicit trafficking of nuclear and radiological materials in Central and Eastern Europe and the newly independent states. Many more incidents could be happening than are being detected. Fortunately, efforts to secure and repatriate HEU from vulnerable sites in this region have begun. Since the summer of 2002, the United States, Russia, the International Atomic Energy Agency (IAEA), partner governments, and non-governmental organizations, such as the Nuclear Threat Initiative, have conducted three successful missions - Belgrade, Romania and Bulgaria - to secure HEU at research sites and to repatriate it to Russia. But more needs to be done, since about 20 additional research sites, each containing enough Russian-origin HEU for at least one bomb, still exist. Some of these sites are located in Central and Eastern Europe. Radiation: Within the past few years, the European Union has commissioned two studies to determine the effectiveness of the existing regulatory practices concerning the life cycle of radioactive sources. The first study examined the controls within the EU itself and found that radioactive materials management varied across the EU. The report underscored the risk posed by some **30,000 disused sources** that are in danger of becoming orphaned, that is, of falling outside of regulatory controls. On the heels of that study, the EU investigated the regulatory practices in the Czech Republic, Estonia, Hungary, Poland, and Slovenia, states that were being considered for early admission to the EU. The EU study concluded that these states have regulatory controls that meet the general standards found throughout the EU. While the results of these pre-11 September reports are by and large encouraging, it should be noted that they focused on safety considerations and did not examine details of security procedures. Nuclear power plants: Well-designed nuclear power plants employ defense-in-depth safety features. To release radioactivity from a nuclear plant, terrorists would have to destroy or disable multiple safety systems. Unfortunately, Central and Eastern Europe contain many Soviet-designed nuclear power plants that do not meet Western safety standards. For example, early Soviet-designed models lack an adequate emergency core cooling system and containment structure, and have an inadequate fire protection system. Such reactors operate in Bulgaria, Slovenia, the Czech Republic, Hungary and Slovakia and Lithuania. While these reactors have engendered discussion regarding safety and security, attacks and sabotage against research centers - where security procedures tend to be less rigorous than at commercial plants - have been overlooked. Many research reactors are located at universities in or near major urban areas. While the inventory of radioactivity in a typical research reactor pales in comparison to the large quantities of lethal fission products within a commercial reactor, release of radioactivity from research sites could suit nuclear terrorists' purposes.

Extinction

Barrett et al. 13—PhD in Engineering and Public Policy from Carnegie Mellon University, Fellow in the RAND Stanton Nuclear Security Fellows Program, and Director of Research at Global Catastrophic Risk Institute—AND Seth Baum, PhD in Geography from Pennsylvania State University, Research Scientist at the Blue Marble Space Institute of Science, and Executive Director of Global Catastrophic Risk Institute—AND Kelly Hostetler, BS in Political Science from Columbia and Research Assistant at Global Catastrophic Risk Institute (Anthony, 24 June 2013, “Analyzing and Reducing the Risks of Inadvertent Nuclear War Between the United States and Russia,” Science & Global Security: The Technical Basis for Arms Control, Disarmament, and Nonproliferation Initiatives, Volume 21, Issue 2, Taylor & Francis)

War involving significant fractions of the U.S. and Russian nuclear arsenals, which are by far the largest of any nations, could have globally catastrophic effects such as severely reducing food production for years, 1 potentially leading to collapse of modern civilization worldwide, and even the extinction of humanity. 2 Nuclear war between the United States and Russia could occur by various routes, including accidental or unauthorized launch; deliberate first attack by one nation; and inadvertent attack. In an accidental or unauthorized launch or detonation, system safeguards or procedures to maintain control over nuclear weapons fail in such a way that a nuclear weapon or missile launches or explodes without direction from leaders. In a deliberate first attack, the attacking nation decides to attack based on accurate information about the state of affairs. In an inadvertent attack, the attacking nation mistakenly concludes that it is under attack and launches nuclear weapons in what it believes is a counterattack. 3 (Brinkmanship strategies incorporate elements of all of the above, in that they involve intentional manipulation of risks from otherwise accidental or inadvertent launches. 4 ) Over the years, nuclear strategy was aimed primarily at minimizing risks of intentional attack through development of deterrence capabilities, and numerous measures also were taken to reduce probabilities of accidents, unauthorized attack, and inadvertent war. For purposes of deterrence, both U.S. and Soviet/Russian forces have maintained significant capabilities to have some forces survive a first attack by the other side and to launch a subsequent counter-attack. However, concerns about the extreme disruptions that a first attack would cause in the other side's forces and command-and-control capabilities led to both sides’ development of capabilities to detect a first attack and launch a counter-attack before suffering damage from the first attack. 5 Many people believe that with the end of the Cold War and with improved relations between the United States and Russia, the risk of East-West nuclear war was significantly reduced. 6 However, it also has been argued that inadvertent nuclear war between the United States and Russia has continued to present a substantial risk. 7 While the United States and Russia are not actively threatening each other with war, they have remained ready to launch nuclear missiles in response to indications of attack. 8 False indicators of nuclear attack could be caused in several ways. First, a wide range of events have already been mistakenly interpreted as indicators of attack, including weather phenomena, a faulty computer chip, wild animal activity, and control-room training tapes loaded at the wrong time. 9 Second, terrorist groups or other actors might cause attacks on either the United States or Russia that resemble some kind of nuclear attack by the other nation by actions such as exploding a stolen or improvised nuclear bomb, 10 especially if such an event occurs during a crisis between the United States and Russia. 11 A variety of nuclear terrorism scenarios are possible. 12 Al Qaeda has sought to obtain or construct nuclear weapons and to use them against the United States. 13 Other methods could involve attempts to circumvent nuclear weapon launch control safeguards or exploit holes in their security. 14 It has long been argued that the probability of inadvertent nuclear war is significantly higher during U.S.–Russian crisis conditions, 15 with the Cuban Missile Crisis being a prime historical example. It is possible that U.S.–Russian relations will significantly deteriorate in the future, increasing nuclear tensions. There are a variety of ways for a third party to raise tensions between the United States and Russia, making one or both nations more likely to misinterpret events as attacks. 16

### solvency

The plan resolves Hamdan’s impact on Geneva without messing with overall treaty law

Carlos Manuel Vasquez 8, law prof at Georgetown, treaties as law of the land: the supremacy clause and the judicial enforcement of treaties, <http://www.harvardlawreview.org/media/pdf/vazquez.pdf>

This Article's twin claims — that the Constitution establishes a presumption that treaties are self-executing in the Foster sense and that a self-executing treaty is enforceable in the courts in the same circumstances as statutory or constitutional provisions of like content — are supported by the text of the Constitution and by the Supreme Court's decision in Percheman. Medellin looks the other way, but is best understood to have found the treaty at issue non-self-executing because the treaty imposed an obligation that required the exercise of nonjudicial discretion. So read, Medellin would be consistent with an interpretation of the Supremacy Clause as creating a presumption that treaties are self-executing in the Foster sense. To say that treaties are to be treated by courts like statutory and constitutional provisions does not mean, of course, that treaty enforcement will always be simple. Attempts to enforce the Constitution and federal statutes in court often generate impressive difficulties. In any given case, it may be uncertain whether the person invoking the provision has standing to do so. It may be uncertain whether the remedy sought is appropriate. There may be questions about whether the provision is sufficiently determinate to be amenable to judicial enforcement.12 Answering these questions in cases involving statutory or constitutional provisions is often difficult. But in cases involving treaties, the lower courts have concocted additional obstacles to enforcement. Consider the decision of the D.C. Circuit in Hamdan v. Rumsfeld.1\* Salim Hamdan, who had been designated for trial by military commission, argued that the procedures that the Secretary of Defense had established for such commissions did not conform to Common Article 3 of the Geneva Conventions, which requires that any trials use procedures "recognized as indispensable" by civilized nations.14 Had this provision appeared in a statute, no court would have hesitated to enforce it. There is little question that a person being subjected to particular procedures in a criminal trial has standing to assert a legal entitlement to better procedures.15 The court did not claim that the requirements of Common Article 3 were too vague for judicial enforcement. To the extent that Hamdan needed a positive legal basis for the relief he sought (release through habeas corpus), the habeas statute provided such authorization, as the Court of Appeals correctly observed.16 The court instead denied relief on the distinct ground — anterior to all of the above, and unknown in non-treaty cases — that the law Hamdan relied upon was not "judicially enforceable."17 The court wrote: As a general matter, a "treaty is primarily a compact between independent nations," and "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it." If a treaty is violated, this "becomes the subject of international negotiations and reclamation," not the subject of a lawsuit.18 Thus, without finding the treaty to be non-self-executing,19 the court found the treaty not to be judicially enforceable, even though a statute of like content clearly would have been.20 The Court of Appeals's analysis closely tracked the government's brief,21 which in turn was almost identical on this issue to the briefs the government has filed — and continues to file — in virtually every case involving treaties.22 Numerous other lower courts confronted with treaty-based claims or defenses have adopted the same analysis,23 requiring a threshold showing of "judicial enforceability"24 beyond what is required for statutory and constitutional provisions and in addition to the requirement of "self-execution" that the Court recognized in Foster.25 This Article argues that, when a treaty binds the United States to behave in a given way towards a particular individual, the treaty is "judicially enforceable" by the individual just as any statute or constitutional provision would be, unless the treaty is non-self-executing in the Foster sense. A treaty might be unenforceable in court because it is too vague, or otherwise calls for judgments of a political nature, or is unconstitutional, just as statutes and constitutional provisions might be. But no additional threshold showing of the treaty's "judicial enforceability" is required.

A private right of action is key – it’s a narrow case-by-case test of eligibility for remedies

Sital Kalantry 8, law prof at Cornell, The Intent-to-Benefit: Individually Enforceable Rights under International Treaties, <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2534&context=journal_articles>

When determining whether a treaty gives rise to individually enforceable rights, courts should apply a modified version of the intentionalist intent-to-benefit test from the Restatement (Second) of Contracts. An approach to determining individually enforceable rights rooted in contract law is the appropriate methodology, because it recognizes that treaties are essentially contracts between nations. Courts, however, have incorrectly imported principles of textual statutory interpretation to determining individually enforceable rights under treaties. The traditional arguments in favor of a textualist approach to private rights of action in statutes do not translate into the treaty interpretation context. Consequently, the theory underlying modem statutory interpretation, textualism, should be rejected in favor of the theory guiding the intent-to-benefit test-intentionalism. Application of the modified intent-to-benefit test suggested by this article is more likely than the statutory approach to lead courts to find that certain treaties create rights in favor of certain individuals that are enforceable by those individuals in a U.S. court. First, under the approach, in order for someone to enforce a treaty in U.S. courts, the treaty does not need to explicitly state that non-parties may bring a suit to enforce it, but rather it requires courts to determine whether the treaty drafters intended to benefit such party. Second, in order for an individual to enforce the treaty, the modified intent-to-benefit test does not require that courts also find that the treaty text provide for the exact remedy that the intended beneficiary is seeking. Finally, it allows courts to consider extra-textual sources, which could confirm and/or manifest the intent in the first instance to benefit certain third parties. Treaties that affect the relationships between the individuals and nations, **such as human rights treaties** and humanitarian law treaties, are more likely than other types of treaties to give rise to individually enforceable rights under the modified intent-to-benefit test, because such treaties are often intended to benefit individuals.

A strong court ruling is key to overcome systemic bias against I-law

Alex Glashausser 5, law prof at Washburn, Difference and Deference in Treaty Interpetation, 50 Vill. L. Rev. 25, <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1204&context=vlr>

When it was the U.S. Department of State interpreting the Consular Convention, the answer was that foreign nationals had no private right of action. 330 That answer confined the treaty to the international plane, the department's milieu. When it was the U.S. Supreme Court, the answer was that even if the treaty conferred a private right of action, a separate provision allowed domestic procedural default rules to defeat that right.331 That answer meshed with the Court's institutional interest in discouraging federal habeas corpus litigation.332 When it was the International Court of Justice, the answer was that the convention did grant a private right of action that could not be trumped by procedural default rules.333 That answer gave the Supreme Court a chance to reconsider its original interpretation, or at least to make a show of doing so, by awaiting the International Court's final judgment.334 Only two justices, however, were willing to postpone an execution to await that final judgment.335 As usual, the majority of the Court breezily dismissed the significance of the International Court.336 The wait for a final judgment could have been a long one. But a reason for the International Court's deliberate pace is that it examines treaties in much more detail than the Supreme Court, issuing more richly analytical opinions. To be sure, the Supreme Court was not bound to obey any commands or follow any precedent of the International Court. In applying treaties within the United States, the Supreme Court is indeed supreme. It is not, however, infallible. Prudence—not deference—suggests that before allowing an execution, waiting for the complete opinion of a juristic body with particular competence in an area would be warranted. In sum, difference among interpreters of treaties may be inevitable. Deference is inappropriate. But independence need not spawn indifference.

Other countries model our judiciary on detention policy

PILPG 8, the Public International Law & Policy Group (PILPG), is a global pro bono law firm that provides legal assistance to foreign governments and international organizations on the negotiation and implementation of peace agreements, the drafting and implementation of post-conflict constitutions, and the creation and operation of war crimes tribunals. PILPG also assists states with the training of judges and the drafting of legislation, “brief of the public international law & policy group as amicus curiae in support of petitioners”, <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuPILPG.authcheckdam.pdf>

iii. transnational judicial dialogue confirms this court’s leadership in promoting adherence to rule of law in times of conflict.

PILPG’s on-the-ground experience demonstrating the leadership of this Court is confirmed by a study of transnational judicial dialogue. Over the past halfcentury, the world’s constitutional courts have been engaged in a rich and growing transnational judicial dialogue on a wide range of constitutional law issues. See, e.g., Melissa A. Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L.J. 487 (2005); Anne-Marie Slaughter, Judicial Globalization, 40 Va. J. Int’l L. 1103 (2000). Courts around the world consider, discuss, and cite foreign judicial decisions not out of a sense of legal obligation, but out of a developing sense that foreign decisions are valuable resources in elucidating complex legal issues and suggesting new approaches to common problems. See Waters, supra, at 493-94.

In this transnational judicial dialogue, the decisions of this Court have exercised a profound — and profoundly positive — influence on the work of foreign and international courts. See generally Constitutionalism and Rights: The Influence of the United States Constitution Abroad (Louis Henkin & Albert J. Rosenthal eds., 1990); Anthony Lester, The Overseas Trade in the American Bill of Rights, 88 Colum. L. Rev. 537 (1988). As Anthony Lester of the British House of Lords has noted,

“there is a vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law. When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C.” Id. at 541.

This Court’s overseas influence is not limited to the Bill of Rights. From Australia to India to Israel to the United Kingdom, **foreign courts have looked to the seminal decisions of this Court as support for their own rulings upholding judicial review, enforcing separation of powers, and providing a judicial check on the political branches**.

Indeed, for foreign courts, this Court’s rulings in seminal cases such as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803),4 Brown v. Board of Education, 347 U.S. 436 (1954),5 United States v. Nixon, 418 U.S. 683 (1974),6 and Roper v. Simmons, 543 U.S. 551 (2005)7 take on a special significance. **Reliance on the moral authority of this Court can provide invaluable support for those foreign courts struggling to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own national legal systems**.

This Court’s potential to positively influence the international rule of law is particularly important in the nascent transnational judicial dialogue surrounding the war on terrorism and the primacy of rule of law in times of conflict. As the world’s courts begin to grapple with the novel, complex, and delicate legal issues surrounding the modern-day war on terrorism, and as states seek to develop judicial mechanisms to address domestic conflicts, foreign governments and judiciaries are confronting similar challenges. In particular, foreign governments and judiciaries must consider how to accommodate the legitimate needs of the executive branch in times of war within the framework of the law.

