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#### Courts affs have to specify the grounds

Dragich 95 - Martha J. Dragich, Associate Professor of Law at Missouri-Columbia, 2-1995 44 Am. U.L. Rev. 757

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

#### Vote neg – all ground and education revolve around judicial reasoning

### 1NC Politics of Schmitt K

#### Politics is Schmittian – trying to fight the executive on their own battlefield is naïve – the aff is just a liberal knee-jerk reaction that swells executive power

Kinniburgh, 5/27 **–** (Colin, Dissent, 5-27, <http://www.dissentmagazine.org/blog/partial-readings-the-rule-of-law>)

The shamelessness of the endeavor is impressive—a far cry, in many ways, from the CIA’s secretive Cold War–era assassination plots. Obama has succeeded in anchoring a legal infrastructure for state-sponsored assassinations on foreign soil while trumpeting it, in broad daylight, as a framework for accountability. Peppered with allusions to the Constitution and to “the law” more generally, the call for transparency instead appears to provide an Orwellian foil for a remarkable expansion of executive powers. Existing laws, domestic or international, are proving a hopelessly inadequate framework with which to hold the Obama administration accountable for arbitrary assassinations abroad. No doubt it is tempting to turn to the Constitution, the Universal Declaration of Human Rights, and other relevant legal documents as a litmus test for the validity of government actions. Many progressive media outlets have a tendency to seize on international law, especially, as a straightforward barometer of injustice: this is particularly true in the case of the Israel-Palestine conflict, as an editorial in the current issue of Jacobin points out. Both domestic and international legal systems often do afford a certain clarity in diagnosing excesses of state power, as well as a certain amount of leverage with which to pressure the states committing the injustices. To hope, however, that legal systems alone can redress gross injustices is naive. Many leftists—and not just “bloodless liberals”—feel obliged to retain faith in laws and courts as a lifeline against oppression, rather than as mere instruments of that same oppression. Even Marx, when he was subjected, along with fellow Communist League exiles, to a mass show trial in Prussian courts in the 1850s, was convinced that providing sufficient evidence of his innocence would turn the case against his accuser, Wilhelm Stieber, a Prussian secret agent who reportedly forged his evidence against the communists. In his writings, Marx expressed his disillusionment with all bourgeois institutions, including the courts; in practice, he hoped that the law would serve him justice. Richard Evans highlights this tension in his insightful review of Jonathan Sperber’s Karl Marx: A Nineteenth-Century Life, published in the most recent London Review of Books. “Naively forgetting,” writes Evans, “what they had said in the Manifesto – that the law was just an instrument of class interests – Marx and Engels expected [their evidence against Stieber] to lead to an acquittal, but the jury found several of the defendants guilty, and Stieber went unpunished.” Marx’s disappointment is all too familiar. It is familiar from situations of international conflict, illustrated by Obama’s drone strikes justifications; it is evident, too, when a police officer shoots dead an unarmed Bronx teenager in his own bathroom, and the charge of manslaugher—not murder—brought against the officer is dropped for procedural reasons by the presiding judge. This is hardly the first such callous ruling by a New York court in police violence cases; the last time charges were brought against an NYPD officer relating to a fatal shooting on duty, in 2007, they were also dropped. Dozens of New Yorkers have died at the hands of the police since then, and Ramarley Graham’s case was the first that even came close to a criminal conviction—only to be dropped for ludicrous reasons. Yet New York’s stop-and-frisk opponents are still fighting their battle out in the courts. In recent months, many activists have invested their hopes for fairer policing in a civil class action suit, Floyd, et. al. vs. City of New York, which may just convict the NYPD of discrimination despite the odds. District court judge Shira Scheindlin, profiled in this week’s New Yorker, has gained a reputation for ruling against the NYPD in stop-and-frisk cases, even when it has meant letting apparently dangerous criminals off the hook. In coming weeks, she is likely to do the same for the landmark Floyd case, in what may be a rare affirmation of constitutional law as a bulwark against state violence and for civil liberties. Even if the city wins the case, the spotlight that stop-and-frisk opponents have shined on the NYPD has already led to a 51 percent drop in police stops in the first quarter of this year. Still, when the powerful choose the battlefield and write the laws of war, meeting them on their terms is a dangerous game.

#### Legality is what feeds a new form of muscular liberalism where these illusions cannot see how much they sustain it which legitimizes wars for democracies and doctrines of pre-emption

Motha 8 \*Stewart, Senior Lecturer, Kent Law School, University of Kent, Canterbury, Kent, Journal of Law, Culture, and Humanities Forthcoming 2008, Liberal Cults, Suicide Bombers, and other Theological Dilemmas

A universalist liberal ideology has been re-asserted. It is not only neo-con hawks or Blairite opportunists that now legitimise wars for democracy. Alarmingly, it is a generation of political thinkers who opposed the Nixonian logic of war (wars to show that a country can ‘credibly’ fight a war to protect its interests1), and those humbled by the anticolonial struggles of liberation from previous incarnations of European superiority that are renewing spurious civilizational discourses. This ‘muscular liberalism’ has found its voice at the moment of a global political debate about the legality and effectiveness of ‘just wars’ – so called ‘wars for democracy’ or ‘humanitarian war’. The new political alignment of the liberal left emerged in the context of discussions about the ‘use of force’ irrespective of UN Security Council endorsement or the sovereign state’s territorial integrity, such as in Kosovo – but gained rapid momentum in response to attacks in New York City and Washington on September 11, 2001. Parts of the liberal left have now aligned themselves with neoconservative foreign policies, and have joined what they believe is a new anti-totalitarian global struggle – the ‘war on terror’ or the battle against Islamist fundamentalism. One task of this essay, then, is to identify this new formation of the liberal left. Much horror and suffering has been unleashed on the world in the name of the liberal society which must endure. However, when suicide bombing and state-terror are compared, the retort is that there is no moral equivalence between the two. Talal Asad in his evocative book, On Suicide Bombing, has probed the horror that is felt about suicide bombing in contrast to state violence and terror.2 What affective associations are formed in the reaction to suicide bombing? What does horror about suicide bombing tell us about the constitution of inter-subjective relations? In this essay I begin to probe these questions about the relation between death, subjectivity, and politics. I want to excavate below the surface oppositions of good deaths and bad, justifiable killing and barbarism, which have been so central to left liberal arguments. As so much is riding on the difference between ‘our good war’ and ‘their cult of death’, it seems apt to examine and undo the opposition. The muscular liberal left projects itself as embodying the values of the ‘West’, a geo-political convergence that is regularly opposed to the ‘East’, ‘Muslims’, or the ‘Islamic World’. I undo this opposition, arguing that thanatopolitics, a convergence of death, sacrifice, martyrdom and politics, is common to left liberal and Islamist political formations. How does death become political for left liberals and Islamist suicide bombers? In the case of the latter, what is most immediately apparent is how little is known about the politics and politicization of suicide bombers. Suicide bombers are represented as a near perfect contrast to the free, autonomous, self-legislating liberal subject – a person overdetermined by her backward culture, oppressive setting, and yet also empty of content, and whose death can have no temporal political purchase. The ‘suicide bomber’ tends to be treated by the liberal left as a trans-historical ‘figure’, usually represented as the ‘Islamo-fascist’ or the ‘irrational’ Muslim.3 The causes of suicide bombing are often implicitly placed on Islam itself – a religion that is represented as devoid of ‘scepticism, doubt, or rebellion’ and thus seen as a favourable setting for totalitarianism.4 The account of the suicide bomber as neo-fascist assassin supplements a lack – that is, that the association of suicide bombing with Islam explains very little. The suicide bomber is thus made completely familiar as totalitarian fascist, or wholly other as “[a] completely new kind of enemy, one for whom death is not death”.5 So much that is written about the suicide bomber glosses over the unknown with political subjectivities, figures, and paradigms (such as fascism) which are familiar enough to be vociferously opposed. By drawing the suicide bomber into a familiar moral register of ‘evil’, political and historical relations between victim and perpetrator are erased.6 In the place of ethnographically informed research the ‘theorist’ or ‘public intellectual’ erases the contingency of the suicide bomber and reduces her death to pure annihilation, or nothingness. The discussion concludes by undoing the notion of the ‘West’, the very ground that the liberal left assert they stand for. The ‘West’ is no longer a viable representation of a geo-political convergence, if it ever was. Liberal discourse has regarded itself as the projection of the ‘West’ and its enlightenment. But this ignores important continuities between Islam, Christianity, and contemporary secular formations. The current ‘clash of monotheisms’, I argue after J-L Nancy, reveals a crisis of sense, authority, and meaning which is inherent to the monotheistic form. An increasingly globalised world is made up of political communities and juridical orders that have been ‘emptied’ of authority and certainty. This crisis of sense conditions the horror felt by the supposedly rational liberal in the face of Islamist terrorism. Horror at terrorism is then the affective bond that sustains a grouping that otherwise suffers the loss of a political project with a definite end. The general objective of this essay is to challenge the unexamined assumptions about politics and death that circulate in liberal left denunciations of Islamic fascism. The horror and fascination with the figure of the suicide bomber reveals an unacknowledged affective bond that constitutes the muscular liberal left as a political formation. This relies on disavowing the sacrificial and theological underpinnings of political liberalism itself – and ignores the continuities between what is called the ‘West’ and the theologico-political enterprise of monotheism. Monotheism is not the preserve of something called the ‘West’, but rather an enterprise that is common to all three Religions of the Book. The article concludes by describing how the writings of Jean-Luc Nancy on monotheism offer liberal left thinkers insights for rethinking the crisis of value that resulted from the collapse of grand emancipatory enterprises as well as the fragmentation of politics resulting from a focus on political identification through difference. I opened with a reference to the ‘liberal left’. Of course the ‘liberal left’ signifies a vast and varied range of political thinking and activism – so I must clarify how I am deploying this term. In this essay the terms ‘liberal left’ or ‘muscular liberal’ are used interchangeably. Paul Berman and Nick Cohen, whose writing I will shortly refer to, are exemplars of the new political alignment who self-identify as ‘democrats and progressives’, but whose writings feature bellicose assertions about the superiority of western models of democracy, and universal human rights.7 Among this liberal left, democracy and freedom become hemispheric and come to stand for the West. More generally, now, the ‘liberal left’ can be distinguished from political movements and thinkers who draw inspiration from a Marxist tradition of thought with a socialist horizon. The liberal left I am referring to would view the Marxist tradition as undervaluing democratic freedoms and human rights. Left liberals also tend to dismiss the so called post-Marxist turn in European continental philosophy as ‘postmodern relativism’.8 PostMarxists confronted the problem of the ‘collective’ – addressing the problem of masses and classes as the universal category or agent of historical transformation. This was a necessary correction to all the disasters visited on the masses in the name of a universal working class. The liberal state exploited these divisions on the left. It is true that a left fragmented through identity politics or the politics of difference were reduced to group based claims on the state. However, liberal multiculturalism was critiqued by anti-racist and feminist thinkers as early as the 1970s for ignoring the structural problems of class or as yet another nation-building device. The new formation of the muscular liberal left have only just discovered the defects of multiculturalism. The dismissal of liberal multiculturalism is now code for ‘too much tolerance’ of ‘all that difference’. The liberal left, or muscular liberal, as I use these terms, should not be conflated with the way ‘liberal’ is generally used in North America to denote ‘progressive’, ‘pro-choice’, open to a multiplicity of forms of sexual expression, generally ‘tolerant’, or ‘left wing’ (meaning socialist). It might be objected that it is not the liberal left, but ‘right wing crazies’ driven by Christian evangelical zeal combined with neo-liberal economic strategies that have usurped a post-9/11 crime and security agenda to mount a global hegemonic enterprise in the name of a ‘war on terror’. It might also be said that this is nothing new – global expansionist enterprises such as 18th and 19th century colonialism mobilised religion, science, and theories of economic development to secure resources and justify extreme violence where necessary. Global domination, it might be argued, has always been a thanatopolitical enterprise. So what’s different now? What is crucial, now, is that the entire spectrum of liberalism, including the ‘rational centre’, is engaged in the kind of mindset whereby a destructive and deadly war is justified in the name of protecting or establishing democracy, the rule of law, and human rights. It might then be retorted that this ‘rational centre’ of liberalism have ‘always’ been oriented in this way. That is partly true, but it is worth recalling that the liberal left I have in mind is the generation that came of age with opposition to the war in Vietnam, other Indo-Chinese conflagrations, and the undoing of empire. This is a left that observed the Cold War conducted through various ‘hot wars’ in Africa, Central and Latin America, and South East Asia and thus at least hoped to build a ‘new world order’ of international law and multilateralism. This is a left that was resolved, by the 1970s, not to repeat the error of blindly following a scientific discourse that promised to produce a utopia – whether this was ‘actually existing socialism’ or the purity of ‘blood and soil’. But now, a deadly politics, a thanatopolitics, is drawn out of a liberal horror and struggle against a monolithically drawn enemy called Islamic fundamentalism. What is new is that Islam has replaced communism/fascism as the new ‘peril’ against which the full spectrum of liberalism is mobilized. Islamist terrorism and suicide bombers, a clash between an apparently Islamic ‘cult of death’ versus modern secular rationality has come to be a central preoccupation of the liberal left. In the process, as Talal Asad has eloquently pointed out, horror about terrorism has come to be revealed as one way in which liberal subjectivity and its relation to political community can be interrogated and understood.9 Moreover, the potential for liberal principles to be deployed in the service of legitimating a doctrine of pre-emption as the ‘new internationalism’ is significant. The first and second Gulf Wars, according to the liberal left, are then not wars to secure control over the supply of oil, or regional and global hegemony, as others on the left might argue, but anti-fascist, anti-totalitarian wars of liberation fought in the name of ‘democracy’. Backing ‘progressive wars’ for ‘freedom and democracy’, those who self-identify as a left which is reasserting liberal democratic principles start by asking questions such as: “Are western freedoms only for westerners?”.10 In the process, freedom becomes ‘western’, and its enemy an amorphous legion behind an unidentifiable line between ‘west’ and the rest (the ‘Muslim world’). The ‘war for democracy’ waged against ‘Islamist terrorism’ and Muslim fundamentalism is the crucible on which the new alignment of the liberal left is forged.

#### U.S. legal leadership enables a neocolonial domination---this link is phenomenally specific to their mechanism of boosting the prestige of U.S. courts in order to export legal norms and practices

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

There is a clear pattern of continuity, not of rupture, between the current policy trend in the international institutional setting and earlier practices, in particular colonialism. The Western world, under current U.S. leadership, having persuaded itself of its superior position, largely justified by its form of government, has succeeded in diffusing rule of law ideology as universally valid, behind whose shadows plunder hides, both in domestic and in international matters. Present-day international interventions led by the United States are no longer openly colonial efforts. They might be called neo-colonial, imperialistic or simply post-colonial interventions. Although practically all of European colonial states (most notably Portugal, Spain, Great Britain, France, Germany and even Italy) regarded themselves as empires, the concept of ‘empire’ is what best describes the present phase of multinational capitalist development with the USA as the most important, hegemonic superpower, using the rule of law to pave the way for international corporate domination. Export of the law can be described and explained in a variety of ways. A first example is the imperialistic/colonial rule, or imposition of law by military rules, as during military conquest: Napoleon imposed his Civil Code to French-occupied Belgium in the early nineteenth century. Similarly, General MacArthur imposed a variety of legal reforms based on the American government model in post World War II Japan, as a condition of the armistice in the aftermath of Hiroshima. Today, Western-style elections and a variety of other laws governing everyday life are imposed in countries under US occupation, such as Afghanistan and Iraq. A second model can be described as imposition by bargaining, in the sense that acceptance of law is part of a subtle extortion11. Target countries are persuaded to adopt legal structures according to Western standards or face exclusion from international markets. This model describes the experience of China, Japan and Egypt in the early twentieth century, and, indeed, contemporary operations of the World Bank, IMF, the World Trade Organization (WTO) and other Western development agencies (United States Agency for International Development (USAID), European Bank for Reconstruction and Development (EBRD), and so on) in the ‘developing’ and former socialist world. A third model, constructed as fully consensual, is diffusion by prestige, a deliberate process of institutional admiration that leads to the reception of law.12 According to this vision, because modernization requires complex legal techniques and institutional arrangements, the receiving legal system, more simple and primitive, cannot cope with the new necessities. It lacks the culture of the rule of law, something that can only be imported from the West. Every country that in its legal development has ‘imported’ Western law has thus acknowledged its ‘legal inferiority’ by admiring and thus voluntarily attempting to import Western institutions. Turkey during the time of Ataturk, Ethiopia at the time of Haile Selassie and Japan during the Meiji restoration are modern examples. Interestingly, if the transplant ‘fails’, such as with the attempts to impose Western-style regulation on the Russian stock market, or as with many law and development enterprises, it is the recipient society that receives the blame. Local shortcomings and ‘lacks’ are said to have precluded progress in the development of the rule of law. When the World Bank produces a development report on legal issues, it invariably shows insensitivity for local complexities and suggests radical and universal transplantation of Western notions and institutions.

#### The alt is to reject the aff in favor of building a culture of resilience

Vermeule and Posner 11 Adrian Vermeule, prof of Law at Harvard University Law School, Eric A Posner., prof of Law at the University of Chicago Law School, *Executive Unbound: After the Madisonian Republic*, Oxford University Press 2011

We do not yet live under a plebiscitary presidency. In such a system, the president has unchecked legal powers except for the obligation to submit to periodic elections. In our system, Congress retains the formal power to make law. It has subjected presidential lawmaking to complex procedures and bureaucratic checks,1 and it has created independent agencies over which the president in theory has limited control. The fed­eral courts can expect the executive to submit to their orders, and the Supreme Court retains certain quasi-lawmaking powers, which it exercises by striking down statutes and blocking executive actions. The federal system is still in place. State legal institutions retain considerable power over their populations. But these legal checks on executive authority (aside from the electoral constraint) have eroded considerably over the last two hundred years. Congress has delegated extensive powers to the executive. For new initia­tives, the executive leads and Congress follows. Congress can certainly slow down policymaking, and block bills proposed by the executive; but it cannot set the agenda. It is hard to quantify the extent of congressional control over regulatory agencies, but it is fair to say that congressional intervention is episodic and limited, while presidential control over both the executive and independent agencies is strong and growing stronger. The states increasingly exercise authority at the sufferance of the national government and hence the president. The federal courts have not tried to stop the erosion of congressional power and state power. Some commentators argue that the federal courts have taken over Con­gress’s role as an institutional check. It is true that the Supreme Court has shown little compunction about striking down statutes (although usually state statutes), and that it rejected some of the legal theories that the Bush administration used to justify its counterterrorism policies. However, the Court remains a marginal player. The Court ducked any legal rulings on counterterror policies until the 2004 Hamdi decision, and even after the Boumediene decision in 2008, no detainee has been released by final judicial order, from Guantanamo or elsewhere, except in cases where the government chose not to appeal the order of a district judge. The vast majority of detainees have received merely another round of legal process. Some speculate that judicial threats to release detainees have caused the administration to release them preemptively. Yet the judges would incur large political costs for actual orders to release suspected terrorists, and the government knows this, so it is unclear that the government sees the judi­cial threats as credible or takes them very seriously. The government, of course, has many administrative and political reasons to release detainees, quite apart from anything the courts do. So the executive submits to judi­cial orders in part because the courts are careful not to give orders that the executive will resist. In general, judicial opposition to the Bush administration’s counterter­rorism policies took the form of incremental rulings handed down at a gla­cial pace, none of which actually stopped any of the major counterterrorism tactics of that administration, including the application of military power against Al Qaeda, the indefinite detention of members of Al Qaeda, tar­geted assassinations, the immigration sweeps, even coercive interrogation. The (limited) modifications of those tactics that have occurred resulted not from legal interventions but from policy adjustments driven by changed circumstances and public opinion, and by electoral victory of the Obama administration. However, the Obama administration has mostly confirmed and in some areas even expanded the counterterrorism policies of the Bush administration. Strong executive government is bipartisan. The 9/11 attack provided a reminder of just how extensive the presi­dent’s power is. The executive claimed the constitutional authority to, in effect, use emergency powers. Because Congress provided redundant stat­utory authority, and the Supreme Court has steadfastly refused to address the ultimate merits of the executives constitutional claims, these claims were never tested in a legal or public forum. But it is worth trying to ima­gine what would have happened if Congress had refused to pass the Autho­rization for Use of Military Force and the Supreme Court had ordered the executive to release detainees in a contested case. We think that the execu­tive, backed up as it was by popular opinion, would have refused to obey. And, indeed, for just that reason, Congress would, never have refused its imprimatur and the Supreme Court would never have stood in the execu­tive’s way. The major check on the executives power to declare an emer­gency and to use emergency powers is—political. The financial crisis of 2008-2009 also revealed the extent of executive power. Acting together, the Fed, the Treasury, and other executive agencies spent hundreds of billions of dollars, virtually nationalizing parts of the financial system. Congress put up a fuss, but it could not make policy and indeed hardly even influenced policy. Congress initially refused to supply a blank check, then in world-record time changed its mind and gave the blank check, then watched helplessly as the administration adopted pol­icies different from those for which it said the legislation would be needed. Courts played no role in the crisis except to ratify executive actions in tension with the law.2 What, then, prevents the executive from declaring spurious emergencies and using the occasion to consolidate its power—or for that matter, consolidating its power during real emergencies so that it retains that power even after normal times return? In many countries, notably in Latin America, presidents have done just that. Citing an economic crisis, or a military threat, or congressional gridlock, executives have shut down independent media, replaced judges with their cronies, suppressed political opposition, and ruled by dictate. Could this happen in the United States? The answer is, very probably, no. The political check on the executive is real. Declarations of emergency not justified by publicly visible events would be met with skepticism. Actions said, to be justified by emergency would not be approved if the justification were not plausible. Separation of powers may be suffering through an enfeebled old age, but electoral democracy is alive and well. We have suggested that the historical developments that have under­mined separation of powers have strengthened democracy. Consider, for example, the communications revolution, which has culminated (so far) in the Internet Age. As communication costs decrease, the size of markets expand, and hence the scale of regulatory activity must increase. Localities and states lose their ability to regulate markets, and the national govern­ment takes over. Meanwhile, reduced communication costs increase the relative value of administration (monitoring firms and ordering them to change their behavior) and reduce the relative value of legislation (issuing broad-gauged rules), favoring the executive over Congress. At the same time, reduced communication costs make it easier for the public to mon­itor the executive. Today, whistleblowers can easily find an audience on the Internet,; people can put together groups that focus on a tiny aspect of the government s behavior; gigabytes of government data are uploaded onto the Internet and downloaded by researchers who can subject them to rigorous statistical analysis. It need not have worked out this way. Govern­ments can also use technology to monitor citizens for the purpose of suppressing political opposition. But this has not, so far, happened in the United States. Nixon fell in part because his monitoring of political enemies caused an overwhelming political backlash, and although the Bush administration monitored suspected terrorists, no reputable critic suggested that it targeted domestic political opponents. Our main argument has been methodological and programmatic: researchers should no longer view American political life through the Madisonian prism, while normative theorists should cease bemoaning the decline of Madisonianism and instead make their peace with the new political order. The center of gravity has shifted to the executive, which both makes policy and administers it, subject to weak constraints imposed by Congress, the judiciary, and the states. It is pointless to bewail these developments, and futile to argue that Madisonian structures should be reinvigorated. Instead, attention should shift to the political constraints on the president and the institutions through, which those political con­straints operate—chief among them elections, parties, bureaucracy, and the media. As long as the public informs itself and maintains a skeptical attitude toward the motivations of government officials, the executive can operate effectively only by proving over and over that it deserves the public s trust. The irony of the new political order is that the executive, freed from the bonds of law, inspires more distrust than in the past, and thus must enter ad hoc partnerships with political rivals in order to persuade people that it means well. But the new system is more fluid, allowing the executive to form those partnerships when they are needed to advance its goals, and not otherwise. Certain types of partnership have become recurrent pat­terns—for example, inviting a member of the opposite party to join the president’s cabinet. Others are likely in the future. In the place of the clockwork mechanism bequeathed to us by the Enlightenment thinking of the founders, there has emerged a more organic system of power sharing and power constraint that depends on shifting political alliances, currents of public opinion, and the particular exigencies that demand government action. It might seem that such a system requires more attention from the public than can reasonably be expected, but the old system of checks and balances always depended on public opinion as well. The centuries-old British parliamentary system, which operated in. just this way, should provide reason, for optimism. The British record on executive abuses, although hardly perfect, is no worse than the American record and arguably better, despite the lack of a Madisonian separation of legislative and executive powers

