# 1NC

### 1

#### A. The term substantial is too vague to be used in policy debates

Nagin, 2004

(Stephen E., Attorney for Respondents before the Federal Trade Comission: Basic Research, A.G. Waterhouse, Klein-Becker USA, Nutrasport, SÖVAGE DERMALOGIC LABORATORIES, Ban, Dennis Gay, Daniel B. Mowrey, “United states of America Before Federal Trade Commission,” June 28, http://www.ftc.gov/os/adjpro/d9318/040628respmodefinitestmnt.pdf)

The Commission’s failure to define the term “substantial” when used in connection with the phrase “fat loss” fails to inform Respondents of the nature and quality of the standard the Commission intends to apply against them. Merely using this subjective and relative term, without an adequate benchmark provides no guidance as to what the Commission contends is objectionable and does not adequately notify Respondents of the acts of which they stand accused. By way of analogy, the term “substantial portion” of a fetal body in the context of “partial-birth” abortion statutes has been declared unconstitutional, as applied. Carhart, M.D. v. Steinberg, 11 F.Supp.2d 1099, 1131 (D. Nebraska 1998) (“While vaginal delivery of an arm or leg is a ‘substantial portion’ of a fetal body, it is unclear what more the term ‘substantial portion’ may mean. Every doctor who testified, including the defense experts, stated that they did not understand the outer limits of the term or the term could be interpreted in vastly different ways by fair-minded people.”); Richmond Medical Center For Women v. Gilmore, 55 F.Supp.2d 441, 498 (E.D. Va. 1999) ([citing Carhart] “…Nebraska’s law was void for vagueness because, and only because, ‘the words ‘substantial portion’ are so vague as to be meaningless to doctors, lay people and prosecutors alike.’”).

#### b. this is a voting issue

#### 1. ground – it’s impossible to know what the plan means, and the heart of the controversy on this topic is not energy production but rather the amount of incentives used.

AP, 2005 (Building industry, utilities oppose solar bill; lexis)

Sen. Kevin Murray, D-Culver City, who is carrying incentive legislation with Sen. John Campbell, R-Irvine, said he expects to find a compromise. "Nobody opposes the concept," Murray said. "The devil is in the details." The goal is to produce 3,000 megawatts worth of solar power by 2018. That amounts to about 5 percent of the state's entire electricity usage at peak periods, generally hot summer afternoons when electricity is most in demand, most expensive, and when solar panels are most efficient. That's the equivalent of 40 new, $30 million, 75-megawatt natural gas plants. One megawatt is enough to power about 750 homes. The program has particular appeal for a state that lived through rolling blackouts and soaring electricity costs in 2000 and 2001. California already is the third-largest consumer of solar power equipment, but advocates say the incentive program would put the state on a par with world-leaders Germany and Japan and bring down the cost of solar technology. The Public Utility Commission would decide how consumers pay into the incentive fund, most likely with a new fee on utility bills. All three investor-owned utilities say they support more solar power, but Edison and PG&E want the Legislature to cap the amount of incentives that could be offered each year. Without an annual cap, they say the cost to rate-payers could run to billions of dollars over the 10-year life of the incentive program. Edison also wants to limit how much money solar homes can get back for putting power back into the electric grid. Edison also objected that the bill singles out rooftop photovoltaic systems for the incentives, while ignoring other solar electricity systems that it said are just as effective at a fraction of the cost.

#### 2. no solvency – Nagin says the plan would be declared unconstitutional and congress can’t override the courts.

#### 3. 2AC clarification is a voting issue – it’s a post hoc rationalization intended only to moot our 1NC offense.

### 2

#### Butler’s politics of vulnerability is based on an abstract notion of the suffering white, American subject. Her appeals to a universal “we” or global community can only reinscribe whiteness.

Thobani 2007 (Sunera, Professor at the University of British Columbia.  White wars: Western feminisms and the `War on Terror' - Feminist Theory 2007; 8; 169 – Sage Publications)

**Butler’s analytic frame** begins with the injury done to the US by the 9/11 attacks: ‘That U.S. boundaries were breached, that an unbearable vulnerability was exposed, that a terrible toll on human life was taken, were, and are, cause for fear and mourning; they are also instigations for patient political reflection’ (2004: xi). The breaching by the US of the boundaries of other countries in the decades preceding the attacks, including Afghanistan and Iraq, are mentioned in passing, but **do not shape the discursive field**, although Butler does note that ‘others have suffered arbitrary violence at the hands of the U.S.’ (p. xiv). But this suffering of others, concretized most pertinently in the bodies of the Iraqi and Afghan populations prior to 9/11, and the many, many other well-known victims of US aggression**, is not the starting point for her analysis** (Mamdani, 2004; Johnson, 2000). **Instead, a particular attack on the US, from which she attends to the generalized suffering of a generic humanity, shapes the frame**. **This framing foregrounds, however unintentionally, the experience of the (white) American subject**, **who has suddenly and graphically discovered its own vulnerability, as it does the imperialist perspective** articulated by the Bush Administration. That this subject neither revels in nor denies the violence done by the US state, complicates, but **does not contest, the imperial perspective**. Butler seems to be deeply disturbed by the US violence in this War **because of the violent *response* it is likely to engender**, and which will **likely threaten US populations in the future**.¶ Butler searches for an understanding of the injury done to the self and to the Other by positing a vulnerability that shapes the experience of human beings: ‘[t]o be injured means that one has the chance to reflect upon injury, to find out the mechanisms of its distribution, to find out who else suffers from permeable borders, unexpected violence, dispossession, and fear, and in what ways’ (2004: xii). Although she allows that this vulnerability is not equally distributed, her analysis nevertheless proceeds on just such an assumption as she reflects **on the possibility of a political community based on this shared experience of vulnerability and loss.**¶ Such a community becomes the ‘we’ of her text: ‘Despite our differences in location and history’, she argues, . . . ¶

my guess is that it is possible to appeal to a “we,” for all of us have some notion of what it is to have lost somebody. Loss has made a tenuous “we” of us all. And if we have lost, then it follows that we have had, that we have desired and loved, that we have struggled to find the conditions for our desire. (Butler, 2004: 20) **In the absence of a discussion of the particularities of the loss of others, the (white) subject’s experience of loss becomes the ground on which this community is to be identified.** Although Butler repeatedly and explicitly cautions against the assumption of a universally shared human condition, her analysis also repeatedly and explicitly **reproduces the notion of a universalized human experience**:

I am referring to violence, vulnerability, and mourning, but there is a more general conception of the human with which I am trying to work here, one in which we are, from the start, even prior to individuation itself, and by virtue of bodily requirements, given over to some set of primary others: this conception means that we are vulnerable to those we are too young to know and to judge, and hence, vulnerable to violence; but also vulnerable to another range of touch, a range that includes the eradication of our being at the one end, and the physical support for our lives at the other. (2004: 31)

#### Butler is just wrong. When compared to the bodies of Afghani, Egyptian, Syria, and host of other peoples, we in the US are not vulnerable. She ignores the historical differences between different peoples to assert a universal humanity, which means a white, American, imperialist humanity.

Thobani 2007 (Sunera, Professor at the University of British Columbia.  White wars: Western feminisms and the `War on Terror' - Feminist Theory 2007; 8; 169 – Sage Publications)

The analysis of the current destruction of sovereignties by the US, its invasions and occupations, becomes grounded in a shared primal, preindividuated psycho-existential experience of vulnerability that elides the alterity historically instantiated between those doing the occupying and those being occupied.

The common experience of vulnerability that Butler’s conceptualization of the human subject foregrounds may be relevant in some phenomenological, existential sense. But **the use of such ‘primal vulnerability’ as the primary lens for an examination of an imperialist war places her discussion in a liberal-individualist frame so abstract as to severely hinder understandings of how geo-political power relations are being restructured by the US** through this War. Indeed, the specific vulnerabilities created byimperialist relations become secondary to the primary vulnerability of theinfant condition. Consequently, Butler’s imposition of the collective ‘we’in prioritizing a condition of infancy assumes the primacy of this conditionas also the ontological point of departure for the Other (if they are to beincluded in her conception of the human). **The implication is that the experiences of occupied peoples can be approached as being essentially the same as those of imperial subjects**. Such a commonality of experience,I argue, **is practicably impossible in the absence of the transformation of the conditions of imperialist domination**. Butler seems to reject humanistassumptions *and* yet applies them to develop her analysis of violence. Hergeneric ‘human’ subject relies on an implicit denial of the recognition thatthe injuries, violence and losses suffered by occupied populations aresignificantly different, and that **these peoples are immensely more threatened with violence and injury than are the subjects of imperialist powers**.

