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#### Adv 1—CMR

#### Interpreting existing statutes to authorize domestic detention decimates civil military relations--- express Congressional authorization key to civilian control

Wilner, 9

(Counsel-Counsel-Shearman & Sterling, “Brief of Retired Military Officers and the National Institute of Military Justice as Amici Curiae in Support of the Petitioner,” Al-Marri v. Spagone, http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_07\_08\_08\_368\_PetitionerAmCuRetMilOfficersandNIMJ.authcheckdam.pdf)

Since the founding of our country, civilian and military leaders have supported limitations on the use of the United States military for domestic law enforcement. These limitations are an essential component of the fundamental American tradition of resisting military intrusion in civilian affairs. The indefinite detention of Petitioner, a civilian lawfully resident in the United States, in the Consolidated Naval Brig in South Carolina, **is contrary to the longstanding limitations on military involvement in domestic law enforcement and the fundamental traditions from which they arise.** Congress codified the prohibition on the use of the military to execute domestic laws in the Posse Comitatus Act of 1878 (“PCA”), explicitly making it unlawful to “use any part of the Army as a posse comitatus or otherwise to execute the laws.” 18 U.S.C. § 1385. **The military detention of a civilian lawfully residing in the United States is prohibited by the PCA**. Exceptions to the PCA can be and have been made. Although Congress has legislated exceptions to the PCA from time to time, **it has always done so expressly**. When it enacted the Authorization for the Use of Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224, upon which the government relies to justify the military detention of Petitioner, Congress created no such express exception and none can be implied. The general language of the AUMF neither overrules nor limits the specific limitations imposed by the PCA on military involvement in domestic law enforcement. There is **no clear statement of congressional intent to set aside the PCA and permit the military detention of Petitioner.** This Court has repeatedly recognized this nation’s fundamental tradition of resistance to military participation in civilian affairs. . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. . . . . . . . 6 In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were ‘necessary and proper’ for the regulation of the ‘land and naval Forces.’ Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority. Reid v. Covert, 354 U.S. 1, 23-24, 30 (1957) (plurality opinion). In Ex parte Milligan, this Court held that if it is possible in times of war to “substitute military force for and to the exclusion of the laws, and punish all persons, as [the executive] thinks right and proper, without fixed or certain rules . . . [then] republican government is a failure, and there is an end of liberty regulated by law.” 71 U.S. 2, 125 (1866). Even when Congress authorized martial law in Hawaii during World War II, the Court held that it did not intend to “exceed the boundaries between military and civilian power” and, therefore, did not authorize the trial of civilians by the military. Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946). The Court has also held that Congress had no authority to pass a law authorizing the military trial of civilian ex-soldiers for crimes committed during service, noting that “[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.” United States ex rel. Toth v. Quarles, 350 U.S. 11, 22-23 (1955). 7 The military itself has long held a strong preference in favor of maintaining the PCA’s restrictions on its participation in domestic law enforcement. There are good reasons for this preference. First, the military’s principal mission is to provide for the national defense. The character and capabilities necessary to succeed at this mission are different from those required for the domestic detention of civilians. Second, violations of the PCA could put individual military personnel at risk of criminal or civil liability. Finally, the **military detention of civilians undermines the necessary combination of trust and distance between military personnel and civilians. A dramatic departure from the PCA, such as the military detention of civilians, has profound implications for the future role of the military and its relationship with civilians.** History is replete with examples of the danger inherent in permitting the military to be routinely involved in domestic law enforcement. The Fourth Circuit overlooked the PCA and did not consider the negative impact of its decision on the military. In light of the PCA’s restrictions on the use of the military to execute domestic laws and the absence of an exception in the AUMF or elsewhere, amici respectfully suggest that the Court reject the Fourth Circuit’s reading of the AUMF as giving the President authority to militarily detain Petitioner and return Petitioner to civilian custody. ARGUMENT I. THE POSSE COMITATUS ACT PROHIBITS THE MILITARY DETENTION OF PETITIONER, NONE OF THE EXCEPTIONS TO THE PCA ARE APPLICABLE, AND THE AUTHORIZATION FOR THE USE OF MILITARY FORCE DID NOT OVERTURN OR OTHERWISE LIMIT THE PCA **The PCA explicitly limits the use of the military for domestic law enforcement. It reflects a fundamental tradition of our country**. Although there are exceptions to the PCA, they do not permit the detention of Petitioner. **The AUMF creates no new exception to the PCA for domestic military detention of civilians, and thus the PCA continues to apply and must be followed.** Petitioner’s detention by the military is inconsistent with the PCA. Petitioner was lawfully resident in the United States when he was arrested by FBI agents at his home in Peoria, Illinois. Criminal charges were filed and Petitioner was in federal custody in New York, and then Illinois, while preparations for a criminal trial in the Central District of Illinois went forward. Eighteen months after Petitioner’s arrest, the President ordered the Attorney General to surrender Petitioner to the Secretary of Defense. Petitioner was removed from civilian custody and transferred to military custody, despite the continued availability of civilian courts and detention. Petitioner remains in military custody without charge or trial. The PCA’s limitations prohibit such use of the military to detain Petitioner, displacing civilian law enforcement authorities. A. The PCA Limits the Use of the Military for Domestic Law Enforcement Congress passed the PCA in 1878 to restore the traditional separation between the military and civilian authorities in domestic affairs that had come undone during Reconstruction. After the Civil War, troops were stationed throughout the South and were used to enforce domestic laws, tamp down disturbances, and support the new governments in the ex-Confederate states. Use of the troops, however, also “became a common method of aiding revenue officers in suppressing illegal production of whiskey [and] assisting local officials in quelling labor disturbances.” Clarence I. Meeks III, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 Mil. L. Rev 83, 90 (1975). Troops were also stationed at voting polls, and allegations were made that they were used to frighten people to prevent them from voting. See 5 Cong. Rec. 2114 (1877); 7 Cong. Rec. 3852, 4185 (1878). There were allegations that the use of the military at polls in the South contributed to an unfair victory for Rutherford B. Hayes in the 1876 presidential elec tion. Representatives in Congress criticized the use of the military as “wholly unnecessary and actually hurtful” and “dangerous to the liberties of the country.” 5 Cong. Rec. 2112, 2159 (1877). Senator Benjamin Hill characterized the proper role of the military as this: “The military never executes the law. The military puts down opposition to the execution of the law when that opposition is too great for the civil arm to suppress. . . . Therefore, I say it ought to be unlawful in all cases to talk about calling upon the Army to execute the law.” 7 Cong. Rec. 4247 (1878). Military commanders joined members of Congress in objecting to the assignment of domestic law enforcement duties to the military. See 7 Cong. Rec. 3579-3582 (1878). The PCA is a landmark statute. Upon its passage, it was said that Congress “had secured to the people of this country the same great protection against a standing army which cost a struggle of two hundred years for the Commons of England to secure for the British people.” 7 Cong. Rec. 4686 (1878). Legislative history from the original and later related statutes makes clear that, with the PCA, Congress sought to isolate the military from engaging in domestic law enforcement activities. The PCA was a response to specific objections arising during the Reconstruction era, but it continues to “embod[y] the inveterate and traditional separation between the military’s mission and civil law enforcement.” S. Rep. No. 97-58, at 148 (1981); see also 127 Cong. Rec. 2005 (1981) (PCA codifies the “important principle prohibiting military involvement in civil law enforcement.”). The PCA is a criminal statute that provides: Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both. 18 U.S.C. § 1385. The PCA has been supplemented by other statutes, most significantly 10 U.S.C. §§ 371-382, which authorize military assistance to civilian law enforcement under specific circumstances. Congress was explicit that this military assistance not include “direct participation” by the military in civilian law enforcement such as “seizure, arrest, or other similar activity.” 10 U.S.C. § 375. Unless otherwise authorized, arrests, apprehensions, and similar activities are “per se prohibited as posse comitatus violations.” Dep’t of the Air Force, General Counsel Guidance Document: Posse Comitatus, Off. Gen. Counsel (Sept. 2003). Military assistance is also prohibited if it will impair military preparedness. 10 U.S.C. § 376. Together, the original statute, the supplementing statutes, and the Department of Defense Directive form the core sources for PCA analysis and application. This Court and others have recognized the PCA as a limitation on the use of military forces for civilian law enforcement. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644-45 (1952) (“Congress has forbidden [the President] to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress.”) (citing to the PCA). Moreover, “traditional American insistence on exclusion of the military from civilian law enforcement” influences the interpretation of the PCA by the courts. United States v. Walden, 490 F.2d 372, 376 (4th Cir. 1974). In those instances when the courts have held that civilianmilitary interaction does not violate the PCA, one or more of the following three constraints were present. See United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991); see also Effect of the Posse Comitatus Act on Proposed Detail of Civilian Employee to the National Infrastructure Protection Center, 22 Op. Off. Legal Counsel 103 (1998). First, there was no “direct active use” of troops to execute the laws, including making arrests, seizing evidence, searching persons or buildings, interviewing witnesses, pursuing escaped civilian prisoners, and searching for suspects. United States v. Red Feather, 392 F. Supp. 916, 923-25 (D.S.D. 1975); see United States v. Yunis, 681 F. Supp. 891, 892 (D.D.C. 1998), aff’d, 924 F.2d 1086 (D.C. Cir. 1991). Second, civilians were not subject to the “exercise of military power which was regulatory, proscriptive, or compulsory in nature.” United States v. McArthur, 419 F. Supp. 186, 194-95 (D.N.D. 1975), aff’d sub nom., United States v. Casper, 541 F.2d 1275 (8th Cir. 1976); see also United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir. 1988). Third, the use of military personnel did not pervade the activities of civilian law enforcement. See Hayes v. Hawes, 921 F.2d 100, 102 03 (7th Cir. 1990); Yunis, 681 F. Supp. at 892. None of those three constraints is present with respect to the military detention of Petitioner. First, military troops are directly and actively used to detain Petitioner in the U.S. Consolidated Naval Brig in South Carolina. Second, Petitioner is subject to compulsory military power as he remains in the brig indefinitely and without charge or trial. Third, military personnel have completely displaced and replaced civilian law enforcement in the detention of Petitioner, a lawful resident of the United States already in civilian custody for eighteen months and scheduled for trial in federal district court. The PCA clearly prohibits the use of the military to detain Petitioner. B. None of the Exceptions to the PCA Permits the Military Detention of Petitioner The PCA has been characterized as “absolute in its command and explicit in its exceptions.” Wrynn v. United States, 200 F. Supp. 457, 465 (E.D.N.Y. 1961). **By the text of the PCA, express constitutional or statutory exceptions are the only permissible ways the military can participate in domestic law enforcement.** None of the exceptions permits the military detention of a civilian, a lawful resident of the country, in the United States. The most significant statutory exceptions to the PCA allow specific types of military assistance to civilian law enforcement, most notably in support of efforts to combat drug trafficking. These exceptions permit the military to provide civilian law enforcement authorities with (i) information collected during the normal course of military operations, (ii) equipment and facilities, (iii) training and advice, (iv) under specific circumstances, operation and maintenance of the equipment and facilities made available, and (v) use of military equipment and facilities outside of the United States in certain emergency situations. 10 U.S.C. §§ 371-374. None of these exceptions applies in this case. The Department of Defense in its regulations asserts two significant constitutional exceptions to the PCA. See DoD Directive 5525.5, DoD Cooperation with Civilian Law Enforcement Officials, Encl. 4 (Jan. 15, 1986). First, they assert that “emergency authority” exists to use military forces when local authorities are unable to provide protection for life or property and restore federal government function and public order, and the military may engage in “protection of Federal property and functions” when local authorities are unable to do so. See 32 C.F.R. § 215.4c(1); DoD Directive 3025.12, Military Assistance for Civil Disturbances (Feb. 4, 1994). Second, they assert that military forces may be used for the “primary purpose of furthering a military or foreign affairs function,” such as investigations related to enforcement of the Uniform Code of Military Justice or protection of Department of Defense personnel. See DoD Directive 5525.5, Encl. 4. Neither exception applies to the seizure and detention of a lawful resident. In summary, the PCA governs, and none of its exceptions applies. C. The AUMF Does Not Create a New Exception to the PCA The Fourth Circuit majority held that Petitioner could be detained by the military because of the authority Congress gave to the President in the AUMF. However, the PCA and its prohibitions on the use of the military for domestic law enforcement were not taken into consideration by the Fourth Circuit. 12 The AUMF creates no new exceptions to the PCA. It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” Davis v. Mich. Dep’t of Treasury, 489 U.S. 803, 809 (1989). The AUMF neither explicitly creates an exception to nor implicitly repeals the PCA, and therefore the specific provisions of the PCA continue to govern the military’s domestic behavior. First, although the AUMF pertains to military action, nothing in its text refers to the PCA or makes the PCA inapplicable. Second, the Court has made clear that there is a strong presumption against implied repeals of prior federal laws. See J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc., 534 U.S. 124, 137 (2001) (“overwhelming evidence is needed for repeal by implication”); see also Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996). This rule is nearly absolute; Congress acts with knowledge of its prior enactments, and this Court has repeatedly made clear that, where Congress wants to repeal its prior actions, it must “expressly contradict” its earlier act or it must be “absolutely necessary” for the act to be interpreted as a repeal “to have any meaning at all.” Nat’l Ass’n of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518, 2532 (2007); see also Astoria Fed. Sav. & Loan Ass’n v. Solimino, 501 U.S. 104, 109 (1991) (“[L]egislative repeals by implication will not be recognized . . . ‘absent a clearly expressed congressional intention to the contrary.’”) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)); Posadas v. Nat’l City Bank of N.Y., 296 U.S. 497, 503 (1936) (“[T]he intention of the legislature to repeal must be clear and manifest.”). That rule should have special force when the prior law purportedly being repealed is so fundamental to our traditions. The AUMF is absolutely silent on the issue of military involvement in domestic law enforcement, as well as the issue of detention more broadly. It neither expressly contradicts nor is irreconcilable with the PCA. Moreover, there is simply nothing in the legislative history of the AUMF to indicate Congress had any intent to repeal any portion of the PCA. This Court has repeatedly made clear that where a law applies to a specific issue – as the PCA does to military involvement in domestic law enforcement – others laws of a more general scope will not interfere with the operation of the specific law, generalia specialibus non derogant. See Morales v. TWA, Inc., 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”); see also Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (“[A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.”). Applying the general language of the AUMF authorizing the use of the military would “undermine limitations” created by the more specific provision, the PCA. See Varity Corp. v. Howe, 516 U.S. 489, 511 (1996). Given the founding historical tradition behind the PCA and the explicit nature of existing exceptions, the AUMF’s broad language about “necessary and appropriate force,” and its silence on domestic military action do not create an exception to the specific language of the PCA. To read it to do so would be contrary to established principles of statutory construction. Even apart from the express statutory framework of the PCA, an exception to the fundamental principles it embodies would require a clear statement, which the AUMF does not provide. When a “weighty and constant value” such as the divisions between the military and civilian spheres is at issue, “‘the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.’” See Astoria Fed. Sav. & Loan, 501 U.S. at 109 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)). The need for a clear statement is particularly pressing when the liberties of the individual are at stake. See Gutknecht v. United States, 396 U.S. 295, 306-07 (1970) (“Where the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them.”); Ex parte Endo, 323 U.S. 283, 300 (1944) (“[W]e must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used”). This Court has consistently required, at a minimum, a clear statement of congressional intent when the Executive wants to expand military authority such that it might depart from the fundamental division between military and civilian authorities. See Endo, 323 U.S. at 300 (applying clear statement requirement to prohibit domestic military detention of Japanese-American citizen); Duncan, 327 U.S. at 304, 315 (applying clear statement requirement to reject claim of statutory authorization for military trials of civilians); Youngstown Sheet & Tube Co., 343 U.S. at 588-89 (requiring explicit congressional authorization for military seizure of steel mills); see also Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (finding the declaration of war against Great Britain and authorization of military force did not imply authority to seize property of enemy aliens in the United States and Congress would have to explicitly authorize this kind of departure from the “modern law of nations”). There is no clear statement by Congress that the Court can look to as authorizing the military detention of Petitioner. The presumption against implied repeals, the rule that specific statutes govern more general ones, and this Court’s expectation of a clear statement by Congress in cases of this type set the bar extremely high for finding that the AUMF created an exception to the PCA that would permit the military detention of Petitioner. There is nothing in the AUMF that can overcome this bar. Absent an express exception to the PCA, Petitioner should not be detained by the military. II. DETENTION OF A LAWFUL RESIDENT IN THE UNITED STATES IS AN UNWELCOME DEPARTURE FOR THE MILITARY AND DETRIMENTAL TO THE RELATIONSHIP BETWEEN MILITARY PERSONNEL AND CIVILIANS Amici have had responsibility for the legal affairs of the military, and based on their experience, believe it is important to prevent the military from being drawn into civilian policing and justice functions. **The quality and character of the United States military would be undermined by a more extensive involvement in domestic law enforcement**. The PCA serves to permit certain types of military assistance while avoiding the risks of military involvement in domestic law enforcement, and its limitations should be observed for the good of the military and the country. Military officials have historically expressed concerns about any involvement in domestic law enforcement. See 7 Cong. Rec. 3579-3582 (1878). During hearings in 1981 on proposed supplements to the PCA allowing specific types of military assistance to civilian law enforcement in support of efforts to combat drug trafficking, the General Counsel of the Department of Defense strongly resisted the diversion of military personnel to nonmilitary functions and expressed a firm opposition to the use of troops in arrests and seizures. See Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong. 6, 19-20 (1981). The military became more comfortable with the supplements only after Congress made it explicit there would be no direct military involvement in domestic law enforcement. See William H. Taft IV, The Role of the DoD in Civilian Law Enforcement, Def. 83, Mar. 1983, at 6. In response to a question about the applicability of the PCA to United States Northern Command, the training of an active Army unit in the United States for on-call response to domestic emergencies and disasters, Colonel Michael Boatner said, “It absolutely governs in every instance. We are not allowed to help enforce the law. We don’t do that. . . . [I]f we review the requirement that comes to us from civil authority and it has any complexion of law enforcement whatsoever, it gets rejected and pushed back, because it’s not lawful.” Congress has echoed the military’s concerns. Congress and the public at large have expressed concerns about departures from the PCA. A recent potential departure arose in Section 1076 of the Defense Authorization Act for Fiscal Year 2007. Section 1076 modified the Insurrection Act from a narrow authorization for the President to declare a form of martial law during violent insurrections, when state and local authorities resist lawful orders, to a broader grant allowing the President to use the military domestically to restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition, the President determines that domestic violence has occurred to such an extent to prevent public order. Although this represented a potentially dramatic expansion of the President’s ability to use the military under the Insurrection Act for domestic law enforcement, Senator Patrick Leahy said the change “was just slipped in the defense bill as a rider with little study. Other congressional committees with jurisdiction over these matters had no chance to comment, let alone hold hearings on, these proposals.” Senator Leahy warned that “[u]sing the military for law enforcement goes against some of the central tenets of our democracy.” The National Sheriffs’ Association said the change “undermines the American tradition manifested under the original Insurrection Act of 1807 and the Posse Comitatus Act of 1878 (18 U.S.C. § 1385) which helped to enforce strict prohibitions on military involvement in domestic law enforcement.” The National Governors Association said “[t]he changes made in Section 1076 . . . place the safety and welfare of citizens in jeopardy and should be repealed.” The Fraternal Order of Police said the Insurrection Act was “a narrow and specific exception to the proud tradition of our nation to prohibit the use of the military to enforce domestic laws” and “[s]hort of an armed and active insurrection, our military personnel should not be used to displace State and local law enforcement.” When Congress took notice of the extent of the change and the potential for the use of the military in domestic law enforcement, it asserted its commitment to the PCA and repealed Section 1076 in its entirety, restoring the original Insurrection Act of 1807. Separation from domestic law enforcement activities is also important to preserve the apolitical nature of the military. In discussing the circumstances that would make it possible for the military to assist with the response to an event like Hurricane Katrina, Admiral Timothy Keating said pre-existing criteria such as severity and level of damage could help remove politics from the decision, and ensure “[t]he success or failure of our effort won’t depend on the political dealings between the governors and the president. . . . We’ll just get a mission and we’ll execute it.” Admiral Keating expressed wariness about a role for the military in law enforcement and also concern for how doing so fit with the civilian view of the role of the military, saying “I don’t think the American people writ large are anxious to have active-duty forces in a law enforcement role.” The military, of course, is not organized for the purposes of administering justice or engaging in domestic police work, but for the purpose of fighting and winning the country’s wars. See Center for Law and Military Operations, Domestic Operational Law Handbook for Judge Advocates 428 (2006); see also United States ex rel. Toth, 350 U.S. at 17 (“Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. . . . To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.”) See Chappell v. Wallace, 462 U.S. 296, 304 (1983) (describing military life as needing “unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel”). The military is not trained to balance society’s interests in punishment against the need for fairness or an individual’s right to due process. These are not its core functions; they are the functions of the civilian justice system, which has successfully handled cases involving suspected terrorists. See, e.g., United States v. Rahman, 189 F.3d 88 (2d Cir. 1999); United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002). The detention of lawful United States residents is not contemplated in the military’s regulations or anticipated in the training of military personnel. The differences in skills and training were noted during a Senate debate about the use of the military in antidrug domestic law enforcement. “The Armed Forces have not, and should not be, trained and equipped to be customs agents. Ground troops have not studied how to pick out the drug smuggler coming across a border hidden among a group of law-abiding American citizens. Combat personnel have not been trained to conduct searches of people and belongings in accordance with constitutional safeguards because, in a war zone, those safeguards do not exist on foreign soil.” 132 Cong. Rec. 26448 (1986). Instead, military manuals describe the importance of the constitutional and historical traditions of restricting the military role in civilian law enforcement. See Center for Law and Military Operations, at 430; see also DoD Directive 5525.5. The military’s role of providing for the national defense is not consistent with the domestic law enforcement task of detaining lawful residents in the United States, and the military is therefore not adequately prepared for such a task. This lack of preparation and training may also pose a problem for individual military personnel, who might be subject to tort liability. During the debates in Congress over the adoption of statutes supplementing the PCA in 1981, a proposal to allow military personnel to search and seize was criticized on a number of grounds including that it may subject soldiers to civil tort liability. See 127 Cong. Rec. 15671 (1981). Military personnel, even if acting under orders, might face criminal and civil liability if their actions were an unlawful violation of the PCA. Military detention of civilians lawfully resident in the United States **risks increased conflict between the military and civilians**. 25 **Avoidance of military- civilian conflict is a longstanding national goal and an important consequence of the PCA**. The “trust relationship between civilian society and the military” has been characterized as “a cornerstone of our system of government.” John J. Pavlick, Jr., The Constitutionality of the U.C.M.J. Death Penalty Provisions, 97 Mil. L. Rev. 81, 119 (1982). An injury to the “relationship between the military and civilian communities” can make “it more difficult for service members to obtain needed local support.” United States v. Pirraglia, 24 M.J. 671, 672 (A.C.M.R. 1987). This Court has recognized that in many ways, the military is “a specialized society separate from civilian society.” Parker v. Levy, 417 U.S. 733, 743 (1974). And the differences “create ‘particular tensions when the military and civilian realms conjoin.’” Berry v. Bean, 796 F.2d 713, 717 (4th Cir. 1986) (quoting Serrano Medina v. United States, 709 F.2d 104, 107 (1st Cir. 1983)). The effort to avoid confrontation between military personnel and civilians is illustrated by the fact the military does not have the required affirmative statutory grant from Congress to arrest civilians, although other federal bodies, such as the U.S. Forest Service, do. See United States v. Moderacki, 280 F. Supp. 633, 637 (D. Del. 1968). During congressional debates over proposed supplements to the PCA, there was concern that even though direct involvement was prohibited, a soldier might end up engaged in a “physical confrontation with civilians.” See 127 Cong. Rec. 15669-15670 (1981). The then General Counsel of the Department of Defense said “it is the arrests and seizures . . . putting, really, into a confrontation, an immediate confrontation, the military and a violator of a civilian statute, that causes us the greatest concern.” Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong. 30 (1981). Detention of a civilian is inconsistent with the military’s goal of limiting confrontation with civilians. Use of the military to enforce laws against civilians could have wide-ranging future implications, including undermining civilian support for the military. The Fourth Circuit’s affirmation of the military detention of Petitioner, lawfully resident in the United States and already in the civilian justice system and in the custody of domestic law enforcement at the time of his military detention**, is contrary to the PCA’s limitations on the use of the military for domestic law enforcement. It is inconsistent with the character and role of the military and creates undesirable tension between military personnel and civilians. The tradition enshrined in the PCA evolved out of a desire to stop government abuses of private individuals, and a failure to protect this tradition weakens the democratic system, the military, and the relationship between the two.**

#### Requiring a congressional role in detention solves CMR

Yingling, 10

Security Studies Prof-George C. Marshall Center & Former Army Officer, 2/1, “The Founders’ Wisdom,” http://www.armedforcesjournal.com/the-founders-wisdom/)

The U.S. faces a number of difficult challenges in civil-military relations that carry with them profound effects on our national security. Among these issues are declining popular support for the wars in Iraq and Afghanistan, growing isolation between the U.S. military and the society it serves, and unresolved disputes over the limits of executive authority. However difficult these problems may be, they are neither unprecedented nor insoluble. The underlying issues in these debates were explicitly addressed by America’s Founders in drafting the U.S. Constitution. Winston Churchill famously observed that “America will always do the right thing, but only after exhausting all other options.” Having today exhausted all other options to provide for our security, Americans would be well served to return to the system of war powers established by the Constitution. James Madison’s elegant system of checks and balances created a system to ensure that we choose our wars carefully and prosecute them intelligently and vigorously. After rebelling against Great Britain and rejecting the Articles of Confederation, the Founders were well aware of the dangers of both tyranny and anarchy. They created a system of government that provided for strong legislative and popular oversight of national security and vigorous executive power to deal with crises. Many of the challenges in civil-military relations that we face are **attributable to insufficient legislative and popular oversight of executive authority**. The solution to these challenges therefore **lies in a reassertion of this authority.** It’s important to consider the historical context in which the Constitution developed. The rebellion against British tyranny was a defining experience for America’s Founders, shaping their views on virtually every aspect of governance. While the American Revolution was largely a dispute over the authority of Parliament to tax the colonies, civil-military disputes also played a significant role. The American colonists’ grievances against King George III cited in the Declaration of Independence included the maintenance and quartering of standing armies in times of peace without the consent of colonial legislatures and the denial of colonial jurisdiction over crimes committed by British troops in the colonies. The Founders were deeply suspicious of standing armies accountable solely to executive power. The colonists accepted the presence of British regulars out of necessity during the French and Indian War (1758-1763) but wished for the removal of these forces to the greatest extent possible once the war ended. Consistent with this view, the Founders raised a Continental Army only for the duration of the Revolution, and all but disbanded it once the British were defeated. Unfortunately, the Articles of Confederation replaced British tyranny with a government too weak to defend American interests. Each state maintained its militia, and 11 also maintained their own navies. The Congress lacked the power to tax, which made it difficult not only to provide for future expenses but also to pay past debts, including those owed to veterans of the Revolution. Amending the Articles required unanimity, and the passage of any law required the assent of nine of the 13 states. The national government lacked the authority to resolve disputes among the states, creating numerous disputes in every aspect of public life. The new government was nearly paralyzed on questions of foreign policy and defense, including negotiating a peace treaty with Great Britain, resolving boundary disputes with Spain and raising a navy capable of protecting commercial interests. Throughout the 1780s, the newly created United States drifted toward anarchy. George Washington feared that unless the national government could be made more vigorous, the new country would “become the sport of European politics.” The Constitution created a system of war powers that remedied many of the weaknesses of the Articles of Confederation while ensuring that the war powers of the U.S. remained under strong legislative and popular oversight. This system of checks and balances applied to every aspect of war powers, from raising forces to conducting operations. The Founders vested the power to raise armies with Congress, using specific language intended to ensure these forces would remain beholden to Congress for support. The Constitution states that Congress shall have the power “to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.” The Founders used different language when describing support for naval forces. While the Constitution empowers Congress to raise armies, it then states that Congress shall have the power “to provide and maintain a navy.” The Founders viewed armies as temporary necessities to deal with particular crises but understood that the maintenance of a navy was an enduring requirement. Naval forces, both the fleet and Marines, gave the young republic an enduring expeditionary capability to protect its commercial interests. As these commercial interests were enduring, so too the capability to protect them must be enduring. Additionally, the Founders viewed naval forces as less of a threat to popular liberties than armies, as the latter are capable of controlling land, populations and resources for extended periods. The Founders also ensured that executive branch officials, including senior military officers, were accountable to Congress. While the authority to appoint military officers resides with the president, the Constitution requires Senate confirmation for the appointment of officers. Perhaps **no check on executive power is more important than the provisions concerning the writ of habeas corpus**. The Constitution states that “the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” Two issues are worth noting here. The first is that there are no “emergency war powers” in the Constitution. The Founders expected us to govern ourselves in time of war according to the same laws that apply in times of peace. Second, **the language regarding the suspension of the Great Writ is found in Article I, which covers Congress, and not Article II covering the president. This omission was no accident; the Founders considered executive power to be both a necessary guardian and a potential danger to popular liberty. The Great Writ is the most important of all checks on executive power, for if the executive has the unchecked power to imprison its opponents, every other liberty is meaningless.** The Founders also extended legislative oversight to the conduct of war itself. By vesting the power to declare war with Congress, the Founders ensured that America would choose its wars carefully. While Congress may be less well-suited to vigorous unitary action than the executive, it is far better-suited to engage in deliberation over the purpose and necessity of committing the nation to war. At the same time, entrusting Congress with the power to declare war ensured that America would prosecute its wars vigorously. The Founders expected that the prosecution of war would require the mobilization of the militia under federal service paid for under the federal budget. The president alone is the commander in chief, but he is dependent on the Congress to raise and maintain military forces and to mobilize the militia. The president may appoint officers to positions of command, but such appointments are dependent on Senate confirmation. Most importantly, the president cannot commit the nation to war without congressional authority. While in practice the president may act in the interest of public safety, Congress’ power of the purse limits such actions to brief expeditionary operations. Many of **the difficulties in civil-military relations today are attributable to our departure from the elegant system of checks and balances** established in the Constitution. Congress has all but abdicated many of its war powers, including raising forces, confirming the appointment of officers, providing oversight to operations and declaring war. This has made the U.S. weaker by allowing hasty, ill-considered and poorly supported executive actions to imperil national security. The remedy for these failures requires not innovation, but rather a return to the time-tested principles of America’s founding.The Constitution requires Congress to raise and maintain military forces to ensure popular support for the development and employment of American military power. However, today’s military forces are manned solely by volunteers and paid for with borrowed money. The congressional task of “raising the Army” has been reduced to the acts of appropriating money and raising the debt ceiling. Until recently, wartime funding came through supplemental appropriations that received far less scrutiny than funds allocated through the normal budgetary process. The financial burdens for raising today’s military and fighting today’s wars will fall to future generations, as the entirety of the defense budget has been financed with deficit spending for nearly a decade. The dangers of military service are born solely by volunteers, a disproportionate number of whom come from working- and middle-class families. The wealthiest and most privileged members of American society are all but absent from the ranks of the U.S. military. Moral exhortations for citizens to care more deeply about national defense are insufficient. Unless the public and its elected representatives have some personal stake in decisions of war and peace, they can not and will not provide adequate oversight in these profound choices. Madison understood that “if men were angels, no government would be necessary.” It is precisely because men are not angels that the Founders placed the terrible power to choose and make war with those who would feel its burdens most directly. In Federalist 51, Madison argues that the “policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.” Rather than hope for better motives in either the executive or the legislature, the American people would be best served by returning to the system of checks and balances in war powers that has served us so well for so long. Given America’s global responsibilities, the U.S. can no longer rely for its security on a small and relatively cheap standing military supported by a large 18th-century style militia. However, we can return to the principle that America’s citizens and our elected representatives must be engaged in the defense of our country. A RETURN TO CITIZEN SOLDIERS The U.S. should therefore abandon the all-volunteer military and return to our historic reliance on citizen soldiers and conscription to wage protracted war. This approach proved successful in both world wars and offers several advantages over the all-volunteer military. First and most important, this approach demands popular participation in national security decisions and provides Congress with powerful incentives to reassert its war powers. Unlike the all-volunteer force, a conscripted force of citizen soldiers would ensure that the burdens of war are felt equally in every community in America. Second, this approach provides the means to expand the Army to a sufficient size to meet its commitments. Unlike the all-volunteer force, a conscripted force would not rely on stop-loss policies or an endless cycle of year-on, year-off deployments of overstressed and exhausted forces. Third, conscription enables the military to be more discriminating in selecting those with the skills and attributes most required to fight today’s wars. Unlike the all-volunteer force, a conscripted force would not rely on exorbitant bonuses and reduced enlistment standards to fill its ranks. Finally, this approach would be less expensive. Unlike the world wars of the 20th century, today’s dangers will not pass quickly, allowing for a return to a smaller and less expensive military establishment. Imposing fiscal discipline on the Pentagon would not only strengthen America’s depleted finances, but also constrain executive ambitions for adventures abroad and congressional appetites for pork-barrel projects at home. Some may argue that conscription is unfair. Only a small percentage of the 4 million Americans eligible for military service in any given year would be required to serve. Past conscription systems were riddled with waiver policies that allowed the most-privileged Americans to avoid military service. Any future conscription policy must be both fair and militarily effective. Both goals may be achieved by raising induction standards to conscript those with the attributes necessary for today’s wars: the ability to speak foreign languages and operate in foreign cultures, engage in complex moral reasoning about the use of force, as well as bear the heavy physical and psychological burdens of combat. Many of the young people who possess these attributes also demonstrate a low propensity to volunteer for military service. Conscription based on militarily relevant skills and attributes without waiver would provide the quality and quantity of manpower required to prosecute today’s wars. Conscripting gifted young people would embrace the fairest principle of all: To whom much is given, much is expected. Defenders of the all-volunteer force often argue that the U.S. already has a military that is broadly representative of and better educated than the society it serves. Today’s military volunteers have certainly demonstrated admirable intelligence, courage and adaptability. However, claims that today’s military is representative of American society are based more on methodological sleight of hand than rigorous analysis. Opponents of conscription point out that the richest 20 percent of American households with military-aged children are slightly overrepresented in today’s military. This category includes all households with median incomes over $52,000, grouping together middle-class families with multimillionaires. By grouping together widely divergent income categories, the Defense Department obscures the absence of the most-privileged Americans from the ranks of the armed forces. The same sleight of hand is evident regarding educational levels. Any educational barrier to enlistment, however low, would necessarily produce a force that is better-educated than the general population from which it is drawn. Defenders of the all-volunteer force are at difficulties to explain why, as demands on enlistees have increased since the end of the Cold War, enlistment standards have declined. In truth, the all-volunteer military competes in a labor market for a limited pool of talent that often has more viable economic alternatives than military service. Beyond the issue of fairness, some may object to increased reliance on the National Guard and reserve on the grounds of strategic responsiveness. The U.S. will continue to require an immediately available active-duty expeditionary force to respond to short-notice, small-scale contingencies. A congressional declaration of war and mobilization of the National Guard and reserve take time. However, for cases of protracted major wars, this time would be well-spent in deliberating the wisdom of proposed war aims. Prior to America’s entry in World War II, Congress and the country engaged in a rigorous debate about the wisdom of President Franklin D. Roosevelt’s defense policies. In the summer of 1941, congressional authorization to extend the draft and federalization of the National Guard passed the House of Representatives by a single vote. However contentious and slow this process may have been, it ensured the country was informed of and committed to FDR’s policies. Roosevelt understood that congressional debate was a vital step in mobilizing popular passions for war. However tactically proficient today’s all-volunteer force may be, it remains isolated from America’s greatest strategic assets: the wisdom and energy of the American people. Others may dispute these methods of raising and funding military power on the grounds of political expediency. Imposing conscription, mobilizing National Guard and reserve forces, raising taxes and cutting domestic spending to pay for military expenditures will be politically unpopular. However, the development of America’s military forces and their commitment to protracted wars were never intended to be politically expedient. The Founders placed these powers in the hands of Congress to ensure that such momentous decisions were undertaken carefully after sober public deliberation. The Founders did not expect that America would “go to war with the Army we have” but rather that Congress would raise the Army we need to prosecute carefully thought out war aims to a successful conclusion. The responsibility of Congress to raise military forces includes the responsibility to confirm senior military officers to positions of important command. To ensure that America’s armed forces are ably led, Congress must return to its tradition of exercising strong oversight on the appointment and conduct of senior officers. The historical record contains ample evidence of the efficacy of Congressional oversight in this regard. The National Security Act (1947) and the Goldwater-Nichols Defense Reorganization Act (1986) both substantially strengthened U.S. military capabilities, and both passed despite the objections of senior military officers. During World War II, Sen. Harry Truman’s leadership of a military oversight committee dramatically improved procurement procedures, saving lives as well as money in the process. More recently, Congress has deviated from this tradition of strong oversight. When Army Gen. George Casey was nominated to serve as the senior U.S. commander in Iraq, the Senate confirmed the nomination unanimously after essentially pro forma hearings. As Greg Jaffe and David Cloud note in “The Fourth Star: Four Generals and the Epic Struggle for the Future of the United States Army,” “[Casey] hadn’t interviewed with either Rumsfeld or Bush before being chosen. No one asked him for his ideas about what needed to be done, and he hadn’t thought about it very much. [Army Chief of Staff Gen. Pete] Schoomaker had given him a book entitled ‘Learning to Eat Soup with a Knife: Counterinsurgency Lessons Learned from Malaya and Vietnam.’ … It was the first book Casey had read on guerrilla war.” After two more years of mounting chaos in Iraq, Congress again returned to its tradition of strong oversight in the appointment of military leaders. When Army Gen. David Petraeus was nominated to replace Casey, the Senate confirmation hearings were far more vigorous, despite Petraeus’ distinguished pedigree in counterinsurgency warfare. The Senate would never confirm a Supreme Court justice who hadn’t given much thought to questions of constitutional law. Instead, senators inquire vigorously into the qualifications and judicial temperament that each nominee brings to his or her grave responsibilities. The Senate should exercise the same rigor in confirming those who lead American forces in battle. **Congress must be equally vigorous in resisting expansive interpretations of executive authority**. Hasty and ill-considered executive decisions may burden the country with untenable and counterproductive policies whose consequences endure for decades. No issue makes this point more clearly than the Bush administration’s policies regarding the detainees at Guantanamo Bay, Cuba. The Bush administration asserted broad authority to detain suspected terrorists, asserting that they were neither lawful combatants fully protected by the Geneva Conventions nor criminal suspects fully protected by the Constitution. **The Supreme Court ultimately rejected these arguments, but not before these policies did substantial damage to America’s reputation around the world. Greater congressional oversight in the formulation of the Bush administration’s detention policies might have prevented this. The Founders provided Congress with ample authority to conduct such oversight,** including the appropriation of funds and the confirmation of executive branch nominees. The Founders did not provide the executive with expanded power in time of war, and placed the authority to suspend the writ of habeas corpus under Congress. The Founders were not naive and understood that not every exigency of war could be anticipated and satisfactorily resolved by the law. Even strong advocates of legislative supremacy recognized the possibility that an executive might act contrary to the law for the purpose of preserving the state. John Locke, whose “Second Treatise on Government” powerfully influenced the Founders’ thinking, acknowledged the possibility of executive prerogative, defined as “power to act according to the discretion for the public good, without the prescription of the law, and sometimes even against it.” However, Locke warned that “the people shall be judge” as to whether such sweeping executive action was intended for the public good. Lincoln’s suspension of the Great Writ in the Civil War, imposed during congressional recess and affirmed only after the fact, is an example of the exercise of executive prerogative for the public good. Especially **in times of war, the people’s elected representatives must balance executive demands for broad discretion with equally important concerns for accountability and oversight.**

#### US CMR directly modeled—self restraint doesn’t solve

Cimbala 12

(Poli Sci Prof-Penn State Brandywine, Civil-military Relations in Perspective: Strategy, Structure and Policy, p. 85-100)

