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## First

#### The United States Court of Appeals for the District of Columbia Circuit should form an en banc panel to review its opinion in Al-Bihani v. Obama on the basis of maintaining uniformity and on the exceptional importance of the case. The en banc panel of the D.C. Circuit should decide that its ruling in Al-Bihani v. Obama has no precedential effect on any other court, that it was limited solely to the facts presented in the original case and that no court should regard Al-Bihani v. Obama as a repudiation of the Charming Betsy canon.

#### The CP solves all of their advantages & locks in SQ Presidential detention powers:

#### The CP limits the reach of al-Bihani by blocking its application in other contexts

Thomas G. Hansford & James F. Spriggs 7, 8-7-, “The Politics of Precedent on the U.S. Supreme Court,” http://press.princeton.edu/chapters/s8204.html

Second, the Court can negatively interpret a precedent by restricting its reach or calling into question its continuing importance. The Court can, for example, distinguish a precedent by finding it inapplicable to a new factual situation, limit a case by restating the legal rule in a narrower fashion, or even overrule a case and declare that it is no longer binding law (see Baum 2001, 142; Gerhardt 1991, 98-109; Johnson 1985, 1986; Maltz 1988, 382-88; Murphy and Pritchett 1979, 491-95). With this kind of interpretation, the Court expresses some level of disagreement with the precedent and, as a result, may undercut the legal authority of a precedent and diminish its applicability to other legal disputes.

#### The D.C. Circuit can rehear the case en banc

D.C. Circuit Rules ’11 – Authored by Clerks of the D.C. Circuit Court of Appeals

CIRCUIT RULES of the UNITED STATES COURT OF APPEALS for the DISTRICT OF COLUMBIA CIRCUIT, Amended Through December 1, 2011, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Circuit%20Rules/$FILE/RulesDecember2011LINKSandBOOKMARKScj2013.pdf>

Rule 35. En Banc Determination¶ (a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored an ordinarily will not be ordered unless:¶ (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions;¶ (2) the proceeding involves a question of exceptional importance.

## Second

**Obama has built a solid basis for expanded Executive authority in the courts and congress – Syria continues the trend**

Gordon **Silverstein**, Assistant Dean and Lecturer in Law at Yale Law School, and author of Law’s Allure: How Law Shapes, Constrains, Saves and Kills Politics, “Obama Just Increased Executive Power—Again,” New Republic, **9/4**/2013

Bush-Cheney Administration alumni have risen from the ashes to denounce President Obama’s decision to force Congress to play its constitutional role in a decision to use military force in Syria. It is, they insist, yet another surrender of power by a feckless President presiding over the degradation of the Executive Branch itself, the empowerment of which was one of their central goals.¶ This is wrong on two dimensions: First, despite their aggressive efforts, **the Bush-Cheney administration left the Presidency weaker, and not stronger. And** second, far from degrading the power of the Executive, the **Obama** administration **has steadily, and significantly built up and exploited presidential power.¶** While it is too early to know if **Obama’s Syrian plan will continue this** trend, there are powerful reasons to think it will.¶ **The Bush-Cheney administration** famously asserted that when it came to foreign policy and national security, the President possessed nearly unlimited, autonomous, and unreviewable power. They insisted that the President could seize and hold prisoners at Guantanamo Bay; that the President alone could decide what and how much due process they were entitled to seek and that together with Congress, they could deny the independent federal courts, the third branch of government, the right to review their decisions. And they declared that the administration had the authority to redefine the meaning of torture.¶ All these **claims** and more were built on novel and poorly supported constitutional theories. **When** they were **challenged in Court, far from** enshrining the administration’s and **permanently shifting formal power to the Executive branch, these theories and claims were rejected, and** what had once been ambiguous and contested questions about **the allocation of power was settled, not by assigning it to the Executive but**, in fact, **by ruling that it belonged exclusively to Congress.¶** Jack Goldsmith, the head of the Office of Legal Counsel in the Bush-Cheney Justice Department, would later write that the administration advanced broad and unsupportable claims and arguments because “the President and Vice President wanted to leave the presidency stronger than they found it.” But, he concludes, “the approach they took achieved exactly the opposite effect. The central irony is that **people whose explicit goal was to expand presidential power have diminished it.”¶** Consider: In 2004 the Supreme Court ruled that the Executive could not independently order the detention of prisoners at Guantanamo, but could do so in this case because Congress had implicitly delegated this power to the President through the very open-ended language of the 2001 Authorization for the Use of Military Force. This was, in short, a power that now explicitly was assigned to Congress.¶ 2004 also was the year in which Goldsmith had to repudiate and withdraw a series of legal opinions his office had released—many authored by John Yoo—including the infamous memos ostensibly offering a legal rationale for the use of torture in interrogations.¶ The Bush-Cheney legal dream team failed again in 2006 in Hamdan v. Rumsfeld when the Supreme Court rejected their assertion that those same detainees could be tried by military commissions established by Executive Order. Commissions were possible, the Court ruled, but only if they were the produce of explicit congressional authorization. Another win for Congress. Another loss for fans of Executive prerogative.¶ But this dance was far from over. In Boumediene v. Bush in 2008, Justice Anthony Kennedy delivered a stinging blow to the Bush-Cheney project, ruling that prisoners at Guantanamo Bay had the right to file petitions for habeas corpus; that Congress and Congress alone could suspend habeas, but had to do so explicitly and could not simply forbid the Courts from hearing these appeals. A question that had been left in some shroud of ambiguity since Lincoln suspended the Great Writ in the Civil War was now clear: The power belongs to Congress alone.¶ John Yoo, one of the Bush-Cheney administration’s leading lawyers, realized in 2006 that the **Supreme Court would** actually **be a major barrier on their path to the constitutional fortification of Executive power.¶** After the Court handed the administration a defeat in the military commissions decision in Hamdan v. Rumsfeld, Yoo told the New York Times that the Justices were “attempting to suppress creative thinking.” The 2006 Hamdan decision, Yoo said, could undercut the entire legal edifice that had been built by the Bush lawyers.¶ What Yoo failed to acknowledge then (and fails to acknowledge even now) is that it was the Bush-Cheney overreach, their “creativity,” that had pressed even a conservative and friendly Supreme Court to undercut the administration’s claims to power, leaving the Executive weaker than it had been when Bush and Cheney walked into the White House in January 2001.¶ And Obama? While the Bush claims actually eroded and undercut Executive power which had built up steadily since World War II, it was the administration of Barack **Obama** that actually, quietly, **efficiently and with unerring focus has expanded, embedded and solidified Executive power.** And it has done so not by making “creative” constitutional claims, but instead **by steadily (and aggressively) building and exercising Executive power**—but doing so **by pressing existing statutes and judicial rulings, rather than unsupportable constitutional theories.**¶ **Turning to Congress now for formal authorization** to use military force **in Syria could** well be another example of this effort—and it may yet **have the same effect.¶** As I wrote in 2009, less than six months into the new administration, **in areas ranging from** the assertion of **the State Secrets privilege** in efforts **to** shut down lawsuits over warrantless **wiretapping and** extraordinary **rendition to** those concerning lawsuits over **detention and treatment in Guantanamo, and** the reach of habeas corpus to **Bagram** Air Force Base in Afghanistan, **Obama’s legal team was building up a far more impressive, far stronger and far more difficult to reverse set of precedents—winning in court after court—a trend that has continued ever since, including memos defending the legality of drone strikes** targeting U.S. citizens, **and** the sweeping authority for the **electronic surveillance** among many others. **Even** in their defense of **the use of force for limited strikes in Libya**, the Obama administration seemed to state that Congress must have a role in major military actions.¶ **These are aggressive claims. They are significant. They are new assertions of power—but they rest** far more squarely **on statutes, statutory interpretation and interpretations of judicial rulings than** did the military rationale offered by **Bush and Cheney**.¶ So—we have two models. The Bush-Cheney model, full of sound and fury which ultimately left the Executive branch weaker and not stronger, and the Obama model, which builds its case for executive power on the back of statutory authorization and judicial rulings.¶ And so, what are we to make of Obama’s decision to force Congress to play a role in a decision to use military force in Syria? Are the Bush apologists right? Is this—though a very difficult needle to thread—of a piece with Obama’s successful efforts to build executive power on a vastly firmer foundation than the constitutional “creativity” of the Bush legal team?¶ It may be, and here’s why:¶ Presidents in the modern era have turned to Congress for a fig-leaf of authorization before—in the 1964 Tonkin Gulf Resolution, or the 2001 Authorization for the Use of Military Force. But these were passed in the shadow of what was perceived to be a genuine emergency. There was no time for deliberation, no time to inspect the evidence. A vote for these authorizations was one that was all too easy for a regretful Congress to abandon as the wars they had ostensibly authorized dragged on and on.¶ This time there is time. Despite withering criticism from the Bush-Cheney apologists, Obama refused to call Congress back for an emergency session. Rather than giving them just hours to support the Commander in Chief in time of crisis, he has assured the nation that the military is confident that a few weeks will make no difference in our ability to achieve our military objectives.¶ A yes vote under this scenario means Congress fully shares the ownership of this policy (and its results). It means that whatever horror comes next in the Middle East, America’s policy there will be just that—America’s policy: The product of Congress acting together with the President, under the traditional rules and process laid out by the U.S. Constitution.¶ And if Congress votes no? Then we have one of two scenarios: The blame for the next atrocity, or the next deployment of chemical weapons in the Middle East or elsewhere is as much their heavy burden as it is Obama’s or, to prevent that, Congress will be compelled to actually deal with a serious policy issue and not simply vote a few dozen more times to repeal Obamacare.¶ **Turning to Congress in this fashion is** very much **in Obama’s self-interest**. But is also **in the national interest, and** quite possibly in **the best interest of those concerned about** preserving and **enhancing Executive power. Future Presidents** who will no doubt face complicated and risky security challenges, **will require the full force of a nation united behind them and** may now be more willing to **follow the precedent Obama has set**.

