# Neg Cards

# Round 1

### 1NC T

**Authority over indefinite detention is the authority TO DETAIN**

GLAZIER 06 Associate Professor at Loyola Law School in Los Angeles, California [David Glazier, ARTICLE: FULL AND FAIR BY WHAT MEASURE?: IDENTIFYING THE INTERNATIONAL LAW REGULATING MILITARY COMMISSION PROCEDURE, Boston University International Law Journal, Spring, 2006, 24 B.U. Int'l L.J. 55]

President Bush's decision to consider the terrorist attacks of September 11, 2001, as an act of war has significant legal ramifications. Endorsed by Congress in the Authorization for the Use of Military Force ("AUMF"), n1 this paradigm shift away from treating terrorism as a crime to treating terrorism as an armed conflict allows the United States to exercise "fundamental incidents of waging war." n2 Among these fundamental war powers are the authorities to detain enemy personnel for the duration of hostilities, to subject law of war violators to trials in military tribunals, and to exercise subject matter jurisdiction over the full scope of the law of war, rather than over only those offenses defined in U.S. criminal statutes. n3

**Restriction is a prohibition on an ACTION – the aff must prohibit indefinite detention**

Northglenn 11 (City of Northglenn Zoning Ordinance, “Rules of Construction – Definitions”, http://www.northglenn.org/municode/ch11/content\_11-5.html)

Section 11-5-3. Restrictions. As used in this Chapter 11 of the Municipal Code, the **term "restriction**" shall mean a prohibitive regulation. Any use, activity, operation, building, structure or thing which is the subject of a restriction is prohibited, and no such use, activity, operation, building, structure or thing shall be authorized by any permit or license.

**The courts have NO AUTHORITY to decide to release prisoners – this is necessary to CORE NEGATIVE GROUND about circumvention related to the aff. It also explodes limits – they can talk about anything related to the 4 topic areas which makes research impossible.**

**Independently, the aff is extra topical – It’s immigration authority which explodes limits and makes being neg impossible**

Chow 11 (Samuel, JD Benjamin N. Cardozo School of Law, “THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS”, 19 Cardozo J. Int'l & Comp. L. 775 2011)

The facts that legitimized the Court's holding in Munaf are substantially different from the facts in Kiyemba. In Kiyemba, the D.C. Circuit Court also held that it did not have the authority to order the petitioners' release into the United States, but for different reasons from those espoused in Munaf. There, the circuit court determined that such release would violate the traditional distribution of immigration authority-a problem that did not exist with the American petitioners in Munaf.2 z As in Munaf, the government concluded that the Kiyemba petitioners' request amounted to a request for "release-plus. ' 23 Unlike Munaf, however, a troubling paradox is raised under the Kiyemba facts as it now stands, the Executive has determined that certain detainees being held unlawfully may, nonetheless, remain indefinitely detained.24 There are three primary elements that contributed to the Uighur 25 plaintiffs' dilemma. First, because of the high risk of torture, the Uighurs could not return to their home country of China.26 Second, diplomatic solutions had failed and no third-party country had been willing to accept them.27 Third, the D.C. Circuit Court determined that release into the United States would violate immigration laws and undermine the Executive's ability to administer those laws. 28 Lacking refuge and possibility of asylum, the Uighurs were forced to remain, indefinitely, as prisoners at Guantanamo Bay.

### 1NC DA

**Momentum preventing sanctions – Obama’s capital is key – bill would start a war with Iran**

WEBER 1 – 30 – 14 senior editor at TheWeek.com [Peter Weber, What sank the Senate's Iran sanctions bill? After Obama's State of the Union speech, it looks like Democrats are going to give peace a chance, after all, <http://theweek.com/article/index/255771/what-sank-the-senates-iran-sanctions-bill>]

In mid-January it appeared that a bipartisan Senate bill threatening Iran with new sanctions was a foregone conclusion. Yes, President Obama opposed the legislation and promised to veto it, but supporters of the Nuclear Weapon Free Iran Act strongly hinted that they had a veto-proof majority — and with 59 senators (43 Republicans and 16 Democrats) co-sponsoring the bill, that seemed eminently plausible.

They would only need eight more votes (and action in the House) to thwart Obama's veto pen, and momentum appeared to be on their side.

If there is any momentum on the bill now, it's on the other side. Obama reiterated his veto threat in the very public setting of his State of the Union address on Tuesday night, saying that "for the sake of our national security, we must give diplomacy a chance to succeed." Jan. 20 marked the beginning of a six-month period of negotiations between the U.S., Iran, and five other world powers aimed at preventing Iran from developing a nuclear bomb.

The negotiations won't be easy, and "any long-term deal we agree to must be based on verifiable action," not trust, Obama said. But "if John F. Kennedy and Ronald Reagan could negotiate with the Soviet Union, then surely a strong and confident America can negotiate with less powerful adversaries today."

After the speech, at least four Democratic cosponsors — Sens. Chris Coons (Del.), Kirsten Gillibrand (N.Y.), Joe Manchin (W.Va.), and Ben Cardin (Md.) — said they didn't want to vote on the bill while negotiations are ongoing. Sen. Richard Blumenthal (D-Conn.) had already adopted that position earlier in the month.

The distance these cosponsors put between themselves and the bill wasn't uniform. Cardin punted to Sen. Harry Reid (D-Nev.), who is opposed to bringing the bill to the floor for a vote. (Cardin "wants to see negotiations with Iran succeed," a spokeswoman's said. "As for timing of the bill, it is and has always been up to the Majority Leader.")

Manchin, on the other hand, told MSNBC that he didn't sign on to the bill "with the intention that it would ever be voted upon or used upon while we were negotiating," but rather "to make sure the president had a hammer if he needed it." He added: "We've got to give peace a chance here."

With the list of Democratic cosponsors willing to vote for the bill shrinking by five, the dream of a veto-proof majority in the next six months appears to be dead. Even Republican supporters of the legislation are pessimistic of its chances: "Is there support to override a veto?" Sen. Jim Inhofe (R-Okla.), the top Republican on the Senate Armed Services Committee, told National Journal on Wednesday. "I say, 'No.'"

So, what happened to the Iran sanctions bill? The short version: Time, pressure, and journalism.

The journalism category encompasses two points: First, reporters actually read the legislation, and it doesn't quite match up with the claims of lead sponsors Sen. Robert Menendez (D-N.J.) and Sen. Mark Kirk (R-Ill.), who say the sanctions would only take effect if Iran was found to be negotiating in bad faith. A much-cited analysis by Edward Levine at the Center for Arms Control and Non-Proliferation showed that the Iran sanctions would kick in unless Obama certified a list of impossible or deal-breaking conditions.

Journalists also started asking the cosponsors about their intentions. It's possible there were never 59 votes for the bill, but the legislation was filed right before Christmas and many reporters (not unreasonably) conflated cosponsorship with support for the bill, regardless of what was happening with the negotiations. They only asked on Tuesday night and Wednesday because Obama brought up the issue in his State of the Union speech.

Time without action always saps momentum, but with the Iran sanctions bill it also allowed events to catch up with the proponents of new sanctions. When they filed the bill Dec. 20, the interim Iran deal was just a talking point; a month later it was reality. The Obama administration, U.S. intelligence community, and outside analysts agree that new sanctions would scuttle the deal, and its harder to take that risk when that deal is in effect.

Finally, critics of the bill — including the White House and J Street, the liberal pro-Israel lobbying group — had time to mount a counterattack. Starting Jan. 6, J Street and other groups opposed to the legislation "reached out to senators who were on the fence and senators who'd cosponsored on day one," says Slate's David Weigel. "The message was the same: Have you guys read this thing?" Dylan William, J Street's director of government relations, describes the strategy in more depth:

We made especially prodigious use of our grass tops activists. These are people who have longstanding relationships with members of Congress to express two things. One: The bill is bad policy. Two: There was no political reason that these senators should feel they need to support the bill. There is deep political support in communities for members of Congress and senators who want to reserve this peaceably. [Slate]

So take a bow, J Street — for now, the David of the Israel lobby has slain its Goliath, the American Israel Public Affairs Committee (AIPAC), which is pushing for the legislation. That could all change if the interim Iran deal falls apart or some other event intercedes to change the equation for lawmakers. But momentum is hard to un-stall, and lawmakers are now considering changing the bill into a non-binding resolution.

John Judis at The New Republic is relieved, and counts Obama's veto threat Tuesday night as the boldest part of his speech. "If these negotiations with Iran fail, the United States will be left with very unsatisfactory alternatives," he writes:

Use military force to stop Iran, which might only delay Iran's acquisition of nuclear weapons, and will potentially inflame the region in a new war, or allow Iran to go ahead and hope to contain Iran as we have contained other potentially hostile nuclear powers. Obama may not be able to secure authorization for the first alternative... and if he opts for the second, he will leave open the possibility of regional proliferation or of Israel going to war against Iran. It's in America's interest — and, incidentally, Israel's as well — to allow the current negotiations to take their course — without malignant interference from Congress and AIPAC. [New Republic]

**It’s a war powers fight that Obama wins – but failure greenlights Israel strikes**

**Merry, 1/1/14** - Robert W. Merry, political editor of the National Interest, is the author of books on American history and foreign policy (Robert, “Obama may buck the Israel lobby on Iran” Washington Times, factiva)

Presidential press secretary Jay Carney uttered 10 words the other day that represent a major presidential challenge to the American Israel lobby and its friends on Capitol Hill. Referring to Senate legislation designed to force President Obama to expand economic sanctions on Iran under conditions the president opposes, Mr. Carney said: “If it were to pass, the president would veto it.”

For years, there has been an assumption in Washington that you can’t buck the powerful Israel lobby, particularly the American Israel Public Affairs Committee, or AIPAC, whose positions are nearly identical with the stated aims of Israeli Prime Minister Benjamin Netanyahu. Mr. Netanyahu doesn’t like Mr. Obama’s recent overture to Iran, and neither does AIPAC. The result is the Senate legislation, which is similar to a measure already passed by the House.

With the veto threat, Mr. Obama has announced that he is prepared to buck the Israel lobby — and may even welcome the opportunity. It isn’t fair to suggest that everyone who thinks Mr. Obama’s overtures to Iran are ill-conceived or counterproductive is simply following the Israeli lobby’s talking points, but Israel’s supporters in this country are a major reason for the viability of the sanctions legislation the president is threatening to veto.

It is nearly impossible to avoid the conclusion that the Senate legislation is designed to sabotage Mr. Obama’s delicate negotiations with Iran (with the involvement also of the five permanent members of the U.N. Security Council and Germany) over Iran’s nuclear program. The aim is to get Iran to forswear any acquisition of nuclear weapons in exchange for the reduction or elimination of current sanctions. Iran insists it has a right to enrich uranium at very small amounts, for peaceful purposes, and Mr. Obama seems willing to accept that Iranian position in the interest of a comprehensive agreement.

However, the Senate measure, sponsored by Sens. Robert Menendez, New Jersey Democrat; Charles E. Schumer, New York Democrat; and Mark Kirk, Illinois Republican, would impose potent new sanctions if the final agreement accords Iran the right of peaceful enrichment. That probably would destroy Mr. Obama’s ability to reach an agreement. Iranian President Hasan Rouhani already is under pressure from his country’s hard-liners to abandon his own willingness to seek a deal. The Menendez-Schumer-Kirk measure would undercut him and put the hard-liners back in control.

Further, the legislation contains language that would commit the United States to military action on behalf of Israel if Israel initiates action against Iran. This language is cleverly worded, suggesting U.S. action should be triggered only if Israel acted in its “legitimate self-defense” and acknowledging “the law of the United States and the constitutional responsibility of Congress to authorize the use of military force,” but the language is stunning in its brazenness and represents, in the view of Andrew Sullivan, the prominent blogger, “an appalling new low in the Israeli government’s grip on the U.S. Congress.”

While noting the language would seem to be nonbinding, Mr. Sullivan adds that “it’s basically endorsing the principle of handing over American foreign policy on a matter as grave as war and peace to a foreign government, acting against international law, thousands of miles away.”

That brings us back to Mr. Obama’s veto threat. The American people have made clear through polls and abundant expression (especially during Mr. Obama’s flirtation earlier this year with military action against Bashar Assad’s Syrian regime) that they are sick and weary of American military adventures in the Middle East. They don’t think the Iraq and Afghanistan wars have been worth the price, and they don’t want their country to engage in any other such wars.

That’s what the brewing confrontation between Mr. Obama and the Israel lobby comes down to — war and peace. Mr. Obama’s delicate negotiations with Iran, whatever their outcome, are designed to avert another U.S. war in the Middle East. The Menendez-Schumer-Kirk initiative is designed to kill that effort and cedes to Israel America’s war-making decision in matters involving Iran, which further increases the prospects for war. It’s not even an argument about whether the United States should come to Israel’s aid if our ally is under attack, but whether the decision to do so and when that might be necessary should be made in Jerusalem or Washington.

2014 will mark the 100th anniversary of beginning of World War I, a conflict triggered by entangling alliances that essentially gave the rulers of the Hapsburg Empire power that forced nation after nation into a war they didn’t want and cost the world as many as 20 million lives. Historians have warned since of the danger of nations delegating the power to take their people into war to other nations with very different interests.

AIPAC’s political power is substantial, but this is Washington power, the product of substantial campaign contributions and threats posed to re-election prospects. According to the Center for Responsive Politics’ Open Secrets website, Sens. Kirk, Menendez and Schumer each receives hundreds of thousands of dollars a year in pro-Israel PAC money and each of their states includes concentrations of pro-Israel voters who help elect and re-elect them.

Elsewhere in the country, AIPAC’s Washington power will collide with the country’s clear and powerful political sentiment against further U.S. adventurism in the Middle East, particularly one as fraught with as much danger and unintended consequence as a war with Iran. If the issue gets joined, as it appears that it will, Mr. Obama will see that it gets joined as a matter of war and peace. If the Menendez-Schumer-Kirk legislation clears Congress and faces a presidential veto, the war-and-peace issue could galvanize the American people as seldom before.

If that happens, the strongly held opinions of a democratic public are liable to overwhelm the mechanisms of Washington power, and the vaunted influence of the Israel lobby may be seen as being not quite what it has been cracked up to be.

**Plan destroys Obama**

Loomis 07 Visiting Fellow at the Center for a New American Security, and Department of Government at Georgetown University [Dr. Andrew J. Loomis, “Leveraging legitimacy in the crafting of U.S. foreign policy”, March 2, 2007, pg 36-37, http://citation.allacademic.com//meta/p\_mla\_apa\_research\_citation/1/7/9/4/8/pages179487/p179487-36.php

Declining political authority encourages defection. American political analyst Norman Ornstein writes of the domestic context, In a system where a President has limited formal power, perception matters. The reputation for success—the belief by other political actors that even when he looks down, a president will find a way to pull out a victory—is the most valuable resource a chief executive can have. Conversely, the widespread belief that the Oval Office occupant is on the defensive, on the wane or without the ability to win under adversity can lead to disaster, as individual lawmakers calculate who will be on the winning side and negotiate accordingly. In simple terms, winners win and losers lose more often than not. Failure begets failure. In short, a president experiencing declining amounts of political capital has diminished capacity to advance his goals. As a result, political allies perceive a decreasing benefit in publicly tying themselves to the president, and an increasing benefit in allying with rising centers of authority. A president’s incapacity and his record of success are interlocked and reinforce each other. Incapacity leads to political failure, which reinforces perceptions of incapacity. This feedback loop accelerates decay both in leadership capacity and defection by key allies. The central point of this review of the presidential literature is that the sources of presidential influence—and thus their prospects for enjoying success in pursuing preferred foreign policies—go beyond the structural factors imbued by the Constitution. Presidential authority is affected by ideational resources in the form of public perceptions of legitimacy. The public offers and rescinds its support in accordance with normative trends and historical patterns, non-material sources of power that affects the character of U.S. policy, foreign and domestic.

**Global war**

**Reuveny, 10** – professor in the School of Public and Environmental Affairs at Indiana University (Rafael, “Unilateral strike could trigger World War III, global depression” Gazette Xtra, 8/7, - See more at: <http://gazettextra.com/news/2010/aug/07/con-unilateral-strike-could-trigger-world-war-iii-/#sthash.ec4zqu8o.dpuf>)

A unilateral Israeli strike on Iran’s nuclear facilities would likely have dire consequences, including a regional war, global economic collapse and a major power clash.

For an Israeli campaign to succeed, it must be quick and decisive. This requires an attack that would be so overwhelming that Iran would not dare to respond in full force.

Such an outcome is extremely unlikely since the locations of some of Iran’s nuclear facilities are not fully known and known facilities are buried deep underground.

All of these widely spread facilities are shielded by elaborate air defense systems constructed not only by the Iranians but also the Chinese and, likely, the Russians as well.

By now, Iran has also built redundant command and control systems and nuclear facilities, developed early warning systems, acquired ballistic and cruise missiles and upgraded and enlarged its armed forces.

Because Iran is well-prepared, a single, conventional Israeli strike—or even numerous strikes—could not destroy all of its capabilities, giving Iran time to respond.

Unlike Iraq, whose nuclear program Israel destroyed in 1981, Iran has a second-strike capability comprised of a coalition of Iranian, Syrian, Lebanese, Hezbollah, Hamas, and, perhaps, Turkish forces. Internal pressure might compel Jordan, Egypt and the Palestinian Authority to join the assault, turning a bad situation into a regional war.

During the 1973 Arab-Israeli War, at the apex of its power, Israel was saved from defeat by President Nixon’s shipment of weapons and planes. Today, Israel’s numerical inferiority is greater, and it faces more determined and better-equipped opponents. After years of futilely fighting Palestinian irregular armies, Israel has lost some of its perceived superiority—bolstering its enemies’ resolve.

Despite Israel’s touted defense systems, Iranian coalition missiles, armed forces, and terrorist attacks would likely wreak havoc on its enemy, leading to a prolonged tit-for-tat.

In the absence of massive U.S. assistance, Israel’s military resources may quickly dwindle, forcing it to use its alleged nuclear weapons, as it had reportedly almost done in 1973.

An Israeli nuclear attack would likely destroy most of Iran’s capabilities, but a crippled Iran and its coalition could still attack neighboring oil facilities, unleash global terrorism, plant mines in the Persian Gulf and impair maritime trade in the Mediterranean, Red Sea and Indian Ocean.

Middle Eastern oil shipments would likely slow to a trickle as production declines due to the war and insurance companies decide to drop their risky Middle Eastern clients. Iran and Venezuela would likely stop selling oil to the United States and Europe.

From there, things could deteriorate as they did in the 1930s. The world economy would head into a tailspin; international acrimony would rise; and Iraqi and Afghani citizens might fully turn on the United States, immediately requiring the deployment of more American troops.

Russia, China, Venezuela, and maybe Brazil and Turkey—all of which essentially support Iran—could be tempted to form an alliance and openly challenge the U.S. hegemony.

Russia and China might rearm their injured Iranian protege overnight, just as Nixon rearmed Israel, and threaten to intervene, just as the U.S.S.R. threatened to join Egypt and Syria in 1973. President Obama’s response would likely put U.S. forces on nuclear alert, replaying Nixon’s nightmarish scenario.

Iran may well feel duty-bound to respond to a unilateral attack by its Israeli archenemy, but it knows that it could not take on the United States head-to-head. In contrast, if the United States leads the attack, Iran’s response would likely be muted.

If Iran chooses to absorb an American-led strike, its allies would likely protest and send weapons but would probably not risk using force.

While no one has a crystal ball, leaders should be risk-averse when choosing war as a foreign policy tool. If attacking Iran is deemed necessary, Israel must wait for an American green light. A unilateral Israeli strike could ultimately spark World War III.

### 1NC CP

**The Executive Branch of the United States should require that persons detained indefinitely receive either civilian trials or be released.**

**The Office of Legal Counsel should determine that the Executive Branch lacks the legal authority detain indefinitely without civilian trial or release. The President should require the Office of Legal Counsel to publish any legal opinions regarding policies adopted by the Executive Branch.**

**CP solves the aff**

Adrian Vermeule 7, Harvard law prof - AND - Eric Posner - U Chicago law, The Credible Executive, 74 U. Chi. L. Rev. 865

\*We do not endorse gendered language

The Madisonian system of oversight has not totally failed. Some- times legislators overcome the temptation to free ride; sometimes they invest in protecting the separation of powers or legislative preroga- tives. Sometimes judges review exercises of executive discretion, even during emergencies. But often enough, legislators and judges have no real alternative to letting executive officials exercise discretion un- checked. The Madisonian system is a partial failure; compensating mechanisms must be adopted to fill the area of slack, the institutional gap between executive discretion and the oversight capacities of other institutions. Again, the magnitude of this gap is unclear, but plausibly it is quite large; we will assume that it is. It is often assumed that this partial failure of the Madisonian sys- tem unshackles and therefore benefits ill-motivated executives. This is grievously incomplete. The failure of the Madisonian system harms the well-motivated executive as much as it benefits the ill-motivated one. Where Madisonian oversight fails, the well-motivated executive is a victim of his own power. Voters, legislators, and judges will be wary of granting further discretion to an executive whose motivations are un- certain and possibly nefarious. The partial failure of Madisonian over- sight thus threatens a form of inefficiency, a kind of contracting failure that makes potentially everyone, including the voters, worse off. Our central question, then, is what the well-motivated executive can do to solve or at least ameliorate the problem. The solution is for the executive to complement his (well-motivated) first-order policy goals with second-order mechanisms for demonstrating credibility to other actors. We thus do not address the different question of what voters, legislators, judges, and other actors should do about an executive who is ill motivated and known to be so. That project involves shoring up or replacing the Madisonian system to block executive dictatorship. Our project is the converse of this, and involves finding new mechanisms to help the well-motivated executive credibly distinguish himself as such. ¶ IV. EXECUTIVE SIGNALING: LAW AND MECHANISMS ¶ We suggest that the executive’s credibility problem can be solved by second-order mechanisms of executive signaling. In the general case, well-motivated executives send credible signals by taking actions that are more costly for ill-motivated actors than for well- motivated ones, thus distinguishing themselves from their ill- motivated mimics. Among the specific mechanisms we discuss, an important subset involves executive self-binding, whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors. Commitments themselves have value as signals of benign motivations. ¶ This departs from the usual approach in legal scholarship. Legal theory has often discussed self-binding by “government” or govern- ment officials. In constitutional theory, it is often suggested that consti- tutions represent an attempt by “the people” to bind “themselves” against their own future decisionmaking pathologies, or relatedly, that constitutional prohibitions represent mechanisms by which govern- ments commit themselves not to expropriate investments or to exploit their populations.72 Whether or not this picture is coherent,73 it is not the question we examine here, although some of the relevant consid- erations are similar.74 We are not concerned with binding the president so that he cannot abuse his powers, but with how he might bind himself or take other actions that enhance his credibility, so that he can generate support from the public and other members of the government. ¶ Furthermore, our question is subconstitutional: it is whether a well-motivated executive, acting within an established set of constitu- tional and statutory rules, can use signaling mechanisms to generate public trust. Accordingly, we proceed by assuming that no constitutional amendments or new statutes will be enacted. Within these con- straints, what can a well-motivated executive do to bootstrap himself to credibility? The problem for the well-motivated executive is to credibly signal his benign motivations. In general, the solution is to engage in actions that are less costly for good types than for bad types. ¶ We begin with some relevant law, then examine a set of possible mechanisms—emphasizing both the conditions under which they might succeed and the conditions under which they might not—and conclude by examining the costs of credibility. ¶ A. A Preliminary Note on Law and Self-Binding ¶ Many of our mechanisms are unproblematic from a legal per- spective, as they involve presidential actions that are clearly lawful. But a few raise legal questions; in particular, those that involve self- binding.75 Can a president bind himself to respect particular first-order policies? With qualifications, the answer is yes, at least to the same extent that a legislature can. Formally, a duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated, thereby establishing a new legal status quo.76 The legal authority to establish a new status quo allows a president to create inertia or political constraints that will affect his own future choices. In a practical sense, presidents, like legislatures, have great de facto power to adopt policies that shape the legal landscape for the future. A president might commit himself to a long-term project of defense pro- curement or infrastructure or foreign policy, narrowing his own future choices and generating new political coalitions that will act to defend the new rules or policies. More schematically, we may speak of formal and informal means of self-binding:

**OLC prevents circumvention**

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.

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.

### 1NC Critique

**It is IMPOSSIBLE for even the most critical stance against western thought to allow the subaltern speech. The affirmative can *NEVER* overcome colonial thinking, it is simply a hollow academic understanding of subaltern life. It will always be sutured in wester-colonial thought.**

Spivak 88 (Gayatri Chakravorty Spivak, Columbia University, Marxism and the Interpretation of Culture "Can the Subaltern Speak?" <http://www.maldura.unipd.it/dllags/docentianglo/materiali_oboe_lm/2581_001.pdf>)

SOME OF THE most radical criticism coming out of the West today is the result of an interested desire to conserve the subject of the West, or the West as Subject. The theory of pluralized ‘subject-effects’ gives an illusion of undermining subjective sovereignty while often providing a cover for this subject of knowledge. Although the history of Europe as Subject is narrativized by the law, political economy, and ideology of the West, this concealed Subject pretends it has ‘no geo-political determinations.’ The much publicized critique of the sovereign subject thus actually inaugurates a Subject. . . .

This S/subject, curiously sewn together into a transparency by denega¬tions, belongs to the exploiters’ side of the international division of labor. It is impossible for contemporary French intellectuals to imagine the kind of Power and Desire that would inhabit the unnamed subject of the Other of Europe. It is not only that everything they read, critical or uncritical, is caught within the debate of the production of that Other, supporting or critiquing the constitution of the Subject as Europe. It is also that, in the constitution of that Other of Europe, great care was taken to obliterate the textual ingredients with which such a subject could cachet, could occupy (invest?) its itinerary - not only by ideological and scientific production, but also by the institution of the law. ... In the face of the possibility that the intellectual is complicit in the persistent constitution of Other as the Self’s shadow, a possibility of political practice for the intel¬lectual would be to put the economic Tinder erasure,’ to see the economic factor as irreducible as it reinscribes the social text, even as it is erased, however imperfectly, when it claims to be the final determinant or the tran¬scendental signified.

The clearest available example of such epistemic violence is the remotely orchestrated, far-flung, and heterogeneous project to constitute the colonial subject as Other. This project is also the asymetrical obliteration of the trace of that Other in its precarious Subjectivity. It is well known that Foucault locates epistemic violence, a complete overhaul of the episteme, in the redefi¬nition of sanity at the end of the European eighteenth century. But what if that particular redefinition was only a part of the narrative of history in Europe as well as in the colonies? What if the two projects of epistemic overhaul worked as dislocated and unacknowledged parts of a vast two-handed engine? Perhaps it is no more than to ask that the subtext of the palimpsestic narra¬tive of imperialism be recognized as ‘subjugated knowledge,’ ‘a whole set of knowledges that have been disqualified as inadequate to their task or insuffi¬ciently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity’ (Foucault 1980: 82).

This is not to describe ‘the way things really were’ or to privilege the narrative of history as imperialism as the best version of history. It is, rather, to offer an account of how an explanation and narrative of reality was established as the normative one. . . .

Let us now move to consider the margins (one can just as well say the silent, silenced center) of the circuit marked out by this epistemic violence, men and women among the illiterate peasantry, the tribals, the lowest strata of the urban subproletariat. According to Foucault and Deleuze (in the First World, under the standardization and regimentation of socialized capital, though they do not seem to recognize this) the oppressed, if given the chance (the problem of representation cannot be bypassed here), and on the way to solidarity through alliance politics (a Marxist thematic is at work here) can speak and know their conditions. We must now confront the following question: On the other side of the international division of labor from socialized capital, inside and outside the circuit of the epistemic violence of imperialist law and education supplementing an earlier economic text, can the subaltern speak? . . .

