# Counterplan

### 1NC – CP

#### Text: The Office of Legal Counsel should determine that the Executive Branch lacks the legal authority conduct targeted killing justified through Just War Theory.

#### The President should require the Office of Legal Counsel to publish any legal opinions regarding policies adopted by the Executive Branch.

#### The CP is competitive and solves the case—OLC rulings do not actually remove authority but nevertheless hold binding precedential value on the executive.

Trevor W. Morrison, October 2010. Professor of Law, Columbia Law School. “STARE DECISIS IN THE OFFICE OF LEGAL COUNSEL,” Columbia Law Review, 110 Colum. L. Rev. 1448, Lexis.

On the other hand, an OLC that says "yes" too often is not in the client's long-run interest. n49 Virtually all of OLC's clients have their own legal staffs, including the White House Counsel's Office in the White House and the general counsel's offices in other departments and agencies. Those offices are capable of answering many of the day-to-day issues that arise in those components. They typically turn to OLC when the issue is sufficiently controversial or complex (especially on constitutional questions) that some external validation holds special value. n50 For example, when a department confronts a difficult or delicate constitutional question in the course of preparing to embark upon a new program or course of action that raises difficult or politically sensitive legal questions, it has an interest in being able to point to a credible source affirming the  [\*1462]  legality of its actions. n51 The in-house legal advice of the agency's general counsel is unlikely to carry the same weight. n52 Thus, even though those offices might possess the expertise necessary to answer at least many of the questions they currently send to OLC, in some contexts they will not take that course because a "yes" from the in-house legal staff is not as valuable as a "yes" from OLC. But that value depends on OLC maintaining its reputation for serious, evenhanded analysis, not mere advocacy. n53

The risk, however, is that OLC's clients will not internalize the long-run costs of taxing OLC's integrity. This is in part because the full measure of those costs will be spread across all of OLC's clients, not just the client agency now before it. The program whose legality the client wants OLC to review, in contrast, is likely to be something in which the client has an immediate and palpable stake. Moreover, the very fact that the agency has come to OLC for legal advice will often mean it thinks there is  [\*1463]  at least a plausible argument that the program is lawful. In that circumstance, the agency is unlikely to see any problem in a "yes" from OLC.

Still, it would be an overstatement to say that OLC risks losing its client base every time it contemplates saying "no." One reason is custom. In some areas, there is a longstanding tradition - rising to the level of an expectation - that certain executive actions or decisions will not be taken without seeking OLC's advice. One example is OLC's bill comment practice, in which it reviews legislation pending in Congress for potential constitutional concerns. If it finds any serious problems, it writes them up and forwards them to the Office of Management and Budget, which combines OLC's comments with other offices' policy reactions to the legislation and generates a coordinated administration position on the legislation. n54 That position is then typically communicated to Congress, either formally or informally. While no statute or regulation mandates OLC's part in this process, it is a deeply entrenched, broadly accepted practice. Thus, although some within the Executive Branch might find it frustrating when OLC raises constitutional concerns in bills the administration wants to support as a policy matter, and although the precise terms in which OLC's constitutional concerns are passed along to Congress are not entirely in OLC's control, there is no realistic prospect that OLC would ever be cut out of the bill comment process entirely. Entrenched practice, then, provides OLC with some measure of protection from the pressure to please its clients.

But there are limits to that protection. Most formal OLC opinions do not arise out of its bill comment practice, which means most are the product of a more truly voluntary choice by the client to seek OLC's advice. And as suggested above, although the Executive Branch at large has an interest in OLC's credibility and integrity, the preservation of those virtues generally falls to OLC itself. OLC's nonlitigating function makes this all the more true. Whereas, for example, the Solicitor General's aim of prevailing before the Supreme Court limits the extent to which she can profitably pursue an extreme agenda inconsistent with current doctrine, OLC faces no such immediate constraint. Whether OLC honors its oft-asserted commitment to legal advice based on its best view of the law depends largely on its own self-restraint.

2. Formal Requests, Binding Answers, and Lawful Alternatives. - Over time, OLC has developed practices and policies that help maintain its independence and credibility. First, before it provides a written opinion, n55 OLC typically requires that the request be in writing from the head or general counsel of the requesting agency, that the request be as specific and concrete as possible, and that the agency provide its own written  [\*1464]  views on the issue as part of its request. n56 These requirements help constrain the requesting agency. Asking a high-ranking member of the agency to commit the agency's views to writing, and to present legal arguments in favor of those views, makes it more difficult for the agency to press extreme positions.

Second, as noted in the Introduction, n57 OLC's legal advice is treated as binding within the Executive Branch until withdrawn or overruled. n58 As a formal matter, the bindingness of the Attorney General's (or, in the modern era, OLC's) legal advice has long been uncertain. n59 The issue has never required formal resolution, however, because by longstanding tradition the advice is treated as binding. n60 OLC protects that tradition today by generally refusing to provide advice if there is any doubt about whether the requesting entity will follow it. n61 This guards against "advice-shopping by entities willing to abide only by advice they like." n62 More broadly, it helps ensure that OLC's answers matter. An agency displeased with OLC's advice cannot simply ignore the advice. The agency might  [\*1465]  construe any ambiguity in OLC's advice to its liking, and in some cases might even ask OLC to reconsider its advice. n63 But the settled practice of treating OLC's advice as binding ensures it is not simply ignored.

In theory, the very bindingness of OLC's opinions creates a risk that agencies will avoid going to OLC in the first place, relying either on their general counsels or even other executive branch offices to the extent they are perceived as more likely to provide welcome answers. This is only a modest risk in practice, however. As noted above, legal advice obtained from an office other than OLC - especially an agency's own general counsel - is unlikely to command the same respect as OLC advice. n64 Indeed, because OLC is widely viewed as "the executive branch's chief legal advisor," n65 an agency's decision not to seek OLC's advice is likely to be viewed by outside observers with skepticism, especially if the in-house advice approves a program or initiative of doubtful legality.

OLC has also developed certain practices to soften the blow of legal advice not to a client's liking. Most significantly, after concluding that a client's proposed course of action is unlawful, OLC frequently works with the client to find a lawful way to pursue its desired ends. n66 As the OLC Guidelines put it, "when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives." n67 This is a critical component of OLC's work, and distinguishes it sharply from the courts. In addition to "providing a means by which the executive branch lawyer can contribute to the ability of the popularly-elected President and his administration to achieve important policy goals," n68 in more instrumental terms the practice can also reduce the risk of gaming by OLC's clients. And that, in turn, helps preserve the bindingness of OLC's opinions. n69

 [\*1466]  To be sure, OLC's opinions are treated as binding only to the extent they are not displaced by a higher authority. A subsequent judicial decision directly on point will generally be taken to supersede OLC's work, and always if it is from the Supreme Court. OLC's opinions are also subject to "reversal" by the President or the Attorney General. n70 Such reversals are rare, however. As a formal matter, Dawn Johnsen has argued that "the President or attorney general could lawfully override OLC only pursuant to a good faith determination that OLC erred in its legal analysis. The President would violate his constitutional obligation if he were to reject OLC's advice solely on policy grounds." n71 Solely is a key word here, especially for the President. Although his oath of office obliges him to uphold the Constitution, n72 it is not obvious he would violate that oath by pursuing policies that he thinks are plausibly constitutional even if he has not concluded they fit his best view of the law. It is not clear, in other words, that the President's oath commits him to seeking and adhering to a single best view of the law, as opposed to any reasonable or plausible view held in good faith. Yet even assuming the President has some space here, it is hard to see how his oath permits him to reject OLC's advice solely on policy grounds if he concludes that doing so is indefensible as a legal matter. n73 So the President needs at least a plausible legal basis for  [\*1467]  disagreeing with OLC's advice, which itself would likely require some other source of legal advice for him to rely upon.

The White House Counsel's Office might seem like an obvious candidate. But despite recent speculation that the size of that office during the Obama Administration might reflect an intention to use it in this fashion, n74 it continues to be virtually unheard of for the White House to reverse OLC's legal analysis. For one thing, even a deeply staffed White House Counsel's Office typically does not have the time to perform the kind of research and analysis necessary to produce a credible basis for reversing an OLC opinion. n75 For another, as with attempts to rely in the first place on in-house advice in lieu of OLC, any reversal of OLC by the White House Counsel is likely to be viewed with great skepticism by outside observers. If, for example, a congressional committee demands to know why the Executive Branch thinks a particular program is lawful, a response that relies on the conclusions of the White House Counsel is unlikely to suffice if the committee knows that OLC had earlier concluded otherwise. Rightly or wrongly, the White House Counsel's analysis is likely to be treated as an exercise of political will, not dispassionate legal analysis. Put another way, the same reasons that lead the White House to seek OLC's legal advice in the first place - its reputation for  [\*1468]  providing candid, independent legal advice based on its best view of the law - make an outright reversal highly unlikely. n76

Of course, the White House Counsel's Office may well be in frequent contact with OLC on an issue OLC has been asked to analyze, and in many cases is likely to make it abundantly clear what outcome the White House prefers. n77 But that is a matter of presenting arguments to OLC in support of a particular position, not discarding OLC's conclusion when it comes out the other way. n78The White House is not just any other client, and so the nature of - and risks posed by - communications between it and OLC on issues OLC is analyzing deserve special attention. I take that up in Part III. n79 My point at this stage is simply that the prospect of literal reversal by the White House is remote and does not meaningfully threaten the effective bindingness of OLC's decisions.

#### Mandatory publishing requirements prevent OLC deferral to presidential pressure—can be self-imposed—avoids SOP concerns with congressional interference.

Ross L. Weiner, February 2009. JD May 2009 @ George Washington University Law School. “THE OFFICE OF LEGAL COUNSEL AND TORTURE: THE LAW AS BOTH A SWORD AND SHIELD,” THE GEORGE WASHINGTON LAW REVIEW, 77 Geo. Wash. L. Rev. 524, Lexis.

The Torture Memo exposed serious deficiencies in how the OLC operates. For two years, interrogators were given erroneous legal advice regarding torture, with two adverse results. First, American interrogators behaved in ways contrary to traditional American values, possibly leading in part to the Abu Ghraib scandal n147 and to a decline in American reputation around the globe. n148 Second, agents on the  [\*549]  frontlines were given advice that, if followed, might be the basis for prosecution one day. n149 More importantly, when the Torture Memo was leaked to the public, it exposed the OLC to charges of acting as an enabler to the executive branch. John Yoo, the author of the Torture Memo, was known as "Dr. Yes" for his ability to author memos asserting exactly what the Bush Administration wanted to hear. n150 To ensure that this situation does not repeat itself in the future, it is critical for changes to be implemented at the OLC by mandating publication and increasing oversight.

A. Mandated Publishing
One explanation for the Torture Memo and its erroneous legal arguments was the OLC authors' belief that the Memo would remain secret forever. When he worked in the OLC, Harold Koh was often told that we should act as if every opinion might be [sic] some day be on the front page of the New York Times. Almost as soon as the [Torture Memo] made it to the front page of the New York Times, the Administration repudiated it, demonstrating how obviously wrong the opinion was. n151
Furthermore, James B. Comey, a Deputy Attorney General in the OLC, told colleagues upon his departure from the OLC that they would all be "ashamed" when the world eventually found out about other opinions that are still classified today on enhanced interrogation techniques. n152 This suggests that OLC lawyers, operating in relative obscurity, felt somewhat protected by the general veil of secrecy surrounding their opinions.

[\*550]  For many opinions, some of which are already published on the OLC's Web site, n153 this will not be a controversial proposition. Publication has three advantages: (1) accessibility; (2) letting people see the factual predicate on which an opinion is based; and (3) eliminating people's ability to strip an OLC opinion of nuance in favor of saying "OLC says we can do it." n154 Koh provides a telling illustration of the problems associated with the absence of mandated publishing as he found an OLC opinion placed in the Territorial Sea Journal that was critical to a case he was trying on behalf of a group of Haitians seeking to enter the United States. n155 He was incredulous that on a matter "of such consequence," n156 he literally had to be lucky to find the opinion. n157

Secrecy in government facilitates abuse, and nowhere is the need for transparency more important than the OLC, whose opinions are binding on the entire executive branch. In a telling example, on April 2, 2008, the Bush Administration declassified a second Torture Memo. n158 In eighty-one pages, John Yoo presented legal arguments that effectively allowed military interrogators carte blanche to abuse prisoners without any fear of prosecution. n159 While the Memo was classified at the "secret" level, it is clear that there was no strategic rationale for classifying it beyond avoiding public scrutiny. n160 According  [\*551]  to J. William Leonard, the nation's top classification oversight official from 2002-2007, "There is no information contained in this document which gives an advantage to the enemy. The only possible rationale for making it secret was to keep it from the American people." n161

To address this problem, the OLC should be required to publish all of its opinions, with a few limited exceptions. John F. Kennedy once said, "The very word 'secrecy' is repugnant in a free and open society." n162 Justice Potter Stewart, in New York Times Co. v. United States, n163 laid out the inherent dangers of secrecy in the realm of foreign affairs:
I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. n164

The proposal to require the OLC to publish its opinions has been advocated by many, including former heads of the OLC. n165 [\*552]

1. Process for Classification
In certain situations, an opinion may have to remain confidential for national security purposes, but mechanisms can be designed to deal with this scenario. First, in order to deem a memorandum classified as a matter of national security, another agency in the executive branch with expertise on the subject should be required to sign off on such a classification. The Torture Memo exposed an instance of the OLC acting secretively not only for national security purposes, but also because it knew the Torture Memo could not withstand scrutiny. n166 Thus, only opinions dealing with operational matters that give aide to the enemy should be classified. Opinions that consist solely of legal reasoning on questions of law clearly would not pass that test.

If there is a disagreement between those in the OLC who choose to classify something and those in the other executive agency who believe it should be published, then the decision should be sent back to the OLC to review the potential for publishing a redacted version of the opinion. For example, consider a memo from the OLC on the different interrogation techniques allowable under the law. While it would be harmful for the OLC to publish specific activities, and thus alert the country's enemies as to interrogation tactics, publishing the legal analysis that gives the President this authority would not be harmful. Publishing would restore legitimacy to the work the OLC is doing and help remove the taint the Torture Memo has left on the office.

2. Exceptions
There are a few necessary exceptions to a rule requiring publication, and the former OLC attorneys who wrote a series of guidelines for the OLC are clear on them:
Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. n167
 [\*553]  This reasoning stems directly from the attorney-client privilege and the need for candor in government. It is imperative that the executive branch seek information on potential action that may or may not be legal (or constitutional), and this type of inquiry should not be discouraged. This exception is only to be applied when the President does not go ahead with the policy in question. If the OLC were to opine that something is illegal or unconstitutional, and the President were to disregard that advice and proceed with the action anyway, this type of opinion should be made public. n168

If the OLC tells a President he can ignore a statute, and the President follows that advice, that opinion should be available to the public. One of the foundations of American governance is that nobody is above the law; advice that a statute should not be enforced contradicts this maxim. The Torture Memo asserted that violations of U.S. law would probably be excused by certain defenses, including necessity and self-defense. n169 Additionally, the Torture Memo argued that "Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield." n170 The OLC thus told the President that he does not have to enforce any congressional statutes that infringe on his Commander in Chief power. For both the purposes of good government and accountability, this type of claim should be made in public, rather than in secret, so Americans know how the President is interpreting the laws.

3. Oversight of Secret Opinions
Increased oversight at the OLC is most important for opinions that are classified as secret pursuant to the above procedures, and are unlikely to ever be heard in a court of law. According to former OLC attorneys:
The absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President - and by extension  [\*554]  OLC - has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers. n171
How can oversight be ensured?

First, memos that are both secret and unlikely to be heard in court must be reviewed by others with an expertise in the field. In 2002, there were two major issues with the OLC: first, almost nobody outside a group of five attorneys was allowed to read the secret opinions, n172 and second, there was a lack of expertise in the office on matters of national security. n173 As Goldsmith later confessed, "I eventually came to believe that [the immense secrecy surrounding these memoranda] was done [not for confidentiality, but] to control outcomes in the opinions and minimize resistance to them."n174

For opinions that are classified as secret, at least one other legal department in the federal government, with a similar level of expertise, should be asked to review a secret opinion in order to take a [\*555]  substantive look at the legal work in question. According to Jack Goldsmith, this process was traditionally how things worked; n175 when the Bush Administration started "pushing the envelope," n176 however, nearly all outside opinion was shut out under the guise of preventing leaks. n177 It is now apparent that the concern stemmed more from a fear of objections than from the national security concern of a leak. n178 Based on the declassification of the Torture Memo, along with the subsequent declassification of another memo on torture, n179 there was no national security purpose for keeping the memos secret.

The reason an outside review of memos labeled as classified is important is that in times of crisis, proper oversight mechanisms need to be in place. It is in times of emergency when the country is most vulnerable to decisions that it might later regret. n180 Based on the legal reasoning exposed in both the Torture Memo and the released Yoo opinion from March 2003, it is reasonable to surmise that other opinions written in the aftermath of September 11 are similarly flawed. n181 Currently, there are a number of classified memoranda that have been referenced in declassified OLC opinions, but have never been declassified themselves. n182 What these memoranda assert, and whether President Bush decided to follow them, are currently unknown. In a recently declassified opinion, however, there is a footnote indicating that the Fourth Amendment's protection against unreasonable searches and seizures is not applicable to domestic military operations related to the war on terror.n183 Because this would be a novel assertion  [\*556]  of authority, the American public should be able to evaluate the merits of such a legal argument.