**Court restrictions on the president’s war powers violates separation of powers**

**Turner 2012**

[Professor Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law with Professor John Norton Moore—who taught the nation’s first course on national security law in 1969. Turner served as chairman of the ABA Standing Committee on Law and National Security from 1989–1992., The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud That Contributed CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW·VOL. 45·2012, Directly to the 9/11 Attacks, <http://law.case.edu/journals/JIL/Documents/45CaseWResJIntlL1&2.pdf>, uwyo//amp]

Yet another key Jefferson rival, Chief Justice John **Marshall, reaffirmed the president’s independent constitutional responsibilities in the field of foreign affairs** in perhaps the most famous of all Supreme Court decisions, Marbury v. Madison, when he wrote: **By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character**, and to his own conscience . . . . [**W]hatever opinion may be entertained of the manner in which executive discretion may be used,** **still there exists**, and can exist, **no power to control that discretion**. **The subjects are political. They respect the nation**, not individual rights, **and being entrusted to the executive, the decision of the executive is conclusive.**18 **Marshall illustrated this principle by mentioning the Secretary of Foreign Affairs (later retitled Secretary of State**) and declaring that **the acts of that officer “can never be examinable by the courts**.”19 As Professor Wright observed in 1922, **“when the constitutional convention gave ‘executive power’ to the President, the foreign relations power was the essential element in the grant. . . .”20**

#### The plan collapses executive crisis response --- triggers terrorism, rogue state attacks, and wildfire prolif

John Yoo 8/30/13, Emanuel S. Heller Professor of Law @ UC-Berkeley Law, visiting scholar @ the American Enterprise Institute, former Fulbright Distinguished Chair in Law @ the University of Trento, served as a deputy assistant attorney general in the Office of Legal Council at the U.S. Department of Justice between 2001 and 2003, received his J.D. from Yale and his undergraduate degree from Harvard, “Like it or not, Constitution allows Obama to strike Syria without Congressional approval,” Fox News, <http://www.foxnews.com/opinion/2013/08/30/constitution-allows-obama-to-strike-syria-without-congressional-approval/>

The most important of the president’s powers are commander-in-chief and chief executive.¶ As Alexander Hamilton wrote in Federalist 74, “The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.”¶ Presidents should conduct war, he wrote, because they could act with “decision, activity, secrecy, and dispatch.” In perhaps his most famous words, Hamilton wrote: “Energy in the executive is a leading character in the definition of good government. . . It is essential to the protection of the community against foreign attacks.”¶ The Framers realized the obvious. Foreign affairs are unpredictable and involve the highest of stakes, making them unsuitable to regulation by pre-existing legislation. Instead, they can demand swift, decisive action, sometimes under pressured or even emergency circumstances, that are best carried out by a branch of government that does not suffer from multiple vetoes or is delayed by disagreements. ¶ Congress is too large and unwieldy to take the swift and decisive action required in wartime. ¶ Our Framers replaced the Articles of Confederation, which had failed in the management of foreign relations because it had no single executive, with the Constitution’s single president for precisely this reason. Even when it has access to the same intelligence as the executive branch, Congress’s loose, decentralized structure would paralyze American policy while foreign threats grow. ¶ Congress has no political incentive to mount and see through its own wartime policy. Members of Congress, who are interested in keeping their seats at the next election, do not want to take stands on controversial issues where the future is uncertain. They will avoid like the plague any vote that will anger large segments of the electorate. They prefer that the president take the political risks and be held accountable for failure.¶ Congress's track record when it has opposed presidential leadership has not been a happy one.¶ Perhaps the most telling example was the Senate's rejection of the Treaty of Versailles at the end of World War I. Congress's isolationist urge kept the United States out of Europe at a time when democracies fell and fascism grew in their place. Even as Europe and Asia plunged into war, Congress passed Neutrality Acts designed to keep the United States out of the conflict.¶ President Franklin Roosevelt violated those laws to help the Allies and draw the nation into war against the Axis. While pro-Congress critics worry about a president's foreign adventurism, the real threat to our national security may come from inaction and isolationism.¶ Many point to the Vietnam War as an example of the faults of the “imperial presidency.” Vietnam, however, could not have continued without the consistent support of Congress in raising a large military and paying for hostilities. And Vietnam ushered in a period of congressional dominance that witnessed American setbacks in the Cold War, and the passage of the ineffectual War Powers Resolution. Congress passed the Resolution in 1973 over President Nixon's veto, and no president, Republican or Democrat, George W. Bush or Obama, has ever accepted the constitutionality of its 60-day limit on the use of troops abroad. No federal court has ever upheld the resolution. Even Congress has never enforced it.¶ Despite the record of practice and the Constitution’s institutional design, critics nevertheless argue for a radical remaking of the American way of war. They typically base their claim on Article I, Section 8, of the Constitution, which gives Congress the power to “declare War.” But these observers read the eighteenth-century constitutional text through a modern lens by interpreting “declare War” to mean “start war.” ¶ When the Constitution was written, however, a declaration of war served diplomatic notice about a change in legal relations between nations. It had little to do with launching hostilities. In the century before the Constitution, for example, Great Britain – where the Framers got the idea of the declare-war power – fought numerous major conflicts but declared war only once beforehand.¶ Our Constitution sets out specific procedures for passing laws, appointing officers, and making treaties. There are none for waging war, because the Framers expected the president and Congress to struggle over war through the national political process.¶ In fact, other parts of the Constitution, properly read, support this reading. Article I, Section 10, for example, declares that the states shall not “engage” in war “without the consent of Congress” unless “actually invaded, or in such imminent Danger as will not admit of delay.” ¶ This provision creates exactly the limits desired by anti-war critics, complete with an exception for self-defense. If the Framers had wanted to require congressional permission before the president could wage war, they simply could have repeated this provision and applied it to the executive.¶ Presidents, of course, do not have complete freedom to take the nation to war. Congress has ample powers to control presidential policy, if it wants to. ¶ Only Congress can raise the military, which gives it the power to block, delay, or modify war plans.¶ Before 1945, for example, the United States had such a small peacetime military that presidents who started a war would have to go hat in hand to Congress to build an army to fight it. ¶ Since World War II, it has been Congress that has authorized and funded our large standing military, one primarily designed to conduct offensive, not defensive, operations (as we learned all too tragically on 9/11) and to swiftly project power worldwide. ¶ If Congress wanted to discourage presidential initiative in war, it could build a smaller, less offensive-minded military.¶ Congress’s check on the presidency lies not just in the long-term raising of the military. It can also block any immediate armed conflict through the power of the purse.¶ If Congress feels it has been misled in authorizing war, or it disagrees with the president's decisions, all it need do is cut off funds, either all at once or gradually.¶ It can reduce the size of the military, shrink or eliminate units, or freeze supplies. Using the power of the purse does not even require affirmative congressional action.¶ Congress can just sit on its hands and refuse to pass a law funding the latest presidential adventure, and the war will end quickly. ¶ Even the Kosovo war, which lasted little more than two months and involved no ground troops, required special funding legislation.¶ The Framers expected Congress's power of the purse to serve as the primary check on presidential war. During the 1788 Virginia ratifying convention, Patrick Henry attacked the Constitution for failing to limit executive militarism. James Madison responded: “The sword is in the hands of the British king; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist.” Congress ended America’s involvement in Vietnam by cutting off all funds for the war.¶ Our Constitution has succeeded because it favors swift presidential action in war, later checked by Congress’s funding power. If a president continues to wage war without congressional authorization, as in Libya, Kosovo, or Korea, it is only because Congress has chosen not to exercise its easy check.¶ We should not confuse a desire to escape political responsibility for a defect in the Constitution. A radical change in the system for making war might appease critics of presidential power. But it could also seriously threaten American national security.¶ In order to forestall another 9/11 attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility.¶ It is not hard to think of situations where congressional consent cannot be obtained in time to act. Time for congressional deliberation, which leads only to passivity and isolation and not smarter decisions, will come at the price of speed and secrecy.¶ The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security.¶ Presidents can take the initiative and Congress can use its funding power to check them. Instead of demanding a legalistic process to begin war, the Framers left war to politics.¶ As we confront the new challenges of terrorism, rogue nations and WMD proliferation, now is not the time to introduce sweeping, untested changes in the way we make war.

