#### 1AC Abstention

#### Advantage 1 is Abstention

#### Failure of the Supreme Court to substantively rule on detention authority causes judicial abstention on national security issues

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

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

Ruling on the Suspension clause gives a clear source of judicial review in military decisions- ensures precedent-setting

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

The relationship between the Suspension Clause and the Due Process Clause has sweeping implications for the detention of suspected terrorists and military engagements in multiple countries after September 11, 2001. In Boumediene v. Bush, the Supreme Court for the first time clearly gave the Suspension Clause independent force as an affirmative source of judicial power to adjudicate habeas petitions and as a source of meaningful process to prisoners in custody.15 As a consequence of this decision, Congress now cannot enact jurisdictions tripping legislation to deny executive detainees access to judicial review of the type that it has twice tried and failed to do in the past decade.16 A noncitizen detained as a national security threat may now have procedural rights to contest the detention.17 Even as the Executive has crafted nuanced positions on power and procedure for detaining persons for national security reasons, and even as Congress has adopted new detention-authorizing legislation,18 the judiciary continues to play a central role, though sometimes unwillingly and deferentially, in detention review.19 Apart from these specific developments, I argue that the reinvigorated Suspension Clause jurisprudence will continue to have ripple effects across all areas regulated by habeas corpus. What process must the government use to ensure that it detains the correct people? The traditional assumption was that the Due Process Clause provided the answers. Judges and scholars described a functional relationship in which due process supplied the rights while habeas provided the procedural means to vindicate them. Justice Antonin Scalia expressed this view in its starkest form in his INS v. St. Cyr dissent, arguing that the Suspension Clause “does not guarantee any content to (or even the existence of) the writ of habeas corpus.”20 Judges and scholars have long assumed that due process offers more protections than habeas corpus, or that the substance of habeas is coextensive with the Due Process Clause.21 Others have suggested that the Suspension Clause has a “structural” role, entwined with other individual rights guarantees.22 The U.S. government, in the wake of the September 11, 2001 attacks, adopted the view that noncitizens captured and detained abroad had no due process rights and thus no habeas remedy, and the D.C. Circuit agreed.23 In two cases that reshaped habeas jurisprudence, Hamdi v. Rumsfeld, decided in 2004,24 and Boumediene, decided in 2008,25 the Court connected the Suspension Clause and the Due Process Clause in a new way. Hamdi seemed to indicate that the Due Process Clause approach had triumphed. The Hamdi plurality applied the cost-benefit due process test from Mathews v. Eldridge26 to outline the procedural rights of citizens who challenge their detention.27 Following Hamdi, the precise scope of what due process required seemed the “looming question” for the future of executive detention.28 In response, the government hastily implemented administrative screening procedures for detainees, ostensibly to comply with the bare minimum that due process appeared to require.29 In Boumediene, the Court chose a different constitutional path. The Court did not discuss whether Guant´anamo detainees had due process rights, but instead held that the Suspension Clause independently supplies process to ensure review of executive detention.30 The Court put to rest the notion that the Suspension Clause is an empty vessel and regulates only the conditions for congressional suspension of the writ. Instead, the Court held that the Suspension Clause itself extended “the fundamental procedural protections of habeas corpus.”31 The Court’s view complements recent scholarship examining the common law origins of habeas corpus.32 However, while an- swering the Suspension Clause question, the ruling created another puzzle. The Court held that a prisoner should have a “meaningful opportunity” to demonstrate unlawful confinement, but it did not specify what process the Suspension Clause ensures, nor to what degree due process concerns influence the analysis.33 Lower court rulings elaborating on the process for reviewing detainee petitions have displayed confusion as to which sources to rely on.34 This Article tries to untangle this important knot.

Judicial abstention props up military adventurism and illegal arms sales

Scales and Spitz 12 (Ann Scales, prof at U Denver law school. Laura Spitz, prof at U Colorado Law School. The Jurisprudence of the Military-Industrial ComplexSeattle Journal for Social Justice Volume 1 | Issue 3 Article 51 10-11-2012)

First, our nation’s history and legitimacy rest upon a separation of military power from democratic governance. For that reason, the armed forces are subject to constitutional constraint. Second, however, as an aspect of separation of powers, courts try not to interfere in areas of foreign policy and military affairs. Often this is referred to as the “political question” doctrine, a determination that a matter is beyond the capabilities of judges. The strongest argument for this deference is that the political branches—or the military itself—have superior expertise in military matters. That may be true in some situations. I am not sure, for example, the Supreme Court would have been the best crowd to organize the invasion of Normandy. But what we now have is an increasingly irrational deference.7 Consider three cases: a. In Korematsu v. United States,8 the Supreme Court said the internment of Japanese-Americans at the beginning of 1942 was constitutional, based upon a military assessment of the possibility of espionage in preparation for a Japanese invasion of the United States. It turns out that the information provided by the military to the Supreme Court was falsified.9 But note two things: (1) the nation was in the midst of a declared world war, and (2) in subsequent less urgent circumstances, Korematsu would seem to argue strongly for military justifications to have to be based upon better, more reliable information than was offered there. b. In the 1981 case of Rostker v. Goldberg,10 the Supreme Court decided that it was constitutional for Congress to exclude women from the peacetime registration of potential draftees, even though both the Department of Defense and the Army Chief of Staff had testified that including women would increase military readiness. But Congress got the benefit of the military deference doctrine as a cover for what I think was a sinister political purpose—to protect the manliness of war—and the Supreme Court felt perfectly free to ignore what those with the real expertise had to say. c. Most recently, in Hamdi v. Rumsfeld,11 the Fourth Circuit held that a U.S. citizen who had been designated an “enemy combatant”12 could be detained indefinitely without access to counsel. In this case, however, not only is there no declared war,13 but also, the only evidence regarding Mr. Hamdi was a two-page affidavit by a Defense Department underling, Mr. Mobbs. Mobbs stated that Mr. Hamdi was captured in Afghanistan, and had been affiliated with a Taliban military unit. The government would not disclose the criteria for the “enemy combatant” designation, the statements of Mr. Hamdi that allegedly satisfied those criteria, nor any other bases for the conclusion of Taliban “affiliation.”14 And that is as good as the evidence for life imprisonment without trial has to be. Deference to the military has become abdication. In other words, what we presently have is not civilian government under military control, but something potentially worse, a civilian government ignoring military advice,15 but using the legal doctrine of military deference for its own imperialist ends. Third, the gigantic military establishment and permanent arms industry are now in the business of justifying their continued existences. This justification is done primarily, as you know, by retooling for post-Cold War enemies—the so-called “rogue states”—while at the same time creating new ones, for example by arming corrupt regimes in Southeast Asia.16 I was reminded of this recently when we went to see comedian Kate Clinton. She thought Secretary Powell had taken too much trouble in his presentation attempting to convince the Security Council that Iraq had weapons of mass destruction.17 Why not, she asked, “just show them the receipts?” Fourth, we have seen the exercise of extraordinary influence by arms makers on both domestic and foreign policy. For domestic pork barrel and campaign finance reasons, obsolete or unproven weapons systems continue to be funded even when the military does not want them!18 And, just when we thought we had survived the nuclear arms race nightmare, the United States has undertaken to design new kinds of nuclear weapons,19 even when those designs have little military value.20 Overseas, limitations on arms sales are being repealed, and arms markets that should not exist are being constantly expanded21 for the sake of dumping inventory, even if those weapons are eventually used for “rogue” purposes by rogue states. This system skews security considerations, and militarizes foreign policy. Force has to be the preferred option because other conduits of policy are not sufficiently well-funded. Plus, those stockpiled weapons have got to be used or sold so that we can build more. Fifth, enlarging upon this in a document entitled The National Security Policy of the United States, we were treated last September to “the Bush doctrine,” which for the first time in U.S. history declares a preemptive strike policy. This document states, “America will act against emerging threats before they are fully formed.”22 If they are only emerging and not fully formed, you may wonder, how will we know they are “threats”? Because someone in Washington has that perception, and when the hunch hits, it is the official policy of this country to deploy the military.23 All options—including the use of nuclear weapons—are always on the table.