**The affirmative is an expression of solidarity yet does nothing to relieve oppression – they aren’t subversive, nor radical, nor even that interesting – their speech act is an intellectual façade designed to avoid having to resolve oppression**

Raskin 99 (Marcus Raskin, Professor of Public Policy at George Washington University, 1999, Transnational Law & Contemporary Problems, Fall)

As I have noted, world social categories and knowledge systems have changed so that they now see the colonized as human beings. **The shifting in social categories, often by those who are the radicals and liberals of the privileged groups**, created deep divisions between reality and its description. But **this has not necessarily resulted in fundamental affirmative change. For those who were consigned to the role of** slave, serf and **oppressed by imperial Western nations, it may be disconcerting, but pleasantly surprising, that some leading international lawyers and intellectuals stand with those movements that take their strength from the dispossessed,** wretched and exploited, whether in war or peace. Even though these idealists are educated in Western and imperial categories of social reality, they have, nonetheless, taken as their task the reconstruction and transformation of international law as it is understood in the United States. The skeptical are permitted their doubts, however. After all, **what can those who represent the pain of others, and only indirectly their own, do to ameliorate the pain of misery sanctioned by imperial law?** What do such a band of idealists dare to teach to those who suffer, especially when that suffering is often caused, directly or indirectly, by the choices made by the very class of which these Western intellectuals and lawyers are members? **Why should the oppressed listen to those educated in a language and thought-pattern which, beneath the honeyed words, are the egocentric and ethnocentric doctrines of the** [\*524] **dominator?** Certainly until decolonization, the abstract meaning of the words were employed as signifiers and killers of the culturally oppressed. The language of description and the mode of argument, the very words themselves, were instruments of the colonizer. Their very rules, laws, precedents and citations acted as a steel-belted noose to stifle the cries of the wretched. And yet, these were the very lessons the colonized needed to learn in order to stand up to the colonizer and survive. Not only did they survive, they pressed on to reform nineteenth and early twentieth century imperial law using the UN, and the International Court of Justice. Most importantly, they effected the consciousness of nations. Nevertheless, **the wretched must wonder why, behind claims of universality and universal human rights, our actions and thoughts have an often indeterminate or contradictory effect**. For Americans, the reason is a complex one. **Americans seek identification with the victim in their dreams, but the reality for the American political and legal class is somewhere between carelessness and negligence of the oppressed worker, toleration for the destruction of other people's cultures for purposes of extraction and commodification, exploiter of their lands, and executioner in counter-revolutions which rain bombs of state and financial terror around the world**. **So even when some in the United States stand with the victim, they must always wonder, "Who are we that come forward with our notions that speak of human affirmation?** Who are we to tell the colonized when independence is a drag on themselves and on others as well, possibly leading to war and internecine conflict?" And **the wretched can go further and say, "You have recognized our struggle, taken away our language and substituted your words of understanding, but now what?** **How is freedom to be sustained? We, the formerly marginalized, the indigenous and the merely wretched, have come to recognize that what is presented by the West to humanity as conventional knowledge is a betrayal."** In truth, it was a betrayal by intellectuals and all those who dared to suggest that the twentieth century could be a time of liberation and freedom. Education and knowledge as mediated through the colonizer's strainer has left humanity in worse shape than at the beginning of the twentieth century. For some, **the god that really failed them was education/knowledge, which, through its institutions, set itself up as the emancipator.** This failure, this sense of futility where knowledge is an instrument of domination for the few, demands recognition.

**We don’t offer an alternative we offer a negation. The aff has not met their burden of their role of the ballot. We can NEVER de-link coloniality by providing a voice for the voiceless.**

**The subaltern has no method by which to engage in social life, culture, and subjectivity, and we should not speak for them.**

Chow 93 (Rey CHOW Modern Culture & Media @ Brown 93 Writing Diaspora p. 34-36)

To the extent that it is our own limit that we encounter when we encounter another, all these intellectuals can do is no more than render the other as the negative of what they are and what they do. As Serres puts it, the spectacle of China's total rationality is so "positive, so rational, so welladapted that one can only speak of it in negative terms."18 As such, the "native" is turned into an absolute entity in the form of an image (the "empty" Japanese ritual or "China loam"), whose silence becomes the occasion for our speech.19 The gaze of the Western scholar is "pornographic" and the native becomes a mere "naked body" in the sense described by Jameson. Whether positive or negative, the construction of the native remains at the level of image identification, a process in which "our" own identity is measured in terms of the degrees to which we resemble her and to which she resembles us. Is there a way of conceiving of the native beyond imagistic resemblance? This question is what prompts Spivak's bold and provocative statement, "The subaltern cannot speak."20 Because it seems to cast the native permanently in the form of a silent object, Spivak's statement foreseeably gives rise to pious defenses of the native as a voiced subject and leads many to jump on the bandwagon of declaring solidarity with "subalterns" of different kinds. Speaking sincerely of the multiple voices of the native woman thus, Benita Parry criticizes Spivak for assigning an absolute power to the imperialist discourse: Since the native woman is constructed within multiple social relationships and positioned as the product of different class, caste and cultural specificities, it should be possible to locate traces and testimony of women's voice on those sites where women inscribed themselves as healers, ascetics, singers of sacred songs, artisans and artists, and by this to modify Spivak's model of the silent subaltern.21 In contrast to Spivak, Parry supports Homi Bhabha's argument that since a discursive system is inevitably split in enunciation, the colonist's text itself already contains a native voice—ambivalently. The colonial text's "hybridity," to use Bhabha's word, means that the subaltern has spoken. 22 But what kind of an argument is it to say that the subaltern's "voice" can be found in the ambivalence of the imperialist's speech? It is an argument which ultimately makes it unnecessary to come to terms with the subaltern since she has already "spoken," as it were, in the system's gaps. All we would need to do would be to continue to study—to deconstruct—the rich and ambivalent language of the imperialist! What Bhabha's word "hybridity" revives, in the masquerade of deconstruction, anti imperialism, and "difficult" theory, is an old functionalist notion of what a dominant culture permits in the interest of maintaining its own equilibrium. Such functionalism informs the investigatory methods of classical anthropology and sociology as much as it does the colonial policies of the British Empire. The kind of subject constitution it allows, a subject constitution firmly inscribed in AngloAmerican liberal humanism, is the other side of the process of image identification, in which we try to make the native more like us by giving her a "voice." The charge of Spivak's essay, on the other hand, is a protest against the two sides of image identification, the two types of freedom the subaltern has been allowed— object formation and subject constitution—which would result either in the subaltern's protection (as object) from her own kind or her achievement as a voice assimilable to the project of imperialism. That is why Spivak concludes by challenging precisely the optimistic view that the subaltern has already spoken: "The subaltern cannot speak. There is no virtue in global laundry lists with 'woman' as a pious item."23 Instead, a radical alternative can be conceived only when we recognize the essential untranslatability from the subaltern discourse to imperialist discourse. Using JeanFrançois Lyotard's notion of the différend, which she explains as "the inaccessibility of, or untranslatability from, one mode of discourse in a dispute to another,"24 Spivak argues the impossibility of the subaltern's constitution in life. The subaltern cannot speak not because there are not activities in which we can locate a subaltern mode of life/culture/subjectivity, but because, as is indicated by the critique of thought and articulation given to us by Western intellectuals such as Lacan, Foucault, Barthes, Kristeva, and Derrida (Spivak's most important reference), "speaking" itself belongs to an already welldefined structure and history of domination. As she says in an interview: "If the subaltern can speak then, thank God, the subaltern is not a subaltern any more." 25 It is only when we acknowledge the fact that the subaltern cannot speak that we can begin to plot a different kind of process of identification for the native. It follows that, within Spivak's argument, it is a silent gesture on the part of a young Hindu woman, Bhuvaneswari Bhaduri, who committed suicide during her menstruation so that the suicide could not be interpreted as a case of illicit pregnancy, that becomes a telling instance of subaltern writing, a writing whose message is only understood retrospectively.26 As such, the "identity" of the native is inimitable, beyond the resemblance of the image. The type of identification offered by her silent space is what may be called symbolic identification. In the words of Slavoj Zizek: in imaginary identification we imitate the other at the level of resemblance—we identify ourselves with the image of the other inasmuch as we are 'like him', while in symbolic identification we identify ourselves with the other precisely at a point at which he is inimitable, at the point which eludes resemblance.27

### 1NC DA

**Deference high now- no courts will touch national security**

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Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive's position, it generally has done so on relatively narrow grounds.¶ Consider the Espionage Act cases that arose during World War I. Schenck v. United States, n63 which is best known for Justice Holmes's [\*452] announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant's having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." n64 The circumstances in which the speech took place affected the scope of First Amendment protection: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." n65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort n66 and of Eugene Debs for a speech denouncing the war. n67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States, n68 but only Justice Brandeis agreed with his position. n69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes's opinions for the Court in the earlier cases. n70¶ Similarly, the Supreme Court rejected challenges to the government's war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs. n71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts. n72 In addition, the Court upheld the validity of the Japanese internment program. n73 Of course, the Court did limit the scope of the [\*453] program by holding that it did not apply to "concededly loyal" citizens. n74 But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated. n75 Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees. n76¶ The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region. n77 The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, n78 but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone. n79 The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges. n80¶ The picture in the post-2001 era is less clear. In three different cases the Supreme Court has rejected the executive branch's position, but all of those rulings were narrow in scope. For example, Hamdi v. Rumsfeld n81 held that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to have a neutral decision-maker determine the factual basis for his detention. There was no majority opinion, however, so the implications of the ruling were ambiguous to say the least. Justice O'Connor's plurality opinion for four members of the Court concluded that Congress had authorized the president to detain enemy combatants by passing the Authorization for Use of Military Force n82 and that the AUMF satisfied the statutory requirement of congressional authorization for the detention of U.S. [\*454] citizens. n83 Justice Souter, joined by Justice Ginsburg, thought that the AUMF had not in fact authorized the detention of American citizens as required by the statute, n84 which suggested that Hamdi should be released. But the Court would have been deadlocked as to the remedy had he adhered to his view of how to proceed. This was because Justices Scalia and Stevens also believed that Hamdi's detention was unlawful and that he should be released on habeas corpus, n85 whereas Justice Thomas thought that the executive branch had acted within its authority and therefore would have denied relief. n86 This alignment left four justices in favor of a remand for more formal proceedings, four other justices in favor of releasing Hamdi, and one justice supporting the government's detention of Hamdi with no need for a more elaborate hearing. To avoid a deadlock, therefore, Justice Souter reluctantly joined the plurality's remand order. n87¶ Hamdi was atypical because that case involved a U.S. citizen who was detained. The vast majority of detainees have been foreign nationals. In Hamdan v. Rumsfeld, n88 the Supreme Court ruled that the military commissions that the executive branch had established in the wake of the September 11 attacks had not been authorized by Congress and therefore could not be used to try detainees. n89 A concurring opinion made clear that the president could seek authorization from Congress to use the type of military commissions that had been established unilaterally in this case. n90¶ Congress responded to that suggestion by enacting the Military Commissions Act of 2006, n91 which sought to endorse the executive's detainee policies and to restrict judicial review of detainee cases. In Boumediene v. Bush, n92 the Supreme Court again rejected the government's position. First, the statute did not suspend the writ of [\*455] habeas corpus. n93 Second, the statutory procedures for hearing cases involving detainees were constitutionally inadequate. n94 At the same time, the Court emphasized that the judiciary should afford some deference to the executive branch in dealing with the dangers of terrorism n95 and should respect the congressional decision to consolidate judicial review of detainee cases in the District of Columbia Circuit. n96¶ Detainees who have litigated in the lower federal courts in the District of Columbia have not found a sympathetic forum. The U.S. Court of Appeals for the D.C. Circuit has not upheld a single district court ruling that granted any sort of relief to detainees, and the Supreme Court has denied certiorari in every post-Boumediene detainee case in which review was sought. n97 In only one case involving a detainee has the D.C. Circuit granted relief, and that case came up from a military commission following procedural changes adopted in the wake of Boumediene. n98 About a month after this symposium took place, in Hamdan v. United States n99 the court overturned a conviction for providing material support for terrorism. The defendant was the same person who successfully challenged the original military commissions in Hamdan v. Rumsfeld. n100 This very recent ruling emphasized that the statute under which he was prosecuted did not apply to offenses committed before its enactment. n101 It remains to be seen how broadly the decision will apply. [\*456] ¶ Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In Arar v. Ashcroft, n102 the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. n103 And in Mohamed v. Jeppesen Dataplan, Inc., n104 the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. n105 Unlike Arar, in which the defendants were federal officials, n106 this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. n107 Although at least four judges on the en banc courts dissented from both rulings, n108 the Supreme Court declined to review either case. n109

**The plan’s restrictions inhibit decisive indefinite detention action—that’s key to effective ops**

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Reading the tea leaves of judicial dicta may be fraught with difficulty, but one certainly discerns from these pragmatic guidelines a view that the Executive should be accorded reasonable deference in matters of preventive detention. This deference is strongest during the early phases of detention, when facts are unclear, when the risks of release are acute, and the dangers of substituting a judicial judgment for that of the military or the Commander-in-Chief is greatest. If the Government learns that al-Qaeda operatives have invaded the U.S. bent on detonating explosives near chemical-laden rail cars, the overwhelming national effort must be directed toward destroying or detaining those forces intent on harming the country. This is not the time for Miranda and presentment but for concerted, decisive action bounded by the law of war. Every instrument of national power must be brought to bear, both military and civilian. If it makes the most sense for the FBI to detain someone, they should do so. If the military has the most information and can most quickly and effectively detain and interrogate, then consistent with military regulations, they should do so.¶ The process of understanding the depth and breadth of the danger, connecting the web of those involved, determining the possibility of future attacks takes time. It remains essential to afford the Commander-in-Chief adequate time and decision space to maximize the opportunity to defeat the threat and prevent future attacks.That is why the NDAA imposes no temporal limits, why it avoids geographic restrictions and why it grants no special protections to citizens who take up arms with the enemy. As Hamdan and Boumerdiene make clear, there are limits to the Court's deference. The more time that passes, the greater the consequences of an erroneous deprivation of liberty and the greater the risk of not affording someone a reasonable opportunity to challenge the basis for their detention. If there is consensus on the matter of process in preventive detention, it appears to mean reasonable deference followed by increased scrutiny with the passage of time. It means judicial review bounded by pragmatism, and it means balancing very real security concerns against the need to protect individuals from arbitrary deprivation of liberty.

**Reforms result in catastrophic terrorism---releases them and kills intel gathering**

Jack Goldsmith 09, Henry L. Shattuck Professor at Harvard Law School, 2/4/09, “Long-Term Terrorist Detention and Our National Security Court,” http://www.brookings.edu/~/media/research/files/papers/2009/2/09%20detention%20goldsmith/0209\_detention\_goldsmith.pdf

These three concerns challenge the detention paradigm. They do nothing to eliminate the need for detention to prevent detainees returning to the battlefield. But many believe that we can meet this need by giving trials to everyone we want to detain and then incarcerating them under a theory of conviction rather than of military detention. I disagree. For many reasons, it is too risky for the U.S. government to deny itself the traditional military detention power altogether, and to commit itself instead to try or release every suspected terrorist. ¶ For one thing, military detention will be necessary in Iraq and Afghanistan for the foreseeable future. For another, we likely cannot secure convictions of all of the dangerous terrorists at Guantánamo, much less all future dangerous terrorists, who legitimately qualify for non-criminal military detention. The evidentiary and procedural standards of trials, civilian and military alike, are much higher than the analogous standards for detention. With some terrorists too menacing to set free, the standards will prove difficult to satisfy. Key evidence in a given case may come from overseas and verifying it, understanding its provenance, or establishing its chain of custody in the manners required by criminal trials may be difficult. This problem is exacerbated when evidence was gathered on a battlefield or during an armed skirmish. The problem only grows when the evidence is old. And perhaps most importantly, the use of such evidence in a criminal process may compromise intelligence sources and methods, requiring the disclosure of the identities of confidential sources or the nature of intelligence-gathering techniques, such as a sophisticated electronic interception capability. ¶ Opponents of non-criminal detention observe that despite these considerations, the government has successfully prosecuted some Al Qaeda terrorists—in particular, Zacharias Moussaoui and Jose Padilla. This is true, but it does not follow that prosecutions are achievable in every case in which disabling a terrorist suspect represents a surpassing government interest. Moreover, the Moussaoui and Padilla prosecutions highlight an under-appreciated cost of trials, at least in civilian courts. The Moussaoui and Padilla trials were messy affairs that stretched, and some observers believe broke, our ordinary criminal trial conceptions of conspiracy law and the rights of the accused, among other things. The Moussaoui trial, for example, watered down the important constitutional right of the defendant to confront witnesses against him in court, and the Padilla trial rested on an unprecedentedly broad conception of conspiracy.15 An important but under-appreciated cost of using trials in all cases is that these prosecutions will invariably bend the law in ways unfavorable to civil liberties and due process, and these changes, in turn, will invariably spill over into non-terrorist prosecutions and thus skew the larger criminal justice process.16¶ A final problem with using any trial system, civilian or military, as the sole lawful basis for terrorist detention is that the trials can result in short sentences (as the first military commission trial did) or even acquittal of a dangerous terrorist.17 In criminal trials, guilty defendants often go free because of legal technicalities, government inability to introduce probative evidence, and other factors beyond the defendant's innocence. These factors are all exacerbated in terrorist trials by the difficulties of getting information from the place of capture, by classified information restrictions, and by stale or tainted evidence. One way to get around this problem is to assert the authority, as the Bush administration did, to use non-criminal detention for persons acquitted or given sentences too short to neutralize the danger they pose. But such an authority would undermine the whole purpose of trials and would render them a sham. As a result, putting a suspect on trial can make it hard to detain terrorists the government deems dangerous. For example, the government would have had little trouble defending the indefinite detention of Salim Hamdan, Osama Bin Laden's driver, under a military detention rationale. Having put him on trial before a military commission, however, it was stuck with the light sentence that Hamdan is completing at home in Yemen.¶ As a result of these considerations, insistence on the exclusive use of criminal trials and the elimination of non-criminal detention would significantly raise the chances of releasing dangerous terrorists who would return to kill Americans or others. Since noncriminal military detention is clearly a legally available option—at least if it is expressly authorized by Congress and contains adequate procedural guarantees—this risk should be unacceptable. In past military conflicts, the release of an enemy soldier posed risks. But they were not dramatic risks, for there was only so much damage a lone actor or small group of individuals could do.18 Today, however, that lone actor can cause far more destruction and mayhem because technological advances are creating ever-smaller and ever-deadlier weapons. It would be astounding if the American system, before the advent of modern terrorism, struck the balance between security and liberty in a manner that precisely reflected the new threats posed by asymmetric warfare. We face threats from individuals today that are of a different magnitude than threats by individuals in the past; having government authorities that reflect that change makes sense.

**Collapse of deference causes global wars**

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Whatever the doctrinal formulation, the basic distinction between the two views is that our view counsels courts to provide high deference during emergencies, as courts have actually done, whereas the civil libertarian view does not. During normal times, the deferential view and the civil libertarian view permit the same kinds of executive action, and during war or other emergencies, the deferential view permits more kinds of executive action than the civil libertarian view does. We assume that courts have historically provided extra deference during an emergency or war because they believe that deference enables the government, especially the executive, to act quickly and decisively. Although deference also permits the government to violate rights, violations that are intolerable during normal times become tolerable when the stakes are higher. Civil libertarians, on the other hand, claim either that government action is likely to be worse during emergencies than during normal times, or at least that no extra deference should be afforded to government decisionmaking in times of emergency-and that therefore the deferential position that judges have historically taken in emergencies is a mistake.

The deferential view does not rest on a conceptual claim; it rests on a claim about relative institutional competence and about the comparative statics of governmental and judicial performance across emergencies and normal times. In emergencies, the ordinary life of the nation, and the bureaucratic and legal routines that have been developed in ordinary times, are disrupted. In the case of wars, including the "war on terror," the government and the public are not aware of a threat to national security at time 0. At time 1, an invasion or declaration of war by a foreign power reveals the existence of the threat and may at the same time cause substantial losses. At time 2, an emergency response is undertaken.

Several characteristics of the emergency are worthy of note. First, the threat reduces the social pie-both immediately, to the extent that it is manifested in an attack, and prospectively, to the extent that it reveals that the threatened nation will incur further damage unless it takes costly defensive measures. Second, the defensive measures can be more or less effective. Ideally, the government chooses the least costly means of defusing the threat; typically, this will be some combination of military engagement overseas, increased intelligence gathering, and enhanced policing at home. Third, the defensive measures must be taken quickly, and-because every national threat is unique, unlike ordinary crime-the defensive measures will be extremely hard to evaluate. There are standard ways of preventing and investigating street crime, spouse abuse, child pornography, and the like; and within a range, these ways are constant across jurisdictions and even nation-states. Thus, there is always a template that one can use to evaluate ordinary policing. By contrast, emergency threats vary in their type and magnitude and across jurisdictions, depending heavily on the geopolitical position of the state in question. Thus, there is no general template that can be used for evaluating the government's response.

In emergencies, then, judges are at sea, even more so than are executive officials. The novelty of the threats and of the necessary responses makes judicial routines and evolved legal rules seem inapposite, even obstructive. There is a premium on the executive's capacities for swift, vigorous, and secretive action. Of course, the judges know that executive action may rest on irrational assumptions, or bad motivations, or may otherwise be misguided. But this knowledge is largely useless to the judges, because they cannot sort good executive action from bad, and they know that the delay produced by judicial review is costly in itself. In emergencies, the judges have no sensible alternative but to defer heavily to executive action, and the judges know this.

**Extinction**

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And while Obama plans to dedicate his efforts to the domestic agenda, a number of brewing international crises are sure to steal his attention and demand his time. Here are a few of the foreign policy issues that, like it or not, may force Obama to divert his focus from domestic concerns in this new term.¶ Syria unraveling: The United Nations says more than 60,000 people have already died in [a civil war t](http://www.cnn.com/2013/01/02/world/meast/syria-civil-war/index.html)hat the West has, to its shame, done little to keep from spinning out of control. Washington[has warned](http://www.nytimes.com/2012/12/04/world/middleeast/nato-prepares-missile-defenses-for-turkey.html?_r=0) that the use of chemical or biological weapons might force its hand. But the regime [may have already used them](http://www.reuters.com/article/2013/01/19/us-syria-chemical-newspaper-idUSBRE90I0JV20130119). The West has failed to nurture a moderate force in the conflict. Now Islamist extremists are growing [more powerful](http://www.al-monitor.com/pulse/originals/2013/01/fighter-syria-aleppo-turkey.html) within the opposition. The chances are growing that worst-case scenarios will materialize. Washington will not be able to endlessly ignore this dangerous war.¶ Egypt and the challenge of democracy: What happens in Egypt strongly influences the rest of the Middle East -- and hence world peace -- which makes it all the more troubling to see liberal democratic forces lose battle after battle for political influence against Islamist parties, and to hear blatantly [anti-Semitic speech](http://www.nytimes.com/2013/01/15/world/middleeast/egypts-leader-morsi-made-anti-jewish-slurs.html) coming from the mouth of Mohammed Morsy barely two years before he became president.¶ Iran's nuclear program: Obama took office promising a new, more conciliatory effort to persuade Iran to drop its nuclear enrichment program. Four years later, he has succeeded in implementing international sanctions, but Iran has continued enriching uranium, leading [United Nations inspectors](http://news.yahoo.com/un-credible-evidence-iran-working-nuke-weapons-153544271.html) to find "credible evidence" that Tehran is working on nuclear weapons. Sooner or later the moment of truth will arrive. If a deal is not reached, Obama will have to decide if he wants to be the president on whose watch a nuclear weapons race was unleashed in the most dangerous and unstable part of the world.¶ North Africa terrorism: A much-neglected region of the world is becoming increasingly difficult to disregard. In recent days, [Islamist extremists](http://edition.cnn.com/2013/01/18/opinion/ghitis-algeria-hostage-crisis/index.html?hpt=op_t1) took American and other hostages in Algeria and France sent its military to fight advancing Islamist extremists in Mali, a country that once represented optimism for democratic rule in Africa, now overtaken by militants who are potentially turning it into a staging ground for international terrorism.¶ Russia repression: As Russian President Vladimir Putin succeeds in [crushing opposition](http://www.france24.com/en/20121027-russian-opposition-leaders-detained-protest-navalny-udaltsov-vladimir-putin) to his [increasingly authoritarian](http://www.freedomhouse.org/report/freedom-world/2013/russia)rule, he and his allies are making anti-American words and policies their favorite theme. A recent ban on adoption of Russian orphans by American parents is only the most vile example. But Washington needs Russian cooperation to achieve its goals at the U.N. regarding Iran, Syria and other matters. It is a complicated problem with which Obama will have to wrestle.¶ Then there are the long-standing challenges that could take a turn for the worse, such as the Israeli-Palestinian conflict. Obama may not want to wade into that morass again, but events may force his hand.¶ And there are the so-called "black swans," events of low probability and high impact. [There is talk](http://www.economist.com/news/asia/21569757-armed-clashes-over-trivial-specks-east-china-sea-loom-closer-drums-war) that China and Japan could go to war over a cluster of disputed islands.¶ A war between two of the world's largest economies could prove devastating to the global economy, just as a sudden and dramatic reversal in the fragile Eurozone economy could spell disaster. Japan's is only the hottest of many territorial disputes between China and its Asian neighbors. Then there's North Korea with its nuclear weapons.¶ We could see regions that have garnered little attention come back to the forefront, such as Latin America, where conflict could arise in a post-Hugo Chavez Venezuela.¶ The president -- and the country -- could also benefit from unexpectedly positive outcomes. Imagine a happy turn of events in Iran, a breakthrough between Israelis and Palestinians, the return of prosperity in Europe, a successful push by liberal democratic forces in the Arab uprising countries, which could create new opportunities, lowering risks around the world, easing trade, restoring confidence and improving the chances for the very agenda Obama described in his inaugural speech.¶ The aspirations he expressed for America are the ones he should express for our tumultuous planet. Perhaps in his next big speech, the State of the Union, he can remember America's leadership position and devote more attention to those around the world who see it as a source of inspiration and encouragement.¶ After all, in this second term Obama will not be able to devote as small a portion of his attention to foreign policy as he did during his inaugural speech.¶ International disengagement is not an option. As others before Obama have discovered, history has a habit of toying with the best laid, most well-intentioned plans of American presidents.

### 1NC Solvency

**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

**Restrictions cause showdowns – collapses SOP**

Posner & Vermeule 7—Professor of Law @ The University of Chicago & Professor of Law @ Harvard Law School [Eric A. Posner & Adrian Vermeule, “Constitutional Showdown,” University of Chicago Law School, John M. Olin Law & Economics Working Paper NO. 348, July 2007, pg. http://ssrn.com/abstract\_id=1002996]

So far, we have explained why the president and Congress might disagree about when to terminate the war, but mere policy disagreement does not result in a showdown. Showdowns arise only when there is a disagreement about authority. If Congress believes that the president has the sole authority to terminate the war, then his view will prevail. Congress may try to pressure him or influence him by offering support for other programs desired by the president, or by trying to rile up the public, but these activities are part of normal politics, and do not provoke a constitutional showdown. Similarly, if the president believes that Congress has the sole authority to terminate the war, then Congress’s view will prevail. This outcome is shown in cell (3) in Table 1. Similarly, no showdown occurs when the two branches agree both about authority and policy—for example, that the president decides, and Congress agrees with his decision (cell (1)). The first column represents the domain of normal politics.

Showdowns can arise only when Congress and the president disagree about who decides. Here, there are two further possibilities. First, Congress and the president disagree about who decides but agree about the correct policy outcome (cell (2)). In these situations, which arise with some frequency, the two branches are often tempted to paper over their differences because an immediate policy choice is not at stake. But sometimes a showdown will occur. We will discuss this special case in Part II.B. Second, Congress and the president disagree about the policy outcome and about authority (cell (4)). In this case, showdowns are likely, because a policy decision must be made, and if the parties cannot agree about what it should be, then they cannot avoid resolving the question of authority. We focus on this case for now.

