# r4 neg v. cal berkeley ms

## 1nc

### 1nc t

#### The aff restricts immigration authority – it’s a preclusive power of the Executive

Chow 11 (Samuel, JD Benjamin N. Cardozo School of Law, “THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS”, 19 Cardozo J. Int'l & Comp. L. 775 2011)

The facts that legitimized the Court's holding in Munaf are substantially different from the facts in Kiyemba. In Kiyemba, the D.C. Circuit Court also held that it did not have the authority to order the petitioners' release into the United States, but for different reasons from those espoused in Munaf. There, the circuit court determined that such release would violate the traditional distribution of immigration authority-a problem that did not exist with the American petitioners in Munaf.2 z As in Munaf, the government concluded that the Kiyemba petitioners' request amounted to a request for "release-plus. ' 23 Unlike Munaf, however, a troubling paradox is raised under the Kiyemba facts as it now stands, the Executive has determined that certain detainees being held unlawfully may, nonetheless, remain indefinitely detained.24 There are three primary elements that contributed to the Uighur 25 plaintiffs' dilemma. First, because of the high risk of torture, the Uighurs could not return to their home country of China.26 Second, diplomatic solutions had failed and no third-party country had been willing to accept them.27 Third, the D.C. Circuit Court determined that release into the United States would violate immigration laws and undermine the Executive's ability to administer those laws. 28 Lacking refuge and possibility of asylum, the Uighurs were forced to remain, indefinitely, as prisoners at Guantanamo Bay.

### 1nc gspec

#### Judicial affs have to specify grounds in the 1ac

Martha J. Dragich, Associate Professor of Law at Missouri-Columbia, 2-1995 44 Am. U.L. Rev. 757

Opinions also permit readers to view the law in historical context. Insofar as opinions identify the precedents on which the court relied, they allow readers to form an understanding of the law's maturity. 164 In addition, the highly specialized citators on which legal research depends allow readers to gauge the continuing vitality of a decision [\*784] based on the frequency and approval with which it is cited. 165 Often, the determination whether or not a particular opinion is lawmaking cannot be made until years later, when further developments in the law demonstrate what the authoring judge could not forecast. 166 Moreover, the lasting authority of a decision depends largely on the quality of its reasoning, which can be evaluated only by reading the opinion. At a minimum, the tasks of researching and applying the law require that the law be findable and knowable, that the precedential value of prior decisions be ascertainable with some degree of reliability, and that prior decisions provide guidance for future cases. These conditions, in turn, can be satisfied only by the publication of judicial opinions stating the facts of the case, the issues considered, the court's reasoning, and the result.

#### Reject the team—

#### It destroys ground and education – alternate court CPs are the heart of the most educational debates on the topic - Key to strategic research and strategy formation

Martha J. Dragich, Associate Professor of Law at Missouri-Columbia, 2-1995 44 Am. U.L. Rev. 757

A published opinion is the "working tool of lawyers and the building block of judges." 145 Opinion writing facilitates the decisionmaking process by sharpening analysis, 146 and by imposing a sense of responsibility and discipline on judges. 147 When writing opinions, judges must determine whether their decisions are [\*782] consistent with and faithful to prior decisions, and whether the opinions establish certain and predictable rules for future cases. 148 Published opinions are the tangible evidence of the law's evolution and foreshadow its future development. 149 Without published opinions, the basic tasks of legal research and analysis would be impossible for attorneys and judges. 150

#### 2AC clarification is bad – sandbagging actors moots the strategic value of the 1nc and puts the negative structurally behind from the outset.

### 1nc pqd

#### Plan tanks PQD

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

Number two: Numerous very important, contested, hotly debated topics have arisen in the last ten years, many of them in the Bush Administration, **involving** for example interrogation techniques, **the scope of detention authority**, habeas review, military commissions, targeted killings, and the use of force more broadly. On some of these questions, the federal courts - and the Supreme Court in particular - have had quite a lot to say; and on others, not so much, at least in part because of several different federal courts doctrines that prevent the courts from speaking too much about those. You're all familiar with standing limits, **political questions**, state secrets, etc. We're going to focus particularly on a couple of them, which are immunity doctrines and the weakening of the Bivens n2 and state court sorts of causes of action.

We will also discuss the fact that there are many people who think the federal courts have become too involved at supervising and resolving substantive questions involving the political branches, including some of Judge Kavanaugh's colleagues, who have been particularly vocal about that, engaging in what appears to be a form of resistance to the Supreme Court's Boumediene n3 decision. By contrast, many other people think the courts have not been nearly involved enough at resolving some of the unresolved questions about the scope of interrogation and detention and military commissions and the like, that might be lingering from the last administration, or occurring now in the new administration, such as with respect to use of force. So that's the second broad topic - whether the federal courts have been too timid or too aggressive in this area.

#### Makes war powers justiciable – causes a slippery slope

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

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

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

[Continues to Footnore]

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

#### Nuclear war

**Knowles 9** – Acting Assistant Professor, New York University School of Law (Robert, Spring, “American Hegemony and the Foreign Affairs Constitution”, 41 Ariz. St. L.J. 87, Lexis Law)

Nonetheless, foreign relations remain special, and courts must treat them differently in one important respect. In the twenty-first century, speed matters, and the executive branch alone possesses the ability to articulate and implement foreign policy quickly. Even non-realists will acknowledge that the international realm is much more susceptible to crisis and emergency than the domestic realm. But speed remains more important even to non-crisis foreign affairs cases. n391 It is true that **the stable nature of American hegemony will prevent truly destabilizing events** from happening without great changes in the geopolitical situation - the sort that occur over decades. The United States will not, for some time, face the same sorts of existential threats as in the past. n392 Nonetheless, in foreign affairs matters, it is only the executive branch that has the capacity successfully to conduct [\*150] treaty negotiations, for example, which depend on adjusting positions quickly. The need for speed is particularly acute in crises. Threats from transnational terrorist groups and loose **nuclear weapons are among the most serious problems** facing the United States today. The United States maintains a "quasi-monopoly on the international use of force," n393 but the rapid pace of change and improvements in weapons technology mean that the executive branch must respond to emergencies long before the courts have an opportunity to weigh in. Even if a court was able to respond quickly enough, it is not clear that we would want courts to adjudicate foreign affairs crises without the deliberation and opportunities for review that are essential aspects of their institutional competence. Therefore, courts should grant a higher level of deference to executive branch determinations in deciding whether to grant a temporary restraining order or a preliminary injunction in foreign affairs matters. Under the super-strong Curtiss-Wright deference scheme, the court should accept the executive branch interpretation unless Congress has specifically addressed the matter and the issue does not fall within the President's textually-specified Article I powers.

#### Causes litigation that shutters DOD contracting

Isenberg 10 (David, Research Fellow – Independent Institute, “Contractor Legal Immunity and the ‘Political Questions’ Doctrine,” CATO Institute, 1-19, <http://www.cato.org/publications/commentary/contractor-legal-immunity-political-questions-doctrine>)

One can easily see why most defense contractors, including private military and security firms working under U.S. government contract, would like to prevent such suits from proceeding. The sheer number of injuries alone gives them reason to want to avoid possible suits. According to ProPublica as of last September 30 the number of private contractors injured in Iraq and Afghanistan totaled 37,652. Of course, not all those injuries are the result of something done wrong. But even a small fraction of them would **entail considerable legal costs for a contractor** so it is easy to understand why they would want to preventing such suits from being filed in the first place.

As I am not a lawyer the following is derived from Maj. Carter’s article.

Traditionally, the reason given for this is that such cases may involve “political questions” that the Judicial Branch is ill-equipped to decide. Thus defense contractor advocates claim these actions must be dismissed, else there be grim consequences for Government contingency contracting.

But according to Maj. Carter, “the recent developments in political question doctrine case law are significant to the future of Government contingency contracting. However, they are not catastrophic — although portrayed as such by some defense contractor advocates. There will not be an explosion of contracting costs passed on to the Government. There will not be a mass refusal of defense contractors to accept contingency contracts. There will not be chaos on the battlefield. Such predictions are nothing more than “bellowing bungle.”

Carter wrote:

What is the political question doctrine? According to Chief Justice John Marshall, “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in [the U.S. Supreme Court].” In 2004, the Court held “[s]ometimes .. . the law is that the judicial department has no business entertaining [a] claim of unlawfulness — because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be ‘nonjusticiable,’ or ‘political questions.’”

What this means is that traditionally courts have deferred to the political branches in matters of foreign policy and military affairs. Policy decisions regarding **the employment of U.S. military forces** in combat belong to the political branches, not the courts. The Supreme Court has held that, due to their “complex, subtle, and professional” nature, decisions as to the “composition, training, equipping, and control of a military force” are “subject always” to the control of the political branches.

Tort suits that challenge the internal operations of these areas of the military are likely to be dismissed as political questions. Yet, notwithstanding the foregoing prohibitions on judicial conduct, the Supreme Court has cautioned, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” As mentioned earlier, vast precedent exists for judicial involvement in foreign and military affairs. Case law establishes that military decisions are reviewable by federal courts. An assertion of military necessity, standing alone, is not a bar to judicial action. Merely because a dispute can be tied in some way to combat activities does not prevent a court from reviewing it. Although an action arises in a contingency environment, if a case is essentially “an ordinary tort suit” it is well within the competence of the courts to entertain. Courts have underscored the point: no litmus test exists that prohibits judicial action merely because an issue involves the military in some fashion.

Where plaintiffs seek only damages and not injunctive relief, such cases are “particularly judicially manageable.” When such a damages-only lawsuit concerns only a defense contractor (as opposed to the Federal Government), courts have held that such actions do not involve “overseeing the conduct of foreign policy or the use and disposition of military power.” Thus, those actions are less likely to raise political questions than suits against the Government, suits seeking injunctive relief, or both.

Given the enormous amount of money involved in Government contingency contracting and the correspondingly large number of contractors and contractor employees performing GWOT (Global War on Terror) contingency contracts, the number of plaintiffs seeking redress for tortious conduct was certain to rise — and it did. Universally, defendant defense contractors invoked the political question doctrine in order to shield themselves from liability in their performance of GWOT contracts, some with more success than others. The first significant case centered around the tragic events at the Abu Ghraib prison in Iraq.

In Ibrahim v. Titan Corp., Iraqi plaintiffs alleged they were tortured, raped, humiliated, beaten, and starved while in U.S. custody. Apparently fearing a dismissal on sovereign immunity grounds if they sued the U.S. Government, the plaintiffs instead chose to name as defendants the contractors who provided interpreters and interrogators for the prison. The defendants filed a motion to dismiss, alleging the matter involved political questions. The court held the case should not be dismissed at such an early stage on political question grounds, especially because the United States was not a party to the case. Ibrahim is significant because it was the first GWOT case to underscore the need for full factual development of a case prior to an assessment of justiciability.

One particularly interesting point in Carter’s article is this:

Judges and scholars openly speculate about the possible consequences of defense contractor tort liability on the federal procurement process. In Boyle, the Supreme Court warned that “[t]he financial burden of judgments against [] contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability … .”

Since private military contracting advocates claim that their firms are more cost effective than the government one might reasonably believe that they can be so only by preventing tort suits against them. If the cost of such suits were factored in, the presumed cost effectiveness could conceivably be significantly less, **or perhaps not exist at all**.

Carter asks “is the situation really this dire? Are contractors at a point where, because of increased litigation risks, they will be forced to charge the Government more for their services or elect to not provide services altogether?”

The answers may not be far away. In November 2008, Joshua Eller filed suit in the U.S. District Court for the Southern District of Texas, as a result of injuries he suffered at Balad Air Base, Iraq, while deployed as a contractor employee of KBR from February to November of 2006. The complaint alleges defendants KBR and Halliburton “intentionally and negligently exposed thousands of soldiers, contract employees and other persons to unsafe water, unsafe food, and contamination due to faulty waste disposal systems … .” The complaint also includes allegations of injury from toxic smoke which emanated from an open air burn pit at Balad. The complaint alleges approximately 1,000 other individuals suffered similar injuries and it seeks to combine all of those actions into a single class action lawsuit. More significantly, this action is only one of several suits currently pending that relate to similar KBR activities in Iraq.

**The political question doctrine will be a** major factor in this coming storm of litigation. With the large number of potential plaintiffs compounded by the seriousness of the conduct and injuries alleged, these suits have the potential to dwarf the damages awards previously sought in earlier GWOT cases. Undoubtedly, KBR will seek to raise the political question doctrine as an absolute bar to these and any similar suits.

Defense contractor advocates warn of “deleterious effects” to the mission and the contractor-military relationship if tort suits against war zone defense contractors are allowed to proceed. They argue such tort claims “frustrate” and “conflict with” the Government’s ability to control contingency operations and would result in compromised logistical support and mission jeopardy. Furthermore, many companies, especially smaller ones, could be deterred from seeking contingency contracts. For those contractors who do elect to proceed, they will seek to insulate themselves from liability by either self-insuring or obtaining insurance coverage, if it is available. The argument continues that such costs will then be passed onto the Government in the form of higher contract prices. But, most alarmingly, some defense contractor advocates claim the impact of such suits “would be far more profound than financial” and defense contractors may, out of a fear of being sued, refuse to follow the military’s instructions altogether.

#### Key to irregular warfighting

**Wallace 9** – deputy head of the Department of Law at the US Military Academy prof since 2001 and a prof at the Judge Advocate General’s School of the Army from 1996-99, B.A. from Carnegie Mellon University, a JD from Seattle University School of Law, MSBA from Boston University, military law degree, specialty in contract law (Col David A., “The future use of corporate warriors with the U.S. Armed Forces: legal, policy, and practical considerations and concerns”, http://www.thefreelibrary.com/The+future+use+of+corporate+warriors+with+the+U.S.+Armed+Forces:...-a0205637482)  
  
It is apparent that private security contractors possess a number of these important capabilities and characteristics. In terms of attributes that would make them a force multiplier for future conflicts, private security contractors can be adaptable/tailored, precise, fast, agile, and lethal. The government, for example, can expand, shrink, and refine the contractor workforce structure very quickly by means of solicitation and statement of work process. Highly skilled contractors can be retained to execute a contract on an ad hoc basis in whatever numbers the government needs to accompany the armed forces or other government entities to address a wide ranging array of security concerns. Additionally, procurement officials may use a variety of legal authorities and contract types to award such contracts quickly and efficiently, and terminate them immediately at the conflict's end, with no back-end retirement or medical costs to the government. Within the military force structure, however, it often takes years to make significant changes.   
After consideration of the nature of the future security challenges (i.e., irregular, disruptive, traditional, and catastrophic), it does not take much imagination to envision how private security contractors could augment U.S. forces in a variety of scenarios. The United States could, for example, use armed contractors with the appropriate skill sets to provide a continuum of services. For example, contractor personnel could serve as peacekeepers or peacemakers (e.g., support U.S. efforts in conflicts like Darfur); locate, tag, and track terrorists; secure critical infrastructure, lines of communication, and potential high-value targets; and assist in foreign internal defense. Moreover, private security contractors could arguably be used as a constabulary force during a military occupation or during stability and support operations. Given that a number of private security firms employ highly skilled former special operations personnel, it is readily foreseeable that contractors could add value to special operations forces as they work to meet the challenges of irregular conflicts or catastrophic challenges.   
Furthermore, in a resource-constrained environment, private security contractors have an intuitive appeal. The government can hire the armed security contractors only when needed. Their services can be terminated at the convenience of the government when the contingency ends; contractors can also be terminated for default if they fail to perform. The contractual agreements can specify the skill sets necessary to satisfy the government's requirements. In sum, security contractors offer important capabilities and attributes that potentially make them an attractive option for future strategic planners. There are, however, significant risks and concerns associated with using private security contractors to augment the future force.

#### Extinction

**Bennett 2008** (12/4, John, DefenseNews, “JFCOM Releases Study on Future Threats”, http://www.defensenews.com/story.php?i=3850158, WEA)

The study predicts future U.S. forces' missions will range "from regular and irregular wars in remote lands, to relief and reconstruction in crisis zones, to sustained engagement in the global commons." Some of these missions will be spawned by "rational political calculation," others by "uncontrolled passion." And future foes will attack U.S. forces in a number of ways. "Our enemy's capabilities will range from explosive vests worn by suicide bombers to long-range precision-guided cyber, space, and missile attacks," the study said. "The threat of mass destruction - from nuclear, biological, and chemical weapons - will likely expand from stable nation-states to less stable states and even non-state networks." The document also echoes Adm. Michael Mullen, chairman of the Joint Chiefs of Staff, and other U.S. military leaders who say America is likely in "an era of persistent conflict." During the next 25 years, it says, "There will continue to be those who will hijack and exploit Islam and other beliefs for their own extremist ends. There will continue to be opponents who will try to disrupt the political stability and deny the free access to the global commons that is crucial to the world's economy." The study gives substantial ink to what could happen in places of strategic import to Washington, like Russia, China, Africa, Europe, Asia and the Indian Ocean region. Extremists and Militias But it calls the Middle East and Central Asia "the center of instability" where U.S. troops will be engaged for some time against radical Islamic groups. The study does not rule out a fight against a peer nation's military, but stresses preparation for irregular foes like those that complicated the Iraq war for years. Its release comes three days after Deputy Defense Secretary Gordon England signed a new Pentagon directive that elevates irregular warfare to equal footing - for budgeting and planning - as traditional warfare. The directive defines irregular warfare as encompassing counterterrorism operations, guerrilla warfare, foreign internal defense, counterinsurgency and stability operations. Leaders must avoid "the failure to recognize and fully confront the irregular fight that we are in. The requirement to prepare to meet a wide range of threats is going to prove particularly difficult for American forces in the period between now and the 2030s," the study said. "The difficulties involved in training to meet regular and nuclear threats must not push preparations to fight irregular war into the background, as occurred in the decades after the Vietnam War." Irregular wars are likely to be carried out by terrorist groups, "modern-day militias," and other non-state actors, the study said. It noted the 2006 tussle between Israel and Hezbollah, a militia that "combines state-like technological and war-fighting capabilities with a 'sub-state' political and social structure inside the formal state of Lebanon." One retired Army colonel called the study "the latest in a serious of glaring examples of massive overreaction to a truly modest threat" - Islamist terrorism. "It is causing the United States to essentially undermine itself without terrorists or anyone else for that matter having to do much more than exploit the weaknesses in American military power the overreaction creates," said Douglas Macgregor, who writes about Defense Department reform at the Washington-based Center for Defense Information. "Unfortunately, the document echoes the neocons, who insist the United States will face the greatest threats from insurgents and extremist groups operating in weak or failing states in the Middle East and Africa." Macgregor called that "delusional thinking," adding that he hopes "Georgia's quick and decisive defeat at the hands of Russian combat forces earlier this year [is] a very stark reminder why terrorism and fighting a war against it using large numbers of military forces should never have been made an organizing principle of U.S. defense policy." Failing States The study also warns about weak and failing states, including Mexico and Pakistan. "Some forms of collapse in Pakistan would carry with it the likelihood of a sustained violent and bloody civil and sectarian war, an even bigger haven for violent extremists, and the question of what would happen to its nuclear weapons," said the study. "That 'perfect storm' of uncertainty alone might require the engagement of U.S. and coalition forces into a situation of immense complexity and danger with no guarantee they could gain control of the weapons and with the real possibility that a nuclear weapon might be used." On Mexico, JFCOM warns that how the nation's politicians and courts react to a "sustained assault" by criminal gangs and drug cartels will decide whether chaos becomes the norm on America's southern border. "Any descent by Mexico into chaos would demand an American response based on the serious implications for homeland security alone," said the report.