#### Presidential adventurism causes nuclear war

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

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

#### Illegal arms sales increase the probability of regional conflict and leads to US-Russia-China escalation

Klare 13 (Michael Klare is a professor of peace and world security studies at Hampshire College The Booming Global Arms Trade Is Creating a New Cold War http://www.motherjones.com/politics/2013/05/global-arms-trade-new-cold-war)

These are just some examples of recent arms deals (or ones under discussion) that suggest a fresh willingness on the part of the major powers to use weapons transfers as instruments of geopolitical intrusion and competition. The reappearance of such behavior suggests a troubling resurgence of Cold War-like rivalries. Even if senior leaders in Washington, Moscow, and Beijing are not talking about resurrecting some twenty-first-century version of the Cold War, anyone with a sense of history can see that they are headed down a grim, well-trodden path toward crisis and confrontation. What gives this an added touch of irony is that leading arms suppliers and recipients, including the United States, recently [voted](http://www.nytimes.com/2013/04/03/world/arms-trade-treaty-approved-at-un.html) in the U.N. General Assembly to approve the [Arms Trade Treaty](http://www.un.org/disarmament/ATT/) that was meant to impose significant constraints on the global trade in conventional weapons. Although the treaty has many loopholes, lacks an enforcement mechanism, and will require years to achieve full implementation, it represents the first genuine attempt by the international community to place real restraints on weapons sales. "This treaty won't solve the problems of Syria overnight, no treaty could do that, but it will help to prevent future Syrias," [said](http://www.nytimes.com/2013/04/03/world/arms-trade-treaty-approved-at-un.html) Anna MacDonald, the head of arms control for [Oxfam International](http://www.oxfam.org/) and an ardent treaty supporter. "It will help to reduce armed violence. It will help to reduce conflict." This may be the hope, but such expectations will quickly be crushed if the major weapons suppliers, led by the US and Russia, once again come to see arms sales as the tool of choice to gain geopolitical advantage in areas of strategic importance. Far from bringing peace and stability—as the proponents of such transactions invariably claim—each new arms deal now holds the possibility of taking us another step closer to a new Cold War with all the heightened risks of regional friction and conflict that entails. Are we, in fact, seeing a mindless new example of the old saw: that those who don't learn from history are destined to repeat it?

**US-Russia miscalculation causes extinction**

**Barrett et al. 1/6** (Anthony M. Barrett- Global Catastrophic Risk Institute, Seth D. Baum- Center for Research on Environmental Decisions, Columbia University, Kelly R. Hostetler- Department of Geography, Pennsylvania State University, 2013, “Analyzing and Reducing the Risks of Inadvertent Nuclear War Between the United States and Russia”, http://sethbaum.com/ac/fc\_NuclearWar.pdf)

War involving significant fractions of the U.S. and Russian nuclear arsenals, which are by far the largest of any nations, could have globally catastrophic effects such as severely reducing food production for years, 1,2,3,4,5,6 potentially leading to collapse of modern civilization worldwide and even the extinction of humanity. 7,8,9,10 Nuclear war between the US and Russia could occur by various routes, including accidental or unauthorized launch; deliberate first attack by one nation; and inadvertent attack. In an accidental or unauthorized launch or detonation, system safeguards or procedures to maintain control over nuclear weapons fail in such a way that a nuclear weapon or missile launches or explodes without direction from leaders. In a deliberate first attack, the attacking nation decides to attack based on accurate information about the state of affairs. In an inadvertent attack, the attacking nation mistakenly concludes that it is under attack and launches nuclear weapons in what it believes is a counterattack. 11,12 (Brinkmanship strategies incorporate elements of all of the above, in that they involve deliberate manipulation of the risk of otherwise unauthorized or inadvertent attack as part of coercive threats that “leave something to chance,” i.e., “taking steps that raise the risk that the crisis will go out of control and end in a general nuclear exchange.” 13,14 ) Over the years, nuclear strategy was aimed primarily at minimizing risks of intentional attack through development of deterrence capabilities, though numerous measures were also taken to reduce probabilities of accidents, unauthorized attack, and inadvertent war. 15,16,17 For purposes of deterrence, both U.S. and Soviet/Russian forces have maintained significant capabilities to have some forces survive a first attack by the other side and to launch a subsequent counter-attack. However, concerns about the extreme disruptions that a first attack would cause in the other side’s forces and command-and-control capabilities led to both sides’development of capabilities to detect a first attack and launch a counter-attack before suffering damage from the first attack. 18,19,20 Many people believe that with the end of the Cold War and with improved relations between the United States and Russia, the risk of East-West nuclear war was significantly reduced. 21,22 However, it has also been argued that inadvertent nuclear war between the United States and Russia has continued to present a substantial risk. 23,24,25,26,27,28,29,30,31,32,33 While the United States and Russia are not actively threatening each other with war, they have remained ready to launch nuclear missiles in response to indications of attack. 34,35,36,37,38 False indicators of nuclear attack could be caused in several ways. First, a wide range of events have already been mistakenly interpreted as indicators of attack, including weather phenomena, a faulty computer chip, wild animal activity, and control-room training tapes loaded at the wrong time. 39 Second, terrorist groups or other actors might cause attacks on either the United States or Russia that resemble some kind of nuclear attack by the other nation by actions such as exploding a stolen or improvised nuclear bomb, 40,41,42 especially if such an event occurs during a crisis between the United States and Russia. 43 A variety of nuclear terrorism scenarios are possible. 44 Al Qaeda has sought to obtain or construct nuclear weapons and to use them against the United States. 45,46,47 Other methods could involve attempts to circumvent nuclear weapon launch control safeguards or exploit holes in their security. 48,49 It has long been argued that the probability of inadvertent nuclear war is significantly higher during U.S.-Russian crisis conditions, 50,51,52,53 with the Cuban Missile Crisis being a prime historical example of such a crisis. 54,55,56,57,58 It is possible that U.S.-Russian relations will significantly deteriorate in the future, increasing nuclear tensions. 59 There are a variety of ways for a third party to raise tensions between the United States and Russia, making one or both nations more likely to misinterpret events as attacks. 60,61,62,63

#### Nuclear conflict with China is an EXISTENTIAL risk – causes nuclear winter

Wittner 11 (11/30/11 Dr. Lawrence, Prof of History Emeritus at SUNY Albany, “Is a Nuclear War with China Possible?”)

