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# Adv – Hegemony

#### THREE I/Ls

#### 1.) US Rule of law hypocrisy alienates allies – plan revitalizes international support

Yang ’11 (Christina – dissertation @ Emory, advised by Michael Sullivan - PhD, Vanderbilt University, 2000 JD, Yale Law School, 1998 “Reconstructing Habeas: Towards a New Emergency Scheme!”

In this global war on terror, America cannot stand alone. But in the aftermath of 9/11, we have become more and more alone. “Once a leading exponent of the rule of law,” David Cole observes, “the United States is now widely viewed as a systematic and arrogant violator of the most basic norms of human rights law – including the prohibitions against torture, disappearances, and arbitrary detention.”104 We cannot afford to alienate our friends with our actions. This loss of legitimacy is not simply harmful because it paints us in hypocritical colors, but because it also leaves us more vulnerable to terrorist attack inasmuch our governmental abuses in the arena of detention “fuels the animus and resentment that inspire the attacks against us in the first place.”105 We only confirm what the terrorists have been saying all along. In the end, the fight against terrorism is fundamentally a battle for hearts and minds.106 The more we win over our enemies, the fewer enemies we have to be concerned about. But the battle is not won with money; it is not won with victory. It is won by a long term commitment to civil liberties and the rule of law – everything that America was once known to stand for – as well as proof that even in the short term, we will act with legitimacy, fairness, and within the constraints of law. “As any leader instinctively knows,” Cole advises, “it is far better to have people follow your lead because they view you as legitimate than to have to try to compel others by force to adhere to your will.”107 Our allies were once willing to aid us in our cause – for the cause, the fight against terrorism, is neither illegitimate nor unworthy of pursuit. They are more reluctant now because we have compromised our legitimacy – i.e., the sincerity of our reasons for fighting this fight – when we employ illegitimate means to reach our ends. We require the help of our allies; and so in order to keep them on our side, we need to maintain “our historic position of leadership in the global spread of the rule of law,” thus reminding them of the “virtue of [the] legal commitments they [too] have made.”108

#### 2.) Judicial deference to military courts undermines legitimacy

Pereira 08 Marcia Pereira 08, Civil Litigation &Transactional Attorney and University of Miami School of Law Graduate, Spring, "ARTICLE: THE "WAR ON TERROR" SLIPPERY SLOPE POLICY: GUANTANAMO BAY AND THE ABUSE OF EXECUTIVE POWER," University of Miami International & Comparative Law Review, 15 U. Miami Int'l & Comp. L. Rev. 389, Lexis

As these examples reveal, many propositions have been advanced to provide for a solution to these detainees with no particular success. Meanwhile, human rights advocates have their eyes centered on our nation. The Human Rights Watch has recently expressed its concerns with respect to the MCA. It advanced that the military commissions "fall far short of international due process standards." n156 It has been articulated that U.S. "artificial" derogation from the Geneva Conventions by virtue [\*440] of the MCA leaves open the door for other States to "opt-out" as well. In other words, any step back from the Geneva Conventions could also provoke mistreatment of captured U.S. military personnel. In addition, scholars of international jurisprudence claim there have been over 50 years since Geneva was entered into force and it has been applied in every conflict. n157 However, U.S. current policies undercut the overarching principles under international law to strive for uniform human rights policies around the World. In the current state of affairs, the Executive branch becomes three branches in one: legislator, executive enforcer, and judge of its own actions. The lack of independent judicial oversight deprives detainees from the opportunity of impartial judicial review of verdicts, regardless of their arbitrariness or lack of legal soundness.¶ In response to the consequences of this expansive executive power, the U.N. Human Rights Committee stated that the use of military courts could present serious problems as far as the equitable, impartial, independent administration of justice is concerned. As detainees have increasingly been deemed non-enemy-combatants, it is possible to assess how the Executive, now Congressional actions, captures civilians who had no connection to the armed conflict. In other words, as a consequence of the disparate overreaching power of the political branches and a rather weakened Judiciary, the U.S. is substantially regarded by the international community with complete disapproval.¶ Thus, the impact of U.S. current polities in the International Community is, at the very least, alarming. If entitling the detainees to a unified due process approach seems unrealistic, at minimum, they should be treated in a manner consistent with the principles of the Geneva Conventions. Relevant provisions in the Third Convention provide that detainees are entitled to a presumption of protection thereunder, "until such time as their status has been determined by a competent tribunal." The detainees must first be designated as civilians, combatant, or criminals rather than lumped into a single composite group of unlawful combatants by presidential fiat. Moreover, the International Covenant on Civil and Political Rights mandates that "[n]o one shall be subjected to arbitrary arrest or detention and those deprived of liberty shall be entitled [\*441] to take proceedings before a court." n158 The meaning of "court" within the Covenant was aimed at civilian courts, not military, in the sense that the preoccupation was to provide them with a fair adjudication with respect to the detainees' status. Yet, the U.S. Government chose to ignore the requirements under international law despite apparently false claims that it would be followed. n159 Instead, as previously discussed in Part II of this Article, Congress made sure that international law does not provide a substantive basis of relief for these detainees' claims by virtue of the MCA.¶ The vast cultural, economic and political differences among signatory States were deemed as plausible justification for permitting reservations treaties. By this mechanism, the States are provided the opportunity to somewhat "tailor" multilateral treaties to their realities. It is evident that the U.S. Government has granted itself the right not to be entirely bound by international law. How wise the use of this mechanism was undertaken by U.S. may be reflected by the current the impact of U.S. policies toward international law mandates. As the detainees' situation develops, however, the U.S. image within the international community is in serious jeopardy. As a result a widespread criticism of the U.S. policies generated an atmosphere of wariness of U.S's ability and willingness to preserve individuals' fundamental rights at any time a situation is categorized as "emergency."¶ [\*442] V. CONCLUSION¶ All the problems outlined in this Article can be corrected. It would not take more than going back to the Constitution and reconstituting the Framers' intent in promoting the leadership of the country as an integral body composed by the three branches of Government. The U.S. Government should ensure that the wide gap between domestic law and the law of armed conflict is minimized by allowing those tried before military commissions to receive trials up to the level of American justice. If no action is taken, the American justice once internationally admired will give space to a stain in the American history. Congress should be more active in undertaking its role of making the law rather than merely voting on proposals based on their political agenda or the Executive's wishes. The Judiciary should step up and actively "say what the law is" rather than handing down amorphous rulings stigmatizing detainees on the basis of their citizenship status. Under basic constitutional principles, doing justice means equal protections of the laws. Using the claim of times of emergency to justify abusive treatment does not foster a democratic society. If the military is not able to advance legal grounds to hold these detainees, they should be released. The Judiciary should be eager to have a case challenging the MCA sooner rather than later and take the opportunity to lay down a clearly ruling on how these detainees should be accorded equal safeguards regardless of their race, national origin, or status. In other words, the Judiciary should take back what Congress has taken away, through implementing major modifications to the Executive's ill-conceived policies regarding commissions. In terms of meaningful separation of powers mandates, what the Constitution has given, Congress cannot take away.

#### 3.) ruling on detention policies signals US commitment to reform

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2. Legitimacy ¶ Federal courts are also generally considered more legitimate than military commissions. The stringent procedural protections reduce the risk of error and generate trust and legitimacy. n245 The federal courts, for example, provide more robust hearsay protections than the commissions. n246 In addition, jurors are [\*165] ordinary citizens, not U.S. military personnel. Indeed, some of the weakest procedural protections in the military commission system have been successfully challenged as unconstitutional. n247 Congress and the Executive have responded to these legal challenges - and to criticism of the commissions from around the globe - by significantly strengthening the commissions' procedural protections. Yet the remaining gaps - along with what many regard as a tainted history - continue to raise doubts about the fairness and legitimacy of the commissions. The current commissions, moreover, have been active for only a short period - too brief a period for doubts to be confirmed or put to rest. n248 Federal criminal procedure, on the other hand, is well-established and widely regarded as legitimate.¶ Legitimacy of the trial process is important not only to the individuals charged but also to the fight against terrorism. As several successful habeas corpus petitions have demonstrated, insufficient procedural protections create a real danger of erroneous imprisonment for extended periods. n249 Such errors can generate resentment and distrust of the United States that undermine the effectiveness of counterterrorism efforts. Indeed, evidence suggests that populations are more likely to cooperate in policing when they believe they have been treated fairly. n250 The understanding that a more legitimate detention regime will be a more effective one is reflected in recent statements from the Department of Defense and the White House. n251¶ 3. Strategic Advantages¶ ¶ There is clear evidence that other countries recognize and respond to the difference in legitimacy between civilian and military courts and that they are, indeed, more willing to cooperate with U.S. counterterrorism efforts when terrorism suspects are tried in the criminal justice system. Increased international cooperation is therefore another advantage of criminal prosecution.¶ Many key U.S. allies have been unwilling to cooperate in cases involving law-of-war detention or prosecution but have cooperated in criminal [\*166] prosecutions. In fact, many U.S. extradition treaties, including those with allies such as India and Germany, forbid extradition when the defendant will not be tried in a criminal court. n252 This issue has played out in practice several times. An al-Shabaab operative was extradited from the Netherlands only after assurances from the United States that he would be prosecuted in criminal court. n253 Two similar cases arose in 2007. n254 In perhaps the most striking example, five terrorism suspects - including Abu Hamza al-Masr, who is accused of providing material support to al-Qaeda by trying to set up a training camp in Oregon and of organizing support for the Taliban in Afghanistan - were extradited to the United States by the United Kingdom in October 2012. n255 The extradition was made on the express condition that they would be tried in civilian federal criminal courts rather than in the military commissions. n256 And, indeed, both the European Court of Human Rights and the British courts allowed the extradition to proceed after assessing the protections offered by the U.S. federal criminal justice system and finding they fully met all relevant standards. n257 An insistence on using military commissions may thus hinder extradition and other kinds of international prosecutorial cooperation, such as the sharing of testimony and evidence.

#### Lack of US legitimacy emboldens challengers causes great power wars

Knowles, 2009 (Robert, Acting assistant Professor, New York University School of Law, “American Hegemony and the Foreign Affairs Constitution,” Arizona State Law Journal, 41 Ariz. St. L.J. 87, October)

International relations scholars are still struggling to define the current era. The U.S.-led international order is unipolar, hegemonic, and, in some ways, imperial. In any event, this order diverges from traditional realist assumptions in important respects. It is unipolar, but stable. It is more hierarchical. The U.S. is not the same as other states; it performs unique functions in the world and has a government open and accessible to foreigners. And the stability and legitimacy of the system depends more on successful functioning of the U.S. government as a whole than it does on balancing alliances crafted by elite statesmen practicing realpolitik. “[W]orld power politics are shaped primarily not by the structure created by interstate anarchy but by the foreign policy developed in Washington.”368 These differences require a new model for assessing the institutional competences of the executive and judicial branches in foreign affairs. One approach would be to adapt an institutional competence model using insights from a major alternative theory of international relations – liberalism. Liberal IR theory generally holds that internal characteristics of states – in particular, the form of government – dictate states behavior, and that democracies do not go to war against one another.369 Liberalists also regard economic interdependence and international institutions as important for maintaining peace and stability in the world.370 Dean Anne-Marie Slaughter has proposed a binary model that distinguishes between liberal, democratic states and non-democratic states.371 Because domestic and foreign issues are “more convergent” among liberal democracies, Slaughter reasons, the courts should decide issues concerning the scope of the political branches’ powers.372 With respect to non-liberal states, the position of the U.S. is more “realist,” and courts should deploy a high level of deference.373 A strength of Dean Slaughter’s binary approach is that it would tend to reduce the uncertainty in foreign affairs adjudication. Professor Nzelibe has criticized this approach because it would put courts in the difficult position of determining which countries are liberal democracies.374 But even if courts are capable of making these determinations, they would still face the same dilemmas adjudicating controversies regarding non-liberal states. Where is the appropriate boundary between foreign affairs and domestic matters? How much discretion should be afforded the executive when individual rights and accountability values are at stake? To resolve these dilemmas, an institutional competence model should be applicable to foreign affairs adjudication across the board. In constructing a new realist model, it is worth recalling that the functional justifications for special deference are aimed at addressing problems of a particular sort of role effectiveness—which allocation of power among the branches will best achieve general governmental effectiveness in foreign affairs. In the 21st Century, America’s global role has changed, and the best means of achieving effectiveness in foreign affairs have changed as well. The international realm remains highly political—if not as much as in the past— but it is American politics that matters most. If the U.S. is truly an empire— and in some respects it is—the problems of imperial management will be far different from the problems of managing relations with one other great power or many great powers. Similarly, the management of hegemony or unipolarity requires a different set of competences. Although American predominance is recognized as a salient fact, there is no consensus among realists about the precise nature of the current international order.375 The hegemonic model I offer here adopts common insights from the three IR frameworks—unipolar, hegemonic, and imperial—described above. First, the “hybrid” hegemonic model assumes that the goal of U.S. foreign affairs should be the preservation of American hegemony, which is more stable, more peaceful, and better for America’s security and prosperity, than the alternatives. If the United States were to withdraw from its global leadership role, no other nation would be capable of taking its place.376 The result would be radical instability and a greater risk of major war.377 In addition, the United States would no longer benefit from the public goods it had formerly produced; as the largest consumer, it would suffer the most. Second, the hegemonic model assumes that American hegemony is unusually stable and durable.378 As noted above, other nations have many incentives to continue to tolerate the current order.379 And although other nations or groups of nations—China, the European Union, and India are often mentioned—may eventually overtake the United States in certain areas, such as manufacturing, the U.S. will remain dominant in most measures of capability for decades to come. In 2025, the U.S. economy is projected to be twice the size of China’s.380 The U.S. accounted for half of the world’s military spending in 2007 and holds enormous advantages in defense technology that far outstrip would-be competitors.381 Predictions of American decline are not new, and they have thus far proved premature.382 Third, the hegemonic model assumes that preservation of American hegemony depends not just on power, but legitimacy.383 All three IR frameworks for describing predominant states—although unipolarity less than hegemony or empire—suggest that legitimacy is crucial to the stability and durability of the system. Although empires and predominant states in unipolar systems can conceivably maintain their position through the use of force, this is much more likely to exhaust the resources of the predominant state and to lead to counter-balancing or the loss of control.384 Legitimacy as a method of maintaining predominance is far more efficient. The hegemonic model generally values courts’ institutional competences more than the anarchic realist model. The courts’ strengths in offering a stable interpretation of the law, relative insulation from political pressure, and power to bestow legitimacy are important for realizing the functional constitutional goal of effective U.S. foreign policy. This means that courts’ treatment of deference in foreign affairs will, in most respects, resemble its treatment of domestic affairs. Given the amorphous quality of foreign affairs deference, this “domestication” reduces uncertainty. The increasing boundary problems caused by the proliferation of treaties and the infiltration of domestic law by foreign affairs issues are lessened by reducing the deference gap. And the dilemma caused by the need to weigh different functional considerations—liberty, accountability, and effectiveness—against one another is made less intractable because it becomes part of the same project that the courts constantly grapple with in adjudicating domestic disputes.