Different agencies of government have personnel with different expertise, so it will be incumbent upon those in the OLC to determine which department, and which individual in the department, has the required security clearance and knowledge to review an opinion. Thus, when an opinion has been deemed classified, before it can be forwarded outside of the OLC, it would have to go to another agency for approval.

The question that the reviewer should have to answer is whether the work he or she is analyzing is an "accurate and honest appraisal of applicable law." n184 If it is, then there is no problem with the opinion, and the second agency will sign off on it. If it is not, then the reviewer should prepare a minority report. What is most critical is that both the Attorney General and the President - who might not be an attorney - understand exactly what their lawyers are saying. For a controversial decision, it should not be sufficient for someone in the OLC like John Yoo to write an inaccurate legal memo that asserts one thing, while the law and precedent say another, with the eventual decisionmaker - the President - only viewing the flawed opinion. The minority report will serve two purposes: first, it will encourage lawyers to avoid dressing up a shoddy opinion in "legalese" to make it look legitimate when in reality it is not; and second, it will ensure that the opinion truly is a full and fair accounting of the law.

The most important by-product from mandated review of secret opinions will be that lawyers in the OLC will no longer be able to hide behind a wall of total confidentiality. n185 Rather than acting as if the OLC is above the law and answerable to no one, the knowledge that every classified opinion will be reviewed by someone with an expertise in the field should give pause to any OLC attorney who lacks independence and serves as a yes-man for the President.

 [\*557]

B. Mechanisms for Implementing Changes

1. Self-Imposed by Executive
The easiest way to implement such a change in OLC requirements would be for the President to impose them on the OLC. The OLC's authority stems from the Attorney General, who has delegated some of his power to the OLC. n186 The Attorney General is in the executive branch, which means that the President has the authority to order these changes.

It is unlikely that the executive branch would self-impose constraints on the OLC, because Executives from both parties have historically exhibited a strong desire to protect the levers of power. n187One of the reasons lawyers at the OLC were able to write documents like the Torture Memo without anyone objecting was because the results were in line with what the Bush Administration wanted to hear. n188 Thus, it was unlikely that the Bush Administration would make any changes during its final year in office, and as it turned out, the Bush Administration ended on January 20, 2009, without making any changes.

Nevertheless, in light of the OPR's publicly announced investigation of the OLC's conduct, n189 and the release of another John Yoo memorandum on torture, n190 the lack of oversight at the OLC could come to the forefront of the public's attention. n191 Thus, it is possible that through public pressure, President Bush could be persuaded to mandate these changes himself. n192

2. Congressional Mandate
Alternatively, Congress could step into the void and legislate. Any potential congressional interference, however, would be fraught with separation of powers concerns, which would have to be dealt with directly. First, the President is entitled to advice from his advisors. n193 Second, a great deal of deference is owed to the President when he is operating in the field of foreign affairs. n194 Any attempt by Congress to limit either of these two powers will most likely be met with resistance. n195

### 2NC CP

#### Presidents have strong incentives to follow OLC rulings and maintain OLC independence --- having a legitimate, external source of legal authorization gives presidents political cover --- if they pursued action without seeking OLC approval, it would lead to political pressure from other branches and the public --- that’s Morrison.

#### OLC rulings hold binding precedential value --- the President has an incentive to defer to those rulings in order to maintain a unitary voice on executive legal policy.

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Various Attorneys General have reflected on the approach of Wirt and Legare that an Attorney General opinion should be approached in similar matter to that of a judge. [n48](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true" \l "n48) Similar to a judge, the Attorney General is bound to make determinations of law, [n49](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n49) not to rule on hypothetical cases, [n50](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n50) and prior Attorneys General opinions have precedential authority on subsequent Attorneys General. [n51](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n51) Attorney General William Moody summarized the prevailing view on the authority of an Attorney General opinion when he opined in 1904:
Of course the opinion of the Attorney-General, when rendered in a proper case - as must be the presumption  [\*231]  always from the fact that it is rendered - must be controlling and conclusive, establishing a rule for the guidance of other officers of the Government, and must not be treated as nugatory and ineffective…
If a question is presented to the Attorney-General in accordance with law - that is, if it is submitted by the President or the head of a Department - if it is a question of law and actually arises in the administration of a Department, and the Attorney-General is of opinion that the nature of the question is general and important ... and therefore conceives that it is proper for him to deliver his opinion, I think it is final and authoritative under the law, and should be so treated ....
... I entertain no doubt whatever that the Attorney-General's opinion should not only be justly persuasive ... but should be controlling and should be followed ... unless contrary to some authoritative judicial decision which puts the matter at rest. It is always to be assumed that an Attorney-General would not overlook or ignore such a decision in announcing his own conclusion. [n52](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n52)
An opinion issued by past Attorneys General and those by the OLC serve as precedent that governs current opinion-making by the OLC. [n53](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n53) One significant attribute of the two centuries of Attorneys General and OLC opinions is that they create an institutional legal foundation and tradition that governs current opinion-making regardless of the personal views of a current Attorney General or head of OLC. [n54](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n54) Legal opinions need not nor should not be guided by the personal, political, or academic opinions held by the writer of  [\*232]  the opinion. Both precedent and institutional tradition obligate the writer to produce opinions that provide the best view of the law taking into account past opinions by the OLC and Attorneys General so as to protect the continuity of the law. [n55](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n55) As Walter Dellinger, in addressing the difference in his views on presidential power to deploy the military without prior congressional approval when he was a professor and when he was head of the OLC, observed,
I expect that I would have seen a distinction between the planned deployment in Haiti and the sending of half a million troops into battle against one of the world's largest and best-equipped armies. Even apart from that, however, I am not sure I agree with the apparent assumption of Professor Tribe's letter and the Washington Times editorial - that it would be wrong for me to take a different view at the Office of Legal Counsel from the one I would have been expected to take as an academic. It might well be the case that I have actually learned something from the process of providing legal advice to the executive branch - both about the law (from the career lawyers at the Departments of Justice, State, and Defense and the National Security Council) and about the extraordinary complexity of interrelated issues facing the executive branch in general and the President in particular.
Moreover, unlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about the President's legal authority to use force. Opinions of the Attorneys General and of the Office of Legal Counsel, in particular, have addressed the extent of the President's authority to use troops without the express prior approval of Congress. Although it would take us too far from the main subject here to discuss at length the stare decisis effect of these opinions on executive branch officers, the opinions do count for something. When lawyers who are now at the Office of Legal Counsel begin to research an issue, they are not expected to turn to what I might have written or said in a floor  [\*233]  discussion at a law professors' convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions. That is not to say that prior opinions will never be reversed, only that there are powerful and legitimate institutional reasons why one's views might properly differ when one sits in a different place. [n56](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n56)
Both tradition and fidelity to the rule of law are important in justifying the authority of the Attorney General to issue legal opinions which are binding on the operations of the executive branch. [n57](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n57)Another reason is protection of the unitary President and the power of the President to control the operation of the executive branch. As General Bell observed,
as a matter of good government, it is desirable generally that the executive branch adopt a single, coherent position with respect to the legal questions that arise in the process of government. Indeed, the commitment of our government to due process of law and to equal protection of the laws probably requires that our executive officers proceed in accordance with a coherent, consistent interpretation of the law, to the extent that it is administratively possible to do so. It is thus desirable for the President to entrust the final responsibility for interpretations of the law to a single officer or department. The Attorney General is the one officer in the executive branch who is charged by law with the duties of advising the others about the law and of representing the interests of the United States in general litigation in which questions of law arise. The task of developing a single, coherent view of the law is entrusted to the President himself, and by delegation to the Attorney General. That task is consistent with the nature of the office of Attorney General. [n58](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?tokenKey=rsh-20.47081.33858445962&target=results_DocumentContent&returnToKey=20_T18153716325&parent=docview&rand=1379281447712&reloadEntirePage=true#n58)
As discussed below, the traditional view of the Office of the Attorney General regarding the quasi-judicial authority and status of legal opinions issued by the Attorney General is institutionalized within the OLC, the Department of Justice, and the executive  [\*234]  branch.

#### Their only answer is the Schmitt evidence hes talkigna bout the legal system in 1934 – doesn’t apply to the current political system or the OCL – prefer Morrison who is NOT a dead nazi

#### The ev says LEGAL change is necessary – OLC creates legal changes – office of LEGAL council lolzers – documetns

#### TAKES OUT THE AFF – says normative claims are bad- -the aff is a normative judgement

#### URA ev is normative says that the SC CAN do things – prefer our evidence NONE of theirs is comparative to the executive branch self-restraint

#### Executive self-binding solves credibility.

Eric A. Posner and Adrian Vermeule, Summer 2007. Kirkland & Ellis Professor of Law, The University of Chicago Law School; and Professor of Law, Harvard Law School. “The Credible Executive,” University of Chicago Law Review, http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/74.3/74\_3\_Posner\_Vermeule.pdf.

Our aim in this Article is to identify this dilemma of credibility that afflicts the well-motivated executive and to propose mechanisms for ameliorating it. We focus on emergencies and national security but cast the analysis within a broader framework. Our basic claim is that the credibility dilemma can be addressed by executive signaling. Without any new constitutional amendments, statutes, or legislative action, law and executive practice already contain resources to allow a well-motivated executive to send a credible signal of his motivations, committing to use increased discretion in public-spirited ways. By tying policies to institutional mechanisms that impose heavier costs on ill-motivated actors than on well-motivated ones, the well-motivated executive can credibly signal his good intentions and thus persuade voters that his policies are those that voters would want if fully informed. We focus particularly on mechanisms of executive self-binding that send a signal of credibility by committing presidents to actions or policies that only a well-motivated president would adopt.

#### Only we have comparative evdience

NZELIBE 04 Bigelow Fellow and Lecturer in Law, University of Chicago Law School [Jide Nzelibe, The Uniqueness of Foreign Affairs, March, 2004, 89 Iowa L. Rev. 941]

One of the most obvious and persistent problems in judicial interpretation of the constitutional foreign affairs powers concerns the role of definition. In other words, the Constitution is unambiguously silent as to the meaning of the relevant terms that define the scope of the foreign affairs powers, such as "war" or "treaties." Furthermore, the Supreme Court has yet to supply its own understanding of what these terms mean from a constitutional standpoint. n159 Understandably, without the benefit of any guidance as to the definition of these terms, lower courts have been reluctant to resolve controversies regarding the constitutional allocation of the foreign affairs powers. Perhaps this explains why, in refusing to hear such controversies, the courts often declare that the underlying issues involve the "lack of judicially manageable or discoverable standards." n160

In many respects, it is not difficult to understand why the courts have balked at imposing any substantive limitations on the scope of the foreign affairs powers. The political branches have a demonstrable institutional advantage over the courts in understanding the international political norms that inform the substantive meaning of the various terms underlying the [\*977] foreign affairs powers. The early constitutional history of the foreign affairs powers strongly suggests that the Framers understood the constitutional meaning of these terms would be consistent with that of early British constitutional practice and the prevailing international norms at the time. n161 In the international context, however, the meanings of these foreign affairs terms are dynamic and tend to evolve with changing conditions and the demands of the international environment. Since the political branches are better suited than the courts in tracking these norms, it makes sense that the courts would also defer to the political branches' understandings of the scope of the foreign affairs powers. More importantly, as a descriptive matter, many of the disputes that implicate foreign affairs involve considerations of "realpolitik" that are largely absent in domestic controversies. n162

# Circumvention

#### Plan doesn’t solve – circumvention 2 warrants:

#### Congress

#### Backlash ensures decision fails

Vladeck 11—Professor of Law and Associate Dean for Scholarship @ American University [Stephen I. Vladeck, “Why Klein (Still) Matters: Congressional Deception and the War on Terrorism,” Journal of National Security Law, Volume 5, 6/16/2011, 9:38 AM

Six weeks later, Congress enacted the USA PATRIOT Act, which included a series of controversial revisions to immigration, surveillance, and other law enforcement authorities.34 But it would be over four years before Congress would again pass a key counterterrorism initiative, enacting the Detainee Treatment Act of 2005 (DTA)35 after—and largely in response to—the Supreme Court’s grant of certiorari in Hamdan v. Rumsfeld.36 In the five years since, Congress had enacted a handful of additional antiterrorism measures, including the Military Commissions Act (MCA) of 2006,37 as amended in 2009,38 the Protect America Act of 2007,39 and the 2008 amendments40 to the Foreign Intelligence Surveillance Act of 1978, known in shorthand as the FAA.41 And yet, although Congress has spoken in these statutes both to the substantive authority for military commissions and to the scope of the government’s wiretapping and other surveillance powers, it has otherwise left some of the central debates in the war on terrorism completely unaddressed.42 Thus, Congress has not revisited the scope of the AUMF since September 18, 2001, even as substantial questions have been raised about whether the conflict has extended beyond that which Congress could reasonably be said to have authorized a decade ago.43 Nor has Congress intervened, despite repeated requests that it do so, to provide substantive, procedural, or evidentiary rules in the habeas litigation arising out of the military detention of noncitizen terrorism suspects at Guantánamo.44

As significantly, at the same time as Congress has left some of these key questions unanswered, it has also attempted to keep courts from answering them. Thus, the DTA and the MCA purported to divest the federal courts of jurisdiction over habeas petitions brought by individuals detained at Guantánamo and elsewhere.45 Moreover, the 2006 MCA precluded any lawsuit seeking collaterally to attack the proceedings of military commissions,46 along with “any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”47 And although the Supreme Court in Boumediene invalidated the habeas-stripping provision as applied to the Guantánamo detainees,48 the same language has been upheld as applied elsewhere,49 and the more general non-habeas jurisdiction-stripping section has been repeatedly enforced by the federal courts in other cases.50

Such legislative efforts to forestall judicial resolution of the merits can also be found in the telecom immunity provisions of the FAA,51 which provided that telecom companies could not be held liable for violations of the Telecommunications Act committed in conjunction with certain governmental surveillance programs.52 Thus, in addition to changing the underlying substantive law going forward, the FAA pretermitted a series of then-pending lawsuits against the telecom companies.53

Analogously, Congress has attempted to assert itself in the debate over civilian trials versus military commissions by barring the use of appropriated funds to try individuals held at Guantánamo in civilian courts,54 and by also barring the President from using such funds to transfer detainees into the United States for continuing detention or to other countries, as well.55 Rather than enact specific policies governing criteria for detention, treatment, and trial, Congress’s modus operandi throughout the past decade has been to effectuate policy indirectly by barring (or attempting to bar) other governmental actors from exercising their core authority, be it judicial review or executive discretion.

Wasserman views these developments as a period of what Professor Blasi described as “constitutional pathology,” typified by “an unusually serious challenge to one or more of the central norms of the constitutional regime.” Nevertheless, part of how Wasserman defends the “Klein vulnerable” provisions of the MCA and FAA is by concluding that the specific substantive results they effectuate can be achieved by Congress, and so Klein does not stand in the way. But if Redish and Pudelski’s reading of Klein is correct, then the fact that Congress could reach the same substantive results through other means is not dispositive of the validity of these measures. To the contrary, the question is whether any of these initiatives were impermissibly “deceptive,” such that Congress sought to “vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate.”56 pg. 257-259

#### Guts solvency and results in violent drone proliferation – ensures war

Brooks 13—Professor of Law @ Georgetown University [Rosa Brooks (Senior Fellow @ New America Foundation, Former Counselor to the Undersecretary of Defense for Policy @ Department of Defense, Former Special Coordinator for Rule of Law and Humanitarian Policy @ DOD and Recipient of the Secretary of Defense Medal for Outstanding Public Service), “Mission Creep in the War on Terror” Foreign Policy | MARCH 14, 2013, pg. http://www.foreignpolicy.com/articles/2013/03/14/mission\_creep\_in\_the\_war\_on\_terror?page=0,0

With Option 3 -- lie, lie, lie -- off the table, and fudging and obfuscation growing harder to comfortably sustain, the thoughts of administration officials turn naturally to Option 2: change the law. Thus, as the Washington Post reported last weekend, some administration officials are apparently considering asking Congress for a new, improved "AUMF 2.0," one that would place U.S. drone policy on firmer legal footing.

Just who is behind this notion is unclear, but the idea of a revised AUMF has been gaining considerable bipartisan traction outside the administration. In a recent Hoover Institution publication, for instance, Bobby Chesney, who served in the Obama Justice Department, teams up with Brookings's Ben Wittes and Bush administration veterans Jack Goldsmith and Matt Waxman to argue for a revised AUMF -- one that can provide "a new legal foundation for next-generation terrorist threats."

I'm as fond of the rule of law as the next gal, so in a general sense, I applaud the desire to ensure that future executive branch counterterrorist activities are consistent with the laws passed by Congress. But "laws" and "the rule of law" are two different animals, and an expanded new AUMF is a bad idea.

Sure, legislative authorization for the use of force against "next generation" terrorist threats would give an additional veneer of legality to U.S. drone policy, and make congressional testimony less uncomfortable for John Brennan and Eric Holder. But an expanded AUMF would also likely lead to thoughtless further expansion of targeted killings. This would be strategically foolish, and would further undermine the rule of law.

#### B. President

#### 1. Political game

Scheppele 12—Professor of Sociology and Public Affairs @ Princeton University [Kim Lane Scheppele (Dir. of the Program in Law and Public Affairs @ Princeton University), “The New Judicial Deference,” Boston University Law Review, 92 B.U.L. Rev. 89, January 2012]

In this Article, I will show that American courts have often approached the extreme policies of the anti-terrorism campaign by splitting the difference between the two sides—the government and suspected terrorists. One side typically got the ringing rhetoric (the suspected terrorists), and the other side got the facts on the ground (the government). In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge. The government continued to treat suspected terrorists almost as badly as it did before the suspected terrorists "won" their cases. And any change in terrorism suspects' conditions that did result from these victorious decisions was slow and often not directly attributable to the judicial victories they won.