But what would that "victory" entail? An attack with these Chinese nuclear weapons would immediately slaughter at least 10 million Americans in a great storm of blast and fire, while leaving many more dying horribly of sickness and radiation poisoning. The Chinese death toll in a nuclear war would be far higher. Both nations would be reduced to smoldering, radioactive wastelands. Also, radioactive debris sent aloft by the nuclear explosions would blot out the sun and bring on a "nuclear winter" around the globe -- destroying agriculture, creating worldwide famine, and generating chaos and destruction. Moreover, in another decade the extent of this catastrophe would be far worse. The Chinese government is currently expanding its nuclear arsenal, and by the year 2020 it is [expected](http://www.nukestrat.com/china/Book-35-125.pdf) to more than double its number of nuclear weapons that can hit the United States. The U.S. government, in turn, has [plans](http://www.guardian.co.uk/world/2011/oct/30/nuclear-powers-weapons-spending-report) to spend hundreds of billions of dollars "modernizing" its nuclear weapons and nuclear production facilities over the next decade.

#### It collapses African stability

Hasan 13 (Ramadansyah, PhD student, University of Waikato. Controlling the Circulation of Small Arms in International Law <http://researchcommons.waikato.ac.nz/bitstream/handle/10289/7500/thesis.pdf?sequence=3>)

In a region where government and government institutions are fragile and unstable, availability of small arms may enhance the tendency to resort to violence to resolve differences. The weapons enable those who own them to contest for power over government institutions, particularly when small arms are in the hands of an organized armed non-State actor.28 Small arms in the hands of insurgents or separatist groups would, therefore, certainly be used to pursue their interests using force generated from utilizing the weapons. This is how small arms could influence the decision to go to an armed conflict, taken with perception of an enhanced strength of possibility to win. The availability of a supply of arms would prolong and intensify the on-going conflict, which in turn, could bring the whole region into instability. This is particularly true in the case of Africa and to a certain degree, in South America and Southeast Asia.

#### African conflict escalates

Glick ‘7 - Senior Middle East Fellow – Center for Security Policy (Caroline, “Condi’s African Holiday”, 12-12, [http://www.centerforsecuritypolicy.org/home.aspx?sid=56&categoryid=56&subcategoryid=90&newsid=11568](http://www.centerforsecuritypolicy.org/home.aspx?sid=56&categoryid=56&subcategoryid=90&newsid=11568%29))

The Horn of Africa is a dangerous and strategically vital place. Small wars, which rage continuously, **can easily escalate into big wars.** Local conflicts have regional and global aspects. **All of the conflicts in this tinderbox, which controls shipping lanes from the Indian Ocean into the Red Sea,** **can potentially give rise to regional, and indeed global conflagrations between competing regional actors and global powers**. The Horn of Africa includes the states of Eritrea, Djibouti, Ethiopia, Somalia, Sudan and Kenya.

#### 1AC Plan Text

#### The United States federal judiciary should apply a clear statement principle to the statutorily defined indefinite detention war powers authority of the President of the United States on the grounds that executive indefinite detention violates the Suspension Clause.

**Advantage 2 is Egypt**

**Morsi’s trial determines Egyptian stability- only fair trial procedures solve**

Arrott 10/15 (Elizabeth, VOA. Morsi Trial Raises Tensions in Divided Egypt <http://www.voanews.com/content/reu-officials-say-egypt-arrests-morsi-supporter-linked-to-cairo-attack/1769928.html>)

The trial of ousted Egyptian President Mohamed Morsi that is set to begin November 4 is expected to heighten political divisions in the volatile nation and test the credibility of Egypt's judicial system. Morsi stands accused of inciting murder and violence during riots last year outside the presidential palace in Cairo. Other charges are pending. In a nation torn between supporters of his Muslim Brotherhood and backers of the new military-led government, the split is becoming ever more defined. On the one side, Morsi's detractors. This man says any Egyptian who has lived on Egypt's soil, drank from the River Nile and betrayed Egypt must be tried and executed. Deep split widens On the other side, Morsi defenders. Abdel Azeem said he believes all the charges are fabricated. And then there's the position of the accused himself. Veteran diplomat Abdullah al Ashaal advised Morsi during his presidency. "Morsi is stuck to the idea that he is still the president and he doesn't accept the jurisdiction of the court,” he said. Al Ashaal sees the trial as purely political. "His crime was that he is a civilian and he dared to sit on the place of a military.” Yet others defend Egypt's judiciary, noting that Morsi's predecessor, old-guard president Hosni Mubarak, also is on trial. Legal system gets tested Political analyst Saad Eddin Ibrahim, of the Ibn Khaldun Center, said the judiciary is up to the task. "The fact that there are trials, and that there is due process and that the accused, even though he is a president, a former president, will have his day in court testifies to these two aspects." Unlike Mubarak's trial, however, it is not clear if Morsi's will be made public. Indications are the case could be heard in secret in Cairo's notorious Tora prison. And there seems to be no quick end to Egypt's cycle of protest, overthrow and trial. At a recent anti-government rally at Cairo University, more cries for “justice” could be heard. This student demands that anyone - including military leader General Abdel Fattah el-Sissi and Interior Minister Mohamed Ibrahim - who has killed others must be brought to trial. Such talk further stokes controversy around recent leaks, denied by the government, that el-Sissi has sought a protected position in his role as defense minister in the new draft constitution.

US detention policy is Egypt’s excuse- fair trial standards key to leverage Al-Sisi

Leitner Center 9 (THE COMPANY WE KEEP: COMPARATIVE LAW AND PRACTICE REGARDING THE DETENTION OF TERRORISM SUSPECTS A White Paper of the Working Group on Detention Without Trial A Project of the Human Rights Institute, Columbia Law School; International Law and the Constitution Initiative, Fordham Law School; and the National Litigation Project, Yale Law School. Page lexis)