Although foreign courts are just beginning to address these issues, it is already clear that they are looking to the experience of the U.S., and to the precedent of this Court, for guidance on upholding the rule of law in times of conflict. In recent years, **courts in Israel, the United Kingdom, Canada, and Australia have relied on the precedent of this Court in decisions addressing the rights of detainees**.8 In short, as a result of this Court’s robust influence on transnational judicial dialogue, its decisions have proved extraordinarily important to the development of the rule of law around the world.

International courts have similarly relied on the precedent of this Court in influential decisions. For example, in the important and developing area of international criminal law, the international war crimes tribunals for Yugoslavia and Rwanda both relied heavily on the precedent of this Court in their early opinions. In the first five years of the Yugoslav Tribunal, the first in the modern iteration of the war crimes tribunals, the justices cited this Court at least seventeen times in decisions establishing the fundamental legal principles under which the Tribunal would function.9 The International Criminal Tribunal for Rwanda similarly relied on this Court’s precedent, citing this Court at least twelve times in its first five years.10 The precedent of this Court has provided a crucial foundation for international criminal law. The reliance on the precedent of this Court speaks to the Court’s international leadership on the promotion of respect for the rule of law in times of conflict.

By ruling in favor of the Petitioners, **this Court will reaffirm the precedent established in its prior decisions granting habeas rights to Guantanamo detainees and**, in doing so, **demonstrate to these foreign courts, and to other courts who will be addressing these issues in the future, that all branches of government must be bound by the rule of law, even in the most challenging of times**.

Loose interpretations of stare decisis that challenge deference are key

Prempeh, 1

(Law Prof--Seton Hall Law School, former Director of Legal Policy and Governance at the Ghana Center for Democratic Development, . In The Global Divergence Of Democracies, ed Larry Diamond, P. 260-264)

Africa's judiciaries are emerging at last from decades of powerlessness and marginalization at the hands of omnipotent executives and strongmen. Constitutional reforms that have accompanied democratic transitions in countries like Benin, Ghana, Malawi, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe are helping to redefine the role and enhance the stature of the judiciary in the contemporary African state. While past judiciaries served primarily as passive instruments of legitimation for authoritarian regimes, today's African courts, like their counterparts in emerging democracies elsewhere, must enforce constitutional limitations on the exercise of governmental power, as well as protect the rights of citizens, the media, and civil society. The idea of judicial review is now enthusiastically embraced in a growing number of African countries. Establishing judicial review is, of course, the easy part; a clause or two in the national constitution is generally all that is required to bestow such awesome power on the courts. **The challenge is to ensure that judges in newly democratizing states exercise their new power** so as **to advance and deepen the transition** to constitutional democracy. This is indeed a matter of genuine concern, because judicial review, though widely celebrated by democrats and constitutional architects in transitional democracies, is not quite the unmitigated virtue it is frequently made out to be. As Alexander Bickel has reminded us, "judicial review means not only that the Court may strike down a legislative [End Page 135] [or executive] action as unconstitutional but also that it may validate it as within constitutionally granted powers and as not violating constitutional limitations."1 Because judicial review "performs not only a checking function but also a legitimating function,"2 it is a double-edged sword. If exercised courageously (but prudently) to defend rights or hold the line against abuses of power, it could enhance constitutionalism in transitional democracies. In the hands of weak, insecure, or illiberal judges, however, judicial review could easily become an even more formidable instrument for legitimating authoritarianism. Thus Africa's newly democratizing states must seek to minimize the risk that judicial review will become a curse rather than the blessing it was meant to be. Because it has generally been assumed that the African judiciary's primary problem to date has been the lack of institutional autonomy and career security for judges, Africa's contemporary constitutional architects have adopted the standard Hamiltonian solution: judicial independence. Thus Africa's new constitutions all carry the standard provisions designed to secure judges in their jobs, salaries, jurisdiction, and judgments. Judges no longer hold their offices at the sufferance of the executive; judicial salaries and other benefits may not be varied to the judges' detriment; the jurisdiction of the courts may not be diminished at the pleasure of the executive or legislature; and, in general, at least two independent institutions must cooperate in making judicial appointments. In some cases, as in Ghana, the new constitution goes even further by giving the judiciary autonomy in the preparation, administration, and control of its own budget. Except in South Africa and Benin, where newly created "constitutional courts" have been laid over the preexisting judiciary, Africa's newly refurbished judiciaries have generally consisted entirely of holdovers from the ancien régime "grandfathered" into the new constitutional arrangement in the name of institutional continuity. The assumption seems to have been that, given a new constitution with a host of rights-friendly provisions, limitations on governmental power, and guarantees of judicial independence, judicial review will lead to a liberal-democratic jurisprudence almost as a matter of course. Yet the evidence that is emerging, especially from the common-law jurisdictions, suggests that there is a significant risk that an asymmetrical jurisprudence will take hold, with the constitutional text contemplating a rights-friendly, liberal-democratic jurisprudence while the actual decisions and reasoning of the courts take a different course. Ghana's experience under its new constitution is a case in point. Liberal Constitution, Illiberal Jurisprudence On 7 January 1993, Ghana's fourth republican constitution went into effect. The constitution, adopted by referendum in April 1992 [End Page 136] (hence the "1992 Constitution"), promises a new beginning in the life of the country. In contrast to the political and legal order that immediately preceded it, the new constitution proclaims the people of Ghana collectively as "sovereign" and guards against a resurgence of absolutist rule by providing for a set of "fundamental human rights and freedoms"; a system of checks and balances involving the sharing of power among three separate but coordinate branches of government; an independent commissioner with power to investigate and remedy citizen complaints of human rights violations and abuse of administrative power; a prohibition against a de jure one-party system; a two-term limitation on the tenure of the president; and an independent judiciary headed by a Supreme Court that has exclusive power to determine the constitutionality of disputed legislative and executive acts. Although Ghana has experimented with similar liberal-democratic constitutions in the past (notably, the 1969 and 1979 constitutions), there is exceptional optimism that the 1992 Constitution is here to stay. Significantly, Ghana has already achieved an unprecedented feat under the new constitution. General elections held in December 1996 marked the first time in the country's postcolonial history that an elected government had successfully served out its constitutional term of office (and, in this case, been reelected to a second term) without the intervention of a coup d'état. This breaking of the jinx, coupled with discernible public antipathy toward military rule and with the "conditioned" investment made by the international donor and investor community in Ghana's ongoing transition, has given Ghanaians renewed hope and confidence that their country's latest attempt at constitutional democracy, though fraught with challenges, is irreversible.3 Much of the burden of this expectation has come to rest on the shoulders of the Ghanaian judiciary, in its new role as the final arbiter of interinstitutional disputes and guardian of the Bill of Rights. Already, however, public faith in the courts has been dampened by a string of rulings that bespeak a lack of judicial solicitude for freedom of expression and of the press. The Supreme Court of Ghana has ruled, for instance, that a seditious libel statute, first enacted during the colonial period and later reenacted without much modification during the one-party era of the 1960s, does not violate the media-friendly provisions of the 1992 Constitution. This ruling, together with another upholding a related criminal libel law, has paved the way for the criminal prosecution of journalists for alleged defamation of the government and of certain influential public figures. In addition, despite language in Article 162 of the Constitution stating that "editors and publishers shall not . . . be penalized or harassed for their editorial opinions and views, or the [End Page 137] content of their publications," a number of courts have imposed "perpetual" injunctions and financially crippling damages on certain publishers and editors in a barrage of civil libel lawsuits brought by leading members of the government and their allies. As justification for these rulings, a justice of the Supreme Court has asserted that the laws criminalizing defamation of public officials are "necessary to protect the dignity of public office," while another has defended such laws, despite their English common-law and colonial antecedents, as reflecting "the customs and traditions" of Ghanaian society. To date, no fewer than three newspaper editors have been summarily imprisoned and fined for criminal contempt of court for violating court-imposed "prior restraints." In another case, a columnist for an independent newspaper was sentenced by the Supreme Court to a 30-day term of imprisonment and a fine for committing a nonstatutory crime called "scandalizing the court." The writer's offense was accusing a justice (now Chief Justice) of the Supreme Court of "judicial chicanery" for committing, and then surreptitiously retracting after the fact (that is, after he had delivered his written judgment in the case), an error of attribution in a politically charged case. In sentencing the defendant, the Supreme Court refused to accept "truth" as a defense or mitigating factor, reaffirming instead an old common-law maxim ("Truth is no defense") that harkens back to the days of the infamous English Court of the Star Chamber. These rulings, directed at Ghana's popular private media, have caused considerable alarm among significant sections of the Ghanaian public. In reaction to the latest "anti-press" rulings, various groups and individuals have joined hands under the banner of "Friends of Freedom of Expression" to protest what they perceive as an unwarranted judicial assault on a right that is, for Ghanaians, as hard-earned as the right to vote. What is important for our purposes is not the politically interesting question of who the losers and winners have been in the cases ruled upon by the Ghanaian courts. In fact, were that the primary concern, one would have to acknowledge that the Supreme Court has ruled against the government in some high-profile constitutional cases, especially during the very early years of the transition. Even so, except for one highly controversial ruling in which the Court enjoined the government from celebrating with public funds the anniversary of the coup d'état of 31 December 1981, most of the rulings that have been adverse to the government have involved provisions of the constitution that did not leave much room in the text for ambiguity or fudging. What is problematic about the decisions of the Ghanaian courts is the dominant jurisprudence--or set of values, beliefs, and assumptions--that seems to be informing the reasoning and the result in the "hard" cases. Do the Ghanaian courts continue to draw largely upon [End Page 138] the assumptions, practices, and precedents of the past, or do they project a transformative vision? Do they resolve textual ambiguity in favor of constitutionalism or in favor of the status quo ante? Do the courts appear willing to consult the liberal-democratic spirit of the constitution in expounding upon its letter, or are they given, instead, to literalism? Do they, when they deem it necessary to lean on precedents from other jurisdictions, select those persuasive authorities that tend to advance liberal-democratic values, or do they selectively avoid such precedents? The picture that emerges from a close study of appellate court opinions and rulings since the new constitution went into effect suggests that the Ghanaian judiciary remains attached to a jurisprudence that is far more authoritarian than liberal. The case of Ghana indicates that reliance on judicial review and formal guarantees of judicial independence as the exclusive mechanisms for liberating African courts from their authoritarian past may be futile, unless such reforms are considered as incidental to the more fundamental question of how to produce a paradigm shift in the jurisprudence § Marked 15:39 § of the judges. If the constitutions of Africa's transitional democracies can be said to compel a new jurisprudence of constitutionalism, it also appears that recourse to tradition and long-standing common-law doctrine, **an ingrained deference to executive diktat, and the force of stare decisis all propel Africa's judges back toward a jurisprudence of executive supremacy**. The trajectory of Africa's democratic transitions will be **adversely altered if Africa's judiciaries fail to make a contemporaneous transition from the jurisprudence of executive supremacy to the jurisprudence of constitutionalism**. A jurisprudence of executive supremacy regards the "state" (personified in an omnipotent chief executive), not a supervening constitution, as the source, juridically speaking, of all "rights" and "freedoms." The state is thus subject to only such restraint as it chooses to place upon itself, while the citizen has only such rights as the state may allow. Consequently, judges operating on the basis of a jurisprudence of executive supremacy lean heavily on those "claw-back" or derogation clauses that typically appear in the nominal constitution and allow the state essentially to take back whatever "rights" it may have granted previously, leaving citizens with only such protection as might remain after the state has had its "due." In short, under a jurisprudence of executive supremacy, the state walks into the courthouse with an almost irrefutable presumption of lawfulness as to its conduct. A judiciary habituated by custom, training, or experience to this way of thinking learns, quite naturally, to be excessively deferential to the state and all manner of public authority. Such a judiciary reckons its institutional role primarily as one of maintaining "law and order," and not as protecting freedom or restraining government. For the better part of its life, the African state--and for that matter, the African judiciary--has paid homage to a jurisprudence of executive supremacy, with regrettable consequences for civil liberties and personal freedom across the continent. It has been observed, for example, that the Kenyan courts' longstanding fidelity to this brand of jurisprudence is partly to blame for how Kenya's once potentially promising Bill of Rights ended up as a "Bill of Exceptions."4The Kenyan courts consistently allowed the limited exceptions tagged on to the Bill of Rights to trump the rights themselves. If current efforts at reconstituting the social compact in Africa along liberal-democratic lines are to stand a chance of succeeding, the jurisprudence of executive supremacy must give way to what we might call a jurisprudence of constitutionalism. A jurisprudence of constitutionalism differs in fundamental respects from a jurisprudence of executive supremacy. In general, judges who follow the latter disclaim any exercise of discretion on their part in matters of interpretation. In practice, too, they tend to follow strictly the dictates of past precedents and usually give literal effect to the plain meaning of legal texts. As a result, their methods of interpretation tend to be narrow, rule-driven, and text-bound. A jurisprudence of constitutionalism, on the other hand, invites more active judicial intermediation and interpretation. In particular, it demands that judges interpreting a constitutional text not only consult the spirit of the law but also endeavor to harmonize the letter with the spirit. To do so, judges must bring to their reasoning and decisions a clear understanding of the overarching values and philosophical foundations of a liberal democracy; of the social, economic, and political evolution of their country; and of the historical antecedents and contemporary purposes of the particular provision in dispute. A jurisprudence of constitutionalism is also less doctrinaire in its insistence on stare decisis and does not regard the "common law" as either cast in stone or beyond judicial review. Instead, it invites judges to weigh the value of keeping the law certain and settled against the imperative to do right in the particular case at hand. The rationale is that, in a legal dispute concerning human rights, civil liberties or the scope of governmental power, as opposed to, say, a dispute over the meaning of a clause in a commercial contract, it is deemed far more important that the result be right than that it follow some precedent from a bygone era.

## 2AC

### t – restrict

The plan is a judicial restriction

Random House Dictionary 2013

(http://dictionary.reference.com/browse/judicial)

ju·di·cial [joo-dish-uhl] Show IPA

adjective

1.

pertaining to judgment in courts of justice or to the administration of justice: judicial proceedings; the judicial system.

2.

pertaining to courts of law or to judges; judiciary: judicial functions.

3.

of or pertaining to a judge; proper to the character of a judge; judgelike: judicial gravity.

4.

inclined to make or give judgments; critical; discriminating: a judicial mind.

5.

decreed, sanctioned, or enforced by a court: a judicial decision.

Restrict is

American Heritage Dictionary 2000

(http://www.thefreedictionary.com/restrict)

re·strict (r-strkt)

tr.v. re·strict·ed, re·strict·ing, re·stricts

To keep or confine within limits. See Synonyms at limit.

Judicial interpretation of treaty authority is the same as interpreting statutory authority

Morrison, professor of law at Minnesota, 2010

(Fred L., The Protection of Foreign Investment In The United States of America+, 58 Am. J. Comp. L. 437, Lexis)

**Treaties**, **like federal law**, **are** also **part of the supreme law of the land**. A formal treaty must be ratified with the advice and consent of two-thirds of the members of the Senate. n14 A treaty has the same status as a federal law, so a subsequently enacted federal law can supersede a treaty for domestic purposes, even though the treaty may still be binding as a matter of international law. n15 A properly ratified treaty can alter previous federal law and override state law, if it is self-executing. n16 The United States also enters into other international obligations called executive agreements. These instruments are either authorized by statute, n17 by the customary practice of the Congress, n18 or are based upon specific authorities expressly granted to the President by the Constitution. n19 They have essentially the same authority in domestic law as formal treaties. n20

Some treaties and executive agreements are, however, non-self-executing and do not become part of the domestic law of the United [\*440] States. Then a federal law must be adopted to implement them. n21 Whether a treaty is self-executing depends primarily on the language of the instrument and whether it can be implemented without providing further detail. n22 Thus a treaty that provided that "each High Contracting Party will pay the full market value of property taken" would be self-executing, while one that provided that "each High Contracting Party will enact legislation that will ensure the payment of full market value of property taken" would not be. n23 Similarly, a treatythat would require implementation by a court or agency would not be self-executing **until that court or agency was identified by statute**. In recent years the U.S. Supreme Court has found several international treaties not to be self-executing.