### 1nc ptx

#### McCutcheon will win in a slim 5-4 ruling – Roberts is key

Reilly and Blumenthal 10-8 (Ryan J., D.C.-based reporter who covers the Justice Department and the Supreme Court for The Huffington Post, and Paul, reporter for the Huffington Post covering money and influence in politics, “McCutcheon v. FEC: Supreme Court Skeptical Of Campaign Contribution Limits,” Huffington Post, 2013, <http://www.huffingtonpost.com/2013/10/08/mccutcheon-v-fec_n_4059180.html2>)

A slim majority of Supreme Court justices seemed skeptical Tuesday that the federal government may cap the total amount of money that individual donors can give to political candidates running for federal office, in a case that could have a massive impact on the campaign finance system.

In McCutcheon v. Federal Election Commission, the high court is set to decide whether the limits on aggregate federal campaign contributions -- the overall cap currently stands at $123,200 per donor for the 2014 election cycle -- are unconstitutional because they place a burden on the free speech rights of donors.

Shaun McCutcheon, the man bringing the case, only seeks to give the maximum individual donation to more candidates. But Senate Minority Leader Mitch McConnell (R-Ky.) is trying to use the case as a vehicle to persuade the Supreme Court to dismantle contribution limits altogether.

Court observers were keeping a close eye on Chief Justice John Roberts, who most campaign finance reform advocates see as the only hope of upholding the aggregate contribution limits. Roberts joined the majority in a 2006 decision holding that contribution limits were constitutional.

Speaking of the aggregate limits on Tuesday, Roberts said, "It seems to me to be a very direct restriction" on donations that, individually, Congress has decided do not pose a corruption threat.

Solicitor General Donald Verrilli Jr., representing the FEC, based his argument to uphold the limits on the possibility that a candidate could solicit a check up to $3.5 million for a joint fundraising committee. This solicitation, Verrilli argued, would violate the ban on the solicitation of extremely large contributions that the court upheld in the 2003 McConnell v. FEC case.

Roberts responded, "I appreciate the argument about the $3.5 million check," but he wondered if there was a way to balance the corruption concern around this solicitation with what Roberts saw as the First Amendment burdens of the aggregate limits.

"I suppose you could calculate and set an aggregate limit that is higher," Verrilli answered.

Justice Anthony Kennedy is usually seen as the high court's swing vote between the conservative and liberal blocs, but he wrote the controversial 2010 Citizens United opinion that paved the way for so-called super PACs to dominate election spending. He was not seen as likely to unite with the liberal-leaning justices in the McCutcheon case.

#### Roberts thinks the aff is overreach

Siegel 12 (Ashley E., J.D. – Boston University School of Law, “Some Holds Barred: Extending Executive Detention Habeas Law Beyond Guantanamo Bay,” Boston University Law Review, Vol. 92, <http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SIEGEL_000.pdf>)

The Court rejected the Government’s argument that the Tribunals provided an adequate substitution for habeas courts.127 While habeas proceedings do not need to resemble a full criminal trial, the writ must nevertheless remain effective. A habeas court “must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.”128 To determine whether the Tribunal process authorized by Congress provided an adequate substitute for habeas review, the Court examined “the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.”129 The Court concluded that the Tribunal scheme made it difficult for detainees to obtain counsel and find supporting or rebutting evidence. Thus, even if the parties to the system worked in perfect diligence and good faith, there was “considerable risk of error” in the Tribunal’s fact-finding.130 Because the factual record was defective at the Tribunal level and the court of appeals could not review new factual evidence that was not or could not be made available to the Tribunal, the Tribunal fell short of providing a constitutionally adequate substitute for habeas review.131 Therefore, the DTA review process was facially inadequate to replace habeas corpus.132 The Court did not specifically address to what length the habeas statute or the Suspension Clause could be applied outside the territorial United States.133 It could have limited its holding to the unique circumstances at Guantanamo Bay.134 Instead, the Court left the jurisdictional standard open to be decided by lower courts on a case-by-case basis.135 The Court also did not elucidate a particular substantive legal standard for the Executive’s detention of prisoners captured in military operations.136 Instead, the Court expressly refused to set a standard for the content of habeas claims in this context.137 In just the first year after Boumediene, district courts heard forty habeas petitions from Guantanamo detainees and granted the writ thirty-one times.138 c. Why Not Remand? Chief Justice Roberts dissented vigorously, stating that once the Court had affirmatively found jurisdiction, it should have remanded the case to the D.C. Circuit for the petitioners to exhaust remedies under the DTA there.139 According to Roberts, lower courts could have thus determined whether the DTA gave appropriate process under the Suspension Clause and Due Process Clause on a case-by-case basis, and the Guantanamo detainees would likely have less delay in getting a remedy than if the DTA was scrapped altogether.140 Instead, Roberts asserted, the majority rushed forward to decide a constitutional issue that it did not yet need to consider.141

#### That flips his decision

Stothers 10-21 (Patrick Stothers-Kwak, Blake, Cassels & Graydon LLP, “Citizens United Did Not Equate Money with Speech—But McCutcheon Will,” 2013, <http://www.thecourt.ca/2013/10/21/citizens-united-did-not-equate-money-with-speech-but-mccutcheon-will/>)

Most debates regarding freedom of expression ultimately boil down to a conflict between free speech utilitarianism—wherein speech is only valuable insofar as it can produce useful social outcomes—and free speech absolutism, which views with extreme skepticism any government attempt to differentiate between useful and non-useful types of speech. The recent line of First Amendment cases has very much skewed towards the latter, and should it continue along this trajectory, Mr. McCutcheon will most likely succeed in his claim. However, Citizens United precipitated a considerable political backlash, and the present case could paint the Court in an even more partisan light—it doesn’t help that the Republican Senate Minority Leader is an amicus curiae. By joining the four liberal justices to uphold key provisions of the Patient Protection and Affordable Care Act in National Federation of Independent Businesses v Sebelius, 567 US (2012), Roberts proved that he has **some regard for the institutional integrity of the Supreme Court and** deference to the political process. It will be interesting to see whether he reprises this role as institutional peacekeeper in McCutcheon.

#### Key to domestic political moderation

Sides 10-16 (John, Associate Professor of Political Science – George Washington University, “Why striking down campaign contribution limits might make politics better,” Washington Post, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/16/why-striking-down-campaign-contribution-limits-might-make-politics-better/>)

Finally, I want to say more about why striking down aggregate contribution limits might actually attenuate ideological extremism (assuming I’m mostly wrong on my first point that people will not try to circumvent contribution limits!). The current campaign finance system – with its emphasis on interest group spending — favors highly ideological factions that have the means and motive to run independent campaigns. Rules that channel more money through party organizations and candidates might dampen the power of groups like the Tea Party. Against this claim, Bob suggests that political parties ran ads in 2012 that were just as “aggressive” and negative as interest groups. Research by the Wesleyan Media Project indicates that this is not true. But this finding is not relevant to my argument.

My point about moderation is not about the tone or content of political ads, but is tied to the nomination process where party factions fight their ideological battles. A generation ago, such battles were waged internally in the proverbial smoke-filled rooms. Today they might be hashed out in the open through primary elections. The advantage goes to the interest group that can raise a lot of money and mobilize its partisan faction of voters. Ideological moderation seems more plausible when political resources are controlled primarily by party leaders whose chief incentive is to win elections rather than take positions.

Like Bob, I support reasonable contribution limits, but I do not think the retention of aggregate limits on party committees and candidates improves the current campaign finance system. I certainly do not think, as Bob suggests, that a favorable ruling for McCutcheon will encourage “more money from fewer sources to flow more freely.” That dynamic was partially spurred by Citizens United. If anything removing the aggregate limits could make the system more accountable by channeling funds to political committees that are transparent, particularly party and candidate committees, which must face the voters at the ballot box.

#### The impact is Russia relations

Sokov 13 (Nicholas – Senior Fellow at the Vienna Center for Disarmament and Non-Proliferation (VCDNP), “US-Russian Relations: Beyond the Reset”, 1/29, <http://www.europeanleadershipnetwork.org/us-russian-relations-beyond-the-reset_459.html>)

Looking into the future, most observers of US-Russian relations tend to concentrate on arms control and disarmament – a new treaty to replace New START, missile defense, tactical nuclear weapons and other similar issues. Others pay attention to the human and political rights issues, including first of all the conservative wave that is sweeping through Russia. It is quite sad that nuclear disarmament and political rights dominate the agenda. This only shows that the relationship lacks depth. More than twenty years after the end of the Cold War, trade and investment remain at an extremely low level. They cannot serve as a stabilizer of the relationship (in sharp contrast to Russia’s relations with Europe) and their absence allows other, more volatile and more adversarial issues to top the agenda. Two features are likely to dominate the future of the US-Russian relationship and both will have a negative effect: domestic politics and the political transition in the Middle East and Northern Africa which is commonly known as the “Arab Spring.” Contrary to common opinion, there are very few truly difficult issues on the bilateral agenda that cannot be resolved through negotiation. The increasingly conflictual nature of the relationship results from domestic politics in both countries rather than from strategic, economic, or political differences. A good illustration is the well-known controversy over missile defense. Any decent diplomat could find a solution in a matter of months. Russian concerns concentrate on the fourth – and the last – phase of the American plan (known as the Phased Adaptive Approach), which foresees deployment of systems theoretically capable of intercepting strategic missiles. The solution proposed by Russian military leaders is to limit the capability of the fourth-phase system (for example, through limits on the number of interceptors and the areas of their deployment) so that it does not undermine the existing US-Russian strategic balance while preserving the ability of the American system to intercept a small number of long-range missiles, i.e., to limit the system to its officially proclaimed purpose. In the end, this is about the predictability of the American missile defense capability. The prospect of reaching agreement, however, is barred by the Republican Party, especially its Tea Party wing, which regards any limits whatsoever as anathema. Missile defense is an article of faith. This is not about plans or capabilities: this is about a deeply ideological commitment to unrestricted unilateralism. The increasingly tough and vocal (even shrill) Russian rhetoric also stems from domestic politics. Implementation of phase four of PAA is supposed to begin in the end of this decade and it may be another five to seven years, if not longer, until it begins to affect Russian strategic capability. There is plenty of time to negotiate. However, the rhetoric of the Russian government suggests that the threat is imminent. It is safe to assume that is simply the familiar “rally-around-the-flag” tactic of consolidating the public around the government.

#### Nuclear war

Allison 11 (Graham, Director – Belfer Center for Science and International Affairs at Harvard’s Kennedy School, and Former Assistant Secretary of Defense, and Robert D. Blackwill, Senior Fellow – Council on Foreign Relations, “10 Reasons Why Russia Still Matters”, Politico, 2011, <http://dyn.politico.com/printstory.cfm?uuid=161EF282-72F9-4D48-8B9C-C5B3396CA0E6>)

That central point is that Russia matters a great deal to a U.S. government seeking to defend and advance its national interests. Prime Minister Vladimir Putin’s decision to return next year as president makes it all the more critical for Washington to manage its relationship with Russia through coherent, realistic policies. No one denies that Russia is a dangerous, difficult, often disappointing state to do business with. We should not overlook its many human rights and legal failures. Nonetheless, Russia is a player whose choices affect our vital interests in nuclear security and energy. It is key to supplying 100,000 U.S. troops fighting in Afghanistan and preventing Iran from acquiring nuclear weapons. Ten realities require U.S. policymakers to advance our nation’s interests by engaging and working with Moscow. First, Russia remains the only nation that can erase the United States from the map in 30 minutes. As every president since John F. Kennedy has recognized, Russia’s cooperation is critical to averting nuclear war. Second, Russia is our most consequential partner in preventing nuclear terrorism. Through a combination of more than $11 billion in U.S. aid, provided through the Nunn-Lugar Cooperative Threat Reduction program, and impressive Russian professionalism, two decades after the collapse of the “evil empire,” not one nuclear weapon has been found loose. Third, Russia plays an essential role in preventing the proliferation of nuclear weapons and missile-delivery systems. As Washington seeks to stop Iran’s drive toward nuclear weapons, Russian choices to sell or withhold sensitive technologies are the difference between failure and the possibility of success. Fourth, Russian support in sharing intelligence and cooperating in operations remains essential to the U.S. war to destroy Al Qaeda and combat other transnational terrorist groups. Fifth, Russia provides a vital supply line to 100,000 U.S. troops fighting in Afghanistan. As U.S. relations with Pakistan have deteriorated, the Russian lifeline has grown ever more important and now accounts for half all daily deliveries. Sixth, Russia is the world’s largest oil producer and second largest gas producer. Over the past decade, Russia has added more oil and gas exports to world energy markets than any other nation. Most major energy transport routes from Eurasia start in Russia or cross its nine time zones. As citizens of a country that imports two of every three of the 20 million barrels of oil that fuel U.S. cars daily, Americans feel Russia’s impact at our gas pumps. Seventh, Moscow is an important player in today’s international system. It is no accident that Russia is one of the five veto-wielding, permanent members of the U.N. Security Council, as well as a member of the G-8 and G-20. A Moscow more closely aligned with U.S. goals would be significant in the balance of power to shape an environment in which China can emerge as a global power without overturning the existing order. Eighth, Russia is the largest country on Earth by land area, abutting China on the East, Poland in the West and the United States across the Arctic. This territory provides transit corridors for supplies to global markets whose stability is vital to the U.S. economy. Ninth, Russia’s brainpower is reflected in the fact that it has won more Nobel Prizes for science than all of Asia, places first in most math competitions and dominates the world chess masters list. The only way U.S. astronauts can now travel to and from the International Space Station is to hitch a ride on Russian rockets. The co-founder of the most advanced digital company in the world, Google, is Russian-born Sergei Brin. Tenth, Russia’s potential as a spoiler is difficult to exaggerate. Consider what a Russian president intent on frustrating U.S. international objectives could do — from stopping the supply flow to Afghanistan to selling S-300 air defense missiles to Tehran to joining China in preventing U.N. Security Council resolutions.

### 1NC CP

#### The executive branch should issue parole for detainees who have won their habeas corpus trial.

#### Executive parole solves the case – and avoids our DAs

Hernández-López 12 (Ernesto, UC Irvine School of Law, “Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World,” UC Irvine Law Review, Vol. 2, http://www.law.uci.edu/lawreview/vol2/no1/hernandez-lopez.pdf)

Under the executive’s authority, parole remains a viable legal option to release the five Uighurs from the base. With parole, the executive permits an alien to enter the United States without any particular visa or refugee status.210 The court in Kiyemba I discounted this option, claiming it requires that an alien must be applying for admission and that an alien refugee cannot qualify unless it is for “compelling reasons in the public interest.”211 This is troubling given parole’s flexibility and historic use. It has been used by the United States on various occasions when aliens did not have a designated legal right to enter the United States, including Hungarian refugees after 1956, Cuban and Southeast Asian refugees before the Refugee Act of 1980, Soviet Union nationals after 1988, and Cuban refugees in 1994.212 Presidents have used the power of parole to permit the entry of foreigners when visa categories did not neatly match up or were used up, at times allowing entry for large groups of foreigners.213

The court though overlooks how parole can easily remedy the problems of indefinite detention, detainees without any specific right to enter the United States, unclear extraterritorial reach of habeas remedies, and an ineffective habeas release order. Statutory law and migration practices, benefiting from a long history and case precedent, suggest that the Uighurs can be paroled in the United States. The problem is that the executive does not want to do so, given domestic political resistance and foreign relations concerns. If the appropriate departments of the executive branch worked to allow the Uighurs to enter the United States, they could easily be paroled without acting outside the authority of the Department of Homeland Security or State.

#### The plan decimates plenary powers

Kagan, 10

(Former US Solicitor General, Kiyemba v. Obama, Brief of Respondent to US Supreme Court, Feb. 5, No. 08-1234, Lexis)

Further, this Court has recognized in Boumediene, as well as in Munaf v. Geren, 128 S. Ct. 2207 (2008), that habeas is an equitable remedy that takes account of relevant practical and legal constraints on the disposition of habeas petitioners. Here, **legal constraints prevent the courts from ordering that petitioners be** brought to and **released** in the United States. To permit the habeas court to grant such extraordinary relief would be inconsistent with constitutional principles governing control over the Nation’s borders. As this Court has long affirmed, **the power to admit or exclude aliens is a sovereign prerogative vested in the political Branches, and “it is not within the province of any court, unless expressly authorized by law, to review [that] determination**.” United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950). Congress has exercised that power by imposing detailed restrictions on the entry of aliens under the immigration laws, as well as specific restrictions on the transfer of individuals detained at Guantanamo Bay to the United States. In light of these statutes and constitutional principles, **neither Boumediene nor the law of habeas corpus justifies granting petitioners the relief they seek**. And the Due Process Clause does not confer a substantive right to enter the United States in these circumstances. Finally, even assuming arguendo that a judicial order compelling the Executive to bring an alien into the United States were justified in some circumstances, the government’s sustained and successful efforts to resettle petitioners should preclude such an order in this case. Indeed, in light of the government’s success in resettling most of the Uighurs and in obtaining offers to resettle the rest, the Court may wish to dismiss the writ of certiorari as improvidently granted.