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#### The Executive Branch of the United States should create “executive v. executive” divisions as per our Katyal evidence to promote internal separation of powers via separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts.

#### Presidential veto power and executive deference mean external restraints fail – internal separation of powers constrains the president and leads to better decision making

Katyal ’6 Neal Katyal, Professor of Law @ Georgetown, The Yale Law Journal, “Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within” 115 Yale L.J. 2314, 2006

After all, Publius's view of separation of powers presumes three branches with equivalent ambitions of maximizing their powers, yet legislative abdication is the reigning modus operandi. It is often remarked that "9/11 changed everything"; 2 particularly so in the war on terror, in which Congress has been absent or content to pass vague, open-ended statutes. The result is an executive that subsumes much of the tripartite structure of government. Many commentators have bemoaned this state of affairs. This Essay will not pile on to those complaints. Rather, it begins where others have left off. If major decisions are going to be made by the President, then how might separation of powers be reflected within the executive branch? The first-best concept of "legislature v. executive" checks and balances must be updated to contemplate second-best "executive v. executive" divisions. And this Essay proposes doing so in perhaps the most controversial area: foreign policy. It is widely thought that the President's power is at its apogee in this arena. By explaining the virtues of internal divisions in the realm of foreign policy, this Essay sparks conversation on whether checks are necessary in other, domestic realms. That conversation desperately needs to center on how best to structure the ever-expanding modern executive branch. From 608,915 employees working in agencies in 1930, 3 to 2,649,319 individuals in 2004, 4 the growth of the executive has not generated a systematic focus on internal checks. We are all fond of analyzing checks on judicial activism in the post-Brown, post-Roe era. So too we think of checks on legislatures, from the filibuster to judicial review. But [\*2317] there is a paucity of thought regarding checks on the President beyond banal wishful thinking about congressional and judicial activity. This Essay aims to fill that gap. A critical mechanism to promote internal separation of powers is bureaucracy. Much maligned by both the political left and right, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview. These benefits have been obscured by the now-dominant, caricatured view of agencies as simple anti-change agents. This Essay celebrates the potential of bureaucracy and explains how legal institutions can better tap its powers. A well-functioning bureaucracy contains agencies with differing missions and objectives that intentionally overlap to create friction. Just as the standard separation-of-powers paradigms (legislature v. courts, executive v. courts, legislature v. executive) overlap to produce friction, so too do their internal variants. When the State and Defense Departments have to convince each other of why their view is right, for example, better decision-making results. And when there is no neutral decision-maker within the government in cases of disagreement, the system risks breaking down. In short, the executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise). A chief aim of this Essay's proposal is to allow each to function without undermining the other. This goal can be met without agency competition - overlapping jurisdiction is simply one catalyzing agent. Other ideas deserve consideration, alongside or independent of such competition, such as developing career protections for the civil service modeled more on the Foreign Service. Executives of all stripes offer the same rationale for forgoing bureaucracy-executive energy and dispatch. 5 Yet the Founders assumed that massive changes to the status quo required legislative enactments, not executive decrees. As that concept has broken down, the risks of unchecked executive power have grown to the point where dispatch has become a worn-out excuse for capricious activity. Such claims of executive power are not limited to the current administration, nor are they limited to politicians. Take, for example, Dean Elena Kagan's rich celebration of presidential administration. 6 Kagan, herself a former political appointee, lauded the President's ability to trump bureaucracy. Anticipating the claims of the current administration, Kagan argued that the [\*2318] President's ability to overrule bureaucrats "energizes regulatory policy" because only "the President has the ability to effect comprehensive, coherent change in administrative policymaking." 7 Yet it becomes clear that the Kagan thesis depends crucially on oversight by the coordinate legislative branch (typically controlled by a party in opposition to the President). Without that checking function, presidential administration can become an engine of concentrated power. This Essay therefore outlines a set of mechanisms that create checks and balances within the executive branch. The apparatuses are familiar - separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts. But these restraints have been informally laid down and inconsistently applied, and in the wake of September 11 they have been decimated. 8 A general framework statute is needed to codify a set of practices. In many ways, the status quo is the worst of all worlds because it creates the facade of external and internal checks when both have withered. I. THE NEED FOR INTERNAL SEPARATION OF POWERS The treacherous attacks of September 11 gave Congress and the President a unique opportunity to work together. Within a week, both houses of Congress passed an Authorization for Use of Military Force (AUMF); 10 two months later they enacted the USA PATRIOT Act to further expand intelligence and law enforcement powers. 11 But Congress did no more. It passed no laws authorizing or regulating detentions for U.S. citizens. It did not affirm or regulate President Bush's decision to use military commissions to try unlawful belligerents. 12 It stood silent when President Bush accepted thinly reasoned legal views of the Geneva Conventions. 13 The administration was content to rely on vague legislation, and Congress was content to enact little else. 14 There is much to be said about the violation of separation of powers engendered by these executive decisions, but for purposes of this Essay, I want [\*2320] to concede the executive's claim - that the AUMF gave the President the raw authority to make these decisions. A democratic deficit still exists; the values of divided government and popular accountability are not being preserved. Even if the President did have the power to carry out the above acts, it would surely have been wiser if Congress had specifically authorized them. Congress's imprimatur would have ensured that the people's representatives concurred, would have aided the government's defense of these actions in courts, and would have signaled to the world a broader American commitment to these decisions than one man's pen stroke. Of course, Congress has not passed legislation to denounce these presidential actions either. And here we come to a subtle change in the legal landscape with broad ramifications: the demise of the congressional checking function. The story begins with the collapse of the nondelegation doctrine in the 1930s, which enabled broad areas of policymaking authority to be given to the President and to agencies under his control. That collapse, however, was tempered by the legislative veto; in practical terms, when Congress did not approve of a particular agency action, it could correct the problem. But after INS v. Chadha, 15 which declared the legislative veto unconstitutional, that checking function, too, disappeared. In most instances today, the only way for Congress to disapprove of a presidential decree, even one chock full of rampant lawmaking, is to pass a bill with a solid enough majority to override a presidential veto. The veto power thus becomes a tool to entrench presidential decrees, rather than one that blocks congressional misadventures. And because Congress ex ante appreciates the supermajority-override rule, its members do not even bother to try to check the President, knowing that a small cadre of loyalists in either House can block a bill. 16 For example, when some of the Senate's most powerful Republicans (John McCain, Lindsay Graham, and John Warner) tried to regulate detentions and trials at Guantanamo Bay, they were told that the President would veto any attempt to modify the AUMF. 17 The result is that once a court [\*2321] interprets a congressional act, such as the AUMF, to give the President broad powers, Congress often cannot reverse the interpretation, even if Congress never intended to give the President those powers in the first place. Senator McCain might persuade every one of the other ninety-nine Senators to vote for his bill, but that is of no moment without a supermajority in the House of Representatives as well. 18 At the same time, the executive branch has gained power from deference doctrines that induce courts to leave much conduct untouched - particularly in foreign affairs. 19 The combination of deference and the veto is especially insidious - it means that a President can interpret a vague statute to give himself additional powers, receive deference in that interpretation from courts, and then lock that decision into place by brandishing the veto. This ratchet-and-lock scheme makes it almost impossible to rein in executive power. All legislative action is therefore dangerous. Any bill, like Senator McCain's torture bill, can be derailed through compromise. A rational legislator, fearing this cascading cycle, is likely to do nothing at all. This expansion of presidential power is reinforced by the party system. When the political branches are controlled by the same party, loyalty, discipline, and self-interest generally preclude interbranch checking. That reluctance is exacerbated by a paucity of weapons that check the President. Post-Chadha, Congress only has weapons that cause extensive collateral damage. The fear of that damage becomes yet another reason why Congress is plagued with inertia. And the filibuster, the last big check in periods of single-party government, is useless against the host of problems caused by Presidents who take expansive views of their powers under existing laws (such as the AUMF). Instead of preserving bicameralism, Chadha has led to its subversion and "no-cameralism." A Congress that conducts little oversight provides a veneer of legitimacy to an adventurist President. The President can appeal to the historic sense of checks and balances, even if those checks are entirely compromised by modern political dynamics. With this system in place, it is no surprise that recent calls [\*2322] for legislative revitalization have failed. No successful action-forcing mechanisms have been developed; instead we are still in John Hart Ely's world of giving a "halftime pep-talk imploring that body to pull up its socks and reclaim its rightful authority." 20 It is time to consider second-best solutions to bring separation of powers into the executive. Bureaucracy can be reformed and celebrated (instead of purged and maligned), and neutral conflict-decision mechanisms can be introduced. Design choices such as these can help bring our government back in line with the principles envisioned by our Founders. 21

#### Internal checks comparatively solve better and don’t link to politics

Metzger ‘9, Gillian E. Metzger, Professor of Law @ Columbia Law School, “The Interdependent Relationship Between Internal and External Separation of Powers” 59 Emory L.J. 423, Emory Law Journal, 2009

Several bases exist for thinking that internal separation of powers mechanisms may have a comparative advantage. First, internal mechanisms [\*440] operate ex ante, at the time when the Executive Branch is formulating and implementing policy, rather than ex post. As a result, they avoid the delay in application that can hamper both judicial and congressional oversight. 76 Second, internal mechanisms often operate continuously, rather than being limited to issues that generate congressional attention or arise in the form of a justiciable challenge. 77 Third, internal mechanisms operate not just at the points at which policy proposals originate and are implemented but also at higher managerial levels, thus addressing policy and administration in both a granular and systemic fashion. In addition, policy recommendations generated through internal checks may face less resistance than those offered externally because the latter frequently arise after executive officials have already decided upon a policy course and are more likely to take an adversarial form. 78 Internal mechanisms may also gain credibility with Executive Branch officials to the extent they are perceived as contributing to more fully informed and expertise-based decisionmaking. 79

### 1NC DA

#### Now key push for CIR – pc key

Kuhnhenn, 1-12-’14 (Jim, “Obama, Congress face crucial immigration push” Albuquerque Journal News, http://www.abqjournal.com/335144/news/obama-congress-face-crucial-immigration-push.html)

His agenda tattered by last year’s confrontations and missteps, President Barack Obama begins 2014 clinging to the hope of winning a lasting legislative achievement: an overhaul of immigration laws. It will require a deft and careful use of his powers, combining a public campaign in the face of protests over his administration’s record number of deportations with quiet, behind-the-scenes outreach to Congress, something seen by lawmakers and immigration advocates as a major White House weakness. In recent weeks, both Obama and House Speaker John Boehner, R-Ohio, have sent signals that raised expectations among overhaul supporters that 2014 could still yield the first comprehensive change in immigration laws in nearly three decades. If successful, it would fulfill an Obama promise many Latinos say is overdue. Hung up in House The Senate last year passed a bipartisan bill that was comprehensive in scope that addressed border security, provided enforcement measures and offered a path to citizenship for 11 million immigrants in the United States illegally. House leaders, pressed by tea party conservatives, demanded a more limited and piecemeal approach. Indicating a possible opening, Obama has stopped insisting the House pass the Senate version. And two days after calling Boehner to wish him happy birthday in November, Obama made it clear he could accept the House’s bill-by-bill approach, with one caveat: In the end, “we’re going to have to do it all.” Boehner, for his part, in December hired Rebecca Tallent, a former top aide to Sen. John McCain and most recently the director of a bipartisan think tank’s immigration task force. Even opponents of a broad immigration overhaul saw Tallent’s selection as a sign legislation had suddenly become more likely. Boehner also fed speculation he would ignore tea party pressure, bluntly brushing back their criticism of December’s modest budget agreement. “The question is what are the core things that Republicans can’t move away from, what are the core things that Democrats can’t walk away from,” said Republican pollster David Winston, who regularly consults with the House leadership. “You may have preferences and then you may have core elements. That’s part of the process of going back and forth.”

#### Plan tanks capital and derails the agenda – empirics prove

Kriner ’10 Douglas L. Kriner, assistant professor of political science at Boston University, “After the Rubicon: Congress, Presidents, and the Politics of Waging War”, University of Chicago Press, Dec 1, 2010, page 68-69

While congressional support leaves the president’s reserve of political capital intact, congressional criticism saps energy from other initiatives on the home front by forcing the president to expend energy and effort defending his international agenda. Political capital spent shoring up support for a president’s foreign policies is capital that is unavailable for his future policy initiatives. Moreover, any weakening in the president’s political clout may have immediate ramifications for his reelection prospects, as well as indirect consequences for congressional races.59 Indeed, Democratic efforts to tie congressional Republican incumbents to President George W. Bush and his war policies paid immediate political dividends in the 2006 midterms, particularly in states, districts, and counties that had suffered the highest casualty rates in the Iraq War. 60 In addition to boding ill for the president’s perceived political capital and reputation, such partisan losses in Congress only further imperil his programmatic agenda, both international and domestic. Scholars have long noted that President Lyndon Johnson’s dream of a Great Society also perished in the rice paddies of Vietnam. Lacking the requisite funds in a war-depleted treasury and the political capital needed to sustain his legislative vision, Johnson gradually let his domestic goals slip away as he hunkered down in an effort first to win and then to end the Vietnam War. In the same way, many of President Bush’s highest second-term domestic proprieties, such as Social Security and immigration reform, failed perhaps in large part because the administration had to expend so much energy and effort waging a rear-guard action against congressional critics of the war in Iraq.61 When making their cost-benefit calculations, presidents surely consider these wider political costs of congressional opposition to their military policies. If congressional opposition in the military arena stands to derail other elements of his agenda, all else being equal, the president will be more likely to judge the benefits of military action insufficient to its costs than if Congress stood behind him in the international arena.

#### CIR solves multiple internal links to the economy

Beadle 12/10 Amanda Peterson, Reporter/Blogger at ThinkProgress.org. She received her B.A. in journalism and Spanish from the University of Alabama, where she was editor-in-chief of the campus newspaper The Crimson White and graduated with honors. Before joining ThinkProgress, she worked as a legislative aide in the Maryland House of Delegates. “Top 10 Reasons Why The U.S. Needs Comprehensive Immigration Reform” http://thinkprogress.org/justice/2012/12/10/1307561/top-10-reasons-why-the-us-needs-comprehensive-immigration-reform-that-includes-a-path-to-citizenship/

The nation needs a comprehensive immigration plan, and it is clear from a recent poll that most Americans support reforming the U.S.’s immigration system. In a new poll, nearly two-thirds of people surveyed are in favor of a measure that allows undocumented immigrants to earn citizenship over several years, while only 35 percent oppose such a plan. And President Obama is expected to “begin an all-out drive for comprehensive immigration reform, including seeking a path to citizenship” in January.¶ Several top Republicans have softened their views on immigration reform following November’s election, but in the first push for reform, House Republicans advanced a bill last month that would add visas for highly skilled workers while reducing legal immigration overall. Providing a road map to citizenship for the millions of undocumented immigrants living in the U.S. would have sweeping benefits for the nation, especially the economy.¶ Here are the top 10 reasons why the U.S. needs comprehensive immigration reform:¶ 1. Legalizing the 11 million undocumented immigrants in the United States would boost the nation’s economy. It would add a cumulative $1.5 trillion to the U.S. gross domestic product—the largest measure of economic growth—over 10 years. That’s because immigration reform that puts all workers on a level playing field would create a virtuous cycle in which legal status and labor rights exert upward pressure on the wages of both American and immigrant workers. Higher wages and even better jobs would translate into increased consumer purchasing power, which would benefit the U.S. economy as a whole.¶ 2. Tax revenues would increase. The federal government would accrue $4.5 billion to $5.4 billion in additional net tax revenue over just three years if the 11 million undocumented immigrants were legalized. And states would benefit. Texas, for example, would see a $4.1 billion gain in tax revenue and the creation of 193,000 new jobs if its approximately 1.6 million undocumented immigrants were legalized.¶ 3. Harmful state immigration laws are damaging state economies. States that have passed stringent immigration measures in an effort to curb the number of undocumented immigrants living in the state have hurt some of their key industries, which are held back due to inadequate access to qualified workers. A farmer in Alabama, where the state legislature passed the anti-immigration law HB 56 in 2011, for example, estimated that he lost up to $300,000 in produce in 2011 because the undocumented farmworkers who had skillfully picked tomatoes from his vines in years prior had been forced to flee the state.¶ 4. A path to citizenship would help families access health care. About a quarter of families where at least one parent is an undocumented immigrant are uninsured, but undocumented immigrants do not qualify for coverage under the Affordable Care Act, leaving them dependent on so-called safety net hospitals that will see their funding reduced as health care reforms are implemented. Without being able to apply for legal status and gain health care coverage, the health care options for undocumented immigrants and their families will shrink.¶ 5. U.S. employers need a legalized workforce. Nearly half of agricultural workers, 17 percent of construction workers, and 12 percent of food preparation workers nationwide lacking legal immigration status. But business owners—from farmers to hotel chain owners—benefit from reliable and skilled laborers, and a legalization program would ensure that they have them.¶ 6. In 2011, immigrant entrepreneurs were responsible for more than one in four new U.S. businesses. Additionally, immigrant businesses employ one in every 10 people working for private companies. Immigrants and their children founded 40 percent of Fortune 500 companies, which collectively generated $4.2 trillion in revenue in 2010—more than the GDP of every country in the world except the United States, China, and Japan. Reforms that enhance legal immigration channels for high-skilled immigrants and entrepreneurs while protecting American workers and placing all high-skilled workers on a level playing field will promote economic growth, innovation, and workforce stability in the United States.¶ 7. Letting undocumented immigrants gain legal status would keep families together. More than 5,100 children whose parents are undocumented immigrants are in the U.S. foster care system, according to a 2011 report, because their parents have either been detained by immigration officials or deported and unable to reunite with their children. If undocumented immigrants continue to be deported without a path to citizenship enabling them to remain in the U.S. with their families, up to 15,000 children could be in the foster care system by 2016 because their parents were deported, and most child welfare departments do not have the resources to handle this increase.¶ 8. Young undocumented immigrants would add billions to the economy if they gained legal status. Passing the DREAM Act—legislation that proposes to create a roadmap to citizenship for immigrants who came to the United States as children—would put 2.1 million young people on a pathway to legal status, adding $329 billion to the American economy over the next two decades.¶ 9. And DREAMers would boost employment and wages. Legal status and the pursuit of higher education would create an aggregate 19 percent increase in earnings for young undocumented immigrants who would benefit from the DREAM Act by 2030. The ripple effects of these increased wages would create $181 billion in induced economic impact, 1.4 million new jobs, and $10 billion in increased federal revenue.¶ 10. Significant reform of the high-skilled immigration system would benefit certain industries that require high-skilled workers. Immigrants make up 23 percent of the labor force in high-tech manufacturing and information technology industries, and immigrants more highly educated, on average, than the native-born Americans working in these industries. For every immigrant who earns an advanced degree in one of these fields at a U.S. university, 2.62 American jobs are created.