[NOTE: RELEVANT FOOTNOTES—]

n14. U.S. Const. art 2, § 2, cl. 2.

n15. See, Restatement of the Foreign Relations Law of the United States (third) § 115 (1987) (An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act is to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.).

n16. According to the Supreme Court, **a** "**self executing treaty**" **needs** "**no domestic legislation**" **to** "**give it force of law in the U**nited **S**tates." Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984). Chief Justice Marshall asserted that a self-executing **treaty** "**operates of itself**, **as** : **a rule for the Court**," "**equivalent to an act of the legislature**." Foster v. Neilson, 27 U.S. 253, 314 (1829).

n17. 1. U.S.C.A. § 112b (West 2009).

n18. Dames & Moore v. Regan, 453 U.S. 654 (1981).

n19. U.S. Const. art 2, § 2.

n20. See, e.g., Dames & Moore v. Regan, 453 US 654 (1981); U.S. v. Pink, 313 U.S. 203 (1942).

n21. Restatement of the Foreign Relations Law of the United States (third) § 111 ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.").

n22. Medellin v. Texas, 128 S.Ct. 1346 (2008) ("**The interpretation of a treaty**, **like the interpretation of a statue**, begins with its text."); (**a treaty** is "equivalent to an act of the legislature," and hence self-executing, when it "**operates of itself without the aid of any legislative provision**.") (Citing Foster v. Neilson, 27 U.S. 253, 254 (1829).).

n23. Restatement (Third) of the Foreign Relations Law of the United States § 141 ("The United States and state A make a treaty providing that each of the parties shall take all necessary action to give full faith and credit to the final judgments rendered by courts in the other. On the basis of the 'necessary and proper' clause, the Congress has the power to enact legislation requiring federal and state courts to give full faith and credit to judgments of A.").

Authority is an officeholder’s power to act

Merriam-Webster’s Dictionary of Law 1996

(“Authority,” Credo Reference, Georgetown University Library)

au•thor•i•ty

n, pl -ties

1

: an official decision of a court used esp. as a precedent

2

a

: **a power to act** esp. over others **that derives from status**, **position**, **or office** 〈the ~ of the president〉; also : jurisdiction

b

: **the power to act that is officially or formally granted** (**as by statute**, corporate **bylaw**, **or court order**) 〈within the scope of the treasurer's ~〉 〈police officers executing a warrant…are not required to “knock and announce” their ~ and purposes before entering — National Law Journal〉

c

: power and **capacity to act granted by someone in a position of control**; specif : **the power to act granted by a principal to his or her agent**

That means presidential flexibility

Rehnquist, Justice of the U.S. Supreme Court, majority opinion, 1984

(William, Regan v Wald, 468 U.S. 222, Lexis)

Since the authority to regulate travel-related transactions was among those "authorities conferred upon the President" by § 5(b) of TWEA "which were being exercised" with respect to Cuba on July 1, 1977, it seems to us to follow from a natural reading of the grandfather clause that the authority to regulate such transactions "may continue to be exercised" with respect to Cuba after that date. Pub. L. 95-223, § 101(b), 91 Stat. 1625. And since the President's authority under § 5(b) to regulate by means of licenses includes the authority to "prevent or prohibit" as well as the authority to "direct and compel," 50 U. S. C. App. § 5(b)(1)(B), it also follows that the grandfather clause constitutes adequate statutory authority for the 1982 amendment to the general license, the practical effect of which was to prevent travel to Cuba.

A contrary, more constricted reading of the grandfather clause does undue violence to the words chosen by Congress. **The clause refers to "authorities"** being exercised on July 1, 1977, **not to "prohibitions"** actually in place on that date. And it provides that those authorities "may continue to be [\*236] exercised." If Congress had wished to freeze existing restrictions, it could easily have done so explicitly. The fact that it did not do so, **but instead used the generic term** "**authorities**," **indicates that Congress intended the President to retain** some **flexibility** to adjust existing embargoes.

Tagging us with results on the ground mixes burdens – enforcement should be a solvency question – circumvention already destroys aff ground without being a voting issue

Oxford Dictionary of Politics, 3rd Edition, 2009

(“Authority,” Oxford University Press via Oxford Reference, Georgetown University Library)

authority

The right or the capacity, or both, to have proposals or prescriptions or instructions accepted without recourse to persuasion, bargaining, or force. Systems of rules, including legal systems, typically entitle particular office-bearers to make decisions or issue instructions: **such office‐bearers have authority conferred on them** by the rules and the practices which constitute the relevant activity. Umpires and referees, for example, have authority under the rules and practices constitutive of most sporting contests. Law enforcement officers are authorized to issue instructions, but they also receive the right to behave in ways which would not be acceptable in the absence of authorization: for example, to search persons or premises. **To have authority** in these ways **is to be the bearer of an office and to** be able to **point to the relation between that office and a set of rules**. **In itself**, **this says nothing about the capacity in fact of such an office‐holder to have proposals and so forth accepted without introducing persuasion**, **bargaining**, **or force**. **A referee**, for example, **may possess authority under the rules of the game**, **but in fact be challenged or ignored by the players**. A distinction is therefore drawn between de jure authority—in which a right to behave in particular ways may be appealed to—and de facto authority—in which there is practical success. A different distinction is drawn between a person who is in authority as an office‐bearer and a person who is an authority on a subject. The latter typically has special knowledge or special access to information not available to those who accept the person's status as an authority. Sometimes the two forms are found together: for example, the Speaker of the Commons possesses authority (to regulate the business of the House, under its rules of procedure), and is also an authority (on its rules of procedure). Attempts have been made to find common features between these two usages. These focus primarily on the ‘internal’ relationship between the authority‐holder and the authority‐subject, the process of recognition of the status involved, and on the willingness of the authority‐subject to adopt the judgement of the authority‐holder (instead of his or her own, or in the absence of the ability to formulate one).

### congress cp

The counterplan gets watered down with RUD’s – doesn’t solve

Penny M. Venetis 11, law prof at Rutgers, making human rights treaty law actionable in the united states: the case for universal implementing legislation, <http://www.law.ua.edu/pubs/lrarticles/Volume%2063/Issue%201/3-Venetis.pdf>

In enacting anti-genocide legislation, Congress had many options, including to adopt the Convention in full, or at the very minimum, to cite to the Convention. Instead, Congress drafted new language that waters down the treaty and makes it, for the most part, inapplicable to the United States. As Lori Damrosch writes: The cumulative import of the Genocide Convention's history is that the Senate for its part... and the Congress as a whole in adopting the implementing legislation, have expressed an intention to confine the domestic legal effect of the Genocide Convention to such criminal proceedings as may be brought pursuant to the implementing legislation, and have purported to preclude reliance on the Genocide Convention as a source of civilly enforceable rights.145

Only judicial enforceability solves – the CP is unenforceable under current doctrine

Friedman, 5

(JD-University of Florida Law, “The Uneasy US Relationship with Human Rights Treaties: The Constitutional Treaty System and Non-Self-Execution Declarations,” 17 Fla. J. Int'l L. 187, March, Lexis)

VI. Conclusion and Suggestions for the Future The U.S. policy on human rights treaties **threatens to undermine over fifty years of effort to establish international human rights standards as international law**. n446 It is essential that the United States **regain and maintain its position as a leader in international human rights and an example for other nations**. But that cannot happen until the United States **starts taking seriously its international obligations under human rights treaties.** Demonstrating respect for international human rights law - and the instruments and organizations that create it - requires that the United States stop using nonself-execution declarations, n447 **mitigate the effects of** [\*256] **nonself-execution declarations already made**, n448 ratify more of the major human rights treaties, n449 **and start complying with its treaty obligations**. But **ratification alone does nothing to advance the nation's standing in the global arena unless the U**nited **S**tates **is prepared to take on real obligations** under those treaties. n450 Ratification of multilateral human rights treaties is important for many reasons. n451 But if and when the treaty-makers ratify future human rights treaties, "they should either agree on implementing legislation to fulfill the requirements of the treaty or agree that the treaty will be self- executing." n452 If neither of those options is feasible, it would be wiser to **refrain entirely from ratification than to ratify the treaties with nonself- execution declarations.** n453 Not only are there significant constitutional arguments against the declarations, n454 but their use shows more disrespect than does non-ratification for international human rights efforts and for other nations. The United States must **stop perpetuating the double standard of international human rights**. n455 The United States seeks to gain access to the [\*258] institutions of international human rights law and to influence other nations and to impose obligations on them, but refuses to accept any obligations to effect changes in its own law. n456 The United States should either commit to the terms of human rights treaties or refrain from ratifying them at all. The treaty-makers should not ratify any more human rights treaties until they are prepared to make real, **concrete, and unqualified commitments to the terms** of those treaties.

### treaties da

Heg internal link is wrong

Gruber, 11

(Law Prof-Colorado, Courts and Terrorism: Nine Nations Balance Rights and Security, “*One More Casualty of the "War on Terror,"* ed. Volcansek, P. 33-50)

One of the Court's apparent guiding principles was the defense of American sovereignty (Id. at 1364). Indeed, many assert that U.S. law must incorporate a strong self-execution doctrine to preserve America's ability to make its own laws and independent judgments without bowing to the authority of a world court (Yoo, 1999a; Yoo 1999b)• Although this argument may have some surface appeal, it is in fact misleading. U.S. treaty law **already** contains many mechanisms to preserve sovereignty, such that adopting an isolationist stance toward self-execution is simply not required. For example, under the "last-in-time rule," Congress always has the option to pass domestic legislation abrogating or superseding the terms of a treaty (Whitney v. Robertson, 12.4 U.S. 19o, i94 (1 888)). Moreover, the executive retains the political option to withdraw from treaties. In fact, after the decision in Aveiza, the United States did withdraw from the Optional Protocol (Medellin, 1z8 S. Ct., at 1354). Thus, the exceptionalist approach to self-execution is not essential for the preservation of sovereignty. The primary achievements of the exceptionalist approach were to allow the United States to sign treaties **that are obligations in name only** and to permit the U.S. government to create the appearance of respect for individual rights while completely denying individuals a remedy.

The Court has retained private rights of action post-Medellin in other major treaty areas—their spillover arg is disproven or non-unique!

John Quigley, President’s Club Professor in Law, Michael E. Moritz College of Law, The Ohio State University, 2012, A Tragi-Comedy of Errors Erodes Self-Execution of Treaties: Medellín v. Texas and Beyond, http://law.case.edu/journals/JIL/Documents/45CaseWResJIntlL1%262.19.Article.Quigley.pdf

X. TREATIES IN PRIVATE LAW CASES POST-MEDELLÍN

In a 2012 article, Oona A. Hathaway, Sabria McElroy, and Sara Aronchick Solow claim that the lower courts have taken the more stringent requirement suggested in Medellín beyond the context of rights sought against governmental entities and are applying it across the board to all treaty-based claims, including suits against private parties.132 They argue that there has now occurred an “end to the carve-out for private law.”133 They cite a few examples.134

However, cases decided in the lower courts post-Medellín involving reliance on a treaty-based right against a private party reveal that the impact of Medellín in that realm is slight. Cases involving self-execution in treaties of friendship, commerce, and navigation, and in a major treaty on international sale of goods appear unaffected. Under the U.S.-Japan Treaty of Friendship, Commerce, and Navigation, a treaty not implemented by congressional legislation, Japanese companies have the right to hire executive personnel of their own choosing and routinely win cases filed by Anglo-Americans who claim discrimination for being passed over.135 This Treaty has no “statement” like that demanded by the Court in Medellín.

**Medellín has been disregarded** **in cases arising under** the Convention on the International Sale of Goods (**CISG),** which regulates the sale of goods between private parties located in different countries.136 **The CISG has not been implemented by congressional legislation**. Its articles prescribing rights and obligations for parties to a covered sale are considered self-executing.137 **It is applied as self-executing by U.S. courts, even though its text contains no statement calling for self-execution**.138

The Medellín case generated speculation as to whether the self- executing character of the CISG might be revisited.139 However, the courts have continued to apply the CISG. In a 2011 case, the Eighth Circuit applied the CISG to a suit between two private parties, without commenting on why it applied.140 The Southern District of New York, applying the CISG in another 2011 case, did mention the fact that it considered the CISG to be self-executing: “The CISG is a self-executing treaty, binding on all signatory nations, that creates a private right of action in federal court under federal law. As a treaty, the CISG is a source of federal law.”141 **The court did not mention Medellín as imposing any requirements that might negate the self- executing character of** CISG **obligations**.

In a 2012 case in which the plaintiff argued that the CISG applied to a contract, another U.S. district court said, “The Court agrees that because the United States and China are both CISG signatories, the CISG governs the contracts.”142 The court said nothing further about application of the CISG.143Again in 2012, still another U.S. district court, when implementing CISG, characterized it as self-executing.144 In support, the court did cite Medellin, but only the passages in Medellin that refer to Foster & Elam for the proposition that some treaty provisions are self-executing.145 The district court did not cite the pages in Medellín that require a statement that suggests self- execution.

The courts appear to be ignoring the prescriptions of Medellín in regard to one category of treaty that provides individual rights against the government, namely, treaties aimed at preventing double taxation of income by more than one state. Provisions in such treaties that protect an individual from paying tax twice on the same income are regarded as self-executing.146 Such treaties typically lack specific language calling for self-execution, yet taxpayers have been allowed to rely on provisions that would benefit them. In a 2009 case in which a taxpayer relied on a taxation treaty with Canada,147 the U.S. Court of Appeals entertained the taxpayer’s argument to determine whether the treaty provision resulted in the redress sought, without referring to the doctrine of self-execution or to Medellín.148 In a 2012 case, the U.S. Tax Court referred to the provisions of a tax treaty with France to determine whether the taxpayer was exempt from taxation in the United States on certain income.149

Another aspect of Medellin that is being ignored in private law cases is the Court’s view that the presence of an enforcement mechanism negates self-execution. The Japan-U.S. FCN treaty, as noted, contains such a mechanism, namely, a clause allowing suit in the ICJ where either Japan or the United States considers the other to be in violation.150 In a 2011 U.S. district court case, an Anglo- American was fired by a Japanese company operating in the United States.151 He sued, alleging discrimination in violation of U.S. legislation. The court found his allegations ill-founded but said that even if they were, they would be barred by provisions in the Japan- U.S. Friendship, Commerce, and Navigation Treaty that afford complete freedom in selection of executive staff.152 The Court did not mention Medellín. In a 2012 case involving a similar issue, another U.S. district court likewise allowed a Japanese employer to rely on the Japan-U.S. FCN treaty.153 As noted, the provision of that Treaty on executive hiring continues to be implemented. The lower courts in post-Medellín cases simply do not mention the enforcement mechanism or the Court’s mention of enforcement mechanisms as a factor negating self-execution.