Does this gap between suspected terrorists' legal gains and their unchanged fates exist because administration officials were flouting the decisions of the courts? The Bush Administration often responded with sound and fury and attempted to override the Supreme Court's decisions or to comply minimally with them when they had to. n6 But, as this Article will show, these decisions did not actually require the government to change its practices very quickly. The decisions usually required the government to change only its general practices in the medium term. Judges had a different framework for analyzing the petitioners' situation than the petitioners themselves did; judges generally couched their decisions in favor of the suspected terrorists as critiques of systems instead of as solutions for individuals. In doing so, however, courts allowed a disjuncture between rights and remedies for those who stood before them seeking a vindication of their claims. Suspected terrorists may have won  [\*92]  in these cases—and they prevailed overwhelmingly in their claims, especially at the Supreme Court—but courts looked metaphorically over the suspects' heads to address the policies that got these suspects into the situation where the Court found them. Whether those who brought the cases actually got to benefit from the judgments, either immediately or eventually, was another question.

Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference. n7 Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, inter arma silent leges: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still "hot," courts jumped right in, dealing governments one loss after another. n8 After 9/11, it appears that deference is dead.

 [\*93]  But, I will argue, deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice. n9 Suspected terrorists have received  [\*94]  from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives.

Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference.

This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted—often bold, ambitious, and brave solutions—nonetheless fail to address the plights of the specific individuals who brought the cases.

This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something—an appearance not entirely false in the long run—while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

#### 2. Nullification – independently destroys court legitimacy

Fallon 9—Professor of Law @ Harvard Law School [Richard H. Fallon, Jr., “Article: Constitutional Constraints,” California Law Review, 97 Calif. L. Rev. 975, August 2009]

1. Inefficacy or Nullity Under Applicable Rules of Recognition

Judges and justices are constrained by the prospect that some decisions they might imaginably render would be treated as nullities or otherwise prove inefficacious. n189 While some rules of recognition tell justices how to identify valid law, others, applicable to other officials, characteristically direct those other officials to accept judicial interpretations as binding—even when those other officials think the judges made mistakes. n190 But there are limits. For example, as I have said before, a judicial directive purporting to raise or lower interest rates solely for policy reasons would not be recognized as legally authoritative. n191

This conclusion may appear trivial, but I do not believe that it is. As Fred Schauer has documented, the Supreme Court's docket typically includes few of the issues that most American regard as most pressing. n192 Matters of war and peace, economic boom and bust, and priorities in the provision of public services seldom come within the province of judicial decision-making. In light of familiar assumptions that unchecked power tends to expand, n193 we might ask why this is so. Part of the answer lies in the justices' awareness of external constraints.

 [\*1016]  As a historical matter, the prospect of judicial pronouncements being treated as nullities or otherwise proving inefficacious is hardly hypothetical. n194 President Thomas Jefferson and Secretary of State James Madison credibly threatened to defy the Supreme Court if it awarded mandamus relief to William Marbury in Marbury v. Madison. n195 Abraham Lincoln directed his subordinates to ignore the ruling of Chief Justice Taney in Ex parte Merryman. n196

Another example may come from the World War II case of Ex parte Quirin, n197 in which the Court upheld executive authority to try alleged Nazi saboteurs before military tribunals rather than civilian courts. n198 While the case was pending, President Franklin D. Roosevelt made it known to the justices that if they ruled for the petitioners, he would order military trials and summary executions to proceed anyway. n199 In the wartime circumstances, military personnel would almost certainly have obeyed presidential orders to ignore a judicial ruling—a consideration that may well have affected the Court's decision to uphold the constitutionality of military trials. n200 The Court may also have framed its famous order that local schools boards should enforce the rights recognized in Brown v. Board of Education n201 "with all deliberate speed," n202 rather than posthaste, partly because it knew that a mandate of immediate desegregation might have proved inefficacious. n203

 [\*1017]  Without attempting to account systematically for all possible external constraints that arise from the prospect that judicial rulings might be null under the rules of recognition practiced by nonjudicial officials, or might otherwise provoke defiance, I offer three observations.

First, in cases in which the justices worry that executive officials or lower courts might defy their rulings, they may feel a tension between the direct normative constraints and the external constraints to which they are subject. In other words, they may believe that they have a legal duty to do what they may feel externally constrained from doing. In Quirin, for example, the justices might easily have believed that at least one of the alleged saboteurs—a U.S. citizen who had been apprehended within the United States—had a constitutional right to civilian trial. n204

As I noted above, however, it also seems plausible that in a case such as Quirin, external constraints might affect the justices' perceptions of their legal duties. For example, in reflecting upon precedents such as Marbury v. Madison n205 and Stuart v. Laird, n206 in which the Court bowed to political threats, the justices may have concluded that the "rule of recognition" authorizes them to avoid rulings that would likely provoke broadly supported defiance and thereby threaten the long-or short-term authority of the judicial branch. As I have written elsewhere:
Looking at the Supreme Court's long-term pattern of decisions, I would surmise that the Justices have internalized the constraint that the Court must conduct itself in ways that the public will accept as lawful and practically tolerable ... : the Court's interpretations of the Constitution must be likely to be accepted and enforced by at least a critical mass of the officials normally counted on to implement judicial decisions, and they should not trigger a strong and enduring sense of mass outrage by political majorities that the Court has overstepped its constitutional powers. n207
 [\*1018]  Second, while assent to judicial mandates is today the norm, and official defiance of court rulings the exception, some observers believe that nonjudicial officials should feel freer than they presently do to treat judicial rulings as not binding on them. In a much discussed book, Larry Kramer has argued that nonjudicial officials once regarded themselves as being entitled as judges to interpret the Constitution, even after the courts had spoken, and to treat judicial rulings as limited to the particular cases in which they were issued or even to ignore them. n208 Whatever historical practice may have been, the recognition practices of nonjudicial officials could change in the future, with official defiance of judicial rulings becoming more common. n209 The external constraints on judges and justices are thus potential variables.

Third, if we ask why elected officials, in particular, currently accede so readily to claims of judicial authority that are not clearly ultra vires, part of the answer can be traced to the external constraint that public expectations impose. The public expects governmental officials to obey the law, and the public has been socialized to believe that judicial interpretations are legally binding. n210 But reference to current norms only postpones the question of how a state of affairs developed in which judicial authority to resolve disputable constitutional questions is so widely accepted.

In addressing this question, it is just as important to recognize that the domain of recognized judicial authority is bounded—that there are some issues committed almost wholly to resolution by politically accountable officials—as it is to note that judicial authority is seldom seriously questioned within its sphere. In accounting for these phenomena, political scientists increasingly argue that the domain within which the Court possesses recognized authority is politically "constructed." n211 With respect to the kinds of issues concerning which the courts speak authoritatively, elected officials prefer that the courts do speak authoritatively. n212 Maintenance of a relatively independent judiciary within a limited sphere may be the preferred strategy of risk-averse political leaders who willingly forego some opportunities to exercise power while they  [\*1019]  hold office in order to prevent unbounded power by their political adversaries when the adversaries triumph at the polls. n213 Perhaps of even greater significance, politicians may find it to their electoral advantage to leave a range of contentious issues for judicial resolution. n214 Congress and the president may also be happy to see dominant national visions enforced against the states n215 and to delegate to the courts a number of issues possessing low political salience. n216

If political scientists are correct that the domain of judicial authority is politically constructed, however, there is no guarantee that the political forces that define that domain will remain in long-term equilibrium. From the perspective of some political scientists, every election is a potential external shock to the system. n217 Keith Whittington advances the more architectonic thesis that, from time to time, "reconstructive" presidents have confronted the Supreme Court, sometimes successfully, and have forced a redefinition of the substantive bounds within which acceptable judicial decision-making can occur. n218 According to Professor Whittington, Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt all achieved this effect to greater or lesser degrees. n219 They did so partly by persuading the public to accept their visions of constitutional meaning and partly, having prevailed in the court of public opinion, by appointing justices who shared their constitutional visions. Thus, to take the starkest example, the prevailing constitutional understandings that emerged from the Roosevelt Revolution of the 1930s—in the country as well as on the Court—differed vastly from those of the 1920s, and the principal engine driving the change was Franklin Roosevelt. n220

 [\*1020]  In order for external constraints to be effective, judges and justices need not respond to them self-consciously, "for the constitutional understandings shared by those affiliated" with the dominant political coalition or "regime"—including jurists who have been nominated and confirmed with their constitutional visions in mind—"will be entrenched and assumed." n221 Nevertheless, the external constraints that define the domain of politically acceptable judicial action can exert important influence as parts of the process through which current and future judges identify and internalize legal norms. As Thomas Keck puts it, "The justices' ostensibly political preferences have themselves been constituted in part by legal ideas, and those legal ideas, in turn, have been derived in large part from ongoing debates in the broader political system." n222

2. Concurrent Agreement or Acquiescence Requirements
 The Supreme Court "is a they, not an it." n223 In considering constraints on the Court as an institution, it is easy to forget that the Court is comprised of nine justices, each of whom is constrained individually by the need to secure the agreement of at least four colleagues in order to render legally efficacious constitutional rulings. n224 Judges of courts of appeals are similarly constrained by the need to muster majority support for their conclusions. Unlike Supreme Court justices, lower court judges are of course further constrained by the Supreme Court's power to reverse their decisions. n225

 [\*1021]  As I have noted, nonjudicial officials can defy or refuse to implement judicial decisions. Indeed, they have sometimes done so. n226 The courts, however, are virtually never constrained by the need to earn the formal approval or acquiescence of officials in another branch in order to act with the authority of law. The reason, I would speculate, is that the Constitution is written, and surrounding norms and expectations have developed, on the hypothesis that the judiciary is the least dangerous branch. n227 If the judiciary is assumed to be relatively impotent to inflict affirmative damage, and if the other branches are more threatening, it may be more desirable to preserve an efficacious checking power for the judiciary than to establish concurrent agreement or acquiescence requirements as formal checks against judicial action.

Having said this, I hasten to add that there may be circumstances under which the exercise of a judicial negative does indeed do affirmative harm—for example, if the Court unwisely invalidates legislation that would further important public interests or protect moral rights. n228 Perceptions that the Court has done so partly explain some of the instances in which "reconstructive" presidents—including Abraham Lincoln and Franklin Roosevelt—have mounted successful attacks on previously prevailing visions of appropriate judicial authority under the Constitution. n229

3. Sanctions
The Constitution insulates the Supreme Court, as it does all federal judges, against certain kinds of sanctions. The justices cannot be removed from office during good behavior, nor can Congress reduce their salaries. n230 All judges, justices included, also enjoy immunity from suits for civil damages based on their official acts. n231

Despite these safeguards of judicial independence, the Constitution provides for some sanctions against Supreme Court justices. Most formally and conspicuously, justices can be impeached and removed from office. n232 They are  [\*1022]  also subject to the criminal law, including its prohibitions against bribery and extortion.

Less formally, justices confront the possibility of sanctioning by their colleagues. If the justices thought one of their number to be reckless or cavalier in her constitutional judgments, they could deprive the wayward colleague of the privilege of speaking authoritatively for the Court simply by refusing to join her opinions. Or they could vote to rehear any case in which that colleague cast the decisive vote—as apparently happened with the aged William O. Douglas. n233 The justices' capacity to write opinions exposing their colleagues' constitutionally faithless reasoning (if such were ever to occur), and thus to hold up offenders to contempt or ridicule, may also qualify as a constitutionally authorized, albeit informal, sanction. n234

Beyond the sanctions available against Supreme Court justices, the Constitution provides mechanisms for the imposition of institutional sanctions, directed not against individual justices but the Court as a whole. The Constitution permits Congress to withdraw at least some cases from the Court's jurisdiction. n235 If so minded, Congress and the president could also "pack" the Court and thereby not only reduce the power of incumbent justices, but also diminish the Court's prestige. n236

Lower federal court judges are vulnerable to virtually the same sanctions as Supreme Court justices, but with one conspicuous addition. Unlike the justices, lower court judges are subject to being reversed, and potentially to being upbraided, on appeal. n237

 [\*1023]  Insofar as threats of sanctions function as a constraint on judicial action, their directive force could sometimes create a tension with applicable normative constraints. n238 This prospect appears most visibly in the case of state judges, who may incur electoral or other political sanctions if their decisions displease a majority of voters. n239 But it is at least imaginable that an irate or partisan Congress might sanction federal judges by impeaching them and removing them from office for rendering unpopular but legally correct decisions. n240

This possibility—which exemplifies the age-old dilemma of who should guard the guardians—is almost surely an unhappy one. But the threat has seldom if ever come to fruition. There are at least three lessons to be drawn.

First, nonjudicial actors within the American political system, including the public, have largely internalized a norm against attempts to interfere with the exercise of independent judgment by the federal judiciary, and especially the Supreme Court. Early in American constitutional history, the Jeffersonian Republicans threatened to impeach judges as an instrument of ideological discipline, but the effort foundered before it gained momentum. n241 More than a century later, when Franklin Roosevelt sought authority to "pack" a Supreme Court that had appeared poised to scuttle hugely popular New Deal policies, Congress and public opinion rallied against the president. n242 Similarly, although members of Congress have recurrently introduced legislation that would curb the authority of the federal courts to rule on controversial issues, n243 such proposals have generally collapsed in the face of protests that they would violate the Constitution's spirit if not its letter. n244

 [\*1024]  Second, as I have noted already, other powerful political actors have good reasons to wish to maintain a relatively powerful, relatively independent judiciary. n245 Granted, "reconstructive" presidents have sometimes sought to challenge the prevailing ideologically inflected assumptions through which the Constitution has predominantly come to be viewed. But even reconstructive presidents and their normal allies have either had normative compunctions about subjecting the Supreme Court to significant sanctions or have encountered external resistance when they attempted to do so.

Third, saying that the sanctioning of federal judges and especially the Supreme Court has occurred infrequently is different from saying that the prospect of sanctions has had no effect. As I have noted, judicial decision-making in the United States has long exhibited a streak of prudentialism, through which the Court has avoided not only particular decisions that might provoke defiance, but also broader patterns of rulings that could arouse political majorities to impose sanctions. n246 Although I would stop considerably short of Judge Richard Posner's conclusion that "constitutional law is a function ... of ideology" checked principally if not exclusively by the justices' "awareness, conscious or unconscious, that they cannot go "too far' without inviting reprisals by the other branches of government spurred on by an indignant public," n247 it seems only commonsensical to assume that sanctions or other external constraints have some effect.

#### Loss of legitimacy destroys the environment

Stein 5—Former Judge of the New South Wales Court of Appeal and the New South Wales Land and Environment Court [Justice Paul Stein (International Union for Conservation of Nature (IUCN) Specialist Group on the Judiciary), “Why judges are essential to the rule of law and environmental protection,” Judges and the Rule of Law: Creating the Links: Environment, Human Rights and Poverty, IUCN Environmental Policy and Law Paper No. 60, Edited by Thomas Greiber, 2006]

The Johannesburg Principles state:

“We emphasize that the fragile state of the global environment requires the judiciary, as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.”

There can be no argument that environmental law, and sustainable development law in particular, are vibrant and dynamic areas, both internationally and domestically. Judge Weeramantry (of the ICJ) has reminded us that we judges, as custodians of the law, have a major obligation to contribute to its development. Much of sustainable development law is presently making the journey from soft law into hard law. This is happening internationally but also it is occurring in many national legislatures and courts.

Fundamental environmental laws relating to water, air, our soils and energy are critical to narrowing the widening gap between the rich and poor of the world. Development may be seen as the bridge to narrow that gap but it is one that is riddled with dangers and contradictions. We cannot bridge the gap with materials stolen from future generations. Truly sustainable development can only take place in harmony with the environment. Importantly we must not allow sustainable development to be duchessed and bastardized.

A role for judges?

It is in striking the balance between development and the environment that the courts have a role. Of course, this role imposes on judges a significant trust. The balancing of the rights and needs of citizens, present and future, with development, is a delicate one. It is a balance often between powerful interests (private and public) and the voiceless poor. In a way judges are the meat in the sandwich but, difficult as it is, we must not shirk our duty. Pg. 53-54

#### Extinction

Barry 13—Political ecologist with expert proficiencies in old forest protection, climate change, and environmental sustainability policy [Dr. Glen Barry (Ph.D. in "Land Resources" and Masters of Science in "Conservation Biology and Sustainable Development” from the University of Wisconsin-Madison), “ECOLOGY SCIENCE: Terrestrial Ecosystem Loss and Biosphere Collapse,” Forests.org, February 4, 2013, pg. http://forests.org/blog/2013/02/ecology-science-terrestrial-ec.asp

Blunt, Biocentric Discussion on Avoiding Global Ecosystem Collapse and Achieving Global Ecological Sustainability

Science needs to do a better job of considering worst-case scenarios regarding continental- and global-scale ecological collapse. The loss of biodiversity, ecosystems, and landscape connectivity reviewed here shows clearly that ecological collapse is occurring at spatially extensive scales. The collapse of the biosphere and complex life, or eventually even all life, is a possibility that needs to be better understood and mitigated against. A tentative case has been presented here that terrestrial ecosystem loss is at or near a planetary boundary. It is suggested that a 66% of Earth's land mass must be maintained in terrestrial ecosystems, to maintain critical connectivity necessary for ecosystem services across scales to continue, including the biosphere. Yet various indicators show that around 50% of Earth's terrestrial ecosystems have been lost and their services usurped by humans. Humanity may have already destroyed more terrestrial ecosystems than the biosphere can bear. There exists a major need for further research into how much land must be maintained in a natural and agroecological state to meet landscape and bioregional sustainable development goals while maintaining an operable biosphere.