#### Key to Mexico coop

Saslaw, 12

(Poli Sci-Claremont McKenna, “One People, One Nation, One Power? Re-Evaluating the Role of the Federal Plenary Power in Immigration,” http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1432&context=cmc\_theses)

On the other hand, Mexico has also responded to the United States as a whole. In an amicus curiae brief submitted to the Ninth Circuit Court of Appeals in United States v. Arizona, one of Mexico’s major concerns was that “SB 1070 dangerously leads to a patchwork of immigration laws that **impede effective and consistent diplomatic relations**.” 66 The brief expresses concern that **Mexican-American “sovereign-to- sovereign” relations will be damaged by inconsistent American immigration policy**. 67 It even quotes James Madison in Federalist 42, saying “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”68 While Mexico may be able to adapt its policies in response to a single state law like SB 1070, **the country appears unwilling to embrace the resulting patchwork throughout the entire U**nited **S**tates. Other countries with weaker ties to the United States are even less likely to regard each state as a sovereign in regards to immigration policy. Beyond concerns about the actions of a single state, **the federal government should also worry about the consequences of several states acting in concert**. If five states pass anti- alien legislation, national consequences may be small. But if over 50 percent of the country enacts a law, it may begin to appear that the nation is speaking with one voice – just not the voice of the President. **Given the potential for foreign policy consequences, the national security rationale behind the plenary power still stands and the President and Congress should continue to control entrance and abode.**

#### Solves stability

Rozental, former deputy foreign minister of Mexico, senior fellow @ Brookings, 2/12/’1

(Andrés, chair of the U.S.-Mexico Migration Panel, convened by the Carnegie Endowment for International Peace and the Instituto Tecnológico Autónomo de México, “Mexico-U.S. Migration: A Shared Responsibility,” <http://www.carnegieendowment.org/pdf/files/M%20exicoReport2001.pdf>)

Simply put, the Panel recognizes that organized criminal activities have a deeply corrosive effect on the institutions of both countries and cooperation in their relentless pursuit should be as seamless as efforts are in other areas where there is an identifiable common threat, much as communicable diseases are in the public health arena. The additional incentives that the United States can put on the table in the form of much greater access to its labor markets, can reinforce the Fox Government’s determination to do much betterthan its predecessor. Showing measurable progress on this issue can change the deeply-held overall impression in the United States that Mexico has only a weak commitment to and, as a result, has been ineffective in attacking the organized criminal networks that have plagued the U.S.-Mexico relationship in recent years.

#### Global war

Haddick, MBA – U. Illinois, managing editor – Small Wars Journal, ‘8

(Robert, <http://westhawk.blogspot.com/2008/12/now-that-would-change-everything.html>)

There is one dynamic in the literature of weak and failing states that has received relatively little attention, namely the phenomenon of “rapid collapse.” For the most part, weak and failing states represent chronic, long-term problems that allow for management over sustained periods. The collapse of a state usually comes as a surprise, has a rapid onset, and poses acute problems. The collapse of Yugoslavia into a chaotic tangle of warring nationalities in 1990 suggests how suddenly and catastrophically state collapse can happen - in this case, a state which had hosted the 1984 Winter Olympics at Sarajevo, and which then quickly became the epicenter of the ensuing civil war. In terms of worst-case scenarios for the Joint Force and indeed the world, two large and important states bear consideration for a rapid and sudden collapse: Pakistan and Mexico. Some forms of collapse in Pakistan would carry with it the likelihood of a sustained violent and bloody civil and sectarian war, an even bigger haven for violent extremists, and the question of what would happen to its nuclear weapons. That “perfect storm” of uncertainty alone might require the engagement of U.S. and coalition forces into a situation of immense complexity and danger with no guarantee they could gain control of the weapons and with the real possibility that a nuclear weapon might be used. The Mexican possibility may seem less likely, but the government, its politicians, police, and judicial infrastructure are all under sustained assault and pressure by criminal gangs and drug cartels. How that internal conflict turns out over the next several years will have a major impact on the stability of the Mexican state. Any descent by the Mexico into chaos would demand an American response based on the serious implications for homeland security alone. Yes, the “rapid collapse” of Mexico would change everything with respect to the global security environment. Such a collapse would have enormous humanitarian, constitutional, economic, cultural, and security implications for the U.S. It would seem the U.S. federal government, indeed American society at large, would have little ability to focus serious attention on much else in the world. The hypothetical collapse of Pakistan is a scenario that has already been well discussed. In the worst case, the U.S. would be able to isolate itself from most effects emanating from south Asia. However, there would be no running from a Mexican collapse.

### 1NC CP

#### The United States federal judiciary should rule that individuals in military detention who have won their habeas corpus hearing can be detained if and only if the executive demonstrates that there was a thorough attempt at repatriation and that the reasoning for preventing release adheres to procedural ideas of deliberation between political branches, transparency, and accountability.

#### Competes – the plan is court-ordered release of ALL detainees that have won their hearings – the CP is LESS restrictive

#### It conditions deference on accountability – solves the aff

Landau 9 (Joseph, Associate-in-Law – Columbia Law School, “Muscular Procedure: Conditional Deference in the Executive Detention Cases,” Washington Law Review, Vol. 84:661, 2009, <https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/176/Landau_Author%20Copy.pdf?sequence=1>)

C. Muscular Procedure’s Effect in Future Cases Whether the judiciary continues to issue decisions of muscular procedure will likely depend upon the deliberation the coordinate branches bring to future security-related decisions. The testing ground may emerge in a case the Supreme Court will consider in its current Term involving the repatriation of detainees whom the government has determined pose no threat to the United States, or possibly in another case in which detainees are seeking to block their return to countries where they fear torture. On the former question, the D.C. Circuit ruled in Kiyemba v. Obama (Kiyemba I) 236 that detainees still stationed at Guantánamo, including those ordered released by habeas courts, have no due process rights and that, accordingly, district courts may not order their release into the United States.237 Kiyemba I places into doubt federal court authority to review the prolonged detention of individuals who have been cleared for release but cannot be relocated safely to a third country. The case provides occasion for the Supreme Court to clarify aspects of Rasul and Boumediene that appear to repudiate decisions upon which the Kiyemba I court relied—in particular, cases barring non-citizens from redressing action by U.S. officials outside the territorial United States.238 More deeply, the case raises questions about the government’s overall accountability in resolving the crisis surrounding those detained individuals who remain virtually stateless at this time, especially now that President Obama has declared a wish to close the Guantánamo detention facility.239 A muscular procedural ruling in that case would look beyond the D.C. Circuit’s purely deferential stance toward the Executive’s repatriation process and consider the thoroughness of executive branch efforts to repatriate those detainees to third countries. Such a ruling would condition deference on the government’s demonstration of its own accountability as opposed to simply assuming that a rigorous process is underway.

#### The CP is goldilocks – checks the president but doesn’t interfere with political questions or security

Landau 9 (Joseph, Associate-in-Law – Columbia Law School, “Muscular Procedure: Conditional Deference in the Executive Detention Cases,” Washington Law Review, Vol. 84:661, 2009, <https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/176/Landau_Author%20Copy.pdf?sequence=1>)

The executive detention cases of the past several years have prompted renewed debate over the proper scope of judicial deference to the executive branch’s claimed need to limit individual liberties during times of crisis. Some theorists argue that courts should resolve large policy questions raised by individual challenges to assertions of executive power.1 Others believe that courts should decide as little as possible, asking only whether executive action is grounded within statutory authority.2 However, a number of the post-9/11 national security decisions have accomplished a great deal without following either approach. In these cases, the Supreme Court and a number of lower courts have put procedural devices to surprisingly “muscular” uses. The decisions illustrate a rare but critical assertion of procedural law where the political branches fail to legislate or properly implement substantive law. This is “muscular procedure”—the invocation of a procedural rule to condition deference on coordinate branch integrity. The cases provide a framework for understanding the role of judicial review in the post-9/11 executive detention decisions, with implications for other fields of law as well.3

Many commentators have criticized the Supreme Court’s executive detention decisions as “merely” procedural rulings, pointing out that the Court has generally addressed itself to questions about adjective law or the ground rules of litigation: whether the Court has jurisdiction; whether detainees can access the courts; and whether the government is required to provide discovery, and if so, how much.4 Far fewer decisions have resolved substantive questions such as the scope of executive power and the content of individual liberty—that is, whom the Executive can hold and for how long, and the specific constitutional protections that apply. But regardless of whether a particular decision turns on “process” or “substance”—an age-old distinction that resists clear definition5 —courts have affected the law of national security in profound ways by explicitly requiring the political branches to adhere to a judicially imposed standard of transparency and deliberation. In individual cases, rulings about seemingly mundane procedural issues such as discovery and evidentiary standards have accelerated the release of enemy combatant detainees who were held at Guantánamo Bay years after being cleared of any wrongdoing.6 More broadly, procedural devices have been used to smoke out and put in check Congress’s lack of oversight of the executive branch and its misguided interpretations and implementation of authorizing legislation.7

In a number of these cases, courts have resolved the merits of an enemy combatant challenge by scrutinizing the Executive’s adherence to baseline procedural safeguards—rejecting determinations based on absolute secrecy, innuendo, tentativeness, or multiple levels of hearsay, while affirming executive branch decisions satisfying minimal standards of reliability.9 In the process, the judiciary has rebuffed the President’s extreme interpretations of vague authorizing legislation,10 reexamined inadequately reasoned decisions by various arms of the executive branch in implementing a congressional delegation,11 and stimulated legislative action where Congress has failed to oversee executive decision-making through the legislative process.12 Throughout these decisions, procedure functions as a corrective to decision-making by one (or both) of the political branches that, if left undisturbed, would violate a judicially imposed standard requiring lucid, intelligible procedures.

Sometimes judicial review is overtly exacting in these cases, with courts imposing burdensome procedural obligations on a party to litigation (usually the government).13 Other times the review is relatively light—as in the imposition of a relaxed standard of review when ruling on an enemy combatant designation—but heavy enough to invalidate executive branch decisions lacking sufficient indicia of reliability.14 Still other times the review is moderately demanding, requiring a co-equal branch to reconsider its interpretation of a statute (in the case of the Executive)15 or to reaffirm its position through clear and more purposeful language (in the case of the legislature).16 These varying procedural demands are generally consistent with the deference norms that obtain under prevailing doctrine,17 but they impose enhanced procedural conditions that require the political branches to satisfy a judicially imposed level of transparency and deliberation—conditions that make procedural review far more muscular than might otherwise be expected.

Muscular procedure highlights a process-oriented approach to legal decision-making in national security through a judicial insistence on procedural regularity, a matter over which the judiciary has a comparative advantage in expertise.19 The theory presents an alternative to much of the conventional wisdom within the relevant literature. Although the prevailing frameworks advocate either blind deference to the collective expertise of the political branches or judicial resolution of large, complex, and highly fractious substantive questions, courts have put procedure to muscular uses by focusing on the means of coordinate branch decision-making, while still allowing the political branches to define the content of the substantive law. The cases discussed in this article, by integrating baseline procedural standards into cases of inter-branch importance, present new ways of thinking about the relationship between judicial decision-making and procedural values such as transparency and deliberation, with implications beyond the national security context.

#### Blanket release causes WMD terror

Popeo, 10

(Attorney-Washington Legal Foundation, Brief on Behalf of Retired Military Officers, National Defense Committee and Washington Legal Foundation, Kiyemba v. Obama, No. 08-1234, Lexis)

Petitioners are asking the Court to rule that every detainee now being held at Guantanamo Bay possesses a substantive due process liberty interest protected by the U.S. Constitution. They further ask the Court to [45] rule that any such detainee who succeeds in overturning his "enemy combatant" designation and who cannot be sent to his nation of citizenship must be released into the United States. They further ask for **adoption of a rule that would require such release without regard to whether the political branches of government believe that release poses national security concerns.** Amici respectfully submit, based on their considerable military experience, that recognition of the constitutional rights asserted by petitioners would raise serious national security concerns. Congress and the Executive Branch have determined that national security dictates that the seven Uighurs remaining at Guantanamo Bay should not be released into the United States. Simply because the Uighurs are no longer deemed "enemy combatants" does not mean there can be adequate assurance they will not be disruptive if allowed to enter the United States. Each of them attended a military training camp in Afghanistan and acquired weaponry skills. Each was at one time determined to be an "enemy combatant" by a CSRT. More than a few of the individuals released from [34] Guantanamo Bay have returned to the battlefield [46] to fight against the United States. Boumediene, 128 S. Ct. at 2295 (Scalia, J., dissenting). If the Executive Branch and Congress are sufficiently concerned about releasing the seven Uighurs into the United States to oppose such release, the courts -- which have vastly fewer resources than the political branches and far less expertise in national security matters -- should be extremely reluctant to second-guess that position. **The potential national security concerns at issue range far beyond how the Uighurs may conduct themselves once released into the United States.** For example, China has stated in no uncertain terms that it wants the Uighurs returned to China and opposes permitting them to live freely in some other country. See, e.g., Peter Spiegel and Barbara Demick, "Uighur Detainees at Guantanamo Pose a Problem for Obama," Los Angeles Times (Feb. 18, 2009) ("China is insisting that the Uighurs be sent home to face trial for separatist activities. It has further intimated that any country that offers them political asylum will in effect be harboring dangerous terrorists."); Bradley S. Klapper, "China to Swiss: Don't Take Uighurs from Guantanamo," Miami [47] Herald (Jan. 8, 2010) ("China warned the Swiss government Friday against accepting two Guantanamo inmates as part of President Barack Obama's effort to close the detention center, calling them terrorist suspects who should face Chinese justice."). Releasing the seven Uighurs into the United States undoubtedly would have adverse effects on U.S. relations with China. Amici submit that the Executive Branch and Congress are better equipped than is the Court to weigh the costs of those effects against [35] whatever benefits might come from the Uighurs' release into the United States. Moreover, every Guantanamo detainee, including some of the most dangerous terrorists in the world, has filed a habeas petition in the District of Columbia and will reap the benefits of a decision extending due process rights to nonresident aliens at Guantanamo Bay. Given the well-known difficulty that the military has experienced in handling the massive amounts of evidence relevant to each of the pending habeas petitions, it is within the realm of possibility that at least some of the most highly dangerous detainees will prevail in their habeas petitions. If that occurs and the detainee [48] reasonably fears persecution in his home country, a decision favoring Petitioners in this matter **could well lead to the release of dangerous terrorists into the United States**. It would also compound the significant disruptions already being experienced by the military as it is forced to divert large amounts of its resources to defending against the habeas petitions filed by so many of its military detainees. See Gen. Thomas L. Hemingway, Wartime Detention of Enemy Combatants: What if There Were a War and No One Could Be Detained Without an Attorney?, 34 DENV. J. INT'L L. & POL'Y 63 (2006). The district court ruled that release into the United States was required because the Uighurs are no longer deemed "enemy combatants" and have nowhere else to go. Under the district court's "all or nothing" standard, the political branches' considered views that the Uighurs could pose a threat to national security if released into the United States count for nothing -- [36] because their evidence does not at present rise to the level necessary to support an "enemy combatant" designation. That decision is a sharp break from 220 years of constitutional history, during [49] which the courts deferred considerably to the political branches' foreign affairs decisions, and raises serious national security concerns.

#### Extinction

**Creamer 11** (Robert, Strategic Consulting Group, “Post-Bin Laden, It's Time to End the Threat of Nuclear Terrorism for Good”)

Worse, al Qaeda and other terrorist organizations have vowed to **obtain** and actually **use** nuclear weapons. The status quo -- the balance of terror -- that for six decades prevented a nuclear war between the U.S. and Russia is every day being made more unstable by the increasing numbers of nuclear players -- and by the potential entry of non-state actors. Far from being deterred by the chaos and human suffering that would ensue from nuclear war -- actors like al Qaeda actively seek precisely that kind of **cataclysm**. The more nuclear weapons that exist in the world -- and more importantly the more weapons-grade fissile material that can be obtained to build a nuclear weapon -- the more likely it is that one, or many more, will actually be used. In the 1980's the specter of a "Nuclear Winter" helped spur the movement for nuclear arms reduction between the U.S. and Soviet Union. Studies showed that smoke caused by fires set off by nuclear explosions in cities and industrial sites would rise to the stratosphere and **envelope the world**. The ash would absorb energy from the sun so that the earth's surface would get **cold**, dry and dark. Plants would die. Much of our food supply would disappear. Much of the world's surface would reach winter temperatures in the summer.

