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## Offcase

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#### The Court will maintain Affirmative Action in the Schuette decision now

Scott Lemieux, Poly Sci Prof @ St. Rose, 7-9-2013, “Affirmative Action's Ominous Future,” Prospect, <http://prospect.org/article/affirmative-actions-ominous-future>

In fact, it's hard to imagine an existing program in higher education the current Court majority would vote to uphold as constitutional—just as it is nearly impossible to imagine a preclearance formula for the Voting Rights Act that this Court would approve—even if Kennedy is unwilling to hold affirmative action unconstitutional writ large. It's even possible that Kennedy will ultimately be willing to take the next step. One reason for the Court deciding to write a minimalist opinion in Fisher after sitting on the case for the better part of a year is that the facts of Fisher were not very favorable to opponents of affirmative action. Abigail Fisher, the plaintiff, probably would not have been admitted to U.T. Austin even under entirely race-neutral admissions criteria, making her a less-than-ideal vehicle for demonstrating the alleged injustices of affirmative action. Given a different set of facts, the Roberts Court may well be willing to go further.¶ However, the upcoming case, Schuette v. Coalition to Defend Affirmative Action, concerns the constitutionality of bans on affirmative action, rather than focusing on the constitutionality of affirmative-action programs. It's unlikely to overturn Grutter since the Court declined to do so in Fisher. In 2006, Michigan voters passed Proposal 2, which banned all affirmative-action programs by state agency. In November of last year, a badly divided Sixth Circuit ruled that Proposal 2 violated the equal protection clause of the Fourteenth Amendment. According to the majority opinion, Proposal 2 was unconstitutional because it "reallocates political power or reorders the decision-making process in a way that places special burdens on a minority group's ability to achieve its goals through that process."¶ This decision's odds of being upheld by the Supreme Court are near to nil. In all candor, it might be an uphill struggle for the opinion to get even one vote. I strongly believe that most affirmative-action programs are constitutional and deplore Proposal 2 as a policy matter, but it's a stretch to argue that Michigan is required to have affirmative-action programs. However, this case presents very different conceptual issues than Fisher did. Since it would be entirely possible to overrule the Sixth Circuit without saying anything about the constitutionality of affirmative action, it is very unlikely that the Court will use the case as a way to resolve the issues Fisher didn't. And so the can will likely be kicked down the road once more, hopefully awaiting a more favorable Court majority in the near future.

#### Ruling on the aff trades off with the court’s willingness to anger the same constituency

Peretti 1 - Terri Jennings Peretti, Professor of Political Science at Santa Clara University, 2001, In Defense of a Political Court, p. 152-153

To the degree that a justice cares deeply about her policy goals, she will be quite attentive to the degree of support and opposition among interest groups and political leaders for those goals. she will be aware of the re­sources (e.g., commitment, wealth, legitimacy) that the relevant interest groups possess who bear the burden of both carrying forward the appropri­ate litigation necessary for policy success and for pressuring the other branches for full and effective implementation. Only the policy-motivated justice will care about the willingness of other government officials to comply with the Court’s decisions or carry them out effectively. And only the policy-motivated justice will care about avoiding the application of political sanc­tions against the Court that might foreclose all future policy options.

The school desegregation cases illustrate these points quite nicely. The Court could not pursue the goal of racial integration and racial equality until there was an organized and highly regarded interest group such as the Na­tional Association for the Advancement of Colored People willing and able to help. The Court further was required to protect that group from political attack, as it did in NAACP v. Alabama’03 and NAACP v. Button.’04 Avoidance of other decisions that might harm its desegregation efforts was also deemed necessary. Thus, the Court had legal doctrine available to void anti discrimination statutes, but refused to do so on two occasions.’05 (Murphy notes that one justice was said to remark upon leaving the conference discussion, “One bombshell at a time is enough.”’06) The Court additionally softened the blow by adopting its “deliberate speed” implementation formula. Even so, the Court still needed the active cooperation of a broad range of government officials, in all branches and at all levels of government, in order to carry out its decisions effectively. Thus, significant progress in racial integration in the southern schools did not in fact occur until Congress and the Department of Health, Education, and Welfare decided to act. The Court further had to consider whether the political opposition that it knew would ensue would be sufficient to result in sanctions against the Court, such as withdrawal of jurisdiction or impeachment.. These considerations arose only in the process of caring deeply about the policy goal at hand—racial equality in public education. They were not a by-product of caring only about the logical or precedential consistency of an opinion or of worrying only about deriving a decision from the Framers' intentions.

#### Guts military readiness

Julie W. Becton Jr, Lt. Gen., 2-19-2003, “Amicus Curiae Brief,” http://www.vpcomm.umich.edu/admissions/legal/gru\_amicus-ussc/um/MilitaryL-both.pdf

The modern American military candidly acknowledges the critical link between minority officers and military readiness and effectiveness. "[T]he current leadership views complete racial integration as a military necessity – that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, success with the challenge of diversity is [-18-] critical to national security." President’s Report § 7.1. The military’s continuing, race-conscious efforts to increase the percentage of minority officers have achieved some results, but this progress must continue. See Dep’t of Def., Population Representation in the Military Services 4-8 (Nov. 1998). Accordingly, the armed forces strive to identify and train the best qualified minority candidates to serve as officers. Infra at 18-27. As we show, these efforts include \*race-conscious recruiting, preparatory, and admissions policies\* at the service academies and in ROTC programs – efforts that underscore the military’s resolve to do what is necessary and effective to integrate the officer corps.

#### Nuke war

Robert Kagan, senior fellow @ Carnegie, 7-19-2007, “End of Dreams, Return of History,” <http://www.hoover.org/publications/policyreview/8552512.html>

The jostling for status and influence among these ambitious nations and would-be nations is a second defining feature of the new post-Cold War international system. Nationalism in all its forms is back, if it ever went away, and so is international competition for power, influence, honor, and status. American predominance prevents these rivalries from intensifying — its regional as well as its global predominance. Were the United States to diminish its influence in the regions where it is currently the strongest power, the other nations would settle disputes as great and lesser powers have done in the past: sometimes through diplomacy and accommodation but often through confrontation and wars of varying scope, intensity, and destructiveness. One novel aspect of such a multipolar world is that most of these powers would possess nuclear weapons. That could make wars between them less likely, or it could simply make them more catastrophic.

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#### The plan identifies the non-Western world as a space devoid of the rule of law---makes aggressive colonial and neoliberalism violence inevitable---their evidence is based on distorted representations

Ugo Mattei 9, Professor at Hastings College of the Law & University of Turin; and Marco de Morpurgo, M.Sc. Candidate, International University College of Turin, LL.M. Candidate, Harvard Law School, 2009, “GLOBAL LAW & PLUNDER: THE DARK SIDE OF THE RULE OF LAW,” online: <http://works.bepress.com/cgi/viewcontent.cgi?article=1014&context=bocconi_legal_papers>

Within this framework, Western law has constantly enjoyed a dominant position during the past centuries and today, thus being in the position to shape and bend the evolution of other legal systems worldwide. During the colonial era, continental-European powers have systematically exported their own legal systems to the colonized lands. During the past decades and today, the United States have been dominating the international arena as the most powerful economic power, exporting their own legal system to the ‘periphery’, both by itself and through a set of international institutions, behaving as a neo-colonialist within the ideology known as neoliberalism. ¶ Western countries identify themselves as law-abiding and civilized no matter what their actual history reveals. Such identification is acquired by false knowledge and false comparison with other peoples, those who were said to ‘lack’ the rule of law, such as China, Japan, India, and the Islamic world more generally. In a similar fashion today, according to some leading economists, Third World developing countries ‘lack’ the minimal institutional systems necessary for the unfolding of a market economy. ¶ The theory of ‘lack’ and the rhetoric of the rule of law have justified aggressive interventions from Western countries into non-Western ones. The policy of corporatization and open markets, supported today globally by the so-called Washington consensus3, was used by Western bankers and the business community in Latin America as the main vehicle to ‘open the veins’ of the continent—to borrow Eduardo Galeano’s metaphor4—with no solution of continuity between colonial and post-colonial times. Similar policy was used in Africa to facilitate the forced transfer of slaves to America, and today to facilitate the extraction of agricultural products, oil, minerals, ideas and cultural artefacts in the same countries. The policy of opening markets for free trade, used today in Afghanistan and Iraq, was used in China during the nineteenth century Opium War, in which free trade was interpreted as an obligation to buy drugs from British dealers. The policy of forcing local industries to compete on open markets was used by the British empire in Bengal, as it is today by the WTO in Asia, Africa, and Latin America. ¶ Foreign-imposed privatization laws that facilitate unconscionable bargains at the expense of the people have been vehicles of plunder, not of legality. In all these settings the tragic human suffering produced by such plunder is simply ignored. In this context law played a major role in legalizing such practices of powerful actors against the powerless.5 Yet, this use of power is scarcely explored in the study of Western law. ¶ The exportation of Western legal institutions from the West to the ‘rest’ has systematically been justified through the ideological use of the extremely politically strong and technically weak concept of ‘rule of law’. The notion of ‘rule of law’ is an extremely ambiguous one. Notwithstanding, within any public discussion its positive connotations have always been taken for granted. The dominant image of the rule of law is false both historically and in the present, because it does not fully acknowledge its dark side. The false representation starts from the idea that good law (which others ‘lack’) is autonomous, separate from society and its institutions, technical, non-political, non-distributive and reactive rather than proactive: more succinctly, a technological framework for an ‘efficient’ market. ¶ The rule of law has a bright and a dark side, with the latter progressively conquering new ground whenever the former is not empowered by a political soul. In the absence of such political life, the rule of law becomes a cold technology. Moreover, when large corporate actors dominate states (affected by a declining regulatory role), law becomes a product of the economy, and economy governs the law rather than being governed by it.

#### Reject their emphasis on Western-models of law in favor of a fundamental rethink of democracy from the bottom-up

Ugo Mattei 9, Professor at Hastings College of the Law & University of Turin; and Marco de Morpurgo, M.Sc. Candidate, International University College of Turin, LL.M. Candidate, Harvard Law School, 2009, “GLOBAL LAW & PLUNDER: THE DARK SIDE OF THE RULE OF LAW,” online: <http://works.bepress.com/cgi/viewcontent.cgi?article=1014&context=bocconi_legal_papers>

In the complex spectrum of global law, both throughout the era of colonialism and neo-liberal US-led Western imperialism within a pattern of continuity, the rule of law, together with the theory of ‘lack’ and other powerful rhetorical arguments, has been used in order to legitimize political interventions and plunder in the ‘emerging’ economies. The sacred concept of rule of law, whose positive connotations are ‘naturally’ assumed, has been portrayed as the embodiment of a professional and neutral technology, thus being capable of substituting the lack of democratic legitimacy of the institutions that are protagonist in the creation of global law. But its dark side has never been shown or discussed. An imperial rule of law is now a dominant layer for the worldwide legal systems. It is produced, in the interest of international capital, by a variety of institutions, both public and private, all sharing a gap in political legitimacy sometimes referred to as ‘democratic deficit’.31 At the same time, law has been constructively turned into a technology and a mere component of an economic system of capitalism, thus hiding its intrinsic political nature, and annulling the relevance of local political systems, now impotent in front of the dynamics of global law. The ‘dry technology’ of the rule of law penetrates worldwide legal systems without any political discussion at the local level, attempting to create the conditions for the development of market economies, often without success, and causing serious consequences for the less powerful. Under the technology of the rule of law, in its imperial version capable of producing plunder, the essence of the United States’ law hides. In the aftermath of World War II, there was a dramatic change in the pattern of Western legal development. Leading legal ideas once produced in continental Europe and exported through the colonized world are now, for the first time, produced in a common law jurisdiction: the United States. Clearly, the present world dominance of the United States has been economic, military and political first, and only recently legal, so that a ready explanation of legal hegemony can be found within a simple conception of law as a product of the economy.32 Furthermore, US law has been capable of expanding worldwide thanks to its prestige, the high level of professionalization of its attorneys and a series of procedural institutions, that benefit plaintiffs, that allow US courts to have a certain capacity to attract jurisdiction, while showing themselves as courts for universal justice.33 The general attitude of the United States has been a very ethnocentric one, and precisely that of showing itself as the guardian of a universal legality, which it is legitimized to export through its courts of law, scholarly production, military and political intervention, and through a set of US-centric international institutions. In recent times, in particular after September 11th 2001 and the declaration of the ‘war on terror’, the US rule of law has come under attack 34, so that once admiring crowds of lawyers and intellectuals worldwide are now beginning to look upon the United States as an uncivilized old West from the perspective of legal culture, despite the professional prestige still enjoyed by the giant New York law firms and by the US academy. Notwithstanding, there has been no decline in the rhetoric of the rule of law when it comes to foreign relations. Bringing democracy and the rule of law is still used as a justification to keep intruding in foreign affairs. The same can be said for the international financial institutions and their innumerable ‘development’ projects that come packaged with the prestigious wrapping of the rule of law. A rethinking of the very idea of global law is necessary and it must derive from a revaluation of the local dimension, which is currently ignored by the neo-liberal model of development. The production of global law should change its direction, and follow a bottom-up approach, rather than a top-down one, thus being sensitive to the local particularities and complexities. Western spectacular ideas of democracy and the rule of law should be rethought. On this planet, resources are scarce, but there would be more than enough for all to live well. Nobody would admire and respect someone who, at a lunch buffet for seven, ate 90 percent of the food, leaving the other guests to share an amount insufficient for one. In a world history of capitalism in which the rule of law has reproduced this precise ‘buffet’ arrangement on the large scale, admiring the instruments used to secure such an unfair arrangement seems indeed paradoxical. People have to be free to build their own economies. There is nothing inevitable about the present arrangements and their dominant and taken-for granted certainties. Indeed, it may be that the present legal and political hegemonies suffer from lack: the lack of world culture and of global political realism.