It is proposed that a critical element in determining the threshold where terrestrial ecosystem loss becomes problematic is where landscape connectivity of intact terrestrial ecosystems erodes to the point where habitat patches exist only in a human context. Based upon an understanding of how landscapes percolate across scale, it is recommended that 66% of Earth's surface be maintained as ecosystems; 44% as natural intact ecosystems (2/3 of 2/3) and 22% as agroecological buffer zones. Thus nearly half of Earth must remain as large, connected, intact, and naturally evolving ecosystems, including old-growth forests, to provide the context and top-down ecological regulation of both human agroecological, and reduced impact and appropriately scaled industrial activities.

Given the stakes, it is proper for political ecologists and other Earth scientists to willingly speak bluntly if we are to have any chance of averting global ecosystem collapse. A case has been presented that Earth is already well beyond carrying capacity in terms of amount of natural ecosystem habitat that can be lost before the continued existence of healthy regional ecosystems and the global biosphere itself may not be possible. Cautious and justifiably conservative science must still be able to rise to the occasion of global ecological emergencies that may threaten our very survival as a species and planet.

Those knowledgeable about planetary boundaries—and abrupt climate change and terrestrial ecosystem loss in particular—must be more bold and insistent in conveying the range and possible severity of threats of global ecosystem collapse, while proposing sufficient solutions. It is not possible to do controlled experiments on the Earth system; all we have is observation based upon science and trained intuition to diagnose the state of Earth's biosphere and suggest sufficient ecological science–based remedies.

If Gaia is alive, she can die. Given the strength of life-reducing trends across biological systems and scales, there is a need for a rigorous research agenda to understand at what point the biosphere may perish and Earth die, and to learn what configuration of ecosystems and other boundary conditions may prevent her from doing so. We see death of cells, organisms, plant communities, wildlife populations, and whole ecosystems all the time in nature—extreme cases being desertification and ocean dead zones. There is no reason to dismiss out of hand that the Earth System could die if critical thresholds are crossed. We need as Earth scientists to better understand how this may occur and bring knowledge to bear to avoid global ecosystem and biosphere collapse or more extreme outcomes such as biological homogenization and the loss of most or even all life. To what extent can a homogenized Earth of dandelions, rats, and extremophiles be said to be alive, can it ever recover, and how long can it last?

The risks of global ecosystem collapse and the need for strong response to achieve global ecological sustainability have been understated for decades. If indeed there is some possibility that our shared biosphere could be collapsing, there needs to be further investigation of what sorts of sociopolitical responses are valid in such a situation. Dry, unemotional scientific inquiry into such matters is necessary—yet more proactive and evocative political ecological language may be justified as well. We must remember we are speaking of the potential for a period of great dying in species, ecosystems, humans, and perhaps all being. It is not clear whether this global ecological emergency is avoidable or recoverable. It may not be. But we must follow and seek truth wherever it leads us.

Planetary boundaries have been quite anthropocentric, focusing upon human safety and giving relatively little attention to other species and the biosphere's needs other than serving humans. Planetary boundaries need to be set that, while including human needs, go beyond them to meet the needs of ecosystems and all their constituent species and their aggregation into a living biosphere. Planetary boundary thinking needs to be more biocentric.

I concur with Williams (2000) that what is needed is an Earth System–based conservation ethic—based upon an "Earth narrative" of natural and human history—which seeks as its objective the "complete preservation of the Earth's biotic inheritance." Humans are in no position to be indicating which species and ecosystems can be lost without harm to their own intrinsic right to exist, as well as the needs of the biosphere. For us to survive as a species, logic and reason must prevail (Williams 2000).

Those who deny limits to growth are unaware of biological realities (Vitousek 1986). There are strong indications humanity may undergo societal collapse and pull down the biosphere with it. The longer dramatic reductions in fossil fuel emissions and a halt to old-growth logging are put off, the worse the risk of abrupt and irreversible climate change becomes, and the less likely we are to survive and thrive as a species. Human survival—entirely dependent upon the natural world—depends critically upon both keeping carbon emissions below 350 ppm and maintaining at least 66% of the landscape as natural ecological core areas and agroecological transitions and buffers. Much of the world has already fallen below this proportion, and in sum the biosphere's terrestrial ecosystem loss almost certainly has been surpassed, yet it must be the goal for habitat transition in remaining relatively wild lands undergoing development such as the Amazon, and for habitat restoration and protection in severely fragmented natural habitat areas such as the Western Ghats.

The human family faces an unprecedented global ecological emergency as reckless growth destroys the ecosystems and the biosphere on which all life depends. Where is the sense of urgency, and what are proper scientific responses if in fact Earth is dying? Not speaking of worst-case scenarios—the collapse of the biosphere and loss of a living Earth, and mass ecosystem collapse and death in places like Kerala—is intellectually dishonest. We must consider the real possibility that we are pulling the biosphere down with us, setting back or eliminating complex life.

The 66% / 44% / 22% threshold of terrestrial ecosystems in total, natural core areas, and agroecological buffers gets at the critical need to maintain large and expansive ecosystems across at least 50% of the land so as to keep nature connected and fully functional. We need an approach to planetary boundaries that is more sensitive to deep ecology to ensure that habitable conditions for all life and natural evolutionary change continue. A terrestrial ecosystem boundary which protects primary forests and seeks to recover old-growth forests elsewhere is critical in this regard. In old forests and all their life lie both the history of Earth's life, and the hope for its future. The end of their industrial destruction is a global ecological imperative.

Much-needed dialogue is beginning to focus on how humanity may face systematic social and ecological collapse and what sort of community resilience is possible. There have been ecologically mediated periods of societal collapse from human damage to ecosystems in the past (Kuecker and Hall 2011). What makes it different this time is that the human species may have the scale and prowess to pull down the biosphere with them. It is fitting at this juncture for political ecologists to concern themselves with both legal regulatory measures, as well as revolutionary processes of social change, which may bring about the social norms necessary to maintain the biosphere. Rockström and colleagues (2009b) refer to the need for "novel and adaptive governance" without using the word revolution. Scientists need to take greater latitude in proposing solutions that lie outside the current political paradigms and sovereign powers.

Even the Blue Planet Laureates' remarkable analysis (Brundtland et al. 2012), which notes the potential for climate change, ecosystem loss, and inequitable development patterns neither directly states nor investigates in depth the potential for global ecosystem collapse, or discusses revolutionary responses. UNEP (2012) notes abrupt and irreversible ecological change, which they say may impact life-support systems, but are not more explicit regarding the profound human and ecological implications of biosphere collapse, or the full range of sociopolitical responses to such predictions. More scientific investigations are needed regarding alternative governing structures optimal for pursuit and achievement of bioregional, continental, and global sustainability if we are maintain a fully operable biosphere forever. An economic system based upon endless growth that views ecosystems necessary for planetary habitability primarily as resources to be consumed cannot exist for long.
Planetary boundaries offer a profoundly difficult challenge for global governance, particularly as increased scientific salience does not appear to be sufficient to trigger international action to sustain ecosystems (Galaz et al. 2012). If indeed the safe operating space for humanity is closing, or the biosphere even collapsing and dying, might not discussion of revolutionary social change be acceptable? Particularly, if there is a lack of consensus by atomized actors, who are unable to legislate the required social change within the current socioeconomic system. By not even speaking of revolutionary action, we dismiss any means outside the dominant growth-based oligarchies.

In the author's opinion, it is shockingly irresponsible for Earth System scientists to speak of geoengineering a climate without being willing to academically investigate revolutionary social and economic change as well. It is desirable that the current political and economic systems should reform themselves to be ecologically sustainable, establishing laws and institutions for doing so. Yet there is nothing sacrosanct about current political economy arrangements, particularly if they are collapsing the biosphere. Earth requires all enlightened and knowledgeable voices to consider the full range of possible responses now more than ever.

One possible solution to the critical issues of terrestrial ecosystem loss and abrupt climate change is a massive and global, natural ecosystem protection and restoration program—funded by a carbon tax—to further establish protected large and connected core ecological sustainability areas, buffers, and agro-ecological transition zones throughout all of Earth's bioregions. Fossil fuel emission reductions must also be a priority. It is critical that humanity both stop burning fossil fuels and destroying natural ecosystems, as fast as possible, to avoid surpassing nearly all the planetary boundaries.

In summation, we are witnessing the collective dismantling of the biosphere and its constituent ecosystems which can be described as ecocidal. The loss of a species is tragic, of an ecosystem widely impactful, yet with the loss of the biosphere all life may be gone. Global ecosystems when connected for life's material flows provide the all-encompassing context within which life is possible. The miracle of life is that life begets life, and the tragedy is that across scales when enough life is lost beyond thresholds, living systems die.

### 2NC – President Circumvents - Precedent Fails

#### Plan doesn’t set a precedent

Devins 9—Professor of Law and Professor of Government @ College of William and Mary [Neal Devins, “Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives,” Willamette Law Review, Vol. 45, Issue 3 (Spring 2009), pp. 395-416]

Before turning to Part I, let me clarify two points that underlie the analysis that is to follow. First, the focus of this essay is the President's power to advance favored policy initiatives. I do not consider the separate question of presidential power over the administrative state. More to the point, if the President does not express a strong policy preference or, alternatively, delegates decision making authority to agency heads, it may be that agency heads will not look to the White House for policy direction. Agency heads, instead, may focus on their own personal agenda or the agendas of congressional committees, interest groups, or careerists in their agency. For reasons I will detail in Part III of this essay, however, Presidents increasingly seek to rein in agency direction-by appointing presidential loyalists and by making use of regulatory review procedures and pre-enforcement directives such as signing statements. Second, in saying that presidential power is largely defined by the dance that takes place between Congress and the White House, I do not mean to suggest that the courts have no role to play in the separation of powers. My point, instead, is that court decisions are of limited reach. They typically settle a case; they rarely establish precedents that define subsequent bargaining between the executive and Congress. In case studies of Supreme Court rulings on the legislative veto, executive privilege, and war powers, Lou Fisher and I (both individually and collectively) have demonstrated the limited reach of Supreme Court decisions. In this essay, I will make limited reference to those writings-but I will not try to establish a point that I have made several times before. Pg. 398-399

### 2NC – A2 – Court Always Legitimate

#### Their arg doesn’t account for the specificity of our link. War powers is one of the rare instances where the wrong decision threaten the court’s credibility and undermines compliance

Chemerinsky 91—Professor of Law @ University of Southern California Law Center [Erwin Chemerinsky, “BOOK REVIEW: THE SEDUCTION OF DEDUCTION: THE ALLURE OF AND PROBLEMS WITH A DEDUCTIVE APPROACH TO FEDERAL COURT JURISDICTION,” Northwestern University Law Review, 86 Nw. U.L. Rev. 96, FALL 1991

There are other, even more subtle, ways in which strict adherence to Congressional statutes could frustrate constitutional enforcement by the judiciary. Scholars such as Alexander Bickel argue that the federal courts, at times, must refrain from deciding constitutional issues within their jurisdiction to preserve sufficient credibility to ensure authority to enforce the Constitution in the long term. n15 There might be instances in which a judicial decision, rendered in compliance with jurisdictional statutes, almost certainly would be ignored. Simple illustrations suffice: should the judiciary declare unconstitutional a very popular war if it believes that its decision definitely would be disregarded, or decide a challenge brought by an impeached and convicted president to the constitutionality of the impeachment proceedings? A persuasive case  [\*101] might be made that following the jurisdictional mandate in such instances would not lead to effective constitutional enforcement and, in the long term, could actually hurt the judiciary's ability to perform its constitutional role. n16

I generally do not find such arguments for the "passive virtues" to be persuasive because they overstate the fragility of judicial legitimacy and underestimate the importance of judicial enforcement of the Constitution. n17 Yet, the examples suggest that there might be instances, however rare, where compliance with the jurisdictional statutes can undermine the short-term or long-term ability of the Court to enforce the Constitution. Hence, in some cases, protecting the Court's constitutional role could mean ignoring the jurisdictional statutes.

## Other Cards

### 1NC - T

#### A topical aff must restrict authority that the President has—they don’t.

Bradley and Goldsmith 5—Curtis and Jack, professor of law at the University of Virginia and professor of law at Harvard [118 Harvard Law Review 2047, May, Lexis]

Second, under Justice Jackson's widely accepted categorization of presidential power, n5 "the strongest of presumptions and the widest latitude of judicial interpretation" attach "when the President acts pursuant to an express or implied authorization of Congress." n6 This  [\*2051]  proposition applies fully to presidential acts in wartime that are authorized by Congress. n7 By contrast, presidential wartime acts not authorized by Congress lack the same presumption of validity, and the Supreme Court has invalidated a number of these acts precisely because they lacked congressional authorization. n8 The constitutional importance of congressional approval is one reason why so many commentators call for increased congressional involvement in filling in the legal details of the war on terrorism. Before assessing what additional actions Congress should take, however, it is important to assess what Congress has already done. Third, basic principles of constitutional avoidance counsel in favor of focusing on congressional authorization when considering war powers issues. n9 While the President's constitutional authority as Commander-in-Chief is enormously important, determining the scope of that authority beyond what Congress has authorized implicates some of the most difficult, unresolved, and contested issues in constitutional law. n10 Courts have been understandably reluctant to address the scope of that constitutional authority, especially during wartime, when the consequences of a constitutional error are potentially enormous. n11 Instead,  [\*2052]  courts have attempted, whenever possible, to decide difficult questions of wartime authority on the basis of what Congress has in fact authorized. n12 This strategy makes particular sense with respect to the novel issues posed by the war on terrorism.

#### They un-limit the topic

BARRON & LEDERMAN 8—\*David J. Barron, Professor of Law, Harvard Law School AND \*\*Martin S. Lederman, Visiting Professor of Law, Georgetown University Law Center [THE COMMANDER IN CHIEF AT THE LOWEST EBB—FRAMING THE PROBLEM, DOCTRINE, AND ORIGINAL UNDERSTANDING, January, 2008, Havard Law Review, 121 Harv. L. Rev. 689]

5. Further Assertions of the Preclusive Commander in Chief Power.—In light of the Bush Administration's theory of preclusive Commander in Chief authority, and its consistent invocation of that argument across so many distinct areas, there are probably other examples as well. Because any further OLC documents containing arguments in support of such statutory noncompliance are not public, we do not know the extent of the phenomenon. On dozens of occasions, however, the President has invoked his power as Commander in Chief in issuing signing statements objecting to statutory enactments, suggesting that he will not fully comply with such laws in some circumstances, in particular when they cut too close to his chosen means of conducting a military campaign. n66 Moreover, the President, as we have noted, has invoked a Commander in Chief objection in vetoing a bill purporting to regulate the use of troops in Iraq. n67 The Administration has further indicated that any statutory restrictions Congress might approve on the use of force against Iran would be unconstitutional. n68 These recent assertions give practical effect to the expansive and uncompromising constitutional theory of preclusive executive war powers first enunciated in the OLC memorandum drafted two weeks after the attacks of September 11. n69

likely be met with resistance. n195

### K

#### Their framing of the War on Terror as a war for JUST global liberalism is false. Their underlying premises leave us powerless in the face of territorial executive authority.

