#### 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.

#### **Illegal arms sales rapidly escalate Middle East war**

Cunningham 12 (Erin, Erin Cunningham is GlobalPost’s editor for the [Middle East](http://www.globalpost.com/internal/section-config/middle-east), [Africa](http://www.globalpost.com/internal/section-config/africa), [Afghanistan](http://www.globalpost.com/internal/section-config/afghanistan) and [Pakistan](http://www.globalpost.com/internal/section-config/pakistan). Erin has reported from the Middle East, South [Asia](http://www.globalpost.com/internal/section-config/asia) and the Balkans for five years, covering Kosovo's independence, the military surge in Afghanistan, protests in Cairo's [Tahrir Square](http://www.globalpost.com/internal/section-config/egypt), the first democratic elections in Tunisia, and Israeli military operations in Gaza. Small arms fuel Middle East conflicts http://www.globalpost.com/dispatch/news/regions/middle-east/121128/small-arms-middle-east-conflict-weapons)

From Libya to Syria, Yemen and the Gaza Strip, everything from shotguns and semi-automatic rifles to anti-tank and anti-aircraft weapons are making local and regional conflicts more lethal, scarring the societies where the weapons end up. And analysts say the problem is only getting worse. “Things have intensified since the Arab Spring,” said Martin Butcher, arms policy adviser at London-based Oxfam, about the region’s weapons trade. “There were particularly troubled hotspots in the Middle East, where illegal or grey market transfers were the norm,” he said, referring to a type of weapons transaction that may begin as legal but diverts arms to illegal end-markets. As the unrest spread, he said, so did the illicit weapons flows. “It’s starting to get worse,” he concluded. Long-term conflicts in the Middle East have helped flood the region with small arms. Some of the weapons arrive as bribes from Western governments to oppressive regimes for maintaining peace with Israel or are acquired by armed groups challenging state power, such as Kurdish separatists in Turkey and Iraq. Gathering comprehensive, accurate data on the region’s small arms trade is difficult because regional governments lack transparency. But according to the Congressional Research Service, the US Congress’s public policy research arm, the Middle East is the developing world’s largest arms market. The United States is the leading exporter of legal small arms to governments across the region. It sold $1.1 billion of weapons to Bahrain, Egypt and Yemen from 2005 to 2010. Some of the arms have ended up on the black market and in the hands of smugglers like Abu Ibrahim. His Bedouin kin in Sinai’s north have engaged in a low-intensity conflict with heavy-handed security forces for years. The conflict is fueled largely by the presence of illicit small arms, including recent shipments from post-Gaddafi Libya, where ordinary people joined rebels pillaging arsenals during the civil war. During the tumult that accompanied the Arab Spring, weakened or toppled governments in Egypt, Libya and Syria withdrew from borders and other guarded areas, giving up weapons stocks as they fled rebel fighters. Across the Sinai Peninsula — where police and intelligence forces recently retreated under fire from armed protesters — smugglers, Islamic militants, criminal networks and armed gangs are amassing even more weapons that have poured across Egypt’s porous border with Libya. Locals say that in addition to assault rifles, Soviet-made large-caliber machine guns, US-manufactured Glock pistols, Chinese shotguns, anti-tank weapons and rocket-propelled grenade launchers are all feeding the frequent armed confrontations between militants, locals and Egyptian security forces. “This has always been a passageway for wars,” Ibrahim said. “We’re not treated well by the authorities. If we were, we wouldn’t need weapons.” Illegal weapons shipments from Libya and Iran are helping fuel the full-scale civil war in Syria, where a peaceful uprising developed into an armed conflict that’s killed around 30,000 people, according to anti-government activists. Oxfam’s Butcher pointed to reports saying weapons are being shipped directly from Benghazi, the cradle of Libya’s uprising, to the rebel Free Syria Army via Lebanon. “It is absolutely clear that the sustained battle in Aleppo couldn’t possibly have happened without a large amount of arms coming in from outside,” he said. Syria’s largest city has been at the center of a pitched battle between the Free Syrian Army and the forces of President Bashar al-Assad for months. “There is a very steady flow of arms going in — from Lebanon, Iraq, Turkey and even Jordan,” said Nicolas Marsh, an arms researcher at the Norwegian Initiative for Small Arms Transfers, a coalition of civil society groups seeking to reduce armed violence. “If the opposition in Syria had run out of ammunition, they would have lost right away.” Illegal small arms can tilt the balance of power in some conflicts, but they often help entrench stalemates in which the breakdown of infrastructure and services increases perceptions of insecurity — and intensifies violence.