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#### Court deference in the context of war fighting is at an all-time high --- most recent cases prove

George D. Brown 11, Interim Dean and Robert F. Drinan, S.l., Professor of Law, Boston College Law School, 1/7/11, “Accountability, Liability, and the War on Terror -- Constitutional Tort Suits as Truth and Reconciliation Vehicles,” Florida Law Review, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1337&context=lsfp>

Still, the notion of national security deference is deeply ingrained in our constitutional tradition. Its institutional foundations make sense, as ably demonstrated by Professor Pushaw.415 The question that arises is whether things have changed with the Court's decisions in a series of "enemy combatant" cases since the onset ofthe war on terror.416 These cases have arisen in the context of petitions for habeas corpus. The Court, as Professor Pushaw puts it, "interpreted the habeas corpus statute generously,'.417 even to the point of distortion.418 On the other hand, the substantive results represented a mixed bag of defects and victories for the President. "[T]hese three cases did not necessarily signal a major shift in the Court's jurisprudence in which individual liberties will be upheld vigorously against executive claims of national security.'.419 Professor Pushaw wrote these words before Boumediene v. Bush,420 in which the Court took on both political branches. Boumediene, far more than its immediate predecessors, might be seen as the case that broke the back of national security deference.421 The majority opinion emphasized the judiciary's Marburybased role as the branch that says "what the law is,' 22 echoing its earlier statement in Hamdi v. Rumsfeld that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake. ,.424 ¶ On the other hand, it is possible to see Boumediene as resting primarily on the key role of habeas corpus. The Court proclaimed the writ's "centrality," noting that "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. ,.425 I have raised elsewhere the argument that one should not extrapolate too far from the habeas cases, even if they are viewed as an assertion of the judicial role.426 Habeas raises the fundamental question of the lawfulness of executive detention and often presents the judiciary with familiar issues of the validity of procedures. Reverse war on terror suits would take the courts much further. ¶ Certainly, the Court's two most recent war on terror decisions show a reluctance to go further and may even constitute a retrenchment. The importance of Ashcroft v. I{lbar27 has already been noted. Holder v. Humanitarian Law Project's points in the same direction. Holder upheld a criminal statute that is a crucial component of the war on terror.429 It did so in the face of a vigorous First Amendment challenge, supported by three Justices.43o Both cases show deference toward the government and appreciation of the difficulties of waging the war on terror. Iqbal noted that "the Nation's top law enforcement officers [were acting] in the aftermath of a devastating terrorist attack .... ,.431 Holder's language is even stronger. The Court stated explicitly that deference was appropriate because "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs.'.432 Indeed, the opinion went further endorsing the preventive approach to counterterrorism and recognizing the government's need to often act "based on informed judgment rather than concrete evidence.'.433 In perhaps the ultimate demonstration of the importance of rhetoric, the Court's opinion closed with a citation of the Preamble to the Constitution and its recognition of the need to provide '''for the common defence [sic].".434 Iqbal and Holder stand in stark contrast to the habeas decisions of a few years earlier.

#### Court interference decks the Executive flexibility necessary to solve prolif, terror, and the rise of hostile powers---link threshold is low

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

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

#### Global nuclear war

Li 9 Zheyao, J.D. candidate, Georgetown University Law Center, 2009; B.A., political science and history, Yale University, 2006. This paper is the culmination of work begun in the "Constitutional Interpretation in the Legislative and Executive Branches" seminar, led by Judge Brett Kavanaugh, “War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare,” 7 Geo. J.L. & Pub. Pol'y 373 2009 WAR POWERS IN THE FOURTH GENERATION OF WARFARE

A. The Emergence of Non-State Actors

**Even as the quantity of nation-states in the world has increased dramatically** since the end of World War II**, the** institution **of the nation-state has been in decline over the past few decades.** Much of this decline is the direct result of the waning of major interstate war, which primarily resulted from the introduction of nuclear weapons.122 The **proliferation of nuclear weapons, and their** immense **capacity for absolute destruction,** **has ensured** that conventional wars **remain limited in scope and duration**. Hence, "both the size of the armed forces and the quantity of weapons at their disposal has declined quite sharply" since 1945.123 At the same time, **concurrent with the decline of the nation-state in the second half of the twentieth century**, **non-state actors have increasingly been willing and able to use force to advance their causes**. In contrast to nation-states, who adhere to the Clausewitzian distinction between the ends of policy and the means of war to achieve those ends, **non-state actors** do not necessarily fight as a mere means of advancing any coherent policy. Rather, they **see their fight** as a life-and-death struggle**, wherein the ordinary terminology of war as an instrument of policy breaks down because of this blending of means and ends**.124 It is the existential nature of this struggle and the disappearance of the Clausewitzian distinction between war and policy that has given rise to a new generation of warfare. The concept of fourth-generational warfare was first articulated in an influential article in the Marine Corps Gazette in 1989, which has proven highly prescient. In describing what they saw as the modem trend toward a new phase of warfighting, the authors argued that: In broad terms, fourth generation warfare seems likely to be widely dispersed and largely undefined; the distinction between war and peace will be blurred to the vanishing point. It will be nonlinear, possibly to the point of having no definable battlefields or fronts. The distinction between "civilian" and "military" may disappear. Actions will occur concurrently throughout all participants' depth, including their society as a cultural, not just a physical, entity. Major military facilities, such as airfields, fixed communications sites, and large headquarters will become rarities because of their vulnerability; the same may be true of civilian equivalents, such as seats of government, power plants, and industrial sites (including knowledge as well as manufacturing industries). 125 **It is precisely this blurring of peace and war and the demise of traditionally definable battlefields that provides the impetus for the formulation of a new. theory of war powers**. As evidenced by Part M, supra, **the constitutional allocation of war powers**, and the Framers' commitment of the war power to two co-equal branches, was not designed **to cope with the current international system,** one that is **characterized by the persistent machinations of international terrorist organizations**, the rise of **multilateral alliances,** the **emergence of** rogue states**, and the potentially wide proliferation of easily deployable** w**eapons of** m**ass** d**estruction**, nuclear and otherwise. B. The Framers' World vs. Today's World The Framers crafted the Constitution, and the people ratified it, in a time when everyone understood that the state controlled both the raising of armies and their use. Today, however, **the threat of terrorism is bringing an end to the era of the nation-state's legal monopoly on violence**, and the kind of war that existed before-based on a clear division between government, armed forces, and the people-is on the decline. 126 As states are caught between their decreasing ability to fight each other due to the existence of nuclear weapons and the increasing threat from non-state actors, it is clear that the Westphalian system of nation-states that informed the Framers' allocation of war powers is no longer the order of the day. 127 As seen in Part III, supra, **the rise of the modem nation-state occurred as a result of its military effectiveness and ability to defend its citizens. If nation-states** such as the United States are **unable to adapt to the changing circumstances of fourth-generational warfare-**that is, if they are unable to adequately defend against low-intensity conflict conducted by non-state actors-"then clearly [the modem state] does not have a future in front of it.' 128 The challenge in formulating a new theory of war powers for fourthgenerational warfare that remains legally justifiable lies in the difficulty of adapting to changed circumstances while remaining faithful to the constitutional text and the original meaning. 29 To that end**, it is crucial to remember that the Framers crafted the Constitution in the context of the Westphalian system** of nation-states. The three centuries following the Peace of Westphalia of 1648 witnessed an international system characterized by wars, which, "through the efforts of governments, assumed a more regular, interconnected character."' 130 That period saw the rise of an independent military class and the stabilization of military institutions. Consequently, "warfare became more regular, better organized, and more attuned to the purpose of war-that is, to its political objective."' 1 3' That era is now over. Today, **the stability of the long-existing Westphalian international order has been greatly eroded** in recent years **with the advent of international terrorist organizations**, **which care nothing for the traditional norms of the laws of war.** This new global environment exposes the limitations inherent in the interpretational methods of originalism and textualism and necessitates the adoption of a new method of constitutional interpretation. While one must always be aware of the text of the Constitution and the original understanding of that text, that very awareness identifies the extent to which fourth-generational warfare epitomizes a phenomenon unforeseen by the Framers, a problem the constitutional resolution of which must rely on the good judgment of the present generation. 13 Now, to adapt the constitutional warmarking scheme to the new international order characterized by fourth-generational warfare, one must understand the threat it is being adapted to confront. C. The Jihadist Threat **The erosion of the Westphalian and Clausewitzian model of warfare and the blurring of the distinction between the means of warfare and the ends of policy, which is one characteristic of fourth-generational warfare, apply to al-Qaeda and other adherents of jihadist ideolog**y who view the United States as an enemy. An excellent analysis of jihadist ideology and its implications for the rest of the world are presented by Professor Mary Habeck. 133 Professor Habeck identifies the centrality of the Qur'an, specifically a particular reading of the Qur'an and hadith (traditions about the life of Muhammad), to the jihadist terrorists. 134 The jihadis believe that the scope of the Qur'an is universal, and "that their interpretation of Islam is also intended for the entire world, which must be brought to recognize this fact peacefully if possible and through violence if not."' 135 Along these lines, the jihadis view the United States and her allies as among the greatest enemies of Islam: they believe "that every element of modern Western liberalism is flawed, wrong, and evil" because the basis of liberalism is secularism. 136 The jihadis emphasize the superiority of Islam to all other religions, and they believe that "God does not want differing belief systems to coexist."' 37 For this reason, jihadist groups such as al-Qaeda "recognize that the West will not submit without a fight and believe in fact that the Christians, Jews, and liberals have united against Islam in a war that will end in the complete destruction of the unbelievers.' 138 **Thus, the adherents of this jihadist ideology, be it al-Qaeda or other groups,** **will continue to target the United States until she is destroyed. Their ideology demands it.** 139 To effectively combat terrorist groups such as al-Qaeda, it is necessary to understand not only how they think, but also how they operate. **Al-Qaeda is a transnational organization capable of simultaneously managing multiple operations all over the world**."14 It is both centralized and decentralized: al-Qaeda is centralized in the sense that Osama bin Laden is the unquestioned leader, but it is decentralized in that its operations are carried out locally, by distinct cells."4 AI-Qaeda benefits immensely from this arrangement because it can exercise direct control over high-probability operations, while maintaining a distance from low-probability attacks, only taking the credit for those that succeed. The local terrorist cells benefit by gaining access to al-Qaeda's "worldwide network of assets, people, and expertise."' 42 **Post-September 11 events have highlighted al-Qaeda's resilience. Even as the United States and her allies fought back,** inflicting heavy casualties on al-Qaeda in Afghanistan and destroying dozens of cells worldwide, "**al-Qaeda's networked nature allowed it to absorb the damage and remain a threat."** 14 3 This is a far cry from earlier generations of warfare, where the decimation of the enemy's military forces would generally bring an end to the conflict. D. The Need for Rapid Reaction and Expanded Presidential War Power By now it should be clear just how different this conflict against the extremist terrorists is from the type of warfare that occupied the minds of the Framers at the time of the Founding. Rather than maintaining the geographical and political isolation desired by the Framers for the new country, **today's United States is an international power targeted by individuals and groups that will not rest until seeing her demise.** **The** Global **War on Terrorism is not** truly **a war within the Framers' eighteenth-century conception of the term**, and the normal constitutional provisions regulating the division of war powers between Congress and the President do not apply. Instead, **this "war"** is a struggle for survival and dominance against forces that threaten to destroy the United States and her allies, and the fourth-generational nature of the conflict, highlighted by an indiscernible distinction between wartime and peacetime, necessitates an evolution of America's traditional constitutional warmaking scheme. As first illustrated by the military strategist Colonel John Boyd, constitutional decision-making in the realm of war powers in the fourth generation should consider the implications of the OODA Loop: Observe, Orient, Decide, and Act. 44 **In the era of fourth-generational warfare**, quick reactions, proceeding through the OODA Loop rapidly, **and disrupting the enemy**'s OODA loop **are the keys to victory. "In order to win**," Colonel Boyd suggested, **"we should operate at a** faster tempo **or rhythm than our adversaries**." 145 In the words of Professor Creveld, "[b]oth organizationally and in terms of the equipment at their disposal, the armed forces of the world will have to adjust themselves to this situation by changing their doctrine, doing away with much of their heavy equipment and becoming more like police."1 46 Unfortunately, the existing constitutional understanding, which diffuses war power between two branches of government, necessarily (by the Framers' design) slows down decision- making. In circumstances where war is undesirable (which is, admittedly, most of the time, especially against other nation-states), the deliberativeness of the existing decision-making process is a positive attribute. In America's current situation, however, **in the midst of the conflict with** al-Qaeda and other **international terrorist organizations**, **the** existing **process** **of constitutional decision-making in warfare may prove a** fatal hindrance **to achieving the initiative** necessary **for victory**. **As a** slow-acting, deliberative body, **Congress does not have the ability to a**dequately **deal with** fast-emerging situations in fourth-generational warfare. Thus, **in order to combat transnational threats** such as al-Qaeda, **the executive branch** must **have the ability to operate by taking offensive military action** even **without congressional authorization, because** only the executive branch **is capable of the swift decision-making and action necessary to prevail in fourth-generational conflicts against fourthgenerational opponents.**

#### Reforms result in catastrophic terrorism---releases them and kills intel gathering

Jack Goldsmith 09, Henry L. Shattuck Professor at Harvard Law School, 2/4/09, “Long-Term Terrorist Detention and Our National Security Court,” http://www.brookings.edu/~/media/research/files/papers/2009/2/09%20detention%20goldsmith/0209\_detention\_goldsmith.pdf

These three concerns challenge the detention paradigm. They do nothing to eliminate the need for detention to prevent detainees returning to the battlefield. But many believe that we can meet this need by giving trials to everyone we want to detain and then incarcerating them under a theory of conviction rather than of military detention. I disagree. For many reasons, it is too risky for the U.S. government to deny itself the traditional military detention power altogether, and to commit itself instead to try or release every suspected terrorist. ¶ For one thing, military detention will be necessary in Iraq and Afghanistan for the foreseeable future. For another, we likely cannot secure convictions of all of the dangerous terrorists at Guantánamo, much less all future dangerous terrorists, who legitimately qualify for non-criminal military detention. The evidentiary and procedural standards of trials, civilian and military alike, are much higher than the analogous standards for detention. With some terrorists too menacing to set free, the standards will prove difficult to satisfy. Key evidence in a given case may come from overseas and verifying it, understanding its provenance, or establishing its chain of custody in the manners required by criminal trials may be difficult. This problem is exacerbated when evidence was gathered on a battlefield or during an armed skirmish. The problem only grows when the evidence is old. And perhaps most importantly, the use of such evidence in a criminal process may compromise intelligence sources and methods, requiring the disclosure of the identities of confidential sources or the nature of intelligence-gathering techniques, such as a sophisticated electronic interception capability. ¶ Opponents of non-criminal detention observe that despite these considerations, the government has successfully prosecuted some Al Qaeda terrorists—in particular, Zacharias Moussaoui and Jose Padilla. This is true, but it does not follow that prosecutions are achievable in every case in which disabling a terrorist suspect represents a surpassing government interest. Moreover, the Moussaoui and Padilla prosecutions highlight an under-appreciated cost of trials, at least in civilian courts. The Moussaoui and Padilla trials were messy affairs that stretched, and some observers believe broke, our ordinary criminal trial conceptions of conspiracy law and the rights of the accused, among other things. The Moussaoui trial, for example, watered down the important constitutional right of the defendant to confront witnesses against him in court, and the Padilla trial rested on an unprecedentedly broad conception of conspiracy.15 An important but under-appreciated cost of using trials in all cases is that these prosecutions will invariably bend the law in ways unfavorable to civil liberties and due process, and these changes, in turn, will invariably spill over into non-terrorist prosecutions and thus skew the larger criminal justice process.16¶ A final problem with using any trial system, civilian or military, as the sole lawful basis for terrorist detention is that the trials can result in short sentences (as the first military commission trial did) or even acquittal of a dangerous terrorist.17 In criminal trials, guilty defendants often go free because of legal technicalities, government inability to introduce probative evidence, and other factors beyond the defendant's innocence. These factors are all exacerbated in terrorist trials by the difficulties of getting information from the place of capture, by classified information restrictions, and by stale or tainted evidence. One way to get around this problem is to assert the authority, as the Bush administration did, to use non-criminal detention for persons acquitted or given sentences too short to neutralize the danger they pose. But such an authority would undermine the whole purpose of trials and would render them a sham. As a result, putting a suspect on trial can make it hard to detain terrorists the government deems dangerous. For example, the government would have had little trouble defending the indefinite detention of Salim Hamdan, Osama Bin Laden's driver, under a military detention rationale. Having put him on trial before a military commission, however, it was stuck with the light sentence that Hamdan is completing at home in Yemen.¶ As a result of these considerations, insistence on the exclusive use of criminal trials and the elimination of non-criminal detention would significantly raise the chances of releasing dangerous terrorists who would return to kill Americans or others. Since noncriminal military detention is clearly a legally available option—at least if it is expressly authorized by Congress and contains adequate procedural guarantees—this risk should be unacceptable. In past military conflicts, the release of an enemy soldier posed risks. But they were not dramatic risks, for there was only so much damage a lone actor or small group of individuals could do.18 Today, however, that lone actor can cause far more destruction and mayhem because technological advances are creating ever-smaller and ever-deadlier weapons. It would be astounding if the American system, before the advent of modern terrorism, struck the balance between security and liberty in a manner that precisely reflected the new threats posed by asymmetric warfare. We face threats from individuals today that are of a different magnitude than threats by individuals in the past; having government authorities that reflect that change makes sense.