The U.S. Supreme Court in Medellín, to be sure, mentioned FCN treaties, as examples of treaties the Court in the past had held to be self-executing in certain of their provisions.154 The Court did not seem to criticize those past decisions. It said that the FCN treaties were held to be self-executing based on their language.155 But if one examines those FCN treaties, one finds nothing like the “statement” the Court said would be necessary to hold a treaty provision self- executing. And past FCN treaties have had enforcement provisions; a feature that the Court in Medellín says disqualifies a treaty’s provision as self-executing. Those past FCN treaties thus do not meet the new requirements on two grounds. By the Court’s reasoning in Medellín, an FCN treaty that simply provides, as do most, for certain rights for foreign nationals in the territory of the other contracting party, and which, as many do, provide an enforcement mechanism, might fail the Court’s test for self-execution.

XI. CONCLUSION

Medellín involved the hardest possible situation for self-execution, since what was at issue was not a statement one could find in the treaty, but a decision made by a judicial organ created by a treaty. A narrow reading of the holding in Medellín is that that it relates solely to the self-executing character of U.N. Charter Article 94, or at least to treaty provisions that require compliance with the decision of a treaty-created judicial organ.156 The Court’s apparent requirement of a “statement” is ambiguous, particularly when taken together with the Court’s apparent approval of a self-execution finding in prior cases involving treaties lacking such a “statement.” If the Court meant to overrule its prior cases, it could have done so. It did not. It purported to preserve its prior case law. Lower courts, even those that do not simply ignore Medellín, may be able to resist suggestions that are likely to be made by counsel that Medellín requires far-reaching restrictions on self-execution.

Private right of action rulings don’t spill over between treaties---empirics prove the Court will distinguish the plan

Stephan, Lewis F. Powell, Jr. Professor of Law and Hunton & Williams Research Professor, University of Virginia, ‘7

(Paul B., 11 Lewis & Clark L. Rev. 65)

Given this assumed authority, the **occasional discussion** in the Court's decisions during this era about the legal effect of treaties is unhelpful. On the one hand, one can find many references to the proposition that treaties generally create rights and obligations on behalf of state parties rather than of 41 individuals. **On the other hand**, one also can find statements tracking Marshall's in Schooner Peggy, namely that treaties constitute part of the law of the United States and, when they create private rights, invite private enforcement. 4 2 **What is missing is any effort to reconcile these propositions** by explaining the significance of a treaty's status as U.S. law, and in particular whether its status as U.S. law leads to private enforcement. After Erie Railroad Co. v. Tompkins, 4 3 however, **it did not seem** so **obvious** that self-execution **automatically** meant the provision of a rule of decision for all disputes, public or private. With the demise of the habits of mind induced by the concept of general federal common law, judges could not take for granted that they could apply any rule of decision that seemed relevant to a case within their jurisdiction, and in particular that they had a free hand to develop a federal common law of remedies. Instead, a federal court had to make an independent analytical step: It had to find an independent source of authority for the application of any particular rule of decision. I know of **only two** post-Erie **instances** where the Supreme Court relied directly on a treaty (as distinguished from a statute that incorporated a treaty by reference) to find a rule of decision that a private person could invoke in a U.S. lawsuit. In several cases involving the Warsaw Convention, the Court assumed that this multilateral instrument provides the relevant substantive rules for litigated commercial disputes that come within its coverage. 4 4 **None of these decisions identifies the** basis of this assumption. The absence of discussion might be significant, if **private enforcement** is the **default for** self-executing **treaties.** **But** one does not need such a strong rule to defend the application of the Warsaw Convention in private suits. If any international instrument to which the United States is a party anticipates private enforcement, this one does. It purports to supply terms for a particular class of contracts, namely those involving international aviation. 4 5 Its rules have legal traction **only** in the context of private disputes over these contracts, in which litigation is the presumed dispute-resolution mechanism. In other words, the Warsaw Convention does no work other than to supply rules of decision to apply in private disputes. The only other instance where the post-Erie Court has embraced private enforcement of a treaty is Kolovrat v. Oregon, 4 6 a suit challenging state inheritance law. An Oregon statute cut off the inheritance rights of a foreign beneficiary of an estate in cases where the beneficiary's home country interfered with the inheritance rights of U.S. citizens. Black, writing for a unanimous Court, ruled that Oregon's law violated a treaty that obligated the United States to grant Yugoslavian citizens the same right to inherit property as .S. citizens enjoyed. 4 7 Black relied on the treaty without ever addressing the question of whether a private person could invoke it in a lawsuit. 4 8 Because Kolovrat, like the Warsaw Convention cases, did not discuss the issue of private enforcement, one struggles to read much into the decision. Two factors confound the case's precedential significance. First, the Court also offered an alternative holding, namely that the Oregon law interfered with the ability of the United States to meet its obligations under the Articles of Agreement of the International Monetary Fund, an international agreement that Congress had implemented through legislation. 4 9 One thus can question whether the treaty argument did much independent work. Second, the facts closely resembled those of Zschernig v. Miller, a case decided seven years later involving the same Oregon statute but a different treaty. There the Court ruled that the restriction on inheritance unconstitutionally interfered with the exclusive power of the national government to conduct foreign relations. In Zschernig the Court did not address the argument that the relevant treaty required the invalidation of the Oregon law.

About the only thing that seems clear from Kolovrat, as elucidated by Zschernig, is that the Court wished to invalidate a state law that expressed hostility to communism, and that the basis for invalidation, whether a treaty, a statute, or the Constitution, was of secondary importance. The decision appears to rest on a general concern about state discrimination against aliens, an impulse that blossomed a few years later into a separate strand of equal protection jurisprudence. **This**, then, **was the precedent confronting the Court** in Sanchez-Llamas. In no instance since Erie had the Court explained the basis for private enforcement of a treaty. Rhetoric indicating that treaties generally did not create rights that individuals could enforce coexisted with "treaties are part of the law of the United States" language. **At no time** did the Court try to identify the functional consequences of any particular approach to implied treaty enforcement. In particular, **it never discussed the** impact of a **presumption for or against private enforcement** on future treaty making or legislative implementation. As noted above, five of the Justices in Sanchez-Llamas **declined to resolve the question** of private enforcement. Four did. In his dissenting opinion in Sanchez-Llamas, Breyer offered his own solution to the private enforcement quandary: Private enforcement should exist whenever a treaty "prescribe[s] a rule by which the rights of the private citizen ... may be determined" and its obligations are "of a nature to be enforced in a court of justice." 5 3 Apparently it would be enough for these Justices to assume private enforcement if a treaty uses a suggestive term such as "right" and contains judicially manageable standards for applying a rule of decision. 5 4

### mandamus cp

**Congress will backlash to the CP more – links to NB**

Economist, 10/6

“Why won't America ratify the UN convention on children's rights?”

<http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2>

The treaty was adopted by the UN General Assembly in 1989 and became one of the most rapidly and widely adopted human-rights pacts. It sets standards for education, health care, social services and penal laws, and establishes the right of children to have a say in decisions that affect them. America signed it in 1995 but never ratified it. (By signing a treaty a country endorses its principles; ratification means committing to be legally bound by it.) **The bar for treaty ratification is set high in America: the president must send treaties to the Senate, where they require approval by a two-thirds majority, the same standard required to amend the Constitution. The child-rights convention has never made it to a vote.** Although Presidents Clinton and Obama have supported ratification, opposition by Republicans in the Senate has made it clear that the treaty would not pass. Opponents of the treaty say it would usurp American sovereignty, a long-standing fear about the UN among some conservative Republicans.

Congress shuts down the process – they don’t want to let anyone out for any reason

Chow 11, JD from Cardozo

(Samuel, THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS, [www.cjicl.com/uploads/2/9/5/9/2959791/cjicl\_19.3\_chow\_note.pdf](http://www.cjicl.com/uploads/2/9/5/9/2959791/cjicl_19.3_chow_note.pdf))

After the D.C. Circuit Court issued its opinion and while the petition for certiorari was pending, the Executive expressly recognized the troubling scenario that the continued detention of the Kiyemba petitioners posed. Defense Secretary Robert M. Gates concluded that it was "difficult for the State Department to make the argument to other countries they should take these people that we have deemed, in this case, not to be dangerous, if we won't take any of them ourselves." Indeed, the Executive was poised to send as many as seven of the petitioners to the United States in 2009. However, in response to the threat of such action. Congress attached a rider to the Supplemental Appropriations Act which prevented the use of defense funds to release any Guantanamo detainees into the United States. Congress also passed two additional pieces of legislation restricting the ability of Guantanamo detainees to enter the United States. The National Defense Authorization Act granted Congress a substantial degree of control over such releases and a spending provision banned the Department of Homeland Security from effectuating such release. The detainees' hope for release, therefore, turned again on the pending petition for certiorari.

Geneva requires regular court proceedings—internal mechanisms like the CP are insufficient

Ratner, 8

(Law Prof-Michigan, “Think Again: Geneva Conventions,” 2/19, http://www.foreignpolicy.com/articles/2008/02/19/think\_again\_geneva\_conventions?page=0,6)

“The Geneva Conventions Are Obsolete” Only in the minor details. The laws of armed conflict are old; they date back millennia to warrior codes used in ancient Greece. But the modern Geneva Conventions, which govern the treatment of soldiers and civilians in war, can trace their direct origin to 1859, when Swiss businessman Henri Dunant happened upon the bloody aftermath of the Battle of Solferino. His outrage at the suffering of the wounded led him to establish what would become the International Committee of the Red Cross, which later lobbied for rules improving the treatment of injured combatants. Decades later, when the devastation of World War II demonstrated that broader protections were necessary, the modern Geneva Conventions were created, producing a kind of international “bill of rights” that governs the handling of casualties, prisoners of war (POWs), and civilians in war zones. Today, the conventions have been ratified by every nation on the planet. Of course, the drafters probably never imagined a conflict like the war on terror or combatants like al Qaeda. The conventions were always primarily concerned with wars between states. That can leave some of the protections enshrined in the laws feeling a little old-fashioned today. It seems slightly absurd to worry too much about captured terrorists’ tobacco rations or the fate of a prisoner’s horse, as the conventions do. So, when then White House Counsel Alberto Gonzales wrote President George W. Bush in 2002 arguing that the “new paradigm” of armed conflict rendered parts of the conventions “obsolete” and “quaint,” he had a point. In very specific—and minor—details, the conventions have been superseded by time and technology. But the core provisions and, more crucially, the spirit of the conventions remain enormously relevant for modern warfare. For one, the world is still home to dozens of wars, for which the conventions have important, unambiguous rules, such as forbidding pillaging and prohibiting the use of child soldiers. These rules apply to both aggressor and defending nations, and, in civil wars, to governments and insurgent groups. The conventions won’t prevent wars—they were never intended to—but they can and do protect innocent bystanders, shield soldiers from unnecessary harm, limit the physical damage caused by war, and even enhance the chances for cease-fires and peace. The **fundamental bedrock** of the conventions is to prevent suffering in war, and that gives them a legitimacy for anyone touched by conflict, anywhere and at any time. That is hardly quaint or old-fashioned. “The Conventions Don’t Apply to Al Qaeda” Wrong. The Bush administration’s position since Sept. 11, 2001, has been that the global war on terror is a different kind of war, one in which the Geneva Conventions do not apply. It is true that the laws do not specifically mention wars against nonstate actors such as al Qaeda. But there have always been “irregular” forces that participate in warfare, and the conflicts of the 20th century were no exception. The French Resistance during World War II operated without uniforms. Vietcong guerrillas fighting in South Vietnam were not part of any formal army, but the United States nonetheless treated those they captured as POWs. So what treatment should al Qaeda get? The conventions contain one section—Article 3—that protects all persons regardless of their status, whether spy, mercenary, or terrorist, and regardless of the type of war in which they are fighting. That same article prohibits torture, cruel treatment, and murder of all detainees, requires the wounded to be cared for, and says that **any trials** must be conducted by regular courts respecting due process. In a landmark 2006 opinion, the U.S. Supreme Court declared that at a minimum Article 3 applies to detained al Qaeda suspects. In other words, the rules apply, even if al Qaeda ignores them. And it may be that even tougher rules should be used in such a fight. Many other governments, particularly in Europe, believe that a “war” against terror—a war without temporal or geographic limits—is complete folly, insisting instead that the fight against terrorist groups should be a law enforcement, not a military, matter. For decades, Europe has prevented and punished terrorists by treating them as criminals. Courts in Britain and Spain have tried suspects for major bombings in London and Madrid. The prosecutors and investigators there did so while largely complying with obligations enshrined in human rights treaties, which constrain them far more than do the Geneva Conventions.

### link uq – courts

Articles 3 and 75 of Geneva are already enforced via citation – should trigger the DA

Tony Ginsburg et al\* 9, law prof at Chicago, “brief of international law experts as amici curiae in support of petitioners”, <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuIntlLawExperts.authcheckdam.pdf>

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The law of war creates an independent legal obligation that the District Court be permitted to order Petitioners’ release. The law of war does not displace the obligations under the Covenant outlined above, but creates an additional international legal obligation on the United States to permit the District Court to order Petitioners’ release.10 **Common Article 3 of the Geneva Conventions, which the United States has ratified, requires that detainees be treated humanely**. **This principle** is appropriately interpreted in light of recognized customary international law that **requires the release of detainees when the reason for their detention has ceased**. In the case at hand, the District Court must have the authority to order the release of Petitioners, whose detention is unlawful and who pose no threat to the United States.

Article 3 of the Geneva Conventions – often called Common Article 3 because it appears in all four of the Geneva Conventions – requires that all persons taking no active part in the hostilities, including detainees, be “treated humanely.” Common Article 3, supra. In Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006), the Supreme Court held that Common Article 3 is legally binding on the United States and enforceable in U.S. courts.11 Common Article 3 provides that in a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,” certain provisions. Common Article 3, supra. Among these provisions is the requirement that “[p]ersons taking no active part in the hostilities, including . . . those placed hors de combat by . . . detention . . . shall in all circumstances be treated humanely.” Id. (second emphasis added).

The obligation that detained civilians be “treated humanely” must be read in light of Article 75 of Protocol I to the Geneva Conventions, see Article 75, supra. Article 75, which is “indisputably part of the customary international law,” 548 U.S. at 634 (plurality opinion),12 provides that all detainees held in connection with armed conflict “shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.” Article 75, supra, § 3 (emphasis added).13

Although the United States has not ratified Protocol I, the Protocol’s status as customary international law renders it an appropriate interpretive tool for the Court. See Hamdan, 548 U.S. at 633 (plurality opinion) (noting that Common Article 3 “must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law,” many of which are “described in Article 75 of Protocol I”). Under Article 75, civilians initially detained because they were thought to pose a security risk must be released as soon as it is clear that they pose no such risk. This reading of Common Article 3 in light of Article 75 is consistent with the conclusions of a 2005 study on Customary International Humanitarian Law by the International Committee of the Red Cross, which concludes that as a matter of treaty law, “arbitrary deprivation of liberty is not compatible” with humane treatment under Common Article 3. See Int’l Comm. Red Cross, I Customary International Humanitarian Law 344 (Jean-Marie Henckaerts & Louise DoswaldBeck eds., 2007).

State Department Legal Advisers have repeatedly stated that the fundamental guarantees expressed in Article 75 are part of the law of war.14

While serving as Legal Adviser to President George W. Bush, William H. Taft, IV wrote that the “customary law notion of fundamental guarantees found more expansive expression in Article 75 of Additional Protocol I to the Geneva Conventions” and that the United States “does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.” William H. Taft, IV, The Law of Armed Conflict After 9/11: Some Salient Features, 28 Yale J. Int’l L. 319, 321-22 (2003). His successor, John Bellinger, argued for a public statement recognizing Article 75 as customary international law binding on the United States, noting in the process that U.S. practice conforms to Article 75. See Letter from John B. Bellinger, III, Legal Adviser, Dep’t of State, to William J. Haynes, II, Gen. Counsel, Dep’t of Def. (Jan. 16, 2008) (on file with the Yale Law School Library). These Legal Advisers were reaffirming a position declared more than two decades ago under then-Deputy Legal Adviser Michael Matheson. See Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int’l L. & Pol’y 419, 427 (1987) (“We support in particular the fundamental guarantees contained in article 75. . . .”). It is therefore appropriate to interpret the binding legal obligations on the United States under Common Article 3 in light of Article 75’s obligation to release detainees as soon as the reason for their detention has ceased.