International human rights law generally proscribes preventive detention except where absolutely necessary and proportionate.[[1]](#footnote-1) Administrative detention for security purposes may theoretically be permitted under international law, but only in the presence of a “public emergency that threatens the life of the nation,”[[2]](#footnote-2) and where criminal prosecution or less restrictive alternatives are impossible.[[3]](#footnote-3) In all events, indefinite detention without trial[[4]](#footnote-4) and detention for purely intelligence-gathering purposes are highly suspect.[[5]](#footnote-5) Moreover, the experiences with emergency detention in India and Israel demonstrate the great danger of sidestepping the criminal process: definitions remain impossibly elastic, the pressure for intelligence-gathering yields coercive treatment, and processes are frequently shrouded in secrecy. The use of long-term preventive detention without charge most often corresponds with wide-ranging human rights violations. Most important, there is no evidence that preventive detention works. Comparative studies of terrorism stretching back more than twenty years have concluded that draconian measures—such as prolonged detention without trial—are not proven to reduce violence, and can actually be counterproductive.[[6]](#footnote-6) Finally, the number of people who have been subjected to detention without charge for more than three years by any democratic state, including India and Israel, is extraordinarily small. Application of such policies abroad thus contrasts sharply with the United States' ongoing detention of over two hundred detainees at Guantanamo and elsewhere. In sum, long-term preventive detention overwhelmingly has been rejected by democratic states abroad.[[7]](#footnote-7) Our allies in Europe and North America have concluded that such detention is unwarranted, unproven and unwise, in marked contrast with the relative success of the criminal justice system in fighting terrorism. By contrast, indefinite detention without trial is a hallmark of repressive regimes such as Egypt, Libya, Syria, and apartheid-era South Africa, which held tens of thousands of government opponents in preventive detention as security threats during the last decades of white rule.[[8]](#footnote-8) Should the United States take the unprecedented step of implementing indefinite detention without trial for terrorism suspects, it would have profound consequences for the rule of law globally and for U.S. foreign policy. By acting outside accepted legal standards, we would embolden other nations with far worse human rights records to adopt sweeping regimes for long-term detention in response to internal or external threats, both real and perceived. Further erosion of the rule of law in nations such as Egypt and Pakistan could further destabilize these states, with dire consequences for global security. Moreover, taking an extreme position so far out of step with our European and North American allies would undermine our ability to gain their critical cooperation in international counterterrorism efforts.

**Creating an independent judiciary post-Arab Spring is critical for Egyptian stability**

El Feigieri 11 (Moataz El Fegiery is deputy director of the Middle East and North Africa Program at the International Center for Transitional Justice (ICTJ). Save Egypt's judiciary, save its revolution.

Nonetheless, the judiciary must be able to work calmly to ensure a sound process, and to accomplish justice that is not vengeful. Justice and the rule of law were at the heart of the Egyptian revolution. If Egyptians want to break with the past they must encourage a fair judicial process. Furthermore, these trials will constitute a historical documentation of the transition period. Thus, a fair and careful process is in the interest of present and future generations. The Egyptian judiciary is not accustomed to communicating with the public and the media. The attempts at providing details and procedures therefore feed speculation and rumours about inquiries and trials. Despite the importance of some steps recently taken by the Supreme Judicial Council to make trials public and ensure victim participation, other outreach measures are still needed to mend the bridge of confidence with the public. The absence of strategy Mubarak's trial cannot be seen as part of a comprehensive strategic framework to address violations of the past regime. Most reformative steps taken by the transitional government have been in reaction to public pressure, rather than based on a clear strategy that would attend to the various challenges of the transition. Inquiries and charges for human rights abuses pressed against members of the former regime thus far have not gone beyond crimes that occurred during the 18 days of the Egyptian revolution. There has been no effort to draw a picture of Egypt's decades of repression and the rights of those victimised by it. Local and international human rights organisations and UN human rights bodies have been documenting human rights violations in Egypt, including in the framework of combating terrorism, such as torture, extrajudicial killing, long-term arbitrary detention, and forced disappearance. So far there seems to be no political will to investigate these crimes and hold perpetrators accountable - despite calls from civil society to address these violations. Achieving justice and accountability has contributed to bringing together other societies torn by conflict and authoritarianism. It is not a panacea to all of a society's problems, but it can help society express its past grievances and re-establish trust in state institutions - two necessary steps in walking to a more open society. The political moment in Egypt can be built upon to strengthen the rule of law and human rights. Trials of the symbols of the former regime, with Mubarak at their head, might give impetus in that direction. Nevertheless, if the challenges threatening the integrity of these trials are not addressed, the course of criminal trials may seriously undermine the transition, as well as the people's confidence in the judiciary.

**The plan doesn’t enforce US norms on Egypt, it creates a model for rule of law to be integrated within the Egyptian system**

**Tolbert**, 2/23/**2011** (David - president of the International Center for Transitional Justice, Justice is central to future of the new egypt and middle east, Ahram Online, p. http://english.ahram.org.eg/News/6271.aspx)

The popular revolutions that saw people of all classes and backgrounds unite in a determined, non-violent and unstoppable effort to end the repressive and corrupt regimes in Egypt and Tunisia have made their demands for justice clear. In the ensuing negotiations shaping the transition of these societies and the region, these calls must not be marginalised **in favour of deals with the** still powerful security structures **or outside interests**. On the contrary, justice must remain central to the **developments** shaping the future of the region as we speak. As well-documented experiences of other countries testify, denying justice-related issues a place at the negotiating table or giving a blanket amnesty to those responsible for serious human rights violations will inevitably come back to haunt the societies emerging from dictatorial rule. Our experience has documented justice mechanisms that have worked to provide long-term stability in various contexts across the globe. There is no legitimate reason why these lessons would not be drawn upon in Egypt, Tunisia and the rest of the region.  Some steps taken by the Egyptian Supreme Council of the Armed Forces in the first days of its rule following the departure of Hosni Mubarak could be promising. While the hope remains that it will hand over to a civilian interim government, the masses that brought down the former regime can derive encouragement from its decisions to dissolve the unrepresentative parliament and promises to speed up the constitutional reforms required to ensure free and fair elections.  However, its reluctance to lift the state of emergency **or free political prisoners** illustrates how naïve it would be to expect that the fundamental changes sought by the people of Egypt could materialise in a few months. The process of transition to a stable democracy based on the rule of law will be long and difficult. Ensuring justice for the past abuses suffered by Egyptians at the hand of Mubarak’s regime will be one of the main challenges facing the new leaders and state institutions. Establishing the facts about these violations, holding perpetrators responsible and providing reparations to victims will be key if Egyptians are to regain faith in the rule of law and start trusting government institutions. The truth about the torture and mistreatment of the perceived enemies of the regime can probably be found in the archives of the security apparatus. This record is of fundamental importance for any future justice effort and must be protected and made accessible to relevant bodies whose mandate and authority will draw from consultations with all segments of society, primarily the victims. As they fought for the change whose tectonic impact will be felt throughout the world in the years to come, the protesters in Tahrir Square called for Hosni Mubarak and his cohorts to be brought to justice for human rights abuses and all-pervasive corruption. It remains to be seen if and how this will come to pass. In the current circumstances, it is hard to expect the Army to be keen on heeding that call when some of the perpetrators could come from its ranks. This testifies to the need for reform of Egypt’s security apparatus as one of the primary mechanisms of transitional justice, essential if the country is to see full democracy and civilian rule. At the same time, the Army can demonstrate its declared loyalty to the people of Egypt by acting promptly to ensure that all those responsible for attacks on the demonstrators, which left hundreds of people dead and countless injured, are swiftly brought to justice. This would be a strong positive sign that the Army is committed to the justice sought by the protesters.      Reparations to the victims who suffered at the hands of the state are another mechanism to be considered in the process of providing justice for past abuses. The crucial element in the process of defining such a reparations scheme would have to be consultations with victims and various other actors, but one idea could be to use the wealth unlawfully amassed through corruption by the officials of the former regime and their cronies. It is evident that Egypt will face great challenges in ensuring that justice and accountability are integr**al elements** of the forging of a stable, free and prosperous society with the rule of law as one of its pillars. **Lessons learned from other societies** across the globe that have undergone similar transitions in the past **are invaluable**. The same goes for the support of the international community, which has an obligation to help Egyptians decide **on the** best way to achieve justice