#### Nuclear terrorism is feasible---high risk of theft and attacks escalate

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

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

#### Nuke terror causes extinction---equivalent to full-scale nuclear war

Owen B. Toon 7, chair of the Department of Atmospheric and Oceanic Sciences at CU-Boulder, et al., April 19, 2007, “Atmospheric effects and societal consequences of regional scale nuclear conflicts and acts of individual nuclear terrorism,” online: http://climate.envsci.rutgers.edu/pdf/acp-7-1973-2007.pdf

To an increasing extent, people are congregating in the world’s great urban centers, creating megacities with populations exceeding 10 million individuals. At the same time, advanced technology has designed nuclear explosives of such small size they can be easily transported in a car, small plane or boat to the heart of a city. We demonstrate here that a single detonation in the 15 kiloton range can produce urban fatalities approaching one million in some cases, and casualties exceeding one million. Thousands of small weapons still exist in the arsenals of the U.S. and Russia, and there are at least six other countries with substantial nuclear weapons inventories. In all, thirty-three countries control sufficient amounts of highly enriched uranium or plutonium to assemble nuclear explosives. A conflict between any of these countries involving 50-100 weapons with yields of 15 kt has the potential to create fatalities rivaling those of the Second World War. Moreover, even a single surface nuclear explosion, or an air burst in rainy conditions, in a city center is likely to cause the entire metropolitan area to be abandoned at least for decades owing to infrastructure damage and radioactive contamination. As the aftermath of hurricane Katrina in Louisiana suggests, the economic consequences of even a localized nuclear catastrophe would most likely have severe national and international economic consequences. Striking effects result even from relatively small nuclear attacks because low yield detonations are most effective against city centers where business and social activity as well as population are concentrated. Rogue nations and terrorists would be most likely to strike there. Accordingly, an organized attack on the U.S. by a small nuclear state, or terrorists supported by such a state, could generate casualties comparable to those once predicted for a full-scale nuclear “counterforce” exchange in a superpower conflict. Remarkably, the estimated quantities of smoke generated by attacks totaling about one megaton of nuclear explosives could lead to significant global climate perturbations (Robock et al., 2007). While we did not extend our casualty and damage predictions to include potential medical, social or economic impacts following the initial explosions, such analyses have been performed in the past for large-scale nuclear war scenarios (Harwell and Hutchinson, 1985). Such a study should be carried out as well for the present scenarios and physical outcomes.

#### Independently, the plan collapses intelligence gathering --- sources dry up --- destroys the heart of counter-terror policy

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

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

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

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

#### Intelligence cooperation solves WMD use

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

Third, the nature of warfare against such unconventional enemies may well be different from the set-piece battlefield matches between nation-states. Gathering intelligence, from both electronic and human sources, about the future plans of terrorist groups may be the only way to prevent September 11-style attacks from occurring again. Covert action by the Central Intelligence Agency or unconventional measures by special forces may prove to be the most effective tool for acting on that intelligence. Similarly, the least dangerous means for preventing rogue nations from acquiring WMD may depend on secret intelligence gathering and covert action, rather than open military intervention. A public revelation of the means of gathering intelligence, or the discussion of the nature of covert actions taken to forestall the threat by terrorist organizations or rogue nations, could render the use of force ineffectual or sources of information useless. Suppose, for example, that American intelligence agencies detected through intercepted phone calls that a terrorist group had built headquarters and training facilities in Yemen. A public discussion in Congress about a resolution to use force against Yemeni territory and how Yemen was identified could tip-off the group, allowing terrorists to disperse and to prevent further interception of their communications.

### 1NC

#### The Justice Department’s Office of Legal Counsel should issue a formal opinion that the President of the United States may not indefinitely detain without the Third Geneva Conventions Article Five rights. The President of the United States should comply with the Office of Legal Counsel’s opinion.

#### OLC opinions are presumptively binding and solve the case

Trevor Morrison 11, Professor of Law at Columbia Law School, “LIBYA, ‘HOSTILITIES,’ THE OFFICE OF LEGAL COUNSEL, AND THE PROCESS OF EXECUTIVE BRANCH LEGAL INTERPRETATION,” Harvard Law Review Forum Vol.124:42, http://www.harvardlawreview.org/media/pdf/vol124\_forum\_morrison.pdf

Deeply rooted traditions treat the Justice Department’s Office of Legal Counsel (OLC) as the most important source of legal advice wit h- in the executive branch. A number of important norms guide the provision and handling of that advice. OLC bases its answers on its best view of the law, not merely its sense of what is plausible or arguable. 6 To ensure that it takes adequate account of competing perspectives within the executive branch, it typically requests and fully considers the views of other affected agencies before answering the questions put to it. Critically, once OLC arrives at an answer, it is treated as binding within the executive branch unless overruled by the Attorney General or the President. That power to overrule, moreover, is wielded extremely rarely — virtually never. As a result of these and related norms, and in spite of episodes like the notorious “torture memos,” OLC has earned a well-deserved reputation for providing credible, authoritative, thorough and objective legal analysis. The White House is one of the main beneficiaries of that reputation. When OLC concludes that a government action is lawful, its conclusion carries a legitimacy that other executive offices cannot so readily provide. That legitimacy is a function of OLC’s deep traditions and unique place within the executive branch. Other executive offices — be they agency general counsels or the White House Counsel’s Office — do not have decades-long traditions of providing legal advice based on their best view of the law after fully considering the competing positions; they have not generated bodies of authoritative precedents to inform and constrain their work; and they do not issue legal opinions that, whether or not they favor the President , are treated as presumptively binding within the executive branch. (Nor should those other offices mimic OLC; that is not their job.) Because the value of a favorable legal opinion from OLC is tied inextricably to these aspects of its work, each successive presidential administration has a strong incentive to respect and preserve them.

#### Solves compliance but maintains flex

HLR 12, Harvard Law Review, Presidential Power and the Office of Legal Counsel, 125 Harv. L. Rev. 2090

As Professor Richard Pildes points out in his critique of their book, though, "willingness to follow OLC interpretations would seem to be the quintessential kind of executive self-binding constraint that Posner and Vermeule otherwise advocate as critical to presidential credibility." n61 Indeed, the President could self-interestedly announce that, because an independent OLC would provide him with a relatively unbiased view of the law, he is pledging to follow its advice in the vast majority of cases. Legally, the President would remain free to weigh OLC's opinion against the advice provided by the White House Counsel or cabinet officials, and he would retain the power to reject any OLC opinion with which he disagreed or which he believed would [\*2100] harm national security or other vital interests if followed. Informally, however, he would face political and reputational costs if he decided to go back on his pledge and substitute his own judgment for that of OLC, n62 costs made even more substantial as a result of the White House's reliance on OLC's reputation to legitimate some of its key legal positions. The stigma attached to disregarding OLC's advice n63 would thus constitute a meaningful limit on the President, particularly if public opinion plays a role in constraining the President, n64 because he would be discouraged from deviating from OLC's view unless he were willing to spend a significant amount of political capital. Thus, if OLC's internal safeguards work correctly, the President will have a strong incentive to follow a (relatively) impartial view of the law while nevertheless retaining the flexibility, in times of need, to determine the meaning of the law for himself.

## Oncase

## Solvency

### Solvency

#### Zero Solvency –

#### A) Applying the 5th Article requires repatriation only at the end of hostilities

3rd Geneva Convention – Commentaries on Article 5 ‘49

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Commentary - Art. 5. Part I : General provisions, ARTICLE 5 [ Link ] . -- BEGINNING AND END OF APPLICATION, PARAGRAPH 1. -- GENERAL PROVISIONS REGARDING APPLICATION AND DURATION

http://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/645ffef194956c48c12563cd0042535c

The Convention applies to prisoners of war "until their final release and repatriation". The time at which they must be released and repatriated is determined by Article 118, paragraph 1 [ Link ] , which provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities" (3). What is the meaning of the term "' final ' release and repatriation" (4)? It means that the prisoner must continue to be treated as such until such time as he is reinstated in the situation in which he was before being captured. Thus it might happen that prisoners of war would be repatriated to an occupied country and that subsequently the Occupying Power might wish to take measures concerning them for security [p.75] reasons. In accordance with Article 4, paragraph B [ Link ] (1), such military personnel must upon re-internment be given the treatment provided under the Convention. Similarly, there could be no question of the Detaining Power assuming the rights of the States which it might have annexed or occupied and then demobilizing and "liberating" prisoners of war in order to transform them into civilian workers.

#### B) The U.S. will never declare an end to hostilities with Al-Qaeda

Blank ’10 - Director, International Humanitarian Law Clinic, Emory University School of Law

GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, VOLUME 39 2010 NUMBER 1, DEFINING THE BATTLEFIELD IN CONTEMPORARY CONFLICT AND COUNTERTERRORISM: UNDERSTANDING THE PARAMETERS OF THE ZONE OF COMBAT, Laurie R. Blank, papers.ssrn.com/sol3/papers.cfm?abstract\_id=1677965

It is commonly accepted that once a state is engaged in an armed conflict, peacetime rules no longer apply. Killings that would be deemed murder or [\*1175] assassination outside armed conflict are not only permitted, but overtly pursued. Moreover, preventive detention schemes that bear little resemblance to Western democracies' criminal justice systems are both allowed and often deemed necessary for the duration of the conflict. Such a system works well when the enemy force is easily identifiable and distinguishable, and the conflict is both geographically and temporally limited. In the conflict between the United States and al Qaeda, however, none of these prerequisites apply. The enemy hides among the civilian population and is scattered across the globe. n20 There is no obvious endpoint, as it is unlikely that the United States is ever going to declare a truce or establish diplomatic relations with a terrorist enemy such as al Qaeda. n21 (Moreover, even after the "war" is deemed to have come to an end, the United States has increasingly laid the groundwork for an expansive view of self-defense - an issue to which I return in Part IV.) And due to technological advances, namely the use of drones, the United States has the ability to track and target the alleged enemy just about anywhere he is found.

### Rendition Turn

#### Plan causes extraordinary rendition shift

Kenneth Anderson 09, Professor of International Law at American University, 5/31, “Security Issues Like Squeezing Jello? Reversion to the Mean? Jack Goldsmith on the Effects of Security Alternatives,” http://opiniojuris.org/2009/05/31/security-issues-like-squeezing-jello-reversion-to-the-mean-jack-goldsmith-on-the-effects-of-security-alternatives/#sthash.TB1xcePu.dpuf

One way you might look at this is that there is a sort-of national security constant that remains in equilibrium over time, using one tactic or another, gradually evolving but representing over time a reversion to the national security mean. Or you might say that national security, seen over time, looks a little like squeezing jello – if squeezed one place it pops out another. ¶ I think Jack is right that the administration – any administration – tends to strive for a certain equilibrium, as it is confronted with a flow of threats that the public discounts to near-zero but which it does not see itself quite so able to do, however much it might want to. However, as the op-ed also notes, and I agree, these methods are not completely equivalent or compensating. That is so not just with regards to third party costs, but also with respect to security as such. Intelligence gathering, by all accounts not very effective to begin with, has become much more difficult. This is not compensation, it is a seemingly permanent downward shift in the security mean. ¶ Besides the consequences that Jack identifies, I would add that the current move to semi-compensating policies means two things. First, intelligence is likely to be increasingly outsourced to foreign intelligence services. That can provide valuable information, but it will be increasingly uncorroborated and subject to filtering by those services. That is not good. ¶ Second, in a somewhat unrelated matter, I would guess that future conflicts, where not fought by Predator, will be increasingly outsourced to proxy forces. ¶ In the focus on intelligence and security, I think this second point has not received sufficient attention. The United States has a long familiarity with proxy forces as a form of deniability, among other things – Ronald Reagan, for example, faced with many limitations placed by Congress on his uses of force, found proxy forces an essential element of his foreign policy, in Central America particularly. The domestic risks that policy can entail are illustrated by the Iran-Contra contra-temps; on the other hand, Reagan was reasonably successful in pursuing his administration’s anti-Communist and anti-Soviet policy aims in Salvador and Nicaragua, among other places, by proxy forces. ¶ But I would be quite surprised if proxy war were not today under active discussion for places like Somalia (where we have already undertaken measures close to it) and other places. More precisely, I would surprised if it were not an active discussion among the New Liberal Realists of the Obama administration, whatever the transnationalists say or think.¶ In any case, whether those last two speculations prove true or not, the tendency of the administration to seek compensating policies seems likely at a minimum to complicate the issues of Guantanamo, Bagram, and other matters besides.

#### Means they solve nothing

Anna-Katherine Staser McGill 12, School of Graduate and Continuing Studies in Diplomacy, Norwich University, David Gray, Campbell University, Summer 2012, “Challenges to International Counterterrorism Intelligence Sharing,” http://globalsecuritystudies.com/McGill%20Intel%20Share.pdf

The CIA’s use of “extraordinary rendition”, the practice of transporting a suspect to a third country for interrogation, has also stoked the ire of many traditional allies. Critics charge that this tactic quite simply allows the CIA to sidestep international laws and obligations by conducting interrogations in nations with poor human-rights records. In 2003, an Italian magistrate formally indicted 13 CIA agents for allegedly kidnapping an Italian resident and transporting him to a third country for interrogation. Ultimately 22 CIA agents and one US military officer were convicted in absentia of crimes connected to the abduction (Stewart, 1). The case not only heightened criticism of the US in Italy but challenged U.S. strategic communications aimed at reducing anti-Americanism worldwide (Reveron 462). According to Julianne Smith, director of the Europe program at the Center for Strategic and International Studies (CSIS), “[extraordinary rendition] makes it extremely difficult [for European governments] to stand shoulder-to-shoulder with the U.S.” (Heller 1).