**Nuclear weapons prolif puts weapons in the hands of rogue states—rogue states multiply and this guarantees accidents and miscalculations that lead to nuke war.**

**Johnson,** Forbes contributor and Presidential Medal of Freedom winner, **2013**

(Paul, “A Lesson For Rogue States”, 5-8, <http://www.forbes.com/sites/currentevents/2013/05/08/a-lesson-for-rogue-states/>, ldg)

Although we live in a violent world, where an internal conflict such as the Syrian civil war can cost 70,000 lives over a two-year period, there hasn’t been a major war between the great powers in 68 years. **Today’s three superpowers–the U.S., Russia and China–have no conflicts of interest that can’t be resolved through compromise**. All have hair-trigger nuclear alert systems, but the sheer scale of their armories has forced them to take nuclear conflict seriously. Thus, in a real sense, nuclear weapons have succeeded in abolishing the concept of a winnable war. **The same cannot be said,** however, **for certain paranoid rogue states**, namely North Korea and Iran. **If these two nations appear to be prospering**–that is, if their nuclear threats are winning them attention and respect, financial bribes in the form of aid and all the other goodies by which petty dictators count success–**other prospective rogues will join them.** **One such state is Venezuela. Currently its oil wealth is largely wasted, but it is great enough to buy entree to a junior nuclear club.** **Another possibility is Pakistan**, which already has a small nuclear capability and is teetering on the brink of chaos. **Other potential rogues are one or two of the components that made up the former Soviet Union.** All the more reason to ensure that North Korea and Iran are dramatically punished for traveling the nuclear path. But how? It’s of little use imposing further sanctions, as they chiefly fall on the long-suffering populations. Recent disclosures about life in North Korea reveal how effectively the ruling elite is protected from the physical consequences of its nuclear quest, enjoying high standards of living while the masses starve. Things aren’t much better in Iran. Both regimes are beyond the reach of civilized reasoning, one locked into a totalitarian vise of such comprehensiveness as to rule out revolt, the other victim of a religious despotism from which there currently seems no escape. Either country might take a fatal step of its own volition. Were North Korea to attack the South, it would draw down a retribution in conventional firepower from the heavily armed South and a possible nuclear response from the U.S., which would effectively terminate the regime. Iran has frequently threatened to destroy Israel and exterminate its people. Were it to attempt to carry out such a plan, the Israeli response would be so devastating that it would put an end to the theocracy forthwith. **The balance of probabilities is that neither nation will embark on a deliberate war but instead will carry on blustering.** **This, however, doesn’t rule out war by accident–a small-scale nuclear conflict precipitated by the blunders of a totalitarian elite.** Preventing Disaster **The most effective, yet cold-blooded, way to teach these states the consequences of continuing their nuclear efforts would be to make an example of one by destroying its ruling class.** The obvious candidate would be North Korea. Were we able to contrive circumstances in which this occurred, it’s probable that Iran, as well as any other prospective rogues, would abandon its nuclear aims. But how to do this? At the least there would need to be general agreement on such a course among Russia, China and the U.S. But China would view the replacement of its communist ally with a neutral, unified Korea as a serious loss. Compensation would be required. Still, it’s worth exploring. **What we must avoid is a jittery world in which proliferating rogue states perpetually seek to become nuclear ones. The risk of an accidental conflict breaking out that would then drag in the major powers is too great.** This is precisely how the 1914 Sarajevo assassination broadened into World War I. **It is fortunate the major powers appear to have understood the dangers of nuclear conflict without having had to experience them. Now they must turn their minds, responsibly, to solving the menace of rogue states**. **At present all we have are the bellicose bellowing of the rogues and the well-meaning drift of the Great Powers–a formula for an eventual and monumental disaster that could be the end of us all.**

## Third

#### Al Qaeda is weak now but could recover if the US allows them the opportunity

McLaughlin 13

(John McLaughlin was a CIA officer for 32 years and served as deputy director and acting director from 2000-2004. He currently teaches at the Johns Hopkins University's School of Advanced International Studies and is a Non-Resident Senior Fellow at the Brookings Institution, ¶ 06:00 AM ET¶ Terrorism at a moment of transition7/12, http://security.blogs.cnn.com/2013/07/12/terrorism-at-a-moment-of-transition/)

A third major trend has to do with the debate underway among terrorists over tactics, targets, and ways to correct past errors.¶ On targets, jihadists are now pulled in many directions. Many experts contend they are less capable of a major attack on the U.S. homeland. But given the steady stream of surprises they’ve sprung – ranging from the 2009 “underwear bomber” to the more recent idea of a surgically implanted explosive – it is hard to believe they’ve given up trying to surprise us with innovations designed to penetrate our defenses.¶ We especially should remain alert that some of the smaller groups could surprise us by pointing an attacker toward the United States, as Pakistan’s Tehrik e Taliban did in preparing Faizal Shazad for his attempted bombing of Times Square in 2010.¶ At the same time, many of the groups are becoming intrigued by the possibility of scoring gains against regional governments that are now struggling to gain or keep their balance – opportunities that did not exist at the time of the 9/11 attacks.¶ Equally important, jihadists are now learning from their mistakes, especially the reasons for their past rejection by populations where they temporarily gained sway.¶ Documents from al Qaeda in the Islamic Maghreb, discovered after French forces chased them from Mali, reveal awareness that they were too harsh on local inhabitants, especially women. They also recognized that they need to move more gradually and provide tangible services to populations – a practice that has contributed to the success of Hezbollah in Lebanon.¶ We are now seeing a similar awareness among jihadists in Syria, Tunisia, Libya, and Yemen. If these “lessons learned” take hold and spread, it will become harder to separate terrorists from populations and root them out.¶ Taken together, these three trends are a cautionary tale for those seeking to gauge the future of the terrorist threat.¶ Al Qaeda today may be weakened, but its wounds are far from fatal. It is at a moment of transition, immersed in circumstances that could sow confusion and division in the movement or, more likely, extend its life and impart new momentum.¶ So if we are ever tempted to lower our guard in debating whether and when this war might end, we should take heed of these trends and of the wisdom J. R. R. Tolkien has Eowyn speak in “Lord of the Rings”: "It needs but one foe to breed a war, not two ..."

#### Al-Bihani interpretation key to fighting the war on terror, judiciary can’t manage the contrary

McGrail, 10

[Deputy Clerk, United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT No. 09-5051 GHALEB NASSAR AL-BIHANI, APPELLANT v. BARACK OBAMA,PRESIDENT OF THE UNITED STATES, ET AL., APPELLEES Appeal from the United States District Court for the District of Columbia (No. 1:05-cv-01312) On Petition for Rehearing En Banc, Filed: August 31, 2010, <http://www.cadc.uscourts.gov/internet/opinions.nsf/7D993FB6907397468525780700715176/$file/09-5051-1263353.pdf> //uwyo-baj]

Most troubling of all is the grotesque non sequitur that Congress must have intended to incorporate international law through the AUMF because it would be odd to think Congress “embrace[d]” a long history of wartime atrocity, from the Rape of Nanking to the massacre at Lidice. Judge Williams may believe that the only barrier that would hold back our nation from a descent into Nazism is an enlightened judiciary standing at the precipice, wielding international norms our 13 polity is presumably unable to muster from within.7 But that belief cannot change the plain text of the AUMF, its legislative history, or the longstanding congressional practice of granting “the President a degree of discretion and freedom from statutory restriction” necessary to carry out his foreign affairs duties, Curtiss-Wright, 299 U.S. at 320. There is no indication that the AUMF placed any international legal limits on the President’s discretion to prosecute the war and, in light of the challenge our nation faced after September 11, 2001, that makes eminent sense. Confronted with a shadowy, non-traditional foe that succeeded in bringing a war to our doorstep by asymmetric means, it was (and still is) unclear how international law applies in all respects to this new context. The prospect is very real that some tradeoffs traditionally struck by the laws of war no longer make sense. That Congress wished the President to retain the discretion to recalibrate the military’s strategy and tactics in light of circumstances not contemplated by our international obligations is therefore sensible, and reflects the traditional sovereign prerogative to violate international law or terminate international agreements. See Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Cir. 1986) (“[T]he power of the President to disregard international law in service of domestic needs is reaffirmed.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 (describing power of the President to suspend or terminate international agreements).8 The only way a court could reach the opposite conclusion is to go beyond the AUMF’s text, freeing it—as Judge Williams suggests—to appeal to an international metanarrative, one activated whenever a legal issue touches on matters that strike the judge as transnational in flavor. Judges act prudently when they consciously forego opportunities for policymaking. Therefore, ignoring the text and plain meaning of a statute to privilege a more creative interpretation is the antithesis of prudence. And, in a time of war, it has the inconvenient effect of upending more than a century of our jurisprudence based on an understanding as old as the Republic: that the “conduct of foreign relations of our government is committed by the Constitution to the executive and legislative . . . departments,” not to the judiciary. Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918). The only proper judicial role in this case is the truly modest route taken by the panel opinion in Al-Bihani. We read “necessary and appropriate” in its traditional sense, taking Congress at its word that the President is to have wide discretion. This is a modest course because the President retains the leeway to implement his authority as broadly or narrowly as he believes appropriate—consistent with international law or not—and the legislature, in turn, may add whatever limits or constraints it deems wise as the war progresses. This ensures that wartime decisions will be informed by the expertise of the political branches, stated in a clear fashion, and that the decisionmakers will be accountable to the electorate. None of those benefits accrue if the conduct of the military is subject to judicial correction based on norms of international discourse. Such an approach would place ultimate control of the war in the one branch insulated from both the battlefield and the ballot box. That would add further illegitimacy to the unpredictable and ad hoc rules judges would draw from the primordial stew of treaties, state practice, tribunal decisions, scholarly opinion, and foreign law that swirls beyond our borders. It is no comfort to the military to say, as Judge Williams does, that courts will only apply international rules they deem to possess the qualities of serious reason, evenhandedness, and practicality. Those are not judicially manageable standards. Those are buzzwords, the pleasing sound of which nearly lulls the mind into missing the vision of judicial supremacy at the heart of Judge Williams’ opinion.