#### Global economic crisis causes nuclear war

Cesare Merlini 11, nonresident senior fellow at the Center on the United States and Europe and chairman of the Board of Trustees of the Italian Institute for International Affairs, May 2011, “A Post-Secular World?”, Survival, Vol. 53, No. 2

Two neatly opposed scenarios for the future of the world order illustrate the range of possibilities, albeit at the risk of oversimplification. The first scenario entails the premature crumbling of the post-Westphalian system. One or more of the acute tensions apparent today evolves into an open and traditional conflict between states, perhaps even involving the use of nuclear weapons. The crisis might be triggered by a collapse of the global economic and financial system, the vulnerability of which we have just experienced, and the prospect of a second Great Depression, with consequences for peace and democracy similar to those of the first. Whatever the trigger, the unlimited exercise of national sovereignty, exclusive self-interest and rejection of outside interference would self-interest and rejection of outside interference would likely be amplified, emptying, perhaps entirely, the half-full glass of multilateralism, including the UN and the European Union. Many of the more likely conflicts, such as between Israel and Iran or India and Pakistan, have potential religious dimensions. Short of war, tensions such as those related to immigration might become unbearable. Familiar issues of creed and identity could be exacerbated. One way or another, the secular rational approach would be sidestepped by a return to theocratic absolutes, competing or converging with secular absolutes such as unbridled nationalism**.**

### 1NC Solvency

#### The administration won’t follow through

Roth, 13 – Kenneth, Executive Director Human Rights Watch, Testimony from May 16 Senate Armed Services Committee Hearing on the AUMF, 5-16

The administration now clings to the AUMF, but the factual predicate for it—US involvement in the conflict with the Taliban and al-Qaeda—is also coming to an end. And, in any event, people detained in the context of an armed conflict between a government and an armed group—such as the current conflict in Afghanistan—should be charged and tried, not detained. The administration’s misuse of the AUMF to rationalize prolonged detention without trial in Guantanamo is another reason why the AUMF should not be extended. Moreover, when it comes to combatants in an armed conflict, the power to detain can easily be linked to the power to kill. If the United States is going to claim the right to detain “combatants” without end on the basis of a global war unconnected to a traditional battlefield, against a non-state enemy that does not control any substantial territory, other nations will undoubtedly make similar claims. And, once governments identify people as combatants, however wrongful that may be, they will inevitably claim the power not only to detain them without charge or trial but also to kill them. Although the United States currently detains many people who are clearly not combatants – those drivers, cooks, doctors and financiers, among others – it should be mindful of how its policies can be interpreted. The best solution is still to try suspects in regular federal courts, with their entrenched procedural protections designed to provide fair trials. Security concerns can reasonably be handled; for example, if trials in the regular United States Courthouse for the Southern District of New York are deemed too difficult despite its long history of trying dangerous criminals such as drug czars and mafia dons, trials could be held securely and with little disruption on nearby Governor’s Island. However, the United States has already tried former CIA- and Guantanamo-detainee Ahmed Ghailani without incident in the regular courthouse for the Southern District of New York. By contrast, Congress’s insistence on using military commissions at Guantanamo has been an unmitigated disaster. The only two convictions obtained after full trials have both been overturned by the United States Court of Appeals for the District of Columbia Circuit; the five other convictions obtained were by plea bargain. During the same time that the military commissions have obtained these seven convictions, federal courts have prosecuted some 500 terrorism suspects. In addition there are profound and legitimate concerns about the fairness of a system that, among other things, permits the introduction into evidence of coerced statements from witnesses, allows the military to hand-pick the jury pool, and severely compromises the attorney-client privilege. Roughly half of the Guantanamo detainees have theoretically been approved for transfer to their home or third countries, and those transfers can proceed if the administration certifies that appropriate security arrangements have been made. The administration should accelerate its efforts to make those arrangements. However, the administration also claims that there remains a category of detainees who are “too dangerous” to release but who cannot be tried because either there is insufficient admissible evidence to prosecute them or their acts did not amount to a chargeable crime. The administration purports to hold these men under the above-described war powers. But even under war rules, the purpose of detention is to keep the enemy from returning to the battlefield. As the US involvement in the Afghan war winds down, it is not clear what war the men released from Guantanamo would return to. And if the fear is that they would join in criminal activity, the answer lies in criminal prosecution, including for such inchoate crimes as conspiracy or attempt, not the “Minority Report” approach of detaining them for crimes that they might at some future point plan to commit. Given Guantanamo’s enormous stain on America’s reputation, there is good reason to believe that these continuing detentions are causing more harm than good to America’s security and counterterrorism efforts. President Obama himself has stated that keeping Guantanamo open weakens US national security. And for the same reasons that long-term detention without trial is wrong and counterproductive in Guantanamo, it would be wrong and counterproductive if moved to the United States. That would simply replicate Guantanamo in another locale

#### The plan is another chapter in the story of Congressional stripping of judicial rulings increasing the rights of detainees

#### A) Overturned the first two Supreme Court cases that attempted to limit indefinite detention

Nikkel 12, 2012, J.D. Candidate, 2012, William S. Boyd School of Law, Las Vegas; B.A., 2009, University of Nevada, Reno. Nevada Law Journal. Spring 2012. The Author would like to thank Professor Christopher L. Blakesley, Professor Terrill Pollman, and the Nevada Law Journal staff for helping with the research and writing of this Note.) Web, Lexis Nexis.

The first challenges to the detention program came in the form of Rasul and Hamdi, both decisions handed down on June 28, 2004, by the Supreme Court.93 Sixteen detainees—two British, two Australian, and twelve Kuwaiti citizens—brought the Rasul action, seeking a writ of habeas corpus in federal court.94 In the 6 to 3 Rasul decision, the Supreme Court held Guant´anamo prisoners could challenge the lawfulness of their detention in federal court because Cuba’s “ultimate sovereignty” over the base did not preclude access.95 On the other hand, in Hamdi, a plurality of the Court found the government could detain an American citizen as an enemy combatant pursuant to the AUMF, but had to offer him the opportunity to challenge the factual basis for his detention with the benefit of a fair hearing before a neutral tribunal and access to counsel.96 Justice O’Connor’s plurality opinion warned “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”97 O’Connor thought the war against the Taliban closely resembled wars of the past, and the president’s traditional war powers likely did not apply in the war against al Qaeda or in conflicts against other non-state actors.98 Furthermore, as critical as the Government’s interest may have been in addressing immediate threats to national security, “history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”99 O’Connor concluded enemy combatant proceedings should be carefully tailored to alleviate “their uncommon potential to burden the Executive at a time of ongoing military conflict.”100 Therefore, the Court attempted to strike a balance in Rasul and Hamdi: although the president could detain unlawful combatants, the administration needed to provide basic due process for captured persons. In response to the Rasul and Hamdi decisions, the government responded twofold to limit due process for Guant´anamo detainees: first with the Combatant Status Review Tribunal (“CSRT”)101 and then with the Detainee Treatment Act of 2005 (“DTA”).102 A mere nine days after the Rasul and Hamdi decisions, allowed Guant´anamo detainees to contest their designations as enemy combatants. 103 The CSRT allowed the detainees to consult a “personal representative” (a military officer “with the appropriate security clearance”) to review “any reasonably available information” possessed by the Department of Defense regarding the detainee’s classification.104 After a preparation and consultation period of thirty days, the Department of Defense would convene a tribunal, composed of three neutral commissioned military officers, to review the detainee’s status.105 However, the rules of evidence did not apply and the tribunal allowed admission of hearsay.106 The detainee could only call “reasonably available” witnesses and the memo created a rebuttable presumption in favor of the government’s evidence.107 Therefore, although the executive branch complied with the Court’s mandate for a neutral tribunal before which detainees could challenge their classifications as “enemy combatants,” the limited due process protections led to criticism that the CSRTs were not in place to discover the truth about the detainees, but rather to prolong their detentions.108 Anticipating more judicial challenges from Guant´anamo detainees due to the shortcomings of the CSRT process, Congress finally entered the fray on December 30, 2005, by passing the Detainee Treatment Act.109 The Act amended 28 U.S.C § 2241, the federal habeas statute, and stripped federal courts of their jurisdiction to hear habeas petitions filed by detainees.110 Couched in language about prohibiting “cruel, inhuman, or degrading treatment” of persons in the United States’ custody,111 the Act codified Wolfowitz’s CSRT memo112 and provided, “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guant´anamo Bay, Cuba.”113

#### B) When the courts responded to give more rights, Congress stripped that decision of meaning too.

Nikkel 12, 2012, J.D. Candidate, 2012, William S. Boyd School of Law, Las Vegas; B.A., 2009, University of Nevada, Reno. Nevada Law Journal. Spring 2012. The Author would like to thank Professor Christopher L. Blakesley, Professor Terrill Pollman, and the Nevada Law Journal staff for helping with the research and writing of this Note.) Web, Lexis Nexis.

The DTA threw pending habeas claims by Guant´anamo detainees, like that of Salim Ahmed Hamdan (allegedly Osama bin Laden’s chauffer and bod-yguard),114 into chaos because it was unclear if pending claims could still be heard by federal courts.115 The Supreme Court, in its 5 to 3 Hamdan v. Rumsfeld decision, found the DTA did not retroactively strip habeas jurisdiction over pending cases.116 Furthermore, the Court invalidated the system of military tribunals the Bush administration created in the wake of 9/11 because the system violated Article 3 of the Geneva Conventions.117 The administration modeled these tribunals after those President Roosevelt used to try the prisoners in Quirin and Eisentrager, but the new tribunals lacked the express authorization from Congress, either by statute or declaration of war.118 At President Bush’s behest, Congress responded yet again, this time in the form of the Military Commissions Act of 2006 (“MCA”), which scholars have called “a harsh rebuke of the Hamdan court.”119 In order to provide President Bush with the “tools he need[ed] to protect [the] country” by allowing military tribunals to provide swift justice for terrorists and to combat future attacks,120 Section 7 of the MCA struck the DTA’s amendment to the federal habeas statute and inserted a new subsection:¶ [N]o court, justice, or judge shall have jurisdiction to hear or consider an application¶ for a writ of habeas corpus filed by or on behalf of an alien detained by the United¶ States who has been determined by the United States to have been properly detained¶ as an enemy combatant or is awaiting such a determination.121¶ The MCA avoided the pitfalls of Hamdan’s challenge by ensuring that its¶ provisions would apply to pending cases as well.122 The Act also defined new¶ offenses the Commission could try,123 permitted testimony obtained through¶ coercive techniques,124 and even prohibited combatants from invoking the protections¶ of the Geneva Conventions.125 The jurisdiction-stripping provisions of¶ the MCA triggered Suspension Clause concerns, setting the stage for¶ Boumediene, the principal case in the Guant´anamo litigation.

#### Stripping guts the case solvency and turns the case—all rights protections would go completely unenforced—trampling meaningful rights:

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Another measure, the misnamed "Constitution Restoration Act of 2004," was written by former Alabama Supreme Court Chief Justice Roy Moore and his allies. It would ban all cases challenging state-sponsored acknowledgement of "God as the sovereign source of law, liberty, or government." For good measure, it would also retroactively overturn all existing rulings in this area and establish a mechanism for impeaching federal judges who dare to uphold church-state separation! One wonders if the legislators who wrote these bills slept through high school civics class. The separation of powers means that the U.S. government consists of three co-equal branches: the president, the Congress and the courts. Congress does not have the power, through simple legislation, to decimate the authority of the courts over issues dealing with the Bill of Rights. Such power would rapidly make the courts superfluous. Whenever a judge ruled in a manner that displeased a legislator, a court-stripping bill would be drawn up and passed. Pretty soon the courts would be nothing but a rubber-stamp body for Congress. Some members of Congress might want that, but it would be a disaster for American democracy. Courts exist to make hard decisions. When lawmakers overstep their bounds and infringe on constitutional rights, courts are there to pull them back. Without the judiciary to protect us, Americans would quickly be at the mercy of the momentary whims of the majority. Our rights would be trampled on.

#### WOT practices shifting towards capture over kill – options are zero-sum

Dillow, 13 – (Clay, “Obama Set To Reboot Drone Strike Policy And Retool The War On Terror “, 5/23/13, <http://www.popsci.com/technology/article/2013-05/obama-set-reboot-drone-strike-policy-and-retool-war-terror>)

These three topics are deeply intertwined, of course. With the drawdown of troops in Iraq and Afghanistan and a reduced American presence in the regions regarded as power bases for the likes of al-Qaeda, al-Shabab, and the Taliban, American security and intelligence forces have only two real options. Strike at suspected terrorists with drones, or somehow capture those suspects and detain them (at some place like Guantanamo). It would seem that if the war on terror is going to continue (and it is--for another 10 or 20 years according to one recently-quoted Pentagon official) then it seems that either detention or the use of lethal strikes must increase. But that’s not really the case, and in today’s speech Obama is expected to outline why the administration thinks so. In his first major counterterrorism address of his second term, the President is expected to announce new restrictions on the unmanned aerial strikes that have been the cornerstone of his national security agenda for the last five years. For all the talk about drone strikes--and they did peak under Obama--such actions have been declining since 2010. And it seems the administration finally wants to come clean (somewhat) about what it has been doing with its drone program, acknowledging for the first time that it has killed four American citizens in its shadow drone wars outside the conflict zones of Afghanistan and Iraq, something the public has known for a while now but the government has refused to publicly admit. The Obama administration will also voluntarily rein in its drone strike program in several ways. A new classified policy signed by Obama will more sharply define how drones can be used**,** the New York Times reports, essentially extending to foreign nationals the same standards currently applied to American citizens abroad. That is, lethal force will only be used against targets posing a “continuing, imminent threat to Americans” and who cannot be feasibly captured or thwarted in any other way. This indicates that the administration’s controversial use of “signature strikes”--the killing of unknown individuals or groups based on patterns of behavior rather than hard intelligence--will no longer be part of the game plan. That’s a positive signal, considering that signature strikes are thought to have resulted in more than a few civilian casualties. Reportedly there’s another important change in drone policy in the offing that President Obama may or may not mention in today’s speech: the shifting of the drone wars in Pakistan and elsewhere (likely Yemen and Somalia as well) from the CIA to the military over the course of six months. This is good for all parties involved. The CIA’s new director, John Brennan, has publicly said he would like to transition the country’s premier intelligence gathering agency back to actual intelligence gathering and away from paramilitary operations--a role that it has played since 2001 but that isn’t exactly in its charter. Putting the drone strike program in the Pentagon also places it in a different category of public scrutiny. The DoD can still do things under the veil of secrecy of course, but not quite like the CIA can (the military is subject to more oversight and transparency than the clandestine services in several respects, and putting drones in the hands of the military also changes the governing rules of engagement). So what does this all mean for the war on terror? If Obama plans to create a roadmap for closing Guantanamo Bay and draw down its drone strike program, it suggests that the administration thinks we are winning--as much as one can win this kind of asymmetric war. It appears the war on terror is shifting toward one in which better intelligence will lead to more arrests and espionage operations to thwart terrorists rather hellfire missile strikes from unseen robots in the sky.

#### Detainee protections increase the incentives for kill rather than capture

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But while these developments have been hailed as victories by civil libertarians, they have not come without significant cost. With increasing frequency, journalists and scholars have begun to document the marked expansion in the government’s use of drones to kill targets who purportedly pose a threat to U.S. national security.12 Though a few observers have intimated that there may be a causal connection between the increase in targeted killing and the growing dearth of unfettered detention options,13 the actual link between these phenomena has not been thoroughly explored. This Article fills that gap. Examining the connection between the government’s detention and targeted killing policies, this Article argues that attempts to remove the “stain” of Guantánamo Bay have created what might be an even greater crisis. Specifically, while civil libertarians have claimed success in executive and judicial efforts to grant detainees greater protections, this success has produced an unintended incentive for the government to kill rather than capture individuals involved in the war on terror. This perverse outcome has occurred not as a result of a foreseeable linear process whereby one phenomenon caused the other, but rather as an unanticipated reaction to changes thrust into the nonlinear dynamic systems14 of warfare and national security law.15 To uncover the relationship between the government’s detention and targeted killing programs, this Article invokes the insights of complex adaptive systems theory.16 While scholars have employed chaos and complexity theory to examine legal issues for some time,17 the more nuanced theory of complex adaptive systems is a relative newcomer.18 Nevertheless, scholars are increasingly making the case that the theory offers a useful means by which to understand the legal system and the effects that flow from changes introduced thereto.19 This Article explains and builds upon that work by arguing that legal policies regulating the war on terror actually implicate two systems—that of both warfare and law. Because these two systems “interact complexly with each other, as well as with all . . . other complex social and physical systems with which they are interconnected,”20 introducing even small changes into either of these complex adaptive systems can generate dramatic effects that are unforeseeable when the intervention initially is introduced.21 Within the context of the war on terror, altering detainee policies may have led to the unintended consequence of encouraging the government to dismiss the option of capturing high-value targets in favor of simply eliminating them with drones.22 This important insight suggests a broader one: thinking of war and national security law as interrelated complex adaptive systems can help policymakers, lawmakers, and judges gain a better appreciation of the practical consequences of their decision-making processes. 22 The law of unintended consequences suggests that well-intentioned efforts to attain a specific goal may actually produce results antithetical to the hoped for effect. See Frank B. Cross, Paradoxical Perils of the Precautionary Principle, 53 WASH. & LEE L. REV. 851, 862 (1996). To make these arguments, the Article proceeds as follows. Part II introduces the theory of complex adaptive systems and explains that law and war both exhibit properties of these systems. Part III provides a summary of significant post-9/11 legal developments related to war on terror detentions and interrogations, and describes how these developments gradually increased the protections afforded to detainees. Part IV argues that these efforts to protect the civil liberties of detainees may actually have had the perverse effect of encouraging targeted killing. More specifically, using complex adaptive systems theory, Part IV argues that the rise of the drone may be evidence of the adaptive and self-organizing properties inherent within the systems of law and war. Part V concludes that the government’s expanded use of drones is representative of an unexpected and unintended consequence that can arise as a result of human intervention into complex adaptive systems.