That said, the pendulum in the U.S. case is swinging toward military freedom of action, perhaps due to the politics of the moment but not for scientific progress on the problematique. In anticipation of the inflection point when military prominence sets off alarm bells for a reassertion of civilian authority and bearing in mind how American civil-military relations sets a standard for a growing number of progressive republics around the globe, this critique adopts a demanding standard for military restraint. Military service takes place in a context of liberal-democratic values that tilt the playing field toward civilian authority, to the extent of accepting on principle the civilian’s “right to be wrong.” 6 Moreover, refocusing attention on the relevant problematique from a political science perspective and noting the unlikelihood of resolving the civil-military relationship at once and for all time has the added benefit of pulling observers outside the rough currents of today’s political rivalries. The Problematique and American Power The modern civil-military problematique, at least for American political science, emerged out of work by a young professor in the Eisenhower era who would go on to become one of the most famous academics of the twentieth century. 7 Samuel Huntington’s The Soldier and the State (1957) hit on a problem that preoccupied Eisenhower himself: how the exigencies of championing the Western cause during the Cold War might slowly strangle liberty at home. 8 One of those demands, of course, was the development and provisioning of an enormous standing military. By the late-1950s, the American armed forces maintained weapons systems to win superiority in every combat environment— land, sea, and air— and in every potential theater. Missile and bomber bases sprung up to ring the Soviet Union as part of the containment strategy, and still it was not enough. 9 By the time The Soldier and the State came out, the Eisenhower administration’s New Look, a nuclear-age force posture to stem the budgetary tide, was cracking under heavy, partisan-fueled criticism. The next President would spend even more taxpayer dollars to create a suite of options, so the U.S. military response could be supple enough to deal appropriately with whatever sort of Soviet provocation. Would so much of the national product and national psyche devoted to military strength undermine American democracy? 10 Plato’s original conundrum was coming back in spades: who or what would protect free society from its new protectors emerging from within the American Republic? The professional warrior caste would wield unprecedented raw, physical power and carry enormous bureaucratic weight in the administration of government. Huntington’s questions reverberate today, though the Cold War challenge has long faded, because after 9/11, American forces re-entered the fray abroad, sending ripples back to the fragile balance of power separating the branches and sustaining responsive, constitutional government in Washington. By an inspired invocation of political theory, then, Huntington would address an impressive sweep of history— across time and space— with relatively simple but powerful concepts. The usual hyperbole— magisterial, seminal, and the rest— genuinely applied to this dissertation. It would draw important critiques from sociologists and historians, but for students of government, intent upon studying institutions and culture to figure out “who decides” and with what consequences for the state, surpassing The Soldier and the State was like moving a mountain. 12 Huntington’s book articulated the civil-military problematique for the United States as a world power, and to this day, political scientists are hard-pressed to offer an alternative. 13 Huntington built his edifice on three pillars: the liberal values of American society, the checks and balances of American institutions, and the professionalism of American military officers. He intended his analysis of civil-military relations to be scientific, but he also wanted his work to be useful for deciding policy. Those twin desires landed him in the paradox confronted by positivists, realists, or rationalists who want to understand the world in order to make it better: if important outcomes for human beings are caused by systematic social forces, where is the space for change? Where is the room for freedom of action and moral responsibility? Huntington’s fix for the gaping hole between theory and practice is open to interpretation and part of the reason The Soldier and the State had such progeny. It is fair to say, though, that Huntington’s pillars were true pillars because none of them changed easily. Culture, constitution, and profession were nonetheless social constructions; all of them could change over long periods of time, or with much smaller probability all at once. At various places in his volume, Huntington described what sort of changes in the three pillars— and the strategic environment— would ease the tensions between military effectiveness and civilian control, but none of the shifts were likely, none of the adjustments particularly easy to perform. Consequently, the tensions and the problematique should be with us for some time, even as civil-military stresses and ensuing policy recommendations rise and fall. 14 Huntington discussed possible variations in military professionalism, and in a controversial epilog, the benefits to civil-military relations if individualistic, avaricious American society were to embrace some of the values on discipline and stoic sacrifice modeled at West Point. His best illustration, though, of how contending social forces pulled the actual practice of civil-military relations back and forth came with his description of institutional arrangements at the nexus of national security decision-making under the Constitution. 15 These passages are not the most cited, even though they provided a blue-print for how a change in the external threat and subsequent interest in new military missions on the part of civilians would affect the civil-military problematique. Huntington created clear categories for different civil-military regimes, but they were challenging to operationalize. For example, it was not clear from Huntington’s prose when he was sketching organizational charts— formal reporting lines and functional assignments codified by statute— and when he was discussing less explicit behavior patterns, what might be called organizational culture, within the Executive. In any case, if we allow that “vertical,” “coordinate,” and “balanced” may refer to informal institutions, Huntington explained well why civil-military problems under constitutional democracy endure and how influence in the relationship sloshes about in response to political pressures. Oscillating Institutions under a Constitutional Democracy Huntington described vertical institutions as those in which the President’s cabinet Secretary at the Department of Defense acted as a sort of deputy commander-in-chief. The civilian authority’s scope across defense issues knew no bounds, and in practice, the civilian’s superior level in the decision-making hierarchy was regularly enforced. Huntington’s abstract rendering of vertical civil-military relations in 1957 uncannily captured George W. Bush’s structuring of the Defense Department decades later under Donald Rumsfeld as the new President replaced the Clinton team in 2001. Huntington also made a good prediction about what happened next, once vertical relations were established. The professional military chafed. Unlimited scope for the civilian Secretary meant senior officers’ expertise on military matters came under frequent, intrusive, and unwelcome scrutiny. Military preferences were too often countermanded because regardless of the administrative or operational nature of the question, the answer tended to be mauled by the deputy commanderin-chief before it got to the President. 16 Moreover, the American Constitution secured democratic control of defense policy and the military arm by limiting the executive commander-in-chief through checks and balances. Today, these are sometimes characterized as separate powers combined with overlapping competencies, or shared responsibilities, but this terminology does not quite capture the adversarial system promoted by James Madison in essays leading up to his culminating argument in Federalist 51. 17 The Founder had researched various ways, including a council of wise men, to try and prevent one governmental power, either the executive or the legislature, from encroaching upon the other. His answer in Federalist 51 gave each branch the means to defend itself through calibrated levers of interdependence that each side could pull harder and harder as its prerogatives became endangered. “Shared responsibilities” makes it sound as if the Founders envisioned happy cooperation that might be forged in gentle deliberation between political leaders with disinterested ideas about the national good. They might have hoped for such enlightened statesmanship, but they feared Machiavellian ploys to aggrandize power. In his institutional analysis, Huntington emphasized the darker aspect of Constitutional checks-and-balances: the American President did not share his commander-in-chief competencies or his authority over the military, but the Constitutional powers of Congress to declare war, approve federal spending, and regulate the armed forces, for example, weakened the President in his corner of the civil-military relationship. If the military should chafe, then, under vertical arrangements for Executive control, the generals could approach Congress and persuade legislators to begin tugging on the fine strings of interdependence. The military officers might expect to gain traction as well if the nub of the problem was an over-concentration of power in the hands of a deputy commander-in-chief, or cabinet Secretary of Defense. Congress, in turn, has the power to set the rules and appropriate funds for a reorganization of the Executive’s Department of Defense that would formally cut away the power of the Secretary, altering reporting requirements or the span of his decision authority as it did in famous legislative watersheds of 1947 and 1986. More likely, in practice, the credible threat of revamping departments under the President would persuade the commander-in-chief to let the steam out of military grievances by informally shifting toward what Huntington termed a coordinate system. 18 The central idea was to ensure that senior officers gain a proper hearing by removing the barrier on their level of influence. At the top of the pyramid, civilmilitary deliberations occurred within a V-formation, with the civilian Secretary and the military chairman occupying de facto coordinate positions on a single tier directly beneath the President. The coordinate system delivered military professional advice directly to the President’s ear, and in principle it established clear jurisdictions for the scope of civilian management under the Secretary of Defense and military autonomy under the uniformed chiefs of staff. Nevertheless, just as inferiority in the level of authority under vertical arrangements led the military to challenge the civilian deputy’s competence on operational questions involving a high quotient of professional expertise, limits on the scope of authority under coordinate arrangements prompted the military to chafe once again. This time the President, preoccupied with the wide-ranging demands of a chief executive as he simultaneously weighed military advice, struggled to maintain already fluid boundaries separating administrative from operational or strategic from tactical concerns. Huntington’s rendering of the civil-military problematique took heavy criticism over the years for overstating the conceptual distinction between military and political decisions, but in identifying the weakness of coordinate civil-military relations, Huntington recognized that the boundary was to an important degree a construction of the players involved. He feared the military could leverage direct access to the commander-in-chief in order to strengthen its autonomy and extend the scope of its influence, calling into question the nature and significance of civilian control. Because of the American Constitution’s animating concern against the concentration of power in Congress or the chief executive, who could, if he gained the upper hand, become a kind of monarch, the military always had an avenue to push back against civilian authority. Splitting the civilians or jeopardizing the President’s approval rating by going public had their risks. The military could lose its leading officers or its institutional autonomy once Congress and the President stood shoulder-to-shoulder against it, but at times under vertical or coordinate arrangements, an American military that took great pride in its professional competence and resented unnecessary civilian interference might feel it had more to gain by kicking over the table and renegotiating the norms of civilian control. 19 The strain on the military to play for change should increase as civil-military relations move closer to the vertical or coordinate archetype. The military could use a broad array of administrative and operational issues to spread the defenses of a deputy commander-in-chief and catch him where he was weakest, undermining a distinct civilian level of authority that blocked top officers from the President; alternatively near the coordinate pole, talented military advisers or commanders could use direct access to the President in order to crowd the scope of civilian influence, pushing the boundary further away from operational issues and into areas of civilian administration or grand strategy. Huntington predicted these conditions would lead to oscillation between suboptimal civil-military systems during America’s ascendance as a world power, when the professional military would remain a central feature of the national political landscape. A more stable solution would combine best elements of the vertical and coordinate systems, limiting both the military’s level and scope of authority. The President would remain in charge overall, with a Secretary of Defense to focus on political-military issues and buffer direct military pressure, but both the commander-in-chief and his cabinet Secretary would practice fastidious self-restraint, deferring to senior officers on questions of professional expertise. Huntington had little confidence that American civil-military relations could discover and settle on this sweet spot, which he called a balanced system. More likely, the fluctuating American arrangements would blast right through it on their way to either the vertical or coordinate extreme. The President was by Constitutional design simply too weak before other political actors, too vulnerable in his ill-defined commander-in-chief role to absent himself from military councils at the same time that he granted uniformed leaders autonomy on a loosely bounded set of military issues, which promised to expand as the international threat or a national security crisis deepened. New Missions, Old Problems For the United States of America operating in the crucible of great power competition, Huntington articulated the civil-military problematique along three dimensions. The demands of a lead role on the world stage, particularly as postwar relations with the Soviet Union deteriorated, would keep the military near the center of American national life, commanding sufficient resources to accumulate potential for disruption in an essentially liberal political order. The likelihood and magnitude of disruption for the Republic would depend on (1) the quality of professionalism in the military, (2) the tolerance of liberal society for conservative military culture in its midst, and (3) institutional arrangements. With respect to this civil-military problematique, scholarly attention after the Cold War attended the changing nature of the external threat and primarily the first two of Huntington’s dimensions. As the Cold War threat faded, the source of new dangers became less certain and grand strategy became more difficult to articulate. Some analysts noted that since the United States still sought a leadership role in world affairs, even without Soviet armored divisions in Eastern Europe, the American military was unlikely to withdraw from its starring role in national debates. Moreover, uncertainty among civilian authorities created a natural opening for senior officers to assert more influence in national security decision-making. 20 During the Clinton administration, the logic of a diminishing external threat seemed to play out. The relatively inexperienced President had campaigned on economic policy, but he soon confronted a series of difficult national security challenges in the Balkans, Somalia, and Haiti. Violence in those places did not imperil U.S. territorial integrity but neither could the last remaining superpower and champion of international order ignore the human suffering or the gross defiling of liberal-democratic principles in a globalizing world. President Clinton was more or less compelled to engage the military in new peacekeeping missions. While casualties were light in comparison to the historical standard for major wars, the operations tempo during a time of defense budget draw-downs was not. The military did not always accept the new tasks passively, with their burgeoning political constraints and unfamiliar operational risks. As late as 1999, a now battle-tested administration raised the stakes, ordering a 78-day air campaign led by the supreme NATO and U.S. European commander to punish Serbia and halt ethnic cleansing in Kosovo. The post-Cold War threat environment offered plenty of opportunities for Cold War-scale civil-military conflict. 21 The ideological dimension of the problematique received its fair share of attention during the 1990s. Though candidate Clinton had moved the Democratic Party to the center in order to capture the White House, in many ways he embodied the commercial energy and consumer-oriented brashness of Highland Falls in Huntington’s famous epilog, sharply contrasting against traditional military traits of stoicism, discipline and self-sacrifice. In a youthful letter to explain his backing out of reserve officer training and perhaps a tour in Vietnam, Clinton had even paraphrased the intolerance Huntington imputed to liberal society, writing as a recent Georgetown graduate and Rhodes Scholar in 1969 that “many fine people” were “still loving their country but loathing the military.” 22 Of course, much had changed since Vietnam, the military after the 1991 Gulf War enjoyed the confidence of nearly nine out of 10 poll respondents, leading all government institutions and the press in national surveys. 23 The Reagan Revolution consolidated powerful conservative voting blocks and forced a rightward shift from the Democrats. Another conservative moment would occur early in Clinton’s presidency with the rise of Newt Gingrich and House Republicans. Subsequent opinion research using data and statistical techniques unavailable to Huntington in the mid-1950s showed that individual responses were often difficult to pigeonhole into broad ideological constructs. From a social science perspective, there was scarce evidence that either liberal society or the military ethos created undue friction during the Clinton years. Even when freed from the Cold War threat, attitudes mixed across civil-military boundaries, and in any case they managed to retain at least a working level of tolerance for one another’s world view. 24 Nevertheless, a related fear highlighted ideological divisions within what Huntington had categorized as liberal American society. American political parties after the Nixon-era Watergate scandal and the electoral successes of the Republican Southern strategy became more ideologically homogeneous. Now in the 1990s, party identification among military officers was changing as well, from neutral to Republican. 25 If a single party affiliation dominated throughout the officer corps, party loyalty could conceivably dilute military judgment when service chiefs or the field commander advised a Democratic commander-in-chief. This concern grew as professional relationships between Clinton staffers and high-ranking officers deteriorated. At one point an Air Force general, Harold Campbell, earned a rebuke and early retirement for ad hominem remarks against the President from the lectern at a formal banquet in Europe. 26 Notably, the accusations of gay-loving, womanizing, pot-smoking, and draft-dodging did not aim directly at Clinton’s policies but at the Commander-in-Chief’s moral qualifications for putting military lives in harm’s way. Overtly disrespectful behavior on the part of civilian staffers as well as prominent officers waned with time. Both sides recognized the value of getting along, and with established rotation cycles through senior military positions, more and more officers advanced through the ranks under Clinton appointees. Also, military ardor for the opposition’s alternative ideas on national security would fade once Republican George W. Bush entered the White House and began to assert his understanding of civilian authority. Nevertheless, legitimate concern over politicization of the military through lopsided party affiliation— one survey put the figure at 8-to-1 in favor of Republican officers— generated a stream of research on the importance of military professionalization during a period of ill-defined threats and ambiguous national security doctrine. Certainly, the civilians still required frank military advice, but it ought to be delivered in ways that did not prematurely constrain the President’s options or trump his preferences. Civilians under democratic control had a “right to be wrong,” and from a principal-agent perspective, it was problematic if the chief executive was prepared to defend a preference, say, for certain peace enforcement missions before Congress and the American people, but the military insisted otherwise. 27 As operational demands, at least for U.S. forces, wound down in the Balkans and the nation anticipated a new commander-in-chief, analysts of the civil-military problematique offered a string of appropriate behaviors that would reinvigorate military professionalism. 28 The problem in the U.S. case, indeed for advanced democracies, was not the likelihood of a military coup but that professional officers who were also accomplished bureaucrats could make the most of institutional autonomy, and democratic limits on civilian authority, to impose military preferences on politicalmilitary questions. Professionalization merited careful attention as post-Cold War dimensions of national security rapidly changed. The concept pointed in two directions. As Huntington wrote, greater professionalization led to more autonomy, which in turn promoted greater competence among the managers of organized violence. Greater professionalization ameliorated the dilemma of civilian control, allowing both military effectiveness and democratic accountability, as long as the code included a robust ethic of self-restraint, the generals and admirals saluting smartly and executing their share of the civilian policy even when they would have decided differently. At the same time, greater professionalization meant more expertise, potentially a larger difference in perspective between military agents and civilian principals, and higher likelihood for situations when military professionals understood that if they did not insist, a less-qualified, less-informed commander-in-chief could steer the armed forces and the nation they defended off a cliff. The dual aspect of military professionalism weakened it as a final solution to the civil-military problematique. Indeed, a parallel research thread emerged toward the end of the Clinton presidency, which turned the focus toward civil-military institutions. As in research growing out of Huntington’s ideological dimension, the principal-agent approach engaged American political institutions at a different level of analysis from The Soldier and the State. Rather than statutory or executive reorganization of departments under the Constitution, the leading principal-agent model analyzed civilian monitoring and punishment of military shirking. 29 The model implied that the self-restraint element of military professionalism would not prevent uniformed advisers or field commanders from straying on some occasions, privileging their own policy preferences— on an issue within their area of expertise— over those of civilian authority. Empirical research into Cold War cases and civil-military frictions during the Clinton administration confirmed that pressures to shirk rose during Presidential uses of force. While the military rarely trumped civilian preferences, this commendable track record required maintenance: constant adjustments to the incentive contract for the military agent, calibrating monitoring costs, and the willingness of civilians to accept military or political risks when punishing deviation from the chief executive’s program. The principal-agent approach might have become less relevant after the Clinton years. Conservative Republican George W. Bush won the presidency in 2000 and brought with him an experienced national security team, including a Vice President, a Secretary of State, and a Secretary of Defense who should have developed a sophisticated comprehension of the code for military professionals. Rather quickly, however, civil-military relations took a different turn. Secretary of Defense Donald Rumsfeld and Secretary of State Colin Powell failed to develop a close working relationship. Rumsfeld and Vice-President Dick Cheney charged the previous administration with abusing the military in peacekeeping missions while cutting its resources. Help was on the way, Bush had promised during the campaign, but it arrived in the form of a wrenching transformation, prodding the services to adopt information technologies, so joint task forces could do more, in less time, using less mass. 30 Cutting mass fell hardest on the Army, which had parochial and legitimate reasons to resist transformation ideology. Accordingly, civilian guidance on new missions, not so much in peacekeeping as conventional warfare, pulled the military away from the successful heavy formations of Gulf War I. The elements of a rocky principal-agent relationship— incessant monitoring, micromanagement, and punishment— rushed back to the fore. 31 The second surprise came with the September 11 terrorist attacks on the United States. The country responded comprehensively: several executive departments reformed operations, and Congress approved major reorganizations to create the Department of Homeland Security as well as a new Intelligence Community. Yet, the military was seen as one of the most capable organizations in being at the time of the attacks. During the ensuing months, the President with the approval of Congress asked it to do much more. The new missions in Afghanistan, Iraq, and elsewhere seemed to fit Rumsfeld’s earlier warnings. For a brief time— through the most intense period of crisis vulnerability for the United States and the destruction of Saddam Hussein’s regime in Iraq— the Secretary enjoyed clear ascendance over dissenting subordinates in the military. Circumstances abruptly changed, again, as violence in Iraq swelled in the aftermath, or post-combat stage, of Operation Iraqi Freedom. Transformation targeted the source of power in adversary states, the military organizations that made dictators like Saddam untouchable and magnified their capacity for mischief during the post-Cold War years of Clinton and Bush’s father. Rumsfeld’s prodding may have helped the Army, indeed the joint force, become lighter, faster, and more lethal against opposing militaries, but it did not prepare the American military for nation-building once a tyrannical regime had been efficiently lopped off. The Secretary took a firm hand the whole time. Suddenly, though, his cantankerous barbs and avuncular informality were not so charming. The cost and the crimes committed by all sides during Iraq’s instability were laid at Rumsfeld’s door. The power he brought to his position and his own goading style invited them there. The military, not in the form of any one person and not in a manner that was illegal or technically insubordinate, took its revenge. The announcements by retired officers— and in one politicized case the dated testimony of an Army chief-of-staff— were said by pundits and scholars to reflect judgments in the corps and among the soldiers, which Rumsfeld repressed through sheer callousness and disregard for military professionalism. 32 In Iraq, the violence worsened, and after a bruising midterm election in 2006, the President accepted Rumsfeld’s resignation, replacing him with Robert Gates, someone viewed as closer to Bush’s father in courteous style as well as pragmatic approach. Secretary Gates’ timing also turned out to be good. The President’s national security team considered a substantive change in strategy during late2006 and early 2007. With Rumsfeld gone, the face of the so-called “Iraq Surge” became that of the field commander, General David Petraeus, who expertly defended the plan before Congress. With few exceptions, Senators, backed by another set of military experts, did not give the surge much chance of success, but they hesitated to deny the General’s request for more troops by cutting off funding. Within 12 months, the surge worked, at least to reduce the daily body count in Iraq. This, along with Gates’ calm and openness to cooperation, lowered the temperature considerably on civil-military relations. Obama’s subsequent decision to keep the longtime Republican in the cabinet, civil-military relations seemed to improve on every one of the problematique’s dimensions. Uncompromising neo-conservative ideology gave way to pragmatism at the same time that the armed services became less overtly partisan and more open-minded about Democratic policy makers in charge of national security. 34 Discussions of professionalism took into account civilian as well as military codes and courtesies, which except for the McChrystal affair in June 2010, both sides more or less accepted. 35 In any case, Republicans, Democrats, and officers generally agreed on how the President responded to McChrystal’s unguarded remarks against the administration. Finally, in terms of principal-agent dynamics, the late-Bush and early-Obama administrations, both benefiting from Gates’ steady hand at the Department of Defense, adjusted the incentive contract: the military received respect and autonomy, and when it failed, senior officers were held to account. Where Rumsfeld had humiliated wayward generals, Gates fired them, a punishment that the corps understood as more in line with military custom. 36 Despite the rehabilitation of civil-military relations after Iraq, continued reminders to remain vigilant on the meaning and practice of military professionalism, and the problematique’s overall contribution to understanding what went wrong during the first six years of the Bush administration, Huntington’s version of the research agenda proffered at the height of the Cold War still has relevance today. Moreover, a close reading of his institutional dimension highlights a contemporary problem for democratic civilian control. The principal-agent approach, that is, the institutional track of the 1990s, illuminated how an advanced democracy like the United States could face serious dilemmas involving the quality of civilian control, even when the danger of a military coup was minimal. 37 However, the framework failed to anticipate deteriorating conditions during the Bush administration because it obscured the typology Huntington created, using vertical and coordinate systems. Under Huntington’s “institutional constant” of Constitutional checks and balances, the commander-in-chief’s political vulnerability would prevent civil-military relations from ever settling into a balanced arrangement that limited both the military’s level and scope of authority. The constant did not imply stasis but unending vacillation between suboptimal rules of the game. A reference back to Huntington’s civilmilitary institutions leads to caution regarding today’s interactions where they are most intense, on the course of the war in Afghanistan and on appropriate investments for U.S. Defense as commitments in Afghanistan and Iraq wind down. Huntington’s theoretical narrative about how a vertical system collapses through to a coordinate system illuminates events from our headlines: the inchoate resistance against Rumsfeld from 2004-2006; the elevation of General Petraeus during the President’s campaign to sell the “Iraq Surge” domestically; the assertiveness of General McChrystal, including his legally protected but politically potent response to press questions in London and the nature of his direct access to the President on the tarmac in Copenhagen; the press profile of General Petraeus in curtailing troop withdrawals from Afghanistan in 2011; and even the suspicions about military information operations to spin the civilian principal during Congressional visits to the field. 38 If Huntington’s institutional constant has held and U.S. civil-military relations just passed another cycle from vertical arrangements under Rumsfeld to informal processes that accommodate an extraordinarily influential commander such as Petraeus, Americans may anticipate yet another shift back to a circumstance where the President commissions an assertive deputy at the Pentagon to reduce military influence on national strategic decisions and bring commanders under tighter civilian control. Coordinate arrangements will work, as long as military leaders continue to make the right judgments on politically charged questions like troop numbers and operational plans. In an era of many new missions, though, it is all too possible for a prominent commander or adviser to win the domestic argument for the wrong policy. 39 In the event of a national security disaster, the chief executive’s vulnerability under the Constitution will compel a response, as Huntington predicted, back to the vertical system for civilian control— despite its flaws. Students of the civil-military problematique have skillfully employed its concepts to maintain scrutiny of a key intra-governmental relationship, even when the external threat did not force public attention to this issue and when democratic fundamentals were assured. Yet, the United States, and perhaps democratic partners who closely attend the U.S. military example, will pay a strategic price if Huntington’s institutional constant— the harrowing flight from vertical to coordinate arrangements and back again— remains so far outside the intellectual discourse on civil-military relations.

#### US CMR key to joint training exercises

Kohn, 2

(Military History Prof-UNC, "The erosion of civilian control of the military in the United States today, Naval War College Review, 6/22, http://usnwc.edu/getattachment/c280d26a-9d66-466a-809b-e0804cbc05f4/Erosion-of-Civilian-Control-of-the-Military-in-the.aspx)

Ponder whether you are prepared to accept, as a principle of civilian control, that it includes the right of civilians to be wrong, to make mistakes--indeed, to insist on making mistakes. (112) This may be very hard to accept, given that people's lives, or the security of the nation, hang in the balance. But remember that the military can be wrong, dead wrong, about military affairs--for after all, you are not politicians, and as Carl von Clausewitz wrote long ago, war is an extension of politics. (113) Were you prepared to work for and with, and to accept, a Gore administration had the Democratic candidate won the 2000 election? If there is doubt on your part, ponder the implications for civil-military relations and civilian control. It is likely that within the next dozen years, there will be another Democratic administration. If the trend toward increasing friction and hostility in civil-military relations during the last three--those of Johnson, Carter, and Clinton--continues into the future, the national security of the United States will not be well served. Last of all, consider that if civilian control is to function effectively, the uniformed military will have not only to forswear or abstain from certain behavior but actively encourage civilians to exercise their authority and perform their legal and constitutional duty to make policy and decisions. You cannot and will not solve those problems yourselves, nor is it your responsibility alone. Civilian behavior and historical circumstances are just as much the causes of the present problems in civil-military relations as any diminution of military professionalism. But you can help educate and develop civilian leaders in their roles and on the processes of policy making, just as your predecessors did, by working with them and helping them--without taking advantage of them, even when the opportunity arises. Proper professional behavior calls for a certain amount of abstinence. What is being asked of you is no more or less than is asked of other professionals who must subordinate their self-interest when serving t heir clients and customers: lawyers to act against their self-interest and advise clients not to press frivolous claims; doctors not to prescribe treatments that are unnecessary; accountants to audit their clients' financial statements fully and honestly; clergymen to refrain from exploiting the trust of parishioners or congregants. (114) It will be up to you to shape the relationship with your particular client, just as others do. At its heart, the relationship involves civilian control in fact as well as form. Civilian control ultimately must be considered in broad context. In the long history of human civilization, there have been military establishments that have focused on external defense--on protecting their societies--and those that have preyed upon their own populations. (115) The American military has never preyed on this society. Yet democracy, as a widespread form of governance, is rather a recent phenomenon, and our country has been fortunate to be perhaps **the leading example for the rest of the world.** For us, civilian control has been more a matter of making certain the civilians control military affairs than of keeping the military out of civilian politics. But if the United States is **to teach civilian control**--professional military behavior--to countries overseas, its officers must look hard **at their own system** and their own behavior at the same time. (116) Our government must champion civilian control in **all circumstances, without hesitation.** In April 2002 the United States acted with stupefying and self-defeating hypocrisy when the White House initially expressed pleasure at the apparent overthrow of President Hugo Chavez in Venezuela by that country's military, condoning an attempted coup while other nations in the hemisphere shunned the violation of democratic and constitutional process. (117) "No one pretends that democracy is perfect or all-wise," Winston Churchill shrewdly observed in 1947. "Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried." (118) Churchill certainly knew the tensions involved in civil-military relations as well as any democratic head of government in modern history. Both sides--civilian and military--need to be conscious of these problems and to work to ameliorate them.

#### US model for joint training exercises solve global war—specifically Afghanistan

Cimbala, 12

(Poli Sci Prof-Penn State Brandywine, Civil-military Relations in Perspective: Strategy, Structure and Policy, p. 8-10)

An interesting question with respect to civil-military relations is whether modernizing autocracies with an Eastern or Middle Eastern way of war can benefit from the experience of Western militaries and civil-military relations. Can China’s rising star be propelled by a civil-military relationship that avoids the worst of the Soviet system, enabling professional military competence within the larger communist party power structure and rule? Can India’s emergence as a military great power, at least regionally, benefit from the study of past successes and failure by Western democracies in controlling their armed forces and in the formulation of policy and strategy? Will the regime in post-Soviet Russia work out a relationship with its reforming military that allows a transition to information age competence, or will Russia remain in retro with reliance on a deficient pool of conscripts, a Soviet-style view of military art, and a propensity for military threat assessments that remains mired in the Cold War (or earlier) past? And what futures portend for civil-military relations in Iran, Iraq, Saudi Arabia and other influential regional actors in the Arab and Islamic worlds? Modern Western militaries had more or less resolved the relationship between church and state, between scepter and miter, before embarking on the industrial and later revolutions and military affairs. But some Middle Eastern and South Asian armed forces will be tasked to formulate military strategy and doctrine within a political context highly embedded in religious symbolism and, in some cases, involving the clergy in control of organs of state. A return of the Ottoman Empire is improbable, but an arc of uncertainty about civil-military relations **extends across North Africa through the Eastern Mediterranean** – Levant, Turkey, the Arabian Peninsula, Persia and Mesopotamia, **former Soviet Central Asia, Afghanistan and Pakistan**. Secular governments in some of these regions were under pressure for Islamicization of their politics, including the politicization of their security organs and militaries. Pakistan already finds itself a divided house marked by political conflict between secular pluralists and dissident Islamicists of various types, and these conflicting tendencies play out within that country’s armed forces and intelligence bureaucracies. Pakistan also possesses nuclear weapons and, however ambivalent about the Taliban in Afghanistan from the U.S. and NATO perspective, cannot be avoided as the proving ground for success or failure in stabilizing a Karzai regime in Afghanistan. And speaking of nuclear weapons, the possible **spread of nuclear weapons among more states in Asia and-or the Middle East** raises a number of issues for civil-military relations. Space does not permit an extended discussion, but the short form of nuclear history is as follow. Through protracted trial and error, the U.S., Soviet and post-Soviet Russia, and other twentieth century nuclear powers learned important lessons about the operation, management and control of nuclear forces. Speaking broadly, nuclear weapons, launchers, and infrastructure required specialized chains of command and hierarchies of control, with “fail safe” protocols both technical and procedural to ensure against (1) the possibility of an accidental or mistaken launch of a nuclear first strike or first use; and (2) the failure of nuclear forces to carry out a successful retaliation against an enemy first strike, due to technical malfunction or flawed decision procedures. The ingredients of failure for possibility number (1) as above, included military usurpation of civilian command over the nuclear launch decision during a crisis or coup attempt. The constituent elements of failure for possibility number (2), as above, included decapitation of the political or military chains of command and disruption of procedures for delegation of authority to surviving commanders. Given the consequences of a U.S.-Soviet nuclear blowout on account of a failure of deterrence during the High Cold War, John Keegan is probably correct to refer to the tasks of nuclear-age heads of state and government and force commanders as “post-heroic” in their mission and professional orientation. They and their states are denied an honorable endgame of prevailing in battle at an acceptable cost, relative to the possible outcomes of conventional wars. The realization that nuclear strategy is therefore primarily or exclusively about the avoidance of war, instead of being about the combative use of nuclear weapons to strategic effect, may make for a controlled nuclear proliferation in which deterrence remains uncertain, but also untested in practice. However, given history’s propensity for wars driven by “fear, honor and interest” as Thucydides noted, reliance on deterrence in the face of extensive nuclear weapons spread could be the equivalent of wishful thinking or gallows humor. Tutorials in civil-military relations for emerging nuclear weapons states, offered by those already members of the nuclear club, may be a “necessary evil” in order to avoid technical or political failure of nuclear command and control. Some evidence of success in this regard is apparent in Pakistan’s recent reorganization of its nuclear security arrangements, doubtless with the blessing of U.S. political and military leaders and the backing of U.S. nuclear expertise. Improving civil-military relations within emerging or nascent nuclear powers implies greater clarity about “who” can enable a nuclear launch, under “what” circumstances and with “which” checks and balances, and “how” the various nuclear weapons and launchers are stored in peacetime and made ready during crises.

#### Key to Afghan stability

Armstrong, 11

(National Security Research Fellow at the Institute for National Security and Counterterrorism, "Afghan Security Force Assistance or Security Sector Reform? Despite Recent Improvements in the Afghan Security Forces, More Emphasis on Ministerial Development and Police Reform is Needed", 12/21, insct.org/commentary-analysis/2011/12/21/afghan-security-force-assistance-or-security-sector-reform-despite-recent-improvements-in-the-afghan-security-forces-more-emphasis-on-ministerial-development-and-police-reform-is-needed/)

Security force assistance is the next logical step in the triage of armed statebuilding in Afghanistan. But the ‘train and equip’ model of security assistance runs against the grain of long term SSR goals. SSR involves the cultural and structural transformation – and construction where absent – of a state’s core security actors into effective, professional, and accountable agents under civilian control. Training security forces (e.g., SFA) is a core element of SSR, but doing it without an equal **emphasis on developing civilian capacity and** control and **oversight mechanisms in the** ministries of defense and interior and in **the judicial system may be dangerous**. It may, in fact, militarize the security sector to the point of entrenching an imbalance in civil-military relations that would make the challenges of fighting corruption and preventing human rights abuses, or worse, coup attempts all the more difficult. NTM-A has made significant progress in building the size and capabilities of the ANSF since its inception in 2009, increasing the Afghan National Army and Police by roughly 75,000 and 40,000, respectively. Likewise, NTM-A is on track to meet its November 2012 ANSF end strength target of 352,000 as well. For now it remains unclear, however, how NATO’s efforts to date, focused mainly on the uniformed services, will influence broader institutional reform across the Afghan security sector. First, the Afghan National Police are currently trained and employed – mostly by U.S. military personnel – to fill a COIN role in local communities, serving essentially as paramilitary forces focused on citizen protection and holding territory cleared by NATO and Afghan Army units. But as Robert Perito of the U.S. Institute of Peace indicates in a recent interview, to be sustainable the Afghan police still needs significant training to provide regular civilian police functions, such as crime prevention, emergency management, and traffic regulation, critical functions for demonstrating the legitimacy of the Afghan state. Additionally, more must be done to bring the Afghan Local Police (ALP) – a community based initiative started in 2010 to increase security by paying armed locals to protect themselves – into the fold under the supervision of the Afghan government and NTM-A. While the ALP has proven valuable in COIN efforts against the Taliban, a recent Human Right Watch report recommends improved mechanisms to vet, train and monitor the ALP following reports of abusive and criminal behavior. Second, civilian expertise within the Afghan Ministries of Defense and Interior is sorely lacking. The reality that both ministries are predominantly led and staffed by current and former Afghan Army generals is a major long-term obstacle. Although this reflects a general shortfall of qualified civilian experts to fill key defense and interior positions, it flies in the face of tangible civilian oversight. The new Ministry of Defense Advisors (MoDA) program is making some headway, with one recent civilian advisor indicating that his Afghan counterparts are now discussing “how to educate and recruit future Afghan civil servants to join the Ministry of Defense” as a means of improving civilian control of the ANSF. It is difficult to tell, however, whether such talk will translate into a greater civilian role in driving Afghan defense and internal security policy. Achieving anything close to the ideal vision of security sector reform in Afghanistan before 2014, much less in the next decade, is unrealistic. ‘Good enough’ is now the operative threshold to be met. But efforts made today will shape the future development of the ANSF and have consequences for both Afghan security and politics well beyond the 2014 transition. As expert Mark Sedra notes in a recent book chapter on Afghanistan, “experience has shown that short-termist approaches to SSR, rather than nurturing democratically accountable and rights respecting security institutions, can breed security force impunity, **corruption** and politicization” (p. 235). Accordingly, regardless of how fast or slow the overarching mission in Afghanistan shifts away from COIN and toward security force assistance in the coming months and years, NATO should look to reprioritize its training and advising emphasis on the Afghan police and developing Afghan civilian capacity at the ministerial level to correct for existing imbalances and to set the Afghan security sector and its civil-military relations on a more sustainable path.

#### Detention cred on judicial protection of citizens is crucial

ICG 10

(International Crisis Group, 11/17, “REFORMING AFGHANISTAN’S BROKEN JUDICIARY”, http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afghanistans%20Broken%20Judiciary.ashx)

**A substantial course correction is needed to restore the rule of law in Afghanistan. Protecting citizens from** crime and **abuses of the law is elemental to state legitimacy. Most** **Afghans do not enjoy such protections and their access to justice institutions is extremely limited**. As a result, appeal to the harsh justice of the Taliban has become increasingly prevalent. In those rare instances when Afghans do appeal to the courts for redress, they find uneducated judges on the bench and underpaid prosecutors looking for bribes. Few judicial officials have obtained enough education and experience to efficiently execute their duties to uphold and enforce the law. Endemic problems with communications, transport, infrastructure and lack of electricity mean that it is likely that the Afghan justice system will remain dysfunctional for some time to come. **Restoring public confidence in the judiciary is critical to a successful counter-insurgency strategy**. The deep-seated corruption and high levels of dysfunction within justice institutions have driven a wedge between the government and the people. The insurgency is likely to widen further if Kabul does not move more swiftly to remove barriers to reform. The first order of business must be to develop a multi-year plan aimed at comprehensive training and education for every judge and prosecutor who enters the system. Pay-and-rank reform must be implemented in the attorney general’s office without further delay. Building human capacity is essential to changing the system. Protecting that capacity, and providing real security for judges, prosecutors and other judicial staff is crucial to sustaining the system as a whole. The international community and the Afghan government need to work together more closely to identify ways to strengthen justice institutions. A key part of any such effort will necessarily involve a comprehensive assessment of the current judicial infrastructure on a province-byprovince basis with a view to scrutinising everything from caseloads to personnel performance. This must be done regularly to ensure that programming and funding for judicial reform remains dynamic and responsive to real needs. More emphasis must be placed on public education about how the system works and where there are challenges. Transparency must be the rule of thumb for both the government and the international community when it comes to publishing information about judicial institutions. Little will change without more public dialogue about how to improve the justice system. The distortions created in the justice system by lack of due process and arbitrary detentions under both Afghan institutions and the U.S. military are highly problematic. Until there is a substantial change in U.S. policy that provides for the transparent application of justice and fair trials for detainees, the insurgency will always be able to **challenge the validity of the international community’s claim that it is genuinely interested in the restoration of the rule of law**. If the international community is serious about this claim, then more must be done to ensure that the transition from U.S. to Afghan control of detention facilities is smooth, transparent and adheres to international law.

#### Afghan governance collapse causes nuclear war

Cronin 13

(Prof-Public Policy at George Mason, “Thinking Long on Afghanistan: Could it be Neutralized?, The Washington Quarterly Vol. 36, No. 1, http://dx.doi.org/10.1080/0163660X.2013.751650)

With ISAF withdrawal inevitable, a sea change is already underway: the question is whether the United States will be ahead of the curve or behind it. Under current circumstances, key actions within Afghanistan by any one state are perceived to have a deleterious effect on the interests of other competing states, so the only feasible solution is to discourage all of them from interfering in a neutralized state. As the United States draws down over the next two years, yielding to regional **anarchy would be irresponsible**. Allowing neighbors to rely on bilateral measures, jockey for relative position, and pursue conflicting national interests without regard for dangerous regional dynamics will result in a repeat of the pattern that has played out in Afghanistan for the past thirty years\_/except this time the outcome could be not just terrorism but **nuclear war.**

#### Escalates

Rubin, 11

(Director of Policy and Government Affairs-Ploughshares Fund, 7/7, Nuclear Concerns After the Afghanistan Withdrawal, http://www.huffingtonpost.com/joel-rubin/middle-east-nuclear-threat\_b\_891178.html)

The national security calculus of keeping U.S. forces in Afghanistan has shifted. Any gains that we made from keeping 100,000 American soldiers in harm's way are now questionable, especially since al Qaeda has been dealt a significant blow with the killing of Osama bin Laden. President Obama's decision to end the surge by late next year only reinforces this reality. Yet many of the underlying sources of conflict and tension in South and Central Asia will remain after an American withdrawal. In a region that has deep experience on nuclear matters -- with nuclear aspirant Iran bordering Afghanistan on one side and nuclear-armed Pakistan and India on the other -- the United States must take into account the potential for regional nuclear insecurity caused by a poorly executed drawdown in Afghanistan. As much as we may like to, we can't just cut and run. So as the United States draws down its forces, we must take care to **leave stable systems and relationships in place**; failure to do so could exacerbate historic regional tensions and potentially create new national security risks. It is therefore essential that Washington policymakers create a comprehensive nuclear security strategy for the region as part of its Afghanistan withdrawal plans that lays the groundwork for regional stability. We have only to look to our recent history in the region to understand the importance of this approach. In the 1980s, the U.S. supported the Mujahedeen against the Soviet Union. When that conflict ended, we withdrew, only to see the rise of al Qaeda -- and its resultant international terrorism -- in the 1990s because we didn't pull out responsibly from Afghanistan. Our choices now in Afghanistan will determine the shape of our security challenges in the region for the foreseeable future. And we can't afford for nuclear weapons to become to South and Central Asia in the 21st century what al Qaeda was in the 1990s to Afghanistan. To avoid such an outcome, several key objectives must be included in any Afghanistan withdrawal plan. First, current levels of regional insecurity -- which already are extremely high -- will continue to drive tensions, and quite possibly conflict, amongst the regional powers. Therefore, we must ensure the implementation of a regional approach to military withdrawal. These efforts must bring all relevant regional players to the table, particularly the nuclear and potentially nuclear states. Iran and all the countries bordering Afghanistan must be part of this discussion. Second, the United States must be mindful to not leave a **governance vacuum inside Afghanistan**. While it is clear that the current counter-insurgency policy being pursued in Afghanistan is not working at a pace that meets either Western or Afghan aspirations, it is still essential that Afghanistan not be allowed to implode. We do not need 100,000 troops to do this, and as the Afghanistan Study Group has recommended, credible political negotiations that emphasize power-sharing and political reconciliation must take place to keep the country intact while the United States moves out. Third, while the rationale for our presence in Afghanistan -- to defeat al Qaeda -- has dissipated, a major security concern justifying our continued involvement in the region -- **potential nuclear conflict** between India and Pakistan -- will remain and may actually rise in importance. It is crucial that we keep a particularly close eye on these programs to ensure that all is done to prevent the illicit transfer or ill-use of nuclear weapons. Regardless of American troop levels in Afghanistan, the U.S. must maximize its military and intelligence relationships with these countries to continue to both understand their nuclear intentions and help prevent potential conflict. We must avoid a situation where any minor misunderstanding or even terrorist act, as happened in Mumbai in 2008, does not set off escalating tensions that lead to a nuclear exchange. Ultimately, the U.S. will one day leave Afghanistan -- and it may be sooner than anyone expects. The key here is to leave in a way that promotes regional stability and cooperation, not a power vacuum that could foster proxy conflicts. To ensure that our security interests are protected and that the region does not get sucked in to a new level of insecurity and tension, a comprehensive strategy to enhance regional security, maintain a stable Afghanistan, and keep a watchful eye on Pakistan and India is essential. Taking such steps will help us to depart Afghanistan in a responsible manner that protects our security interests, while not exacerbating the deep strategic insecurities of a region that has the **greatest risk of arms races and nuclear conflict in the world.**

#### Global nuclear war

Carafano, 10

(1/2, Sr. Fellow-Heritage Foundation, http://gazettextra.com/news/2010/jan/02/con-obama-must-win-fast-afghanistan-or-risk-new-wa/)

We can expect similar results if Obama’s Afghan strategy fails and he opts to cut and run. Most forget that throwing South Vietnam to the wolves made the world a far more dangerous place. The Soviets saw it as an unmistakable sign that America was in decline. They abetted military incursions in Africa, the Middle East, southern Asia and Latin America. They went on a conventional- and nuclear-arms spending spree. They stockpiled enough smallpox and anthrax to kill the world several times over. State-sponsorship of terrorism came into fashion. Osama bin Laden called America a “paper tiger.” If we live down to that moniker in Afghanistan, odds are the world will get a lot less safe. Al-Qaida would be back in the game. Regional terrorists would go after both Pakistan and India—potentially **triggering a nuclear war** between the two countries. Sensing a Washington in retreat, **Iran and North Korea could shift their nuclear programs into overdrive**, hoping to save their failing economies by selling their nuclear weapons and technologies to all comers. **Their nervous neighbors would want nuclear arms of their own. The resulting nuclear arms race could be far more dangerous than the Cold War’s two-bloc standof**f. With multiple, independent, nuclear powers cautiously eyeing one another, the world would look a lot more like Europe in 1914, when precarious shifting alliances snowballed into a very big, tragic war. The list goes on. There is no question that countries such as **Russia, China and Venezuela would rethink their strategic calculus as well**. That could produce all kinds of serious regional challenges for the United States. Our allies might rethink things as well. Australia has already hiked its defense spending because it can’t be sure the United States will remain a responsible security partner. **NATO might well fall apart. Europe could be left with only a puny EU military force** incapable of defending the interests of its nations.