#### Leadership key to coalitions—solves every major impact.

Greenberg 5 – Director Emeritus and Honorary Vice Chairman of the Council on Foreign Relations and a member of the Trilateral Commission, Maurice, “On Leadership”, The National Interest, 12/1, http://www.nationalinterest.org/Article.aspx?id=10874

I am concerned that these are not the issues being discussed by our political leadership and that the United States is abdicating its role as a global leader. There are a number of **problems** that **require** the **U**nited **S**tates to step forward and exercise **leadership**. In matters of world trade, the Doha Round has not been a booming success. Promises of aid for Africa have turned out to be little more than promises. We have **transnational threats such as terrorism**, **environmental degradation and** the spread of **disease**. We have an issue of global warming. I'm not a scientist, but I am concerned that the intensity **and** strength of natural disasters has grown. Ocean **warming** has occurred by several degrees of temperature, ice flows are melting in the poles--what is going to be the impact of that on the world's climate? There are a whole host of issues that **are** not simply matters of American national interest, but **are** global, **planetary interests**. And make no mistake, **if the** **U**nited **S**tates **does not lead, who will?** The future of the European Union is a question mark. The proposed constitution was not enthusiastically embraced by Europe's population. More and more Europeans are dissatisfied with the euro, which, I might add, seems less and less likely to replace the dollar as the leading currency for global trade and finance. American **leadership is essential to put together** the broad-based **coalitions necessary to tackle these** **problems.** Our **national interest is served by continuing to build up** our **relations with other states, creating** a network of **mutual interdependence, rather than** ignoring problems or **isolating ourselves** from the rest of the world.

#### The plan’s external oversight on detention maintains heg ---legitimacy is the vital internal link to global stability

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

The hegemonic model also reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts. The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on, among other things, predictability. n422 G. John Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors: "The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability." n423 Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States. At the same time, the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states." n424¶ The Bush Administration's detainee policy, for all of its virtues and faults, was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429¶ In an anarchic world characterized by great power conflict, one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law. Indeed, the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.¶ The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436¶ Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view. In contrast, the President's (and Congress's) responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage, even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest." n438¶ At the same time, the enemy combatant cases make allowances for the executive branch's superior speed. The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy. n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440¶ The enemy combatant litigation also underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head. In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play. Rather than hobbling the exercise of foreign policy, the courts are a key form of "soft power." n442 As Justice Kennedy's majority opinion observed in Boumediene, courts can bestow external legitimacy on the acts of the political branches. n443 Acts having a basis in law are almost universally regarded as more legitimate than merely political acts. Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world." n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige.¶ Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity. n447 The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony. In fact, the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States. n448 This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights. n449¶ Conclusion¶ When it comes to the constitutional regime of foreign affairs, geopolitics has always mattered. Understandings about America's role in the world have shaped foreign affairs doctrines. But the classic realist assumptions that support special deference do not reflect the world as it is today. A better, more realist, approach looks to the ways that the courts can reinforce and legitimize America's leadership role. The Supreme Court's rejection of the government's claimed exigencies in the enemy combatant cases strongly indicates that the Judiciary is becoming reconciled to the current world order and is asserting its prerogatives in response to the fewer constraints imposed on the executive branch. In other words, the courts are moving toward the hegemonic model. In the great dismal swamp that is the judicial treatment of foreign affairs, this transformation offers hope for clarity: the positive reality of the international system, despite terrorism and other serious challenges, permits the courts to reduce the "deference gap" between foreign and domestic cases.

#### Solves status competition—most proximite cause of war.

Wohlforth 9 - William C. Wohlforth is a professor of government at Dartmouth College, “Unipolarity, Status Competition, and Great Power War”, World Politics, 61.1, Jan, MUSE

Do Great Powers Care about Status? Mainstream theories generally posit that states come to blows over an international status quo only when it has implications for their security or material well-being. The guiding assumption is that a state’s satisfaction [End Page 34] with its place in the existing order is a function of the material costs and benefits implied by that status.24 By that assumption, once a state’s status in an international order ceases to affect its material wellbeing, its relative standing will have no bearing on decisions for war or peace. But the assumption is undermined by cumulative research in disciplines ranging from neuroscience and evolutionary biology to economics, anthropology, sociology, and psychology that human beings are powerfully motivated by the desire for favorable social status comparisons. This research suggests that the preference for status is a basic disposition rather than merely a strategy for attaining other goals.25 People often seek tangibles not so much because of the welfare or security they bring but because of the social status they confer. Under certain conditions, the search for status will cause people to behave in ways that directly contradict their material interest in security and/or prosperity. Much of this research concerns individuals, but international politics takes place between groups. Is there reason to expect individuals who act in the name of states to be motivated by status concerns? Compelling findings in social psychology suggest a positive answer. Social identity theory (sit) has entered international relations research as a psychological explanation for competitive interstate behavior.26 According to the theory’s originator, Henri Tajfel, social identity is “that part of an individual’s self-concept which derives from his knowledge of his membership of a social group (or groups) together with the value and emotional significance attached to that membership.”27 Tajfel and his followers argue that deep-seated human motivations of self-definition and self-esteem induce people to define their identity in relation to their in-group, to compare and contrast that in-group with out-groups, and to want that comparison to reflect favorably on themselves. In a [End Page 35] remarkable set of experiments that has since been replicated dozens of times, Tajfel and his collaborators found that simply assigning subjects to trivially defined “minimal” in-groups led them to discriminate in favor of their in-group at the expense of an out-group, even when nothing else about the setting implied a competitive relationship. Although sit appears to provide a plausible candidate explanation for interstate conflict, moving beyond its robust but general implication about the ubiquitous potential for status seeking to specific hypotheses about state behavior has proved challenging. In particular, experimental findings concerning which groups individuals will select as relevant comparisons and which of many possible identity-maintenance strategies they will choose have proved highly sensitive to the assumptions made about the social context. The results of experimental research seeking to predict responses to status anxiety—whether people will choose social mobility (identifying with a higher status group), social creativity (seeking to redefine the relevant status-conferring dimensions to favor those in which one’s group excels), social conflict (contesting the status-superior group’s claim to higher rank), or some other strategy—are similarly highly context dependent.28 For international relations the key unanswered question remains: under what circumstances might the constant underlying motivation for a positive self-image and high status translate into violent conflict? While sit research is suggestive, standard concerns about the validity of experimental findings are exacerbated by the fact that the extensive empirical sit literature is generally not framed in a way that captures salient features of international relations. The social system in which states operate is dramatically simpler than the domestic social settings much of the research seeks to capture. Decision makers’ identification with the state is generally a given, group boundaries are practically impermeable, and there are very few great powers and very limited mobility. For states, comparison choice and the selection of status- maintenance strategies are constrained by exogenous endowments and geographical location. Natural and historical endowments—size and power potential—vary much more among states than among individuals [End Page 36] and so play a much larger role in determining hierarchies and influencing the selection of identity maintenance strategies. Assumptions built into most sit research to date generally do not capture these realities of interstate life. In particular, standard sit research designs beg the question of the expected costs of competing for status. Experiments do not generally posit situations in which some groups are endowed with demonstrably superior means with which to discriminate in favor of their own group at the expense of out-groups. Indeed, built in to most experimental setups is an implied assumption of material equality among groups. Yet international politics is notable as a social realm with especially large disparities in material capabilities, and decision makers are unlikely to follow identity-maintenance strategies that are demonstrably beyond their means. Nevertheless, there is no reason to doubt the relevance for states of sit’s core finding that individual preferences for higher status will affect intergroup interactions. Individuals who identify with a group transfer the individual’s status preference to the group’s relations with other groups. If those who act on behalf of a state (or those who select them) identify with that state, then they can be expected to derive utility from its status in international society. In addition, there are no evident reasons to reject the theory’s applicability to interstate settings that mimic the standard sit experimental setup—namely, in an ambiguous hierarchy of states that are comparable in material terms. As Jacques Hymans notes: “In the design of most sit experiments there is an implicit assumption of rough status and power parity. Moreover, the logic of sit theory suggests that its findings of ingroup bias may in fact be dependent on this assumption.”29 Status conflict is thus more likely in flat, ambiguous hierarchies than in clearly stratified ones. And there are no obvious grounds for rejecting the basic finding that comparison choice will tend to be “similar but upward” (that is, people will compare and contrast their group with similar but higher status groups).30 In most settings outside the laboratory this leaves a lot of room for consequential choices, but in the context of great power relations, the set of feasible comparison choices is constrained in highly consequential ways. [End Page 37] How Polarity Affects Status Competition sit is often seen in a scholarly context that contrasts power-based and identity-based explanations.31 It is thus put forward as a psychological explanation for competitive behavior that is completely divorced from distributions of material resources. But there is no theoretical justification for this separation. On the contrary, a long-standing research tradition in sociology, economics, and political science finds that actors seek to translate material resources into status. Sociologists from Weber and Veblen onward have postulated a link between material conditions and the stability of status hierarchies. When social actors acquire resources, they try to convert them into something that can have more value to them than the mere possession of material things: social status. As Weber put it: “Property as such is not always recognized as a status qualification, but in the long run it is, and with extraordinary regularity.” 32 This link continues to find support in the contemporary economics literature on income distribution and status competition.33 Status is a social, psychological, and cultural phenomenon. Its expression appears endlessly varied; it is thus little wonder that the few international relations scholars who have focused on it are more struck by its variability and diversity than by its susceptibility to generalization. 34 Yet if sit captures important dynamics of human behavior, and if people seek to translate resources into status, then the distribution of capabilities will affect the likelihood of status competition in predictable ways. Recall that theory, research, and experimental results suggest that relative status concerns will come to the fore when status hierarchy is ambiguous and that people will tend to compare the states with which they identify to similar but higher-ranked states.35 Dissatisfaction arises not from dominance itself but from a dominance that [End Page 38] appears to rest on ambiguous foundations. Thus, status competition is unlikely in cases of clear hierarchies in which the relevant comparison out-groups for each actor are unambiguously dominant materially. Applied to international politics, this begins to suggest the conditions conducive to status competition. For conflict to occur, one state must select another state as a relevant comparison that leaves it dissatisfied with its status; it must then choose an identity-maintenance strategy in response that brings it into conflict with another state that is also willing to fight for its position. This set of beliefs and strategies is most likely to be found when states are relatively evenly matched in capabilities. The more closely matched actors are materially, the morelikely they areto experience uncertainty about relative rank. When actors start receiving mixed signals—some indicating that they belong in a higher rank while others reaffirm their present rank—they experience status inconsistency and face incentives to resolve the uncertainty. When lower-ranked actors experience such inconsistency, they will use higher-ranked actors as referents. Since both high- and low-status actors are biased toward higher status, uncertainty fosters conflict as the same evidence feeds contradictory expectations and claims. When the relevant out-group is unambiguously dominant materially, however, status inconsistency is less likely. More certain of their relative rank, subordinate actors are less likely to face the ambiguity that drives status competition. And even if they do, their relative weakness makes strategies of social competition an unlikely response. Given limited material wherewithal, either acquiescence or strategies of social creativity are more plausible responses, neither of which leads to military conflict. The theory suggests that it is not just the aggregate distribution of capabilities that matters for status competition but also the evenness with which key dimensions— such as naval, military, economic, and technological—are distributed. Uneven capability portfolios—when states excel in different relevant material dimensions—make status inconsistency more likely. When an actor possesses some attributes of high status but not others, uncertainty and status inconsistency are likely.36 The more a lower-ranked actor matches the higher-ranked group in some but not all key material dimensions of status, the more likely it is to conceive an interest in contesting its rank and the more [End Page 39] likely the higher-ranked state is to resist. Thus, status competition is more likely to plague relations between leading states whose portfolios of capabilities are not only close but also mismatched. Hypotheses When applied to the setting of great power politics, these propositions suggest that the nature and intensity of status competition will be influenced by the nature of the polarity that characterizes the system. Multipolarity implies a flat hierarchy in which no state is unambiguously number one. Under such a setting, the theory predicts status inconsistency and intense pressure on each state to resolve it in a way that reflects favorably on itself. In this sense, all states are presumptively revisionist in that the absence of a settled hierarchy provides incentives to establish one. But the theory expects the process of establishing a hierarchy to be prone to conflict: any state would be expected to prefer a status quo under which there are no unambiguous superiors to any other state’s successful bid for primacy. Thus, an order in which one’s own state is number one is preferred to the status quo, which is preferred to any order in which another state is number one. The expected result will be periodic bids for primacy, resisted by other great powers.37 For its part, bipolarity, with only two states in a material position to claim primacy, implies a somewhat more stratified hierarchy that is less prone to ambiguity. Each superpower would be expected to see the other as the main relevant out-group, while second-tier major powers would compare themselves to either or both of them. Given the two poles’ clear material preponderance, second-tier major powers would not be expected to experience status dissonance and dissatisfaction, and, to the extent they did, the odds would favor their adoption of strategies of social creativity instead of conflict. For their part, the poles would be expected to seek to establish a hierarchy: each would obviously prefer to be number one, but absent that each would also prefer an ambiguous status quo in which neither is dominant to an order in which it is unambiguously outranked by the other. Unipolarity implies the most stratified hierarchy, presenting the starkest contrast to the other two polar types. The intensity of the competition over status in either a bipolar or a multipolar system might [End Page 40] vary depending on how evenly the key dimensions of state capability are distributed—a multipolar system populated by states with very even capabilities portfolios might be less prone to status competition than a bipolar system in which the two poles possess very dissimilar portfolios. But unipolarity, by definition, is characterized by one state possessing unambiguous preponderance in all relevant dimensions. The unipole provides the relevant out-group comparison for all other great powers, yet its material preponderance renders improbable identity-maintenance strategies of social competition. While second-tier states would be expected to seek favorable comparisons with the unipole, they would also be expected to reconcile themselves to a relatively clear status ordering or to engage in strategies of social creativity. General Patterns of Evidence Despite increasingly compelling findings concerning the importance of status seeking in human behavior, research on its connection to war waned some three decades ago.38 Yet empirical studies of the relationship between both systemic and dyadic capabilities distributions and war have continued to cumulate. If the relationships implied by the status theory run afoul of well-established patterns or general historical findings, then there is little reason to continue investigating them. The clearest empirical implication of the theory is that status competition is unlikely to cause great power military conflict in unipolar systems. If status competition is an important contributory cause of great power war, the1n, ceteris paribus, unipolar systems should be markedly less war-prone than bipolar or multipolar systems. And this appears to be the case. As Daniel Geller notes in a review of the empirical literature: “The only polar structure that appears to influence conflict probability is unipolarity.”39 In addition, a larger number of studies at the dyadic level support the related expectation that narrow capabilities gaps and ambiguous or unstable capabilities hierarchies increase the probability of war.40 [End Page 41] These studies are based entirely on post-sixteenth-century European history, and most are limited to the post-1815 period covered by the standard data sets. Though the systems coded as unipolar, near-unipolar, and hegemonic are all marked by a high concentration of capabilities in a single state, these studies operationalize unipolarity in a variety of ways, often very differently from the definition adopted here. An ongoing collaborative project looking at ancient interstate systems over the course of two thousand years suggests that historical systems that come closest to the definition of unipolarity used here exhibit precisely the behavioral properties implied by the theory. 41 As David C. Kang’s research shows, the East Asian system between 1300 and 1900 was an unusually stratified unipolar structure, with an economic and militarily dominant China interacting with a small number of geographically proximate, clearly weaker East Asian states.42 Status politics existed, but actors were channeled by elaborate cultural understandings and interstate practices into clearly recognized ranks. Warfare was exceedingly rare, and the major outbreaks occurred precisely when the theory would predict: when China’s capabilities waned, reducing the clarity of the underlying material hierarchy and increasing status dissonance for lesser powers. Much more research is needed, but initial exploration of other arguably unipolar systems—for example, Rome, Assyria, the Amarna system—appears consistent with the hypothesis.43 Status Competition and Causal Mechanisms <Evidence Continues Several Pages Later> Conclusion The evidence suggests that narrow and asymmetrical capabilities gaps foster status competition even among states relatively confident of their basic territorial security for the reasons identified in social identity theory and theories of status competition. Broad patterns of evidence are consistent with this expectation, suggesting that unipolarity shapes strategies of identity maintenance in ways that dampen status conflict. The implication is that unipolarity helps explain low levels of military competition and conflict among major powers after 1991and that a return to bipolarity or multipolarity would increase the likelihood ofsuch conflict. This has been a preliminary exercise. The evidence for the hypotheses explored here is hardly conclusive, but it is sufficiently suggestive to warrant further refinement and testing, all the more so given [End Page 56] the importance of the question at stake. If status matters in the way the theory discussed here suggests, then the widespread view that the rise of a peer competitor and the shift back to a bipolar or multipolar structure present readily surmountable policy challenges is suspect. Most scholars agree with Jacek Kugler and Douglas Lemke’s argument: “[S]hould a satisfied state undergo a power transition and catch up with dominant power, there is little or no expectation of war.” 81 Given that today’s rising powers have every material reason to like the status quo, many observers are optimistic that the rise of peer competitors can be readily managed by fashioning an order that accommodates their material interests. Yet it is far harder to manage competition for status than for most material things. While diplomatic efforts to manage status competition seem easy under unipolarity, theory and evidence suggest that it could present much greater challenges as the system moves back to bipolarity or multipolarity. When status is seen as a positional good, efforts to craft negotiated bargains about status contests face long odds. And this positionality problem is particularly acute concerning the very issue unipolarity solves: primacy. The route back to bipolarity or multipolarity is thus fraught with danger. With two or more plausible claimants to primacy, positional competition and the potential for major power war could once again form the backdrop of world politics. [End Page 57]