**Another Egyptian civil war causes middle east conflict and destroys the buffer zone between Iran and Israel**

The Nation 13 (Egypt facing civil war: US officials paint grim scenario http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/international/18-Aug-2013/egypt-facing-civil-war-us-officials-paint-grim-scenario)

With the political and security situation in Egypt deteriorating, American officials have begun to question whether America’s long-standing Middle East ally can remain a fundamentally stable state. “There is a real possibility of civil war,” a senior US official briefed on the intelligence was quoted as saying in a dispatch published in The Wall Street Journal Friday. “There is a dangerous possibility Egypt goes the way of Syria.” In his remarks from outside the Martha’s Vineyard home where he is vacationing, Obama condemned the deadly violence in Egypt and called on its interim government to lift a state of emergency. He also tried to nudge the military and the Brotherhood toward the peaceful beginnings of a broad government. “America will work with all those in Egypt,” he said, insisting “all parties need to have a voice in Egypt’s future.” The UN Security Council, which met in an emergency session on Thursday night, failed to evolve a response to the killings by Egyptian security forces, reflecting deep divisions among member states. Worries that Egypt is headed to an extended armed insurrection, and that the US has little power to stop it, help explain President Barack Obama’s weak response to this week’s bloody crackdown by Egyptian security forces on Muslim Brotherhood supporters, US officials say. In response to violence that has left hundreds dead on the streets of Cairo, Obama on Thursday cancelled a coming US-Egyptian military exercise to show displeasure at the actions of the country’s military leaders-but stopped short of cutting off aid more broadly. But diplomatic observers said Obama’s response was just a slap on the wrist. US officials fear that Egypt could head in a darker direction. They say the nightmare scenario would be a civil war in Egypt that creates a crescent-shaped arc of instability from Syria and Lebanon to Iraq, Egypt and Libya. According WSJ, Israeli officials have told their American counterparts that, if Egypt succumbs to violence, an already fragile Jordan could be next, jeopardising the Jewish state’s last stable border and its buffer zone with Iran. Moreover, a stockpile of arms lies in neighbouring Libya, a country in which the security situation is spiralling downward in similar fashion. That impedes the ability of the Libyan government to lock down the arsenal accumulated by the late Libyan leader Moammar Gadhafi. US officials worry eastern Libya could serve as a springboard for insurgents moving across the border into Egypt, WSJ said. The Egyptian military has appealed to the US for months to help curb the flow of weapons they feared were moving across the Libyan border and on to the militants operating on the other side of Egypt, in the Sinai Peninsula.

**Middle East wars cause extinction**

Russell, 9 (James A. Russell, Senior Lecturer, National Security Affairs, Naval Postgraduate School, ‘9 (Spring)  
“Strategic Stability Reconsidered: Prospects for Escalation and Nuclear War in the Middle East” IFRI, Proliferation Papers//, #26, \_\_http://www.ifri.org/downloads/PP26\_Russell\_2009.pdf\_\_)

Strategic stability in the region is thus undermined by various factors: (1) asymmetric interests in the bargaining framework that can introduce unpredictable behavior from actors; (2) the presence of non-state actors that introduce unpredictability into relationships between the antagonists; (3) incompatible assumptions about the structure of the deterrent relationship that makes the bargaining framework strategically unstable; (4) perceptions by Israel and the United States that its window of opportunity for military action is closing, which could prompt a preventive attack; (5) the prospect that Iran’s response to pre-emptive attacks could involve unconventional weapons, which could prompt escalation by Israel and/or the United States; (6) the lack of a communications framework to build trust and cooperation among framework participants. These systemic weaknesses in the coercive bargaining framework all suggest that escalation by any the parties could happen either on purpose or as a result of miscalculation or the pressures of wartime circumstance. Given these factors, it is disturbingly easy to imagine scenarios under which a conflict could quickly escalate in which the regional antagonists would consider the use of chemical, biological, or nuclear weapons. It would be a mistake to believe the nuclear taboo can somehow magically keep nuclear weapons from being used in the context of an unstable strategic framework. Systemic asymmetries between actors in fact suggest a certain increase in the probability of war – a war in which escalation could happen quickly and from a variety of participants. Once such a war starts, events would likely develop a momentum all their own and decision-making would consequently be shaped in unpredictable ways. The international community must take this possibility seriously, and muster every tool at its disposal to prevent such an outcome, which would be an unprecedented disaster for the peoples of the region, with substantial risk for the entire world.

**Israel-Iran war goes nuclear and draws in the US**

Russell 9 (James. Senior lecturer in the Department of National Security Affairs at NPS. Strategic Stability Reconsidered: Prospects for Escalation and Nuclear War in the Middle East. Proliferation Papers.)

America’s disapproval of Israeli pre-emption may reflect a reduced national appetite for military action in general, and for unilateral strategic action. However, the intensity of U.S.-Israeli bilateral relations places the United States in an extremely awkward position: on the one hand, a cherished ally could openly be calling for the fulfillment of security commitments77 for its protection and security in response to an external threat; on the other hand, U.S. security commitment to its allies include deterrence and defense, but are widely regarded as excluding preventative actions. To summarize, systemic weaknesses in the coercive bargaining framework induce the prospect of strategic instability in which escalation could unfold in a number of scenarios leading to the use of nuclear weapons by either the United States, Israel, or Iran. For purposes of this paper, escalation means an expansion of the intensity and scope of the conflict.78 The common denominator for the proposed scenarios is that nuclear use occurs in the context of conflict escalation – a conflict that could be initiated by a variety of different parties and in a variety of different circumstances.79 It is extremely unlikely that either the United States or Israel would initiate the use of nuclear weapons as part of a pre-emptive attack on Iran’s nuclear sites.80 However, there are escalation scenarios involving state and non-state actors in the coercive bargaining framework that could conceivably lead to nuclear weapons use by Israel and/or the United States. Iran’s response to what would initially start as a sustained stand-off bombardment (Desert Fox Heavy) could take a number of different forms that might lead to escalation by the United States and Israel, surrounding states, and non-state actors. Once the strikes commenced, it is difficult to imagine Iran remaining in a Saddam-like quiescent mode and hunkering down to wait out the attacks. Iranian leaders have unequivocally stated that any attack on its nuclear sites will result in a wider war 81 – a war that could involve regional states on both sides as well as non-state actors like Hamas and Hezbollah. While a wider regional war need not lead to escalation and nuclear use by either Israel or the United States, wartime circumstances and domestic political pressures could combine to shape decision-making in ways that present nuclear use as an option to achieve military and political objectives. For both the United States and Israel, Iranian or proxy use of chemical, biological or radiological weapons represent the most serious potential escalation triggers. For Israel, a sustained conventional bombardment of its urban centers by Hezbollah rockets in Southern Lebanon could also trigger an escalation spiral.