#### US CMR model in Argentina key to solve Falklands conflict

Isacson, 11

(Sr. Associate for Regional Security Policy-Washington Office on Latin America, “Why Latin America Is Rearming,” 2/4, http://www.wola.org/commentary/why\_latin\_america\_is\_rearming)

Latin American nations very seldom fight each other. It has been over 70 years since the region has seen an interstate war last more than a month. Border disputes occasionally flare up (Nicaragua and Costa Rica; Peru and Ecuador; Peru and Chile; Bolivia and Chile; and others). **Argentina continues to dispute the Falkland Islands with Great Britain**. And leaders – especially when they are on opposing sides of an ideological divide – have been known to say very unkind things about each other. These disagreements, however, almost never come close to violence. In the worst of cases, they end up in The Hague. The highest-profile, most severe interstate security disputes in the past few years have involved Colombia – particularly under the hard-right government of Alvaro Uribe (2002 - 2010) – and the left-leaning governments of Venezuela and Ecuador. Venezuelan President Hugo Chávez frequently alleges that the United States poses an immediate threat to his country’s security. Especially since the 2009 revelation of a defense cooperation agreement, including use of military bases, between Colombia and the United States, Chávez has speculated that US aggression would likely come via Colombia. Ecuador, for its part, increased its defense spending after the Colombian army carried out a March 2008 raid, about a mile inside Ecuadorian territory, which killed a top leader of the Revolutionary Armed Forces of Colombia (FARC), a guerrilla group. Although Ecuador has since scaled back some of its purchases, in particular reducing in size an order of Brazilian Super Tucano attack aircraft, the episode showed the extreme sensitivity with which countries in the region view any breach of sovereignty or territorial integrity. Colombian President Juan Manuel Santos has worked to reduce tensions with Venezuela and Ecuador since assuming office in August 2010, and the country’s defense agreement with the United States has been tabled for now following a Colombian court decision that the deal requires legislative approval. Still, Venezuela is proceeding with one of the region’s most ambitious military buildups: Its $11.3 billion in overseas arms purchases between 2006 and 2009 placed it fourth in the developing world during that period, according to the US Congressional Research Service. Venezuela suffers one of the hemisphere’s highest crime rates, but its arms buildup is aimed at an outward threat: the possibility of invasion or other destabilizing activity by the United States. Preparation for “asymmetrical warfare” involving guerrilla resistance following a US invasion, for instance, is a chief pretext given for Venezuela’s large-scale effort to organize citizen militias and provide them with tens of thousands of light weapons. Colombia’s disagreements with Venezuela and Ecuador, meanwhile, are heavily rooted in Colombia’s own internal conflict with two 1960s-vintage, now drug-funded leftist guerrilla groups. This is the only traditional “political” armed conflict left in the hemisphere (unless one counts a much lower-level struggle with the drug-funded remnants of Peru’s Shining Path guerrillas). As mentioned, it was a cross-border Colombian raid against guerrillas that raised tensions with Ecuador. And troubles with Venezuela have been most strongly exacerbated by Colombian claims that Caracas tolerates or even assists guerrillas, with FARC and the National Liberation Army (ELN) operating in Venezuelan territory. (It remains unclear whether this guerrilla presence is due to Venezuelan policy or to a lack of territorial control.) In any case, Colombia’s own military buildup, which has included a nearly threefold increase in defense expenditures since 2000, has been aimed far more at its internal war effort than at any scenario of conflict with its neighbors. Although the numbers coming out of Colombia and Venezuela may appear to point to an arms race, Colombia’s focus is in fact overwhelmingly internal. After a 1998 - 2002 peace process with the FARC and the ELN began to founder, Bogotá opted for all-out war, ramping up its military and police capacities, with the help of over $5 billion in US assistance. Fighting since 2002 has killed more than 21,000 combatants and 15,000 civilians. Large battlefield gains against the guerrillas have resulted from the buildup. However, drug money and continued government neglect of the country’s most remote regions guarantee that, unless a negotiated settlement is reached, the conflict will not end any time soon. Threats from within At a time when few traditional armed conflicts are under way, internal threats continue to anchor the missions of most Latin American and Caribbean militaries, and especially underpin states’ defense spending. The region suffers the highest levels of violent crime in the world, much of it perpetrated by organized crime syndicates, drug traffickers, and gangs. Even amid good economic times, murder, kidnapping, and extortion rates are worsening nearly everywhere. **The capacities** of weak security sectors **–** civilian police and **judiciary bodies – are overwhelmed** in societies characterized by large numbers of unoccupied and undereducated youth, high income inequality, a ready availability of guns, and the promise of quick money through crime. Polls show citizen security to be a principal public concern, with many countries’ populations calling for harder-line mano dura (“iron fist”) strategies. In response, much of the region – especially Mexico, Central America, the Andes, and the Caribbean – are changing laws and launching programs to put soldiers on the streets to combat common crime. The best-known case is Mexico, where President Felipe Calderón’s December 2006 decision to deploy the armed forces against vicious drug cartels has yet to reduce violence, which has claimed about 30,000 lives in four years. In El Salvador, where murder rates dwarf those of Iraq and Afghanistan, a government run by the Farabundo Martí­ National Liberation Front – the 1980s guerrilla insurgency turned political party – has deployed its former adversary, the Salvadoran military, to the streets to join the police in fighting criminal gangs. Bolivia’s leftist government is urging reluctant armed forces to fight crime in the cities. Even in Chile, where memories of Augusto Pinochet’s repressive regime have kept the army strictly out of public security, Michelle Bachelet’s left-of-center government used soldiers to keep order in the aftermath of a powerful February 2010 earthquake. Using the armed forces for internal security missions is controversial in much of Latin America and the Caribbean. Since few “traditional” military missions (such as external threats) exist today, the region is struggling to define what its armed forces exist to do, and public security appears to provide a politically attractive answer. Yet **the renewed focus on an internal enemy, mixed in with the population, threatens to erode the important civilianization that much of Latin America** and the Caribbean achieved in the 1980s and 1990s. Sharp disagreements over the military’s internal security role were a recurring theme of discussions among the region’s defense ministers during their latest periodic meeting, a November 2010 summit in Bolivia. General welfare Crime-fighting missions provide militaries with budget increases and bigger arms purchases, but generally do not lead to medals or promotions. The greatest military prestige is still attached to preparing for traditional external threats, or projecting military power beyond borders. These goals, along with the high command’s own demand for more sophisticated warships, aircraft, and weapons systems, underlie the costly military modernizations under way in Brazil, Chile, and – in a less clearly planned way – Venezuela. Chile’s recent purchases, including roughly $1 billion in fighter aircraft from the United States and the Netherlands, are billed as replacements for aging 1960s- and 1970s-era equipment. The chief of Chile’s air force claims that they fit “the concept of deterrence, which says ‘don’t mess with me because I can hit back hard.’” Chile’s buildup also owes to a legacy of the Pinochet dictatorship: a constitutional provision that diverts a portion of state copper revenues – which have been running near all-time highs – into an armed forces procurement fund over which civilians exercise little control. The country’s weapons-buying ambitions have been reduced, however, by the high cost of rebuilding after the February 2010 earthquake. Brazil, following a long period of growth that has made it the world’s eighth-largest economy, is undergoing the region’s most ambitious military modernization. With Latin America’s largest population (nearly 200 million) and the region’s largest armed forces, Brazil is abandoning its inward-looking ways and seeking to become the region’s predominant power and a significant global actor. Evidence of this is Brazil’s hosting of the 2014 World Cup and 2016 Olympics, its ambition to gain a permanent seat on the United Nations Security Council, and its ill-fated effort to broker a nuclear compromise with Iran, which enraged the Barack Obama administration. The government of Luis Inácio Lula da Silva (2003 - 2010) concluded that military power is key to Brazil’s rise to global prominence, and Brazil has led the region in arms purchases – among them a 2008 naval deal with France that included a nuclear-powered submarine and significant technology transfers. The naval purchase is not just about prestige; Brazil claims it wants to protect offshore oil discoveries that promise to make it one of the world’s top petroleum suppliers. (Brazilian defense officials have begun referring to the country’s Atlantic territorial waters as their “Blue Amazon.”) Meanwhile, led by manufacturers like Embraer, Brazil is becoming a global arms dealer in its own right. In Brazil, Venezuela, Chile, and elsewhere, however, a little-discussed ulterior purpose lies behind the arms purchases: keeping the high command happy. Almost everywhere in the region, civilian control of the military remains far from complete. Especially where the military gave up power with its political standing more or less intact, or where leftist leaders rule uneasily over an ultraconservative officer corps, many elected governments are willing to yield to the armed forces on questions like pay raises and weapons procurement. The most alarming recent example of such tensions occurred in Ecuador on September 30, 2010, when the national police staged an uprising to protest cuts to their benefits. The military command refused to restore order until it secured a presidential commitment to raise soldiers’ pay. Despite pressure from their high commands, some Latin American and Caribbean countries have refused to participate in the recent shopping spree. The most notable case is Argentina, where the military left power badly discredited after mismanaging the economy, losing the 1982 Falklands War, and “disappearing” as many as 30,000 people. The governments of Néstor and Cristina Kirchner (2003 to the present) have kept defense budgets low. Uruguay and Paraguay have similarly resisted military budget hikes. In Peru, whose economic growth has been particularly healthy, the business community has been willing to see its taxes go to military pay raises, but not to large weapons purchases. The government of Alan Garcí­a even canceled a proposed purchase of Chinese tanks, which the high command had wanted so badly that it included “test-drive” models in a 2009 Lima military parade. In countries not making significant arms purchases, the military’s desire to “keep up” is undoubtedly a source of tension with civilian leaders. In a region that has seen two uprisings or coups since June 2009 (Honduras and Ecuador), some countries’ increased defense spending can spell danger for other countries’ civil-military relations. The rise in arms purchases also has troubling implications for regional security and economic development. A significant expansion of weapons stockpiles, particularly small arms and light weapons, increases the likelihood that, in some future scenario, they will be used. Meanwhile, especially in countries with high poverty rates and low tax collection, arms purchases carry a large opportunity cost. Hundreds of millions spent on defense systems means hundreds of millions not spent on health, infrastructure, and especially education. This may carry a long-term cost in lost competitiveness and productivity that is many times higher than the cost of the weapons themselves. Outselling Washington Interestingly, the United States, which often gets blamed for beefing up the region’s militaries, is not the main vendor in the current wave of arms sales. Richard Grimmett, who tracks weapons transfers to the developing world for the Congressional Research Service, has found that between 2006 and 2009 the United States slipped to number three from its accustomed first-place spot among Latin America’s main arms vendors. Washington has been outsold by the Russians and the French, who market weapons with fewer conditions and transparency requirements, and are more willing to transfer technology. Russia’s largest customer has been Venezuela; France’s has been Brazil. The United States, whose leading customers are Mexico and Colombia, has not increased over recent years the roughly $1 billion to $1.5 billion in arms and military equipment that it sells to the region annually. The stagnation in US sales has been accompanied by an overall diminution of Washington’s role in the region. Although the United States is still the hemisphere’s dominant political and military actor, and the largest provider of aid, its influence is notably reduced. US leadership in the region was badly discredited during the years when the administration of George W. Bush pursued deeply unpopular policies. Ongoing wars elsewhere in the world have distracted Washington’s attention. And the economic crisis that began in 2008 (while economies in Latin America have continued to grow) has crippled US influence. Meanwhile other countries, most notably Venezuela and Brazil, have pursued far more active regional foreign policies. The region has seen an increased presence of and greater participation by extra-hemispheric actors as well – not just arms vendors like Russia and France, but also China, whose voracious demand for raw materials has contributed strongly to recent economic prosperity. Most Chinese interest in Latin America and the Caribbean has been purely economic, and has been driven by rising investment. But military cooperation has included increased arms sales – Chinese light weapons, tanks, and missiles are usually more affordable than competitors’ similar products – as well as modest initiatives in military-to-military engagement and training. The extra-hemispheric actor whose presence most concerns US officials is Iran, which has tightened relations with Venezuela, Bolivia, Nicaragua, Ecuador, and Brazil. While most cooperation to date has been diplomatic and economic, US intelligence agencies are doubtless watching for signs of military cooperation. So far, officials maintain, they have seen little evidence of this. US commentators do voice concerns, however, about Venezuela’s fledgling nuclear program, which may involve the purchase of a reactor from Russia. Chávez insists that the goal is merely to produce peaceful nuclear energy, and Obama has made clear that the United States is not concerned about it as long as Venezuela abides by international nonproliferation commitments. Still, this plan, as well as Venezuela’s supplies of uranium, are no doubt a top focus of US intelligence agencies’ monitoring of Caracas and its ties to Tehran. The nuclear issue is also salient in Brazil, which has two nuclear power plants and a third under construction, and which maintained a covert nuclear weapons program during its 1964 - 1985 military dictatorship. Although Brazil has recently limited the International Atomic Energy Agency’s access to its uranium enrichment facilities, it is not believed to be developing a nuclear bomb, something that its constitution forbids. However, it is quite possible that Brazil’s national ambitions include developing the capacity to assemble a nuclear weapon quickly should it feel the need to do so. Ultimately, though, no country in the region wants at present to be the first to abrogate the Tlatelolco Treaty, which since 1968 has made Latin America and the Caribbean a region free of nuclear weapons. Count the weapons For now, the greater security concern is the proliferation of conventional arms in the region, including both light weapons and the acquisition of ever more costly and sophisticated weapons systems. Arms transfers and defense expenditures have been a principal topic of discussion at gatherings of the region’s political, diplomatic, and defense leaders. While these discussions have done nothing to halt military spending, they have reflected efforts to improve transparency, confidence building, and information sharing. Defense ministries, particularly in South America, have been encouraged to produce “white papers” explaining their threat perceptions, doctrines, military structures, and procurement plans. These have been helpful and should be systematized and made more frequent. The hemisphere’s governments need to do far more than this, however, to declare their intentions and communicate their expenditures. As Lucila Santos of the Washington Office on Latin America has pointed out, it is shameful that in 2011 countries still must learn about their neighbors’ defense capabilities from private outside sources like the Stockholm International Peace Research Institute or Great Britain’s International Institute for Strategic Studies. A common methodology of reporting defense expenditures should be adopted, shared on the internet, and utilized to guide regional discussions of defense and security cooperation. This register should include purchases of small arms and light weapons, which may pose the greatest danger because they are the most likely to be used. Institutions already exist to formalize this. The UN mechanism for standardized international reporting of military expenditures, and a similar mechanism in the Organization of American States (OAS), are weak and vague, and they carry no sanction for nonparticipation. However, a lack of region-wide consensus on transparency regarding weapons information may make an all-encompassing hemispheric agreement impossible in the short term. Peru found this in June 2010 when, as host of the annual OAS General Assembly meeting, it encountered stiff resistance to its effort to make arms transfers the principal agenda topic. More hope exists at the subregional level, particularly in South America. There in 2008 a new organization, the Union of South American Nations, spawned a South American Defense Council. This body adopted a 2009 - 2010 action plan including a common methodology for reporting defense expenditures, which goes well beyond the region’s previous attempts. Unfortunately, while increasing transparency is a laudable and necessary goal, few good options exist for convincing countries to limit their arms purchases, which is ultimately a sovereign decision. Nations that seek to limit arms purchases in the region must continue to employ moral suasion and encourage multilateral discussions. Arms vendor countries, for their part, should show restraint and follow a code of conduct such as that envisioned by a proposed Arms Trade Treaty currently before the United Nations. Latin American and Caribbean countries would also help matters by committing to an avoidance of secret – or even vaguely worded – bilateral military cooperation agreements with powers from outside the region. These agreements – such as the Colombia-US defense cooperation pact or Venezuela’s secret agreement with Russia – increase tensions unnecessarily and should be curbed, or at least brought into the open. Address the Causes For the time being, though, nations in Latin America and the Caribbean are likely to continue increasing their spending on weapons. And **the regional security picture is likely to become still more complicated, as** Washington’s influence wanes, regional leaders like Brazil emerge, outside actors play a greater role, and **democratic civilian control over the military faces new challenges.** For US policy makers confronting this complex picture, the experience of the twentieth century offers poor preparation. The United States is no longer able to act unaccountably as a dominant power, as it did during the “gunboat diplomacy” years. Nor can it treat the hemisphere like a two-player, “with us or against us” chessboard, as it did during the cold war. **Washington is still the most powerful country in the hemisphere**, and that is unlikely to change any time soon. But it must adapt its approach and become more creative. The United States, while recognizing that it can no longer determine every outcome, must orient its policies toward reducing risks to regional security. This means looking beyond narrow “threats” to US interests like Venezuela or Cuba, drugs, or terrorism, and instead cooperating to help countries reduce the concerns – citizen insecurity, organized crime, regional distrust, **uneasy civil-military relations – that are leading them to increase their defense expenditures.** Unlike in the twentieth century, **the hallmarks of US policy should be encouraging demilitarization, strengthening civilian institutions, and fostering bilateral and regional dialogues to reduce threats and counteract the impulse to seek military solutions.** This will be a difficult pivot for many in the US defense and foreign policy communities to execute, but today’s complexity makes clear that there is really no other choice.

#### Exporting CMR deescalates Falkland conflict

Szusterman, 12

(Director of the Latin America Programme at the Institute for Statecraft, “Latin America and Learning from NATO’s Experience,” 12/20, http://www.statecraft.org.uk/sites/statecraft.org.uk/files/documents/NATO%20Papers%2011-Latin%20America%20and%20NATO.pdf

However, despite this regional framework for economic cooperation, “democratic governments […] have not established a democratic process of decision‐making, particularly where security issues are concerned.” Furthermore, **the absence of adequate democratic civilian control over the military in several countries of the region could “potentially undermine the consolidation of democracy in Latin America**”. This is exactly the kind of situation where the NATO political mechanisms discussed above could be of assistance. The north of the region is more challenging from a security and democracy perspective. Venezuela and Ecuador remain suspicious of US involvement in Colombia, while at the same time they have not been prepared to help their neighbour with its own internal security problems, allowing FARC guerrillas to establish havens across the borders. These countries too, despite their mistrust of NATO, would have a lot to gain from adopting Alliance mechanisms and processes. Because Mercosur has not addressed the fundamental security issues it is not evolving and growing and may even be in danger of decline. Protectionist trade policies adopted recently by Argentina, and to a lesser extent, by Brazil, have strained relations. Economic integration and increasingly regionalisation, as in seen in the creation of UNASUR – the Union of South American Nations, have added a **new dimension to Argentina’s claim over the Falkland/Malvinas Islands**. Argentina uses the UNASUR annual summit conferences to exert pressure on the United Kingdom to undertake negotiations for the transfer of sovereignty without reference to the wishes of the population of the Islands. But UNASUR also has no adequate political mechanisms on the NATO model to address such security disputes, and is most certainly another worthy candidate for the introduction of such political tools for regional conflict prevention and resolution. New security challenges are a further reason to follow NATO’s example. In the 1960s state weakness justified the need for US military intervention and reinforced the internal security role of local armies, to the detriment of democracy. Today, there is a danger that new security challenges (organised crime, drug trafficking, illegal migration, the spilling of domestic instability across borders) might do the same unless steps are taken to confront these challenges in a different way. Although social violence has deep historical roots in countries like Mexico, Colombia, Brazil and Bolivia, it is relatively new in countries like Argentina and Chile. But it is Central America where the new security challenges related to organised crime are most serious. Experts believe that the transit route for up to 90% of all South American produced cocaine destined for the US market goes through this region. This has turned it, and especially Guatemala, Honduras and El Salvador, into the area with the highest peacetime murder rates in the world. The increase in violence has overwhelmed the police forces in the area, many of them accused of involvement in arms and drug trafficking. **NATO-style political mechanisms are urgently needed to improve the regional security collaboration without which these threats will multiply.**

#### Causes global war

Rozoff, 10

(2/23, MA-European History & Manager-Stop NATO International, South Atlantic: Britain May Provoke New Conflict With Argentina

http://rickrozoff.wordpress.com/2010/02/23/south-atlantic-britain-may-provoke-new-conflict-with-argentina/

Her Venezuelan colleague President Hugo Chavez, indicating the dangerous dimension a new British-provoked altercation with Argentina can escalate into, said, “The English are still threatening Argentina. Things have changed. We are no longer in 1982. **If conflict breaks out, be sure Argentina will not be alone like it was back then.**” [8] Before the summit began he said, “We support unconditionally the Argentine government and the Argentine people in their complaints. That sea and that land belongs to Argentina and to Latin America.” [9] He reiterated that position during his speech on February 22. While highlighting the military threat posed by Britain off the coast of Argentina, he alluded to a British submarine site in the Falklands/Las Malvinas and said “we demand not only [that] the submarine platform…be removed, but also [that] the British government…follow the resolutions of the United Nations and give back that territory to the Argentine People.” [10] Nicaragua’s President Daniel Ortega, also in attendance at the summit, stated “We will back a resolution demanding that England return Las Malvinas to its rightful owner, that it return the islands to Argentina.” [11] The Times of London quoted Marco Aurelio Garcia, foreign policy adviser to Brazil’s President Lula da Silva, as adding: “Las Malvinas must be reintegrated into Argentine sovereignty. Unlike in the past, today there is a consensus in Latin America behind Argentina’s claims.” [12] The comments by Venezuela’s president, addressing as they did the threat of a new military confrontation between Britain and Argentina, bear particular scrutiny in light of recent actions by London and statements by its head of state. In late December Britain conducted a two-day military operation off the coast of the Falklands/Las Malvinas which included the use of Typhoon multi-role fighters and warships. The exercises, code-named Cape Bayonet, “took place during a tour of the Falklands by British forces ahead of the start of drilling in the basin in February 2010″ and “simulated an enemy invasion….” [13] A news report at the time added, “Britain has strengthened its military presence in the Falklands since the [1982] war and has a major operational base at Mount Pleasant, 35 miles from the capital Stanley. “The prospect of the islands transforming into a major source of oil revenue for Britain has raised the military’s argument for more funding to beef up the forces in South Atlantic.” [14] Four days before British drilling began off the islands, Prime Minister Gordon Brown stated “We have made all the preparations that are necessary to make sure that the Falkland Islanders are properly protected,” [15] although Argentine officials have repeatedly denied the possibility of a military response to British encroachments and provocations in the South Atlantic Ocean. On the same day, February 18, Argentina’s Vice Minister of Foreign Relations Victorio Taccetti accused Britain of “a unilateral act of aggression and subjugation” [16] in moving to seize oil and gas in the disputed region. Buenos Aires has prohibited ships from going to and coming from the Falklands/Las Malvinas through Argentine waters. What is at stake are, according to British Geological Survey estimates, as many as 60 billion barrels of oil under the waters off the Falklands/Las Malvinas. In late January a Russian military analyst explained that even that colossal energy bonanza is not all that Britain covets near the Falklands/Las Malvinas and further south. Ilya Kramnik wrote that “along with the neighboring islands controlled by the U.K., the Falklands are the de facto gateway to the Antarctic, which explains London’s tenacity in maintaining sovereignty over them and the South Georgia and the South Sandwich Islands, as well as territorial claims regarding the South Shetland and South Orkney Islands under the Antarctic Treaty.” Regarding Antarctica itself, “Under the ice, under the continental shelf, there are enormous mineral resources and the surrounding seas are full of bio-resources. In addition, the glaciers of Antarctica contain 90% of the world’s fresh water, the shortage of which becomes all the more acute with the growth in the world’s population.” [17] A Chinese analysis of over two years earlier described what Britain in part went to war for in 1982 and why it may do so again: Control of broad tracts of Antarctica. “The vastness of seemingly barren, ice-covered land is uncovered and exposed to the outside world, revealing a ‘treasure basin’ with incredibly abundant mineral deposits and energy reserves….A layer of Permian Period coal exists on the mainland, and holds 500 billion tons in known reserves. “The thick ice dome over the land is home to the world’s largest reservoir for fresh water; holds approximately 29.3 million cubic kilometers of ice; and makes up 75% of earth’s fresh water supply. “It is possible to say that the South Pole could feed the entire world with its abundant supplies of food [fish] and fresh water…[T]he value of the South Pole is not confined to the economic sphere; it also lies in its strategic position. “The US Coast Guard has long had garrisons in the region, and the US Air Force is the number one air power in the region.” [18] The feature from which the preceding excerpts originated ended with a warning: “[T]he South Pole [Antarctic] Treaty points out that the South Pole can only be exploited and developed for the sake of peace; and can not be a battle ground. Otherwise, the ice-cold South Pole could prove a fiercely hot battlefield.” [19] Two days before the May 13, 2009 deadline for “states to stake their claims in what some experts [have described] as the last big carve-up of maritime territory in history,” [20] Britain submitted a claim to the United Nations Commission on the Limits of the Continental Shelf for one million square kilometers in the South Atlantic reaching into the Antarctic Ocean. An article in this series written five days afterward detailed the new scramble for Antarctica initiated by Britain and Australia, the second being granted 2.5 million additional square kilometers in the Antarctic Ocean in April of 2008. [21] A newspaper in the United Kingdom wrote about London’s million-kilometer South Atlantic and Antarctic ambitions beforehand that “Not since the Golden Age of the Empire has Britain staked its claim to such a vast area of land on the world stage. And while the British Empire may be long gone, the Antarctic has emerged as the latest battleground for rival powers competing on several fronts to secure valuable oil-rich territory….The Falklands claim has the most potential for political fall-out, given that Britain and Argentina fought over the islands 25 years ago, and the value of the oil under the sea in the region is understood to be immense. Seismic tests suggest there could be about 60 billion barrels of oil under the ocean floor.” [22] Last autumn a Russian news source warned about the exact initiative of this February 22 in stating “Many believe that the 1982 war between Britain and Argentina with almost 1,000 servicemen killed in the hostilities was all about oil and gas fields in the South Atlantic. In this sense, Desire Petroleum should certainly think twice before starting to capitalize on what was a subject of the bloodbath in 1982….” Regarding the territorial claims submitted by Britain last May (still in deliberations at the UN Commission on the Limits of the Continental Shelf), the report pointed out London’s “eagerness to expand its Falkland Islands’ continental shelf from 200 to 350 nautical miles, which would enable Britain to develop new oil fields in South Georgia and the South Sandwich Islands,” and ended with a somber warning: “Given London’s unwillingness to try to arrive at a political accommodation with Buenos Aires, a UN special commission will surely have tougher times ahead as far as its final decision on the continental shelf goes. And it is only to be hoped that Britain will be wise enough not to turn the Falkland Islands into another **regional hot spot**.” [23] Unlike the first South Atlantic war of 1982, when the regime of General Leopoldo Galtieri garnered no support from other Latin American nations, a future standoff or armed conflict between Argentina and Britain over the Falklands/Las Malvinas **will see Latin American and Caribbean states acting in solidarity with Argentina**. If the United Kingdom succeeds in provoking a new war, it in turn will appeal to its NATO allies for logistical, surveillance and other forms of assistance, including **direct military intervention** if required. In addition to the U.S. and Canada, Britain’s NATO allies in the Western Hemisphere include France and the Netherlands with their possessions and military bases in the Caribbean and South America. Britain is **playing with fire** and if it **ignites a new conflict it could rapidly spread far beyond** the waters off the southern tip of **South America.**

### adv 2

#### Adv 2—SOP

#### Lack of a clear statement rule on detention destroys US credibility--makes it impossible to promote the rule of law globally

Wells, 9

(President-American Bar Association, Brief Amicus Curiae of American Bar Association in Support of Petitioner, Al Marri v. Spagone, 1/28, WestLaw)

For over two hundred years, whenever this nation has been confronted by war, our government has struggled to achieve a proper balance between the protection of the people and each person's individual rights. After the September 11, 2001 attack, Congress and the President were forced to take unprecedented steps to ensure the safety of this nation and of innocents worldwide. While recognizing the government's responsibility to work to prevent another attack on our nation, ABA asserts that this country must also be vigilant in defining those lines that cannot be crossed. As our national experience has taught us: [W]e must be on constant guard against excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. \*5 \*\*\* And we must ever keep in mind that “the Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. Duncan v. Kahanamoku, 327 U.S 304, 335 (1946) (Murphy, J. concurring) (quoting Ex parte Milligan, 71 U.S. 2, 120-21 (1866)). The ABA believes that the methods employed in the cause of national security, even in grave times, must comply with constitutionally permissible statutory law and policy, and with international law to which the United States is a signatory. As this Court stated, “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of … those liberties … which make[] the defense of the Nation worthwhile.” United States v. Robel, 389 U.S. 258, 264 (1967). Accordingly, the ABA, through its members and appointed Task Forces, has studied the Acts of Congress and the implementing orders of the Executive that have resulted from the September 11, 2001 attack. Based on the experiences and judgment of a broad range of legal practitioners, the ABA has adopted policies4 that it believes strike the appropriate \*6 balance between national security needs and the preservation of our fundamental freedoms, as well as the preservation of the constitutionally established balance of powers among our branches of government. At the heart of the ABA's policies is the conclusion that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military, detention unless such persons are given the opportunity for prompt meaningful judicial review, with meaningful access to, and effective assistance of, counsel, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures. In February 2002, five months after the September 11, 2001 terrorist attack, the ABA voiced concern about the military order titled, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” This order was issued by President Bush, assertedly pursuant to his authority as President and Commander in Chief under the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224 (“AUMF”). After careful study, the ABA adopted a policy specifically urging that the President and Congress assure that neither this military order, nor any similar military order that might be issued, would be deemed applicable to United States citizens, lawful resident aliens, and other persons lawfully present in the \*7 United States.5 The ABA did so because the military order authorized military commissions that, in the \*8 ABA's opinion, would not satisfy constitutional minimum guarantees and would entail substantially fewer protections than those required for trials conducted in federal district court or under the Uniform Code of Military Justice.6 Concerned that constitutional safeguards were not being properly considered in connection with other military orders and actions taken by the Executive, the ABA formed a Task Force on Treatment of Enemy Combatants in March 2002. This Task Force was charged with examining the constitutional, statutory, and international law and policy questions raised by the detention of “enemy combatants.” In February 2003, the Task Force submitted its resolutions and report to the ABA House of Delegates, after having circulated them in preliminary form to ABA members, working groups from the ABA's Criminal Justice Section and the Section of Individual Rights and Responsibilities, and the Congress and the Executive. The resolutions, which were adopted as ABA policy in February 2003, focused on the safeguards that should \*9 be employed when the government designates and detains, as “enemy combatants,” United States citizens or other persons lawfully present in the United States.7 \*10 In its accompanying report,8 the Task Force noted that the cases of Yaser Hamdi and Jose Padilla, both United States citizens, were then proceeding through the courts. The Task Force concluded that these cases raised troublesome and profound issues, especially in light of the observation by the United States Court of Appeals for the Fourth Circuit that the government had taken the position that “with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so.” Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002). The Task Force noted that the Executive had maintained that its power to detain “enemy combatants” indefinitely without bringing criminal charges derived from Supreme Court precedent, in particular, Ex parte Quirin, 317 U.S. 1 (1942), and from the laws of war. The Task Force noted, however, that the Quirin defendants were able to seek review and were represented by counsel. Further, the question for decision had been whether their detention for trial by Military Commission was “in conformity with the laws and Constitution of the United States.” Quirin, 317 U.S. at 18. Since the Quirin Court had held that these enemy aliens - who were not lawfully within the United States - were entitled to judicial review, the Task Force concluded that the same entitlement could not be denied to United States citizens and other persons lawfully present in the United States, especially when held without charges. \*11 Specifically as to the AUMF, the Task Force concluded that neither the AUMF nor any laws enacted in response to terrorist attacks expressly authorized detention of United States citizens as “enemy combatants.” Further, 18 U.S.C. § 4001(a) raised serious questions about using the AUMF in support of such detentions.9 The Congressional House Report accompanying the legislation that became Section 4001(a) stated that the purpose of the bill was “to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists” and to repeal the Emergency Detention Act of 1950 (“EDA”). See H.R. Rep. No. 92-116, at 1435 (1971). The EDA had been enacted at the beginning of the Korean War and had authorized the establishment of domestic detention camps to hold, during internal security emergencies, individuals deemed likely to engage in espionage or sabotage. Id. at 1435-36. The House Report noted that “the constitutional validity of the Detention Act was subject to grave challenge because it allowed for detention merely if there was reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage.” Id. at 1438. The Task Force concluded that, if the AUMF is nevertheless interpreted as authorizing detentions of “enemy combatants” including United States citizens and others lawfully present in the United States, standards for detention must be established and judicial review must be required to determine, with appropriate \*12 deference to the President's determination, whether the detention meets those standards. However, the Task Force noted, appropriate deference does not mean that the courts may not review Executive determinations as to the scope of its authorization. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (executive order taking possession of private property was not sustained as exercise of President's military power as Commander in Chief, even though “theater of war” was an expanding concept). Courts have preserved their role in reviewing Executive detentions even in times of war. See, e.g., Robel, 407 U.S. at 1318-19 (“The standard of judicial inquiry must also recognize that the ‘concept’ of ‘national defense’ cannot be deemed an end in itself, justifying an exercise of [executive] power designed to promote such a goal”). See also, In re Yamashita, 327 U.S. 1, 8 (1946) (“The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner”). Based on this analysis, the Task Force concluded that “enemy combatants” who were citizens or lawfully within the United States, and who had not been charged with a crime or a violation of the law of war, must be afforded a prompt opportunity for meaningful judicial review of the legal basis for their detention. This review, further, must include the right to effective assistance of counsel, since the right to judicial review could well be meaningless if detainees were not afforded effective assistance of counsel in challenging their detention. The Task Force also noted that legislation was required that would establish constitutionally acceptable standards and procedures under which a court \*13 could determine whether continued detention was permissible. This was necessary because, in the Task Force's opinion, the AUMF and, accordingly, Section 4001(a), were applicable to detentions of United States citizens and others lawfully present in the United States as “enemy combatants.” Compare, Hamdi, 542 U.S. 507, 519 (2004) (Congress “clearly and unmistakably” authorized detention under the AUMF “in the narrow circumstances considered here” of an armed Taliban soldier captured in combat). Certainly **Congressional silence has never been sufficient to authorize military jurisdiction over civilians seized while legally within the United States**. See, e.g., Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (in authorizing “martial law” under Hawaiian Organic Act, Congress did not authorize supplanting of courts by military tribunals); Milligan, 71 U.S. at 136-37 (Chase, C.J., concurring) (where provisions of act contemplated no trial or sentence other than by civil court, trial by military commission could not be asserted). If the Executive is to be authorized to assert military jurisdiction over citizens or persons lawfully present in the United States and to dispense with their constitutionally guaranteed criminal due process rights, then Congress must say so and fixed procedures governing such jurisdiction must be in place. As stated in the ABA policy: “FURTHER RESOLVED, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens, residents and others who are detained within the United States as “enemy combatants.” \*14 Finally, the Task Force concluded that, in setting and executing national policy regarding citizens and other persons lawfully present in the United States who are detained as “enemy combatants,” both Congress and the Executive should consider how that policy may affect the response of other nations to future acts of terrorism. The Task Force noted that international agreements and principles recognized by the United States, which include the Universal Declaration of Human Rights10 and the International Covenant on Civil and Political Rights,11 support the protection of individuals from arbitrary detention and guarantee a meaningful review of a detainee's status. These and other international human rights treaties, conventions and jurisprudence are the result, in substantial \*15 part, of **the leadership of the United States and its efforts to promote the rule of law**. The ABA also notes that, **throughout the world, constitutions and rules of criminal procedure reflect the United States' influence and leadership in promoting the rule of law.** The ABA has played a role in those efforts, especially through its Rule of Law Initiative. This Initiative assists countries, **including the former Soviet republics and countries in Europe, Eurasia, Asia, Africa, the Middle East and Latin America, to develop and implement legal reforms and respect for the rule of law**.12 The training programs that the ABA conducts for attorneys and judges in these countries help to ensure the growing force of the rule of law.13 **Reaffirmation of the rights of U.S. citizens and legal residents to access to the courts encourages the adoption of the rule of law, solidifies our relations with other nations, and works to protect our country and the world from terrorism. The denial of the protection of judicial process to those declared to be “enemy combatants” undermines these important goals**. As Lord Peter Goldsmith, then Attorney General of the United Kingdom, stated in a speech to the ABA House of Delegates, the threat of terrorism “does not mean that we have an unlimited license to throw away our values for the sake of expediency”; rather the rule of law requires “subjecting executive action \*16 **to the scrutiny of the democratic institutions and also of the courts, for judicial scrutiny is a key part of the rule of law**.”14 CONCLUSION The American Bar Association, as amicus curiae, respectfully requests that this Court hold that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless such persons are given the opportunity for prompt meaningful judicial review, with meaningful access to, and effective assistance of, counsel for such review, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

#### Reversing the Al-Marri decision key---misreading legislative precedent shatters our influence

Atwood, 9

(Et. Al, Frmr. USAID Administrator, Amicus Brief, Al-Marri v Spagone, Brief of Frmr. US Diplomats, 1/28, http://www.brennancenter.org/sites/default/files/legacy/Justice/20090128.Almarri.v.Sapgone.Amicus.Brief-Former.U.S.Diplomats.pdf)

One hallmark of a dictatorship is the government’s assertion of a right to arrest and indefinitely imprison anyone within its borders, citizen or non-citizen, without criminal trial or charges, and to confine such individuals in harsh and inhumane conditions. Aside from undercutting our ability to exercise moral suasion against such regimes, a decision upholding such a claimed right by the United States Executive will ill-serve our country as we seek to restore our international reputation and to obtain more cooperation from our allies in combating terrorism, in supporting our efforts in the wars in Afghanistan and Iraq, and in dealing with the Israeli-Palestinian conundrum. Our professional experience informs us that the United States faces an international credibility gap resulting from a “do as I say not as I do” foreign policy that placed perceived threats to American security as the paramount ethic above its once venerated respect for freedom from unjustified restraints on liberty. Indeed, in its prosecution of the war on terror, the United States has largely dispensed with its most valuable diplomatic asset – its values – and adopted a duplicitous stance that exempts our country from the same standard to which we expect others to adhere. We have come to believe, in our representation of this country to other nations, that those nations are more willing to accept American leadership and counsel to the extent that they see us as true to the principle of freedom under the law. Yet, the evidence is clear that the world has taken notice of, and reacted negatively to, our government’s increasing willingness to dispense with first principles of individual liberty. The State Department Legal Advisor in the previous Administration has acknowledged Guantanamo’s disastrous impact on our foreign relations, calling it a “huge black eye for the United States – an albatross round our neck.”3 The group Human Rights Watch now lists Petitioner’s detention as an “enemy combatant” in annual reports detailing world-wide human rights abuses.4 The group specifically warns of the increasing danger of U.S. policy in applying war-time powers against its residents and the perilous path upon which the U.S. has embarked. As elaborated in its 2004 World Report: The U.S. Government asserts that its treatment of … al-Marri is sanctioned by the laws of war (also known as international humanitarian law) …. But the U.S. government is **seeking to make the entire world a battlefield in the amorphous, ill-defined, and most likely never ending “war against terrorism**.” By its logic, any individual believed to be affiliated in any way with terrorists can be imprisoned indefinitely …. The laws of war were never intended to undermine the basic rights of persons, whether combatants or civilians, but **the administration’s rereading of the law does just that**.5 Before the House Subcommittee on International Relations, a former Assistant Secretary of State for Democracy, Human Rights and Labor, testified that current U.S. policy detracts from our long term diplomatic goals in that it “needlessly antagoniz[es] our allies …. [and] unwittingly diminish[es] our capacity for exceptional leadership to address the global human rights challenges ahead.”6 Petitioner’s detention is specifically cited as an example of a practice that “encourage[s] other countries to commit similar abuses in the name of fighting terrorism and [as] undermin[ing] our ability to protest when they do.”7 The double standards of the U.S. approach to human rights abroad and at home with regard to Petitioner, as well as Guantanamo, **present an insurmountable challenge to our diplomatic mission. This is so because our most effective diplomatic weapon – our nation’s moral standing – is lost when our government holds itself to a different standard than it would have other countries apply.** Consider that the United States Department of State provides an annual report to the Speaker of the House of Representatives and the Senate Committee on Foreign Relations offering “a full and complete report regarding the status of internationally recognized human rights” for essentially all countries in the world.8 Among the offenses against “internationally recognized human rights” acknowledged and reported by the State Department are instances of “arbitrary arrest or detention” and “denial of fair public trials” – precisely what has happened to the Petitioner here.9 Petitioner has been held without criminal trial or legal justification for nearly eight years. He also alleges that he was held for periods as long as sixteen months incommunicado, when his family was denied access to see him, as were his attorneys. Petitioner further alleges that he was interrogated repeatedly in ways that bordered on torture, including sleep deprivation, painful stress positions, extreme sensory deprivation, and threats of violence or death.10 Compare this treatment with the further State Department report on human rights abuses in Iran, one of the most notorious totalitarian regimes in the world. For Iran, the State Department catalogued as human rights abuses the fact that: Detainees often went weeks or months without charges or trial, frequently were denied prompt contact with family, and often were denied access to legal representation for prolonged periods ….[M]any detainees were held incommunicado …. In practice there was neither a legal time limit for incommunicado detention nor any judicial means to determine the legality of the detention ….11 This same State Department report on human rights abuses for Iran also describes common methods of prisoner abuse “includ[ing] prolonged solitary confinement with sensory deprivation, … long confinement in contorted positions, … [and] threats of execution if individuals refused to confess ….”12 The United States has historically been viewed as a beacon of light for its commitment to a basic tenet of Anglo-American law – that no one may be subjected to indefinite detention without charge, and that the conditions of justified confinement shall be humane. In our professional experience, we have found our commitment to these fundamental precepts of human dignity to be the strongest asset of American diplomacy. The admiration and respect for this nation abroad is a function of our own commitment to liberty under law and we have led the world in this cause. When our nation is perceived as applying these principles selectively, or ignoring them all together, our voice abroad is not only weakened but our adversaries are also emboldened to conduct the very type of treatment against which we have historically rallied. For example, explaining the detention of militants without trial, Malaysia’s law minister said that the practice was “just like the process in Guantanamo Bay.”13 Egypt has also moved to detain human rights campaigners as threats to national security, as have Ivory Coast, Cameroon and Burkina Faso.14 Russia, in its recent campaign in Georgia and brutality in Chechnya, has also heralded the war on terror as its primary justification.

#### SOP model from detention key---solves global instability

Knowles, 9

(Law Prof-NYU, “Article: American Hegemony and the Foreign Affairs Constitution”, 41 Ariz. St. L.J. 87, Spring, Lexis)

**The hegemonic model** also **reduces the need for executive branch flexibility**, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system **depends on the ability of the U.S. to govern effectively**. Effective governance **depends on**, among other things, **predictability**. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 **Stable interpretation of the** **law** **bolsters the stability of the system** because other nations will know that they can rely on those interpretations and that there will be at least some degree of **enforcement** by the United States. At the same time, the **s**eparation **o**f **p**owers **serves the global-governance function** by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424 The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429 In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. **Instead, the danger is that American rule-breaking will set a pattern** of rule-breaking **for the world, leading to instability**. n431 America's military predominance enables it to set the rules of the game. **When the U.S. breaks its own rules, it loses legitimacy**.

#### Democratic liberalism backsliding now---the US model of an unrestrained executive causes collapse

Diamond, 9

(Poli Sci Prof-Stanford, “The Impact of the Global Financial Crisis on Democracy”, Presented to the SAIS-CGD Conference on New Ideas in Development after the Financial Crisis, Conference Paper)

Concern about the future of democracy is further warranted by the gathering signs of a **democratic recession**, even before the onset of the global economic recession. During the past decade, the global expansion of democracy has essentially leveled off and hit an equilibrium While freedom (political rights and civil liberties) continued to expand throughout the post-Cold War era, that progress also halted in 2006, and 2007 and 2008 were the worst consecutive years for freedom since the end of the Cold War, with the number of countries declining in freedom greatly outstripping the number that improved. Two-thirds of all the breakdowns of democracy since the third wave began in 1974 have occurred in the last nine years, and in a number of strategically important states like Russia, Nigeria, Venezuela, Pakistan and Thailand. Many of these countries have not really returned to democracy. And **a number of countries linger in a twilight zone between democracy and authoritarianism**. While normative support for democracy has grown around the world, it remains in many countries, tentative and uneven, or is even eroding under the weight of growing public cynicism about corruption and the self-interested behavior of parties and politicians. Only about half of the public, on average, in Africa and Asia meets a rigorous, multidimensional test of support for democracy. Levels of distrust for political institutions—particularly political parties and legislatures, and politicians in general—are very high in Eastern Europe and Latin America, and in parts of Asia. In many countries, 30-50 percent of the public or more is willing to consider some authoritarian alternative to democracy, such as military or one-man rule. And where governance is bad or elections are rigged and the public cannot rotate leaders out of power, skepticism and defection from democracy grow. Of the roughly 80 new democracies that have emerged during the third wave and are still standing, probably **close to three-quarters are insecure and could run some risk of reversal during adverse** global and domestic **circumstances**. Less at risk—and probably mostly consolidated—are the more established developing country democracies (India, Costa Rica, Botswana, Mauritius), and the more liberal democracies of this group: the ten postcommunist states that have been admitted to the EU; Korea and Taiwan; Chile, Uruguay, Panama, Brazil, probably Argentina; a number of liberal island states in the Caribbean and Pacific. This leaves about 50 democracies and near democracies—including such big and strategically important states as Turkey, Ukraine, Indonesia, the Philippines, South Africa, certainly Pakistan and Bangladesh, and possibly even Mexico—where **the survival of constitutional rule cannot be taken for granted.** In some of these countries, like South Africa, the demise of democracy would probably come, if it happened, not as a result of a blatant overthrow of the current system, **but rather via a gradual executive strangling of** political **pluralism and freedom**, or a steady decline in state capacity and political order due to rising criminal and ethnic violence. Such circumstances would also swallow whatever hopes exist for the emergence of genuine democracy in countries like Iraq and Afghanistan and for the effective restoration of democracy in countries like Thailand and Nepal.