#### 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.

#### 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.

#### 1AC Libya

**Advantage 2 is Venezuela**

#### US detention policy makes successful pressure of Venezuela through the OAS impossible

Bosworth 13 (James, Former Associate for Communications at The Inter-American Dialogue and Director of Research at The Rendon Group, Consultant at the Woodrow Wilson International Center for Scholars, “Protecting the IACHR, now make it stronger,” 3-25-13, <http://www.bloggingsbyboz.com/2013/03/protecting-iachr-now-make-it-stronger.html>)

Last Friday, the OAS voted to reform the Inter-American Commission on Human Rights (IACHR). Most importantly, the organization managed to push back against a set of cynical and harmful proposals by four countries - Bolivia, Ecuador, Nicaragua and Venezuela - that would have weakened the organization and reduced its funding sources. Those four countries ended up isolated from the other 30 voting members of the OAS who remained committed to strengthening the Inter-American human rights system. Sources: AQ, Pan-American Post, IPS, Ecuador wanted the system to be funded only by countries that have signed the San Jose Pact and wanted all the rapporteurs funded equally. This would have eliminated most of the funding for the IACHR coming from the US, Canada and Europe without guarantees of pledges to replace that money. It also would have weakened the Special Rapporteur on Freedom of Expression, a particularly thorn in the side for Ecuador's censorship-loving president. Of course, the ALBA criticisms aren't actually about funding. The ALBA countries tried to weaken the IACHR because they are annoyed that any independent outside organizations criticizes their abuses of human rights and free speech. So, good on the rest of the Americas including the US, Brazil and Mexico for working to stop those proposals from being implemented. All three of those countries have all recently faced tough criticisms from the IACHR, making it notable that they still defended the commission at this session. From the speech of Deputy Secretary Burns: This is why we actively respond to the Commission even as it raises challenging issues for us – from the death penalty and the human rights of migrants and incarcerated children, to the status of detainees at Guantanamo Bay. And this is why we continue to collaborate with the Commission – including its recent on-site visit to immigrant detention facilities in the United States. We do this not because we always see eye to eye with the Commission. We do it because we are secure in our commitment to democratic principles and in our conviction that we are accountable to our citizens for the protection of their human rights. We do it because we believe that no government should place itself beyond international scrutiny when it comes to the protection of basic human rights and civil liberties. Strong words that I absolutely agree with. However.... On 12 March the US formally answered questions to the IACHR about the detainees held at Guantanamo Bay. At that time, the US lawyer did not provide any timeline for closing the detention center and refused to admit anyone is being held in "indefinite detention," though the fact they are held without trial and without a potential release date seems to be the definition of that term. Though the US defended the conditions of the prison, as far as I can tell, no representative from the IACHR has been allowed to visit. On the issue of immigrant detentions, here is the IACHR in July 2009 based on its visits to detention centers (longer report released in 2011): Finally, the Rapporteurship was distressed at the use of solitary confinement to ostensibly provide personal protection for vulnerable immigrant detainees, including homosexuals, transgender detainees, detainees with mental illnesses, and other minority populations. The use of solitary confinement as a solution to safeguard threatened populations effectively punishes the victims. The Rapporteurship urges the U.S. Government to establish alternatives to protect vulnerable populations in detention and to provide the mentally-ill with appropriate treatment in a proper environment. Here is the NYT yesterday: On any given day, about 300 immigrants are held in solitary confinement at the 50 largest detention facilities that make up the sprawling patchwork of holding centers nationwide overseen by Immigration and Customs Enforcement officials, according to new federal data. Nearly half are isolated for 15 days or more, the point at which psychiatric experts say they are at risk for severe mental harm, with about 35 detainees kept for more than 75 days. Four years after the IACHR visited the immigrant detention facilities and spoke out against the practice of solitary confinement, the article in the NYT from 2013 reads just like the IACHR report from 2009. Nothing has been done to respond to those criticisms. The US gets credit for fighting back against the ALBA countries' push to silence the IACHR. The commission provides a needed voice for the hemisphere's human rights. Over the past month, with the purpose of protecting and strengthening human rights in the hemisphere, I've heard US officials praise Brazil, Mexico and Uruguay for listening and acting on the recommendations of the IACHR. The sad truth is that the US praised those other countries because the US hasn't acted on many of the important criticisms that it has received from the IACHR. It's part of the credibility gap that the US faces in this hemisphere. Last week, the Obama administration played a vital role in protecting human rights in the hemisphere by leading the effort at the OAS to maintain a strong IACHR. We need to remember that nothing the US says diplomatically at the OAS will be as powerful as the US ability to lead by example. If the US really wants stronger human rights protections in this hemisphere, that effort starts at home. The issues raised by Deputy Secretary Burns in his OAS speech - Guantanamo and immigrant detention conditions - would be great places to start.