#### Last is Solvency

#### Applying a clear statement principle solves- significantly restricts detention authority

Sarah Erickson-Muschko (J.D., Georgetown University Law Center) June 2013 “Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States” 101 Geo. L.J. 1399, Lexis

III. EXISTING SCHOLARSHIP ON THE CLEAR STATEMENT RULE: THE FOCUS ON INDIVIDUAL STATUS

Many scholars have advanced arguments regarding the application of a clear statement principle to the AUMF. 133 Two specific arguments have been made [\*1419] about the applicability of a clear statement principle in the context of U.S. territory, both of which focus on the status of the individual as the triggering factor. Professors Richard Fallon and Daniel Meltzer argue that a clear statement principle applies when U.S. citizens are detained on U.S. territory. 134 This argument is based on statutory grounds, namely the theory that the Non-Detention Act triggers the clear statement requirement. 135 This argument is perfectly sound in that respect. However, it is incomplete in that it does not address the constitutional grounds for imposing a clear statement rule: the Due Process Clause of the Fifth Amendment, which applies to all persons, including noncitizens. 136 Reading the AUMF and the NDAA 2012 together to allow for the indefinite military detention without trial of individuals arrested on U.S. territory would be inconsistent with the constitutional prohibition on depriving a person of liberty without due process of law. Professors Curtis Bradley and Jack Goldsmith offer the most comprehensive constitutionally based argument for when and how to apply a clear statement principle. Their position is that courts should apply a clear statement requirement "when the President takes actions under the AUMF that restrict the liberty of noncombatants in the United States," but not when such actions only restrict the liberty of combatants. 137 Looking to the three World-War-II-era decisions discussed in Part II, they conclude that Endo and Duncan stand for the proposition that liberty interests trump the President's commander-in-chief authority when the President's actions are unsupported by historical practice in other wars and affect the constitutional rights of U.S. citizens who are not combatants. 138 In this context, "the canon protecting constitutional liberties prevails." 139 In contrast, the authors point to Quirin to show that "the Court did not demand a clear statement before concluding that the U.S. citizen enemy combatant in that case could be subject to a military commission trial in the United States even though neither the authorization to use force nor the authorization for military commissions specifically mentioned U.S. citizens." 140 In such a case, the authors contend that a clear statement requirement protecting civil liberties is not required because "the presidential action involves a traditional wartime function exercised by the President against an acknowledged enemy combatant or enemy [\*1420] nation." 141 In this context, "the President's Article II powers are at their height, and the relevant liberty interests (and thus the need for a liberty-protecting clear statement requirement) are reduced (or nonexistent)." 142 Despite its level of detail, Bradley and Goldsmith's clear statement principle will likely never be of much help to courts construing the AUMF. By basing their clear statement requirement on the distinction between combatants and noncombatants, they fail to resolve the key interpretive question: namely, how to construe the AUMF to avoid grave constitutional concerns where an individual's status as an enemy combatant is in dispute. Their interpretation accommodates a broad reading of Quirin. However, in Quirin, nobody disputed that the detainees were in fact unlawful enemy combatants under long-standing law-of-war principles. In contrast, a court reviewing the classification of an individual as an "enemy combatant" under the AUMF and NDAA 2012 must determine what it means to be "part of" or provide "substantial[] support[]" to al-Qaeda or an "associated force[]" or otherwise to commit a "belligerent act." 143 The question of how to construe these terms lies at the core of detainee litigation, 144 and the provisions in the NDAA 2012 failed to clarify their meaning. Bradley and Goldsmith acknowledge that the AUMF is silent on the point of "what institutions or procedures are appropriate for determining whether a person captured and detained on U.S. soil is in fact an enemy combatant." 145 However, they fail to address how this ambiguity impacts the application of their clear statement principle. Their framework is therefore of no real help to courts that must first determine whether an individual was properly deemed to be an "enemy combatant" before determining whether the clear statement rule applies to thee AUMF. The clear statement rule thus fails to fulfill its core purpose of resolving statutory ambiguity in a manner that avoids serious constitutional questions. In addition to failing to resolve the due process questions surrounding the [\*1421] "enemy combatant" determination, Bradley and Goldsmith's argument does not resolve the core separation of powers concern: namely, whether, and if so under what conditions, it is constitutionally permissible for the President to apply martial law in place of the criminal justice system on U.S. territory despite the absence of any compelling need to do so. In short, their argument assumes that such an application of law-of-war principles on U.S. territory, outside of the battlefield context, would be a legitimate exercise of the President's war powers in the context of counterterrorism. This is hard to square with the Milligan Court's powerful statements to the contrary. 146 IV. MOVING BEYOND INDIVIDUAL STATUS: THE CONSTITUTION APPLIES IN THE UNITED STATES This Note argues that the clear statement principle applies to the AUMF detention authority whenever it is invoked to detain individuals arrested within the United States--at least where the enemy combatant question is in dispute. The principal trigger for application of the clear statement principle should not be an individual's status but rather the presumption that constitutional rights and restraints apply on U.S. territory. Courts therefore should dispense with the enemy combatant inquiry under these circumstances. This Note posits that such a construction is required to preserve the constitutionality of the AUMF. This constitutional default rule presumes that Congress has not delegated power to the executive branch to circumvent due process protections wholesale, and that it has not altered the traditional boundaries between military and civilian power on U.S. territory. Any departure from this baseline at least requires a clear manifestation of congressional intent. As evinced by the divisions in Congress over passage of the detention provisions in the NDAA 2012, there is no consensus as to the breadth of the detention power afforded to the executive branch under the AUMF. Courts should therefore not presume that the statute authorizes application of martial law to circumvent otherwise applicable constitutional restraints and due process rights. By making the jurisdictional question--civilian versus military--the trigger for the clear statement principle, the judiciary would properly place the impetus on Congress to clearly define and narrowly circumscribe the conditions under which the executive may use military jurisdiction to detain individuals on U.S. territory. This is the only way to ensure that our nation's political representatives have adequately deliberated and reached a consensus with respect to delegating powers to the executive branch where such delegation would have the consequence of displacing, in a wholesale fashion, constitutional protections. For all its controversy, § 412 of the USA PATRIOT Act of 2001 provides an example of where Congress has provided for executive detention under circumstances that are arguably sufficiently detailed to satisfy a clear statement [\*1422] requirement. 