#### Great power war

Gat, 11

(National Security Prof-Tel Aviv University, “The Changing Character of War,” in The Changing Character of War, ed. Strachan & Scheipers, P. 30-32)

Since 1945, the decline of major great power war has deepened further. Nuclear weapons have concentrated the minds of all concerned wonderfully, but no less important have been the institutionalization of free trade and the closely related process of rapid and sustained economic growth throughout the capitalist world. The communist bloc did not participate in the system of free trade, but at least initially it too experienced substantial growth, and, unlike Germany and Japan, it was always sufﬁciently large and rich in natural resources to maintain an autarky of sorts. With the Soviet collapse and with the integration of the former communist powers into the global capitalist economy, the prospect of a major war within the developed world seems to have become very remote indeed. This is one of the main sources for the feeling that war has been transformed: its geopolitical centre of gravity has shifted radically. The modernized, economically developed parts of the world constitute a ‘zone of peace’. War now seems to be conﬁned to the less-developed parts of the globe, the world’s ‘zone of war’, where countries that have so far failed to embrace modernization and its pacifying spin-off effects continue to be engaged in wars among themselves, as well as with developed countries. While the trend is very real, one wonders if the near disappearance of armed conﬂict within the developed world is likely to **remain as stark** as it has been since the collapse of communism. The post-Cold War moment may turn out to be a **ﬂeeting** one. The probability of major wars within the developed world remains low—because of the factors already mentioned: increasing wealth, economic openness and interdependence, and nuclear deterrence. But the deep sense of change prevailing since 1989 has been based on the far more radical notion that the triumph of capitalism also spelled the irresistible ultimate victory of democracy; and that in an afﬂuent and democratic world, major conﬂict no longer needs to be feared or seriously prepared for. This notion, however, is **fast eroding** with the return of capitalist non-democratic great powers that have been absent from the international system since 1945. Above all, there is the formerly communist and fast industrializing authoritarian-capitalist China, whose massive growth represents the greatest change in the global balance of power. Russia, too, is retreating from its postcommunist liberalism and assuming an increasingly authoritarian character. Authoritarian capitalism may be **more viable than people tend to assume**. 8 The communist great powers failed even though they were potentially larger than the democracies, because their economic systems failed them. By contrast, the capitalist authoritarian/totalitarian powers during the ﬁrst half of the twentieth century, Germany and Japan, particularly the former, were as efﬁcient economically as, and if anything more successful militarily than, their democratic counterparts. They were defeated in war mainly because they were too small and ultimately succumbed to the exceptional continental size of the United States (in alliance with the communist Soviet Union during the Second World War). However, the new non-democratic powers are both large and capitalist. China in particular is the largest player in the international system in terms of population and is showing spectacular economic growth that within a generation or two is likely to make it a true non-democratic superpower. Although the return of capitalist non-democratic great powers does not necessarily imply open conﬂict or war, it might indicate that the democratic hegemony since the Soviet Union’s collapse could be **short-lived** and that **a universal ‘democratic peace’ may still be far off**. The new capitalist authoritarian powers are deeply integrated into the world economy. They partake of the development-open-trade-capitalist cause of peace, but not of the liberal democratic cause. Thus, it is crucially important that any protectionist turn in the system is avoided so as to prevent a grab for markets and raw materials such as that which followed the disastrous slide into imperial protectionism and conﬂict during the ﬁrst part of the twentieth century. Of course, the openness of the world economy does not depend exclusively on the democracies. In time, China itself might become more protectionist, as it grows wealthier, its labour costs rise, and its current competitive edge diminishes. With the possible exception of the sore Taiwan problem, China is likely to be less restless and revisionist than the territorially conﬁned Germany and Japan were. Russia, which is still reeling from having lost an empire, may be more problematic. However, as China grows in power, it is likely to become more assertive, ﬂex its muscles, and behave like a superpower, even if it does not become particularly aggressive. The democratic and non-democratic powers may coexist more or less peacefully, albeit warily, side by side, armed because of mutual fear and suspicion, as a result of the so-called ‘security dilemma’, and against worst-case scenarios. But there is also the prospect of more antagonistic relations, accentuated ideological rivalry, **potential and actual conﬂict,** intensiﬁed arms races, and even new cold wars, with spheres of inﬂuence and opposing coalitions. Although great power relations will probably vary from those that prevailed during any of the great twentieth-century conﬂicts, as conditions are never quite the same, they may vary less than seemed likely only a short while ago.

#### Supreme Court actions on detention modeled in Iraq---lack of credibility on detention decimates our signal

Scharf, 9

(PILPG Managing Director, with John Drinko-Law Prof-Case Western, “BRIEF OF THE PUBLIC INTERNATIONAL LAW & POLICY GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS”, www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_PetitionerAmCuPILPG.authcheckdam.pdf)

As the foregoing examples illustrate, **foreign governments rely on the precedent set by the U.S. and this Court when addressing new and complex issues in times of conflict.** Finding for the Petitioners in the present case will reaffirm this Court’s leadership in promoting respect for rule of law in foreign states during times of conflict. B. **Foreign Judges Follow U.S. and Supreme Court Leadership in Times of Conflict.** In addition to its work advising foreign governments, PILPG has been and continues to be involved in a number of judicial training initiatives in foreign states. These initiatives aim to foster independent and fair judicial systems in transitional and post-conflict states throughout Central and Eastern Europe, **Africa, and the Middle East**. In these trainings, PILPG frequently **relies on the work of this Court to illustrate and promote adherence to the rule of law**. In 2004, for example, PILPG led a week-long training session for Iraqi judges in Dubai on due process and civil liberties protections to institute in the new post-Saddam legal system. The training was seen as an **important step toward the democratization of Iraq**, and something that would hasten the ability of the U.S. to withdraw its troops from Iraq. On the second day of the training program, local and international media published the leaked photos of the abuses at Abu Ghraib. The Iraqi judges would not allow the training sessions to continue until PILPG answered to their satisfaction questions about whether the U.S. judicial system could ensure that the perpetrators would be brought to justice, that the victims would be able to bring suit for their injuries, and that the abuses would be halted. When PILPG returned for another training session several months later, the Iraqi judges had mixed reactions to the prosecutions of the Abu Ghraib perpetrators. Some judges perceived the U.S. Prosecutions of the perpetrators as not aggressive enough, which **left the Iraqi judges with the impression that the U.S. was not leading by example**. Although other Iraqi judges appreciated and sought to follow the U.S. example to try those responsible for abuses before an independent tribunal, it was clear that Abu Ghraib temporarily set back U.S. efforts to establish rule of law in Iraq. A year later, in 2005, PILPG conducted training sessions for the Iraqi high tribunal judges who would be presiding over the trial of Saddam Hussein and other former leaders of the ba’athist regime. Even more than the human rights training of ordinary Iraqi judges discussed above, the successful operation of the Iraqi high tribunal was seen as critical to suppressing the spread of sectarian violence and heading off a full-scale civil war in Iraq. The objectives of the tribunal were twofold. First, the tribunal sought to bring those most responsible for the atrocities committed under the Ba’athist regime before an independent panel of judges to be tried under international standards of justice. Second, the tribunal sought to establish a model for upholding and implementing rule of law in Iraq and to demonstrate that the need for rule of law is greatest in response to the gravest atrocities. During the training sessions, the Iraqi judges requested guidance on controlling disruptive defendants in the courtroom. Specifically, the judges **asked whether they could bind and gag the defendants in the courtroom as they understood had been done to the defendants in the 1969 “Chicago Seven” trial in the U.S**. PILPG explained that the U.S. Court of Appeals had ultimately overturned the convictions in that case, in part because of the mistreatment of the defendants in the courtroom. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972). This information **persuaded the Iraqi judges to seek less draconian means of control** in the trial of Saddam Hussein, which was televised gavel to gavel in Iraq. See generally Michael Newton and Michael Scharf, Enemy of the State: The Trial and Execution of Saddam Hussein (2008). Foreign judicial interest in U.S. respect for rule of law during the war on terror is not limited to Iraqi judges. In 2006, PILPG conducted sessions in a weeklong rule of law training program in Prague for fifty judges from former Soviet Bloc countries in Eastern Europe. At the start of the first session, one of the judges asked “Sobriaetes’ li vi goverit’ o slone v komnate?,” which translates to “Are you going to be addressing the elephant in the room?” Michael P. Scharf, The Elephant in the Room: Torture and the War on Terror, 37 Case W. Res. J. Int’l L. 145, 145 (2006). The question referred to the so-called “White House Torture Memos,” released just before the training session began, which asserted that Common Article 3 of the 1949 Geneva Conventions was not applicable to detainees held at Guantanamo Bay and which provided justification for Military Commissions whose procedures would not meet the Geneva standards. Id. at 145-46. The group of judges asked PILPG to explain “how representatives of the United States **could expect to be taken seriously in speaking about the importance of human rights law when the United States itself has recently done so much that is contrary to that body of law in the context of the so-called ‘Global War on Terror**.’” Id. at 145. PILPG addressed judges’ concerns by explaining that the President’s decision to establish Military Commissions via Executive Order, and whether those Commissions had to comport with the Geneva Conventions, was currently being reviewed by this Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and that the Executive Branch would be bound to follow the holding of this Court. Scharf, supra, at 148. **Foreign judges closely follow the work of this Court and the example set by the U.S. Government in upholding the rule of law during the war on terror**. As these examples illustrate, **when the U.S. upholds the rule of law, foreign judges are more likely to follow.**

#### Improving governance key to stave off Iraqi civil war

Cordesman, 13

(Burke Chair in Strategy at CSIS, 9/9, “Violence in Iraq: The Growing Risk of Serious Civil Conflict”, https://csis.org/files/publication/120718\_Iraq\_US\_Withdrawal\_Search\_SecStab.pdf)

Iraq is a nation with great potential and its political divisions and ongoing low-level violence do not mean it cannot succeed in establishing stability, security, and a better life for its people. Iraq cannot succeed, however, by denying its growing level of violence and the responsibility of Iraq’s current political leaders for its problems. There are gaps in the data on Iraq’s current level of violence, its causes, and the responsibility of given actors. The data are still good enough, however, to warn that Iraq may be moving back to a level of civil conflict that will amount to a serious civil war. There is also substantial reporting to show that Iraq’s violence is not simply the product of extremists and terrorist groups. Iraq’s growing violence is also the result of the fact that Iraq is the scene of an ongoing struggle to establish a new national identity: one that can bridge across the deep sectarian divisions between its Shi’ites and Sunnis as well as the ethnic divisions between its Arabs and its Kurds and other minorities. Improving the quality and focus of Iraqi efforts at counterterrorism and internal security is a key priority, but it Iraq cannot end its violence through force or repression. Iraq’s leaders must build a new structure of political consensus. They must build an effective structure of governance, and social order that sharply reduces the problems caused by the mix of dictatorship, war, sanctions, occupation, and civil conflict that began in the 1970s and create the kind of national government that can give democracy real meaning and serve the needs of all the Iraqi people.. Iraq must also deal with deep underlying problems. It must cope with a steadily growing population, and diversify an economy that is so dependent on petroleum exports that they provide some 95% of its government revenues. If Iraq’s leaders fail, try to deal with this mix of political divisions and structural problems by denial, or continue their present factional struggles; the end result will be to delay Iraq’s progress by every year their present search for self-advantage continues. What is far worse is that their failures may cause a new major civil war or even divide the country.

#### Judicial independence crucial to solve

Pimental, 13

(Law Prof-Ohio Northern University, June, “Judicial Independence in Post-Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy”, http://works.bepress.com/cgi/viewcontent.cgi?article=1013&context=david\_pimentel)

Contemporary Iraq is facing the full range of challenges that come with post-conflict transitional justice. That includes the backward-looking issues of restorative and retributive justice, for the atrocities and mass human rights violations they suffered during the Saddam Hussein regime and the conflict that followed his downfall.1 It also includes the forward-looking efforts, “paving the road toward peace and reconciliation” and establishing a functional state, characterized by the Rule of Law, in the society torn apart by conflict.2 Among the critical institutions demanding attention in the post-conflict reconstruction is the judiciary, particularly the need for an independent judiciary.3 There is increasing recognition that a functional legal system, one that protects rights and redresses wrongs, is vital to restoring the peace and stability to a war-torn society. Only with such a sound legal system— and a fair, impartial and independent judiciary—will people trust their disputes to the state, and refrain from the vigilante score-settling that signals the breakdown of the Rule of Law.

#### Iraq collapse causes escalatory Middle East conflict and Baloch secessionist wars

Byman, 6

(Prof of Security Studies-Georgetown, 8/20, “What Next,” http://www.washingtonpost.com/wp-dyn/content/article/2006/08/18/AR2006081800983\_pf.html)

The consequences of an all-out civil war in Iraq could be dire. Considering the experiences of recent such conflicts, hundreds of thousands of people may die. Refugees and displaced people could number in the millions. And with Iraqi insurgents, militias and organized crime rings wreaking havoc on Iraq's oil infrastructure, a full-scale civil war could **send global oil prices soaring** even higher. However, the greatest threat that the United States would face from civil war in Iraq is from the spillover -- the burdens, the instability, the **copycat secession attempts** and even the **follow-on wars** that could emerge in neighboring countries. Welcome to the new "new Middle East" -- a region where **civil wars could follow** one after another, like so many Cold War dominoes. And unlike communism, these dominoes may actually fall. For all the recent attention on the Israeli-Hezbollah conflict, far more people died in Iraq over the past month than in Israel and Lebanon, and tens of thousands have been killed from the fighting and criminal activity since the U.S. occupation began. Additional signs of civil war abound. Refugees and displaced people number in the hundreds of thousands. Militias continue to proliferate. The sense of being an "Iraqi" is evaporating. Considering how many mistakes the United States has made in Iraq, how much time has been squandered, and how difficult the task is, even a serious course correction in Washington and Baghdad may only postpone the inevitable. Iraq displays many of the conditions most conducive to spillover. The country's ethnic, tribal and religious groups are also found in neighboring states, and they share many of the same grievances. Iraq has a history of violence with its neighbors, which has fostered desires for vengeance and fomented constant clashes. Iraq also possesses resources that its neighbors covet -- oil being the most obvious, but important religious shrines also figure in the mix -- and its borders are porous. Civil wars -- whether in Africa, Asia, Europe or the Middle East -- tend to spread across borders. For example, the effects of the Jewish-Palestinian conflict, which began in the 1920s and continued even after formal hostilities ended in 1948, contributed to the 1956 and 1967 Arab-Israeli wars, provoked a civil war in Jordan in 1970-71 and then triggered the Lebanese civil war of 1975-90. In turn, the Lebanese conflict helped spark civil war in Syria in 1976-82. With an all-out civil war looming in Iraq, Washington must decide how to deal with the most common and dangerous ways such conflicts spill across national boundaries. Only by understanding the refugee crises, terrorism, radicalization of neighboring populations, copycat secessions and foreign interventions that such wars frequently spark can we begin to plan for how to cope with them in the months and years ahead. Refugees Spread The Fighting Massive refugee flows are a hallmark of major civil wars. Afghanistan's produced the largest such stream since World War II, with more than a third of the population fleeing. Conflicts in the Balkans in the 1990s also generated millions of refugees and internally displaced people: In Kosovo, more than two-thirds of Kosovar Albanians fled the country. In Bosnia, half of the country's 4.4 million people were displaced, and 1 million of them fled the country altogether. Comparable figures for Iraq would mean more than 13 million displaced Iraqis, and more than 6 million of them running to neighboring countries. Refugees are not merely a humanitarian burden. They often continue the wars from their new homes, thus spreading the violence to other countries. At times, armed units move from one side of the border to the other. The millions of Afghans who fled to Pakistan during the anti-Soviet struggle in the 1980s illustrate such violent transformation. Stuck in the camps for years while war consumed their homeland, many refugees joined radical Islamist organizations. When the Soviets departed, refugees became the core of the Taliban. This movement, nurtured by Pakistani intelligence and various Islamist political parties, eventually took power in Kabul and opened the door for Osama bin Laden to establish a new base of operations for al-Qaeda. Refugee camps often become a sanctuary and recruiting ground for militias, which use them to launch raids on their homelands. Inevitably, their enemies attack the camps -- or even the host governments. In turn, those governments begin to use the refugees as tools to influence events back in their homelands, arming, training and directing them, and thereby exacerbating the conflict. Perhaps the most tragic example of the problems created by large refugee flows occurred in the wake of the Rwandan genocide in 1994. After the Hutu-led genocide resulted in the death of 800,000 to 1 million Tutsis and moderate Hutus, the Tutsi-led Rwandan Patriotic Front "invaded" the country from neighboring Uganda. The RPF was drawn from the 500,000 or so Tutsis who had already fled Rwanda from past pogroms. As the RPF swept through Rwanda, almost 1 million Hutus fled to neighboring Congo, fearing that the evil they did unto others would be done unto them. For two years after 1994, Hutu bands continued to conduct raids in Rwanda and began to work with Congolese dictator Mobutu Sese Seko. The new RPF government of Rwanda responded by attacking not only the Hutu militia camps, but also its much larger neighbor, bolstering a formerly obscure Congolese opposition leader named Laurent Kabila and installing him in power in Kinshasa. A civil war in Congo ensued, killing perhaps 4 million people. The flow of refugees from Iraq could worsen instability in all of its neighboring countries. Kuwait, for example, has just over 1 million citizens, one-third of whom are Shiite. The influx of several hundred thousand Iraqi Shiites across the border could change the religious balance in the country overnight. Both these Iraqi refugees and the Kuwaiti Shiites could turn against the Sunni-dominated Kuwaiti government, seeing violence as a means to end the centuries of discrimination they have faced at the hands of Kuwait's Sunnis. Terrorism Finds New Homes The war in Iraq has proved to be a disaster for the struggle against Osama bin Laden. Fighters there are receiving training, building networks and becoming further radicalized -- and the U.S. occupation is proving a dream recruiting tool for young Muslims worldwide. As bad as this is, a wide-scale civil war in Iraq could make the terrorism problem even worse. Such terrorist organizations as Hezbollah, the Liberation Tigers of Tamil Eelam (LTTE), the Armed Islamic Group (GIA), the Irish Republican Army (IRA) and the Palestine Liberation Organization (PLO) were all born of civil wars. They eventually shifted from assaulting their enemies in Lebanon, Sri Lanka, Algeria, Northern Ireland and Israel, respectively, to mounting attacks elsewhere. Hezbollah has attacked Israeli, American and European targets on four continents. The LTTE assassinated former Indian prime minister Rajiv Gandhi because of his intervention in Sri Lanka. The IRA began a campaign of attacks in Britain in the 1980s. The GIA did the same to France the mid-1990s, hijacking an Air France flight then moving on to bombings in the country. In the 1970s, various Palestinian groups began launching terrorist attacks against Israelis wherever they could find them -- including at the Munich Olympics and airports in Athens and Rome -- and then attacked Western civilians whose governments supported Israel. In Afghanistan, the anti-Soviet struggle in the 1980s was a key incubator for bin Laden's movement. Many young mujaheddin went to Afghanistan with only the foggiest notion of jihad. But during the fighting in Afghanistan, individuals took on one another's grievances, so that Saudi jihadists learned to hate the Egyptian government and Chechens learned to hate Israel. Meanwhile, al-Qaeda convinced many of them that the United States was at the center of the Muslim world's problems -- a view that almost no Sunni terrorist group had previously embraced. Other civil wars in Muslim countries, including the Balkans, Chechnya and Kashmir, began for local reasons but became enmeshed in the broader jihadist movement. Should Iraq descend into a deeper civil war, the country could become a sanctuary for both Shiite and Sunni terrorists, possibly even exceeding the problems of Lebanon in the 1980s or Afghanistan under the Taliban. Right now, the U.S. military presence keeps a lid on the jihadist effort. There are no enormous training camps such as those the radicals enjoyed in Afghanistan. Likewise, Hezbollah and other Shiite terrorist groups have maintained a low profile in Iraq so far, but the more embattled the Shiites feel, the better the chance they will invite greater Hezbollah involvement. Shiite fighters may even strike the Sunni backers of their Iraqi adversaries, such as Saudi Arabia and Kuwait, or incite their own Shiite populations against them. And lost in the focus on Arab terrorist groups is the Kurdish Workers Party (PKK), an anti-Turkish group that has long fought to establish a Kurdish state in Turkey from bases in Iraq. The more Iraq is consumed by chaos, the more likely it is that the PKK will regain a haven in northern Iraq. The Sunni jihadists would be particularly likely to go after Saudi Arabia given its long, lightly patrolled border with Iraq, as well as their interest in destabilizing the ruling Saud family. The turmoil in Iraq has energized young Saudi Islamists. In the future, the balance may shift from Saudis helping Iraqi fighters against the Americans to Iraqi fighters helping Saudi jihadists against the Saudi government, with Saudi **oil infrastructure an obvious target**. Radicalism Is Contagious Civil wars tend to inflame the passions of neighboring populations. This is often just a matter of proximity: Chaos and slaughter five miles down the road has a much greater emotional impact than a massacre 5,000 miles away. The problem worsens whenever ethnic or religious groupings also spill across borders. Frequently, people demand that their government intervene on behalf of their compatriots embroiled in the civil war. Alternatively, they may aid their co-religionists or co-ethnics on their own -- taking in refugees, funneling money and guns, providing sanctuary. The Albanian government came under heavy pressure from its people to support the Kosovar Albanians who were fighting for independence from the Serbs. As a result, Tirana provided diplomatic support and covert aid to the Kosovo Liberation Army in 1998-99, and threatened to intervene to prevent Serbia from crushing the Kosovars. Similarly, numerous Irish and Irish American groups clandestinely supported the Irish Republican Army, providing money and guns to the group and lobbying Dublin and Washington. Sometimes, radicalization works in the opposite direction if neighboring populations share the grievances of their comrades across the border, and as a result are inspired to fight in pursuit of similar goals in their own country. Although Sunni Syrians had chafed under the minority Alawite dictatorship since the 1960s, members of the Muslim Brotherhood (the leading Sunni Arab opposition group) were spurred to action when they saw Lebanese Sunni Arabs fighting to wrest a share of political power from the minority Maronite-dominated government in Beirut. This spurred their own decision to organize against Hafez al-Assad's regime in Damascus. By the late 1970s, their resistance had blossomed into civil war, but Assad's regime was not as weak as Lebanon's. In 1982, Assad razed the center of the city of Hama, a Muslim Brotherhood stronghold, killing 20,000 to 40,000 people and snuffing out the revolt. Iraq's neighbors are vulnerable to this aspect of spillover. Iraq's own divisions are mirrored throughout the region; for instance, Bahrain, Kuwait and Saudi Arabia all have sizable Shiite communities. In Saudi Arabia, Shiites make up about 10 percent of the population, but they are heavily concentrated in its oil-rich Eastern Province. Bahrain's population is majority Shiite, although the regime is Sunni. Likewise, Iran, Syria and Turkey all have important Kurdish minorities, which are geographically concentrated adjacent to Iraqi Kurdistan. Populations in some countries around Iraq are already showing dangerous signs of radicalization. In March, after the Sunni jihadist bombing of the Shiite Askariya shrine in Iraq, more than 100,000 Bahraini Shiites took to the streets in anger. In 2004, when U.S. forces were battling Iraqi Sunni insurgents in Fallujah, large numbers of Bahraini Sunnis protested. There has been unrest in Iranian Kurdistan in the past year, prompting Iran to deploy troops to the border and even shell Kurdish positions in Iraq. The Turks, too, have deployed additional forces to the Iraqi border to prevent any movement of Kurdish forces between the two countries. Most ominous of all, tensions are rising between Shiites and Sunnis in the key Eastern Province of Saudi Arabia. As in Bahrain, many Saudi Shiites saw the success of Iraq's Shiites and are now demanding better political and economic treatment. The government made a few initial concessions, but now the kingdom's Sunnis are openly accusing the Shiites of heresy. Religious leaders on both sides have begun to warn of a coming civil war or schism within Islam. The horrors of such a split are on display only miles away in Iraq. Secession Breeds Secessionism Iraq's neighbors are just as fractured as Iraq itself. Should Iraq fragment, **voices for secession elsewhere will gain strength**. The dynamic is clear: One oppressed group with a sense of national identity stakes a claim to independence and goes to war to achieve it. As long as that group isn't crushed immediately, others with similar goals can be inspired to do the same. The various civil wars in the former Yugoslavia in the 1990s provide a good example. Slovenia was determined to declare independence, which led the Croats to follow suit. When the Serbs opposed Croatian secession from Yugoslavia by force, the first of the Yugoslav civil wars broke out. The European Union foolishly recognized both Slovene and Croatian independence, hoping that would end the bloodshed. However, many Bosnian Muslims wanted independence, and when they saw the Slovenes and Croats rewarded for their revolts, they pursued the same course. The new Bosnian government feared that if it did not declare independence, Serbia and Croatia would gobble up the respective Serb- and Croat-inhabited parts of their country. When Bosnia held a March 1992 referendum on independence, 98 percent voted in favor. The barricades went up all over Sarajevo the next day, kicking off the worst of the Balkan civil wars. It didn't stop there. The eventual success of the Bosnians -- even after four years of war -- was an important element in the thinking of Kosovar Albanians when they agitated against the Serbian government in 1997-98. Serbian repression sparked an escalation toward independence that ended in the 1999 Kosovo War between NATO and Serbia. Kosovo, in turn, inspired Albanians in Macedonia to launch a guerrilla war against the Skopje government in hope of achieving the same or better. In Iraq's case, the first candidate for secession is obvious: Kurdistan. If any group on Earth deserves its own country, it is surely the Kurds -- a distinct nation of 25 million people living in a geographically contiguous space with their own language and culture. However, if the Iraqi Kurds declare their independence and are protected by the international community, it is not hard to imagine Kurdish groups in Turkey and Iran following suit. Moreover, the Kurds are not the only candidates. Shiite leader Abdul Aziz Hakim has called for autonomy for Iraq's Shiite regions -- a likely precursor for demands of outright independence. If Iraqi Shiites try to split off, other Shiites in the Gulf region might agitate against their own regimes along similar lines. Moreover, if ethnic or sectarian self-determination begins spreading throughout the Middle East more generally, secessionist movements could also **spread to** unlikely groups such as Iran's minority Azeri and **Baluch populations**. Beware of Neighborly Interventions Another critical problem of civil wars is the tendency of neighboring states to get involved, turning the conflicts into regional wars. **Foreign governments may intervene** overtly or covertly to "stabilize" the country in turmoil and stop the refugees pouring across their borders, as the Europeans did during the Yugoslav wars. Neighboring states will intervene to eliminate terrorist groups setting up shop in the midst of the civil war, as Israel did repeatedly in Lebanon. They also may intervene to stem the flow of "dangerous ideas" into their country. Iran and Tajikistan intervened in the Afghan civil war on behalf of co-religionists and co-ethnicists suffering at the hands of the rabidly Sunni, rabidly Pashtun Taliban, just as Syria intervened in Lebanon for fear that the conflict there was radicalizing its Sunni population. In virtually every case, these interventions brought only further grief to the interveners and to the parties of the civil war. Opportunism is another powerful motive. States often harbor designs on their neighbors' land and resources and see the chaos of civil war as an opportunity to achieve long-frustrated ambitions. Much as Croatia's Franjo Tudjman and Serbia's Slobodan Milosevic may have felt the need to intervene in the Bosnian civil war to protect their ethnic brothers, it seems clear that a more important motive for both was to carve up Bosnia between them. Many states attempt to influence the course of a civil war by providing money, weapons and other support to one side. In effect, they use their intelligence services to create proxies who can fight the war for them. But states find that proxies are rarely able to secure their interests, typically leading them to escalate to open intervention. Both Israel and Syria employed proxies in Lebanon, for example, but found them inadequate, prompting their own invasions. Pakistan is one of the few countries to succeed in using a proxy force (the Taliban) to secure its interests in a civil war. However, the nation's support of these radical Islamists encouraged the explosion of Islamic fundamentalism in Pakistan itself -- increasing the number of armed groups operating from Pakistan and creating networks for drugs and weapons to fuel the conflict. Today, Pakistan is a basket case, and much of the reason lies in its costly effort to prevail in the Afghan civil war. Covert foreign intervention is proceeding apace in Iraq, with Iran leading the way. U.S. military and Iraqi sources think there are several thousand Iranian agents of all kinds already in Iraq. These personnel have simultaneously funneled money, guns and other support to friendly Shiite groups and established the infrastructure to wage a large-scale clandestine war if necessary. Iran has set up an extensive network of safe houses, arms caches, communications channels and proxy fighters, and will be well-positioned to pursue its interests in a full-blown civil war. The Sunni powers of Jordan, Kuwait, Saudi Arabia and Turkey are frightened by Iran's growing influence and presence in Iraq and have been scrambling to catch up. Turkey may be the most likely country to overtly intervene in Iraq. Turkish leaders fear both the spillover of Turkish secessionism and the possibility that Iraq is becoming a haven for the PKK. Turkey has already massed troops on its southern border, and officials are threatening to intervene. What's more, none of Iraq's neighbors thinks that it can afford to have the country fall into the hands of the other side. An Iranian "victory" would put the nation's forces in the heartland of the Arab world, bordering Jordan, Kuwait, Saudi Arabia and Syria; several of these states poured tens of billions of dollars into Saddam Hussein's military to prevent just such an occurrence in the 1980s. Similarly, a Sunni Arab victory (backed by the Jordanians, Kuwaitis and Saudis) would put radical Sunni fundamentalists on Iran's doorstep -- a nightmare scenario for Tehran. Add in, too, each country's interest in preventing its rivals from capturing Iraq's oil resources. If these states are unable to achieve their goals through clandestine intervention, they will have a powerful incentive to launch a conventional invasion.

#### Global nuclear war

Mir 12

(Columnist for The Nation (Pakistan) & Author of the book *Gwadar on the Global Chessboard*, “Balochistan and geopolitics,” http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/columns/02-Mar-2012/balochistan-and-geopolitics)

Today, the "province" of Balochistan resides in Pakistan, though part of greater Balochistan belongs to Iran as well, and perhaps some to Afghanistan. About 50 percent of the population of Balochistan is said to be Pashtun. Here's some more from the article: Balochistan and geopolitics ... The rationale of these ill-intentioned pseudo thinkers is absolutely absurd. According to them, since the Pakistani elite is exploiting Balochistan, so it should be balkanised. Those who believe that Balochistan should not be a part of Pakistan are geopolitical imbeciles. Indeed, the propagandists making these claims are clueless about regional realities because: • Pakistan: It will fight a war, even a nuclear war of national survival to defend itself. • Iran: The Iranian Seistan is part of Balochistan, which the imperialists want to carve out. Therefore, Iran will fight a war in unison with Pakistan to defend Balochistan against the US threats. • Afghanistan: The Taliban are winning; the Americans are leaving. No Afghan - not even Karzai - will cede the Afghan territory to become 'greater independent Balochistan'. Nor can landlocked Kabul take up fights with both Islamabad and Tehran. • Turkey: The Turks will support Pakistan and oppose independent Balochistan. Those who are plotting Balochistan also support Kurdistan to balkanise Turkey. Turkey will oppose Balochistan splitting by Nato, even if Nato is foolhardy to play the diabolical game of neocons. • India: It has been supporting the destabilisation of Balochistan and will continue to do so. But for India to overtly support Balochistan can lead to a nuclear war with Pakistan. Besides this can also trigger freedom movements in Kashmir, Khalistan, Assam, Tamil Nadu and a dozen other places. Playing the US-Israel game will spoil its relations with Iran, Russia and China. • China: It will support Pakistan. USA's aim in Balochistan is to block China from Gwadar. Balochistan today, Xinjiang tomorrow! China's defence begins from Pakistan. • Russia: It is Pakistan's new friend. Besides, the Pak-Iran link is supported by Moscow. So, the geopolitics of the region negates any viability of an independent Balochistan. In addition, anti-Americanism in Pakistan has a complex dynamic. The US meddling in Balochistan will not create an 'independent Balochistan', but will initiate a war, perhaps, **leading to World War III.**

#### Court must require a clear statement for domestic detention---crucial to SOP

Harvard Law Review 6

(“Constitutional Law. Separation of Powers. Fourth Circuit Holds That Congress Authorized the President to Detain American Citizens Captured on U.S. Soil as Enemy Combatant, Padilla v.Hanft, 423 F.3d 386 (4th Cir. 2005), Cert. Denied, 126 S. Ct. 1649 (2006),” 119 Harv. L. Rev. 2628, June, Lexis)

**Federal courts often look to Congress for help in defining executive power during wartime, treating the President's authority as dependent on** congressional authorization. In Hamdi v. Rumsfeld,1 the Supreme Court held that the President's detention as an "enemy combatant" of an American citizen captured in Afghanistan was authorized by Congress's 2001 Authorization for Use of Military Force2 (AUMF).3 Recently, in Padilla v. Hanft,4 the Fourth Circuit concluded that the power under this authorization did not vary based on the "locus of capture."5 Thus, the President could **detain as an enemy combatant an American arrested in the United States** as well as one captured abroad. In so holding, the Fourth Circuit properly recognized courts' **inability to weigh national security interests** but ignored the **distinctive threats that the domestic seizure of American citizens poses** to civil liberties. By ignoring these threats, **the court foreclosed the possibility of requiring a clear statement from Congress** before recognizing the detention power claimed by the President. As a result, the Fourth Circuit continued an approach, evident in Hamdi, that increases the role of courts - but decreases the role of Congress - in defining presidential power. Courts should instead require an **explicit statement authorizing such detentions to ensure Congress's engagement** with the novel issues presented by the war on terror. On May 8, 2002, Jose Padilla, an American citizen, was arrested in Chicago's O'Hare Airport as a material witness to a grand jury investigation of the September I ith terrorist attacks.6 Shortly thereafter, President Bush ordered that he be taken into custody as an enemy combatant who had "closely associated with al Qaeda," had engaged in "conduct that constituted hostile and war-like acts," and represented "a continuing, present and grave danger to the national security of the United States."' Padilla's attorney petitioned on his behalf for a writ of habeas corpus, alleging that Padilla's detention violated the Fourth, Fifth, and Sixth Amendments and the Suspension Clause of the Constitution." The government responded that Padilla's detention fell within the inherent power of the President and was also authorized by the AUMF.9 The district court granted summary judgment in favor of Padilla. Relying on Ex parte Milligan1o and the Non-Detention Act,"1 the court reasoned that the President lacked the power to seize an American citizen domestically as an enemy combatant absent a specific authorization from Congress.12 Interpreting the AUMF to "allow for the greatest possible accommodations between those liberties and the exigencies of war,"13 the court held that although it may be "necessary and appropriate" to detain an American citizen who is captured on the battlefield, "the same is [not] true when a United States citizen is arrested in a civilian setting."•4 The court concluded that "there [was] **no language in the AUMF that 'clearly and unmistakably' grant[ed] the President the authority** to hold" Padilla."5 **Given the absence of clear congressional authorization and the background prohibition embodied in the Non-Detention Act, the President's inherent authority was "at its lowest ebb" - insufficient to provide an independent basis for Padilla's detention**.16 A unanimous panel of the Fourth Circuit reversed, finding that the AUMF authorized Padilla's detention.17 Writing for the panel, Judge Luttigs8 read Hamdi as finding congressional authorization for detention when needed to "prevent a combatant's return to the battle-field."'9 Because "Padilla pose[d] the same threat of returning to the battlefield as Hamdi," Judge Luttig rejected Padilla's argument that overseas capture was part of the "narrow circumstances" to which the Hamdi plurality had confined its holding.20 Rather, Hamdi's incapacitation rationale "render[ed] ... point of capture irrelevant."21 The court also rejected Padilla's contention that, under Ex parte Endo,22 only a clear statement from Congress could authorize his de-tention.23 In holding that the internment of a Japanese American exceeded executive power, the Supreme Court in Endo noted that be-cause it assumed that Congress valued civil liberties, it would infer, "when asked to find implied powers ..., that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."24 However, the Fourth Circuit pointed to a disclaimer in Endo that detaining Endo during, rather than following, his evacuation might have been lawful, and inferred that the Court had not in fact applied a clear statement rule.25 Even if a clear statement were required, Judge Luttig concluded, the functional equivalence of Hamdi and Padilla meant that because "the AUMF constitute[d] such a clear statement according to the Supreme Court [in Hamdi],"26 it did so in Padilla as well. Although the plurality in Hamdi adopted a minimalist approach to construing the AUMF, both the Hamdi plurality and the Fourth Circuit in Padilla treated the balancing of national security and civil liberties as a **judicial task**. By eliding the distinctions between Hamdi and Padilla, the Fourth Circuit foreclosed a valuable opportunity to apply a clear statement rule to the AUMF in the context of domestic capture. The decision will thus reduce congressional engagement **with issues of executive power** and continue Hamdi's trend of **interposing a** judicial assessment of national security **interests** - albeit infused with deference to the Executive - **between Congress and the President.** Courts should instead follow a predictable rule that requires **a clear statement of authorization whenever an American citizen is detained domestically**. Notably lacking in the Fourth Circuit's opinion is any significant treatment of the **distinctive threats to civil liberties posed by the power to seize and detain American citizens domestically**. Yet two potential distinctions make domestic capture riskier than foreign capture, and a third makes it less necessary. First, domestic capture may **increase the risk of** erroneous classification, both by exposing a far larger population of American citizens to detention and by shifting the evidentiary basis for detention from a battlefield identification to a complicated domestic investigation. Second, the distrust of abusive government central to **America's constitutional ethos** - a distrust on display in the Suspension Clause - is magnified when the power to detain is exercised domestically: unlike detentions abroad, domestic seizures raise the specter of political suppression. Third, the **greater availability of the civilian justice system** and the ability of the investigating and arresting officers to participate in trial without leaving the battlefield lower the burden of requiring criminal process.27 When applied to the particular facts in Padilla, these distinctions are contestable, especially given the incapacity of courts to assess issues such as the comparative likelihood of erroneous capture. But these objections lose sight of the task in Padilla - determining whether Congress authorized (or clearly authorized) the domestic detention of American citizens under the AUMF. Although Congress could have authorized domestic capture together with foreign capture, such a reading of the AUMF is not a logical necessity. Based on a perception of more risk and less necessity, Congress could have viewed domestic detention (if it considered the issue at all) as beyond the scope of its authorization. This purposive ambiguity **removes** Padilla from the set of circumstances for which, following Hamdi, "the AUMF [necessarily] constitutes such **a clear statement** according to the Supreme Court. ''28 Yet the Fourth Circuit dismissed these differences between battlefield and domestic capture, treating Padilla as logically identical to Hamdi. Thus, because the plurality in Hamdi did not explicitly apply a clear statement rule,29 the Fourth Circuit decided that it was not re-quired to do so either. This conclusion foreclosed an opportunity to limit a **methodological error** in Hamdi. The Hamdi plurality erred by taking an active role in balancing the substantive interests at stake while at the same time applying a minimalist methodology **ill-suited to the national security context**. Democratic values would have been better served - in Hamdi and in Padilla - had the courts put forth a comprehensive framework yet **retained a passive and procedural role by employing a clear statement rule**.30 Hamdi was both minimalist and active. The plurality limited its holding to the "narrow circumstances" in the case.31 It defined the at-tributes of an "enemy combatant" narrowly,32 sketched only minimally the procedures by which lower courts would review executive deten-tions,33 and in so doing avoided addressing whether the President possessed inherent authority to detain Hamdi. In declining to put forth a framework that would apply to many future cases, the Hamdi plurality embraced a facet of minimalism that Professor Cass Sunstein terms "narrowness."34 Yet despite its circumscribed vision, the plurality in Hamdi did not remain passive. Rather, it "necessarily reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."35 By defining, albeit minimally, the process by which the Executive may detain a putative enemy combatant, the plurality in Hamdi explicitly balanced national security and civil liberties.36 This combination of minimalism and judicial activism gets it back-wards. The conventional case for minimalism emphasizes the value of the "accretion of case-by-case judgments, [which] could produce fewer mistakes on balance, because each decision would be appropriately in- formed by an understanding of particular facts.""37The defense of an active role for the judiciary often begins with a paean to the value of rights and the Court's indispensable role in protecting them.38 Yet enemy combatant cases are so rare, and their resolutions so often delayed, that minimalism is unlikely to yield an evolving, comprehensive case law**. And in a realm that cries out for dialogue between Congress and the President, minimalism renders the background against which such** an **interaction** could **occur** less clear and less predictable. Some **arbitrary clarity in this context is** likely **more valuable than carefully parsed ambiguity**. As for judicial role, the **federal courts** simply lack the capacity **to assess** exactly **how much process is necessary and appropriate in pursuit of national security**.39 As Justice Scalia noted in his Hamdi dissent, the Court "claim[ed] authority to engage in this sort of 'judicious balancing' from Mathews v. Eldridge, a case involv-ing... the withdrawal of disability benefits!"40 **Not only does a court undermine democratic values when it interposes its judgment between those of Congress and the Executive, but it may also replace an actor** capable of checking the President **with one that** lacks the institutional clout **to do so.** As the Fourth Circuit illustrated in Padilla, courts that are aware of their institutional limitations often adopt a posture of deference to the Executive that informs not only their determinations of due process, but also their interpretations of statutory language itself.41 However, Judge Luttig's deference to the President notwithstanding, it was still the Fourth Circuit that ratified the Executive's claim of power in Padilla - not Congress.42 The challenge for a court interpreting a broad delegation such as the AUMF is to provide a sufficiently **clear and stable background to allow the political branches** and public **to engage in a productive dialogue while**, at the same time, **avoiding a role so active as to preempt the discussion**. The Fourth Circuit could have better **struck this difficult balance and promoted** structural **constitutional values** by using a **clear statement rule to encourage greater congressional involvement** in the definition of executive power. The Supreme Court has increasingly relied on clear statement rules as a means of protecting constitutional interests.43 This approach to the AUMF would have produced a clear procedural framework for the definition of congressional power - **Congress must be explicit whenever authorizing detention on U.S. soil** - while still avoiding a central substantive role. Admittedly, the Fourth Circuit did find that "even were a clear statement by Congress required [in Padilla], the AUMF constitutes such a clear statement according to the Supreme Court [in Hamdi]."44 But it is only evidence of how Congress's role has atrophied, and the courts' correspondingly grown, that notwithstanding the Non- Detention Act, the significance of the interests at stake, and the command of Ex parte Endo, the Fourth Circuit was able to find a "clear statement" in a congressional declaration passed four years earlier, in the context of an invasion of Afghanistan, that the President may use "necessary and appropriate force" to combat terrorism. A clear statement rule means little if it simply requires a judicial opinion to recite the word "clear"; to be effective, such a rule must represent a genuine shift in the attitude of courts. Although the Supreme Court in Hamdi undertook an independent balancing of the security and liberty interests at stake, it consciously attempted to limit this endeavor. The redeeming feature of a minimal-ist mistake is of course that it is easily remedied. Future courts should therefore read Hamdi narrowly and apply **a clear statement rule** that **encourages congressional engagement with national security concerns rather than place a judicial imprimatur on constitutionally dubious claims of executive power.** Although **courts are ill-suited to review the President's assessment of threats to national security,** they need not give up on the idea that **Congress and the President can work together to deliver on the Constitution's dual promises of security and liberty.**

#### Plan solves—key to three branch model

Erickson-Muschko, 13

(JD-Georgetown Law, Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States, 101 Geo. L.J. 1399, June, Lexis)

IV. MOVING BEYOND INDIVIDUAL STATUS: THE CONSTITUTION APPLIES IN THE UNITED STATES This Note argues that the clear statement principle applies to the AUMF detention authority whenever it is invoked to detain individuals arrested within the United States--at least where the enemy combatant question is in dispute. The principal trigger for application of the clear statement principle should not be an individual's status but rather the presumption that constitutional rights and restraints apply on U.S. territory. Courts therefore should dispense with the enemy combatant inquiry under these circumstances. This Note posits that such a construction is required to preserve the constitutionality of the AUMF. This constitutional default rule presumes that Congress has not delegated power to the executive branch to circumvent due process protections wholesale, and that it has not altered the traditional boundaries between military and civilian power on U.S. territory. Any departure from this baseline at least requires a clear manifestation of congressional intent. As evinced by the divisions in Congress over passage of the detention provisions in the NDAA 2012, there is no consensus as to the breadth of the detention power afforded to the executive branch under the AUMF. Courts should therefore not presume that the statute authorizes application of martial law to circumvent otherwise applicable constitutional restraints and due process rights. **By making the jurisdictional question--civilian versus military--the trigger for the clear statement principle, the judiciary would properly place the impetus on Congress to clearly define and narrowly circumscribe the conditions under which the executive may use military jurisdiction to detain individuals on U.S. territory**. This is the **only way to ensure that our nation's political representatives have adequately deliberated and reached a consensus** with respect to delegating powers to the executive branch where such delegation would have the consequence of displacing, in a wholesale fashion, constitutional protections. For all its controversy, § 412 of the USA PATRIOT Act of 2001 provides an example of where Congress has provided for executive detention under circumstances that are arguably sufficiently detailed to satisfy a clear statement [\*1422] requirement. n147 Absent this level of clarity, where the President purports to use the AUMF to detain militarily on U.S. territory, courts must presume that constitutional rights and restraints apply and are not displaced by martial law. A. DUE PROCESS CONCERNS One of the most basic rights accorded by the Constitution is the fundamental right to be free from deprivations of liberty absent due process of law. The AUMF must be read with the gravity of this fundamental right in mind. As the Court made clear in Endo, where fundamental due process rights are at stake, ambiguous wartime statutes are to be construed to allow for "the greatest possible accommodation of the liberties of the citizen." n148 Courts "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." n149 This includes statutes that would otherwise "exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions . . . ." n150 B. THE SUSPENSION CLAUSE The Suspension Clause lends further constitutional support to applying a clear statement requirement to the AUMF detention authority on U.S. territory. The Suspension Clause gives Congress the emergency power to suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." n151 As Fallon and Meltzer observe, this Clause--and the limited circumstances in which it may be invoked--suggest, or even explicitly affirm, "the presumptive rule that when the civilian courts remain capable of dealing with threats posed by citizens, those courts must be permitted to function." n152 To interpret the AUMF as congressional authorization to displace the civilian system and apply military jurisdiction on U.S. territory would "render that [\*1423] emergency power essentially redundant." n153 The Suspension Clause also underscores that the right to be free from the arbitrary deprivation of physical liberty is one of the most central rights that the Constitution was intended to protect. C. THE LACK OF MILITARY NECESSITY The lack of military necessity for applying law-of-war principles on U.S. territory further supports the construction of the AUMF to avoid displacing civilian law with law of war in the domestic context. The Supreme Court long ago declared that martial law may not be applied on U.S. territory when civilian law is functioning and "the courts are open and their process unobstructed." n154 Instead, "[t]he necessity [for martial law] must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." n155 In the absence of such necessity, "[w]hen peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty . . . ." n156 The past ten years have shown that there is no need to stretch law-of-war principles in the AUMF to reach U.S. territory. The exigencies associated with an active battlefield, which were critical to the Hamdi plurality's interpretation of the AUMF, n157 are simply not present in the United States. Instead, "American law enforcement agencies . . . continue to operate within the United States. These agencies have a powerful set of legal tools, adapted to the criminal process, to deploy within the United States against . . . suspected [terrorists], and the civilian courts remain open to impose criminal punishment." n158 Indeed, for more than a decade since the 9/11 attacks, domestic law enforcement agencies have carried the responsibility for domestic counterterrorism and have successfully thwarted several terrorism plots. n159 Civilian courts have adjudicated the prosecution of suspected terrorists captured on U.S. territory under [\*1424] federal laws. n160 The experience of the past decade shows that the civilian system is up to the task, and there is no military exigency that justifies curtailing constitutional protections and applying military authority in the domestic context. n161 Accordingly, the circumstances that the Supreme Court found to justify the use of the military authority under the AUMF to capture and indefinitely detain Hamdi, who was found armed on the active battlefield in Afghanistan, do not extend to persons captured on U.S. territory. The manner in which the government handled the Padilla and al-Marri cases further demonstrates the lack of military necessity. In both cases, the government abandoned its position that national security imperatives demanded that they continue to be held in military custody; both were transferred to federal custody and ultimately convicted of federal crimes carrying lengthy prison terms. n162 The Supreme Court's precedent in Quirin neither requires, nor can it be fairly read to justify, a different conclusion. First, the issue of indefinite military detention without trial was not before the Court in that case. Second, the status of the Nazis in Quirin as enemy combatants was undisputed, in contrast to that of individuals who are "part of" or "substantially support" al-Qaeda or "associated forces." n163 Third, the Court in Quirin went "out of its way to say that the Court's holding was extremely limited," encompassing only the precise factual circumstances before it. n164 Finally, Quirin itself is shaky precedent, as evidenced by the Court's own subsequent statements and as elaborated in numerous scholarly commentaries on the case. n165 As Katyal and Tribe observe: Quirin plainly fits the criteria typically offered for judicial confinement or reconsideration: It was a decision rendered under extreme time pressure, with respect to which there are virtually no reliance interests at stake, and where the statute itself has constitutional dimensions suggesting that its construction should be guided by relevant developments in constitutional law. n166 [\*1425] This case therefore should not be read as foreclosing the application of a clear statement principle to the AUMF as applied on U.S. territory where an individual's status as an enemy combatant is in dispute. CONCLUSION The AUMF is ambiguous: it does not specify whether it reaches individuals captured on U.S. territory, and Congress declined to resolve this question when it enacted § 1021 of the NDAA 2012. If a future administration invokes the AUMF as authority to capture and hold persons on U.S. territory in indefinite military detention, it will be left to the courts to determine whether this is constitutional. **Courts should resolve this question by applying a clear statement requirement**. This Note has argued that the trigger for this clear statement requirement is not the individual's status but rather the presumption that constitutional rights and restraints apply on U.S territory. Courts should apply this default presumption regardless of an individual's citizenship status, and it should apply even where the government claims that the individual is an "enemy combatant," at least where that determination is subject to dispute. This Note has argued that **this method of statutory interpretation is constitutionally required**. "[B]y extending to all 'persons' within the Constitution's reach such guarantees as . . . due process of law, the Constitution constrains how our government may conduct itself in bringing terrorists to justice." n167 If these constraints are to remain meaningful, these guarantees require, at the very least, that courts presume that constitutional guarantees prevail where congressional intent is unclear. The past ten years have shown that our criminal justice system is capable of thwarting terrorist attacks and bringing terrorists to justice while still preserving the safeguards of liberty that are fundamental to our system of justice. "[T]hese safeguards need, and should receive, the watchful care of those [e]ntrusted with the guardianship of the Constitution and laws." n168

#### Lack of CMR in Latin America creates a crisis of instability

Elin Skaar, Ph.d., Senior Researcher, Coordinator: Rights and Legal Institutions @ CMI, and Camila Gianella Malca, 2014, “Latin American Civil-Military Relations in a Historical Perspective: A Literature Review,” January 17

About fifteen years ago, Consuelo Cruz and Rut Diamint optimistically noted that “The tanks that not too long ago roamed the streets have vanished from sight, military uniforms seem passé and coups obsolete, and the era of the generals appears finally to have been consigned to the archives” (Cruz and Diamint 1998: xx). **Their conclusion may have been overly optimistic**. Although civilian governments dominate the Latin American continent today, the military coups in Venezuela (2002), Honduras (2009) and possibly Paraguay (2012) 3 along with the failed coup attempts in Bolivia (2009) and in Ecuador (2010) remind us that **the military are still a force** government. Indeed, the cyclic alternation of civilians and generals in high office in many countries dates back to the era of independence **to be reckoned with in politics**.4 The military in Latin America is notorious for its interference with civilian in the 1860s and 1870s. In more recent times, specifically the period 1970-1990, the Latin American continent was largely dominated by military governments – or **suffering civil war**.5 According to Brian Loveman “in 1979, over two-thirds of Latin America's people were living under military rule. By 1993, however, not a single military regime remained in Central or South America or the Spanish-speaking Caribbean” (Loveman 1994).