### 1NC Solvency

#### Court rulings are toothless – enforcement is delayed and merely result in legal limbo

Scheppele 12 (Kim Lane, Laurance S. Rockefeller Professor of Sociology and Public Affairs in the Woodrow Wilson School and University Center for Human Values; Director of the Program in Law and Public Affairs, Princeton University, “THE NEW JUDICIAL DEFERENCE BOSTON UNIVERSITY LAW REVIEW,” vol 92, <http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SCHEPPELE.pdf>)

In this Article, I will show that American courts have often approached the extreme policies of the anti-terrorism campaign by splitting the difference between the two sides - the government and suspected terrorists. One side typically got the ringing rhetoric (the suspected terrorists), and the other side got the facts on the ground (the government). In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge. The government continued to treat suspected terrorists almost as badly as it did before the suspected terrorists "won" their cases. And any change in terrorism suspects' conditions that did result from these victorious decisions was slow and often not directly attributable to the judicial victories they won.¶ Does this gap between suspected terrorists' legal gains and their unchanged fates exist because administration officials were flouting the decisions of the courts? The Bush Administration often responded with sound and fury and attempted to override the Supreme Court's decisions or to comply minimally with them when they had to. n6 But, as this Article will show, these decisions did not actually require the government to change its practices very quickly. The decisions usually required the government to change only its general practices in the medium term. Judges had a different framework for analyzing the petitioners' situation than the petitioners themselves did; judges generally couched their decisions in favor of the suspected terrorists as critiques of systems instead of as solutions for individuals. In doing so, however, courts allowed a disjuncture between rights and remedies for those who stood before them seeking a vindication of their claims. Suspected terrorists may have won [92] in these cases - and they prevailed overwhelmingly in their claims, especially at the Supreme Court - but courts looked metaphorically over the suspects' heads to address the policies that got these suspects into the situation where the Court found them. Whether those who brought the cases actually got to benefit from the judgments, either immediately or eventually, was another question. Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference.7 Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, inter arma silent leges: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still “hot,” courts jumped right in, dealing governments one loss after another.8 After 9/11, it appears that deference is dead. But, I will argue, deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice.9 Suspected terrorists have received from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives. Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference. This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted – often bold, ambitious, and brave solutions – nonetheless fail to address the plights of the specific individuals who brought the cases. This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something – an appearance not entirely false in the long run – while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

#### And, lower courts won’t enforce the plan

**Ku and Yoo, 6 -** Associate Professor of Law, Hofstra University School of Law; Visiting Associate Professor of Law, William & Mary Marshall-Wythe School of Law AND Professor of Law, University of California at Berkeley School of Law (Boalt Hall); Visiting Scholar, American Enterprise Institute (Julian and John, 23 Const. Commentary 179, “HAMDAN v. RUMSFELD: THE FUNCTIONAL CASE FOR FOREIGN AFFAIRS DEFERENCE TO THE EXECUTIVE BRANCH” lexis)

Courts are also highly decentralized. With 94 district courts and 667 judges, differing interpretations of ambiguous foreign affairs laws could result in broad conflicts between different judicial districts. Although the appellate process can eventually unify inconsistent interpretations, the process is notoriously slow and limited. The Supreme Court itself hears about 70-85 cases a year compared to the estimated 325,000 appeals that are filed from district court decisions annually. As a result, the system is poorly designed for achieving a speedy and unified interpretation of an ambiguous statute, treaty, or rule of customary international law.

Such inflexibility surely advances the goals of a domestic legal system in uniformity, predictability, and stability in the interpretation and application of federal law. For these reasons, deference [201] doctrines do not require judicial abdication to the executive branch. Rather, they typically allow the courts to make the initial judgment about the proper meaning of a statute or treaty. Where such statutes or treaties are ambiguous or broadly phrased, however, a continued resort to a rigid, slow, inflexible and decentralized decisionmaking process based upon limited information is hard to justify.

This is not to say that courts could not interpret ambiguous statutes if necessary. Rather, the central question is, from a comparative institutional perspective, whether there is reason to think that courts would be equal or superior to other branches of government in resolving ambiguities in laws designed to achieve national foreign policies.

### 1NC Legitimacy

#### No solvency---will just use replace detention w/ drones or rendition

Robert Chesney 11, Charles I. Francis Professor in Law, University of Texas School of Law, “ARTICLE: WHO MAY BE HELD? MILITARY DETENTION THROUGH THE HABEAS LENS”, Boston College Law Review, 52 B.C. L. Rev 769, Lexis

The convergence thesis describes one manner in which law might respond to the cross-cutting pressures associated with the asymmetric warfare phenomenon—i.e., the pressure to reduce false positives (targeting, capture, or detention of the wrong individual) while also ensuring an adequate capacity to neutralize the non-state actors in question. One must bear in mind, however, that detention itself is not the only system of government action that can satisfy that latter interest. Other options exist, including the use of lethal force; the use of rendition to place individuals in detention at the hands of some other state; the use of persuasion to induce some other state to take custody of an individual through its own means; and perhaps also the use of various forms of surveillance to establish a sort of constructive, loose control over a person (though for persons located outside the United States it is unlikely that surveillance could be much more than episodic, and thus any resulting element of “control” may be quite weak).210¶ From the point of view of the individual involved, all but the last of these options are likely to be far worse experiences than U.S.-administered detention. In addition, all but the last are also likely to be far less useful for purposes of intelligence-gathering from the point of view of the U.S. government.211 Nonetheless, these alternatives may grow attractive to the government in circumstances where the detention alternative becomes unduly restricted, yet the pressure for intervention remains. The situation is rather like squeezing a balloon: the result is not to shrink the balloon, but instead to displace the pressure from one side to another, causing the balloon to distend along the unconstrained side. So too here: when one of these coercive powers becomes constrained in new, more restrictive ways, the displaced pressure to incapacitate may simply find expression through one of the alternative mechanisms. On this view it is no surprise that lethal drone strikes have increased dramatically over the past two years, that the Obama administration has refused to foreswear rendition, that in Iraq we have largely (though not entirely) outsourced our detention operations to the Iraqis, and that we now are progressing along the same path in Afghanistan.212¶ Decisions regarding the calibration of a detention system—the¶ management of the convergence process, if you will—thus take place in the shadow of this balloon-squeezing phenomenon. A thorough policy review would take this into account, as should any formal lawmaking process. For the moment, however, our formal law-making process is not directed at the detention-scope question. Instead, clarification and development with respect to the substantive grounds for detention takes place through the lens of habeas corpus litigation.

#### Plan can’t boost legitimacy or soft power---alt causes overwhelm

Kudryashov 11 - Roman Kudryashov, Researcher: Applied Politics & Economics, the New School, May 17, 2011, “Democracy Promotion in between Domestic and International Needs,” online: http://whataretheseideas.wordpress.com/2011/05/17/democracy-promotion-in-between-domestic-and-international-needs/

Additionally, America must occasionally pause for self reflection (in an attempt to understand how other people view the nation): While America advertises democratization, policy choices, alliances, and domestic conditions all run counter argument. Where the CFR report suggests switching some media programming into a C-SPAN format to show how democratic politics work (Albright p.32), I argue that the bitter partisan politics leading to budget deadlocks in congress, the radicalizing ideology of the Tea Party, George Bush’s blatant disregard of UN Security Council advice on invading Iraq, and the illegitimate politics of Wisconsin’s Scott Walker in the face of a state-wide strike advertise the failings of the American democratic system 21. As far as neoliberal policies that America packages with its democratization program go, Joseph Stieglitz points out that with the distribution of wealth in America, the nation more and more begins to resemble the autocratic regimes it is criticizing (Stieglitz 1).

As Michael Pocalyko points out at the end of the CFR dissenting views, “Abu Ghraib matters infinitely more than Americans realize. Its effects are enduring. These human rights abuses were a stunning desecration of American values and a psychological assault on Islam. No one…in the Arab nations has ‘moved on’” (Albright p.47). Likewise, Washington’s almost-axiomatic support for Israel will mean that America will be blamed by proxy for whatever conflicts and injustices arise out of the Israeli-Arab and Palestinian conflicts 22. America would do well to be careful of the image it creates for itself in international affairs---the adverse reactions to American democracy promotion confirm that Arabic civil society responds to what America does, not what it says, so a strategic planning approach concerning how America is perceived would argue for repairing America’s reputation through policy changes, before embarking on noble goals of democracy promotion.

#### Previous rulings solves the aff

Siegel 12 (Ashley E., J.D. – Boston University School of Law, “Some Holds Barred: Extending Executive Detention Habeas Law Beyond Guantanamo Bay,” Boston University Law Review, Vol. 92, <http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SIEGEL_000.pdf>)

Mr. Janjua’s situation implicates the very concerns that the Supreme Court discussed in the Boumediene line of cases. While Mr. Janjua’s case does not fall under the definition of extraordinary rendition, since he has not been removed to a foreign country, there are many parallels between his case and extraordinary rendition cases. Specifically, as with extraordinary rendition, the U.S. government has ordered Mr. Janjua’s enforced disappearance by the Pakistani government to avoid compliance with U.S. law and international conventions.212 The Supreme Court and the D.C. Circuit have both expressed a concern that the Executive would seek to avoid compliance with the law by sidestepping any standard the Court would elucidate.213 Further, Mr. Janjua’s situation implicates separation-of-powers concerns, an issue with which the Supreme Court in Boumediene was particularly concerned. By ordering foreign governments to detain terrorist suspects on behalf of the U.S. government, the Executive sidesteps judicial review of its actions and removes such detainees’ rights to challenge their detentions.

The Boumediene factors themselves allow habeas rights to be extended to those in Mr. Janjua’s circumstances. The first factor, considering the detainee’s status and the process afforded in determining that status, appears to weigh in favor of a detainee in Mr. Janjua’s circumstances. Such a detainee often has not been charged with any crime, nor given any status whatsoever. Even if a status has been given to such a detainee, it is unlikely that a disappeared person was afforded any process or allowed to rebut that status in any meaningful way. While such detainees are often considered suspected terrorists, their detention should not draw on indefinitely without any formal charges or the opportunity to rebut those charges. The first factor weighs more in this sort of detainee’s favor than perhaps those in Eisentrager, Boumediene, or Maqaleh since both the status and status-determination process in the present case provide significantly less protection.

### 1NC Globalism

#### Modeling fails

**Chodosh 03** (Hiram, Professor of Law, Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law, 38 Tex. Int'l L.J. 587, lexis)

**Exposure to foreign systems is** helpful but **seldom sufficient for effective reform design.** Reform models are more likely to be successful if they are not merely copied or transplanted into the system. The argument that transplants are easy and common (though based on substantial historical evidence) **profoundly undervalues** the relationship between law and external social objectives. 103 Furthermore, reforms conceived as blunt negations of [\*606] the status quo are not likely to be successful. 104 Reform proposals based on foreign systems or in reaction to (or as a negation of) recent domestic experience require careful adaptation to local circumstances and conditions. However, most communities are **not familiar with the tools of adaptation** and tend to think of foreign models as package deals to accept or reject (but rarely to alter), and alterations tend to graft one institution onto another without comprehensive consideration of the system as a whole. 105

#### Nobody cares

Eric Black 12, former reporter for the Star Tribune and Twin Cities blogger, Some ideas to limit the ‘supremacy’ of the U.S. Supreme Court, 11/27/12, www.minnpost.com/eric-black-ink/2012/11/some-ideas-limit-supremacy-us-supreme-court

It seems to be part of our national DNA. We see ourselves as so unlike the rest of the world that we have developed a semi-religious belief in what we call “American exceptionalism.” Maybe the upside is some kind of boost to our collective self-esteem. But one of the downsides is a reluctance to look around the world and see if anyone (especially not France) has a good idea from which we might benefit.

Especially on democracy. We see ourselves as the world’s model for democracy and the “rule of law.” We expect others to copy us, although they have long since stopped doing so with reference to the specifics of how to design a government. We grumble a good deal about the breakdowns in our system, but we are not much open to ideas for improving it.

University of Minnesota political scientist Lisa Hilbink, whose specialties include comparative constitutional systems around the world, said that basically, since the end of World War II, most of the world outside of Latin America came to the conclusion that the U.S. system was “pretty crazy.”

## 2nc

### t immigration

#### Concede not immigration—kills solvency

Hernández-López 12 (Ernesto, UC Irvine School of Law, “Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World,” UC Irvine Law Review, Vol. 2, http://www.law.uci.edu/lawreview/vol2/no1/hernandez-lopez.pdf)

While all of the Kiyemba cases raised constitutional issues regarding common law habeas,9 habeas remedies, and separation of powers, they demonstrate that immigration law doctrine provides generous justification for detention even in situations when noncombatants are detained indefinitely.10 In theory, if certiorari were granted in any of the Kiyemba cases, the Supreme Court may provide the next step in habeas doctrine since Boumediene v. Bush found constitutional habeas does protect base detainees.11 In Boumediene the Supreme Court held that habeas extends despite detainees’ noncitizen status and their presence outside domestic borders. Accordingly, before the Kiyemba disputes in 2009, alienage and extraterritorial location were not formal bars to constitutional rights or judicial remedies. This Article argues that by relying on immigration law to justify detentions, the Kiyemba triumvirate suggests immigration law provides courts a way to minimize the effect of Boumediene: extraterritorial habeas for aliens is checked by plenary powers reasoning regarding political questions, alien status, and their location. The Kiyemba cases suggest that the plenary powers doctrine, as applied to aliens detained overseas, limits extraterritorial constitutional protections implied in Boumediene.

The D.C. Circuit’s reasoning sanctioning detention reflects hallmark plenary powers doctrine norms. The Supreme Court effectively agreed with this reasoning, as evident in its denial of certiorari in Kiyemba III. These plenary powers doctrine norms include: deference for political questions, the denial of certain rights to aliens, and that an alien’s physical location precludes rights protection. Even if the Supreme Court did actually rule in a Kiyemba dispute, it would most likely focus on habeas and not limit the immigration law justifications in Court of Appeals’ opinions.12 Nevertheless, the doctrinal consistency of plenary powers effectively has shaped the legal identity of these five Uighurs. They are aliens in overseas detention.

### diplomacy/relations NB

#### The plan and perm mandate release – that crushes diplomatic relations

Milko 12 – Their Author (Jennifer L., “Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, Duquesne Law Review, Winter, 50 Duq. L. Rev. 173, Lexis)

While the importance of the writ for the preservation of the individual liberty and as a check on Executive power is one aspect of the tripartite system, the Executive's interest in maintaining a unified voice in the realm of foreign policy is another key concern. By allowing the courts to order release of a detainee or to order advance notice of transfer so that the petitioner may present evidence that he would be harmed in a recipient country, the Judiciary would be forced to make determinations about foreign affairs that its judges **may not be competent to make**. ***In a time of chaos and intricate foreign relations***, the sensitivity and difficulty of forging meaningful diplomatic relations with other nations at this time in history is a key concern of the Executive, and properly within that Branch's authority under the Constitution. Permitting the Judiciary to make determinations from the bench about the appropriateness of human rights or other similar determinations in a judicial proceeding could very well damage the diplomatic relations that the Executive is attempting to form with recipient nations.

#### Alliances prevent nuclear war.

**Ross**, Winter 1998/**1999** (Douglas – professor of political science at Simon Fraser University, Canada’s functional isolationism and the future of weapons of mass destruction, International Journal, p. lexis)

Thus, an easily accessible tax base has long been available for spending much more on international security than recent governments have been willing to contemplate. Negotiating the landmines ban, discouraging trade in small arms, promoting the United Nations arms register are all worthwhile, popular activities that polish the national self-image. But they should all be supplements to, not substitutes for, a proportionately equitable commitment of resources to the management and prevention of international conflict – and thus the containment of the WMD threat. Future American governments will not ‘police the world’ alone. For almost fifty years the Soviet threat compelled disproportionate military expenditures and sacrifice by the United States. That world is gone. Only by enmeshing the capabilities of the United States and other leading powers in a co-operative security management regime where the burdens are widely shared does the world community have any plausible hope of avoiding **warfare involving nuclear or other WMD**.

### CP—top level

#### The plan is a substantive ruling, while the CP is a procedural ruling. Data concludes that release is MORE LIKELY after the CP than the plan – prefer comparative ev

Landau 9 (Joseph, Associate-in-Law – Columbia Law School, “Muscular Procedure: Conditional Deference in the Executive Detention Cases,” Washington Law Review, Vol. 84:661, 2009, https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/176/Landau\_Author%20Copy.pdf?sequence=1)

[Green = basis for CP Text, READ BOTH COLORS]

Civil libertarian critics, some of whom write from the detainees’ perspectives,61 note that procedural decisions often create uncertainty in the law and delay final resolutions.62 They observe that procedure can prolong the confinement of detainees who may be innocent.63 But the data on Guantánamo releases sheds a different light on that analysis. Very few detainees released from Guantánamo have been transferred after a judicial order resolving the merits of a case: only eleven of the thirty detainees who have been ordered released at the conclusion of a full merits hearing65 have been transferred from Guantánamo.66 Moreover, **many of the 552 releases so far have occurred** after a procedural ruling.68 Hamdi exemplifies this latter point: shortly after the Court required the executive branch to provide Hamdi a due process hearing, the government chose to release him.69 Although Hamdi was denied any opportunity to disprove his enemy combatant status,70 he was spared the near-certainty of remaining in detention throughout trial and a likely period of extended confinement during a protracted appellate process.

While advocates claim that the rule of law will be better served through decisions resolving substantive legal questions, **there is no guarantee that substantive rulings would redound to the benefit of the causes they champion**. Moreover, procedural rulings have provided critical remedies in contexts where substantive law is generally unavailing, as for instance where detainees have sought judicial protection against torture overseas.71 It would not be a stretch therefore to argue that many of the detainees—if they could choose—**might be** better off **with a procedural resolution than a decision of substance**.72 Beyond the debate about the relative merits and deficiencies of “procedural” versus “substantive” decisions lies a deeper point about the role of certain procedural values in precisely the types of complex and highly charged scenarios raised within the executive detention context. Where courts have placed a premium on coordinate branch adherence to procedural ideas such as deliberation, transparency, and accountability, judicial decisions have had a forceful effect on the individual cases and the law more generally. By invoking these procedural devices, courts have brought hundreds of cases to effective resolution. In other cases, courts have rebuffed extreme interpretations of statutes by the Executive, rejected decision-making by various arms of the executive branch that inadequately implemented a congressional delegation, and provided executive oversight where Congress failed to do so. This is muscular procedure, which provides opportunities for thinking about how procedure can affect the law—and substantive rights—in new and unexplored ways.