## Advantage 1---Human Rights

### Offense

#### Incorporating CIL locks in outdated crisis response---political branch involvement is key to prevent mission creep that makes WMD crisis inevitable

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

D. The Democracy Deficit of Classical Customary International Law

The democracy deficit of classical customary law is more subtle. First, the role of publicists continues to create an agency problem by lodging discretionary decisions in a guild that is unrepresentative of the general population and not subject to any kind of electoral accountability. n155 To be sure, classical custom depends on more objective judgments, such as determinations about the number of nations that actually engage in a practice and do so from a sense of obligation. n156 But even these determinations require discretionary judgment. The practices of nation-states are not written down in some canonical text. They must be inferred from a study of historical events and then categorized. n157 Whether nations are engaging in a given practice out [\*1208] of a sense of obligation is also not self-evident. n158 Opinio juris thus also requires interpretation. It would be surprising if publicists were able to keep their normative views completely separate from these purportedly objective determinations.

As noted above, this is not simply a theoretical issue. The two groups most responsible for determining the content of international law - law professors and international jurists - are likely to have biases that will prompt them to both expand international law and shape its content to their liking. Even in the absence of biases, discovering the content of customary international law is far harder than discovering the content of statutes or treaties because these latter instruments are committed to writing. n159 This epistemic difficulty weakens the quality of international law even if democratic nations substantially contribute to the practices that constitute it because their practices are less closely connected to norms than in the domestic context. n160

Moreover, the materials from which practices are inferred, while more circumscribed than those relied on in modern customary international law, still may reflect a democracy deficit. First, the aforementioned problem of cheap talk remains: the acceptance of an international obligation does not necessarily suggest that it binds the nation domestically. Second, the classic conception of custom does not require that a government decision to follow a practice be in keeping with the will of its people. n161 Customary international law does not inquire into the internal governance of a nation from which a practice emerges.

To be sure, many nations now are democratic and thus the requirement of widespread consensus suggests that at least some democratic nations will sign on to new principles of customary international law. But nothing in customary international law requires that even the practices of democratic nations reflect the results of decisions of elected officials. n162 Many democratic nations insulate their policies on certain issues from popular control. For instance, majority public opinion in several European nations would like to apply the death penalty in certain circumstances, but political elites prevent these sentiments from becoming law and assure continued prohibition. n163

[\*1209] But even if we could rely on international publicists to make objective judgments, and even if the judgments were based on practices that emerged from the electoral processes of some democratic nations, classical customary international law faces another kind of democracy deficit: the problem of the dead hand. Because classical international law requires widespread consensus among states, once formulated it is difficult to change. n164 Even if all states participating in the formulation of international law were democratic, and even if we did not have an unrepresentative class of publicists and international jurists distilling its norms, it would still often fail to represent contemporary sentiment, as opposed to past democratic sentiment. The consensus requirement of international law locks old norms in place even if they are clearly suboptimal. n165

The problem is exacerbated in an age of rapid technological change, like our own. Customary international law arose at time when change in technology was relatively slow. Thus, rules once in place were unlikely to become anachronistic. Scientific discovery and technological invention now proceeds much faster and, according to some, at an ever-accelerating rate. n166 As a result, the nature of the world's social problems changes ever faster.

In this context, the dead hand problem is particularly acute. To take but one example, customary international law is perhaps best interpreted to preclude preemptive attacks, at least without the agreement of the Security Council. n167 Nevertheless, the possibility of weapons of mass destruction (WMD) may render that rule anachronistic. We are not here trying to determine whether a [\*1210] rule permitting or prohibiting preemption is wise. Our point is that democratic processes in our nation would evaluate sound policy on preemptive attacks with reference to current circumstances. It would not be confined by a consensus crystallized long ago at a time when terrorists and rogue states did not have easy access to weapons of mass destruction. n168

#### Incorporation of ILAW causes a move towards international tribunals that turns US modeling

John O. McGinnis 8, Northwestern University School of Law, Medellin v. Texas: Presidential Power and International Tribunals, 6 Geo. J.L. & Pub. Pol'y 129

Some have argued that following international judgments may improve American welfare because only international law, including delegations of international tribunals, can provide the solutions to tragedies of the common [\*136] where spillovers of one nation affect other nations. n42 For instance, it may be best for all nations to refrain from over-fishing in a common body of water because in the long run that makes everyone better off. n43 Thus, following that an international norm limiting fishing is a good idea, it may be better to follow judgments in the international body on how to interpret a treaty providing these fishing allocations because otherwise, the different courts of different nations may cheat at the margin.

But at most, this seems to me an argument for international agreements by the political branches to accept these international decisions. The political branches could decide to enter into treaties or even to adopt international judgments if they believe that it would solve coordination problems among nations. n44 That will provide some evidence that the solutions international law provides are actually good ones. I'll leave here to one side the important question of whether Article III or the Appointments Clause would constitutionally prevent such delegations.

Finally, some have argued we should follow raw international judgments to take into account the interest of other nationals. n45 I, myself, think the touchstone of American jurisprudence should be the welfare of Americans. But here, let me look at the question that American judgments may actually be better than international judgments for the interest of citizens around the world. First, not all activities in international law generate substantial negative spillovers from one nation to another. For instance, the decisions at Medellin only directly concern those who had subjected themselves to the jurisdiction of the United States and the center of policy interest was largely in the United States and not other nations. n46

Yet, even if one is concerned with how such judgments affect foreigners, our power to determine how the processes of our own criminal law work, including how those processes relate to treaties, has benefits to foreigners. One benefit is that some individuals can choose to move, here as millions do each decade, to take advantage of our peculiar bundle of rights and responsibilities. n47 Moreover, all democratic nations can evaluate our rights and processes and embrace as many as are good for them. n48 Of course, I recognize the issue in Medellin is [\*137] small enough that it hardly is likely to be a spur to migration to the United States or even much emulation abroad. But in the future, the issue may well be more important as the international tribunals take on a far wider scope. Thus, the principal of local autonomy in deciding such issues remains very important. By converging our domestic jurisprudence to some international standard, we may actually prevent other nations from enjoying the fruits of our judicial approach.

#### International law will be manipulated to crush hegemony

Rivkin, former DOJ director, 2K—partner in the law firm of Baker & Hostetler, LLP, and was Deputy Director, Office of Policy Development, U.S. Department of Justice, and served in the White House Counsel’s Office. (David and Lee A. Casey—served in the Office of Legal Counsel in the U.S. Department of Justice, The Rocky Shoals of International Law, Winter 2000, http://findarticles.com/p/articles/mi\_m2751/is\_2000\_Winter/ai\_68547471/, AMiles)

Second, as a practical matter, the new international law has the potential to undermine American leadership in the post-Cold War global system. Even more fundamentally, international law may well make the world safe for aggression, by imposing undue constraints on those countries that are willing to use force to deter and punish it. Although, as noted above, the new international law has a number of manifestations, those elements dealing with the use of military force, and the potential consequences for individual American officials who order or implement its use, are the most advanced and pernicious. As the world's pre-eminent military power, with global interests and responsibilities, the United States should be very concerned about any effort to create international judicial institutions capable of prosecuting individual soldiers, officers and elected officials in the chain of command. The international criminal "norms" applied in these courts, both in the ad hoc criminal courts for the former Yugoslavia and Rwanda and in the International Criminal Court, are ambiguous in their meaning and remarkably fluid in their application. For example, one of the "war crimes prosecutable in the ICC is defined as [i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. Whether any particular attack causes "excessive" civilian injuries or environmental damage is very much a matter of opinion. This is, in fact, a crime that can be tailored to fit almost any circumstances, as was all but openly acknowledged by the prosecutor's office of the Yugoslav tribunal during its investigation of alleged NATO war crimes. This investigation was undertaken after a number of NGOs complained that NATO's 1999 air campaign against Serbia resulted in too many civilian deaths. As candidly noted in [t]he answers to these questions [regarding allegedly excessive civilian casualties] are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision-maker. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. [4] The key underlying problem here is that injuries to noncombatants and their property--so-called "collateral damage"--are an endemic consequence of combat. As a result, the traditional law of war, jus in hello, although proscribing certain hostile actions toward civilians, eschewed overly rigid rules on collateral damage. Unfortunately, instead of continuing to rely on the broad, traditional jus in hello principles of proportionality and discrimination, the new norms have come to resemble American domestic regulatory law. These rules are overly prescriptive and proscriptive, to such an extent that ensuring full compliance has become almost impossible. This is particularly the case because the new international law seems to suggest that zero civilian casualties and no collateral damage are not only attainable outcomes in modern combat, but that these should be the norm. The combination of the unrealistic norms and unaccountable judicial bodies that would apply them is particularly problematic. The American military is particularly vulnerable here. This is because U.S. military doctrine has always been attrition-oriented, emphasizing the intensive application of firepower and the use of "decisive force." It is inevitable that damage to civilian sites, and civilian casualties, will result. This is all the more likely given the growing American aversion to combat casualties, which forces our military commanders to rely more and more on air strikes and missile attacks. This raises the real possibility that American soldiers and officials will be considered subject to prosecution, even in situations where the intervention has been "humanitarian" in character, as with the air campaign against Serbia. Significantly, while no prosecutions against NATO officials are currently planned, even the relatively tame Yugoslav tribunal did not give the alliance a clean bill of health. Indeed, the prosecutor's office declined to bring indictments, not because it concluded that no crimes were committed by NATO, but because "[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses." Future outcomes in the permanent ICC, a court that will be less dependent upon U.S. and NATO largesse than is the Yugoslav tribunal, may be very different. And the fact that the United States has not signed, and would not ratify, the ICC treaty will not prevent the ICC from pursuing Americans. The court claims to exercise a form of "universal jurisdiction" that will allow it to prosecute American citizens when their actions, or the effects of their ac tions, take place on the territory of a state that has signed the ICC treaty. Moreover, the danger here is not limited to the potential actions of the ICC. Based on the "universal jurisdiction" theory--which suggests that any state can prosecute international humanitarian violations wherever they occur, whether or not that state's own citizens are involved--any state, or even a low-level foreign magistrate, can begin a prosecution against American military or civilian officials. This was, of course, the case with the former Chilean dictator, Augusto Pinochet, who traveled to England for medical treatment in 1998, and was very nearly extradited to Spain to stand trial for his actions during his rule in Chile. Overall, there is no doubt that, insofar as they can successfully claim the right to prosecute military and civilian leaders for violations of the laws of war and international humanitarian norms, international judicial bodies and interested states will be able effectively to shape American policy. An American president would be far less likely to use force if there were a genuine possibility that U.S. soldiers or officials, including himself, would face future prosecution in a foreign court. Both our allies and our adversaries fully understand the importance of molding the new international law to fit their needs, and its power as an effective weapon against the United States. Examples of this phenomenon are not difficult to find. Human rights activists, of course, have frequently made exaggerated claims that pre-existing international humanitarian norms require fundamental changes in U.S. foreign and domestic policy. States are also increasingly using the language of law as a means of shaping U.S. policy. In one of the most boldly cynical examples of this phenomenon, the People's Republic of China--desperate to prevent American deployment of even a limited anti-ballistic missile defense--has asserted that the 1972 Anti-Ballistic Missile Treaty between the United States and the Soviet Union remains in force (even though the Soviet Union disappeared a decade ago), and that it cannot be terminated by the United States because that treaty has assumed the status of "customary" international law.

### AT: Human Rights Modeling

#### Authoritarian states don’t follow norms

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

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

#### Human rights credibility irrelevant

Andrew Moravcsik 5, PhD and a Professor of Politics and International Affairs at Princeton, 2005, "The Paradox of U.S. Human Rights Policy," American Exceptionalism and Human Rights, http://www.princeton.edu/~amoravcs/library/paradox.pdf

It is natural to ask: What are the consequences of U.S. "exemptionalism” and noncompliance? International lawyers and human rights activists regularly issue dire warnings about the ways in which the apparent hypocrisy of the United States encourages foreign governments to violate human rights, ignore international pressure, and undermine international human rights institutions. In Patricia Derian's oft-cited statement before the Senate in I979: "Ratification by the United States significantly will enhance the legitimacy and acceptance of these standards. It will encourage other countries to join those which have already accepted the treaties. And, in countries where human rights generally are not respected, it will aid citizens in raising human rights issues.""' One constantly hears this refrain. Yet there is little empirical reason to accept it. Human rights norms have in fact spread widely without much attention to U.S. domestic policy. In the wake of the "third wave" democratization in Eastern Europe, East Asia, and Latin America, government after government moved ahead toward more active domestic and international human rights policies without attending to U.S. domestic or international practice." The human rights movement has firmly embedded itself in public opinion and NGO networks, in the United States as well as elsewhere, despite the dubious legal status of international norms in the United States. One reads occasional quotations from recalcitrant governments citing American noncompliance in their own defense-most recently Israel and Australia-but there is little evidence that this was more than a redundant justification for policies made on other grounds. Other governments adhere or do not adhere to global norms, comply or do not comply with judgments of tribunals, for reasons that seem to have little to do with U.S. multilateral policy.