As authoritarian regimes started to break down in the early 1980s, Latin America embarked on what has been referred to as the “third wave” of democracy (Huntington 1991). Today, most governments in the region are classified as “democratic”, though exactly **what this means is open to dispute**. One overall trend in the region over the past two decades has been the gradual withdrawal of the military from politics and “back to the barracks”. But how firm is this retreat? To what extent is the military actually under civilian control? Broadening the concept of civil-military relations (CMR) beyond the political realm: What economic role have the armed forces played in the region? And what is the relationship between the military and civilians today?

# 2AC

### Cmr adv

#### Absent modeling---CMR key to stop global nuclear war

Fried, 12

(Dean’s Teaching Fellow-Johns Hopkins, "Rethinking Civilian Control: Nuclear Weapons, American Constitutionalism and War-Making," For Presentation at the 2012 Millennium Conference, London School of Economics and Political Science, 10/21, millenniumjournal.files.wordpress.com/2012/10/fried-lse-paper.docx?)

This material contextual dynamic is also illustrated by a novel shift in civil military relations in which the professionalism of the military cannot be relied upon, and rather, the executive must be active and assertive in controlling the very weapons the military would traditionally be entrusted to use. This Assertive Civil-Military Control as defined by Feaver, using Huntington as a foil, is a method that does not presuppose that the military will conform to the values and more importantly the orders of civilian society or that the officer corps will understand civilian leadership. Nor does it place its trust in military professionalism to restrain itself. As it relates to control over nuclear weapons, assertive civilian nuclear control is a means by which the military is restrained in its ability to use the nuclear weapons in its possession, by keeping custody of the ability for launch out of their control. It is an emphasis on the ‘never’ end of the always/never problematique, a means by which the weapons will not be fired unless given the order by the civilian command. While in possession of the military, the weapons themselves cannot be armed or used because of the method of positive control. The need for the control of such weapons outside the bounds of what Huntington called military professionalism, is a corollary of the increased costs of war and a heightened fear of military accidents or unauthorized uses. In the aftermath of a major nuclear exchange, in as little as 500 detonations, the planet becomes uninhabitable. As argued by the astrophysicist Carl Sagan, global nuclear war would not only bring about the physical destruction of the countries launching such weapons, but would very likely **end life on earth** as we know it. As he writes it, “cold, dark, radioactivity, pyrotoxins and ultraviolet light following a nuclear war…would imperil every survivor on the planet.” Sagan raises the specter that even a massive disarming first strike by either superpower at the time might be sufficient to wipe out all life. Therefore, the increasing speed of delivery in conjunction with the rapidly expanding scope of nuclear destruction necessitates further positive control measures to prevent the military from unauthorized use. This in turn reinforces the unchecked power of the president, for it would be only he who can give the order to strike.

### at: tk shift

#### No drone shift link---numbers don’t line up

Robert Chesney 11, Charles I. Francis Professor in Law at the UT School of Law as well as a non-resident Senior Fellow at Brookings, "Examining the Evidence of a Detention-Drone Strike Tradeoff", October 17, [www.lawfareblog.com/2011/10/examining-the-evidence-of-a-detention-drone-strike-tradeoff/](http://www.lawfareblog.com/2011/10/examining-the-evidence-of-a-detention-drone-strike-tradeoff/)

Yesterday Jack linked to this piece by Noah Feldman, which among other things advances the argument that the Obama administration has resorted to drone strikes at least in part in order to avoid having to grapple with the legal and political problems associated with military detention:¶ Guantanamo is still open, in part because Congress put obstacles in the way. Instead of detaining new terror suspects there, however, Obama vastly expanded the tactic of targeting them, with eight times more drone strikes in his first year than in all of Bush’s time in office.¶ Is there truly a detention-drone strike tradeoff, such that the Obama administration favors killing rather than capturing? As an initial matter, the numbers quoted above aren’t correct according to the New America Foundation database of drone strikes in Pakistan, 2008 saw a total of 33 strikes, while in 2009 there were 53 (51 subsequent to President Obama’s inauguration). Of course, you can recapture something close to the same point conveyed in the quote by looking instead to the full number of strikes conducted under Bush and Obama, respectively. There were relatively few drone strikes prior to 2008, after all, while the numbers jump to 118 for 2010 and at least 60 this year (plus an emerging Yemen drone strike campaign). But what does all this really prove?¶ Not much, I think. Most if not all of the difference in drone strike rates can be accounted for by specific policy decisions relating to the quantity of drones available for these missions, the locations in Pakistan where drones have been permitted to operate, and most notably whether drone strikes were conditioned on obtaining Pakistani permission. Here is how I summarize the matter in my forthcoming article on the legal consequences of the convergence of military and intelligence activities:¶ According to an analysis published by the New America Foundation, two more drone strikes in Pakistan’s FATA region followed in 2005, with at least two more in 2006, four more in 2007, and four more in the first half of 2008.[1] The pattern was halting at best. Yet that soon changed. U.S. policy up to that point had been to obtain Pakistan’s consent for strikes,[2] and toward that end to provide the Pakistani government with advance notification of them.[3] But intelligence suggested that on some occasions “the Pakistanis would delay planned strikes in order to warn al Qaeda and the Afghan Taliban, whose fighters would then disperse.”[4] A former official explained that in this environment, it was rare to get permission and not have the target slip away: “If you had to ask for permission, you got one of three answers: either ‘No,’ or ‘We’re thinking about it,’ or ‘Oops, where did the target go?”[5]¶ Declaring that he’d “had enough,” Bush in the summer of 2008 “ordered stepped-up Predator drone strikes on al Qaeda leaders and specific camps,” and specified that Pakistani officials going forward should receive only “‘concurrent notification’…meaning they learned of a strike as it was underway or, just to be sure, a few minutes after.”[6] Pakistani permission no longer was required.[7] ¶ The results were dramatic. The CIA conducted dozens of strikes in Pakistan over the remainder of 2008, vastly exceeding the number of strikes over the prior four years combined.[8] That pace continued in 2009, which eventually saw a total of 53 strikes.[9] And then, in 2010, the rate more than doubled, with 188 attacks (followed by 56 more as of late August 2011).[10] The further acceleration in 2010 appears to stem at least in part from a meeting in October 2009 during which President Obama granted a CIA request both for more drones and for permission to extend drone operations into areas of Pakistan’s FATA that previously had been off limits or at least discouraged.[11] ¶ There is an additional reason to doubt that the number of drone strikes tells us much about a potential detention/targeting tradeoff: most of these strikes involved circumstances in which there was no feasible option for capturing the target. These strikes are concentrated in the FATA region, after all. ¶ Having said all that: it does not follow that there is no detention-targeting tradeoff at work. I’m just saying that drone strikes in the FATA typically should not be understood in that way (though there might be limited exceptions where a capture raid could have been feasible). Where else to look, then, for evidence of a detention/targeting tradeoff?¶ Bear in mind that it is not as if we can simply assume that the same number of targets emerge in the same locations and circumstances each year, enabling an apples-to-apples comparison. But set that aside.¶ First, consider locations that (i) are outside Afghanistan (since we obviously still do conduct detention ops for new captures there) and (ii) entail host-state government control over the relevant territory plus a willingness either to enable us to conduct our own ops on their territory or to simply effectuate captures themselves and then turn the person(s) over to us. This is how most GTMO detainees captured outside Afghanistan ended up at GTMO. Think Bosnia with respect to the Boumediene petitioners, Pakistan’s non-FATA regions, and a variety of African and Asian states where such conditions obtained in years past. In such locations, we seem to be using neither drones nor detention. Rather, we either are relying on host-state intervention or we are limiting ourselves to surveillance. Very hard to know how much of each might be going on, of course. If it is occurring often, moreover, it might reflect a decline in host-state willingness to cooperate with us (in light of increased domestic and diplomatic pressure from being seen to be responsible for funneling someone into our hands, and the backdrop understanding that, in the age of wikileaks, we simply can’t promise credibly that such cooperation will be kept secret). In any event, this tradeoff is not about detention versus targeting, but something much more complex and difficult to measure.

### t – restrict

#### We Meet – we prohibit it without a clear statement from Congress

#### Or their interpretation requires the plan to ban all activities in each area – no aff meets, doesn’t match the literature, and the affs that scare them are worse as PICs

#### We agree “Restrict” is to limit, but that’s a question of authority

#### “Restrictions” includes the scope of authority, but that doesn’t mean they put the president in handcuffs

#### Clear statement constrains authority

Lin 5 (Albert, Acting Professor of Law, University of California, Davis, School of Law. J.D., Boalt Hall School of Law, University of California, Berkeley 1996; M.P.P., Harvard University 1995; B.S., Emory University 1992, “EROSIVE INTERPRETATION OF ENVIRONMENTAL LAW IN THE SUPREME COURT'S 2003-04 TERM” Summer, 2005, 42 Hous. L. Rev. 565)

Perhaps the most significant federalism decision, from the vantage point of federal environmental law, has been the Court's decision in SWANCC. n341 The issue originally presented by that case was Congress's authority to regulate isolated wetlands pursuant to the Commerce Clause. n342 **The Court sidestepped that constitutional issue**, however, **and**, as described earlier, **resolved the case on** statutory grounds**.** n343 **The critical move for the Court was the application of the** following clear statement interpretive rule: "Where an administrative interpretation of a statute invokes the outer limits of Congress'[s] power, we expect a clear indication that Congress intended that result." n344 In light of that rule, the Court held the regulation at issue to be beyond the authority conferred by the CWA. n345 Avoidance of the constitutional issue left open the possibility of a subsequent congressional response. However, given the slim likelihood of such a response in the present political climate, the narrowing of the statute through **statutory interpretation had** almost **as** [\*626] **significant an impact as a change in constitutional doctrine.** n346 The potential ramifications of the decision extend beyond the CWA, as a systematic application of **the Court's clear statement** interpretive rule **is likely to result in a contraction of** **federal** regulatory **authority**. n347

#### Their new definition later in the 1nc means no court affs

#### “On” means there’s no limits disad

Dictionary.com, http://dictionary.reference.com/browse/on

On

preposition

1.so as to be or remain supported by or suspended from: Put your package down on the table; Hang your coat on the hook.

2.so as to be attached to or unified with: Hang the picture on the wall. Paste the label on the package.

#### Resolutional precision filters the T debate— it’s a legal topic and legal education is the point

#### Functional limits check – agent CP’s and authority key warrants are built-in for the neg

#### They mix burdens – circumvention means we wouldn’t be T – moots the core question in the res

#### Reasonability

### neolib / lawfare

#### RoB = plan, d-making and fairness

#### PDB

#### Ghoshray’s theory of the law is wrong

Sanders, assistant professor of political science – U Cincinnati, ‘12

(Rebecca, “Exceptional Security Practices, Human Rights Abuses, and the Politics of Legal Legitimation in the American ‘Global War on Terror’,” A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy Department of Political Science University of Toronto, p. 366-368)

I found that changes in the structure of constraint have encouraged the resort to a strategy of plausible legality in the current period. I moreover found that the structure of legal regimes shape the contours of plausibly legal argument. The case studies on torture, due process, and surveillance suggest that law is not a sufficient constraint to prevent actors with a preference for policies that violate human rights from authorizing them. However, law does make a difference in the current context insofar as it forces actors with a preference for abuse to seek legal cover and to limit their explicit authorizations to practices that they can make at least strained legal arguments about. Accounting for these observations in light of theoretical expectations about the impact of constraints on practice is not easy. Paradigms by their nature are not falsifiable. At first glace, quite radically different theories can provide a convincing explanation of the same phenomena. Nevertheless, ultimately some approaches prove more helpful than others. Realist and decisionistic perspectives conceptualize compliance and noncompliance as something ontologically external to the rule. Derogation is normless and outside the law––an act of sovereign power based on interest or necessity. In this drama, law is a plaything. As a result, they cannot explain why policy makers would feel compelled to engage in extensive legal rationalizations for human rights violations. While they may superficially acknowledge the role of normative constraint in times of normalcy, their theoretical toolkit is not equipped to understand the independent impact or law or norms in times of crisis. Liberals and constructivists are better able to explain the pull of compliance. Yet, neoliberal positivism has trouble explaining how valid, formal law can be transformed to facilitate human rights abuses. While it can explain law as an independent constraint, constructivism also struggles with partial compliance. If norms matter, if they have been internalized, they should matter all the time. How norms can exist but not work is unclear. In the political ecology of twenty-first century American politics, legality is the legitimate language of authorization. Accounts that treat law as a purely instrumental tool fail to acknowledge the essential legitimating role law plays. On the other hand, an emphasis on legal constraint often confuses form with substance, the medium with the message. I have tried to examine how divergent understandings of law’s impact on states might be reconciled to provide a fuller account of the phenomenon in question. A paradoxical picture emerges. American policy makers cynically marshaled law to obscure their controversial practices, but needed to do so precisely because there are substantial costs to ignoring law. Intelligence agencies sought immunity in legal opinions because law does have bite. Despite a strong proclivity for unmitigated executive power, policy makers hid behind legalistic rather than purely political arguments. In this sense, law as a predominant currency of contemporary legitimacy perversely shaped the logic of human rights violations. Against its intended purpose, it permitted abuse, but limited the resort to pure lawlessness.

#### Their impact is about all globalization – not intrinsic to the 1AC

#### Sovereign legalism is inevitable and sustainable

S.D. Krasner 10, political science professor at Stanford, “The Durability of Organized Hypocrisy”, in Sovereignty in Fragments: The Past, Present and Future of a Contested Concept, googlebooks

**Sovereignty has come to provide** the dominant logic of appropriateness **for organizing political life**, despite **the fact that** logics of **consequences** often **dictate behaviour** that is **inconsistent with the basic principles of sovereign statehood and expectations of how it is actually practised**. This decoupling of logics of appropriateness and logics of consequences, an example of organized hypocrisy**,-** is not a new development. **It has always characterized the sovereign state system**. Consequential actors have not had an incentive to align more closely dominant principles and actual behaviour. This calculus could, however, change if the core security interests of the most powerful states are threatened in ways that cannot be accommodated within existing sovereign norms. If such threats do become manifest, the decoupling between rules and norms could become even greater, or the rules of the international system might be rewritten. Neither of these outcomes, greater decoupling or new rules, is preferable to the status quo of organized hypocrisy. The concept of sovereignty embeds two separate and distinct principles and one fundamental assumption about actual practice. The three core elements of sovereignty are:

The concept of sovereignty embeds two separate and distinct principles and one fundamental assumption about actual practice. The three core elements of sovereignty are:

\* International legal sovereignty: international recognition which implies the right to enter into contracts or treaties with other states, juridical equality, membership in international organizations.

\* Westphalian/Vattelian sovereignty: the absence of submission to external authority structures, even structures that states have created using their international legal sovereignty.

\* Domestic sovereignty: more or less effective control over the territory of the state including the ability to regulate trans-border movements.

These three elements of sovereignty are analytically and empirically distinct; they are not an organic whole.' The Peace of Westphalia actually said little about what later came to be called Westphalian sovereignty. Emmerich de Vattel, a Swiss jurist, was the first explicitly to stipulate the rule of non-intervention. The elements of sovereignty are not logically related, nor have they always been conjoined in practice. Political entities can have international legal sovereignty, recognition, without having Westphalian/Vattelian sovereignty or effective domestic sovereignty. States can have effective and autonomous domestic governance without being recognized. They can enjoy recognition and effective domestic governance without having Westphalian/Vattelian sovereignty. In the contemporary world there are two striking deviations from the conventional sovereignty script: the European Union, whose members have used their international legal sovereignty to compromise their Westphalian/Vattelian sovereignty; and failed or weak states that enjoy international legal sovereignty and sometimes Westphalian/ Vattelian sovereignty but are unable to exercise effective domestic sovereignty. In the Breaking of Nations Robert Cooper argues that in the contemporary international environment there are three worlds: the modern world of conventionally sovereign states; the post-modern world of Europe; and the pre-modern world of failed, repressive and badly governed states.

The rules and practices of sovereignty did not begin at any particular point in time. Rather they evolved over several centuries. The Peace of Westphalia, which is often seen as the key transition to the modern state system, was, in fact, only one of many way stations. There were elements of the Peace that led later observers to identify it as the 'majestic portal which leads from the old into the new world'. The treaties did re-affirm the right of the princes of the Holy Roman Empire to enter into treaties, although this was a right given to them initially in the Golden Bull of 1356, one of the founding documents of the empire. It did treat Protestant and Catholic states equally. It did re-affirm the principle first enunciated in the Peace of Augsburg of 1555 that the prince could set the official religion of his territory, although this right was circumscribed by other provisions of the Treaties of Osnabruck and Munster, which comprise the Peace. For instance, there were a number of cities with mixed populations in which the Peace stated that authority had to be shared between Protestants and Catholics. The Peace also included manifestly medieval provisions such as rules for designating the Electors of the Holy Roman Empire and stipulations that are in conflict with what are now considered core principles of sovereignty, such as the provisions for supporting religious toleration in Germany, which violate the rule of non-intervention in the internal affairs of states. The Peace provided that religious questions had to be decided by a majority of Protestants and Catholics voting separately in the Courts and Diet of the Holy Roman Empire. A basic constitutional provision of the Empire was thus defined by an international treaty. Even the re-affirmation of the right of princes to make treaties was conditioned by a clause stating that any such 'Alliances be not against the Emperor, and the Empire, nor against the Publick Peace, and this Treaty, and without prejudice to the Oath by which every one is bound to the Emperor and the Empire'.

**That sovereignty has always been characterized by organized hypocrisy**, a disjunction between logics of appropriateness and logics of consequences, **is not surprising in an environment as complex as the international system.** There is probably no **single** set of rules **that could align interests, power and principles**; no set of rules that would create a self-enforcing equilibrium **from which actors never had an incentive to deviate.** But what is, perhaps, surprising is the durability of **this** decoupling. **Every major peace treaty** from the Peace of Westphalia to the United Nations charter **enunciated principles** that were **inconsistent with accepted sovereign norms**." Despite these inconsistencies, no **enduring** alternative **construct** has arisen **to replace or even complement sovereignty**. **Constructs that were explicitly accepted in the past**, such as colonialism (arguably consistent with sovereignty rules in that the colonial power did have full control over domestic and international affairs), protectorates, and the mandates of the League of Nations and trusteeships of the United Nations, **have disappeared**, but new developments such as the European Union and failed states have brought organized hypocrisy into the contemporary world.

Sovereignty has endured because **the** interests **of key players in the system** could be accommodated by deviations **from its rules and practices.** For the rules to change, key actors, those with an ability to change the system, would have to support some alternative **set of constructs**, something that they would only do if such alternatives could provide better outcomes. When sovereignty rules have manifestly failed to provide desirable outcomes, states have been able to cobble together alternatives. In Bosnia, for instance, governance has been provided under the auspices of the Contact Group and the European Union. **When the U**nited **S**tates **and other countries moved from recognizing** the government of **Taiwan** as the government of China **to recognizing** the government in **Beijing, they established quasi-diplomatic arrangements for** conducting business with **Taiwan**. The American Institute in Taiwan operates what is, in effect, a diplomatic mission. **This arrangement is not a perfect substitute** for conventional diplomatic ties; for instance Taiwanese officials in Washington do not meet with their counterparts in the State Department building, **but** Taiwan has flourished economically and achieved effective domestic and Westphalian/Vattelian sovereignty despite having formal diplomatic ties with only a handful of countries, most of which it has provided with significant economic subventions. Hong Kong, formally a part of China, has a separate visa regime from that of China and is a member of some international organizations of which China is also a member. When China assumed control of Hong Kong in 1997 it was anxious to reassure both the Hong Kong and international business communities that the Hong Kong economy could operate under different rules from that of the rest of China. The rest of the world was happy to accommodate China's desires even though this meant violating conventional sovereignty norms.

#### Case = DA to alt cause it’s based on a specific legal course-correction, which they reject – also turns their impact cause rejection just results in the squo ruling, not the absence of law

#### Can’t solve neolib

Jamie Peck 10, geography prof at the University of British Columbia, Postneoliberalism and its Malcontents, Antipode, Volume 41, Issue Supplement s1, pages 94–116

While Latin American experiences can and should spur the postneoliberal imagination, the region's lessons are also sobering ones. Here, audacious forms of neoliberalized accumulation by dispossession inadvertently prepared the ground for widespread social mobilization and radical resistance politics. And in the decade or so that followed, electoral realignments in Venezuela, Brazil, Argentina, Bolivia, Chile and elsewhere consolidated progressive gains, as a period of hegemonic dispute gave way to region-wide hegemonic instability (Sader 2009). **Moving purposefully in the direction of postneoliberal forms of governance has**, however, **been a challenge, even for the region's largest economies**. Global financial flows, trading regimes, and investment policies continue to be guided by logics of short-term, price competition—in the context of global overaccumulation—while progressive forms of multilateral coordination can only be negotiated in the long shadows of imperial and neoimperial power (Drake 2006). As Sader (2009:176) notes:

the deregulation fostered by neoliberal policies favoured the hegemony of financial capital in its speculative mode. In order to instate a different model, it would be necessary to introduce new forms of economic regulation, **which would be very difficult, even in the current crisis**, once deregulation has a foothold. **It could not come from a single country**, no matter what its importance, **because others would benefit from the flow of capital rejected in this country**. At the same time, **it would be hard to come to a large-scale international agreement, due to the different interests of the biggest powers and international corporations**.

**Whereas neoliberalism may have exposed the limits of financial capitalism, it has also undermined the strategic and organizational resources required for its transcendence**. In Sader's (2009) eyes, the root of the problem for progressive forces is what he characterizes as a “gulf” between the evident failures of neoliberalized capitalism and the potential of postneoliberal movements, forces, and interests. The short- and medium-term prospects for such forms of alternative politics will surely be structured (and to some extent constrained) by the neoliberalized terrains on which they must be prosecuted. **This is not simply a matter of contending with** (residual) **neoliberal power centers**, in economics ministries, in international financial institutions, in think tanks, in the media, and in much of the corporate sector. Perhaps more intractably, **it must also entail overcoming the profound reconstitution of** cross-national, interlocal, and cross-scalar **relations through** various forms of **market rule**, which facilitate the reproduction of neoliberalized logics of action, institutional routines, and political projects—both through the dull compulsion of competitive pressures and through the harsh imperatives of regulatory downloading.

### advisory COUNTERPLAN

#### PDB

#### Perm do counterplan – if they take up a case, it would result in the same ruling of the aff – if not,it doesn’t overrule the 4th circuit and links more the NB because they’re shafting themselves

#### CP increases confusion – 4th circuit already ruled on al-Marri

#### Doesn’t solve CMR because interference with the PCA is based on precedent, not just this one instance

#### Counterplan is the status quo---both Patriot Act and Non-Detention Act said no domestic detention

Huq, 9

(Law Prof-Brennan Center-NYU, “Brief for Petitioner, Al Marri v. Spagone, Supreme Court, http://www.scotusblog.com/case-files/cases/al-marri-v-spagone/)

Second, the Fourth Circuit ignored Congress's clear intent, manifested contemporaneously in the Patriot Act, that non-citizen domestic terrorism suspects not be detained indefinitely without charge and that domestic terrorism cases continue to be prosecuted in the civilian criminal justice and immigration systems. Thus, not only does the AUMF lack the clear statement necessary to authorize detention without criminal process, but Congress explicitly rejected this very detention power in the Patriot Act. In construing the AUMF, the Fourth Circuit also ignored the Non-Detention Act, which demands an explicit statement from Congress to detain citizens domestically without \*16 criminal process and which was intended to prevent military encroachment on civilian prerogatives. Third, the Fourth Circuit also ignored Congress's explicit limitation in the AUMF to use only “necessary and appropriate” force. Read alongside the Patriot Act, and against the constitutional backdrop of Milligan and its progeny, the AUMF cannot be understood to authorize military seizure and detention in the United States except possibly in the exceptional circumstances (not presented here) when the civilian courts are not open or functioning. Moreover, it is abundantly clear that military detention was neither “necessary” nor “appropriate” on the particular facts of this case - where Petitioner had been arrested by law enforcement at his home and held in solitary confinement for eighteen months pending federal criminal prosecution. Indeed, the government has never even explained, let alone demonstrated, why it was “necessary” or “appropriate” to re-label Petitioner an “enemy combatant” on the eve of trial and supplant civilian criminal process with indefinite military detention. The Fourth Circuit, however, erred not only in its reading of the AUMF. It erred also by concluding that the Constitution would permit Petitioner's military detention if Congress had authorized it. The Constitution limits the domestic exercise of military jurisdiction to those who fall clearly within the established definition of a combatant under precedent, custom, and longstanding law-of-war principles. Nothing alleged by the government brings al-Marri within those constitutionally \*17 permissible bounds. Al-Marri concededly was not affiliated with the armed forces of an enemy nation and was never present on a battlefield, let alone took up arms there against the United States. The constitutional imperative of preserving the longstanding distinction between combatants and civilians, and thus the civilian sphere's independence from military intrusion, applies with even greater force here because the nature of the alleged conflict means that military detention is not simply a temporary measure to prevent a soldier's return to a battlefield, but is a potential life sentence without the constitutional protections of the criminal process. The president, moreover, has no inherent authority to subject al-Marri to indefinite military detention. All of the Fourth Circuit judges who addressed this argument rejected it, and the government failed even to raise it in its Brief in Opposition. Because Congress, in a bill enacted contemporaneously with the AUMF's passage, refused to allow indefinite detention of suspected terrorist aliens arrested in the United States, the president's authority here is at its lowest ebb. Nothing in the Constitution's history or text, or this Court's precedents, supports the notion that Article II allows the president to declare a legal resident - or an American citizen - an enemy combatant and hold him indefinitely without charge. \*18 ARGUMENT I. THE AUMF DOES NOT AUTHORIZE PETITIONER'S INDEFINITE MILITARY DETENTION. The Fourth Circuit's judgment sanctions a breathtaking and unprecedented expansion of executive detention power within the United States. Although this case involves a legal resident alien, the Fourth Circuit's construction of the AUMF extends equally to American citizens.9 The domestic military detention the Fourth Circuit licensed is anathema to our tradition of individual liberty and the historic presumption against military intrusion into the domestic civilian sphere. At a bare minimum, Congress must make an explicit statement authorizing military seizure and detention at home, especially where that detention is potentially without end. The Fourth Circuit manifestly erred in inferring a power of indefinite domestic detention from Congress's approval of “necessary and appropriate” force, especially given both the serious \*19 constitutional problems its interpretation raises and Congress's clear, contemporaneous refusal to sanction such detention in the Patriot Act. A. The AUMF Lacks the Clear Statement Necessary to Authorize the Military Detention of Legal Residents Seized Inside the United States. Since the Founding, it has been the abiding norm under the Due Process Clause of the Fifth Amendment that people arrested in this country have the right to speedy criminal prosecution. See, e.g., Hamdi, 542 U.S. at 529 (plurality opinion) (“ ‘In our society liberty is the norm,’ and detention without trial ‘is the carefully limited exception.’ ” (quoting United States v. Salerno, 481 U.S. 739, 755 (1987))); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ( “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”). Any departure from this constitutional bedrock - if permitted at all - requires an explicit statement from Congress. See Ex parte Endo, 323 U.S. 283, 298-300 (1944) (statutes must be construed not to infringe the fundamental constitutional right against detention without trial absent an express statement). Where individual liberty is at stake, as in other contexts, the clear statement requirement ensures that when the government is acting in a constitutionally sensitive area, “the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (emphasis added) (internal quotation marks and \*20 citations omitted); INS v. St. Cyr, 533 U.S. 289, 299-300, 304-305 (2001) (narrowly construing a statute explicitly eliminating all judicial review over final deportation orders not to eliminate habeas corpus review); Greene v. McElroy, 360 U.S. 474, 507 (1959) (statutes should be construed to infringe fundamental liberties only to the extent they clearly and unequivocally authorize curtailment of such liberties); see also Pet. App. 23a n.6 (Motz, J.) (noting that the Supreme Court has permitted exceptions to the criminal process “only when a legislative body has explicitly authorized the exception” (emphasis in original) (citing cases)). This canon does not simply protect core individual liberties. It also safeguards Congress's prerogative of democratic deliberation on matters cutting to the heart of the Nation's values and traditions. The clear statement requirement applies in time of crisis as well as in time of calm. See, e.g., Endo, 323 U.S. at 296-297, 300-301 (rejecting the executive's claim of domestic detention power not “clearly and unmistakably” granted by statute despite the executive's claim that such power was “essential” to the war effort); Coleman v. Tennessee, 97 U.S. 509, 514 (1879) (absent “clear and direct language,” courts must not construe congressional language as permitting military “interference” with the “regular administration of justice in the civil courts”); see also Hamdan v. Rumsfeld, 548 U.S. 557, 623-625 (2006) (narrowly construing permissible deviations from the Uniform Code of Military Justice's procedural rules in finding that newly created military commissions impermissibly deviated from those rules). Silence, by contrast, does not \*21 constitute permission, especially if executive action infringes constitutional rights. See, e.g., Brown v. United States, 12 U.S. (8 Cranch) 110, 126, 128-129 (1814) (refusing to construe a declaration of war to authorize the military seizure of enemy property within the United States and, by necessary implication, the seizure of enemy persons); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-178 (1804) (striking down the wartime seizure of a ship traveling from a French port because a congressional statute authorized only the seizure of a ship traveling to a French port). Detention without trial raises especially grave concerns - and thus heightens the imperative of a clear legislative statement - when that detention is indefinite and potentially permanent, as al-Marri's necessarily is. Al-Marri's detention based on his alleged connection with al Qaeda has already exceeded 2,000 days and, as the government suggests, will likely continue “for a long time,” possibly for life. Pet. App. 67a (Motz, J.) (quoting the Deputy Solicitor General); see also Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229, 2270 (2008) (cautioning that detention in a ‘war on terror’ “may last a generation or more”). Legal authority for prolonged, possibly lifelong detention without charge cannot be manufactured out of congressional silence. It demands the most explicit of legislative statements. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 699-701 (2001) (refusing to construe a statute explicitly authorizing some detention of allegedly dangerous aliens to authorize indefinite, possibly permanent, detention). \*22 The Fourth Circuit, however, did not simply nullify a fundamental liberty interest without clear congressional sanction. It also disregarded a core structural predicate of the Constitution: the historic presumption against military intrusion into the domestic civilian sphere. A crucial force behind the Constitution's conception and design was the Framers' “general mistrust of military power permanently at the Executive's disposal.” Hamdi, 542 U.S. at 568 (Scalia, J., dissenting); accord Laird v. Tatum, 408 U.S. 1, 15 (1972) (“[A]ny military intrusion into civilian affairs” has always been staunchly resisted.); Reid v. Covert, 354 U.S. 1, 30 (1957) (plurality opinion) (A “well-established purpose of the Founders” in drafting the Constitution was “to keep the military strictly within its proper sphere, subordinate to civil authority.”); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952) (refusing to sanction President Truman's claimed authority to seize the Nation's steel mills to avert a labor strike, even though the President said the seizure was necessary to avert national catastrophe). As Justice Jackson explained, “That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.” Id. at 644 (Jackson, J., concurring) (emphasis added). The Framers' desire to secure the protections of the criminal process and to limit military encroachment on civilian government animated this Nation's creation. See The Declaration of Independence paras. 12, 18 (U.S. 1776) (protesting \*23 that the English crown had “affected to render the Military independent of and superior to the Civil Power” and “depriv[ed] us in many cases, of the benefits of Trial by Jury”). The Framers enshrined the strong presumption in favor of criminal process and against military detention throughout the Constitution. See, e.g., U.S. Const. art. I, § 9, cl. 2; id. art. III, § 2, cl. 3; id. amends. IV, V, and VI; Milligan, 71 U.S. at 119-120 (explaining that Article III's jury trial clause and the Fourth, Fifth, and Sixth Amendments serve as a bulwark against military infringement on individual liberty); Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946); see also Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (trial by jury historically provided a bulwark against tyranny and oppression). The Framers also installed additional protections against military encroachment in the Bill of Rights. See U.S. Const. amend. III. Congress has demonstrated the same vigilance against military intrusion into the domestic civilian sphere through its enactment of landmark statutes. See, e.g., Non-Detention Act, 18 U.S.C. § 4001(a) (responding to the military detention of Japanese-Americans during World War II by prohibiting the detention of American citizens unless expressly authorized by Congress); Posse Comitatus Act, 18 U.S.C. § 1385 (prohibiting the use of the military to execute the laws in the United States unless “expressly authorized” by Congress). Time and again, this Court has remained faithful to the Framers' understanding by holding that the extension of military jurisdiction to individuals seized within the United States - if allowed at all - raises grave constitutional questions. \*24 It has therefore demanded that Congress, at minimum, state unequivocally any intent to supplant the civilian criminal process with military jurisdiction. In Milligan, the government asserted that the president, as commander-in-chief, must have the power to deal militarily with dangerous men such as Lambdin Milligan, who had allegedly aided the enemy and plotted to take military action within the United States during the Civil War. 71 U.S. at 16-17. The government vigorously argued that while Milligan did not have the right that a belligerent has to wage war under the laws of war, he was nonetheless part of a vast, secret conspiracy, the Sons of Liberty, which involved more than 100,000 men and utilized a paramilitary structure, id. at 102, rendering him as proper a subject of military jurisdiction as a person who “had been taken in action with arms in his hand,” id. at 21. The Court unanimously rejected that argument. All nine Justices agreed that Milligan could not be tried by military commission because of the serious constitutional problems raised by that intrusion of military jurisdiction into the civilian sphere. The Justices diverged only on whether to reject this intrusion for want of a clear legislative statement or on constitutional grounds. The majority recognized that Milligan was alleged to have committed “an enormous crime” in “a period of war” when he communicated with the Confederacy, conspired to “seize munitions of war,” and “join[ed] and aid[ed] … a secret” terrorist organization “for the purpose of overthrowing the Government and duly constituted authorities of the \*25 United States.” Id. at 6-7, 130 (emphasis in original). Yet that majority held, in a ruling never since repudiated, that the Constitution required that Milligan be tried in a civilian court, as long as those courts were open and functioning. Id. at 121-122; see also Hamdi, 542 U.S. at 522 (plurality opinion) (reaffirming Milligan); id. at 567-568 (Scalia, J., dissenting) (same); Hamdan, 548 U.S. at 591, 595 n.25 (Stevens, J., concurring) (same). The president, it explained, could not simply opt out of the criminal justice system while the civilian courts remained available solely because an alleged offender posed a grave danger, even at a time when the Nation's survival was at stake. Milligan, 71 U.S. at 122. The Court also held that Milligan could not be further detained by the military, even absent trial by military commission, noting that “[i]f in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana.” Id. at 131.10 The four concurring Justices reached the same result on statutory grounds. They concluded that in the absence of an explicit legislative statement sanctioning military commissions Congress had “not authorized” military jurisdiction over a resident of \*26 the United States even though it was a time of war and even though Congress had taken the extraordinary step of suspending the writ of habeas corpus in Indiana. Id. at 135-136 (Chase, C.J., concurring). Like the majority's constitutional holding, the concurrence's statutory conclusion preserved the presumption of liberty secured by civilian criminal process against military infringement. This Court has since hailed Milligan as “one of the great landmarks in [its] history.” Reid, 354 U.S. at 30 (plurality opinion); see also, e.g., Hamdan, 548 U.S. at 591 (extolling Milligan as a “seminal case”). The Court's World War II opinion in Quirin adheres to this approach. In Quirin, all involved accepted that the petitioners were subject to military detention based on their uncontested affiliation with the armed forces of the enemy German government - a clear and irrefutable basis for military jurisdiction under longstanding and universally accepted law-of-war principles. In upholding the exercise of domestic military jurisdiction, the Court nevertheless emphasized that Congress had “explicitly provided” for the petitioners' trial by military commission under the Articles of War. Quirin, 317 U.S. at 28; accord Hamdan, 548 U.S. at 592 (Quirin rested on express congressional authorization); see also infra at 50-52 (discussing Quirin). Four years later, the Court reaffirmed the presumption against reading legislative silence to authorize military displacement of the Constitution's criminal procedure protections. Duncan v. Kahanamoku, 327 U.S. 304 (1946). In Duncan, the \*27 government claimed that a statute authorizing Hawaii's governor to place that territory under martial law, which had been proclaimed by the governor and approved by President Roosevelt, had to be interpreted as authorizing military trials. Id. at 307-309, 312-313. The government further claimed that changes in war's technologies had rendered obsolete traditional limits on military jurisdiction, revoking the ordinary presumption in favor of the civilian criminal process. Id. at 329 (Murphy, J., concurring); Br. of the United States at 65, Duncan v. Kahanamoku, 327 U.S. 304 (1946) (No. 14). The Court decisively rejected the government's argument and declined its invitation to allow the historic “boundaries between military and civilian power” to shift with changes in modern warfare even though those changes had made the Nation's entire territory more vulnerable to attack. Duncan, 327 U.S. at 324; see also id. at 330 (Murphy, J., concurring) (“The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed [even] through a reasonable fear of military assault.”). The Court instead narrowly construed the statute authorizing martial law, finding that it “was not intended to authorize the supplanting of [civilian] courts by military tribunals.” Id. at 324. The Court thus reaffirmed the continued primacy of the civilian courts as long as those courts were open and functioning, even though Hawaii was in the theater of military operations, continuously in danger of invasion, and “under fire” at the time. Id. at 340, 344 (Burton, J., dissenting). \*28 The Court's more recent decision in Hamdi is consistent with the clear statement rule and underscores the absence of any clear statement for the detention here. In Hamdi, this Court held that the AUMF provided for the military detention of an armed soldier captured on a foreign battlefield (in Afghanistan), where he had been fighting alongside enemy government forces against U.S. and allied troops during the hostilities there. Hamdi, 542 U.S. at 512-513, 516-517 (plurality opinion). Although the Hamdi plurality recognized that the AUMF did not specifically mention detention, it explained that the military detention of an armed soldier captured on a foreign battlefield was so “fundamental [an] incident of waging war” that “in permitting the use of ‘necessary and appropriate force,’ ” Congress had “clearly and unmistakably” authorized detention “in the narrow circumstances considered here.” Id. at 519 (emphases added). The plurality further observed that in such limited circumstances, both established law-of-war principles and the military's own rules provided a clear and predictable legal framework for determining the status of prisoners captured as an incident to the use of military force. Id. at 538 (referencing Article 5 of the Third Geneva Convention and U.S. Army Regulation 190-8). Hamdi thus shows that Congress understood that the AUMF, like past military authorizations, would be interpreted in line with established law-of-war principles, customary practices, and the constitutional norms that have historically constrained military power domestically. See id. at 518-521 (plurality opinion) (AUMF must be \*29 interpreted in light of “longstanding law-of-war principles”); accord Hamdan, 548 U.S. at 593-595 (expressly refusing to read the broad language of the AUMF to “expand[ ] the President's authority to convene military commissions,” and instead finding that this authority was limited by traditional law-of-war principles “[a]bsent a more specific congressional authorization”); accord Milligan, 71 U.S. at 121-122; Duncan, 327 U.S. at 319-324; Cass R. Sunstein, Clear Statement Principles and National Security: Hamdan and Beyond, 2006 Sup. Ct. Rev. 1, 4, 6 (2006) (recognizing that departure by the executive “from standard adjudicative forms … must be authorized by an explicit and focused decision from the national legislature,” especially where that departure “intrude[s] on constitutionally sensitive interests”). Unlike military detention of armed soldiers captured on a foreign battlefield in a war against an enemy government, indefinite military detention of individuals arrested at their homes in the United States and detained on the basis of suspected wrongdoing - even suspected terrorist acts - in an open-ended, generations-long struggle against a terrorist organization is not and never has been a “fundamental incident of waging war.” To the contrary, al-Marri's military detention in connection with such a struggle raises the very concerns that prompted the Hamdi plurality to warn against inferring a detention power from the AUMF's silence beyond Hamdi's narrow and traditional law-of-war circumstances. See Hamdi, 542 U.S. at 521 (cautioning that inferring a detention power beyond the battlefield circumstances in Afghanistan, and the \*30 “longstanding law-of-war principles” on which that inference rests, might cause the understanding that the AUMF authorizes detention to “unravel”). The law of war fails to provide the necessary clear authorization for the detention here that it did in Hamdi. As this Court has observed, the law of war recognizes two types of armed conflicts: international and non-international. Hamdan, 548 U.S. at 630-631. International armed conflicts, by definition, exist only between nation states. See Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Hamdan, 548 U.S. at 630-631. Non-international armed conflicts, by contrast, typically occur within the territory of a nation state and do not have a nation state on both sides. The latter term encompasses civil wars or other armed conflicts between a government and an insurgent group within its territory. See, e.g., Int'l Comm. of the Red Cross, Commentary: Geneva Convention (III) Relative to the Treatment of Prisoners of War, at 28-29, 31-33 (Jean S. Pictet gen. ed., 1960); Leslie C. Green, The Contemporary Law of Armed Conflict 317 (2d ed. 2000); John Cerone, Misplaced Reliance on the ‘Law of War,’ 14 New Eng. J. Int'l & Comp. L. 57, 63-64 (2007); see also Hamdan, 548 U.S. at 629 (describing non-international armed conflict as a conflict “ ‘occurring in the territory of one of the High Contracting parties [to the Geneva Conventions]’ ” (quoting Common Article 3 of the Geneva Conventions)). The Hamdan Court assumed, arguendo, the existence of a non-international armed conflict against al Qaeda in Afghanistan. \*31 Hamdan, 548 U.S. at 628-629; id. at 641-642 (Kennedy, J., concurring). That is a conflict in which the government admits al-Marri took no part. See, e.g., Pet. for Reh'g and Reh'g En Banc at 10, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427); Pet. App. 67a (Motz, J.).11 The Court did not decide in Hamdan whether there was a non-international armed conflict against al Qaeda in the United States, nor did it assume such a conflict. Likewise, the Court need not decide that question here.12 Even if the facts were to give rise to a non-international armed conflict against al Qaeda in the United States, law-of-war principles still would provide no support for the government's position because, as Judge Motz \*32 explained, those principles have not traditionally provided states with any independent authority to detain in such conflicts. Pet. App. 57a, 68a-69a, 74a-75a. In international armed conflicts, the Geneva Conventions have long supplied a clearly defined and established legal framework for detention. By contrast, in non-international armed conflicts, the law of war does not separately authorize detention. Instead the law of war has long presumed that domestic law provides the applicable authority for detention in such conflicts. See, e.g., Gabor Rona, An Appraisal of U.S. Practice Relating to ‘Enemy Combatants,’ 10 Y.B. of Int'l Humanitarian L. 232, 240-241 (2009), available at http:// papers.ssrn.com/sol3/papers.cfm?abstract\_id=1326551 (“the legal basis for detention [in non-international armed conflicts] is found in domestic not international law”; the law of war “simply does not displace domestic law on questions of detention”); Marco Sassòli, Query: Is There a Status of “Unlawful Combatant?,” in 80 International Law Studies 57, 64 (Richard B. Jaques ed., 2006) (in non-international armed conflicts, the law of war provides for guarantees of humane treatment but does not itself authorize detention). In sum, rather than authorizing (or forbidding) the detention of persons seized and held within a state's territory in a non-international armed conflict, the law of war presumes that such persons will be held pursuant to domestic criminal law or other legislation that \*33 explicitly authorizes detention. See, e.g., Sassòli, supra, at 64; Rona, supra, at 241.13 In the United States, the relevant domestic law - the Constitution, Milligan and its progeny, and framework statutes like the Non-Detention and Posse Comitatus Acts - has long instructed that the norm is detention pursuant only to criminal charge and trial. It has required that domestic detention by the military, if permitted at all, must have express authorization from Congress. Unlike in Hamdi, the law of war simply does not supply the requisite clear authority necessary for the military detention power the government asserts here. Thus, in approving the use of military force against al Qaeda in the AUMF, Congress cannot be said to have silently delegated an undefined and open-ended domestic detention power, untethered to longstanding and established law-of-war principles, that displaces - literally in this case - the criminal justice process that has operated within the United States since the Nation's founding. Nor can \*34 Congress be said to have simply left it to the courts to create from whole cloth an unprecedented scheme of domestic military detention, applicable to citizens and legal residents alike, without legislating any guidelines or limits on the scope of the detention power or how this power was to be exercised or reviewed. Cf. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001) (Congress “does not … hide elephants in mouseholes.”). To the contrary, on the rare occasions that Congress has approved some limited form of domestic arrest and detention absent criminal charge and speedy trial during wartime or for national security purposes, it has expressly provided for the exercise of that delegated detention power and carefully circumscribed its boundaries. See Alien Enemies Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (codified at 50 U.S.C. § 21); Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II, §§ 102-103, 64 Stat. 1019, 1021 (repealed 1971). Congress unmistakably failed to provide either the analogous clear signal or the determinate guidelines necessary to infer domestic detention power from the AUMF. The Fourth Circuit's profusion of divergent opinions, theories, and definitions itself reflects the absence of statutory authority for Petitioner's indefinite military detention. Five judges crafted three different and novel definitions of “enemy combatant” - beyond the various and shifting definitions supplied by the government. See supra at 11. The confusion below thus highlights the fact that there is no “clear” congressional license for a domestic military detention scheme hidden in the \*35 AUMF's silence. The Fourth Circuit's effort to devise such a domestic detention scheme by ad hoc judicial lawmaking usurps the deliberative role constitutionally assigned to Congress under the Separation of Powers. See, e.g., Mistretta v. United States, 488 U.S. 361, 371-372 (1989); Youngstown, 343 U.S. at 609 (Frankfurter, J., concurring); see also Loving v. United States, 517 U.S. 748, 757-758 (1996) (“[Article I] make[s] Congress the branch most capable of responsive and deliberative lawmaking.”). If, as the executive has insisted throughout the course of this litigation, core constitutional rights are to be curtailed to fight terrorism at home, “it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of [a] Court.” Hamdi, 542 U.S. at 578 (Scalia, J., dissenting).14 \*36 B. The Patriot Act and the Overarching Statutory Landscape Show that Congress Denied the President the Very Power He Has Asserted in this Case. While the AUMF is silent on detention, Congress was not. The very day after Congress enacted the AUMF, it began consideration of another statute that addressed, separately and explicitly, the domestic detention of alien terrorist suspects without ordinary civilian process. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (“Patriot Act”).15 The fact that Congress saw the need to address domestic seizures and detentions of alien terrorism suspects contemporaneously with its consideration of the AUMF and mere days after the September 11 attacks demonstrates that legislators themselves did not believe that they had addressed the questions the executive finds resolved in the AUMF's silence. Rather, it shows legislators believed that they still needed to resolve the question \*37 of how alien terrorism suspects would be handled domestically. In the Patriot Act, Congress, after careful deliberation, explicitly refused to grant the very power of indefinite detention without charge that the executive claims to have obtained sub silentio in the AUMF. The executive's claim of indefinite military detention power cannot be squared with Congress's contemporaneous and exhaustive consideration and rejection of indefinite domestic detention without charge in the Patriot Act. Congress focused in the Patriot Act on the precise situation purportedly present here: an alien who has entered the United States to facilitate or engage in terrorist acts. See Patriot Act § 412; Pet. App. 77a-78a (Motz, J.) (describing the Patriot Act's detailed detention provisions). Enacted in the immediate wake of the September 11 attacks, the Patriot Act was the centerpiece of Congress's domestic response to the attacks, and complemented the AUMF. Among other things, the Patriot Act expressly focused on the problem of aliens entering the United States with the intent of supporting or engaging in terrorist attacks, whether in al Qaeda's name or otherwise. Specifically, section 412 of the Patriot Act authorizes the Attorney General to seize suspected terrorist aliens in the United States, even if the intelligence necessary to link them to al Qaeda is not yet confirmed, and to detain them without any process. It mandates, however, that within seven days of seizure, the Attorney General must begin “removal proceedings” or “charge [such suspected \*38 terrorist aliens] with a criminal offense.” Patriot Act § 412(a). Thus, even when Congress expressly authorized the domestic seizure and detention of suspected alien terrorists, it carefully cabined the detention power and explicitly prohibited detention without charge beyond seven days by requiring the initiation of criminal prosecution or an immigration removal proceeding. See Youngstown, 343 U.S. at 609 (Frankfurter, J., concurring) (“It is quite impossible … when Congress did specifically address itself to a problem … to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.”). And by preserving Justice Department control of such detentions, Congress remained faithful to the longstanding suspicion of military intrusions into the domestic civilian sphere. See supra Part I.A. Congress, moreover, specifically refused to authorize indefinite detention without charge of terrorist aliens within the United States. Pet. App. 60a (Motz, J.) (discussing legislative history). When the Bush Administration initially requested that authority - the authority at issue here - members of both parties in Congress fiercely objected during legislative hearings on the Patriot Act, and several responded that such indefinite detention authority was unconstitutional. See, e.g., Homeland Defense: Hearing Before the S. Comm. on the Judiciary, 107th Cong. 18, 26, 28 (2001); Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. on the Judiciary, 107th Cong. 21, 40, 54 (2001). In the course of those hearings, no one - not one legislator and no member of the Administration - suggested that the AUMF had already granted the \*39 president the power to order indefinite military detention of some terrorists within the United States, even those allegedly affiliated with the perpetrators of the September 11 attacks. Congressional opposition to indefinite detention ultimately forced the Bush Administration to accept a bipartisan agreement to eliminate any indefinite detention authority from the Patriot Act. See Patriot Act § 412(a); see also 147 Cong. Rec. S10, 561 (daily ed. Oct. 11, 2001) (statement of Sen. Hatch) (relating that “Senator Kennedy, Senator Kyl, and I worked out a compromise that limits the [detention] provision”); 147 Cong. Rec. H7206 (daily ed. Oct. 23, 2001) (statement of Rep. Delahunt) (stating that negotiations had led to a “better bill” than that reflected in the initial proposal, which included authorization of indefinite detention). That the Administration and Congress felt the need during the hearings and markup to address the indefinite detention of terrorists within the United States in such detail and at such length without any reference to the AUMF underscores that no one believed that the AUMF, passed just weeks earlier, already granted the president any such authority. See, e.g., Erlenbaugh v. United States, 409 U.S. 239, 243-244 (1972) (subsequent bills must be read in tandem with earlier legislation and are “entitled to great weight in resolving any ambiguities and doubts” in the latter (internal quotation marks and citation omitted)).16 \*40 The legislative history of the AUMF similarly shows that Congress rejected the Bush Administration's eleventh-hour effort to expand the AUMF's reach to encompass the United States. As Senator Daschle has recounted, “[l]iterally minutes before the Senate cast its vote” on the AUMF, “the administration sought to add the words ‘in the United States and’ after ‘appropriate force’ in the [AUMF's] agreed-upon text” so as to give “the president broad authority to exercise expansive powers not just overseas - where we all understood he wanted to act - but right here in the United States, potentially against American citizens.” Tom Daschle, Editorial, Power We Didn't Grant, Wash. Post, Dec. 23, 2005. The Senate refused “to accede to this extraordinary request for additional authority.” Id.17 \*41 It is therefore clear from the statutory language, the context of enactment, and the legislative record that while Congress separately addressed the dangers of domestic terrorism in the Patriot Act, Congress was focused in the AUMF on the overseas use of the military in long-term foreign conflicts that Congress anticipated - overseas engagements that manifestly required legislative sanction. See AUMF § 2(b) (citing the War Powers Resolution). The AUMF was clearly drafted in anticipation of the impending conflict in Afghanistan, where the individuals responsible for the September 11 attacks and those who harbored them were known to be located. See Hamdan, 548 U.S. at 568; Hamdi, 542 U.S. at 510 (plurality opinion). Unlike the Patriot Act, the AUMF was not drafted with the detention of terrorism suspects seized in this country in mind. Nor did it grant the president discretion to treat the United States as a war zone and displace the civilian justice system by transforming criminal defendants into combatants through the stroke of a pen. Given the long and unbroken constitutional tradition of prosecuting terrorists seized inside the United States in the criminal justice system, and the strong presumption against military action domestically, it makes perfect sense that Congress authorized the use of military force abroad in the AUMF while responding to the threat at home by substantially enlarging law enforcement's power to detain and prosecute suspected terrorists through \*42 the Patriot Act.18 Cf. Youngstown, 343 U.S. at 610 (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”); Nat'l Lead Co. v. United States, 252 U.S. 140, 147 (1920) (Congress is presumed to legislate with knowledge of established executive branch practice, especially where that practice is longstanding).19 The Fourth Circuit, moreover, wrongly assumed that Congress silently abrogated the Non-Detention Act in the AUMF. See 18 U.S.C. § 4001(a). Repeals by implication are strongly disfavored. See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. \_\_, 127 S. Ct. 2518, 2532 (2007); Branch v. Smith, 538 U.S. 254, 273 (2003). The Non-Detention Act was enacted with the express purpose of prohibiting military detention without criminal trial of allegedly dangerous individuals seized in the United States in time of war or crisis absent clear and explicit direction from Congress. See Padilla v. Rumsfeld, 352 F.3d 695, 718-720 (2d Cir. 2003) (discussing legislative history); accord Hamdi, 542 U.S. at 541-547 (Souter, J., concurring) (same). The Non-Detention Act, to be sure, applies only to citizens, while this case involves a non-citizen. But the Fourth Circuit's decision, as judges of that court recognized, extends the AUMF domestically to citizens and non-citizens alike. The text of the AUMF, this Court's ratio decidendi in Hamdi, and the basic force of the government's own arguments admit no distinction between citizens and non-citizens. See supra note 9; cf. Clark v. Martinez, 543 U.S. 371, 378 (2005) (“To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”). Thus, if the AUMF authorizes Petitioner's indefinite military detention, it also allows the indefinite military detention of American citizens arrested in the United States. But, as discussed above, the AUMF provides no such authorization.