#### OAS review is critical to Venezuelan judicial stability- now is key

The Economist 13 (“Latin America’s Venezuela problem: Ostrich diplomacy, Venezuela’s neighbours studiously ignore the crisis unfolding next door,” 6-8-13, <http://www.economist.com/news/americas/21579067-venezuelas-neighbours-studiously-ignore-crisis-unfolding-next-door-ostrich-diplomacy/>)

FOR Latin American presidents of all political persuasions, a knock on the door from Henrique Capriles is a far from welcome sound these days. Not that the leader of Venezuela’s opposition is a particularly boring or obnoxious guest, despite the strenuous efforts of President Nicolás Maduro to portray him as a “murderous fascist”. It’s just that having Mr Capriles round for a cup of tea can get you into all sorts of trouble, as Colombia’s Juan Manuel Santos found out to his cost. On May 29th a shirtsleeved Mr Santos held a private meeting of about an hour with Mr Capriles, which provoked a barrage of invective from the Venezuelan government. The Colombian president had “put a bomb under” relations between the two countries, said Diosdado Cabello, the speaker of Venezuela’s National Assembly. Venezuela would have to “review” its support for Colombia’s peace talks with the leftist FARC guerrillas, added Elías Jaua, the foreign minister. To top things off, Mr Maduro said certain Colombian institutions “at the highest level” were plotting with the Venezuelan opposition to inject him with a poison that would lead to a slow death. Mr Santos said this was “crazy”. His foreign minister declined to engage in microphone diplomacy. Colombia and Venezuela, whose governments are poles apart ideologically, have enjoyed a friendship of convenience in recent years after a very rocky decade. The reason for all the huffing and puffing is that Mr Capriles, who came within an ace of winning a snap presidential election on April 14th, has challenged the result in the supreme court and is seeking to persuade the region’s governments of his case. Mr Maduro is the chosen successor of Hugo Chávez, who died of cancer in March, five months after being re-elected. He heads a weak administration beset by political and economic problems and desperate to hang on to the international support that Chávez built up over more than a decade of oil diplomacy. With the Chávez charisma gone, the new president’s legitimacy in doubt and the money running out, bluster is one of the few resources not in short supply. This week was to have been Peru’s turn to receive a visit from Mr Capriles. But such was the panic in Ollanta Humala’s government at having to decide whether to receive him that the trip was postponed. Peru currently chairs the South American Union (Unasur), one of several regional bodies failing to deal with the Venezuelan crisis. Unasur held an emergency meeting on the eve of Mr Maduro’s inauguration to insist on an audit of the election result. But although the opposition says the partial audit now under way is insufficient, Unasur has failed to pursue the case. Peru’s foreign minister stood down—officially for health reasons—shortly after he had the effrontery to say publicly that a fresh Unasur summit on the subject was being mooted. Most Latin American and Caribbean governments are either ideologically close to the chavista regime, dependent on its oil-fuelled largesse, or simply disinclined to incur its wrath. The Organisation of American States (OAS), whose annual assembly began on June 4th in Guatemala, is bound by treaty to monitor its members’ democratic credentials. But the OAS’s Democratic Charter, launched in 2001, has so far been used only to protect presidents (including Chávez) and to bludgeon puny countries such as Honduras and Paraguay. Brazil, which has the muscle to take on a country the size of Venezuela, seems more concerned with protecting its businesses, which are making billions from trade with its northern neighbour. Ahead of the OAS meeting its secretary-general, José Miguel Insulza, said the “atmosphere” was not conducive to a discussion of the Venezuelan crisis—a diplomatic way of saying no one was prepared to pick up the hot potato. Mr Insulza himself has in the past admitted that Venezuela is in breach of the Democratic Charter. Among other things, it requires an independent judiciary and guarantees recourse to the inter-American human-rights system. Venezuela has announced that it will abandon the system later this year. The ostrich approach may not work for ever. For one thing, the Venezuelan opposition’s campaign across the region is putting presidents under pressure from their parliaments and civic groups to support democracy. Second, Venezuela’s political fragility and Mr Maduro’s weakness threaten instability which the region may be unable to ignore. Shutting the door in Mr Capriles’ face could prove a short-sighted policy, as well as a shameful one.