The United States’ obligation under Common Article 3 to ensure the courts have the authority to order release of detainees when there is no lawful basis for detention **can be enforced by this Court through the habeas statute**. Section 2241 expressly provides that habeas relief is available where detention is contrary to U.S. treaty obligations. 28 U.S.C. § 2241(c)(3) (2006) (noting that writ extends to prisoners held “in custody in violation of the Constitution or laws or treaties of the United States”); see Mali v. Keeper of the Common Jail, 120 U.S. 1, 17 (1887) (holding that because a “treaty is part of the supreme law of the United States,” the power to issue writs of habeas corpus applies to prisoners held in violation of treaties). **At a minimum, Common Article 3 should be used to interpret the domestic habeas corpus statute**. See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

### 2ac pqd

There’s no spillover to overall deference and no impact

Alex Glashausser 5, law prof at Washburn, Difference and Deference in Treaty Interpetation, 50 Vill. L. Rev. 25, <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1204&context=vlr>

When a case arises under a treaty, executive branch actors may well hope that the court does nothing to impair that additional obligation. In a word, what they wish for is deference. After all, they are in a better position than judges to know what interpretation of the treaty will suit current foreign policy—which is not necessarily the same as the "correct'' interpretation of the treaty, to the extent that one exists. The court, though, should not acquiesce to the executive's interpretation. Instead, it should interpret the treaty only in light of its fealty to the Constitution. The court has not taken on the separate obligation to another sovereign.138 For example, the President may have decided for diplomatic reasons that the language in an FCN treaty allowing foreign companies to hire personnel "of their choice" exempts foreign companies from all employment discrimination suits.139 But a court might properly read the treaty as having a more limited effect. The court's duty to interpret the treaty as a self-executing domestic law runs to "We the People," one of whom might well be a wrongly rejected job applicant. Reading the treaty as the President desired would violate that duty. In sum, courts should remember that their obligation is to apply the Constitution. When the executive branch undertakes a separate obligation to another sovereign, the substance of that promise often becomes domestic law that courts can enforce, but because that extraconstitutional obligation is not directly incurred by the judiciary, courts need not appease the executive branch by deferring to its interpretations. If a court's interpretation causes a treaty partner to complain of a violation, that partner will have recourse to various possible sanctions, formal or informal; thus, courts should not worry overly about the plight of the international obligee. In any event, better that courts apply the law at the possible expense of international obligations than bow to international obligations at the definite expense of their constitutional duty. 3. Separation of Interpretations Occasionally, courts stand up to the executive branch. One judge who did accept the general concept of deference directly challenged the assumption that it was a code word for submission: Implicit in the Government's posture is that its concept of "great weight" necessarily must yield concurrence. . . . Were this notion to prevail, the Court's constitutional role and discretion in treaty interpretation effectively would be reduced to that of a mere echo of the Government's perspective. . . . Even in articulation the theory makes a mockery of constitutional separation of powers. Manifestly, its effectuation would spell doom for judicial independence.140 In my view, even a more limited notion of "great weight" can portend similar doom. If a court would independently arrive at an interpretation different from that of the executive branch but announces a decision consistent with the executive's view—in other words, if the deference is not mere dicta—then the judicial role has been compromised.141 Neither interpreter in such a situation needs to be wrong. Actors in the two branches have unique responsibilities and operate under diverse restrictions and allegiances.142 Judicial and executive interpretations of treaties thus have reason to be different, and when they are, the judiciary has little reason to back down.'43 As long as courts retain their essential independence, there is nothing wrong with using prudential discretion to weigh the position of the executive branch on occasion; declining to defer does not rule out consideration of others' opinions. After all, the executive branch negotiates treaties and is in a better position than the judiciary to understand how they work in practice.144 Much as appellate courts respect the fact-finding of trial judges who receive live testimony,145 courts might recognize the particular value of the executive perspective. Moreover, a pitfall of the separation of powers is the potential for a paralyzed government.146 At some point, when the pragmatic need for the nation to speak with one voice becomes particularly strong,147 it may be wise for the judiciary to echo die executive in the spirit of overlooking one principle of the republic to save the whole.148 Likewise, at times, a court's own sustained legitimacy might depend on avoiding clashes with the executive branch. Federal courts do not have their own armies to enforce judgments.149 It is one thing to disagree with an executive interpretation in a case between private parties; it is another when the President is a party. In direct challenges to executive authority, such as that in Kucinich v. Bush,150 courts as a practical matter can reasonably take into account their own long-term self-interest. But even then, they can reach an accommodating result without invoking the damaging doctrines of deference or nonjusticiability.151 I am not decrying judicial deference to the executive interpretations of all laws—only of treaties. For example, courts defer to agencies' interpretation of regulations and statutes.152 Descriptively, that deference has been a bit weaker than with treaty interpretation.153 Prescriptively, though, it makes more sense. In that situation, Congress has explicidy delegated the implementation of a statutory scheme to an executive agency. To the extent that congressional intent concerning a statute is meaningful, so is agency intent, because Congress may delegate that role. As to any given statute, Congress comprises all the drafters. As to treaties, in contrast, the executive is only one of the two (or more) parties to the agreement. The executive's self-serving intent is thus less of a guide to what a treaty means than is Congress's intent as to what a statute means.154 If courts were to assert themselves and interpret treaties independendy, perceived violations of the international obligations of the United States would not suddenly spike. Although the perspectives of the executive and the judiciary differ somewhat, cross-branch interpretations should be fairly consistent. Executive interpretations will presumably tend to favor results that maintain smooth diplomatic relationships with treaty partners, and so will judicial ones, because the collective intent of the parties to a given treaty is likely cooperative as well. Along the same lines, it is unlikely that courts will read treaties in ways that cause violations of other norms of international law. Treaty drafters presumably intend their work product to comply with those norms; after all, the documents they write are themselves an important part of international law.155 Courts' interpretations ought to reflect that intent.156 In short, disdaining deference would hardly be cataclysmic for foreign policy. Even when judicial interpretation does deviate from that of the executive branch, disdaining deference would not cause the chaos that some fear. The Framers' main concern about courts and treaties was the "hydra" problem157—that the voices of multiple courts would turn foreign policy into a cacophony. But that problem will not rear its head because the independent judiciary has one ultimate arbiter. And that unitary head, the Supreme Court, unlike many countries' highest courts, considers itself bound by stare decisis.158 Therefore, although the federal judiciary might speak with a voice different from that of the executive, that voice is stable enough to help maintain positive foreign relations.159 The inconstancy of treaties need not spawn instability of interpretation within a single branch of government. With that in mind, courts should fulfill their constitutional duty to interpret treaties without being cowed into silence. They need not be indifferent to executive interpretations, but nor should they be deferent.

Deference is a myth—Zivotofsky was the death knell

Gwynne Skinner, Professor of Law at Willamette, 8/23/13, Misunderstood, Misconstrued, and Now Clearly Dead: The 'Political Question Doctrine' in Cases Arising in the Context of Foreign Affairs, papers.ssrn.com/sol3/papers.cfm?abstract\_id=2315237

Lower federal courts often erroneously cite the “political question doctrine” to dismiss as nonjusticiable individual rights claims arising in foreign or military affairs contexts, a trend that has increased since the 1962 case of Baker v. Carr. Similarly, lower courts have begun citing “special factors counselling hesitation” when dismissing constitutional claims (“Bivens claims”) in similar contexts, inappropriately treating “special factors” as a nonjusticiability doctrine. Lower federal courts should not cite either doctrine as a reason to avoid adjudicating individual rights claims arising in the context of foreign or military affairs. Rather, lower federal courts should adjudicate these claims on their merits by deciding whether the political branch at issue had the power under the Constitution to act as it did. Doing so is consistent with the manner in which the Supreme Court has approached these types of cases for over 200 years. The Court affirmed this approach in the 2012 case of Zivotofsky v. Clinton, a case in which the Court once and for all rung the death knell for the application of the “political question doctrine” as a nonjusticiability doctrine in cases involving individual rights – even those arising in a foreign policy context. In fact, a historical review of Supreme Court cases demonstrates that the Supreme Court has never applied the so-called “political question doctrine” as a true nonjusticiable doctrine to dismiss individual rights claims (and arguably, not to any claims at all), even those arising in the context of foreign or military affairs. This includes the seminal “political question” case of Marbury v. Madison. Rather, the Supreme Court has almost always rejected the “political question doctrine” as a basis to preclude adjudication of individual rights claims, even in the context of foreign or military affairs. Moreover, the Supreme Court has consistently admonished lower courts regarding the importance of the judiciary branch’s adjudication of individual rights claims, even in such contexts.13 That is not to say that from time to time the Court has not cited a “political question doctrine” in certain of its cases. However, a close review of those cases demonstrates that rather than dismissing such claims in those cases as “nonjusticiable,” the Court in fact adjudicated the claims by finding that either the executive or Congress acted constitutionally within their power or discretion. Moreover, the post-9/11 Supreme Court cases of Hamdi v. Rumsfeld, Rasul v. Bush, and Bush v. Boumediene, in which the Supreme Court consistently found that the political branches overstepped their constitutional authority, clarified that the doctrine should not be used to dismiss individual rights claims as nonjusticiable, even those arising in a foreign or military affairs context. In case there remained any doubt, the Supreme Court in Zivotofsky rejected the “political question doctrine” as a nonjusticiability doctrine, at least in the area individual rights, if not altogether. The Court found the case, involving whether the parents of a boy born in Jerusalem had the right to list Israel as his place of birth pursuant to a Congressional statute, was justiciable.17 The Court addressed the real issue, which was whether Congress had the authority to trump the President over whether Israel could be listed as the country of birth on passports where a person was born in Jerusalem, notwithstanding the President’s sole authority to recognize other governments. 18 In ruling as it did, the Court stayed true to many of its earlier cases involving “political questions” by adjudicating the claim through deciding whether one of the political branches took action that was within its constitutional authority. In the case, the Court showed its willingness to limit the power of the President in the area of foreign affairs rather than finding the claim nonjusticiable.

Lederman says no link and a million alt causalities

Lederman 11

Martin, Professor of Law – Georgetown University Law Center, “War, Terror, and the Federal Courts, Ten Years After 9/11: Conference\*: Association of American Law Schools' Section on Federal Courts Program at the 2012 AALS Annual Meeting in Washington, D.C.,” American University Law Review, June, 61 Am. U.L. Rev. 1253, Lexis

Numerous very important, contested, hotly debated topics have arisen in the last ten years, many of them in the Bush Administration, involving for example interrogation techniques, the scope of detention authority, habeas review, military commissions, targeted killings, and the use of force more broadly. On some of these questions, the federal courts—and the Supreme Court in particular—have had quite a lot to say; and on others, not so much, at least in part because of several different federal courts doctrines that prevent the courts from speaking too much about those. You’re all familiar with standing limits, political questions, state secrets, etc. We’re going to focus particularly on a couple of them, which are immunity doctrines and the weakening of the Bivens2 and state court sorts of causes of action. We will also discuss the fact that there are many people who think the federal courts have become too involved at supervising and resolving substantive questions involving the political branches, including some of Judge Kavanaugh’s colleagues, who have been particularly vocal about that, engaging in what appears to be a form of resistance to the Supreme Court’s Boumediene3 decision. By contrast, many other people think the courts have not been nearly involved enough at resolving some of the unresolved questions about the scope of interrogation and detention and military commissions and the like, that might be lingering from the last administration, or occurring now in the new administration, such as with respect to use of force. So that’s the second broad topic—whether the federal courts have been too timid or too aggressive in this area

Miller says case-by-case AND it’s about AEP v. Connecticut—blue highlighting

Miller 10 (Mathew Edwin, JD – University of Michigan Law School, Associate – Latham & Watkins LLP, “The Right Issue, the Wrong Branch: Arguments against Adjudicating Climate Change Nuisance Claims,” Michigan Law Review, November, 109 Mich. L. Rev. 257, Lexis)

However, to say that cases like American Electric Power are justiciable just because plaintiffs allege a public nuisance begs the question: Why should such claims **automatically be justiciable?** It contravenes the **purpose and articulation of the political question doctrine** to suggest that nuisances are categorically justiciable because political questions have historically excluded torts between private parties and have focused instead on governmental issues like gerrymandering, foreign policy, and federal employment. n70 Again, Baker demanded "discriminating" case-by-case inquiries, rejecting "resolution by any semantic cataloguing." n71 Similarly, the fact that other public nuisance claims have not presented political questions in the past should not preclude such a finding in the climate context. n72 Indeed, the argument for nonjusticiability rests on the notion that climate suits are unique and therefore defy classification among tort precedent. n73

[\*271] Extending the political question doctrine to a public nuisance allegation would surpass precedent in terms of claim-category application. Yet with respect to the theory behind the doctrine, **such an extension is proper** because cases like American Electric Power would push existing nuisance law to embrace a complex, qualitatively unique phenomenon **that cannot be prudentially adjudicated**. n74 The Supreme Court has never held that torts cannot present political questions, so prudential constitutional principles should similarly apply to them. This Note simply argues that the facts, claims, parties, and relief demanded in this particular mode of litigation should fall under the nonjusticiability umbrella, wherever its limits may lie. n75 The following analysis of Baker invokes the American Electric Power situation specifically for the sake of convenience, but the arguments therein should be read to apply to injunctive climate nuisance claims generally.

[Continues to Footnore]

n75. This Note does not purport to suggest exactly where the line ought to be drawn in applying the political question doctrine to tort claims. A consideration of the potential doctrinal "slippery slope" - where courts might improperly refuse to adjudicate claims solely on the basis of complexity - is beyond the scope of the present discussion.

They all decided PQD didn’t apply which is an alt cause and disproves doctrinal spillover.

May ‘11

James, Professor of Law and Graduate Engineering (Adjunct) at Widener University where he teaches constitutional and environmental law and co-directs the Environmental Law Center. “AEP v. Connecticut and the Future of the Political Question Doctrine,” http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/aep-v.-connecticut-and-the-future-of-the-political-question-doctrine/

This would seem to mean that at least **four members of the Court**—Justices Ginsburg, Breyer, Kagan, and Kennedy—held that the political question doctrine **does not bar review** of the plaintiffs’ federal common law claims in the case. The other four justices were silent about the role of the political question doctrine. Chief Justice Roberts and Justice Scalia joined Justice Ginsburg’s unanimous opinion without comment on whether the doctrine applied to bar review. This could suggest that they do not disagree with its holding that the doctrine does not bar review. Justice Alito, joined by Justice Thomas, issued a brief concurrence about Massachusetts v. EPA. The concurrence was silent about the role of the doctrine, again suggesting that neither believed that the doctrine barred review. Thus, while it is not entirely clear, it is safe to make four observations about how the Court addressed the political question doctrine in AEP. First, four justices held that the doctrine did not bar review. Second, **four other justices did not contest that holding**. Third, none of the eight justices contended that the doctrine barred review in the case. Moreover, there is nothing to suggest that Justice Sotomayor—who recused herself—believed that the doctrine barred review. This suggests that **none of the nine justices on the Court believe that the doctrine bars review.** Last, at the very least, a majority of the Supreme Court has broader views of the justiciability of federal common law claims for climate change than did the district court in AEP.