In making the racialized distinctions between the forms and degrees of violence experienced by Afghans, Iraqis and other Muslims and white subjects disappear through her resort to humanist assumptions, **the experience and perspective of the (imperial) white subject is restored to centrality.**

#### Richard Dyer points out that one way in which whiteness is reproduced is through the treatment of whites as a human norm. He argues that it is racial power that enables white subjects to claim this position of the human: ‘There is no more powerful position than that of being “just” human. The claim to power is the claim to speak for the commonality of humanity. Raced people can’t do that – they can only speak for their race’ (Dyer, 1997: 2). Butler reproduces a classic feature of racial power by making whiteness invisible, even as the definition of the human is claimed by the white subject.

#### ALTERNATIVE: Rather than begin from shared vulnerability, we must recognize how vulnerability is differently constituted by different populations. We are not vulnerable the way that detainees in GTMO are vulnerable. For them, Butler’s politics of nonviolence, grief, and memorialization are unacceptable. For them burning down the entire system of indefinite detention is the only alternative.

**Farley ’05** (Anthony Paul, Professor of Law @ Boston College, “Perfecting Slavery”, 1/27/2005, [http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1028&context=lsfp -](http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1028&context=lsfp%20-) SG)

What is to be done? Two hundred years ago, when the slaves in Haiti rose up, they, of necessity, burned everything: They burned San Domingo flat so that at the end of the war it was a charred desert. Why do you burn everything? asked a French officer of a prisoner. We have a right to burn what we cultivate because a man has a right to dispose of his own labour, was the reply of this unknown anarchist. The slaves burned everything because everything was against them. Everything was against the slaves, the entire order that it was their lot to follow, the entire order in which they were positioned as worse than senseless things, every plantation, everything. “Leave nothing white behind you,” said Toussaint to those dedicated to the end of white-over black. “God gave Noah the rainbow sign. No more water, the fire next time.” The slaves burned everything, yes, but, unfortunately, they only burned everything in Haiti. Theirs was the greatest and most successful revolution in the history of the world but the failure of their fire to cross the waters was the great tragedy of the nineteenth century. At the dawn of the twentieth century, W.E.B. Du Bois wrote, “The colorline belts the world.” Du Bois said that the problem of the twentieth century was the problem of the colorline. The problem, now, at the dawn of the twenty-first century is the problem of the colorline. The colorline continues to belt the world. Indeed, the slave power that is the United States now threatens an entire world with the death that it has become and so the slaves of yesterday, today, and tomorrow, those with nothing but their chains to lose, must, if they would be free, if they would escape slavery, win the entire world. We begin as children. We are called and we become our response to the call. Slaves are not called. What becomes of them? What becomes of the broken-hearted? The slaves are divided souls, they are brokenhearted, the slaves are split asunder by what they are called upon to become. The slaves are called upon to become objects but objecthood is not a calling. The slave, then, during its loneliest loneliness, is divided from itself. This is schizophrenia. The slaves are not called, or, rather, the slaves are called to not be. The slaves are called unfree but this the living can never be and so the slaves burst apart and die. The slaves begin as death, not as children, and death is not a beginning but an end. There is no progress and no exit from the undiscovered country of the slave, or so it seems. We are trained to think through a progress narrative, a grand narrative, the grandest narrative, that takes us up from slavery. There is no up from slavery. The progress from slavery to the end of history is the progress from white-over-black to white-over-black to white-overblack. The progress of slavery runs in the opposite direction of the past present future timeline. The slave only becomes the perfect slave at the end of the timeline, only under conditions of total juridical freedom. It is only under conditions of freedom, of bourgeois legality, that the slave can perfect itself as a slave by *freely choosing* to bow down before its master. The slave perfects itself as a slave by offering a prayer for equal rights. The system of marks is a plantation. The system of property is a plantation. The system of law is a plantation. These plantations, all part of the same system, *hierarchy*, produce white-overblack, white-over-black only, and that continually. The slave perfects itself as a slave through its prayers for equal rights. The plantation system will not commit suicide and the slave, as stated above, has knowing non-knowledge of this fact. The slave finds its way back from the undiscovered country only by burning down every plantation. When the slave prays for equal rights it makes the free choice to be dead, and it makes the free choice to not be. Education is the call. We are called to be and then we become something. We become that which we make of ourselves. We follow the call, we pursue a calling. Freedom is the only calling—it alone contains all possible directions, all of the choices that may later blossom into the fullness of our lives. We can only be free. Slavery is death. How do slaves die? Slaves are not born, they are made. The slave must be trained to be that which the living cannot be. The only thing that the living are not free to be is dead. The slave must be trained to follow the call that is not a call. The slave must be trained to pursue the calling that is not a calling. The slave must be trained to objecthood. The slave must become death. Slavery is white-over-black. White-over-black is death. White-over-black, death, then, is what the slave must become to pursue its calling that is not a calling.

### 3

#### The United States Congress should substantially increase statutory restrictions on the war powers authority of the President of the United States by requiring that persons detained be released.

#### The counterplan is definitively competitive: we PIC out of the offer of civilian trials. This makes it both textually and functionally competitive.

#### The US court system is racist at every step of the way. Evidence collection, jury selection, the trial system itself – all of these components of the legal system are steeped in racism. Putting prisoners through the trial system will NOT lead to reform – we need massive jarring shocks to the system which only the counterplan can solve.

Quigley 2010 (Bill, Legal Director @ Center for Constitutional Rights and Professor at Loyola New Orleans. "Fourteen Examples of Racism in Criminal Justice System" http://www.huffingtonpost.com/bill-quigley/fourteen-examples-of-raci\_b\_658947.html)