Why showdowns occur. In our war example, Congress and the president disagree about when the war should end, and who should make the decision. Let us suppose that they can both make reasonable constitutional arguments, and that the judiciary will not step in to resolve the dispute. What happens next? If each branch asserts its power, we have a full-blown constitutional crisis. No ordinary political or legal means exists for resolving the dispute. Consider how this crisis might play out. One possibility is that Congress enacts a law declaring the war at an end, and the president directs the military to disobey the law. The military would need to decide whether to obey the president or Congress. The military might make this decision on the basis of a good-faith legal analysis, or it might not. Whether or not it does, there is a further question whether soldiers would obey the decisions of the generals, and the public would support the decisions of the soldiers. The soldiers might fear that if the generals take an unlawful stance, the soldiers might subsequently be found guilty of committing crimes. And even if they do not, they might fear that the public might fault them for obeying (or disobeying) the generals. A great deal of delay and paralysis could result as people decide for themselves what they ought to do. But eventually only two outcomes are possible. One is that the nation divides into factions and a civil war erupts—a real possibility in many countries, but one sufficiently remote in the United States today that we can safely ignore it. The other is that through the mysterious process by which public opinion forms, the public will throw its weight behind one branch or the other, and the branch that receives public support will prevail. Pg. 14-15

**Winning the showdown encourages aggrandizement. It will expand the President’s authority**

Posner & Vermeule 07—Professor of Law @ The University of Chicago & Professor of Law @ Harvard Law School [Eric A. Posner & Adrian Vermeule, “Constitutional Showdown,” University of Chicago Law School, John M. Olin Law & Economics Working Paper NO. 348, July 2007, pg. http://ssrn.com/abstract\_id=1002996

Showdowns and aggrandizement. It is difficult to give evidence that showdowns can produce (not just prevent) aggrandizement, because there is no consensus on a normative benchmark. However, it can be shown, more narrowly, that relative to a wide range of such benchmarks, aggrandizing showdowns occur. Commentators who have very different accounts of the optimal distribution of powers across institutions have in common the belief that, relative to their own preferred accounts of the optimal distribution of powers, showdowns have produced aggrandizement. Consider Robert Bork’s view that the Supreme Court’s power grew alarmingly after it largely prevailed in the criminal-procedure showdowns of the 1960s, while Richard Epstein holds that the power of the President and Congress grew alarmingly when they prevailed over the Old Court in the constitutional showdowns of the later 1930s. Bork and Epstein have very different views about the optimal distribution of powers, but both agree that the showdowns to which they point produced a maldistribution of powers relative to their preferred benchmarks. Pg. 50-51

**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.

**Plan causes Comstock for terrorists – Guts solvency**

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

Article III trials, therefore, seem to offer the greatest protection against arbitrary and indefinite detention. Regardless what process the courts followed, alleged terrorists would still receive a sentence matching the crime for which they were convicted. But a recent Supreme Court decision and a proposed rule from the Bureau of Prisons cast doubt on whether Article III trials—and, more importantly, Article III sentences—will continue to protect against indefinite detention.

The Supreme Court's ruling in United States v. Comstock sets a disturbing precedent for terrorist-detainees. 89 Comstock involved sentencing issues for sex offenders, a topic seemingly unrelated to terrorism. Yet the Court held that Congress may use its Necessary and Proper Clause powers to permanently detain dangerous sex offenders if they appear to pose a threat to the surrounding community upon release." That Congress may order the civil commitment of dangerous prisoners after completing their sentences sets the stage for transplanting an indefinite detention regime into the criminal sphere. The possibility that this reasoning would or could be extended to cover terrorists subject to Article III criminal sentencing is far from remote. Indeed, many commentators noticed instantly Comstock's potential impact on terror connected inmates.91

The statute at issue in Comstock authorizes a court to civilly commit a soon-to-be-released prisoner if he (1) previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) "suffers from a serious mental illness, abnormality, or disorder," and (3) as a result of the disorder, remains "sexually dangerous to others" such that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 92 If a court finds all of these factors, it may commit the prisoner to the Attorney General's custody, who must make "all reasonable efforts" to return the prisoner to the state in which he was tried or in which he is domiciled.9 3 If the Attorney General is unsuccessful in this endeavor, the prisoner is sent to a federal treatment facility and remains there until he is no longer dangerous.94

By its terms, this statute applies to sex criminals, not terrorists.

Nevertheless, this opinion, which garnered the support of seven justices, clears away any foreseeable barriers to Congress issuing a similar statute aimed at terrorists. After Comstock, Congress may authorize the Attorney General to detain "dangerous" criminals in perpetuity after the termination of their sentences under its Necessary and Proper Clause powers. A statute codifying that notion would alter terrorism prosecutions radically. Pg. 24

**Turns case**

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

The combination of Comstock and the CMU regulations resembles a legally sanctioned Guantanamo-type detention regime set up lawfully within the United States. Suspected terrorists can be held in highly monitored and austere containment, indefinitely. This not only mirrors the military tribunal detention system, but in many ways, exacerbates its perceived infirmities. For, although the Obama Administration has acknowledged that it will indefinitely detain some terrorists even after they complete their tribunal-imposed sentences, 119 the range of those persons implicated by military tribunals is much smaller than the reach of Comstock and the CMU regulations. 12 The Government has conceded that the Authorization for Use of Military Force permits Executive (AUMF) detention only of non-citizen enemy combatants and unprivileged belligerents. 12 ' Thus, the biggest single exception to the Executive's broad military detention authority had been American citizens, precluded from military commission jurisdiction.2 2 Diplomatic concerns had further barred full tribunal trials for British, Australian, and Canadian citizens.12 Since a growing number of recent terror suspects have been American or British, 24 it appeared that indefinite and segregated Executive detention would have limited future application. But neither Comstock nor the CMU regulation is so limited: both would apply fully to American and foreign citizens alike. And because a criminal's offense conduct, which cannot be changed, serves as the underlying justification for Comstock and CMU detention, both have the capacity to last indefinitely.125 pg. 28

**Restricting detention creates a perverse incentive for drone use—that’s worse and flips any legitimacy advantage**

Gartenstein-Ross 12—Daveed Gartenstein-Ross, J.D. from NYU School of Law, is the Director of the Center for the Study of Terrorist Radicalization at the Foundation for Defense of Democracies, a Washington-based think tank. He frequently consults on counter-terrorism for various government agencies as well as the private sector [Dec 4 2012, “Gitmo's Troubling Afterlife: The Global Consequences of U.S. Detention Policy,” http://www.theatlantic.com/international/archive/2012/12/gitmos-troubling-afterlife-the-global-consequences-of-us-detention-policy/265862/]

One option, of course, is ending preventive detention entirely, which is favored by many of Obama's critics on the left. But that carries second-order consequences of its own, since al Qaeda has not ended its fight against the United States, nor is the broader problem of violent non-state actors going to disappear. If the U.S. doesn't employ preventive detention, doesn't this create a perverse incentive for killing rather than capturing the opponent? As Wittes writes, "The increasing prevalence of kill operations rather than captures is probably not altogether unrelated to the fundamental change in the incentive structure facing our fighters and covert operatives."

Moreover, if the U.S. tries to wash its hands of preventive detention, detainees will almost certainly end up in worse conditions as a result. The idea has seemingly taken hold that because detention of violent non-state actors by Western governments is unjustifiable and immoral, "local" detention is preferable. So, for example, the United States supported recent military efforts by African Union, Somali, and Ke

nyan forces to push back the al Qaeda-aligned Shabaab militant group in southern Somalia. The U.S. did not take the lead in detaining enemy fighters, and instead its Somali allies did so. But when one compares, say, detention conditions in Somalia to those in Gitmo, the latter is far more humane. If the U.S. and other Western countries eschew detention when fighting violent non-state actors, somebody is going to have to do it, and that alternative is almost certainly going to be worse for the detainees themselves.

What these second-order consequences point to is the fact that reform of U.S. detention policy is more vital than moving detainees to other facilities. William Lietzau, the deputy assistant secretary of defense for rule of law and detainee policy, has told me that the detention of violent non-state actors is an unsettled area of law. To Lietzau, defined and developed rules govern the prosecution of criminals, while the Geneva Conventions govern detention of privileged belligerents under the law of war. But for unprivileged belligerents, such as violent non-state actors, the applicable law is largely undefined. Lietzau has even designed a chart, which has become famous among his colleagues, illustrating the law's lack of development.

This is not to say that moving detainees from Guantánamo to the continental United States is necessarily a bad idea. One could argue that removing that symbol is important. Further, in the long run, moving the detainees may actually save money, since everything at Gitmo, from food to construction materials, must be imported at high cost. But the location of the detention does not address any substantive concerns.

Though it will not be easy, working with partners like the International Committee of the Red Cross to forge a better set of principles and procedures governing the detention of unprivileged belligerents is far more important than moving the Gitmo detainees elsewhere. Put simply, violent non-state actors will continue to challenge the nation-state, so nation-states need a way to deal with detention in this context. Our current policy of pretending that we have moved past noncriminal detention all but ensures we will be caught flat-footed the next time such detention is necessary in a large scale, and thus that the problems inherent to detaining unprivileged belligerents will have gone unaddressed.

### 1NC Solvency – Trials

**Trials will just become Kangaroo Courts that facilitate indefinite detention**

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

V. CONCLUSION

The pressure to convict "dangerous" terrorists against a backdrop of a decade-long war has taken its toll on the federal courts. Rather than vindicating the accused's constitutional rights in all circumstances, the federal courts have too often become complicit in distorting them.179 Federal courts have begun to resemble the military tribunal system that was once defined by how distinct it was from the Article III system. The past decade has seen federal courts' power to review executive detention heavily circumscribed. Federal prisons have begun to approximate Guantinamo Bay's indefinite detention regime, and federal criminal trial proceedings of terrorists at times bear an eerie resemblance to military commission norms.

As much as one may endorse the apparent move from military commissions to federal courts, that move should be rejected if it comes at the cost of scarring the Article III system. Therefore, both those in favor of military commissions and those in favor of federal court trials should pause. Regardless of whether it may be desirable that the criminal justice system has the flexibility to adjust to these wartime conditions, these developments have eviscerated the largest disparities between the tribunal and criminal spheres. Even persons in favor of a separate judicial system in the form of tribunals no longer have much justification for such a proposal.

Wars invariably have a corrosive effect on democratic institutions. 180 Courts are no different. Perhaps, as some have suggested, the solution would be to remove courts from the fast-paced business of trying terror with a common law process.18' However, that solution is too simplistic. It is apparent that, no matter where terrorists are tried, our societal fear of the threat they pose has led us to create mirror-image systems that tend toward kangaroo courts, state secrets, prolonged interrogation, and indefinite detention. Until we confront and deal with this inclination, any system in which we try terrorists is doomed to repeat these errors. Pg. 37-38

**Courts will give in to wartime pressures. Seepage will create bad law for nonterror cases**

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

Wars have a corrosive effect on courts. Many of the darkest moments in federal jurisprudential history have resulted from wartime cases. This is because, "[in an idealized view, our judicial system is insulated from the ribald passions of politics. [But] in reality, those passions suffuse the criminal justice system."26 Wars especially tend to excite passions to a fever pitch. As the D.C. Circuit has lamented,

[t]he common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple. None of those factors exist in the Guantinamo context .... [11n the midst of an ongoing war, time to entertain a process of trial and error is not a luxury we have.27

The war in Afghanistan, presenting a host of thorny legal issues, 28 is now the longest war in United States history.29 This means that thefederal courts have never endured wartime conditions for so long. As a result of this prolonged martial influence, it is clear that this war is corroding federal court jurisprudence. Court-watchers have long feared the danger of "seepage"—the notion that, if terrorists were tried in Article III courts, the pressure to convict would spur the creation of bad law that would "seep" into future non-terror trials."g In this Note, I argue that this hypothetical fear of seepage has become concrete. Indeed, judges already admit that the war has taken a regrettable toll on courts' opinions. In Al-Bihani v. Obama g1 a recent D.C. Circuit decision about Guantdnamo detention, habeas corpus review, and criminal procedure, the opinion's author admits how the courts have bent to accommodate the pressures of war:

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedures, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.32 pg. 13-14

**They rollback due process rights for all cases**

Mukasey 7—US district judge [MICHAEL B. MUKASEY, “Jose Padilla Makes Bad Law,” Wall Street Journal, August 22, 2007, pg. http://tinyurl.com/lmhup5x]

And third, consider the distortions that arise from applying to national security cases generally the rules that apply to ordinary criminal cases.

On one end of the spectrum, the rules that apply to routine criminals who pursue finite goals are skewed, and properly so, to assure that only the highest level of proof will result in a conviction. But those rules do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means.

Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, is said to have told his American captors that he wanted a lawyer and would see them in court. If the Supreme Court rules -- in a case it has agreed to hear relating to Guantanamo detainees -- that foreigners in U.S. custody enjoy the protection of our Constitution regardless of the place or circumstances of their apprehension, this bold joke could become a reality.

The director of an organization purporting to protect constitutional rights has announced that his goal is to unleash a flood of lawyers on Guantanamo so as to paralyze interrogation of detainees. Perhaps it bears mention that one unintended outcome of a Supreme Court ruling exercising jurisdiction over Guantanamo detainees may be that, in the future, capture of terrorism suspects will be forgone in favor of killing them. Or they may be put in the custody of other countries like Egypt or Pakistan that are famously not squeamish in their approach to interrogation -- a practice, known as rendition, followed during the Clinton administration.

At the other end of the spectrum, if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.

### 1NC Solvency – Critique

**Their fetishization for ‘rethinking’ overwhelms solvency—the entire reason they employ these shifty strategies is to critique, critique, critique, and avoid the material difficulties of change. The aff begets more ‘thinking’**

Bryant 12 (Levi Bryant, teaches philosophy at Collin College, “RSI, Discursivity, Critique, and Politics,” Larval Subjects, 7/18/2012, <http://larvalsubjects.wordpress.com/2012/07/18/rsi-discursivity-critique-and-politics/>)

If I get worked up about these issues, then this is because I think they’ve created serious lacuna in our political theory and practice. Suppose I focus on norms, for example. Great, I’ve developed a theory of norms and how they contribute to the social fabric. Yet while Kant claims that “ought implies can”, I’m not so sure. You’ve shown that something is unjust or that this would be the reasonable way to proceed. But at the real-material level people are caught in sticky networks that suck them into life in particular ways. They ought, for example, to drive an electric car, but what if it’s not available where they are or what if they can’t afford it? Well they should do whatever they can to get it? But what of their other obligations such as eating, sheltering themselves, taking care of their children, paying their medical bills, etc? It would be so nice if we just had mistaken beliefs or failed to recognize the right norms. Things would be so easy then. But there’s life, there’s the power of things. Sometimes the issues aren’t ones of ideology– and yes, of course, I recognize that ideology is probably involved in making electric cars expensive and hard to obtain, but not for them always –sometimes they’re simply issues of the power of things. And if we treat things as blank screens we’ll have difficulty seeing this and we’ll miss out on other opportunities for engagement. Long ago I used to keep track of my blog. I had a map that showed me where all my visits were coming from about the world. I noticed that the interior portions of the United States were largely dark with no visits and that the coasts and cities had a high volume of traffic. Given that my blog talks about all sorts of things ranging from weather patterns to beavers to mantis shrimps to octopi (I get all these random visits from folks searching for these things), it followed that the absence of traffic from these regions of the country couldn’t be explained in terms of a lack of interest in French and continental philosophy (yes, I recognize that there are also cultural reasons folks from these reasons might shy away from such things). What then was it? I think the answer must be that there’s a lack easy and inexpensive internet access from these portions of the country. Notice also that these regions of the country are also the most conservative regions of the country. Could there be a relation between lack of access and conservatism? I am not suggesting that lack of access is the cause of conservatism and fundamentalism. Clearly there’s a whole history in these regions and an entire set of institutions that exercise a particular inertia. I’m saying that if the only voices you hear are those in your immediate community, how much opportunity is there to think and imagine otherwise? You’re only exposed to the orthodoxy of your community and their sanctions. I am also not saying that if you give people the internet they’ll suddenly become radical leftists. Minimally, however, they’ll have a vector of deterritorialization that allows them to escape the constraints of their local social field. All of this begs the question of who critique is for. If it can’t get to the audience that you want to change, what’s it actually doing? Who’s it addressed to? Sometimes you get the sense that the practice of radical political philosophy and critical theory is a bit like the Underpants Gnomes depicted in South Park: The Underpants Gnomes have a plan for success: collect underwear —>; ? [question mark] —->; profit. This is like our critical theorists: debunk/decipher —>; ? [question mark] —->; revolution! The problem is the question mark. We’re never quite sure what’s supposed to come between collecting the underwear and profit, between debunking and revolution. This suggests an additional form of political engagement. Sometimes the more radical gesture is not to debunk and critique, but to find ways to lay fiber optic cables, roads, plumbing, etc. How, for example, can a people rise up and overturn their fundamentalist dictators if they’re suffering from typhoid and cholera as a result of bad plumbing and waste disposal? How can people overturn capitalism when they have to support families and need places to live and have no alternative? Perhaps, at this point, we need a little less critique and a little more analysis of the things that are keeping people in place, the sticky networks or regimes of attraction. Perhaps we need a little more carpentry. This has real theoretical consequences. For example, we can imagine someone writing about sovereignty, believing they’re making a blow against nationalism by critiquing Schmitt and by discussing Agamben, all the while ignoring media of communication or paths of relation between geographically diverse people as if these things were irrelevant to nationalism occurring. Ever read Anderson on print culture and nationalism? Such a person should. Yet they seem to believe nationalism is merely an incorporeal belief that requires no discussion of material channels or media. They thereby deny themselves of all sorts of modes of intervention, hitching everything on psychology, attachment, and identification. Well done!

**Abstracting <impact> as something out there which pervades all possible energy production conveniently justifies inaction. Read the aff as an autopoetic system, designed never to escape its comfy theoretical armchair, that pervades their ability to create progress.**

Bryant 12 (Levi Bryant, “McKenzie Wark: How Do You Occupy an Abstraction?” Larval Subjects, 8/4/2012, <http://larvalsubjects.wordpress.com/2012/08/04/mckenzie-wark-how-do-you-occupy-an-abstraction/> spelling errors fixed in brackets)

Here I’m also inclined to say that we need to be clear about system references in our political theorizing and action. We think a lot about the content of our political theorizing and positions, but I don’t think we think a lot about how our political theories are supposed to actually act in the world. As a result, much contemporary leftist political theory ends up in a performative contradiction. It claims, following Marx, that [its] aim is not to represent the world but to change it, yet it never escapes the burrows of academic journals, conferences, and presses to actually do so. Like the Rat-Man’s obsessional neurosis where his actions in returning the glasses were actually designed to fail, there seems to be a built in tendency in these forms of theorization to unconsciously organize their own failure. And here I can’t resist suggesting that this comes as no surprise given that, in Lacanian terms, the left is the position of the hysteric and as such has “a desire for an unsatisfied desire”. In such circumstances the worst thing consists in getting what you want. We on the left need to traverse our fantasy so as to avoid this sterile and self-defeating repetition; and this entails shifting from the position of political critique (hysterical protest), to political construction– actually envisioning and building alternatives. So what’s the issue with system-reference? The great autopoietic sociological systems theorist, Niklas Luhmann, makes this point nicely. For Luhmann, there are intra-systemic references and inter-systemic references. Intra-systemic references refer to processes that are strictly for the sake of reproducing or maintaining the system in question. Take the example of a cell. A cell, for-itself, is not for anything beyond itself. The processes that take place within the cell are simply for continuing the existence of the cell across time. While the cell might certainly emit various chemicals and hormones as a result of these processes, from its own intra-systemic perspective, it is not for the sake of affecting these other cells with those hormones. They’re simply by-products. Capitalism or economy is similar. Capitalists talk a good game about benefiting the rest of the world through the technologies they produce, the medicines they create (though usually it’s government and universities that invent these medicines), the jobs they create, etc., but really the sole aim of any corporation is identical to that of a cell: to endure through time or reproduce itself through the production of capital. This production of capital is not for anything and does not refer to anything outside itself. These operations of capital production are intra-systemic. By contrast, inter-systemic operations would refer to something outside the system and its auto-reproduction. They would be for something else. Luhmann argues that every autopoietic system has this sort of intra-systemic dimension. Autopoietic systems are, above all, organized around maintaining themselves or enduring. This raises serious questions about academic political theory. Academia is an autopoietic system. As an autopoietic system, it aims to endure, reproduce itself, etc. It must engage in operations or procedures from moment to moment to do so. These operations consist in the production of students that eventually become scholars or professors, the writing of articles, the giving of conferences, the production of books and classes, etc. All of these are operations through which the academic system maintains itself across time. The horrifying consequence of this is that the reasons we might give for why we do what we do might (and often) have little to do with what’s actually taking place in system continuance. We say that our articles are designed to demolish capital, inequality, sexism, homophobia, climate disaster, etc., but if we look at how this system actually functions we suspect that the references here are only intra-systemic, that they are only addressing the choir [of] other academics, that they are only about maintaining that system, and that they never proliferate through the broader world. Indeed, our very style is often a big fuck you to the rest of the world as it requires expert knowledge to be comprehended, thereby insuring that it can have no impact on broader collectives to produce change. Seen in this light, it becomes clear that our talk about changing the world is a sort of alibi, a sort of rationalization, for a very different set of operations that are taking place. Just as the capitalist says he’s trying to benefit the world, the academic tries to say he’s trying to change the world when all he’s really doing is maintaining a particular operationally closed autopoietic system. How to break this closure is a key question for any truly engaged political theory. And part of breaking that closure will entail eating some humble pie. Adam Kotsko wrote a wonderful and hilarious post on the absurdities of some political theorizing and its self-importance today. We’ve failed horribly with university politics and defending the humanities, yet in our holier-than-thou attitudes we call for a direct move to communism. Perhaps we need to reflect a bit on ourselves and our strategies and what political theory should be about. Setting all this aside, I think there’s a danger in Wark’s claims about abstraction (though I think he’s asking the right sort of question). The danger in treating hyperobjects like capitalism as being everywhere and nowhere is that our ability to act becomes paralyzed. As a materialist, I’m committed to the thesis that everything is ultimately material and requires some sort of material embodiment. If that’s true, it follows that there are points of purchase on every object, even where that object is a hyperobject. This is why, given the current form that power takes or the age of hyperobjects, I believe that forms of theory such as new materialism, object-oriented ontology, and actor-network theory are more important than ever (clearly the Whiteheadians are out as they see everything as internally related, as an organism, and therefore have no way of theorizing change and political engagement; they’re quasi-Hegelian, justifying even the discord in the world as a part of “god’s” selection and harmonization of intensities). The important thing to remember is that hyperobjects like capitalism are unable to function without a material base. They require highways, shipping routes, trains and railroads, fiber optic cables for communication, and a host of other things besides. Without what Shannon Mattern calls “infrastructure”, it’s impossible for this particular hyperobject exists. Every hyperobject requires its arteries. Information, markets, trade, require the paths along which they travel and capitalism as we know it today would not be possible without its paths. The problem with so much political theory today is that it focuses on the semiosphere in the form of ideologies, discourses, narratives, laws, etc., ignoring the arteries required for the semiosphere to exercise its power. For example, we get OWS standing in front of Wall Street protesting– engaging in a speech act –yet one wonders if speech is an adequate way of addressing the sort of system we exist in. Returning to system’s theory, is the system of capital based on individual decisions of bankers and CEO’s, or does the system itself have its own cognition, it’s own mode of action, that they’re ineluctably trapped in? Isn’t there a sort of humanist prejudice embodied in this form of political engagement? It has value in that it might create larger collectives of people to fight these intelligent aliens that live amongst us (markets, corporations, etc), but it doesn’t address these aliens themselves because it doesn’t even acknowledge their existence. What we need is a politics adequate to hyperobjects, and that is above all a politics that targets arteries. OOO, new materialism, and actor-network theory are often criticized for being “apolitical” by people who are fascinated with political declarations, who are obsessed with showing that your papers are in order, that you’ve chosen the right team, and that see critique and protest as the real mode of political engagement. But it is not clear what difference these theorists are making and how they are escaping intra-systemic self-reference and auto-reproduction. But the message of these orientations is “to the things themselves!”, “to the assemblages themselves!” “Quit your macho blather about where you stand, and actually map power and how it exercises itself!” And part of this re-orientation of politics, if it exists, consists in rendering deconstruction far more concrete. Deconstruction would no longer show merely the leaks in any system and its diacritical oppositions, it would go to the things themselves. What does that mean? It means that deconstruction would practice onto-cartography or identify the arteries by which capitalism perpetuates itself and find ways to block them. You want to topple the 1% and get their attention? Don’t stand in front of Wall Street and bitch at bankers and brokers, occupy a highway. Hack a satellite and shut down communications. Block a port. Erase data banks, etc. Block the arteries; block the paths that this hyperobject requires to sustain itself. This is the only way you will tilt the hands of power and create bargaining power with government organs of capital and corporations. You have to hit them where they live, in their arteries. Did anyone ever change their diet without being told that they would die? Your critique is an important and indispensable step, but if you really wish to produce change you need to find ways to create heart attacks and aneurysms. Short of that, your activity is just masturbation. But this requires coming to discern where the arteries are and doing a little less critique of cultural artifacts and ideologies. Yet choose your targets carefully. The problem with the Seattle protests was that they chose idiotic targets and simply acted on impotent rage. A window is not an artery. It doesn’t organize a flow of communication and capital. It’s the arteries that you need to locate. I guess this post will get Homeland Security after me.

**Their democratic pedagogy is weak localism in disguise, privileging feel-good ‘rethinking’ over radical materialism**

Katz 2k (Adam Katz, English Instructor at Onodaga Community College. 2000. Postmodernism and the Politics of “Culture.” Pg.189-190.)

With such contradictions, Dirlik’s concluding affirmation of a politics of dialogue, coalition building and Henry Giroux’s “border pedagogy” are, ultimately, evasions of the question of how to theorize resistance to globalization without an affirmation of the local and cultural. Now, at this point, perhaps some readers will ask whether all resistance is not, on some level, local. Doesn’t one resist a specific assault on someone’s rights or some collective set of living conditions or some crucial condition of democracy? Doesn’t a revolution always overthrow a single state? Leaving aside for now the way in which postmodern articulations of the global and local serve to avoid questions of the state and sovereignty, I would concede this point in its obvious, banal sense. The question is whether the logic of resistance, the materials of resistance, and the legitimacy of resistant practices can be found in the local, cultural site. This is what postmodern cultural studies, even more forcefully in its international phase, insists upon, and this is what I do deny. Resistance, in global capi­talism, is, in the first instance, only resistance in any meaningful sense in­sofar as it theorizes (and provides occasions for other theorizations of) the articulation of the interlocking economic, political, and ideological forms constitutive of the globe. The most productive way of theorizing the local in these terms is by pri­oritizing politics, as I suggested in the introduction and first chapter in particular, as a space of accountability to the conditions of openness that make politics possible in the first place; such an accountability situates any political action and space in relation to an outside—i.e., the theoreti­cal struggles that are implicated in politics, before which politics “ap­pears,” and that come to meet or address political actions. Such a politics must secure its conditions of possibility in the name of the level and modes of world-responsibility that contemporary social conditions re­quire. These conditions of possibility point in several directions: toward the economic, in the first case interference with and ultimately suppres­sion of the logic of capital and private property; toward the reciprocally constitutive political and theoretical principles themselves, engaging polit­ical action as instances of theory and practicing theory as clarification of the articulation of the political and the economic; and toward the outside, seeking not a neutral judge but a surfaced polemic aimed at making visi­ble the relevant economic/political/ideological articulation. So, there is, of course, a “direct” antagonist, but it exists as this articulation, in oppo­sition to which political action pursues a different articulation via ideol­ogy critique. In other words, an antilocalist politics starts with the recipro­cal clarification of principles, concepts, and globally situated antipolitical violence (manifested always ideologically) —not in some remainder where traditional, modern and postmodern, and local and global collide and de­construct each other.