#### Constrained executive makes it impossible to respond to the rapid and existential nature of the threat posed by terrorism-strong, flexible executive key to check nuclear, chemical, and biological attacks

Royal 2011

[John Paul, Fellow of the Institute for World Politics, 2011, War Powers and the Age of Terrorism, <http://www.thepresidency.org/storage/Fellows2011/Royal-_Final_Paper.pdf>, uwyo//amp]

The international system itself and national security challenges to the United States in particular, underwent rapid and significant change in the first decade of the twenty-first century. War can no longer be thought about strictly in the terms of the system and tradition created by the Treaty of Westphalia over three and a half centuries ago. Non-state actors now possess a level of destructiveness formerly enjoyed only by nation states. Global terrorism, coupled with the threat of weapons of mass destruction developed organically or obtained from rogue regimes, presents new challenges to U.S. national security and place innovative demands on the Constitution’s system of making war. In the past, as summarized in the 9/11 Commission Report, threats emerged due to hostile actions taken by enemy states and their ability to muster large enough forces to wage war: “Threats emerged slowly, often visibly, as weapons were forged, armies conscripted, and units trained and moved into place. Because large states were more powerful, they also had more to lose. They could be deterred" (National Commission 2004, 362). This mindset assumed that peace was the default state for American national security. Today however, we know that threats can emerge quickly. Terrorist organizations half-way around the world are able to wield weapons of unparalleled destructive power. These attacks are more difficult to detect and deter due to their unconventional and asymmetrical nature. In light of these new asymmetric threats and the resultant changes to the international system, peace can no longer be considered the default state of American national security. Many have argued that the Constitution permits the president to use unilateral action only in response to an imminent direct attack on the United States. In the emerging security environment described above, pre-emptive action taken by the executive branch may be needed more often than when nation-states were the principal threat to American national interests. Here again, the 9/11 Commission Report is instructive as it considers the possibility of pre-emptive force utilized over large geographic areas due to the diffuse nature of terrorist networks: In this sense, 9/11 has taught us that terrorism against American interests “over there” should be regarded just as we regard terrorism against America “over here.” In this sense, the American homeland is the planet (National Commission 2004, 362). Furthermore, the report explicitly describes the global nature of the threat and the global mission that must take place to address it. Its first strategic policy recommendation against terrorism states that the: U.S. government must identify and prioritize actual or potential terrorist sanctuaries. For each, it should have a realistic strategy to keep possible terrorists insecure and on the run, using all elements of national power (National Commission 2004, 367). Thus, fighting continues against terrorists in Afghanistan, Yemen, Iraq, Pakistan, the Philippines, and beyond, as we approach the tenth anniversary of the September 11, 2001 attacks. Proliferation of weapons of mass destruction (WMD), especially nuclear weapons, into the hands of these terrorists is the most dangerous threat to the United States. We know from the 9/11 Commission Report that Al Qaeda has attempted to make and obtain nuclear weapons for at least the past fifteen years. Al Qaeda considers the acquisition of weapons of mass destruction to be a religious obligation while “more than two dozen other terrorist groups are pursing CBRN [chemical, biological, radiological, and nuclear] materials” (National Commission 2004, 397). Considering these statements, rogue regimes that are openly hostile to the United States and have or seek to develop nuclear weapons capability such as North Korea and Iran, or extremely unstable nuclear countries such as Pakistan, pose a special threat to American national security interests. These nations were not necessarily a direct threat to the United States in the past. Now, however, due to proliferation of nuclear weapons and missile technology, they can inflict damage at considerably higher levels and magnitudes than in the past. In addition, these regimes may pursue proliferation of nuclear weapons and missile technology to other nations and to allied terrorist organizations. The United States must pursue condign punishment and appropriate, rapid action against hostile terrorist organizations, rogue nation states, and nuclear weapons proliferation threats in order to protect American interests both at home and abroad. Combating these threats are the “top national security priority for the United States…with the full support of Congress, both major political parties, the media, and the American people” (National Commission 2004, 361). Operations may take the form of pre-emptive and sustained action against those who have expressed hostility or declared war on the United States. Only the executive branch can effectively execute this mission, authorized by the 2001 AUMF. If the national consensus or the nature of the threat changes, Congress possesses the intrinsic power to rescind and limit these powers.

#### Terrorist retaliation causes nuclear war – draws in Russia and China

Ayson, 10

Robert Ayson, Professor of Strategic Studies and Director of the Centre for Strategic Studies: New Zealand at the Victoria University of Wellington, 2010 (“After a Terrorist Nuclear Attack: Envisaging Catalytic Effects,” Studies in Conflict & Terrorism, Volume 33, Issue 7, July, Available Online to Subscribing Institutions via InformaWorld)

A terrorist nuclear attack, and even the use of nuclear weapons in response by the country attacked in the first place, would not necessarily represent the worst of the nuclear worlds imaginable. Indeed, there are reasons to wonder whether nuclear terrorism should ever be regarded as belonging in the category of truly existential threats. A contrast can be drawn here with the global catastrophe that would come from a massive nuclear exchange between two or more of the sovereign states that possess these weapons in significant numbers. Even the worst terrorism that the twenty-first century might bring would fade into insignificance alongside considerations of what a general nuclear war would have wrought in the Cold War period. And it must be admitted that as long as the major nuclear weapons states have hundreds and even thousands of nuclear weapons at their disposal, there is always the possibility of a truly awful nuclear exchange taking place precipitated entirely by state possessors themselves. But these two nuclear worlds—a non-state actor nuclear attack and a catastrophic interstate nuclear exchange—are not necessarily separable. It is just possible that some sort of terrorist attack, and especially an act of nuclear terrorism, could precipitate a chain of events leading to a massive exchange of nuclear weapons between two or more of the states that possess them. In this context, today’s and tomorrow’s terrorist groups might assume the place allotted during the early Cold War years to new state possessors of small nuclear arsenals who were seen as raising the risks of a catalytic nuclear war between the superpowers started by third parties. These risks were considered in the late 1950s and early 1960s as concerns grew about nuclear proliferation, the so-called n+1 problem. t may require a considerable amount of imagination to depict an especially plausible situation where an act of nuclear terrorism could lead to such a massive inter-state nuclear war. For example, in the event of a terrorist nuclear attack on the United States, it might well be wondered just how Russia and/or China could plausibly be brought into the picture, not least because they seem unlikely to be fingered as the most obvious state sponsors or encouragers of terrorist groups. They would seem far too responsible to be involved in supporting that sort of terrorist behavior that could just as easily threaten them as well. Some possibilities, however remote, do suggest themselves. For example, how might the United States react if it was thought or discovered that the fissile material used in the act of nuclear terrorism had come from Russian stocks,40 and if for some reason Moscow denied any responsibility for nuclear laxity? The correct attribution of that nuclear material to a particular country might not be a case of science fiction given the observation by Michael May et al. that while the debris resulting from a nuclear explosion would be “spread over a wide area in tiny fragments, its radioactivity makes it detectable, identifiable and collectable, and a wealth of information can be obtained from its analysis: the efficiency of the explosion, the materials used and, most important … some indication of where the nuclear material came from.”41 Alternatively, if the act of nuclear terrorism came as a complete surprise, and American officials refused to believe that a terrorist group was fully responsible (or responsible at all) suspicion would shift immediately to state possessors. Ruling out Western ally countries like the United Kingdom and France, and probably Israel and India as well, authorities in Washington would be left with a very short list consisting of North Korea, perhaps Iran if its program continues, and possibly Pakistan. But at what stage would Russia and China be definitely ruled out in this high stakes game of nuclear Cluedo? In particular, if the act of nuclear terrorism occurred against a backdrop of existing tension in Washington’s relations with Russia and/or China, and at a time when threats had already been traded between these major powers, would officials and political leaders not be tempted to assume the worst? Of course, the chances of this occurring would only seem to increase if the United States was already involved in some sort of limited armed conflict with Russia and/or China, or if they were confronting each other from a distance in a proxy war, as unlikely as these developments may seem at the present time. The reverse might well apply too: should a nuclear terrorist attack occur in Russia or China during a period of heightened tension or even limited conflict with the United States, could Moscow and Beijing resist the pressures that might rise domestically to consider the United States as a possible perpetrator or encourager of the attack? Washington’s early response to a terrorist nuclear attack on its own soil might also raise the possibility of an unwanted (and nuclear aided) confrontation with Russia and/or China. For example, in the noise and confusion during the immediate aftermath of the terrorist nuclear attack, the U.S. president might be expected to place the country’s armed forces, including its nuclear arsenal, on a higher stage of alert. In such a tense environment, when careful planning runs up against the friction of reality, it is just possible that Moscow and/or China might mistakenly read this as a sign of U.S. intentions to use force (and possibly nuclear force) against them. In that situation, the temptations to preempt such actions might grow, although it must be admitted that any preemption would probably still meet with a devastating response.