#### The CP results in the plan by facilitating detainee release and preventing executive overreach

Landau 9 (Joseph, Associate-in-Law – Columbia Law School, “Muscular Procedure: Conditional Deference in the Executive Detention Cases,” Washington Law Review, Vol. 84:661, 2009, https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/176/Landau\_Author%20Copy.pdf?sequence=1)

Part II develops a framework of muscular procedure by exploring decisions that condition judicial deference on the Executive’s adherence to a judicially imposed standard of transparency and deliberation. Within that framework, procedure can perform different functions. In individual cases, courts can invoke procedural devices to precipitate detainee releases,21 guide merits determinations,22 halt the return of detainees to countries where they fear torture,23 and endorse efforts by litigants to invoke additional procedural rules in aid of their respective claims or defenses.24 More broadly, courts can use procedural rulings to reject decision-making by the coordinate branches that lacks professional judgment—including occasions when the President overreaches in interpreting a statutory mandate,25 when various arms of the executive branch fail to manage their own internal processes of review,26 or when Congress abdicates its responsibility to oversee executive branch decision-making through clear legislation.27 The cases demonstrate how judicial decisions about procedural rules can have a far greater effect on the substantive law than many commentators have recognized.

#### Group solvency – there are two framing issues:

#### ONE – evaluate through the lens of sufficiency – ordering blanket release isn’t necessary, small conditions are sufficient

Chow 11 (Samuel, J.D. – Benjamin N. Cardozo School of Law, “The Kiyemba Paradox: Creating a Judicial Framework to Eradicate Indefinite, Unlawful Executive Detentions,” Cardozo J. Of Int’l & Comp. Law, Vol. 19, http://www.cjicl.com/uploads/2/9/5/9/2959791/cjicl\_19.3\_chow\_note.pdf)

In Kiyemba, the government’s approach to reconciling these two paradigms was to interpret Munaf as limiting the availability of release-plus, and to use Mezei and the immigration paradigm as the legal basis for excluding the Kiyemba petitioners from the United States. In other words, in balancing the two paradigms, the government found a greater interest in preserving executive authority over immigration. Given the problematic application of Mezei as the framework for this immigration-based argument, the government’s approach is both unconvincing and troubling. Giving courts the unlimited ability to order release into the United States may not be a desirable remedy in all cases, but there must, at the very least, be exceptions to that general rule. Such an exception should be applied in Kiyemba.

#### TWO – compare the counterplan vs. the status quo, not the plan – it reverses executive unilateralism [the cp = bilateral endorsement, that’s sufficient to signal judicial review]

Landau 9 (Joseph, Associate-in-Law – Columbia Law School, “Muscular Procedure: Conditional Deference in the Executive Detention Cases,” Washington Law Review, Vol. 84:661, 2009, https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/176/Landau\_Author%20Copy.pdf?sequence=1)

Civil libertarianism and “bilateral endorsement”48 represent the two leading theories that have emerged in light of the Court’s decisions. While both conceptions of judicial review advance at least some role for the courts in deciding questions of national security—only a third position, executive unilateralism, rejects judicial review entirely—they take very different approaches to the issue of how courts should decide the substance of the liberty/security debate.

### yes habeas

#### The CP is goldilocks – not complete deference, focus on procedural issues – need to expand the model

Landau 9 (Joseph, Associate-in-Law – Columbia Law School, “Muscular Procedure: Conditional Deference in the Executive Detention Cases,” Washington Law Review, Vol. 84:661, 2009, https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/176/Landau\_Author%20Copy.pdf?sequence=1)

The executive detention cases of the past several years demonstrate a rare but critical assertion of procedural law where the political branches fail to legislate or to properly implement substantive law. This is “muscular procedure”—the invocation of a procedural device to condition deference on political branch integrity. Courts have affected the law of national security in profound ways **by requiring the political branches to adhere to a judicially imposed standard of transparency and deliberation**. Courts have resolved the merits of individual enemy combatant challenges by rejecting executive branch decisions based on absolute secrecy, innuendo, tentativeness, or multiple levels of hearsay, while affirming executive determinations that satisfy minimal standards of reliability. More broadly, courts have used procedural rules to smoke out and put in check Congress’s lack of oversight of the executive branch and the President’s inadequate interpretation and implementation of authorizing legislation. Although the prevailing descriptive and normative frameworks advocate either blind deference to the collective expertise of the political branches or judicial resolution of large, complex and highly fractious substantive questions, courts have instead put procedure to muscular uses—focusing on the means of coordinate branch decision-making, while still allowing the political branches to define the content of the substantive law. This theory of judicial review, which is grounded in the judiciary’s comparatively greater expertise in procedure, has implications beyond the national security context.

### globalism

#### Their 1AC doesn’t come close to making a solvency argument and proves our sufficiency argument –

#### Milko and Scharf ev are the ONLY internal links – the word “release” isn’t highlighted once in both pieces of evidence. All the evidence says is that a remedy is needed and the courts should not be purely deferential to the executive – the CP reverses that – that’s Landau.

By refusing to second-guess the Executive, the judiciary may be losing an important check on the former's power because there is no guarantee that the Executive is ensuring safety or making the best effort to protect the unlawfully kept detainees.

Scharf is just the DIALOGUE claim—more suited to that

#### AND, Landau’s counterplan solves global modeling of rule of law – procedural restraints are sufficient

West 11 (Robin, Frederick J. Haas Professor of Law and Philosophy and Associate Dean – Georgetown University Law Center, “The Limits of Process,” Chapter 2, *Getting to the Rule of Law*, Ed. James E. Fleming, p. 33-36)

More generally, the procedural Rule of Law requires that we be treated as an intelligent participatory member of law's empire, even when the state seeks to use law's sword 10 punish, stigmatize, or penalize us. The formal requirements broadly associated with Lon Fuller's work protect our interest in law's certainly and predictability and hence maximize our liberty and to .some degree our dignity—they respect, for example, our agentic capacity to decide to be law abiding. Such a choice is available to us only if the laws we are being asked to abide by are in accordance more or less with Fuller's eight formal requirements. This is not, however, sufficient. Waldron argues. For a Rule of Law regime. Such a regime must also be procedurally just. Again, these are not die same thing, nor do they stem from the same core values. The procedural Rule of Law respects not SO much our liberty or our agentic capacity to choose for or against law abidance but rather our intelligence and our individual perspective: decent procedure should grant us an opportunity to participate as an equal and intelligent citizen in the system of law that inflicts its will upon us, and to do so in a way that allows our elaboration of our own perspective on both the rules being applied against us and our own .story about the events that triggered the law's hand. Finally, both contrast with a substantive understanding of the Rule of Law, argued by legal and political philosophers as requiring a state that protects property and contract rights and actively seeks to impose this understanding in emerging democracies interested in embracing a rule of law, Against such substantive and formal understandings, Waldron offers his procedural interpretation as a necessary complement. That's the argument as I understand it.

It would be churlish to object too strenuously to this humane proposal 10 expand the Rule of Law of our imaginings to **include a procedural dimension**, particularly given contemporary national, global, and political realities. We are indeed suffering a deficit of procedural fairness in our various courts of criminal justice, from the military commissions in Guantanamo Bay, [FOOTNOTE 7] to the district courts of Baltimore City,8 to various points abroad. And, a growing body of Rule of Law scholarship that is proving influential in those countries with systems seeking to emulate our own identifies the Rule of Law almost exclusively with the certainty and predictability in economic life that are so beneficial to those with property: a limited and generally regressive conception of legalism that protects market-based liberties but little else." Complementing that property-centered Rule of Law ideology with something that centers on people rather than profit can't hurt. We are also facing, although this may be low on the list of world problems, a badly demoralized domestic law school environment. The economic pressures on our graduates, who are lacing a very poor job market; declining or lost faith, and for good reason, among constitutional academic lawyers that the Supreme Court will use its powers to move us toward a more just society and a lost faith in the adjudicative process that for many in the academy provided the raison d'etre of law itself, of academic legal scholarship, and of their own participation in it; a growing malaise afflicting faculty and students caused by a lack of any shared sense of law's moral purpose or point to replace that declining faith;'" despair among ethics professors and constitutional lawyers over the use of law's forms—"legal memoranda," "justice departments," "offices of legal counsel," and the like—in the George W. Bush administration to promote the seemingly lawless ends of the most powerful leviathan on Earth" coupled with the failure of the Obama administration to do anything about it; increased calls from the academy to the academy to stop doing "merely" normative, or "advocacy," or "doctrinal" scholarship, thus calling into question the point and even the existence of what has been for almost a century the bread and butter of good legal scholarship—because of all these factors, law school faculties, and therefore their students, find themselves in a profound crisis of identity, all stemming from a sense that both the academy and the profession it serves have been demoralized: they both self-avowed ly lack a moral point. Briefly put, it's not clear anymore that this perhaps not-very-remunerative-after-all profession for which we train our students and which for some time now has not been very much fun, either, is actually good for anything anymore, or whether it ever was, or whether it really is, as some skeptics have been saying for a long time, nothing but a legitimating mask of an increasingly insane and psychopathic sovereign beast. A little bit of Rule of Law idealism—whether formal, procedural, or substantive —can't hurt, in such a climate, and it might help. It might help make the case for robust procedural protections for our prisoners of our wars on terror abroad and on drugs here, it might help us temper, or at least complement, the Ride of Law interpretations that center profit with one that centers individual dignity and intelligence, and it might help us reclaim a sense of law's ennobling purpose in die contemporary legal academy. All of that would be terrific. 1 have no quarrel with the basic thrust of this project.

[Continues to Footnote 7]

7. But see Joseph Landau, "Muscular Procedure: Conditional Deference in the Executive Detention Cases," Wash. L. Rev. 84 (2009): 661.

### legitimacy

#### Their Metcalf evidence proves our sufficiency arguments – it just says that the courts can’t be purely deferential, but needs to have the OPTION to review habeas decisions, NOT that release be required. We solve that – that’s Landau.

#### AND, the CP *threatens* a court-ordered release, but doesn’t *mandate* it – results in an observer effect that prompts executive action but avoids all our net-benefits

Deeks 13 (Ashley, Associate Professor of Law – University of Virginia Law School, “The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference,” Vol. 82, November, <http://fordhamlawreview.org/assets/pdfs/Vol_82/Deeks_November.pdf>)

Legal scholarship lacks a sustained theoretical account of how and why this phenomenon works to influence executive policymaking.9 Courts are not the only audiences for executive policies, and as a result the observer effect is not the executive’s only source of incentives to alter those policies. However, because courts can strike down executive policies, force the executive to comply with specific policies crafted by the courts, and mandate the creation of new policies as a matter of law, courts are a key audience for the executive’s national security policies. As a result, it is important to understand when, how, and why the observer effect works.

The observer effect, however, does more than simply inform why and how the executive changes its national security policies. It also can (and should) inform ongoing descriptive and normative debates about national security deference. Some scholars claim that “in crises, the executive governs nearly alone, at least so far as law is concerned,”10 and that the courts’ monitoring function is broken.11 Scholars are sharply divided about whether that is a good thing or a bad thing. The existence of the observer effect calls into question a key premise of the debate by revealing that the executive does not in fact govern “nearly alone,” at least **when the executive reasonably can** foresee **that a court may step in** to review particular security policies. Yet the way **the observer effect operates allows the executive to preserve and utilize its functional advantages to craft pragmatic security policies,** avoiding **what critics see as the more problematic effects of judicial involvement** in national security decisionmaking.

[Continues to Footnote 9]

9. See Keith E. Whittington, Judicial Checks on the President, in THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY 646, 661–62 (George C. Edwards III & William G. Howell eds., 2009) (“Even more intriguing, however, is the possibility of further work examining the executive and how it responds to the courts, or fails to do so. . . . [U]nderstanding how both institutions think about and react to one another will ultimately be essential to understanding the operation of the judicial check. Relatively little is known about how judicial signals are processed within the executive branch and how legal interpretations are made, permeated, and implemented through the executive branch. . . . In short, the judicial check will matter more if the executive branch anticipates it and adjusts its behavior accordingly. Further theoretical and empirical investigation is needed to flesh out whether and under what conditions the executive anticipates judicial action.”); see also Cass R. Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U. CHI. L. REV. 653, 656 (1985) (“[I]t is important to keep in mind the fact, traditionally overlooked in discussions of judicial review of agency action, that the **availability of review** will often serve as an important constraint on regulators during the decisionmaking process long before review actually comes into play.”).

### terrorism links

#### The plan undermines the effectiveness of overseas operations—perverse incentive for premature release

White, 10

(Counsel-Baker Botts LLP, Brief for Foundation for Defense of Democracies, Kyemba v. Obama, http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_RespondentAmCuFDD.authcheckdam.pdf)

Petitioners are not entitled to release into the United States. They are aliens whose admission is prohibited by federal law. The fact that petitioners are not “enemy combatants” does not affect the applicability and enforceability of other federal laws barring their entry and release into the United States. The federal immigration statutes squarely prohibit entry by persons who, like petitioners, may have received military-type training from terrorists. See infra pp. 6-11. Those prohibitions constitute the corporate judgment of the American people through the Government’s political Branches, and that judgment is rooted in the Nation’s continuing experience in matters of national security. II. **Petitioners demand an unprecedented right of entry** into the United States that would, **if granted to them, frustrate the conduct of U.S. military operations overseas.** The possibility of detained aliens obtaining direct access to the Nation’s civilian population would encourage U.S. military and other counterterrorism officials to consider, among other unsatisfactory options, **releasing dangerous persons to suboptimal locations** or rendering them to foreign governments.

#### Detention key to intel

Blum, 8

(Department of Homeland Security Office of General Counsel, October 2008, Homeland Security Affairs, “Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects,” Vol 4. No. 3, http://www.hsaj.org/?fullarticle=4.3.1)

After September 11, 2001, the Administration decided to detain certain individuals suspected of being members or agents of al Qaeda or the Taliban as enemy combatants and hold them indefinitely and incommunicado for the duration of the war on terror. The rationale behind this system of preventive detention is to incapacitate suspected terrorists, facilitate interrogation, and hold them when traditional criminal charges are not feasible for a variety of reasons. By employing an armed-conflict model that treats terrorists as “combatants,” the Bush Administration argues it can preventively detain terrorists until the end of hostilities, despite there being no foreseeable ending scenario to an amorphous war on terror. Furthermore, terrorists are automatically “unlawful” or “enemy” combatants and hence not entitled to protections as true prisoners of war; yet, under the Bush Administration’s approach, they also are not entitled to the legal protections afforded criminals. As law professor David Luban notes: “By selectively combining elements of the war model and elements of the law model, Washington is able to maximize its own ability to mobilize lethal force against terrorists while eliminating most traditional rights of a military adversary, as well as the rights of innocent bystanders caught in the crossfire.” Designating individuals as enemy combatants and holding them indefinitely for a war on terror that may never end raises serious legal and policy concerns. After 9/11, the Administration determined that the Geneva Conventions did not apply to the conflict with the Taliban and al Qaeda. 8 Hence, all Taliban and al Qaeda operatives were automatically unlawful “prisoners of war” and could be subjected to interrogation. 9 In August 2002, Jay Bybee, then-assistant attorney general in the Office of Legal Counsel, sent President Bush a memorandum stating: “As commander-in-chief, the President has constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy.” 10 According to John Yoo, former deputy assistant attorney general under the Bush Administration, “Information is the primary weapon in the conflict against this new kind of enemy, and intelligence gathered from captured operatives is perhaps the most effective means of preventing future terrorist attacks upon U.S. territory.” 11 As law professor Howard Ball observes, “the Administration has offered one fundamental rationale for such treatment [designations of enemy combatants]: the acquisition of actionable intelligence.” 12

### drones alt cause

#### Drones tubes all their advs---resentment, rule of law, legitimacy, etc

Jeremy Scahill 13, 10/29/13, national security correspondent for the Nation magazine and author of the New York Times bestsellers Blackwater, Obama Presidency Marred by Legacy of Drone Program, www.motherjones.com/politics/2013/10/obama-drone-counterterrorism-war-legacy