147 Absent this level of clarity, where the President purports to use the AUMF to detain militarily on U.S. territory, courts must presume that constitutional rights and restraints apply and are not displaced by martial law. A. DUE PROCESS CONCERNS One of the most basic rights accorded by the Constitution is the fundamental right to be free from deprivations of liberty absent due process of law. The AUMF must be read with the gravity of this fundamental right in mind. As the Court made clear in Endo, where fundamental due process rights are at stake, ambiguous wartime statutes are to be construed to allow for "the greatest possible accommodation of the liberties of the citizen." 148 Courts "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." 149 This includes statutes that would otherwise "exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions . . . ." 150 B. THE SUSPENSION CLAUSE The Suspension Clause lends further constitutional support to applying a clear statement requirement to the AUMF detention authority on U.S. territory. The Suspension Clause gives Congress the emergency power to suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." 151 As Fallon and Meltzer observe, this Clause--and the limited circumstances in which it may be invoked--suggest, or even explicitly affirm, "the presumptive rule that when the civilian courts remain capable of dealing with threats posed by citizens, those courts must be permitted to function." 152 To interpret the AUMF as congressional authorization to displace the civilian system and apply military jurisdiction on U.S. territory would "render that [\*1423] emergency power essentially redundant." 153 The Suspension Clause also underscores that the right to be free from the arbitrary deprivation of physical liberty is one of the most central rights that the Constitution was intended to protect. C. THE LACK OF MILITARY NECESSITY The lack of military necessity for applying law-of-war principles on U.S. territory further supports the construction of the AUMF to avoid displacing civilian law with law of war in the domestic context. The Supreme Court long ago declared that martial law may not be applied on U.S. territory when civilian law is functioning and "the courts are open and their process unobstructed." 154 Instead, "[t]he necessity [for martial law] must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." 155 In the absence of such necessity, "[w]hen peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty . . . ." 156 The past ten years have shown that there is no need to stretch law-of-war principles in the AUMF to reach U.S. territory. The exigencies associated with an active battlefield, which were critical to the Hamdi plurality's interpretation of the AUMF, 157 are simply not present in the United States. Instead, "American law enforcement agencies . . . continue to operate within the United States. These agencies have a powerful set of legal tools, adapted to the criminal process, to deploy within the United States against . . . suspected [terrorists], and the civilian courts remain open to impose criminal punishment." 158 Indeed, for more than a decade since the 9/11 attacks, domestic law enforcement agencies have carried the responsibility for domestic counterterrorism and have successfully thwarted several terrorism plots. 159 Civilian courts have adjudicated the prosecution of suspected terrorists captured on U.S. territory under [\*1424] federal laws. 160 The experience of the past decade shows that the civilian system is up to the task, and there is no military exigency that justifies curtailing constitutional protections and applying military authority in the domestic context. 161 Accordingly, the circumstances that the Supreme Court found to justify the use of the military authority under the AUMF to capture and indefinitely detain Hamdi, who was found armed on the active battlefield in Afghanistan, do not extend to persons captured on U.S. territory. The manner in which the government handled the Padilla and al-Marri cases further demonstrates the lack of military necessity. In both cases, the government abandoned its position that national security imperatives demanded that they continue to be held in military custody; both were transferred to federal custody and ultimately convicted of federal crimes carrying lengthy prison terms. 162 The Supreme Court's precedent in Quirin neither requires, nor can it be fairly read to justify, a different conclusion. First, the issue of indefinite military detention without trial was not before the Court in that case. Second, the status of the Nazis in Quirin as enemy combatants was undisputed, in contrast to that of individuals who are "part of" or "substantially support" al-Qaeda or "associated forces." 163 Third, the Court in Quirin went "out of its way to say that the Court's holding was extremely limited," encompassing only the precise factual circumstances before it. 164 Finally, Quirin itself is shaky precedent, as evidenced by the Court's own subsequent statements and as elaborated in numerous scholarly commentaries on the case. 165 As Katyal and Tribe observe: Quirin plainly fits the criteria typically offered for judicial confinement or reconsideration: It was a decision rendered under extreme time pressure, with respect to which there are virtually no reliance interests at stake, and where the statute itself has constitutional dimensions suggesting that its construction should be guided by relevant developments in constitutional law. 166 [\*1425] This case therefore should not be read as foreclosing the application of a clear statement principle to the AUMF as applied on U.S. territory where an individual's status as an enemy combatant is in dispute. CONCLUSION The AUMF is ambiguous: it does not specify whether it reaches individuals captured on U.S. territory, and Congress declined to resolve this question when it enacted § 1021 of the NDAA 2012. If a future administration invokes the AUMF as authority to capture and hold persons on U.S. territory in indefinite military detention, it will be left to the courts to determine whether this is constitutional. Courts should resolve this question by applying a clear statement requirement. This Note has argued that the trigger for this clear statement requirement is not the individual's status but rather the presumption that constitutional rights and restraints apply on U.S territory. Courts should apply this default presumption regardless of an individual's citizenship status, and it should apply even where the government claims that the individual is an "enemy combatant," at least where that determination is subject to dispute. This Note has argued that this method of statutory interpretation is constitutionally required. "[B]y extending to all 'persons' within the Constitution's reach such guarantees as . . . due process of law, the Constitution constrains how our government may conduct itself in bringing terrorists to justice." 167 If these constraints are to remain meaningful, these guarantees require, at the very least, that courts presume that constitutional guarantees prevail where congressional intent is unclear. The past ten years have shown that our criminal justice system is capable of thwarting terrorist attacks and bringing terrorists to justice while still preserving the safeguards of liberty that are fundamental to our system of justice. "[T]hese safeguards need, and should receive, the watchful care of those [e]ntrusted with the guardianship of the Constitution and laws." 168