Judicial independence is a prerequisite to stability- signal of internal executive review fails

Provea 13 (Venezuelan Program of Education and Action on Human Rights, “The political use of the Venezuelan judicial system,” Venezuela: International Bulletin on Human Rights Issue No. 5, August 13, <http://www.derechos.org.ve/pw/wp-content/uploads/boletin_05_eng.pdf>)

“In recent years, the Commission has heard of cases in which members of the judiciary have expressly stated their support for the executive, showing the lack of independence of this institution. The Commission has also observed how certain failures caused by the lack of independence of the judiciary is exacerbated in cases of high political significance, and consequently affects society’s confidence in justice.” Four years later the situation is even more worrying. The judiciary and the Public Prosecutor are political instruments of the executive branch to criminalize social protest and to persecute dissident voices. As it has been indicated by several Venezuelan human rights organizations in a statement of July 26 there is “a deep concern over the progressive weakening of judicial guarantees in Venezuela and prosecution as a method to criminalize those with critical positions and to discard them.” The use of justice, to face social protest, led by the working men and women of the country, is expressed in the opening of lawsuits against student leaders, community, indigenous and unions and even, in some cases, by applying military justice. The most emblematic case is the trial of the unionist Rubén González after the Criminal Chamber of the Supreme Court set aside the judgment against him, which was deliberately biased in favor of the government, (that verdict sentencing him to seven years in prison). The Criminal Chamber overturned the judgement after unions announced the call for a strike in response to the decision. In its judgment the Criminal Chamber said: “[the judgement] injured the constitutional rights of the defense, due process and hence to effective judicial protection as provided in Articles 26 and 49.1 of the Constitution of the Bolivarian Republic of Venezuela, what ultimately denied the exercise of procedural defenses that our legal system provides in a criminal trial” This biased and unconstitutional conduct of a criminal court The political use of the Venezuelan judicial system has been repeated in trials of other social leaders, some of whom have more than six years on probation. But there are two major elements in the manipulation of the justice system. One of them is a priori defense of senior government officials from the high courts to the claims brought by individuals for violations of their rights. It is even exclude senior officials of their constitutional obligations, through sentences being handed down by the Constitutional Court, which imposed same criteria to other courts. Although the Constitution provides that any public official should give timely and adequate response to the requests made by any person, but when the request is made to the President of the Republic, the Constitutional Court stated that: “In this regard, it is noted that the multiple functions assigned to the President and the scale of these, prevents suchpublic officer to be given equal treatment as any other official who did not answer, -within the time periods-to requests that have been made.” A study conducted by PROVEA on the behavior of the Supreme Court of Justice to complaints against senior government officials, determined that only 7.14% of decisions are in favor of the petitioners, but when it came to action against the National Assembly, the General Prosecutor or against the President of the Republic, the petitioners did not receive positive responses in any case. The other outstanding feature is the use of Justice to prosecute political dissidents. An emblematic case is the open trial against General Francisco Vicente Uson Ramirez, who in a television program gave his opinion about alleged human rights violations in a particular fact. The many irregularities in the judicial process, generated his case had to be presented at the Inter-American system for the protection of human rights, which concluded in a judgment handed down by the Inter-American Court of Human Rights on November 20, 2009. Conclusion issued by the IACHR in its Report on Democracy and Human Rights in Venezuela, is fully in effect: “The lack of independence and autonomy of the judiciary from political power is one of the weakest points of democracy in Venezuela, a situation that seriously hinders the free exercise of human rights in Venezuela. According to the Commission, is the lack of independence that has allowed the possibility of using the punitive power of the State to criminalize human rights defenders in Venezuela, prosecute peaceful social protest and prosecute political dissidents.”