### AT: Climate Change

#### Best data proves climate change doesn’t cause conflict

Erik Gartzke 11, Associate Professor of Political Science at UC-San Diego, March 16, 2011, “Could Climate Change Precipitate Peace?,” online: <http://dss.ucsd.edu/~egartzke/papers/climate_for_conflict_03052011.pdf>An evolving consensus that the earth is becoming warmer has led to increased interest in the social consequences of climate change. Along with rising sea levels, varying patterns of precipitation, vegetation, and possible resource scarcity, perhaps the most incendiary claims have to do with conflict and political violence. A second consensus has begun to emerge among policy makers and opinion leaders that global warming may well result in increased civil and even interstate warfare, as groups and nations compete for water, soil, or oil. Authoritative bodies, leading government officials, and even the Nobel Peace prize committee have highlighted the prospect that climate change will give rise to more heated confrontations as communities compete in a warmer world. Where the basic science of climate change preceded policy, this second consensus among politicians and pundits about climate and conflict formed in the absence of substantial scientific evidence. While anecdote and some focused statistical research suggests that civil conflict may have worsened in response to recent climate change in developing regions (c.f., Homer-Dixon 1991, 1994; Burke et al. 2009). these claims have been severely criticized by other studies (Nordas & Gleditsch 2007; Buhaug et al. 2010: Buhaug 2010).1 In contrast, long-term macro statistical studies find that conflict increases in periods of climatic chill (Zhang et al. 2006, 2007; Tol & Wagner 2010).2 Research on the more recent past reveals that interstate conflict has declined in the second half of the twentieth century,

the very period during which global warming has begun to make itself felt (Goldstein 2002; Levy et al. 2001; Luard 1986, 1988; Hensel 2002; Sarkees, et al. 2003; Mueller 2009).3 While talk of a ''climatic peace” is premature, broader claims that global warming causes conflict must be evaluated in light of countervailing evidence and a contrasting set of causal theoretical claims.4

#### No climate multilateralism — nationalism ensures gridlock

David Held 13, Professor of Politics and International Relations, at the University of Durham AND Thomas Hale, Postdoctoral Research Fellow at the Blavatnik School of Government, Oxford University AND Kevin Young, Assistant Professor in the Department of Political Science at the University of Massachusetts Amherst, 5/24/13, “Gridlock: the growing breakdown of global cooperation,” http://www.opendemocracy.net/thomas-hale-david-held-kevin-young/gridlock-growing-breakdown-of-global-cooperation

Gridlock exists across a range of different areas in global governance today, from security arrangements to trade and finance. This dynamic is, arguably, most evident in the realm of climate change. The diffusion of industrial production across the world—a process enabled by economic globalization—has created a situation in which the basic consumption of each individual directly affects the life chances of every other individual on the planet, as well as the life chances of future generations.¶ This is a powerful and entirely new form of global interdependence. Bluntly put, the future of our civilization depends on our ability to cooperate across borders. And yet, despite twenty years of multilateral negotiations under the UN, a global deal on climate change mitigation or adaptation remains elusive, with differences between developed countries, which have caused the problem, and developing countries, which will drive future emissions, forming the core barrier to progress. Unless we overcome gridlock in climate negotiations, as in other issue areas, we will be unable to continue to enjoy the peace and prosperity we have inherited from the postwar order.¶ There are, of course, several forces that might work against gridlock. These include the potential of social movements to uproot existing political constraints, catalysed by IT innovation and the use of associated technology for coordination across borders; the capacity of existing institutions to adapt and accommodate factors such as emerging multipolarity (the shift from the G-5/7 to the G-20 is one example); and efforts at institutional reform which seek to alter the organizational structure of global governance (for example, proposals to reform the Security Council or to establish a financial transaction tax). ¶ Whether there is the political will or leadership to move beyond gridlock remains a pressing question. Social movements find it difficult to convert protests into consolidated institutional change. At the same time, the political leadership of the great power blocs appears dogged by national concerns: Washington is sharply divided, Europe is preoccupied with the future of the Euro and China is absorbed by the challenge of sustaining economic growth as the prime vehicle of domestic legitimacy. Against this background, the further deepening of gridlock and the continuing failure to address global collective action problems appears likely.

### AT: Disease

#### No extinction

Posner 5—Senior Lecturer, U Chicago Law. Judge on the US Court of Appeals 7th Circuit. AB from Yale and LLB from Harvard. (Richard, Catastrophe, http://goliath.ecnext.com/coms2/gi\_0199-4150331/Catastrophe-the-dozen-most-significant.html)

Yet the fact that Homo sapiens has managed to survive every disease to assail it in the 200,000 years or so of its existence is a source of genuine comfort, at least if the focus is on extinction events. There have been enormously destructive plagues, such as the Black Death, smallpox, and now AIDS, but none has come close to destroying the entire human race. There is a biological reason. Natural selection favors germs of limited lethality; they are fitter in an evolutionary sense because their genes are more likely to be spread if the germs do not kill their hosts too quickly. The AIDS virus is an example of a lethal virus, wholly natural, that by lying dormant yet infectious in its host for years maximizes its spread. Yet there is no danger that AIDS will destroy the entire human race. The likelihood of a natural pandemic that would cause the extinction of the human race is probably even less today than in the past (except in prehistoric times, when people lived in small, scattered bands, which would have limited the spread of disease), despite wider human contacts that make it more difficult to localize an infectious disease.

## Advantage 2---Rule of Law

### AT: Judicial Modeling

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

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

The second benefit to foreigners of distinctive U.S. legal norms is information. The costs and benefits of our norms will be visible for all to see. n268 Particularly in an era of increased empirical social science testing, over time we will be able to analyze and identify the effects of differences in norms between the United States and other nations. n269 Such diversity benefits foreigners as foreign nations can decide to adopt our good norms and avoid our bad ones.

The only noteworthy counterargument is the claim that U.S. norms will have more harmful effects than those of raw international law, yet other nations will still copy them. But both parts of this proposition seem doubtful. First, U.S. law emerges from a democratic process that creates a likelihood that it will cause less harm than rules that emerge from the nondemocratic processes [\*1235] that create international law. Second, other democratic nations can use their own political processes to screen out American norms that might cause harm if copied.

Of course, many nations remain authoritarian. n270 But our norms are not likely to have much influence on their choice of norms. Authoritarian states are likely to select norms that serve the interests of those in power, regardless of the norms we adopt. It is true that sometimes they might cite our norms as cover for their decisions. But the crucial word here is "cover." They would have adopted the same rules, anyway. The cover may bamboozle some and thus be counted a cost. But this would seem marginal compared to the harm of allowing raw international law to trump domestic law.

### AT: Rule of Law

#### The broader US legal system has tanked

Jonathan Turley 10, the Shapiro Professor of Public Interest Law at George Washington University, member of USA TODAY's Board of Contributors, 6/14/10, “Do laws even matter today?,” http://usatoday30.usatoday.com/news/opinion/forum/2010-06-15-column15\_ST\_N.htm

Though I am a critic of the Arizona law, I do not view its supporters in such one-dimensional terms. Indeed, I do not view the public response in purely immigration terms. Whether it is illegal immigration or the mortgage crisis or corporate bailouts, there seems to be a growing sense among many citizens that they are expected to play by the rules while others are exempt.¶ With polls showing about 60% of people supporting the Arizona law and almost half supporting similar laws in their states, it is implausible to suggest that all these people are racists or extremists — let alone fascists. Notably, a majority of Americans also opposed the bank bailouts and mortgage forgiveness. In each of these controversies, there is a sense that the government was stepping in to protect people from the consequences of their actions.¶ In the mortgage crisis, tens of thousands of people accepted high-risk, low-interest loans while other citizens either declined to buy homes or agreed to higher monthly payments to avoid such deals. When Congress intervened with mortgage relief, some of those who had acted responsibly wondered whether they acted stupidly by rejecting low rates and later federal support.¶ Bailouts and immigration¶ Then there were the corporate bailouts. For citizens to secure a loan, they have to meet exacting terms and disclosures. Yet, when banks and firms concealed risks or engaged in financial wrongdoing, Congress bailed them out and allowed their executives to reap fat bonuses. The laws on fraud and deceptive practices simply did not seem to apply to them. Just as several companies were declared "too big to fail," many of their executives appeared too big to lose money — unlike the millions of citizens burned by their business practices.¶ Those prior controversies coalesced with the immigration debate. The last time Congress granted amnesty to illegal immigrants was 1986 — and it was criticized at the time for rewarding those who had evaded deportation. Complaints over the lack of federal enforcement had been percolating for years but exploded along Arizona's long desert border. When a law mandated state enforcement of federal laws, the Obama administration moved to block it.¶ Indeed, high-ranking Obama officials such as John Morton, head of the Immigration and Customs Enforcement, have suggested that they might refuse to deport those arrested under the Arizona law. While we continue to tell millions around the world that they must wait for years to immigrate legally, Congress and the White House are considering a new amnesty proposal to benefit an additional 11 million illegal immigrants.¶ In each of these areas, the perception is that the law says one thing but actually means different things for different people.

It is a dangerous perception, and it is not entirely unfounded. Such double-standards have become common as Congress and presidents seek to avoid unpopular legal problems.¶ •Torture: While acknowledging that waterboarding is torture and that torture violates domestic and international law, President Obama and members of Congress have barred any investigation or prosecution of those crimes.¶ •Pollution: While citizens are subject to pay for the full damage they cause to their neighbors and are routinely fined for their environmental damage for everything from dumping in rivers to leaf burning, Congress capped the liability for massive corporations such as BP and Exxon at a ridiculous $75 million. Though BP is likely to spend much more in litigation (particularly if prosecuted criminally), the current law requires citizens to pay the full cost of their environmental damage while capping the costs for companies producing massive destruction.¶ •Privacy: When the telecommunications companies found themselves on the losing end of citizen suits over the violation of privacy laws, Congress (including then-Sen. Obama) and President Bush simply changed the law to legislatively kill the citizen suits and protect the companies.¶ An arbitrary system¶ The message across these areas is troubling. To paraphrase Animal Farm, all people are equal, but some people are more equal than others.¶ A legal system cannot demand the faith and fealty of the governed when rules are seen as arbitrary and deceptive. Our leaders have led us not to an economic crisis or an immigration crisis or an environmental crisis or a civil liberties crisis. They have led us to a crisis of faith where citizens no longer believe that laws have any determinant meaning. It is politics, not the law, that appears to drive outcomes — a self-destructive trend for a nation supposedly defined by the rule of law.

### AT: Afghanistan War

#### Afghan stability increasing

DoD July 2013, Department of Defense, July 2013, "Report on¶ Progress Toward Security and¶ Stability in Afghanistan," http://www.defense.gov/pubs/Section\_1230\_Report\_July\_2013.pdf¶

The conflict in Afghanistan has shifted into a fundamentally new phase. For the past 11 years, ¶ the United States and our coalition partners have led the fight against the Taliban, but now ¶ Afghan forces are conducting almost all combat operations. The progress made by the ¶ International Security Assistance Force (ISAF)-led surge over the past three years has put the ¶ Government of the Islamic Republic of Afghanistan (GIRoA) firmly in control of all of ¶ Afghanistan’s major cities and 34 provincial capitals and driven the insurgency into the ¶ countryside. ISAF’s primary focus has largely transitioned from directly fighting the insurgency ¶ to training, advising and assisting the Afghan National Security Forces (ANSF) in their efforts to ¶ hold and build upon these gains, enabling a U.S. force reduction of roughly 34,000 personnel—¶ half the current force in Afghanistan—by February 2014. ¶ As agreed by President Obama and President Karzai at their January 2013 meeting in ¶ Washington, D.C., and in line with commitments made at the Lisbon and Chicago NATO ¶ summits, "Milestone 2013" was announced on June 18, 2013, marking ISAF’s official transition ¶ to its new role. The ANSF has grown to approximately 96 percent of its authorized end-strength ¶ of 352,000 personnel and is conducting almost all operations independently. As a result, ISAF ¶ casualties are lower

than they have been since 2008. The majority of ISAF bases has been ¶ transferred to the ANSF or closed (although most large ISAF bases remain), and construction of¶ most ANSF bases is complete. Afghanistan’s populated areas are increasingly secure; the ANSF ¶ has successfully maintained security gains in areas that have transitioned to Afghan lead ¶ responsibility. To contend with the continuing Taliban threat, particularly in rural areas, the ¶ ANSF will require training and key combat support from ISAF, including in extremis close air ¶ support, through the end of 2014.

### AT: Indo-Pak War

#### No conflict and no nuclear escalation- deterrence

A. Vinod Kumar 6/30/13 MPhil in disarmament studies and an Associate Fellow at Institute for Defense Studies and Analyses, New Delhi, 6/30/13, "Nuclear Deterrence Works in Indo-Pak Ties," http://www.indepthnews.info/index.php/global-issues/1650-nuclear-deterrence-works-in-indo-pak-ties

NEW DELHI (IDN | [IDSA](http://www.idsa.in/)) - For over two decades, a dominant section of western analysts harped on the volatilities of the India and Pakistan nuclear dyad, often overselling the ‘South Asia as a nuclear flashpoint’ axiom, and portending a potential nuclear flare-up in every major stand-off between the two countries. The turbulence in the sub-continent propelled such presages, with one crisis after another billowing towards serious confrontations, but eventually easing out on all occasions. While the optimists described this as evidence of nuclear deterrence gradually consolidating in this dyad, the pessimists saw in it the ingredients of instability that could lead to a nuclear conflict. Though there is no denial of the fact that the three major crises since the 1998 nuclear tests – Kargil (1999), the Parliament attack and Operation Parakram (2001-2002) and the Mumbai terror strike (2008) – brought the two rivals precariously close to nuclear showdowns, not once had their leaderships lost complete faith in the efficacy of mutual deterrence.

### AT: Russia War

#### No Russia war---no motive or capability

Betts 13 Richard is the Arnold A. Saltzman Professor of War and Peace Studies @ Columbia. “The Lost Logic of Deterrence,” Foreign Affairs, March/April, Vol. 92, Issue 2, Online

These continuities with the Cold War would make sense only between intense adversaries. Washington and Moscow remain in an adversarial relationship, but not an intense one. If the Cold War is really over, and the West really won, then continuing implicit deterrence does less to protect against a negligible threat from Russia than to feed suspicions that aggravate political friction. In contrast to during the Cold War, it is now hard to make the case that Russia is more a threat to NATO than the reverse. First, the East-West balance of military capabilities, which at the height of the Cold War was favorable to the Warsaw Pact or at best even, has not only shifted to NATO's advantage; it has become utterly lopsided. Russia is now a lonely fraction of what the old Warsaw Pact was. It not only lost its old eastern European allies; those allies are now arrayed on the other side, as members of NATO. By every significant measure of power -- military spending, men under arms, population, economic strength, control of territory -- NATO enjoys massive advantages over Russia. The only capability that keeps Russia militarily potent is its nuclear arsenal. There is no plausible way, however, that Moscow's nuclear weapons could be used for aggression, except as a backstop for a conventional offensive -- for which NATO's capabilities are now far greater.¶ Russia's intentions constitute no more of a threat than its capabilities. Although Moscow's ruling elites push distasteful policies, there is no plausible way they could think a military attack on the West would serve their interests. During the twentieth century, there were intense territorial conflicts between the two sides and a titanic struggle between them over whose ideology would dominate the world. Vladimir Putin's Russia is authoritarian, but unlike the Soviet Union, it is not the vanguard of a globe-spanning revolutionary ideal.