**The war on terror has become PERMANENT because of our willingness to suspend law in a specific context for a security justification. Ending ID practices are NOT SUFFICIENT.**

Drumbl 04 (Mark A. Drumbl¶ Washington and Lee University School of Law, “'Lesser Evils' in the War on Terrorism”, 36 Case W. Res. J. Int'l L. 335 (2004). P. 336- 348)

Democracies need to be particularly vigilant about the duty of¶ adversarial justification, and willing, as the Israeli Supreme Court put it, to¶ train to win with one hand tied behind their backs. After seeing the slippery¶ slope that quickly arose once physical force was permitted in official¶ questioning, the Israeli Supreme Court ruled in 1999 that "shaking suspects¶ and confining them in chairs tipped forward in painful positions for long periods were violations of Israel's national and international commitments¶ against torture.''35 For Ignatieff, "liberal democratic regimes encourage a¶ kind of moral narcissism, a blinding belief that because this kind of society¶ authorizes such means, they must be acceptable." 36 He goes on to note that,¶ as a consequence of this moral narcissism, "democratic values . . . may¶ actually blind democratic agents to the moral reality of their actions. The¶ nobility of ends is no guarantee against resort to evil means; indeed, the¶ more noble they are, the more ruthlessness they can endorse."37 The threat¶ occasioned by our narcissism is precisely why legalism-and its¶ companion, namely open adversarial review-is so important, and should¶ remain so, in the struggle against terrorism. Our responses to threats and¶ attacks can do more damage than the threats and attacks themselves. This¶ too, forms part of the calculus of the apocalyptic mind of the terrorist¶ agenda. We need to guard against it.

The White House is wise to realize that the terrorist threat does differ¶ from the state-based threats that, at least initially, grounded modern¶ international law.38 But this argument cuts both ways. On the one hand, it¶ suggests some basis to rescript traditional legal categories and blur the¶ differences between criminals and enemies, war and defense, armed attacks¶ and criminal attacks, and prisoners and detainees. On the other hand, this¶ is not a war in any classic sense. Normally, war ends with a surrender,¶ occupation, and dismantling of the opposing forces. This cannot happen in¶ the case of the war on terrorism. So, this war could become never-ending¶ or ending perhaps only when a greater threat emerges from somewhere else¶ to which we much respond.39 But that means that the changes to the law¶ that seem necessary in the name of extraordinary national security concerns¶ could very well and very easily become ordinary and, thereby, permanent.¶ This suggests our societies require and deserve the dissensus and discussion¶ that our governments may wish to avoid.

# Round 4

## 1NC

### 1NC T

**Restrictions must be prohibitions**

**Their supervising terms OR conditions for acting don’t meet.**

COURT OF APPEALS 12 [STATE OF WASHINGTON DEPARTMENT OF HEALTH, THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I, RANDALL KINCHELOE Appellant. vs. Respondent, BRIEF OF APPELLANT, http://www.courts.wa.gov/content/Briefs/a01/686429%20Appellant%20Randall%20Kincheloe's.pdf]

3. The ordinary definition of the term "restrictions" also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation. Black's Law Dictionary, 'fifth edition,(1979) defines "restriction" as; A limitation often imposed in a deed or lease respecting the use to which the property may be put.

The term "restrict' is also cross referenced with the term "restrain." Restrain is defined as;

To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb.

**Vote Neg—Smaller predictable case list comes for Prohibitions only, and allowing modifications creates a bi-directional topic where they can IMPROVE war-fighting by the president.**

### 1NC DA

**Momentum preventing sanctions – Obama’s capital is key – bill would start a war with Iran**

WEBER 1 – 30 – 14 senior editor at TheWeek.com [Peter Weber, What sank the Senate's Iran sanctions bill? After Obama's State of the Union speech, it looks like Democrats are going to give peace a chance, after all, <http://theweek.com/article/index/255771/what-sank-the-senates-iran-sanctions-bill>]

In mid-January it appeared that a bipartisan Senate bill threatening Iran with new sanctions was a foregone conclusion. Yes, President Obama opposed the legislation and promised to veto it, but supporters of the Nuclear Weapon Free Iran Act strongly hinted that they had a veto-proof majority — and with 59 senators (43 Republicans and 16 Democrats) co-sponsoring the bill, that seemed eminently plausible.

They would only need eight more votes (and action in the House) to thwart Obama's veto pen, and momentum appeared to be on their side.

If there is any momentum on the bill now, it's on the other side. Obama reiterated his veto threat in the very public setting of his State of the Union address on Tuesday night, saying that "for the sake of our national security, we must give diplomacy a chance to succeed." Jan. 20 marked the beginning of a six-month period of negotiations between the U.S., Iran, and five other world powers aimed at preventing Iran from developing a nuclear bomb.

The negotiations won't be easy, and "any long-term deal we agree to must be based on verifiable action," not trust, Obama said. But "if John F. Kennedy and Ronald Reagan could negotiate with the Soviet Union, then surely a strong and confident America can negotiate with less powerful adversaries today."

After the speech, at least four Democratic cosponsors — Sens. Chris Coons (Del.), Kirsten Gillibrand (N.Y.), Joe Manchin (W.Va.), and Ben Cardin (Md.) — said they didn't want to vote on the bill while negotiations are ongoing. Sen. Richard Blumenthal (D-Conn.) had already adopted that position earlier in the month.

The distance these cosponsors put between themselves and the bill wasn't uniform. Cardin punted to Sen. Harry Reid (D-Nev.), who is opposed to bringing the bill to the floor for a vote. (Cardin "wants to see negotiations with Iran succeed," a spokeswoman's said. "As for timing of the bill, it is and has always been up to the Majority Leader.")

Manchin, on the other hand, told MSNBC that he didn't sign on to the bill "with the intention that it would ever be voted upon or used upon while we were negotiating," but rather "to make sure the president had a hammer if he needed it." He added: "We've got to give peace a chance here."

With the list of Democratic cosponsors willing to vote for the bill shrinking by five, the dream of a veto-proof majority in the next six months appears to be dead. Even Republican supporters of the legislation are pessimistic of its chances: "Is there support to override a veto?" Sen. Jim Inhofe (R-Okla.), the top Republican on the Senate Armed Services Committee, told National Journal on Wednesday. "I say, 'No.'"

So, what happened to the Iran sanctions bill? The short version: Time, pressure, and journalism.

The journalism category encompasses two points: First, reporters actually read the legislation, and it doesn't quite match up with the claims of lead sponsors Sen. Robert Menendez (D-N.J.) and Sen. Mark Kirk (R-Ill.), who say the sanctions would only take effect if Iran was found to be negotiating in bad faith. A much-cited analysis by Edward Levine at the Center for Arms Control and Non-Proliferation showed that the Iran sanctions would kick in unless Obama certified a list of impossible or deal-breaking conditions.

Journalists also started asking the cosponsors about their intentions. It's possible there were never 59 votes for the bill, but the legislation was filed right before Christmas and many reporters (not unreasonably) conflated cosponsorship with support for the bill, regardless of what was happening with the negotiations. They only asked on Tuesday night and Wednesday because Obama brought up the issue in his State of the Union speech.

Time without action always saps momentum, but with the Iran sanctions bill it also allowed events to catch up with the proponents of new sanctions. When they filed the bill Dec. 20, the interim Iran deal was just a talking point; a month later it was reality. The Obama administration, U.S. intelligence community, and outside analysts agree that new sanctions would scuttle the deal, and its harder to take that risk when that deal is in effect.

Finally, critics of the bill — including the White House and J Street, the liberal pro-Israel lobbying group — had time to mount a counterattack. Starting Jan. 6, J Street and other groups opposed to the legislation "reached out to senators who were on the fence and senators who'd cosponsored on day one," says Slate's David Weigel. "The message was the same: Have you guys read this thing?" Dylan William, J Street's director of government relations, describes the strategy in more depth:

We made especially prodigious use of our grass tops activists. These are people who have longstanding relationships with members of Congress to express two things. One: The bill is bad policy. Two: There was no political reason that these senators should feel they need to support the bill. There is deep political support in communities for members of Congress and senators who want to reserve this peaceably. [Slate]

So take a bow, J Street — for now, the David of the Israel lobby has slain its Goliath, the American Israel Public Affairs Committee (AIPAC), which is pushing for the legislation. That could all change if the interim Iran deal falls apart or some other event intercedes to change the equation for lawmakers. But momentum is hard to un-stall, and lawmakers are now considering changing the bill into a non-binding resolution.

John Judis at The New Republic is relieved, and counts Obama's veto threat Tuesday night as the boldest part of his speech. "If these negotiations with Iran fail, the United States will be left with very unsatisfactory alternatives," he writes:

Use military force to stop Iran, which might only delay Iran's acquisition of nuclear weapons, and will potentially inflame the region in a new war, or allow Iran to go ahead and hope to contain Iran as we have contained other potentially hostile nuclear powers. Obama may not be able to secure authorization for the first alternative... and if he opts for the second, he will leave open the possibility of regional proliferation or of Israel going to war against Iran. It's in America's interest — and, incidentally, Israel's as well — to allow the current negotiations to take their course — without malignant interference from Congress and AIPAC. [New Republic]

**It’s a war powers fight that Obama wins – but failure greenlights Israel strikes**

**Merry, 1/1/14** - Robert W. Merry, political editor of the National Interest, is the author of books on American history and foreign policy (Robert, “Obama may buck the Israel lobby on Iran” Washington Times, factiva)

Presidential press secretary Jay Carney uttered 10 words the other day that represent a major presidential challenge to the American Israel lobby and its friends on Capitol Hill. Referring to Senate legislation designed to force President Obama to expand economic sanctions on Iran under conditions the president opposes, Mr. Carney said: “If it were to pass, the president would veto it.”

For years, there has been an assumption in Washington that you can’t buck the powerful Israel lobby, particularly the American Israel Public Affairs Committee, or AIPAC, whose positions are nearly identical with the stated aims of Israeli Prime Minister Benjamin Netanyahu. Mr. Netanyahu doesn’t like Mr. Obama’s recent overture to Iran, and neither does AIPAC. The result is the Senate legislation, which is similar to a measure already passed by the House.

With the veto threat, Mr. Obama has announced that he is prepared to buck the Israel lobby — and may even welcome the opportunity. It isn’t fair to suggest that everyone who thinks Mr. Obama’s overtures to Iran are ill-conceived or counterproductive is simply following the Israeli lobby’s talking points, but Israel’s supporters in this country are a major reason for the viability of the sanctions legislation the president is threatening to veto.

It is nearly impossible to avoid the conclusion that the Senate legislation is designed to sabotage Mr. Obama’s delicate negotiations with Iran (with the involvement also of the five permanent members of the U.N. Security Council and Germany) over Iran’s nuclear program. The aim is to get Iran to forswear any acquisition of nuclear weapons in exchange for the reduction or elimination of current sanctions. Iran insists it has a right to enrich uranium at very small amounts, for peaceful purposes, and Mr. Obama seems willing to accept that Iranian position in the interest of a comprehensive agreement.

However, the Senate measure, sponsored by Sens. Robert Menendez, New Jersey Democrat; Charles E. Schumer, New York Democrat; and Mark Kirk, Illinois Republican, would impose potent new sanctions if the final agreement accords Iran the right of peaceful enrichment. That probably would destroy Mr. Obama’s ability to reach an agreement. Iranian President Hasan Rouhani already is under pressure from his country’s hard-liners to abandon his own willingness to seek a deal. The Menendez-Schumer-Kirk measure would undercut him and put the hard-liners back in control.

Further, the legislation contains language that would commit the United States to military action on behalf of Israel if Israel initiates action against Iran. This language is cleverly worded, suggesting U.S. action should be triggered only if Israel acted in its “legitimate self-defense” and acknowledging “the law of the United States and the constitutional responsibility of Congress to authorize the use of military force,” but the language is stunning in its brazenness and represents, in the view of Andrew Sullivan, the prominent blogger, “an appalling new low in the Israeli government’s grip on the U.S. Congress.”

While noting the language would seem to be nonbinding, Mr. Sullivan adds that “it’s basically endorsing the principle of handing over American foreign policy on a matter as grave as war and peace to a foreign government, acting against international law, thousands of miles away.”

That brings us back to Mr. Obama’s veto threat. The American people have made clear through polls and abundant expression (especially during Mr. Obama’s flirtation earlier this year with military action against Bashar Assad’s Syrian regime) that they are sick and weary of American military adventures in the Middle East. They don’t think the Iraq and Afghanistan wars have been worth the price, and they don’t want their country to engage in any other such wars.

That’s what the brewing confrontation between Mr. Obama and the Israel lobby comes down to — war and peace. Mr. Obama’s delicate negotiations with Iran, whatever their outcome, are designed to avert another U.S. war in the Middle East. The Menendez-Schumer-Kirk initiative is designed to kill that effort and cedes to Israel America’s war-making decision in matters involving Iran, which further increases the prospects for war. It’s not even an argument about whether the United States should come to Israel’s aid if our ally is under attack, but whether the decision to do so and when that might be necessary should be made in Jerusalem or Washington.

2014 will mark the 100th anniversary of beginning of World War I, a conflict triggered by entangling alliances that essentially gave the rulers of the Hapsburg Empire power that forced nation after nation into a war they didn’t want and cost the world as many as 20 million lives. Historians have warned since of the danger of nations delegating the power to take their people into war to other nations with very different interests.

AIPAC’s political power is substantial, but this is Washington power, the product of substantial campaign contributions and threats posed to re-election prospects. According to the Center for Responsive Politics’ Open Secrets website, Sens. Kirk, Menendez and Schumer each receives hundreds of thousands of dollars a year in pro-Israel PAC money and each of their states includes concentrations of pro-Israel voters who help elect and re-elect them.

Elsewhere in the country, AIPAC’s Washington power will collide with the country’s clear and powerful political sentiment against further U.S. adventurism in the Middle East, particularly one as fraught with as much danger and unintended consequence as a war with Iran. If the issue gets joined, as it appears that it will, Mr. Obama will see that it gets joined as a matter of war and peace. If the Menendez-Schumer-Kirk legislation clears Congress and faces a presidential veto, the war-and-peace issue could galvanize the American people as seldom before.

If that happens, the strongly held opinions of a democratic public are liable to overwhelm the mechanisms of Washington power, and the vaunted influence of the Israel lobby may be seen as being not quite what it has been cracked up to be.

**Plan destroys Obama**

Loomis 07 Visiting Fellow at the Center for a New American Security, and Department of Government at Georgetown University [Dr. Andrew J. Loomis, “Leveraging legitimacy in the crafting of U.S. foreign policy”, March 2, 2007, pg 36-37, http://citation.allacademic.com//meta/p\_mla\_apa\_research\_citation/1/7/9/4/8/pages179487/p179487-36.php

Declining political authority encourages defection. American political analyst Norman Ornstein writes of the domestic context, In a system where a President has limited formal power, perception matters. The reputation for success—the belief by other political actors that even when he looks down, a president will find a way to pull out a victory—is the most valuable resource a chief executive can have. Conversely, the widespread belief that the Oval Office occupant is on the defensive, on the wane or without the ability to win under adversity can lead to disaster, as individual lawmakers calculate who will be on the winning side and negotiate accordingly. In simple terms, winners win and losers lose more often than not. Failure begets failure. In short, a president experiencing declining amounts of political capital has diminished capacity to advance his goals. As a result, political allies perceive a decreasing benefit in publicly tying themselves to the president, and an increasing benefit in allying with rising centers of authority. A president’s incapacity and his record of success are interlocked and reinforce each other. Incapacity leads to political failure, which reinforces perceptions of incapacity. This feedback loop accelerates decay both in leadership capacity and defection by key allies. The central point of this review of the presidential literature is that the sources of presidential influence—and thus their prospects for enjoying success in pursuing preferred foreign policies—go beyond the structural factors imbued by the Constitution. Presidential authority is affected by ideational resources in the form of public perceptions of legitimacy. The public offers and rescinds its support in accordance with normative trends and historical patterns, non-material sources of power that affects the character of U.S. policy, foreign and domestic.

**Global war**

**Reuveny, 10** – professor in the School of Public and Environmental Affairs at Indiana University (Rafael, “Unilateral strike could trigger World War III, global depression” Gazette Xtra, 8/7, - See more at: <http://gazettextra.com/news/2010/aug/07/con-unilateral-strike-could-trigger-world-war-iii-/#sthash.ec4zqu8o.dpuf>)

A unilateral Israeli strike on Iran’s nuclear facilities would likely have dire consequences, including a regional war, global economic collapse and a major power clash.

For an Israeli campaign to succeed, it must be quick and decisive. This requires an attack that would be so overwhelming that Iran would not dare to respond in full force.

Such an outcome is extremely unlikely since the locations of some of Iran’s nuclear facilities are not fully known and known facilities are buried deep underground.

All of these widely spread facilities are shielded by elaborate air defense systems constructed not only by the Iranians but also the Chinese and, likely, the Russians as well.

By now, Iran has also built redundant command and control systems and nuclear facilities, developed early warning systems, acquired ballistic and cruise missiles and upgraded and enlarged its armed forces.

Because Iran is well-prepared, a single, conventional Israeli strike—or even numerous strikes—could not destroy all of its capabilities, giving Iran time to respond.

Unlike Iraq, whose nuclear program Israel destroyed in 1981, Iran has a second-strike capability comprised of a coalition of Iranian, Syrian, Lebanese, Hezbollah, Hamas, and, perhaps, Turkish forces. Internal pressure might compel Jordan, Egypt and the Palestinian Authority to join the assault, turning a bad situation into a regional war.

During the 1973 Arab-Israeli War, at the apex of its power, Israel was saved from defeat by President Nixon’s shipment of weapons and planes. Today, Israel’s numerical inferiority is greater, and it faces more determined and better-equipped opponents. After years of futilely fighting Palestinian irregular armies, Israel has lost some of its perceived superiority—bolstering its enemies’ resolve.

Despite Israel’s touted defense systems, Iranian coalition missiles, armed forces, and terrorist attacks would likely wreak havoc on its enemy, leading to a prolonged tit-for-tat.

In the absence of massive U.S. assistance, Israel’s military resources may quickly dwindle, forcing it to use its alleged nuclear weapons, as it had reportedly almost done in 1973.

An Israeli nuclear attack would likely destroy most of Iran’s capabilities, but a crippled Iran and its coalition could still attack neighboring oil facilities, unleash global terrorism, plant mines in the Persian Gulf and impair maritime trade in the Mediterranean, Red Sea and Indian Ocean.

Middle Eastern oil shipments would likely slow to a trickle as production declines due to the war and insurance companies decide to drop their risky Middle Eastern clients. Iran and Venezuela would likely stop selling oil to the United States and Europe.

From there, things could deteriorate as they did in the 1930s. The world economy would head into a tailspin; international acrimony would rise; and Iraqi and Afghani citizens might fully turn on the United States, immediately requiring the deployment of more American troops.

Russia, China, Venezuela, and maybe Brazil and Turkey—all of which essentially support Iran—could be tempted to form an alliance and openly challenge the U.S. hegemony.

Russia and China might rearm their injured Iranian protege overnight, just as Nixon rearmed Israel, and threaten to intervene, just as the U.S.S.R. threatened to join Egypt and Syria in 1973. President Obama’s response would likely put U.S. forces on nuclear alert, replaying Nixon’s nightmarish scenario.

Iran may well feel duty-bound to respond to a unilateral attack by its Israeli archenemy, but it knows that it could not take on the United States head-to-head. In contrast, if the United States leads the attack, Iran’s response would likely be muted.

If Iran chooses to absorb an American-led strike, its allies would likely protest and send weapons but would probably not risk using force.

While no one has a crystal ball, leaders should be risk-averse when choosing war as a foreign policy tool. If attacking Iran is deemed necessary, Israel must wait for an American green light. A unilateral Israeli strike could ultimately spark World War III.

### 1NC Critique

**Liberal institutionalism is an imperial ideology disguised by the language of science. Liberal institutionalism requires the elimination of non-liberal forms of life to achieve national security**

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.

**This drive to destroy non-liberal ways of life will culminate in extinction**

Batur 7 [Pinar, PhD @ UT-Austin – Prof. of Sociology @ Vassar, *The Heart of Violence: Global Racism, War, and Genocide*, Handbook of The Sociology of Racial and Ethnic Relations, eds. Vera and Feagin, p. 441-3]

War and genocide are horrid, and taking them for granted is inhuman. In the 21st century, our problem is not only seeing them as natural and inevitable, but even worse: not seeing, not noticing, but ignoring them. Such act and thought, fueled by global racism, reveal that racial inequality has advanced from the establishment of racial hierarchy and institutionalization of segregation, to the confinement and exclusion, and elimination, of those considered inferior through genocide. In this trajectory, global racism manifests genocide. But this is not inevitable. This article, by examining global racism, explores the new terms of exclusion and the path to permanent war and genocide, to examine the integrality of genocide to the frame-work of global antiracist confrontation. GLOBAL RACISM IN THE AGE OF “CULTURE WARS” Racist legitimization of inequality has changed from presupposed biological inferiority to assumed cultural inadequacy. This defines the new terms of impossibility of coexistence, much less equality. The Jim Crow racism of biological inferiority is now being replaced with a new and modern racism (Baker 1981; Ansell 1997) with “culture war” as the key to justify difference, hierarchy, and oppression. The ideology of “culture war” is becoming embedded in institutions, defining the workings of organizations, and is now defended by individuals who argue that they are not racist, but are not blind to the inherent differences between African-Americans/Arabs/Chinese, or whomever, and “us.” “Us” as a concept defines the power of a group to distinguish itself and to assign a superior value to its institutions, revealing certainty that affinity with “them” will be harmful to its existence (Hunter 1991; Buchanan 2002). How can we conceptualize this shift to examine what has changed over the past century and what has remained the same in a racist society? Joe Feagin examines this question with a theory of systemic racism to explore societal complexity of interconnected elements for longevity and adaptability of racism. He sees that systemic racism persists due to a “white racial frame,” defining and maintaining an “organized set of racialized ideas, stereotypes, emotions, and inclinations to discriminate” (Feagin 2006: 25). The white racial frame arranges the routine operation of racist institutions, which enables social and economic repro-duction and amendment of racial privilege. It is this frame that defines the political and economic bases of cultural and historical legitimization. While the white racial frame is one of the components of systemic racism, it is attached to other terms of racial oppression to forge systemic coherency. It has altered over time from slavery to segregation to racial oppression and now frames “culture war,” or “clash of civilizations,” to legitimate the racist oppression of domination, exclusion, war, and genocide. The concept of “culture war” emerged to define opposing ideas in America regarding privacy, censorship, citizenship rights, and secularism, but it has been globalized through conflicts over immigration, nuclear power, and the “war on terrorism.” Its discourse and action articulate to flood the racial space of systemic racism. Racism is a process of defining and building communities and societies based on racial-ized hierarchy of power. The expansion of capitalism cast new formulas of divisions and oppositions, fostering inequality even while integrating all previous forms of oppressive hierarchical arrangements as long as they bolstered the need to maintain the structure and form of capitalist arrangements (Batur-VanderLippe 1996). In this context, the white racial frame, defining the terms of racist systems of oppression, enabled the globalization of racial space through the articulation of capitalism (Du Bois 1942; Winant 1994). The key to understanding this expansion is comprehension of the synergistic relationship between racist systems of oppression and the capitalist system of exploitation. Taken separately, these two systems would be unable to create such oppression independently. However, the synergy between them is devastating. In the age of industrial capitalism, this synergy manifested itself imperialism and colonialism. In the age of advanced capitalism, it is war and genocide. The capitalist system, by enabling and maintaining the connection between everyday life and the global, buttresses the processes of racial oppression, and synergy between racial oppression and capitalist exploitation begets violence. Etienne Balibar points out that the connection between everyday life and the global is established through thought, making global racism a way of thinking, enabling connections of “words with objects and words with images in order to create concepts” (Balibar 1994: 200). Yet, global racism is not only an articulation of thought, but also a way of knowing and acting, framed by both everyday and global experiences. Synergy between capitalism and racism as systems of oppression enables this perpetuation and destruction on the global level. As capitalism expanded and adapted to the particularities of spatial and temporal variables, global racism became part of its legitimization and accommodation, first in terms of colonialist arrangements. In colonized and colonizing lands, global racism has been perpetuated through racial ideologies and discriminatory practices under capitalism by the creation and recreation of connections among memory, knowledge, institutions, and construction of the future in thought and action. What makes racism global are the bridges connecting the particularities of everyday racist experiences to the universality of racist concepts and actions, maintained globally by myriad forms of prejudice, discrimination, and violence (Balibar and Wallerstein 1991; Batur 1999, 2006). Under colonialism, colonizing and colonized societies were antagonistic opposites. Since colonizing society portrayed the colonized “other,” as the adversary and challenger of the “the ideal self,” not only identification but also segregation and containment were essential to racist policies. The terms of exclusion were set by the institutions that fostered and maintained segregation, but the intensity of exclusion, and redundancy, became more apparent in the age of advanced capitalism, as an extension of post-colonial discipline. The exclusionary measures when tested led to war, and genocide. Although, more often than not, genocide was perpetuated and fostered by the post-colonial institutions, rather than colonizing forces, the colonial identification of the “inferior other” led to segregation, then exclusion, then war and genocide. Violence glued them together into seamless continuity. Violence is integral to understanding global racism. Fanon (1963), in exploring colonial oppression, discusses how divisions created or reinforced by colonialism guarantee the perpetuation, and escalation, of violence for both the colonizer and colonized. Racial differentiations, cemented through the colonial relationship, are integral to the aggregation of violence during and after colonialism: “Manichaeism [division of the universe into opposites of good and evil] goes to its logical conclusion and dehumanizes” (Fanon 1963:42). Within this dehumanizing framework, Fanon argues that the violence resulting from the destruction of everyday life, sense of self and imagination under colonialism continues to infest the post-colonial existence by integrating colonized land into the violent destruction of a new “geography of hunger” and exploitation (Fanon 1963: 96). The “geography of hunger” marks the context and space in which oppression and exploitation continue. The historical maps drawn by colonialism now demarcate the boundaries of post-colonial arrangements. The white racial frame restructures this space to fit the imagery of symbolic racism, modifying it to fit the television screen, or making the evidence of the necessity of the politics of exclusion, and the violence of war and genocide, palatable enough for the front page of newspapers, spread out next to the morning breakfast cereal. Two examples of this “geography of hunger and exploitation” are Iraq and New Orleans.

**Challenge to conceptual framework of national security.**

**Only our alternative displaces the source of executive overreach. Legal restraint without conceptual change is futile.**

Aziz RANA Law at Cornell 11 [“Who Decides on Security?” Cornell Law Faculty Working Papers, Paper 87, http://scholarship.law.cornell.edu/clsops\_papers/87 p. 45-51]

 Above all, it indicates that the central problem with the procedural solutions offered by constitutional scholars—emphasizing new statutory frameworks or greater judicial assertiveness—is that they mistake a question of politics for one of law. In other words, such scholars ignore the extent to which governing practices are the product of background political judgments about threat, democratic knowledge, professional expertise, and the necessity for insulated decision-making. To the extent that Americans are convinced that they face continuous danger from hidden and potentially limitless assailants—danger too complex for the average citizen to comprehend independently—it is inevitable that institutions (regardless of legal reform initiatives) will operate to centralize power in those hands presumed to enjoy military and security expertise. Thus, any systematic effort to challenge the current framing of the relationship between security and liberty must begin by challenging the underlying assumptions about knowledge and security upon which legal and political arrangements rest. Without a sustained and public debate about the validity of security expertise, its supporting institutions, and the broader legitimacy of secret information, there can be no substantive shift in our constitutional politics. The problem at present, however, is that no popular base exists to raise these questions. Unless such a base emerges, we can expect our prevailing security arrangements to become ever more entrenched.