#### US drones get modeled---causes war

Roberts, 13 **–** (Kristen, news editor for the National Journal, master in security studies from Georgetown, “When the Whole World Has Drones”, March 22, <http://www.nationaljournal.com/magazine/when-the-whole-world-has-drones-20130321>)

The proliferation of drone technology has moved well beyond the control of the United States government and its closest allies. The aircraft are too easy to obtain, with barriers to entry on the production side crumbling too quickly to place limits on the spread of a technology that promises to transform warfare on a global scale. Already, more than 75 countries have remote piloted aircraft. More than 50 nations are building a total of nearly a thousand types. At its last display at a trade show in Beijing, China showed off 25 different unmanned aerial vehicles. Not toys or models, but real flying machines. It’s a classic and common phase in the life cycle of a military innovation: An advanced country and its weapons developers create a tool, and then others learn how to make their own. But what makes this case rare, and dangerous, is the powerful combination of efficiency and lethality spreading in an environment lacking internationally accepted guidelines on legitimate use. This technology is snowballing through a global arena where the main precedent for its application is the one set by the United States; it’s a precedent Washington does not want anyone following. America, the world’s leading democracy and a country built on a legal and moral framework unlike any other, has adopted a war-making process that too often bypasses its traditional, regimented, and rigorously overseen military in favor of a secret program never publicly discussed, based on legal advice never properly vetted. The Obama administration has used its executive power to refuse or outright ignore requests by congressional overseers, and it has resisted monitoring by federal courts. To implement this covert program, the administration has adopted a tool that lowers the threshold for lethal force by reducing the cost and risk of combat. This still-expanding counterterrorism use of drones to kill people, including its own citizens, outside of traditionally defined battlefields and established protocols for warfare, has given friends and foes a green light to employ these aircraft in extraterritorial operations that could not only affect relations between the nation-states involved but also destabilize entire regions and potentially upset geopolitical order. Hyperbole? Consider this: Iran, with the approval of Damascus, carries out a lethal strike on anti-Syrian forces inside Syria; Russia picks off militants tampering with oil and gas lines in Ukraine or Georgia; Turkey arms a U.S.-provided Predator to kill Kurdish militants in northern Iraq who it believes are planning attacks along the border. Label the targets as terrorists, and in each case, Tehran, Moscow, and Ankara may point toward Washington and say, we learned it by watching you. In Pakistan, Yemen, and Afghanistan. This is the unintended consequence of American drone warfare. For all of the attention paid to the drone program in recent weeks—about Americans on the target list (there are none at this writing) and the executive branch’s legal authority to kill by drone outside war zones (thin, by officials’ own private admission)—what goes undiscussed is Washington’s deliberate failure to establish clear and demonstrable rules for itself that would at minimum create a globally relevant standard for delineating between legitimate and rogue uses of one of the most awesome military robotics capabilities of this generation. THE WRONG QUESTION The United States is the indisputable leader in drone technology and long-range strike. Remote-piloted aircraft have given Washington an extraordinary ability to wage war with far greater precision, improved effect, and fewer unintended casualties than conventional warfare. The drones allow U.S. forces to establish ever greater control over combat areas, and the Pentagon sees the technology as an efficient and judicious force of the future. And it should, given the billions of dollars that have gone into establishing and maintaining such a capability. That level of superiority leads some national security officials to downplay concerns about other nations’ unmanned systems and to too narrowly define potential threats to the homeland. As proof, they argue that American dominance in drone warfare is due only in part to the aircraft itself, which offers the ability to travel great distances and loiter for long periods, not to mention carry and launch Hellfire missiles. The drone itself, they argue, is just a tool and, yes, one that is being copied aggressively by allies and adversaries alike. The real edge, they say, is in the unparalleled intelligence-collection and data-analysis underpinning the aircraft’s mission. “There is what I think is just an unconstrained focus on a tool as opposed to the subject of the issue, the tool of remotely piloted aircraft that in fact provide for greater degrees of surety before you employ force than anything else we use,” said retired Lt. Gen. David Deptula, the Air Force’s first deputy chief of staff for intelligence, surveillance, and reconnaissance. “I think people don’t realize that for the medium altitude aircraft—the MQ-1 [Predator] and MQ-9 [Reaper] that are generally written about in the press—there are over 200 people involved in just one orbit of those aircraft.… The majority of those people are analysts who are interpreting the information that’s coming off the sensors on the aircraft.” The analysts are part of the global architecture that makes precision strikes, and targeted killing, possible. At the front end, obviously, intelligence—military, CIA, and local—inform target decisions. But in as near-real time as technologically possible, intel analysts in Nevada, Texas, Virginia, and other locations watch the data flood in from the aircraft and make calls on what’s happening on target. They monitor the footage, listen to audio, and analyze signals, giving decision-makers time to adjust an operation if the risks (often counted in potential civilian deaths) outweigh the reward (judged by the value of the threat eliminated). “Is that a shovel or a rifle? Is that a Taliban member or is this a farmer? The way that warfare has advanced is that we are much more exquisite in our ability to discern,” Maj. Gen. Robert Otto, commander of the Air Force Intelligence, Surveillance, and Reconnaissance Agency, told National Journal at Nellis Air Force Base in Nevada. “We’re not overhead for 15 minutes with a fighter that’s about to run out of gas, and we have to make a decision. We can orbit long enough to be pretty sure about our target.” Other countries, groups, and even individuals can and do fly drones. But no state or group has nearly the sophisticated network of intelligence and data analysis that gives the United States its strategic advantage. Although it would be foolish to dismiss the notion that potential U.S. adversaries aspire to attain that type of war-from-afar, pinpoint-strike capability, they have neither the income nor the perceived need to do so. That’s true, at least today. It’s also irrelevant. Others who employ drones are likely to carry a different agenda, one more concerned with employing a relatively inexpensive and ruthlessly efficient tool to dispatch an enemy close at hand. “It would be very difficult for them to create the global-strike architecture we have, to have a control cell in Nevada flying a plane over Afghanistan. The reality is that most nations don’t want or need that,” said Peter Singer, director of the Brookings Institution’s Center for 21st Century Security and Intelligence and one of the foremost experts in advanced military technology. “Turkey’s not looking to conduct strikes into the Philippines.... But Turkey is looking to be able to carry out long-duration surveillance and potentially strike inside and right on its border.” And that’s a NATO ally seeking the capability to conduct missions that would run afoul of U.S. interests in Iraq and the broader Middle East. Already, Beijing says it considered a strike in Myanmar to kill a drug lord wanted in the deaths of Chinese sailors. What happens if China arms one of its remote-piloted planes and strikes Philippine or Indian trawlers in the South China Sea? Or if India uses the aircraft to strike Lashkar-e-Taiba militants near Kashmir? “We don’t like other states using lethal force outside their borders. It’s destabilizing. It can lead to a sort of wider escalation of violence between two states,” said Micah Zenko, a security policy and drone expert at the Council on Foreign Relations. “So the proliferation of drones is not just about the protection of the United States. It’s primarily about the likelihood that other states will increasingly use lethal force outside of their borders.” LOWERING THE BAR Governments have covertly killed for ages, whether they maintained an official hit list or not. Before the Obama administration’s “disposition matrix,” Israel was among the best-known examples of a state that engaged, and continues to engage, in strikes to eliminate people identified by its intelligence as plotting attacks against it. But Israel certainly is not alone. Turkey has killed Kurds in Northern Iraq. Some American security experts point to Russia as well, although Moscow disputes this. In the 1960s, the U.S. government was involved to differing levels in plots to assassinate leaders in Congo and the Dominican Republic, and, famously, Fidel Castro in Cuba. The Church Committee’s investigation and subsequent 1975 report on those and other suspected plots led to the standing U.S. ban on assassination. So, from 1976 until the start of President George W. Bush’s “war on terror,” the United States did not conduct targeted killings, because it was considered anathema to American foreign policy. (In fact, until as late as 2001, Washington’s stated policy was to oppose Israel’s targeted killings.) When America adopted targeted killing again—first under the Bush administration after the September 11 attacks and then expanded by President Obama—the tools of the trade had changed. No longer was the CIA sending poison, pistols, and toxic cigars to assets overseas to kill enemy leaders. Now it could target people throughout al-Qaida’s hierarchy with accuracy, deliver lethal ordnance literally around the world, and watch the mission’s completion in real time. The United States is smartly using technology to improve combat efficacy, and to make war-fighting more efficient, both in money and manpower. It has been able to conduct more than 400 lethal strikes, killing more than 3,500 people, in Afghanistan, Pakistan, Yemen, Somalia, and North Africa using drones; reducing risk to U.S. personnel; and giving the Pentagon flexibility to use special-forces units elsewhere. And, no matter what human-rights groups say, it’s clear that drone use has reduced the number of civilians killed in combat relative to earlier conflicts. Washington would be foolish not to exploit unmanned aircraft in its long fight against terrorism. In fact, defense hawks and spendthrifts alike would criticize it if it did not. “If you believe that these folks are legitimate terrorists who are committing acts of aggressive, potential violent acts against the United States or our allies or our citizens overseas, should it matter how we choose to engage in the self-defense of the United States?” asked Rep. Mike Rogers, R-Mich., chairman of the House Intelligence Committee. “Do we have that debate when a special-forces team goes in? Do we have that debate if a tank round does it? Do we have the debate if an aircraft pilot drops a particular bomb?” But defense analysts argue—and military officials concede—there is a qualitative difference between dropping a team of men into Yemen and green-lighting a Predator flight from Nevada. Drones lower the threshold for military action. That’s why, according to the Council on Foreign Relations, unmanned aircraft have conducted 95 percent of all U.S. targeted killings. Almost certainly, if drones were unavailable, the United States would not have pursued an equivalent number of manned strikes in Pakistan. And what’s true for the United States will be true as well for other countries that own and arm remote piloted aircraft. “The drones—the responsiveness, the persistence, and without putting your personnel at risk—is what makes it a different technology,” Zenko said. “When other states have this technology, if they follow U.S. practice, it will lower the threshold for their uses of lethal force outside their borders. So they will be more likely to conduct targeted killings than they have in the past.” The Obama administration appears to be aware of and concerned about setting precedents through its targeted-strike program. When the development of a disposition matrix to catalog both targets and resources marshaled against the United States was first reported in 2012, officials spoke about it in part as an effort to create a standardized process that would live beyond the current administration, underscoring the long duration of the counterterrorism challenge. Indeed, the president’s legal and security advisers have put considerable effort into establishing rules to govern the program. Most members of the House and Senate Intelligence committees say they are confident the defense and intelligence communities have set an adequate evidentiary bar for determining when a member of al-Qaida or an affiliated group may be added to the target list, for example, and say that the rigor of the process gives them comfort in the level of program oversight within the executive branch. “They’re not drawing names out of a hat here,” Rogers said. “It is very specific intel-gathering and other things that would lead somebody to be subject for an engagement by the United States government.” BEHIND CLOSED DOORS The argument against public debate is easy enough to understand: Operational secrecy is necessary, and total opacity is easier. “I don’t think there is enough transparency and justification so that we remove not the secrecy, but the mystery of these things,” said Dennis Blair, Obama’s former director of national intelligence. “The reason it’s not been undertaken by the administration is that they just make a cold-blooded calculation that it’s better to hunker down and take the criticism than it is to get into the public debate, which is going to be a hard one to win.” But by keeping legal and policy positions secret, only partially sharing information even with congressional oversight committees, and declining to open a public discussion about drone use, the president and his team are asking the world to just trust that America is getting this right. While some will, many people, especially outside the United States, will see that approach as hypocritical, coming from a government that calls for transparency and the rule of law elsewhere. “I know these people, and I know how much they really, really attend to the most important details of the job,” said Barry Pavel, a former defense and security official in the Bush and Obama administrations who is director of the Brent Scowcroft Center on International Security at the Atlantic Council. “If I didn’t have that personal knowledge and because there isn’t that much really in the press, then I would be giving you a different rendering, and much more uncertain rendering.” That’s only part of the problem with the White House’s trust-us approach. The other resides in the vast distance between the criteria and authorization the administration says it uses in the combat drone program and the reality on the ground. For example, according to administration officials, before a person is added to the targeted strike list, specific criteria should be met. The target should be a 1) senior, 2) operational 3) leader of al-Qaida or an affiliated group who presents 4) an imminent threat of violent attack 5) against the United States. But that’s not who is being targeted. Setting aside the administration’s redefining of “imminence” beyond all recognition, the majority of the 3,500-plus people killed by U.S. drones worldwide were not leaders of al-Qaida or the Taliban; they were low- or mid-level foot soldiers. Most were not plotting attacks against the United States. In Yemen and North Africa, the Obama administration is deploying weaponized drones to take out targets who are more of a threat to local governments than to Washington, according to defense and regional security experts who closely track unrest in those areas. In some cases, Washington appears to be in the business of using its drone capabilities mostly to assist other countries, not to deter strikes against the United States (another precedent that might be eagerly seized upon in the future). U.S. defense and intelligence officials reject any suggestion that the targets are not legitimate. One thing they do not contest, however, is that the administration’s reliance on the post-9/11 Authorization for Use of Military Force as legal cover for a drone-strike program that has extended well beyond al-Qaida in Afghanistan or Pakistan is dodgy. The threat that the United States is trying to deal with today has an ever more tenuous connection to Sept. 11. (None of the intelligence officials reached for this article would speak on the record.) But instead of asking Congress to consider extending its authorization, as some officials have mulled, the administration’s legal counsel has chosen instead to rely on Nixon administration adviser John Stevenson’s 1970 justification of the bombing of Cambodia during the Vietnam War, an action new Secretary of State John Kerry criticized during his confirmation hearing this year. Human-rights groups might be loudest in their criticism of both the program and the opaque policy surrounding it, but even the few lawmakers who have access to the intelligence the administration shares have a hard time coping with the dearth of information. “We can’t always assume we’re going to have responsible people with whom we agree and trust in these positions,” said Sen. Angus King, I-Maine, who sits on the Senate Intelligence Committee. “The essence of the Constitution is, it shouldn’t matter who is in charge; they’re still constrained by principles and rules of the Constitution and of the Bill of Rights.” PEER PRESSURE Obama promised in his 2013 State of the Union to increase the drone program’s transparency. “In the months ahead, I will continue to engage Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world,” the president said on Feb. 12. Since then, the administration, under pressure from allies on Senate Intelligence, agreed to release all of the legal memos the Justice Department drafted in support of targeted killing. But, beyond that, it’s not certain Obama will do anything more to shine light on this program. Except in situations where leaks help it tell a politically expedient story of its skill at killing bad guys, the administration has done little to make a case to the public and the world at large for its use of armed drones. Already, what’s become apparent is that the White House is not interested in changing much about the way it communicates strike policy. (It took Sen. Rand Paul’s 13-hour filibuster of CIA Director John Brennan’s nomination to force the administration to concede that it doesn’t have the right to use drones to kill noncombatant Americans on U.S. soil.) And government officials, as well as their surrogates on security issues, are actively trying to squash expectations that the administration would agree to bring the judicial branch into the oversight mix. Indeed, judicial review of any piece of the program is largely off the table now, according to intelligence officials and committee members. Under discussion within the administration and on Capitol Hill is a potential program takeover by the Pentagon, removing the CIA from its post-9/11 role of executing military-like strikes. Ostensibly, that shift could help lift the secret-by-association-with-CIA attribute of the program that some officials say has kept them from more freely talking about the legitimate military use of drones for counterterrorism operations. But such a fix would provide no guarantee of greater transparency for the public, or even Congress. And if the administration is not willing to share with lawmakers who are security-cleared to know, it certainly is not prepared to engage in a sensitive discussion, even among allies, that might begin to set the rules on use for a technology that could upend stability in already fragile and strategically significant places around the globe. Time is running out to do so. “The history of technology development like this is, you never maintain your lead very long. Somebody always gets it,” said David Berteau, director of the International Security Program at the Center for Strategic and International Studies. “They’re going to become cheaper. They’re going to become easier. They’re going to become interoperable,” he said. “The destabilizing effects are very, very serious.” Berteau is not alone. Zenko, of the Council on Foreign Relations, has urged officials to quickly establish norms. Singer, at Brookings, argues that the window of opportunity for the United States to create stability-supporting precedent is quickly closing. The problem is, the administration is not thinking far enough down the line, according to a Senate Intelligence aide. Administration officials “are thinking about the next four years, and we’re thinking about the next 40 years. And those two different angles on this question are why you see them in conflict right now.” That’s in part a symptom of the “technological optimism” that often plagues the U.S. security community when it establishes a lead over its competitors, noted Georgetown University’s Kai-Henrik Barth. After the 1945 bombing of Hiroshima and Nagasaki, the United States was sure it would be decades before the Soviets developed a nuclear-weapon capability. It took four years. With drones, the question is how long before the dozens of states with the aircraft can arm and then operate a weaponized version. “Pretty much every nation has gone down the pathway of, ‘This is science fiction; we don’t want this stuff,’ to, ‘OK, we want them, but we’ll just use them for surveillance,’ to, ‘Hmm, they’re really useful when you see the bad guy and can do something about it, so we’ll arm them,’ ” Singer said. He listed the countries that have gone that route: the United States, Britain, Italy, Germany, China. “Consistently, nations have gone down the pathway of first only surveillance and then arming.” The opportunity to write rules that might at least guide, if not restrain, the world’s view of acceptable drone use remains, not least because this is in essence a conventional arms-control issue. The international Missile Technology Control Regime attempts to restrict exports of unmanned vehicles capable of carrying weapons of mass destruction, but it is voluntary and nonbinding, and it’s under attack by the drone industry as a drag on business. Further, the technology itself, especially when coupled with data and real-time analytics, offers the luxury of time and distance that could allow officials to raise the evidentiary bar for strikes—to be closer to certain that their target is the right one. But even without raising standards, tightening up drone-specific restrictions in the standing control regime, or creating a new control agreement (which is never easy to pull off absent a bad-state actor threatening attack), just the process of lining up U.S. policy with U.S. practice would go a long way toward establishing the kind of precedent on use of this technology that America—in five, 10, or 15 years—might find helpful in arguing against another’s actions.

#### Plan causes extraordinary rendition shift

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

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

### 1NC Legitimacy

#### Best evidence concludes no legitimacy impact

Brooks & Wohlforth 8 – Stephen G. Brooks, Assistant Professor of Government at Dartmouth, and William C. Wohlforth, Associate Professor of Government at Dartmouth, 2008, World Out of Balance: International Relations and the Challenge of American Primacy, p. 201-206

First, empirical studies find no clear relationship between U.S. rulebreaking, legitimacy, and the continued general propensity of other governments to comply with the overall institutional order. Case studies of U.S. unilateralism—that is, perceived violations of the multilateral principle underlying the current institutional order—reach decidedly mixed results.74 Sometimes unilateralism appears to impose costs on the United States that may derive from legitimacy problems; in other cases, these acts appear to win support internationally and eventually are accorded symbolic trappings of legitimacy; in yet others, no effect is discernable. Similar results are reported in detailed analyses of the most salient cases of U.S. noncompliance with international law, which, according to several studies, is as likely to result in a “new multilateral agreement and treaties [that] generally tilt towards U.S. policy preferences” as it is to corrode the legitimacy of accepted rules.75

The contestation created by the Bush administration’s “new unilateralism,” on the one hand, and the “new multilateralism” represented by other states’ efforts to develop new rules and institutions that appear to constrain the United States, on the other hand, fits the historical pattern of the indirect effect of power on law. Highlighting only the details of the struggle over each new rule or institution may deflect attention from the structural influence of the United States on the overall direction of change. For example, a focus on highly contested issues in the UN, such as the attempt at a second resolution authorizing the invasion of Iraq, fails to note how the institution’s whole agenda has shifted to address concerns (e.g., terrorism, proliferation) that the United States particularly cares about. The secretary-general’s Highlevel Panel on Threats, Challenges and Change endorsed a range of U.S.-supported positions on terrorism and proliferation.76 International legal scholars argue that the United States made measurable headway in inculcating new rules of customary law to legitimate its approach to fighting terrorism and containing “rogue states.”77 For example, UN Security Council Resolution 1373 imposed uniform, mandatory counterterrorist obligations on all member states and established a committee to monitor compliance.

That said, there is also evidence of resistance to U.S. attempts to rewrite rules or exempt itself from rules. Arguably the most salient example of this is the International Criminal Court (ICC). During the negotiations on the Rome Convention in the late 1990s, the United States explicitly sought to preserve great-power control over ICC jurisdiction. U.S. representatives argued that the United States needed protection from a more independent ICC in order to continue to provide the public good of global military intervention. When this logic failed to persuade the majority, U.S. officials shifted to purely legal arguments, but, as noted, these foundered on the inconsistency created by Washington’s strong support of war crimes tribunals for others. The Rome Convention rejected the U.S. view in favor of the majority position granting the ICC judicial panel authority to refer cases to court’s jurisdiction.78 By 2007, 130 states had signed the treaty and over 100 were full-fledged parties to it.

President Clinton signed the treaty, but declined to submit it to the Senate for ratification. The Bush administration “unsigned” it in order legally to be able to take action to undermine it. The United States then persuaded over 75 countries to enter into agreements under which they undertake not to send any U.S. citizen to the ICC without the United States’ consent; importantly, these agreements do not obligate the United States to investigate or prosecute any American accused of involvement in war crimes. This clearly undermines the ICC, especially given that about half the states that have signed these special agreements with the United States are also parties to the Rome Statute. 79 At the same time, the EU and other ICC supporters pressured governments not to sign special agreements with the United States, and some 45 have refused to do so—about half losing U.S. military assistance as a result. In April 2005, the United States chose not to veto a UN Security Council resolution referring the situation in Darfur, Sudan, to the ICC. To many observers, this suggests that inconsistency may yet undermine U.S. opposition to the court.80 If the U.S. campaign to thwart the court fails, and there is no compromise solution that meets some American concerns, the result will be a small but noticeable constraint: U.S. citizens involved in what might be construed as war crimes and who are not investigated and prosecuted by the U.S. legal system may have to watch where they travel.

The upshot as of 2007 was something of a stalemate on the ICC, demonstrating the limits of both the United States’ capability to quash a new legal institution it doesn’t like and the Europeans’ ability to legitimize such an institution without the United States’ participation. Similar stalemates characterize other high-profile arguments over other new international legal instruments, such as the Kyoto Protocol on Climate Change and the Ottawa Landmine Convention. Exactly as constructivists suggest, these outcomes lend credence to the argument that power does not translate unproblematically into legitimacy. What the larger pattern of evidence on rule breaking shows, however, is that this is only one part of the story; the other part involves rule breaking with few, if any, legitimacy costs, and the frequent use of go-it-alone power to revise or create rules.

AN EROSION OF THE ORDER?