# Neg Block

## DA

### Nuke Terror

#### Nuclear terrorism likely—state sponsorship key

Graham Allison, Director, Belfer Center for Science and International Affairs; Douglas Dillon Professor of Government; Faculty Chair, Dubai Initiative, Harvard Kennedy School, 9/7/12, "Living in the Era of Megaterror", belfercenter.ksg.harvard.edu/publication/22302/living\_in\_the\_era\_of\_megaterror.html

Today, how many people can a small group of terrorists kill in a single blow? Had Bruce Ivins, the U.S. government microbiologist responsible for the 2001 anthrax attacks, distributed his deadly agent with sprayers he could have purchased off the shelf, tens of thousands of Americans would have died. Had the 2001 “Dragonfire” report that Al Qaeda had a small nuclear weapon (from the former Soviet arsenal) in New York City proved correct, and not a false alarm, detonation of that bomb in Times Square could have incinerated a half million Americans.¶ In this electoral season, President Obama is claiming credit, rightly, for actions he and U.S. Special Forces took in killing Osama bin Laden. Similarly, at last week’s Republican convention in Tampa, Jeb Bush praised his brother for making the United States safer after 9/11. There can be no doubt that the thousands of actions taken at federal, state and local levels have made people safer from terrorist attacks.¶ Many are therefore attracted to the chorus of officials and experts claiming that the “strategic defeat” of Al Qaeda means the end of this chapter of history. But we should remember a deeper and more profound truth. While applauding actions that have made us safer from future terrorist attacks, we must recognize that they have not reversed an inescapable reality: The relentless advance of science and technology is making it possible for smaller and smaller groups to kill larger and larger numbers of people.¶ If a Qaeda affiliate, or some terrorist group in Pakistan whose name readers have never heard, acquires highly enriched uranium or plutonium made by a state, they can construct an elementary nuclear bomb capable of killing hundreds of thousands of people. At biotech labs across the United States and around the world, research scientists making medicines that advance human well-being are also capable of making pathogens, like anthrax, that can produce massive casualties.¶ What to do? Sherlock Holmes examined crime scenes using a method he called M.M.O.: motive, means and opportunity. In a society where citizens gather in unprotected movie theaters, churches, shopping centers and stadiums, opportunities for attack abound. Free societies are inherently “target rich.”¶ Motive to commit such atrocities poses a more difficult challenge. In all societies, a percentage of the population will be homicidal. No one can examine the mounting number of cases of mass murder in schools, movie theaters and elsewhere without worrying about a society’s mental health. Additionally, actions we take abroad unquestionably impact others’ motivation to attack us.¶ As Faisal Shahzad, the 2010 would-be “Times Square bomber,” testified at his trial: “Until the hour the U.S. ... stops the occupation of Muslim lands, and stops killing the Muslims ... we will be attacking U.S., and I plead guilty to that.”¶ Fortunately, it is more difficult for a terrorist to acquire the “means” to cause mass casualties. Producing highly enriched uranium or plutonium requires expensive industrial-scale investments that only states will make. If all fissile material can be secured to a gold standard beyond the reach of thieves or terrorists, aspirations to become the world’s first nuclear terrorist can be thwarted.

#### Bioterrorism causes extinction- no barriers to use and terrorists pursuing now

Nathan Myhrvold '13, Phd in theoretical and mathematical physics from Princeton, and founded Intellectual Ventures after retiring as chief strategist and chief technology officer of Microsoft Corporation , July 2013, "Stratgic Terrorism: A Call to Action," The Lawfare Research Paper Series No.2, <http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf>

A virus genetically engineered to infect its host quickly, to generate symptoms slowly—say, only after weeks or ¶ months—and to spread easily through the air or by casual contact would be vastly more devastating than HIV. It could silently penetrate the population to unleash its deadly effects suddenly. This type of epidemic would be almost impossible to combat because most of the infections would occur before the epidemic became obvious. A technologically sophisticated terrorist group could develop such a virus and kill a large part of humanity with it. Indeed, terrorists may not have to develop it themselves: some scientist may do so first and publish the details.¶ Given the rate at which biologists are making discoveries about viruses and the immune system, at some point in the near future, someone may create artificial pathogens that could drive the human race to extinction. Indeed, a ¶ detailed species-elimination plan of this nature was openly ¶ proposed in a scientific journal. ¶ The ostensible purpose of that particular research was ¶ to suggest a way to extirpate the malaria mosquito, but ¶ similar techniques could be directed toward humans.16 ¶ When I’ve talked to molecular biologists about this method, they are quick to point out that it is slow and easily ¶ detectable and could be fought with biotech remedies. If ¶ you challenge them to come up with improvements to the ¶ suggested attack plan, however, they have plenty of ideas.¶ Modern biotechnology will soon be capable, if it is not already, of bringing about the demise of the human race—¶ or at least of killing a sufficient number of people to end ¶ high-tech civilization and set humanity back 1,000 years or ¶ more. That terrorist groups could achieve this level of technological sophistication may seem far-fetched, but keep in mind that it takes only a handful of individuals to accomplish these tasks. Never has lethal power of this potency been accessible to so few, so easily. Even more dramatically ¶ than nuclear proliferation, modern biological science has ¶ frighteningly undermined the correlation between the lethality of a weapon and its cost, a fundamentally stabilizing ¶ mechanism throughout history. Access to extremely lethal agents—lethal enough to exterminate Homo sapiens—will be available to anybody with a solid background in biology, terrorists included.¶ The 9/11 attacks involved at least four pilots, each of ¶ whom had sufficient education to enroll in flight schools ¶ and complete several years of training. Bin laden had a degree in civil engineering. Mohammed Atta attended a German university, where he earned a master’s degree in urban ¶ planning—not a field he likely chose for its relevance to ¶ terrorism. A future set of terrorists could just as easily be students of molecular biology who enter their studies innocently enough but later put their skills to homicidal use. ¶ Hundreds of universities in Europe and Asia have curricula ¶ sufficient to train people in the skills necessary to make a ¶ sophisticated biological weapon, and hundreds more in the ¶ United States accept students from all over the world. ¶ Thus it seems likely that sometime in the near future a small band of terrorists, or even a single misanthropic individual, will overcome our best defenses and do something truly terrible, such as fashion a bioweapon that could kill ¶ millions or even billions of people. Indeed, the creation of such weapons within the next 20 years seems to be a virtual certainty.

### AT: Link Turn

#### Broader CT practices gut legitimacy/credibility/HR/due process

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

One should be cautious of jumping too quickly to condemnation. No country has a perfect record on human rights. Indeed, as Darius Rejali and others have documented, modern torture techniques have been perfected not only by totalitarian states but also by the grand liberal democracies, particularly the UK, France, and the U.S. 6 But the scope and magnitude of the post-9/11 institutionalization of torture and other abuses is unique in modern history among the liberal democratic states. The institution undermines the principles of equality before the law, universal human dignity and autonomy, and basic liberties are the moral-philosophical core of the liberal democratic state. ¶ The system of torture and its legal arguments created in its defense have damaged international human rights standards and diminished credibility and legitimacy of the United States as a lead advocate for human rights. It is likely to have compromised national security as well. Is it possible to reverse this damage to credibility and security? A number of tenuous balancing acts are involved. Each of these elements stands on their own as a nest of complex issues in need of resolution and for which present options are suboptimal. Credibility, however, depends on each of them taken as an interrelated whole. these critical balancing acts include: 1) legally and humanely processing Guantanamo detainees and other detainees in light of the abuses, while also ensuring national and international security; 2) pursuing the moral and legal accountability required in a representational democracy, while mitigating other resulting political and social injuries; and 3) reinforcing international human rights standards and ensuring the rule of law in tandem with the pursuit of national interests. Furthermore, the events compel us to revisit a larger and older question addressed briefly in the final section: what must be said about the contemporary status and nature of human rights and their enforcement if powerful countries may ignore them or rewrite their content to accommodate the perceived interests of that country?

#### Lack of accountability for past practices guts cred

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

A second critical element for restoring credibility is accountability for the torture regime undertaken through concrete measures. President Obama’s executive order closing Guantanamo and the black sites is a good first step. Despite the complexities discussed above regarding the detainees, the prison closings demonstrate a presumptive respect for the rule of law and for the public moral element of accountability. Yet these two strains of accountability — legal and public-moral accountability — do not necessarily overlap. Accountability, moreover, must take into account political context. This is not to say that politics should take priority over law and morality. It is to raise the finer point that the purpose of genuine accountability is defeated if undertaken (or not undertaken) for political reasons or if seriously undermined by political upheaval or other comparable damages to a society. A democratic society is defined in part by its accountability mechanisms and the fairness of their application. But we should be very careful. Resistance to investigation and accountability in the name of social unity has deep and manipulative political roots in nearly every country whose leaders have faced war crimes accusations. It would be very tempting simply to “look ahead.”¶ The reason for pursuing accountability is not solely retribution for previous wrongs or, although vital, restoration of the rule of law. Accountability has a pragmatic function. It helps to ensure that acts destructive of any human rights framework we wish to perpetuate, acts such as torture, do not occur again. Indeed, as discussed in the concluding remarks, society reconstructs not only the rule of law but also a more robust human rights regime through demands for and concrete steps towards genuine accountability.¶ Legal accountability. Manfred Nowak, U.N. Special Rapporteur on Torture, has announced that the U.S. is obligated under the U.N. Convention Against Torture to investigate and prosecute officials involved in legally justifying torture as a first step. Otherwise, the other 145 countries of the convention are obligated by law to claim universal jurisdiction and carry out investigations and prosecutions if necessary. Indeed, in the current absence of a U.S. investigation, Spain’s investigating magistrate of the national court, Judge Baltasar Garzón (who brought the war crimes case against Augusto Pinochet of Chile), has opened a criminal investigation into Guantanamo detainee torture, possibly extending to other prisons such as the Baghram military base. A second case brought by the national court against six high-level Bush administration officials is currently under consideration. ¶ The law is clear. U.S. civil code Title 18, Part I, Chapter 113c, § 2340 defines and outlaws torture. Explicitly in accordance with Common Article 3 of the Geneva conventions, Chapter 118, § 2441 outlines prosecutable war crimes, including torture, cruel or inhuman treatment, murder, and sexual assault or abuse. If death results from the abuses, the United States may seek the death penalty. Recall that roughly 100 detainees have died in U.S. custody, 34 of these cases attributed by human rights first to death from torture.40 The Supremacy Clause of the U.S. Constitution (Article VI, Paragraph 2) states, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding,” integrating ratified international treaty law into the heart of U.S. federal law.¶ The U.S. is party to the Geneva conventions, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the American Convention on Human Rights (signatory only), and other relevant international law. The U.S. has thus far refused to sign the international convention for the Protection of All Persons from enforced Disappearance, a 2006 treaty with over 70 signatories that is not yet in force. The U.S. is not a member of the international criminal court, although as U.S. senator from Illinois Barack Obama previously expressed support for U.S. ratification of the Rome statute of the ICC, the court’s founding treaty (signed but not ratified by the U.S.). ¶ Legal accountability requires investigation into the system of extraordinary rendition, disappearances, indefinite detention, deaths in custody, and torture in the conflict with al Qaeda, the war in Afghanistan, and the Iraq War. It demands investigation of the OLC lawyers’ legal analyses, the “extreme pressure” some lawyers and interrogators have mentioned, and the relations between the policy, political considerations, and legal justifications. The many “landmines” or loopholes in the law created by the OLC memo lawyers will be tested through investigation and civil lawsuits.41 And this process of recalibrating federal law with international human rights will take years.

### Link Debate

#### Military detention is key to combating terrorism

Michael Tomatz 13, Colonel, B.A., University of Houston, J.D., University of Texas, LL.M., The Army Judge Advocate General Legal Center and School (2002); serves as the Chief of Operations and Information Operations Law in the Pentagon. AND Colonel Lindsey O. Graham B.A., University of South Carolina, J.D., University of South Carolina, serves as the Senior Individual Mobilization Augmentee to The Judge Advocate Senior United States Senator from South Carolina, “NDAA 2012: CONGRESS AND CONSENSUS ON ENEMY DETENTION,” 69 A.F. L. Rev. 1

In bringing the conference report to the Senate floor, which all 26 Senate conferees signed, Senator Carl Levin emphasized the depth and breadth of flexibility left to the Executive branch. As he explained, the final bill does not restrain law enforcement agencies from conducting investigations or interrogations. n87 "If and when a determination is made that a suspect is a foreign al-Qaeda terrorist, that person would be slated for transfer to military custody under procedures written by the Executive branch." n88 Importantly, even after transfer "all existing law enforcement tools remain available to the FBI and other law enforcement agencies." n89 Military detention and military commissions trials for foreign al-Qaeda terrorists may enjoy Congressional preference, but are not the only means of dealing with foreign terrorists in what is fundamentally an all-in approach designed to give the Executive primary and residual authorities to deal with a complex threat. A preference for military detention ensures the availability of established tactics, techniques and procedures not necessarily present in the civilian justice system, and is ultimately meant to enhance intelligence gathering and prevent dangerous enemy forces from returning to the fight.

#### We lose the cases --- emboldens terrorism

Jack Goldsmith 06, a law professor at Harvard, and Eric A. Posner, a law professor at the University of Chicago, 8/4/06, “A Better Way on Detainees,” http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080301257.html

Everyone involved in the contentious negotiations between the White House and Congress over the proper form for military commissions seems to agree on at least one thing: that al-Qaeda and Taliban terrorists ought to be prosecuted. We think this assumption is wrong: Terrorist trials are both unnecessary and unwise.¶ The United States holds more than 400 terrorism suspects at Guantanamo Bay, and 500 or so more at Bagram air base in Afghanistan. Five years after the Sept. 11 attacks, it has announced plans for military trials for only 10 of these detainees. The 10 do not include the al-Qaeda leaders in U.S. custody or the numerous small fry who served as foot soldiers for al-Qaeda or the Taliban. They are, at best, medium-fry terrorists.¶ Why only 10? Because it is difficult to try terrorists in this war. For most detainees, the government lacks evidence of overt crimes such as murder. It can prosecute these detainees only for the vague and problematic crime of conspiracy to commit a terrorist act based on membership in and training with al-Qaeda or the Taliban. Beyond this problem, witnesses are scattered around the globe, and much of the evidence is in a foreign language, or classified, or hearsay -- in many cases all of these things.¶ Even if these obstacles are overcome, the prosecution of Zacarias Moussaoui shows that trials of political enemies are more difficult, more time-consuming and, in the end, more circuslike than an ordinary criminal trial. The defendant or his lawyers will use a trial not to contest guilt but rather to rally followers and demoralize foes.¶ These are some of the reasons the Bush administration sought to use military commissions with fewer procedural protections than ordinary trials. But commissions have proved politically and legally difficult to implement. Even if they can be made to work, skeptics will still regard them as kangaroo courts.¶ There is a better and easier way to deal with captured terrorists. The Supreme Court has made clear that the conflicts with al-Qaeda and the Taliban are governed by the laws of war, and the laws of war permit detention of enemy soldiers without charge or trial until hostilities end. The purpose of wartime detention is not to punish but to prevent soldiers from returning to the battlefield. A legitimate wartime detainee is dangerous, like a violent mental patient subject to civil confinement, and that is reason enough to hold him. This has been the legal justification for terrorist detentions to date, and it will almost certainly be the basis for future detentions.¶ The main concern with military detentions is that the war will last a long time, perhaps indefinitely. If so, detention could mean a life sentence. We don't yet know whether this concern is warranted. But there are several ways to assure Americans and the world that the system is as fair and humane as circumstances permit.¶ Congress should require a rigorous process for determining the status of enemy combatants that includes some form of representation for the detainee. It should establish periodic review, perhaps yearly, to determine whether the detainee remains dangerous and thus warrants continued detention. It should insist that detainees live in genuinely humane conditions appropriate for very long-term detention. And it should urge the president to endeavor to transfer detainees to their home countries when feasible, and with appropriate human rights guarantees.¶ The executive branch has already introduced many elements of this system. With congressional blessing and amplification, the system will appear more legitimate and will better withstand judicial and public scrutiny.¶ Such a system will not assuage the complaints of those, especially our allies, who reject the military model for terrorism and abhor long-term detention without trial. But Congress and the president have consistently endorsed the military model since Sept. 11. And our allies have not proposed a better system than military detention that both ensures American security and respects human rights. Politicized trials would do little more to address these concerns of our allies, and we have no feasible alternative to military detention for most terrorists in custody.