### 1NC CP

**The president of the United States should entitle that all individuals in military detention are entitled to habeas corpus protection in the US federal courts. The United States Executive branch should clarify the current statute governing indefinite detention not be used as a basis for denying habeas corpus as such a reading would raise serious Constitutional problems.**

**Self-binding is better than the courts**

Adrian Vermeule 7, Harvard law prof - AND - Eric Posner - U Chicago law, The Credible Executive, 74 U. Chi. L. Rev. 865

\*We do not endorse gendered language

The Madisonian system of oversight has not totally failed. Some- times legislators overcome the temptation to free ride; sometimes they invest in protecting the separation of powers or legislative preroga- tives. Sometimes judges review exercises of executive discretion, even during emergencies. But often enough, legislators and judges have no real alternative to letting executive officials exercise discretion un- checked. The Madisonian system is a partial failure; compensating mechanisms must be adopted to fill the area of slack, the institutional gap between executive discretion and the oversight capacities of other institutions. Again, the magnitude of this gap is unclear, but plausibly it is quite large; we will assume that it is. It is often assumed that this partial failure of the Madisonian sys- tem unshackles and therefore benefits ill-motivated executives. This is grievously incomplete. The failure of the Madisonian system harms the well-motivated executive as much as it benefits the ill-motivated one. Where Madisonian oversight fails, the well-motivated executive is a victim of his own power. Voters, legislators, and judges will be wary of granting further discretion to an executive whose motivations are un- certain and possibly nefarious. The partial failure of Madisonian over- sight thus threatens a form of inefficiency, a kind of contracting failure that makes potentially everyone, including the voters, worse off. Our central question, then, is what the well-motivated executive can do to solve or at least ameliorate the problem. The solution is for the executive to complement his (well-motivated) first-order policy goals with second-order mechanisms for demonstrating credibility to other actors. We thus do not address the different question of what voters, legislators, judges, and other actors should do about an executive who is ill motivated and known to be so. That project involves shoring up or replacing the Madisonian system to block executive dictatorship. Our project is the converse of this, and involves finding new mechanisms to help the well-motivated executive credibly distinguish himself as such. ¶ IV. EXECUTIVE SIGNALING: LAW AND MECHANISMS ¶ We suggest that the executive’s credibility problem can be solved by second-order mechanisms of executive signaling. In the general case, well-motivated executives send credible signals by taking actions that are more costly for ill-motivated actors than for well- motivated ones, thus distinguishing themselves from their ill- motivated mimics. Among the specific mechanisms we discuss, an important subset involves executive self-binding, whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors. Commitments themselves have value as signals of benign motivations. ¶ This departs from the usual approach in legal scholarship. Legal theory has often discussed self-binding by “government” or govern- ment officials. In constitutional theory, it is often suggested that consti- tutions represent an attempt by “the people” to bind “themselves” against their own future decisionmaking pathologies, or relatedly, that constitutional prohibitions represent mechanisms by which govern- ments commit themselves not to expropriate investments or to exploit their populations.72 Whether or not this picture is coherent,73 it is not the question we examine here, although some of the relevant consid- erations are similar.74 We are not concerned with binding the president so that he cannot abuse his powers, but with how he might bind himself or take other actions that enhance his credibility, so that he can generate support from the public and other members of the government. ¶ Furthermore, our question is subconstitutional: it is whether a well-motivated executive, acting within an established set of constitu- tional and statutory rules, can use signaling mechanisms to generate public trust. Accordingly, we proceed by assuming that no constitutional amendments or new statutes will be enacted. Within these con- straints, what can a well-motivated executive do to bootstrap himself to credibility? The problem for the well-motivated executive is to credibly signal his benign motivations. In general, the solution is to engage in actions that are less costly for good types than for bad types. ¶ We begin with some relevant law, then examine a set of possible mechanisms—emphasizing both the conditions under which they might succeed and the conditions under which they might not—and conclude by examining the costs of credibility. ¶ A. A Preliminary Note on Law and Self-Binding ¶ Many of our mechanisms are unproblematic from a legal per- spective, as they involve presidential actions that are clearly lawful. But a few raise legal questions; in particular, those that involve self- binding.75 Can a president bind himself to respect particular first-order policies? With qualifications, the answer is yes, at least to the same extent that a legislature can. Formally, a duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated, thereby establishing a new legal status quo.76 The legal authority to establish a new status quo allows a president to create inertia or political constraints that will affect his own future choices. In a practical sense, presidents, like legislatures, have great de facto power to adopt policies that shape the legal landscape for the future. A president might commit himself to a long-term project of defense pro- curement or infrastructure or foreign policy, narrowing his own future choices and generating new political coalitions that will act to defend the new rules or policies. More schematically, we may speak of formal and informal means of self-binding:

**Second plank’s avoidance of the constitution is better – soft law acts the same as judicially or statutorily enforced restrictions but avoids controversy**

Morrison 06 (Associate Professor of Law, Cornell Law School. This Issue Brief was first released by ACS in August 2006. It draws on parts of a larger article, Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 COLuM. L. rEv. (2006)., “The Canon of Constitutional Avoidance and Executive Branch Legal Interpretation in the War on Terror”, <http://www.acslaw.org/files/Morrison-%20Executive%20Branch%20Legal%20Interpretation%20-%20War%20on%20Terror%20-%20August%202006%20-%20Advance%20Vol%201.pdf>)

On this alternative account, modern avoidance would seem to apply just as well in the executive branch as in the courts. Enforcing the Constitution is not an exclusively judicial task. The President’s oath of office imposes on him a duty to “preserve, protect and defend the Constitution,”and that duty is not contingent on judicial enforcement. To the contrary, it is especially significant in areas where the constitutional norm is judicially underenforced. The underenforced norms thesis says that when institutional or other factors inhibit robust judicial enforcement of a particular constitutional provision, it falls to the executive branch (and the legislative branch) to enforce the provision more fully. In a similar vein, Akhil Amar and others have argued that the Constitution builds in a preference for the most government-restrictive view of the law adopted by any of the three branches. 3 On this account, even if the underlying constitutional provision is not especially underenforced by the courts, the Constitution is designed to prefer whichever branch’s implementation of the provision is most protective.

Analogizing from these accounts of direct constitutional interpretation to instances of statutory construction, executive use of the avoidance canon would appear entirely appropriate. After all, the fundamental aim of avoidance as envisioned by the constitutional enforcement theory is to implement constitutional norms by resisting congressional forays into constitutionally sensitive areas. On this view, the avoidance canon is a statutory means of enforcing constitutional values. Employing the avoidance canon, then, can be viewed as fulfilling the executive branch’s independent obligation to enforce the Constitution itself.

### 1NC Modeling

**The Iraqi system is broken. The can’t solve for judge intimidation**

**Temple-Raston 08** [Dina Temple-Raston, “Iraqis on Slow Road to Building Judicial System,: NPR, March 27, 2008 4:02 PM, pg. http://www.npr.org/people/11209543/dina-temple-raston

It is a stifling existence but, Gallo says, necessary. There are about 1,200 judges in all of Iraq — three-dozen of them have been murdered since 2003.

"If you can intimidate that aspect of the judicial system — the judges — then it doesn't matter how many witnesses you have and it doesn't matter how many investigators you have or prosecutors. If the judges don't feel they can make a decision in a secure environment that is fair and even-handed, then the whole system is going to crumble," he says.

Two Judicial Systems: Before Saddam and After

The judicial assassinations are only the beginning. The little hinges that make a judicial system function — legal traditions, precedents, even something as simple as court transcripts — just don't exist in Iraq.

Judge Faiq Zaidan, the chief investigative judge in one of Baghdad's Central Criminal Courts, has worked in the Iraqi legal system since 1999 — both before and after the rule of Saddam Hussein.

"During the Saddam era, justice wasn't independent. Before 2003, if a judge refused to listen to the suggestions of politicians, Saddam put him in jail," Zaidan recalls. "Now, we have to convince people we operate differently, independently."

Creating an Iraqi judicial system that inspires that kind of confidence is the job of Philip Lynch, the rule of law coordinator for Iraq. He says the experiences of the Saddam years continue to haunt the present. Witness intimidation, for example, is still a huge issue in Iraq.

**No terminal impact -- no risk of India/Pakistan spillover**

**Malik, 3** (Mohan, Professor of Security Studies at the Asia-Pacific Center for Security Studies, Asian Affairs, An American Review, “The Stability of Nuclear Deterrence in South Asia: The Clash between State and Antistate Actors”, 30:3, Fall ,Proquest)

India and Pakistan's past behavior shows that there is little or no danger of either side firing a nuclear weapon in anger or because of miscalculation. "Gentlemanly wars" is the primary term used to describe past Indian-Pakistani wars. In all three wars, both sides avoided wars of attrition or deliberate targeting of population and industrial centers. Despite their penchant for inflammatory and bellicose rhetoric, no sane leader willingly would commit national suicide. The leaders in both capitals insist that nuclear weapons are only for deterrence and are not weapons of war. History shows that nuclear weapons are usable only against an opponent that does not have the ability to retaliate in kind-such as the United States against Japan in 194The only exception to this rule might be the case of a state that faced total imminent destruction. It is conceivable that Pakistan could use nuclear weapons if faced with total defeat by India. Indians argue, however, that they have no interest in destroying the Pakistani state and incorporating another 140 million Muslims into the Indian state. One Indian analyst argues, "Since the 1980s, Indian military doctrine has moved away from the seizure of Pakistani territory in recognition of the less significant role played by landmass in modern estimates of strategic strength. Not only does India not have any territorial ambitions on Pakistan, [India is] prepared to permanently concede Pakistan-occupied Kashmir to Islamabad, and would accept the 'line of control' in Kashmir as the international boundary."22 If New Delhi goes to war with Islamabad, the war will be over Kashmir, not the existence of Pakistan. Many Indians claim that the West consistently and deliberately has promoted the idea of a nuclear flashpoint to get India and Pakistan to establish a nuclear risk reduction regime concurrently with a sustained dialogue on Kashmir and their nonproliferation agenda. Pakistan long has subscribed to this idea and publicly articulated its intention to use nuclear weapons if India launches a conventional attack across the line of control in Pakistani Kashmir. The presence of nuclear weapons certainly makes states exceedingly cautious; notable examples are China and Pakistan's postnuclear behavior. The consequences of a nuclear war are too horrendous to contemplate. Policymakers in New Delhi and Islamabad have a sound understanding of each other's capabilities, intentions, policies, and, more important, red lines, which they are careful not to cross. This repeatedly has been demonstrated since the late 1980s. Despite the 1999 Kargil War and the post-September 11 brinkmanship that illustrate the "stability-instability" paradox that nuclear weapons have introduced to the equation in South Asia,23 proponents of nuclear deterrence in Islamabad and New Delhi believe that nuclear deterrence is working to prevent war in the region. They point to the fact that neither the 1999 Kargil conflict nor the post-September 11 military standoff escalated beyond a limited conventional engagement due to the threat of nuclear war. So the stability argument is based on the reasonable conclusion that nuclear weapons have served an Important purpose in the sense that India and Pakistan have not gone to an all-out war since 1971.24 just as nuclear deterrence maintained stability between the United States and the USSR during the cold war, so it can induce similar stabilizing effects in South Asia.

No one models the US—there are too many other countries to look to. Also, the SQ solves because other countries reject Presidentialism now

Versteeg 13—Mila Versteeg is an Associate Professor at the University of Virginia, School of Law [May 29, 2013, “Model, Resource, or Outlier? What Effect Has the U.S. Constitution Had on the Recently Adopted Constitutions of Other Nations?” http://www.heritage.org/research/lecture/2013/05/model-resource-or-outlier-what-effect-has-the-us-constitution-had-on-the-recently-adopted-constitutions-of-other-nations]

Unsurprisingly, attempting to gauge one constitution’s “influence” on another involves various conceptual and methodological challenges. To illustrate, a highly generic constitution may be generic because others have followed its lead, because it has modeled others, or simply by coincidence. That said, if two constitutions are becoming increasingly dissimilar, by definition, one cannot be following the other. That is, neither is exerting influence on the other (at least not in a positive way).

This is the phenomenon we observed in comparing the U.S. Constitution to the rest of the world; based on the rights index, the U.S. has become less similar to the world since 1946 and, with a current index of 0.30, is less similar now than at any point during the studied period. This phenomenon has occurred even among current American allies; among countries in regions with close cultural and historic ties to the U.S. (namely, Latin America and Western Europe); and among democracies. Only among common law countries is constitutional similarity higher than it was after World War II, but even that similarity has decreased since the 1960s.

Rights provisions are not the only constitutional elements that have lost favor with the rest of the world; structural provisions pioneered by American constitutionalism—such as federalism, presidentialism, and judicial review—have also been losing their global appeal.

For instance, in the early 20th century, 22 percent of constitutions provided for federalistic systems, while today, just 12 percent do.

A similar trend has occurred for presidentialism, another American innovation. Since the end of World War II, the percentage of countries employing purely presidential systems has declined, mainly in favor of mixed systems, which were a favorite of former Soviet bloc countries.

Finally, though judicial review is not mentioned in the U.S. Constitution, it has proved the most popular American structural innovation. But though the popularity of judicial review in general has exploded over the past six decades, most countries have opted for the European style of review (which designates a single, constitutional court which alone has the power to nullify laws inconsistent with the constitution) over the American model (in which all courts are empowered to strike unconstitutional laws). In 1946, over 80 percent of countries exercised American-style constitutional review; today, fewer than half do.

Reasons for the Decline

It appears that several factors are driving the U.S. Constitution’s increasing atypicality. First, while in 2006 the average national constitutions contained 34 rights (of the 60 we identify), the U.S. Constitution contains relatively few—just 21—and the rights it does contain are often themselves atypical.

Just one-third of constitutions provide for church and state separation, as does the U.S. Establishment Clause, and only 2 percent of constitutions (including, e.g., Mexico and Guatemala) contain a “right to bear arms.” Conversely, the U.S. Constitution omits some of the most globally popular rights, such as women’s rights, the right to social security, the right to food, and the right to health care.

These peculiarities, together with the fact that the U.S. Constitution is both old and particularly hard to amend, have led some to characterize the Constitution as simply antiquated or obsolete.

### 1NC Human rights

Human rights leadership is impossible—alt causes overwhelm and the US won’t exercise its influence.

Mariam 8/18/13—Professor Alemayehu G. Mariam teaches political science at California State University, San Bernardino and is a practicing defense lawyer [August 18, 2013, “Is America Disinventing Human Rights?” http://www.ethiopianreview.us/48632]

Carter also raised a number of important questions: Has the U.S. abdicated its moral leadership in the arena of international human rights? Has the U.S. betrayed its core values by maintaining a detention facility at Guantánamo Bay, Cuba, and subjecting dozens of prisoners to “cruel, inhuman or degrading treatment or punishment” and leaving them without the “prospect of ever obtaining their freedom”? Does the arbitrary killing of a person suspected to be an enemy terrorist in a drone strike along with women and children who happen to be nearby comport with America’s professed commitment to the rule of law and human rights?

In 1948, the U.S. played a central leadership role in “inventing” the principal instrument which today serves as the bedrock foundation of modern human rights. The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in December 1948, set a “common standard of achievement for all peoples and all nations” in terms of equality, dignity and rights. Mrs. Eleanor Roosevelt, the widow of President Franklin D. Roosevelt, chaired the committee that drafted the UDHR. Eleanor remains an unsung heroine even though she was the mother of the modern global human rights movement. Without her, there would have been no UDHR; and without the UDHR, it is doubtful that the plethora of subsequent human rights conventions and regimes would have come into existence. Remarkably, she managed to mobilize, organize and proselytize human rights even though she had no legal training, diplomatic experience or bureaucratic expertise. She used her skills as political activist and advocate in the cause of freedom, justice and civil rights to work for global human rights.

Is America disinventing human rights?

It seems the U.S. is “disinventing” human rights through the pursuit of double (triple, quadruple) standard of human rights policy wrapped in a cover of diplocrisy. In Africa, the U.S. has one set of standards for Robert Mugabe’s Zimbabwe and Omar al-Bashir’s Sudan. Mugabe and Bashir are classified as the nasty hombres of human rights in Africa. The U.S. has targeted both regimes for crippling economic sanctions and diplomatic pressure. The U.S. has frozen the assets of Mugabe’s family and henchmen because the “Mugabe regime rules through politically motivated violence and intimidation and has triggered the collapse of the rule of law in Zimbabwe.”

The U.S. calls “partners” equally brutal regimes in Africa which serve as its proxies. Paul Kagame of Rwanda, Yuweri Museveni of Uganda and the deceased leader of the regime in Ethiopia are lauded as the “new breed of African leaders” and crowned “partners”. Uhuru Kenyatta, recently elected president of Kenya and a suspect under indictment by the International Criminal Court (ICC) for crimes against humanity is said to be different than Bashir who faces similar ICC charges. In 2009, Ambassador Susan E. Rice, then-U.S. Permanent Representative to the United Nations, demanded Bashir’s arrest and prosecution: “The people of Sudan have suffered too much for too long, and an end to their anguish will not come easily. Those who committed atrocities in Sudan, including genocide, should be brought to justice.” No official U.S. statement on Uhuru’s ICC prosecution was issued.

The U.S. maintains excellent relations with Teodoro Obiang Nguema Mbasogo of Equatorial Guinea who has been in power since 1979 because of that country’s oil reserves; but all of the oil revenues are looted by Obiang and his cronies. In 2011, the U.S. brought legal action in federal court against Obiang’s son to seize corruptly obtained assets including a $40 million estate in Malibu, California overlooking the Pacific Ocean, a luxury plane and a dozen super-sports cars worth millions of dollars. The U.S. has not touched any of the other African Ali Babas and their forty dozen thieving cronies who have stolen billions and stashed their cash in U.S. and other banks.

Despite lofty rhetoric in support of the advancement of democracy and protection of human rights in Africa, the United States continues to subsidize and coddle African dictatorships that are as bad as or even worse than Mugabe’s. The U.S. currently provides substantial economic aid, loans, technical and security assistance to the repressive regimes in Ethiopia, Congo (DRC), Uganda, Rwanda and elsewhere. None of these countries holds free elections, allow the operation of an independent press or free expression or abide by the rule of law. All of them are corrupt to the core, keep thousands of political prisoners, use torture and ruthlessly persecute their opposition. Yet they are deemed U.S. “partners”.

 “Principled disengagement” as a way of reinventing an American human rights policy?

If the Obama Administration indeed has a global or African human rights policy, it must be a well-kept secret. In March 2013, Michael Posner, U.S. Assistant Secretary of State for Democracy, Human Rights, and Labor said American human rights policy is based on “principled engagement”: “We are going to go to the United Nations and join the Human Rights Council and we’re going to be part of it even though we recognize it doesn’t work… We’re going to engage with governments that are allies but we are also going to engage with governments with tough relationships and human rights are going to be part of those discussions.” Second, the U.S. will follow “a single standard for human rights, the Universal Declaration of Human Rights, and it applies to all including ourselves…” Third, consistent with President “Obama’s personality”, the Administration believes “change occurs from within and so a lot of the

**Human rights cred is irrelevant—public opinion, norms, and NGO networks outweigh US policy**

Moravcsik 5—Andrew Moravcsik, PhD and a Professor of Politics and International Affairs at Princeton [2005, “The Paradox of U.S. Human Rights Policy,” *American Exceptionalism and Human Rights*, http://www.princeton.edu/~amoravcs/library/paradox.pdf]

It is natural to ask: What are the consequences of U.S. "exemptionalism” and noncompliance? International lawyers and human rights activists regularly issue dire warnings about the ways in which the apparent hypocrisy of the United States encourages foreign governments to violate human rights, ignore international pressure, and undermine international human rights institutions. In Patricia Derian's oft-cited statement before the Senate in I979: "Ratification by the United States significantly will enhance the legitimacy and acceptance of these standards. It will encourage other countries to join those which have already accepted the treaties. And, in countries where human rights generally are not respected, it will aid citizens in raising human rights issues.""' One constantly hears this refrain. Yet there is little empirical reason to accept it. Human rights norms have in fact spread widely without much attention to U.S. domestic policy. In the wake of the "third wave" democratization in Eastern Europe, East Asia, and Latin America, government after government moved ahead toward more active domestic and international human rights policies without attending to U.S. domestic or international practice." The human rights movement has firmly embedded itself in public opinion and NGO networks, in the United States as well as elsewhere, despite the dubious legal status of international norms in the United States. One reads occasional quotations from recalcitrant governments citing American noncompliance in their own defense-most recently Israel and Australia-but there is little evidence that this was more than a redundant justification for policies made on other grounds. Other governments adhere or do not adhere to global norms, comply or do not comply with judgments of tribunals, for reasons that seem to have little to do with U.S. multilateral policy.

**Legitimacy not key to heg—popularity isn’t a factor**

Brooks and Wohlforth 9—\*Stephen G. Brooks is Associate Professor of Government at Dartmouth College. \*\*William C. Wohlforth is the Daniel Webster Professor of Government at Dartmouth College [March-April, 2009, “Reshaping the world order: how Washington should reform international institutions,” *Foreign Affairs*, Emory]

FOR ANALYSTS such as Zbigniew Brzezinski and Henry Kissinger, the key reason for skepticism about the United States' ability to spearhead global institutional change is not a lack of power but a lack of legitimacy. Other states may simply refuse to follow a leader whose legitimacy has been squandered under the Bush administration; in this view, the legitimacy to lead is a fixed resource that can be obtained only under special circumstances. The political scientist G.John Ikenberry argues in After Victory that states have been well positioned to reshape the institutional order only after emerging victorious from some titanic struggle, such as the French Revolution, the Napoleonic Wars, or World War I or II. For the neoconservative Robert Kagan, the legitimacy to lead came naturally to the United States during the Cold War, when it was providing the signal service of balancing the Soviet Union. The implication is that today, in the absence of such salient sources of legitimacy, the wellsprings of support for U.S. leadership have dried up for good. But this view is mistaken. For one thing, it overstates how accepted U.S. leadership was during the Cold War: anyone who recalls the Euromissile crisis of the 1980s, for example, will recognize that mass opposition to U.S. policy (in that case, over stationing intermediaterange nuclear missiles in Europe) is not a recent phenomenon. For another, it understates how dynamic and malleable legitimacy is. Legitimacy is based on the belief that an action, an actor, or a political order is proper, acceptable, or natural. An action - such as the Vietnam War or the invasion of Iraq - may come to be seen as illegitimate without sparking an irreversible crisis of legitimacy for the actor or the order. When the actor concerned has disproportionately more material resources than other states, the sources of its legitimacy can be refreshed repeatedly. After all, this is hardly the first time Americans have worried about a crisis of legitimacy. Tides of skepticism concerning U.S. leadership arguably rose as high or higher after the fall of Saigon in 1975 and during Ronald Reagan's first term, when he called the Soviet Union an "evil empire." Even George W. Bush, a globally unpopular U.S. president with deeply controversial policies, oversaw a marked improvement in relations with France, Germany, and India in recent years - even before the elections of Chancellor Angela Merkel in Germany and President Nicolas Sarkozy in France. Of course, the ability of the United States to weather such crises of legitimacy in the past hardly guarantees that it can lead the system in the future. But there are reasons for optimism. Some of the apparent damage to U.S. legitimacy might merely be the result of the Bush administration's approach to diplomacy and international institutions. Key underlying conditions remain particularly favorable for sustaining and even enhancing U.S. legitimacy in the years ahead. The United States continues to have a far larger share of the human and material resources for shaping global perceptions than any other state, as well as the unrivaled wherewithal to produce public goods that reinforce the benefits of its global role. No other state has any claim to leadership commensurate with Washington's. And largely because of the power position the United States still occupies, there is no prospect of a counterbalancing coalition emerging anytime soon to challenge it. In the end, the legitimacy of a system's leader hinges on whether the system's members see the leader as acceptable or at least preferable to realistic alternatives. Legitimacy is not necessarily about normative approval: one may dislike the United States but think its leadership is natural under the circumstances or the best that can be expected. Moreover, history provides abundant evidence that past leading states - such as Spain, France, and the United Kingdom - were able to revise the international institutions of their day without the special circumstances Ikenberry and Kagan cite. Spainfashioned both normative and positive laws to legitimize its conquest of indigenous Americans in the early seventeenth century; France instituted modern concepts of state borders to meet its needs as Europe's preeminent land power in the eighteenth century; and the United Kingdom fostered rules on piracy, neutral shipping, and colonialism to suit its interests as a developing maritime empire in the nineteenth century. As Wilhelm Grewe documents in his magisterial The Epochs of International Law, these states accomplished such feats partly through the unsubtle use of power: bribes, coercion, and the allure oflucrative long-term cooperation. Less obvious but often more important, the bargaining hands of the leading states were often strengthened by the general perception that they could pursue their interests in even less palatable ways - notably, through the naked use of force. Invariably, too, leading states have had the power to set the international agenda, indirectly affecting the development of new rules by defining the problems they were developed to address. Given its naval primacy and global trading interests, the United Kingdom was able to propel the slave trade to the forefront of the world's agenda for several decades after it had itself abolished slavery at home, in 1833. The bottom line is that the United States today has the necessary legitimacy to shepherd reform of the international system.

**PRISM destroyed legitimacy/soft power**

Migranyan 13—Andranik is the director of the Institute for Democracy and Cooperation in New York. He is also a professor at the Institute of International Relations in Moscow, a former member of the Public Chamber and a former member of the Russian Presidential Council [July 5, 2013, “Scandals Harm U.S. Soft Power,” http://nationalinterest.org/commentary/scandals-harm-us-soft-power-8695]

For the past few months, the United States has been rocked by a series of scandals. It all started with the events in Benghazi, when Al Qaeda-affiliated terrorists attacked the General Consulate there and murdered four diplomats, including the U.S. ambassador to Libya. Then there was the scandal exposed when it was revealed that the Justice Department was monitoring the calls of the Associated Press. The Internal Revenue Service seems to have targeted certain political groups. Finally, there was the vast National Security Agency apparatus for monitoring online activity revealed by Edward Snowden. Together, these events provoke a number of questions about the path taken by contemporary Western societies, and especially the one taken by America.¶ Large and powerful institutions, especially those in the security sphere, have become unaccountable to the public, even to representatives of the people themselves. Have George Orwell’s cautionary tales of total government control over society been realized?¶ At the end of the 1960s and the beginning of the 1970s, my fellow students and I read Orwell’s 1984 and other dystopian stories and believed them to portray fascist Germany or the Soviet Union—two totalitarian regimes—but today it has become increasingly apparent that Orwell, Huxley and other dystopian authors had seen in their own countries (Britain and the United States) certain trends, especially as technological capabilities grew, that would ultimately allow governments to exert total control over their societies. The potential for this type of all-knowing regime is what Edward Snowden revealed, confirming the worst fears that the dystopias are already being realized.¶ On a practical geopolitical level, the spying scandals have seriously tarnished the reputation of the United States. They have circumscribed its ability to exert soft power; the same influence that made the U.S. model very attractive to the rest of the world. This former lustre is now diminished. The blatant everyday intrusions into the private lives of Americans, and violations of individual rights and liberties by runaway, unaccountable U.S. government agencies, have deprived the United States of its authority to dictate how others must live and what others must do. Washington can no longer lecture others when its very foundational institutions and values are being discredited—or at a minimum, when all is not well “in the state of Denmark.”¶ Perhaps precisely because not all is well, many American politicians seem unable to adequately address the current situation. Instead of asking what isn’t working in the government and how to ensure accountability and transparency in their institutions, they try, in their annoyance, to blame the messenger—as they are doing in Snowden’s case. Some Senators hurried to blame Russia and Ecuador for anti-American behavior, and threatened to punish them should they offer asylum to Snowden.¶ These threats could only cause confusion in sober minds, as every sovereign country retains the right to issue or deny asylum to whomever it pleases. In addition, the United States itself has a tradition of always offering political asylum to deserters of the secret services of other countries, especially in the case of the former Soviet Union and other ex-socialist countries. In those situations, the United States never gave any consideration to how those other countries might react—it considered the deserters sources of valuable information. As long as deserters have not had a criminal and murderous past, they can receive political asylum in any country that considers itself sovereign and can stand up to any pressure and blackmail.¶ Meanwhile, the hysteria of some politicians, if the State Department or other institutions of the executive branch join it, can only accelerate the process of Snowden’s asylum. For any country he might ask will only be more willing to demonstrate its own sovereignty and dignity by standing up to a bully that tries to dictate conditions to it. In our particular case, political pressure on Russia and President Putin could turn out to be utterly counterproductive. I believe that Washington has enough levelheaded people to understand that fact, and correctly advise the White House. The administration will need sound advice, as many people in Congress fail to understand the consequences of their calls for punishment of sovereign countries or foreign political leaders that don’t dance to Washington’s tune.¶ Judging by the latest exchange between Moscow and Washington, it appears that the executive branches of both countries will find adequate solutions to the Snowden situation without attacks on each other’s dignity and self-esteem. Russia and the United States are both Security Council members, and much hinges on their decisions, including a slew of common problems that make cooperation necessary.¶ Yet the recent series of scandals has caused irreparable damage to the image and soft power of the United States. I do not know how soon this damage can be repaired. But gone are the days when Orwell was seen as a relic of the Cold War, as the all-powerful Leviathan of the security services has run away from all accountability to state and society. Today the world is looking at America—and its model for governance—with a more critical eye.