#### No offense- Collapse causes lash-out─

Goldstein ‘7 (Avery, Professor of Global Politics and International Relations @ University of Pennsylvania, “Power transitions, institutions, and China's rise in East Asia: Theoretical expectations and evidence,” Journal of Strategic Studies, Volume 30, Issue 4 & 5 August)

Two closely related, though distinct, theoretical arguments focus explicitly on the consequences for international politics of a shift in power between a dominant state and a rising power. In War and Change in World Politics, Robert Gilpin suggested that peace prevails when a dominant state’s capabilities enable it to ‘govern’ an international order that it has shaped. Over time, however, as economic and technological diffusion proceeds during eras of peace and development, other states are empowered. Moreover, the burdens of international governance drain and distract the reigning hegemon, and challengers eventually emerge who seek to rewrite the rules of governance. As the power advantage of the erstwhile hegemon ebbs, it may become desperate enough to resort to the ultima ratio of international politics, force, to forestall the increasingly urgent demands of a rising challenger. Or as the power of the challenger rises, it may be tempted to press its case with threats to use force. It is the rise and fall of the great powers that creates the circumstances under which major wars, what Gilpin labels ‘hegemonic wars’, break out.13 Gilpin’s argument logically encourages pessimism about the implications of a rising China. It leads to the expectation that international trade, investment, and technology transfer will result in a steady diffusion of American economic power, benefiting the rapidly developing states of the world, including China. As the US simultaneously scurries to put out the many brushfires that threaten its far-flung global interests (i.e., the classic problem of overextension), it will be unable to devote sufficient resources to maintain or restore its former advantage over emerging competitors like China. While the erosion of the once clear American advantage plays itself out, the US will find it ever more difficult to preserve the order in Asia that it created during its era of preponderance. The expectation is an increase in the likelihood for the use of force – either by a Chinese challenger able to field a stronger military in support of its demands for greater influence over international arrangements in Asia, or by a besieged American hegemon desperate to head off further decline. Among the trends that alarm those who would look at Asia through the lens of Gilpin’s theory are China’s expanding share of world trade and wealth (much of it resulting from the gains made possible by the international economic order a dominant US established); its acquisition of technology in key sectors that have both civilian and military applications (e.g., information, communications, and electronics linked with the ‘revolution in military affairs’); and an expanding military burden for the US (as it copes with the challenges of its global war on terrorism and especially its struggle in Iraq) that limits the resources it can devote to preserving its interests in East Asia.14 Although similar to Gilpin’s work insofar as it emphasizes the importance of shifts in the capabilities of a dominant state and a rising challenger, the power-transition theory A. F. K. Organski and Jacek Kugler present in The War Ledger focuses more closely on the allegedly dangerous phenomenon of ‘crossover’– the point at which a dissatisfied challenger is about to overtake the established leading state.15 In such cases, when the power gap narrows, the dominant state becomes increasingly desperate to forestall, and the challenger becomes increasingly determined to realize the transition to a new international order whose contours it will define. Though suggesting why a rising China may ultimately present grave dangers for international peace when its capabilities make it a peer competitor of America, Organski and Kugler’s power-transition theory is less clear about the dangers while a potential challenger still lags far behind and faces a difficult struggle to catch up. This clarification is important in thinking about the theory’s relevance to interpreting China’s rise because a broad consensus prevails among analysts that Chinese military capabilities are at a minimum two decades from putting it in a league with the US in Asia.16 Their theory, then, points with alarm to trends in China’s growing wealth and power relative to the United States, but especially looks ahead to what it sees as the period of maximum danger – that time when a dissatisfied China could be in a position to overtake the US on dimensions believed crucial for assessing power. Reports beginning in the mid-1990s that offered extrapolations suggesting China’s growth would give it the world’s largest gross domestic product (GDP aggregate, not per capita) sometime in the first few decades of the twentieth century fed these sorts of concerns about a potentially dangerous challenge to American leadership in Asia.17 The huge gap between Chinese and American military capabilities (especially in terms of technological sophistication) has so far discouraged prediction of comparably disquieting trends on this dimension, but inklings of similar concerns may be reflected in occasionally alarmist reports about purchases of advanced Russian air and naval equipment, as well as concern that Chinese espionage may have undermined the American advantage in nuclear and missile technology, and speculation about the potential military purposes of China’s manned space program.18 Moreover, because a dominant state may react to the prospect of a crossover and believe that it is wiser to embrace the logic of preventive war and act early to delay a transition while the task is more manageable, Organski and Kugler’s powertransition theory also provides grounds for concern about the period prior to the possible crossover.19

# Adv – Adventurism

#### Failure of the Supreme Court to substantively rule on detention authority causes judicial abstention and presidential adventurism

Vaughns 13 (B.A. (Political Science), J.D., University of California, Berkeley, School of Law. Professor of Law, University of Maryland Francis King Carey School of Law.Of Civil Wrongs and Rights: Kiyemba v. Obama and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years After 9/11 ASIAN AMERICAN LAW JOURNAL [Volume 20:7])

After being reversed three times in a row in Rasul, Hamdan, and then Boumediene, the D.C. Circuit finally managed in Kiyemba to reassert, and have effectively sanctioned, its highly deferential stance towards the Executive in cases involving national security. In particular, the D.C. Circuit concluded that an order mandating the Uighurs’ release into the continental United States would impermissibly interfere with the political branches’ exclusive authority over immigration matters. But this reasoning is legal ground that the Supreme Court has already implicitly—and another three-judge panel of the D.C. Circuit more explicitly—covered earlier. As such, the Bush administration’s strategy in employing the “war” paradigm at all costs and without any judicial intervention, while unsuccessful in the Supreme Court, has finally paid off in troubling, and binding, fashion in the D.C. Court of Appeals, where, national security fundamentalism reigns supreme and the Executive’s powers as “Commander-in-Chief” can be exercised with little, if any, real check; arguably leading to judicial abstention in cases involving national security. The consequences of the Kiyemba decision potentially continue today, for example, with passage of the National Defense Authorization Act of 2012,246 which President Obama signed, with reservations, into law on December 31, 2011.247 This defense authorization bill contains detainee provisions that civil liberties groups and human rights advocates have strongly opposed.248 The bill’s supporters strenuously objected to the assertion that these provisions authorize the indefinite detention of U.S. citizens.249 In signing the bill, President Obama later issued a statement to the effect that although he had reservations about some of the provisions, he “vowed to use discretion when applying” them.250 Of course, that does not mean another administration would do the same, especially if courts abstain from their role as protectors of individual rights. In the years after 9/11, the Supreme Court asserted its role incrementally, slowly entering into the debate about the rights of enemy combatant detainees. This was a “somewhat novel role” for the Court.251 Unsurprisingly, in so doing, the Court’s intervention “strengthened detainee rights, enlarged the role of the judiciary, and rebuked broad assertions of executive power.”252 Also unsurprisingly, the Court’s decisions in this arena “prompted strong reactions from the other two branches.”253 This may be so because, as Chief Justice Rehnquist noted, the Court had, in the past, recognized the primacy of liberty interests only in quieter times, after national emergencies had terminated or perhaps before they ever began.254 However, since the twentieth century, wartime has been the “normal state of affairs.”255 If perpetual war is the new “normal,” the political branches likely will be in a permanent state of alert. Thus, it remains for the courts to exercise vigilance and courage about protecting individual rights, even if these assertions of judicial authority come as a surprise to the political branches of government.256 But courts, like any other institution, are susceptible to being swayed by influences external to the law. Joseph Margulies and Hope Metcalf make this very point in a 2011 article, noting that much of the post-9/11 scholarship mirrors this country’s early wartime cases and “envisions a country that veers off course at the onset of a military emergency but gradually steers back to a peacetime norm once the threat recedes, via primarily legal interventions.”257 This model, they state, “cannot explain a sudden return to the repressive wilderness just at the moment when it seemed the country had recovered its moral bearings.”258 Kiyemba is very much a return to the repressive wilderness. In thinking about the practical and political considerations that inevitably play a role in judicial decisionmaking (or non-decisionmaking, as the case may be), I note that the Court tends to be reluctant to decide constitutional cases if it can avoid doing so, as it did in Kiyemba. Arguably, this doctrine of judicial abstention is tied to concerns of institutional viability, in the form of public perception, and to concerns about respecting the separation of powers.259 But, as Justice Douglas once famously noted, when considering the separation of powers, the Court should be mindful of Chief Justice Marshall’s admonition that “it is a constitution we are expounding.”260 Consequently, “[i]t is far more important [for the Court] to be respectful to the Constitution than to a coordinate branch of government.”261 And while brave jurists have made such assertions throughout the Court’s history, the Court is not without some pessimism about its ability to effectively protect civil liberties in wartimes or national emergencies. For example, in Korematsu—one of the worst examples of judicial deference in times of crisis—Justice Jackson dissented, but he did so “with explicit resignation about judicial powerlessness,” and concern that it was widely believed that “civilian courts, up to and including his own Supreme Court, perhaps should abstain from attempting to hold military commanders to constitutional limits in wartime.”262 Significantly, even when faced with the belief that the effort may be futile, Justice Jackson dissented. As I describe in the following section, that dissent serves a valuable purpose. But, for the moment, I must consider the external influences on the court that resulted in that feeling of judicial futility.

#### Two Scenarios

#### First, Obama uses adventurist detention policies to signal US African pivot

The Atlantic 10/6 “Are We Pivoting to Africa Rather Than Asia?” http://www.theatlantic.com/international/archive/2013/10/are-we-pivoting-to-africa-rather-than-asia/280318/

This weekend, the United States conducted two raids against militant Islamists in Tripoli, Libya and Barawe, Somalia. Though the action in Tripoli appeared to be more successful—FBI and CIA agents nabbed Abu Anas al-Liby, a suspected leader of Al Qaeda—the significance of both raids lies less in their immediate success and more in their implications for American involvement in Africa.¶ What was the purpose of the raids?¶ The raid in Libya this Saturday culminated in the arrest of al-Liby, who was on the most wanted terrorists list for his involvement in the 1998 bombings of American Embassies in Kenya and Tanzania.¶ Less official information is available concerning the purpose of the raid in Somalia. However, observers have suggested that this raid was tasked with the bringing the organizers of the recent Westgate Mall assault to justice. American government officials have confirmed that SEAL Team 6 was deployed to Barawe, Somalia, where they engaged in a firefight with militants before aborting the mission. No American casualties have been reported and it is estimated that seven people were killed in the exchange.¶ What is the significance of the raids for American military involvement in Africa?¶ North Africa has long seen a strong American military presence due to its proximity to America’s strategic partners in the Middle East, while East Africa cooperated with the United States in its efforts to stabilize Somalia, until the infamous Black Hawk down fiasco. The raids conducted this weekend suggest that the importance and nature of American involvement in the region is quickly changing.¶ Under the auspices of United States Africa Command, or AFRICOM, which has only been operating since 2008, American military posts in Africa may witness a change in mandate, in which they are more frequently understood as being on the frontlines of counter-terrorism policy, and less as bases from which to organize and launch action in the Arabian Peninsula and the Middle East. Though current AFRICOM missions are largely based on cooperative relationships and many of their programs emphasize the training of local participants, the change in the continent’s strategic importance may be linked to a rise in the sort of unilateral counter-terrorism policy undertaken this weekend.¶ What does this mean for American foreign policy?¶ Frequently relegated to the back-burner of American foreign policy, Africa is indeed rising in policy deliberations in Washington. This summer, President Obama made official visits to Senegal, South Africa, and Tanzania, with the aim of fostering political and economic partnerships with these countries. The cultivation of these political relationships and the increased military activity in Africa may suggest that an “African shift” will displace the “Asian pivot.”