Using drones, cruise missiles, and Special Ops raids, the United States has embarked on a mission to kill its way to victory. The war on terror, launched under a Republican administration, was ultimately legitimized and expanded by a popular Democratic president. Although Barack Obama's ascent to the most powerful office on Earth was the result of myriad factors, it was largely due to the desire of millions of Americans to shift course from the excesses of the Bush era.¶ Had John McCain won the election, it is difficult to imagine such widespread support, particularly among liberal Democrats, for some of the very counterterrorism policies that Obama implemented. As individuals, we must all ask whether we would support the same policies—the expansion of drone strikes, the empowerment of Joint Special Operations Command (JSOC), the use of the State Secrets Privilege, the use of indefinite detention, the denial of habeas corpus rights, the targeting of US citizens without charge or trial—if the commander in chief was not our candidate of choice.¶ But beyond the partisan lens, the policies implemented by the Obama administration will have far-reaching consequences. Future US presidents—Republican or Democratic—will inherit a streamlined process for assassinating enemies of America, perceived or real. They will inherit an executive branch with sweeping powers, rationalized under the banner of national security.¶ Assassinating Enemies¶ In 2012, a former constitutional law professor was asked about the US drone and targeted killing program. "It's very important for the president and the entire culture of our national security team to continually ask tough questions about 'Are we doing the right thing? Are we abiding by the rule of law? Are we abiding by due process?'" he responded, warning that it was important for the United States to "avoid any kind of slippery slope into a place where we're not being true to who we are."¶ That former law professor was Barack Obama.¶ The creation of the kill list and the expansion of drone strikes "represents a betrayal of President Obama's promise to make counterterrorism policies consistent with the US constitution," charged Boyle. Obama, he added, "has routinized and normalized extrajudicial killing from the Oval Office, taking advantage of America's temporary advantage in drone technology to wage a series of shadow wars in Afghanistan, Pakistan, Yemen, and Somalia. Without the scrutiny of the legislature and the courts, and outside the public eye, Obama is authorizing murder on a weekly basis, with a discussion of the guilt or innocence of candidates for the 'kill list' being resolved in secret." Boyle warned:¶ "Once Obama leaves office, there is nothing stopping the next president from launching his own drone strikes, perhaps against a different and more controversial array of targets. The infrastructure and processes of vetting the 'kill list' will remain in place for the next president, who may be less mindful of moral and legal implications of this action than Obama supposedly is."¶ In late 2012, the ACLU and the New York Times sought information on the legal rationale for the kill program, specifically the strikes that had killed three US citizens—among them 16-year-old Abdulrahman Awlaki. In January 2013, a federal judge ruled on the request. In her decision, Judge Colleen McMahon appeared frustrated with the White House's lack of transparency, writing that the Freedom of Information Act (FOIA) requests raised "serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men."¶ She charged that the Obama administration "has engaged in public discussion of the legality of targeted killing, even of citizens, but in cryptic and imprecise ways, generally without citing to any statute or court decision that justifies its conclusions." She added, "More fulsome disclosure of the legal reasoning on which the administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable 'hot' field of battle, would allow for intelligent discussion and assessment of a tactic that (like torture before it) remains hotly debated. It might also help the public understand the scope of the ill-defined yet vast and seemingly ever-growing exercise."¶ Ultimately, Judge McMahon blocked the release of the documents. Citing her legal concerns about the state of transparency with regard to the kill program, she wrote:¶ "This Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret."¶ How to Make Enemies and Not Influence People¶ It is not just the precedents set during the Obama era that will reverberate into the future, but also the lethal operations themselves. No one can scientifically predict the future consequences of drone strikes, cruise missile attacks, and night raids. But from my experience in several undeclared war zones across the globe, it seems clear that the United States is helping to breed a new generation of enemies in Somalia, Yemen, Pakistan, Afghanistan, and throughout the Muslim world.¶ Those whose loved ones were killed in drone strikes or cruise missile attacks or night raids will have a legitimate score to settle. In an October 2003 memo, written less than a year into the US occupation of Iraq, Donald Rumsfeld framed the issue of whether the United States was "winning or losing the global war on terror" through one question: "Are we capturing, killing, or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training, and deploying against us?"¶ More than a decade after 9/11, that question should be updated. At the end of the day, US policymakers and the general public must all confront a more uncomfortable question: Are our own actions, carried out in the name of national security, making us less safe or more safe? Are they eliminating more enemies than they are inspiring? Boyle put it mildly when he observed that the kill program's "adverse strategic effects… have not been properly weighed against the tactical gains associated with killing terrorists."¶ In November 2012, President Obama remarked that "there's no country on Earth that would tolerate missiles raining down on its citizens from outside its borders." He made the statement in defense of Israel's attack on Gaza, which was launched in the name of protecting itself from Hamas missile attacks. "We are fully supportive of Israel's right to defend itself from missiles landing on people's homes and workplaces and potentially killing civilians," Obama continued. "And we will continue to support Israel's right to defend itself." How would people living in areas of Yemen, Somalia, or Pakistan that have been regularly targeted by US drones or missile strikes view that statement?¶ Toward the end of President Obama's first term in office, the Pentagon's general counsel, Jeh Johnson, gave a major lecture at the Oxford Union in England. "If I had to summarize my job in one sentence: it is to ensure that everything our military and our Defense Department do is consistent with US and international law," Johnson said. "This includes the prior legal review of every military operation that the Secretary of Defense and the President must approve."¶ As Johnson spoke, the British government was facing serious questions about its involvement in US drone strikes. A legal case brought in the United Kingdom by the British son of a tribal leader killed in Pakistan alleged that British officials had served as "secondary parties to murder" by providing intelligence to the United States that allegedly led to the 2011 strike. A U.N. commission was preparing to launch an investigation into the expanding kill program, and new legal challenges were making their way through the US court system. In his speech, Johnson presented the US defense of its controversial counterterror policies:¶ "Some legal scholars and commentators in our country brand the detention by the military of members of al-Qaeda as 'indefinite detention without charges.' Some refer to targeted lethal force against known, identified individual members of al-Qaeda as 'extrajudicial killing.'¶ "Viewed within the context of law enforcement or criminal justice, where no person is sentenced to death or prison without an indictment, an arraignment, and a trial before an impartial judge or jury, these characterizations might be understandable.¶ "Viewed within the context of conventional armed conflict—as they should be—capture, detention, and lethal force are traditional practices as old as armies."¶ The Era of the Dirty War on Terror¶ In the end, the Obama administration's defense of its expanding global wars boiled down to the assertion that it was in fact at war; that the authorities granted by the Congress to the Bush administration after 9/11 to pursue those responsible for the attacks justified the Obama administration's ongoing strikes against "suspected militants" across the globe—some of whom were toddlers when the Twin Towers crumbled to the ground—more than a decade later.¶ The end result of the policies initiated under President Bush and continued and expanded under his Democratic successor was to bring the world to the dawn of a new age, the era of the Dirty War on Terror. As Boyle, the former Obama campaign counterterrorism adviser, asserted in early 2013, the US drone program was "encouraging a new arms race for drones that will empower current and future rivals and lay the foundations for an international system that is increasingly violent."¶ Today, decisions on who should live or die in the name of protecting America's national security are made in secret, laws are interpreted by the president and his advisers behind closed doors, and no target is off-limits, including US citizens. But the decisions made in Washington have implications far beyond their impact on the democratic system of checks and balances in the United States.¶ In January 2013, Ben Emmerson, the U.N. special rapporteur on counterterrorism and human rights, announced his investigation into drone strikes and targeted killing by the United States. In a statement launching the probe, he characterized the US defense of its use of drones and targeted killings in other countries as "Western democracies… engaged in a global [war] against a stateless enemy, without geographical boundaries to the theatre of conflict, and without limit of time." This position, he concluded, "is heavily disputed by most States, and by the majority of international lawyers outside the United States of America."¶ At his inauguration in January 2013, Obama employed the rhetoric of internationalism. "We will defend our people and uphold our values through strength of arms and rule of law. We will show the courage to try and resolve our differences with other nations peacefully—not because we are naive about the dangers we face, but because engagement can more durably lift suspicion and fear," the president declared. "America will remain the anchor of strong alliances in every corner of the globe; and we will renew those institutions that extend our capacity to manage crisis abroad, for no one has a greater stake in a peaceful world than its most powerful nation."¶ Yet, as Obama embarked on his second term in office, the United States was once again at odds with the rest of the world on one of the central components of its foreign policy. The drone strike in Yemen the day Obama was sworn in served as a potent symbol of a reality that had been clearly established during his first four years in office: US unilateralism and exceptionalism were not only bipartisan principles in Washington, but a permanent American institution. As large-scale military deployments wound down, the United States had simultaneously escalated its use of drones, cruise missiles, and Special Ops raids in an unprecedented number of countries. The war on terror had become a self-fulfilling prophecy.

### other alt causes

#### There are no cred silver bullets- takes years to escape legacies

**Gray ’11** [Colin S, Professor of International Politics and Strategic Studies at the University of Reading, England, and Founder of the National Institute for Public Policy, “Hard Power And Soft Power: The Utility Of Military Force as An Instrument Of Policy In The 21st Century,” April, <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1059>]

It bears repeating because it passes unnoticed that culture, and indeed civilization itself, are dynamic, not static phenomena. They are what they are for good and sufficient local geographical and historical reasons, and cannot easily be adapted to fit changing political and strategic needs. For an obvious example, the dominant American strategic culture, though allowing exceptions, still retains its principal features, the exploitation of technology and mass.45 These features can be pathological when circumstances are not narrowly conducive to their exploitation. Much as it was feared only a very few years ago that, in reaction to the neglect of culture for decades previously, the cultural turn in strategic studies was too sharp, so today there is a danger that the critique of strategic culturalism is proceeding too far.46 The error lies in the search for, and inevitable finding of, “golden keys” and “silver bullets” to resolve current versions of enduring problems. Soft-power salesmen have a potent product-mix to sell, but they fail to appreciate the reality that American soft power is a product essentially unalterable over a short span of years. As a country with a cultural or civilizational brand that is unique and mainly rooted in deep historical, geographical, and ideational roots, America is not at liberty to emulate a major car manufacturer and advertise an extensive and varied model range of persuasive soft-power profiles. Of course, some elements of soft power can be emphasized purposefully in tailored word and deed. However, foreign perceptions of the United States are no more developed from a blank page than the American past can be retooled and fine-tuned for contemporary advantage. Frustrating though it may be, a country cannot easily escape legacies from its past.

#### PRISM destroyed soft power / credibility

Migranyan 13 (Andranik is the director of the Institute for Democracy and Cooperation in New York. He is also a professor at the Institute of International Relations in Moscow, a former member of the Public Chamber and a former member of the Russian Presidential Council. “Scandals Harm U.S. Soft Power,” 7/5, http://nationalinterest.org/commentary/scandals-harm-us-soft-power-8695)

For the past few months, the United States has been rocked by a series of scandals. It all started with the events in Benghazi, when Al Qaeda-affiliated terrorists attacked the General Consulate there and murdered four diplomats, including the U.S. ambassador to Libya. Then there was the scandal exposed when it was revealed that the Justice Department was monitoring the calls of the Associated Press. The Internal Revenue Service seems to have targeted certain political groups. Finally, there was the vast National Security Agency apparatus for monitoring online activity revealed by Edward Snowden. Together, these events provoke a number of questions about the path taken by contemporary Western societies, and especially the one taken by America.¶ Large and powerful institutions, especially those in the security sphere, have become unaccountable to the public, even to representatives of the people themselves. Have George Orwell’s cautionary tales of total government control over society been realized?¶ At the end of the 1960s and the beginning of the 1970s, my fellow students and I read Orwell’s 1984 and other dystopian stories and believed them to portray fascist Germany or the Soviet Union—two totalitarian regimes—but today it has become increasingly apparent that Orwell, Huxley and other dystopian authors had seen in their own countries (Britain and the United States) certain trends, especially as technological capabilities grew, that would ultimately allow governments to exert total control over their societies. The potential for this type of all-knowing regime is what Edward Snowden revealed, confirming the worst fears that the dystopias are already being realized.¶ On a practical geopolitical level, the spying scandals have seriously tarnished the reputation of the United States. They have circumscribed its ability to exert soft power; the same influence that made the U.S. model very attractive to the rest of the world. This former lustre is now diminished. The blatant everyday intrusions into the private lives of Americans, and violations of individual rights and liberties by runaway, unaccountable U.S. government agencies, have deprived the United States of its authority to dictate how others must live and what others must do. Washington can no longer lecture others when its very foundational institutions and values are being discredited—or at a minimum, when all is not well “in the state of Denmark.”¶ Perhaps precisely because not all is well, many American politicians seem unable to adequately address the current situation. Instead of asking what isn’t working in the government and how to ensure accountability and transparency in their institutions, they try, in their annoyance, to blame the messenger—as they are doing in Snowden’s case. Some Senators hurried to blame Russia and Ecuador for anti-American behavior, and threatened to punish them should they offer asylum to Snowden.¶ These threats could only cause confusion in sober minds, as every sovereign country retains the right to issue or deny asylum to whomever it pleases. In addition, the United States itself has a tradition of always offering political asylum to deserters of the secret services of other countries, especially in the case of the former Soviet Union and other ex-socialist countries. In those situations, the United States never gave any consideration to how those other countries might react—it considered the deserters sources of valuable information. As long as deserters have not had a criminal and murderous past, they can receive political asylum in any country that considers itself sovereign and can stand up to any pressure and blackmail.¶ Meanwhile, the hysteria of some politicians, if the State Department or other institutions of the executive branch join it, can only accelerate the process of Snowden’s asylum. For any country he might ask will only be more willing to demonstrate its own sovereignty and dignity by standing up to a bully that tries to dictate conditions to it. In our particular case, political pressure on Russia and President Putin could turn out to be utterly counterproductive. I believe that Washington has enough levelheaded people to understand that fact, and correctly advise the White House. The administration will need sound advice, as many people in Congress fail to understand the consequences of their calls for punishment of sovereign countries or foreign political leaders that don’t dance to Washington’s tune.¶ Judging by the latest exchange between Moscow and Washington, it appears that the executive branches of both countries will find adequate solutions to the Snowden situation without attacks on each other’s dignity and self-esteem. Russia and the United States are both Security Council members, and much hinges on their decisions, including a slew of common problems that make cooperation necessary.¶ Yet the recent series of scandals has caused irreparable damage to the image and soft power of the United States. I do not know how soon this damage can be repaired. But gone are the days when Orwell was seen as a relic of the Cold War, as the all-powerful Leviathan of the security services has run away from all accountability to state and society. Today the world is looking at America—and its model for governance—with a more critical eye.

### soft power d

#### Soft power is a symptom and not a cause of hegemony

Jervis, 9 (Robert, PhD, professor of IR at Columbia, “Unipolarity: A Structural Perspective,” World Politics, Jan)

It is even more difficult to measure and generalize about other forms of capability, often summarized under the heading “soft power.”5 It [End Page 191] seems likely, however, that the distribution of most forms of soft power will roughly correlate with the distribution of economic and military resources. Soft power matters but by itself cannot establish or alter the international hierarchy. Some small countries are widely admired (for example, Canada), but it is unclear whether this redounds to their benefit in some way or helps spread their values. Although states that lose economic and military strength often like to think that they can have a disproportionate role by virtue of their culture, traditions, and ideas, this rarely is the case. Intellectual and cultural strength can feed economic growth and perhaps bolster the confidence required for a state to play a leading role on the world stage, but material capabilities also tend to make the state’s ideas and culture attractive. This is not automatic, however. As I will discuss further below, economic and military power are not sufficient to reach some objectives, and a unipole whose values or behavior are unappealing will find its influence reduced.

### liberal internationalism

#### Their impact is bogus

Azar **Gat**, July/August **2009**, is a researcher and author on military history, he was the Chair of the Department of Political Science at Tel Aviv University, Foreign Affairs, “Which Way Is History Marching?,”<http://www.foreignaffairs.com/articles/65162/azar-gat-daniel-deudney-and-g-john-ikenberry-and-ronald-inglehar/which-way-is-history-marching?page=show>

UNDILUTED OPTIMISM to the sweeping, blind forces of globalization. A message need not be formulated in universalistic terms to have a broader appea When it comes to the question of how to deal with a nondemocratic superpower China in the international arena, Deudney and Ikenberry, as well as Inglehart and Welzel, exhibit undiluted liberal internationalist optimism. China's free access to the global economy is fueling its massive growth, thereby strengthening the country as a potential rival to the United States -- a problem for the United States not unlike that encountered by the free-trading British Empire when it faced other industrializing great powers in the late nineteenth century. According to Inglehart and Welzel, there is little to worry about, because rapid development will only quicken China's democratization. But it was the United Kingdom's great fortune -- and liberal democracy's -- that its hegemonic status fell into the hands of another liberal democracy, the United States, rather than into those of nondemocratic Germany and Japan, whose future trajectories remained uncertain at best. The liberal democratic countries could have made China's access to the global economy conditional on democratization, but it is doubtful that such a linkage would have been feasible or desirable. After all, China's economic growth has benefited other nations and has made the developed countries -- and the United States in particular -- as dependent on China as China is dependent on them. Furthermore, economic development and interdependence in themselves -- in addition to democracy -- are a major force for peace. Democracies' ability to promote internal democratization in countries much smaller and weaker than China has been very limited, and putting pressure on China could backfire, souring relations with China and diverting its development to a more militant and hostile path. Deudney and Ikenberry suggest that China's admission into the institutions of the liberal international order established after World War II and the Cold War will oblige the country to transform and conform to that order. But large players are unlikely to accept the existing order as it is, and their entrance into the system is as likely to change it as to change them. The Universal Declaration of Human Rights provides a case in point. It was adopted by the United Nations in 1948, in the aftermath of the Nazi horrors and at the high point of liberal hegemony. Yet the UN Commission on Human Rights, and the Human Rights Council that replaced it, has long been dominated by China, Cuba, and Saudi Arabia and has a clear illiberal majority and record. Today, more countries vote with China than with the United States and Europe on human rights issues in the General Assembly of the United Nations. Critics argue that unlike liberalism, nondemocratic capitalist systems have no universal message to offer the world, nothing attractive to sell that people can aspire to, and hence no "soft power" for winning over hearts and minds. But there is a flip side to the universalist coin: many find liberal universalism dogmatic, intrusive, and even oppressive. Resistance to the unipolar world is a reaction not just to the power of the United States but also to the dominance of human rights liberalism. There is a deep and widespread resentment in non-Western societies of being lectured to by the West and of the need to justify themselves according to the standards of a hegemonic liberal morality that preaches individualism to societies that value community as a greater good. Compared to other historical regimes, the global liberal order is in many ways benign, welcoming, and based on mutual prosperity.

### no democracy

#### Democracy spillover is a joke and the US can’t affect it---their evidence ignores … everything

Walt 11/28/11—IR, Harvard (Stephen, Requiem for the "Arab Spring?," 11/28/11, online at walt.foreignpolicy.com)

But if the history of revolutions tells us anything, it is that rebuilding new political orders is a protracted, difficult, and unpredictable process, and having a few Mandelas around is no guarantee of success. Why? Because once the existing political order has collapsed, the stakes for key groups in society rise dramatically. The creation of new institutions -- in effect, the development of new rules for ordering political life -- inevitably creates new winners and losers. And everyone knows this. Not only does this situation encourage more and more groups to join the process of political struggle, but awareness that high stakes are involved also gives them incentives to use more extreme means, including violence.

Under these conditions, it is a pipedream to think that key actors in a complex and troubled society like Egypt or Libya (or in the future, Syria) could quickly agree on new political institutions and infuse them with legitimacy. Even if interim rulers write a quick constitution, hold a referendum, or elect new representatives, those whose interests are undermined by the outcomes are bound to question the new rules and the process and to do what they can to undermine or amend them. What one should expect, therefore, are half-measures, false starts, prolonged uncertainty, and highly contingent events, where seemingly random events (a riot, an accident, an episode of overt foreign interference, an unexpected flurry of violence, etc.) can alter the course of events in far-reaching ways. Tunisia notwithstanding, what you are unlikely to get is a quick and easy consensus on new institutions.