### 2ac military contractors

No impact—next paragraph…

Isenberg 10

David, Research Fellow – Independent Institute, “Contractor Legal Immunity and the ‘Political Questions’ Doctrine,” CATO Institute, 1-19, <http://www.cato.org/publications/commentary/contractor-legal-immunity-political-questions-doctrine>

[michigan’s card begins]

One can easily see why most defense contractors, including private military and security firms working under U.S. government contract, would like to prevent such suits from proceeding. The sheer number of injuries alone gives them reason to want to avoid possible suits. According to ProPublica as of last September 30 the number of private contractors injured in Iraq and Afghanistan totaled 37,652. Of course, not all those injuries are the result of something done wrong. But even a small fraction of them would entail considerable legal costs for a contractor so it is easy to understand why they would want to preventing such suits from being filed in the first place. As I am not a lawyer the following is derived from Maj. Carter’s article. Traditionally, the reason given for this is that such cases may involve “political questions” that the Judicial Branch is ill-equipped to decide. Thus defense contractor advocates claim these actions must be dismissed, else there be grim consequences for Government contingency contracting. But according to Maj. Carter, “the recent developments in political question doctrine case law are significant to the future of Government contingency contracting. However, they are not catastrophic — although portrayed as such by some defense contractor advocates. There will not be an explosion of contracting costs passed on to the Government. There will not be a mass refusal of defense contractors to accept contingency contracts. There will not be chaos on the battlefield. Such predictions are nothing more than “bellowing bungle.” Carter wrote: What is the political question doctrine? According to Chief Justice John Marshall, “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in [the U.S. Supreme Court].” In 2004, the Court held “[s]ometimes .. . the law is that the judicial department has no business entertaining [a] claim of unlawfulness — because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be ‘nonjusticiable,’ or ‘political questions.’” What this means is that traditionally courts have deferred to the political branches in matters of foreign policy and military affairs. Policy decisions regarding the employment of U.S. military forces in combat belong to the political branches, not the courts. The Supreme Court has held that, due to their “complex, subtle, and professional” nature, decisions as to the “composition, training, equipping, and control of a military force” are “subject always” to the control of the political branches. Tort suits that challenge the internal operations of these areas of the military are likely to be dismissed as political questions. Yet, notwithstanding the foregoing prohibitions on judicial conduct, the Supreme Court has cautioned, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” As mentioned earlier, vast precedent exists for judicial involvement in foreign and military affairs. Case law establishes that military decisions are reviewable by federal courts. An assertion of military necessity, standing alone, is not a bar to judicial action. Merely because a dispute can be tied in some way to combat activities does not prevent a court from reviewing it. Although an action arises in a contingency environment, if a case is essentially “an ordinary tort suit” it is well within the competence of the courts to entertain. Courts have underscored the point: no litmus test exists that prohibits judicial action merely because an issue involves the military in some fashion. Where plaintiffs seek only damages and not injunctive relief, such cases are “particularly judicially manageable.” When such a damages-only lawsuit concerns only a defense contractor (as opposed to the Federal Government), courts have held that such actions do not involve “overseeing the conduct of foreign policy or the use and disposition of military power.” Thus, those actions are less likely to raise political questions than suits against the Government, suits seeking injunctive relief, or both. Given the enormous amount of money involved in Government contingency contracting and the correspondingly large number of contractors and contractor employees performing GWOT (Global War on Terror) contingency contracts, the number of plaintiffs seeking redress for tortious conduct was certain to rise — and it did. Universally, defendant defense contractors invoked the political question doctrine in order to shield themselves from liability in their performance of GWOT contracts, some with more success than others. The first significant case centered around the tragic events at the Abu Ghraib prison in Iraq. In Ibrahim v. Titan Corp., Iraqi plaintiffs alleged they were tortured, raped, humiliated, beaten, and starved while in U.S. custody. Apparently fearing a dismissal on sovereign immunity grounds if they sued the U.S. Government, the plaintiffs instead chose to name as defendants the contractors who provided interpreters and interrogators for the prison. The defendants filed a motion to dismiss, alleging the matter involved political questions. The court held the case should not be dismissed at such an early stage on political question grounds, especially because the United States was not a party to the case. Ibrahim is significant because it was the first GWOT case to underscore the need for full factual development of a case prior to an assessment of justiciability. One particularly interesting point in Carter’s article is this: Judges and scholars openly speculate about the possible consequences of defense contractor tort liability on the federal procurement process. In Boyle, the Supreme Court warned that “[t]he financial burden of judgments against [] contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability … .” Since private military contracting advocates claim that their firms are more cost effective than the government one might reasonably believe that they can be so only by preventing tort suits against them. If the cost of such suits were factored in, the presumed cost effectiveness could conceivably be significantly less, or perhaps not exist at all. Carter asks “is the situation really this dire? Are contractors at a point where, because of increased litigation risks, they will be forced to charge the Government more for their services or elect to not provide services altogether?” The answers may not be far away. In November 2008, Joshua Eller filed suit in the U.S. District Court for the Southern District of Texas, as a result of injuries he suffered at Balad Air Base, Iraq, while deployed as a contractor employee of KBR from February to November of 2006. The complaint alleges defendants KBR and Halliburton “intentionally and negligently exposed thousands of soldiers, contract employees and other persons to unsafe water, unsafe food, and contamination due to faulty waste disposal systems … .” The complaint also includes allegations of injury from toxic smoke which emanated from an open air burn pit at Balad. The complaint alleges approximately 1,000 other individuals suffered similar injuries and it seeks to combine all of those actions into a single class action lawsuit. More significantly, this action is only one of several suits currently pending that relate to similar KBR activities in Iraq. The political question doctrine will be a major factor in this coming storm of litigation. With the large number of potential plaintiffs compounded by the seriousness of the conduct and injuries alleged, these suits have the potential to dwarf the damages awards previously sought in earlier GWOT cases. Undoubtedly, KBR will seek to raise the political question doctrine as an absolute bar to these and any similar suits. Defense contractor advocates warn of “deleterious effects” to the mission and the contractor-military relationship if tort suits against war zone defense contractors are allowed to proceed. They argue such tort claims “frustrate” and “conflict with” the Government’s ability to control contingency operations and would result in compromised logistical support and mission jeopardy. Furthermore, many companies, especially smaller ones, could be deterred from seeking contingency contracts. For those contractors who do elect to proceed, they will seek to insulate themselves from liability by either self-insuring or obtaining insurance coverage, if it is available. The argument continues that such costs will then be passed onto the Government in the form of higher contract prices. But, most alarmingly, some defense contractor advocates claim the impact of such suits “would be far more profound than financial” and defense contractors may, out of a fear of being sued, refuse to follow the military’s instructions altogether.

[Michigan’s card ends]

To this Carter writes:

The consequences predicted by defense contractor advocates vastly overstate the actual impact these GWOT tort suits will have on Government contingency contracting. Several reasons exist for this contention. First, the Government currently pays far too much money to defense contractors overseas for them to now decline performance of contingency contracts. The **alleged** dramatic price increases in U.S. Government contracts due to the increased litigation risk are unlikely as well. Contract prices may rise **to some degree**, but the Government can **ill afford to refuse to pay them**. Second, the U.S. military does not own the internal means to provide the goods and perform the services contracted for in a contingency environment — such goods and services are necessary for mission accomplishment. Finally, as discussed earlier, apart from the political question doctrine, defense contractors who face allegations of tortious conduct in a contingency environment have **several legal defenses** and other alternatives to limit or avoid liability, **including insurance**. **Viewed together**, these points counter forecasts of the impending ruin of Government contingency contracting.

### 2ac politics

The President will use the court for cover

Stimson 9

[09/25/09, Cully Stimson is a senior legal fellow at the Heritage Foundation and an instructor at the Naval Justice School former American career appointee at the Pentagon. Stimson was the Deputy Assistant Secretary of Defense for Detainee Affairs, “Punting National Security To The Judiciary”, <http://blog.heritage.org/2009/09/25/punting-national-security-to-the-judiciary/>]

So what is really going on here? To those of us who have either served in senior policy posts and dealt with these issues on a daily basis, or followed them closely from the outside, it is becoming increasingly clear that this administration is trying to create the appearance of a tough national-security policy regarding the detention of terrorists at Guantanamo, yet allow the courts to make the tough calls on releasing the bad guys. Letting the courts do the dirty work would give the administration plausible cover and distance from the decision-making process. The numbers speak for themselves. Of the 38 detainees whose cases have been adjudicated through the habeas process in federal court in Washington, 30 have been ordered released by civilian judges. That is close to an 80 percent loss rate for the government, which argued for continued detention. Yet, how many of these decisions has this administration appealed, knowing full well that many of those 30 detainees should not in good conscience be let go? The answer: one. Letting the courts do it for him gives the president distance from the unsavory release decisions. It also allows him to state with a straight face, as he did at the Archives speech, “We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people.” No, the president won’t release detainees; he’ll sit back and let the courts to do it for him. And the president won’t seek congressional authorization for prolonged detention of the enemy, as he promised, because it will anger his political base on the Left. The ultra-liberals aren’t about to relinquish their “try them or set them free” mantra, even though such a policy threatens to put terrorists back on the battlefield. Moreover, the president would have to spend political capital to win congressional authorization for a prolonged detention policy. Obviously, he would rather spend that capital on other policy priorities. Politically speaking, it is easier to maintain the status quo and let the detainees seek release from federal judges. The passive approach also helps the administration close Gitmo without taking the heat for actually releasing detainees themselves.

Normal means is courts will announce their decision at the end of the term

Mondak 92 [Jeffery J., assistant professor of political science @ the University of Pittsburgh. “Institutional legitimacy, policy legitimacy, and the Supreme Court.” American Politics Quarterly, Vol. 20, No. 4, Lexis]

The process described by the political capital hypothesis acts as expected in the laboratory, and the logic of the link between institutional and policy legitimacy has thus gained strong empirical corroboration. However, the dynamic's pervasiveness defies precise estimation due to the limitations of available public opinion data. Still, the results reported here are provocative. First, this view of legitimation may apply to institutions beyond the Supreme Court. Consequently, efforts to use this theory in the study of other institutions may yield evidence supportive of a general process. A second concern is how the Court responds to its institutional limits. Specifically, **strategy within the Court can be considered from the context of legitimacy.** For example, **what tactics may the Court employ to reduce the erosion of political capital? By releasing controversial rulings at the end of a term**, for instance, **the Court may afford itself a healing period, a time to repair damaged credibility prior to the next round of efforts at conferring policy legitimacy**. This suggests a third issue, the manner in which institutional approval is replenished. Does institutional support return to some equilibrium once dispute surrounding a particular ruling fades, or must the Court release popular edicts to offset the effects of its controversial actions?

Zero risk of Iran strikes

Suzanne Maloney, Brookings Saban Center Senior Fellow, 1/13/14, Six Myths about Iran Sanctions, www.brookings.edu/blogs/iran-at-saban/posts/2014/01/7-iran-sanctions-nuclear-deal-myths?utm\_content=bufferb5045&utm\_medium=social&utm\_source=twitter.com&utm\_campaign=buffer#

Myth 6. Support for additional Iran sanctions is the equivalent of support for war.

No. With all due respect to the Obama administration officials who have been making this argument, **it is an overstatement** and, in many cases, patently untrue and unfair. It may be effective domestic politics, given the country's understandable weariness of Middle Eastern conflicts, but it is an ugly smear to accuse all those who are skeptical about the current diplomacy or who seek additional pressure on Iran of war-mongering.

More to the point, the outcome of new sanctions is almost certainly not war. Tehran has come to the negotiating table despite, and because of, severe economic pressure. Rouhani's determination to achieve a deal, the speed with which he has advanced this agenda, and the flimsy pushback (by the rough-and-tumble standards of Iranian internal politics) he has received from hard-liners suggests that there is a broad and deep consensus around ending the nuclear stand-off with the West. No one should doubt Foreign Minister Zarif's sincerity when he says sanctions will end the talks, but there is a reasonable chance that Tehran will continue to seek a diplomatic resolution under almost any circumstances — there simply is no better alternative for Iranian interests.

The same is true for Washington. Few in Congress are truly eager for another costly Middle Eastern conflict, and despite the tough talk from successive U.S. presidents on preventing a nuclear Iran, **there is nothing automatic about military action**. **Even if the current diplomacy collapses, Washington and the world will have an array of alternatives** for blunting Iran's nuclear advances, **including many that fall short of war**.

Obama is irrelevant—interim agreement success stopped sanction supporters

Patricia Zengerle, 1/13/14, Iran deal progress dampens push for new U.S. sanctions bill, www.reuters.com/article/2014/01/14/us-iran-nuclear-congress-idUSBREA0D02T20140114?feedType=RSS&feedName=topNews&utm\_source=dlvr.it&utm\_medium=twitter&dlvrit=992637

President Barack Obama is more likely to win his battle with the U.S. Congress to keep new sanctions on Iran at bay now that world powers and Tehran have made a new advance in talks to curb the Islamic Republic's nuclear program. Despite strong support for a bill in the Senate to slap new sanctions on the Islamic Republic, analysts, lawmakers and congressional aides said on Monday that **the agreement to begin implementing a nuclear deal on January 20 makes it harder** **for sanctions supporters to attract more backers.** Senator Richard Blumenthal, a Connecticut Democrat, was one of several of the 59 co-sponsors who said there is no clamor for a vote any time soon. "I want to talk to some of my colleagues. I'm encouraged and heartened by the apparent progress and certainly the last thing I want to do is impede that progress. But at the same time, sanctions are what has brought the Iranians to the table," he told reporters. Sixteen of Obama's fellow Democrats are among the co-sponsors of the measure requiring further cuts in Iran's oil exports if Tehran backs away from the interim agreement, despite Iran warning that it would back away from the negotiating table if any new sanctions measure passed. The current list of supporters is close to the 60 needed to pass most legislation in the 100-member Senate. But 67 votes would be required to overcome a veto, which Obama has threatened as he tries to reach a wider agreement with Iran to prevent it from developing an atomic bomb. "The prospects for a diplomatic solution could implode if Iran leaves the table or if Iran responds with their own provocative actions," said Colin Kahl, who served as a Middle East expert at the Pentagon until 2011 and now teaches security studies at Georgetown University. "Even if neither happens, Iran's moderate negotiators would likely harden their negotiating positions in the next phase to guard their right flank at home against inevitable charges of American 'bad faith,' making a final compromise harder to achieve," he said. The bill in the Senate would cut Iran's oil exports to almost zero two years after enactment, place penalties on other industries and reduce Obama's power to issue a waiver on Iran sanctions, if Iran were to break the interim deal. Supporters say it is necessary to pass a bill now rather than wait to see if Iran complies with the agreement in order to pressure Tehran to negotiate in good faith and not to keep developing nuclear weapons while talks continue. "If the Iranians have their way, they'll drag it out forever," Arizona Senator John McCain, a Republican co-sponsor of the measure, told reporters. Iranian officials say their nuclear program is peaceful. Democratic Senator Robert Menendez of New Jersey and Republican Mark Kirk of Illinois, the measure's lead sponsors, are trying to attract more supporters, hoping to pressure Senate Majority Leader Harry Reid to allow a vote on the legislation. Pro-Israel lobbying groups, convinced that Iran cannot be trusted, are also pushing lawmakers to sign on in the hope of increasing the pressure on Reid, a Nevada Democrat, to let the bill move ahead. But there is no guarantee that all the senators who co-sponsored the sanctions move would actually vote for any final bill, and even less that Democrats would override a veto by a president from their own party. Backers of the sanctions bill said they could force Reid's hand by putting a hold on nominations by the administration - such as dozens pending for State Department positions. But Senate leadership aides - including Republicans - acknowledge that the chamber's rules give Reid enough leeway to block any action. DEMOCRATS IN LINE Stopping - or delaying - new sanctions is also made easier because there is a strong core of lawmakers - including senior Democrats - who strongly oppose them. Ten powerful committee chairs signed a letter in December opposing the new sanctions, and none of those 10 has changed position. An aide to Menendez, who is chairman of the Senate Foreign Relations Committee, said there had been no indication by Monday on when the sanctions bill might come to the floor. Analysts said there had been real concern about a delay in implementing the interim agreement reached in Geneva between Iran and the so-called P5+1 powers in November. But **Sunday's announcement of the start date eases** those **fears**. "It shows that they are moving ahead, and what that means is that Iran's not delaying, which was a fear," said Michael Adler, an expert on Iran at the Wilson Center think tank in Washington.