**Venezuelan stability creates a new oil market- ends Arctic development**

**Weafer 13** (Chris Weafer is chief strategist at Sberbank Investment Research, BBC Monitoring Former Soviet Union – Political, “No business as usual for Russia in Venezuela – paper,” 3-12-13, Supplied by BBC Worldwide Monitoring)

Despite assurances from government officials in Caracas that it will be business as usual after the death of Venezuelan President Hugo Chavez last week, his passing will almost certainly lead to the start of political and social changes in that country. The only question is the time frame. Chavez's death and the emergence of a new presidential administration will surely have a significant impact on the global oil industry and price of oil, although perhaps on an even longer timeline. According to the BP Energy Review, Venezuela sits on the world's largest exploitable reserves of oil. Chavez's policies have led not only to no significant exploitation of those reserves but have actually directly led to a cut in the country's average daily oil output by one-third in the 14 years he served as president. In 1999, the country produced an average of 3.5 million barrels per day, while the current average output has dropped to 2.5 million barrels. With the right investments, the country may easily support average daily oil output of 5 million barrels and probably higher, according to industry estimates. There can be little doubt that as of last week, Venezuela has become the most important target location for foreign oil majors, especially US companies. Russian oil majors still have a small advantage, and senior executives from state-owned Rosneft and Gazprom will be eager to ensure good relations with the next administration. But they must know that there is now a limited window to convert promised cooperation with the Venezuelan state-owned oil company, PDVSA, into actual projects. Oil executives from Houston will soon be descending on Venezuela with lucrative alternatives, and PDVSA, in dire need of capital investment, will surely be listening to their offers. For Russia, that means three risks. First, Gazprom and Rosneft will have more competition for joint-venture deals in that country. Second, Venezuela is an easier alternative to the hostile and unpredictable Russian Arctic for US oil companies, which may make it harder for Moscow to attract joint-venture deals. Finally, the prospect of more oil coming out of Venezuela adds to the growth projections for shale oil as a significant longer-term threat to the price of oil, and therefore, to the Russian economy. None of this will be lost on the Kremlin. It means that there will have to be greater urgency to convert promised deals into real projects in Venezuela. At the same time, the Kremlin will want to conclude more joint ventures to exploit the Arctic. It also means that the clock counting down to lower oil revenues is now ticking, increasing the need for more urgent progress in economic reforms. The Venezuelan constitution mandates that a new election must take place within 30 days. As it stands today, the current vice president, Nicolas Maduro, is expected to be elected to replace Chavez. Maduro said he intends to stick with the economic and political policies and ideologies of his former boss, but since Maduro is no Chavez, this will be virtually impossible to achieve. Chavez was a hugely charismatic, larger-than-life leader who managed to maintain unity of purpose among the many vested interests in the country. At the same time, he stayed popular with the people even as the economy slid further into trouble. With oil averaging over 110 dollars per barrel last year, the Venezuelan state budget ran a deficit of close to 20 per cent of gross domestic product. Now that Chavez is gone, the soon-to-be-elected president Maduro will come under increasing pressure to take actions to start improving the economy. No different from President Vladimir Putin's situation when he took over an ailing economy in Russia in 2000, the only place that the new Venezuelan president can get revenue is from the oil sector. But after Chavez practically destroyed PDVSA when he fired 20,000 skilled engineers and other workers in 2002, PDVSA will need a huge boost to capital spending and joint-venture partnerships. Although politically risky, Maduro may have no other choice than to ask ExxonMobil and Chevron, two of the US majors that had their local projects nationalized by Chavez, to come back. Venezuela is certainly an attractive option for the world's big oil majors. Recoverable reserves are now put at just under 300 billion barrels, compared to about 265 billion in Saudi Arabia and less than 100 billion in Russia. Most of Venezuelan oil is heavy and more expensive to refine, but it lies only a few hundred meters below the Orinoco Belt. That makes it a lot more attractive than, for example, speculatively drilling in the hostile Russian Arctic while dodging icebergs. The Orinoco Belt is an extremely important natural environment, and the inevitable objections from domestic, regional and international environmentalists will slow any development. But as has happened in similar situations elsewhere, the quest for the prize will almost certainly prevail. Venezuela needs the money. Venezuela has also very likely moved to near the top of the US government's list of geopolitical priorities. The US is set on a course to become energy independent, and the International Energy Agency calculates this may take two to three decades based on current trends and with optimistic assumptions for US shale oil production. Such assumptions have always been speculative when it comes to the oil industry. But a more achievable target for the US is to become regionally oil independent -that is, to only source its oil requirements domestically and from Canada, Mexico and now perhaps from Venezuela. That would allow the US to become completely independent of Middle East oil within 10 years or so. A change in Venezuela's political and economic priorities would also weaken the Cuban economy since Chavez supplied Cuba with almost free oil. That would hasten the inevitable regime change there as well, an extra bonus for Washington. But while such an outcome would be very favourable for the US economy, it would accelerate the game change already started in the global oil industry with the rapid growth in shale oil volumes. No matter how you work the assumptions, the world is heading for a lot more oil supply over the balance of this decade. New major oil production will come from North America, Iraq and the Caspian Sea, where Kazakhstan's giant Kashagan field starts to produce from this year, almost certainly from Venezuela if a new administration takes concrete steps to increase foreign investment and production in the oil sector. This may be the real reason Russian officials shed a few tears at Chavez's funeral on Friday.