## Solvency

#### No solvency, the international interpretation of the wording Al-Bihani used results in the same decision

Posner, 10

[Steve C. Posner on the Military Commissions Act since Boumediene v. Bush, “GHALEB NASSAR AL-BIHANI, APPELLANT v. BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL., APPELLEES No. 09-5051 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 619 F.3d 1; 393 U.S. App. D.C. 57; 2010 U.S. App. LEXIS 18169” August 31, 2010, LexisNexis, uwyo-baj]

But suppose we ignore the questionable propriety of Judge Williams' interpretive method and endeavor to apply it in this case. Ironically--and perhaps paradoxically--we likely would double-back to the same conclusion that international law does not limit the AUMF. The phrase in the AUMF on which Al-Bihani hinges his argument is "necessary and appropriate," which he contends modifies the word "force" by prohibiting conduct not approved by international law. The closest analogy in domestic law is the phrase "necessary and proper," which, as Judge Kavanaugh notes in his concurrence, has in its constitutional and statutory provenance been consistently interpreted to broaden rather than to constrain discretion. See, e.g., Legal Tender Cases, 79 U.S. (12 Wall.) 457, 550, 20 L. Ed. 287 (1870) ("[T]he auxiliary powers, those necessary and appropriate to the execution of other powers singly described . . . are grouped in the last clause [\*\*\*18] of section eight of the first article [the Necessary and Proper Clause].") (emphasis added). Turning to international materials does not yield a different meaning. Usage of the phrase "necessary and appropriate" on the international plane grants nations wide discretion to act and does not purport to constrain them with international law. One example--among many--is U.N. Security Council Resolution 1624, which in three separate clauses calls upon states "to take all measures as may be necessary and appropriate and in accordance with their [\*7] [\*\*63] obligations under international law" to counter incitement to terrorist acts. S.C. Res. 1624, PP 1, 3, U.N. Doc. S/RES/1624 (Sept. 14, 2005) (emphasis added); see also id. pmbl. That the Security Council felt the need to append international law obligations to "necessary and appropriate"-- three times, no less--indicates the phrase does not automatically incorporate such obligations.

#### Their Waring evidence concludes no impact– at worst a handful of detainees are impacted

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Spring, 2012 Georgetown Journal of International Law 43 Geo. J. Int'l L. 927, Lexis

B. Revival of International Law Despite Al-Bihani?¶ 1. Al Warafi: Affirmed in Part, Remanded in Part¶ The case of Mr. Al Warafi presented a new issue in the ongoing saga of litigation to determine the scope of the President's detention authority. Mr. Al Warafi was found to be "part of" the Taliban by the District Court, n197 and this determination was affirmed by the Circuit Court. n198 However, Mr. Al Warafi claimed to be medical personnel under Article 24 of the First Geneva Convention. n199 The Geneva Convention states that "[m]edical personnel exclusively engaged in the . . . treatment of the wounded or sick, or in the prevention of disease . . . shall be respected and protected in all circumstances [and] shall be retained only in so far as the state of health . . . of prisoners of war require." n200 Mr. Al Warafi argued that when such personnel are not needed to care for detainees they should be returned to their home country, in accordance with the Geneva Conventions. n201¶ The District Court did not make a determination on Mr. Al Warafi's Geneva Convention protection claim because it found that Al-Bihani and the MCA 2006 precluded the Geneva Conventions from being invoked as a source of rights. n202 Surprisingly, however, the D.C. Circuit Court remanded and ordered a factual finding into whether Mr. Al Warafi was "permanently and exclusively medical personnel" according to Article 24 of the First Geneva Convention. n203 The Circuit Court stated that, "assuming arguendo [the Geneva Convention's applicability]," the District Court needed to make a determination on Mr. Al Warafi's status. n204 This order seemed to imply that the results could be used to limit the scope of detention authority. Even though Al-Bihani said that international law has no role in detention authority, the Circuit Court's order in Al Warafi calls that into question. n205¶ [\*956] VI. RECOMMENDATIONS¶ The Supreme Court should review the holding in Al-Bihani because the removal of international law has caused significant upheaval in Guantanamo litigation. Since the D.C. Circuit Court is the only court system that can hear Guantanamo habeas appeals, a grant of certiorari is even more important since there are no other courts that can review. n206 As Judge Janice Brown's concurrence in Al-Bihani noted, "The common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts . . . [but in the Guantanamo context] [t]he petitions . . . are funneled through one federal district court and one appellate court." n207¶ Additionally, the Al-Bihani opinion should be reviewed because it directly conflicts with prior Supreme Court precedent. The Court in Hamdi expressly stated that the law of war should inform the scope of detention authority, and in Hamdan, the Court directed lower courts to use international law in the Guantanamo context. n208¶ However, the Supreme Court instead denied certiorari. n209 Some Court observers saw this denial as a clear signal that the Court was "at least strongly hesitant, if not entirely unwillingly, to second-guess how the D.C. Circuit Court fashions the law of detention of individuals by the U.S. military." n210 And at least two Justices have indicated that this [\*957] area of law needs to have clarification from the Court. n211 In a dissent from a certiorari denial in Noriega v. Pastrana, Justice Thomas, joined by Justice Scalia, stressed that regarding the question of whether a habeas corpus petition can invoke the Geneva Conventions as a source of rights in habeas proceedings, "[i]t is incumbent upon [the Court] to provide what guidance we can . . . ." n212 The dissent further explained that "our opinion will help the political branches and the courts discharge their responsibilities over detainee cases, and will spare detainees and the Government years of unnecessary litigation." n213¶ In light of the contradiction between the ruling in Hamdi and the ruling in Al-Bihani, the Supreme Court should take up the issue to clarify the rule of law. It is the Supreme Court's role to say "what the law is," n214 and it should do so here. The need for clarity is particularly salient given that the lives of the Guantanamo detainees are at stake. n215¶ VII. CONCLUSION¶ After the 9/11 attacks, the United States wanted to quickly gather intelligence to prevent another deadly attack from happening. In response, Congress passed the AUMF to provide the President with the authority to "prevent any future acts of international terrorism against the United States." n216 However, as the war in Afghanistan progressed and the use of Guantanamo Bay increased, it became clear that there were several questions as to just how far the President's authority extended. With respect to detention, the sources of such authority in [\*958] the twentieth century has come from explicit legislation from Congress and international law. n217 However, the AUMF did not expressly lay out the terms or scope of detention. n218 As such, the Supreme Court in Hamdi interpreted the AUMF to include detention, as this was a fundamental principle of the law of war. n219 The Court also limited the scope of detention through the application of the law of war. n220 As the Guantanamo habeas litigation began working its way through the D.C. District Court a few different formulations of detention authority developed, all using the law of war to inform that authority. n221 However, all of this changed when the D.C. Circuit Court ruled in Al-Bihani that international law had no role in limiting the President's detention authority. n222 This decision directly conflicted with Hamdi and failed to acknowledge this conflict. In addition to creating a precedent that conflicted with the Supreme Court, this decision also conflicted with the scope of detention authority described by the President and Congress. n223 As a result of Al-Bihani, the international law principles developed by the lower courts have been eliminated. The repercussions of this elimination were that several decisions that had granted habeas relief to detainees were reversed. n224 Finally, although it seemed that Al-Bihani and its progeny closed the door on international law, a recent opinion out of the D.C. Circuit Court has implied that at least some provisions of the Geneva Conventions may be relevant. n225 However, such statements are irrelevant for detainees whose petitions have been denied on the basis of expansive detention authority unlimited by the law of war.