#### Guarantees instability and war in the region – de-legitimizes governments and empowers terrorist networks

Muhammad 10/11 (2013; Jehron – freelance writer, expert in African affairs) “U.S. Gov't Destabilizing Africa through AFRICOM” http://www.finalcall.com/artman/publish/World\_News\_3/article\_100866.shtml

(FinalCall.com) - Thanks to the U.S. and its proxy-led interventions, instability in North Africa and the Middle East has spread to the African continent.¶ Violence, including the longstanding conflict (you might remember “Black Hawk Down”) in Somalia has spread to include Ethiopia, Uganda and most recent victim Kenya.¶ While global concern focuses on poison gas attacks in Syria, Iran’s alleged creation of nuclear weapons, and the coup of the first democratically- elected Egyptian president, “Libya has plunged unnoticed into its worst political and economic crisis since the defeat of Gadhafi two years ago,” according to The Independent, a UK based newspaper.¶ Not only have militias taken over the Libyan countryside and Libyan crude output gone down to a trickle, The Independent reported, “government authority is disintegrating in all parts of the country putting in doubt claims by American, British and French politicians that NATO’s military action in Libya in 2011 was an outstanding example of a successful foreign military intervention, which should be repeated in Syria.”¶ Caught off guard by America’s regime change initiative in Libya and instability it caused in places like Mali, the continent-wide African Union has yet to confront the growing footprint of AFRICOM, the U.S. Africa Command.¶ Why? It may have to do with AFRICOM’s ability to hide the real purpose of its presence in Africa.¶ According to TomDispatch.com, America’s military command “has been slipping, sneaking, creeping into Africa, deploying ever more facilities in ever more countries—and in a fashion so quiet, so covert, that just about no American (and African for that matter) has any idea this is going on.”¶ It could also be that the AU voice is muzzled since external donors (U.S. and European) funded African Union program costs in 2013 to the tune of $155.3 million or 56 percent of the total AU budget. The AU member states, according to Pambazuka.org, fund mostly operational costs, $122.8 million or 44 percent of the budget. Of this only $5.3 million “goes toward programs of the AU while 96 percent goes to operational costs,” said authors Janah Ncube and Achieng Maureen Akena.¶ Outgoing AU chairman Dr. Ping, during his last address to the executive council in 2012, said the AU has “little legitimacy in claiming marginalization in global politics when it is unable to be self-sustaining and depends on donors to support its programs,” reported Pambazuka.With the winding down of U.S. involvement in Afghanistan, ending the war in Iraq, and President Obama’s visit to Asia suggesting a rebalancing of U.S. military resources, AFRICOM’s increasing military presence, “out of the public earshot,” suggests “Africa is the battlefield of tomorrow, today,” wrote TomDispatch’s managing editor Nick Turse.¶ The increasing instability that is in the Middle East and North Africa is destined to plague the continent. The African Union, this author feels, should raise its voice wherever U.S. and European forces or proxies have intervened militarily. The interventions are deepening problems in nations and regions, creating refugees, increasing militia groups and creating more areas awash in weapons.¶ In the post 9/11 era and in the wake of U.S. “stability” operations in Africa which only accelerated during the Obama years, “militancy has spread, insurgent groups have proliferated, allies have faltered or committed abuses, terrorism has increased, the number of failed states has risen, and the continent has become more unsettled,” wrote Turse.¶ The recent massacre in a Kenyan suburb, inside an upscale shopping mall in Nairobi’s affluent Westlands area, is a case in point. Hooded gunmen claiming to be members of Al-Shaabab took responsibility for the attack in retaliation for Kenya’s role in the war against militants in Somalia. At least 72 people were killed.¶ The Somali group Al-Shaabab, according to news reports, “vowed in late 2011 to carry out a large-scale attack in Nairobi in retaliation for Kenya’s sending of troops into Somalia to fight” Islamic insurgents. AMISOM, the U.S. and European funded African Union Mission in Somalia, is to a large extent responsible for Kenya’s search and destroy incursions inside Somalia.¶ AMISOM has also used Ugandan troops. In 2010 over 60 persons, in three different suicide bomb attacks, were killed while watching the World Cup in Uganda. Al-Shabaab claimed responsibility. Yusef Sheikh Issa, an Al Shabaab commander in Somalia told the Associated Press, “Uganda is one of our enemies. Whatever makes them cry, makes us happy.”¶ If one looks deeply into what brought about the rise of Al-Shabaab you discover a U.S.-supported invasion by Ethiopia.¶ Ethiopia—following in the footsteps of the U.S.-sponsored Joint Operations Command that included the CIA—invaded Somalia under the cover of hunting for persons responsible for the bombings of U.S. embassies in Kenya and Tanzania. This invasion was the final nail in the coffin of the Islamic Courts Union, which was responsible for the closest Somalia has come to a stable government in recent history.¶ If a picture is worth a thousand words, what’s a map worth? Take the one created by TomDispatch that documents U.S. military outposts, construction, security cooperation, and deployments in Africa. “It looks,” according to Turse, “like a field of mushrooms after a monsoon.” U.S. current military involvement is found in “no fewer than 49 African nations,” he said.¶ President George W. Bush announced in 2007, the establishment of AFRICOM, a unified command for U.S. military forces in Africa. He said AFRICOM was being launched for purely peaceful reasons.¶ “Military aid and questionable trade” have always been the “the twin pillars” of America’s involvement in Africa.¶ “Imperial acquisition (or the acquisition of natural resources),” according to Crossedcrocodiles.com, “masquerades as humanitarian aid and manifests as the militarization of the continent through the U.S. Africa Command, AFRICOM.”¶ The late President Gadhafi utilized Libya’s oil wealth to block the spread of AFRICOM. With no deterrent equal to Gadhafi , the increased instability on the continent will continue.

#### Results in global nuclear war

Deutsch 2[Founder of the Rabid Tiger Project, A Political Risk Consulting and Related Research Firm (Rapid Tiger Project, http://www.rabidtigers.com/rtn/newsletterv2n9.html]

The Rabid Tiger Project believes that a nuclear war is most likely to start in Africa. Civil wars in the Congo (the country formerly known as Zaire), Rwanda, Somalia and Sierra Leone, and domestic instability in Zimbabwe, Sudan and other countries, as well as occasional brushfire and other wars (thanks in part to "national" borders that cut across tribal ones) turn into a really nasty stew. We've got all too many rabid tigers and potential rabid tigers, who are willing to push the button rather than risk being seen as wishy-washy in the face of a mortal threat and overthrown. Geopolitically speaking, Africa is open range. Very few countries in Africa are beholden to any particular power. South Africa is a major exception in this respect - not to mention in that she also probably already has the Bomb. Thus, outside powers can more easily find client states there than, say, in Europe where the political lines have long since been drawn, or Asia where many of the countries (China, India, Japan) are powers unto themselves and don't need any "help," thank you. Thus, an African war can attract outside involvement very quickly. Of course, a proxy war alone may not induce the Great Powers to fight each other. But an African nuclear strike can ignite a much broader conflagration, if the other powers are interested in a fight.

#### Second, this stirs up flashpoints in East Asia over North Korea

Symonds 4-5-13 [Peter, leading staff writer for the World Socialist Web Site and a member of its International Editorial Board. He has written extensively on Middle Eastern and Asian politics, contributing articles on developments in a wide range of countries, “Obama’s “playbook” and the threat of nuclear war in Asia,” http://www.wsws.org/en/articles/2013/04/05/pers-a05.html]

The Obama administration has engaged in reckless provocations against North Korea over the past month, inflaming tensions in North East Asia and heightening the risks of war. Its campaign has been accompanied by the relentless demonising of the North Korean regime and claims that the US military build-up was purely “defensive”. However, the Wall Street Journal and CNN revealed yesterday that the Pentagon was following a step-by-step plan, dubbed “the playbook”, drawn up months in advance and approved by the Obama administration earlier in the year. The flights to South Korea by nuclear capable B-52 bombers on March 8 and March 26, by B-2 bombers on March 28, and by advanced F-22 Raptor fighters on March 31 were all part of the script.¶ There is of course nothing “defensive” about B-52 and B-2 nuclear strategic bombers. The flights were designed to demonstrate, to North Korea in the first instance, the ability of the US military to conduct nuclear strikes at will anywhere in North East Asia. The Pentagon also exploited the opportunity to announce the boosting of anti-ballistic missile systems in the Asia Pacific and to station two US anti-missile destroyers off the Korean coast.¶ According to CNN, the “playbook” was drawn up by former defence secretary Leon Panetta and “supported strongly” by his replacement, Chuck Hagel. The plan was based on US intelligence assessments that “there was a low probability of a North Korean military response”—in other words, that Pyongyang posed no serious threat. Unnamed American officials claimed that Washington was now stepping back, amid concerns that the US provocations “could lead to miscalculations” by North Korea.¶ However, having deliberately ignited one of the most dangerous flashpoints in Asia, there are no signs that the Obama administration is backing off. Indeed, on Wednesday, Defence Secretary Hagel emphasised the military threat posed by North Korea, declaring that it presented “a real and clear danger”. The choice of words was deliberate and menacing—an echo of the phrase “a clear and present danger” used to justify past US wars of aggression.¶ The unstable and divided North Korean regime has played directly into the hands of Washington. Its bellicose statements and empty military threats have nothing to do with a genuine struggle against imperialism and are inimical to the interests of the international working class. Far from opposing imperialism, its Stalinist leaders are looking for a deal with the US and its allies to end their decades-long economic blockade and open up the country as a new cheap labour platform for global corporations.¶ As the present standoff shows, Pyongyang’s acquisition of a few crude nuclear weapons has in no way enhanced its defence against an American attack. The two B-2 stealth bombers that flew to South Korea could unleash enough nuclear weapons to destroy the country’s entire industrial and military capacity and murder even more than the estimated 2 million North Korean civilians killed by the three years of US war in Korea in the 1950s.¶ North Korea’s wild threats to attack American, Japanese and South Korean cities only compound the climate of fear used by the ruling classes to divide the international working class—the only social force capable of preventing war.¶ Commentators in the international media speculate endlessly on the reasons for the North Korean regime’s behaviour. But the real question, which is never asked, should be: why is the Obama administration engaged in the dangerous escalation of tensions in North East Asia? The latest US military moves go well beyond the steps taken in December 2010, when the US and South Korean navies held provocative joint exercises in water adjacent to both North Korea and China.¶ Obama’s North Korea “playbook” is just one aspect of his so-called “pivot to Asia”—a comprehensive diplomatic, economic and military strategy aimed at ensuring the continued US domination of Asia. The US has stirred up flashpoints throughout the region and created new ones, such as the conflict between Japan and China over the disputed Senkaku/Diaoyu islands in the East China Sea. Obama’s chief target is not economically bankrupt North Korea, but its ally China, which Washington regards as a dangerous potential rival. Driven by the deepening global economic crisis, US imperialism is using its military might to assert its hegemony over Asia and the entire planet.¶ The US has declared that its military moves against North Korea are designed to “reassure” its allies, Japan and South Korea, that it will protect them. Prominent figures in both countries have called for the development of their own nuclear weapons. US “reassurances” are aimed at heading off a nuclear arms race in North East Asia—not to secure peace, but to reinforce the American nuclear monopoly.¶ The ratcheting-up of tensions over North Korea places enormous pressures on China and the newly-selected leadership of the Chinese Communist Party. An unprecedented public debate has opened up in Beijing over whether or not to continue to support Pyongyang. The Chinese leadership has always regarded the North Korean regime as an important buffer on its northeastern borders, but now fears that the constant tension on the Korean peninsula will be exploited by the US and its allies to launch a huge military build-up.¶ Indeed, all of the Pentagon’s steps over the past month—the boosting of anti-missile systems and practice runs of nuclear capable bombers—have enhanced the ability of the US to fight a nuclear war against China. Moreover, the US may not want to provoke a war, but its provocations always run the risk of escalating dangerously out of control. Undoubtedly, Obama’s “playbook” for war in Asia contains many more steps beyond the handful leaked to the media. The Pentagon plans for all eventualities, including the possibility that a Korean crisis could bring the US and China head to head in a catastrophic nuclear conflict.

#### Korea war draws in every great power.

Stares and Wit 9 (Paul B., General John W. Vessey senior fellow for conflict prevention and director of the center for preventive action of CFR and Joel S., adjunct senior research fellow at the Weather head East Asia Institute at Columbia University and a visiting fellow at the US Korea Institute at John Hopkins, “Preparing for Sudden Change in North Korea”)

These various scenarios would present the United States and the neighboring states with challenges and dilemmas that, depending on how events were to unfold, could grow in size and complexity. Important and vital interests are at stake for all concerned. North Korea is hardly a normal country located in a strategic backwater of the world. As a nuclear weapons state and exporter of ballistic missile systems, it has long been a serious proliferation concern to Washington. With one of the world’s largest armies in possession of huge numbers of long-range artillery and missiles, it can also wreak havoc on America’s most important Asian allies––South Korea and Japan––both of which are home to large numbers of American citizens and host to major U.S. garrisons committed to their defense. Moreover, North Korea abuts two great powers—China and Russia––that have important interests at stake in the future of the peninsula. That they would become actively engaged in any future crisis involving North Korea is virtually guaranteed. Although all the interested powers share a basic interest in maintaining peace and stability in northeast Asia, a major crisis from within North Korea could lead to significant tensions and––as in the past–– even conflict between them. A contested or prolonged leadership struggle in Pyongyang would inevitably raise questions in Washington about whether the United States should try to sway the outcome.5 Some will almost certainly argue that only by promoting regime change will the threat now posed by North Korea as a global proliferator, as a regional menace to America’s allies, and as a massive human rights violator, finally disappear. Such views could gain some currency in Seoul and even Tokyo, though it seems unlikely. Beijing, however, would certainly look on any attempt to promote a pro-American regime in Pyongyang as interference in the internal affairs of a sovereign state and a challenge to China’s national interests. This and other potential sources of friction could intensify should the situation in North Korea deteriorate. The impact of a severe power struggle in Pyongyang on the availability of food and other basic services could cause tens and possibly hundreds of thousands of refugees to flee North Korea. The pressure on neighboring countries to intervene with humanitarian assistance and use their military to stem the flow of refugees would likely grow in these circumstances. Suspicions that the situation could be exploited by others for political advantage would add to the pressure to act sooner rather than later in a crisis. China would be the most likely destination for refugees because of its relatively open and porous border; its People’s Liberation Army (PLA) has reportedly developed contingency plans to intervene in North Korea for possible humanitarian, peacekeeping, and “environmental control” missions.6 Besides increasing the risk of dangerous military interactions and unintended escalation in sensitive borders areas, China’s actions would likely cause considerable consternation in South Korea about its ultimate intentions toward the peninsula. China no doubt harbors similar fears about potential South Korean and American intervention in the North.