**Escalating oil developments causes Arctic nuclear war**

**Talmadge 12** (Eric – AP, Huffington Post, “Arctic Climate Change Opening Region To New Military Activity’, 4/16, http://www.huffingtonpost.com/2012/04/16/arctic-climate-change-military-activity\_n\_1427565.html)

To the world's military leaders, the debate over climate change is long over. They are preparing for a new kind of Cold War in the Arctic, anticipating that rising temperatures there will open up a treasure trove of resources, long-dreamed-of sea lanes and a slew of potential conflicts. By Arctic standards, the region is already buzzing with military activity, and experts believe that will increase significantly in the years ahead. Last month, Norway wrapped up one of the largest Arctic maneuvers ever — Exercise Cold Response — with 16,300 troops from 14 countries training on the ice for everything from high intensity warfare to terror threats. Attesting to the harsh conditions, five Norwegian troops were killed when their C-130 Hercules aircraft crashed near the summit of Kebnekaise, Sweden's highest mountain. The U.S., Canada and Denmark held major exercises two months ago, and in an unprecedented move, the military chiefs of the eight main Arctic powers — Canada, the U.S., Russia, Iceland, Denmark, Sweden, Norway and Finland — gathered at a Canadian military base last week to specifically discuss regional security issues. None of this means a shooting war is likely at the North Pole any time soon. But as the number of workers and ships increases in the High North to exploit oil and gas reserves, so will the need for policing, border patrols and — if push comes to shove — military muscle to enforce rival claims. The U.S. Geological Survey estimates that 13 percent of the world's undiscovered oil and 30 percent of its untapped natural gas is in the Arctic. Shipping lanes could be regularly open across the Arctic by 2030 as rising temperatures continue to melt the sea ice, according to a National Research Council analysis commissioned by the U.S. Navy last year. What countries should do about climate change remains a heated political debate. But that has not stopped north-looking militaries from moving ahead with strategies that assume current trends will continue. Russia, Canada and the United States have the biggest stakes in the Arctic. With its military budget stretched thin by Iraq, Afghanistan and more pressing issues elsewhere, the United States has been something of a reluctant northern power, though its nuclear-powered submarine fleet, which can navigate for months underwater and below the ice cap, remains second to none. Russia — one-third of which lies within the Arctic Circle — has been the most aggressive in establishing itself as the emerging region's superpower. Rob Huebert, an associate political science professor at the University of Calgary in Canada, said Russia has recovered enough from its economic troubles of the 1990s to significantly rebuild its Arctic military capabilities, which were a key to the overall Cold War strategy of the Soviet Union, and has increased its bomber patrols and submarine activity. He said that has in turn led other Arctic countries — Norway, Denmark and Canada — to resume regional military exercises that they had abandoned or cut back on after the Soviet collapse. Even non-Arctic nations such as France have expressed interest in deploying their militaries to the Arctic. "We have an entire ocean region that had previously been closed to the world now opening up," Huebert said. "There are numerous factors now coming together that are mutually reinforcing themselves, causing a buildup of military capabilities in the region. This is only going to increase as time goes on." Noting that the Arctic is warming twice as fast as the rest of the globe, the U.S. Navy in 2009 announced a beefed-up Arctic Roadmap by its own task force on climate change that called for a three-stage strategy to increase readiness, build cooperative relations with Arctic nations and identify areas of potential conflict. "We want to maintain our edge up there," said Cmdr. Ian Johnson, the captain of the USS Connecticut, which is one of the U.S. Navy's most Arctic-capable nuclear submarines and was deployed to the North Pole last year. "Our interest in the Arctic has never really waned. It remains very important." But the U.S. remains ill-equipped for large-scale Arctic missions, according to a simulation conducted by the U.S. Naval War College. A summary released last month found the Navy is "inadequately prepared to conduct sustained maritime operations in the Arctic" because it lacks ships able to operate in or near Arctic ice, support facilities and adequate communications. "The findings indicate the Navy is entering a new realm in the Arctic," said Walter Berbrick, a War College professor who participated in the simulation. "Instead of other nations relying on the U.S. Navy for capabilities and resources, sustained operations in the Arctic region will require the Navy to rely on other nations for capabilities and resources." He added that although the U.S. nuclear submarine fleet is a major asset, the Navy has severe gaps elsewhere — it doesn't have any icebreakers, for example. The only one in operation belongs to the Coast Guard. The U.S. is currently mulling whether to add more icebreakers.