#### Aff has no effect; Congress never implemented the treaties in question; that’s a prereq, their author

Walsh, 10

[Cara Maureen Walsh J.D. Candidate 2010, Vanderbilt University Law School. “Al-Bihani, Not So Charming,” October 2010, Vanderbilt Journal of Transnational Law 43 Vand. J. Transnat'l L. 1151]

According to the court, because Congress has not domestically implemented it, international law is “not a source of authority for U.S. courts.”165 The court also noted that Congress could authorize the President to violate international law, and asserted that the AUMF and subsequent statutes may have done so.166 Thus, the court concluded that it had “no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles,”167 and that it would look solely to “the sources courts always look to”: domestic statutes and controlling case law.168

#### Realism is inevitable- states maximize power, and will go to war to maintain being the hegemon

Joseph K. **Clifton 11**,

Claremont McKenna College “DISPUTED THEORY AND SECURITY POLICY: RESPONDING TO “THE RISE OF CHINA”,” 2011, <http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1164&context=cmc_theses>, accessed 12/12/12,WYO?JF

Offensive realism, a creation of John Mearsheimer, takes the structural formulation from Waltz and uses it to argue for a different expectation of state behavior and international outcomes. While defensive realism claim that states only pursue power to the extent that it creates a balance, offensive realism claims that the state’s appetite for power is insatiable. As Mearsheimer puts it, “A state’s ultimate goal is to be the hegemon in the system.”29 In the offensive realist understanding, states are also motivated by security, but have little reason to believe that maintaining the balance of power alone will provide this. Because states have the ability to attack each other, and there is no way to ensure benign intention of other states, states are potential dangers to each other. The only way for a state to maximize its chance of survival (Mearsheimer tends to use “survival” instead of “security”) is to maximize its power because a powerful state is less likely to be attacked and more likely to win if attacked.30

#### Conflict is caused by human nature and is inevitable

Joseph K. **Clifton 11**,

Claremont McKenna College “DISPUTED THEORY AND SECURITY POLICY: RESPONDING TO “THE RISE OF CHINA”,” 2011, <http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1164&context=cmc_theses>, accessed 12/12/12,WYO?JF

Also known as “human nature realism,”14 classical realism posits that conflict between states is primarily a product of the aggressiveness of human nature. Hans J. Morgenthau is the canonical author of classical realism with his work Politics Among Nations, which was influential after World War II.15 As Morgenthau argues, “political realism believes that politics, like society in general, is governed by objective laws that have their roots in human nature.”16 That nature in the international arena translates to a state’s “interest defined in terms of power.”17 In other words, states seek as much political power as possible because they are social institutions, and therefore follow the drives of human nature. Given the premise that people (and states) will experience a conflict of interest in their pursuit of power, the goal of politics is to achieve “the realization of the lesser evil rather than of the absolute good.”18 This “lesser evil” is pursued through the balance of power, in which states try to maintain an existing equilibrium or construct a new equilibrium.

## Charming Betsy

#### Forcing conformity to international law kills separation of powers

Posner, 10

[Steve C. Posner on the Military Commissions Act since Boumediene v. Bush, “GHALEB NASSAR AL-BIHANI, APPELLANT v. BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL., APPELLEES No. 09-5051 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 619 F.3d 1; 393 U.S. App. D.C. 57; 2010 U.S. App. LEXIS 18169” August 31, 2010, LexisNexis, uwyo-baj]

If that is their wish, it is a curious one. The idea that international norms hang over domestic law as a corrective force to be implemented by courts is not only alien to our caselaw, but an aggrandizement of the judicial role beyond the Constitution's conception of the separation of powers. See United States v. Yunis, 924 F.2d 1086, 1091, 288 U.S. App. D.C. 129 (D.C. Cir. 1991) ("[T]he role of judges . . . is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law."). That aggrandizement is clear in the more extreme scholarly opinions calling for courts to ignore congressional intent in favor of international norms. And it is only slightly better disguised in the superficially restrained claims that Congress intends to conform its actions with global ideals, and that a clear statement is required if courts are to be prevented from reading international law into statutory text. Traditional clear statement rules are justified on the basis of preserving statutes against possible nullification by a constitutional value, keeping both Congress and the judiciary within their constitutional capacities. [\*\*\*11] 5 However, a demand that Congress clearly enunciate the inapplicability of international norms is not premised on any constitutional value; nothing in the Constitution compels the domestic incorporation of international law. Instead, what such a demand protects is a policy preference, imputing to Congress a general posture toward international restrictions and erecting the highest interpretive hurdle to the legitimate prerogative of Congress to legislate apart from them. This is a restrained search for legislative "intent" only in the most Orwellian sense--one that grants judges license to usurp the legislative role and dictate to Congress what it is supposed to think. Surprisingly, proponents of this idea actually claim it guards the separation of powers. See Wuerth, supra, at 349-50. But if that is the case, then the cure is truly worse than the disease.

**SOP key to prevent inter-branch conflict**

**Taylor- Robinson and Ura 12** (Michelle M, Joseph, "Public opinion and conflict in the separation of powers: Understanding the Honduran coup of 2009," Journal of Theoretical Politics, Oct 9, jtp.sagepub.com/content/early/2012/10/07/0951629812453216.full.pdf)

Finally, our model shows that **once inter-institutional conﬂict has emerged within the**¶ **separation of powers, it is likely** to continue inexorably **until it is resolved by authoritative**¶ **public action**. **An institution that** rationally **seeks to expand its authority in a separation**¶ **of powers system will also have incentives to continue and**, indeed, **escalate the conﬂict**¶ **rather than abandon its effort to aggrandize its authority in the face of opposition**. Likewise, **an attacked institution that rationally combats an attempted expansion of another**¶ **institution’s authority will not fold if the aggressor subsequently raises the stakes.** In the¶ case of Honduras, this dynamic is visible in the mutual escalation of the conﬂict between¶ President Zelaya and the nation’s Congress and Supreme Court. More generally, **this**¶ **result indicates dim prospects for hopes that inter-branch conﬂicts may be resolved by processes that are entirely endogenous to the institutions in question. Rather, intervention by the public or some other exogenous force may be critical to resolving a conﬂict**¶ **once it has emerged.**

#### Extinction

Linda S. **Jamison**, Deputy Director of Governmental Relations @ CSIS, Spring 19**93**, Executive-Legislative Relations after the Cold War, Washington Quarterly, v.16, n.2, p. 189

Indeed there are very few domestic issues that do not have strong international implications, and likewise there are numerous transnational issues in which all nations have a stake. Environmental degradation, the proliferationof weapons of mass destruction, population control, migration, international narcotics trafficking, the spread of AIDS, andthe deterioration of the human condition in the less developed world are circumstancesaffecting all corners ofthe globe. Neither political isolation nor policy bifurcation is an option for the United States. Global circumstances have drastically changed with the end of the Cold War and the political and policy conditions that sustained bipartisan consensus are not applicable to the post-war era. The formulation of a new foreign policy must be grounded in broad-based principles that reflect domestic economic, political and social concerns while providing practical solutions to new situations. Toward a cooperative US Foreign Policy for the 1990s: Ifthe federalgovernment is to meetthenewinternational policychallengesof the post-cold war era, institutional dissension caused by partisan competition and executive-legislative friction must give way to a new way of business**.** Policy flexibility must be the watchword of the 1990s in the foreign policy domainif the United States is to have any hope of securing its interests in theuncertainyears ahead**.** One former policymaker, noting the historical tendency of the United States to make fixed “attachments,” has argued that a changing world dictates policy flexibility, where practical solutions can be developed on principles of broad-based policy objectives (Fulbright 1979). Flexibility, however, will not be possible without interbranch cooperation. The end of the Cold War and the new single-party control of the White House and Congress provide a unique opportunity to reestablish foreign policy cooperation. Reconfiguring post cold war objectives requires comprehension of the remarkable transformations in world affairs and demands an intense political dialogue that goes beyond the executive branch (Mann 1990, 28-29).

#### No uniqueness for backing down from treaties

Crootoff  11  
Rebecca Crootof, J.D. Yale Law School  
Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon (April 5, 2011). Yale Law Journal. Available at SSRN: <http://ssrn.com/abstract=1803380>  
 The Charming Betsy Canon Encourages Domestic Courts’ Engagement with International Agreements and International Adoption

Much of domestic law already accords with international law, in large part because the United States actively influences the development of treaties. The United States often plays a pivotal role in drafting international treaties, and U.S. ratifications of multilateral treaties often are accompanied by declarations that U.S. obligations under the treaty are already fulfilled by domestic law. Therefore, aside from the fact that the Charming Betsy canon does not obligate or encourage courts to override domestic law, its proper application will likely favor interpretations that harmonize with provisions previously endorsed by the United States.