The biggest crime in the U.S. criminal justice system is that it is a race-based institution where African-Americans are directly targeted and punished in a much more aggressive way than white people. Saying the US criminal system is racist may be politically controversial in some circles. But the facts are overwhelming. No real debate about that. Below I set out numerous examples of these facts. The question is - are these facts the mistakes of an otherwise good system, or are they evidence that the racist criminal justice system is working exactly as intended? Is the US criminal justice system operated to marginalize and control millions of African Americans? Information on race is available for each step of the criminal justice system - from the use of drugs, police stops, arrests, getting out on bail, legal representation, jury selection, trial, sentencing, prison, parole and freedom. Look what these facts show. One. The US has seen a surge in arrests and putting people in jail over the last four decades. Most of the reason is the war on drugs. Yet whites and blacks engage in drug offenses, possession and sales, at roughly comparable rates - according to a report on race and drug enforcement published by Human Rights Watch in May 2008. While African Americans comprise 13% of the US population and 14% of monthly drug users they are 37% of the people arrested for drug offenses - according to 2009 Congressional testimony by Marc Mauer of The Sentencing Project. Two. The police stop blacks and Latinos at rates that are much higher than whites. In New York City, where people of color make up about half of the population, 80% of the NYPD stops were of blacks and Latinos. When whites were stopped, only 8% were frisked. When blacks and Latinos are stopped 85% were frisked according to information provided by the NYPD. The same is true most other places as well. In a California study, the ACLU found blacks are three times more likely to be stopped than whites. Three. Since 1970, drug arrests have skyrocketed rising from 320,000 to close to 1.6 million according to the Bureau of Justice Statistics of the U.S. Department of Justice. African Americans are arrested for drug offenses at rates 2 to 11 times higher than the rate for whites - according to a May 2009 report on disparity in drug arrests by Human Rights Watch. Four. Once arrested, blacks are more likely to remain in prison awaiting trial than whites. For example, the New York state division of criminal justice did a 1995 review of disparities in processing felony arrests and found that in some parts of New York blacks are 33% more likely to be detained awaiting felony trials than whites facing felony trials. Five. Once arrested, 80% of the people in the criminal justice system get a public defender for their lawyer. Race plays a big role here as well. Stop in any urban courtroom and look at the color of the people who are waiting for public defenders. Despite often heroic efforts by public defenders the system gives them much more work and much less money than the prosecution. The American Bar Association, not a radical bunch, reviewed the US public defender system in 2004 and concluded "All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring...The fundamental right to a lawyer that America assumes applies to everyone accused of criminal conduct effectively does not exist in practice for countless people across the US." Six. African Americans are frequently illegally excluded from criminal jury service according to a June 2010 study released by the Equal Justice Initiative. For example in Houston County, Alabama, 8 out of 10 African Americans qualified for jury service have been struck by prosecutors from serving on death penalty cases. Seven. Trials are rare. Only 3 to 5 percent of criminal cases go to trial - the rest are plea bargained. Most African Americans defendants never get a trial. Most plea bargains consist of promise of a longer sentence if a person exercises their constitutional right to trial. As a result, people caught up in the system, as the American Bar Association points out, plead guilty even when innocent. Why? As one young man told me recently, "Who wouldn't rather do three years for a crime they didn't commit than risk twenty-five years for a crime they didn't do?" Eight. The U.S. Sentencing Commission reported in March 2010 that in the federal system black offenders receive sentences that are 10% longer than white offenders for the same crimes. Marc Mauer of the Sentencing Project reports African Americans are 21% more likely to receive mandatory minimum sentences than white defendants and 20% more like to be sentenced to prison than white drug defendants. Nine. The longer the sentence, the more likely it is that non-white people will be the ones getting it. A July 2009 report by the Sentencing Project found that two-thirds of the people in the US with life sentences are non-white. In New York, it is 83%. Ten. As a result, African Americans, who are 13% of the population and 14% of drug users, are not only 37% of the people arrested for drugs but 56% of the people in state prisons for drug offenses. Marc Mauer May 2009 Congressional Testimony for The Sentencing Project. Eleven. The US Bureau of Justice Statistics concludes that the chance of a black male born in 2001 of going to jail is 32% or 1 in three. Latino males have a 17% chance and white males have a 6% chance. Thus black boys are five times and Latino boys nearly three times as likely as white boys to go to jail. Twelve. So, while African American juvenile youth is but 16% of the population, they are 28% of juvenile arrests, 37% of the youth in juvenile jails and 58% of the youth sent to adult prisons. 2009 Criminal Justice Primer, The Sentencing Project. Thirteen. Remember that the US leads the world in putting our own people into jail and prison. The New York Times reported in 2008 that the US has five percent of the world's population but a quarter of the world's prisoners, over 2.3 million people behind bars, dwarfing other nations. The US rate of incarceration is five to eight times higher than other highly developed countries and black males are the largest percentage of inmates according to ABC News. Fourteen. Even when released from prison, race continues to dominate. A study by Professor Devah Pager of the University of Wisconsin found that 17% of white job applicants with criminal records received call backs from employers while only 5% of black job applicants with criminal records received call backs. Race is so prominent in that study that whites with criminal records actually received better treatment than blacks without criminal records! So, what conclusions do these facts lead to? The criminal justice system, from start to finish, is seriously racist. Professor Michelle Alexander concludes that it is no coincidence that the criminal justice system ramped up its processing of African Americans just as the Jim Crow laws enforced since the age of slavery ended. Her book, The New Jim Crow: Mass Incarceration in the Age of Colorblindness sees these facts as evidence of the new way the US has decided to control African Americans - a racialized system of social control. The stigma of criminality functions in much the same way as Jim Crow - creating legal boundaries between them and us, allowing legal discrimination against them, removing the right to vote from millions, and essentially warehousing a disposable population of unwanted people. She calls it a new caste system. Poor whites and people of other ethnicity are also subjected to this system of social control. Because if poor whites or others get out of line, they will be given the worst possible treatment, they will be treated just like poor blacks. Other critics like Professor Dylan Rodriguez see the criminal justice system as a key part of what he calls the domestic war on the marginalized. Because of globalization, he argues in his book Forced Passages, there is an excess of people in the US and elsewhere. "These people", whether they are in Guantanamo or Abu Ghraib or US jails and prisons, are not productive, are not needed, are not wanted and are not really entitled to the same human rights as the productive ones. They must be controlled and dominated for the safety of the productive. They must be intimidated into accepting their inferiority or they must be removed from the society of the productive. This domestic war relies on the same technology that the US uses internationally. More and more we see the militarization of this country's police. Likewise, the goals of the US justice system are the same as the US war on terror - domination and control by capture, immobilization, punishment and liquidation.What to do? Martin Luther King Jr., said we as a nation must undergo a radical revolution of values. A radical approach to the US criminal justice system means we must go to the root of the problem. Not reform. Not better beds in better prisons. We are not called to only trim the leaves or prune the branches, but rip up this unjust system by its roots. We are all entitled to safety. That is a human right everyone has a right to expect. But do we really think that continuing with a deeply racist system leading the world in incarcerating our children is making us safer? It is time for every person interested in justice and safety to join in and dismantle this racist system. Should the US decriminalize drugs like marijuana? Should prisons be abolished? Should we expand the use of restorative justice? Can we create fair educational, medical and employment systems? All these questions and many more have to be seriously explored. Join a group like INCITE, Critical Resistance, the Center for Community Alternatives, Thousand Kites, or the California Prison Moratorium and work on it. As Professor Alexander says "Nothing short of a major social movement can dismantle this new caste system."

#### The executive will redefine the law to get around the plan

Pollack 13

Norman Pollack 13, Prof of History @ MSU and PhD in History from Harvard, “Drones, Israel, and the Eclipse of Democracy, Counterpunch, 2/5, [www.counterpunch.org/2013/02/05/drones-israel-and-the-eclipse-of-democracy/](http://www.counterpunch.org/2013/02/05/drones-israel-and-the-eclipse-of-democracy/)

Bisharat first addresses the transmogrification of international law by Israel’s military lawyers. We might call this damage control, were it not more serious. When the Palestinians first sought to join the I.C.C., and then, to receive the UN’s conferral of nonmember status on them, Israel raised fierce opposition. Why? He writes: “Israel’s frantic opposition to the elevation of Palestine’s status at the United Nations was motivated precisely by the fear that it would soon lead to I.C.C. jurisdiction over Palestinian claims of war crimes. Israeli leaders are unnerved for good reason. The I.C.C. could prosecute major international crimes committed on Palestinian soil anytime after the court’s founding on July 1, 2002.” In response to the threat, we see the deliberate reshaping of the law: Since 2000, “the Israel Defense Forces, guided by its military lawyers, have attempted to **remake the laws** of war by consciously violating them and then **creating** new legal concepts to provide juridical cover for their misdeeds.” (Italics, mine) In other words, habituate the law to the existence of atrocities; in the US‘s case, targeted assassination, repeated often enough, seems permissible, indeed clever and wise, as pressure is steadily applied to the laws of war. Even then, “collateral damage” is seen as unintentional, regrettable, but hardly prosecutable, and in the current atmosphere of complicity and desensitization, never a war crime. (**Obama is** hardly a novice **at** this game of **stretching the law to suit the convenience of**, shall we say, the **national interest**? In order to ensure the distortion in counting civilian casualties, which would bring the number down, as Brennan with a straight face claimed, was “zero,” the Big Lie if ever there was one, placing him in distinguished European company, Obama **redefined the meaning** of “combatant” status to be any male of military age throughout the area (which we) declared a combat zone, which noticeably led to a higher incidence of sadism, because it allowed for “second strikes” on funerals—the assumption that anyone attending must be a terrorist—and first responders, those who went to the aid of the wounded and dying, themselves also certainly terrorists because of their rescue attempts.) These guys play hardball, perhaps no more than in using—by report—the proverbial baseball cards to designate who would be next on the kill list. But funerals and first responders—verified by accredited witnesses–seems overly much, and not a murmur from an adoring public.