**“Credibility” is irrelevant—states will evaluate threats based off current capabilities and interests—basically every academic study is on our side and you’ll only have evidence from think tankers and pundits.**

Christopher Fettweis, Winter 2007-2008. Assistant professor of national security affairs in the National Security Decision Making Department at the U.S. Naval War College. “Credibility and the War on Terror,” Political Science Quarterly, 122.4.

The war in Vietnam marked the beginning of the current debate over the importance of credibility, and the point of divergence between scholars and practitioners. Despite dire warnings from many of its leaders, the United States not only withdrew its forces from Southeast Asia but also cut back on its aid and watched North Vietnamese troops overrun Saigon in 1975. Since this "cut-and-run" and subsequent loss of an ally were undoubtedly unmitigated disasters for the credibility of the United States, presumably a string of foreign policy setbacks should have followed. If international actions are truly interdependent, as policymakers believe, then the 1970s would prob- ably have seen evidence of allies beginning to question U.S. commitments, dominoes falling where the reputation of the United States maintained the status quo, and increased levels of Soviet activity in the third world. The conventional wisdom suggests that the humiliating rooftop helicopter evacua- tion of the U.S. embassy in Saigon should have heralded a dark period for U.S. foreign policy. However, no such string of catastrophes took place. Perhaps most ob- viously, there is no evidence that any alhes of the United States were sig- nificantly demoralized, or that any questioned the wisdom of their allegiance. If anything, many of Washington's closest alhes seemed relieved when the war ended, since many of them had doubted its importance in the first place and had feared that it distracted the United States from other, more pressing issues.^^ Certainly no state, not even any "client" states in the third world, changed its geopolitical orientation as a result of Vietnam. The damage to U.S. credibility also did not lead to the long-predicted spread of communism throughout the region, as even Kissinger today grudgingly acknowledges.^' On the contrary, in the ten years that followed the fall of Saigon, the non-communist nations of Southeast Asia enjoyed a period of unprecedented prosperity.^" The only dominoes that fell were two countries that were even less relevant than Vietnam to the global balance of power— Cambodia and Laos, both of which were hardly major losses for the West, especially given the tragedies that followed. Nationalism proved to be a bul- wark against the spread of communism that could not be overcome by any loss of confidence in U.S. commitments. Most importantly, the Soviet Union apparently failed to become em- boldened by the U.S. withdrawal, and did not appreciably increase its "adventurism" in the third world, compared to the 1950s and '60s, when U.S. credibility was high.^^ In an important and convincing study, Ted Hopf examined over 500 articles and 300 leadership speeches made by Soviet policy- makers throughout the 1970s, and found that their public pronouncements did not show evidence of a belief that U.S. setbacks in the third world signaled a lack of resolution. "The most dominant inference Soviet leaders made after Vietnam," concluded Hopf, "was not about falling regional dominoes or bandwagoning American allies, but about the prospects of detente with the United States and Western Europe."^^ Soviet behavior did not change, despite the perception of incompetence that many Americans feared would inspire increased belligerence. Kissinger has referred to Soviet decisions to intervene in Angola and Ethiopia as evidence of the negative effect of Vietnam, but Hopf found no evidence that perceptions of U.S. credibility affected Soviet decision makers. It appears as if those interventions—which, of course, were in strategically irrelevant countries anyway—were indepen- dent events that probably would have occurred no matter what had happened in Vietnam. Other negative events in the 1970s, such as the fall of the Shah, seem even more independent of the catastrophe, despite half-hearted efforts to link them together." As it turns out, Vietnam was all but irrelevant to international politics, which is of course exactly what critics of the war had maintained all along. The immediate post-Vietnam era actually contains a good deal of evidence to bolster a conclusion opposite to the presumptions of deterrence theorists. Robert Jervis has argued that states often act more aggressively in periods of "low" credibility following a reversal, or in response to the perception of irresolution. The Soviets might well have expected the United States to act like a wounded animal, perhaps even more willing to defend its interests than before the withdrawal from Vietnam. "A statesman's will- ingness to resist," Jervis argued, "may be inversely related to how well he has done in the recent past."^'' Indeed, U.S. policymakers, believing that the national credibility had been damaged, seemed eager to reverse such perceptions abroad. The seizure of the Mayaguez, which occurred imme- diately after the fall of Saigon, provided the opportunity to do so. The re- sponse of the administration of Gerald Ford was rapid, decisive, and belligerent. As the President said at the time, "I have to show some strength in order to help us ... with our credibility in the world." Kissinger had told reporters off the record that "the United States must carry out some act somewhere in the world which shows its determination to continue to be a world power." He wanted to react rapidly, arguing that "indecision and weakness can lead to demoralized friends and emboldened adversaries." Even though a rapid military response might have put the captured crew at risk, their lives were unfortunately a "secondary consideration," argued Kissinger, since the "real issue was international credibility and not the safe return of the crew."^Âs will be argued below, the credibility imperative rarely supports negotiated solutions. This was by no means an isolated inci- dent. The invasion of Grenada, for example, cannot be understood without reference to the perceived loss of credibility that followed the removal of troops from Lebanon after the bombings of the embassy and Marine bar- racks. The intervention in Somalia was in large part a response to and cover for U.S. inaction in Bosnia.^\* Since Vietnam, scholars have been generally unable to identify cases in which high credibility helped the United States achieve its goals. The short- term aftermath of the Cuban Missile Crisis, for example, did not include a string of Soviet reversals, or the kind of benign bandwagoning with the West that deterrence theorists would have expected. In fact, the perceived rever- sal in Cuba seemed to harden Soviet resolve. As the crisis was drawing to a close, Soviet diplomat Vasily Kuznetsov angrily told his counterpart, "You Americans will never be able to do this to us again."^' Kissinger commented in his memoirs that "the Soviet Union thereupon launched itself on a de- termined, systematic, and long-term program of expanding all categories of its military power .... The 1962 Cuban crisis was thus a historic turning point—but not for the reason some Americans complacently supposed."^\* The reasser- tion of the credibility of the United States, which was done at the brink of nuclear war, had few long-lasting benefits. The Soviets seemed to learn the wrong lesson. There is actually scant evidence that other states ever learn the right lessons. Cold War history contains little reason to believe that the credibility of the superpowers had very much effect on their ability to influence others. Over the last decade, a series of major scholarly studies have cast further doubt upon the fundamental assumption of interdependence across foreign policy actions. Employing methods borrowed from social psychology rather than the economics-based models commonly employed by deterrence theorists, Jonathan Mercer argued that threats are far more independent than is com- monly believed and, therefore, that reputations are not likely to be formed on the basis of individual actions.^' While policymakers may feel that their decisions send messages about their basic dispositions to others, most of the evidence from social psychology suggests otherwise. Groups tend to interpret the actions of their rivals as situational, dependent upon the constraints of place and time. Therefore, they are not likely to form lasting impressions of irreso- lution from single, independent events. Mercer argued that the interdependence assumption had been accepted on faith, and rarely put to a coherent test; when it was, it almost inevitably failed.\* Mercer's larger conclusions were that states cannot control their reputa- tions or level of credibility, and that target adversaries and alhes will ultimately form their own perceptions. Sending messages for their consideration in future crises, therefore, is all but futile. These arguments echoed some of the broader critiques of the credibility imperative that had emerged in response to the war in Vietnam, both by reahsts hke Morgenthau and Waltz and by so-called area specialists, who took issue with the interdependence beliefs of the generahsts. As Jervis observed, a common axis of disagreement in American foreign policy has been between those who focus on the specific situation and the particular nations involved (often State Department officials or area experts), and those who take a global geopolitical perspective (often in the White House or outside foreign pohcy generalists). The former usually believe that states in a region are strongly driven by domestic concerns and local rivalries; the latter are pre- disposed to think that these states look to the major powers for their cues and have little control over their own fates."" Throughout most of the Cold War, since those who argued that events are interdependent won most of the pohcy debates, U.S. foreign policy was obsessed with credibility. A series of other studies have followed those of Hopf and Mercer, yielding similar results. The empirical record seems to suggest that there have been few instances of a setback in one arena influencing state behavior in a second arena. Daryl Press began his recent study expecting to find that perceptions of the opponent's credibility would be an important variable affecting state behavior.''^ He chose three cases in which reputation would presumably have been vital to the outcome—the outbreak of the First World War, the Berlin Crisis of the late 1950s, and the Cuban Missile Crisis—and found, to his surprise, that in all three cases, leaders did not appear to be influenced at all by prior actions of their rivals, for better or for worse. Crisis behavior appeared to be entirely independent; credibility, therefore, was all but irrelevant. Mercer's conclusions about reputation seem to have amassed a good deal more sup- porting evidence in the time since he wrote. Today the credibility imperative's academic defenders are small in number and influence.'\*'' In the policy world, however, the obsession with credibility lives on undiminished, and doubters are clearly in the minority. Shiping Tang considers the continued existence of the credibility impera- tive in spite of the overwhelming evidence to the contrary to be evidence of almost cultish behavior among policymakers.''^ The longevity of this cult seems to derive from a couple of foundations. First, since foreign policy is by necessity a worst-case-scenario business, prudence often counsels leaders to hedge against the most negative potential outcomes.''^ Since a loss of credibility offers a presumably plausible route to national ruin, the sagacious policymaker will often be very wary of damage to the reputation of the state, no matter what logic and the empirical evidence suggest. After all, while incorrect academics face virtually no consequences, missteps by leaders can be catastrophic. Second, the current academic conventional wisdom is counterintui- tive, and in some senses contradictory to normal daily experience. Indi- viduals certainly develop reputations in their daily lives that influence the way that others treat them. Parents understand that they must carry through on their threats and promises if they want their children to take their future instructions seriously, and we all have friends whose repeated fail- ures to deliver on past promises make us skeptical of their future assur- ances."' However, international relations differ drastically from interper- sonal. As Press explains, Children use past actions when they evaluate their parents' credibility to punish them, and perhaps we all use past actions to assess whether a friend will show up at the movies. But there is no logical basis to generalize from these mundane situations to the most critical decisions made by national leaders during crises. In fact it would be odd—even irrational—if people relied on the same mental shortcuts that they use to make unimportant split-second decisions of daily life when they confront the most important decisions of their lives—decisions on which their country's survival depends."\*^Press argues that national capabilities and interests—not past behavior— provide the foundation for the formation of perceptions. However, the credi- bility imperative has a powerful intuitive logic behind it, based upon lifetimes of interpersonal experience. There are therefore significant impediments in front of those who would challenge the wisdom of the pohcymaker's obsession with reputation. This divergence in conventional wisdom between policy and scholarship would not be a major issue for twenty-first-century international politics if policies that are primarily based upon the need to appear credible were not often counterproductive, costly, and dangerous. The imperative has clear effects upon policy, and is employed in debates in predictable, measurable, and uniformly unhelpful ways.

**Maintaining hegemony accelerates paranoid imperial violence – their obsession manufactures threats and conceals the US’ role in enemy construction – the alternative makes visible power relationships that enable endless warfare**

McClintock 9 (Anne, Simone de Beauvoir Professor of English and Women’s and Gender Studies at the University of Wisconsin, Madison, "Paranoid Empire: Specters from Guantánamo and Abu Ghraib," Muse)

By now it is fair to say that the United States has come to be dominated by two grand and dangerous hallucinations: the promise of **benign US globalization** and the permanent threat of the “war on terror.” I have come to feel that we cannot understand the extravagance of the violence to which the US government has committed itself after 9/11—two countries invaded, thousands of innocent people imprisoned, killed, and tortured—unless we grasp a defining feature of our moment, that is, a deep and disturbing doubleness with respect to power. Taking shape, as it now does, around **fantasies of global omnipotence** (Operation Infinite Justice, the War to End All Evil) **coinciding with nightmares of impending attack**, the United States has entered the domain of **paranoia**: dream world and catastrophe. For it is only in paranoia that one finds simultaneously and in such condensed form both **deliriums of absolute power and forebodings of perpetual threat.** Hence the spectral and nightmarish quality of the “war on terror,” a limitless war against a limitless threat, a war vaunted by the US administration to encompass all of space and persisting without end. But the war on terror is not a real war, for “terror” is not an identifiable enemy nor a strategic, real-world target. The war on terror is what William Gibson calls elsewhere “a consensual hallucination,”[4](http://muse.jhu.edu.go.libproxy.wfubmc.edu/journals/small_axe/v013/13.1.mcclintock.html#f4) and the US government can fling its military might against ghostly apparitions and hallucinate a victory over all evil only at the cost of catastrophic self-delusion and the infliction of great calamities elsewhere. [End Page 51] I have come to feel that we **urgently need to make visible** (the better politically to challenge) those established but **concealed circuits of imperial violence** that now animate the war on terror. We need, as urgently, to illuminate the continuities that connect those circuits of imperial violence abroad with the vast, internal shadowlands of prisons and supermaxes—the modern “slave-ships on the middle passage to nowhere”—that have come to characterize the United States as a super-carceral state.[5](http://muse.jhu.edu.go.libproxy.wfubmc.edu/journals/small_axe/v013/13.1.mcclintock.html#f5) Can we, the uneasy heirs of empire, now speak only of national things? If a long-established but primarily covert US imperialism has, since 9/11, manifested itself more aggressively as an overt empire, does the terrain and object of intellectual inquiry, as well as the claims of political responsibility, not also extend beyond that useful fiction of the “exceptional nation” to embrace the shadowlands of empire? If so, how can we theorize the phantasmagoric, imperial violence that has come so dreadfully to constitute our kinship with the ordinary, but which also at the same moment renders extraordinary the ordinary bodies of ordinary people, an imperial violence which in **collusion** with a complicit corporate media would **render itself invisible**, casting **states of emergency** into fitful shadow and fleshly bodies into specters? For imperialism is not something that happens elsewhere, an offshore fact to be deplored but as easily ignored. Rather, the force of empire comes to **reconfigure**, from within, the nature and violence of the nation-state itself, giving rise to perplexing questions: Who under an empire are “we,” the people? And who are the ghosted, ordinary people beyond the nation-state who, in turn, constitute “us”? We now inhabit a crisis of violence and the visible. How do we insist on seeing the violence that the imperial state attempts to render **invisible**, while also seeing the ordinary people afflicted by that violence? For to allow the spectral, disfigured people (especially those under torture) obliged to inhabit the haunted no-places and penumbra of empire to be made visible as ordinary people is to forfeit the long-held US claim of moral and cultural exceptionalism, the traditional self-identity of the United States as the **uniquely superior, universal standard-bearer of moral authority, a tenacious, national mythology of originary innocence now in tatters**. The deeper question, however, is not only how to see but also how to theorize and oppose the violence without becoming beguiled by the seductions of spectacle alone.[6](http://muse.jhu.edu.go.libproxy.wfubmc.edu/journals/small_axe/v013/13.1.mcclintock.html#f6) Perhaps in the labyrinths of torture we must also find a way to speak with ghosts, for specters disturb the authority of vision and the hauntings of popular memory disrupt the great forgettings of official history. [End Page 52] Paranoia Even the paranoid have enemies. —Donald Rumsfeld Why paranoia? Can we fully understand the proliferating circuits of imperial violence—the very eclipsing of which gives to our moment its uncanny, phantasmagoric cast—without understanding the **pervasive presence of the paranoia** that has come, quite violently, to manifest itself across the political and cultural spectrum as a defining feature of our time? By paranoia, I mean not simply Hofstadter’s famous identification of the US state’s tendency toward conspiracy theories.[7](http://muse.jhu.edu.go.libproxy.wfubmc.edu/journals/small_axe/v013/13.1.mcclintock.html#f7) Rather, I conceive of paranoia as an **inherent contradiction** with respect to power: a **double-sided phantasm** that **oscillates precariously between deliriums of grandeur and nightmares of perpetual threat**, a deep and dangerous doubleness with respect to power that is held in unstable tension, but which, if suddenly destabilized (as after 9/11), can produce **pyrotechnic displays of violence**. The pertinence of understanding paranoia, I argue, lies in its peculiarly intimate and peculiarly dangerous relation to violence.[8](http://muse.jhu.edu.go.libproxy.wfubmc.edu/journals/small_axe/v013/13.1.mcclintock.html#f8) Let me be clear: I do not see paranoia as a primary, structural cause of US imperialism nor as its structuring identity. Nor do I see the US war on terror as animated by some collective, psychic agency, submerged mind, or Hegelian “cunning of reason,” nor by what Susan Faludi calls a national “terror dream.”[9](http://muse.jhu.edu.go.libproxy.wfubmc.edu/journals/small_axe/v013/13.1.mcclintock.html#f9) Nor am I interested in evoking paranoia as a kind of psychological diagnosis of the imperial nation-state. Nations do not have “psyches” or an “unconscious”; only people do. Rather, a social entity such as an organization, state, or empire can be spoken of as “paranoid” if the dominant powers governing that entity cohere as a collective community around **contradictory cultural narratives, self-mythologies, practices, and identities that oscillate between delusions of inherent superiority and omnipotence,** and phantasms of threat and engulfment. The term paranoia is analytically useful here, then, not as a description of a collective national psyche, nor as a description of a universal pathology, but rather as an **analytically strategic concept**, a way of seeing and being **attentive to contradictions within power**, a way of making visible (the better politically to oppose) the contradictory **flashpoints of violence** that the state tries to conceal. [End Page 53] Paranoia is in this sense what I call a hinge phenomenon, articulated between the ordinary person and society, between psychodynamics and socio-political history. Paranoia is in that sense dialectical rather than binary, for its violence **erupts from the force** of its multiple, **cascading contradictions**: the intimate memories of wounds, defeats, and humiliations condensing with cultural fantasies of aggrandizement and revenge, in such a way as to be productive at times of **unspeakable violence**. For how else can we understand such debauches of cruelty?

### 1NC Solvency

**The plan is like giving Logan an assignment: it doesn't get done**

**A. 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

**Restrictions cause showdowns – collapses SOP**

Posner & Vermeule 7—Professor of Law @ The University of Chicago & Professor of Law @ Harvard Law School [Eric A. Posner & Adrian Vermeule, “Constitutional Showdown,” University of Chicago Law School, John M. Olin Law & Economics Working Paper NO. 348, July 2007, pg. http://ssrn.com/abstract\_id=1002996]

So far, we have explained why the president and Congress might disagree about when to terminate the war, but mere policy disagreement does not result in a showdown. Showdowns arise only when there is a disagreement about authority. If Congress believes that the president has the sole authority to terminate the war, then his view will prevail. Congress may try to pressure him or influence him by offering support for other programs desired by the president, or by trying to rile up the public, but these activities are part of normal politics, and do not provoke a constitutional showdown. Similarly, if the president believes that Congress has the sole authority to terminate the war, then Congress’s view will prevail. This outcome is shown in cell (3) in Table 1. Similarly, no showdown occurs when the two branches agree both about authority and policy—for example, that the president decides, and Congress agrees with his decision (cell (1)). The first column represents the domain of normal politics.

Showdowns can arise only when Congress and the president disagree about who decides. Here, there are two further possibilities. First, Congress and the president disagree about who decides but agree about the correct policy outcome (cell (2)). In these situations, which arise with some frequency, the two branches are often tempted to paper over their differences because an immediate policy choice is not at stake. But sometimes a showdown will occur. We will discuss this special case in Part II.B. Second, Congress and the president disagree about the policy outcome and about authority (cell (4)). In this case, showdowns are likely, because a policy decision must be made, and if the parties cannot agree about what it should be, then they cannot avoid resolving the question of authority. We focus on this case for now.

Why showdowns occur. In our war example, Congress and the president disagree about when the war should end, and who should make the decision. Let us suppose that they can both make reasonable constitutional arguments, and that the judiciary will not step in to resolve the dispute. What happens next? If each branch asserts its power, we have a full-blown constitutional crisis. No ordinary political or legal means exists for resolving the dispute. Consider how this crisis might play out. One possibility is that Congress enacts a law declaring the war at an end, and the president directs the military to disobey the law. The military would need to decide whether to obey the president or Congress. The military might make this decision on the basis of a good-faith legal analysis, or it might not. Whether or not it does, there is a further question whether soldiers would obey the decisions of the generals, and the public would support the decisions of the soldiers. The soldiers might fear that if the generals take an unlawful stance, the soldiers might subsequently be found guilty of committing crimes. And even if they do not, they might fear that the public might fault them for obeying (or disobeying) the generals. A great deal of delay and paralysis could result as people decide for themselves what they ought to do. But eventually only two outcomes are possible. One is that the nation divides into factions and a civil war erupts—a real possibility in many countries, but one sufficiently remote in the United States today that we can safely ignore it. The other is that through the mysterious process by which public opinion forms, the public will throw its weight behind one branch or the other, and the branch that receives public support will prevail. Pg. 14-15

**Winning the showdown encourages aggrandizement. It will expand the President’s authority**

Posner & Vermeule 07—Professor of Law @ The University of Chicago & Professor of Law @ Harvard Law School [Eric A. Posner & Adrian Vermeule, “Constitutional Showdown,” University of Chicago Law School, John M. Olin Law & Economics Working Paper NO. 348, July 2007, pg. http://ssrn.com/abstract\_id=1002996

Showdowns and aggrandizement. It is difficult to give evidence that showdowns can produce (not just prevent) aggrandizement, because there is no consensus on a normative benchmark. However, it can be shown, more narrowly, that relative to a wide range of such benchmarks, aggrandizing showdowns occur. Commentators who have very different accounts of the optimal distribution of powers across institutions have in common the belief that, relative to their own preferred accounts of the optimal distribution of powers, showdowns have produced aggrandizement. Consider Robert Bork’s view that the Supreme Court’s power grew alarmingly after it largely prevailed in the criminal-procedure showdowns of the 1960s, while Richard Epstein holds that the power of the President and Congress grew alarmingly when they prevailed over the Old Court in the constitutional showdowns of the later 1930s. Bork and Epstein have very different views about the optimal distribution of powers, but both agree that the showdowns to which they point produced a maldistribution of powers relative to their preferred benchmarks. Pg. 50-51

**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

#### No nuclear terrorism – no capability nor intent reject their alarmism

* Many reasons to doubt both the capability and interest of terrorists getting nuclear devices
* Dangers of a loose nuke from Russia is far over-stated
* Even if a terrorist group got a nuclear weapon using it would be very difficult
* Terrorists and connections between rogue states is exaggerates
* Iran and North Korea are not going to give terrorists nukes because their arsenals are small
* What can go wrong will go wrong – multiple intensifying and compounding probability make terrorist failure inevitable
* Their evidence uses worst case scenarios which is alarmist and false
* Insider documents within Al-Qaeda show they don’t want nuclear weapons and prefer convention weapons
* Their evidence about them wanting nukes is wrong the 90s and out of date
* Even if they did want a nuke it was only to deter a U.S. invasion

Gavin 2010, Francis J. Gavin is Tom Slick Professor of International Affairs and Director of the Robert S. Strauss Center¶ for International Security and Law, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin, 2010, International Security, Vol. 34, No. 3 (Winter 2009/10), pp. 7–37¶ © 2010 by the President and Fellows of Harvard College and the Massachusetts Institute of Technology, “Same As It Ever Was ¶ Nuclear Alarmism, Proliferation, and the¶ Cold War”, http://www.mitpressjournals.org/doi/pdf/10.1162/isec.2010.34.3.7

Nuclear Terrorism. The possibility of a terrorist nuclear attack on the¶ United States is widely believed to be a grave, even apocalyptic, threat and a¶ likely possibility, a belief supported by numerous statements by public¶ ofªcials. Since the collapse of the Soviet Union, “the inevitability of the spread¶ of nuclear terrorism” and of a “successful terrorist attack” have been taken for¶ granted.48¶ Coherent policies to reduce the risk of a nonstate actor using nuclear weapons clearly need to be developed. In particular, the rise of the Abdul Qadeer¶ Khan nuclear technology network should give pause.49 But again, the news is¶ not as grim as nuclear alarmists would suggest. Much has already been done¶ to secure the supply of nuclear materials, and relatively simple steps can produce further improvements. Moreover, there are reasons to doubt both the capabilities and even the interest many terrorist groups have in detonating a¶ nuclear device on U.S. soil. As Adam Garªnkle writes, “The threat of nuclear¶ terrorism is very remote.”50¶ Experts disagree on whether nonstate actors have the scientific, engineering,¶ financial, natural resource, security, and logistical capacities to build a nuclear¶ bomb from scratch. According to terrorism expert Robin Frost, the danger of a¶ “nuclear black market” and loose nukes from Russia may be overstated. Even¶ if a terrorist group did acquire a nuclear weapon, delivering and detonating it¶ against a U.S. target would present tremendous technical and logistical¶ difficulties.51 Finally, the feared nexus between terrorists and rogue regimes¶ may be exaggerated. As nuclear proliferation expert Joseph Cirincione argues,¶ states such as Iran and North Korea are “not the most likely sources for terrorists since their stockpiles, if any, are small and exceedingly precious, and hence¶ well-guarded.”52 Chubin states that there “is no reason to believe that Iran today, any more than Sadaam Hussein earlier, would transfer WMD [weapons of¶ mass destruction] technology to terrorist groups like al-Qaida or Hezbollah.”53¶ Even if a terrorist group were to acquire a nuclear device, expert Michael¶ Levi demonstrates that effective planning can prevent catastrophe: for nuclear terrorists, what “can go wrong might go wrong, and when it comes to¶ nuclear terrorism, a broader, integrated defense, just like controls at the source¶ of weapons and materials, can multiply, intensify, and compound the possibilities of terrorist failure, possibly driving terrorist groups to reject nuclear terrorism altogether.” Warning of the danger of a terrorist acquiring a nuclear¶ weapon, most analyses are based on the inaccurate image of an “infallible tenfoot-tall enemy.” This type of alarmism, writes Levi, impedes the development¶ of thoughtful strategies that could deter, prevent, or mitigate a terrorist attack:¶ “Worst-case estimates have their place, but the possible failure-averse, conservative, resource-limited ªve-foot-tall nuclear terrorist, who is subject not only¶ to the laws of physics but also to Murphy’s law of nuclear terrorism, needs to¶ become just as central to our evaluations of strategies.”54¶ A recent study contends that al-Qaida’s interest in acquiring and using nuclear weapons may be overstated. Anne Stenersen, a terrorism expert, claims¶ that “looking at statements and activities at various levels within the al-Qaida network, it becomes clear that the network’s interest in using unconventional¶ means is in fact much lower than commonly thought.”55 She further states that¶ “CBRN [chemical, biological, radiological, and nuclear] weapons do not play a¶ central part in al-Qaida’s strategy.”56 In the 1990s, members of al-Qaida debated whether to obtain a nuclear device. Those in favor sought the weapons¶ primarily to deter a U.S. attack on al-Qaida’s bases in Afghanistan. This assessment reveals an organization at odds with that laid out by nuclear alarmists of¶ terrorists obsessed with using nuclear weapons against the United States regardless of the consequences. Stenersen asserts, “Although there have been¶ various reports stating that al-Qaida attempted to buy nuclear material in the¶ nineties, and possibly recruited skilled scientists, it appears that al-Qaida central have not dedicated a lot of time or effort to developing a high-end CBRN¶ capability.... Al-Qaida central never had a coherent strategy to obtain¶ CBRN: instead, its members were divided on the issue, and there was an¶ awareness that militarily effective weapons were extremely difficult to obtain.”57 Most terrorist groups “assess nuclear terrorism through the lens of¶ their political goals and may judge that it does not advance their interests.”58¶ As Frost has written, “The risk of nuclear terrorism, especially true nuclear terrorism employing bombs powered by nuclear fission, is overstated, and that¶ popular wisdom on the topic is significantly fiawed.”59

## Solvency

### 2NC – End Run Disad Overview

#### Article II authority – end run ensures it

Daskal & Vladeck 13—Fellow @ Georgetown’s Center on National Security and the Law & Professor of law @American University Washington [Jennifer Daskal (Professor of Law @ Georgetown University) & Stephen I. Vladeck (Associate Dean for Scholarship at American University Washington College of Law), “After the AUMF: A Response to Chesney, Goldsmith, Waxman, and Wittes,” Lawfare, Sunday, March 17, 2013 at 10:31 PM, pg. http://www.lawfareblog.com/2013/03/after-the-aumf/

Despite these successes of our Article III courts, it seems that a key—and possibly principal—objective of the CGWW proposal is to provide authority to this and future presidents to detain terrorism suspects without charge. Indeed, as they candidly note in explaining why they believe the President’s existing authorities aren’t sufficient for groups not covered by the AUMF, “It is also not clear whether the president’s Article II authority includes detention powers.”