#### Charming Betsy canon meaningless; does not require federal statute compliance

McGrail, 10

[Deputy Clerk, United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT No. 09-5051 GHALEB NASSAR AL-BIHANI, APPELLANT v. BARACK OBAMA,PRESIDENT OF THE UNITED STATES, ET AL., APPELLEES Appeal from the United States District Court for the District of Columbia (No. 1:05-cv-01312) On Petition for Rehearing En Banc, Filed: August 31, 2010, <http://www.cadc.uscourts.gov/internet/opinions.nsf/7D993FB6907397468525780700715176/$file/09-5051-1263353.pdf> //uwyo-baj]

But putting aside the preceding discussion (and the odd conceptual loop it creates), I reiterate that consulting international sources in that manner is not something judges have in their interpretive toolbox. The only generally applicable role for international law in statutory interpretation 11 is the modest one afforded by the Charming Betsy canon, which counsels courts, where fairly possible, to construe ambiguous statutes so as not to conflict with international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); see also Sampson v. Fed. Repub. of Germany, 250 F.3d 1145, 1152 (7th Cir. 2001).6 However, Judge Williams does not appear to confine international law to such a narrow space. By including international discourse among the traditional tools available to courts when interpreting statutes, Judge Williams is not limiting the application of international law to ambiguous statutory text. Generally, a statute’s text is only ambiguous if, after “employing traditional tools of statutory construction,” a court determines that Congress did not have a precise intention on the question at issue. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). It is at this point—analogous to Chevron Step Two— that the Charming Betsy canon has had any application in federal courts. But Judge Williams implies that international law should be consulted in the first instance to influence interpretation at the same level as traditional interpretive tools, making its use predicate to a finding of ambiguity. This implication has the secondary effect of eviscerating the limiting principle of the Charming Betsy canon that it only exerts a negative force on the meaning of statutes, pushing them away from meanings that would conflict with international law. Courts do not apply Charming Betsy as an affirmative indicator of statutory meaning. See, e.g., Sampson, 250 F.3d at 1152–53 (holding the Charming Betsy canon does not require “federal statutes [to be] read to reflect norms of international law”); Princz v. Fed. Repub. of Germany, 26 F.3d 1166, 1174 & n.1 (D.C. Cir. 1994) (rejecting dissent’s argument that statutes must be read “consistently with international law” and must be presumed to “incorporate[] standards recognized under international law,” Princz, 26 F.3d at 1183 (Wald, J., dissenting)). However, under Judge Williams’ method, I see no reason why courts would be bound by this rule, since traditional interpretive sources are normally viewed as indicative of affirmative meaning. These inconsistencies with the Charming Betsy canon make clear that Judge Williams’ proposal cannot possibly be correct. If it were, it would be a mystery why American jurisprudence would even bother to enunciate an interpretive canon like the Charming Betsy. Judge Williams’ approach would make that canon vestigial, foolish even—akin to a canon limiting the use of dictionaries.

#### 1ac card concedes single decisions don’t implicate Charming Betsy – no spillover

Crootoff  11  
Rebecca Crootof, J.D. Yale Law School  
Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon (April 5, 2011). Yale Law Journal. Available at SSRN: <http://ssrn.com/abstract=1803380>  
 The Charming Betsy Canon Encourages Domestic Courts’ Engagement with International Agreements and International Adoption

Conclusion There are legitimate reasons to celebrate and criticize Medellin’s reasoning. The case clarifies murky areas of domestic law, but it does so at the expense of the United States fulfilling its international commitments. However, those who rejoice in or bemoan Medellin’s seeming presumption in favor of non-selfexecution mistake the case’s import. While high-profile decisions like Medellin will draw fire, treaties’ influence in domestic jurisprudence remains largely unaffected.Treaties, eve self-executing treaties, are rarely used directly. Instead, in concert with the Charming Betsy canon, both self- and non-self-executing treaties serve as useful tools in statutory construction. Existing court practice reflects this understanding, and normative arguments support it. The limited application of the Charming Betsy canon results in relatively costless compliance with international law, accords with separation-of-powers principles by avoiding unintended and possibly undesirable breaches of international obligations, and allows domestic courts to engage with and influence developing norms. In giving meaning to U.S. international obligations while respecting the limits of international law in domestic jurisprudence, judicious application of the Charming Betsy canon in conjunction with non-self-executing treaties reconciles often-opposing interests.

## Warming o/w

#### The affirmative’s perception of war is reductionist and ignores smaller conflicts and terrorism that are happening now—Syria and Kenya are both recent events that prove—and still have an impact.

#### War destroys the environment – Kuwait proves

World Resource Institute, ‘2

[World Resources Institute, The Environment: Another casualty of war?, December 2002, http://archive.wri.org/jlash/letters.cfm?contentid=564]

Amid what appear to be accelerating preparations for a new war, it is worth taking time to reflect on the environmental consequences of the 1991 Gulf War. War is inherently destructive. The purpose of the massive structures of military security that nations array against one another is the destruction of a physical enemy and his capacity to fight back. While smart bombs and precision guidance increase the probability that weapons will hit their targets, they do not eliminate so-called "collateral damage" to people and ecosystems. And there is reason to fear that Saddam Hussein will fight the next war in ways that maximize "collateral damage."  In fact, what many recall as a short-lived conflict resulting in the liberation of Kuwait was an environmental disaster - one from which the region and its people have yet to recover. Iraqi forces themselves created much of the immediate ecological hardship facing the Gulf region after the war. Oil spilled into the Persian Gulf, tarred beaches and killed more than 25,000 birds. Scientists predict the toxic residue will continue to affect fisheries in the Gulf for over 100 years. As much as six million barrels of oil a day - almost ten percent of the world's daily ration of oil that year - shot into the air from the burning wells. Oil spilled on land formed huge pools in lowlands, covering fertile croplands. One oil lake in southern Kuwait was a half a mile long and 25 feet deep in places. It contained nine times as much oil as the Exxon Valdez spill. The deposition of oil, soot, sulfur, and acid rain on croplands up to 1,200 miles in all directions from the oil fires turned fields untillable and led to food shortages. The fires released nearly half a billion tons of carbon dioxide, the leading cause of global warming, emissions greater than all but the eight largest polluting countries for 1991 that will remain in the atmosphere for more than a century. The oil that did not burn in the fires traveled on the wind in the form of nearly invisible droplets resulting in an oil mist or fog that poisoned trees and grazing sheep, contaminated fresh water supplies, and found refuge in the lungs of people and animals throughout

#### Nuclear war depletes the ozone and destroys the environment.

**Sagan,** Director of the Laboratory for planetary studies at Cornell University. **84**

(Carl, Winter. Foreign Affairs. “Nuclear War and Climatic Catastrophe” )

Nuclear explosions of more than one-megaton yield generate a radiant fireball that rises through the trosposphere into the stratosphere. The fireballs from weapons with yields between 100 kilotons and one megaton will partially extend into the stratosphere. The high temperatures in the fireball chemically ignite some of the nitrogen in the air, producing oxides of nitrogen, which in turn chemically attack and destroy the gas ozone in the middle stratosphere. But ozone absorbs the biologically dangerous ultraviolet radiation from the Sun. Thus the partial depletion of the stratospheric ozone layer, or “ozonosphere,” by high yield nuclear explosions will increase the flux of solar ultraviolet radiation at the surface of the Earth (after the soot and dust have settled out). After a nuclear war in which thousands of high yield weapons are detonated, the increases in biologically dangerous ultraviolet light might be several hundred percent. In the more dangerous shorter wavelengths, larger increase would occur. Nucleic acids and proteins , the fundamental molecules for life on Earth, are especially sensitive to ultraviolet radiation. Thus, an increase of the solar ultraviolet flux at the surface of the Earth is potentially dangerous for life.   These four effects – obscuring smoke in the troposphere, obscuring dust in the stratosphere, the fallout of radioactive debris, and the partial destruction of the ozone layer –constitute the four known principal adverse environmental consequences that occur after a nuclear war is “over.” There may be other about which we are still ignorant. Te dust and, especially, the dark soot absorb ordinary visible light from the Sun, heating the atmosphere and cooling the Earth’s surface.

# 2NC

## Warming

#### Proliferation causes nuclear war, terrorism and global instability

Kroenig 12

[Matthew, assistant professor in the Department of Government at Georgetown University and a research affiliate with The Project on Managing the Atom at Harvard University, he served as a strategist on the policy planning staff in the Office of the Secretary of Defense where he received the Office of the Secretary of Defense’s Award for Outstanding Achievement. He is a term member of the Council on Foreign Relations and has held academic fellowships from the National Science Foundation, the Belfer Center for Science and International Affairs at Harvard University, the Center for International Security and Cooperation at Stanford University, and the Institute on Global Conflict and Cooperation at the University of California, “The History of Proliferation Optimism: Does It Have A Future?” <http://www.npolicy.org/article.php?aid=1182&rtid=2>], accessed 6/5/13,WYO/JF

In this essay, I argue that the spread of nuclear weapons poses a grave threat to international peace and to U.S. national security.  Scholars can grab attention by making counterintuitive arguments about nuclear weapons being less threatening than power holders believe them to be, but their provocative claims cannot wish away the very real dangers posed by the spread of nuclear weapons. The more states that possess nuclear weapons, the more likely we are to suffer a number of devastating consequences including: nuclear war, nuclear terrorism, global and regional instability, constrained U.S. freedom of action, weakened alliances, and the further proliferation of nuclear weapons.  While it is important not to exaggerate these threats, it would be an even greater sin to underestimate them and, as a result, not take the steps necessary to combat the spread of the world’s most dangerous weapons.

#### No uniqueness for backing down from treaties – their author

Crootoff  11  
Rebecca Crootof, J.D. Yale Law School  
Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon (April 5, 2011). Yale Law Journal. Available at SSRN: <http://ssrn.com/abstract=1803380>  
 The Charming Betsy Canon Encourages Domestic Courts’ Engagement with International Agreements and International Adoption

Much of domestic law already accords with international law, in large part because the United States actively influences the development of treaties. The United States often plays a pivotal role in drafting international treaties, and U.S. ratifications of multilateral treaties often are accompanied by declarations that U.S. obligations under the treaty are already fulfilled by domestic law. Therefore, aside from the fact that the Charming Betsy canon does not obligate or encourage courts to override domestic law, its proper application will likely favor interpretations that harmonize with provisions previously endorsed by the United States.