The second general evidence pattern concerns whether fallout from the unpopular U.S. actions on ICC, Kyoto and Ottawa, Iraq, and many other issues have led to an erosion of the legitimacy of the larger institutional order. Constructivist theory identifies a number of reasons why institutional orders are resistant to change, so strong and sustained action is presumably necessary to precipitate a legitimacy crisis that might undermine the workings of the current order. While aspects of this order remain controversial among sections of the public and elite both in the United States and abroad, there is little evidence of a trend toward others opting out of the order or setting up alternatives. Recall also that the legitimacy argument works better in the economic than in the security realm. It is also in the economic realm that the United States arguably has the most to lose. Yet it is hard to make the empirical case that U.S. rule violations have undermined the institutional order in the economic realm. Complex rules on trade and investment have underwritten economic globalization. The United States generally favors these rules, has written and promulgated many of them, and the big story of the 1990s and 2000s is their growing scope and ramified nature—in a word, their growing legitimacy. On trade, the WTO represents a major strengthening of the GATT rules that the United States pushed for (by, in part, violating the old rules to create pressure for the upgrade). As of 2007, it had 149 members, and the only major economy remaining outside was Russia’s. And notwithstanding President Putin’s stated preference for an “alternative” WTO, Russian policy focused on accession.81 To be sure, constructivists are right that the WTO, like other rational-legal institutions, gets its legitimacy in part from the appearance of independence from the major powers.82 Critical analysts repeatedly demonstrate, however, that the organization’s core agenda remains powerfully influenced by the interests of the United States.83

Regarding international finance, the balance between the constraining and enabling properties of rules and institutions is even more favorable to the United States, and there is little evidence of general legitimacy costs. The United States retains a privileged position of influence within the International Monetary Fund and the World Bank. An example of how the scope of these institutions can expand under the radar screen of most legitimacy scholarship is International Center for Settlement of Investment Disputes (ICSID)—the major dispute settlement mechanism for investment treaties. Part of theWorld Bank group of institutions, it was established in 1966, and by 1991 it had considered only 26 disputes. With the dramatic growth in investment treaties in the 1990s, however, the ICSID came into its own. Between 1998 and 2004, over 121 disputes were registered with the Center.84 This increase reflects the rapidly growing scope of international investment law. And these new rules and treaties overwhelmingly serve to protect investors’ rights, in which the United States has a powerful interest given how much it invests overseas.

Looking beyond the economic realm, the evidence simply does not provide a basis for concluding that serial U.S. rule-breaking imposed general legitimacy costs sufficient to erode the existing order. On the contrary, it suggests a complex and malleable relationship between rule breaking, legitimacy, and compliance with the existing order that opens up numerous opportunities for the United States to use its power to change rules and limit the legitimacy costs of breaking rules. The evidence also suggests that just as rules do not automatically constrain power, power does not always smoothly translate into legitimacy. As our review of the ICC issue showed, the United States is not omnipotent, and its policies can run afoul of the problems of hypocrisy and inconsistency that constructivists and legal scholars identify. Indeed, neither the theory nor the evidence presented in this chapter can rule out the possibility that the United States might have enjoyed much more compliance, and had much more success promulgating its favored rules and quashing undesired rule change, had it not been such a rule breaker or had it pursued compensating strategies more energetically.

#### Human rights cred is irrelevant---public opinion, global norms, and NGO networks outweigh US policy

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

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

### 1NC Judicial Globalism

#### Democratic peace theory is flawed—laundry list

Rosato, prof @ Notre Dame, 3 [Sebastian Rosato is an Assistant Professor of Political Science at the University of Notre Dame, “The Flawed Logic of Democratic Peace Theory,” The American Political Science Review. Menasha: Nov 2003. Vol. 97, Iss. 4; pg. 585, 18 pgs]

The causal mechanisms that comprise the normative logic do not appear to operate as stipulated. The available evidence suggests that, contrary to the claims of democratic peace theorists, democracies do not reliably externalize their domestic norms of conflict resolution, nor do they generally treat each other with trust and respect when their interests clash. Moreover, existing attempts to repair the logic are unconvincing. The historical record indicates that democracies have often failed to adopt their internal norms of conflict resolution in an international context. This claim rests, first, on determining what democratic norms say about the international use of force and, second, on establishing whether democracies have generally adhered to these prescriptions. Liberal democratic norms narrowly circumscribe the range of situations in which democracies can justify the use of force. As Doyle (1997, 25) notes, "Liberal wars are only fought for popular, liberal purposes." This does not mean that they will go to war less often than other kinds of states; it only means that there are fewer reasons available to them for waging war. Democracies are certainly justified in fighting wars of self-defense. Locke ([1690] 1988), for example, argues that states, like men in the state of nature, have a right to destroy those who violate their rights to life, liberty, and property (269-72). There is considerable disagreement among liberal theorists regarding precisely what kinds of action constitute self-defense, but repulsing an invasion, preempting an impending military attack, and fighting in the face of unreasonable demands all plausibly fall under this heading. Waging war when the other party has not engaged in threatening behavior does not. In short, democracies should only go to war when "their safety and security are seriously endangered by the expansionist policies of outlaw states" (Rawls 1999, 90-91). Another justification for the use of force is intervention in the affairs of other states or peoples, either to prevent blatant human rights violations or to bring about conditions in which liberal values can take root. For Rawls (1999,81), as for many liberals, human rights violators are "to be condemned and in grave cases may be subjected to forceful sanctions and even to intervention" (see also Doyle 1997, 31-32, and Owen 1997, 34-35). Mill ([1859] (1984)) extends the scope of intervention, arguing that "barbarous" nations can be conquered to civilize them for their own benefit (see also Mehta 1990). However, if external rule does not ensure freedom and equality, it will be as illiberal as the system it seeks to replace. Consequently, intervention can only be justified if it is likely to "promote the development of conditions in which appropriate principles of justice can be satisfied" (Beitz 1979, 90). The imperialism of Europe's great powers between 1815 and 1975 provides good evidence that liberal democracies have often waged war for reasons other than self-defense and the inculcation of liberal values. Although there were only a handful of liberal democracies in the international system during this period, they were involved in 66 of the 108 wars listed in the Correlates of War (COW) dataset of extrasystemic wars (Singer and Small 1994). Of these 66 wars, 33 were "imperial," fought against previously independent peoples, and 33 were "colonial," waged against existing colonies.

#### Authoritarian states don’t follow norms — their “US justifies others” arg is naive

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

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

#### Can’t solve SOP – detention, drones, and other WOT policies are all alt causes

#### SOP resilient

Rosman 96 [Michael E. Rosman (General Counsel @ Center for Individual Rights; JD from Yale); Review of “FIGHTING WORDS: INDIVIDUALS, COMMUNITIES AND LIBERTIES OF SPEECH”; Constitutional Commentary 96 (Winter, p. 343-345)]

Of course, the other branches also shove at the boundaries of branch power--FDR's Court-packing plan being one notable example of this practice. Sometimes the law of unintended consequences grabs hold. Perhaps the Court-packing plan concentrated the Justices' minds on finding ways to hold New Deal legislation constitutional, but it also blew up in FDR's face politically. At least for the last two hundred years, however, no branch has managed to expand its power to the point of delivering an obvious knock-out blow to another branch. Seen from this broader perspective, cases such as Morrison,(33) Bowsher v. Synar,(34) and Mistretta v. United States(35) surely alter the balance of branch power at a given historical moment, but do not change the fundamental and brute fact that the Constitution puts three institutional heavyweights into a ring where they are free to bash each other. Judicialocentrism tends to obscure this obvious point because it causes people to dwell on the hard cases that reach the Supreme Court. The power of separation of powers, however, largely resides in its ability to keep the easy cases from ever occurring. For instance, Congress, although it tries to weaken the President from time to time, has not tried to reduce the President to a ceremonial figurehead a la the Queen of England. Similarly, Congress does not make a habit of trying cases that have been heard by the courts. This list could be continued indefinitely. The Supreme Court has had two hundred years to muck about with separation-of-powers doctrine. Over that time, scores of Justices--each with his or her own somewhat idiosyncratic view of the law--have sat on the bench. Scholars have denounced separation-of-powers jurisprudence as a mess. But the Republic endures, at least more or less. These historical facts tend to indicate that the Court need not rush to change its approach to separation of powers to prevent a slide into tyranny.

#### No reverse causal—countries won’t magically clean up their act

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

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

#### No impact to SOP- Presidents bypass formal constitutional barriers all the time,

Zasloff, Professor of Law, UCLA School of Law, 2004(Jonathan, “Taking Politics Seriously: A Theory of California's Separation of Powers” 51 UCLA L. Rev. 1079, Copyright (c) 2004 The Regents of the University of California)

Presidents break legislative impasses by "solving" pressing problems with unilateral decrees that often go well beyond their formal constitutional authority; rather than protesting, representatives are relieved that they can evade political responsibility for making hard decisions; subsequent presidents use these precedents to expand their decree power further; the emerging practice may even be codified by later constitutional amendments. Increasingly, the house is reduced to a forum for demagogic posturing, while the president makes tough decisions unilaterally without considering the interests and ideologies represented by the leading political parties in Congress. n226 Will this always happen? Of course not. But it has happened frequently - far too frequently to make confident assertions about the necessity of presidentialism to the preservation of liberal democracy. The crucial question then is, what does this finding mean for the process of American constitutional interpretation? It certainly can't mean that judges should take it upon themselves to create parliamentary government in the United States. But it should give us great pause to adhere to rigid separation of powers formalism. Indeed, while the evidence so far clearly points to the conclusion that parliamentarism is superior to presidentialism, all that is necessary for the argument for judicial deference is that it is no worse. And that is unquestionable. Put another way, even if government completely slides down the slippery slope - if the worst-case scenario occurs - it should not be cause for political concern. And thus, it should not be cause for judicial concern.

#### Nigeria unstable now – Islamic insurgency in the north

Divine Jr. 13 (Ntaryike, “Cameroon Struggles with Thousands of Nigerian Refugees” Voice of America. Web, Acc at http://www.voanews.com/content/cameroon-struggles-with-thousands-of-nigerian-refugees/1744122.html  
The Boko Haram insurgency has been raging in northern Nigeria since 2010. Thousands have been killed. The militant sect wants to establish an Islamic state in northern Nigeria. The state launched a large-scale military offensive against Boko Haram in mid-May. Security forces have restricted media access to the frontlines, and cell phone communications have been cut in much of the northeast during the offensive. ¶ A VOA reporter visited refugees scattered throughout northern Cameroon in August. The refugees described having fled in great haste, leaving behind belongings and herds of cattle. Some said they decided to leave following threats and brutal attacks by Boko Haram militants. Some described waking up in the middle of the night to gunshots as soldiers battled militants. They said they fled soon after for fear of being caught in the crossfire. Many said that they feared the Nigerian military. Shenaku Alimu said she fled her village of Hadwa after soldiers killed her husband. She recounted how one evening in June, soldiers raided her village. “They said they had come to arrest Boko Haram militants. My husband, who is Muslim, got scared and tried to run. They shot and killed him in front of me… The authorities have failed to protect us and that is why I fled Nigeria. I am not keen to go back. I lost everything, including my husband," said Alimu. Human rights organizations say that the Nigerian military's heavy-handed response to Boko Haram over the past three years has included abuses against civilians that have only fed the insurgency. The Nigerian government denies such accusations. There is concern that ongoing military action in Nigeria will push militants into Cameroon and Niger. Cameroon has been on guard against possible spillover from the insurgency. Boko Haram claimed responsibility for kidnapping a French family of seven in northern Cameroon in February. The family was released two months later following negotiations. In August, the Nigerian military released a statement saying that Boko Haram leader, Abubakar Shekau, had been injured in battle and then snuck across the border into the Cameroonian town of Amitchide where he later died. In June, Cameroon deployed part of its elite Rapid Intervention Battalion to reinforce security along its border with Nigeria.

#### That’s causing thousands of refugees to leave the country – aff impacts inevitable

Divine Jr. 13 (Ntaryike, “Cameroon Struggles with Thousands of Nigerian Refugees” Voice of America. Web, Acc at http://www.voanews.com/content/cameroon-struggles-with-thousands-of-nigerian-refugees/1744122.html

MAROUA, CAMEROON — Thousands of people have fled northeastern Nigeria since mid-May when the Nigerian military began an offensive against the militant Islamist sect, Boko Haram. Neighboring countries like Cameroon have been confronted with a double challenge as they try to meet the needs of civilians fleeing violence, while also trying to prevent infiltration by Boko Haram militants. Pastor Daouda Dilmas is one of thousands of Nigerians who have fled into northern Cameroon in the past four months. He fled with his family from the Goza local government area of Borno State in early June. "We came here because of the Boko Haram attacks on us,” he said, adding that they had been calling on Nigerian authorities for help, but the intervention came too late. "Because we had been reporting to them but they were unable to come as early as possible. That is the reason that we run for our lives," said Dilmas. The pastor and his family are living at a refugee camp set up by the U.N. and Cameroon's government in Minawao, about 130 kilometers east of the border. However, most of the refugees are squatting in communities or staying in makeshift shelters in the bush. It is difficult to know exactly how many people have arrived. U.N. agencies have counted between 3,000 and 8,000 refugees. Local government and civil society sources say that number is closer to 20,000 and that it is mostly women and children.

That flow also causes ethnic conflicts which is the aff’s only internal link between refugees and instability   
Divine Jr. 13 (Ntaryike, “Cameroon Struggles with Thousands of Nigerian Refugees” Voice of America. Web, Acc at http://www.voanews.com/content/cameroon-struggles-with-thousands-of-nigerian-refugees/1744122.html

Entry denied Some refugees told VOA that Cameroonian security forces initially blocked them from crossing the border out of fear that they were Boko Haram. Amadou Mbaino said he was not able to get into Cameroon until July. He is now living in a community school building in Mokolo town but remains one of the thousands of undocumented refugees in the country.  
 He said "when we were fleeing, security forces stopped us at the border and ordered us to go back. They said we could be Boko Haram militants and so we had to trek for several days to find crossings where there were no soldiers. As I speak, I am not at ease because there are frequent controls by gendarmes who want to send us back. But I cannot go back to hell." The governor of the Far North region, which has the highest concentration of refugees

, told VOA that refugees must start complying with immigration regulations or face the consequences. Cameroonian border communities, like the village of Sangme, say it is a question of security. Village chief Moussa Abdoulaye said "that is the problem. We do not know who is who among these people. Their presence here is causing us worries because we don't know if there are any Boko Haram members among them or whether Boko Haram would follow them to attack them here. We are taking measures to send back anyone with suspicious behavior." Humanitarian agencies have been working to provide assistance to refugees, in particular in the Minawao refugee camp. However, there are concerns that the massive influx is straining the already limited resources of host communities. northern Cameroon is prone to food shortages and disease outbreaks during the rainy season.

#### 1AC Mwalimu evidence is talking about Constitutional modeling, which has already happened

#### Nigerian collapse is not reverse causal – no evidence the separation of powers is sufficient to overcome collapse due to the poverty and privatization that their Vanguard evidence cites -

#### No judicial independence regardless of US policy – the executive can remove judges

Shehu 12, PHD and Senior lecturer and law professor at the University of Ilorin, (“Modeling Separation For Constitutionalism: The Nigerian Approach” Journal of Law, Policy and Globalization” ISSN 2224-3259 (Online) Vol 3, 2012

4.2 Judicial Function¶ Further, as if he is head of the judiciary, the president appoints certain judicial officers on the recommendation of the National Judicial Council, subject to confirmation by the Senate (Nigerian Constitution, 1999: s. 231(1, 2)). Also, such judicial officers can only be removed by the President “acting on an address supported by two-thirds majority of the Senate” (ibid: s. 292). The role of the President in the appointment and removal of judicial officers can not be regarded as executive, it is judicial. This is so because judicial function starts from the moment a person is appointed a judge having been so recommended by the appropriate authority, or so elected.¶ Even, assuming his role is executive in nature, it thus presupposes that the “executive powers” of the president include some judicial or quash-judicial functions. This is again a clear case of limited separation of powers. Otherwise, the National Judicial Council could make recommendation for appointment, removal, discipline and all that to the Chief Justice of Nigeria as head of the judiciary of the federation for approval, without the involvement of either the Executive or the Legislature.

#### 1AC Diblia evidence cites lack of funding as a problem for Judicial independence – no warrant for why the aff solves that

#### They don’t have a single connection between the Bihari and the Glick evidence – even if refugee flows happen, no warrant for why that causes African instability

## 2NC

### 2NC K Cards

#### All of our solvency arguments are *net offense*---legalism creates the façade that the executive is being constrained while allowing the government to do as it pleases under the guise of constraint---this swells executive power and turns the case

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The examples cited in this section suggest not the formation of an utterly lawless regime, but, rather, within an order that continues to understand itself in terms of the categories provided by liberal contractarianism, the more insidious creation, multiplication, and institutionalization of what David Dyzenhaus calls "grey holes." Such holes are "spaces in which there are some legal constraints on executive action...but the constraints are so insubstantial that they pretty well permit government to do as it pleases."40 As such, they are more harmful to the rule of law than are outright dictatorial usurpations, first, because the provision of limited procedural protections masks the absence of any real constraint on executive power; and, second, because location of the authority to create such spaces within the Constitution implies that, in the last analysis, they bear ex ante authorization by the people. When created, in other words, they may receive but they do not require ratification, whether by Congress or by those whom its members are said to represent. What this means in effect is that the second Bush administration has dispensed with Jefferson's stipulation that extra-constitutional executive acts (or, rather, acts that Jefferson deemed to be outside those constitutionally permitted) require ex post facto ratification; and, in addition, that it has dispensed with Locke's contention that, however unlikely, at least in principle, specific exercises of extra-legal prerogative power (or, rather, acts that Locke deemed to be outside those legally permitted) are properly subject to revolutionary rejection. What one finds in the second Bush administration, then, is a denial of both models of accountability, combined with an aggressive commitment to the constitution of a security state that is liberal only in name. As it extends its reach, perfection of that state renders the prospect of popular repudiation of prerogative power ever more chimerical, and, indeed, renders recognition of the problematic character of its exercise ever less likely.

#### Politics is Schmittian – congress and courts cannot effectively constrain the executive

Vermeule and Posner, 11 – Adrian Vermeule, prof of Law at Harvard University Law School, Eric A Posner., prof of Law at the University of Chicago Law School, Executive Unbound: After the Madisonian Republic, Oxford University Press 2011

Our thesis is that these modifications to liberal legalism fail. Either they do not go far enough to square with the facts, or they go so far as to effec­tively abandon the position they seek to defend. We live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity. As against liberal constitutional theorists like Janies Madison, Bruce Acker­man,1 and Richard Epstein,2 and liberal theorists of the rule of law like ..Albert Venn Dicey3 and David Dyzenhaus,4 we argue that in the modern administrative state the executive governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crisis. Whereas Madison is an exemplar of liberal legalism, particularly in the domain of constitutional theory, we draw upon the thought of the Weimar legal theorist Carl Schmitt. We do not agree with all of Schmitt’s views, by any means. To the. extent Schmitt thought that democratic poli­tics do not constrain the executive, or thought that in the administrative state the executive is not only largely unconstrained by law but also uncon­strained tout court, we disagree. Indeed, to the extent that Schmitt thought this, he fell into a characteristic error of liberal legalism, which equates lack of legal constraint with unbounded power. But Schmitt’s critical arguments against liberal legalism seem to us basically correct, at least when demysti­fied and rendered into suitably pragmatic and institutional terms. A central theme in Schmitt s work, growing outof Weimar’s running economic and security crises in the 1920s and early 1930s, involves the relationship between the classical rule-of-law state, featuring legislative enactment of general rules enforced by courts, and the administrative state, featuring discretionary authority and ad hoc programs, administered by the executive, affecting particular individuals and firms. The nub of Schmitt s view is the idea that liberal lawmaking institutions frame, general norms that are essentially “oriented to the past,” whereas “the dictates of modern interventionist politics cry out for a legal system conducive to a present- and future-oriented ‘steering’ of complex, ever-changing eco­nomic scenarios.”3 Legislatures and courts, then, are continually behind the pace of events in the administrative state; they play an essentially reac­tive and marginal role, modifying and. occasionally blocking executive policy initiatives, but rarely taking the lead. And in crises, the executive governs nearly alone, at least so far as law is concerned. In our view, the major constraints on the executive, especially in crises, do not arise from law or from the separation-of-powers framework defended by liberal legalists, but from politics and public opinion. Law and politics are hard to separate and lie on a continuum—elections, for example, are a complicated mix: of legal rules and political norms—but the poles are clear enough for our purposes, and the main constraints on the executive arise from the political end of the continuum. A central fallacy of liberal legalism, we argue, is the equation of a constrained executive with an executive constrained by law. The pressures of the administrative state loosen legal constraints, causing liberal legalists to develop tyrannophobia, or unjustified fear of dictatorship. They overlook the de facto political con­straints that have grown up and, to some degree, substituted for legal constraints on the executive.6 As the bonds of law have loosened, the bonds of politics have tightened their grip. The executive, “unbound” from the standpoint of liberal legalism, is in some ways more constrained than ever before. We do not claim that these political constraints necessarily cause the executive to pursue the public interest, however defined, or that they pro­duce optimal executive decision-making. We do claim that politics and public opinion at least block the most lurid forms of executive abuse, that courts and Congress can do no better, that liberal legalism goes wrong by assuming that a legally unconstrained executive is unconstrained overall, and that in any event there is no pragmatically feasible alternative to exec­utive government under current conditions. The last point has normative implications, because of the maxim “Ought implies can.” Executive gov­ernment is best in the thin sense that there is no feasible way to improve upon it, under the conditions of the administrative state.