Thus, CGWW appear to believe that long-term, law-of-war detention authority is necessary to deal with the threat posed by emerging terrorists groups who fall outside the AUMF. But they fail to explain why this is needed; how such detentions would not re-trigger the same international approbation and condemnation that has long accompanied the detentions at Guantánamo; where the detainees would be held; or how they would protect against blowback. Moreover, to the extent that their primary concerns stem from the threats in the Sahel and Somalia (see, for example, CGWW at 5), the difficulties posed by trying to capture such suspects apply regardless of whether the goal is law-of-war detention or criminal prosecution.

#### Institutionalizing norms for drones ensures inevitable escalation through destabilizing command and control systems, deterrence, and miscalculation – we can’t give you a specific instance in which two nations that would otherwise not fight will fight but it causes a destabilization of accepted norms which would otherwise place a lid on conflict

Fisk & Ramos 13—Lecturer in Political Science @ Loyola Marymount University & Professor of Political Science @ Loyola Marymount University [Kerstin Fisk & Dr. Jennifer M. Ramos, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm,” International Studies Perspectives, April 15, 2013, pg. DOI: 10.1111/insp.12013

Taken together, though, in terms of their position on the idea of preventive self-defense, our findings suggest two similarities. First, in all four cases reviewed here, leaders invoked the US example to justify their actions. Particularly in India, similarities to 9/11 were drawn in an effort to legitimize moves toward offensive strategies. Second, asymmetric tactics are not only a tool of the weak, but also of stronger states. We found a strong correlation between strategies of preventive self-defense and the acquisition of drone technology. Because of their precision-strike capability, drones are an obvious choice for states committed to preventive self-defense.

Conclusion

Preventive self-defense entails waging a war or an attack by choice, in order to prevent a suspected enemy from changing the status quo in an unfavorable direction. Prevention is acting in anticipation of a suspected latent threat that might fully emerge someday. One might rightfully point out that preventive strikes are nothing new—the Iraq War is simply a more recent example in a long history of the preventive use of force. The strategic theorist Colin Gray (2007:27), for example, argues that “far from being a rare and awful crime against an historical norm, preventive war is, and has always been, so common, that its occurrence seems remarkable only to those who do not know their history.” Prevention may be common throughout history, but this does not change the fact that it became increasingly difficult to justify after World War II, as the international community developed a core set of normative principles to guide state behavior, including war as a last resort. The threshold for war was set high, imposing a stringent standard for states acting in self-defense. Gray concedes that there has been a “slow and erratic, but nevertheless genuine, growth of a global norm that regards the resort to war as an extraordinary and even desperate measure” and that the Iraq war set a “dangerous precedent” (44). Although our cases do not provide a definitive answer for whether a preventive self-defense norm is diffusing, they do provide some initial evidence that states are re-orienting their military and strategic doctrines toward offense. In addition, these states have all either acquired or developed Unmanned Aerial Vehicles for the purposes of reconnaissance, surveillance, and/or precision targeting.

Thus, the results of our plausibility probe provide some evidence that the global norm regarding the use of force as a last resort is waning, and that a preventive self-defense norm is emerging and cascading following the example set by the United States. At the same time, there is variation among our cases in the extent to which they apply the strategy of self-defense. China, for example, has limited their adaption of this strategy to targeted killings, while Russia has declared their strategy to include the possibility of a preventive nuclear war. Yet, the preventive self-defense strategy is not just for powerful actors. Lesser powers may choose to adopt it as well, though perhaps only implementing the strategy against actors with equal or lesser power. Research in this vein would compliment our analyses herein.

With the proliferation of technology in a globalized world, it seems only a matter of time before countries that do not have drone technology are in the minority. While preventive self-defense strategies and drones are not inherently linked, current rhetoric and practice do tie them together. Though it is likely far into the future, it is all the more important to consider the final stage of norm evolution—internalization—for this particular norm. While scholars tend to think of norms as “good,” this one is not so clear-cut. If the preventive self-defense norm is taken for granted, integrated into practice without further consideration, it inherently changes the functioning of international relations. And unmanned aerial vehicles, by reducing the costs of war, make claims of preventive self-defense more palatable to the public. Yet a global norm of preventive self-defense is likely to be destabilizing, leading to more war in the international system, not less. It clearly violates notions of just war principles—jus ad bellum. The United States has set a dangerous precedent, and by continuing its preventive strike policy it continues to provide other states with the justification to do the same. // \*\*\*Four case studies are Russia, China, India, and Germany \*\*\*Acquisition and use of drones are informed by self-defense posture

### 2NC Link

#### 3. Congress is necessary to implement any judicial restriction on the President. Even if the aff has ev that says the Courts can restrict the President, force them to provide a piece of evidence saying implementation will be successful. It won’t be—Congress has no evidence in strengthening its war powers vis-à-vis the President. This card means you vote neg on presumption

NZELIBE 6—Assistant Professor of Law, Northwestern University Law School [Jide Nzelibe, A Positive Theory of the War-Powers Constitution, Iowa Law Review, March, 2006, 91 Iowa L. Rev. 993]

B. Why the Courts Are Unlikely to Tip the Balance of War powers in Congress's Favor

Congress has, for prudent political reasons, often declined to use its formal powers to constrain the President in war-powers issues. But even if members of Congress seem to face significant domestic-audience constraints in participating in war-powers issues, one might ask why the courts do not intervene to level the policy-making playing field. Indeed, one oft-cited antidote to the perceived "imperial" actions of the President in the war-powers realm is judicial intervention. n291 Judicial intervention, it is commonly argued, will tip the institutional balance of powers in Congress's favor and encourage it to exercise its war-powers prerogative. n292

There are two compelling reasons why courts have resisted, and will likely continue to resist, intervening in war-powers disputes. First, due to the political calculus that many members of Congress face, the courts usually assume that it is unlikely that there is a genuine confrontation between the two political branches on war-powers disputes. Second, the courts are probably reluctant to intervene in inter-branch disputes in a sphere where they might have low institutional authoritativeness.

On the first point, the courts have been generally reluctant to protect legislative prerogatives in war powers when members of Congress have failed to do so. Indeed, many members of Congress often have political incentives not to confront the President on war-powers controversies. As such, many of the disputes regarding the division of **war power**s that come before the courts routinely involve what are essentially intra-legislative disputes, where a segment of Congress (often a minority) seems to disagree with the majority's decision. In most such cases, a majority of Congress has either explicitly accepted the President's national-security agenda or has implicitly acquiesced to the agenda without taking formal legislative action. In other words, in those cases there has not been a genuine constitutional impasse that might appropriately trigger court scrutiny. Courts, probably anticipating the political spoils at stake, decline to participate in a "political pass the [\*1060] blame" game by insisting that the courts will not do what Congress refuses to do for itself. n293

Where members of Congress are unwilling to constrain executive-branch authority through legislation, courts understandably recognize that judicial intervention might prove to be meaningless. First, where there is insufficient congressional support for a court decision that favors congressional intervention in war powers, members of Congress will very likely lack the political will to implement such a decision. In other words, members of Congress who fear that greater congressional intervention will expose them to electoral risks will have every incentive to sidestep a judicial ruling that awards them more powers in national-security affairs.

Second, courts will often lack the opportunity to effectively monitor the successful implementation of a bright-line judicial rule regarding the allocation of war powers. Judicial monitoring will often be difficult because there are so many procedural and jurisdictional hurdles to bringing a legal challenge to the allocation of **war power**s. Since most citizens will lack standing to bring the lawsuit, most such lawsuits will probably have to come from members of Congress. Even if disaffected members of Congress are able to overcome significant standing obstacles of their own, n294 they are still likely to face a slew of other procedural obstacles, including ripeness, n295 mootness, n296 and the political-question doctrine. n297

Furthermore, the risk of non-compliance with judicial decisions also implicates the institutional legitimacy of the courts to adjudicate on war-powers claims. As some commentators have observed, courts seem to be especially wary about intervening in separation-of-powers issues in foreign affairs, because the popular legitimacy that underlies judicial resolution of domestic constitutional disputes does not tend to extend to foreign-affairs [\*1061] disputes. n298 In other words, when issues involve the adjudication of individual-rights claims or domestic separation-of-powers disputes, courts can often tap into the popular acceptance of their role in resolving such disputes. n299 In disputes regarding the allocation of war powers, however, it is unlikely that the judicial branch will be able to draw on the popular underpinnings of its legitimacy to secure political-branch compliance with its decisions. This is because there does not seem to be much of a public appetite for increased judicial involvement in foreign-affairs disputes. n300 Moreover, unlike in the domestic realm where the courts play a key legitimating function in separation-of-powers disputes, the political branches have very little incentive to embrace a more active judicial role in disputes over the allocation of war powers. n301

In any event, even if greater judicial intervention in war-powers disputes were politically feasible, it is not clear that such intervention would compel Congress to play a more active role on war-powers issues. In other words, members of Congress are not likely to embrace a war-powers role that has significant electoral risks simply because such a role has been judicially sanctioned. Indeed, not only will members of Congress lack an incentive to comply with such judicial decisions, but judicial monitoring of legislative compliance will often prove very difficult to carry out. At most, if compelled to take on a more active role by a judicial decision when it is not in their political interest to do so, members of Congress will likely substitute legislative rubberstamping for silent acquiescence as the preferred response to the President's use-of-force initiatives. In sum, if greater political accountability for use-of-force decisions is the end goal, there is little evidence that judicially prompted congressional intervention will change the current war-powers landscape.

### 2NC No Solvency

#### Trials will apply Comstock for terrorists – turns the case.

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

Article III trials, therefore, seem to offer the greatest protection against arbitrary and indefinite detention. Regardless what process the courts followed, alleged terrorists would still receive a sentence matching the crime for which they were convicted. But a recent Supreme Court decision and a proposed rule from the Bureau of Prisons cast doubt on whether Article III trials—and, more importantly, Article III sentences—will continue to protect against indefinite detention.

The Supreme Court's ruling in United States v. Comstock sets a disturbing precedent for terrorist-detainees. 89 Comstock involved sentencing issues for sex offenders, a topic seemingly unrelated to terrorism. Yet the Court held that Congress may use its Necessary and Proper Clause powers to permanently detain dangerous sex offenders if they appear to pose a threat to the surrounding community upon release." That Congress may order the civil commitment of dangerous prisoners after completing their sentences sets the stage for transplanting an indefinite detention regime into the criminal sphere. The possibility that this reasoning would or could be extended to cover terrorists subject to Article III criminal sentencing is far from remote. Indeed, many commentators noticed instantly Comstock's potential impact on terror connected inmates.91

The statute at issue in Comstock authorizes a court to civilly commit a soon-to-be-released prisoner if he (1) previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) "suffers from a serious mental illness, abnormality, or disorder," and (3) as a result of the disorder, remains "sexually dangerous to others" such that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 92 If a court finds all of these factors, it may commit the prisoner to the Attorney General's custody, who must make "all reasonable efforts" to return the prisoner to the state in which he was tried or in which he is domiciled.9 3 If the Attorney General is unsuccessful in this endeavor, the prisoner is sent to a federal treatment facility and remains there until he is no longer dangerous.94

By its terms, this statute applies to sex criminals, not terrorists.

Nevertheless, this opinion, which garnered the support of seven justices, clears away any foreseeable barriers to Congress issuing a similar statute aimed at terrorists. After Comstock, Congress may authorize the Attorney General to detain "dangerous" criminals in perpetuity after the termination of their sentences under its Necessary and Proper Clause powers. A statute codifying that notion would alter terrorism prosecutions radically. Pg. 24

#### Article III trials will just become Kangaroo Courts that facilitate indefinite detention. Fear of terror will turn them into the mirror image of military tribunals

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

V. CONCLUSION

The pressure to convict "dangerous" terrorists against a backdrop of a decade-long war has taken its toll on the federal courts. Rather than vindicating the accused's constitutional rights in all circumstances, the federal courts have too often become complicit in distorting them.179 Federal courts have begun to resemble the military tribunal system that was once defined by how distinct it was from the Article III system. The past decade has seen federal courts' power to review executive detention heavily circumscribed. Federal prisons have begun to approximate Guantinamo Bay's indefinite detention regime, and federal criminal trial proceedings of terrorists at times bear an eerie resemblance to military commission norms.

As much as one may endorse the apparent move from military commissions to federal courts, that move should be rejected if it comes at the cost of scarring the Article III system. Therefore, both those in favor of military commissions and those in favor of federal court trials should pause. Regardless of whether it may be desirable that the criminal justice system has the flexibility to adjust to these wartime conditions, these developments have eviscerated the largest disparities between the tribunal and criminal spheres. Even persons in favor of a separate judicial system in the form of tribunals no longer have much justification for such a proposal.

Wars invariably have a corrosive effect on democratic institutions. 180 Courts are no different. Perhaps, as some have suggested, the solution would be to remove courts from the fast-paced business of trying terror with a common law process.18' However, that solution is too simplistic. It is apparent that, no matter where terrorists are tried, our societal fear of the threat they pose has led us to create mirror-image systems that tend toward kangaroo courts, state secrets, prolonged interrogation, and indefinite detention. Until we confront and deal with this inclination, any system in which we try terrorists is doomed to repeat these errors. Pg. 37-38

### 1nc—Seepage

#### Article III trials will just become Kangaroo Courts that facilitate indefinite detention. Fear of terror will turn them into the mirror image of military tribunals

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

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#### Article III courts will give in to wartime pressures. Seepage will create bad law for nonterror cases

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

Wars have a corrosive effect on courts. Many of the darkest moments in federal jurisprudential history have resulted from wartime cases. This is because, "[in an idealized view, our judicial system is insulated from the ribald passions of politics. [But] in reality, those passions suffuse the criminal justice system."26 Wars especially tend to excite passions to a fever pitch. As the D.C. Circuit has lamented,

[t]he common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple. None of those factors exist in the Guantinamo context .... [11n the midst of an ongoing war, time to entertain a process of trial and error is not a luxury we have.27

The war in Afghanistan, presenting a host of thorny legal issues, 28 is now the longest war in United States history.29 This means that thefederal courts have never endured wartime conditions for so long. As a result of this prolonged martial influence, it is clear that this war is corroding federal court jurisprudence. Court-watchers have long feared the danger of "seepage"—the notion that, if terrorists were tried in Article III courts, the pressure to convict would spur the creation of bad law that would "seep" into future non-terror trials."g In this Note, I argue that this hypothetical fear of seepage has become concrete. Indeed, judges already admit that the war has taken a regrettable toll on courts' opinions. In Al-Bihani v. Obama g1 a recent D.C. Circuit decision about Guantdnamo detention, habeas corpus review, and criminal procedure, the opinion's author admits how the courts have bent to accommodate the pressures of war:

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedures, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.32 pg. 13-14

#### They rollback due process rights for all cases

Mukasey 7—US district judge [MICHAEL B. MUKASEY, “Jose Padilla Makes Bad Law,” Wall Street Journal, August 22, 2007, pg. http://tinyurl.com/lmhup5x]

And third, consider the distortions that arise from applying to national security cases generally the rules that apply to ordinary criminal cases.

On one end of the spectrum, the rules that apply to routine criminals who pursue finite goals are skewed, and properly so, to assure that only the highest level of proof will result in a conviction. But those rules do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means.

Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, is said to have told his American captors that he wanted a lawyer and would see them in court. If the Supreme Court rules -- in a case it has agreed to hear relating to Guantanamo detainees -- that foreigners in U.S. custody enjoy the protection of our Constitution regardless of the place or circumstances of their apprehension, this bold joke could become a reality.

The director of an organization purporting to protect constitutional rights has announced that his goal is to unleash a flood of lawyers on Guantanamo so as to paralyze interrogation of detainees. Perhaps it bears mention that one unintended outcome of a Supreme Court ruling exercising jurisdiction over Guantanamo detainees may be that, in the future, capture of terrorism suspects will be forgone in favor of killing them. Or they may be put in the custody of other countries like Egypt or Pakistan that are famously not squeamish in their approach to interrogation -- a practice, known as rendition, followed during the Clinton administration.

At the other end of the spectrum, if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.

### Legitimacy

**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.

## Model

### 2NC—No Modelling

#### Conclusion

Scarf 09 (Michael P. Scharf et al., Counsel of Record, Brief of the Public International Law & Policy Group as Amicus Curiae in Support of the Petitioners, Jamal Kiyemba, et. Al., v. Barack H. Obama, et al., SCOTUS, No. 08-1234, 12—09, p. 3-8.)

ARGUMENT I. KIYEMBA v. OBAMA IS A TEST OF SUPREME COURT LEADERSHIP IN UPHOLDING RULE OF LAW IN TIMES OF CONFLICT

#### Immigration detentions means they can’t solve.

Hernandez 11 (Ernesto A. Hernandez, Chapman University School of Law Professor of Law, “Kiyemba, Guantanamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World”, Available at: <http://works.bepress.com/ernesto_hernandez/17>)

This Article analyzes the legal puzzle of ongoing Uighur detention in Guantánamo, which is characterized by indefinite detention for noncombatants. The legal puzzle is the result of a doctrinal clash between an extraterritorial Constitution, with the Supreme Court protecting habeas for alien detainees in Boumediene, and the plenary power doctrine which precludes most constitutional protections for aliens. The Article makes two central arguments. First, immigration law, mostly in the form of plenary power reasoning, provides a fallback or default set of legal justifications to detain individuals in Guantánamo. As the Kiyemba cases illustrate, after significant constitutional habeas protections are afforded to detainees and their detention is found to be unlawful, immigration law provides the political branches generous authority to continue detentions. While much scholarly and public attention highlights the Kiyemba cases as settling doctrinal habeas debates, these cases also clearly emphasize immigration law, in statutory law and in the plenary power doctrine, as justifications for detention. By repeatedly relying on immigration law, the Kiyemba cases stress how dependable and secure this doctrine is to exclude aliens from constitutional rights protections. For immigration and alienage issues, the doctrine precludes judicial remedies and only permits political solutions exclusively from the executive or Congress. A political remedy for the Uighur detainees appears extremely unlikely, given the impasse created by China, U.S. domestic politics, and the detainees’ own choices.

#### Foreign courts don't look to US rulings

**Liptak 8**—Adam Liptak is the Supreme Court correspondent for The New York Times [“U.S. Court Is Now Guiding Fewer Nations,” The New York Times, September 18, 2008, http://tinyurl.com/c2dw7jz]

WASHINGTON — Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War.

But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices.

“One of our great exports used to be constitutional law,” said Anne-Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton. “We are losing one of the greatest bully pulpits we have ever had.”

From 1990 through 2002, for instance, the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year, an analysis by The New York Times found. In the six years since, the annual citation rate has fallen by half, to about six.

Australian state supreme courts cited American decisions 208 times in 1995, according to a recent study by Russell Smyth, an Australian economist. By 2005, the number had fallen to 72.

The story is similar around the globe, legal experts say, particularly in cases involving human rights. These days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment, said Harold Hongju Koh, the dean of the Yale Law School. In those areas, Dean Koh said, “they tend not to look to the rulings of the U.S. Supreme Court.”

The rise of new and sophisticated constitutional courts elsewhere is one reason for the Supreme Court’s fading influence, legal experts said. The new courts are, moreover, generally more liberal than the Rehnquist and Roberts courts and for that reason more inclined to cite one another.

Another reason is the diminished reputation of the United States in some parts of the world, which experts here and abroad said is in part a consequence of the Bush administration’s unpopularity around the world. Foreign courts are less apt to justify their decisions with citations to cases from a nation unpopular with their domestic audience.

“It’s not surprising, given our foreign policy in the last decade or so, that American influence should be declining,” said Thomas Ginsburg, who teaches comparative and international law at the University of Chicago.

Aversion to Foreign Law

The adamant opposition of some Supreme Court justices to the citation of foreign law in their own opinions also plays a role, some foreign judges say.

“Most justices of the United States Supreme Court do not cite foreign case law in their judgments,” Aharon Barak, then the chief justice of the Supreme Court of Israel, wrote in the Harvard Law Review in 2002. “They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.”

Partly as a consequence, Chief Justice Barak wrote, the United States Supreme Court “is losing the central role it once had among courts in modern democracies.”

Justice Michael Kirby of the High Court of Australia said that his court no longer confined itself to considering English, Canadian and American law. “Now we will take information from the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa,” he said in an interview published in 2001 in The Green Bag, a legal journal. “America” he added, “is in danger of becoming something of a legal backwater.”

#### Judges don't follow US precedent—they cite former rulings to bolster their own justifications not to determine how to rule moving forward

#### US is the anti-model—the plan is just as likely to set the wrong precedent

**Schor 8**—Professor of Law at Suffolk University Law School [Miguel Schor, “Judicial Review and American Constitutional Exceptionalism,” *Osgoode Hall Law Journal*, Vol. 46, 2008]

This article questions the conventional wisdom that the logic of Marbury has conquered the world’s democracies by exploring two questions: why do social movements contest constitutional meaning by fighting over judicial appointments in the United States, and why does such a strategy make little sense in democracies that constitutionalized rights in the late twentieth century?6 The short answer is that the United States has been both a model and an anti-model 7 in the worldwide spread of judicial review. The United States stood astride the world after the Second World War and elements of American constitutionalism such as judicial review proved irresistible to democracies around the globe.8 Polities that adopted judicial review in the late twentieth century, however, rejected the key assumption on which judicial review in the United States is founded.. American constitutionalism assumes that law is separate from politics and that courts have the power and the duty to maintain that distinction.

This assumption was rejected because other democracies learned from the American experience that courts that exercise judicial review are powerful political as well as legal actors. The fear of providing constitutional courts with too much power played an important role in shaping judicial review outside the United States. 9 When judicial review began to spread around the globe in the second half of the twentieth century, the hope of Marbury (the promise of constitutionalized rights) became fused with the fear of Lochner 10 (the possibility that courts might run amok). In seeking to thread a needle between Marbury and Lochner , the American assumption that a constitution is a species of law was rejected in favour of a very different baseline assumption that constitutions are neither law nor politics, but an entirely new genus of “political law.” 11Consequently, democracies abroad adopted stronger mechanisms by which citizens can hold constitutional courts accountable 12and which make it less likely that social forces will use appointments as a vehicle for constitutional battles. Pg. 37-38

### Ext: Schor—Political court

#### US model is rejected. The political court model is preferable

**Schor 08**—Professor of Law @ Suffolk University Law School. [Miguel Schor, “Judicial Review and American Constitutional Exceptionalism,” Osgoode Hall Law Journal, Vol. 46, 2008

The rejection of the American model of judicial review comes in two principal flavours. Germany and Canada are America’s principal competitors in the export of constitutional norms. 13 Germany and Canada—along with the democracies they influenced 14 —rejected the American constitutional assumption that law is separate from politics. Germany sought to craft a constitutional court sufficiently powerful to serve as a counterweight to the legislature and able to arbitrate disputes between political elites. 15 This is the political court model of judicial review. Canada sought to preserve a role for Parliament in interpreting the Constitution. 16 This is the politicized rights model of judicial review. Both of these models provide stronger mechanisms by which citizens can hold courts accountable than does the American model. 17 Popular constitutionalism—the notion that citizens should play a role in construing their constitution—may have originated in the United States, 18 but has thrived better abroad than at home. Pg. 538-539

### 1NC—Squo Solves

#### Status quo solves—modeling inevitable

Aft 11—Aaron B. Aft, J.D., Indiana University Maurer School of Law [Winter 2011, “Respect My Authority: Analyzing Claims of Diminished U.S. Supreme Court Influence Abroad,” Indiana Journal of Global Legal Studies, Vol. 18, No. 1]

Considering the role cast for foreign precedent by its proponents and the trepidation of its opponents, one may tentatively conclude that the influence of foreign jurisprudence on the U.S. Supreme Court is limited to a modest background role. Based on the descriptions offered by Justice Breyer and Justice Kirby as to the use of foreign precedent, the influence of foreign precedent is perhaps less than the volume n54 of the debate might indicate. Certainly some shared ideas are influential, but this influence seems limited to providing background information, rather than serving a dispositive role in a given case.

Lastly, it may be tempting to infer from the preceding discussion that the hostility of some prominent U.S. judges to the use of foreign precedent may leave foreign jurists less inclined to cite U.S. precedent. However, that conclusion is premature, and to accurately assess the extent of the U.S. Supreme Court's influence abroad, it is necessary to examine the use of U.S. precedent overseas.

 [\*431]

B. Use of U.S. Supreme Court Precedent Abroad

In contrast to the vigorous debate that characterizes the U.S. Supreme Court's use of foreign case law, many courts in other countries take a more expansive view of the use of foreign precedent. For example, in Australia, n55 Canada, n56 India, n57 Israel, n58 New Zealand, n59 Singapore, n60 and South Africa, n61 to name but a few, reference to U.S. precedent is not uncommon. n62 Many of the judges in these countries offer justifications for their comparative endeavors similar to those advanced by Justices Breyer and Kirby. n63

In Canada, citation to U.S. precedent is seen as "an aspect of a more general trend" of comparative exercise. n64 Indeed, the entire practice of referring to foreign precedent is merely reflective of the "legal cosmopolitanism" that Canadian jurists have found to be "a valuable source of enrichment and greater sophistication." n65 In Canada comparative practice has been used to provide important background on [\*432] legal questions via consideration of "the successes and failures of various approaches" taken by other states and is driven by a desire "to benefit from expertise acquired [by longstanding non-Canadian constitutional jurisprudence]." n66

Justices from Australia have advanced similar arguments. For example, Justice Kirby has been an outspoken advocate of comparative reference to foreign precedent. n67 As he notes in a recent article, references to foreign precedent by the High Court of Australia are quite uncontroversial. Such references are used because they "have been found helpful and informative and therefore useful in the development of the municipal decision-maker's own opinions concerning apparently similar problems presented by the municipal constitution or other laws." n68 And while reference to international law in certain contexts may be controversial, n69 the utility of referring to jurisprudence of other countries as a means of elucidating the meaning of the Australian Constitution remains unquestioned. n70

Although courts in many countries commonly refer to foreign precedent, Canada and Australia are particularly useful for measuring the influence of the U.S. Supreme Court abroad. Of obvious benefit is the fact that these countries speak English, n71 but of even more benefit is the fact that observers have extensively studied and documented the practices of the Supreme Court of Canada and the High Court of Australia with special attention to the citation of U.S. precedent. Section B will end by noting any conclusions that can be drawn from the discussion, with an eye to addressing arguments that the influence of the U.S. Supreme Court is waning due to hostility toward comparative practice. n72

As noted above, the relative influence (measured by citation analysis) of U.S. authority, and the U.S. Supreme Court in particular, on the Supreme Court of Canada has recently declined. At the same time, the data available regarding the citation practices of the High Court of Australia indicate that citation to U.S. authority in general is increasing. A review of how U.S. authority is used, as opposed to how often, will help determine the full extent of the influence the U.S. Supreme Court wields abroad, as well as any changes to it over time. Unfortunately, available studies of "how" are less thorough than the studies of "how often." n192

C. Informal Judicial Meetings and Exchanges

Though important, empirical study alone is insufficient to fully capture the U.S. Supreme Court's influence abroad. Advances in telecommunications have placed many court decisions at the fingertips of judges the world over, enabling a curious jurist to access decisions almost as soon as they are released. n193

Beyond technology, it is also important to consider the "informal" contacts-i.e. interactions beyond the context of adjudicating cases-between U.S. Supreme Court Justices and their colleagues and counterparts around the world. In addition to occasionally citing the opinions of their colleagues, "[j]udges are also meeting face to face" n194 and "are getting to know each other better as they interact at conferences and in personal meetings. . . ." n195 These informal contacts between judges provide opportunities for judges to engage in dialogue aside from citation of foreign law, undermining claims that the U.S. Supreme Court is "out of step" with the transnational judicial dialogue. n196 Anne-Marie Slaughter has expertly catalogued many [\*449] examples of such contacts, n197 and the following merely supplements her valuable work.