Benno **TESCHKE** IR @ Sussex **’11** “Fatal attraction: a critique of Carl Schmitt’s international political and legal theory” *International Theory* 3:2 p. 216-221

This article has argued that attention to Schmitt’s political context and politics of concept-formation provides a privileged vantage-point for disclosing the purpose and limits of Schmitt’s theoretical premises, which generated a determinate, but defective, reinterpretation of the history of international law and order. The theoretical and historical critique of Schmitt’s triple theoretical axiomatic revealed their one-dimensional (geo)political cast, which precludes the incorporation of social relations into Schmitt’s definition of his research premises. These dual deficiencies – theoretical and historical – suggest a shift to the alternative paradigm of international historical sociology. Inversely, the article has suggested that the Schmitt-inspired IR literature tends to dissociate Schmitt’s thought – history and theory – from his specific political project. This generates a depoliticized and de-contextualized acceptance of his conceptual narrative of international law and order, which translates into an underproblematized projection of Schmittian categories unto an altered contemporary geopolitical configuration. As a result, the neo-Schmittian endorsement of Schmitt’s history and theory as international theory stands on fragile ground**.** Carl Schmitt formulated his international thought in the context of the interwar crisis – IR’s ‘Twenty Years’ Crisis. This crisis of capitalist modernity had deeply affected the political and geopolitical landscape of all major powers, but found its most acute expression (next to Russia) in the crisis of the Weimar Republic, facing disorder from below – strikes, civil war, coup d’E´ tats, revolution – and a loss of sovereign autonomy from outside, codified in the Versailles Treaty. Schmitt’s intellectual riposte revolved around the political reassertion of domestic and international order. The former was encapsulated in the definition of sovereignty as an unmediated and subjective decision on the state of exception (and, later, the full embrace of the Fuhrer-principle and the ‘total state’), and in the concept of the political, which redefined democracy in identitarian– existentialist terms through the mediation of agonistic friend/enemy declarations by the state executive. The latter was captured in his defence of the sanctity of the legality of Imperial Germany’s war against the Allies as the highest expression of the state’s ius belli ac pacis of the ius publicum europaeum and, later, the idea of land-appropriations as the historical norm. This legitimized Nazi-Germany’s war of conquests and the idea of coexisting imperial greater regions as the new nomos of the earth. Schmitt remorselessly dissected the crisis of the legal form, the relation between constitutionalism, democracy and emergency powers, and the pathologies of liberal international law in order to fend off the potential of a revolutionary German pouvoir constituant and to deconstruct the practice and ideology of the legal–political expansion of the liberal-capitalist ‘zone of peace’ – the incipient legalization and de-politicization of interstate relations. But rather than developing categories of analysis for the crisis, he provided normative legal-political categories against the crisis. Schmitt developed a legal–political–spatial counter-vocabulary – concepts for a New Order – to stem the tide of the advancing liberal-capitalist ‘spaceless universalism’ and the threat of socialist revolution. The ideological purpose, theoretical limitations, and historical deficiencies of Schmitt’s legal–political–spatial register do not per se invalidate all Schmittian insights. But they do cast doubt on the standing of his international thought as a plausible and coherent international theor**y,** and raise a large question mark behind attempts to elevate him to a hitherto under-appreciated classic of IR, and The Nomos to the status of a founding text of the discipline (Odysseos and Petito 2007, 8). How can neo-Schmittians escape these liabilities? Furthermore, its undigested problems manifest themselves in a number of questions and challenges to contemporary attempts to mobilize Schmitt as a critic of the liberal project of modernity. For at the centre of the heterodox – partly post-structuralist, partly realist – neo-Schmittian analysis stands the conclusion of The Nomos: the thesis of a structural and continuous relation between liberalism and violence (Mouffe 2005, 2007; Odysseos 2007). It suggests that, in sharp contrast to the liberal-cosmopolitan programme of ‘perpetual peace’, the geographical expansion of liberal modernity was accompanied by the intensification and de-formalization of war in the international construction of liberal constitutional states of law and the production of liberal subjectivities as rights-bearing individuals. Liberal world-ordering proceeds via the conduit of wars for humanity, leading to Schmitt’s ‘spaceless universalism’. In this perspective, a straight line is drawn fromWWI to theWar on Terror to verify Schmitt’s long-term prognostic of the 20th century as the age of ‘neutralizations and de-politicizations’ (Schmitt 1993). But this attempt to read the history of 20th century international relations in terms of a succession of confrontations between the carrier nations of liberal modernity and the criminalized foes at its outer margins seems unable to comprehend the complexities and specificities of ‘liberal’ world-ordering, then and now. For in the cases of Wilhelmine, Weimar and fascist Germany, the assumption that their conflicts with the AngloAmerican liberal-capitalist heartland were grounded in an antagonism between liberal modernity and a recalcitrant Germany outside its geographical and conceptual lines runs counter to the historical evidence. For this reading presupposes that late-Wilhelmine Germany was not already substantially penetrated by capitalism and fully incorporated into the capitalist world economy, posing the question of whether the causes of WWI lay in the capitalist dynamics of inter-imperial rivalry (Blackbourn and Eley 1984), or in processes of belated and incomplete liberalcapitalist development, due to the survival of ‘re-feudalized’ elites in the German state classes and the marriage between ‘rye and iron’ (Wehler 1997). It also assumes that the late-Weimar and early Nazi turn towards the construction of an autarchic German regionalism – Mitteleuropa or Großraum – was not deeply influenced by the international ramifications of the 1929 Great Depression, but premised on a purely political– existentialist assertion of German national identity. Against a reading of the early 20th century conflicts between ‘the liberalWest’ and Germany as ‘wars for humanity’ between an expanding liberal modernity and its political exterior, there is more evidence to suggest that these confrontations were interstate conflicts within the crisis-ridden and nationally uneven capitalist project of modernity. Similar objections and caveats to the binary opposition between the Western discourse of liberal humanity against non-liberal foes apply to the more recent period. For how can this optic explain that the ‘liberal West’ coexisted (and keeps coexisting) with a large number of pliant authoritarian client-regimes (Mubarak’s Egypt, Suharto’s Indonesia, Pahlavi’s Iran, Fahd’s Saudi-Arabia, even Gaddafi’s pre-intervention Libya, to name but a few), which were and are actively managed and supported by the West as antiliberal Schmittian states of emergency, with concerns for liberal subjectivities and Human Rights secondary to the strategic interests of political and geopolitical stability and economic access? Even in the more obvious cases of Afghanistan, Iraq, and, now, Libya, the idea that Western intervention has to be conceived as an encounter between the liberal project and a series of foes outside its sphere seems to rely on a denial of their antecedent histories as geopolitically and socially contested state-building projects in pro-Western fashion, deeply co-determined by long histories of Western anti-liberal colonial and post-colonial legacies. If these states (or social forces within them) turn against their imperial masters, the conventional policy expression is ‘blowback’. And as the Schmittian analytical vocabulary does not include a conception of human agency and social forces – only friend/ enemy groupings and collective political entities governed by executive decision – it also lacks the categories of analysis to comprehend the social dynamics that drive the struggles around sovereign power and the eventual overcoming, for example, of Tunisian and Egyptian states of emergency without US-led wars for humanity. Similarly, it seems unlikely that the generic idea of liberal world-ordering and the production of liberal subjectivities can actually explain why Western intervention seems improbable in some cases (e.g. Bahrain, Qatar, Yemen or Syria) and more likely in others (e.g. Serbia, Afghanistan, Iraq, and Libya). Liberal world-ordering consists of differential strategies of building, coordinating, and drawing liberal and anti-liberal states into the Western orbit, and overtly or covertly intervening and refashioning them once they step out of line. These are conflicts within a world, which seem to push the term liberalism beyond its original meaning. The generic Schmittian idea of a liberal ‘spaceless universalism’ sits uncomfortably with the realities of maintaining an America-supervised ‘informal empire’, which has to manage a persisting interstate system in diverse and case-specific ways. But it is this persistence of a worldwide system of states, which encase national particularities, which renders challenges to American supremacy possible in the first place. This raises the final question of how the specificity of the War on Terror can be aligned with the generality of liberal world-ordering and international law since WWI? For Schmitt diagnosed the turn towards a multilateral, if US-directed, liberal institutionalization of world politics during the interwar years as the key mechanism for the realization of his age of neutralizations. However, 21st century United States unilateralism seems to negate this diagnosis frontally, activating Schmitt’s politics of the exception. If Schmitt’s original position was articulated as a critique of the Kantian–Kelsian project, neo-Schmittians now have to resolve the question of whether the War on Terror grafts a World-Leviathan onto the liberal project, superseding an incipient world state of law, or whether United States unilateralism can be squared with the Kantian project of liberal international law. For the suggestion that the War against Terror presents a fundamental continuity in American foreign policy, inscribed in its generic liberal cosmopolitanism, is saddled with a number of paradoxes. It is unsurprising, therefore, that the literature is internally divided over whether the War on Terror presents a continuity (Mouffe 2005, 2007; Odysseos 2007) or a discontinuity (Zolo 2002, 2007) in American foreign policy and a sharp break with liberal international law. The Bush Doctrine and its ideological underpinning, Neo-Conservatism and the ‘Project for a New American Century’, were articulated against a liberal Kelsenite legalization and institutionalization of interstate relations, embracing the distinctly Schmittian idea of the selective transcendence of the liberal rule of domestic and international law – states of exception (Drolet 2010). This was expressed in the abrupt decline of the post-Cold War notion of global governance and its re-politicization even prior to 9/11 in a neo-authoritarian direction, captured in the discourse of empire and imperialism – full-spectrum dominance. At the horizon of this vision – derided by left Schmittians as a political apocalypse and embraced by right Schmittians as the heroic self-assertion of an American or Western community of values – looms a world without a political exterior: a militarized Pax Americana. In the Neo-Conservative project, Schmitt and Kelsen combine to form a paradoxical (mis-)alliance, as the political use of Schmitt is reserved for the US state, supervising a Kelsenite international institutional arrangement for the lesser partners within the liberal zone of peace. Liberalism is, by definition, a broad concept, but it cannot be indefinitely expanded beyond breaking point without loosing some sense of terminological coherence. Whereas Schmitt articulated his concepts against capitalist crisis to defend German state autonomy domestically and internationally, the neoConservative ideology sought to defend the domestic autonomy and international primacy of the United States state in the context of its own capitalist crisis (Colas and Saull 2005). The basic concept of the political plus decisionism, which Schmitt constructed to defend Germany against American imperialism was mobilized by neo-Conservatives to cultivate an existentialist ethics for a post-welfare, patriotic, and heroic community of American values. But neo-Conservatism was not originally articulated as a response to international terror and foreign policy considerations. It was conceived in the 1970s as an alternative state strategy for the management of domestic disorder – analogous to the original function of Schmitt’s decisionism in Weimar Germany – as the long economic downturn in the United States, the fiscal crisis of the US state, and the rise of the post-welfare state precipitated the turn towards Schmittian prescriptions (Drolet 2010). This entailed the re-assertion of public order through the national identity-galvanizing effects of a community of values, sustained by binary friend/foe declarations and the re-validation of executive government through the invocation of states of exception, domestically and internationally. Yet, neo-Conservatism reaches beyond a static friend/enemy dualism by adding an ideologically super-charged discourse of democracy and freedom promotion – redefined as polyarchy – that transcends the mere articulation of geopolitical differences to formulate a dynamic theory of American imperialism. It is neither ‘world-government’, nor a Großraum, nor a ‘spaceless universalism’, but a flexible front of the willing against the unwilling that feeds on the idea of the theatrical management and permanent mobilization of the state of exception – a war without end. The Schmittian net result during Bush’s neo-conservative presidency, sketched in the Bush Doctrine and executed in the global War on Terror, includes, inter alia, the strengthening of executive prerogatives, the doctrine of pre-emptive war, the abrogation of basic civil liberties, secret renditions and indefinite detentions, the use of torture, war crimes, the refusal to apply the Geneva Convention to prisoners of war, and the disregard of basic human rights. These measures diverge from the normal liberal conception of the domestic and international rule of law and are more in line with decisionist prescriptions for their suspension and supercession – legibus absoluta. Significant differences in policy-formation and strategy disappear from view if Bush junior is equated with Woodrow Wilson. Critical neo-Schmittians find themselves therefore in the ambiguous situation of having to reject the programme of legal liberal internationalism, revalidating pan-regions as bulwarks against a perceived ‘spaceless universalism’, while simultaneously seeing the idiom of exception usurped by neo-Conservatives. And as both the neo-Conservatives and the critics of the politics of the exception draw on Schmitt for policy-inspiration, to what resources of critique against the politics of fear can these neo-Schmittians turn without endangering their Schmittian credentials?

#### Imperialist framing of non-liberal societies as unstable threats justifies eliminating non-liberal forms of life.

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A pathology of deviancy, aberration and breakdown

Emergent across a host of contemporary institutions is a policy-making consensus linked to the threat posed by ‘failed states’ and the new set of associated security, development and humanitarian challenges. Hilary Benn, Secretary of State for International Development in the UK, has recently stated that ‘weak states present a challenge to our system of global governance. For the international system to work, it depends on strong states . . . that are able to deliver services to their populations, to represent their citizens, to control activities on their territory, and to uphold international norms, treaties, and agreements.’ By contrast, ‘weak and failing states provide a breeding ground for international crime’, harbour terrorists and threaten the achievement of the Millennium Development Goals with the spread of HIV/AIDS, refugee flows and poverty.3 This identified perfusion of warlords, criminals, drug barons and terrorists within ‘failed states’ has become a central policy-making concern within the UK and the US.4 Institutions in the UK such as the Foreign and Commonwealth Office (FCO), the Ministry of Defence (MOD), the Department for International Development (DfID) and the Overseas Development Institute (ODI) support the view of ‘failed states’ as representing deviancy from the norms of Western statehood. The aforementioned CRI programme emerging from Tony Blair’s Strategy Unit develops a focus on ‘fragile states’ in conditions of crisis. Preliminary policy documents have highlighted the breakdown of political, economic and social institutions; the loss of territorial control; civil unrest; mass population displacement; and violent internal conflict in states as diverse as Somalia, the Democratic Republic of Congo (DRC), Sudan, the Central African Republic, Liberia, Sierra Leone and Coˆte d’Ivoire. At the centre of the most recently launched Commission for Africa report, Our Common Interest, is also ‘the long-term vision for international engagement in fragile states . . . to build legitimate, effective and resilient state institutions’.6 As Blair indicated in launching this report, ‘to tackle the instability, conflict, and despair which disfigures too much of Africa and which can fuel extremism and violence, is to help build our own long-term peace and prosperity’.7 Elsewhere, the putative ‘better effects of empire’ (such as inward investment, pacification and impartial administration) have been heralded as central to United Nations strategy on state-building within weak states based on a re-consideration of models of trusteeship.8 The United States National Security Strategy has also announced that ‘America is now threatened less by conquering states than we are by failing ones’, and the United States Agency for International Development (USAID) has similarly produced a ‘Fragile States Strategy’ focusing on the problems of governance and civil conflict arising from poor state capacity and effectiveness.9 This policy-making approach represents a pathological view of conditions in colonial states as characterised by deviancy, aberration and breakdown from the norms of Western statehood.10 It is a view perhaps most starkly supported in the scholarly community by Robert Kaplan’s vision of the ‘coming anarchy’ in West Africa as a predicament that will soon confront the rest of the world. In his words: The coming upheaval, in which foreign embassies are shut down, states collapse, and contact with the outside world takes place through dangerous, disease-ridden coastal trading posts, will loom large in the century we are entering.11 Hence a presumed reversion ‘to the Africa of the Victorian atlas’, which ‘consists now of a series of coastal trading posts . . . and an interior that, owing to violence, and disease, is again becoming . . . “blank” and “unexplored”’.12 Similarly, Samuel Huntington has referred to ‘a global breakdown of law and order, failed states, and increasing anarchy in many parts of the world’, yielding a ‘global Dark Ages’ about to descend on humanity. The threat here is characterised as a resurgence of non-Western power generating conflictual civilisational faultlines. For Huntington’s supposition is that ‘the crescent-shaped Islamic bloc . . . from the bulge of Africa to central Asia . . . has bloody borders’ and ‘bloody innards’.13 In the similar opinion of Francis Fukuyama: Weak or failing states commit human rights abuses, provoke humanitarian disasters, drive massive waves of immigration, and attack their neighbours. Since September 11, it also has been clear that they shelter international terrorists who can do significant damage to the United States and other developed countries.14 Finally, the prevalence of warlords, disorder and anomic behaviour is regarded by Robert Rotberg as the primary causal factor behind the proliferation of ‘failed states’. The leadership faults of figures such as Siakka Stevens (Sierra Leone), Mobutu Sese Seko (Zaıre), Siad Barre (Somalia) or Charles Taylor (Liberia) are therefore condemned. Again, though, the analysis relies on an internalist account of the ‘process of decay’, of ‘shadowy insurgents’, of states that exist merely as ‘black holes’, of ‘dark energy’ and ‘forces of entropy’ that cast gloom over previous semblances of order.15 Overall, within these representations of deviancy, aberration and breakdown, there is a significant signalling function contained within the metaphors: of darkness, emptiness, blankness, decay, black holes and shadows. There is, then, a dominant view of postcolonial states that is imbued with the imperial representations of the past based on a discursive economy that renews a focus on the postcolonial world as a site of danger, anarchy and disorder. In response to such dangers, Robert Jackson has raised complex questions about the extent to which international society should intervene in ‘quasi-’ or ‘failed states’ to restore domestic conditions of security and freedom.16 Indeed, he has entertained the notion of some form of international trusteeship for former colonies that would control the ‘chaos and barbarism from within’ such ‘incorrigibly delinquent countries’ as Afghanistan, Cambodia, Haiti and Sudan with a view to establishing a ‘reformation of decolonisation’.17 Andrew Linklater has similarly stated that ‘the plight of the quasi-state may require a bold experiment with forms of international government which assume temporary responsibility for the welfare of vulnerable populations’.18 In the opinion of some specialists, this is because ‘such weak states are not able to stand on their own feet in the international system’.19 Whilst the extreme scenario of sanctioning state failure has been contemplated, the common response is to rejuvenate forms of international imperium through global governance structures.20 Backers of a ‘new humanitarian empire’ have therefore emerged, proposing the recreation of semi-permanent colonial relationships and the furtherance of Western ‘universal’ values, and, in so doing, echoing the earlier mandatory system of imperial rule.21 In Robert Keohane’s view, ‘future military actions in failed states, or attempts to bolster states that are in danger of failing, may be more likely to be described both as self-defence and as humanitarian or public-spirited’.22

#### Alternative: Resist their calls for prescriptive legal modeling. Questioning the universality of the liberal-legal model opens up alternative futures for social justice.