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

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

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

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

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

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

Ruling on the Suspension Clause ensures judicial review over all executive detention- prevents circumvention and ensures due process rights

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

The Suspension Clause has long cast a shadow over the regulation of detention. Now the Supreme Court has brought the Clause out of the shadows, giving it substance. It does not merely describe when the government may suspend the writ, nor does it solely reflect an important principle of constitutional avoidance in interpreting statutes that restrict judicial review of detention. Instead, the Clause affirmatively offers a simple but powerful form of process to detainees. Moreover, the Court emphasized a Suspension Clause concern with both legal and factual error. This Article has explored this new understanding of the Suspension Clause in light of the changing and unsettled relationship between two complex areas of law: due process and habeas corpus. Both “due process and habeas corpus are quite general, amorphous, and capacious” in their content.508 Despite ring- ing language uniting habeas and due process in a tradition dating back to Magna Carta, habeas and due process cover importantly different terrain. The Suspension Clause supplies process in circumstances where the Due Process Clause does not apply, while due process has varied applications outside areas covered by habeas corpus. In executive detentions, however, the Suspension Clause plays an outsized role. Taken seriously, the Court in Hamdi and Boumediene forged a relationship between the Suspension Clause and the Due Process Clause. Nelson Tebbe and Robert Tsai examined what circumstances justify “constitutional borrowing” and noted concerns where there is a lack of fit, a lack of transparency, and incomplete application from one area of constitutional law to another.509 In *Boumediene*, the Court was careful not to explicitly borrow due process standards. The Court’s caution was justified. While due process analysis focuses on adequacy of procedures, habeas process provides the authority for judges to examine the factual and legal authorization for detention. Though habeas process may be “skeletal” in its outlines, both at common law and in modern federal statutes, it provides judges a powerful tool. In significant ways, complex and sometimes poorly conceived distinctions in statutes nevertheless respect core habeas process, in part due to the judicial interventions. I have argued that *Boumediene* was no innovation, but rather it followed the longstanding view that habeas is at its most expansive concerning detention without a trial. The Suspension Clause demands that habeas corpus remain in full force where there was no adequate prior judicial process, particularly in the context of indefinite detentions. This places the judiciary in the uncomfortable position of reviewing broad congressional authorizations for detentions and changing executive procedures in factually and legally contested detainee petitions. Thrust into that difficult role, lower courts have often relied upon inapposite sources, hewing to some vision of a bare constitutional minimum rather than providing a meaningful habeas process. The D.C. Circuit approves a standard of proof that is too lenient as defined, if not also in application. Its approach unduly limits discovery and uses an odd harmless error rule. In other respects, rulings have done a better job harmonizing evidentiary and criminal procedure rules with habeas process. Careful application could avoid unfortunate rulings, with an exception: the decision not to extend habeas to Bagram was partially due to Boumediene’s misstep in adopting a multifactored jurisdictional test.510 Congress has preserved the central role of the judiciary in the contest over what procedures should govern review of national security detention. Although the National Defense Authorization Act for Fiscal Year 2012 contains broad authorization for detention, it does not alter or address procedural aspects of judicial review, despite calls to do so.511 Perhaps Congress has reached a stable equilibrium. Judges’ approaches to future detentions and detention legislation in future conflicts will focus on the Suspension Clause question. If Congress centers review in an enhanced version of CSRTs, if POWs receive military hearings and demand access to habeas, or if Congress creates a national security court with Article III judges but streamlined procedure, courts will ask whether each is an adequate and effective substitute for habeas, and not simply whether general procedures satisfy due process. In some cases, the answer might be the same under a habeas or due process approach, but only if judges retain the power to adequately review authorization for detentions. Moreover, *Boumediene* will continue to impact all of habeas corpus, ranging from judicial review under immigration statutes to central questions in postconviction law, including actual-innocence claims. The connection between habeas corpus and due process has been long celebrated. Daniel Meador heralded how “[f]lexibility to meet new problems is one of the characteristics of both due process and habeas corpus, and the value of the habeas corpus—due process combination as protection against arbitrary imprisonment—can hardly be exaggerated.”512 Yet the virtues of flexibility include the vices of malleability. The Suspension Clause jurisprudence forged in the wake of Hamdi and Boumediene suggests that connecting habeas corpus and due process requires great care. The structural role of the Suspension Clause is now firmly established. Contrary to expectations, after exerting its influence in the shadows for so long, the Clause anchors a process animating the operation of far-flung aspects of habeas corpus, ranging from military detention, to immigration detention, to postconviction review. While due process and habeas corpus overlap in some of the protections they provide, a judge asks different questions when examining a due process claim versus a habeas challenge to custody. A judge examining a due process claim will focus on the general adequacy of the procedures employed. A judge examining a habeas challenge will focus on the legal and factual authorization of an individual detention, and in more troubling cases, on the larger Suspension Clause question of whether federal judges have an adequate and effective ability to examine that question of authorization. The roles of habeas and due process are distinct and in important respects they share an inverse relationship—habeas corpus can fill the breach when due process is inadequate. The Suspension Clause ensures that habeas corpus serves a powerful, independent, and unappreciated role standing alone.

1. Human Rights Comm., Communication No. 1324/2004: Australia, ¶ 7.2, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006) (detention could be arbitrary if “not necessary in all the circumstances of the case and proportionate to the ends sought”); Human Rights Comm., Communication No. 560/1993: Australia, ¶ 7.2, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) (same if “not necessary in all the circumstances of the case”); Human Rights Comm., Communication No. 305/1988: Netherlands, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990) (same if not “reasonable in all the circumstances”); *see also* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 507 (2003). [↑](#footnote-ref-1)
2. General Comment No. 29, “Derogation during a state of emergency”, in “International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies”, UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 184 ff. [↑](#footnote-ref-2)
3. Article 9(1) of the International Covenant on Civil and Political Rights (“ICCPR”) provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” UNTS, Vol. 999, p. 171, 16 December 1966, entered into force 23 March 1976. While Article 4 permits for the derogation of Article 9 in times of public emergency “which threaten[] the life of the nation and the existence of which is officially proclaimed,” derogations must still be “strictly required by the exigencies of the situation” and may not involve discrimination “solely on the grounds of race, color, sex, language, religion or sound origin.” *Id*. at Art. 4. *See* Alfred de Zayas, *Human rights and indefinite detention,* 87 Int’l Rev. Red Cross 15, (2005); *see also* Human Rights Comm., Communication No. 66/1980: Uruguay, ¶ 18.1, U.N. Doc. CCPR/C/17/D/66/1980 (Oct. 12, 1982) (“[A]dministrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society *which cannot be contained in any other manner* ....”) (emphasis added). [↑](#footnote-ref-3)
4. *Bolaños v. Ecuador*, No. 238/1987, UN Doc. A/44/40, Annex X, Sec. I, para. 8.3 (finding violation of Article 9, paragraph 3 where criminal defendant was held in pre-trial detention for over five years). [↑](#footnote-ref-4)
5. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 Int’l Rev. Red Cross 375, 377 (2005) (“[I]nternment or administrative detention for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security, cannot be justified.”). The Israeli Supreme Court rejected Israel’s use of detainees as “bargaining chips” on the ground that detention must be based on an individualized assessment of risk. *A v. Minister of Defence*. CrimFH 7048/97, [2000] IsrSC 44(1) 721. *See also* Human Rights Comm., Second Periodic Report Addendum: Israel, ¶¶ 125-28, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001); Human Rights Comm., Concluding Observations: Israel 1998, *supra*, at 106, ¶ 21; Human Rights Comm., Concluding Observations: Israel, ¶ 13, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003). [↑](#footnote-ref-5)
6. *See* Arunabha Bhoumik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel and India*, 33 Denv. J. Int'l L. & Pol'y 285, 292-95 (2005) (discussing various comparative empirical studies of counterterrorism); Yonah Alexander, Combating Terrorism: Strategies of Ten Countries 7 (2002) (study of the United States, Argentina, Peru, Colombia, Spain, the U.K., Israel, Turkey, India, and Japan); Christopher Hewitt, The Effectiveness of Anti-Terrorist Policies 66-67 (1984) (study of Northern Ireland, Uruguay, Spain, Italy and Cyprus). [↑](#footnote-ref-6)
7. Stephanie Cooper Blum, *Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects*, 4 Homeland Sec. Aff. 1, 1 (2008) (“America’s policy of preventive detention is not just different as a matter of degree – it is grossly different as a matter of kind.”). [↑](#footnote-ref-7)
8. Jeremy Sarkin, *Preventive Detention in South Africa*, in Preventive Detention and Security Law: A Comparative Survey 209 (Andrew Harding & John Hatchard eds., 1993). [↑](#footnote-ref-8)