### 4

#### Plan text is conditional - it has an either or statement

Aff condo is a voting issue

#### A. Neg ground – they can spike out of all of our DAs and CPs and they don’t have to pick a world until after we are done speaking

#### B. Education – the aff is never stable, makes it impossible to actually understand the effects of policy

### 5

#### Executive flexibility on detention powers now

Tomatz 13

Michael Tomatz 13, Colonel, B.A., University of Houston, J.D., University of Texas, LL.M., The Army Judge Advocate General Legal Center and School (2002); serves as the Chief of Operations and Information Operations Law in the Pentagon. AND Colonel Lindsey O. Graham B.A., University of South Carolina, J.D., University of South Carolina, serves as the Senior Individual Mobilization Augmentee to The Judge Advocate Senior United States Senator from South Carolina, “NDAA 2012: CONGRESS AND CONSENSUS ON ENEMY DETENTION,” 69 A.F. L. Rev. 1

President Obama signed the NDAA "despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists." n114 While the Administration voiced concerns throughout the legislative process, those concerns were addressed and ultimately resulted in a bill that preserves the flexibility needed to adapt to changing circumstances and upholds America's values. The President reiterated his support for language in Section 1021 making clear that the new legislation does not limit or expand the scope of Presidential authority under the AUMF or affect existing authorities "relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." n115¶ The President underscored his Administration "will not authorize the indefinite military detention without trial of American citizens" and will ensure any authorized detention "complies with the Constitution, the laws of war, and all other applicable law." n116 Yet understanding fully the Administration's position requires recourse to its prior insistence that the Senate Armed Services Committee remove language in the original bill which provided that U.S. citizens and lawful resident aliens captured in the United States would not be subject to Section 1021. n117 There appears to be a balancing process at work here. On the one hand, the Administration is in lock-step with Congress that the NDAA should neither expand nor diminish the President's detention authority. On the other hand, policy considerations led the President to express an intention to narrowly exercise this detention authority over American citizens.¶ The overriding point is that the legislation preserves the full breadth and depth of detention authority existent in the AUMF, to include the detention of American citizens who join forces with Al Qaida. This is a dynamic and changing conflict. If a home-grown terrorist destroys a U.S. target, the FBI gathers the evidence, and a U.S. Attorney prosecutes, traditional civilian criminal laws govern, and the military detention authority resident in the NDAA need never come into play. This is a reasonable and expected outcome in many cases. The pending strike on rail targets posited in this paper's introduction, where intelligence sources reveal an inchoate attack involving American and foreign nationals operating overseas and at home, however, may be precisely the type of scenario where military detention is not only preferred but vital to thwarting the attack, conducting interrogations about known and hidden dangers, and preventing terrorists from continuing the fight.

#### Judicial review of foreign policy decks the executive flexibility necessary to solve prolif, terror, and the rise of hostile powers---link threshold is low

Blomquist 10

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the unique [\*883] constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats. n16¶ The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22¶ [\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation¶ Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations.¶ (1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27¶ (2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28¶ (3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30¶ (4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32¶ (5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34¶ [\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39¶ Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

#### Prolif causes extinction

Horowitz 9

Professor of Political Science @ University of Pennsylvania [Michael Horowitz (Former Emory debater and NDT Champion), “The Spread of Nuclear Weapons and International Conflict: Does Experience Matter?,” Journal of Conflict Resolution, Volume 53 Number 2, April 2009 pg. 234-257]

Learning as states gain experience with nuclear weapons is complicated. While to some extent, **nuclear acquisition** might provide information about resolve or capabilities, it also **generates uncertainty about the way an actual conflict would go**—**given the new risk of nuclear escalation—and uncertainty about relative capabilities**. **Rapid proliferation** **may especially heighten uncertainty** given the potential for reasonable states to disagree at times about the quality of the capabilities each possesses. 2 What follows is an attempt to describe the implications of inexperience and incomplete information on the behavior of nuclear states and their potential opponents over time. Since it is impossible to detail all possible lines of argumentation and possible responses, the following discussion is necessarily incomplete. This is a first step. **The acquisition of nuclear weapons increases the confidence of adopters in their ability to impose costs in the case of a conflict and the expectations of likely costs if war occurs by potential opponents**. The key questions are whether nuclear states learn over time about how to leverage nuclear weapons and the implications of that learning, along with whether actions by nuclear states, over time, convey information that leads to changes in the expectations of their behavior—shifts in uncertainty— on the part of potential adversaries. Learning to Leverage? When a new state acquires nuclear weapons, how does it influence the way the state behaves and how might that change over time? Although **nuclear acquisition** might be orthogonal to a particular dispute, it **might be related to a particular security challenge, might signal revisionist aims with regard to an enduring dispute, or might signal the desire to reinforce the status quo**. This section focuses on how acquiring nuclear weapons influences both the new nuclear state and potential adversaries. In theory, systemwide perceptions of nuclear danger could allow new nuclear states to partially skip the early Cold War learning process concerning the risks of nuclear war and enter a proliferated world more cognizant of nuclear brinksmanship and bargaining than their predecessors. However, **each new nuclear state has to resolve its own particular civil–military issues surrounding operational control and plan its national strategy in light of its new capabilities**. Empirical research by Sagan (1993), Feaver (1992), and Blair (1993) suggests that viewing the behavior of other states does not create the necessary tacit knowledge; there is no substitute for experience **when it comes to handling a nuclear arsenal, even if experience itself cannot totally prevent accidents**. Sagan contends that civil–military **instability in many likely new proliferators and pressures generated by the requirements to handle the responsibility of dealing with nuclear weapons will skew decision making toward more offensive strategies** (Sagan 1995). The questions surrounding Pakistan’s nuclear command and control suggest there is no magic bullet when it comes to new nuclear powers’ making control and delegation decisions (Bowen and Wolvén 1999). Sagan and others focus on inexperience on the part of new nuclear states as a key behavioral driver. **Inexperienced operators and the bureaucratic desire to “justify” the costs spent developing nuclear weapons**, combined with organizational biases that may favor escalation to avoid decapitation—**the “use it or lose it” mind-set— may cause new nuclear states to adopt riskier launch postures, such as launch on warning, or at least be perceived that way by other states** (Blair 1993; Feaver 1992; Sagan 1995). 3 **Acquiring nuclear weapons** **could** alter state preferences **and make states more likely to escalate disputes once they start**, given their new capabilities. 4 But their general lack of experience at leveraging their nuclear arsenal and effectively communicating nuclear threats could mean **new nuclear states will be more likely to select adversaries poorly and to find themselves in disputes with resolved adversaries that will reciprocate militarized challenges**.

#### Limitations fail during emergencies

Vermeule 6

Adrian Vermeule, Professor of Law, Harvard Law School, 2006, “THE EMERGENCY CONSTITUTION IN THE POSTSEPTEMBER¶ 11 WORLD ORDER: SELF‐DEFEATING PROPOSALS: ACKERMAN ON EMERGENCY POWERS,” Fordham Law¶ Review, Nov., pp. LN.

A statute could, in principle, perform such constitutional functions by aligning the various parties' expectations about the¶ future, which then provide a basis for objecting to usurpations or interference when the emergency occurs. However,¶ history shows that statutory limitations are weak during emergencies. The War Powers Resolution , which limited the¶ circumstances under which the President could use military force and imposed various reporting requirements when the¶ President did use force, has been ignored. As I mentioned above, the National Emergencies Act similarly imposed¶ restrictions and reporting requirements on the President's power to declare emergencies, and the International Emergency¶ Economic Powers Act limited the President's power to impose economic sanctions during emergencies. None of these¶ statutes has had much of an impact on the behavior of executives. n61 Finally, after 9/11 the President undertook a¶ program of domestic warrantless surveillance, one that in the view of many commentators clearly violates the Foreign¶ Intelligence Surveillance Act. n62 Public opinion, however, is divided about the program's legality. n63 As of this writing,¶ there seems little prospect that Congress will retaliate; the most likely outcome is some sort of legislative ratification of the¶ program, which means that the President will have effectively annulled the Foreign Intelligence Surveillance Act as well as¶ the other framework statutes governing executive action in emergencies.”