Obama exerting capital on Iran ensures the sanction bill passes

Patrick Clawson, Washington Institute for Near East Research Director, 1/17/14, Why are congressional Democrats considering new Iran sanctions?, www.bbc.co.uk/news/world-us-canada-25749219

This week President Barack Obama met congressional Democrats, asking them to vote against sanctions on Iran and support continued negotiation.

But the administration's overtures may be too little, too late.

In a highly partisan atmosphere and with mid-term elections coming later this year, it would be very difficult for Democrats to go against a president of their own party, especially on foreign policy - an area where Congress mostly defers to the president.

That is particularly true when the president speaks repeatedly and publicly about the inappropriateness of the action Congress is considering.

But Mr **Obama's team is doing an impressive job of encouraging congressional Democrats to hand the president a stinging defeat**: namely, to pass legislation about the Iran nuclear negotiations which Mr Obama has described as sure to torpedo those talks.

'War'

The Obama team accuses those with whom they disagree of wanting war, posing the issue as: negotiate, or pass the legislation and leave war as the only option.

That enrages many in Congress who point out that the administration repeatedly opposed past congressional sanction initiatives and then, after those sanctions were enacted, went on to describe those sanctions as key elements in persuading Iran to come to the negotiating table.

Some in Congress suspect that the same dynamic seen over the last several years would apply to this new bill: the administration would strongly oppose it while it was under debate, and then once it was passed, would shift position 180 degrees to describe the new congressionally mandated pressure on Iran as central to persuading Iran to become more accommodating.

Bad cop?

In other words, most if not all of the congressional supporters of the proposed legislation see what they are doing as adding to US leverage in the negotiations.

Many of them think that they are playing the bad cop to the Obama administration's good cop in a way very similar to how Iranian Foreign Minister Javad Zarif and Iranian President Hassan Rouhani play the good cop to Supreme Leader Ayatollah Ali Khamenei's bad cop.

Each side can say to the other: "You have to help me do a deal I can sell to the hardliners who have much power in my country."

Perhaps this time, unlike the previous several times when Congress adopted sanctions legislation over the objections of the White House, the new measures would actually hurt the negotiations.

But Congress is not well-disposed to believe the administration's protestations that this is the case.

Personal relations

It does not help that **this comes against a background of congressional Democrats often being unhappy about** a perceived **lack of co-ordination and co-operation with the White House on a wide range of issues**, such as how to respond when the healthcare rollout had so many problems.

Mr Obama does not have the strong personal relations with Congress members that some past presidents had, nor has he established consistently effective means for working out deals with Congress.

Further **infuriating** some of the congressional sponsors has been the Obama team's strong public stance about how Iran is sure to react to the bill if passed. This seems like a self-fulfilling prophecy.

After all, if President Obama predicts Iran will strenuously object if the bill becomes law, that puts Zarif and Rouhani in a position where they must react strongly or else they will attract domestic criticism.

In fact, they must show that they are taking an even tougher stance than Mr Obama predicts they will.

This dynamic has been seen before in Obama Middle East policy.

Criticism

When President Obama said that Palestinian-Israeli peace talks could continue only if Israel froze settlement activities, that put Palestinian Authority Chairman Mahmoud Abbas into a position where he had to be firmer than Obama on the issue of settlements, even though many analysts have suggested that prior to Obama's statement he was willing to proceed even if settlement activity continued.

He had seemed to care at least as much or more about Israeli release of Palestinian prisoners.

Many in Congress have been highly critical in private of President Obama's stance on the settlement issue - which did not in fact bring an end to settlements and which long impeded the resumption of Palestinian-Israeli talks - and they see the president's stance on the Iran sanctions legislation as repeating the same mistake.

Tough sell

Compounding the problem, the Obama team has not engaged with Congress about how to craft a more acceptable bill, instead gambling on killing the bill.

Having put so much energy into the issue, congressional supporters of the legislation want to be able to show they accomplished something: they need to be able to vote in favour of a bill that they can claim preserves their core objectives.

If the Obama team insists that instead these members of Congress fall on their sword for the president, **that is a tough sell**.

## 1AR

### AT: Middle East Instability

#### No impact

Fettweis, Asst Prof Poli Sci – Tulane, Asst Prof National Security Affairs – US Naval War College, ‘7

(Christopher, “On the Consequences of Failure in Iraq,” *Survival*, Vol. 49, Iss. 4, December, p. 83 – 98)

Without the US presence, a second argument goes, nothing would prevent Sunni-Shia violence from sweeping into every country where the religious divide exists. A Sunni bloc with centres in Riyadh and Cairo might face a Shia bloc headquartered in Tehran, both of which would face enormous pressure from their own people to fight proxy wars across the region. In addition to intra-Muslim civil war, cross-border warfare could not be ruled out. Jordan might be the first to send troops into Iraq to secure its own border; once the dam breaks, Iran, Turkey, Syria and Saudi Arabia might follow suit. The Middle East has no shortage of rivalries, any of which might descend into direct conflict after a destabilising US withdrawal. In the worst case, Iran might emerge as the regional hegemon, able to bully and blackmail its neighbours with its new nuclear arsenal. Saudi Arabia and Egypt would soon demand suitable deterrents of their own, and a nuclear arms race would envelop the region. Once again, however, none of these outcomes is particularly likely.

Wider war

No matter what the outcome in Iraq, the region is not likely to devolve into chaos. Although it might seem counter-intuitive, by most traditional measures the Middle East is very stable. Continuous, uninterrupted governance is the norm, not the exception; most Middle East regimes have been in power for decades. Its monarchies, from Morocco to Jordan to every Gulf state, have generally been in power since these countries gained independence. In Egypt Hosni Mubarak has ruled for almost three decades, and Muammar Gadhafi in Libya for almost four. The region's autocrats have been more likely to die quiet, natural deaths than meet the hangman or post-coup firing squads. Saddam's rather unpredictable regime, which attacked its neighbours twice, was one of the few exceptions to this pattern of stability, and he met an end unusual for the modern Middle East. Its regimes have survived potentially destabilising shocks before, and they would be likely to do so again.

The region actually experiences very little cross-border warfare, and even less since the end of the Cold War. Saddam again provided an exception, as did the Israelis, with their adventures in Lebanon. Israel fought four wars with neighbouring states in the first 25 years of its existence, but none in the 34 years since. Vicious civil wars that once engulfed Lebanon and Algeria have gone quiet, and its ethnic conflicts do not make the region particularly unique.

The biggest risk of an American withdrawal is intensified civil war in Iraq rather than regional conflagration. Iraq's neighbours will likely not prove eager to fight each other to determine who gets to be the next country to spend itself into penury propping up an unpopular puppet regime next door. As much as the Saudis and Iranians may threaten to intervene on behalf of their co-religionists, they have shown no eagerness to replace the counter-insurgency role that American troops play today. If the United States, with its remarkable military and unlimited resources, could not bring about its desired solutions in Iraq, why would any other country think it could do so?17

Common interest, not the presence of the US military, provides the ultimate foundation for stability. All ruling regimes in the Middle East share a common (and understandable) fear of instability. It is the interest of every actor - the Iraqis, their neighbours and the rest of the world - to see a stable, functioning government emerge in Iraq. If the United States were to withdraw, increased regional cooperation to address that common interest is far more likely than outright warfare.

#### Empirics go neg

Kevin Drum, Staff Writer for the Washington Monthly, 9/9/’7

(<http://www.washingtonmonthly.com/archives/individual/2007_09/012029.php>)

Having admitted, however, that the odds of a military success in Iraq are almost impossibly long, Chaos Hawks nonetheless insist that the U.S. military needs to stay in Iraq for the foreseeable future. Why? Because if we leave the entire Middle East will become a bloodbath. Sunni and Shiite will engage in mutual genocide, oil fields will go up in flames, fundamentalist parties will take over, and al-Qaeda will have a safe haven bigger than the entire continent of Europe. Needless to say, this is nonsense. Israel has fought war after war in the Middle East. Result: no regional conflagration. Iran and Iraq fought one of the bloodiest wars of the second half the 20th century. Result: no regional conflagration. The Soviets fought in Afghanistan and then withdrew. No regional conflagration. The U.S. fought the Gulf War and then left. No regional conflagration. Algeria fought an internal civil war for a decade. No regional conflagration.

### Link

#### That avoids the link

Keith Whittington, Princeton Politics Professor, 2005, Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, The American Political Science Review, Nov., (99)4,

There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician's own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, shifting blame for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

#### Empirics

Gregory Intoccia, practicing attorney specializing in telecommunications, 2001, Reassessing Judicial Capacity to Resolve Complex Questions of Social Policy, 11 USAFA J. Leg. Stud. 127

Elected politicians appear to "pass the buck" to the judiciary when an issue divides the electorate in a manner that is not in keeping with conventional party divisions. As the judiciary is a non-partisan institution that has traditionally resolved specific controversies, the courts offer politicians the opportunity to deflect issues potentially disruptive to partisan debate. For example, judicial policy on abortion suggests that this principle is valid. For at least a decade prior to the Supreme Court's abortion decision in Roe v. Wade, many mainstream politicians generally sought to avoid the abortion issue. In the mid-1960s, the two major parties remained divided over New Deal economic issues, but voters were increasingly interested in other issues such as law and order, race, gender equity and social lifestyles. At that time, the majority Democratic Party was divided between liberals who were attracted to new views of social lifestyles and traditionalists who condemned them. The Republican Party was also divided internally over these issues, but to a lesser degree. While the two parties primarily debated economic issues, many mainstream politicians sought to avoid debate on a number of non-economic social issues. As the debate over such issues as abortion intensified, elected officials increasingly deferred to the judiciary for resolution. In the months prior to the Roe v. Wade decision, many politicians sought to remove themselves from the potential fall-out of a legislative solution to the abortion question, preferring instead that the judiciary decide whether to eliminate abortion restrictions.

#### No one backlashes to the politicians

James Stoutenborough, Utah Political Science Dept, 2006, Reassessing the Impact of Supreme Court Decisions on Public Opinion, Political Research Quarterly

In many cases, courts have been empowered by and served the interests of other political actors. While this undermines the countermajoritarian difficulty as an empirical hypothesis, it is not at all reassuring from a democratic perspective. Judicial review can provide an opportunity for elected political actors to evade responsibilities or to pursue policies while evading electoral consequences. Such actions may enhance or enable domination by letting those actors pursue policies that might lead to domination without suffering electoral consequences. The possibility that judicial review can provide another outlet that permits legislators to "run from daylight"85 and effect important policy changes with a minimum of public scrutiny is a serious concern, and may especially contribute to domination by powerful economic elites. An additional concern is that judicial review can have the perverse effect of making legislators less attentive to their constitutional responsibilities, as they may vote for legislation they believe to be unconstitutional under the assumption that the courts will correct their mistake.86

### Impact

Deal collapse doesn’t cause a strike

Yousaf Butt, a nuclear physicist, is director of the Emerging Technologies Program at the Cultural Intelligence Institute, 1/17/14, Eight Ways You're Wrong About Iran's Nuclear Program, nationalinterest.org/print/commentary/eight-ways-youre-wrong-about-irans-nuclear-program-9723

Meme 1: “If the world powers fail to reach a deal with Tehran the alternative is bombing.”

An incarnation of this shopworn meme appears in [4]Matthew Kroenig's recent piece in Foreign Affairs [4]. He states “A truly comprehensive diplomatic settlement between Iran and the West is still the best possible outcome, but there is little reason to believe that one can be achieved. And that means the United States may still have to choose between bombing Iran and allowing it to acquire a nuclear bomb.” Er, no. That's a false choice. Iran is not acquiring a nuclear bomb—the [6]US Director of National Intelligence (DNI) has a “high level of confidence” [6] that no decision to weaponize has yet been taken in Tehran. This conclusion of the DNI is not based on an absence of evidence but on actual information [7] that whatever weaponization research Iran may have been doing up to about 2003 has been wrapped up a decade ago.

The P5+1 nations—the five permanent members of the Security Council: the US, UK, France, Russia and China, plus Germany—are not negotiating with Iran to stop it from making a nuclear bomb. They are negotiating with Iran on how to continue to keep its nuclear program peaceful. The discussion is about the methods used to verify that Iran continues its peaceful nuclear program. **Even if the nuclear talks fall apart the IAEA inspectors would still continue to inspect Iranian nuclear facilities**.

If we—or our allies—bomb Iran the IAEA inspectors would most certainly be expelled, Iran would likely leave the NPT, and Tehran would likely kick off a full-blown nuclear weapons development project. Iraq's nuclear weapons project also started in earnest after Israel bombed [8] Iraq's Osirak reactor in 1981.

To sum up: The negotiations with Iran are about the methods to use to continue to make sure Iran's nuclear program is peaceful. **Not reaching a deal is not the end of the world**. And if we do bomb Iran, it is likely to bring about the very thing the bombs were trying to prevent: a full-blown nuclear weapons program.

No strike – no escalation anyway

Elhusseini 13 (Fadi, Palestinian Diplomat and Journalist, 3/12/2013, "Will Israel attack Iran?", jordantimes.com/will-israel-attack-iran)

That red line is fast approaching, but is Israel going to really attack Iran? Many observers say this is sheer fantasy, especially in view of the new Israeli government coalition and the current developments in the Middle East. Iran insists its nuclear programme is peaceful and a national right, yet the fiery speeches and comments delivered by its officials proffer neither good gestures nor convincing assurances to the international community or its sympathisers. The prospect of war terrifies not only Israelis, but also people across the Middle East and the rest of the world. Surveys in Israel show that most Israelis oppose launching a unilateral attack on Iranian nuclear facilities. Experts believe that no Israeli attack would deter the Iranian nuclear programme and its ambition would not be ended, but simply delayed. Israeli military and intelligence chiefs believe that a strike on Iran is a bad idea, while the Obama administration has told Israel to back off and wait for sanctions to work. While it is likely that Iran would retaliate against Israel and possibly the US in response to any attack, it is unlikely that Iran will instigate a major war. Albeit for different reasons, Iran, Israel and the US understand that a war would not serve their interests. Israeli decision makers are confident that if things go bad, the US will not leave Israel at peril. Neither the US, whose most difficult decisions are usually taken in the second presidential term, nor other international powers would leave Israel unaided or accept an Israeli defeat. Iranian decision makers are also aware of the fact that initiating a major war would lead to an eventual American intervention and an inevitable confrontation with the world’s biggest military might.