#### Their method is bad – (1) it’s rooted in tyrannaphobia (2) the state is hijacked by elites who control decision making and normalize an authoritarian state that wages war on populations – debate should focus on how cultural elements combat normalization of violence

Giroux 13 Henry A. is a social critic and educator, and the author of many books. He currently holds the Global Television Network Chair in English and Cultural Studies at McMaster University, Ontario, Monthly Review, Volume 65, Issue 01 (May)

In addition, as the state is hijacked by the financial-military-industrial complex, the “most crucial decisions regarding national policy are not made by representatives, but by the financial and military elites.”53 Such massive inequality and the suffering and political corruption it produces point to the need for critical analysis in which the separation of power and politics can be understood. This means developing terms that clarify how power becomes global even as politics continues to function largely at the national level, with the effect of reducing the state primarily to custodial, policing, and punishing functions—at least for those populations considered disposable. The state exercises its slavish role in the form of lowering taxes for the rich, deregulating corporations, funding wars for the benefit of the defense industries, and devising other welfare services for the ultra-rich. There is no escaping the global politics of finance capital and the global network of violence it has produced. Resistance must be mobilized globally and politics restored to a level where it can make a difference in fulfilling the promises of a global democracy. But such a challenge can only take place if the political is made more pedagogical and matters of education take center stage in the struggle for desires, subjectivities, and social relations that refuse the normalizing of violence as a source of gratification, entertainment, identity, and honor. War in its expanded incarnation works in tandem with a state organized around the production of widespread violence. Such a state is necessarily divorced from public values and the formative cultures that make a democracy possible. The result is a weakened civic culture that allows violence and punishment to circulate as part of a culture of commodification, entertainment, distraction, and exclusion. In opposing the emergence of the United States as both a warfare and a punishing state, I am not appealing to a form of left moralism meant simply to mobilize outrage and condemnation. These are not unimportant registers, but they do not constitute an adequate form of resistance .What is needed are modes of analysis that do the hard work of uncovering the effects of the merging of institutions of capital, wealth, and power, and how this merger has extended the reach of a military-industrial-carceral and academic complex, especially since the 1980s. This complex of ideological and institutional elements designed for the production of violence must be addressed by making visible its vast national and global interests and militarized networks, as indicated by the fact that the United States has over 1,000 military bases abroad.54 Equally important is the need to highlight how this military-industrial-carceral and academic complex uses punishment as a structuring force to shape national policy and everyday life. Challenging the warfare state also has an important educational component. C. Wright Mills was right in arguing that it is impossible to separate the violence of an authoritarian social order from the cultural apparatuses that nourish it. As Mills put it, the major cultural apparatuses not only “guide experience, they also expropriate the very chance to have an experience rightly called ‘our own.’”55 This narrowing of experience shorn of public values locks people into private interests and the hyper-individualized orbits in which they live. Experience itself is now privatized, instrumentalized, commodified, and increasingly militarized. Social responsibility gives way to organized infantilization and a flight from responsibility. Crucial here is the need to develop new cultural and political vocabularies that can foster an engaged mode of citizenship capable of naming the corporate and academic interests that support the warfare state and its apparatuses of violence, while simultaneously mobilizing social movements to challenge and dismantle its vast networks of power. One central pedagogical and political task in dismantling the warfare state is, therefore, the challenge of creating the cultural conditions and public spheres that would enable the U.S. public to move from being spectators of war and everyday violence to being informed and engaged citizens.Unfortunately, major cultural apparatuses like public and higher education, which have been historically responsible for educating the public, are becoming little more than market-driven and militarized knowledge factories. In this particularly insidious role, educational institutions deprive students of the capacities that would enable them not only to assume public responsibilities, but also to actively participate in the process of governing. Without the public spheres for creating a formative culture equipped to challenge the educational, military, market, and religious fundamentalisms that dominate U.S. society, it will be virtually impossible to resist the normalization of war as a matter of domestic and foreign policy. Any viable notion of resistance to the current authoritarian order must also address the issue of what it means pedagogically to imagine a more democratically oriented notion of knowledge, subjectivity, and agency and what it might mean to bring such notions into the public sphere. This is more than what Bernard Harcourt calls “a new grammar of political disobedience.”56 It is a reconfiguring of the nature and substance of the political so that matters of pedagogy become central to the very definition of what constitutes the political and the practices that make it meaningful. Critical understanding motivates transformative action, and the affective investments it demands can only be brought about by breaking into the hardwired forms of common sense that give war and state-supported violence their legitimacy. War does not have to be a permanent social relation, nor the primary organizing principle of everyday life, society, and foreign policy. The war of all-against-all and the social Darwinian imperative to respond positively only to one’s own self-interest represent the death of politics, civic responsibility, and ethics, and set the stage for a dysfunctional democracy, if not an emergent authoritarianism. The existing neoliberal social order produces individuals who have no commitment, except to profit, disdain social responsibility, and loosen all ties to any viable notion of the public good. This regime of punishment and privatization is organized around the structuring forces of violence and militarization, which produce a surplus of fear, insecurity, and a weakened culture of civic engagement—one in which there is little room for reasoned debate, critical dialogue, and informed intellectual exchange. Patricia Clough and Craig Willse are right in arguing that we live in a society “in which the production and circulation of death functions as political and economic recovery.”57 The United States understood as a warfare state prompts a new urgency for a collective politics and a social movement capable of negating the current regimes of political and economic power, while imagining a different and more democratic social order. Until the ideological and structural foundations of violence that are pushing U.S. society over the abyss are addressed, the current warfare state will be transformed into a full-blown authoritarian state that will shut down any vestige of democratic values, social relations, and public spheres. At the very least, the U.S. public owes it to its children and future generations, if not the future of democracy itself, to make visible and dismantle this machinery of violence while also reclaiming the spirit of a future that works for life rather than death—the future of the current authoritarianism, however dressed up they appear in the spectacles of consumerism and celebrity culture. It is time for educators, unions, young people, liberals, religious organizations, and other groups to connect the dots, educate themselves, and develop powerful social movements that can restructure the fundamental values and social relations of democracy while establishing the institutions and formative cultures that make it possible. Stanley Aronowitz is right in arguing that: the system survives on the eclipse of the radical imagination, the absence of a viable political opposition with roots in the general population, and the conformity of its intellectuals who, to a large extent, are subjugated by their secure berths in the academy [and though] we can take some solace in 2011, the year of the protester…it would be premature to predict that decades of retreat, defeat and silence can be reversed overnight without a commitment to what may be termed “a long march” through the institutions, the workplaces and the streets of the capitalist metropoles.58 The current protests among young people, workers, the unemployed, students, and others are making clear that this is not—indeed, cannot be—only a short-term project for reform, but must constitute a political and social movement of sustained growth, accompanied by the reclaiming of public spaces, the progressive use of digital technologies, the development of democratic public spheres, new modes of education, and the safeguarding of places where democratic expression, new identities, and collective hope can be nurtured and mobilized. Without broad political and social movements standing behind and uniting the call on the part of young people for democratic transformations, any attempt at radical change will more than likely be cosmetic.

#### Legalism is epistemologically flawed and violent.

Dossa ‘99 Shiraz, Department of Political Science, St. Francis Xavier University, Antigonish, Nova Scotia, “Liberal Legalism: Law, Culture and Identity,” The European Legacy, Vol. 4, No. 3, pp. 73-87,1

Law's imperial reach, it massive authority, in liberal politics is a **brute**, recurring **fact**. In Law's Empire, Dworkin attests to its scope and power with candour: "We live in and by the law. It makes us what we are" (vii). But he fails to appreciate that law equally traduces others, it systematically unmakes them. For Dworkin, a militant liberal legalist, law is the insiders' domain: legal argument has to be understood internally from the "judge's point of view"; sociological or historical readings are irrelevant and "perverse".2 Praising the decencies of liberal law is necessary in this world: rule of law, judicial integrity, fairness, justice are integral facets of tolerable human life. Lawfulness is and ought to be part of any decent regime of politics. But law's rhetoric on its own behalf systematically scants law's violent, dark underside, it skillfully masks law's commerce with destruction and death**.** None of this is visible from the internalist standpoint, and Dworkin's liberal apologia serves to mystify the gross reality of law's empire. In liberal political science, law's presumed, Olympian impartiality, is thus not a contested notion. Liberals still presuppose as a matter of course the juristic community's impartiality and neutrality, despite empirical evidence to the contrary.3 One consequence of the assumed sanctity of the judicial torso within the body politic, has been that law's genealogy, law's chronological disposition towards political and cultural questions, have simply not been of interest or concern to most liberal scholars. A further result of this attitude is the political science community's nearly total ignorance of liberal law's complicity in western imperialism, and in shaping western attitudes to the lands and cultures of the conquered natives. Liberal jurisprudence's subterranean life, its invidious consciousness is, however, not an archaic, intermittent annoyance as sensitive liberals are inclined to think: indeed law is as potent now as it has been in last two centuries in articulating a dismissive image of the native Other.

#### Sequencing DA – alt has to come first or movements get sapped

Nagin 5 Tomiko Brown, Visiting Associate Professor, University of Virginia School of Law, “ELITES, SOCIAL MOVEMENTS, AND THE LAW: THE CASE OF AFFIRMATIVE ACTION,” Columbia Law Review, 105 Colum. L. Rev. 1436

Those seeking to have an impact on the political and legal orders should not root a mass movement in the courts;instead, affirmative litigation about constitutional rights should be anchored upon and preceded by a mass movement.Efforts to achieve fundamental change shouldbegin with the target constituency and be waged initially outside of the confines of institutionalized politics.Law should be understood as a tactic in an ongoing political struggle, where the struggle is the main event and favorable legal outcomes are its byproducts. There is a crucially important temporal component to this view. Legal claims can be tactically useful in a political strategy for achieving change - butonly after social movements lay the groundworkfor legal change. Social movements must first create political pressure that frames issues in a favorable manner, creates cultural norm shifts, and affects public opinion; these norm shifts then increase the likelihood that courts will reach outcomes favored by lawyers. [437](http://www.lexis.com/research/retrieve?_m=b1b76c3bff33e7c7527182cc42568c87&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAl&_md5=b4841fe459fa752b47486b13d84385b6&focBudTerms=milliken%20w/150%20hispanic%20or%20latino&focBudSel=all#n437) Again, my claims find support in the history of the mid-twentieth-century civil rights movement. This narrative posits an intimate relationship between the sociopolitical dynamics within black client communities and the success (or failure) of civil rights lawyers' litigation campaigns for rights. The postwar civil rights movement confirms that the moral suasion of participatory democratic groups of nonlawyers, and typically nonelites, was integral to law's movement from a Jim Crow regime to a [\*1523] constitutional order in which formal equality was the norm. During the past three decades, historians who have analyzed social change have discovered that small groups of inexpert individuals can be the leading edge of a social movement, especially when they work in coalition with those who traditionally wield influence in society. [438](http://www.lexis.com/research/retrieve?_m=b1b76c3bff33e7c7527182cc42568c87&docnum=11&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzz-zSkAl&_md5=b4841fe459fa752b47486b13d84385b6&focBudTerms=milliken%20w/150%20hispanic%20or%20latino&focBudSel=all#n438)Through their commitment to a social cause, ordinary people with no insider knowledge of the technical aspects of the broad issue on which they are mobilizing can create circumstances in which those with actual power (political, economic, and, ultimately, legal power) are persuaded to act in their favor.

#### Aff gets lost in the details of specifics like \_\_\_\_\_ policy which ignores broader systemic criticism and normalizes war on terror

Saas, 12 \*\*William O. Pf Department of Communication Arts and Sciences at the Pennsylvania State University. symploke > Volume 20, Numbers 1-2

How might one critique this massive network of violence that has become so enmeshed in our contemporary geo-socio-political reality? Is there any hope for reversing the expansion of executive violence in the current political climate, in which the President enjoys minimal resistance to his most egregious uses of violence? How does exceptional violence become routine? Answers to these broad and difficult questions, derived as they are from the disorientingly vast and hyper-accelerated retrenchment of our current political situation, are best won through the broad strokes of what Slavoj Žižek calls "systemic" critique. For Žižek, looking squarely at interpersonal or subjective violences (e.g., torture, drone strikes), drawn as we may be by their gruesome and immediate appeal, distorts the critic's broader field of vision. For a fuller picture, one must pull one's critical focus back several steps to reveal the deep, objective structures that undergird the spectacular manifestations of everyday, subjective violence (Žižek 2008, 1-2). Immediately, however, one confronts the limit question of Žižek's mandate: how does one productively draw the boundaries of a system without too severely dampening the force of objective critique? For practical purposes, this essay leaves off discussion of neoliberal economic domination, vital as it may be to a full accounting for the U.S.' latest and most desperate expressions of state solvency.

#### Bad for the left – as progressives stay focused on the law, conservatives chalk up more wins. Reliance on the law is WORSE than doing nothing

West 6, Pf Law @ Georgetown, (Robin, *Harvard Journal of Law & Gender*, Winter, lexis)

And law is indeed a strikingly conservative and conserving set of institutions and practices. I argued in the book that legal critics, feminist and otherwise, should elevate the concept of harm in our thinking about law. And when we do so, we should think much more than we currently do about the harms sustained by various subordinated groups, including women. All I want to add here in response to some of Halley's remarks is that harm- and law-focused inquiries with respect to gender or otherwise that come from such a focus are indeed reformist projects. They are projects about how law could do better, instrumentally, what it claims to do, and what it does do some of the time, what it does not do at all well most of the time, and often does not do at all, period. However, while it is important to get judge-made law to do better what it already does, it is even more important. I think, to put law in its place. Law--meaning here, adjudicative law--is (lo and behold) not politics. It cannot do what politics might be able to do. It has been a tragic mistake, I think, of liberals, radicals, identitarian theorists, critical legal scholars, and progressives of all stripes involved in law, legal theory, and legalism of the past half century, to assert, and so repetitively and confidently, the contrary. The domain of adjudicative law has its own ethics. It is for the most part deeply moored in conservative values. It has some redemptive potential and therefore some play for progressive gains, but really not much. More important, it has the potential, all in the name of justice, to further aggravate the harmsit manages to so successfully avoid. *Caring for Justice* was an attempt to expose the aggravation of harm done by law in the name of justice, exploit its redemptive potential, and argue that others should do this also. But completely aside from the arguments of that book, I think this is still a very important and very much under-examined question for progressive lawyers to ask: how much can be asked of adjudicative law? Again, my answer is "not much." Others disagree. My current retrospective on the place of Catharine MacKinnon's jurisprudence in our law and letters, for example, argues that a part of the brilliance of her labors over the last thirty years has been her quite conscious embrace of law and legalism, rather than the domain of politics, culture, or education, to achieve evolutionary changes in our understanding of both sexual injury and sexual justice. [**97**](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n97) She has been phenomenally successful in pushing law to become a **[\*48]** vehicle for that evolutionary change. By contrast, I think, the benighted attempt over the last half century of progressive constitutional lawyers and theorists to employ the stratagems and ethics of legalism so as to refigure our fundamental politics, to achieve substantive equality, expand liberty, and the like--and to do so by urging on courts the development of progressive interpretations of their constitutional corollaries--has been a pretty striking failure, and not only because of the current Republican staffing of the courts. Obviously, the arguments put forward by progressives, radicals, and liberals in their thousands upon thousands of pages of briefs--arguments about what equality should look like, about what freedoms we all should or should not have, about democracy, about speech, about reproduction, about race, about sex, and so on and so on and so on, as well as their constitutional corollaries, from *Brown* [98](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n98) to *Roe* [99](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n99) to *Casey* [100](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n100) to *Lawrence* [101-](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n101-)-are vital arguments with which to engage. The problem is that these arguments should be--and are not--the bread and butter of very ordinary politics, completely traditionally understood. The repeated insistence by liberal legalists over the last half-century that these arguments are, in fact, in law's domain has not secured progressive victories and has had the perverse effect instead of impoverishing our politics. [**102**](http://www.lexis.com/research/retrieve?_m=39680407fb828dfdd157d657f657a888&docnum=53&_fmtstr=FULL&_startdoc=51&wchp=dGLbVtz-zSkAt&_md5=4f80854bd4621b982f860148cd3f92b3&focBudTerms=casey%20and%20foucault%20and%20abortion&focBudSel=all#n102) The repeated insistence by critical legal scholars over the last thirty years that, contra liberalism, there is no difference between law and politics--and that what follows is simply that all those legal arguments in all of those endless Supreme Court opinions pontificating over the meaning of liberty and equality are in fact political arguments--has not changed this dynamic one bit. It has not only underscored the total absence of any coherent progressive instrumentalism from left understandings of the potential of law. Of greater consequence, it has also even **further emasculated and eviscerated** our politics, worse than liberalism could have done if it had tried, and it did not. The critical insistence on the deconstruction of the differences between law and politics has only reinforced, rather than challenged in any meaningful way, the liberal legalist conceit that law, rather than politics ordinarily understood, is the domain of radical and liberal political thought. We have no political "left" in this country, in part, because those who would otherwise be inclined to make one have instead poured their thought, their passion, and their commitments into litigation [\*49] strategies or into the project of pointing out over and over the politics of those projects**.** The result of this has been an entrenched conservatism across the board**-**-the board, that is, of both law and politics. Progressives need to re-direct their political arguments, including the radical arguments, out of law and law reviews and into the domain of politics. We first have to get over the lazy assumption that there is no need to do so--either because law is much loftier than ordinary politics, such that ennobling political arguments *ought* to be made in judicial fora (liberalism); or because there's no difference between law and politics, so that pointing out that legal arguments are through and through political is the beginning and end of political thought (critical). There are alternatives to both, and we ought to start figuring out what they are.

#### Complacency DA – relying on the law create psychological co-option and satisfaction with what he we have done

Lobel, 7 **–** Assistant Professor of Law, University of San Diego, (Orly, Harvard Law Review, 120 Harv. L. Rev. 937)

Psychological cooptation is produced by the law precisely because law promises more than it can and will deliver. At the same time, law is unlike other sets of rules or systems in which we feel as though we have more choice about whether to participate. As described earlier, law presents itself simultaneously as the exclusive source of authority in a society and as the only engine for social change. It further presents itself as objective, situated outside and above politics. Thus, social actors who enter into formal channels of the state risk transformation into a particular hegemonic consciousness**.** Relying upon the language of law and legal rights to bring change legitimates an ideological system that masks inequality. [95](http://www.lexis.com/research/retrieve?_m=b7d531dcca7209b987833602ed6fbb4e&docnum=23&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAt&_md5=3f8bfd4662cb01d0d1bf9f28a63e1155&focBudTerms=lobel%20and%20harvard&focBudSel=all#n95) When social demands are fused into legal action and the outcomes are only moderate adjustments of existing social arrangements, the process in effect naturalizes systemic injustice. The legal process reinforces, rather than resists, the dominant ideologies, institutions, and social hierarchies of the time. For example, when a court decision declares the end of racial segregation but de facto segregation persists, individuals become blind to the root causes of injustice and begin to view continued inequalities as inevitable and irresolvable. Similarly, rights-based discourse has a legitimation effect, since rights mythically present themselves as outside and above politics. [96](http://www.lexis.com/research/retrieve?_m=b7d531dcca7209b987833602ed6fbb4e&docnum=23&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAt&_md5=3f8bfd4662cb01d0d1bf9f28a63e1155&focBudTerms=lobel%20and%20harvard&focBudSel=all#n96) Meanwhile, the legal framework allows the courts to implement a color blindness ideology and grant only symbolic victories rather than promote meaningful progress. [97](http://www.lexis.com/research/retrieve?_m=b7d531dcca7209b987833602ed6fbb4e&docnum=23&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAt&_md5=3f8bfd4662cb01d0d1bf9f28a63e1155&focBudTerms=lobel%20and%20harvard&focBudSel=all#n97) As such, the role of law is one that in fact ensures the [\*958] "continued subordination of racial and other minority interests," while pacifying the disadvantaged who rely on it. [98](http://www.lexis.com/research/retrieve?_m=b7d531dcca7209b987833602ed6fbb4e&docnum=23&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzb-zSkAt&_md5=3f8bfd4662cb01d0d1bf9f28a63e1155&focBudTerms=lobel%20and%20harvard&focBudSel=all#n98) Social movements seduced by the "myth of rights" assume a false sequence, namely "that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change."