#### Asian war goes nuclear---no defense---interdependence and squo institutions don’t check

C. Raja Mohan 13, distinguished fellow at the Observer Research Foundation in New Delhi, March 2013, Emerging Geopolitical Trends and Security in the Association of Southeast Asian Nations, the People’s Republic of China, and India (ACI) Region,” background paper for the Asian Development Bank Institute study on the Role of Key Emerging Economies, http://www.iadb.org/intal/intalcdi/PE/2013/10737.pdf

Three broad types of conventional conflict confront Asia. The first is the prospect of war between great powers. Until a rising PRC grabbed the attention of the region, there had been little fear of great power rivalry in the region. The fact that all major powers interested in Asia are armed with nuclear weapons, and the fact that there is growing economic interdependence between them, has led many to argue that great power conflict is not likely to occur. Economic interdependence, as historians might say by citing the experience of the First World War, is not a guarantee for peace in Asia. Europe saw great power conflict despite growing interdependence in the first half of the 20th century. Nuclear weapons are surely a larger inhibitor of great power wars. Yet we have seen military tensions build up between the PRC and the US in the waters of the Western Pacific in recent years. The contradiction between the PRC’s efforts to limit and constrain the presence of other powers in its maritime periphery and the US commitment to maintain a presence in the Western Pacific is real and can only deepen over time.29 We also know from the Cold War that while nuclear weapons did help to reduce the impulses for a conventional war between great powers, they did not prevent geopolitical competition. Great power rivalry expressed itself in two other forms of conflict during the Cold War: inter-state wars and intra-state conflict. If the outcomes in these conflicts are seen as threatening to one or other great power, they are likely to influence the outcome. This can be done either through support for one of the parties in the inter-state conflicts or civil wars. When a great power decides to become directly involved in a conflict the stakes are often very high. In the coming years, it is possible to envisage conflicts of all these types in the ACI region. ¶ Asia has barely begun the work of creating an institutional framework to resolve regional security challenges. Asia has traditionally been averse to involving the United Nations (UN) in regional security arrangements. Major powers like the PRC and India are not interested in “internationalizing” their security problems—whether Tibet; Taipei,China; the South China Sea; or Kashmir—and give other powers a handle. Even lesser powers have had a tradition of rejecting UN interference in their conflicts. North Korea, for example, prefers dealing with the United States directly rather than resolve its nuclear issues through the International Atomic Energy Agency and the UN. Since its founding, the involvement of the UN in regional security problems has been rare and occasional.¶ The burden of securing Asia, then, falls squarely on the region itself. There are three broad ways in which a security system in Asia might evolve: collective security, a concert of major powers, and a balance of power system.30 Collective security involves a system where all stand for one and each stands for all, in the event of an aggression. While collective security systems are the best in a normative sense, achieving them in the real world has always been difficult. A more achievable goal is “cooperative security” that seeks to develop mechanisms for reducing mutual suspicion, building confidence, promoting transparency, and mitigating if not resolving the sources of conflict. The ARF and EAS were largely conceived within this framework, but the former has disappointed while the latter has yet to demonstrate its full potential. ¶ A second, quite different, approach emphasizes the importance of power, especially military power, to deter one’s adversaries and the building of countervailing coalitions against a threatening state. A balance of power system, as many critics of the idea point out, promotes arms races, is inherently unstable, and breaks down frequently leading to systemic wars. There is growing concern in Asia that amidst the rise of Chinese military power and the perception of American decline, many large and small states are stepping up their expenditure on acquiring advanced weapons systems. Some analysts see this as a structural condition of the new Asia that must be addressed through deliberate diplomatic action. 31 A third approach involves cooperation among the great powers to act in concert to enforce a broad set of norms—falling in between the idealistic notions of collective security and the atavistic forms of balance of power. However, acting in concert involves a minimum level of understanding between the major powers. The greatest example of a concert is the one formed by major European powers in the early 18th century through the Congress of Vienna after the defeat of Napoleonic France. The problem of adapting such a system to Asia is the fact that there are many medium-sized powers who would resent any attempt by a few great powers to impose order in the region.32 In the end, the system that emerges in Asia is likely to have elements of all the three models. In the interim, though, there are substantive disputes on the geographic scope and the normative basis for a future security order in Asia.

#### SCOTUS suspension clause application solves -

Yang ’11 (Christina – dissertation @ Emory, advised by Michael Sullivan - PhD, Vanderbilt University, 2000 JD, Yale Law School, 1998 “Reconstructing Habeas: Towards a New Emergency Scheme!”

In the wake of 9/11 and since the start of the War on Terror, the government – including the Obama administration – has justified its self-expanded powers with the security argument. The government, its supporters argue, requires such powers in order to adequately protect the American people. In other words, the President did not seek out expansion of powers because he wanted to; no, it was for the safety and wellbeing of the American people. To say the least, it is a difficult argument – that, we, the government, require greater discretion for your, the citizen’s, own good – to outright reject. After all, who doesn’t wish to feel safe, to feel protected, and well looked after? Are we to say, “No thanks, I’ll keep my freedom and take my chances with the terrorists.” Sure, some will; but the majority will not. Exploding bombs, collapsing skyscrapers, and the deaths of those we know are immediately cognizable and evoke strong emotional responses. Liberties, separation-of-powers concerns, on the other hand, are far less tangible and far more abstract. Yes, everybody can rally behind freedom as an idea; but when faced with the choice between continual fear and more restricted freedoms, most prefer to feel safe than sorry. As a result, our politics are skewed a certain way. As the greater public continually says, “Better safe than sorry,” in turn the government justifies its actions with “Better safe than sorry, that’s what America wants.” Put bluntly, this is not the case where the status quo is acceptable. We are not dealing with a situation in which we could or could not change – in which the wheel ain’t broke so don’t fix it. Preventive detention in the aftermath of emergency has time and time again shown itself to be abusive when allowed to be under the sole discretion of the executive. And in many ways, the practice is incompatible with our enduring values of freedom, transparency, due process, and minority protections. Remember, absolute power corrupts absolutely. Bruce Ackerman attempted with his emergency constitution to place it beneath the purview of the legislative branch, but as we have shown, such a solution does not adequately address the fundamental problem of preventive detention: mistaken imprisonment. Oftentimes, preventive paradigms cast broad dragnets which subsequently result in the imprisonment of countless innocents – that is, individuals of a targeted minority group, e.g. persons of Arab ancestry or Muslim faith. The national security theorists, the Jack Bauer enthusiasts, have tried to convince us that increased security is all we require in times of emergency – that everything else is secondary. Exceptional times call for exceptional measures. Rights can be recovered, but can lives? Can nations? The reality is, however, the terrorist threat is not nearly as grave as these security apologists make it out to be. Yes, a terrorist attack is undoubtedly tragic and may even result in the loss of thousands of lives; nonetheless, it is not capable of toppling or overtaking governments. Isolated terrorist attacks, in short, are not existential threats. Too often, the safety – bought at the price of liberty – the government offers is illusory. As Steven T. Wax observes, “The searches of baby strollers at airports does little or nothing for safety in the air and nothing at all for the safety of trains, trucks, shipping, and chemical and power plants.”20 We need to be smart about our security and not buy into the fallacy of the more intrusive security measures automatically leads to greater safety. Not to mention, as has been shown throughout this paper, rounding up people based on paranoia, profiling, or any other arbitrary reason, not only does nothing to help our security, but also harms us insofar as we fail to differentiate between the legitimate and the illegitimate. Indeed, such actions damage our integrity as a country that believes in the maxim “innocent until proven guilty,” as a country that believes there is more to life than feeling safe and secure in our physical and material being. We need to instead ask ourselves exactly how much freedom we are willing to give up in the name of increased security? We must keep in mind the long-term costs, and not just the short-term benefits, of granting our president, our law enforcement, and our military freer and freer reign. Small sacrifices inevitably accumulate, and subsequently can morph into much bigger sacrifices than we are actually willing to give up. Furthermore, we owe those harmed – those wrongly detained – better than just monetary compensation. They deserve more than a “sorry” or an “our mistake, here’s some cash to make you whole.” They warrant, at the very least, an apology which vows this is the last time we make this recurring mistake: “We sincerely apologize for your wrongful detention, we will do our very best to make sure this does not happen again.” And so, in arguing for a framework in which the Suspension Clause is the absolute minimum in the arena of preventive detention, we remain the most true to our American ideals.21 It is then, during times of crisis and emergency, the task of the judiciary – the most politically-insulated branch of government – to uphold the writ of habeas corpus in its constitutional form, i.e. the Suspension Clause, and thereby set the absolute minimum in times of exigency. It is the responsibility of judges to force the executive to justify his actions in a court of law as well as the court – domestic and international – of public opinion. Most importantly, it is the time-honored duty of this nation’s legal guardians to ensure that the ideals which informed our founding are not lost. In more colloquial terms, it is up to our judges – through the vehicle of habeas corpus – to be the good man in the storm. After all, in the age of terror, “[i]f anybody destroys our legacy of freedom, it will be us.”22 Thus, the upkeep and preservation of our freedom, our values and beliefs, is our responsibility – and ours alone. Indeed, by the time Al Maqaleh, or another case like it, comes before the Supreme Court of the United States, we – the people, the lawyers, the judges – should be prepared to not simply enforce the new habeas emergency paradigm by extending the writ to all those detained by the United States, but also to do better, with each subsequent generation, as a nation dedicated to an enduring legacy of freedom.

#### Even if the plan doesn’t change all detention policies, court ruling triggers observer effect – shifts presidential policy to favor court rulings to save face

Deeks 10/21 (2013, Ashley – Law Prof @ U of VA) “Courts Can Influence National Security Without Doing a Single Thing” http://www.newrepublic.com/article/115270/courts-influence-national-security-merely-watching

While courts rarely intervene directly in national security disputes, they nevertheless play a significant role in shaping Executive branch security policies. Let’s call this the “observer effect.” Physics teaches us that observing a particle alters how it behaves. Through psychology, we know that people act differently when they are aware that someone is watching them.¶ In the national security context, the “observer effect” can be thought of as the impact on Executive policy-setting of pending or probable court consideration of a specific national security policy. The Executive’s awareness of likely judicial oversight over particular national security policies—an awareness that ebbs and flows—plays a significant role as a forcing mechanism. It drives the Executive to alter, disclose, and improve those policies before courts actually review them.¶ Take, for example, U.S. detention policy in Afghanistan. After several detainees held by the United States asked U.S courts to review their detention, the Executive changed its policies to give detainees in Afghanistan a greater ability to appeal their detention—a change made in response to the pending litigation and in an effort to avoid an adverse decision by the court. The Government went on to win the litigation. A year later, the detainees re-filed their case, claiming that new facts had come to light. Just before the government’s brief was due in court, the process repeated itself, with the Obama Administration revealing another rule change that favored the petitioners. Exchanges between detainees and their personal representatives would be considered confidential, creating something akin to the attorney-client privilege. Thus we see the Executive shifting its policies in a more rights-protective direction without a court ordering it to do so.¶ Other examples of the observer effect abound. In 2005, the Executive decided to reveal the processes by which it negotiated “diplomatic assurances” to return Guantanamo detainees to foreign countries, in an effort to fend off court decisions delaying those returns. The Government might well have won in court even without these revelations – the precedents suggested that it would have—but it hedged its bets by persuading the courts that it had in place a thorough process to ensure that the United States did not expose detainees to likely mistreatment in the receiving country.¶ Here’s another example: in the face of some adverse lower court decisions (which the Government ultimately won on appeal), the Government curtailed its own use of the “state secrets” privilege. That’s a privilege the government may invoke when a lawsuit raises legal challenges that cannot be proven or defended without disclosing information that would jeopardize U.S. national security. And the Government altered the policies pursuant to which it uses secret evidence to deport aliens, due in part to critical language in court decisions, even though the Government likely would have won the cases on the merits.¶ When should we expect to see the observer effect? In general, we should look for three things. First, there must be a triggering event. This ranges from the filing of a non-frivolous case, to some indication from a court that it may reach the merits of a case (i.e., ordering briefing on an issue, or rejecting the government’s motion for summary judgment), to the court’s consideration of the issue on the merits. The observer effect most clearly comes into play when a court becomes seized with a national security case after an extended period of judicial non-involvement in security issues, such as when federal courts started to consider the type of person the Executive lawfully may detain on the battlefield. The observer effect then kicks in to influence the Executive’s approach to the policy being challenged in the triggering case, as well as to future (or other pre-existing) Executive policies in the vicinity of that triggering case.¶ Second, future uncertainty plays a critical role in eliciting the observer effect. In some cases, the question for the Executive will be whether a court will conclude that it can or should exercise jurisdiction over a case. In other cases, Executive uncertainty will exist when it is not obvious what law will govern the dispute at issue, or where there is little precedent to guide the courts in resolving the dispute. It is this uncertainty that leaves the Executive with doubt about whether it will win the case, and that creates incentives for the Executive to alter its policies in anticipation of litigation or its outcome. After all, there are real advantages to the Executive in retaining the power to shape these national security policies, even under a potentially watchful eye of the courts.¶ The third factor that helps secure the observer effect’s operation is the likelihood of future litigation on related issues. If a court declines to defer to the Executive in a particular case, that decision is unlikely to create an observer effect if the Executive has confidence that the factual and legal questions at issue in that case will not arise again. In contrast, when the Executive perceives that a set of policies is likely to come under sustained litigation (and thus under the potential oversight of multiple judges over time), it is more likely to concertedly review—and alter—those policies.¶ When these three elements are present, the observer effect is likely to come into play. How does the Executive react? The Executive attempts to maximize the total value of two elements: a sufficiently security-focused policy and unilateral control over national security policymaking. To achieve this goal, the Executive often is willing to cede some ground on the first element to retain the second element. The Executive therefore often responds to the presence of these three elements by shifting its policy to a position that gives it greater confidence that the courts would uphold it if presented with a challenge to that policy. This does not mean that it will establish or revise its policy to a point at which it has full confidence that a court will deem the policy acceptable. Instead, the Executive has strong incentives to take a gamble: all it needs to do is establish a policy that is close enough to what a court would find acceptable that it alters the court’s calculation about whether to engage on the merits. It is, in short, a governmental game of chicken.¶ I don’t want to suggest that a potentially adverse decision by a court is the sole driver of Executive policy-making. While courts may be one important audience for national security policies, there are many other audiences, including Congress, the general public, the media, and elites. Proving what causes the Executive to select or modify a particular policy is notoriously difficult because many factors and influences usually coalesce to produce government policy. But important pressures are brought to bear by an increased Executive awareness of possible court intervention, especially because courts have the power to rewrite national security policies in a way that members of the public and the media do not.¶ One important lesson to draw from the observer effect is that it matters what signals the courts and the Executive send to each other and how they send them. When courts hear cases on the merits or when Justices issue statements related to denials of certiorari, they have the opportunity to initiate a dialogue with the Executive—whether or not the courts ultimately defer to the Executive’s position. That dialogue allows the courts to gesture at acceptable and unacceptable policy choices, while the Executive gauges which policies to adopt and how large of a “cushion” to build into those policies to avoid future adverse decisions. For instance, when Justice Kennedy (along with two other Justices) concurred in the denial of certiorari in a case called Padilla v. Hanft, his concurrence implied that the Court would step in to hear the case if the Executive, which had shifted Jose Padilla from military custody to civilian custody, re-detained Padilla as an enemy combatant. This allowed the Court to send a strong signal to the Executive about a national security policy that the Court would have a hard time upholding.¶ The observer effect has real-world implications for national security policy changes on the horizon. For example, if Congress attempts to establish judicial oversight of the Executive branch’s targeted killing program, it is useful to understand the nuanced ways in which the Executive can and does respond to potential—but somewhat uncertain—judicial oversight and decisions, even those that stop short of adjudicating issues on the merits. In shedding light on the Executive/judicial relationship, the observer effect should inform Congressional considerations in crafting such a court.¶ It is true that courts have decided only a limited number of substantive issues in the national security arena, notwithstanding the continuing proliferation of litigation. However, important substantive policy changes have occurred since 2002—changes due not to the direct sunlight of court orders, but to the shadow cast by the threat or reality of court decisions on Executive policymaking in related areas of activity. Court decisions, particularly in the national security realm, have a wider ripple effect than many recognize because the Executive has robust incentives to try to preserve security issues as its sole domain. In areas where the observer effect shifts Executive policies closer to where courts likely would uphold them, demands for deference by the Executive turn out to be more modest than they might seem if considered from the isolated vantage of a single case at a fixed point in time. It remains critical for courts to police the outer bounds of Executive national security policies, but they need not engage systematically to have a powerful effect on the shape of those policies and, consequently, the constitutional national security order.

Plan Text

#### The United States Supreme Court should restrict presidential war powers authority by overruling the D.C. Circuit Al-Maqaleh v. Gates decision on the grounds that it violates the Suspension Clause.