### Ch 1

#### Obama will resist the plan - fights over war powers create intractable national diversions and destroys military decision making, interbranch cooperation and rule of law

Lobel 8

Lobel, Pittsburgh law professor, 2008¶ (Jules, “Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War”, Ohio State Law Journal, vol 69, lexis)

The critical difficulty with a contextual approach is its inherent ambiguity and lack of clarity, which tends to sharply shift the balance of power in favor of a strong President acting in disregard of congressional will. For example, the application of the Feldman and Issacharoff test asking whether the congressional restriction makes realistic sense in the modern world would yield no coherent separation of powers answer if applied to the current Administration’s confrontation with Congress. It would undoubtedly embolden the President to ignore Congress’s strictures. The President’s advisors would argue that the McCain Amendment’s ban on cruel and inhumane treatment, or FISA’s requirement of a warrant, does not make realistic sense in the context of the contemporary realities of the war on terror in which we face a shadowy, ruthless nonstate enemy that has no respect for laws or civilized conduct, a conclusion hotly disputed by those opposed to the President’s policies. Focusing the debate over whether Congress has the power to control the treatment of detainees on the President’s claim that the modern realities of warfare require a particular approach will merge the separation of powers inquiry of who has the power with the political determination of what the policy ought to be. Such an approach is likely to encourage the President to ignore and violate legislative wartime enactments whenever he or she believes that a statute does not make realistic sense—that is, when it conflicts with a policy the President embraces. 53 The contextual approach has a “zone of twilight” quality that Justice Jackson suggested in Youngstown. 54 Often constitutional norms matter less than political realities—wartime reality often favors a strong President who will overwhelm both Congress and the courts. While it is certainly correct— as Jackson noted—that neither the Court nor the Constitution will preserve separation of powers where Congress is too politically weak to assert its authority, a fluid contextual approach is an invitation to Presidents to push beyond the constitutional boundaries of their powers and ignore legislative enactments that seek to restrict their wartime authority. Moreover, another substantial problem with a contextual approach in the war powers context is that the judiciary is unlikely to resolve the dispute. 55 The persistent refusal of the judiciary to adjudicate the constitutionality of the War Powers Resolution strongly suggests that courts will often refuse to intervene to resolve disputes between the President and Congress over the constitutionality of a statute that a President claims impermissibly interferes with her conduct of an ongoing war. 56 This result leaves the political branches to engage in an intractable dispute over the statute’s constitutionality that saps the nation’s energy, diverts focus from the political issues in dispute, and endangers the rule of law. Additionally, in wartime it is often important for issues relating to the exercise of war powers to be resolved quickly. Prompt action is not usually the forte of the judiciary. If, however, a constitutional consensus exists or could be consolidated that Congress has the authority to check the President’s conduct of warfare, that consensus might help embolden future Congresses to assert their power. Such a consensus might also help prevent the crisis, chaos, and stalemate that may result when the two branches assert competing constitutional positions and, as a practical matter, judicial review is unavailable to resolve the dispute. Moreover, the adoption of a contextual, realist approach will undermine rather than aid the cooperation and compromise between the political branches that is so essential to success in wartime. In theory, an unclear, ambiguous division of power between the branches that leaves each branch uncertain of its legal authority could further compromise and cooperation. However, modern social science research suggests that the opposite occurs. 57 Each side in the dispute is likely to grasp onto aspects or factors within the ambiguous or complex reality to support its own self-serving position. This self-serving bias hardens each side’s position and allows the dispute to drag on, as has happened with the ongoing, unresolved dispute over the constitutionality of the War Powers Resolution. Pg. 407-409

#### Civilian courts fail – transfer restrictions and no jurisdictions will accept. Also undermines legitimacy of the legal system which turns the case

Mataconis 2011

(Doug, Attorney, JD from George Mason University School of Law, April 4, "Obama Administration To Abandon Plans For Civilian Trials For 9/11 Plotters", http://www.outsidethebeltway.com/obama-administration-to-abandon-plans-for-civilian-trials-for-911-plotters/)

After a quixotic two year search for a proper venue and process for a civilian trial Khalid Sheikh Mohammed and the other 9/11 defendants being held in the military prison at Guantanamo Bay, [the Obama Administration has apparently abandoned those plans completely:](http://www.nytimes.com/2011/04/05/us/05gitmo.html)¶ In a major reversal, the Obama administration has decided to try Khalid Sheikh Mohammed for his role in the attacks of Sept. 11 before a military commission at Guantánamo Bay, Cuba, and not in a civilian courtroom.¶ Attorney General Eric H. Holder Jr. is expected to announce on Monday afternoon that Mr. Mohammed, the self-described mastermind of the attacks, and four other accused conspirators will face charges before a panel of military officers, a law enforcement official said. The Justice Department has scheduled a press conference for 2 p.m. Eastern time.¶ Mr. Holder, who had wanted to prosecute Mr. Mohammed before a regular civilian court in New York City, changed his mind after Congress imposed a series of restrictions barring the transfer of Guantánamo detainees into the United States, making such a trial impossible for now, the official said.¶ Mr. Mohammed and the accused conspirators were charged before a military commission at Guantánamo Bay late in the Bush administration, and had given signs that they were preparing to plead guilty. But their trial was cut short in January 2009 when President Obama, as one of his first moves after his inauguration, froze all tribunal proceedings at Guantánamo to start a review of the counterterrorism policies he inherited from former President George W. Bush.¶ The administration eventually decided to prosecute some terrorism suspects in civilian courts, but to keep using a revised form of tribunals for others. Mr. Obama placed Mr. Holder in charge of deciding where each detainee should be tried.¶ The reality of the situation is that there wasn’t a jurisdiction in the United States that wanted to be the home of what would arguably be the highest profile criminal trial in American history. That’s why Congress acted in the manner that it did, on a bipartisan basis. There had been some speculation that KSM and the others would be tried in a civilian trial held on a secure military base somewhere, but even that ran into the roadblock of local authorities who objected to being the locale for a trial that would potentially be a major target for terrorism. So, in the end, the Obama Administration really had no other choice but to reverse its previous decision.¶ In the end, though, it’s just as well that they did because it was clear from the beginning that a trial for Khalid Sheikh Mohammed and the other 9/11 suspects would have been a complete and total fraud and a perversion of justice. In a real trial, there is at least some possibility that, at the end, the Defendant could be found innocent and go free, but that was never a possibility for a civilian trial of KSM. Back in November 2009, Attorney General Holder made clear that [KSM and the others would never be set free regardless of what happened at trial.](http://campaignspot.nationalreview.com/post/?q=MDVlMjZkYmFkNDQ4ZmUxOThhZWQ3ZDBhMGY0Y2FjNTU=) Just a few months later, White House Press Secretary Robert Gibbs said that [the Administration expected that KSM would be executed after he was found guilty.](http://www.msnbc.msn.com/id/35168785/ns/us_news-security/) President Obama said much the same thing himself in [an MSNBC interview in November 2009.](http://www.msnbc.msn.com/id/34015727/ns/us_news-security/) In an ordinary criminal trial, statements like this from the nation’s chief executive and his assistants would be considered poisoning the jury pool, but they illustrate the basic fact that the Administration never intended to give KSM a real trial, [they just wanted a show trial:](http://corner.nationalreview.com/post/?q=NDgxN2IzM2E3Y2QzZDY4ODIxMjgxMTdjZjVjNThlNDA=)¶ Every day it appears more and more that the White House wants it both ways. They want to claim that this is a fair trial but also an act of venegeance. The terrorists will be treated as if they might be innocent — key to a fair trial — but at the end of the day they’ll get their comeuppance. If KSM & Co. get off on a technicality, don’t worry, they’ll still be locked up, but when they’re convicted the White House will claim it was always a fair process. They’ll get a fair trial from an impartial jury in New York, but it’s “fitting” and “poetic justice” that the jury will be drawn from the community that was viciously attacked on 9/11. Fair but vengeul, honest but foreordained, instructive to the world but really just about the law: The rhetoric from the White House and the Democrats isn’t persuasive to those who listen closely and certainly won’t be persuasive to foreigners Obama is determined to impress.¶ The point of all of this is to show that the rule of law is intact, but what the White House is doing is in fact undermining the legitimacy of the legal system by having it do something it shouldn’t. Obama, Pat Leahy, and the rest preen as if they are morally superior for preferring civilian courts, but what they are doing is undermining civilian courts, and it gets worse every time they open their mouths.¶ The military tribunal system is not without its own flaws, of course, and the same “show trial” element exists there to the extent that it is quite clear that KSM would not be found not guilty and would most definitely not be released if he was. In reality, what this demonstrates is the extent to which both Congress and the Bush Administration dropped the ball in the years after 9/11 in failing to adopt some kind of statutory framework governing the detention of these people. I don’t like the idea of indefinite detention without some judicial review. A President should not be permitted to label anyone, even a foreign national, a “terrorist” and lock them away forever without any review by a third party to determine whether or not they there is a legitimate reason to detain them. As much as I dislike indefinite detention, though, I like even less the idea of the justice system being used to “send a signal” when it’s clear that the outcome in Court will have absolutely no impact on whether or not someone continues to be detained. That’s not justice, it’s a Stalinist show trial.