#### Detention without trial is crucial to incapacitate high value terrorists

Jack Goldsmith 10, Henry L. Shattuck Professor at Harvard Law School, 10/8/10, “Don’t Try Terrorists, Lock Them Up,” http://www.nytimes.com/2010/10/09/opinion/09goldsmith.html

The real lesson of the ruling, however, is that prosecution in either criminal court or a tribunal is the wrong approach. The administration should instead embrace what has been the main mechanism for terrorist incapacitation since 9/11: military detention without charge or trial.¶ Military detention was once legally controversial but now is not. District and appellate judges have repeatedly ruled — most recently on Thursday — that Congress, in its September 2001 authorization of force, empowered the president to detain members of Al Qaeda, the Taliban and associated forces until the end of the military conflict.¶ Because the enemy in this indefinite war wears no uniform, courts have rightly insisted on high legal and evidentiary standards — much higher than what the Geneva Conventions require — to justify detention. And many detainees in cases that did not meet these standards have been released.¶ Still, while it is more difficult than ever to keep someone like Mr. Ghailani in military detention, it is far easier to detain him than to convict him in a civilian trial or a military commission. Military detention proceedings have relatively forgiving evidence rules and aren’t constrained by constitutional trial rules like the right to a jury and to confront witnesses. There is little doubt that Mr. Ghailani could be held in military detention until the conflict with Al Qaeda ends.¶ Why, then, does the Obama administration seek to prosecute him in federal court? One answer might be that trials permit punishment, including the death penalty. But the Justice Department is not seeking the death penalty against Mr. Ghailani. Another answer is that trials “give vent to the outrage” over attacks on civilians, as Judge Kaplan has put it. This justification for the trial is diminished, however, by the passage of 12 years since the crimes were committed.¶ The final answer, and the one that largely motivates the Obama administration, is that trials are perceived to be more legitimate than detention, especially among civil libertarians and foreign allies.¶ Military commissions have secured frustratingly few convictions. The only high-profile commission trial now underway — that of Omar Khadr, a Canadian who was 15 at the time he was detained — has been delayed for months. Commissions do not work because they raise scores of unresolved legal issues like the proper rules of evidence and whether material support and conspiracy, usually the main charges, can be brought in a tribunal since they may not be law-of-war violations.¶ Civilian trials in federal court, by contrast, often do work. Hundreds of terrorism-related cases in federal court have resulted in convictions since 9/11; this week, the would-be Times Square bomber, Faisal Shahzad, was sentenced to life in prison after a guilty plea.¶ But Mr. Ghailani and his fellow detainees at Guantánamo Bay are a different matter. The Ghailani case shows why the administration has been so hesitant to pursue criminal trials for them: the demanding standards of civilian justice make it very hard to convict when the defendant contests the charges and the government must rely on classified information and evidence produced by aggressive interrogations.¶ A further problem with high-stakes terrorism trials is that the government cannot afford to let the defendant go. Attorney General Eric Holder has made clear that Khalid Shaikh Mohammed, the 9/11 plotter, would be held indefinitely in military detention even if acquitted at trial. Judge Kaplan said more or less the same about Mr. Ghailani this week. A conviction in a trial publicly guaranteed not to result in the defendant’s release will not be seen as a beacon of legitimacy.¶ The government’s reliance on detention as a backstop to trials shows that it is the foundation for incapacitating high-level terrorists in this war. The administration would save money and time, avoid political headaches and better preserve intelligence sources and methods if it simply dropped its attempts to prosecute high-level terrorists and relied exclusively on military detention instead.

#### Distraction --- compliance with trial requirements distracts the exec from focusing on military affairs --- undermines the war on terror

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

Empirically, judicial demands on executive branch procedural compliance, if unchecked, become steadily more demanding over time. The executive naturally responds by being more internally exacting to avoid problems. Progressively, executive compliance, initially framed and understood as a reasonably modest set of burdens to promote the integrity of judicial proceedings, becomes instead a consuming priority and expenditure, which, if permitted in the context of warfare, would inevitably detract from the military mission that is the bedrock of our national security. ¶ In the fore here, plainly, are such matters as discovery and confrontation rights. If the courts were given final authority, while hostilities are ongoing, to second-guess the executive’s decision to detain a combatant by scrutinizing reports that summarize the basis for detention, it is only a short leap to the court’s asking follow-up questions or determining that testimony, perhaps subject to cross-examination, is appropriate. Are we to make combat personnel available for these proceedings? Shall we take them away from the battle we have sent them to fight so they can justify to the satisfaction of a judge the capture of an alien enemy combatant that has already been approved by military commanders? Given the fog and anxiety of war, shall we expect them to render events as we would an FBI agent describing the circumstances of a domestic arrest? ¶ Nor is that the end of the intractable national security problems. What if capture was effected by our allies rather than our own forces (as was the case, for example, with the jihadist who was the subject of the Hamdi case)? Shall we try to compel affidavits or testimony from members of, say, the Northern Alliance? What kinds of strains will be put on our essential wartime alliances if they are freighted with requests to participate in American legal proceedings, and possibly compromise intelligence methods and sources – all for the purpose of providing heightened due process to the very terrorists who were making war on those allies? ¶ These are lines that Congress must draw. Leaving them for the courts themselves to sort out would place us on a path toward full-blown civilian trials for alien enemy combatants – the very outcome the creation of a new system was intended to avoid.

### Flex Impact

The aff spills over and guts broader executive war powers.

Green ‘9

Craig, Associate Professor, Temple Law School; University Fellowship, Princeton History Department; J.D., Yale Law School, “Ending the Korematsu Era: A Modern Approach ,” http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=roger\_craig\_green

Another lesson from sixty years of wartime cases concerns the role of precedent itself in guiding presidential action. Two viewpoints merit special notice, with each having roots in opinions by Justice Jackson. On one hand is his explanation in Korematsu that courts must not approve illegal executive action: A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion . . . show[s] that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.270 This “loaded weapon” idea is orthodox in analysis of Korematsu as a racist morality play. The passage is cited as evidence that Supreme Court precedents really matter, and that tragically racist errors retain their menacing power throughout the decades.271 Students are reminded that Korematsu has never been directly overruled, thereby inviting imagination that Korematsu itself is a loaded weapon just waiting for a President to grasp and fire.272 This conventional approach is incomplete. As we have seen, the first and decisive precedent supporting World War II’s racist policies was not Korematsu but Hirabayashi; thus, Jackson himself helped to “load” the doctrinal “weapon” over which he worried just a year later.273 Jackson’s willingness to eviscerate Hirabayashi in Korematsu only exemplifies (as if anyone could doubt it) that no Supreme Court decision can fiat a legal principle “for all time.”274 Past cases can be overruled, disfavored, ignored, or reinterpreted if the Court finds reason to do so, and this is effectively what has happened to Korematsu and Hirabayashi themselves in the wake of Brown, the civil rights era, and other modern history.275 Korematsu was a direct “repetition” of Hirabayshi’s racism for “expand[ed]” purposes, yet it only launched these two cases farther toward their current pariah status.276 A second perspective on war-power precedents is Jackson’s Youngstown concurrence, which rejected President Truman’s effort to seize steel mills and maintain output for the Korean War.277 Jackson’s opinion ends with selfreferential pessimism about judicial authority itself: I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.278 This “no illusion” realism about presidential authority views judicial limitations on the President as contingent on Congress’s political wisdom and responsiveness — without any bold talk about precedents as “loaded weapons” or stalwart shields. On the contrary, if taken seriously, Jackson’s opinion almost suggests that judicial decisions about presidential wartime activities are epiphenomenal: When Congress asserts its institutional prerogatives and uses them wisely, the executive might be restrained, but the Court cannot do much to swing that political balance of power. Jackson’s hardnosed analysis may seem intellectually bracing, but it understates the real-world power **of judicial precedent to shape what is politically possible**.279 Although Presidents occasionally assert their willingness to disobey Supreme Court rulings, actual disobedience of this sort is vanishingly rare and would carry grave political consequences.280 Even President Bush’s repeated losses in the GWOT did not spur serious consideration of noncompliance, despite strong and obvious support from a Republican Congress.281 Likewise, from the perspective of strengthening presidential power, Korematsu-era precedents clearly emboldened President Bush in his twenty-first-century choices about Guantanamo and military commissions.282 The modern historical record thus shows that judicial precedent can both expand and limit the operative sphere of presidential action. Indeed, the influence of judicial precedent is stronger than a court-focused record might suggest. The past sixty years have witnessed a massive bureaucratization and legalization of all levels of executive government.283 From the White House Counsel, to the Pentagon, to other entities addressing intelligence and national security issues, lawyers have risen to such high levels of governmental administration that almost no significant policy is determined without multiple layers of internal legal review.284 And these executive lawyers are predominantly trained to think — whatever else they may believe — that Supreme Court precedent is authoritative and binding.285 Some middle ground seems therefore necessary between the “loaded weapon” and “no illusion” theories of precedent. Although Supreme Court decisions almost certainly influence the scope of presidential war powers, such practical influence is neither inexorable nor timeless. A more accurate theory of war-power precedents will help explain why it matters that American case law includes a reservoir of Korematsu-era decisions supporting excessive executive war power, and will also suggest how lawyers, judges, and scholars might eviscerate such rulings’ force. Korematsu is the kind of iconic negative precedent that few modern lawyers would cite for its legal holding. Yet even as Korematsu’s negative valence is beyond cavil, the breadth and scope of that negativity are not clear. Everyone knows that Korematsu is wrong, yet like other legal icons — Marbury, Dred Scott, Lochner, Erie, and Brown — its operative meaning is debatable. Just as Korematsu was once an authoritative precedent and is now discredited, this Article has sought to revise Korematsu’s cultural meaning even further, transforming it from an isolated and irrelevant precedent about racial oppression to a broadly illuminating case about how courts supervise presidential war powers.

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

Ghitis 13 (Frida, world affairs columnist for The Miami Herald and World Politics Review. A former CNN producer and correspondent, she is the author of *The End of Revolution: A Changing World in the Age of Live Television*. “World to Obama: You can't ignore us,” 1/22, http://www.cnn.com/2013/01/22/opinion/ghitis-obama-world)

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

#### Emboldened rogue states threaten nuclear war --- crisis management is key to solve

Dibb 6 Emeritus Prof of IR @ Australian National University, Sydney Morning Herald (Australia), August 15, 2006 Tuesday, As one nuclear flashpoint reaches a lull, another simmers away, Pg. 11, Lexis

NOW that the building blocks for achieving a cessation in hostilities in the crisis involving Israel and Hezbollah in Lebanon are in place, the focus can shift back to the main game - Iran and North Korea. Both flashpoints have the potential to escalate out of control if they are not managed carefully. Yet neither region is noted for the success of its diplomacy. Both the Middle East and North-East Asia are heavily armed parts of the world characterised by deep-seated hatreds and long-standing territorial disputes. Historically, such situations have been a recipe for disaster. Not so long ago we were being told that we were living in a peaceful, interdependent world. Yet the fact is that the constraints and understandings of the bipolar Cold War world have been replaced by a more uncertain world, where there is much more jockeying for position and influence. In the Middle East, the destruction of Saddam Hussein's regime and its replacement, at least for now, by a weakened Iraq has allowed Iran to become the dominant regional power. The regime in Tehran is hell-bent on exporting terrorism and acquiring nuclear weapons. For Israel, the ceasefire may stall the military action, but the longer-term real strategic threat it faces - the spectre of a nuclear-armed Iran equipped with ballistic missiles of sufficient range and accuracy to target Israel without taking out Palestinian or neighbouring Arab territories - will not go away. Israel will not tolerate this and the US needs to make it clear to Tehran that any such attack on Israel will bring about Iran's destruction. That was a good enough understanding with the USSR at the height of the Cold War. But this discipline no longer applies because now there is only one superpower, which cannot control both Israel and Arab-Iranian protagonists. In North Korea a similar situation applies. Having seen the destruction of Saddam's regime, North Korea's Kim Jong-il is intent on acquiring nuclear weapons to preserve his regime. But the end of the Cold War has eroded the influence of North Korea's allies over its military ambitions and sense of security. China has been embarrassed by its inability to restrain North Korea from testing nuclear-capable ballistic missiles and Russia no longer wields any influence over the rogue state. In many ways, the situation in North-East Asia is potentially even more dire than in the Middle East. North Korea's recalcitrance in dismantling its nuclear weapons program comes at a time of unprecedented tensions between China and Japan and South Korea and Japan where one false move could spell disaster. North Korea is playing a dangerous game of bellicose brinkmanship; it continues to keep more than a million troops on high-alert status, including heavy artillery concentrations only 50 kilometres from Seoul, a city of more than 10 million people. North Korea's acquisition of nuclear weapons threatens to seriously destabilise North-East Asia and result in a nuclear arms race developing there. As it is, the North's belligerence is encouraging Japan to build up its military capabilities. This at a time when China's poor relations with Japan are worrying. The Chinese communist leadership drums up anti-Japanese nationalism whenever it suits, while China's military build-up greatly concerns Japan. The pace of Beijing's defence spending is puzzling, particularly as China faces no military threat for the first time in many decades. Similarly, Japan's relations with South Korea are at a low point, partly over Japan's view of the history of World War II but also because of territorial disputes, which Seoul has elevated to the level of national pride, threatening the use of military force. This is occurring when, from Tokyo's perspective, South Korea is drifting from the orbit of the US alliance and getting uncomfortably close to China, as well as appeasing North Korea. All this is an unhealthy mix of great power tensions and deep-seated historical distrust and growing military capabilities. The bigger worry is that Pyongyang's adventurism will incinerate any efforts to stabilise a region full of dangerous rivalries, as will the inevitable collision between Iran and Israel in the Middle East.

### UQ

Courts won’t rule on political questions now.