Solvency

#### Detention policy is incomprehensible in the status quo- only Supreme Court rulings send a clear judicial review test for lower court judges and spills over to effective Congressional policy

Garrett 12 (Brandon, Roy L. and Rosamund Woodruff Morgan Professor of Law, University of Virginia School of Law. HABEAS CORPUS AND DUE PROCESSCORNELL LAW REVIEW [Vol. 98:47] page lexis)

The Suspension Clause casts a broad shadow over the regulation of all forms of detention. It has exerted direct and indirect influence even in contexts where statutes largely supplant habeas corpus as the primary vehicle for judicial review. The Executive, courts, and Congress have long been concerned with avoiding Suspension Clause problems, and the Supreme Court’s own sometimes-carried-out warnings that it will narrowly interpret efforts to restrict judicial review to avoid potential Suspension Clause problems have, many years before Boumediene, helped to structure judicial review of detention. I have argued that the Suspension Clause explains why, as the Court put it in INS v. St. Cyr, “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”451 Post- Boumediene, judges may rely on the Suspension Clause more directly, and not just as a principle of constitutional avoidance. Understanding the Suspension Clause as affirmatively guaranteeing a right to habeas process to independently examine the authorization for a detention helps to explain habeas and constitutional doctrine across a range of areas. Why does habeas corpus sometimes provide access to process unavailable under the Due Process Clause, while sometimes due process provides more process than habeas would? At its core, habeas corpus provides judges with process in situations where the need for review of legal and factual questions surrounding detention is most pressing. This view of habeas process can be seen as related to the Court’s long line of decisions that guarantee a “right of access” to courts without clarifying the source of that “[s]ubstantive [r]ight.”452 In Boumediene, the Court grounded that right in the Suspension Clause. This basis for the right makes some sense of the varied nature of habeas review in which statutes and case law differ depending on the type of detention. Judicial review does not vary categorically; for example, immigration does not receive less review than postconviction or military detention habeas. Instead, judicial review varies within each category. This is the product of evolving executive detention policies, varying postconviction practice, and changes over time in federal statutes, some poorly conceived and some sensible. No one actor provides coherence to habeas practice at any time, and some of the statutes are notoriously Byzantine, poorly drafted, and illogical. Judges have long played, however, an important role in interpreting the writ (and the underlying constitutional rights). Indeed, for some time, the Supreme Court’s interventions have reinforced the role habeas plays, particularly in the executive detention context. In response to the Court’s habeas rulings, which generally avoid defining the precise reach of the Suspension Clause, Congress has drafted statutes to preserve judicial review of detentions in an effort to steer clear of Suspension Clause problems, with mixed results.

#### SCOTUS ruling key – influences presidential and legislative agendas over detention policy

Elsea & Garcia ’12 (Jennifer & Michael – legislative attorneys) “Judicial Activity Concerning

Enemy Combatant Detainees: Major Court Rulings” http://www.fas.org/sgp/crs/natsec/R41156.pdf

Although the political branches of government have been primarily responsible for shaping U.S. wartime detention policy in the conflict with Al Qaeda and the Taliban, the judiciary has also played a significant role in clarifying elements of the rights and privileges owed to detainees under the Constitution and existing federal statutes and treaties. These rulings may have longterm consequences for U.S. detention policy, both in the conflict with Al Qaeda and the Taliban and in future armed conflicts. Judicial decisions concerning the meaning and effect of existing statutes and treaties may compel the executive branch to modify its current practices to conform with judicial opinion. For example, judicial opinions concerning the scope of detention authority conferred by the AUMF may inform executive decisions as to whether grounds exist to detain an individual suspected of involvement with Al Qaeda or the Taliban. Judicial decisions concerning statutes applicable to criminal prosecutions in Article III courts or military tribunals may influence executive determinations as to the appropriate forum in which to try detainees for criminal offenses. Judicial rulings may also invite response from the legislative branch, including consideration of legislative proposals to modify existing authorities governing U.S. detention policy. The 2012 NDAA, for example, contains provisions which arguably codify aspects of existing jurisprudence regarding U.S. authority to detain persons in the conflict with Al Qaeda. Judicial activity with respect to the present armed conflict may also influence legislative activity in future hostilities. For example, Congress may look to judicial rulings interpreting the meaning and scope of the 2001 AUMF for guidance when drafting legislation authorizing the executive to use military force in some future conflict. While the Supreme Court has issued definitive rulings concerning certain issues related to wartime detainees, many other issues related to the capture, treatment, and trial of suspected enemy belligerents are either the subject of ongoing litigation or are likely to be addressed by the judiciary. Accordingly, the courts appear likely to play a significant role in shaping U.S. policies relating to enemy belligerents in the foreseeable future.

#### Suspension Clause application solves without sacrificing military missions

Nelson ’11 (Luke - B.A., University of Minnesota Duluth, 2007; J.D. Candidate, University of New Hampshire School of Law, 2011) “Territorial Sovereignty and the Evolving Boumediene Factors: Al Maqaleh v. Gates and the Future of Detainee Habeas Corpus Rights” http://law.unh.edu/assets/images/uploads/publications/unh-law-review-vol-09-no2-nelson.pdf

Lastly, Al Maqaleh presents another opportunity for the Supreme Court to provide further guidance on the practical-obstacles factor. As mentioned earlier, the inherent deficiency of a multi-factored, functional test is its arbitrary and unequal application.144 The Boumediene Court’s deficient guidance on the practical-obstacles factor only exacerbates this problem. Unquestionably, deference to the President and military leaders regarding decisions on military necessity, operations in an active theater of war, and reasonable detention of enemy combatants should not be circumvented. However, questions remain regarding the risk of executive manipulation of the Boumediene test.145 For instance, one question is the effect on the practical-obstacles analysis when a detainee is captured beyond an active theater of war and later transported into an active theater for detention. This scenario played out in Al Maqaleh. In our current “Global War on Terrorism,” another lingering question is the actual boundaries of an active theater of war.146 A detainee should not be denied Suspension Clause protections because the government transported him into an active theater where the Suspension Clause would arguably not reach. Furthermore, another question is the effect of military necessity and the military mission on the practicalobstacles factor. These questions require that a delicate and fine line be drawn. On one hand are the surest safeguards of liberty and the separation of powers check on the executive.147 On the other hand is the importance of the military mission and executive deference in international conflict policy decisions. The answer to these questions must include some level of deference to the legitimate needs of the armed forces in advancing the military mission148 but also address the pertinent constitutional issues that cannot be overlooked. Safe to say, the writ of habeas corpus is one of these pertinent constitutional issues. However, as the Boumediene Court recognized, the executive branch is entitled to a “reasonable period of time” before a court will entertain a habeas corpus petition from a detainee.149 This reasonable period of time is necessary to allow the military to screen and review the detainee and determine the detainee’s combatant status.150 This balance between the military mission and an individual’s surest safeguard of liberty will allow the courts to maintain a practical, functional, and detainee-by-detainee, detention-site-by-detention-site application of the habeas test that the Boumediene Court envisioned.

#### Failing to articulate habeas standards for lower court judges makes indefinite detention inevitable and triggers your disads

Sparrow 11 (Indefinite Detention After Boumediene: Judicial Trailblazing in Uncharted and Unfamiliar Territory SUFFOLK UNIVERSITY LAW REVIEW [Vol. XLIV:261 p lexis Tyler Sparrow is an associate in the Securities Department, and a member of the Litigation and Enforcement Practice Group]

This section will argue that the current guidance on detainee habeas corpus actions offered by the Supreme Court as well as the Executive and Legislative branches is vague and inadequate.100 Because of this inadequacy, federal district court judges cannot proceed with any confidence that their judgments will stand, nor can the litigants form any reasonable predictions from the case law.101 This section will then examine how more definitive Supreme Court precedent would help to unify the case law dealing with detainee habeas corpus actions.102 Finally, this section will argue that adoption of legislation clearly addressing the substantive scope of the government’s detention authority would clarify the law for the public, the federal courts, and most importantly those detained without charge.103 The Supreme Court’s holding in Boumediene was limited to the constitutional issues regarding Guantanamo detainees’ access to the writ of habeas corpus, leaving all questions of procedure and substantive scope-ofdetention authority to the lower federal courts.104 This lack of guidance has drawn criticism from legal scholars and federal judges alike.105 A group of noted legal scholars observed that, in holding Guantanamo detainees were entitled to seek the writ of habeas corpus, the Supreme Court “gave only the barest sketch of what such proceedings should look like, leaving a raft of questions open for the district and appellate court judges.”106 Furthermore, the Obama Administration has stated that it will not seek further legislation from Congress to justify or clarify its detention authority.107 This lack of guidance has led to disparate results in detainee habeas corpus actions with similar facts, based not on the merits of the cases, but rather on which particular judge hears the petition.108 B. Need for Supreme Court Precedent Addressing Standards and Procedure for Detainee Habeas Corpus Actions The Supreme Court’s refusal to address the substantive scope of the government’s detention authority in Boumediene has left the task to federal district court judges, who are free to apply whichever standard they see fit, regardless of its disparity from the standard being applied down the hall of the very same courthouse.109 For instance, it is up to the district judges whether to analyze detention authority under the rubric of “substantial support” for the Taliban and/or Al Qaeda, or the rubric pertaining to being a “part of” either of these groups.110 There are also differing opinions as to when, and how long, a detainee’s relationship with the Taliban and/or Al Qaeda must have existed to justify detention, under either the “part of” or “substantial support” rationales.111 Differing judicial approaches can also be seen in the weight of evidence required to justify detention, as well as how to treat hearsay and evidence obtained in the face of coercion.112 This creates a situation where neither the government nor the detainee “can be sure of the rules of the road in the ongoing litigation, and the prospect that allocation of a case to a particular judge may prove dispositive on the merits can cut in either direction.”113 The Supreme Court has the opportunity to unify these divergent paths by finally ruling on questions such as the substantive scope of the government’s detention authority, the standard and weight of evidence required for continued detention, whether a relationship with the Taliban and/or Al Qaeda can be sufficiently vitiated, and the reliability of hearsay evidence and statements made under coercion.114

# 2AC

## Adventurism

#### Oversight doesn’t determine flexibility---tech, elusive enemies and personnel outweigh

Stephen Holmes 9, Walter E. Meyer Professor of Law, New York University School of Law, “The Brennan Center Jorde Symposium on Constitutional Law: In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror”, April, California Law Review, 97 Calif. L. Rev. 301, Lexis

Even if the promoters of unfettered executive power were justified in associating legal rules with ineffectiveness during emergencies, their single-minded obsession with circumventing America's allegedly "super-legalistic culture" n33 would need explaining. Let us stipulate, for the sake of argument, that civil liberties, due process, treaty obligations, and constitutional checks and balances make national-security crises somewhat harder to manage. If so, they would still rank quite low among the many factors that render the terrorist threat a serious one. None of them rivals in importance the extraordinary vulnerabilities created by technological advances, especially the proliferation of compact weapons of extraordinary destructiveness, in the context of globalized communication, transportation, and banking. None of them compares to a shadowy, dispersed, and elusive enemy that cannot be effectively deterred. And none of them is as constraining as the scarcity of linguistically and culturally knowledgeable personnel and other vital national-security assets, including satellite coverage of battle zones, which the government must allocate in some rational way in response to an obscure, evolving, multidimensional, and basically immeasurable threat.¶ The curious belief that laws written for normal times are especially important obstacles to defeating the terrorist enemy is based less on evidence and argument than on a hydraulic reading of the liberty-security relationship. One particular implication of the hydraulic model probably explains the psychological appeal of a metaphor that is patently inadequate descriptively: if the main thing preventing us from defeating the enemy is "too much law," then the pathway to national security is easy to find; all we need to do is to discard [\*318] the quaint legalisms that needlessly tie the executive's hands. That this comforting inference is the fruit of wishful thinking is the least that might be said.

#### Preserving the judicial right to due process enhances productive executive flex—unrestrained flex is worse for decision making

Stephen Holmes 9, Walter E. Meyer Professor of Law, New York University School of Law, “The Brennan Center Jorde Symposium on Constitutional Law: In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror”, April, California Law Review, 97 Calif. L. Rev. 301, Lexis