#### Their restriction is a smokescreen and won’t be enforced

Nzelibe 7

Professor of Law @ Northwestern University [Jide Nzelibe, “Are Congressionally Authorized Wars Perverse?” Stanford Law Review, Vol. 59, 2007] we reject the use of ableist language in this card

These assumptions are all questionable. As a preliminary matter, there is not much causal evidence that supports the institutional constraints logic. As various commentators have noted, Congress's bark with respect to war powers is often much greater than its bite. Significantly, skeptics like Barbara Hinckley suggest that any notion of an activist Congress in war powers is a myth and members of Congress will often use the smokescreen of "symbolic resolutions, increase in roll calls and lengthy hearings, [and] addition of reporting requirements" to create the illusion of congressional participation in foreign policy.' 0 Indeed, even those commentators who support a more aggressive role for Congress in initiating conflicts acknowledge this problem," but suggest that it could be fixed by having Congress enact more specific legislation about conflict objectives and implement new tools for monitoring executive behavior during wartime. 12 Yet, even if Congress were equipped with better institutional tools to constrain and monitor the President's military initiatives, it is not clear that it would significantly alter the current war powers landscape. As Horn and Shepsle have argued elsewhere: "[N]either specificity in enabling legislation ... nor participation by interested parties is necessarily optimal or self-fulfilling; therefore, they do not ensure agent compliance. Ultimately, there must be some enforcement feature-a credible commitment to punish ....Thus, no matter how much well-intentioned and specific legislation Congress passes to increase congressional oversight of the President's military initiatives, it will come to naught if members of Congress lack institutional incentives to monitor and constrain the President's behavior in an international crisis. Various congressional observers have highlighted electoral disincentives that members of Congress might face in constraining the President's military initiatives. 14 Others have pointed to more institutional obstacles to congressional assertiveness in foreign relations, such as collective action problems. 15 Generally, lawmaking is a demanding and grueling exercise. If one assumes that members of Congress are often obsessed with the prospect of reelection, 16 then such members will tend to focus their scarce resources on district-level concerns and hesitate to second-guess the President's response in an international crisis. 17 Even if members of Congress could marshal the resources to challenge the President's agenda on national issues, the payoff in electoral terms might be trivial or non-existent. Indeed, in the case of the President's military initiatives where the median voter is likely to defer to the executive branch's judgment, the electoral payoff for members of Congress of constraining such initiatives might actually be negative. In other words, regardless of how explicit the grant of a constitutional role to Congress in foreign affairs might be, few members of Congress are willing to make the personal sacrifice for the greater institutional goal. Thus, unless a grand reformer is able to tweak the system and make congressional assertiveness an electorally palatable option in war powers, calls for greater congressional participation in war powers are likely to fall on deaf ears. Pg. 912-913

### Ch 2

#### All lives are infinitely valuable, the only ethical option is to maximize the number saved

**Cummisky, 96** (David, professor of philosophy at Bates, Kantian Consequentialism, p. 131)

Finally, even if one grants that saving two persons with dignity cannot outweigh and compensate for killing one—because dignity cannot be added and summed in this way—this point still does not justify deontologieal constraints. On the extreme interpretation, why would not killing one person be a stronger obligation than saving two persons? If I am concerned with the priceless dignity of each, it would seem that 1 may still saw two; it is just that my reason cannot be that the two compensate for the loss of the one. Consider Hills example of a priceless object: If I can save two of three priceless statutes only by destroying one. Then 1 cannot claim that saving two makes up for the loss of the one. But Similarly, the loss of the two is not outweighed by the one that was not destroyed. Indeed, even if dignity cannot be simply summed up. How is the extreme interpretation inconsistent with the idea that I should save as many priceless objects as possible? Even if two do not simply outweigh and thus compensate for the lass of the one, each is priceless: thus, I have good reason to save as many as I can. In short, it is not clear how the extreme interpretation justifies the ordinary killing'letting-die distinction or even how it conflicts with the conclusion that the more persons with dignity who are saved, the better.\*

#### A. Root cause claims fail

Brian Martin, Professor of Science, Technology and Society at the University of Wollongong, ‘90

(<http://www.uow.edu.au/arts/sts/bmartin/pubs/90uw/uw13.html>)

In this chapter and in the six preceding chapters I have examined a number of structures and factors which have some connection with the war system. There is much more that could be said about any one of these structures, and other factors which could be examined. Here I wish to note one important point: attention should not be focussed on one single factor to the exclusion of others. This is often done for example by some Marxists who look only at capitalism as a root of war and other social problems, and by some feminists who attribute most problems to patriarchy. The danger of monocausal explanations is that they may lead to an inadequate political practice. The 'revolution' may be followed by the persistence or even expansion of many problems which were not addressed by the single-factor perspective. The one connecting feature which I perceive in the structures underlying war is an unequal distribution of power. This unequal distribution is socially organised in many different ways, such as in the large-scale structures for state administration, in capitalist ownership, in male domination within families and elsewhere, in control over knowledge by experts, and in the use of force by the military. Furthermore, these different systems of power are interconnected. They often support each other, and sometimes conflict. This means that the struggle against war can and must be undertaken at many different levels. It ranges from struggles to undermine state power to struggles to undermine racism, sexism and other forms of domination at the level of the individual and the local community. Furthermore, the different struggles need to be linked together. That is the motivation for analysing the roots of war and developing strategies for grassroots movements to uproot them.

# 2NC

## DA

**We should always advocate for fewer nuclear weapons for all countries**

**Etzioni**, 200**4** (Amitai, , Ph.D. in Sociology from Berkeley, professor of international affairs at The George Washington University, “Pre-empting nuclear terrorism in a new Global Order,” The Foreign Policy Centre, October, http://www.gwu.edu/~ccps/PreemptNucTerr.pdf)