#### Our entire aff it was bad for the courts to uphold a reading of the law that upends SOP---just having Congress change course does nothing to alter the symbolic and precedential value of the ruling

Lynch, 9

(Legal Fellow-Cato Institute, 1/28, Brief of the Cato Institute, The Constitution Project, and The Rutherford Institute, as Amici Curiae in Support of Reversal, Al Marri v. Spagone, WestLaw)

The Constitution Project is an independent, bi-partisan think tank which creates coalitions of \*2 respected leaders from across the political spectrum to issue consensus recommendations for policy reforms. The Project's Liberty and Security Committee - a bipartisan, blue-ribbon group of prominent Americans - addresses the importance of preserving both national security and civil liberties. In July 2004, this committee issued a Report on Post-9/11 Detentions in which its signatories urged that “[a]ny detention of a citizen or non-citizen in the United States **must be expressly authorized by congressional statute** or by the law of war,” and that “[t]he courts of the United States must be available to hear claims of detainees that they are being held or treated in violation of the law.”2 In addition, in 2005, the Project's bipartisan War Powers Committee released Deciding to Use Force Abroad: War Powers in a System of Checks and Balances, a report analyzing the respective powers of all three branches of government during wartime.3 The Rutherford Institute is an international civil liberties organization that was founded in 1982 by its President, John W. Whitehead. The Rutherford Institute specializes in providing legal representation \*3 without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues. During its 26-year history, attorneys affiliated with The Rutherford Institute have represented numerous parties before this Court. The Institute has also filed amicus curiae briefs in cases dealing with important constitutional issues arising from the current efforts to combat terrorism. See, e.g., Munaf v. Geren, 128 S. Ct. 2207 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004). SUMMARY OF ARGUMENT The government has claimed, and the fractured en banc Fourth Circuit erroneously concluded, that the President has authority to use the military to detain, without charge or trial, persons who are lawfully in the United States and who have allegedly engaged in terrorism-related conduct. There is no such authority - not in any Act of Congress nor in the Constitution. Thus, neither the government's claim nor the ruling below can be sustained. A. The government has pointed to the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), as the source of congressional authorization for its use of the military for domestic detention, but that statute is silent on the issue and \*4 speaks only in general terms about use of military force. It does not satisfy the Court's clear statement rule that requires Congress to expressly authorize the Executive's use of military detention power in lieu of civilian criminal prosecution within the domestic sphere. This Court has never inferred such an authorization from general declarations of military force by Congress. This Court's conclusion in Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004), that the AUMF implicitly authorizes certain military detentions does not govern the instant case because the ruling in Hamdi applies only to the military detention of persons taken prisoner on a foreign battlefield, inside a zone of active combat. Hamdi does not extend to the military detention of individuals who are lawfully in the United States, far from the foreign battlefield. It is the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, that granted the Executive authority to detain terrorism suspects present in the United States. Congress considered the Patriot Act contemporaneously with the AUMF and enacted it a few weeks later. The Patriot Act does not authorize Executive detention in the United States by use of the military without charge or trial, and the government makes no such contention. The government's reading of the AUMF to authorize the domestic military detention it seeks in this case would render superfluous Congress's enactment of the more specific domestic detention \*5 provisions of the Patriot Act. The legislative history of the Patriot Act demonstrates that Congress intended the Patriot Act, not the AUMF, to provide the President with detention power over terror suspects who are in the United States lawfully. It also demonstrates that Congress considered - and declined to grant - the military detention power that the government now claims. B. Lacking express congressional authorization, the government has asserted that the Executive has the inherent authority under the Commander-in-Chief Clause in Article II of the Constitution to use the military to detain persons who are lawfully in the United States. But the Commander-in-Chief Clause grants no such authority. Under the Constitution, the use of military power is a shared responsibility between the Legislature and the Executive, and even the President's broad power to wage war overseas as Commander-in-Chief requires congressional authorization. This constitutional diffusion of government power regarding the use of the military reflects the Framers' desire to guard against any threats to democratic government posed by standing armies controlled by a potentially tyrannical Executive. And this constitutional structure **confirms the need for explicit authorization from Congress** for the President \*6 to use the military to detain without charge or trial persons who are lawfully in the United States. C. Allowing the Executive to use the military to detain, without charge or trial, persons who are lawfully in the United States could give rise to manipulation of the civilian criminal justice system. Such manipulation threatens the constitutionally protected liberty of every person who is lawfully in the United States, including American citizens. ARGUMENT The Executive's Use Of Military Power To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States Is Not Authorized By Congress Or By The Constitution It is well settled that, under our constitutional system of disaggregated government power, the authority of the Executive, even in wartime, must derive either from an act of Congress or from the Constitution. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). This is so because “the Constitution diffuses power \*\*\* to secure liberty.” Id. at 635 (Jackson, J., concurring). Consistent with that basic tenet, this Court has repeatedly viewed with great suspicion any attempt \*7 by the Executive to exercise its power to use the military in the domestic sphere without congressional authorization. Moreover, this Court has recognized that the preservation of individual rights **requires strict enforcement of the checks-and-balances in our constitutional system, by requiring a clear statement from Congress** or explicit constitutional authority derived from Article II, before the President may use military power against persons who are lawfully in the United States. These fundamental separation-of-powers principles **require that the judgment of the court of appeals be reversed**. The deeply fractured Fourth Circuit en banc court was wrong when it concluded that “Congress has empowered the President to detain [petitioner] as an enemy combatant.” Pet. App. 7a. It was wrong because the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), on which it relied, does not expressly grant the President the authority to use the military to detain without charge or trial persons who are lawfully in the United States, far from the foreign battlefield. Lack of express congressional authorization is fatal to the government's case because the President's authority as Commander-in-Chief under Article II provides no such power. \*8 A. Congress Has Not Authorized The Executive To Use The Military To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States 1. The AUMF does not authorize such detention The Executive has erred in its claim that the AUMF grants it the power to use the military to detain as “enemy combatants,” without charge or trial, persons who are lawfully in the United States. The AUMF was passed by Congress on September 14, 2001, as an immediate response to the September 11th terrorist attacks against the United States. The AUMF provides the President with the authority to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. § 2(a), 115 Stat. at 224. This plain language does not support the ruling below. The AUMF is a general authorization for the use of military force. It does not explicitly authorize the President to use the military to detain without \*9 charge or trial persons who are lawfully in the United States. 2. The court of appeals' ruling **violates longstanding principles that require a clear statement from Congress when it authorizes the Executive to curtail individual rights** a. The government has argued that this Court should infer from the circumstances surrounding enactment of the AUMF congressional authorization for the domestic military detention power claimed here. See Br. in Op. 23. But this Court's clear statement requirement plainly precludes any such inference. For more than 60 years, this Court has held that grants of power to the Executive that have the potential to weaken or remove enshrined constitutional protections - such as the right not to be detained by the military without due process (the right at issue here) - must be clearly stated by Congress. See Ex parte Endo, 323 U.S. 283, 300 (1944) (“We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.” (emphasis added)). This requirement of a clear statement from Congress **“facilitates a dialogue between Congress** \*10 **and the Court**,” Boumediene v. Bush, 128 S. Ct. 2229, 2243 (2008), **and it serves as a critical check on the overreaching that is threatened by the President's use of military power to detain persons** who are lawfully in the United States. See Kent v. Dulles, 357 U.S. 116, 129 (1958) (“We hesitate to find in [a] broad generalized power an authority to trench so heavily on the rights of the citizen.”); Greene v. McElroy, 360 U.S. 474, 506 (1959) (holding that clear statements are required “not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.” (citation omitted)). This Court has not hesitated to adhere to the clear statement requirement to preclude domestic military detention of persons during times of national crisis. In Ex parte Endo, this Court held that a statute that ratified an executive order directing the “exclu[sion]” of persons of Japanese ancestry from the West Coast during World War II was not sufficiently explicit with regard to “detention” as to authorize the military internment of loyal, law-abiding United States citizens, or to support inferring such internment authority. See 323 U.S. at 300 (“In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between \*\*\* liberties and the exigencies of war.”). \*11 Similarly, in Duncan v. Kahanamoku, 327 U.S. 304 (1946), this Court refused to construe Congress's statutory authorization for the governor of Hawaii to declare “martial law” when there was an imminent threat of a military invasion as a grant of power for the governor to use military tribunals to resolve domestic criminal cases after the attack on Pearl Harbor. See id. at 316-317, 324 (refusing to assume that, by explicitly authorizing the imposition of “martial law,” Congress intended to permit the governor to transgress the “boundaries between military and civilian power, in which our people always believed” and “which ha[ve] become part of our political philosophy and institutions”). Congress has acted in accordance with the clear statement requirement on other occasions when it has used clear and unmistakable language to vest the Executive with the power to detain persons who are lawfully residing in the United States, and even when such detention involves the use of civilian authority. In the Emergency Detention Act of 1950, ch. 1024, tit. II, § 100, 64 Stat. 1019 (EDA) (codified at 50 U.S.C. §§811-826 (1970)) (repealed 1971), for example, Congress explicitly authorized the Attorney General to “apprehend and by order detain \*\*\* each person as to whom there is reasonable grounds to believe \*\*\* probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage.” Id. § 103, 64 Stat. at 1021; see also the Alien Enemy Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 21) (authorizing the President to \*12 apprehend, restrain, secure, and remove resident aliens who are inside the United States if their home country is in a declared war with the United States). Moreover, when Congress expressly authorizes detention by the Executive it typically provides explicit procedural safeguards, such as preliminary hearings and ongoing judicial review. See, e.g., 18 U.S.C. § 3142(f) (mandating a judicial hearing - with the right to be represented by counsel, to testify, to present witnesses, and to cross-examine witnesses - within five days of a detention on a material witness warrant under 18 U.S.C. § 3144); EDA, §§ 102(b), 104(d), 109(b), 111, 64 Stat. at 1021-1029 (requiring a public presidential proclamation of an “Internal Security Emergency” to trigger the Act's detention provisions, which mandate a preliminary hearing within a reasonable time, provide an opportunity to consult counsel and to cross-examine witnesses, and permit appellate review by an executive board within 45 days, subject to further review by a court on appeal or via habeas corpus). The AUMF fails to satisfy the clear statement mandate because nothing in the text comes close to authorizing the President to do what the ruling below allows; namely, to use the military to detain persons who are lawfully in the United States apart from the criminal justice system and to subject them to such ongoing detention without charge or trial. In addition, the text of the AUMF does not provide any procedural safeguards whatsoever for persons whom \*13 the Executive chooses to detain through domestic use of the military - a silence that speaks volumes about the fact that Congress did not intend the AUMF to authorize the Executive to have the power to impose military detention without charge or trial on persons who are lawfully in the United States. b. Hamdi v. Rumsfeld, 542 U.S. 507 (2004), is not to the contrary. In Hamdi, a plurality of the Court concluded that the AUMF authorizes the military detention without charge or trial of persons who are captured on a foreign battlefield while actively taking up arms against the United States. The plurality opinion made clear that its conclusion followed only from “the narrow circumstances alleged” in that case. Id. at 509. That ruling cannot be viewed as controlling with regard to persons who, unlike Hamdi, are lawfully in the United States at the time they are arrested and have never taken up arms against the United States on a battlefield. As the plurality opinion emphasized, Hamdi, a United States citizen, was apprehended in Afghanistan - “a foreign combat zone,” id. at 523 - while he was allegedly “carrying a weapon against American troops on a foreign battlefield,” id. at 522 n.1. Because such conduct indisputably qualified Hamdi for “enemy combatant” status under established principles of international law, id. at 518, the plurality concluded that the AUMF implicitly conferred on the Executive the authority to detain such individuals, even United States citizens, \*14 apprehended under like circumstances, see id. at 517-518. The Hamdi plurality's carefully limited ruling that the AUMF authorizes the Executive to use the military to detain “individuals in the narrow category” of persons who are captured while actively fighting on a foreign battlefield against United States military forces, id. at 517, says nothing about whether a person who is lawfully in the United States, far from a battlefield, can be detained by the military without charge or trial, rather than being arrested and prosecuted in the civilian criminal justice system. The Hamdi plurality also expressly distinguished Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), in a manner that confirms that the AUMF's detention authorization should not be construed to authorize the detention at issue in this case. Milligan involved the apprehension, detention, and military trial of an individual who was apprehended on peaceful territory within the United States but accused of subversive conduct in support of the Confederacy during the Civil War. This Court rejected the government's contention that, as a traditional incident of war, the Executive could convene a military tribunal to try Milligan, 71 U.S. at 131, which is essentially the same claim that the government makes here with regard to military detention. The Court in Milligan reasoned that the use of military authority was not proper because Milligan was not apprehended while in a State that was in rebellion, and because even dangerous and \*15 subversive behavior on the part of a person who is lawfully in the United States does not suffice to transform peaceful territory within the United States into a battlefield. See Ex parte Milligan, 71 U.S. at 127 (rejecting the existence of “actual war” in Indiana because it was not subjected to foreign invasion, civil war, or an overthrow of the national authority). Moreover, the Hamdi plurality specifically found that the fact that Milligan “was not a prisoner of war, but a resident of Indiana arrested while at home there” to be “central” to the Court's conclusion in Milligan that trial by military tribunal was improper. Hamdi, 542 U.S. at 522 (emphasis added). The plurality emphasized that “[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different.” Ibid. 3. This Court has not previously construed a general congressional authorization for the use of military force, like the AUMF, to confer upon the Executive the power to use the military to detain without charge or trial persons who are lawfully in the United States a. The ruling below represents a sea change with regard to the scope and effect of congressional authorizations for the use of military force. This Court has never held that a general authorization to \*16 use military force by Congress permits the Executive to use the military to detain persons who are lawfully in the United States. As far back as the War of 1812, the Court rejected attempts by the government to use such a general authorization for use of military force as a justification to seize enemy property or persons inside the United States. In Brown v. United States, 12 U.S. (8 Cranch) 110 (1814), the Court addressed a declaration of war by Congress that authorized the President “to use the whole land and naval force of the United States to carry [war against the United Kingdom of Great Britain and Ireland] into effect.” Declaration of War against the United Kingdom, ch. 102, 2 Stat. 755 (1812). The Court held that this general declaration was not sufficient to authorize the government to seize as “enemy property” in the United States certain British-owned cargo scheduled to be transported to England. The Court reasoned that the Executive's power to confiscate property, like its power to seize persons, can be asserted only “in execution of some existing law.” Brown, 12 U.S. at 122, 123. To underscore its conclusion that the Executive “did not possess the[] powers [to seize property or persons] by virtue of the declaration of war,” the Court relied in part on the fact that Congress had separately enacted specific legislation that authorized the military detention of enemy aliens. Id. at 126. Enactment by Congress of such a law to authorize detention of enemy aliens would not \*17 have been necessary if a general declaration of war was sufficient authority for detention. See ibid. (“War gives an equal right over persons and property: and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property.”).4 This Court's refusal to view a general authorization by Congress for the use of force as specific congressional authority for the Executive's exertion of military authority over individuals in the United States has persisted through subsequent armed conflicts. The Court consistently has maintained that Congress must expressly authorize the substitution of military process for civilian judicial process with regard to persons apprehended inside the United States. In Ex parte Milligan, 71 U.S. at 121-122, the Court ruled that there was no congressional authorization for military trials, and this was so despite the fact that President Lincoln's use of military power had been ratified by Congress, \*18 see Act of 1861, ch. 63, § 3, 12 Stat. 326 (1861), and Congress had suspended the writ of habeas corpus, see An Act Relating To Habeas Corpus, ch. 81, 12 Stat. 755 (1863). In Duncan, 327 U.S. at 324, this Court did not mention, much less examine, Congress's broad authorization for the President to use force against Japan during World War II when it held that there was no congressional authorization for the imposition of a military judicial system in Hawaii after the Pearl Harbor attack. See Duncan, 327 U.S. at 313, 324. Moreover, in Ex parte Endo, 323 U.S. at 303-304, this Court rejected the contention that Congress had authorized the Executive's detention of loyal citizens of Japanese ancestry, despite the existence of a use-of-force declaration so expansive in scope that it authorized the President “to employ the entire naval and military forces of the United States and the resources of the Government” in the war against Japan and also pledged “all the resources of the country” to “bring the conflict to a successful termination.” See Joint Resolution Declaring a State of War Against the Imperial Government of Japan, Pub. L. No. 77-328, 55 Stat. 795 (1941). b. The reasoning of Ex parte Quirin, 317 U.S. 1 (1942) - on which the government has relied heavily - has been subject to pointed criticism. See, e.g., Hamdi, 542 U.S. at 569 (Scalia, J., dissenting) (Quirin “was not this Court's finest hour”). It is also inapposite. \*19 Quirin did not rely on a general authorization for the use of military force. Rather, it construed a set of statutory provisions enacted by Congress that expressly authorized the Executive to conduct military trims under certain circumstances. See Quirin, 317 U.S. at 26-27. Congress had also declared that the United States was at war with Germany, see Declaration of State of War with Germany, Pub. L. No. 77-331, 55 Star. 796 (1941), and had expressly “pledged all of the resources of the country” to the President for use in conducting that war. Id. at 795. But this Court did not rely upon that general declaration to rule that the government was authorized to conduct military trials of the defendants, who had been apprehended in the United States. Rather, the Court held that more specific provisions of Articles 2 and 12 of the Articles of War, which were distinct from the general declaration of war, authorized the government to conduct military trials in the United States with respect to “any \*\*\* person who by the law of war is subject to trial by military tribunal[].” Quirin, 317 U.S. at 27 (citation and internal quotation marks omitted). Furthermore, in contrast to the use of military detention power in the domestic sphere that the Executive claims the AUMF provides, Quirin explicitly established that widely-accepted “law of war” principles determined who was subject to “trial by military tribunal” under the applicable statutory framework. See id. at 30 (noting that “Congress has incorporated by reference, as within the jurisdiction \*20 of military commissions, all offenses which are defined as such by the law of war”); see also Hamdi, 542 U.S. at 518 (citing Quirin to conclude that, “by universal agreement and practice,” the “capture, detention, and trial of unlawful combatants” is an “important incident of war” (internal quotation marks, brackets and citation omitted)). Persons who, like the Quirin defendants, had conceded their formal affiliation with enemy armed forces and “with the purpose of destroying war materials and utilities, [had] entered or after entry [had] remained in our territory without uniform,” unquestionably committed “an offense against the law of war.” Quirin, 317 U.S. at 46; see also Hamdi, 542 U.S. at 571 (Scalia, J., dissenting). Thus, the Quirin Court concluded that their trial by military tribunal was authorized by statute. Quirin, 317 U.S. at 46. Notably, although this Court unconditionally determined that the defendants in Quirin qualified as “enemy belligerents” subject to trial by military tribunal under longstanding law-of-war principles, id. at 37, it did not address the unclear international law status of individuals who have no formal affiliation with the military arm of an enemy government. Compare Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2113-2116 (2005) (suggesting that “enemy combatant” status under the AUMF depends largely on the scope of one's association with an enemy terrorist organization) with Ryan Goodman & Derek Jinks, \*21 International Law, U.S. War Powers, and the Global War on Terrorism, 118 Harv. L. Rev. 2653, 2654-2658 (2005) (arguing that direct participation in hostilities is a necessary and important ingredient to the “enemy combatant” classification). 4. Congress's contemporaneous creation of a detailed scheme in the Patriot Act for detention of domestic terrorism suspects that does not authorize military detention without charge or trial contradicts the Executive's interpretation of the AUMF Congress's enactment of the Patriot Act, see Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA Patriot Act”) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, demonstrates that any Executive military detention authority that can be inferred from the language of the AUMF (as in Hamdi) was not intended to apply in the domestic sphere. Congress intended the AUMF to provide the President with authority to conduct military operations abroad in response to the September 11th attacks. In contrast, the Patriot Act was intended to address the scope of the Executive's powers with regard to combating terrorism at home. a. The Patriot Act was enacted five weeks after the AUMF was signed into law. See Patriot Act, 115 Stat. at 272. Various elements of the legislation that became the Patriot Act were being considered by \*22 members of Congress, in conjunction with the Executive branch, at the same time that the AUMF was enacted. See Hearing on Terrorism Investigation and Prosecution Before the S. Comm. on the Judiciary, 107th Cong. 1 (Sept. 25, 2001) [hereinafter “Hearing on Terrorism Investigation and Prosecution”] (statement of Sen. Leahy) (remarking that the Attorney General had started briefing and working with a bi-partisan group of congressional leaders regarding domestic anti-terrorism legislation “literally within hours of the terrible matters on September 11”). As enacted, the Patriot Act was designated as an Act to provide the Executive with “tools” to “[i]ntercept and [o]bstruct [t]errorism,” § 1(a), 115 Stat. at 272. Military detention of persons in the United States without charge or trial for the duration of international hostilities is not one of the “tools” that the Patriot Act provides. First, the Patriot Act does not authorize the Executive to use military authority in the domestic sphere at all. Second, Congress placed a specific, temporal limit on the authority that the Patriot Act confers on the Attorney General to use civilian authority to “take into custody any alien” in the United States who is certified as a national security threat by the Attorney General based on “reasonable grounds to believe” that such person has engaged in or is associated with terrorist activities or “any other activity that endangers the national security of the United States.” 8 U.S.C. § 1226a(a)(1), (3)(A), (3)(B). \*23 Congress specified that the Attorney General must, within seven days of arrest, either place the alien in removal proceedings or charge the alien with a criminal offense. Id. § 1226a(a)(5). By contrast, the domestic military detention without charge at issue here has already lasted for more than five years.5 Third, even when an alien has been certified by the Attorney General to be a national security danger and has been placed in removal proceedings or ordered removed, if that alien is unlikely to be removed in the reasonably foreseeable future, the Patriot Act limits the Attorney General's detention authority to “additional periods of up to six months” and “only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.” 8 U.S.C. § 1226a(a)(6). The Act requires that the Attorney General review the national security threat certification every six months, and if the Attorney General determines the certification should be revoked, the alien may be released on appropriate conditions, “unless such release is otherwise prohibited by law.” 8 U.S.C. § 1226a(a)(7). The Act also allows the detained alien \*24 to request in writing every six months that the Attorney General reconsider the certification of him as a national security threat and to submit documents or other evidence in support of that request, ibid. In addition, the Patriot Act provides such detained aliens with access to habeas corpus relief and appellate review. Id. § 1226a(b). In enacting the Patriot Act, Congress thus granted the Executive domestic detention powers over persons suspected of terrorism who are determined to be national security threats and those powers are much more circumscribed than the power the government now claims.6 Well-settled canons of statutory construction preclude a general grant of authority from rendering a specific one superfluous. See Preiser v. Rodriguez, 411 U.S. 475, 489 (1973) (where “Congress has passed a more specific act to cover [a particular] situation,” it should govern such situations in lieu of an available general statute, which could otherwise apply); see also St. Louis, I. M. & S. Ry. Co. v. United States, 251 U.S. 198, 207 (1920) ( “Congress must be presumed to have known of its former legislation \*\*\* and to have passed the new laws in view of the provisions of the legislation already enacted.”); NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S. 274, 291-292 (1960) (“Courts may properly take into account the later Act when asked to extend \*25 the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.”). Thus, the broad provisions of the AUMF cannot be read to render superfluous the Patriot Act's specific provisions demarcating the scope of the Executive's power to detain persons who pose national security threats in the United States. If Congress had intended the AUMF to be read so broadly, the detention provisions of the Patriot Act would have been unnecessary. This Court should not adopt such a construction. See Hohn v. United States, 524 U.S. 236, 249 (1998) (“We are reluctant to adopt a construction making another statutory provision superfluous.”). b. The legislative history of the Patriot Act confirms this conclusion. Congress considered, and rejected, a provision that would have granted the broad authority that the Executive claims here - i.e., potentially unlimited detention without charge or trim of any person that the Attorney General “has reason to believe may further or facilitate” terrorist acts. See Hearing on Terrorism Investigation and Prosecution, supra, at 26 (statement of Sen. Arlen Specter) (expressing concerns that the legislation proposed by the Executive branch “gives broader powers than just having mandatory detention of someone thought to be a terrorist who is being held for deportation on some other lines”); see also John Lancaster, Hill Puts Brakes On Expanding Police Powers, Washington Post, Sept. 30, 2001, at A6 \*26 (noting that “the administration's anti-terrorism package has run into strong bipartisan resistance,” including an unwillingness to pass legislation pursuant to which a person “suspected of involvement in terrorism - but not convicted of a crime - could be held indefinitely at the discretion of the attorney general or other Justice Department officials”). Moreover, the fact that Congress found it necessary to establish domestic detention powers in the Patriot Act strongly suggests that such power was not part of the AUMF. Senator Orrin Hatch explained that the Patriot Act bill “represent[s] the domestic complement to the weapons our military currently is bringing to bear on the terrorists' associates overseas” pursuant to the authority that Congress previously had granted in the AUMF. 147 Cong. Rec. S10990, S11015 (daily ed. Oct. 25, 2005) (statement of Sen. Hatch) (emphasis added). Likewise, in contrast to the government's argument here that the AUMF provides the Executive with domestic detention authority, even after the AUMF was enacted, top Justice Department officials actively sought the legal authority to detain without charge or trial alien terrorism suspects who were arrested while lawfully in the United States and who the Attorney General believed posed a national security threat. See \*27 Hearing on Legislative Proposals Designed to Combat Terrorism Before the H. Comm. on the Judiciary, 107th Cong., 2001 WL 1143717 (Sept. 24, 2001) (testimony of Assistant Att'y Gen. Viet Dinh). B. Article II Of The Constitution Does Not Grant The Executive Inherent Authority To Use The Military To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States The government wrongly argued below that it can find authority in Article II of the Constitution to use the military to detain without charge or trial terrorism suspects who are lawfully in the United States. This Court should subject that claim to careful scrutiny because, as explained above, such authority is contrary to the will of Congress with regard to the Executive's treatment of domestic terrorism suspects as established in the Patriot Act. Congress's enactment of the Patriot Act, and its failure to authorize domestic military detention by the Executive of persons who are lawfully in the United States, strongly counsels against any conclusion that the Constitution inherently permits the Executive to impose such domestic military detention. As Justice Jackson explained in his concurrence in Youngstown, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb” and any claim to such power “must be scrutinized with caution, for what is \*28 at stake is the equilibrium established constitutional system.” 343 U.S. at 634. 1. The Commander-in-Chief Clause of Article II does not provide the President with inherent authority to use the military to detain persons who are lawfully in the United States a. The President's primary role as Commander-in-Chief is to direct the conduct of American troops engaged in armed conflicts on the battlefield. See Ex parte Milligan, 71 U.S. at 139 (the Commander-in-Chief power consists of “the command of the [armed] forces and the conduct of [military] campaigns”). The Constitution looks both to Congress and the President when it addresses war powers and the Nation's security forces. Many of the critical wartime decision-making functions are reserved in the Constitution for Congress. See Quirin, 317 U.S. at 26 (the Constitution “invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces” (emphasis added)). Indeed, “out of seventeen specific paragraphs of congressional power” that are set forth in Article I of the Constitution with regard to the powers of Congress, “eight of them are devoted in whole or in part to specification of powers \*29 connected with warfare.” Johnson v. Eisentrager, 339 U.S. 763, 788 (1950) (emphasis added) (naming Congress's enumerated power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval, and to make rules concerning captures on land and water). The government's contention that the Constitution authorizes the Executive to use the military domestically, without congressional authorization, in order to detain persons who are lawfully in the United States cannot be reconciled with the Framers' concerns. “The Commander-in-Chief Clause was understood [by the Framers] to establish the hierarchical superiority of the President in the military chain of command, thereby both ensuring civilian control over the armed forces and establishing a ‘superintendence prerogative’ with respect to at least some military operations,” but not to give the Executive the power to proceed without congressional authorization in regard to matters of war. David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb - Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689 (2008). The Framers were wary of standing armies “constantly on foot” and of “the danger of an undue exercise of military power” by the Executive, especially within the domestic sphere. 3 Joseph Story, Commentaries on the Constitution of the United States 94, 97 (Boston, Hilliar, Gray & Co. \*30 1833); accord Hamdi, 542 U.S. at 568 (Scalia, J., dissenting) (“No fewer than 10 issues of the Federalist were devoted in whole or in part allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime.”). b. This Court has never held that, in the absence of express congressional authorization, the President has inherent authority under the Constitution to use military power inside the United States. See Youngstown, 343 U.S. at 632 (Douglas, J., concurring) (“[O]ur history and tradition rebel at the thought that the grant of military power [to the Commander-in-Chief] carries with it authority over civilian affairs.”). Except when force is used for a limited range of defensive purposes, see infra Part B(1)(c), the President must seek advance authorization from Congress to initiate the use of military power inside the United States. Indeed, as this Court reasoned in Brown, 12 U.S. at 126-127, the fact that Congress saw fit to enact the Alien Enemy Act, ch. 66, 1 Stat. 577 (1798), which, in the midst of an undeclared naval war with France, expressly granted the President authority to impose domestic military detention on certain lawful residents in the unusual circumstances of a declared war or invasion by a foreign nation or government, strongly suggests that the Executive has no inherent constitutional power to impose the detention that the Act was enacted to authorize. Similarly, this Court squarely rejected the Executive's imposition of \*31 military justice over a citizen who was apprehended in a peaceful State, even though it was alleged that he had conspired with and joined a secret enemy organization “for the purpose of overthrowing the Government.” Ex parte Milligan, 71 U.S. at 6. Despite this serious allegation of a national security threat, this Court maintained that the Executive had no inherent authority under the Constitution to try such a person in a military, rather than civilian, court. See id. at 121, 124. It is of particular importance that the Executive here claims the constitutional prerogative to use military detention power inside the United States. This Court need not determine whether, or to what extent, the Commander-in-Chief Clause of Article II authorizes the Executive to engage in military detention without charge or trial of persons captured on foreign soil in the absence of congressional authorization. See Hamdi, 542 U.S. at 577 (Scalia, J., dissenting) (“Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different.”). Regardless of any constitutional authority that the Executive may have to act without congressional authorization with regard to military affairs in foreign territory, see United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-316 (1936), “the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy,” Youngstown, 343 U.S. at 644 (Jackson, J., concurring) (emphasis added), is well established and should not be in dispute. \*32 c. Even the widely accepted historical power of the President to use the military to repel a sudden attack on, or invasion of, our country, see The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863), does not encompass the power to use the military to detain persons who are lawfully in the United States and well outside the territorial and temporal scope of the attack. Such power to use the military to detain individuals who are lawfully in the United States as a means of thwarting an invasion is not at issue in the instant case, of course, because any such authority would exist only in a moment of genuine emergency, when there was no time for deliberation. See Hamdi, 542 U.S. at 552 (Souter, J., concurring). Such an emergency has not been alleged by the government here. Moreover, the expedience and attention with which Congress acted in regard to the September 11th attacks demonstrates that, even in a moment of true exigency, there likely would be no “want of statutory authority” that would impede Executive action in preventing further attack. Ibid.7 \*33 Setting aside the circumstance in which there is evidence of an imminent attack against the United States - and here none has been alleged - the power to use the military to detain without charge or trial persons who are lawfully in the United States cannot be grounded on the contention that such domestic detention authority is required to combat terrorism during a time of war. Armed international conflict always and inevitably presents unforeseen dangers to the security of the Nation. During such urgent times, when fear and uncertainty give rise to fervent calls for protection at the expense of individual liberty, it is all the more important that the breadth of Executive power be kept in check, consistent with the Nation's constitutional framework. 2. In the absence of congressional authorization, the Executive cannot subject a person who is lawfully in the United States to military detention in lieu of civilian criminal prosecution without **encroaching on the powers of other branches of government** Any claim of inherent constitutional executive power to use the military to detain without charge or \*34 trial persons who are lawfully in the United States would **contravene separation of powers principles** by encroaching on authority that the Framers reserved for other branches of government. First, as discussed above, the use of military power is a shared responsibility between the Legislature and the Executive under our Constitution. Cf. Youngstown, 343 U.S. at 635 (Jackson, J., concurring) (“Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”). Like seizure of the steel mills in Youngstown, the circumstances under which individuals who are inside the United States may be deprived of liberty by military detention is a matter that is constitutionally relegated to the determination of Congress, not the will of the Executive through the unauthorized imposition of military force. See Youngstown, 343 U.S. at 587 (acknowledging that “[e]ven though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property [in this United States] in order to keep labor disputes from stopping production” because “[t]his is a job for the Nation's lawmakers, not for its military authorities”); id. at 644 (Jackson, J., concurring) (“That the military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems \*35 obvious from the Constitution and from elementary American history”). Neither the Executive nor this Court is free to redistribute that power to make laws. Second, although it is a fundamental constitutional tenet that civilian courts adjudicate government allegations against individuals in the United States that may result in a deprivation of liberty, the Executive contends here that **it has the power to bypass the constitutional role of the courts as guarantors of a fair pre-deprivation process** and use the military to detain without charge or trial persons whom it has apprehended in the United States. Within our constitutional framework, however, **courts serve as a bulwark against the suppression of the procedural constitutional rights of individuals within the domestic sphere**. Consequently, this Court has consistently maintained that the civilian judicial system - and the rights that it protects - cannot be supplanted by Executive military action without congressional authorization, so long as the courts are open and functioning. See Duncan, 327 U.S. at 315-316, 324; Ex parte Milligan, 71 U.S. at 122. This Court should reach that same conclusion here. \*36 C. A Ruling That The Executive Has The Power To Use The Military To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States Would Undermine Our Civilian Criminal Justice System And Important Rights Of Citizens 1. The military detention authority that the Executive claims in this case would permit manipulation of the civilian criminal justice system If military detention without charge or trial of persons who are lawfully in the United States were a legal option for the Executive, the foundations of our civilian criminal justice system would be subject to erosion. The government would have little incentive to pursue more costly and time-consuming civilian criminal prosecutions, with the numerous attendant protections for individual constitutional rights that such proceedings provide. Military detention could become the norm, not the rare exception, in cases involving domestic terrorism allegations. Recognition of military detention authority in the domestic realm also would permit government manipulation of civilian criminal proceedings. The government's handling of the allegations against Jose Padilla reflects such a likelihood because the government shuttled the terror suspect between military detention and civilian criminal prosecution at will. See Padilla v. Hanft, 432 F.3d 582, 583-584 (4th Cir. 2005); see also Padilla v. Hanft, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the \*37 denial of certiorari) (noting that, while Padilla had been transferred from military detention into the civilian justice system, there was “a continuing concern that his status might be altered again”). Such power would allow the Executive to wield the threat of military detention over individuals subject to domestic criminal prosecution, and also permit the collection of information for use in civilian criminal prosecutions while operating outside the confines of civilian criminal procedure rules. See, e.g., United States v. Abu Ali, 528 F.3d 210, 229-34 (4th Cir. 2008) (upholding the inclusion at trial of incriminating statements made by the defendant, a United States citizen, during his 20 months of detention in Saudi Arabia, despite allegations of torture). The incentives for such manipulation are compounded if former detainees ultimately have little legal recourse against the government officials responsible for any mistaken and unlawful detention. See, e.g., Arar v. Ashcroft, 532 F.3d 157, 189-190 (2d Cir. 2008) (denying a domestic detainee's Bivens remedy because he could not show that the government, in detaining him in order to interrogate him about his connections with terrorist groups, acted with “punitive intent” or an illegitimate purpose), reh'g en banc granted (2d Cir. Aug. 12, 2008) (oral argument held Dec. 9, 2008); Pet. Br. at 18-19, Ashcroft v. Iqbal, No. 07-1015 (U.S. Aug. 29, 2008) (arguing that a heightened qualified immunity standard should apply to foreclose all claims brought \*38 by terrorism suspect detainees against top-tier Executive Branch officials). 2. The power claimed here by the Executive would imperil citizens and non-citizens alike The threat to individual liberty that arises from the claimed breadth of the Executive's detention authority in this case affects more than just a small and isolated segment of the population of the United States; it extends to all persons who are lawfully in this country, including citizens. Currently, the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits the detention of citizens without congressional authorization, but this law would not shield citizens if the AUMF is construed as implicit congressional authorization for the President to use the military to detain without charge or trial persons who are lawfully in the United States. See Hamdi, 542 U.S. at 517. The AUMF makes no distinction between citizens and noncitizens. Nor would the American citizenship of a suspected terrorist render him any less of an “enemy combatant,” or restrict his detention as such. Id. at 519 (“There is no bar to this Nation's holding one of its own citizens as an enemy combatant.”). Thus, not only lawfully present noncitizens but also United States citizens - both of whom the Constitution protects against the deprivation of liberty without due process, see \*39 Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Wong Wing v. United States, 163 U.S. 228, 238 (1896) - could be swept up in domestic military detention dragnets. And the severe price to be paid for mistaken allegations of terrorist ties would be borne by innocent citizens and noncitizens alike. Cf. Mark Larabee & Ashbel S. Green, One Mistaken Clue Sets a Spy Saga in Motion, The Oregonian, Mar. 26, 2006, at A1 (describing the two-week long detention of a Portland-area lawyer on a material witness warrant that was issued based on the government's erroneous allegation of a connection between his fingerprint and the 2003 Madrid bombings). The Executive here has not disclaimed the power to use the military to apprehend and detain, without charge or trial, United States citizens who are in the United States. To the contrary, the government is on record arguing that the President can do precisely that. See Pet. Br. at 40, 41, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) (arguing that “nothing in the Authorization of Force suggests that Congress sought to withhold support for the President's use of force against enemy combatants who are American citizens,” and that “[t]here is also no basis for reading the broad language of [the AUMF] to contain an unstated exception for enemy combatants captured within the United States”); id. at 44 (“[T]here is no question that the President's decision to detain Padilla[, a U.S. citizen apprehended in the United States,] as an enemy \*40 combatant falls comfortably within the broad sweep of Congress's Authorization of Force.”). CONCLUSION For the reasons set forth above, the judgment of the court of appeals should be reversed.