## Terror

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# 1NR

1. Tests the affirmative plan- 90% of policy is implementation, we prove their policy is 90% bad

Elmore, Prof. Public Affairs at University of Washington, PolySci Quarterly 79-80, p. 605, 1980

The emergence of implementation as a subject for policy analysis coincides closely with the discovery by policy analysts that decisions are not self-executing. Analysis of policy choices matter very little if the mechanism for implementing those choices is poorly understood in answering the question, "What percentage of the work of achieving a desired governmental action is done when the preferred analytic alternative has been identified?" Allison estimated that in the normal case, it was about 10 percent, leaving the remaining 90 percent in the realm of implementation.

#### En Banc review solves

Dehn, 10

[Major John C. Dehn is an Assistant Professor in the Department of Law, US Military Academy, West Point, NY. He currently teaches International Law and Constitutional and Military Law. He is writing in his personal capacity and his views do not necessarily represent the views of the Department of Defense, the US Army, or the US Military Academy. “The Relevance of International Law to (the Substantive and Procedural Rules of) Preventive Detention in Armed Conflict – A Rejoinder to Al-Bihani,” Opinio Juris, January 29, 2010, <http://opiniojuris.org/2010/01/29/the-relevance-of-international-law-to-the-substantive-and-procedural-rules-of-preventive-detention-in-armed-conflict-%E2%80%93-a-rejoinder-to-al-bihani/> //uwyo-baj]

The al-Bihani opinion completely reverses this longstanding approach. Effectively overturning the Charming Betsy as if it were the fictitious Poseidon cruise ship, it requires a finding of congressional intent to comply with international laws governing armed conflict before the court will look to them when interpreting the AUMF and related statutes. One hopes an en banc rehearing will right the ship, sparing the district courts from being forced to reorient to this topsy-turvy legal environment and claw their way to daylight.

#### Their author agrees that an en banc review hearing can reassess the precedential effect of an Appellate Court ruling like Al-Bihani

Alistine ’11 – Prof of Law @ Univ. of Maryland

Michael P. Van Alstine, Prof of Law University of Maryland, Duke Law Journal, STARE DECISIS AND FOREIGN AFFAIRS <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881137>

[KU Evidence Begins…]

It is a curious fact the Framers structured the Constitution precisely to protect against divergent interpretations of our nation’s international legal obligations by the separate state courts, but that the vast bulk of this work is now done by independent and geographically dispersed federal courts. The Supreme Court itself has repeatedly emphasized the demand for national uniformity in this field. But as Justice Scalia caustically observed in 2004 with specific reference to international law, “the lower federal courts [are] the principal actors; we review but a tiny fraction of their decisions.” The facts amply bear this out. Over 99% of the appellate treaty cases in the last decade came from the federal circuit courts. A broader study by David Sloss found a similar percentage in the period from 1970 through 2006. This principal cause for this is that, unlike in the Supreme Court, in most matters litigants have an appeal as of right to the federal circuits. The original conception was strikingly different, however. In the founding era, international law matters with relevance to national authority (especially, treaties) were under the mandatory, final control of the Supreme Court. Through a series of statutes between 1868 and 1925, however, the unifying force of this control declined dramatically. Upon the creation of the Circuit Courts of Appeal in 1891, Congress removed the right of direct appeal from district courts to the Supreme Court on treaty issues. Then, the Judiciary Act of 1925 eliminated even appeals as of right from the circuit courts and state courts in favor of discretionary review via a writ of certiorari for all but the rare constitutional challenges to treaties. Today, effectively all cases are subject only to discretionary review by the Supreme Court. The practical effect of all of these developments is that the independent, geographically dispersed courts of appeal provide the final judicial voice on nearly all matters of international law. Few would argue that these regional appellate courts (with only exceedingly rare leveling by the Supreme Court) represent an effective system for ensuring uniform fidelity to the international legal obligations of the United States. The problem is even more acute than this, however. Nearly all of the precedents in the federal circuit courts come from individual, local panels—not the regional court as a whole. The cause of this is the law-of-the-circuit doctrine. Under this doctrine, which controls in every federal circuit, a precedent created by a single three-judge panel is absolutely binding on all subsequent panels in the circuit. In the rare case that a subsequent panel misses the message, later panels are obligated to follow the earlier precedent. This doctrine is severe indeed. It prohibits reexamination of the first panel precedent even in light of subsequent insights and analyses of other circuits. The 11th Circuit recently declared this point bluntly: “The fact that other circuits disagree with [our] analysis is irrelevant.” All that remains is en banc review; but even this rare option is “not favored and ordinarily will not be ordered.” To present the point starkly, consider a hypothetical involving the Ninth Circuit. A panel majority may create a precedent on the international legal obligations of the United States that is then binding on the entire circuit. This means that a decision of two judges would control a circuit of over 60 million people, nearly 20% of the country’s entire population. The precedent would be impervious to subsequent review within the circuit as well as subsequent insights from other circuits. The law-of-the-circuit doctrine thus effectively precludes resolution of inter-circuit conflicts except for rare en banc review and in the 1% of cases the Supreme Court decides to hear. The result is a very real possibility of a localized patchwork of judicial declarations on the rights or obligations of the United States under international law. To put it mildly, such a system is discordant with the “‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s exclusive allocation of the foreign relations power to the national government in the first place.”

[KU Evidence Ends.]

#### The perm links to the net benefit (explain specifics)

#### Any solvency deficits to the aff are a reason to reject the perm

#### The perm has the court rule on a moot issue; kills SOP.

Watson, ’91 (Partner – Kirkland & Ellis, 86 Nw. U.L. Rev. 143)

A case becomes "moot" when "its factual or legal context changes in such a way that **a justiciable question no longer is before the court.**" 32 [\*147] Defining mootness as the absence of a justiciable issue, however, merely raises the question of what is meant by the term "justiciability." 33 The Supreme Court has distinguished a justiciable controversy "from one that is academic or moot." 34 Accordingly, a justiciable controversy is one that is "definite and concrete, touching the legal relations of parties having adverse legal interests." 35 The controversy must be "real and substantial[,] . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." 36 The rule that a court will not decide a moot case is recognized in virtually every American jurisdiction. 37

With the concepts of mootness and justiciability so loosely formulated, some scholars have attempted to understand mootness jurisprudence by cataloguing the various circumstances which render a case moot. 38 A case may become moot because the alleged wrong passes and cannot be expected to recur; 39 because a defendant pays money owed [\*148] and no longer wishes to appeal; 40 because a criminal defendant dies while appealing his case; 41 because the law under which the suit was brought has since changed; 42 or because a party is no longer affected by the challenged statute. 43

Continues

The danger of permitting Smith to pursue his claim without requiring that he have a personal stake in the outcome may seem innocuous. Yet, the risk to separation of powers **is greatest where** the temptation exists to **ignore the requirements of justiciability and resolve a moot issue**. 224 Perhaps the danger is difficult to understand because such cases put the system at risk, rather than any particular person. 225 If the personal stake and live issue requirements are not satisfied throughout a judicial [\*175] proceeding, then the claim is within the legislative province according to the argument set out in this Section. Therefore, a court that decides the issue and administers a "remedy" when neither an actual harm nor a real plaintiff exists **performs a legislative function.** To inflate the judicial power through prudential considerations (such as preserving judicial resources) **tips the balance of powers** through these cases. 226 The constitutional constant becomes variable when prudential factors become overreaching. **This undermines our system of separated powers**.

## Flex

#### Flexibility on detention policy high now-unilateral approach

Goldsmith & Wittes 09

[Jack Goldsmith and Benjamin Wittes, June 29, 2009, United States Detention Policy: Will Obama Follow Bush or FDR?, <http://www.brookings.edu/research/opinions/2009/06/29-obama-wittes>, uwyo//amp]

Soon after the Sept. 11, 2001, attacks, the Bush administration faced a fateful choice about terrorist detainees: Should it get Congress on board, or go it alone? President George W. Bush bypassed the legislature and for seven years based U.S. detention policy on his own constitutional authority, Congress's general authorization for the war against al-Qaeda and its affiliates, and the international laws of war. Working with Congress would be hard, administration officials reasoned; the legislature might constrain executive flexibility; and the president had powerful arguments that he didn't need additional legislative support.¶ Today, President Obama faces much the same choice, and he appears sorely tempted to follow the same road, for the same reasons: "White House officials are increasingly worried that reaching quick agreement with Congress on a new detention system may be impossible," The Post reported Saturday, and "Congress may try to assert too much control over the process." Obama is considering creating a long-term detention apparatus by presidential executive order based on essentially the same legal authorities the Bush administration used. ¶ Obama, to put it bluntly, seems poised for a nearly wholesale adoption of the Bush administration's unilateral approach to detention. The attraction is simple, seductive and familiar. The legal arguments for unilateralism are strong in theory; past presidents in shorter, traditional wars did not seek specific congressional input on detention. Securing such input for our current war, it turns out, is still hard. The unilateral approach, by contrast, lets the president define the rules in ways that are convenient for him and then dares the courts to say no.