**Magnitude of escalation in the Arctic is correlated to how much economic development occurs- try or die for the aff**

**Wallace and Staples 10** (Michael Wallace and Steven Staples. \*Professor Emeritus at the University of British Columbia and President of the Rideau Institute in Ottawa

“Ridding the Arctic of Nuclear Weapons: A Task Long Overdue,”http://www.arcticsecurity.org/docs/arctic-nuclear-report-web.pdf)

The fact is, the Arctic is becoming a zone of increased military competition. Russian President Medvedev has announced the creation of a special military force to defend Arctic claims. Last year Russian General Vladimir Shamanov declared that Russian troops would step up training for Arctic combat, and that Russia’s submarine fleet would increase its “operational radius.” 55 Recently, two Russian attack submarines were spotted off the U.S. east coast for the first time in 15 years. 56 In January 2009, on the eve of Obama’s inauguration, President Bush issued a National Security Presidential Directive on Arctic Regional Policy. It affirmed as a priority the preservation of U.S. military vessel and aircraft mobility and transit throughout the Arctic, including the Northwest Passage, and foresaw greater capabilities to protect U.S. borders in the Arctic. 57 The Bush administration’s disastrous eight years in office, particularly its decision to withdraw from the ABM treaty and deploy missile defence interceptors and a radar station in Eastern Europe, have greatly contributed to the instability we are seeing today, even though the Obama administration has scaled back the planned deployments. The Arctic has figured in this renewed interest in Cold War weapons systems, particularly the upgrading of the Thule Ballistic Missile Early Warning System radar in Northern Greenland for ballistic missile defence. The Canadian government, as well, has put forward new military capabilities to protect Canadian sovereignty claims in the Arctic, including proposed ice-capable ships, a northern military training base and a deep-water port. Earlier this year Denmark released an all-party defence position paper that suggests the country should create a dedicated Arctic military contingent that draws on army, navy and air force assets with shipbased helicopters able to drop troops anywhere. 58 Danish fighter planes would be tasked to patrol Greenlandic airspace. Last year Norway chose to buy 48 Lockheed Martin F-35 fighter jets, partly because of their suitability for Arctic patrols. In March, that country held a major Arctic military practice involving 7,000 soldiers from 13 countries in which a fictional country called Northland seized offshore oil rigs. 59 The manoeuvres prompted a protest from Russia – which objected again in June after Sweden held its largest northern military exercise since the end of the Second World War. About 12,000 troops, 50 aircraft and several warships were involved. 609 Ridding the Arctic of Nuclear Weapons: A Task Long Overdue Jayantha Dhanapala, President of Pugwash and former UN under-secretary for disarmament affairs, summarized the situation bluntly: “From those in the international peace and security sector, deep concerns are being expressed over the fact that two nuclear weapon states – the United States and the Russian Federation, which together own 95 per cent of the nuclear weapons in the world – converge on the Arctic and have competing claims. These claims, together with those of other allied NATO countries – Canada, Denmark, Iceland, and Norway – could, if unresolved, lead to conflict escalating into the threat or use of nuclear weapons.” 61 Many will no doubt argue that this is excessively alarmist, but no circumstance in which nuclear powers find themselves in military confrontation can be taken lightly. The current geo-political threat level is nebulous and low – for now, according to Rob Huebert of the University of Calgary, “[the] issue is the uncertainty as Arctic states and non-Arctic states begin to recognize the geo-political/economic significance of the Arctic because of climate change.” 62

#### 1AC Solvency

#### 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.