One of the most common objections raised by nations that are pressured not to acquire nuclear arms, to give up those they do command, or to convert their HEU to LEU, is that the big powers, especially the United States and Russia, are not doing the same. Indeed this conception is reflected in the NPT, in which the big powers promised to ‘pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament’.74 Others have argued recently, when the United States began to develop a special nuclear weapon that might be used to destroy WMD hidden in deep bunkers or mountain sides, that it is ‘hypocritical’ for the United States to extend its nuclear arsenal while asking others to disgorge theirs. For similar reasons the United States is urged to convert its civilian reactors to LEU. Since the early 1960s, I have been writing, testifying before Congress, running about making speeches, and demonstrating – in Trafalgar Square and Columbus Circle – in favour of nuclear arms reductions by the United States and the USSR.75 Nor do I have any trouble realising that by some Rawlsian or still other fairness doctrine, those now with nuclear arms cannot morally demand that others give them up yet still keep theirs. However, **one must face the bitter** international **reality that some** nations and some ‘non-state **actors’** (terrorists especially) **pose a much greater danger than** do **others, and some nations have a greater capability to pressure them** to desist **than** do **others**. In this context, it makes sense to roll back the dangers involved, even if those who are going to do so are themselves far from pure. Reference, one must recall, is to preventing nuclear war and massive terrorism. **Take India and Pakistan**. As already indicated, these two nations have come close to nuclear blows on several occasions.76 Their command and control systems are far from perfect, which means that accidental war or action by some rogue generals cannot be ruled out. The result of such a war would be devastating. If the conflict between these two nations over Kashmir could be settled, and the new border were guaranteed by the international community, say by posting international trigger wire troops there, and as a result both nations decided to give up their nuclear weapons, their citizens would be much safer. The world would also be a beneficiary, as terrorists would have two fewer places from which to get nuclear arms. Other nations, especially China, would feel less compelled to build up their nuclear arms. **Would it be better if the United States and Russia reduce**d their **nuclear arms at the same time? It would. But should one refrain from encouraging India and Pakistan to save themselves from a nuclear holocaust if the United States and Russia do not play fair?** The answer seems to be a screaming **no**. The same holds true for North Korea, as well as the creation of a nuclear free zone in the Middle East (if Israel’s borders could be guaranteed. The reason I refer to border guarantees both in reference to Pakistan and Israel is because both nations face much larger conventional armies than they can marshal. Hence if they are even to consider such a move, they must feel that there will be some other way besides nuclear weapons to deter their neighbours from overrunning them). In the near future, the big powers will be more likely to encourage others not to join the nuclear ‘club’ (an unfortunate name) and to prevent terrorists from gaining access to nuclear bombs and materials, than they are likely to reduce their own arms.77 However unfair this may seem, in international relations the rule applied elsewhere – that **one should not allow the quest for the best to deter us from doing good** – applies with extra strength, as even the good is so elusive. **Reducing the threat of nuclear war** and nuclear terrorism, any place, any time, **is an unmitigated good**. To reduce the number and potency of nuclear arms – and the material from which they can be readily made – is a social good of the highest order. **It should not be delayed in pursuit** **of** finding **fairer ways** of proceeding.

## T

#### Substantial is completely subjective and varies in each specific application

#### Department of Environmental Quality, 2004

#### (Response to comments on rules for public drinking water systems, December 6, http://www.deq.state.id.us/rules/drinking\_water/58\_0108\_0401\_response.pdf)

Response:The language in this paragraph was carefully deliberated during rule negotiations. DEQ does not wish to change it without having the opportunity to involve those who participated. The intent of this section is to require that DEQ be notified of all substantial deviations from the plans and specifications. Discussions of proposed deviations will then determine if they are substantial and require written approval. The term “substantial” is unavoidably subjective and will vary from one project to the next, based on professional judgement exercised jointly by the water system and DEQ.

Substantial requires field context to give it meaning

Paul Devinsky 2002 (IP UPDATE, VOLUME 5, NO. 11, NOVEMBER 2002, “Is Claim "Substantially" Definite? Ask Person of Skill in the Art”, mwe.com/index.cfm/fuseaction/publications.nldetail/object\_id/c2c73bdb-9b1a-42bf-a2b7-075812dc0e2d.cfm)

In reversing a summary judgment of invalidity, the U.S. Court of Appeals for the Federal Circuit found that the district court, by failing to look beyond the intrinsic claim construction evidence to consider what a person of skill in the art would understand in a "technologic context," erroneously concluded the term "substantially" made a claim fatally indefinite. Verve, LLC v. Crane Cams, Inc., Case No. 01-1417 (Fed. Cir. November 14, 2002). The patent in suit related to an improved push rod for an internal combustion engine. The patent claims a hollow push rod whose overall diameter is larger at the middle than at the ends and has "substantially constant wall thickness" throughout the rod and rounded seats at the tips. The district court found that the expression "substantially constant wall thickness" was not supported in the specification and prosecution history by a sufficiently clear definition of "substantially" and was, therefore, indefinite. The district court recognized that the use of the term "substantially" may be definite in some cases but ruled that in this case it was indefinite because it was not further defined. The Federal Circuit reversed, concluding that the district court erred in requiring that the meaning of the term "substantially" in a particular "technologic context" be found solely in intrinsic evidence: "While reference to intrinsic evidence is primary in interpreting claims, the criterion is the meaning of words as they would be understood by persons in the field of the invention." Thus, **the Federal Circuit instructed** that "**resolution of any ambiguity** arising from the claims and specification **may be aided by** extrinsic **evidence of usage** and meaning of a term in the context of the invention." The Federal Circuit remanded the case to the district court with instruction that "[**t]he question is not whether the word 'substantially' has a fixed meaning** as applied to 'constant wall thickness,' **but how the phrase would be understood by persons experienced in this field** of mechanics, upon reading the patent documents."

Substantially as a term is fine so long as it is given effect where applied – i.e. in the 1AC plan text.

Words and Phrases, 64 (p. 819)

"**Substantially" is a relative word which** while it must be used with care and discrimination in a claim of a patent, **must** nevertheless **be given effect** by allowing considerable latitude of meaning, **where it is applied** such subjects as thickness, as by requiring two parts of a device to be substantially the same thickness and cannot be held to require them to be of exactly the same things.

I will now prove that substantially can mean so many contradictory things that to leave it undefined in the 1AC makes voting aff impossible. They said we could define it for them – very well, I will, and at the end their plan text will be so convoluted you will have to vote negative on presumption.

First is substantially modifying an increase can either mean:

1. The aff must create totally new incentives

Lowe, 2003 (E. J., Department of philosophy at the University of Durham, “Substantial change and spatiotemporal coincidence,” Ratio, Volume 16, Issue 2)

Change comes in several species, which differ from one another in ontologically significant ways. Two familiar but quite different species of change that persisting objects can undergo are change of composition and qualitative change. The first sort of change occurs when a composite object undergoes a change of its component parts. By a 'component part' of a persisting object I mean some­thing which helps to compose that object and which is therefore itself a persisting object, capable in principle of existing inde­pendently of the object which it helps to compose. The second sort of change — **qualitative change — occurs when one** and the same object **has** numerically **different qualities at** numerically **dif­ferent times**. Of course, these two kinds of change are not entirely independent of one another. Sometimes, a change of the one kind brings about a change of the other kind. For example, if a composite object acquires new parts possessing qualities that are different from those of its old parts, the composite object itself may undergo a change of its qualities — as when a house changes in colour because new bricks of a different colour are used to replace some of its old bricks. But a composite object can also undergo qualitative change without undergoing any change of composition — for instance, when its component parts are simply rearranged, with the result that the shape of the composite object as a whole changes. However, there is also a third species of change that persisting objects can undergo, which is traditionally called **substantial change**. This is the kind of change which **occurs when a persisting object** either **begins or ceases to exist.** It is, thus, **not** exactly a kind of **change which happens** in or **to an object**, in the way that qualitative and compositional changes are. Rather, **it is** a **change** of objects — a change **with respect to what objects there are** in the world. This is aptly called 'substantial change', simply because persisting objects — things such as houses, apples, and planks of wood — are traditionally called 'individual substances', or 'substantial individuals'.

OR B. The aff must increase preexisting incentives.

Buckley 6 (Jeremiah, Attorney, Amicus Curiae Brief, Safeco Ins. Co. of America et al v. Charles Burr et al, <http://supreme.lp.findlaw.com/supreme_court/briefs/06-84/06-84.mer.ami.mica.pdf>)

First, the court said that the ordinary meaning of the word “increase” is “to make something greater,” which it believed should not “be limited to cases in which a company raises the rate that an individual has previously been charged.” 435 F.3d at 1091. Yet the definition offered by the Ninth Circuit compels the opposite conclusion. Because “increase” means “to make something greater,” there must necessarily have been an existing premium, to which Edo’s actual premium may be compared, to determine whether an “increase” occurred. Congress could have provided that “ad-verse action” in the insurance context means charging an amount greater than the optimal premium, but instead chose to define adverse action in terms of an “increase.” That def-initional choice must be respected, not ignored. See Colautti v. Franklin, 439 U.S. 379, 392-93 n.10 (1979) (“[a] defin-ition which declares what a term ‘means’ . . . excludes any meaning that is not stated”). Next, the Ninth Circuit reasoned that because the Insurance Prong includes the words “existing or applied for,” Congress intended that an “increase in any charge” for insurance must “apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy.” 435 F.3d at 1091. This interpretation reads the words “exist-ing or applied for” in isolation. Other types of adverse action described in the Insurance Prong apply only to situations where a consumer had an existing policy of insurance, such as a “cancellation,” “reduction,” or “change” in insurance. Each of these forms of adverse action presupposes an already-existing policy, and under usual canons of statutory construction the term “increase” also should be construed to apply to increases of an already-existing policy. See Hibbs v. Winn, 542 U.S. 88, 101 (2004) (“a phrase gathers meaning from the words around it”) (citation omitted).