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To paraphrase Wendy Brown, legal analysis need not march only in the service of an immediate political dilemma; to try to make it so may be to fall into a trap. There is an important place for distanced reflection on legal rules and reforms. Although such efforts may be discounted as not immediately helpful, even beside the point, critical reflection is far from disengagement from politics or the dilemmas of the "real world." 23 Given law's intimate connection with social organization and social power, even critique is unlikely to entirely shed its normative charge. Critical scholars have often resisted the normative move, the efforts to extrude the political and ideological from accounts about law, and the idea that particular legal conclusions follow from commitments to rights or efficiency such that "right answers" simply become a matter of professional [\*736] skill or craft. Indeed, resistance to the quick slippage into the prescriptive mode is central to the critical project. The basis of this resistance is not merely an uncontrolled subversive or oppositionist instinct; rather, it emanates primarily from the sense that the overwhelming compulsion to answer the question in the terms in which it is posed allows many assumptions that are crucial to the pertinence or intelligibility of the question itself to remain unquestioned and intact. 24 Almost as often as critical scholars have made such observations, they have faced the following criticism: It is not enough to be critical of the content of legal rules or the structure of legal argumentation; you have to offer an alternative, a prescription by which it can be fixed. Otherwise, the critique is empty, even worthless. 25 Yet, as Schlag observes, "One might think that destruction is inherently bad and construction inherently good, but this view, while pervasive, is woefully inadequate. Indeed, it all depends upon what is being destroyed and what is being constructed." 26 From the standpoint of those not entirely invested in the current order, critique may be regarded as constructive; in the process of critical reflection, roads now foreclosed may be opened. What follows are four possible critical optics or strategies, not all of which are entirely distinct. It is obvious that at least some of them may be compatible with existing reform proposals, as what they foreclose is not any particular rule or reform, but rather the arguments of entailment which, whether on the basis of the rule of law, efficiency, or even human rights, currently give them primacy and legitimacy. All are predicated on the idea that it may be more useful to try to uncover and trace what we are doing when we pursue different types of law reform than to prescribe precisely what to do, and that the role of midwife, whether to efficiency or human rights, does not exhaust the functions of those with legal expertise in the context of global law reform efforts. All propose a much chastened normative role for the legal professional and all challenge the hyper-investment in the reason of law to resolve social, political, or economic issues. At the same time, all of these proposals at least implicitly resituate law as a site of political conflict and a place in which some of the work of its resolution might take place. All, however, discourage investment in the pious or moral dimension of law, especially to [\*737] the extent that it forecloses the exploration of competing arguments and alternatives. A cautionary note seems in order. The relative absence of critical reflexivity to date is not accidental. The policing of alternative legal analyses comes from the fact that what is acknowledged, even emphasized, in such analyses—the distributive dimension of reforms, the ideological character of reform proposals, the cultural particularity of "universal" rules—is normally excluded. Because such elements may be excluded as a matter of the structure and integrity of claims about the role of law in development, and even the status of the discipline itself, to venture into this territory is to risk speaking the voice of unreason, the classic place to which dissenters of all stripes are consigned. Notwithstanding, there remains a useful role for legal academics in uncovering the assumptions behind reforms, reflecting on their biases, and trying to foresee their consequences along multiple axes. In particular, it seems important to try to project how rule and institutional changes might reallocate resources and power in specific contexts. Far from forays into new territory, these tasks primarily involve recuperating some of the most basic insights and techniques of legal analysis. 1. Resisting the Project of Law Generation/Demoting the Lawyers and Economists One possibility is to simply state that, for reasons of legitimacy and basic democratic control, lawyers should have no privileged place in determining many of the questions that are currently cast as matters of lawyerly expertise. Put another way, there should be an active effort to disenchant the world about sole reliance on the professional tools of law and reason to solve the problems of development, and to demote the role of lawyers (as well as other technocrats) in governance ventures. It needs to be emphasized that this is not a rejection of law, or the rule of law, or even the importance of law. "Rejecting the law" is not an option; we live in a world structured at every turn by legal rules. Nor does it necessarily compel disengagement on the part of legal academics from a process that, like it or not, is in full swing, although some are sure to find that an appropriate response. It is a rejection of the claims about law's insulation from politics and, in particular, a contestation of the idea that there is a broad framework of laws that is simply required to be modern or civilized, and is for that reason properly excluded from the forces of politics and democratic deliberation. To say that such questions can and should be answered by economists, lawyers, or other technocrats is to participate in the fiction that they can be successfully [\*738] divorced from questions about the organization of social life, the distribution of social power, and the allocation of social resources. Lawyers should simply come clean about the impossibility of this. Paradoxically, such an admission is unlikely to end the role of the lawyer in the legal reform process; it may even encourage more legal advice and greater participation, though on less problematic terms. Among its salutary effects might be deeper reflection on the desirability of proposed reforms, greater skepticism toward what is offered, interrogation of the interests that are affected, for either better or worse, consideration of the expected consequences, as well as open assessment of alternatives. Despite the tendency to dismiss those who fail to offer a well-formulated alternative, there may be considerable virtues in not having a fully articulated positive program, all of which parallel concerns that have been raised in development theory. 27 First, it can be a deliberate choice to reject the uncritical export of law and avoid the imperial tendencies present in such ventures. Second, progressive lawyers might want to create space for local alternatives. As law expands, more and more issues are moved out of the zone of democratic deliberation and into the zone governed by reason or efficiency, the expansion of law may legitimately be resisted where it represents the compression of politics. Third, lawyers may (and probably often should) feel unequipped to offer formulaic answers from afar, as there can be a deep artificiality about reform proposals which are generated by those who will not experience their effects. The intuition behind the norm of self-determination is that important social decisions, legal reforms among them, should be made not simply with attention to how they will be received and play out in given contexts and histories, but also by those who will have to live with the consequences. Such consequences impose a singular discipline on the decision maker, so much so that eliminating them fundamentally denatures the decision making process. It is simply a mistake to think that the outcomes will remain untouched, or that they will be better in some global sense, when this element is absent from the process. 2. Critical Readings/Multiple Readings As compared to discussions in domestic contexts, debates around [\*739] law reform "for export" to date have been remarkably flat and one-dimensional. Right now, the economic lens predominates. Even from within the economic optic, efficiency concerns control, crowding out distributive considerations, although redistribution is a persistent and inevitable effect of reform. Thus, one useful role lies in simply deepening and complexifying the accounts of the legal reform process; much more attention could be profitably paid to the multiple dimensions of legal rules. These efforts also might aid rather than impair the law and development project, if only because they may provide insight into why and how reforms routinely produce unforeseen outcomes. There is a range of methods that could be employed to this end. Law and development projects need to be looked at in cultural terms. Specific claims should be analyzed empirically. The path of reforms should be traced historically and genealogically. Dominant arguments could be analyzed semiotically, with attention to the narrative they project about the world. Historical work is particularly valuable in tracing the contingency of even the most well-entrenched legal rules and uncovering the rhetorical and ideological shifts in the structure of legal argumentation over time. Multiplying the types of legal analyses would permit us to detail the different functions and properties of laws, even where greater efficiency is the motivation behind their implementation. In sum, it would enable us to better trace the flow of resources, the creation of new powers through law, and the emergence of new social groups and political constituencies. Critical analysis directs our attention to the role of law in constituting social relations and practices, rather than merely regulating them after the fact; it reminds us that legal rules stand to be implicated in the production of the very social phenomena to which law is called to respond. Attention to this role raises a whole series of inquiries in the context of reform. How might reforms affect existing social groups? Workers? Women? Ethnic or national minorities? How might they affect sexual identities, racial affiliations? What new social formations might they produce? Critical readings should aim to bring to the surface, rather than repress, the tradeoffs that are involved in different reform paths. One of the most pernicious dimensions of simplistic rule of law and good governance narratives is the claim that there are no conflicts among desirable values and ends. Resistance is sure to arise from contesting what is dogma, to wit, that the implementation of efficiency enhancing rules is an uncontentious goal, that everyone stands to gain from free trade, that property and contract rights are the paramount legal entitlements, and that rule-based regimes "level the playing field" and ensure fairness [\*740] among otherwise unequal parties. Treating such claims as interrogatories rather than simply facts, however, is likely to engender better attention to the actual effects of reforms. Although transformative projects backed by law are often imagined as inherently progressive, they are not necessarily so. In addition, there is inevitable uncertainty and risk in law reform. If there is a comparative advantage that lawyers bring to the table, it is familiarity with the varied and unpredictable path of legal rules in operation. Indeed, no one else can be expected to possess the intimate knowledge of the fate of legal rules that lawyers and legal academics acquire in the course of their professional lives. In short, to the extent that we get involved in law and development ventures, at a minimum we should export the critique too. It seems at best negligent, at worst disingenuous, to fail to speak candidly about the conflicts within the discipline, and to suppress the wide variety of opinions about whether particular reforms are a good or bad idea. To do so is patronizing and unnecessarily mystifying; it also seems unlikely to be persuasive, at least for long. 3. Alternative Institutional Possibilities Another possibility is to trace alternative futures, by positing regulatory and institutional scenarios that are equally compatible with the rule of law. 28 To put it another way, lawyers could play a role in countering the "false necessity" of reforms, whether advanced in the name of law or growth simpliciter. 29 Some of these alternatives may be defended in the name of furthering the project of progress-through-economic-growth, although they are different from those conventionally put forward. But whether or not they are congruent with the aims of current governance and market reform projects, a central task should be to resist the idea that the rule of law, good governance, and market reform are institutionally interchangeable, or that any one configuration of laws is required to create market regimes based on the rule of law. Lawyers have a useful professional role to play in detailing the myriad ways in which market norms have been institutionalized in different contexts and at different periods of time in the same jurisdiction. Perhaps at the present time, one of the most important tasks is to simply point out the variety of different legal rules that might be available to respond to the challenges and dilemmas posed by globalization. Fetishism about particular rules and institutions may stand in the [\*741] way of some otherwise needed or desired social transformation. For example, changes may be foreclosed because they are said to trespass on property rights, because they differ from the rules and institutions conventionally found in model market societies, or because they overtly further a particular social or distributive interest rather than a "general" or "universal" interest. All such claims, however, rest on assumptions that close analyses of law easily disturb. Legal scholars might point out that property rights, for example, are routinely disaggregated and allocated among different groups, reconstituted by a variety of regulatory structures, and restrained by the operation of other legal rules both "private" and "public."

### Just War

#### Apocalyptic terrorism is solved only by killing – any policy of disarmament is suicide

Peters Masters in IR 2004, Ralph Peters, , St. Mary's University, Texas,[1] M.A. (international relations), Penn State, Retired U.S. Army officer¶ Military analyst, Retired Lieutenant Colonel, 2004, “WHEN DEVILS WALK THE EARTH ¶ The Mentality and Roots of Terrorism, and How to Respond”, The Center For Emerging Threats and Opportunities, PDF, <http://www.au.af.mil/au/awc/awcgate/usmc/ceto/when_devils_walk_the_earth.pdf> \*\*gender edited

The “pure” practical terrorist is an idealist, sometimes very well-educated(historically, secular universities have been excellent recruiting grounds for terrorists who want to force improvement upon the world). While it may seem counter-intuitive, the apocalyptic, religious terrorist tends to be recruited from the ranks of the fearful and threatened, from among the worried, not the confident; he is a coward in the face of life, if not in the face of death (this is absolutely applicable to the key operatives of the September 11th, 2001, plot).Despite the media-driven image of Islamic terrorists representing hordes of the Faithful, apocalyptic terrorists, such as the members of al Qa’eda, tend to act out of intensely-personal disaffection and a sense of alienation from social norms, while the practical terrorist is more apt to feel driven by group grievances (though he, too, is rarely a “successful” member of society before his conversion to terror). The apocalyptic terrorist “wants out,” while the practical terrorist wants “back in,” although on much-improved terms of his own dictation (another aspect of this psychology is that practical terrorists, even when involved in international movements, prefer to focus on the locale of their personal grievances, while apocalyptic terrorists view the greater world as their enemy and are far more likely to transpose blame from their own societies onto other cultures).While both types find comfort—a home and brotherhood—in the terrorist organization, the practical terrorist imagines himself as a representative of his people, while the apocalyptic terrorist sees himself as chosen and apart, despite his occasional rhetoric about protecting the masses adhering to his faith. The practical terrorist idealizes his own kind—his people--while the apocalyptic terrorist insists that only his personal ideals have any validity. The practical terrorist is impassioned and imagines that his deeds will help his brethren in the general population, while the apocalyptic terrorist is detached from compassion by his faith and only wants to punish the “sinful,” whom he finds ever more numerous as he is progressively hypnotized by the dogma that comforts him.

Except for the most cynical gunmen, practical terrorists believe that mankind can be persuaded (or forced) to regret past errors and make amends, and that reform of the masses is possible (although a certain amount of coercion may be required). But apocalyptic terrorists (such as Osama bin Laden) are merciless. Practical terrorists may see acts of retribution as a tactical means, but apocalyptic terrorists view themselves as tools of a divine and uncompromising retribution. Retribution against unbelievers, heretics and even their own brethren whose belief is less pure is the real strategic goal of apocalyptic terrorists, even when they do not fully realize it themselves or cannot articulate it. Even among average Americans, there is often a great gulf between what they consciously think they believe and the “slumbering” deeper beliefs that catalytic events awaken—such as the frank thirst for revenge felt by tens of millions of “peaceful” Americans in the wake of the events of September 11th. It is considerably less likely that a morally-crippled, obsessed, apocalyptic terrorist cocooned in an extreme religious vision will be able to articulate his real goals; we cannot know apocalyptic terrorists by their pronouncements so well as by their deeds, since much of what they say is meant to make their intentions seem more innocent or justified than they are. Often, apocalyptic terrorists are lying even to themselves. Apocalyptic terrorists are whirling in the throes of a peculiar, malignant madness, and barely know what they believe in the depths of their souls—in fact, much of their activity is an attempt to avoid recognition of the darkness within themselves, a struggle to depict themselves as(avenging) angels of light. Centuries ago, we might have said they were possessed by devils. Today, we must at least accept that they are possessed and governed by a devilish vision. The practical terrorist punishes others to force change. The religious terrorist may speak of changes he desires in this world, but his true goal is simply the punishment of others—in the largest possible numbers—as an offering to the bloodthirsty, vengeful God he has created for himself. This apocalyptic terrorist may identify himself as a Muslim or a Christian, but (S)he is closer akin to an Aztec sacrificing long lines of prisoners on an altar of blood (one of the many psychological dimensions yet to be explored in terrorist studies is the atavistic equation of bloodshed with cleansing—an all-too-literal bath of blood). No change in the world order will ever content the apocalyptic terrorist, since his (Her) actual discontents are internal to himself and no alteration in the external environment could sate his appetite for retribution against those he needs to believe are evil and guilty of causing his personal sufferings and disappointments—for such men, suicidal acts have a fulfilling logic, since only their own destruction can bring them lasting peace. Above all, they need other humans to hate while they remain alive—the only release for the profound self-hatred underlying the egotism that lets them set themselves up as God’s judges—as imitation Gods themselves—upon this earth. In theological terms, there is no greater blasphemer in any religion than the killer who appoints himself as God’s agent, or assumes a godlike right to judge entire populations for himself, but the divine mission oft he apocalyptic terrorist leaves no room for theological niceties. Pretending to defend his religion, he creates a vengeful splinter religion of his own. The health of any religious community can be gauged by the degree to which it rejects these bloody apostles of terror, and the Islamic world’s acceptance of apocalyptic terrorists as heroes is perhaps the most profound indicator of its spiritual crisis and decay. Make no mistake: The terrorist “martyrs” of September 11th, 2001, and Osama bin Laden will be remembered by Islamic historians and by generation after generation of Muslim children as great heroes in the struggle for true religion and justice—no matter what Islamic governments may say to please us, many millions of Muslims around the world felt tremendous pride in the atrocities in New York, Washington and Pennsylvania. This makes it all the more vital that the United States kill Osama bin Laden, exterminate alQa’eda, destroy the Taliban, and depose any other governments found to have supported their terrorism. If Osama bin Laden survives to thumb his nose at an “impotent superpower,” he will attract hundreds of thousands of supporters, and tens of millions more sympathizers. He is already a hero, and he must not be allowed to remain a triumphant one. An apocalyptic terrorist of the worst kind, his superficial agenda(deposing the government of Saudi Arabia, expelling U.S. troops from the Middle East, imposing Sharia law) is nothing compared to his compulsion to slaughter and destroy. Although his vision is closer to the grimmest passages of Christianity’s Book of Revelation than to anything in the Koran, Osama bin Laden has been able to convince countless Muslims that his vision is of the purest and proudest Islamic form. This should be a huge warning flag to the West about the spiritual crisis in the Islamic world. Logic of the sort cherished on campuses and in government bureaucracies does not apply. This battle is being fought within the realms of the emotions and the soul, not of the intellect. We face a situation so perverse that it is as if tens of millions of frustrated Christians decided that Kali, the Hindu Goddess of death and destruction, embodied the true teachings of Jesus Christ. We are witnessing the horrific mutation of a great world religion, and the Islamic world likely will prove the greatest breeding ground of apocalyptic terrorists in history. Small and vicious gods. The belief systems of practical terrorists are often modular; some such men can learn ,evolve, synthesize or re-align their views. But the apocalyptic terrorist cannot tolerate any debate or dissent—all divergent opinions are a direct threat to his mental house of cards. The apocalyptic terrorist embraces a totality of belief and maintains it with an ironclad resolution attained by only the most extreme—and psychotic—secular terrorists. From identifying himself as a tool of his God, he begins to assume his right to God like powers. The practical terrorist is in conflict with the existing system, but the apocalyptic terrorist sees himself as infinitely superior to it. The practical terrorist looks up at the authority he seeks to replace, but the apocalyptic terrorist looks down on the humankind he despises. Despise enforcing rigorous discipline within the terrorist organization, the practical terrorist nonetheless retains a sense of human imperfection. The religious, apocalyptic terrorist believes that those who are imperfect deserve exterminate on (in oneof terrorism’s gray area anomalies, the “secular” Nazi regime took on an essentially religious vision that embraced state terror—Hitler’s attitude toward the Jews was astonishingly similar to Osama bin Laden’s view of Jews, Christians and even secular Muslims; of course, the desire to please God or authority by slaughtering unbelievers has a long tradition in many religions, from medieval Catholicism to contemporary Hindu extremism).