In the face of an unprecedented national-security threat, individual rights, far from invariably interfering with the effectiveness of the executive branch, may sometimes serve a vitally pragmatic function. Those who deny this possibility, in principle, misunderstand due process as a rigid restraint. Laws that discipline executive decision making should not be understood as laying down sharp lines between the permitted and the forbidden. Besides being a personal liberty, a suspect's right to challenge the evidence against him is simultaneously a duty of the government to provide a plausible rationale for its requests to apply coercive force. A right that is enforceable against the government is best understood not as a rigid limit, therefore, but as a rebuttable presumption. In this framework, rights demarcate provisional no-go zones into which government entry is prohibited unless and until an adequate justification can be given for government action. If the executive branch violates a right that it is usually required to respect, it has to give a reason why.¶ This is how legal rights contribute to a democratic culture of justification. A private right is neither a non-negotiable value nor an insurmountable barrier, but rather a trip-wire and a demand for government explanation of its actions. The rights of the accused are therefore the obligations of the prosecution. Before criminally punishing an individual, the executive must give reasons why such punishment is deserved before a judicial tribunal that can refuse consent. Here lies the difference between a constitutional executive and an absolute monarch: the former must give reasons for his actions, while the latter can simply announce tel est mon plaisir. n72¶ For analogous reasons, it is one-sided and even obscurantist to describe habeas corpus, on balance, as a gratuitous hindrance to effectiveness in counterterrorism. It can occasionally involve risks, but habeas does not "tie the government's hands." Like the traditional charge-or-release rule, habeas simply forces the executive to give plausible reasons for its actions. Such a right is a spur, therefore, not a rein. It may sometimes appear to be a roadblock, [\*333] obstructing effective action, but it is also an incentive to take reasonable care, aimed at increasing the likelihood of intelligent decision making even under enormous pressure and time constraints. Abolishing such incentives will not guarantee intelligent, focused, and effective government action.¶ Advocates of executive discretion in the war on terror are perfectly right to point out that legal restrictions on the executive can occasionally impede effective action. But their analysis is one-sided and too narrowly focused; they need to add that the absence of legal restrictions on the executive, in turn, can encourage irresponsible, profligate, and self-defeating choices. The genuine challenge of counterterrorism is to balance the two symmetrical risks, not to pretend that following rules is risky while circumventing rules is not.¶ An administration that is legally exempted from providing reasons for its actions also has a weak incentive to develop and implement a coherent overall policy. One reason why the United States was able to treat various terrorist suspects in its custody (Salim Ahmed Hamdan, Yaser Hamdi, David Hicks, John Walker Lindh, Khaled al-Masri, Zacarias Moussaoui, Jose Padilla, and Mohammad al-Qahtani) in incomprehensibly erratic and inconsistent ways may have been that it was never forced to explain publicly, or perhaps even behind closed doors, exactly what it was doing. The Bush administration also allocated scarce resources behind a veil of national-security secrecy - that is, without having to explain the security-security tradeoffs it was making. The outcomes, as they have gradually come to light, do not look even vaguely pragmatic.¶ That violations of personal liberty can, under some conditions, severely damage national security is also relevant to the dispute about trying terrorist suspects before Article III courts (or before ordinary military courts-martial). That national security could be damaged by open trials has been frequently alleged. And the possibility cannot be ruled out. But advocates of executive discretion rarely mention the potential damage to national security of closed or partially closed trials and the potential strategic benefits of open and visibly fair trials. This is unfortunate because a fully public trial of mass murdering zealots, using visibly fair procedures, would provide an exceptional opportunity to rivet the attention of the world on the heinous acts and twisted mentality of the jihadists; this is something that no procedure that looks rigged, where Muslim defendants appear in any way railroaded, can possibly do.¶ Transparent judicial procedures, although they may be costly along some dimensions, can also help convince domestic and foreign onlookers that decisions of guilt and innocence are being made responsibly, not arbitrarily. They can vindicate tough counterterrorism policies and refute the allegation that authorities are exaggerating the threat to national security. Public willingness to cooperate with counterterrorism efforts depends on public confidence in the essential fairness of law-enforcement authorities. n73 Such [\*334] confidence is especially vital for managing a threat, such as Islamist terrorists with access to WMD, that is likely to endure for decades, if not longer.¶ Even more, the transcripts of past public trials of Islamic terrorists have provided a trove of open-source and relatively reliable information that independent scholars and analysts have used to help the country make sense of the motives and operational techniques of the enemy. Many dots will remain unconnected if such information is reserved for the exclusive perusal of a few individuals with high security clearances operating in isolation from outside criticism.¶ Yes, wholly public trials may possibly expose the sources and methods of U.S. counterterrorism agencies. n74 But the alternative, trials conducted on the basis of undisclosed information, will likely cause equivalent damage, due to the perverse incentives that they engender. Once again, the tacit tradeoff here involves security versus security. One predictable motive for reluctance to hold a trial in open court might be the embarrassing untrustworthiness of sources and shoddiness of investigative methods. Expecting a closed trial, in effect, investigators and prosecutors have a much weaker incentive to take reasonable care to ferret out reliable information and to use dependable techniques for ascertaining the facts. This is how executive discretion can erode executive professionalism. If terrorism investigators and prosecutors fail to take reasonable care, they will then need secrecy not for the respectable reason that secrecy protects security, but for the discreditable reason that secrecy conceals the illicit shortcuts of investigators who are subjectively convinced, on no compelling grounds, that their guesses and hunches are always totally right. Those who imagine the possible security benefits of such deviations from ordinary standards of due process are not completely mistaken. They have simply over-generalized a partial perspective, unjustifiably ignoring the equally likely possibility of security losses.¶ Subjectively, without any doubt, a president and his entourage can experience congressional and judicial oversight as an annoying hindrance to free and "flexible" action, just as a prosecutor can experience independent trial judges, discovery rules, defense attorneys, and public trials as obstacles to putting away "obviously guilty" suspects. But rules can be subjectively experienced as disabling restraints when, on balance, they actually serve to facilitate adaptation to reality. That is how shield laws and whistleblower laws ideally function, for example. n75 Double-blind tests, as mentioned earlier, work [\*335] in a similar way, allowing the system of scientific research to make progress and adapt to reality, even if individual researchers feel to some extent hemmed in by the system's constraints.¶ The executive branch's obligation to give reasons for its actions is built into the American legal system, both at the micro-level of criminal trials and at the macro-level of checks and balances. To hinder the fatal slide from flexibility to arbitrariness, from expediency to recklessness, the U.S. legal and constitutional system requires the executive branch to test the factual premises of the use of force in some sort of adversarial process. This is the most important way in which due process can enhance governmental performance.¶ To illustrate how some form of adversarial process might have been useful in the war on terror, we need only consider the possibility that either a serious congressional inquiry before going to war in Iraq or a semi-public trial of Khalid Sheikh Mohammed would have discredited the myth of an Osama-Saddam connection, one of the principal delusions that pumped up public support for a misbegotten war.¶ And what were the consequences of brushing aside the presumption of innocence and worries about mistaken identity at Guantanamo Bay, where hundreds of detainees have now spent seven years in administrative detention without the detaining authority having to explain why? By failing to provide even perfunctory individualized hearings, that is, by failing to select with minimal care among individuals delivered for a fee to the American authorities in Afghanistan and elsewhere, the U.S. government (I exaggerate to make my point) sent the first 700 "stunt doubles" who came into its custody to the detention-and-interrogation center in Cuba, thereby misspending our scarce interrogation capacities on individuals of minimal or no intelligence value. n76 And Guantanamo is not the only situation in which jettisoning traditional rules for presumed tactical gains has proved strategically self-defeating.¶ As Shakespeare's Iago and Othello memorably illustrate, pre-constitutional and therefore legally unconstrained power wielders are notoriously vulnerable to being manipulated by disinformation. Today's advocates of a "monarchical" swelling of presidential discretion tend to underestimate this particular cost of acting with excessive secrecy and [\*336] dispatch. n77 Besides contracting individual rights, a loosening of evidentiary standards can simultaneously harm national security by encouraging liars to clog the system with disinformation and false leads and discouraging honest people from reporting what they observe. If authorities begin shipping suspects to prison camps, where they are held incommunicado, without double-checking the alleged evidence, they unwittingly create incentives for malicious or self-serving witnesses to swarm out of the woodwork. (Call this "the elasticity of supply" of informants with hidden agendas.) Contrariwise, well-intentioned people will hesitate to communicate their observations of suspicious activity next door, lest an innocent neighbor be incarcerated for years on the basis of misperceptions that could easily have been dispelled in court.

Immigration Courts are Heavily Clogged Now

Brad Health ‘9 , 3-29-09, USA Today, http://www.usatoday.com/news/nation/2009-03-29-immigcourt\_N.htm?csp=34

WASHINGTON — The nation's immigration courts are now so clogged that nearly 90,000 people accused of being in the United States illegally waited at least two years for a judge to decide whether they must leave, one of the last bottlenecks in a push to more strictly enforce immigration laws. Their cases — identified by a USA TODAY review of the courts' dockets since 2003 — are emblematic of delays in the little-known court system that lawyers, lawmakers and others say is on the verge of being overwhelmed. Among them were 14,000 immigrants whose cases took more than five years to decide and a few that took more than a decade. "It's an indication that they just don't have enough resources," says Kerri Sherlock Talbot of the American Immigration Lawyers Association. Some immigration courts are now so backlogged that just putting a case on a judge's calendar can take more than a year, says Dana Marks, an immigration judge in San Francisco and president of the National Association of Immigration Judges. "You could have a case that would take an hour (to hear). But I can't give you that hour of time for 14 months," Marks says. In the most extreme cases, immigrants can remain locked up while their cases are delayed. More often, the backlogs leave them struggling to exist until they learn their fate, Marks and others say. The immigration courts, run by the Justice Department, have weathered years of criticism that their 224 judges are unable to handle a flood of increasingly-complicated cases. Justice Department spokeswoman Susan Eastwood acknowledges some long delays, but says that's often the result of unusual circumstances. She says the department has enough judges

## 2AC: XO

#### No precedence, congress and courts can overturn or eliminate executive orders.

William G. Howell, Associate Prof Gov Dep @ Harvard 2005(Unilateral Powers: A Brief

Overview; Presidential Studies Quarterly, Vol. 35, Issue: 3, Pg 417)

Plainly, presidents cannot institute every aspect of their policy agenda by decree. The checks and balances that define our system of governance are alive, though not always well, when presidents contemplate unilateral action. Should the president proceed without statutory or constitutional authority, the courts stand to overturn his actions, just as Congress can amend them, cut funding for their operations, or eliminate them outright. (4) Even in those moments when presidential power reaches its zenith--namely, during times of national crisis--judicial and congressional prerogatives may be asserted (Howell and Pevehouse 2005, forthcoming; Kriner, forthcoming; Lindsay 1995, 2003; and see Fisher's contribution to this volume). In 2004, as the nation braced itself for another domestic terrorist attack and images of car bombings and suicide missions filled the evening news, the courts extended new protections to citizens deemed enemy combatants by the president, (5) as well as noncitizens held in protective custody abroad. (6) And while Congress, as of this writing, continues to authorize as much funding for the Iraq occupation as Bush requests, members have imposed increasing numbers of restrictions on how the money is to be spent.

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

Friedersdorf 13

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

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

#### Future presidents prevent solvency

Harvard Law Review 12, "Developments in the Law: Presidential Authority," Vol. 125:2057, www.harvardlawreview.org/media/pdf/vol125\_devo.pdf

The recent history of signing statements demonstrates how public opinion can effectively check presidential expansions of power by inducing executive self-binding. It remains to be seen, however, if this more restrained view of signing statements can remain intact, for it relies on the promises of one branch — indeed of one person — to enforce and maintain the separation of powers. To be sure, President Obama’s guidelines for the use of signing statements contain all the hallmarks of good executive branch policy: transparency, accountability, and fidelity to constitutional limitations. Yet, in practice, this apparent constraint (however well intentioned) may amount to little more than voluntary self-restraint. 146 Without a formal institutional check, it is unclear what mechanism will prevent the next President (or President Obama himself) from reverting to the allegedly abusive Bush-era practices. 147 Only time, and perhaps public opinion, will tell.

#### Exec fiat is a voter---aff authors assume the exec WON’T act---no comparative lit kills aff ground and real world education

Richard H. Pildes 13, J.D. candidate at NYU school of law, and Samuel Issacharoff, J.D. candidate at NYU school of law, June 1st, 2013, "Drones and the Dilemma of Modern Warfare,"lsr.nellco.org/cgi/viewcontent.cgi?article=1408&context=nyu\_plltwp

As with all use of lethal force, there must be procedures in place to maximize the likelihood of correct identification and minimize risk to innocents. In the absence of form al legal processes, sophisticated institutional entities engaged in repeated, sensitive actions – including the military – will gravitate toward their own internal analogues to legal process, even without the compulsion or shadow of formal judicial review. This is the role of bureaucratic legalism 63 in developing sustained institutional practices, even with the dim shadow of unclear legal commands. These forms of self- regulation are generated by programmatic needs to enable the entity’s own aims to be accomplished effectively; at times, that necessity will share an overlapping converge with humanitarian concerns to generate internal protocols or process-like protections that minimize the use of force and its collateral consequences, in contexts in which the use of force itself is otherwise justified. But because these process-oriented protections are not codified in statute or reflected in judicial decisions, they typically are too invisible to draw the eye of constitutional law scholars who survey these issues from much higher levels of generality.

## 2AC: Lower Courts

#### Only federal courts have the necessary procedures

Kende ’11 (Mark – Dean‘s Visiting Scholar, Georgetown University Law Center (2010-2011). Professor of Law, James Madison Chair in Constitutional Law, Director of the Drake Constitutional Law Center) “THE U.S. SUPREME COURT, THE WAR ON TERROR, AND THE NEED FOR THICK CONSTITUTIONAL REVIEW” http://mississippilawjournal.org/wp-content/uploads/2012/04/13\_Kende\_Final\_Edit.pdf

III. ARTICLE III JUDGES ARE THE ONLY SOLUTION The federal courts are the only place that have a strong record of successfully trying terrorism cases.119 These courts already have procedures in place so judges don‘t have to make them up. These courts adjudicated the first World Trade Center bombing cases.120 Courts can also solve classified information problems, and security issues, as they have in the past.121 The Obama Administration offered to help with the security question by purchasing an unused rural Illinois prison, though that is now a moot point.122 Thus the allegations by two administrations that courts can‘t handle some of these cases have been disproved by concrete evidence to the contrary, and by the military commission failures. This is no longer a philosophical, political, or legal debate. This is the real world.

## 2AC: Bond

#### Multiple issues thump

Politico 10/3 “Supreme Court will hear cases during shutdown” http://www.politico.com/blogs/under-the-radar/2013/10/supreme-court-will-hear-cases-during-shutdown-174254.html

A total of six cases are on for argument next week, including a challenge to limits on how much money an individual donor can give in the aggregate to federal campaigns and political action committees during each election cycle. The lower levels of the federal judiciary have also continued to work since the shutdown, using funds from fees the courts collect and from appropriations not limited to a specific fiscal year. Some civil cases involving the U.S. Government have been halted because most lawyers working for the Justice Department's Civil Division have been furloughed. A memo issued by the Administrative Office of the U.S. Courts indicates a partial shutdown of the courts is likely to take place at about the time of the Columbus Day holiday. After that, the courts would only handle essential work, including those relating to protection of life and property. However, the official guidance suggests that many cases could be deemed essential where judges have a role created by statute or the Constitution.

#### 2. Capital is bulletproof

Gibson 12 (James L. Gibson, Sidney W. Souers Professor of Government (Department of Political Science), Professor of African and African-American Studies, and Director of the Program on Citizenship and Democratic Values (Weidenbaum Center on the Economy, Government, and Public Policy) at Washington University in St. Louis; and Fellow at the Centre for Comparative and International Politics and Professor Extraordinary in Political Science at Stellenbosch University (South Africa), 7/15/12, “Public Reverence for the United States Supreme Court: Is the Court Invincible?”, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2107587)

Political scientists and legal scholars continue to be obsessed with the so-called countermajoritarian dilemma created by the United States Supreme Court’s lack of accountability, particularly when coupled with its immense policy-making powers. Especially when the Supreme Court makes decisions that seem to fly in the face of public preferences—as in Kelo v. New London 1 and Citizens United v. Federal Election Commission 2—concerns about the function of the institution within American democracy sharpen. Indeed, some seem to believe that by making policies opposed by the majority of the American people the Court undermines its fundamental legitimacy, its most valuable political capital. The underlying assumption of these worries about the Supreme Court’s legitimacy is that dissatisfaction with the Court’s decisions leads to the withdrawal, or at least diminution, of support for the institution. So when the Court decides a high profile case like Citizens United in a widely unpopular direction, it is logical to assume that the Court’s legitimacy suffers. Again, the assumption is that legitimacy flows from pleasing decisions, but it is undermined by displeasing decisions. At least some empirical evidence directly contradicts this assumption. In what is perhaps the most salient and politically significant decision of the last few decades, the Supreme Court’s decision in Bush v. Gore 3 effectively awarded the presidency to George W. Bush. One might have expected that this decision would undermine the Court’s legitimacy, at least with Democrats and probably with African-Americans as well. Yet several empirical research projects have indicated that, if anything, the Court’s legitimacy was boosted by this decision, even among Democrats and African-Americans. 4 Bush v. Gore had great potential to chip away at the Court’s legitimacy—it was a deeply divided 5-4 decision; divided by the justices’ partisanships as well; it extended the Court’s authority into an area of law in which the Court had generally deferred to the states; the decision was severely criticized by some, with many in the legal academy describing the decision as a “self-inflicted wound”; 5 and, of course, it was a decision of immense political importance. If Bush v. Gore did not subtract from the Court’s institutional legitimacy, it is difficult to imagine less momentous decisions undermining judicial legitimacy. Political scientists have been studying the legitimacy of the Supreme Court for decades now, and several well-established empirical findings have emerged. The findings relevant to the countermajoritarian dilemma can be summarized in a series of nutshells: ● The Supreme Court is the most legitimate political institution within the contemporary United States. Numerous studies have shown that the American mass public extends great legitimacy to the Court; typically, Congress is depicted as being dramatically less legitimate than the Supreme Court. Indeed, some have gone so far as to describe the Supreme Court as “bulletproof,” and therefore able to get away with just about any ruling, no matter how unpopular. And indeed, the United States Supreme Court may be one of the most legitimate high courts in the world.