### Alt – Bottom-Up Statebuilding

#### Refuse the 1AC’s call for liberal internationalism---the question of the debate shouldn’t focus on centralized models of peacebuilding---their demand for a concrete alternative reflects Western methodological bias that reproduces failed state-building models---rejecting liberal state-building brings a slew of peaceful local alternatives into view

Oliver P. Richmond 10, professor at the School of International Relations and Director of the Centre for Peace and Conflict Studies, University of St Andrews, October 29, 2010, “What Is Your Alternative?,” online: http://www.opendemocracy.net/oliver-p-richmond/what-is-your-alternative

The phrase ‘what is your alternative?’ is often heard in response to criticisms of the liberal peace. This is like saying, ‘resistance is futile’. The liberal peacebuilding and statebuilding framework is regarded as the highest achievement of modern society – a way of taming the violence of state formation. Compliance with this hierarchical schema is demanded like a proof of identity (the author was once told off at a major international conference for appearing ‘anti-liberal’!). In a post-colonial era of pluralism, diversity, and the promotion of development, there is a somewhat contradictory desire for a centralised model of peace, to be led by key international actors and donors, who together will maintain the dominant liberal and neoliberal version of the state, together with its associated knowledge systems. Its proponents appear to be in constant fear of a sudden leadership challenge from inferior or alien forms of peace. It might be better to recognise the changes that have already occurred to the liberal peace model - from Timor where the rational state is being mediated by a customary and traditional order, to Guatemala where the indigenous population is increasingly holding the neoliberal state accountable to an alternative life-world, and Afghanistan, where a range of actors (some quite unsavoury) have begun to demand and receive accommodation in the political process. To begin to understand such processes, and how they may contribute to a peaceful order in a positive sense, which is locally relevant, is far more important than maintaining the liberal state or even the global economy in its current form. Ultimately, this request for an alternative fails to recognise the implications of such processes and maintains the exclusiveness and exclusionary dynamics of the liberal peace. It is a form of censorship that negates any kind of peace not organised in a similar fashion to that of a liberal peace. It is a power claim, couched in terms of an elite knowledge, designed either to preserve northern hegemony, or simply resulting from a methodological bias towards security, rights, and institutions, as seen via northern, rational problem-solving approaches. These biases write out the voices, needs, rights, and socio-historical milieu of many of the world’s citizens in post-conflict and development settings beyond the global north. They evacuate the local and replace it with western modes of politics and economy - with western hegemony- however well-meaning- expressed through peacebuilding, statebuilding, aid and development. Such statements also mistake the target of our critique. Critics like myself are not ‘in it’ for ideological reasons, or even to produce a new narrative for peacebuilding, also controlled by those who have created it. It is not to be troublesome, or to present new idealistic visions of an alternative for the many post-conflict citizens of the world. Instead we are trying to restore to the centre of debate, and to the centre of the very processes of peacebuilding or statebuilding, the political subjects who are the reason for their existence. Ironically, liberal peacebuilding and statebuilding have forgotten the situation of their subjects - the needs, rights, and historical, contextual milieu of the post-conflict citizen. The critique’s central engagement with peace confuses many commentators who are used to thinking about exporting ‘flat-pack’ assemblages for state reform: programming that mirrors some idealised western experience. It also confuses those who think liberalism represents the ‘end of history’ and so the ultimate form of peace. It also confuses those who are concerned with states, institutions, and power, and believe that organised and large scale mobilisation is the only form of progressive politics. They are often more used to thinking in terms of - and defending - power, sovereignty, institutions, territory and markets (with ‘rights’ as a rhetorical flourish). Of course liberalism is flexible about the right of critique, which after all is the engine of progress in Enlightenment terms. So it is peculiar that, for many, it is almost taboo to critique the liberal peace. There is an unwillingness to recognise that exported grand political projects may not succeed, or that power disappears or is wasted on white elephant projects. Meanwhile, local political subjects, aware of their own context, can make peace for themselves and also crave autonomy. Even in post-conflict settings, it is the citizens who either give legitimacy to peacebuilding, statebuilding, and development projects run by externals, or withdraw it. Yet rampant interventionism together with a civilising mission have replaced processes of local and national enablement and support. Nevertheless, it is an inconvenient fact that local subjects in all sorts of post-conflict settings around the world, have found ways of transforming the liberal peace project, despite its apparent hegemony. Sometimes this appears commensurate with international norms, human rights, and democracy, and sometimes not. But local contexts and the associated norms of a liberal peace are modifying each other. So the answer to the question, what is the alternative? - is to look around the world and see how many modifications and alternatives are actually out there, coming into being in post-conflict settings and driven by local capacity. Some appear more conducive to forms of peace than others - but this calculation should rest on the level of local legitimacy, representation, and engagement with needs, assessments which should then be incorporated into international understandings of legitimacy rather than the other way around. There are many different types of state, some nuanced versions of liberal states, others neoliberal, others centralised, some decentralised, others authoritarian, some social democracies, some ethnically majoritarian, some power sharing, federal, confederal, some representative democracies, some participatory, some representing a national myth, some based on religion or socialism, some balancing many identities, many adopting and developing particular strategies in the global economy, and so on. This diversity is reflected in both regional arrangements and in local and contextual forms of politics, too. This is far more the reality than the current banality of liberal peace/neoliberal state vs local anarchy/ failed states that mark much of the west’s rather colonial view of the world. It is no wonder that there has been a post-colonial reaction against this from many states and emerging donors, the BRICs, and of course, civil society and customary actors, and individual citizens concerned with their identity, global inequality, and the local resonance of the peace, the state, regional and global order they desire. So, a far more plausible research strategy for peacebuilding and statebuilding would look at the impact such local agencies, norms, institutions, and capacity have on the liberal peace and states-system, processes of state formation, and vice-versa. This would develop and protect local, state, and regional dynamics of peace, pluralism and diversity, institutions, law, and rights as well as dealing with needs (which has been one of the most problematic omissions of the liberal peace system). It would prevent the hijack of peacebuilding and statebuilding for ideological ends, and would mitigate the unintended consequences of the dominant northern methodological bias towards security, power, state and institutions - especially on human life. I would argue that such research reflects what is already occurring rather than a policy driven attempt to create external compliance. We are already beyond the liberal peace. Luddites might defend it, and want to be taken to the hypothetical leader of the daring challenge against the liberal peace and neoliberal state (if only to attempt a citizen’s arrest), but the more significant research project is about how the dominant models are being modified and reformed by their supposedly weak subjects, who are utilising their own institutions, context, and rights of representation - as democracy intends - though against the odds. This form of critical and local agency is not just modifying the liberal peace but it is a challenge to the centralised and state-centric notions of power and norms that this peace is organised around. They are leading and producing hybrid, post-liberal forms of peace. To resist this would be futile: to enable, assist, and mediate it would be a better strategy.

## 1NR

### 1NR Obama Circumvention

#### Obama will never release these people – turns the aff

Michael Crowley, May 24, 2013, Time, “Can Obama End the War on Terror?” <http://swampland.time.com/2013/05/24/can-obama-end-the-war-on-terror/>

But there’s another other critique. This one holds that Guantanamo itself isn’t the problem. It’s the policy behind it: indefinite detention. Obama’s plan would send some Guantanamo detainees back to their home in Yemen, and possibly to some other countries, and try others in the criminal and military justice systems on U.S. soil. But even Obama’s plan would leave nearly 50 prisoners in a state of indefinite detention. These are prisoners who probably can never be charged in court, either because the evidence against them is tainted by the use of torture, or because the government is convinced they are dangerous but does not have specific charges to mount against them. On this question, Obama essentially punted: “[O]nce we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law,” he said.¶ “[H]istory will cast a harsh judgment on this aspect of our fight against terrorism, and those of us who fail to end it,” Obama went on to say. But he has not offered a clear plan for what to do with these prisoners who apparently cannot be tried. One thing he does not seem prepared to do is simply release them. America may have damaged al Qaeda enough that Barack Obama can talk about a day when the war against the disciples of Osama bin Laden will be over. But that day has not yet arrived. And until it does, Obama may have to live with some unpleasant moral compromises.

#### Obama could easily do the plan if he wanted to

**Daily Kos 13** (“How Obama could close Guantanamo” [http://www.dailykos.com/story/2013/07/25/1226653/-How-Obama-could-close-Guantanamo] July 25)

It was part of a campaign promise the president made, to close the camp and "determine how to deal with those who have been held there." But five years on, the controversial prison remains open. Congress has made it impossible for the military to close that awful place, but Obama - if he wanted to - could easily transfer the prisoners out of there so they can be tried as our Constitution promises and requires.¶ Here's how. The federal prison system are in the executive branch, they can be directed to do Obama's bidding via executive order, no congressional action needed. And the US Marshall Service is subject to Obama's orders too. They have large passenger aircraft based in Oklahoma City for the sole purpose of transporting prisoners. No appropriations involved.¶ So send the Marshalls to Gitmo, order the military to open the doors (this costs the military zero thus no congressional prohibition) and fly the prisoners to the states to await trial in federal prisons, which unlike state prisons, have plenty of room. And get on with administering justice.

#### The NDAA explicitly allows it

Eviatar 13 – Daphne, “Obama can close Guantanamo” [http://www.japantoday.com/category/opinions/view/obama-can-close-guantanamo] May 4)

The National Defense Authorization Act that Congress passed last year specifically allows the president to transfer detainees out of Guantanamo if the defense secretary certifies that it’s in the interest of U.S. national security and that measures will be taken to substantially mitigate any risks they may pose.

#### Guantanamo hearings prove

IPS, 13 (Inter Press Service, “U.S. Claims No Indefinite Detention at Guantánamo”, 3/13/13, <http://www.ipsnews.net/2013/03/u-s-claims-no-indefinite-detention-at-guantanamo/>)

In an unusual public testimony, the U.S. government has publicly stated that no “indefinite detention” is taking place among detainees at the military prison in Guantánamo Bay. “The United States only detains individuals when that detention is lawful and does not intend to hold any individual longer than is necessary,” Michael Williams, a senior legal advisor for the State Department, told a hearing at the Inter-American Commission on Human Rights. The testimony took place Tuesday as a panel of human rights lawyers appealed before an international human rights body over what they called an “unfolding humanitarian crisis” at the military prison, calling for an end to ongoing human rights violations they say are being committed against the detainees. The hearing, at the Organisation of American States headquarters here in Washington, marked the first time since President Barack Obama’s re-election that the U.S. government has had to publicly answer questions concerning Guantánamo Bay. Legal representatives for the detainees also presented disturbing eyewitness accounts of prisoner despair at the facility, brought on by prolonged indefinite detention and harsh conditions that has led to a sustained hunger strike involving more than 100 prisoners at the U.S. base in Cuba. Established in 2002, the Guantánamo Bay military prison held, at its height, more than 700 suspects of terrorism. The facility currently holds 166 prisoners, of whom 90 – most of them Yemenis – have reportedly been cleared for repatriation, while another 36 are due to be prosecuted in federal courts, although those trials have yet to take place. The remaining are being held indefinitely without trial because evidence of their past ties to terrorist groups is unlikely to be admissible in court. In some cases, this is reportedly due to its acquisition by torture, while in other cases because the U.S. government believes that the suspects would return to extremist activities if they were to be released. The IACHR has repeatedly called for the closure of the Guantánamo Bay detention centre, and has requested permission to meet with the men detained there. The U.S. government has failed to allow the hemispheric rights body permission to make such a visit, however. The IACHR held Tuesday’s hearing to learn more about the unfolding humanitarian crisis at the Guantánamo prison. It also focused on new components to the National Defense Authorization Act (NDAA), signed earlier this year, which has been criticised for authorising indefinite detention and restricts the transfer of Guantánamo detainees. Tuesday’s hearing saw testimony from experts in law, health and international policy, covering the psychological impact of indefinite detention, deaths of some suspects at Guantánamo, the lack of access to fair trials, and U.S. policies that have restricted the prison’s closure. On taking office four years ago, President Obama famously promised to close the prison and ordered an end to certain interrogation tactics that rights groups called “torture”, including “extraordinary rendition” to third countries known to use torture. Yet he has since relied to a much greater extent on drone strikes against “high value” suspected terrorists from Afghanistan, Pakistan, Yemen and Somalia, while failing to close the prison. “In the 2008 campaign, both [presidential candidate John] McCain and Obama were squarely opposed to Guantánamo and agreed that this ugly hangover from the Bush/Cheney era had to be abandoned,” Omar Farah, staff attorney at the Center for Constitutional Rights (CCR), told IPS. “But four years later, the political whims have completely reversed and there is almost unanimity that Guantánamo needs to remain open aside from occasional platitudes from the president.” Yet Farah is clear in his view that reversing this trend is still well within President Obama’s power. “This is something that really calls for leadership from the president – he needs to decide if he wants Guantánamo to be part of his legacy,” Farah says. “If the U.S. isn’t willing to charge someone in a fair process and can’t produce proper evidence of their crimes, then those prisoners have to be released. There is just no other way to have a democratic system. We’ve never had this kind of an alternative system of justice, and yet that’s what we have in Guantánamo.” Pervasive health crisis Human rights activists claim the Obama administration has not only broken his promise to rapidly close Guantánamo, but that his administration has also extended some of the worst aspects of the system. They point to the administration’s continuance of indefinite detention without charge or trial, employing illegitimate military commissions to try some suspects, and blocking accountability for torture. At Tuesday’s hearings, the State Department’s Williams made extensive note of the health facilities and services that the U.S. government has made available for the detainees. And while critics do admit that the government facilities do meet international standards for detainees’ physical needs, they note that the mere fact of indefinite detention inflicts a toll all its own. “The hopelessness and despair caused by indefinite detention is causing an extremely pressing and pervasive health crisis at Guantánamo,” Kristine Huskey, a lawyer with Physicians for Human Rights, an advocacy group, told IPS. “A person held in indefinite detention is a person deprived of information about their own fate. They are in custody without knowing when, if ever, they will be released. Additionally, they do not know if they will be charged with crimes, receive a trial, or ever see their families again. If they have been abused or mistreated, they also do not know if this will happen again.” At Tuesday’s hearing, however, Williams refused even to admit that indefinite detention was taking place at Guantánamo. CCR’s Farah called the whole experience “very disheartening”. “It was shocking – they explicitly denied that there is indefinite detention, despite the fact that most of the prisoners there have been there for more than a decade without charge or trial,” Farah said. “So we are looking for the IACHR to remain actively engaged and hope that they will continue to put pressure on the U.S. government to comply with their international legal obligations toward these prisoners.”

### 1NR Lower Courts

#### the lower courts will RULE TO DETAIN –

Worthington, 2011 (Andy is an investigative journalist and author of several books on Guantanamo bay, “Guantánamo and the Death of Habeas Corpus, The Future of  Freedom Foundation.” July 28, 2011) Retrieved from: <http://www.fff.org/comment/com1107u.asp>

Last month, the third anniversary of [Boumediene v. Bush](http://www.andyworthington.co.uk/2008/06/13/the-supreme-courts-guantanamo-ruling-what-does-it-mean/) (on June 12) passed without mention. This was a great shame, not only because it was a powerful ruling, granting the Guantánamo prisoners constitutionally guaranteed habeas corpus rights, but also because, after that bold intervention, which led to [the release of 26 prisoners](http://www.andyworthington.co.uk/guantanamo-habeas-results-the-definitive-list/) who subsequently won their habeas corpus petitions, the prisoners at Guantánamo have once more been abandoned by the courts.¶ The courts’ failure has come about largely because a number of judges in the D.C. Circuit Court, where appeals against the habeas rungs are filed, have revealed themselves to be at least as right-wing as the architects of the “War on Terror” in the Bush administration. Led by Judge A. Raymond Randolph, whose previous claim to fame on national security issues was that he supported every piece of Guantánamo-related legislation that was subsequently overturned by the Supreme Court, the Circuit Court has, in the last year, succeeded in gutting habeas corpus of all meaning, when its relief is sought by any of the 171 men still held at Guantánamo.¶ Throughout this year, I have [followed](http://www.andyworthington.co.uk/2011/02/24/habeas-hell-how-the-great-writ-was-gutted-at-guantanamo/), with [despair](http://www.andyworthington.co.uk/2011/03/31/mocking-the-law-judges-rule-that-evidence-is-not-necessary-to-hold-insignificant-guantanamo-prisoners-for-the-rest-of-their-lives/), the Circuit Court’s [rulings](http://www.andyworthington.co.uk/2011/04/20/more-judicial-interference-on-guantanamo/), which are [distressing](http://www.andyworthington.co.uk/2011/06/25/judges-keep-guantanamo-open-forever/) on two fronts: firstly, because judges have whittled away at the lower courts’ demands that the government establish its case “by a preponderance of the evidence,” which is a very low standard in the first place; and secondly, because the Circuit Court has reinforced the misconception at the heart of the “War on Terror,” almost delighting, it seems, in failing to acknowledge that soldiers are different from terrorists.¶ In fact, despite the Supreme Court’s attempt to grant rights to the prisoners, both soldiers and terrorists are still, essentially, held at Guantánamo as a category of human being with almost no rights at all — what George W. Bush notoriously referred to as “unlawful enemy combatants.” ¶ Last month, just after the Boumediene anniversary, on June 23, Judge Ricardo Urbina delivered the 60th Guantánamo habeas ruling, turning down the habeas petition of Khairullah Khairkhwa, an Afghan prisoner ([PDF](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv1805-200)). This was unsurprising, as Khairkhwa was the governor of the western province of Herat under the Taliban, and had also served as the Taliban’s Minister of the Interior. Crucially, Khairkhwa’s defense turned on his claim that he did not have a military role, but Judge Urbina agreed with the Justice Department that there was evidence indicating that “he served as a member of a Taliban envoy that met clandestinely with senior Iranian officials to discuss Iran’s offer to provide the Taliban with weapons and other military support in anticipation of imminent hostilities with US coalition forces.”

#### lower appeals decisions are the MOST visible – plan leads to more of them which turns the aff

Fallon 10 Harvard Constitutional Law Prof (Richard H. Jr., “The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science”, Columbia Law Review 110 Colum. L. Review, 2010, <http://heinonline.org/HOL/Page?men_tab=srchresults&handle=hein.journals/clr110&id=367&size=2&collection=journals&terms=Supreme%20Court|Court&termtype=phrase&set_as_cursor=#366>, accessed 2013)

Third, even though the Court’s jurisdictional rulings have not entailed the recognition of substantive rights, they have had the effect – which was almost surely intended – of unsettling the status quo ante by giving notice to the Executive Branch that its detention policies are not immune from judicial scrutiny. More specifically, the Court’s jurisdictional decisions have invited litigation in the lower courts in which petitioners have asserted an array of substantive and procedural rights. The result has been a kind of “percolating” process through which challenges to executive practices that are initially advanced in the lower federal courts draw public attention and, what is more, law the foundation for future appeals to the Supreme Court. Despite relative quiescence to date, the Court has thus guaranteed itself future opportunities to consider what rights executive detainees have in a climate different from that which existed in the months and years immediately after 9/11.

### 1NR Previous Decisions

#### Previous decisions prove the courts will defer on not giving habeas to detainees in an ACTIVE THEATER OF WAR –

Nikkel 12, 2012, J.D. Candidate, 2012, William S. Boyd School of Law, Las Vegas; B.A., 2009, University of Nevada, Reno. Nevada Law Journal. Spring 2012. The Author would like to thank Professor Christopher L. Blakesley, Professor Terrill Pollman, and the Nevada Law Journal staff for helping with the research and writing of this Note.) Web, Lexis Nexis.

Dilawar's horrific death was one of many prisoner abuses at Bagram Airfield since late 2001, thrusting the base into the national spotlight as the New York Times and other media outlets began to investigate the abuses at Bagram. 6 In the wake of this increased international scrutiny and the United States Supreme Court's decision opening federal courts to detainee habeas challenges from Guantanamo Bay Naval Base in Boumediene v. Bush, 7 detainees at Bagram filed habeas suits in federal court to seek release. 8 The United States District Court for the District of Columbia ("District Court") consolidated these cases into a single action, Al Maqaleh v. Gates, and held in August 2009 that the Bagram detainees could indeed seek habeas relief in domestic courts. 9 However, the United States Court of Appeals for the District of Columbia ("D.C. Circuit") reversed this decision in May 2010 because the detainees' location in an active "theater of war" precluded their access to federal courts under Boumediene. 10 The D.C. Circuit's reversal revealed a fundamental paradox in the government's approach to the Afghan conflict and the "war on terror." 11 Presidents Obama and Bush have insisted the nation cannot be at "war" with al Qaeda and therefore the protections of the Geneva Conventions and other international law [\*445] do not apply to nor protect captured persons. 12 When the Bagram detainees challenged the legality of their detentions, the D.C. Circuit deferred to the executive's judgment and denied habeas relief because Bagram was in an "active theater of war in a territory under neither the de facto nor the de jure sovereignty of the United States." 13 This paradox puts Bagram detainees in a legal "black hole" 14 where they cannot obtain relief through traditional military justice (like Geneva-governed military commissions) and domestic courts refuse to hear their habeas claims.