#### Enmity creates absolute foes that drive unlimited conflict.

Scheuerman 4 [William Scheuerman, Political Science at Indiana, “International Law as Historical Myth,” *Constellations*, 11 (4) p. 546-547]

Second, Schmitt’s odd periodization obscures the fundamental changes to traditional European interstate relations generated by the emergence of the modern nation-state. As Bobbitt has succinctly observed, the appearance of the nation-state was accompanied by the strategic style of total war. If the nation governed the state, and the nation’s welfare provided the state’s reason for being, then the enemy’s nation must be destroyed—indeed, that was the way to destroy the state. . . . [F]or the nation-state it was necessary to annihilate the vast resources of men and material that a nation could throw into the field . . . . 36 It was the idea of a “nation in arms” that not only posed a direct threat to earlier absolutist images of “king’s wars,” but also opened the door to many pathologies of modern warfare: the full-scale mobilization of the “nation” and subsequent militarization of society, and killing of “enemy” civilians. The European nation-state and total war may represent two sides of the same coin.37 Of course, for Schmitt’s purposes it is useful that the idea of the “nation in arms” first takes the historical stage in the context of the French Revolution and its commitment to universalistic ideals of liberty, equality, and fraternity.38 Nation-state-based democracy is indeed a normatively ambivalent creature, resting on an uneasy synthesis of universalistic liberal democratic ideals with historically contingent notions of shared cultural identity, language, history, and ethnos.39 Although Schmitt and his followers predictably try to link the horrors of modern warfare to the growing significance of universalistic liberal-democratic ideals, a more persuasive empirical case can be made that those horrors can be traced to highly particularistic and exclusionary ideas of national identity, according to which the “other”—in this case, outsiders to the “national community”—came to be perceived as representing life-and-death foes in the context of crisis-ridden industrial capitalism and the increasingly unstable interstate system of the nineteenth century. Such ideas of national identity ultimately took the disastrous form of the “inflamed nationalism and ethnic truculence” that dominated European politics by the late nineteenth century and ultimately culminated in World War I.40 Nationalism and ethnic truculence played a key role in the destruction of the traditional European balance of power system since they required a fundamental reshuffling of state borders in accordance with “national identity”; of course, this question had been of marginal significance in the absolutist interstate system. In this context as well, one of Schmitt’s heroes, Bismarck, in reality played a role very different from that described by Schmitt in Nomos der Erde: “the last statesman” of the jus publicum europaeum not only helped forge a unified German nation-state, but in order to do relied on total warfare while undermining the traditional European system of states, in part because it rested on state forms (e.g., the diverse, polyglot Russian and Austro-Hungarian Empires) fundamentally distinct from the modern nation-state.41 On this matter as well, Schmitt’s analysis is either openly misleading or revealingly silent. Perhaps his own unabashed enthusiasm for rabid ethnonationalism in the context of National Socialism helps explain this silence.42

#### Their impact is circular. Our explicit use of liberal standards is better than their implicit use.

Scheuerman 4 [William Scheuerman, Political Science at Indiana, “International Law as Historical Myth,” *Constellations*, 11 (4) p. 537-538]

Schmitt holds the universalistic aspirations of liberal international law responsible for the brutalities of total war: universalism engenders a self-righteous brand of pseudo-humanitarianism blind to the terrible dangers of state violence waged under the banner of a (fictional) singular humanity. Blurring any meaningful distinction between legality and morality, those who dare to oppose the liberal international community are demonized and accordingly subjected to fire bombings (e.g., Dresden) and even atomic bombs (e.g., Hiroshima and Nagasaki). Liberal international law rests on a false universalism not only because self-interested great powers (e.g., Great Britain and the United States) typically interpret and enforce it, but also because its humanitarian rhetoric masks their pursuit of global economic domination: Schmitt shares with orthodox Marxist critics of international law the idea of a necessary kinship between universalistic international law and global free-market capitalism.1 The apex of liberal self-righteousness is the assertion that liberal wars no longer even deserve to be described as such. Although their technological superiority permits them to kill civilians in any corner of the globe, liberal states purportedly undertake “police action” (or, in present-day parlance, humanitarian intervention) for the sake of enforcing international law, whereas only outcast states who dare to challenge liberal hegemony allegedly continue to engage in barbaric wars. The exclusionary character of liberal universalism is thereby taken to its logical conclusion: liberal international law requires what Schmitt describes as a discriminatory concept of war. Only a short step beyond this conceptual move is the widespread real-life liberal tendency to ignore or at least downplay civilian casualties in humanitarian interventions undertaken against pariah states. Little imagination is required to understand the potential appeal of this diagnosis at an historical juncture when the world’s most well-armed liberal state, the United States, self-righteously claims the right to intervene unilaterally in accordance with its own idiosyncratic interpretation of both international law and the interests of humanity—despite the opposition of both the United Nations and global civil society to President Bush and his radical right-wing foreign policy.2 Indeed, anyone familiar with Schmitt’s work on international law occasionally finds herself wondering whether the White House playbook for foreign policy might not have been written by Schmitt or at least by one of his followers.3 Nor should it come as a surprise that a sophisticated body of unabashedly liberal political thought—I am thinking of realism à la Hans Morgenthau and his followers—has tried to build on some of Schmitt’s more perceptive insights about the special dangers of an international system dominated by great powers like the United States.4 Readers of this journal, however, hardly need a reminder of the normative flaws of Schmitt’s assault on liberal international law. Notwithstanding the seeming plausibility of Schmitt’s diagnosis, its basic conceptual weaknesses are no less self-evident. What is the normative standpoint of Schmitt’s critique? Much of the surprising pathos of his attack on liberal international law derives from the fact that he implicitly contrasts its self-understanding to less-than-attractive legal and political realities: despite its purported humanitarianism, liberal international law engenders unparalleled brutality. Even though his hostility to modern universalism prevents him from admitting as much, Schmitt’s apparent outrage against the murderousness of recent international politics5 implicitly presupposes characteristically modern norms of universal equality and reciprocity. Of course, Schmitt is no closet universalist. Yet why are brutal air warfare and the discriminatory concept of war problems in the first place unless Schmitt’s argument rests at least implicitly on some (implicitly humanitarian) concern about the basic equality and value of all human life?6 Pace Schmitt, the universalistic core of liberal international law can be plausibly interpreted as an immanent normative motor which allows us to criticize and subsequently reform the sad realities of the existing international system according to its own internal normative criteria. However accurate Schmitt’s description of those realities, what his account obscures is the core normative achievement of universalistic international law, namely the fact that it offers internal standards for critically diagnosing and ultimately obliterating the political and legal pathologies described by him.

### Colonialism

#### Preventing death is the first ethical priority – it’s the only impact you can’t recover from.

Bauman 95 Zygmunt Bauman, University of Leeds Professor Emeritus of Sociology, 1995, Life In Fragments: Essays In Postmodern Morality, p. 66-71

The being‑for is like living towards‑the‑future: a being filled with anticipation, a being aware of the abyss between future foretold and future that will eventually be; it is this gap which, like a magnet, draws the self towards the Other,as it draws life towards the future, making life into an activity of overcoming, transcending, leaving behind. The self stretches towards the Other, as life stretches towards the future; neither can grasp what it stretches toward, but it is in this hopeful and desperate, never conclusive and never abandoned stretching‑toward that the self is ever anew created and life ever anew lived. In the words of M. M. Bakhtin, it is only in this not‑yet accomplished world of anticipation and trial, leaning toward stubbornly an‑other Other, that life can be lived ‑ not in the world of the `events that occurred'; in the latter world, `it is impossible to live, to act responsibly; in it, I am not needed, in principle I am not there at all." Art, the Other, the future: what unites them, what makes them into three words vainly trying to grasp the same mystery, is the modality of possibility. A curious modality, at home neither in ontology nor epistemology; itself, like that which it tries to catch in its net, `always outside', forever `otherwise than being'. The possibility we are talking about here is not the all‑too‑familiar unsure‑of‑itself, and through that uncertainty flawed, inferior and incomplete being, disdainfully dismissed by triumphant existence as `mere possibility', `just a possibility'; possibility is instead `plus que la reahte' ‑ both the origin and the foundation of being. The hope, says Blanchot, proclaims the possibility of that which evades the possible; `in its limit, this is the hope of the bond recaptured where it is now lost."' The hope is always the hope of *being fu filled,* but what keeps the hope alive and so keeps the being open and on the move is precisely its *unfu filment.* One may say that the paradox *of hope* (and the paradox of possibility founded in hope) is that it may pursue its destination solely through betraying its nature; the most exuberant of energies expends itself in the urge towards rest. Possibility uses up its openness in search of closure. Its image of the better being is its own impoverishment . . . The togetherness of the being‑for is cut out of the same block; it shares in the paradoxical lot of all possibility. It lasts as long as it is unfulfilled, yet it uses itself up in never ending effort of fulfilment, of recapturing the bond, making it tight and immune to all future temptations. In an important, perhaps decisive sense, it is selfdestructive and self‑defeating: its triumph is its death. The Other, like restless and unpredictable art, like the future itself, is a *mystery.* And being‑for‑the‑Other, going towards the Other through the twisted and rocky gorge of affection, brings that mystery into view ‑ makes it into a challenge. That mystery is what has triggered the sentiment in the first place ‑ but cracking that mystery is what the resulting movement is about. The mystery must be unpacked so that the being‑for may focus on the Other: one needs to know what to focus on. (The `demand' is *unspoken,* the responsibility undertaken is *unconditional;* it is up to him or her who follows the demand and takes up the responsibility to decide what the following of that demand and carrying out of that responsibility means in practical terms.) Mystery ‑ noted Max Frisch ‑ (and the Other is a mystery), is an exciting puzzle, but one tends to get tired of that excitement. `And so one creates for oneself an image. This is a loveless act, the betrayal." Creating an image of the Other leads to the substitution of the image for the Other; the Other is now fixed ‑ soothingly and comfortingly. There is nothing to be excited about anymore. I know what the Other needs, I know where my responsibility starts and ends. Whatever the Other may now do will be taken down and used against him. What used to be received as an exciting surprise now looks more like perversion; what used to be adored as exhilarating creativity now feels like wicked levity. Thanatos has taken over from Eros, and the excitement of the ungraspable turned into the dullness and tedium of the grasped. But, as Gyorgy Lukacs observed, `everything one person may know about another is only expectation, only potentiality, only wish or fear, acquiring reality only as a result of what happens later, and this reality, too, dissolves straightaway into potentialities'. Only death, with its finality and irreversibility, puts an end to the musical‑chairs game of the real and the potential ‑ it once and for all closes the embrace of togetherness which was before invitingly open and tempted the lonely self." `Creating an image' is the dress rehearsal of that death. But creating an image is the inner urge, the constant temptation, the *must* of all affection . . . It is the loneliness of being abandoned to an unresolvable ambivalence and an unanchored and formless sentiment which sets in motion the togetherness of being‑for. But what loneliness seeks in togetherness is an end to its present condition ‑ an end to itself. Without knowing ‑ without being capable of knowing ‑ that the hope to replace the vexing loneliness with togetherness is founded solely on its own unfulfilment, and that once loneliness is no more, the togetherness ( the being‑for togetherness) must also collapse, as it cannot survive its own completion. What the loneliness seeks in togetherness (suicidally for its own cravings) is the foreclosing and pre‑empting of the future, cancelling the future before it comes, robbing it of mystery but also of the possibility with which it is pregnant. Unknowingly yet necessarily, it seeks it all to its own detriment, since the success (if there is a success) may only bring it back to where it started and to the condition which prompted it to start on the journey in the first place. The togetherness of being‑for is always in the future, and nowhere else. It is no more once the self proclaims: `I have arrived', `I have done it', `I fulfilled my duty.' The being‑for starts from the realization of the bottomlessness of the task, and ends with the declaration that the infinity has been exhausted. This is the tragedy of being‑for ‑ the reason why it cannot but be death‑bound while simultaneously remaining an undying attraction. In this tragedy, there are many happy moments, but no happy end. Death is always the foreclosure of possibilities, and it comes eventually in its own time, even if not brought forward by the impatience of love. The catch is to direct the affection to staving off the end, and to do this against the affection's nature. What follows is that, if moral relationship is grounded in the being-for togetherness (as it is), then it can exist as a project, and guide the self's conduct only as long as its nature of a project (a not yet-completed project) is not denied. Morality, like the future itself, is forever not‑yet. (And this is why the ethical code, any ethical code, the more so the more perfect it is by its own standards, supports morality the way the rope supports the hanged man.) It is because of our loneliness that we crave togetherness. It is because of our loneliness that we open up to the Other and allow the Other to open up to us. It is because of our loneliness (which is only belied, not overcome, by the hubbub of the being‑with) that we turn into moral selves. And it is only through allowing the togetherness its possibilities which only the future can disclose that we stand a chance of acting morally, and sometimes even of being good, in the present

#### The lack of moral confidence in US hardline policies of prioritizing security over liberty collapses heg.

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TWENTY YEARS later, it is time once again to challenge an indifferent America and a confused American conservatism. Today's lukewarm consensus about America's reduced role in a post-Cold War world is wrong. Conservatives should not accede to it; it is bad for the country and, incidentally, bad for conservatism. Conservatives will not be able to govern America over the long term if they fail to offer a more elevated vision of America's international role. What should that role be? Benevolent global hegemony. Having defeated the "evil empire," the United States enjoys strategic and ideological predominance. The first objective of U.S. foreign policy should be to preserve and enhance that predominance by **strengthening America's security,** supporting its friends, advancing its interests, and standing up for its principles around the world. The aspiration to benevolent hegemony might strike some as either hubristic or morally suspect. But a hegemon is nothing more or less than a leader with preponderant influence and authority over all others in its domain. That is America's position in the world today. The leaders of Russia and China understand this. At their April summit meeting, Boris Yeltsin and Jiang Zemin joined in denouncing "hegemonism" in the post-Cold War world. They meant this as a complaint about the United States. It should be taken as a compliment and a guide to action. Consider the events of just the past six months, a period that few observers would consider remarkable for its drama on the world stage. In East Asia, the carrier task forces of the U.S. Seventh Fleet helped deter Chinese aggression against democratic Taiwan, and the 35,000 American troops stationed in South Korea helped deter a possible invasion by the rulers in Pyongyang. In Europe, the United States sent 20,000 ground troops to implement a peace agreement in the former Yugoslavia, maintained 100,000 in Western Europe as a symbolic commitment to European stability and security, and intervened diplomatically to prevent the escalation of a conflict between Greece and Turkey. In the Middle East, the United States maintained the deployment of thousands of soldiers and a strong naval presence in the Persian Gulf region to deter possible aggression by Saddam Hussein's Iraq or the Islamic fundamentalist regime in Iran, and it mediated in the conflict between Israel and Syria in Lebanon. In the Western Hemisphere, the United States completed the withdrawal of 15,000 soldiers after restoring a semblance of democratic government in Haiti and, almost without public notice, prevented a military coup in Paraguay. In Africa, a U.S. expeditionary force rescued Americans and others trapped in the Liberian civil conflict. These were just the most visible American actions of the past six months, and just those of a military or diplomatic nature. During the same period, the United States made a thousand decisions in international economic forums, both as a government and as an amalgam of large corporations and individual entrepreneurs, that shaped the lives and fortunes of billions around the globe. America influenced both the external and internal behavior of other countries through the International Monetary Fund and the World Bank. Through the United Nations, it maintained sanctions on rogue states such as Libya, Iran, and Iraq. Through aid programs, the United States tried to shore up friendly democratic regimes in developing nations. The enormous web of the global economic system, with the United States at the center, combined with the pervasive influence of American ideas and culture, allowed Americans to wield influence in many other ways of which they were entirely unconscious. The simple truth of this era was stated last year by a Serb leader trying to explain Slobodan Milosevic's decision to finally seek rapprochement with Washington. "As a pragmatist," the Serbian politician said, "Milosevic knows that all satellites of the United States are in a better position than those that are not satellites." And America's allies are in a better position than those who are not its allies. Most of the world's major powers welcome U.S. global involvement and prefer America's benevolent hegemony to the alternatives. Instead of having to compete for dominant global influence with many other powers, therefore, the United States finds both the Europeans and the Japanese -- after the United States, the two most powerful forces in the world -- supportive of its world leadership role. Those who anticipated the dissolution of these alliances once the common threat of the Soviet Union disappeared have been proved wrong. The principal concern of America's allies these days is not that it will be too dominant but that it will withdraw. Somehow most Americans have failed to notice that they have never had it so good. They have never lived in a world more conducive to their fundamental interests in a liberal international order, the spread of freedom and democratic governance, an international economic system of free-market capitalism and free trade, and the security of Americans not only to live within their own borders but to travel and do business safely and without encumbrance almost anywhere in the world. Americans have taken these remarkable benefits of the post-Cold War era for granted, partly because it has all seemed so easy. Despite misguided warnings of imperial overstretch, the United States has so far exercised its hegemony without any noticeable strain, and it has done so despite the fact that Americans appear to be in a more insular mood than at any time since before the Second World War. The events of the last six months have excited no particular interest among Americans and, indeed, seem to have been regarded with the same routine indifference as breathing and eating. And that is the problem. The most difficult thing to preserve is that which does not appear to need preserving. The dominant strategic and ideological position the United States now enjoys is the product of foreign policies and defense strategies that are no longer being pursued. Americans have come to take the fruits of their hegemonic power for granted. During the Cold War, the strategies of deterrence and containment worked so well in checking the ambitions of America's adversaries that many American liberals denied that our adversaries had ambitions or even, for that matter, that America had adversaries. Today the lack of a visible threat to U.S. vital interests or to world peace has tempted Americans to absentmindedly dismantle the material and spiritual foundations on which their national well-being has been based. They do not notice that potential challengers are deterred before even contemplating confrontation by their overwhelming power and influence. The ubiquitous post-Cold War question -- where is the threat? -- is thus misconceived. In a world in which peace and American security depend on American power and the will to use it, the main threat the United States faces now and in the future is its own weakness. American hegemony is the only reliable defense against a breakdown of peace and international order. The appropriate goal of American foreign policy, therefore, is to preserve that hegemony as far into the future as possible. To achieve this goal, the United States needs a neo-Reaganite foreign policy of military supremacy and moral confidence.