Remember the French Revolution? The storming of the Bastille took place in July 1789, the nobility was abolished by the National Assembly the following year, and Louis XVI tried unsuccessfully to flee in 1791 before being forced to accept a new constitution. Internal turmoil and foreign interference eventually lead to war in 1792, Louis and Marie Antoinette were executed in 1793, and Paris was soon engulfed by the Jacobin terror, which eventually burns itself out. A new constitution is adopted in 1795, establishing a government known as the "Directory," which is eventually overthrown by Napoleon's coup d'etat on 18 Brumaire, 1799. By the time Napoleon seized power, it had been more than ten years since the initial revolutionary upheaval.

To judge by that timetable, the "Arab spring" has a long way to go. And other cases offer a similar lesson. The Russian revolution starts with the fall of the Tsarist regime in March 1917 and the formation of Kerensky's provisional government, which is subsequently overthrown by the Bolshevik coup a few months later. But the Bolsheviks' hold on power isn't fully established until their victory in the Russian Civil War, which isn't fully won until 1923. The Soviet political order endured recurrent power struggles over the next decade, until Joseph Stalin vanquished his various opponents and established a personal dictatorship.

Or take a more recent case, Iran. The revolution begins in 1978, with a steadily escalating series of street demonstrations. The shah flees into exile in January 1979, the Ayatollah Khomeini returns in February and appoints Mehdan Bazegar as Prime Minister of an interim government. A new constitution is drafted by October, but there is a continuing struggle for power between liberal, Islamist, and other groups.

The first president of the new "Islamic Republic," Abdolhassan Bani-Sadr, is impeached in 1981, and the outbreak of the Iran-Iraq war strengthens hardliners and provides an opportunity for a crackdown against some prominent members of the original revolutionary movement. The Islamic republic remains a work-in-progress to this day, with the role of the "Supreme Jurisprudent," the Revolutionary Guards, the clergy, the presidency, and the Majlis remaining in flux.

Even the comparatively benign American Revolution was hardly a done-deal when the peace treaty with England was signed in 1783. Independence from England had required the colonists to fight a lengthy war of independence, and the fledgling republic then faced several armed rebellions, most notably Shays' Rebellion in 1786. These challenges revealed the inadequacies of the original Articles of Confederation (1777-1786) leading to the drafting and adoption of what is now the U.S. Constitution.

In short, anybody who thought that the events that swept through the Arab world in 2011 were going to produce stable and orderly outcomes quickly was living in a dream world. To say this is not to oppose what has happened, or to believe that the old orders could or should have continued. Rather, it is to recognize that radical reform -- even revolution -- is a long, difficult, and uncertain process, and that the ride is likely to be a bumpy one for years to come.

History also warns that outside powers have at best limited influence over the outcomes of a genuine revolutionary process. Even well-intentioned efforts to aid progressive forces can backfire, as can overt efforts to thwart them. Overall, a policy of "benevolent neglect" may be the more prudent course, making it clear that outsiders are prepared to let each country's citizens choose their own order, provided that important foreign policy redlines are not crossed. But for a country like the United States, which still sees itself as a model for others and tends to think that it has the right and the wisdom to tell them what to do, patience and restraint can be hard to sustain. And patience is what is needed most these days.

### canada model

#### No one models American courts – Canada is the model

Law, Professor of Law and Professor of Political Science, Washington University in St. Louis, and Versteeg, Associate Professor, University of Virginia School of Law, June 2012

(David S. and Mila, “THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION,” 87 N.Y.U.L. Rev. 762, Lexis)

In 1987, to mark the bicentennial of the U.S. Constitution, Time magazine released a special issue in which it called the Constitution "a gift to all nations" and proclaimed proudly that 160 of the 170 nations then in existence had modeled their constitutions upon our own. n2 As boastful as the claim may be, the editors of Time were not entirely without reason. Over its two centuries of history, the U.S. Constitution has had an immense impact on the development of constitutionalism around the world. n3 Constitutional law has been called [765] one of the "great exports" of the United States. n4 In a number of countries, constitutional drafters have copied extensively, and at times verbatim, from the text of the U.S. Constitution. n5 Countless more foreign constitutions have been characterized as this country's "constitutional offspring." n6

It is widely assumed among scholars and the general public alike that the United States remains "the hegemonic model" for constitutionalism in other countries. n7 The U.S. Constitution in particular continues to be described as "the essential prototype of a written, single-document constitution." n8 There can be no denying the popularity of [766] the Constitution's most important innovations, such as judicial review, entrenchment against legislative change, and the very idea of written constitutionalism. n9 Today, almost 90% of all countries possess written constitutional documents backed by some kind of judicial enforcement. n10 As a result, what Alexis de Tocqueville once described as an American peculiarity is now a basic feature of almost every state. n11

There are growing suspicions, however, that America's days as a constitutional hegemon are coming to an end. n12 It has been said that [767] the United States is losing constitutional influence because it is increasingly out of sync with an evolving global consensus on issues of human rights. n13 Indeed, to the extent that other countries still look to the United States as an example, their goal may be less to imitate American constitutionalism than to avoid its perceived flaws and mistakes. n14 Scholarly and popular attention has focused in particular upon the influence of American constitutional jurisprudence. The reluctance of the U.S. Supreme Court to pay "decent respect to the opinions of mankind" n15 by participating in an ongoing "global judicial dialogue" n16 is supposedly diminishing the global appeal and influence of American constitutional jurisprudence. n17 **Studies conducted by** [768] **scholars in other countries** have begun to **yield empirical evidence that citation to U.S. Supreme Court decisions by foreign courts is** in fact **on the decline**. n18 By contrast, however, the extent to which the U.S. Constitution itself continues to influence the adoption and revision of constitutions in other countries remains a matter of speculation and anecdotal impression.

**With** the help of **an extensive data set** of our own creation **that spans all national constitutions over the last six decades**, this Article explores the extent to which various prominent constitutions - including the U.S. Constitution - epitomize generic rights constitutionalism or are, instead, increasingly out of sync with evolving global practice. **A stark contrast can be drawn between the declining attraction of the U.S. Constitution as a model for other countries and the increasing attraction of the model provided by America's neighbor to the north**, **Canada**. We also address the possibility that today's constitution makers look for inspiration not only to other national constitutions, but also to regional and international human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Our findings do little to assuage American fears of diminished influence in the constitutional sphere.

Part I introduces the data and methods used in this Article to quantify constitutional content and measure constitutional similarity. Part II describes the global mainstream of rights constitutionalism, in the form of a set of rights that can be found in the vast majority of the [769] world's constitutions. From this core set of rights, we construct a hypothetical generic bill of rights that exemplifies current trends in rights constitutionalism. We then identify the most and least generic constitutions in the world, measured by their similarity to this generic bill of rights, and we pinpoint the ways in which the rights-related provisions of the U.S. Constitution depart from this generic model.

Part III documents the growing divergence of the U.S. Constitution from the global mainstream of written constitutionalism. Whether the analysis is global in scope or focuses more specifically upon countries that share historical, legal, political, or geographic ties to the United States, the conclusion remains the same: **The U.S. Constitution has become an increasingly unpopular model for constitutional framers elsewhere**. Possible explanations include the sheer brevity of the Constitution, its imperviousness to formal amendment, its omission of some of the world's generic constitutional rights, and its inclusion of certain rights that are increasingly rare by global standards.

Parts IV and V tackle the question of whether a prominent constitution from some other country has supplanted the U.S. Constitution as a model for global constitutionalism. Part IV contrasts the growing deviance of the U.S. Constitution from global constitutional practice with the increasing popularity of the Canadian approach to rights constitutionalism. Unlike its American counterpart, the Canadian Constitution has remained squarely within the constitutional mainstream. Indeed, **when Canada departed from the mainstream by adopting a new constitution**, **other countries followed its lead**. Closer examination reveals, however, that the popularity of the Canadian model is largely confined to countries with an Anglo-American legal tradition. In other words, our analysis suggests that Canada is in the vanguard of what might be called a Commonwealth model of rights constitutionalism, but not necessarily of global constitutionalism as a whole.

Part V considers whether the widely celebrated constitutions of Germany, South Africa, or India might instead be leading the way for global constitutionalism. **Although all** three are currently **more mainstream than the U.S. Constitution**, we find little evidence that global constitution-writing practices have been strongly shaped by any of the three.

Part VI explores the possibility that transnational human rights instruments have begun to shape the practice of formal constitutionalism at the national level. The evidence that international and regional human rights treaties may be serving as models for domestic constitutions varies significantly from treaty to treaty. In particular, [770] we find that the average constitution has increasingly grown to resemble the International Covenant on Civil and Political Rights and the European Convention on Human Rights, as well as the African Charter on Human and Peoples' Rights and the Charter of Civil Society for the Caribbean Community. There is little evidence, however, that any of these treaties is actually responsible for generating global consensus as to what rights demand formal constitutional protection. Although these treaties may express and reinforce preexisting global constitutional trends, they do not appear to define those trends in the first place.

Finally, the Conclusion discusses **possible explanations for the declining influence of American constitutionalism**. These **include a broad decline in American hegemony** across a range of spheres, **a judicial aversion to constitutional comparativism**,

**a historical and normative commitment to American exceptionalism**, **and sheer constitutional obsolescence**.

## 1nr

### yes terrorism

#### Risk of nuclear terrorism is real and high now

Matthew, et al, 10/2/13 [ Bunn, Matthew, Valentin Kuznetsov, Martin B. Malin, Yuri Morozov, Simon Saradzhyan, William H. Tobey, Viktor I. Yesin, and Pavel S. Zolotarev. "Steps to Prevent Nuclear Terrorism." Paper, Belfer Center for Science and International Affairs, Harvard Kennedy School, October 2, 2013, Matthew Bunn. Professor of the Practice of Public Policy at Harvard Kennedy School andCo-Principal Investigator of Project on Managing the Atom at Harvard University’s Belfer Center for Science and International Affairs. • Vice Admiral Valentin Kuznetsov (retired Russian Navy). Senior research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, Senior Military Representative of the Russian Ministry of Defense to NATO from 2002 to 2008. • Martin Malin. Executive Director of the Project on Managing the Atom at the Belfer Center for Science and International Affairs. • Colonel Yuri Morozov (retired Russian Armed Forces). Professor of the Russian Academy of Military Sciences and senior research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, chief of department at the Center for Military-Strategic Studies at the General Staff of the Russian Armed Forces from 1995 to 2000. • Simon Saradzhyan. Fellow at Harvard University’s Belfer Center for Science and International Affairs, Moscow-based defense and security expert and writer from 1993 to 2008. • William Tobey. Senior fellow at Harvard University’s Belfer Center for Science and International Affairs and director of the U.S.-Russia Initiative to Prevent Nuclear Terrorism, deputy administrator for Defense Nuclear Nonproliferation at the U.S. National Nuclear Security Administration from 2006 to 2009. • Colonel General Viktor Yesin (retired Russian Armed Forces). Leading research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences and advisor to commander of the Strategic Missile Forces of Russia, chief of staff of the Strategic Missile Forces from 1994 to 1996. • Major General Pavel Zolotarev (retired Russian Armed Forces). Deputy director of the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, head of the Information and Analysis Center of the Russian Ministry of Defense from1993 to 1997, section head - deputy chief of staff of the Defense Council of Russia from 1997 to 1998.<http://belfercenter.ksg.harvard.edu/publication/23430/steps_to_prevent_nuclear_terrorism.html>]

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

### at: zivotofsky

#### The Court characterized it has a narrow exception – Skinner assume broad application

Ian J. Drake 13 (Montclair State University, Federal Roadblocks: The Constitution and the National Popular Vote Interstate Compact, Publius (2013), First published online: September 20, 2013)

A “Political Question”?

As the Supreme Court has recently stated: “In general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid’ ” (Zivotofsky v. Clinton [2012], quoting Cohens v. Virginia [1821]). However, there is what the Court in Zivotofsky referred to as a “narrow exception” to this responsibility: the “political question” doctrine. In Baker v. Carr (1962), the Supreme Court gave definition to the “political question” doctrine. This doctrine, premised upon the separation of powers and depending upon context, either prohibits or counsels against judicial review of a dispute (Barkow 2002). In light of the institutional roles of the states, Congress, and the Court in the question of the NPV, it is possible that the Court could decide the NPV presents a political question. However, it is unlikely the Court would avoid deciding such a case.

### russia impact

#### DA outweighs –

the biggest extinction threat

**Bostrom 2** (Nick, Professor of Philosophy and Global Studies at Yale, "Existential Risks: Analyzing Human Extinction Scenarios and Related Hazards," 38, www.transhumanist.com/volume9/risks.html)

A much greater existential risk emerged with the build-up of nuclear arsenals in the US and the USSR. An all-out nuclear war was a possibility with both a substantial probability and with consequences that might have been persistent enough to qualify as global and terminal. There was a real worry among those best acquainted with the information available at the time that a nuclear Armageddon would occur and that it might annihilate our species or permanently destroy human civilization. Russia and the US retain large nuclear arsenals that could be used in a future confrontation, either accidentally or deliberately. There is also a risk that other states may one day build up large nuclear arsenals. Note however that a smaller nuclear exchange, between India and Pakistan for instance, is not an existential risk, since it would not destroy or thwart humankind’s potential permanently.

#### 1% risk means you vote neg

**Bostrum 5** (Nick – prof of philosophy at Oxford University and recipient of the Gannon Award, Transcribed by Packer, 4:38-6:12, p. http://www.ted.com/index.php/talks/view/id/44, accessed 10/20/07)

Now if we think about what just reducing the probability of human extinction by just one percentage point. Not very much. So that’s equivalent to 60 million lives saved, if we just count currently living people. The current generation. One percent of six billion people is equivalent to 60 million. So that’s a large number. If we were to take into account future generations that will never come into existence if we blow ourselves up then the figure becomes astronomical. If we could you know eventually colonize a chunk of the universe the virgo supercluster maybe it will take us a hundred million years to get there but if we go extinct we never will. Then even a one percentage point reduction in the extinction risk could be equivalent to this astronomical number 10 to the power of 32 so if you take into account future generations as much as our own every other moral imperative or philanthropic cause just becomes irrelevant. The only thing you should focus on would be to reduce existential risk, because even the tiniest decrease in existential risk would just overwhelm any other benefit you could hope to achieve. Even if you just look at the current people and ignore the potential that would be lost if we went extinct it should still be a high priority.

#### Independently – also says arms control collapses

#### Extinction

**Collins and Rojansky**, 8/18/**2010** (James – director of the Russia and Eurasia Program at the Carnegie Endowment for International Peace, ex-US ambassador to the Russian Federation, and Matthew – deputy director of the Russia and Eurasia Program, Why Russia Matters, Foreign Policy, p. http://www.foreignpolicy.com/articles/2010/08/18/why\_Russia\_matters)

Russia's nukes are still an existential threat. Twenty years after the fall of the Berlin Wall, Russia has thousands of nuclear weapons in stockpile and hundreds still on hair-trigger alert aimed at U.S. cities. This threat will not go away on its own; cutting down the arsenal will require direct, bilateral arms control talks between Russia and the United States. New START, the strategic nuclear weapons treaty now up for debate in the Senate, is the latest in a long line of bilateral arms control agreements between the countries dating back to the height of the Cold War. To this day, it remains the only mechanism granting U.S. inspectors access to secret Russian nuclear sites. The original START agreement was essential for reining in the runaway Cold War nuclear buildup, and New START promises to cut deployed strategic arsenals by a further 30 percent from a current limit of 2,200 to 1,550 on each side. Even more, President Obama and his Russian counterpart, Dmitry Medvedev, have agreed to a long-term goal of eliminating nuclear weapons entirely. But they can only do that by working together.

### AT: NSA

Ev about the ACLU – doesn’t rise to the supreme court, not the temporal time frame of the DA

#### Their NSA argument doesn’t assume Roberts – he’s key

Douglas 10-7 (Joshua A., Assistant Professor in Election Law – University of Kentucky College of Law, “Roberts: The ‘swing’ justice of election law,” Reuters, 2013, <http://blogs.reuters.com/great-debate/2013/10/07/roberts-the-swing-justice-of-election-law/>)

Tuesday’s oral argument in McCutcheon v. FEC, the latest high-profile campaign finance case, will likely generate familiar storylines about a fiercely ideological Supreme Court, where one justice drives the outcome of a close 5-4 decision. Public perception of the Supreme Court is that there are four conservatives, four liberals and Justice Anthony Kennedy in the middle — as the “swing” vote. But that’s wrong — at least where voting rights and campaign finance cases are concerned. Though Kennedy’s vote dictates some outcomes when the court is split 5-4 along ideological lines, another justice has been the driving force behind current election law jurisprudence. In this matter, it is truly Chief Justice John Roberts’s court. Since Roberts became chief justice in 2005, the court has issued 23 written opinions involving voting rights, redistricting or campaign finance. Roberts is the only justice who has been in the majority every time. In addition, he has written twice as many majority opinions in this field as any other justice — six, as compared to Kennedy’s three. Roberts has now written more than 25 percent of the election law decisions handed down since he joined the court. He has also likely influenced the language on many others. Seven of the 23 election law cases were decided “per curiam,” or without a publicly-disclosed author because they are “by the court” as a whole. So Roberts may also have had a hand in drafting these opinions. As chief justice, Roberts assigns the opinion writer whenever he is in the majority. He therefore affects these cases strategically, even when he does not draft the opinion himself. Roberts’s choice of opinion author can ensure the decisions have the kind of language and arguments he wants. If this all sounds like inside baseball — it is. But it has a significant impact on the scope of the decisions that the court issues.