Litwak ‘12

Brian, JD candidate at UNC, "Putting Constitutional Teeth Into aPaper Tiger: How to Fix the War PowersResolution," American University National Security Law Brief, Vol. 2, No. 2, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1034&context=nslb>

A. The Political Question Doctrine

First announced by the Supreme Court in Baker v. Carr, 35 the political question doctrine holds that certain categories of disputes are nonjusticiable or inappropriate for the courts to hear.36 In the arena of foreign affairs, courts have been especially willing to decline to adjudicate cases, invoking the political question doctrine where the court lacks the “institutional capacity to handle certain matters.”37 In Crockett v. Reagan, 38 twenty-nine members of Congress sought declaratory judgment against the President for supplying military equipment and aid to the government of El Salvador in violation of the WPR.39 The President claimed that the military personnel sent to El Salvador were performing a limited training and advisory function for the El Salvadorian military and, therefore, were not engaged in “hostilities” as contemplated in Section 1543(a)(1).40 The plaintiffs painted a different picture, claiming the military personnel were planning specific operations and working in areas exposed to heavy combat.41 The United States District Court for the District of Columbia dismissed the case as nonjusticiable, concluding that the factfinding necessary to determine whether U.S. forces were introduced into hostilities was “appropriate for congressional, not judicial, investigation and determination.”42 Relying on Baker, the court categorized the case as one “characterized by a lack of judicially discoverable and manageable standards for resolution.”43 Less than a year later, the United States District Court for the District of Columbia dismissed another alleged violation of the WPR on identical grounds.44 Pertaining to U.S. sponsored paramilitary activities in Nicaragua, the court dismissed the suit, holding that it “lack[ed] judicially discoverable and manageable standards for resolving the dispute presented.”45 Courts have reaffirmed this position on numerous occasions. In Lowry v. Reagan, 46 the plaintiffs (comprising 113 members of Congress) suffered a similar fate. The court, asked to decide if U.S. actions in the Persian Gulf constituted “hostilities,” declined to exercise jurisdiction over the claims, again citing the political question doctrine. The court held: “[W]ith regard to cases concerning foreign relations, that these matters often ‘lie beyond judicial cognizance’ due [sic] the need for a ‘single-voiced statement of the Government’s views.’”47 As noted in Sanchez-Espinoza, 48 the court’s refusal to decide the questions of hostilities was prompted, in part, due to the risk of the “potentiality of embarrassment [resulting] from multifarious pronouncements by various departments on one question.”49 When a court is faced with an elusive set of facts concerning foreign affairs and differing positions on the presence of “hostilities” presented by the President and Congress, it will dismiss the dispute as nonjusticiable under the guise of the political question doctrine. The court’s exercise of the political question doctrine, excusing itself from deciding the differing positions of the Executive and Congress, combines multiple aligning considerations. First, as a practical matter, courts lack the institutional capacity to decide the presence of hostilities.50 Second, the Constitution delegates foreign affairs decisions to the two political branches, not the courts.51 Third, deciding the issue of hostilities in foreign affairs would take the courts into “uncharted legal terrain,” where no law exists and applicable standards are wanting.52 Given the omission of a definition of “hostilities” in the WPR53 and the absence of a workable legal standard, courts would have an extremely difficult time navigating this “uncharted terrain” in foreign affairs. Consequently, courts have opted to leave the resolution of the disputes to those elected branches both capable and constitutionally committed to making decisions concerning the use of force abroad.54 Although not the only tool invoked by courts to skirt tough decisions concerning the separation of war powers,55 the political question doctrine is an oft-accepted argument by courts in justifying the dismissal of claims made pursuant to the WPR.56

Courts have been incremental and conservative—the aff destroys that

Waxman ‘9

Matthew, Associate Professor of Law at Columbia Law School, where he specializes in national security law and international law. He is also a member of the Hoover Institution Task Force on National Security and Law and an Adjunct Senior Fellow at the Council on Foreign Relations. Mr Waxman previously served at the US Department of State as Principal Deputy Director of Policy Planning. His prior government appointments included Deputy Assistant Secretary of Defense for Detainee Affairs, Director for Contingency Planning & International Justice at the National Security Council, and Executive Assistant to the National Security Advisor., “Can Courts Be ‘Trusted’ in National Security Crises? ,” http://178.236.153.226/uploads/documents/Waxman.pdf

Another difference between the Supreme Court’s combatant detention cases and many of its prior interventions in national security crises is the likelihood that the current terrorist emergency will continue for many years and have **no clear endpoint.** To be sure, the country has faced long-term national security threats before, including the founding period, when the new nation was surrounded by strong imperial powers, and the Cold War, during which the threat of nuclear annihilation loomed for decades. But the September 2001 attacks exposed the country to a new awareness of direct danger, from both outside the country and within, that will continue indefinitely. The long-term nature of the current terrorist threat and both its domestic and foreign features have several implications for the role of courts in fashioning responses. Given the continuing nature of this national security crisis, courts cannot assume that validating executive actions will have only temporary effects. Recalibrations of security and liberty may be needed, but wherever they are set may become the norm rather than a temporary response to exceptional circumstances. So far the Supreme Court has taken a sensible approach to that recalibration process. It has been cautious and incremental in articulating or enforcing outer bounds of government powers. That is prudent, given that the nature of the terrorist threat is still evolving, as are such contextual factors as the technological capacity of both the government and terrorist organizations. It has been more forceful in urging Congress to legislate the boundaries of coercive state powers. While courts can urge Congress to act, they cannot force it to do so. Congress has been reluctant to take on some of the biggest national security issues, such as whom can be detained and interrogated outside the criminal justice system and according to exactly what rules, instead leaving it to courts to fill in those important details. Whereas arguably Congress is best situated and constitutionally charged with setting long-term policy for defending the nation and its liberties, it has thus far played a secondary role to the executive and even courts on some key issues.

## CP

### AT: Obama Ignores

#### The President has institutional incentives to listen to the OLC---incentives to maintain the OLC's credibility are bigger than the incentive to specific interests that the plan affects

Trevor Morrison 11, Professor of Law at Columbia Law School, “LIBYA, ‘HOSTILITIES,’ THE OFFICE OF LEGAL COUNSEL, AND THE PROCESS OF EXECUTIVE BRANCH LEGAL INTERPRETATION,” Harvard Law Review Forum Vol.124:42, http://www.harvardlawreview.org/media/pdf/vol124\_forum\_morrison.pdf

These questions parallel the kinds of questions that are inevitable when the President overrules OLC. Indeed, the institutional incentives against too readily overruling OLC are basically the same as the incentives against ousting OLC altogether. In either case, the White House will face difficult questions from the press and will be exposed to political attack by its adversaries in Congress. 25

These questions and criticisms underscore how wrong it is to suppose that OLC can be ousted from its role “without anybody considering it improper.” 26 Indeed, the notion that a President determined to pursue a particular policy can simply cast about for a favorable legal opinion and then rely on it with impunity ignores the reality of government today. As long as the President’s decision is publicly disclosed, questions about the substance and process of the decision will be asked. Answers that depict a highly anomalous process will raise further questions. That may be the ultimate check here: the prospect of public criticism and political reprisal encourages the White House to maintain OLC’s traditional role even when doing so cuts against its immediate policy preferences. And that is as it should be.

#### Continual presidential override of the OLC results in alternate checks on presidential power---means the President has an incentive to maintain the Office's credibility

Trevor Morrison 11, Professor of Law at Columbia Law School, “LIBYA, ‘HOSTILITIES,’ THE OFFICE OF LEGAL COUNSEL, AND THE PROCESS OF EXECUTIVE BRANCH LEGAL INTERPRETATION,” Harvard Law Review Forum Vol.124:42, http://www.harvardlawreview.org/media/pdf/vol124\_forum\_morrison.pdf

Just as the White House benefits greatly from OLC’s reputation for providing authoritative opinions based on its best view of the law, undermining that reputation can do real harm to the long - run institutional interests of the White House. If the presumption in favor of OLC’s authoritativeness is undermined, then in cases when the White House relies on an OLC opinion to establish the legality of a policy or program, outside observers will suspect it is mere opportunism — that the White House is invoking OLC merely because OLC said “yes.” At that point, the benefit of being able to point to OLC as a source of authoritative, credible legal analysis will be lost. To put it in Posner and Vermeule’s terms, the executive self - binding mechanism will unravel, and with it the presidential power - enhancing credibility it can provide. 19

## HR

## Advantage 2 --- Rule of Law

### AT: Afghanistan War

#### Great power cooperation is far more likely --- they will also prevent a civil war

Hadar 11—former prof of IR at American U and Mount Vernon-College. PhD in IR from American U (1 July 2011, Leon, Saving U.S. Mideast Policy, http://nationalinterest.org/commentary/saving-us-policy-the-mideast-5556)

Indeed, contrary to the warning proponents of U.S. military intervention typically express, the withdrawal of American troops from Iraq and Afghanistan would not necessarily lead to more chaos and bloodshed in those countries. Russia, India and Iran—which supported the Northern Alliance that helped Washington topple the Taliban—and Pakistan (which once backed the Taliban) all have close ties to various ethnic and tribal groups in that country and now have a common interest in stabilizing Afghanistan and containing the rivalries.

### AT: Indo-Pak War

#### No Indo-Pak war—the two will work together in Afghanistan

Henry Pant ‘12 teaches in King's College, London, 5/19/12, “Afghanistan's Post-NATO Future”, http://www.realclearworld.com/articles/2012/05/19/afghanistans\_post-nato\_future\_100058.html

This is also a signal to the Taliban and other extremist groups that waiting out American forces might no longer be as credible an option as it may have once seemed. Washington's new message will have particular resonance in India and Pakistan as ties between the two South Asian neighbours remain the most important fault line in shaping Afghanistan's future. Pakistan will come under renewed pressure to articulate a long-term policy of renouncing ties with extremist groups. Islamabad's hedging strategy is no longer workable. Amidst the growing challenge of the Taliban to Pakistan, the country faces a dilemma about collusion between Afghan and Pakistan Taliban. Pakistan is recognizing the difficulty of managing post-America neighborhood with more than 40 million Pashtuns living in the mountainous borderlands of Pakistan and Afghanistan asserting their profile. Moreover the larger reality is that Pakistan is today weaker than anytime in its history. The economy is in shambles, the sectarian divide is growing, the extremist groups it nurtured are turning against the state, and it has no real friends left. Even China prefers to maintain a respectful distance. It's not surprising that even the Pakistani army chief speaks of the need for "peaceful coexistence" with India. Fearing its own marginalization in post-2014 Afghanistan, Pakistan has signaled that it's ready to end the blockade of NATO ground-supply routes to Afghanistan. New Delhi, for its part, has been at a loss trying to respond to rapidly changing realities in its immediate neighbourhood. Now that some clarity has been restored to the American posture, New Delhi must put its own house in order. India has not had a very consistent policy towards Afghanistan over the last decade. Part of this has been a function of the rapidly evolving ground realities in Afghanistan, but large part has also been due to India's inability to articulate its vital interests in Afghanistan to allies or adversaries. There is an overarching lack of coherence in Indian response as New Delhi seems to be perpetually on the defensive, first making Washington the sole pivot of its outreach to Kabul and then petulantly complaining about American unreliability. On the one hand, India has been signaling to the US that it views long-term American presence in Afghanistan as integral to regional security. On the other, it's been reaching out to make common cause with the Iranians, who want to see complete US withdrawal from the region. Iran has been putting pressure on Afghanistan not to proceed with ratification of the US-Afghan strategic partnership pact. Even as India has signed a strategic partnership agreement with Afghanistan promising to enhance its role in Afghan security, it has at the same time reduced its economic footprint. In the absence of governmental support, the Indian private sector, despite its keenness to invest in Afghanistan, has been gradually withdrawing from the country for fear of becoming a target of the Taliban. As a result, New Delhi has not only complicated its own future options, but also confused allies about whether India can be a credible partner in Afghanistan. Indian interests converge with those of the US in Afghanistan to a remarkable degree in ensuring that the Taliban does not get a foothold in Kabul and Afghanistan does not once again emerge as a launching pad to carry out attacks against India. The Washington-Kabul strategic partnership agreement provides India with some crucial space for diplomatic maneuvering so as to regain the lost ground and expand its footprint in a neighboring state where it remains hugely popular despite its inconsistent policy approach. The recent attempt to beef up intelligence sharing between India and Afghanistan is the first step in the operationalization of the Indo-Afghan strategic partnership, but more concrete steps are needed to ensure that New Delhi maintains a substantial presence and acts as a reliable partner of the US. India and Pakistan have already started talking after a long lull, and this could be a precursor to some sort of a joint engagement on Afghanistan, dampening the rivalry between the two neighbors. At the same time, India should underscore its continuing role in ensuring sustainable economic development and capacity building in Afghanistan. Those who want New Delhi to step up its role in Afghanistan in consonance with its growing global weight must be reassured about India's reliability as a partner.

## Advantage 1---Human Rights

### AT: Disease

#### Intervening actors check

Zakaria 9**—**Editor of Newsweek, BA from Yale, PhD in pol sci, Harvard. He serves on the board of Yale University, The Council on Foreign Relations, The Trilateral Commission, and Shakespeare and Company. Named "one of the 21 most important people of the 21st Century" (Fareed, “The Capitalist Manifesto: Greed Is Good,” 13 June 2009, http://www.newsweek.com/id/201935)

Note—Laurie Garrett=science and health writer, winner of the Pulitzer, Polk, and Peabody Prize

It certainly looks like another example of crying wolf. After bracing ourselves for a global pandemic, we've suffered something more like the usual seasonal influenza. Three weeks ago the World Health Organization declared a health emergency, warning countries to "prepare for a pandemic" and said that the only question was the extent of worldwide damage. Senior officials prophesied that millions could be infected by the disease. But as of last week, the WHO had confirmed only 4,800 cases of swine flu, with 61 people having died of it. Obviously, these low numbers are a pleasant surprise, but it does make one wonder, what did we get wrong? Why did the predictions of a pandemic turn out to be so exaggerated? Some people blame an overheated media, but it would have been difficult to ignore major international health organizations and governments when they were warning of catastrophe. I think there is a broader mistake in the way we look at the world. Once we see a problem, we can describe it in great detail, extrapolating all its possible consequences. But we can rarely anticipate the human response to that crisis. Take swine flu. The virus had crucial characteristics that led researchers to worry that it could spread far and fast. They described—and the media reported—what would happen if it went unchecked. But it did not go unchecked. In fact, swine flu was met by an extremely vigorous response at its epicenter, Mexico. The Mexican government reacted quickly and massively, quarantining the infected population, testing others, providing medication to those who needed it. The noted expert on this subject, Laurie Garrett, says, "We should all stand up and scream, 'Gracias, Mexico!' because the Mexican people and the Mexican government have sacrificed on a level that I'm not sure as Americans we would be prepared to do in the exact same circumstances. They shut down their schools. They shut down businesses, restaurants, churches, sporting events. They basically paralyzed their own economy. They've suffered billions of dollars in financial losses still being tallied up, and thereby really brought transmission to a halt." Every time one of these viruses is detected, writers and officials bring up the Spanish influenza epidemic of 1918 in which millions of people died. Indeed, during the last pandemic scare, in 2005, President George W. Bush claimed that he had been reading a history of the Spanish flu to help him understand how to respond. But the world we live in today looks nothing like 1918. Public health-care systems are far better and more widespread than anything that existed during the First World War. Even Mexico, a developing country, has a first-rate public-health system—far better than anything Britain or France had in the early 20th century.