#### 3. Hedges appeal thumps

RT 9/3 (Supreme Court to rule on fate of indefinite detention for Americans under NDAA http://rt.com/usa/ndaa-scotus-hedges-suit-359/)

The United States Supreme Court is being asked to hear a federal lawsuit challenging the military’s legal ability to indefinitely detain persons under the National Defense Authorization Act of 2012, or NDAA. According to Pulitzer Prize-winning journalist Chris Hedges — a co-plaintiff in the case — attorneys will file paperwork in the coming days requesting that the country’s high court weigh in on Hedges v. Obama and determine the constitutionality of a controversial provision that has continuously generated criticism directed towards the White House since signed into law by President Barack Obama almost two years ago and defended adamantly by his administration in federal court in the years since.

5. Judges are insolated – won’t spill over

Schauer ‘4 Frederick Schauer, Law prof at Hravard 2k4 California Law Review. , 92 Cal. L. Rev. 1045)

Examples of the effects of judicial supremacy hardly occupy the entirety of constitutional law. As the proponents of popular constitutionalism properly claim, it is simply not plausible to argue that all of the Supreme Court's decisions are counter-majoritarian, nor that the Court is unaware of the potential repercussions if a high percentage of its decisions diverges too dramatically from the popular or legislative will. Nevertheless, there is no indication that the Court uses its vast repository of political capital only to accumulate more political capital, and in many areas judicial supremacy has made not just a short-term difference, but a long-term difference as well. Perhaps most obvious is school prayer. For over forty years the Court has persisted in its view that organized prayer in public schools is impermissible under the Establishment Clause 59 despite the fact that public opinion is little more receptive to that view now than it was in 1962. 60 So too with flag burning, where the Court's decisions from the late 1960s 61 to the present have remained dramatically divergent from public and legislative opinion. 62 Or consider child pornography, where the Court's decision in Ashcroft v. Free Speech Coalition 63 flew in the face of an overwhelming congressional majority approving the extension of existing child pornography laws to virtual child pornography. Similarly, in the regulation of "indecency," the Court has spent well over a decade repeatedly striking down acts of Congress that enjoyed overwhelming public and  [\*1059]  congressional support. 64 Most dramatic of all, however, is criminal procedure, where the Supreme Court's decision in Dickerson v. United States, 65 invalidating a congressional attempt to overrule Miranda v. Arizona, 66 underscores the persistent gap in concern for defendants' rights between Congress and the public, on the one hand, and the Supreme Court, on the other.

#### 6. Courts spin solves controversy

Wells 07 (Michael L., Marion and W. Colquitt Carter Chair in Tort and Insurance Law at the University of Georgia School of Law, "'Sociological Legitimacy' in Supreme Court Opinions" Washington & Lee Law Review, Summer 2007, vol 1011 issue 64, Lexis)

This Article rejects that premise. My thesis is that the Court's opinions may serve worthy goals and earn our respect even if other reasons account for outcomes. To borrow Judge Posner's metaphor, I believe that the Court's professional varnish and its masks deserve more scholarly attention and a kinder assessment than they have received. Deployed with skill and prudence, false (but widely acceptable) reasons help maintain the appearance that the Court is in step with the broad public, to whom it is ultimately accountable. Adept appearance management can succeed even when segments of the public differ sharply among themselves as to the norms of constitutional adjudication. In this way, putting an attractive face on its rulings may serve the Court's vital institutional need for public confidence. Appreciating the role of appearance management in ensuring the Court's institutional effectiveness enhances our understanding of the opinions and opens the door to a whole new set of criteria for evaluating them. In making these points, I borrow Richard Fallon's illuminating distinction between "legal legitimacy" and "sociological legitimacy." Legal legitimacy requires that an opinion candidly state the reasons for the outcome. Sociological legitimacy is achieved by an opinion that secures public acceptance of the Court's rulings. Badly-reasoned opinions may lack legal legitimacy, yet succeed in winning sociological legitimacy. There may be a difference between reasons that will please the Court's audience and those that do the work of deciding cases.

#### 7. Strong court decisions snowball and build capital

Paulsen 02 [Michael, Prof of Law @ Minnesota, Spring, 19 Const. Commentary 215]

Judicial triumphs tend to beget more judicial triumphs - and sometimes judicial triumphalism and hubris. It is probably only a slight exaggeration to say that if there had been no Youngstown there would have been no Brown v. Board of Education, 10 no Cooper v. Aaron, 11 no Warren Court criminal procedure and civil rights revolution, no United States v. Nixon, 12 no Roe v. Wade 13 and Planned Parenthood v. Casey. 14 Still more, had Youngstown played out differently in the end - had Truman resisted or evaded the Court's judgment against his seizure of the steel industry - the aftermath of the Nixon Tapes case might have played out differently, too. Had Truman successfully held on to the steel mills in the face of an adverse decision, Nixon probably would have held on to the tapes, too, no matter what the Court said. And perhaps the Court would not even have tried to order Nixon to produce the tapes in the first place. Finally, if Youngstown had been decided the other way, The Pentagon Papers Case 15 probably would have played out differently, too. The federal government probably would have won in court the power to enjoin a newspaper's publication of materials the government deems detrimental to national security (or affirmance of an executive order banning such publication). 16 Or, had Youngstown been decided as it was but Truman successfully defied the judgment, Nixon might have seized the printing [\*220] presses of The New York Times and The Washington Post and ignored any judicial decrees to the contrary. 17

## 2AC: Legitimacy

#### Specifically, US leadership key to effective negotiations on the Montreal Protocol

US-EPA 12 U.S. Environmental Protection Agency¶ June 2012¶ 2¶ Benefits of Addressing HFCs under the Montreal Protocol¶ June 2012 http://www.epa.gov/ozone/downloads/Benefits%20of%20Addressing%20HFCs%20Under%20the%20Montreal%20Protocol,%20June%202012.pdf

The Montreal Protocol has been an unparalleled environmental success story. It is the only international agreement to achieve universal ratification. It has completed an enormous task in the phaseout of CFCs and halons—chemicals that had become pervasive in multiple industries. It established a schedule to phaseout the remaining important ODS (namely, HCFCs). Under the Montreal Protocol, Article 5 and non-Article 5 countries together have not only set the ozone layer on a path to recovery by mid-century but have reduced greenhouse gases by over 11 Gigatons CO2eq per year, providing an approximate 10-year delay in the onset of the effects of climate change.34 This legacy is now at risk. Although safe for the ozone layer, the continued emissions of HFCs— primarily as alternatives to ODS but also from the continued production of HCFC-22—will have an immediate and significant effect on the Earth’s climate system. Without further controls, it is predicted that HFC emissions could negate the entire climate benefits achieved under the Montreal Protocol. HFCs are rapidly increasing in the atmosphere. HFC-use is forecast to grow, mostly due to increased demand for refrigeration and air conditioning, particularly in Article 5 countries. There is a clear connection to the Montreal Protocol’s CFC and HCFC phaseout and the increased use of HFCs. However, it is possible to maintain the climate benefits achieved by the Montreal Protocol by using climate-friendly alternatives and addressing HFC consumption. Recognizing the concerns with continued HFC consumption and emissions, the actions taken to date to address them, the need for continued HFC use in the near future for certain applications, and the needed for better alternatives, Canada, Mexico and the United States have proposed an amendment to phase down HFC consumption and to reduce byproduct emissions of HFC-23, the HFC with the highest GWP. The proposed Amendment would build on the success of the Montreal Protocol, rely on the strength of its institutions, and realize climate benefits in both the near and long-term. Table 10 displays the projected benefits from the Amendment.

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#### Cred matters more than flexibility

Schwarz 7 senior counsel, and Huq, associate counsel at the Brennan Center for Justice at NYU School of Law, (Frederick A.O., Jr., partner at Cravath, Swaine & Moore, chief counsel to the Church Committee, and Aziz Z, former clerk for the U.S. Supreme Court, Unchecked and Unbalanced: Presidential Power in a Time of Terror, p. 201)

The Administration insists that its plunge into torture, its lawless spying, and its lock-up of innocents have made the country safer. Beyond mere posturing, they provide little evidence to back up their claims. Executive unilateralism not only undermines the delicate balance of our Constitution, but also lessens our human liberties and hurts vital counterterrorism campaigns. How? Our reputation has always mattered. In 1607, Massachusetts governor John Winthrop warned his fellow colonists that because they were a "City on a Hill," "the eyes of all people are upon us."4 Thomas Jefferson began the Declaration of Independence by invoking the need for a "decent respect to the opinions of mankind:' In today's battle against stateless terrorists, who are undeterred by law, morality, or the mightiest military power on earth, our reputation matters greatly.¶ Despite its military edge, the United States cannot force needed aid and cooperation from allies. Indeed, our status as lone superpower means that only by persuading other nations and their citizens—that our values and interests align with theirs, and so merit support, can America maintain its influence in the world. Military might, even extended to the globe's corners, is not a sufficient condition for achieving America's safety or its democratic ideals at home. To be "dictatress of the world," warned John Quincy Adams in 1821, America "would be no longer the ruler of her own spirit." A national security policy loosed from the bounds of law, and conducted at the executive's discretion, will unfailingly lapse into hypocrisy and mendacity that alienate our allies and corrode the vitality of the world's oldest democracy.5

#### Suspension Clause application solves without sacrificing military missions

Nelson ’11 (Luke - B.A., University of Minnesota Duluth, 2007; J.D. Candidate, University of New Hampshire School of Law, 2011) “Territorial Sovereignty and the Evolving Boumediene Factors: Al Maqaleh v. Gates and the Future of Detainee Habeas Corpus Rights” http://law.unh.edu/assets/images/uploads/publications/unh-law-review-vol-09-no2-nelson.pdf

Lastly, Al Maqaleh presents another opportunity for the Supreme Court to provide further guidance on the practical-obstacles factor. As mentioned earlier, the inherent deficiency of a multi-factored, functional test is its arbitrary and unequal application.144 The Boumediene Court’s deficient guidance on the practical-obstacles factor only exacerbates this problem. Unquestionably, deference to the President and military leaders regarding decisions on military necessity, operations in an active theater of war, and reasonable detention of enemy combatants should not be circumvented. However, questions remain regarding the risk of executive manipulation of the Boumediene test.145 For instance, one question is the effect on the practical-obstacles analysis when a detainee is captured beyond an active theater of war and later transported into an active theater for detention. This scenario played out in Al Maqaleh. In our current “Global War on Terrorism,” another lingering question is the actual boundaries of an active theater of war.146 A detainee should not be denied Suspension Clause protections because the government transported him into an active theater where the Suspension Clause would arguably not reach. Furthermore, another question is the effect of military necessity and the military mission on the practicalobstacles factor. These questions require that a delicate and fine line be drawn. On one hand are the surest safeguards of liberty and the separation of powers check on the executive.147 On the other hand is the importance of the military mission and executive deference in international conflict policy decisions. The answer to these questions must include some level of deference to the legitimate needs of the armed forces in advancing the military mission148 but also address the pertinent constitutional issues that cannot be overlooked. Safe to say, the writ of habeas corpus is one of these pertinent constitutional issues. However, as the Boumediene Court recognized, the executive branch is entitled to a “reasonable period of time” before a court will entertain a habeas corpus petition from a detainee.149 This reasonable period of time is necessary to allow the military to screen and review the detainee and determine the detainee’s combatant status.150 This balance between the military mission and an individual’s surest safeguard of liberty will allow the courts to maintain a practical, functional, and detainee-by-detainee, detention-site-by-detention-site application of the habeas test that the Boumediene Court envisioned.

### Bond

#### Can’t solve chemical industry – too many factors

Zack’s 12 [Zack’s Equity Research, Chemical Industry Stock Outlook - Dec 2012 , 12/20/12, http://www.zacks.com/commentary/25066/chemical-industry-stock-outlook-dec-2012]

Commodity price hikes, though subsiding lately, is adding to feedstock costs for many of the U.S. chemical producers. Their ability to pass these costs on to end consumers is not always easy, given the competitive pressures at play. As a result, margins for a number of producers will continue to be under pressure.¶ Given the industry’s sensitivity to the global economy, any negative current in the macro economy would be reflected in the prospects of the chemical companies. The turmoil in Europe and its impact on global growth remain sources of near-term uncertainty. Western Europe continues to pose challenges on chemical stocks due to weak demand (particularly in the construction industry) and the lingering impact of debt crisis.¶ The U.S. housing sector, a key consumer of chemicals, has shown signs of recovery lately, manifested by a steady pick-up in home prices. However, demand from this industry still remains way below the historic levels. Weakness in the electronics and construction end-markets may continue to weigh on the results.¶ Chemical companies generate a considerable amount of revenues outside the U.S., and therefore are exposed to foreign exchange fluctuations. Unfavorable currency exchange translation (stemming from a stronger dollar) dented most of these companies’ results in the most recent quarter.¶ Another challenge comes in the form of production disruptions as a result of Hurricane Sandy, which wreaked havoc on the Northeast U.S. Production is expected to be hit by associated outages in the December quarter.¶ Chemical titan The Dow Chemical Company (DOW - Analyst Report) was hammered by several headwinds in the September quarter. Its profit slid on lower pricing across all regions. The company also saw weak demand for its products in the quarter, stemming from the challenging conditions in Europe and sluggish activity across major emerging markets.¶ Moreover, building and construction sales remain under pressure due to lower volume in Europe and recovery in electronics remains slow, partly due to sluggish growth China. Moreover, currency headwinds are expected to continue given the weak euro. The company announced a major restructuring program including headcount reductions, plant closures and capital spending cuts.¶ The other chemical giant DuPont (DD - Analyst Report) had a drab third quarter due to lower demand across titanium dioxide and photovoltaic markets. It witnessed weakness across a number of end markets in the quarter. The company reduced its earnings forecast for 2012 and announced a restructuring plan that includes retrenchment of 1,500 workers globally.¶ DuPont also remains exposed to raw material cost inflation, which is expected to constrict its margin in the fourth quarter. Moreover, currency headwinds weighed on the performance of a number of segments in the third quarter and are expected to reduce its earnings for 2012.¶ Air Products and Chemicals Inc. (APD - Analyst Report) also felt the heat in the September quarter as weak demand due to the sluggish economic conditions led to a big slide in its profit. Slowing U.S. manufacturing growth due to high unemployment and the concerns over the U.S. fiscal cliff coupled with the slowdown in Asia is expected to impinge its results moving ahead. We have downgraded our rating on the stock to Underperform factoring in the challenges it may face in the next fiscal year.¶ Agricultural chemical company Agrium Inc. (AGU - Analyst Report) has put up a lackluster third quarter on weak potash demand and is expected see a weak December quarter due to a significant decline in international potash demand and lower ammonia sales volume in Western Canada. Moreover, global phosphate market is expected to remain weak in the near term, partly due to lower demand from India.¶ Specialty chemical company Valspar Corporation (VAL - Analyst Report) is contending with the difficult global economic conditions. Persistent weakness in its Paints segment hurt its sales in the most recent quarter. The segment has been hit by a weak residential housing market in Australia, which may continue to affect revenues moving ahead.