#### We are straight-turning PQD

#### A clear statement rule does not interfere – it has the courts tell Congress to clarify the scope of authority, which explicitly avoids the courts dictating outcomes

#### But only the plan avoids a crushing constitutional ruling and foster inter-branch dialogue that’s key to presidential power

Russell, 9

(Partner-Howe & Russell, Brief of Constitutional Law Scholars Bruce Ackerman, Erwin Chemerinsky, Richard A. Epstein, Richard H. Fallon, Pamela S. Karlan, Geoffrey R. Stone, Kathleen M. Sullivan, and Laurence H. Tribe as Amici Curiae in Support of Petitioner, Al Marri v. Spagone, WestLaw)

Whether such an extension should be attempted is a decision the Constitution gives, in the first instance, to Congress, acting in consultation with the Executive branch. While the Constitution confers upon the President war powers as Commander-in-Chief, that power is generally subject to legislative control, particularly when the war powers are exercised domestically and individual liberty is at stake. Indeed, this Court has never upheld domestic \*4 detention of lawful U.S. residents in the absence of clear legislative authorization.

In light of the Constitution's allocation of wartime authority, this **Court should require clear authorization from Congress** before confronting the difficult constitutional questions that could arise from applying the enemy combatant concept to individuals like petitioner here. Requiring clarity from Congress avoids possibly **unnecessary constitutional rulings in a delicate area, while also honoring the Constitution's strong presumption in favor of individual liberty** and criminal process. It also vindicates Congress's prerogatives and, most importantly**, encourages an inter-branch dialogue regarding the necessity, wisdom, and limits of any expansion of military detention authority over the domestic population**. In this case, the general language of the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) - which simply authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ….” - does not evidence congressional deliberation and authorization with sufficient clarity. \*5 ARGUMENT I. Treating Individuals Lawfully Within The United States As Enemy Combatants Based On Suspicions Of Involvement In Terrorism Would Constitute A Significant Expansion Of Traditional Executive Detention Powers. 1. The Founding Generation “viewed freedom from unlawful restraint as a fundamental precept of liberty.” Boumediene v. Bush, 128 S. Ct. 2229, 2244 (2008); see Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (“[T]he most elemental of liberty interests [is] the interest in being free from physical detention by one's own government.”) (plurality opinion). Indeed, “[e]xecutive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned … save by the judgment of his peers or by the law of the land.” Rasul v. Bush, 542 U.S. 466, 474 (2004) (citation omitted). By the time of the Founding, English law had recognized for almost six centuries that to deprive a person of liberty “without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom.” 1 William Blackstone, Commentaries 136; see also The Federalist No. 84, at 480 (Alexander Hamilton) (Clinton Rossiter ed. 1991) (decrying “the practice of arbitrary imprisonments” as “the favorite and most formidable instruments of tyranny”). Those who had survived colonial military rule were particularly aware of the threat to liberty posed by military involvement in domestic affairs, including military detention of \*6 alleged enemies of the state. See, e.g., Duncan v. Kahanamoku, 327 U.S. 304, 319-20, 323-24 (1946). As a result, the Founders established a constitution under which “liberty is the norm, and detention without trial is the carefully limited exception.” Hamdi, 542 U.S. at 529 (internal quotation marks omitted).2 \*7 In Hamdi, this Court considered one such carefully limited exception,3 explaining that the “capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’ ” Id. at 518 (quoting Ex parte Quirin, 317 U.S. 1, 28, 30 (1942)). In light of that historical understanding, the Court rejected the claim that detaining Hamdi as an enemy combatant violated the Constitution, observing that he was captured in a traditional war, fighting on behalf of the Taliban government of Afghanistan against U.S. forces that had invaded the country after the attacks of September 11, 2001. Id. at 521-24. For the same reason, the Court construed the general authorization in the AUMF - which plainly contemplated those military operations in Afghanistan - to encompass authority to detain traditional enemy combatants engaged in active fighting there. Id. at 518-19. \*8 2. The Fourth Circuit, sitting en banc, held that the AUMF also empowers the President to detain suspects lawfully residing in the United States as enemy combatants in the so-called “war on terror.” See Pet. App. 7a (per curiam). That conclusion requires an expansion of the concept of an “enemy combatant” beyond the tradition recognized in this Court's prior cases. The traditional enemy combatant category is well-recognized and easily defined. As this Court explained in Hamdi, the law of war developed the concept of the enemy combatant in the context of traditional wars between nations, or between a nation and insurrectionists in a civil war. 542 U.S. at 518-519; see, e.g., Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 4, Aug. 12, 1949, 6 U.S.T. 3316, 7 U.N.T.S. 135 (distinguishing between conflicts of an international character and conflicts not of that character). Accordingly, the core of the concept extends to soldiers of an enemy nation “carrying a weapon against American troops on a foreign battlefield,” Hamdi, 542 U.S. at 522 n.1, and to spies and saboteurs working for an enemy state who unlawfully enter the United States “with the purpose of destroying war materials and utilities.” Ex parte Quirin, 317 U.S. at 46. At the same time, this Court has recognized an outer limit to the category as well. In Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), the Court held that a citizen of Indiana could not be treated as an enemy combatant for participating in a secret society that planned to overthrow the government during the Civil War. See id. at 130-31. Although Milligan participated in a conspiracy to commit acts of \*9 violence on behalf of an enemy force during an ongoing war, he had never been a Confederate solider, did not participate in battle, and was arrested in United States, not Confederate, territory. Id. at 107. For these reasons, the Court concluded that Milligan should have been tried by a civilian court - not detained as an enemy combatant and tried by military court. Id. at 131. Likewise, although this Court has never been called upon to so hold, it seems obvious that the government lacks the authority to detain as enemy combatants members of other violent groups traditionally treated as criminals when lawfully within the United States, including individuals suspected of involvement in domestic terrorism, organized crime, drug cartels, and subversive political groups.4 \*10 3. Whether modern circumstances justify applying the enemy combatant concept to individuals lawfully residing within the United States and accused of participating in terrorism is an important question. Answering that question affirmatively would require an expansion from the historical core concept. To be sure, the conflict with terrorism shares some features of a traditional war. Like Hamdi and Quirin, al-Marri is alleged to have conspired to engage in war-like acts against our government. But that fact alone does not distinguish this case from Milligan or other instances in which the nation has relied on the criminal justice system to punish and deter similar violent acts against the government. See supra note 4. Indeed, the Constitution plainly contemplates that some of the most serious acts of violence against the government will be addressed through the criminal justice system, defining treason to include “levying War” against the United States and providing that “[n]o person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt act, or on Confession in open Court.” U.S. Const. art. III, § 3. It is also true that this conflict involves the use of military force, supporting the analogy to a traditional war to some extent. But that cannot be determinative either. Congress has authorized the \*11 use of military resources in the “war on drugs,”5 for example, and no one has ever suggested that the government may detain indefinitely those suspected of drug trafficking for the duration of that conflict. At the same time, in some important respects the “war on terror” is “entirely unlike … the conflicts that informed the development of the law of war.” Hamdi, 542 U.S. at 521. Among other things, the “war on terror” does not involve a conflict between sovereign states or a civil war within our borders. Each of this Court's prior decisions addressing indefinite detention during wartime has involved such conflicts. See, e.g., Ex parte Quirin, 317 U.S. 1 (1942) (World War II), Ex parte Endo, 323 U.S. 283 (1944) (same), Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (individual fighting with Taliban government in Afghanistan).6 In this case, the “war on terror” is a conflict against a “loosely connected … global movement of Islamic terrorism.” Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2109 (2005). As a consequence, unlike traditional wars, this conflict does not involve soldiers of an enemy \*12 government, a circumscribed field of battle, or any discernable end point, all features of prior conflicts that have served to both delimit the scope of the enemy combatant exception and ease the burden of distinguishing true enemy combatants from common criminals. Accordingly, the common-law courts that developed the concept of the enemy combatant as part of the law of war (which, in turn, influences the constitutional understanding of the scope of the government's detention power) simply did not have occasion to “confront[] cases with close parallels to this one.” Boumediene, 128 S. Ct. at 2251. The Court is thus left with the question whether suspects in the “war on terror” are sufficiently similar to combatants in a traditional war (e.g., Quirin and Hamdi) - and sufficiently dissimilar to individuals with a recognized right to the protections of the criminal justice system (e.g., Milligan, McVeigh, and members of the Mafia) - to justify treating them under the rules developed for traditional wars. As discussed below, there is no need for this Court to resolve that question in this case, and amici take no position on it. We do believe, however, that it is important to recognize that extending the enemy combatant exception to those accused of terrorism within the United States raises a myriad of complications and difficulties, as illustrated by the badly fractured decision below, which produced numerous divergent conceptions of an “enemy combatant” in the “war on terror,” each subject to extensive criticism. See, e.g., Pet. App. 63a (Motz, J., concurring in the judgment); 163a-64a (Williams, J., concurring in part and dissenting in part); 253a-54a \*13 (Wilkinson, J., concurring in part and dissenting in part). At the same time, the risk to fundamental constitutional values is obvious: precisely because the enemy in this conflict is so diffuse and difficult to identify, having no clear indicia of membership and no defined battlefield, the universe of plausible suspects could be enormous. And because there is no historical basis for limiting treatment as an enemy combatant to noncitizens, see Hamdi, 542 U.S. at 519, the proposed expansion of executive detention authority places every person in the United States, citizen and alien alike, at risk of erroneous deprivation of liberty without recourse to the procedures of the criminal justice system that the Founders established precisely in order to assuage concerns about the scope of domestic military authority. Moreover, the Court should be mindful that history has shown that expansions of government authority at the expense of individual rights are difficult to contain in times of national stress once ordinary constitutional constraints are relaxed. See, e.g., David Cole, Enemy Aliens, 54 Stan. L. Rev. 953, 976, 990 (2002) (describing internment of Japanese citizens residing in the United States and American citizens of Japanese descent during World War II); Geoffrey R. Stone, Perilous Times: Free Speech in Wartime 318-20 (2004) (discussing Cold War excesses arising from fear of communist agents infiltrating U.S. government). \*14 II. This Court Should **Require Clear Congressional Authorization Before Considering Any Expansion Of The Enemy Combatant Exception.** Whether the present threat of global terrorism justifies modifying the traditional conception of an “enemy combatant” thus raises important constitutional questions that this Court may someday be required to resolve. But not today. Rather, the Court should defer a constitutional decision until Congress, in consultation with the President, has plainly considered the question itself and clearly authorized indefinite detention of individuals lawfully living in the United States and suspected of terrorism. Appling this clear statement rule not only avoids a potentially unnecessary constitutional decision, but also **gives effect to the Constitution's division of wartime authority among the branches and allows the Court to fulfill its important constitutional role with the benefit of the wisdom, judgment, and experience of its coordinate branches** on a question that requires the special expertise and competencies of all three departments of our government. A. The Constitution Permits Domestic Military Detention Without Trial Only Upon The Concurrence Of All Three Branches Of Government. This Court has never approved the military detention of individuals lawfully residing in the United States without legislative authorization. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion) (allowing congressionally- \*15 approved detention of enemy combatants); Ex Parte Quirin, 317 U.S. 1, 41-42 (1942) (congressionally-authorized military trial of saboteurs caught within the United States); Ludecke v. Watkins, 335 U.S. 160, 161-62, 173 (1948) (detention of resident aliens only pursuant to specific congressional authorization). This is a reflection of the constitutional design. 1. The Founding Generation protected liberty not only through the enumeration of specific individual rights, but also through the separation of powers. See, e.g., Boumediene v. Bush, 128 S.Ct. 2244, 2246 (2008) (noting that “allocat [ing] powers among three independent branches … serves not only to make Government accountable but also to secure individual liberty”); Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (explaining that the separation of powers “was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty”). Thus, among the “bedrock principles of our constitutional system” is the idea that “great power must be held in check and that the body that defines what conduct to outlaw, the body that prosecutes violators, and the body that adjudicates guilt and dispenses punishment should be three distinct entities.” Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259, 1259 (2002). 2. Multi-branch participation is as central to protecting liberty in wartime as it is in times of peace. Our Constitution “is a law for rulers and people, equally in war and in peace.” Ex parte Milligan, 71 U.S. 2, 120 (1866). Most rights remain \*16 in place in wartime,7 and the fundamental structural protection against encroachment on liberty - the separation of powers - continues to govern. The Constitution thus assigns Congress the power to “declare War,” “raise and support Armies,” regulate the military, and govern the capture of enemy property. U.S. Const. art. I, § 8. And perhaps most importantly for this case, the Constitution gives Congress the authority to “define and punish … Offenses against the Law of Nations.” Id. The Founders thus recognized the need to take into account general precepts of the international law of war as they continue to evolve and adapt to changing conditions. But they placed principal authority for deciding when and how to refine the definition of war crimes with Congress, not the President or the judiciary. Accordingly, under our Constitution, many fundamental wartime decisions are made through a dialogue between Congress and the President, whose power to suggest and veto legislation ensures congressional consideration of his expert views as Commander-in-Chief. See U.S. Const. art. I, § 7; William H. Rehnquist, All the Laws But One: Civil Liberties In Wartime 219 (2000) (the Constitution makes “clear that the President may do \*17 many things in carrying out a congressional directive that he may not be able to do on his own”). The legislative role is especially important when the government acts to infringe fundamental liberty interests. “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” Hamdi, 542 U.S. at 536 (plurality opinion); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring) (observing that although the President exercises substantial wartime authority when his war powers are “turned against the outside world,” when those powers are “turned inward” the Constitution requires the involvement of Congress); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).8 Thus, for example, the Founders explicitly provided for multi-branch participation in the punishment of wartime treason, assigning Congress the responsibility of defining the punishment, the President the duty of prosecution, and the judiciary the oversight of the trials. U.S. Const. art. II, § 1, art. III, § 3. The Constitution further protected individual liberty by safeguarding access to the Great \*18 Writ of Habeas Corpus, even in time of war, allowing its suspension only in “Cases of Rebellion or Invasion,” U.S. Const. art. I, § 9, and only as authorized by Congress, see, e.g., Ex parte Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) (recognizing that suspension of the writ requires congressional approval); see also Hamdi, 542 U.S. at 537 (plurality opinion) (same); id. at 562 (Scalia, J., dissenting) (same). It should come as no surprise, then, that **indefinite domestic detention of individuals without trial should require the concurrence of all three branches of government, each exercising its own special competencies**. Thus, for example, in Ex parte Endo, 323 U.S. 283 (1944), this Court confronted the lawfulness of the internment of a loyal American citizen of Japanese descent during World War II. Although no one doubted the gravity of wartime risks faced by the nation, this Court nonetheless proceeded upon the assumption (apparently unchallenged by the President) that the detention required congressional approval. See id. at 298-99. And finding no such authorization in the relevant statutes, the Court held the detention unlawful and ordered Endo's release. Id. at 302-04. In a related context, the Court in Duncan v. Kahanamoku, 327 U.S. 304 (1946), held invalid a military order replacing the civilian courts of Hawaii with military tribunals during World War II, after concluding that the action, although approved by the President, id. at 308, was not authorized by Congress, id. at 324. \*19 B. A Clear Statement Rule Ensures That Joint Participation Has Taken Place And **Encourages Dialogue Between The Branches**. This Court should not find congressional approval of the indefinite detention of lawful U.S. residents suspected of terrorism-related offenses absent clear indication that Congress has directly considered and approved the practice. Such a clear statement rule is consistent with this Court's prior practice in this area. In each of this nation's most recent major conflicts - World War II, the Cold War, and the war on terrorism - this Court has declined to approve substantial new incursions on individual rights in the absence of clear congressional authorization. See Hamdan v. Rumsfeld, 548 U.S. 557, 601-02 (2006) (refusing to approve the trial by military commission of detainees at Guantanamo because of the lack of clear legislative authorization); Kent v. Dulles, 357 U.S. 116, 129 (1958) (requiring clear evidence of congressional authorization of revocation of passports of suspected communists); Ludecke, 355 U.S. at 163-64 (approving the detention of citizens of enemy governments during World War II under the Alien Enemy Act because the Act's “terms, purpose, and construction le[ft] no doubt” about its authorization); Duncan, 327 U.S. at 324 (declining to read federal statute to permit military supplanting of civilian courts in Hawaii during World War II because of lack of clear legislative authorization); Endo, 323 U.S. at 299-300, 302 (finding no authorization for internment of loyal Japanese-American citizens during World \*20 War II); see also generally Cass Sunstein, Minimalism at War, 2004 Sup. Ct. Rev. 47.9 This traditional requirement of a plain statement promotes four important objectives. First, requiring Congress to speak clearly will avoid a potentially unnecessary constitutional decision in an area in which the Court should be reluctant to act unnecessarily. See, e.g., INS v. St. Cyr, 533 U.S. 289, 299-300 (2001); Spector Motor Servc., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944). Second, a clear statement rule reflects the constitutional presumption in favor of preserving individual liberty. “In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between [individual] liberties and the exigencies of war.” Endo, 323 U.S. at 300. Thus, this Court has “assume[d], when asked to find implied powers in a grant of legislative … authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.” Id.; see also Coleman v. Tennessee, 97 U.S. (7 Otto) 509, 514 (1878) \*21 (explaining that given the “known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect”); Duncan, 327 U.S. at 317 (same). In the wartime context, such presumptions guard against the risk that the military might undervalue civilian liberty and that the “continual effort and alarm attendant on a state of continual danger” will lead to the erosion of civil rights. See The Federalist No. 8, at 61-62 (Alexander Hamilton) (Clinton Rossiter ed., 1961).10 Third, a clear statement rule **enforces the constitutionally ordained separation of powers by insisting upon Congress's prerogative to decide whether, and how, to authorize the extraordinary measure of indefinite domestic military detention.** In the criminal context, this Court narrowly construes penal statutes not only out of respect for individual liberty, but also in deference to Congress's exclusive authority to define the content of federal criminal law. See, e.g., United States v. Wiltberger, 18 U.S. 76, 95 (1820) (explaining that rule of lenity - which \*22 requires that criminal statutes “be construed strictly” - is founded in part “on the plain principle that the power of punishment is vested in the legislative, not in the judicial department”). The same should be true when courts construe statutes alleged to authorize deprivations of liberty outside the criminal justice system. Indeed, such vigilance is especially appropriate in times of conflict, when the perceived need for quick and decisive action may create a special risk of executive infringement on legislative authority. Cf. Jack Goldsmith, The Terror Presidency 126 (2007) (after terrorist attacks of September 11, 2001, the operating ethos for some in the executive branch has been to “push and push and push until some larger force makes us stop”) (internal quotation marks omitted). Fourth, a clear statement requirement can **operate as an “interpretive rule [that] facilitates a dialogue between” the branches.** Boumediene, 128 S. Ct. at 2243. By design, the legislative process is a collaborative endeavor between the legislative and executive departments, taking advantage of the strengths, and compensating for the weaknesses, of each branch. “Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.” Loving v. United States, 517 U.S. 748, 757-58 (1996). Thus, Congress is charged with legislative responsibilities precisely because it is the branch with the best claim to speak authoritatively on behalf of a large and diverse nation. And in balancing competing claims and interests - such as whether traditional criminal procedures are \*23 ineffective to meet the modern threat - Congress can inform itself through factfinding procedures that are not available to the courts. Cf. Bush v. Lucas, 462 U.S. 367, 389 (1983). At the same time, Congress may lack the depth of experience and expertise found in the executive branch, headed by a Commander-in-Chief charged with the day-to-day execution of the law and protection of the nation from the threat of global terrorism. Even without the threat of a presidential veto, U.S. CONST. art. I, § 7, the President's views on questions of national security inevitably garner deference. Thus, requiring a clear statement ensures that tradeoffs between security and liberty are undertaken in the first instance through a “deliberative and reflective process engaging both of the political branches.” Hamdan, 548 U.S. at 637 (Kennedy, J., concurring in part). It also helps ensure that the collaboration is, in fact, “informed,” see Boumediene, 128 S. Ct. at 2243, by making certain that the particular sacrifices made in the name of public safety were directly considered. See St. Cyr, 533 U.S. at 299 n.10 (“ ‘In traditionally sensitive areas, … the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.’ ”) (citation omitted). When authorization is found in broad and vague terms - when legislators are not required to “deliberate, argue, and take a stand,” see Goldsmith, supra, at 207 - there is an increased likelihood that the courts will unknowingly and unnecessarily \*24 authorize broad powers Congress did not fully contemplate. Of course, the concurrence of the legislative and executive branches cannot displace the courts' fundamental obligation to enforce the individual rights guaranteed by the Constitution. It may be that Congress and the President will be willing to sacrifice more liberty than the founding document will permit. But just as clear statement rules ensure that Congress has done its job, they assist the courts in doing theirs. For one thing, requiring Congress to act with clarity in the first instance may diminish the practical difficulties in drawing constitutional lines in this uncharted area. Legislative lines can be drawn with a clarity that is difficult for courts to achieve and can be modified in light of experience and with changing conditions. For example, during the Civil War, after President Lincoln unilaterally suspended habeas corpus, the Congress legislatively authorized the suspension but “limited [that] authority in important respects.” See Milligan, 71 U.S. at 133 (Chase, C.J., concurring in the judgment). So, too, in this case, were Congress to conclude that indefinite detention is appropriate in some cases involving alleged terrorists lawfully residing in the United States, it could well lay down limitations that would narrow the scope of this Court's eventual constitutional inquiry. Congress might, for example, provide statutory criteria for concluding that an individual is an enemy combatant and legislatively define the permissible duration of confinement. And Congress might also establish procedural safeguards sufficiently protective to avoid any serious procedural \*25 due process concerns with the method for determining enemy combatant status.11 While such determinations would not bind this Court on the question of the statute's constitutionality, they would represent the considered judgment of two co-equal branches of government on questions to which their views are especially entitled to substantial respect. **An inter-branch dialogue between the political branches and the judiciary could be especially helpful in this context**, where the constitutional calculus necessarily involves a weighing of public necessity against private interests, both of values of the highest order. Without it, courts might, for example, **underestimate military necessity or the special problems created by efforts to deal with an extraordinary kind of crime through ordinary criminal processes**. Federal judges do not see daily threat briefings and “must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.” Boumediene, 128 S. Ct. at 2276-77. At the same time, courts pressed to pass on the constitutionality of measures instigated by the Executive alone may give undue deference to assertions of military authority precisely because they recognize their \*26 relative lack of expertise. Requiring the President to justify his requests for extraordinary authority to the people's elected representatives in Congress can guard against that risk as well. There is no reason to believe that Congress will default in its responsibility to act with clarity. See Petr. Br. 36-45 (discussing enactment of the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001)). Nor is there any reason to think that if this Court denies the Executive a power Congress intended to give it, and which the President believes essential to the security of our country, that the executive branch lacks the means or the will to “return[] to Congress to seek the authority he believes necessary.” Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (Breyer, J., concurring). III. The AUMF Does Not Clearly Authorize Military Detention Of Individuals Lawfully Within The United States On Suspicion of Terrorism. In this case, the United States has identified only one statute, the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), which it believes authorizes the indefinite military detention of legal U.S. residents. But the AUMF does not authorize such detention with sufficient clarity, if at all. See Petr. Br. 28-48. The AUMF authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ….” § 2(a), 115 Stat. at 224. Those words may \*27 constitute sufficient congressional authorization for the Executive to detain traditional enemy combatants captured in Afghanistan. See Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion). But the AUMF does not even mention - let alone clearly authorize - an extension of that traditional authority to include the indefinite detention of individuals within the United States on suspicion of terrorism. Cf. id. at 547-548 (2004) (Souter, J., concurring) (finding AUMF did not clearly authorize detention even of citizens engaged in active combat with U.S. forces in Afghanistan); id. at 573-74 (Scalia, J., dissenting) (same); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, 120 Harv. L. Rev. 2029, 2085 (2007) (concluding that the AUMF does not “provide[] the necessary statutory authorization for the indefinite detention of aliens apprehended within the United States”).12 \*\*\*\*\* The conflict between our foundational commitment to individual liberty and preserving the nation's security in the face of new and terrible threats is one of the defining challenges of our times. Striking the proper balance will require all the wisdom and experience our country can bring to bear \*28 on the problem**. Denying the President the authority he seeks here will facilitate, not end, that necessary deliberative process**. “Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation **does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine - through democratic means - how best to do so**.” Hamdan, 548 U.S. at 636 (Breyer, J., concurring).

### 2nd COUNTERPLAN

#### Perm do the counterplan – the CP is the aff with overspecificaiton of statute and the grounds put before the ruling

#### Perm do the CP -- Delegating to an international court is a statutory restriction

EUGENE KONTOROVICH, Associate Professor, Northwestern University School of Law, 2009, THE CONSTITUTIONALITY OF INTERNATIONAL COURTS: THE FORGOTTEN PRECEDENT OF SLAVE-TRADE TRIBUNALS, EBSCO

One might answer the extradition analogy by observing that, to the extent the international court has jurisdiction over U.S. citizens, it is because it has been given those powers by the United States. That action is in functional terms a delegation of U.S. authority. The ICC certainly cannot violate Article III or any other constitutional provision. Yet the signing and ratification of a treaty empowering it is surely an exercise of the legislative and executive power of the United States. The response to the slave-trade court shows that even if constitutional arguments do not lie against the court, they can be made directly against the treaty that empowers it.

Professor Pfander makes a more nuanced version of the "nonU.S." argument. In his view, the legitimacy of non-Article III courts is based on the Tribunals Clause of Article I, which gives Congress considerable latitude to create tribunals so long as they remain in some sense inferior to Article III tribunals. International courts, however, are not "constituted" by Congress.''"\* Thus, the Tribunals Clause is inapplicable, and there is no need for such courts to be amenable to Article III judicial review.''^ This conclusion follows nicely from Professor Pfander's basic view of the inferiority requirement. It is also potentially consistent with the slave-trade precedent. In a two-nation mixed tribunal, without the participation of one country, there is no internationai court. As the number of participating nations increases, the argument that the additional ones "constitute" an already existing court decreases. (The Monroe Administration did repeatedly use words like "establish" and "institute" to describe the role that the United States was being asked to play in relation to the mixed courts, though this again may have been a function of their binational structure,)

Yet the response to the extradition argument may be repeated here, though perhaps not as forcefully, While international courts are not "creatures of Congress, to the extent that they have power over Americans, it is because they have been given these powers by American officials. While an international court as a whole may not be "constituted" by Congress, its applicability to Americans in a sense is. By ratifying the Rome Statute, one might think that the Senate "constitutes" the ICC as a court that can try Americans, even though the ICC was already constituted with respect to other countries.

#### Perm do both

#### Doesn’t solve because by definition it has NO GROUNDS

#### Also doesn’t solve our model because it doesn’t craft a right to release

#### Avoidance canon fails---allows executive carve-outs that access our whole case

Katyal, 7

(Former Solicitor General & Law Prof-Georgetown, with Derek Jenks, Law Prof-UT, “Disregarding Foreign Relations Law,” 116 Yale L.J. 1230, April, Lexis)

Posner and Sunstein offer one other response, which is that "other canons of interpretation, most notably constitutional avoidance, operate as a check on executive authority." n153 **This is a rather odd sort of check with respect to the detainee examples**. After all, both authors have acknowledged, if not endorsed, [\*1272] previous Court decisions stating that the Constitution does not protect detainees abroad. n154 Indeed, the functional absence of the doctrine of constitutional avoidance in this context is just one more reason why Chevron rules should not apply here, because our system cannot rely on that check the way it does in the domestic sphere. Moreover, the nature of the underlying constitutional questions illustrates a deeper problem with reliance on the constitutional avoidance canon, namely that the scope and content of constitutional checks fluctuate depending on other important legal characterizations that the President can manipulate. For example, noncitizen enemy combatants captured and detained outside the sovereign territory of the United States might be entitled to substantially less constitutional protection than other persons subject to executive authority. n155 The crucial legal questions then become: Who is an "enemy"? n156 What process is due persons facing such a classification? n157 What qualifies as the sovereign territory of the United States? n158 Take another example: the proper role of Congress and the courts in second-guessing executive action turns substantially on whether the President acts pursuant to his inherent constitutional authority. n159 But whether he does so turns substantially on (1) [\*1273] how the context of his actions is characterized (is the United States at war, and are all military detention facilities part of the battlefield?), and (2) how the persons against whom his action is directed are classified (are the relevant persons enemy combatants?). The important point is that assigning the executive the kind of authority contemplated by Posner and Sunstein **would, in many circumstances, provide an end run around the constitutional avoidance canon by permitting the executive to redefine background facts that would impact whether the canon would be applicable in the first place**. Ultimately, providing the President with such powers is in tension with the rule of law, for it allows the executive to substitute case-by-case factual characterizations for law, and to do so in areas that are concerned with restraining the powers of the executive.

### hobby lobby

#### Plan preserves judicial capital

Kennedy 2 (Joseph, Assistant Professor, University of North Carolina School of Law, “ MAKING THE CRIME FIT THE PUNISHMENT” Spring, 2002, 51 Emory L.J. 753) \*\*Insert Footnote 452

William Eskridge and Philip Frickey have argued that substantive canons of interpretation - as opposed to referential canons that deal with extrinsic sources or linguistic canons that deal with syntax and grammar and such - can help predict judicial behavior. n439 Substantive canons in their view are canons that express the value choices of the Court. n440 One theme of their argument concerns the ways in which different Courts have struck the division of labor between constitutional and statutory interpretation. Eskridge and Frickey note [\*857] two important trends in the Court's decisions during the 1980s. First, "as the Supreme Court grew less activist in constitutional interpretation during the 1980s, it grew correspondingly more activist in statutory interpretation." n441 Second, **they noted** a distinct emphasis on "clear statement rules" over mere statutory presumptions and even the creation and use of "super-strong clear statement rules." n442 Whereas statutory presumptions of interpretation can be rebutted by textual or legislative history arguments, the policy presumptions embodied in clear statement rules can only be rebutted by a "clear statement" on the face of the statute. n443 Super-strong clear statement rules require "very specifically targeted "**clear statements'**" that in and of themselves - without reference to legislative history or to any other extrinsic source - leave no room for doubt **about the Court's intent.** n444

Paradoxically, these super-strong clear statement rules protect values that are constitutional in nature but that arise in areas where the Court has refrained from direct constitutional regulation. Eskridge and Frickey argue that these super-strong clear statement rules have created a "domain of quasi-con-stitutional law."

Such rules are protecting particularly important constitutional values. But, on the other hand, the super-strong clear statement rules the Court has actually adopted protect constitutional values that are virtually never enforced through constitutional interpretation. That is, the Court in the 1980s has tended to create the strongest clear statement rules to confine Congress's power in areas in which Congress has the constitutional power to do virtually anything. What the Court is doing is creating a domain of "quasi-constitutional law' in certain areas: Judicial review does not prevent Congress from legislating, but **judicial interpretation of the** resulting **legislation requires a**n extraordinarily **specific statement on the face of the statute** for Congress to limit the states or the executive department. n445

[\*858] Frickey and Eskridge point out that quasi-constitutional law has much to recommend it. In areas such as federalism, where constitutional norms are underenforced and essentially unenforceable, "the Court may have **a legitimate role** in forcing the political process to pay attention to the constitutional values at stake, and super-strong clear statement rules are a practical way for the Court to focus legislative attention on these values." n446

While acknowledging that "much of what the Court has been doing may have been unconscious," Eskridge and Frickey discern an underlying theory in the Rehnquist Court's use of statutory canons. "Certain constitutional values - most notably the structural rather than individual rights values - are either unenforceable by the Court because they involve essentially non-justiciable political questions or will be underenforced by the Court." n447 These structural constitutional values include the nondelegation doctrine, federalism limitations on the national government, and separation of powers. n448 **These clear statement** and super-strong clear statement **rules protect** these under-protected **constitutional values** against "accidental or undeliberated infringe-ment **by requiring Congress to address those values specifically and directly."** n449 Achieving this protection through statutory interpretation obviously minimizes the offense given to countermajoritarian concerns. n450

Eskridge and Frickey point out serious problems with both this underlying theory and with the Court's actual use of clear statement rules. They find the best possible theory in support of these canons ultimately incoherent - especially with respect to super-strong clear statement rules - because it uses statutory interpretation as **a "backdoor" method** of accomplishing something [\*859] that constitutional theory cannot support. n451 Super-strong clear statement rules in particular "might provide the Court with a cover for a great deal more countermajoritarian activism, overall, **than would** open **invalidation through judicial review**." n452 n452. Id. at 637. In the context of criticizing Ashcroft's effective overruling of Garcia through the use of a super-strong clear statement rule, Eskridge and Frickey make this point **in terms of the** Court's political capital: **Because the Court sees itself as using up political capital every time it invalidates a statute, it thinks twice about exercising judicial review**. To the extent **the Court does not see itself as being "on the spot' when it interprets statutes, it may believe it has more freedom to interpret statutes** to thwart legislative expectations **than it does to strike them down.** In that event, the Court's overall level of activism may be much higher under a Gregory super-strong clear statement rule than under a National League of Cities constitutional rule. Finally, Eskridge and Frickey have concerns about the constitutional values that the Court has been protecting through clear statement rules. n453

#### Single decision don’t matter – controversy’s inevitable and irrelevant

ABA 13 (American Bar Association“ Experts predict more divided decisions when Supreme Court takes on controversial cases in new term” September 2013, ABA News)

Experts predict more divided decisions when Supreme Court takes on controversial cases in new term

As the Supreme Court prepares to begin a new docket in October, constitutional law experts recently discussed some of the upcoming cases and analyzed what could result from potential new legal interpretations on political tactics, freedom of speech and privacy in the digital age. If the past term is any indication, there may be more division and less harmony in the court’s future, according to experts on the American Bar Association panel, “A Conversation on the Supreme Court.”

“We had a blockbuster term last June that ended with a series of hotly contested 5-4 decisions involving voting rights and marriage equality,” said Jeffrey Rosen, president and CEO of the National Constitution Center.

Erwin Chemerinsky, dean and distinguished professor at the University of California-Irvine School of Law, said that out of the 73 cases the Supreme Court decided in the 2012-13 term, 23 were resolved with a 5-4 split.

Rosen said the big question for the new term will be whether the high court will continue to divide 5-4 along apparent ideological lines or whether Chief Justice John Roberts will be able to persuade the justices to come together for narrow, unanimous opinions, similar to the past term’s affirmative action case, Fisher v. University of Texas.

Affirmative action will make an appearance in the upcoming term as well, with the Supreme Court agreeing to hear Schuette v. Coalition to Defend Affirmative Action, a case with the potential to address questions that remained after the Fisher decision. The court will examine whether a state law that prohibits discrimination or preferential treatment based on race or sex is a violation of the Equal Protection Clause.

“It's very different than any of the other affirmative action cases that have ever come before the court,” Chemerinsky said. “The prior affirmative action cases, whether it’s Fisher or Grutter or even back to Bakke, were all about when is it permissible for the government to voluntarily choose to have an affirmative action program?” He said it will be interesting to see how the Supreme Court deals with a state prohibiting affirmative action programs.

Another **high-profile case**, the National Labor Relations Board v. Noel Canning, involves the validity of the NLRB to act when the board members were appointed by President Barack Obama while Congress was in recess. In order to operate, the NLRB has to have at least three out of five members available to make a decision. In order to get past the Senate filibusters that were stopping the NLRB from taking action, Obama made three recess appointments to the NLRB.

The Recess Appointments Clause in Article 2 of the Constitution states that “the president shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.” When the newly appointed NLRB members ruled against Canning in a case, he sued the board, claiming it did not have the proper authority to make the decision.

Chemerinsky described the Canning case that came before the NLRB as “a garden-variety kind of labor management matter that comes before the NLRB all the time. There's nothing particularly unique about these facts or even notable.”

“What makes this case so important is the way in which the membership of the NLRB had been determined as of the time it was ruling on the union’s complaint against Noel Canning,” he said.