US coop and Israel cabinet change

Raviv 13 (Dan Raviv of CBS News and Yossi Melman, who covers security issues for the Israeli website Walla, are co-authors of Spies Against Armageddon: Inside Israel's Secret Wars. They blog at IsraelSpy.com., 3/18/2013, "Good News for Obama Before His Trip -- Israel Unlikely to Bomb Iran in 2013", www.huffingtonpost.com/dan-raviv/obama-israel-trip\_b\_2894109.html)

Any serious analysis of the new cabinet line-up will lead to the conclusion that Israel will not bomb Iran this year: not on its own, and clearly Obama has no intention of having the United States do so before 2014 at the earliest. He told Israeli TV, after all, that it will be more than a year before Iran is able to arm itself with a nuclear weapon. Israel is likely, once again, to restrain itself -- reluctantly depending on Obama to strike Iran, while the United States and other major powers attempt to avoid a Middle East war by negotiating a deal with Iran. In addition to the Iran issue, Obama will spend some time on the flagging prospects for an Israeli-Palestinian peace accord. He will make a short visit to the Palestinian Authority on Thursday, but it does not seem that Obama will put his reputation on the line by pushing any particular plan for renewing talks between the two skeptical sides. Yet, after returning to Jerusalem from Ramallah on Thursday, Obama may have some visionary ambitions in a highly anticipated speech -- at a large convention center, rather than to Israel's parliament, signaling that he wishes to address the people directly rather than through their politicians. Israelis expect to hear that Obama truly cares about the country remaining a democratic and Jewish nation. His priority in the Middle East now matches that of Prime Minister Netanyahu. They are both highly concerned about Iran's stubborn continuation of its uranium enrichment and clear defiance of international sanctions. The time for a bold step seems near, and Obama will have to conjure up some strong alternatives if he does not want that step to be an Israeli military strike. His chances of restraining Israel have increased greatly with the installation of a new governing coalition, being sworn in on Monday. Cabinet posts have been divvied out, and the line-up of ministers reflects the reality that Netanyahu's right-wing Likud party lost 25 per cent of the seats it had in the last Knesset. The post of foreign minister is again held by Avigdor Lieberman, whose party partnered with Likud in the January election. That normally would indicate an uncompromising refusal to make concessions to the Palestinians or allow Iran to get any closer to creating a nuclear bomb, but Lieberman's authority is diminished by the fact that he is on trial on corruption charges. The new coalition partners are moderates. Most notable are the new kids on the bloc: a former TV anchor, Yair Lapid, and a wealthy software entrepreneur who happens to be religious, Naftali Bennett. Both have powerfully turned Israel's focus onto domestic reforms, and neither shows any appetite for war with Iran. The most significant factor is the departure from politics of Ehud Barak, who as defense minister was enthusiastically saber-rattling with Netanyahu against Iran. The defense post will now be held by Moshe ("Boogie") Yaalon, who is in the prime minister's Likud party. As a former chief of staff of Israel's military who served in recent years as minister for strategic affairs, Yaalon is intimately familiar with all of his country's capabilities and choices. On most issues he is a hawk. Yaalon is unabashedly proud of being the senior officer in the army's elite Sayeret Matkal commandoes when they assassinated Yasser Arafat's deputy, Abu Jihad, in far-off Tunisia in 1988. Yaalon continues to believe in an uncompromising battle against terrorists. He also says that the Palestinian Authority in Ramallah, led by Arafat's successor, Mahmoud Abbas, is not ready for a peace deal. Despite his hard-line views, Yaalon has displayed surprising caution when it comes to Iran. Together with other members of the inner security cabinet, he disdained pressure on the military by Netanyahu and Barak to prepare an immediate attack on Iran. We can expect Yaalon to show the same restraint in his new job, only this time with a voice that is louder and more authoritative. He is joined now by other moderate ministers who oppose Netanyahu's verbally adventurous approach toward Iran, including a former foreign minister who launched her own political party, Tzipi Livni. The faction which opposes a military strike mentions three key reasons: An attack likely would not delay Iran's nuclear work for long; it would give Iran a moral and perhaps legal justification to rush toward a nuclear bomb; and Iranian-backed retaliation against Israel could be highly disruptive to normal life. The new ministers counseling caution enjoy some tail wind from the top military brass. The chief of staff, Major General Benny Gantz, and the commander of the air force, Lt.-General Amir Eshel both firmly oppose a unilateral strike on Iran by Israel. They do, however, advocate a coordinated effort with the United States - including the use of force as a last resort, to be led by America's awesome forces. Although no one in Israel is leaking any details, it's understood that intelligence agencies -- led by the foreign operations agency, the Mossad -- are highly active in covert operations against Iran's nuclear work. There, too, sources say there is unprecedented cooperation with the United States.

Israel strike doesn’t escalate

Rogan 12 (Thomas Rogan is an American blogger living in London. He holds a BA in war studies from King's College London and an MSc in Middle East politics from the School of Oriental and African Studies. He has recently completed a law course in London and keeps a blog, 8/18/2012, "Israeli Could Attack Iran Without Causing A Major War in the Region", [www.guardian.co.uk/commentisfree/2012/aug/18/israeli-attack-iran](http://www.guardian.co.uk/commentisfree/2012/aug/18/israeli-attack-iran))

Over the last few days, Israeli newspapers have been consumed by reports that the prime minister, Binyamin Netanyahu, has decided to launch an attack on Iranian nuclear facilities some time this autumn. Although Netanyahu has an obvious interest in increasing pressure on Iran, it would be an error to regard these reports as simple rhetorical sensationalism. In my opinion, whether this year or next, Israel is likely to use its airforce to attack Iran. While it is impossible to know for sure whether Netanyahu will act, it is possible to consider the likely repercussions that would follow an Israeli attack. While it is likely that Iran would retaliate against Israel and possibly the US in response to any attack, it is unlikely that Iran will instigate a major war. Albeit for different reasons, Iran, Israel and the US all understand that a war would not serve their interests. First, the Israeli policy angle. If Netanyahu decides to order an attack on Iran, his focus will be on maximising the success of that action and minimising any negative consequences that might follow. In terms of Iranian retaliation, Israel would expect Iran's core non-state allies Hamas, the Palestinian Islamic Jihad and Hezbollah to launch rocket attacks into Israeli territory. However, present success with advanced defence systems has helped increase Israeli confidence in their ability to absorb this method of retaliation. Beyond rocket attacks, the Israeli leadership also understands that a likely mechanism for Iranian retaliation is via attacks against Israeli interests internationally. Whether carried out by the Iranian Quds Force or Hezbollah, or a combination of both, various incidents this year have shown Israel that Iran continues to regard covert action as a powerful weapon. The key for Israel is that, while these Iranian capabilities are seen as credible, they are not seen to pose intolerable threats to Israel. Faced with rocket strikes or limited attacks abroad – to which the likely response would be air strikes or short-duration ground operations (not a repeat of 2006) in Lebanon and Gaza – Israel would be unlikely to pursue major secondary retaliation against Iran. Certainly, Israel would not want to encourage intervention by Syria's Assad alongside Iran (an outcome that might follow major retaliatory Israeli action). If Netanyahu does decide to take action, Israeli objectives would be clearly limited. The intent would be to prevent Iran from acquiring a nuclear capability while minimising escalation towards war. Israel has no interest in a major conflict that would risk serious damage to the Israeli state. Though holding opposite objectives, Iran's attitude concerning a major war is similar to Israel's. While Iran regards nuclear capability as prospectively guaranteeing the survival of its Islamic revolution, clerical leaders also understand that initiating a major war would make American intervention likely. Such intervention would pose an existential threat to the theocratic project that underpins the Islamic Republic. Thus, in the event of an Israeli attack, Iran's response would be finely calibrated towards achieving three objectives: • First, punishing Israel for its attack. • Second, deterring further Israeli strikes and so creating space for a reconstituted Iranian nuclear programme. • Finally, weakening US/international support for Israel so as to increase Israeli isolation and vulnerability. Hezbollah, Hamas and other non-state allies would play a major role in effecting Iranian retaliation. Iran may also attempt to launch a number of its new Sajjil-2 medium-range missiles against Israel. Again, however, using these missiles would risk major retaliation if many Israeli citizens were killed. As a preference, Iran would probably perceive that utilising Hamas and Hezbollah would allow retaliation without forcing Netanyahu into a massive counter-response. Crucially, I believe Iran regards that balancing its response would enable it to buy time for a reconstituted, hardened nuclear programme. In contrast to the relatively open current structure, sites would be deeper underground and far less vulnerable to a future attack. The nuclear ambition would not be lost, simply delayed. As a final objective for retaliation, Iran would wish to weaken Israel's relationship with the US and the international community. This desire might encourage Iran to take action against US navy assets in the Gulf and/or attempt to mine the Strait of Hormuz, so as to cause a price spike in global oil markets and increased international discomfort. However, beyond their rhetoric, the Iranian leadership understand that they cannot win a military contest against the US, nor hold the strait for longer than a few days. For Iran then, as with Israel, regional war is far from desirable. Finally, consider the US. It is now clear that Obama and Netanyahu disagree on Iran. In my opinion, Netanyahu does not believe Obama will ever be willing to take pre-emptive military action against Iran's nuclear programme. Conversely, Obama believes Netanyahu's diplomatic expectations are too hasty and excessively restrictive. The policy distance between these two leaders appears increasingly irreconcilable. If Netanyahu decides to go it alone and attack Iran, the US president will face the unpleasant scenario of having to protect American interests while avoiding an escalation dynamic that might spin out of control towards war. This difficulty is accentuated by Obama's re-election race and his fear of the domestic economic fallout that may come from the decisions that he might have to make. Again, the simple point is that the US government has no interest in a war with Iran. If Netanyahu decides to take military action, he will do so in a strategic environment in which Israel, Iran and the US have no preference for a major war. Each state views the prospect of a war as counter to their particular long-term ambitions. Because of this, while serious, Iranian retaliation would be unlikely to produce an escalatory dynamic leading to war. The leadership of each of these states will restrain their respective actions in the pursuit of differing long-term objectives but common short-term ones.

### Capital Not Key

Reid is sufficient to block sanctions

Jon Terbush, The Week, 1/16/14, Should Congress stop meddling with the Iranian nuclear talks, theweek.com/article/index/255168/should-congress-stop-meddling-with-the-iranian-nuclear-talks

It's unclear if Democrats would really follow through with such a huge slap to Obama's authority, or if their noise is just pre-election posturing. Plus, Senate Majority Leader Harry **Reid** (D-Nev.) has **indicated he may not bring the sanctions up for a vote**.

Furthermore, House Republicans may have inadvertently killed the Senate's efforts by saying they could bring the bill up in their chamber; co-opting the plan would give it a partisan whiff that could **turn off some on-the-fence Democrats**.

Reid may be the White House's best friend on the issue. The push for more sanctions hasn't gone away in the face of a veto threat, and he may be the only one who can keep it from bringing it to that point.

Obama not spending sufficient capital on Iran

The Leveretts, Flynt and Hillary Mann, Going to Tehran, New America Foundation, Former National Security Council, 1/20/14, Iran, Syria and the Tragicomedy of U.S. Foreign Policy, goingtotehran.com/iran-syria-and-the-tragicomedy-of-u-s-foreign-policy

Of course, to say that Obama has put a lot of political capital on the line over the sanctions issue begs the question of **whether he is really prepared to spend the far larger amounts of capital that will be required to close a final nuclear deal with Tehran**. As Hillary points out, if Obama were “really trying to lead this country on a much more constructive, positive trajectory after failed wars and invasions in Iraq and Afghanistan and Libya—Libya entirely on President Obama’s watch—[he] would be doing a lot more, rather than just giving these lukewarm talks, basically trying to continue to kiss up to major pro-Israel constituencies, and then trying to bring in some of political favors” on Capitol Hill.

Obama’s push backfires—largest risk for Dem defections

Josh Rogin, Daily Beast, 1/11/14, Inside the White House War on Dems, www.thedailybeast.com/articles/2014/01/11/inside-the-white-house-war-on-dems.html

The Obama administration is going to war with its own party to save its peace talks with Iran.

The White House is now openly declaring that Senate Democrats who support new sanctions against Iran are itching for war, but their campaign to pressure their own party members has been going on for months and has done little to dissuade Democrats from supporting sanctions.

The White House brought their fight with Congressional Democrats out in the open Thursday evening when National Security Staff member Bernadette Meehan sent an incendiary statement lashing out at pro-sanctions Democrats to a select group of reporters, accusing them of being in favor of a strike on Iran.

“If certain members of Congress want the United States to take military action, they should be up front with the American public and say so,” said Meehan. “Otherwise, it’s not clear why any member of Congress would support a bill that possibly closes the door on diplomacy and makes it more likely that the United States will have to choose between military options or allowing Iran’s nuclear program to proceed.”

Meehan’s statement was issued the same day Senate Foreign Relations Committee Chairman Robert Menendez (D-NJ) published a Washington Post op-ed arguing in favor of legislation that would spell out Congressional parameters for a final nuclear deal with Iran and propose new sanctions that would take effect if diplomacy falls through.

In the op-ed Menendez called his legislation a “diplomatic insurance policy” and “an act of reasonable pragmatism.”

But the White House both privately and publicly has warned Democratic lawmakers that supporting the Menendez legislation could mean they will be blamed if the negotiations collapse, according to both administration officials and Congressional staffers engaged in the legislative process.

The message from the White House echoes warnings from Iran’s foreign minister, Javad Zarif, who last month said new sanctions in Congress would derail the interim agreement he signed at the end of November. Senior Obama administration officials themselves have warned privately that even the introduction of the new sanctions measure, let alone its passage, jeopardized the new round of talks in Geneva.

But the White House’s warnings have had little effect. Menendez and Sen. Mark Kirk introduced their bill on Dec. 16 with 13 Republican co-sponsors and 14 Democratic co-sponsors. The bill now has 59 co-sponsors, including 16 Democrats.

White House Press Secretary Jay Carney declined Friday to back down from Meehan’s characterization of pro-sanctions Democrats as warmongers.

“I don’t know every one of 100 senators what their personal views on, on whether or not military force ought to be used in Iran, so I can’t give a blanket statement about how they all feel,” he said. “What I do know is, when it comes to Senator Menendez and all of the partners who have assisted this administration over the years in building a sanctions regime is that we share a common goal, which is to deprive Iran of the opportunity of acquiring a nuclear weapon and to do so through negotiations. That’s why we built the sanctions regime.”

That explanation glosses over the fact that the Obama administration worked against several sanctions measures Congress has passed in recent years, despite claiming credit for those sanctions after the fact.

Regardless, both Democrats who support the administration and those who support Menendez told The Daily Beast that **the White House’s tactic of going after their own party’s legislators is over-the-top and ineffective, alienating allies, creating bad will on Capitol Hill, and wasting political capital the administration may need on this issue down the road.**

“The White House has clearly overreached in calling Democratic supporters of the Menendez-Kirk bill warmongers,” one senior Democratic Congressional aide said. “These are Democrats, some who have been in public service for decades and have long supported increasing sanctions against Iran. It’s just not credible and not helpful for them to use such extreme language when it’s clearly not true.”

Even those who support the administration’s overall position on Iran sanctions say the White House’s tactics are backfiring. Trita Parsi, the executive director of the National Iranian American Council, which opposes new sanctions legislation, said that the White House doesn’t appreciate that to oppose the Menendez-Kirk bill is a risky decision for Democrats because it puts them at odds with the pro-Israel lobby and many of their constituents.

“**The approach of the White House towards Congress, particularly towards allies, is not one that tends to build political capital and as long as they continue to use that approach, there is going to continue to be unnecessary resistance**,” said Parsi. “The sense in Congress is that the White House is asking them for political cover but not giving them political cover. There’s a widespread perception that there’s no reciprocity.”