### 1NR Black Sites

#### – the CIA will just transfer Guantanamo detainees to black sites to avoid the plan\*\*\*1AC AUTHOR

Parry 13 Law Professor (John T., Lewis & Clark University, JD cumm laude Harvard Law School, “Ahmad and Others v. The United Kingdom (Eur. Ct. H.R.) Introductory Note by John T. Parry”, *International Legal Materials*, vol. 52 no. 2 pp. 440-495, 2013, <http://www.jstor.org/stable/10.5305/intelegamate.52.2.0440?origin=JSTOR-pdf>, accessed September 2013)

Extraordinary rendition, as conducted by the Central Intelligence Agency (‘CIA’), appears to be the latest mutation of enforced disappearance. From the information available it appears that the CIA had set up an apparatus, by which it collected information about suspected terrorists, abducted them, transferred them to one or more countries where they were detained without any legal process. In these countries, unregistered places of detention (also known as ‘black sites’) were in full operation. At these sites, ‘enhanced interrogation techniques’ — a euphemism for torture — were applied to individuals. It is difficult to believe that the hosting countries had no knowledge, actual or constructive, of this. For instance, Poland and Romania have been named as two of the hosting countries.20 Despite the denial by the former country, it has been reported that indeed it was implicated in the CIA program.21

### 1NR Stripping Turns Case

#### a) worse for judicial globalism – stripping makes habeas a “phrase with no underlying force” - \*1AC AUTHOR

Milko 12

[Winter, 2012, Jennifer L. Milko, “Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, 50 Duq. L. Rev. 173]

In light of the compelling arguments on both sides, several important issues have ambiguous answer, and the Supreme Court has, thus far, not chosen to shine light on the situation. Following the 2010 October Term and the Supreme Court's denial of all Guantanamo detainee petitions, the High Court has sent a message that it does not want to review the D.C. Circuit's interpretation of the procedural and substantive issues which that Circuit has implemented. The Supreme Court has not ruled on any cases relating to Guantanamo detainees since its 2008 decision in Boumediene v. Bush. While the Court settled the issue of whether detainees had the privilege of habeas corpus in that case, the Court left the intricacies of the writ and its scope for the lower courts to define. Though leaving this authority in the hands of the lower courts may have been a been appropriate at the time Boumediene was decided, the number of habeas petitions and the subsequent petitions for certiorari to the Supreme Court indicate that there are important issues that must be clarified, and the Supreme Court [\*194] should grant certiorari to be the final voice on these issues for several reasons. First, the stakes in these habeas petitions are high. The detainees at Guantanamo have already been assured the right to petition the courts for habeas corpus to challenge their detention as unlawful. The scope of the courts' authority to provide a remedy is a critical for those individuals on a personal level as well as for the nation as whole. This country was created with a tripartite system and checks and balances for a reason: the Founding Fathers implemented a governmental structure that would serve to limit the three individual branches in order to protect individual liberty. n142 The writ of habeas corpus has an extensive history and is considered to play an integral role in the protection of individual liberty. n143 Habeas corpus is the Judiciary's tool to check the power of the Executive, and has traditionally allowed courts to provide a remedy to reign in the unbridled power of the Executive. The Court in Boumediene asserted that habeas gave the prisoner a meaningful opportunity to challenge his confinement as unlawful, and "the habeas court must have the power to order conditional release of an individual unlawfully detained - though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." n144 While the importance of the writ for the preservation of the individual liberty and as a check on Executive power is one aspect of the tripartite system, the Executive's interest in maintaining a unified voice in the realm of foreign policy is another key concern. By allowing the courts to order release of a detainee or to order advance notice of transfer so that the petitioner may present evidence that he would be harmed in a recipient country, the Judiciary would be forced to make determinations about foreign affairs that its judges may not be competent to make. In a time of chaos and intricate foreign relations, the sensitivity and difficulty of forging meaningful diplomatic relations with other nations at this time in history is a key concern of the Executive, and properly within that Branch's authority under the Constitution. Permitting the Judiciary to make determinations from the bench about the appropriateness of human rights or other similar determinations in a judicial proceeding could very well damage the diplo [\*195] matic relations that the Executive is attempting to form with recipient nations. This separation of powers dilemma facing the High Court has no easy solution, but the critical role that the proper allocation of authority plays in the separation of powers system and the lack of substantive guidance on Guantanamo issues since Boumediene in 2008 demands attention from the Supreme Court. Additionally, because the Guantanamo cases have been litigated in the D.C. Circuit, no other appellate courts have had the opportunity to review these issues. n145 Without the opportunity for an opposing view in another judicial circuit and with no final determination by the Supreme Court, the D.C. Circuit Court of Appeals has been free to shape the law of Guantanamo habeas cases as it wishes. Adding to the concern of the lack of a "check" on the D.C. Circuit Court of Appeals is the fact that the trend within the Circuit itself has been inconsistent as the district courts have assumed a greater role for the judiciary, only to be chastised on appeal for failure to defer to the political branches in these cases. With the D.C. Circuit serving as the sole authority on the scope of the courts' habeas power in Guantanamo cases, petitioners' claims that this court has been improperly applying Supreme Court precedent is another concern that the High Court should address. In both release and transfer cases, the petitioners have argued that while Boumediene assures the privilege of habeas corpus, the Kiyemba cases have foreclosed the courts from fashioning a remedy in contradiction to Boumediene. n146 Instead, the D. C. Circuit Court of Appeals has refused to interfere, based on the Munaf proposition that the determinations of the Executive should not be second-guessed, and has accepted the assurances of the Executive Branch that they are working secure release or that they will not send detainees to countries where it is more likely than not that they will face torture. Raising suspicions that the use of Munaf in the Guantanamo habeas cases was perhaps improper, three Supreme Court Justices questioned the role of that decision and the questions it raised. Petitioners have alleged that the circumstances of that case are markedly different than the facts in the Guantanamo cases, and that Munaf should not be read to bar detainees in habeas petitions [\*196] the opportunity to challenge their transfer or the court to enjoin such a transfer. The nature of these Guantanamo issues presents a complex situation that makes the separation of powers issue more difficult. If the courts do traditionally have the power to require notice or order release under its habeas authority, the manner in which that remedy would require inquiry into the Executive Branch's policy decisions may cross the line into a political question. Because of the nature of diplomacy and foreign affairs in contemporary society, the thought may be that it is easier to reduce the rights of the individual in order to provide for the national security of the country as a whole. IV. Conclusion There are valid arguments on both sides in this issue and the nature of the cases and the times in which we live complicate the situation. The Supreme Court is in a difficult situation-if the Court grants certiorari to review the D.C. Circuit Court of Appeals' jurisprudence of the Guantanamo cases, it must settle an issue of vast importance. Separation of powers and the roles of the Executive and Judiciary in the context of Guantanamo litigation impact the individual liberty of the petitioners and the sensitive nature of foreign affairs and the war on terrorism. Because of significance of these issues, the D.C. Circuit should not be the sole voice addressing them. It should be the responsibility of the nation's Highest Court to settle the debate and determine the appropriate balance of power. Without this supreme guidance, the petitioners will continue to present the same issues and questions to the courts, and these cases will continue to be litigated according to the trend that has dominated the D.C. Circuit over the past several years. With a new Supreme Court Term beginning and new Guantanamo cases bearing old issues appearing before the Court again, the Supreme Court should grant certiorari to review the delicate balance between the power of the courts and the authority of the political branches. The Court left the scope of habeas power undefined after Boumediene and has refused to substantively address the issues created in its aftermath. Since that decision, the D.C. Circuit has given great deference to the Executive Branch. Without any supreme guidance, the D.C. Circuit has been free to fashion the law as it sees fit with no further checks and balances on that interpretation as this Circuit is the sole decision-maker re [\*197] garding these habeas petitions. If the current system stays in place, appeals and petitions regarding the same issues for Guantanamo detainees will continue to cycle through the D.C. Circuit. With so many petitions to the High Court on the same subject, it seems only logical that the Supreme Court should finish what it started nearly six years ago and decide whether the courts have a role to play in the release and transfer of detainees. More Guantanamo petitions for certiorari have been filed in the 2011 Term, and one has raised a familiar issue yet again: whether the Guantanamo detainees have the right to challenge transfer to a recipient nation on fear of torture. n147 The Founding Fathers envisioned a system of checks and balances in order to protect the People from oppression and to prevent any one person or entity from hoarding too much power. The struggle for power between the branches of our government is something that will never fade away entirely, and there are times when it is proper for one branch to defer to the judgment of another, but when an issue arises that has raised so many questions and has been the foundation for numerous appeals and petitions to the Supreme Court for clarification, the People deserve at least some guidance on such an unsettled area of the law. As of now, the D.C. Circuit has been trustworthy of the Executive Branch, and, while in the end, such deference in this area may be appropriate, the very nature of habeas corpus is a strong tool in the hands of the judiciary which should be considered by the Supreme Court. The Court should analyze whether allowing deference strips the Judiciary of the important check of habeas corpus because granting the right of habeas corpus to prisoners without giving the courts the subsequent power to remedy the problem has the potential of making this important right just a phrase with no underlying force.

#### b) all of your 1ac evidence is in the context of giving Boumedine legitimacy – but Obama will never apply it to black sites

Glenn Greenwald, is a former Constitutional and civil rights litigator and is the author of three New York Times Bestselling books: two on the Bush administration's executive power and foreign policy abuses, and his latest book, With Liberty and Justice for Some, an indictment of America's two-tiered system of justice. Greenwald was named by The Atlantic as one of the 25 most influential political commentators in the nation, “The evil of indefinite detention and those wanting to de-prioritize it”, Jan 8th 2012, http://www.salon.com/2012/01/08/the\_evils\_of\_indefinite\_detention\_and\_those\_wanting\_to\_de\_prioritze\_them/

Post-Boumediene, indefinite detention remains a staple of Obama policy. The Obama DOJ has repeatedly argued that the Boumediene ruling should not apply to Bagram, where — the Obama administration insists — it has the power to imprison people with no due process, not even a habeas hearing; the Obama DOJ has succeeded in having that power enshrined. Obama has proposed a law to vest him with powers of “prolonged detention” to allow Terrorist suspects to be imprisoned with no trials. His plan for closing Guantanamo entailed the mere re-location of its indefinite detention system to U.S. soil, where dozens of detainees, at least, would continue to be imprisoned with no trial. And, of course, the President just signed into law the NDAA which contains — as the ACLU put it — “a sweeping worldwide indefinite detention provision,” meaning — as Human Rights Watch put it — that “President Obama will go down in history as the president who enshrined indefinite detention without trial in US law.” Those held at Guantanamo will continue to receive at least a habeas hearing, but those held in other American War on Terror prisons will not. Read Boumediene’s Op-Ed to see why this is so odious.

### 1NR Uniqueness

#### YOU HAVE READ A SINGLE PIECE OF DEVINS EVIDENCE WHICH OUR 1NC EVIDENCE ASSUMES –

#### Devins doesn’t talk about the Combatant Status Review Tribunal (“CSRT”)101 and then with the Detainee Treatment Act of 2005 (“

most lawmakers treated Hamdan as simply a call for Congress to set policy in this area - to formally authorize military commissions and to place constraints on the operation of those commissions. Under this view, lawmakers went about balancing the Geneva Conventions, habeas corpus filings, judicial review, and executive branch discretion. Their solution was a bill that authorized military commissions,

#### Congress overturned Rasul and Hamdi with the detainee treatment act – it threw pending habeas claims AWAY

Congress responded yet again, this time in the form of the Military Commissions Act of 2006 (“MCA”), which scholars have called “a harsh rebuke of the Hamdan court.”119 In order to provide President Bush with the “tools he need[ed] to protect [the] country” by allowing military tribunals to provide swift justice for terrorists and to combat future attacks,

#### The House would hate it - they voted against ending indefinite detention in May - twice

FCNL 13 June 14th, 2013, Friends Committee on National Legislation, http://fcnl.org/issues/foreign\_policy/FY\_2014\_Military\_Authorization\_Amendments\_to\_Watch/

(Failed 200-226) Amendment No. 13: Reps. Adam Smith (WA) and Chris Gibson (NY) have submitted a bipartisan amendment that would eliminate indefinite military detention of any person detained under 2001 Authorization of the Use of Military Force authority. The amendment strikes section 1022.

(Failed 174-249) Amendment No. 20: Rep. Adam Smith (WA) has submitted an amendment that would provide a framework for closing the US military prison at Guantanamo Bay, Cuba.

#### Congress would hate themselves – the GOP doesn’t want to move or repatriate cleared detainees – Congress would never commit to following up on the plan

Wilson 11\* Elizabeth A. Assistant Professor for Human Rights Law, Seton Hall University; Ph.D., University of Pennsylvania; J.D., Harvard University. New England Law Review, Spring, 45 New Eng. L. Rev. 625

He made efforts to try detainees charged with perpetrating 9/11 [\*652] and other terrorist acts in federal courts; to move Guantanamo detainees to the United States; and to repatriate cleared detainees. All of these efforts were vigorously opposed by Congress and ultimately thwarted. Nowhere was it more evident that a change in leadership style on the President's part did not alter the partisan climate than in the failure to close Guantanamo. Despite the continuity in President Obama's approach to counter-terrorism, Republicans quickly mobilized to block key elements of President Obama's agenda, when those with extreme views strove to stir up opposition with allegations that he is a Muslim, a socialist, a terrorist, and a foreigner.

### 1NR Apply Old Laws

#### Even if they win Congress won’t create a NEW LAW, Congressional stripping – Congress will assert that the DTA already stripped habeas jurisdiction. The didn’t it in response to the listen habeas litigation from Bagram

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In the course of the first habeas case ever litigated on behalf of a detainee held in Bagram Air Force Base, I attempted to locate the report and was told that Congress had no record that the procedures had ever been submitted. However, after allegations that the procedures were not submitted to Congress as required by law, the government immediately produced a copy of the written procedures as an exhibit attached to a reply brief and stated that the procedures had been submitted to Congress on August 10, 2006. 135 The report was filed with Representative Sensenbrenner, a conservative Republican who was the Chairman of the House Judiciary Committee at the time. 136 More egregiously, Senators John Kyl and Lindsey Graham inserted a statement purporting to show Congress intended the DTA to contain a strip of habeas jurisdiction into the Congressional Record just before the DTA was passed when the relevant amendment had been passed almost a month earlier; 137 they later claimed in a brief to the Supreme Court that the statement was an "extensive colloquy" (i.e., live floor debate clarifying the effect of a bill before a vote is taken). 138 Actions such as these raise the suspicion, though not the certainty, that at least some members of Congress were actively colluding with the executive.

#### Military commissions turn the aff – the aff can’t solve if their trials produce coerced statements from witnesses, allowing the military to hand-pick the jury pool, with no attorney-client privilege

#### Congress strips oversight and jurisdiction of the courts

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Passivity is not Congress's worst failing in recent years. If the Republican-led Congress did not actively approve the President's actions, it threw up a shield, so that the re-balancing of constitutional powers was left up to the courts. 121 Democrats alleged that while in the majority, Republican members of Congress chairing the military and intelligence committees were refusing to hold hearings or to use the subpoena power to compel the Bush Administration to turn over key documents and memos related to anti-terrorism policy. 122 Specific examples abound, but a few of the highlights are the following: After 9/11, the Federal Bureau of Investigation ("FBI") picked up hundreds of Muslim-Americans, some on terrorism charges, but the majority were held for immigration offenses like overstaying a visa. 123 These individuals, who eventually became known collectively as "the September 11 Detainees," were held secretly and without charge, sometimes for a matter of months. 124 Even after the Inspector General of the Department of Justice issued a critical report in April 2003 identifying "significant problems" in the custodial treatment of these detainees, Congress took no action in response. 125 [\*647] Abu Ghraib provides another example. On May 12, shortly after 60 Minutes broke the story on network television on April 28, 2004, 126 Congress held a closed door screening of many more photos and videos, all of which were apparently "appalling" and "horrific." 127 Yet Congress did not pass the Detainee Treatment Act ("DTA") until December 2005, almost a year and a half later. While the DTA required, as a matter of law, that the military conform its interrogation practices to the Army Field Manual, it also attempted to strip federal courts of jurisdiction to hear the habeas petitions filed by Guantanamo detainees. 128 These petitions arose from the Supreme Court's decision in Rasul v. Bush that the federal habeas statute extended to cover a military base "under the complete control" of the United States. 129 When the Supreme Court held in Hamdan v. Rumsfeld that Congress had not spoken clearly enough to give the provision retrospective effect, 130 Congress immediately passed the Military Commissions Act, making it clear that, yes, it really meant to strip the courts of jurisdiction. 131 Ensuring that the Hamdan decision resulted in no prosecutions of Bush Administration officials, Congress included a sweeping grant of immunity. To examine Congress's role very generally, it is clear that much of the legal uncertainty generated by post-9/11 Bush-Administration policies can be traced to the joint resolution passed by Congress the day after 9/11, the Authorization for the AUMF. 132 The AUMF was succinct but vague: it clearly gave the President the authority to use force against the perpetrators of 9/11, but it did not clearly authorize the President to detain suspects indefinitely, to convene military tribunals, or to create lawless enclaves (so-called black sites) where suspects could be "rendered" [\*648] without due process of law. 133 By not clarifying its intent, Congress allowed the President to claim that the sweeping powers he sought to exercise in the "War on Terror" were in fact authorized by Congress, even if they were not inherent in his Article II authority. At times, the majority in Congress did much more than throw up a shield. Even when Congress voted on oversight measures, individual members, intentionally or unintentionally, subverted its oversight. For example, the DTA requires the Department of Defense to file a report with Congress describing the procedures used to determine the status of "aliens detained in the custody or under the physical control" of the Department of Defense "not later than 180 days after" the DTA became law. 134 In the course of the first habeas case ever litigated on behalf of a detainee held in Bagram Air Force Base, I attempted to locate the report and was told that Congress had no record that the procedures had ever been submitted. However, after allegations that the procedures were not submitted to Congress as required by law, the government immediately produced a copy of the written procedures as an exhibit attached to a reply brief and stated that the procedures had been submitted to Congress on August 10, 2006. 135 The report was filed with Representative Sensenbrenner, a conservative Republican who was the Chairman of the House Judiciary Committee at the time. 136 More egregiously, Senators John Kyl and Lindsey Graham inserted a statement purporting to show Congress intended the DTA to contain a strip of habeas jurisdiction into the Congressional Record just before the DTA was passed when the relevant amendment had been passed almost a month earlier; 137 they later claimed in a brief to the Supreme Court that the statement was an "extensive colloquy" (i.e., live floor debate clarifying the effect of a bill before a vote is taken). 138 Actions such as these raise the suspicion, though not the certainty, that at least some members of Congress were actively colluding with the executive.

#### Hamdi and Rasul are examples of this

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The first challenges to the detention program came in the form of Rasul and Hamdi, both decisions handed down on June 28, 2004, by the Supreme Court.93 Sixteen detainees—two British, two Australian, and twelve Kuwaiti citizens—brought the Rasul action, seeking a writ of habeas corpus in federal court.94 In the 6 to 3 Rasul decision, the Supreme Court held Guant´anamo prisoners could challenge the lawfulness of their detention in federal court because Cuba’s “ultimate sovereignty” over the base did not preclude access.95 On the other hand, in Hamdi, a plurality of the Court found the government could detain an American citizen as an enemy combatant pursuant to the AUMF, but had to offer him the opportunity to challenge the factual basis for his detention with the benefit of a fair hearing before a neutral tribunal and access to counsel.96 Justice O’Connor’s plurality opinion warned “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”97 O’Connor thought the war against the Taliban closely resembled wars of the past, and the president’s traditional war powers likely did not apply in the war against al Qaeda or in conflicts against other non-state actors.98 Furthermore, as critical as the Government’s interest may have been in addressing immediate threats to national security, “history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”99 O’Connor concluded enemy combatant proceedings should be carefully tailored to alleviate “their uncommon potential to burden the Executive at a time of ongoing military conflict.”100 Therefore, the Court attempted to strike a balance in Rasul and Hamdi: although the president could detain unlawful combatants, the administration needed to provide basic due process for captured persons. In response to the Rasul and Hamdi decisions, the government responded twofold to limit due process for Guant´anamo detainees: first with the Combatant Status Review Tribunal (“CSRT”)101 and then with the Detainee Treatment Act of 2005 (“DTA”).102 A mere nine days after the Rasul and Hamdi decisions, allowed Guant´anamo detainees to contest their designations as enemy combatants. 103 The CSRT allowed the detainees to consult a “personal representative” (a military officer “with the appropriate security clearance”) to review “any reasonably available information” possessed by the Department of Defense regarding the detainee’s classification.104 After a preparation and consultation period of thirty days, the Department of Defense would convene a tribunal, composed of three neutral commissioned military officers, to review the detainee’s status.105 However, the rules of evidence did not apply and the tribunal allowed admission of hearsay.106 The detainee could only call “reasonably available” witnesses and the memo created a rebuttable presumption in favor of the government’s evidence.107 Therefore, although the executive branch complied with the Court’s mandate for a neutral tribunal before which detainees could challenge their classifications as “enemy combatants,” the limited due process protections led to criticism that the CSRTs were not in place to discover the truth about the detainees, but rather to prolong their detentions.108 Anticipating more judicial challenges from Guant´anamo detainees due to the shortcomings of the CSRT process, Congress finally entered the fray on December 30, 2005, by passing the Detainee Treatment Act.109 The Act amended 28 U.S.C § 2241, the federal habeas statute, and stripped federal courts of their jurisdiction to hear habeas petitions filed by detainees.110 Couched in language about prohibiting “cruel, inhuman, or degrading treatment” of persons in the United States’ custody,111 the Act codified Wolfowitz’s CSRT memo112 and provided, “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guant´anamo Bay, Cuba.”113