“The stakes in this are enormous because the NLRB, with these three recess appointments, issued hundreds and hundreds of orders. What if the Supreme Court affirms the D.C. Circuit on any of these grounds? Does that then mean that everything that this NLRB did is overturned?” Chemerinsky continued. “Earl Warren was a recess appointment to the Supreme Court by Dwight Eisenhower. He presided over the oral arguments in Brown v. Board of Education. His recess appointment wouldn’t have been valid under the theory of the D.C. Circuit. This goes back to practices that started in the early 19th century.”

A review of the executive branch’s use of the Recess Appointments Clause reveals that the issue has remained controversial in the absence of a Supreme Court decision delineating what the framers meant. This case in the upcoming term may finally resolve the ongoing debate.

Another political issue at hand in McCutcheon v. Federal Election Commission is the idea of limiting how much money an individual can contribute to a political campaign. Is setting a limit on how much a person can give to federal election candidates a violation of free speech?

Chemerinsky said the court previously found in Buckley v. Valeo that contribution limits are allowed, but expenditure limits are unconstitutional. For example, a supporter can only donate a certain amount of money directly to a campaign but can spend unlimited quantities on advertisements to support a particular candidate or issue. After the Citizens United decision, which led to almost $1 billion in new political spending in the 2012 elections, an outcome against contribution limits could once again change the political fundraising landscape.

“It will be fascinating to see if the court really does take the step of abandoning the expenditures/contribution distinction,” said Paul Smith, partner at Jenner & Block LLP. Smith said that if the court does abandon the distinction, “basically the entire edifice of campaign finance regulation will come down.”

In the high-profile case of McCullen v. Coakley, abortion sets the stage but is not the issue at hand. Rather than deciding on the legality of the medical practice, as the court has wrestled with in the past, the question will revolve around the First Amendment and the court’s interpretation of free speech.

Massachusetts has a law preventing abortion opponents from getting within 35 feet of clinics providing abortions. In the case Hill v. Colorado, the justices held that a law that prohibited anyone from entering an area next to a health care facility to engage another person in conversation without permission was constitutional, mainly because, as Smith said, “the law didn’t draw lines based on content. It applied to everyone and therefore was permissible.” Since the law in Massachusetts allows employees of the clinic to approach people, the plaintiffs claim it is “a content-based distinction that allows pro-choice speech but not anti-abortion speech,” Smith explained.

He predicts divided decisions on McCullen v. Coakley and Town of Greece v. Galloway, another First Amendment case before the court, but this one concerning freedom of religion. Smith said he expects the “two warring camps” to disagree on whether a town prayer before a city council meeting violates the amendment.

Another challenge for the court will be whether to determine the legality behind certain searches as they pertain to technology. While the Supreme Court has handled DNA technology and Fourth Amendment limits in previous terms, it has yet to tackle the constitutionality of cellphone and smartphone searches. Erica Hashimoto, professor at University of Georgia School of Law, hopes that the court will take up two petitions concerning these searches, because “moving forward, this is going to become an important issue.”

Hashimoto also thinks it will be an entertaining oral argument, based on past sessions concerning the justices’ understanding of text messaging. “Justice [Elena] Kagan in a recent speech said the justices are not necessarily the most technologically sophisticated people and the court hasn't really gotten to email. So oral argument may be really fun,” Hashimoto said.

Chemerinsky said the court first needs to determine what information stored digitally is protected under the Fourth Amendment. “I don't think the court can decide whether looking at someone’s cellphone is a search and what’s in the scope of the arrest without having a theory of informational privacy,” he said.

**With each controversial issue that comes before the court, there is history and precedent**. As Chemerinsky said, **on hot-button topics where the country remains divided, each outcome will have its supporters and dissenters**. So while Chief Justice Roberts might desire consensus among the justices, **cases are often still decided by a margin of one**. “[Roberts] also knows **the legitimacy of the Supreme Court is a product of all it’s done over 200 years and** no single decision will matter much for its legitimacy,” Chemerinsky said.

#### Recess appointments and EPA disprove the internal link

Warren Richey, Staff writer, 2/23/14 [“Supreme Court takes up challenge to Obama and the EPA,” http://www.csmonitor.com/USA/Justice/2014/0223/Supreme-Court-takes-up-challenge-to-Obama-and-the-EPA-video]

For the second time in two months, the US Supreme Court is taking up a case examining whether the Obama administration by-passed Congress in an effort to unilaterally advance its political and policy objectives.¶ The US Supreme Court will hear arguments on the Obama administration possibly bypassing Congress on the regulation of greenhouse gas emissions.¶ **At issue in Monday’s oral argument is whether the Environmental Protection Agency usurped legislative power** reserved to Congress when EPA officials wrote broad new rules regulating the emission of greenhouse gases under the Clean Air Act.¶ Last month, the high court heard argument in a case testing whether President Obama acted properly when he ignored pro forma sessions of the Senate, declared Congress to be in recess, and then used his recess appointment power to unilaterally appoint three members to the National Labor Relations Board despite Senate objections to his nominees.¶ President Obama and his administration have also been criticized for postponing statutory requirements and deadlines in the healthcare reform law, the Affordable Care Act, and in exercising “prosecutorial discretion” to selectively enforce US immigration laws.¶ The legal challenges at the Supreme Court aren’t about the administration’s political priorities; rather **they are about the mechanisms the administration has chosen to achieve its priorities and whether those mechanisms comply with constitutional and statutory limits on executive power.** ¶

#### No impact to economic decline – prefer new data

Daniel Drezner 14, IR prof at Tufts, The System Worked: Global Economic Governance during the Great Recession, World Politics, Volume 66. Number 1, January 2014, pp. 123-164

The final significant outcome addresses a dog that hasn't barked: the effect of the Great Recession on cross-border conflict and violence. During the initial stages of the crisis, multiple analysts asserted that the financial crisis would lead states to increase their use of force as a tool for staying in power.42 They voiced genuine concern that the global economic downturn would lead to an increase in conflict—whether through greater internal repression, diversionary wars, arms races, or a ratcheting up of great power conflict. Violence in the Middle East, border disputes in the South China Sea, and even the disruptions of the Occupy movement fueled impressions of a surge in global public disorder. The aggregate data suggest otherwise, however. The Institute for Economics and Peace has concluded that "the average level of peacefulness in 2012 is approximately the same as it was in 2007."43 Interstate violence in particular has declined since the start of the financial crisis, as have military expenditures in most sampled countries. Other studies confirm that the Great Recession has not triggered any increase in violent conflict, as Lotta Themner and Peter Wallensteen conclude: "[T]he pattern is one of relative stability when we consider the trend for the past five years."44 The secular decline in violence that started with the end of the Cold War has not been reversed. Rogers Brubaker observes that "the crisis has not to date generated the surge in protectionist nationalism or ethnic exclusion that might have been expected."43

#### Ukraine will crash the economy

Thompson and Wallace, CNN Money, 3/3/’14

(Mark and Gregory, “Ukraine crisis: Why it matters to the world economy,” CNNMoney)

While the world watches the escalating crisis in Ukraine, investors and world leaders are considering how the instability could roil the global economy.

The political turmoil is rooted in the country's strategic economic position. It is an important conduit between Russia and major European markets, as well as a significant exporter of grain.

But in the post-Soviet era, it's a weakened economy. Now, the government is in need of an economic rescue -- and torn between whether Russia or the Western economies (including the European Union) is the savior it needs.

Here are five reasons the world's largest economies are watching what happens in Ukraine.

1. Ukraine is an important tie between Russia and the rest of Europe: Ukraine doesn't hold the economic power it once did, but it does retain its geography. Russia supplies about 25% of Europe's gas needs, and half of that is pumped via pipelines running through Ukraine. Moscow has cut off that flow in past disputes with Kiev and a disruption could push up energy prices for businesses and households.

The critical Crimean peninsula juts into the Black Sea, and the Russians base their Black Sea navy there.

2. Sanctions on Russia: One prospect on the table would be the unusual circumstance of a top-10 global economy placing sanctions on another. But Secretary of State John Kerry said Sunday the U.S. is "absolutely" willing to consider sanctions against Russia. President Obama, he added, "is currently considering all options."

That possibility must be on the mind of Russia's government, which is certainly "looking very seriously at the economic component of" its military and diplomatic moves, said John Beyrle, a former U.S. ambassador to Russia.

"The reality is that Russia is dependent on the international economy in a way that wasn't true 10 years ago," Beyrle said Sunday on CNN's "State of the Union." "Fully one -half of Russia's foreign trade now ... is with European Union countries. Russia depends on European imports to keep its stores filled, to keep the standard of living that Russians have gotten accustomed to."

Even if sanctions aren't leveled, the political relationship between Russia and the West will likely chill. Although President Obama spent an hour and a half on the phone with Russian President Vladimir Putin on Saturday, the U.S. is expected to skip an upcoming G8 preparatory meeting in Sochi, Russia. On Sunday, U.S. officials also canceled upcoming energy and trade talks with their Russian counterparts.

3. European and world trade could be impacted: The impact could be felt beyond Europe if the world's supply of grain is impacted. Ukraine is one of the world's top exporters of corn and wheat, and prices could rise even on concern those exports could halt.

And the current political uprising was fueled by the government's handling of a trade agreement that would have brought Ukraine closer to the European Union. The government cut off negotiations in November amid pressure from Russia, which offered discounts on natural gas if Ukraine signed a pact with Moscow's Customs Union.

4. Ukraine's government is in debt and needs assistance: The situation arguably would not be so volatile if Ukranian government coffers were more stable or the economy stronger. The country owes $13 billion in debt this year and $16 billion comes due before the end of 2015. Without help, the country appears to be headed for default.

"In order to avoid a complete collapse in the coming weeks, Ukraine needs money now," Lubomir Mitov, emerging Europe chief economist at the Institute of International Finance, said. "Ukraine cannot survive without reforms in the next few months."

It's not clear who would supply the needed economic assistance, especially after the ouster of key Russian-aligned officials prompted Moscow to freeze a $15 billion bailout and there is no comparable alternative in sight.

The most likely source of support would be the International Monetary Fund. Managing Director Christine Lagarde said the IMF is consulting with other bodies that could help raise the $35 billion Ukraine says it needs.

The IMF said Monday that it would begin a fact-finding mission in Kiev starting Tuesday and concluding on March 14 to "discuss the policy reforms" that world body would require as part of any loan.

Treasury Secretary Jack Lew said Sunday the U.S. is "prepared to work (with) partners to provide as much support as Ukraine needs" for economic growth and stability.

5. **Ukraine isn't the only fragile emerging market**: Ukraine's instability comes at a difficult time for emerging markets worldwide, which are seeing growth slow as the Federal Reserve eases its economic stimulus. The situation in Ukraine could lead investors to reassess the risks of other emerging markets slowing economic growth. Troubles in Ukraine will also hurt Russian banks, which have leant heavily to Ukraine. The Russian ruble is down about 10% since the start of 2014.

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## SOP

### Baloch

#### Baloch secession triggers state collapse and lashout

Malik 12

(Former Defence Adviser to Australia and New Zealand and Sec. General of Pakistan Forum for Security and Development, “A Threat in the Making,” http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/columns/19-Mar-2012/a-threat-in-the-making)

Such a US dominated independent unified Balochistan would literally cut Pakistan to size, unleashing powerful centrifugal forces that will send it splintering. This will kick-start an unstoppable ethno-regional **chain reaction**. All divided ethnic-tribal-sectarian populations across the Iran-Afghanistan-Pakistan-India-Nepal-Bangladesh-Sri Lanka complex and beyond will find cause to redraw the existing political borders to create similar states for themselves too. This will **massively destabilise** the whole **South** Central **Asia**n Region (SCAR) and the Greater Middle East Region (GMER) and unleash uncontrollable upheavals, turmoil and strife - creating fertile grounds for further exploitation by the US-led West! The geostrategic imperatives: A severely truncated Pakistan is presumed to be more amenable to pressures applied by the US and its protégé India, the “regional cop-in-waiting”. However, as a natural corollary to this ‘proposed dismemberment’ of Pakistan, there would be an immediate and critical lowering of nuclear thresholds in the SCAR-GMER! The ramifications would be severe and with extra regional connotations! Balochistan constitutes the most vital and critical strategic space for Pakistan and it will “employ all elements of its power to protect this vital space so critical for the province’s solidarity, territorial integrity and survival as a unified nation!” Were the US to base forces in this proposed territory of Balochistan, it would acquire the strategic central position in SWA. It will effectively control all Pakistani ports on the Arabian Sea/Mekran Coast and dominate the Iranian ports of Chabahar and Port Abbas. It will also be able to project power through the Straits of Hormuz, the Persian Gulf, the Arabian Sea and by implication the Indian Ocean. Russia, China and the CARs will be contained, while the envelopment of Iran would be complete. Iran’s dominance of the Straits of Hormuz would be critically circumscribed and its bargaining position severely slashed. Pakistan’s and Iran’s nuclear installations would remain vulnerable under hawkish US oversight. US-Indian-Israeli dominance of the SCAR-GMER will be complete! The geo-economic imperatives: Such a proposed state of Balochistan would greatly facilitate the US and the West to exploit and harvest its and Afghanistan’s enormous mineral deposits. Furthermore, Balochistan provides the only viable natural trade corridor to link the world’s largest fossil fuel deposits of the GMER and the CARs to the energy deficient and voracious economies of India and China. The US would like to create and control such east-west and north-south trade corridors. The USA’s New Silk Road Project (NSRP) is a step in this very direction. This would also deny China, Russia and the CARs these trade corridors and the warm waters of the Arabian Sea. Most critically it would deprive China of a most important pearl in its “strategy of string of pearls - Gwadar!” The USA will thus have a stranglehold over the economic jugular of the region. The modus operandi: Extensive bipartisan support in the US Congress will be sought to make these bills part of the US government policy. A sympathetic international environment and opinion will be crafted through the United Nations (UN), European Union (EU), their various organisations and other international fora, and the Western, Indian and some elements of Pakistani media. The “Baloch case” will, probably, hinge upon “the right of self-determination”, “ethnic cleansing” and “human rights violations” - a la Bosnia Herzegovina (ethnic cleansing) and Sudan and East Timor (rights of self-determination). At the appropriate time, a Baloch government-in-exile will announce a Unilateral Declaration of Independence (UDI), which will be immediately accepted by the UN, the US and its allies. A pliant UN Security Council (UNSC) will then pass the requisite resolution for international intervention in Balochistan. A plebiscite for Baloch independence under UN auspices will follow. An international expeditionary force will also be assembled for strategic effect. The reality: Of all the Baloch tribes, the errant ones are but a small part! The large majority of the Baloch as well as the Pashtun/Hazaras/settlers are not inclined towards independence or secession. Therefore, there is no casus belli for any international intervention - diplomatic, informational, political or military - in Balochistan, Pakistan. Sure, there are issues in Balochistan that need to be tackled post-haste. But the solution has to be homemade and essentially political in nature. An alien solution cannot be rammed down Pakistan’s throat. This is an internal matter for Pakistan, indeed! All actions have to be taken by the Pakistanis, for the Pakistanis and strictly within the ambit of Pakistan and Pakistan alone. Period. Once challenged, **nuclear Pakistan will react** very **violently and decisively** to safeguard its solidarity and territorial integrity. All options, by default, will always stay on the table! All regional and global powers like China, Russia and fora, like the UN, the EU, the OIC, the SCO, the ECO etc, must play their due pre-emptive roles at the UNSC and all other related international platforms to forestall any such gargantuan misadventures.

#### Baloch secession leads to escalating civil war

Hilaly, 12

(2/26, Former Ambassador & Columnist for The News (Pakistan), “Balochistan is not beyond hope,” http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=94643&Cat=9)

It is equally absurd for those hotheads in exile to think that the Baloch can piggyback their way to independence with Indian or American support. Even if India possesses such a desire, it does not have the means to make it happen, short of **risking a full-scale war**. As for America trying to carve out a Baloch state out of Pakistan, that would only compound the historical ignorance displayed in Washington’s Afghan strategy. Actually, an independent Balochistan is neither feasible nor desirable. If anything, it will be a huge disaster. For a start, the province itself is deeply divided between Baloch and Pakhtuns. An endless civil conflict is more likely than independence if the situation should get out of control in Balochistan. The fact that the notion of independence is a serious issue is only because we have mistreated the Baloch and also because of the way we have mismanaged our overall foreign relations.

#### Independence push triggers war

Shahid, 12

(2/28, Columnist-The Dawn (India), “Secession to compound problem, says Raisani,” http://www.dawn.com/2012/02/28/secession-to-compound-problem-says-raisani.html)

QUETTA: Balochistan Chief Minister Nawab Aslam Raisani has said he believes in dialogue for resolving the issues being faced by the province, but Baloch nationalists are not ready for talks because they only want independence. Talking to EU Ambassador to Pakistan Lars-Gunner Wigemark who had called on him at the Chief Minister`s House on Monday, Mr Raisani said there was possibility of a **civil war breaking out** in the province if efforts were made for Balochistan`s secession. The chief minister said there were confirmed reports of involvement of a foreign hand in the unrest in Balochistan. He told the EU envoy that every Baloch Sardar and Nawab had his own area and nobody was under control of the other. Therefore, maintaining law and order and normal life would be impossible and there would be a big disaster if Balochistan was separated from the country.

#### Collapses Pakistan --> nuclear use

Akbar, 11

(Hubert Humphrey Fellow at the International Consortium of Investigative Journalists, 10/20, ‘A civil war in Afghanistan will further destabilise Pakistan’

http://www.dawn.com/2011/10/20/%E2%80%98a-post-2014-civil-war-in-afghanistan-will-further-destabilise-pakistan%E2%80%99.html

A. Outside forces have had a very detrimental effect on Afghanistan. One important source of outside influence is Pakistan which is paranoid about the possibility of being encircled by an India-friendly government in Afghanistan. The recent signing of the strategic agreement between Kabul and New Delhi surely did not assuage Pakistan’s fears. Pakistan has always tried to cultivate actors to gain influence over Kabul. Pakistan has almost always done this with the exclusion of the northern groups and with the support of the Pashtuns. It is ironic because Pakistan’s own Pashtun population has historically received harsh treatment or neglect. Many Pashtuns, at the same time, strongly resent Pakistan’s cultivation of proxies inside Afghanistan because they view this as interference into Afghanistan’s affairs. India has tried to cultivate its proxies and supported non-Pashtun groups. During the civil war of 1990s, Iran supported the Hazaras for ethnic and religious reasons. Ironically, Russia was supporting the Northern Alliance although they had fought against the Soviets during the Cold War. Today, we are seeing efforts to re-cultivate those proxies because we don’t know at this point if post-2014 Afghanistan will be stable. Q. Who do you think is the right authority to address Pakistan‘s concerns in Afghanistan? A. It would be easier to do so if we had only one actor in the region. For Pakistan, the relations with US means to get an assurance that India will negotiate over Kashmir while for India it is primarily linked to getting Pakistan ceasing cooperation with Islamic groups inside Kashmir. Thus, the problem will not be solved only through Pak-Afghan engagement. Kabul wants to cultivate India as a proxy in case its relationship with Pakistan worsens. The signing of the recent strategic agreement was precisely a move in frustration because of the Rabbani killing and the attack on the US embassy. There was a time when India and Pakistan had nearly reached an agreement on Kashmir during Musharraf’s term but the Indian government was not capable of delivering. Later on, Musharraf lost his influence in Pakistan but it showed that India and Pakistan were both capable of resolving their problems without the major involvement of the United States or China. There is much of a possibility for both the countries to move forward if they liberate themselves from the constrains of history. If India-Pakistan issues are not resolved, Pakistan will continue to frustrate the US in Afghanistan by not taking action against the Haqqani Network which will further poison the relationship because US troops are getting killed as a result of the ISI-Haqqani nexus. If some more American soldiers are killed in Afghanistan with the support of Pakistan, the fallout would be huge. The US Congress has become extremely anti-Pakistan because it views Pakistan as complicit in terrorism against the United States. Q. What do you think will happen if security situation worsens in Af-Pak after 2014? A. I can imagine some very disastrous outcomes for Pakistan, Afghanistan and the United States in the region. A post-2014 major civil war in Afghanistan will further destabilise Pakistan. Some of the trends in Pakistan are extremely worrisome. It is a country where institutions are not capable of delivering to the public, be it education, energy or safety. The civilian government has abdicated responsibility to the military and the military has proven itself unable to address many of these issues. The level of militancy in South Punjab is very intense and the military does not feel it can do much about it. Pakistan has huge internal problems. If **secessionist** and militant **movements gain momentum**, **then the safety of Pakistan’s nuclear program will** also **become worrisome.**

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### More w/m

#### Statutory grounds

Stephenson 8 (Matthew, Assistant Professor, Harvard Law School, “The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs” October, 2008, 118 Yale L.J. 2)

The third argument in favor of constitutionally derived clear statement rules appeals to a kind of judicial minimalism. n87 Because clear statement rules, particularly the canon of constitutional avoidance, obviate the need to resolve a hard constitutional question **by deciding the case on statutory grounds**, these rules are thought to foster judicial modesty and moderation, as well as to preserve the courts' institutional legitimacy and authority and to limit conflict with the other branches of government. n88

### Vague

#### The constitution is deliberately vague regarding sources of war power authority—their calls for “precision” are historically imprecise—err aff, to effectively restrict the four topic areas, we require flexibility to effect all authority within that limited silo

Graham Dodds, Ph.D., Concordia professor of political science, 2013, Take Up Your Pen: Unilateral Presidential Directives in American Politics, p. 50-2

Fifth, maybe the framers were intentionally vague in Article II because they did not want the president to be bound, and perhaps because they even wanted the office to grow. In other words, while on the previous rationale the first president was to fill in the blanks, on this rationale the blanks were to persist, such that all future presidents could be free to act, unfettered by either textual restraints or historical precedents. Sixth, maybe the constitutional ambiguity about the executive's power was the result of the constitutional clarity over the executive's structure. In other words, maybe the framers purposely chose a trade-off: to give the presidency a clear structure but to leave its powers vague. 88 On one version of this rationale, the framers purposely chose not to give the executive clear powers because they were worried about tyranny and foreign influence. As McDonald explains, “There was at least a vague consensus that an executive must be created, but no one could think of a way of electing one that would be safe from corruption and foreign intrigue. Accordingly, no one was comfortable with the idea of entrusting the office with significant powers. Thus when the Committee of Detail prepared the first draft of a constitution in early August, a president was provided for, but most of the executive powers… were lodged exclusively in the Congress, especially the Senate.” 89 Thus, the lack of many specific presidential powers was the price to be paid for clearly stipulating the executive's structure. Seventh, another possible reason for the Constitution's ambiguous treatment of the executive is that the framers simply did not do a very good or thorough job. Again, McDonald articulates one version of this view: “Though we are accustomed to praising the Framers for their statecraft and wisdom, that fateful ambiguity was the result not of design but of slipshod craftsmanship…. Not until the adoption of the electoral college system on September 6— two working days before the main labor of the convention was finished and turned over to a Committee on Style for the final drafting of the Constitution— was a safe way of electing the president hit upon. Properly, the delegates should then have thoroughly reconsidered presidential power, but they were tired, irritable, and anxious to go home.” 90 In short, McDonald suggests that the founders were eager to conclude the long, arduous convention and as a result were insufficiently attentive to some constitutional details. While this charge is not a popular or flattering one, over two centuries of hindsight suggests that the delegates might well have exercised a bit more foresight or devoted a bit more attention to filling in some constitutional details, the lack of which would later prove problematic. Eighth, maybe the Constitution's treatment of the executive is vague because it is contained in a constitution. As Chief Justice John Marshall put it in 1819, “We must never forget that it is a constitution we are expounding.” 91 In other words, constitutions are necessarily somewhat vague, such that some indeterminacy is simply ineliminable. This may be seen at two levels. At the level of constitutional theory, it may be the case that constitutions cannot be complete; a constitution cannot fully constitute everything. 92 As Alexander Hamilton explained in the Pacificus-Helvidius debates, “The difficulty of a complete and perfect specification of all the cases of Executive authority would naturally dictate the use of general terms.” 93 As a result, some indeterminacy must be expected. And at the level of pragmatic, practical politics, it may be the case that constitutions should not be overly rigid. Even if a constitution could somehow account for everything, it must be able to adapt if it is to remain binding as circumstances change, so it should leave some leeway or permit some flexibility, perhaps in addition to formal amendment. For this reason, constitutional ambiguity may actually be an indication of strength rather than weakness. Peter Nardulli alludes to both versions of this point: “A certain level of ambiguity in a document such as a constitution is unavoidable and to some extent desirable.” 94 Ninth, beyond suggesting that constitutional indeterminacy is in some sense ineliminable, I want to suggest further that this is emphatically the case with regard to executive power. This point is perhaps best made by Harvey Mansfield in Taming the Prince. According to Mansfield, executive power is inherently ambiguous; whatever its particular constitutional instantiation, executive power is necessarily indeterminate. On Mansfield's view, the execution of law requires a flexibility and an adaptability that is in some sense a-legal or even tyrannical. 95 Mansfield credits Machiavelli with recognizing the necessity of tyranny in the executive function of government, and he further claims that after Locke and others sought to domesticate the executive, Machiavelli's prince was nevertheless imported into the U.S. constitutional order in the office of the president.

#### Otherwise, the aff loses every debate on circumvention

Graham Dodds, Ph.D., Concordia professor of political science, 2013, Take Up Your Pen: Unilateral Presidential Directives in American Politics, p. 33-4

While the vesting clause is perhaps the most plausible constitutional warrant for broad executive powers such as executive orders and proclamations, there are several others. For example, Article II charges the president with the duty to “take care that the laws be faithfully executed.” As with the vesting clause, the “take care” clause is open to very different interpretations. On one view, it merely instructs the president to administer statutes carefully. One another view, however, it may invoke a broader scope of action, for example if such action is necessary for carrying out the will of Congress. Just as Article I's “necessary and proper” clause may give Congress a broad justification for legislative action, Article II's “take care” clause may give the president a broad justification for executive actions like executive orders. 12 This expansive interpretation has occasionally met with judicial affirmation. For example, in the case of In re Neagle (1890), the Supreme Court ruled that the “take care” clause pertained not only to statutes but also to any “rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.” 13 Insofar as the president is expected to carry out and otherwise attend to these matters, he may perhaps legitimately issue unilateral directives to that effect.

In addition to the vesting and “take care” clauses, Article II has three other clauses that may be construed to allow for expansive presidential power, possibly including unilateral presidential directives. For example, it says that the president “shall be commander-in-chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.” The president's status as head of the military is an enormous source of power. According to Corwin, through this grant of power the framers conferred on the president “all the prerogatives of monarchy in connection with warmaking except only the power to declare war and the power to create armed forces.” 14 This power is most closely associated with the president's ability to issue military orders, which are closely related to but distinct from other types of unilateral presidential directives. Nevertheless, presidents have often used their power as commander in chief to justify various unilateral directives. Courts have generally been reticent to contradict presidents’ invocations of this power (Youngstown is a prominent exception to this rule), but this constitutional provision does not offer clear constitutional support for unilateral presidential directives that are not closely related to military matters or national security.

Article II also notes that the president “may require the opinion, in writing, of the principal officer in each of the executive departments.” This phrase offers a limited source of presidential power, and although scholars have neglected it, it appears to sanction a narrow type of executive orders, such as instructing cabinet-level officials to report on political or policy issues. Indeed, the very first executive order ever issued took this form, as George Washington ordered the officials left over from the government under the Articles of Confederation to give him a report of their activities. However, like the commander in chief clause, this clause does not offer a clear constitutional basis for a broad range of unilateral presidential directives.

Last but not least, Article II also contains the presidential oath of office: “I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.” The oath contains two components that may serve as constitutional warrants for unilateral presidential directives. First, in requiring the president to execute his office, it may sanction actions not specified in Article II that may be necessary for the performance of actions that are specified, much like the “take care” clause. Second, in requiring the president to “preserve, protect, and defend” the Constitution, the oath may arguably sanction actions that are not mentioned in the constitutional text, if they are necessary for ensuring the long-term viability of that text and the polity that it creates and sustains. Taking this view a step further, Abraham Lincoln argued that the oath committed him to undertake actions that were narrowly unconstitutional (or at least extraconstitutional) yet necessary to preserve the larger constitutional order:

I have never understood that the presidency conferred upon me an unrestricted right to act… I did understand, however, that my oath to preserve the Constitution to the best of my ability imposed upon me the duty of preserving, by every indispensable means, that government— that nation, of which that Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution?… I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assume this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the Constitution, if… I should permit the wreck of the government, country and Constitution all together. 15

This oath-based rationale may justify significant powers for the executive in times of dire emergency, but it does not clearly support unilateral presidential directives in less exigent circumstances.

When read expansively, each of the above constitutional resources offers some rationale for considerable executive power, but none offers a clear and incontrovertible justification for a wide range of unilateral presidential directives. However, there is the possibility that broad executive powers and unilateral presidential directives might be justified even by relatively narrow readings of the above clauses, if they are creatively combined. In other words, perhaps the above clauses need not stand alone; they may be aggregated so as to justify practices that might not be covered by any one clause alone. As Ferdinand Lundberg explains, presidents often construct “syllogisms by arranging isolated clauses of the Constitution in a variety of ways as premises, leading to conclusions which state that they have the power they wish to exercise. Whatever the Constitution does not expressly forbid, and it forbids very little, they may do. But whatever the Constitution does not expressly command, they with a little ingenuity deduce. It is obvious that by rearranging sentences and words, and taking some out of context, one can make almost any substantial text mean whatever one wants it to mean.” 16 Of course, the creative construction of constitutional warrants from controversial pieces may itself be doubly controversial, but it provides an important potential source of constitutional justification for unilateral presidential directives and other practices.

The Constitution is not the only source for or justification of presidential power, as the president can largely do what Congress permits him to do. In particular, Congress often formally delegates power to the president via statute, and many unilateral presidential directives are issued pursuant to laws empowering the president to act. The set of existing statutory warrants for presidential orders grows with virtually every new law passed, and old legislative warrants are seldom formally eliminated, such that this resource for justifying presidential action is enormous. When presidents creatively combine their statutory authority to issue orders with possible textual constitutional warrants in the manner described above, there may be many thousands of justifications for unilateral presidential directives. 17 However, courts have determined that congressional delegation can be constitutionally problematic, and statutes can justify some but not all executive orders, so even this basis for executive orders has shortcomings.

## K

### Impact

#### The system’s resilient and the alt fails

Gideon **Rose 12**, Editor of Foreign Affairs, “Making Modernity Work”, Foreign Affairs, January/February

The central question of modernity has been how to reconcile capitalism and mass democracy, and since the postwar order came up with a good answer, it has managed to weather all subsequent challenges. The upheavals of the late 1960s seemed poised to disrupt it. But despite what activists at the time thought, they had little to offer in terms of politics or economics, and so their lasting impact was on social life instead. This had the ironic effect of stabilizing the system rather than overturning it, helping it live up to its full potential by bringing previously subordinated or disenfranchised groups inside the castle walls. The neoliberal revolutionaries of the 1980s also had little luck, never managing to turn the clock back all that far. **All potential alternatives** in the developing world, meanwhile, **have proved to be either dead ends or temporary detours from the beaten path**. The much-ballyhooed "rise of the rest" has involved not the discrediting of the postwar order of Western political economy but its reinforcement: the countries that have risen have done so by embracing global capitalism while keeping some of its destabilizing attributes in check, and have liberalized their polities and societies along the way (and will founder unless they continue to do so). Although the structure still stands, however, it has seen better days. Poor management of public spending and fiscal policy has resulted in unsustainable levels of debt across the advanced industrial world, even as mature economies have found it difficult to generate dynamic growth and full employment in an ever more globalized environment. Lax regulation and oversight allowed reckless and predatory financial practices to drive leading economies to the brink of collapse. Economic inequality has increased as social mobility has declined. And a loss of broad-based social solidarity on both sides of the Atlantic has eroded public support for the active remedies needed to address these and other problems. Renovating the structure will be a slow and difficult project, the cost and duration of which remain unclear, as do the contractors involved. Still, at root, **this is not an ideological issue**. The question is not what to do but how to do it--how, under twenty-first-century conditions, to rise to the challenge Laski described, making the modern political economy provide enough solid benefit to the mass of men that they see its continuation as a matter of urgency to themselves. The old and new articles that follow trace this story from the totalitarian challenge of the interwar years, through the crisis of liberalism and the emergence of the postwar order, to that order's present difficulties and future prospects. Some of our authors are distinctly gloomy, and one need only glance at a newspaper to see why. But remembering the far greater obstacles that have been overcome in the past, **optimism would seem the better long-term bet**.

#### No crisis of ideology

Gideon **Rose 12**, Editor of Foreign Affairs, “Making Modernity Work”, Foreign Affairs, January/February

We are living, so we are told, through an ideological crisis. The United States is trapped in political deadlock and dysfunction, Europe is broke and breaking, authoritarian China is on the rise. Protesters take to the streets across the advanced industrial democracies; the high and mighty meet in Davos to search for "new models" as sober commentators ponder who and what will shape the future. In historical perspective, however, **the true narrative of the era is actually the reverse--not ideological upheaval but stability**. Today's troubles are real enough, but they relate more to policies than to principles. The major battles about how to structure modern politics and economics were fought in the first half of the last century, and they ended with the emergence of the most successful system the world has ever seen. Nine decades ago, in one of the first issues of this magazine, the political scientist Harold Laski noted that with "the mass of men" having come to political power, the challenge of modern democratic government was providing enough "solid benefit" to ordinary citizens "to make its preservation a matter of urgency to themselves." A generation and a half later, with the creation of the postwar order of mutually supporting liberal democracies with mixed economies, that challenge was being met, and as a result, more people in more places have lived longer, richer, freer lives than ever before. In ideological terms, at least, all the rest is commentary.

#### No mindset shift

Matthew **Lockwood 11**, previously Associate Director for Climate, Transport and Energy at the Institute for Public Policy Research, “The Limits to Environmentalism”, March 25, <http://politicalclimate.net/2011/03/25/the-limits-to-environmentalism-4/>

This brings us neatly finally to the third problem with PWG: politics. Jackson does have some discussion of the need for our old favourite “political will” towards the end of the book, and there are some examples of concrete ideas (e.g. shorter working week, ban advertising aimed at children), but there is basically no political strategy. Indeed, the argument is framed in terms of the need for “social and economic change” and “governance”, but not politics at all. The key question is how we are supposed to get from where we are to where he wants us to be. Jackson acknowledges that **at the moment, many people want growth (or more precisely, economic stability) and so demand it of politicians, who then have a political incentive to deliver it**. The quandary (not really acknowledged) is which strategy to adopt in this situation. Do you first reshape the economy to deliver economic stability without growth (e.g. by a shorter working week), which then demonstrates to people socially and politically that growth isn’t necessary for a good life, or do you first have to bring about major social change, moving people away from consumerism, as a precondition for transforming the economy and making the end of growth politically feasible? The discussion in chapter 11 of the book sort of implies that Jackson is thinking in terms of the latter route, but it actually has no strategy. He lays out (some quite conventional, even dare I say it, already proposed by economists) policies like carbon taxation and the aforementioned shorter working week but there is nothing on political narrative. The closest we get to a strategy for social transformation is banning advertising aimed at children (also a theme of Tom Crompton’s) and policies to drive greater durability of products. A counterview might be that all these changes are needed, and it doesn’t matter so much what happens first, that they all reinforce each other etc etc. But I don’t think that’s enough. The political party in the UK that comes closest to offering the Jackson vision is the Green Party. They got 1% of the popular vote in the 2010 general election, and one MP. **What stronger evidence can there be that the vision on its own is not enough?** A final point takes us back to equity (see previous post), but this time within rich countries. Certainly within the US and the UK, a large group of people in the low-to-middle part of the income distribution have seen their real incomes stagnate or fall over the last decade, as the rich have got richer. Telling this “squeezed middle” that economic growth is to end is not going to go down well § Marked 10:28 § unless there is a credible strategy for redistribution. That’s why a good initial step for a more sustainable economy might be a set of good old-fashioned social democratic policies on tax and spend. Prosperity without Growth raises some very important questions, and Tim Jackson shows how tight a squeeze we are in. But the book leaves some even more crucial questions hanging. Of course ending economic growth in rich countries would make a solution to ecological limits a bit easier, but **this would play only a small role**. In the absence of radical technological change, only serious “de-growth”, what Kevin Anderson and Alice Bows call “planned economic recession” would be sufficient to bring about the cut in emissions needed. With rapid growth in poor countries this conclusion is even stronger. So what we should be focusing on is achieving that technological change. Yes, it hasn’t materialised so far, but nor have the policies for low carbon innovation we need to produce it – like Gandhi’s Western civilisation, the low carbon revolution would be a good idea. And yes, getting those policies in place will require political effort. **But that effort will be as nothing compared with the political challenge of replacing capitalism with a new steady state system** either lacking innovation or with a disappearing working week. Perhaps the most fundamental, indeed philosophical issue here is that, despite the fact that Jackson has made a good effort to make an argument about limits into an argument about quality of life, his underlying message is (pace Obama): “No, we can’t”. But beyond the environmentalist camp, **this message will not work**. In the face of the biggest collective challenge that humanity has faced, we need a narrative that has the human potential to solve problems, and overcome apparently unbeatable odds, at its heart.

### Alt

#### Prioritization claims are counter-productive and illogical – you should evaluate the veracity of the 1ac’s claims about the world while embracing a plurality of (methods / ontologies / theories)

Andrew Bennett 13, government prof at Georgetown, The mother of all isms: Causal mechanisms and structured pluralism in International Relations theory, European Journal of International Relations 2013 19:459

The political science subfield of International Relations (IR) continues to undergo debates on whether and in what sense it is a 'science,1 how it should organize its inquiry into international politics, and how it should build and justify its theories. On one level, an 'inter-paradigm' debate, while less prominent than during the 1990s, has continued to limp along among researchers who identify their work as fitting within the research agenda of a grand school of thought, or 'ism,' and the scholar most closely associated with it, including neorealism (Waltz, 1979), neoliberalism (Keohane, 1984), constructivism (Wendt, 1992), or occasionally Marxism (Wallerstein, 1974) or feminism (Tickner, 1992). Scholars participating in this debate have often acted as if their preferred 4 ism' and its competitors were either "paradigms" (following Kuhn, 1962) or "research programs' (as defined by Lakatos, 19701. and some have explicitly framed their approach as paradigmatic or programmatic (Hopf, 1998).

A second level of the debate involves post-positivist critiques of IR as a "scientific' enterprise (Lapid, 1989). While the vague label "post-positivist, encompasses a diverse group of scholars, frequent post-positivist themes include arguments that observation is theory-laden (Kuhn, 1962), that knowledge claims are always part of mechanisms of power and that meaning is always social (Foucault, 1978), and that individual agents and social structures are mutually constitutive (Wendt, 1992). Taken together, these arguments indicate that the social sciences face even more daunting challenges than the physical sciences.

A third axis of contestation has been methodological, involving claims regarding the strengths and limits of statistical, formal, experimental, qualitative case study, narrative, and other methods. In the last two decades the argument that there is 'one logic of inference1 and that this logic is 'explicated and formalized clearly in discussions of quantitative research methods' (King et al., 1994: 3) has generated a useful debate that has clarified the similarities, differences, uses, and limits of alternative methods ( Brady and Collier, 2010; George and Bennett, 2005; Goertz and Mahoney, 2006).

These debates have each in their own way proved fruitful, increasing the theoretical, epistemological, and methodological diversity of the field (Jordan el al., 2009). The IR subfield has also achieved considerable progress in the last few decades in its theoretical and empirical understanding of important policy-relevant issues, including the inter-democratic peace, terrorism, peacekeeping, international trade, human rights, international law, international organizations, global environmental politics, economic sanctions, nuclear proliteration, military intervention, civil and ethnic conflicts, and many other topics.

Yet there is a widespread sense that this progress has arisen in spite of interparadigmatic debates rather than because of them. Several prominent scholars, including Rudra Sil and Peter Katzenstein, have argued that although research cast within the framework of paradigmatic debates has contributed useful concepts and findings, framing the IR field around inter-paradigmatic debates is ultimately distracting and even counterproductive (Sil and Katzenstein, 2010; see also David Lake, 2011, and in this special issue, and Patrick Thaddeus Jackson and Daniel Nexon, 2009, and in this special issue). These scholars agree that IR researchers have misapplied Kuhn's notion of paradigms in ways that imply that grand theories of tightly connected ideas — the isms — are the central focus of IR theorizing, and that such isms should compete until one wins general consensus. Sil and Katzenstein argue that the remedy for this is to draw on pragmatist philosophers and build upon an 'eclectic' mix of theories and methods to better understand the world (Sil and Katzenstein, 2010). In this view, no single grand theory can capture the complexities of political life, and the real explanatory weight is carried by more fine-grained theories about 'causal mechanisms."

In this article I argue that those urging a pragmatic turn in IR are correct in their diagnosis of the drawbacks of paradigms and their prescription tor using theories about causal mechanisms as the basis for explanatory progress in IR. Yet scholars are understandably reluctant to jettison the "isms' and the inter-paradigmatic debate not only because they fear losing the theoretical and empirical contributions made in the name of the isms, but because framing the field around the isms has proven a useful shorthand for classroom teaching and field-wide discourse. The 'eclectic' label that Sil and Katzenstein propose can easily be misinterpreted in this regard, as the Merriam-Webster online dictionary defines 'eclectic\* as 'selecting what appears to be best in various doctrines, methods, or styles,' as Sil and Katzenstein clearly intend, but it also includes as synonyms "indiscriminate" and 'ragtag.'1 By using the term 'eclecticism' and eschewing any analytic structure for situating and translating among different examples of IR research, Sil and Katzenstein miss an opportunity to enable a discourse that is structured as well as pluralistic, and that reaches beyond IR to the rest of the social sciences.

I maintain that in order to sustain the genuine contributions made under the guise of the inter-paradigmatic debate and at the same time get beyond it to focus on causal mechanisms rather than grand theoretical isms, four additional moves are necessary. First, given that mechanism-based approaches are generally embedded within a scientific realist philosophy of science, it is essential to clarify the philosophical and definitional issues associated with scientific realism, as well as the benefits — and costs — of making hypothesized causal mechanisms the locus of explanatory theories. As Christian Reus-Smit argues in this special issue, IR theory cannot sidestep metatheoretical debates. Second, it is important to take post-positivist critiques seriously and to articulate standards for theoretical progress, other than paradigmatic revolutions, that are defensible even if they are fallible. Third, achieving a shift toward mechanismic explanations requires outlining the contributions that diverse methods can make to the study of causal mechanisms. Finally, it is vital to demonstrate that a focus on mechanisms can serve two key functional roles that paradigms played for the IR subfield: first, providing a framework for cumulative theoretical progress; and, second, constituting a useful, vivid, and structured vocabulary for communicating findings to fellow scholars, students, political actors, and the public (see also Stefano Guzzini's article in this special issue). I argue that the term 'structured pluralism' best captures this last move, as it conveys the sense that IR scholars can borrow the best ideas from different theoretical traditions and social science disciplines in ways that allow both intelligible discourse and cumulative progress.

Alter briefly outlining the problems associated with organizing the IR field around the "isms/ this article addresses each of these four tasks in turn. First, it takes on the challenges of defining "causal mechanisms' and using them as the basis of theoretical explanations. Second, it acknowledges the relevance and importance of post-positivist critiques of causal explanation, yet it argues that scientific realism and some approaches to interpretivism are compatible, and that there are standards upon which they can agree forjudging explanatory progress. Third, it very briefly clarifies the complementary roles that alternative methods can play in elucidating theories about causal mechanisms. Finally, the article presents a taxonomy of theories about social mechanisms to provide a pluralistic but structured framework for cumulative theorizing about politics. This taxonomy provides a platform for developing typological theories — or what others in this special issue, following Robert Merton, have called middle-range theories — on the ways in which combinations of mechanisms interact to produce outcomes. Here, I join Lake in this special issue in urging that IR theorizing be centered around middle-range theories, and I take issue with Jackson and Nexon's suggestion herein that such theorizing privileges correlational evidence, and their assertion that statistical evidence is inherently associated with Humean notions of causation. I argue that my taxonomy of mechanisms offers a conceptual bridge to the paradigmatic isms in IR. adopting and organizing their theoretical insights while leaving behind their paradigmatic pretensions. The article concludes that, among its other virtues, this taxonomy can help reinvigorate dialogues between IR theory and the fields of comparative and American politics, economics, sociology, psychology, and history, stimulating cross-disciplinary discourses that have been inhibited by the scholasticism of IR's ingrown 'isms.'