### AT: Redish

#### backing off war powers now because justices THINK it’s unpopular with the public

Devins and Fisher 2 (Neal, Goodrich Professor of Law and Professor of Government – College of William and Mary, and Louis, Senior Specialist in Separation of Powers – Congressional Research Service, “The Steel Seizure Case: One of a Kind?,” Constitutional Commentary, Spring, 19 Const. Commentary 63, Lexis)

There is a relatively simple explanation for this phenomenon. If members of Congress fail to assert their prerogatives over war and peace, federal judges are unwilling to fill the breach left open by lawmakers. At the time of Youngstown, Congress's failure to act was aberrational. Rather, as detailed above, the culture of expectations was one in which Congress was an active participant in war-making. Correspondingly, judges assumed their traditional role in our system of checks and balances - assessing the legality of governmental action. Today, Congress's general practice is to acquiesce, not challenge, presidential war-making. With Congress retreating in **war powers**, courts too have backed away. This section details how social and political forces have pushed courts away from war powers issues. Before doing so, we will briefly explain why those forces should matter to the Supreme Court. n79

Just as the Supreme Court leaves its mark on American society, so are social forces part of the mix of constitutional law. True, the Justices work in a somewhat insulated atmosphere. But, as Chief Justice William Rehnquist reminded us, the "currents and tides of public opinion ... lap at the courthouse door," n80 for "judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events." n81 As such, "judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs." n82

**Constitutional decisionmaking**, moreover, is a dynamic process that involves all parts of government and the people as well. Lacking the power to appropriate funds or command the military, the Court understands that it must act in a way that garners public acceptance. Its power, as the Justices themselves admit, lies in its legitimacy. n83 An especially telling manifestation [\*77] of how public opinion affects Court decisionmaking is evident when the Court reverses itself to conform its decisionmaking to the social and political forces beating against it. In explaining the collapse of the Lochner era, for example, Justice Owen Roberts recognized the extraordinary importance of public opinion: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country - for what in effect was a unified economy." n84 Social and political forces also played a defining role in the Court's reconsideration of decisions on sterilization and the eugenics movement, state-mandated flag salutes, the Roe v. Wade trimester standard, the death penalty, states' rights, and much more. n85 Absent popular support, these decisions proved ineffective. In the end, as Justice Robert Jackson wrote, "the practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority." n86

When taking social and political forces into account, moreover, the Court is apt to "exercise the rights of governance that bring it prestige and to avoid exercising the rights of governance that may bring it harm." n87 For example, when Congress signals the Court that it has doubts about the constitutionality of its handiwork, the Court does not risk much political capital by striking down that law. n88

Under contemporary conditions, courts have little incentive to involve themselves in war powers disputes. Unlike Youngstown, unilateral executive war-making is now the norm. Not only has Congress abandoned its traditional role, the public and the media also see the president as the "sole organ" of modern day war-making.

### russia rels link

#### Impact d is old – says relations are low, not that they will ever come to the point of collapse

#### Domestic politics overwhelms all alt causes – it shapes how we interact with Russia

Sokov 13 (Nicholas – Senior Fellow at the Vienna Center for Disarmament and Non-Proliferation (VCDNP), “US-Russian Relations: Beyond the Reset”, 1/29, http://www.europeanleadershipnetwork.org/us-russian-relations-beyond-the-reset\_459.html)

Fundamental differences in the assessment of the “Arab Spring” also contribute to the negative trend in the US-Russian relationship. When looking at Arab states, the West sees oppressive regimes that are doomed and tries to influence the outcome by supporting pro-democracy secular elements of the opposition. An important element in the Western approach is an attempt to minimize human casualties. Moscow sees Western interference or at least support of opposition forces as misguided, at best. The better informed experts in Moscow no longer see the “Arab Spring” as a Western attempt to establish control over the region under the guise of democratization (the way they perceived the “Rose,” the “Orange” and the other revolutions in the post-Soviet states). Instead, they see major destabilization in the neighborhood and the emergence of Islamist regimes with varying degrees of radicalism. Today’s events in Syria repeat the pattern that has become standard. Moscow tries to stabilize the situation (whether by limited political support or by calls for a dialogue and managed transition) while the West supports the popular uprising and blames Moscow for not helping. In the meantime, events on the ground develop independently of both. The list can be continued. The bottom line, however, is already clear. While objectively there is plenty of ground for cooperation – and long-term interests of Russia and the United States are very close, perhaps even coincide in many issue-areas – domestic politics and differences in perceptions prevent such cooperation. Of course, a new Cold War is hardly on the cards: neither side is interested in uncontrolled escalation of tensions and, in all fairness, neither can afford it. But the reset policy has, by and large, failed: its limited success did not translate into broad cooperation, and not for the lack of trying on the part of the Obama administration. It would be futile to hope that dialogue on nuclear disarmament – even in the unlikely case it leads to an agreement (domestic politics will likely prevent serious negotiations from even starting) – will hardly pull bilateral relations out of the deep ravine they reside in at the moment.

#### Russia perceives domestic politics as the reason to not cooperate – even if it’s not true

Lukyanov 9/5 (Fyodor – editor of the journal Russia in Global Affairs, chairman of the Council on Foreign and Defense Policy and a member of the Russian Council for International Affairs, “Putin: US on Dangerous Course In Syria”, 2013, http://www.al-monitor.com/pulse/originals/2013/09/russia-america-strike-dangerous-syria.html)

In Russia, the United States is seen more and more as a source of global instability, made even more dangerous by the fact that its actions are dictated mainly by domestic political considerations and the alignment of forces between the parties in Congress. This is the reason for the desire to neither cooperate with nor resist the United States, but rather to try somehow to avoid it and minimize the risks from its policy. Until recently, the dominant viewpoint among the Russian public was that the United States always knows what it wants and pursues its goals. The aggrandizement of the American strategy found its apotheosis in the popular notion of “manageable chaos” promoted by conservatives in Russia. Supposedly, the United States is intentionally creating total chaos and turmoil in the Middle East so it will be easier to control everything in the muddy waters of never-ending crisis.

### finishing 1nc scheppele

#### Finishing 1nc scheppele - answers their 2ac characterization

Scheppele 12 (Kim Lane, Laurance S. Rockefeller Professor of Sociology and Public Affairs in the Woodrow Wilson School and University Center for Human Values; Director of the Program in Law and Public Affairs, Princeton University, “THE NEW JUDICIAL DEFERENCE BOSTON UNIVERSITY LAW REVIEW,” vol 92, <http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SCHEPPELE.pdf>)

.9 Suspected terrorists have received from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives. Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference. This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted – often bold, ambitious, and brave solutions – nonetheless fail to address the plights of the specific individuals who brought the cases. This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something – an appearance not entirely false in the long run – while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

### lower courts fail

#### Turns the whole aff

Irias 13 (Jose F., “Wartime Detention and the Extraterritorial Habeas Corpus Doctrine: Refining the Boumediene Framework in Light of its Goals and its Failures,” New York University Law Review, Vol. 88, October, <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-4-Irias.pdf>)

The disparate outcomes in the district and circuit courts were the result of the courts' drastically different applications of Boumediene's three-factor test. The Boumediene test has thus proven too vague to meaningfully check the Executive's wartime detention power.18 This Note seeks to clarify the Boumediene framework in order to provide lower courts with sufficient guidance.

The Boumediene Court expressly delegated to lower courts the power to create the procedural, evidentiary, and substantive rules for habeas cases.19 Yet the D.C. Circuit has misused this power with "both the intent and the effect of vitiating the Supreme Court's 2008 decision."20 Admittedly, refining the Boumediene framework in order to ensure thai the writ is not wrongly suspended abroad may prove a limited success in curbing executive detention powers, insofar as the lower federal courts may still consistently decide the cases on the merits in favor of the Executive. But a bad shot is better than no shot at all.21

#### Their author admits lower court confusion is likely and turns the aff

Milko 12 – Their Author (Jennifer L., “Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, Duquesne Law Review, Winter, 50 Duq. L. Rev. 173, Lexis)

This separation of powers dilemma facing the High Court has no easy solution, but the critical role that the proper allocation of authority plays in the separation of powers system and the lack of substantive guidance on Guantanamo issues since Boumediene in 2008 demands attention from the Supreme Court. Additionally, because the Guantanamo cases have been litigated in the D.C. Circuit, no other appellate courts have had the opportunity to review these issues. n145 Without the opportunity for an opposing view in another judicial circuit and with no final determination by the Supreme Court, the D.C. Circuit Court of Appeals has been free to shape the law of Guantanamo habeas cases as it wishes. Adding to the concern of the lack of a "check" on the D.C. Circuit Court of Appeals is the fact that the trend within the Circuit itself has been inconsistent as the district courts have assumed a greater role for the judiciary, only to be chastised on appeal for failure to defer to the political branches in these cases.

With the D.C. Circuit serving as the sole authority on the scope of the courts' habeas power in Guantanamo cases, petitioners' claims that this court has been improperly applying Supreme Court precedent is another concern that the High Court should address. In both release and transfer cases, the petitioners have argued that while Boumediene assures the privilege of habeas corpus, the Kiyemba cases have foreclosed the courts from fashioning a remedy in contradiction to Boumediene. n146 Instead, the D. C. Circuit Court of Appeals has refused to interfere, based on the Munaf proposition that the determinations of the Executive should not be second-guessed, and has accepted the assurances of the Executive Branch that they are working secure release or that they will not send detainees to countries where it is more likely than not that they will face torture.

## 2nr

### terrorism card

#### Risk is high – only the CP preserves strategic flexibility by allowing the president to defense decisions to detain – ensures dangerous detainees aren’t released

Stimson 9 (Charles D., Senior Legal Fellow in the Center for Legal and Judicial Studies – Heritage Foundation, “Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War,” Heritage Foundation, 1-23,[www.heritage.org/research/reports/2009/01/holding-terrorists-accountable-a-lawful-detainment-framework-for-the-long-war](http://www.heritage.org/research/reports/2009/01/holding-terrorists-accountable-a-lawful-detainment-framework-for-the-long-war))

Thus, despite what some have argued over the years, the United States is not required, by its inter­national obligations or otherwise, to "trythem or set them free." This false choice is dangerous, and it comes with real consequences. It is widely known that somedetainees released from detention in Iraq, Afghanistan, and Guantanamo have taken up arms against Americans and ourallies and no doubt have committed further combatant activity.[18] This risk of further combatant activity will always exist, and it is particularly acute in the current conflict. Reducing that risk through lawful detainment is not always a controversial proposition. For years, the United States has captured, detained, and law­fully interrogated thousands of combatants within the political boundaries of Iraq and Afghanistan, and it will continue to do so for some time in Afghanistan.[19] Most detainees are detained to pre­vent further combatant activity against the U.S. or our forces--not tried in a criminal trial. Beyond Guantanamo With respect to terrorists captured in the future outside of Afghanistan, including by our allies or in a future conflict or other crisis, the detainment situation is more complicated. Neither the criminal law nor the law of armed conflict provides compre­hensive and complete policy prescriptions in terms of how best to keep these combatants off of the bat­tlefield and lawfully interrogate them while upholding the rule of law, protecting human rights, and safeguarding our country. Prior to September 11, 2001, terrorism was treated as a matter of criminal law. The limits of and flaws in that approach have been detailed in numerous articles.[20] It is true that our anti-terrorism statutes have improved over the years and that our track record of trying terrorism in the courts is impres­sive, but despite the system's strength and flexibil­ity, these improvements will carry us only so far.[21] A recent report by Human Rights First, In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts, details over 100 terrorism cases successfully prosecuted in federal court since 9/11. The report covers many, but not all, of the important laws and legal and policy considerations regarding trying terrorism cases in federal district court. Yet it does not mention one case of a terrorist captured over­seas on the battlefield after 9/11 and tried in the U.S. courts, nor does it seriously address the issue of the use of hearsay in federal trials for battle­field captures. Most important, the Human Rights First report downplays the risks associated with the inadvertent disclosure of classified evidence, including valuable (and expensive) sources and methods of intelli­gence gathering. In every case involving such evi­dence--and this would include some cases involving terrorists captured overseas--there must be a careful, sophisticated cost-benefit analysis conducted by the highest officials in the govern­ment before deciding to disclose certain evidence in courtroom proceedings. Trying some terrorists in federal court should be an option, and it is an option the Bush Administration should have used more often;[22] but it should not be the exclusive weapon in our arsenal for combating al-Qaeda and other unprivileged belligerents. To its credit, the Human Rights First report does acknowledge that some detainees may properly be held under "the law of war for the duration of active hostilities to prevent them from returning to the field of battle, and without any effort by the government to file charges or impose punish­ment."[23] In other words, military detention has a place in this conflict.[24] For the most part, the Bush Administration and Congress, in its Authorization for the Use of Mili­tary Force, recognized the terrorist attacks of 9/11 as an act of war, and the law of armed conflict was the foundation for the legal framework surround­ing detention. With respect to Guantanamo, the law-of-armed-conflict paradigm was challenged within weeks of detainees arriving in January 2002, and its limitations have become clearer during this long conflict. Certainly, the law of armed conflict should and will provide the underpinnings for the detention framework in Afghanistan in the years to come, but it does not provide adequate answers to or proce­dural protections for detainees captured outside of Afghanistan and all of the issues that arise in a con­flict of this nature.[25] A legal regime can only set the boundaries of permissible policy; it is not a substitute for policy decisions to resolve lingering questions. In the future, when we capture a high-value al-Qaeda operative somewhere outside of Afghanistan who plots acts of terrorism or trains fellow terrorists but has not committed a domestic crime that can be prosecuted in federal district court, a court-martial, or even a new national security court, do we release him? If not, should we detain him, and under what legal framework? Where will he be detained? It is highly unlikely that the government of Afghanistan (or any other country) will allow him to be detained inside their country. Should we bring him to the United States? If so, what is his legal status, and what framework is he held under? Further, in many of these cases, we will want to lawfully interrogate a captured operative to gain tactical or strategic intelligence. How do those law­ful interrogations for intelligence reasons affect the potential for criminal prosecution? We may not be able to prosecute some of these individuals, and it may not be in our best interest as a country to try them because to do so might unreasonably risk exposing critical national security secrets. A Future Framework The answer, far beyond closing Guantanamo, is to solve the broader challenge of holding account­able and incapacitating terrorists in a detention framework that is lawful, durable, and internation­ally acceptable. As we capture future high-value terrorists outside of Afghanistan and conclude that some may not be prosecuted in our domestic courts, we will need a sustainable legal framework to detain them.[26]Creating the right framework will be challeng­ing, but it is necessary. As a former Administration official in charge of detainee matters observed, detention carries risks to both liberty and secu­rity.[27] Much thought needs to be given to the char­acteristics of persons subject to detention.[28]Conceptual criteria such as (among others) danger­ousness, active or direct participation, membership in or support for an organization such as al-Qaeda, past acts, and future intentions must all be consid­ered and weighed before drafting an appropriate definition of who may be detained.[29] However, we must remain ever mindful that our service members are facing the enemy on numerous battlefields every day: These questions are not, and should not be treated as, merely academic. As for procedural protections for future captures, under the law of armed conflict, if there is a ques­tion as to a detainee's legal status (e.g., a prisoner of war, a civilian, or some other class), the detaining authority must hold a hearing, similar to an Article 5 hearing provided to prisoners of war under the Geneva Conventions, at or near the time of capture. If the "Article 5" hearing officer finds the terrorist detainable, then he may be detained. Alternatively, the hearing officer could make a finding that the captured person does not meet the proper criteria and order him released after the hearing. If the person is deemed detainable by the hear­ing officer, after a defined period of lawful interro­gation, the detainee should be given an Article 5- style "competent tribunal" hearing before a military judge where he should have assistance of military counsel.[30] If the military judge, after a full and fair hearing, decides that the detainee qualifies for fur­ther military detention, the detainee is thereafter detained pending periodic review. There should be robust judicial appellate review, and the detainee should be afforded qualified free appellate counsel. The basis for his detention should be reviewed periodically. Furthermore, military detention should be used only for those detainees who cannot be safely pros­ecuted.[31] This means, at the front end of the deten­tion matrix, that there must be a robust system in place to determine which cases are prosecutable and which ones are not. As a legal matter, there is support for the argu­ment that the current Authorization for Use of Mil­itary Force (AUMF) authorizes the President to detain militarily a person captured in the United States.[32] However, as a policy matter, the proposed military detention framework should not apply to anyone captured in the United States, at least under current circumstances.[33] Not even the Geneva Conventions or the princi­ples underlying them answer every question. Once you give future captures an "Article 5" hearing and a "competent tribunal" determines that the detainee may be detained, then what? Does the case get transferred automatically to a federal dis­trict court judge for "independent review," perhaps under a newly created national security court? And how long do you detain the individual? How often do you review the basis of his detention? According to the Geneva Conventions, a person subject to detention must have the basis for his detention reviewed periodically, but is that an appropriate standard in this case? I believe it is warranted. Would this system even be workable if, for example, the United States captured hundreds of detainees at a time? And what impact will these robust new rules and procedures have in the next war against a state actor who will receive fewer safeguards or rights as a prisoner of war? All of this must be done as transparently as possible. Finally, the United States must continue to allow the International Committee of the Red Cross[34] to perform its valuable function vis-à-vis detainees, and we must continue to work with and engage the ICRC in a substantive, confidential diplomatic dialogue. Conclusion Shuttering detention operations at Guantanamo Bay will be only a symbolic gesture--or perhaps not even that--if the Obama Administration does not also address the broader challenge of lawfully incapacitating terrorists who are intent on waging war against us. The incoming Administration has the duty to think through the strategic rationale of military detention in the broader context of its counterterrorism policies. Some detainees may be appropriate candidates for criminal prosecution in federal district court, in terrorists' court-martials, or even in a newly created national security court--as long as there is not an unreasonable risk of exposure of critical national security information. Other detainees at Guantan­amo Bay and those captured in the future will be appropriate candidates for military detention. Achieving this new policy will take time. It will require the new Administration to use this "strategic pause" inmilitary commissions, habeas corpus cases, and other ongoing matters to take stock of the best way forward. We will see how Barack Obama responds to calls from some of his supporters to "try them or set them free." Will he make the case for a thoughtful military detainment policy, or will he give in to their dangerous demand? If Obama acknowledges that al-Qaeda members and others similarly situ­ated are not common criminals and that military detention is a lawful and necessary tool in this ongoing conflict, we will know that our new Presi­dent is serious about the threats aligned against us.