On the materiality of Substantially:

1. Substantially can mean of substance and material

AHD 11 (American Heritage Dictionary, “substantial”, http://education.yahoo.com/reference/dictionary/entry/substantial)

sub·stan·tial (sb-stnshl) KEY

ADJECTIVE:

Of, relating to, or **having substance; material**.

OR B. “Substantially” can mean without any material qualifications at all

Black’s Law Dictionary, 6th Edition, 1990

Substantially: Essentially; without material qualifications; in the main; in substance; materially, in a substantial manner. About, actually, competently, and essentially.

On the numbers front:

Substantially can be

1. QUALITATIVE

Words and Phrases 2 (Volume 40A, p. 458)

D.S.C. 1966. The word “substantial” within Civil Rights Act providing that a place is a public accommodation if a “substantial” portion of food which is served has moved in commerce must be construed in light of its usual and customary meaning, that is, something of real worth and importance; of considerable value; valuable, something worthwhile as distinguished from something without value or merely nominal

OR B. QUANITITATIVE

Webster’s 2003 (Merriam Webster’s Dictionary, www.m-w.com)

Main Entry: sub.stan.tial

b : considerable in quantity : significantly great <earned a substantial wage>

Quantitative measures are also arbitrary for substantially:

It can be as little as 2%

Words & Phrases 60

'Substantial" means "of real worth and importance; of considerable value; valuable." Bequest to charitable institution, making 1/48 of expenditures in state, held exempt from taxation; such expenditures constituting "substantial" part of its activities. Tax Commission of Ohio v. American Humane Education Soc., 181 N.E. 557, 42 Ohio App. 4.

OR “Substantially” can be as large as 90%

Words & Phrases 5 (40B, p. 329)

N.H. 1949. -The word "substantially" as used in provision of Unemployment Compensation Act that experience rating of an employer may transferred to' an employing unit which acquires the organization, -trade, or business, or "substantially" all of the assets thereof, is 'an elastic term which does not include a definite, fixed amount of percentage, and the transfer does not have to be 100 per cent but cannot be less than 90 per cent in the ordinary situation. R.L c. 218, § 6, subd. F, as added by Laws 1945, c. 138, § 16.-Auclair Transp. v. Riley, 69 A.2d 861, 96 N.H. l.-Tax347.1.

#### 1) The resolution includes the term substantially so that it may be more specifically defined given the context of the 1AC plan. Each different incentive, regulation, and energy source will have to define substantially to apply to those specific cases.

Viscasillas 4 – professor at the Universidad Carlos III de Madrid, (Pilar, “Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)”, CISG Advisory Council Opinion No. 4, 10-24, <http://cisgac.com/default.php?ipkCat=128&ifkCat=146&sid=146>)

2.8. Legal writers who follow the economic value criterion have generally quantified the term "substantial part" by comparing Article 3(1) CISG (substantial) with Article 3(2) CISG (preponderant): substantial being less than preponderant. In this way, legal writers have used the following percentages to quantify substantial: 15%,[[14]](http://cisgac.com/default.php?ipkCat=128&ifkCat=146&sid=146#14) between 40% and 50%,[[15]](http://cisgac.com/default.php?ipkCat=128&ifkCat=146&sid=146#15) or more generally 50%.[[16]](http://cisgac.com/default.php?ipkCat=128&ifkCat=146&sid=146#16) At the same time, other authors, although they have not fixed any numbers in regard to the quantification of the term "substantial" have declared that "preponderant" means "considerably more than 50% of the price" or "clearly in excess of 50%".[[17]](http://cisgac.com/default.php?ipkCat=128&ifkCat=146&sid=146#17) Thus it seems that for the latter authors, the quantification of the term "substantial" is placed above the 50% figure. Also, some Courts have followed this approach.[[18]](http://cisgac.com/default.php?ipkCat=128&ifkCat=146&sid=146#18) 2.9. To consider a fixed percentage might be arbitrary due to the fact that the particularities of each case ought to be taken into account; that the scholars are in disagreement; and that the origin of those figures is not clear.[[19]](http://cisgac.com/default.php?ipkCat=128&ifkCat=146&sid=146#19) Therefore, it does not seem to be advisable to quantify the word "substantial" a priori in percentages. A case-by-case analysis is preferable and thus it should be determined on the basis of an overall assessment.

#### Empirically the term substantially is used in a general overview but must be made specific to the case at hand

Tarlow 00 – Nationally prominent criminal defense lawyer practicing in Los Angeles, CA. He is a frequent author and lecturer on criminal law. He was formerly a prosecutor in the United States Attorney's Office and is a member of The Champion Advisory Board (Barry, The Champion January/February, lexis)

In *Victor*, the trial court instructed that: "A reasonable doubt is an actual and substantial doubt . . . as distinguished from a doubt arising from mere  [\*64]  possibility, from bare imagination, or from fanciful conjecture." Victor argued on appeal after receiving the death penalty that equating a reasonable doubt with a "substantial doubt" overstated the degree of doubt necessary for acquittal. Although the court agreed that the instruction was problematic given that "substantial," could be defined as "that specified to a large degree," it also ruled that any ambiguity was removed by reading the phrase in the context of the sentence in which it appeared. Finding such an explicit distinction between a substantial doubt and a fanciful conjecture was not present in the *Cage* instruction, it held that the context makes clear that "substantial" was used in the sense of existence rather than in magnitude of the doubt and, therefore, it was not unconstitutional as applied. [*Id. at 1250*](http://www.lexisnexis.com.proxy.lib.umich.edu/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T11113058883&homeCsi=154153&A=0.08807382399355024&urlEnc=ISO-8859-1&&citeString=114%20S.%20Ct.%201239,at%201250&countryCode=USA).

"Substantially" should be defined on a case-by-case basis

Edlin 2 (Aaron, Professor of Economics and Law – University of California Berkeley School of Law, January, 111 Yale L.J. 941)

Might price reductions of less than twenty percent qualify as substantial? In some markets they should, and it would be reasonable to decide substantiality on a case-by-case basis. One advantage of a bright-line rule is that it would let incumbents know where they stand. Monopolies that price only slightly above their average cost would be insulated from the entry of higher-cost entrants if they could credibly convey a willingness to price below the entrants' cost after entry, as illustrated in Part III. However, these monopolies do consumers little harm and may enhance market efficiency.

#### 5. Policymaking should NOT require Cross Examination

Milne 1994 (Philip Milne, Partner in Simpson Grierson's Wellington Local Government and Environment work group, 1994 "Validity of Rules in Regional Plans: A Seminar for Wellington Regional Council Officers" http://www.qp.org.nzipubs/3665.pd0 p.17)

What can be said however is that in order to minimise the risk of a successful challenge, it is important that rules be drafted as objectively and clearly as practicable. One should always bear in mind the basic principle that so far as is possible, a reader should be able to determine the effect of the rule from the rule itself. In particular, the category within which the rule will place a particular activity should be clear, along with the requirements of the rule (performance standards/conditions). 5.4 Do the principles relating to certainty and reserving discretions apply equally to different types of activity? There is considerable authority for a consistent application of these principles to rules concerning "permitted activities". (See Ruddlesden and Kapiti Borough (1986) 11 NZ 11)A 301). A permitted activity is one permitted as of right without the need for a resource consent provided it complies with all relevant conditions in a plan. If a proposal meets those conditions it may go ahead without consent. Clearly it is desirable, if not essential, that the classification of an activity as permitted and all conditions attached to those classifications be objectively ascertainable and certain. Otherwise persons carrying out activities in the belief that they are permitted, may in fact be doing so unlawfully.

## K

No cards

## CASE

No cards

# 1NR

## CP

No cards