#### No UQ – Collapse of American primacy and perception causes lashout

Lieven 11 (Anatol, works for the New America Foundation, 7/11/11, “U.S.-Russian Relations and the Rise of China,” New America Foundation, <http://newamerica.net/publications/policy/us_russian_relations_and_the_rise_of_china>)

There, but also to a considerable degree across Europe, landed and industrial elites endangered by the rise of socialism turned to nationalism as a means of rallying a degree of mass support and creating mass political parties. This meant that these elites were also on occasions trapped into foreign policy positions that wiser heads among them would sooner have avoided. Starting in Britain, from the 1850s on, mass circulation newspapers (the new media of the day) began to exert an important influence on governments. This contributed to forcing the British government into the Crimean War, a conflict that the then Prime Minister, Lord Aberdeen, deeply disliked. It is not difficult to see possible parallels with China's position today. With Maoist ideology effectively dead, nationalism remains by far the strongest ideological support of the Chinese communist regime, and one with deep roots in Chinese society.5 New media in the form of the internet and "blogosphere" have given ordinary Chinese a certain ability to express their views outside the bounds of the state-controlled media, as long as they do not launch open attacks on the existing system. As the Chinese internet response to a number of international incidents has shown, the views expressed are often nationalist and even chauvinist ones, and are frequently deeply hostile to the United States, as well as to some of China's neighbors (especially Japan, for reasons both of history and contemporary territorial disputes).6 Far from diminishing this nationalist tendency, any steps towards democratization in China could make it considerably worse. As convincingly argued by Jack Snyder and Edward Mansfield, the early growth of democracy is highly likely to be accompanied by strong nationalist tendencies. In the case of China, exploiting cases of international tension to stir up nationalism would be an obvious way for future opposition politicians to gain mass support against the top government officials of the day without stepping completely outside the Communist system.7 On the U.S. side, the adjustment of the U.S. public and political elites to the loss of U.S. primacy will be extremely difficult psychologically, especially if combined with a long period of economic difficulties created in part by China's rise. Whether China's rise is the cause or it simply coincides with the historic decline of the white middle classes may not matter, China may still take the blame. Remember that another element in the growth of mass chauvinist nationalism in late 19th Century Europe was the "Great Depression" which lasted from the mid-1870s to the mid-1890s, and involved persistently high levels of unemployment in some areas, and a wrenching dislocation of previous economic and social patterns among the traditional lower-middle classes in particular. It is possible that the same dynamics are in place in the United States today. It is true that U.S. popular culture has always involved strong elements of isolationism, but it has also contained equally strong tendencies to a violent response if the U.S. is seen as threatened or insulted. There could be many occasions of perceived insult between the U.S. and China in the decades to come.

### 2NC – K

#### Displacing the universalism of liberal legal modeling is a pre-requisite for the critical use of rights.

Balakrishnan RAJAGOPAL Law and Development @ MIT, 9 [*International Law from Below Development, Social Movements and Third World Resistance* p. 247-250]

The primary reason why the new stream of critique has been successfully coopted by human-rights discourse is because of two reasons: first, the new stream did not question the very model of development that the state was pursuing and the dominant role of the state in that process; and second, the new stream was also framed as rights discourse thereby losing much of its transformatory potential, without attempting to rethink the very Lockian terms of that discourse to reflect pluriversal ways of achieving human dignity and freedom. Before such rethinking occurs, articulation of any emancipatory project in the language of rights is limited within its rationalistic and disciplinary terms, which emphasize individual autonomy over relationships and trust. The model of development pursued by the Third World was based on western ideas of rationality and progress which had to be questioned in order to formulate a critical praxis of human rights. Rights discourse, with its historical connection to ideas of property and sovereignty, had to be replaced with other strategies or discourses, in order to get over its conservative influence. All this did not happen. Viewed against this historiography, social movements offer much that is different and interesting from a human-rights point of view. First, much of the social movements theory and practice is radically skeptical of development in that social movements do not aim to catch-up with the West, but seek to determine what kind of growth is best for them, under what conditions such growth should occur and whether there should be limits to such growth. In this sense, they contradict western ideas of rationality and progress, which are based on the principle of scarcity and the policy of ever-expanding growth. Second, substantial parts of social movements theory and practice is not state-centered. This is not only because many social movements do not aspire for State power, but also because the practice of many social movements transcends the sovereignty–counter-sovereignty dualism that typifies human rights discourse. Third, social movements theory and practice offer an interesting and different way of thinking about how to realize the emancipatory or liberating potential of rights discourse without succumbing to the conservative influences of its property-sovereignty roots. Finally, social movements research is also likely to contribute to international human-rights law in two major areas of critique: in the area of feminist critiques of the public–private distinction, the notion of ‘cultural politics’ developed above is likely to offer an alternative to the liberal politics of the mainstream human-rights discourse, due to its decentered political sphere and the plurality of social actors. It shows how it may be possible to develop a human rights praxis without falling victim to the public–private distinction. Also, in the area of Third World critiques of cultural relativism, social movement theory and practice are likely to show whether and how it is possible to develop a human-rights praxis without succumbing to the utopian universalism of the mainstream or the crass apologia of the relativists. It does this by showing how debate about identities and values is influenced and affected by debate about strategies and resources. I shall now elaborate on these themes.

#### Liberal institutionalism is an imperial ideology disguised by the language of science. Liberal institutionalism requires the elimination of non-liberal forms of life.

Tony SMITH Poli Sci @ Tufts 12 [*Conceptual Politics of Democracy Promotion* eds. Hobson and Kurki p. 206-210]

Writing in 1952, Reinhold Niebuhr expressed this point in what remains arguably the single best book on the United States in world affairs, The Irony of American History. 'There is a deep layer of Messianic consciousness in the mind of America,' the theologian wrote. Still, 'We were, as a matter of fact, always vague, as the whole liberal culture is fortunately vague, about how power is to be related to the allegedly universal values which we hold in trust for mankind' (Niebuhr 2008: 69). 'Fortunate vagueness', he explained, arose from the fact that 'in the liberal version of the dream of managing history, the problem of power is never fully elaborated' (Niebuhr 2008: 73). Here was a happy fact that distinguished us from the communists, who assumed, thanks to their ideology, that they could master history, and so were assured that the end would justify the means, such that world revolution under their auspices would bring about universal justice, freedom , and that most precious of promises, peace. In contrast, Niebuhr could write: On the whole, we have as a nation learned the lesson of history tolerably well. We have heeded the warning 'let not the wise man glory in his wisdom, let not the mighty man glory in his strength.' Though we are not without vainglorious delusions in regard to our power, we are saved by a certain grace inherent in common sense rather than in abstract theories from attempting to cut through the vast ambiguities of our historic situation and thereby bringing our destiny to a tragic conclusion by seeking to bring it to a neat and logical one ... This American experience is a refutation in parable of the whole effort to bring the vast forces of history under the control of any particular will, informed by a particular ideal ... [speaking of the communists] All such efforts are rooted in what seems at first glance to be a contradictory combination of voluntarism and determinism. These efforts are on the one hand excessively voluntaristic, assigning a power to the human will and the purity to the mind of some men which no mortal or group of mortals possesses. On the other, they are excessively deterministic since they regard most men as merely the creatures of an historical process. (Niebuhr 2008: 75, 79) The Irony of American History came out in January 1952, only months after the publication of Hannah Arendt's The Origins of Totalitarianism, a book that reached a conclusion similar to his. Fundamentalist political systems of thought, Arendt (1966: 467-9) wrote, are known for their scientific character; they combine the scientific approach with results of philosophical relevance and pretend to be scientific philosophy . .. Ideologies pretend to know the mysteries of the whole historical process—the secrets of the past, the intricacies of the present, the uncertainties of the future—because of the logic inherent in their respective ideas ... they pretend to have found a way to establish the rule of justice on earth ... All laws have become laws of movement. And she warned: Ideologies are always oriented toward history .... The claim to total explanation promises to explain all historical happenings ... hence ideological thinking becomes emancipated from the reality that we perceive with our five senses, and insists on a ' truer' reality concealed behind all perceptible things, dominating them from this place of concealment and requiring a sixth sense that enables us to become aware of it. ... Once it has established its premise, its point of departure, experiences no longer interfere with ideological thinking, nor can it be taught by reality. (Arendt 1966: 470) For Arendt as for Niebuhr, then, a virtue of liberal democracy was its relative lack of certitude in terms of faith in an iron ideology that rested on a pseudoscientific authority that its worldwide propagation would fulfill some mandate of history, or to put it more concretely, that the United States had been selected by the logic of historical development to expand the perimeter of democratic government and free market capitalism to the ends of the earth, and that in doing so it would serve not only its own basic national security needs but the peace of the world as well. True, in his address to the Congress asking for a declaration of war against Germany in 1917, Wilson had asserted, 'the world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty.' (Link 1982: 533). Yet just what this meant and how it might be achieved were issues that were not resolved intellectually—at least not before the 1990s. Reinhold Niebuhr died in 1971, Hannah Arendt in 1975, some two decades short of seeing the 'fortunate vagueness' Niebuhr had saluted during their prime be abandoned by the emergence of what can only be called a ' hard liberal internationalist ideology', one virtually the equal of Marxism- Leninism in its ability to read the logic of History and prescribe how human events might be changed by messianic intervention into a world order where finally justice, freedom , and peace might prevail. The authors of this neo-liberal, neo-Wilsonianism: left and liberal academics. Their place of residence: the United States, in leading universities such as Harvard, Yale, Princeton, and Stanford. Their purpose: the instruction of those who made foreign policy in Washington in the aftermath of the Cold War. Their ambition: to help America translate its 'unipolar moment' into a 'unipolar epoch' by providing American leaders with a conceptual blueprint for making the world safe for democracy by democratising the world, thereby realizing through 'democratic globalism' the century-old Wilsonian dream—the creation of a structure of world peace. Their method: the construction of the missing set of liberal internationalist concepts whose ideological complexity, coherence, and promise would be the essential equivalence of MarxismLeninism, something most liberal internationalists had always wanted to achieve but only now seemed possible. Democratic globalism as imperialism in the 1990s The tragedy of American foreign policy was now at hand. Rather than obeying the strictures of a ' fortunate vagueness' which might check its ' messianic consciousness', as Niebuhr had enjoined, liberal internationalism became possessed of just what Arendt had hoped it might never develop, 'a scientific character ... of philosophic relevance' that 'pretend[s] to know the mysteries of the whole historical process,' that 'pretend[s] to have found a way to establish the rule of justice on earth ' (Niebuhr 2008: 74; Arendt 1966: 470). Only in the aftermath of the Cold War, with the United States triumphant and democracy expanding seemingly of its own accord to many comers of the world—from Central Europe to different countries in Asia (South Korea and Taiwan), Africa (South Africa), and Latin America (Chile and Argentina)—had the moment arrived for democracy promotion to move into a distinctively new mode, one that was self-confidently imperialist. Wilsonians could now maintain that the study of history revealed that it was not so much that American power had won the epic contest with the Soviet Union as that the appeal of liberal internationalism had defeated proletarian internationalism. The victory was best understood, then, as one of ideas, values, and institutions—rather than of states and leaders. In this sense, America had been a vehicle of forces far greater than itself, the sponsor of an international convergence of disparate class, ethnic, and nationalist forces converging into a single movement that had created an historical watershed of extraordinary importance. For a new world, new ways of thinking were mandatory. As Hegel has instructed us, 'Minerva's owl flies out at dusk' , and liberal scholars of the 1990s applied themselves to the task of understanding the great victories of democratic government and open market economies over their adversaries between 1939 and 1989. What, rather exactly, were the virtues of democracy that made these amazing successes possible? How, rather explicitly, might the free world now protect, indeed expand, its perimeter of action? A new concept of power and purpose was called for. Primed by the growth of think-tanks and prestigious official appointments to be 'policy relevant' , shocked by murderous outbreaks witnessed in the Balkans and Central Africa, believing as the liberal left did that progress was possible, Wilsonians set out to formulate their thinking at a level of conceptual sophistication that was to be of fundamental importance to the making of American foreign policy after the year 2000.6 The jewel in the crown of neo-liberal internationalism as it emerged from the seminar rooms of the greatest American universities was known as ' democratic peace theory'. Encapsulated simply as ' democracies do not go to war with one another', the theory contended that liberal democratic governments breed peace among themselves based on their domestic practices of the rule of law, the increased integration of their economies through measures of market openness, and their participation in multilateral organisations to adjudicate conflicts among each other so as to keep the peace. The extraordinary success of the European Union since the announcement of the Marshall Plan in 1947, combined with the close relations between the United States and the world's other liberal democracies, was taken as conclusive evidence that global peace could be expanded should other countries join ' the pacific union ', ' the zone of democratic peace'. A thumb-nail sketch cannot do justice to the richness of the argument. Political scientists of an empirical bent demonstrated conclusively to their satisfaction that 'regime type matters ', that it is in the nature of liberal democracies to keep the peace with one another, especially when they are integrated together economically. Theoretically inclined political scientists then argued that liberal internationalism could be thought of as ' non-utopian and non-ideological ', a scientifically validated set of concepts that should be recognized not only as a new but also a dominant form of conceptual ising the behaviour of states (Moravcsik 1997). And liberal political philosophers could maintain on the basis of democratic peace theory that a Kantian (or Wilsonian) liberal world order was a morally just goal for progressives worldwide to seek so that the anarchy of states, the Hobbesian state of nature, could be superseded and a Golden Age of what some dared call 'post-history' could be inaugurated (Rawls 1999). Yet if it were desirable that the world's leading states be democratised, was it actually possible to achieve such a goal? Here a second group of liberal internationalists emerged, intellectuals who maintained that the transition from authoritarian to democratic government had become far easier to manage than at earlier historical moments. The blueprint of liberal democracy was now tried and proven in terms of values, interests, and institutions in a wide variety of countries. The seeds of democracy could be planted by courageous Great Men virtually anywhere in the world. Where an extra push was needed, then the liberal world could help with a wide variety of agencies from the governmental (such as the Agency for International Development or the National Endowment for Democracy in the United States) to the non-governmental (be it the Open Society Institute, Human Rights Watch, Amnesty International, or Freedom House). With the development of new concepts of democratic transition, the older ideas in democratization studies of 'sequences' and ' preconditions' could be jettisoned. No longer was it necessary to count on a long historical process during which the middle class came to see its interests represented in the creation of a democratic state, no longer did a people have to painfully work out a social contract of tolerance for diversity and the institutions of limited government under the rule of law for democracy to take root. Examples as distinct as those of Spain, South Korea, Poland, and South Africa demonstrated that a liberal transformation could be made with astonishing speed and success. When combined, democratic peace theory and democratic transition theory achieved a volatile synergy that neither alone possessed. Peace theory argued that the world would benefit incalculably from the spread of democratic institutions, but it could not say that such a development was likely. Transition theory argued that rapid democratisation was possible, but it could not establish that such changes would much matter for world politics. Combined, however, the two concepts came to be the equivalent of a Kantian moral imperative to push what early in the Clinton years was called ' democratic enlargement' as far as Washington could while it possessed the status of the globe's sole superpower. The result would be nothing less than to change the character of world affairs that gave rise to war—international anarchy system and the character of authoritarian states—into an order of peace premised on the character of democratic governments and their association in multilateral communities basing their conduct on the rule of law that would increasingly have a global constitutional character. The arrogant presumption was, in short, that an aggressively liberal America suddenly had the possibility to change the character of History itself toward the reign of perpetual peace through democracy promotion. Enter the liberal jurists. In their hands a 'right to intervene' against states or in situations where gross and systematic human rights were being violated or weapons of mass destruction accumulated became a 'duty to intervene' in the name of what eventually became called a state 's 'responsibility to protect.' (lCISS 200 I). The meaning of 'sovereignty' was now transformed. Like pirate ships of old, authoritarian states could be attacked by what Secretary of State Madeleine Albright first dubbed a 'Community of Democracies', practicing ' muscular multilateralism' in order to reconstruct them around democratic values and institutions for the sake of world peace. What the jurists thus accomplished was the redefinition not only of the meaning of sovereignty but also that of 'Just War'. Imperialism to enforce the norms a state needed to honor under the terms of its 'responsibility to protect' (or 'R2P' as its partisans liked to phrase it) was now deemed legitimate. And by moving the locus of decision-making on the question of war outside the United Nations (whose Security Council could not be counted on to act to enforce the democratic code) to a League, or Community, or Concert of Democracies (the term varied according to the theorist), a call to arms for the sake of a democratising crusade was much more likely to succeed.