Slaughter observes that judges around the world are meeting at inter-judicial conferences, n198 via judicial exchanges, n199 and through conferences sponsored by law schools and NGOs. n200 One prominent example is the gathering of the Organization of Supreme Courts of the Americas (OSCA), hosted in Washington, D.C. in 1995. Chaired by then-Chief Justice William Rehnquist, the meeting boasted attendees from twenty-five countries representing North America, Central America, South America, and the Caribbean. n201 Some of these experiences have been noted in judicial opinions. n202 In addition, "[a] flood of foundation and government funding for judicial seminars, training programs, and [\*450] educational materials under the banner [of] 'rule of law' programs has significantly expanded the opportunities for cross-fertilization." n203 Furthermore, U.S. Supreme Court Justices have given at least seven speeches in four countries over the last ten years. n204 Some Justices have engaged in literary projects with counterparts from abroad, n205 and the Court has paid tribute to fallen colleagues abroad. n206

### AT: Kersh

#### No empirical evidence for backsliding

Wolfgang Merkel, March 2010. Department of Democracy Research, Social Science Research Center, Berlin; and Department of Political Science, Humboldt University, Berlin, Germany. “Are dictatorships returning? Revisiting the ‘democratic rollback’ hypothesis,” Contemporary Politics 16.1, http://www.wzb.eu/sites/default/files/personen/merkel.wolfgang.289/contemporary-politics2010-merkel.pdf.

Since 2007 an increasing number of articles have diagnosed ‘freedom in retreat’ and predicted a ‘return to the authoritarian great powers’. Highly distinguished scholars warn against the ‘democratic rollback’, and articles on the resilience of authoritarian regimes have appeared in the best journals of political science. Is the tide of democratization turning, and do we have to expect a new reverse wave of autocratization? This article argues that there is no hard empirical evidence that we are witnessing a trend towards re-autocratization on a global scale. The optimism of the early 1990s of a seemingly irresistible trend towards democracy is partially due to an empirical artefact caused by inappropriate underlying theoretical concepts. The overestimation of human agency and political crafting on the one side and underestimation of structural impediments for democracy on the other side contributed to this optimism, as did the thin concept of ‘electoral democracy’ or teleological speculation about the end of history. Democratic rollback does not seem to be as widespread as is sometimes claimed.

#### Democratic peace is spurious --- causal logic does not support the correlation.

Sebastian Rosato, November 2003. Ph.D. Candidate, Department of Political Science. “The Flawed Logic of Democratic Peace Theory,” American Political Science Review 97.4.

Democratic peace theory—the claim that democ- racies rarely fight one another because they share common norms of live-and-let-live and domestic institutions that constrain the recourse to war—is probably the most powerful liberal contribu- tion to the debate on the causes of war and peace.1 If the theory is correct, it has important implications for both the study and the practice of international poli- tics. Within the academy it undermines both the realist claim that states are condemned to exist in a constant state of security competition and its assertion that the structure of the international system, rather than state type, should be central to our understanding of state behavior. In practical terms democratic peace theory provides the intellectual justification for the belief that spreading democracy abroad will perform the dual task of enhancing American national security and promot- ing world peace.

In this article I offer an assessment of democratic peace theory. Specifically, I examine the causal logics that underpin the theory to determine whether they offer compelling explanations for why democracies do not fight one another.

A theory is comprised of a hypothesis stipulating an association between an independent and a dependent variable and a causal logic that explains the connec- tion between those two variables. To test a theory fully, we should determine whether there is support for the hypothesis, that is, whether there is a correlation be- tween the independent and the dependent variables and whether there is a causal relationship between them.2 An evaluation of democratic peace theory, then, rests on answering two questions. First, do the data sup- port the claim that democracies rarely fight each other? Second, is there a compelling explanation for why this should be the case?

Democratic peace theorists have discovered a pow- erful empirical generalization: Democracies rarely go to war or engage in militarized disputes with one an- other. Although there have been several attempts to challenge these findings (e.g., Farber and Gowa 1997; Layne 1994; Spiro 1994), the correlations remain ro- bust (e.g., Maoz 1998; Oneal and Russett 1999; Ray 1995; Russett 1993; Weart 1998). Nevertheless, some scholars argue that while there is certainly peace among democracies, it may be caused by factors other than the democratic nature of those states (Farber and Gowa 1997; Gartzke 1998; Layne 1994). Farber and Gowa (1997), for example, suggest that the Cold War largely explains the democratic peace finding. In essence, they are raising doubts about whether there is a convinc- ing causal logic that explains how democracies inter- act with each other in ways that lead to peace. To resolve this debate, we must take the next step in the testing process: determining the persuasiveness of the various causal logics offered by democratic peace theorists.

## Heg / Hum Cred

### 2NC—No Model

#### US courts aren’t a human rights model

**Liptak 8**—Adam Liptak, J.D. from Yale, is the Supreme Court correspondent for The New York Times [“U.S. Court Is Now Guiding Fewer Nations,” The New York Times, September 18, 2008, http://tinyurl.com/c2dw7jz]

WASHINGTON — Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War.

But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices.

“One of our great exports used to be constitutional law,” said Anne-Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton. “We are losing one of the greatest bully pulpits we have ever had.”

From 1990 through 2002, for instance, the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year, an analysis by The New York Times found. In the six years since, the annual citation rate has fallen by half, to about six.

Australian state supreme courts cited American decisions 208 times in 1995, according to a recent study by Russell Smyth, an Australian economist. By 2005, the number had fallen to 72.

The story is similar around the globe, legal experts say, particularly in cases involving human rights. These days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment, said Harold Hongju Koh, the dean of the Yale Law School. In those areas, Dean Koh said, “they tend not to look to the rulings of the U.S. Supreme Court.”

The rise of new and sophisticated constitutional courts elsewhere is one reason for the Supreme Court’s fading influence, legal experts said. The new courts are, moreover, generally more liberal than the Rehnquist and Roberts courts and for that reason more inclined to cite one another.

Another reason is the diminished reputation of the United States in some parts of the world, which experts here and abroad said is in part a consequence of the Bush administration’s unpopularity around the world. Foreign courts are less apt to justify their decisions with citations to cases from a nation unpopular with their domestic audience.

“It’s not surprising, given our foreign policy in the last decade or so, that American influence should be declining,” said Thomas Ginsburg, who teaches comparative and international law at the University of Chicago.

Aversion to Foreign Law

The adamant opposition of some Supreme Court justices to the citation of foreign law in their own opinions also plays a role, some foreign judges say.

“Most justices of the United States Supreme Court do not cite foreign case law in their judgments,” Aharon Barak, then the chief justice of the Supreme Court of Israel, wrote in the Harvard Law Review in 2002. “They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.”

Partly as a consequence, Chief Justice Barak wrote, the United States Supreme Court “is losing the central role it once had among courts in modern democracies.”

Justice Michael Kirby of the High Court of Australia said that his court no longer confined itself to considering English, Canadian and American law. “Now we will take information from the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa,” he said in an interview published in 2001 in The Green Bag, a legal journal. “America” he added, “is in danger of becoming something of a legal backwater.”

#### Human rights leadership is impossible—alt causes overwhelm and the US won’t exercise its influence.

Mariam 8/18/13—Professor Alemayehu G. Mariam teaches political science at California State University, San Bernardino and is a practicing defense lawyer [August 18, 2013, “Is America Disinventing Human Rights?” http://www.ethiopianreview.us/48632]

Carter also raised a number of important questions: Has the U.S. abdicated its moral leadership in the arena of international human rights? Has the U.S. betrayed its core values by maintaining a detention facility at Guantánamo Bay, Cuba, and subjecting dozens of prisoners to “cruel, inhuman or degrading treatment or punishment” and leaving them without the “prospect of ever obtaining their freedom”? Does the arbitrary killing of a person suspected to be an enemy terrorist in a drone strike along with women and children who happen to be nearby comport with America’s professed commitment to the rule of law and human rights?

In 1948, the U.S. played a central leadership role in “inventing” the principal instrument which today serves as the bedrock foundation of modern human rights. The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in December 1948, set a “common standard of achievement for all peoples and all nations” in terms of equality, dignity and rights. Mrs. Eleanor Roosevelt, the widow of President Franklin D. Roosevelt, chaired the committee that drafted the UDHR. Eleanor remains an unsung heroine even though she was the mother of the modern global human rights movement. Without her, there would have been no UDHR; and without the UDHR, it is doubtful that the plethora of subsequent human rights conventions and regimes would have come into existence. Remarkably, she managed to mobilize, organize and proselytize human rights even though she had no legal training, diplomatic experience or bureaucratic expertise. She used her skills as political activist and advocate in the cause of freedom, justice and civil rights to work for global human rights.

Is America disinventing human rights?

It seems the U.S. is “disinventing” human rights through the pursuit of double (triple, quadruple) standard of human rights policy wrapped in a cover of diplocrisy. In Africa, the U.S. has one set of standards for Robert Mugabe’s Zimbabwe and Omar al-Bashir’s Sudan. Mugabe and Bashir are classified as the nasty hombres of human rights in Africa. The U.S. has targeted both regimes for crippling economic sanctions and diplomatic pressure. The U.S. has frozen the assets of Mugabe’s family and henchmen because the “Mugabe regime rules through politically motivated violence and intimidation and has triggered the collapse of the rule of law in Zimbabwe.”

The U.S. calls “partners” equally brutal regimes in Africa which serve as its proxies. Paul Kagame of Rwanda, Yuweri Museveni of Uganda and the deceased leader of the regime in Ethiopia are lauded as the “new breed of African leaders” and crowned “partners”. Uhuru Kenyatta, recently elected president of Kenya and a suspect under indictment by the International Criminal Court (ICC) for crimes against humanity is said to be different than Bashir who faces similar ICC charges. In 2009, Ambassador Susan E. Rice, then-U.S. Permanent Representative to the United Nations, demanded Bashir’s arrest and prosecution: “The people of Sudan have suffered too much for too long, and an end to their anguish will not come easily. Those who committed atrocities in Sudan, including genocide, should be brought to justice.” No official U.S. statement on Uhuru’s ICC prosecution was issued.

The U.S. maintains excellent relations with Teodoro Obiang Nguema Mbasogo of Equatorial Guinea who has been in power since 1979 because of that country’s oil reserves; but all of the oil revenues are looted by Obiang and his cronies. In 2011, the U.S. brought legal action in federal court against Obiang’s son to seize corruptly obtained assets including a $40 million estate in Malibu, California overlooking the Pacific Ocean, a luxury plane and a dozen super-sports cars worth millions of dollars. The U.S. has not touched any of the other African Ali Babas and their forty dozen thieving cronies who have stolen billions and stashed their cash in U.S. and other banks.

Despite lofty rhetoric in support of the advancement of democracy and protection of human rights in Africa, the United States continues to subsidize and coddle African dictatorships that are as bad as or even worse than Mugabe’s. The U.S. currently provides substantial economic aid, loans, technical and security assistance to the repressive regimes in Ethiopia, Congo (DRC), Uganda, Rwanda and elsewhere. None of these countries holds free elections, allow the operation of an independent press or free expression or abide by the rule of law. All of them are corrupt to the core, keep thousands of political prisoners, use torture and ruthlessly persecute their opposition. Yet they are deemed U.S. “partners”.

 “Principled disengagement” as a way of reinventing an American human rights policy?

If the Obama Administration indeed has a global or African human rights policy, it must be a well-kept secret. In March 2013, Michael Posner, U.S. Assistant Secretary of State for Democracy, Human Rights, and Labor said American human rights policy is based on “principled engagement”: “We are going to go to the United Nations and join the Human Rights Council and we’re going to be part of it even though we recognize it doesn’t work… We’re going to engage with governments that are allies but we are also going to engage with governments with tough relationships and human rights are going to be part of those discussions.” Second, the U.S. will follow “a single standard for human rights, the Universal Declaration of Human Rights, and it applies to all including ourselves…” Third, consistent with President “Obama’s personality”, the Administration believes “change occurs from within and so a lot of the emphasis… [will be] on how we can help local actors, change agents, civil society, labor activists, religious leaders trying to change their societies from within and amplify their own voices and give them the support they need…”

On August 14, according to Egyptian government sources, 525 protesters, mostly members of the Muslim Brotherhood, were killed and 3,717 injured at the hands of Egyptian military and security forces. It was an unspeakably horrifying massacre of protesters exercising their right to peaceful expression of grievances.

On August 15, President Obama criticized the heavy-handed crackdown on peaceful protesters with the usual platitudes. “The United States strongly condemns the steps that have been taken by Egypt’s interim government and security forces. We deplore violence against civilians.” His message to the Egyptian people was somewhat disconcerting in light of the massacre. “America cannot determine the future of Egypt. We do not take sides with any particular party or political figure. I know it’s tempting inside Egypt to blame the United States.”

In July 2009, in Ghana, President Obama told Africa’s “strongmen”, “History offers a clear verdict: governments that respect the will of their own people are more prosperous, more stable, and more successful than governments that do not…. No person wants to live in a society where the rule of law gives way to the rule of brutality… Make no mistake: history is on the side of these brave Africans [citizens and their communities driving change], and not with those who use coups or change Constitutions to stay in power. Africa doesn’t need strongmen, it needs strong institutions.”

President Obama has a clear choice in Egypt between “those who use coups to stay in power” and the people of Egypt peacefully protesting in the streets. Now he says, “We don’t take sides…” By “not taking sides”, it seems he has taken sides with Egypt’s strongmen who “use coups to stay in power”. So much for “principled engagement”!

Obama reassured the Egyptian military that the U.S. does not intend to end or suspend its decades-old partnership with them. He cautioned the military that “While we want to sustain our relationship with Egypt, our traditional cooperation cannot continue as usual while civilians are being killed in the streets.” He indicated his disapproval of the imposition of “martial law” but made no mention of the manifest military coup that had ousted Morsy. He obliquely referred to it as a “military intervention”. He made a gesture of “action” cancelling a symbolic military exercise with the Egyptian army. There will be no suspension of U.S. military aid to Egypt and no other sanctions will be imposed on the Egyptian military or government.

I am not clear what Obama’s human rights policy of “principled engagement” actually means. But I have a lot of questions about it: Does it mean moral complacency and tolerance of the crimes against humanity of African dictators for the sake of the war on terror and oil? Is it a euphemism for abdication of American ideals on the altar of political expediency? Does it mean overlooking and excusing the crimes of ruthless dictators and turning a blind eye to their bottomless corruption? Does “principled engagement” mean allowing dictators to suck at the teats of American taxpayers to satisfy their insatiable aid addiction while they brutalize their people?

The facts of Obama’s “principled engagement” tell a different story. In May 2010, after the ruling party in Ethiopia declared it had won 99.6 percent of the seats in parliament, the U.S. demonstrated its “principled engagement” by issuing a Statement expressing “concern that international observers found that the elections fell short of international commitments” and promised to “work diligently with Ethiopia to ensure that strengthened democratic institutions and open political dialogue become a reality for the Ethiopian people.” There is no evidence that the U.S. did anything to “strengthen democratic institutions and open political dialogue to become a reality for the Ethiopian people.”

When two ICC indicted suspects in Kenya (Kenyatta and Ruto) won the presidency in Kenya a few months ago, the U.S. applied its “principled engagement” in the form of a robust defense of the suspects. Johnnie Carson, the former United States Assistant Secretary of State for African Affairs, said the ICC indictments of Bashir and Uhuru/Ruto are different. “I don’t want to make a comparison with Sudan in its totality because Sudan is a special case in many ways.” What makes Bashir and Sudan different, according to Carson, is the fact that Sudan is on the list of countries that support terrorism and Bashir and his co-defendants are under indictment for the genocide in Darfur. Since “none of that applies to Kenya,” according to Carson, it appears the U.S. will follow a different policy.

President Obama says the U.S. will maintain its traditional partnership with Egypt’s military, Egypt’s “strongmen”. At the onset of the Egyptian Revolution in 2011, Obama and his foreign policy team froze in stunned silence, flat-footed and twiddling their thumbs and scratching their heads for days before staking out a position on that popular uprising. They could not bring themselves to use the “D” word (dictator as in Hosni Mubarak) to describe events in Egypt then. Today Obama cannot bring himself to say the “C” word (as in Egyptian military coup).

Obama is in an extraordinary historical position as a person of color to advance American ideals and values throughout the world in convincing and creative ways. But he cannot advance these ideals and values through a hollow notion of “principled engagement.”

Rather, he must adopt a policy of “principled disengagement” with African dictators. That does not mean isolationism or a hands off approach to human rights. By “principled disengagement” I mean a policy and policy outcome that is based on measurable human rights metrics. Under a policy of “principled disengagement”, the U.S. would establish clear, attainable and measurable human rights policy objectives in its relations with African dictatorships. The policy would establish minimum conditions of human rights compliance. For instance, the U.S. could set some basic criteria for the conduct of free and fair elections, press and individual freedoms, limits on arbitrary arrests and detentions, prevention of extrajudicial punishments, etc. Using its annual human rights assessments, the U.S. could make factual determinations on the extent to which it will engage or disengage with a particular regime. “Partnership” status and the benefits that come with it will be reserved to those regimes that have good and improving records on specific human rights measures. Regimes that steal elections, win elections by 99.6 percent, engage in arbitrary arrests and detentions and other human rights violations would be denied “partnership” status and denied aid, loans and technical assistance. Persistent violators of human rights would be given a compliance timetable to improve their records and provided appropriate assistance to achieve specific human rights goals. If regimes persist in a pattern and practice of human rights violations, the U.S. could raise the stakes and impose economic and diplomatic sanctions.

The ‘‘Ethiopia Democracy and Accountability Act of 2007’’ contained many important statutory provisions that could serve as a foundation for “principled disengagement”.

Obama’s “principled engagement” seems to be a justification for expediency at the cost of American ideals. Until he decides to stand for principle, instead of standing behind the rhetoric of “principled engagement”, he will continue to find himself on a tightrope of moral, legal and political ambiguity. The U.S. cannot “condemn” and “deplore” its way out of its human rights obligations or global leadership role. Yes, the U.S. must take sides! It must take a stand either with the victims of human rights abuses throughout the world or the human rights abusers of the world. If Obama wants to save the world from strongmen with boots and in designer suits with briefcases full of cash, he should pursue a policy of “principled disengagement”. But he should start by reflecting on the words he spoke during his first inauguration speech:

### Ext. Legit Not k2 Heg

#### Legitimacy doesn’t affect the structural reasons why heg solves war

Maher 11—Richard Maher, adjunct prof of political science at Brown [The Paradox of American Unipolarity: Why the United States May Be Better Off in a Post-Unipolar World, Orbis 55;1]

The United States should start planning now for the inevitable decline of its preeminent position in world politics. By taking steps now, the United States will be able to position itself to exercise maximum influence beyond its era of preponderance. This will be America’s fourth attempt at world order. The first, following World War I and the creation of the League of Nations, was a disaster. The second and third, coming in 1945 and 1989-1991, respectively, should be considered significant achievements of U.S. foreign policy and of creating world order. This fourth attempt at world order will go a long way in determining the basic shape and character of world politics and international history for the twenty-first century. The most fundamental necessity for the United States is to create a stable political order that is likely to endure, and that provides for stable relations among the great powers. The United States and other global stakeholders must prevent a return to the 1930s, an era defined by open trade conflict, power competition, and intense nationalism. Fortunately, the United States is in a good position to do this. The global political order that now exists is largely of American creation. Moreover, its forward presence in Europe and East Asia will likely persist for decades to come, ensuring that the United States will remain a major player in these regions. The disparity in military power between the United States and the rest of the world is profound, and this gap will not close in the next several decades at least. In creating a new global political order for twenty-first century world politics, the United States will have to rely on both the realist and liberal traditions of American foreign policy, which will include deterrence and power balancing, but also using international institutions to shape other countries’ preferences and interests. Adapt International Institutions for a New Era of World Politics. The United States should seek to ensure that the global rules, institutions, and norms that it took the lead in creating---which reflect basic American preferences and interests, thus constituting an important element of American power---outlive American preeminence. We know that institutions acquire a certain ‘‘stickiness’’ that allow them to exist long after the features or forces at the time of their creation give way to a new landscape of global politics. The transaction costs of creating a whole new international---or even regional--- institutional architecture that would compete with the American post-World War II vintage would be enormous. Institutions such as the International Monetary Fund (IMF), World Bank, and World Trade Organization (WTO), all reflect basic American preferences for an open trading system and, with a few exceptions, have near-universal membership and overwhelming legitimacy. Even states with which the United States has significant political, economic, or diplomatic disagreement---China, Russia, and Iran---have strongly desired membership in these ‘‘Made in USA’’ institutions. Shifts in the global balance of power will be reflected in these institutions---such as the decision at the September 2009 Pittsburgh G-20 summit to increase China’s voting weight in the IMF by five percentage points, largely at the expense of European countries such as Britain and France. Yet these institutions, if their evolution is managed with deftness and skill, will disproportionately benefit the United States long after the demise of its unparalleled position in world politics. In this sense, the United States will be able to ‘‘lock in’’ a durable international order that will continue to reflect its own basic interests and values. Importantly, the United States should seek to use its vast power in the broad interest of the world, not simply for its own narrow or parochial interests. During the second half of the twentieth century the United States pursued its own interests but also served the interests of the world more broadly. And there was intense global demand for the collective goods and services the United States provided. The United States, along with Great Britain, are history’s only two examples of liberal empires. Rather than an act of altruism, this will improve America’s strategic position. States and societies that are prosperous and stable are less likely to display aggressive or antagonistic behavior in their foreign policies. There are things the United States can do that would hasten the end of American preeminence, and acting in a seemingly arbitrary, capricious, and unilateral manner is one of them. The more the rest of the world views the American-made world as legitimate, and as serving their own interests, the less likely they will be to seek to challenge or even transform it.19 Cultivate Balance of Power Relationships in Other Regions. The United States enjoys better relations with most states than these states do with their regional neighbors. South and East Asia are regions in which distrust, resentment, and outright hostility abound. The United States enjoys relatively strong (if far from perfect) strategic relationships with most of the major states in Asia, including Japan, India, Pakistan, and South Korea. The United States and China have their differences, and a more intense strategic rivalry could develop between the two. However, right now the relationship is generally stable. With the possible exception of China (but perhaps even Beijing views the American military presence in East Asia as an assurance against Japanese revanchism), these countries prefer a U.S. presence in Asia, and in fact view good relations with the United States as indispensable for their own security.

### Ext. A/C

#### U.S. cred is gone—surveillance scandals

Eades 7/17/13—Mark C. Eades is an American writer and educator currently residing in Shanghai, China. He has taught at both Shanghai International Studies University and Fudan University [July 17, 2013, “Western Governments Lose Credibility as Global Surveillance Scandal Grows,” http://www.atlantic-community.org/-/western-governments-lose-credibility-as-global-surveillance-scandal-grows]

As revelations of secret surveillance programs by Western governments appear almost daily and the drama of American whistleblower Edward Snowden's bid for freedom continues to unfold, the governments of the US and its Western allies are quickly losing credibility globally. In order to regain credibility, the West must come clean about its global surveillance activities, take steps to cease or at least significantly reduce such activities, and end persecution of whistleblowers such as Snowden.

Ongoing reveals from former US National Security Agency (NSA) analyst Edward Snowden implicate the US and other Western governments in spying and surveillance activities that appear to violate the rights of citizens and go far beyond the bounds of national security interests. These revelations, and America's relentless pursuit of Snowden with the acquiescence of European governments, have severely damaged the credibility of Western governments internally and externally.

### AT: Impx

#### No impact to warming

Idso and Idso 11 (Craig D., Founder and Chairman of the Board – Center for the Study of Carbon Dioxide and Global Change, and Sherwood B., President – Center for the Study of Carbon Dioxide and Global Change, “Carbon Dioxide and Earth’s Future Pursuing the Prudent Path,” February, http://www.co2science.org/education/reports/ prudentpath/prudentpath.pdf)

As presently constituted, earth’s atmosphere contains just slightly less than 400 ppm of the colorless and odorless gas we call carbon dioxide or CO2. That’s only four-hundredths of one percent. Consequently, even if the air's CO2 concentration was tripled, carbon dioxide would still comprise only a little over one tenth of one percent of the air we breathe, which is far less than what wafted through earth’s atmosphere eons ago, when the planet was a virtual garden place. Nevertheless, a small increase in this minuscule amount of CO2 is frequently predicted to produce a suite of dire environmental consequences, including dangerous global warming, catastrophic sea level rise, reduced agricultural output, and the destruction of many natural ecosystems, as well as dramatic increases in extreme weather phenomena, such as droughts, floods and hurricanes. As strange as it may seem, these frightening future scenarios are derived from a single source of information: the ever-evolving computer-driven climate models that presume to reduce the important physical, chemical and biological processes that combine to determine the state of earth’s climate into a set of mathematical equations out of which their forecasts are produced. But do we really know what all of those complex and interacting processes are? And even if we did -- which we don't -- could we correctly reduce them into manageable computer code so as to produce reliable forecasts 50 or 100 years into the future? Some people answer these questions in the affirmative. However, as may be seen in the body of this report, real-world observations fail to confirm essentially all of the alarming predictions of significant increases in the frequency and severity of droughts, floods and hurricanes that climate models suggest should occur in response to a global warming of the magnitude that was experienced by the earth over the past two centuries as it gradually recovered from the much-lower-than-present temperatures characteristic of the depths of the Little Ice Age. And other observations have shown that the rising atmospheric CO2 concentrations associated with the development of the Industrial Revolution have actually been good for the planet, as they have significantly enhanced the plant productivity and vegetative water use efficiency of earth's natural and agro-ecosystems, leading to a significant "greening of the earth." In the pages that follow, we present this oft-neglected evidence via a review of the pertinent scientific literature. In the case of the biospheric benefits of atmospheric CO2 enrichment, we find that with more CO2 in the air, plants grow bigger and better in almost every conceivable way, and that they do it more efficiently, with respect to their utilization of valuable natural resources, and more effectively, in the face of environmental constraints. And when plants benefit, so do all of the animals and people that depend upon them for their sustenance. Likewise, in the case of climate model inadequacies, we reveal their many shortcomings via a comparison of their "doom and gloom" predictions with real-world observations. And this exercise reveals that even though the world has warmed substantially over the past century or more -- at a rate that is claimed by many to have been unprecedented over the past one to two millennia -- this report demonstrates that none of the environmental catastrophes that are predicted by climate alarmists to be produced by such a warming has ever come to pass. And this fact -- that there have been no significant increases in either the frequency or severity of droughts, floods or hurricanes over the past two centuries or more of global warming -- poses an important question. What should be easier to predict: the effects of global warming on extreme weather events or the effects of elevated atmospheric CO2 concentrations on global temperature? The first part of this question should, in principle, be answerable; for it is well defined in terms of the small number of known factors likely to play a role in linking the independent variable (global warming) with the specified weather phenomena (droughts, floods and hurricanes). The latter part of the question, on the other hand, is ill-defined and possibly even unanswerable; for there are many factors -- physical, chemical and biological -- that could well be involved in linking CO2 (or causing it not to be linked) to global temperature. If, then, today's climate models cannot correctly predict what should be relatively easy for them to correctly predict (the effect of global warming on extreme weather events), why should we believe what they say about something infinitely more complex (the effect of a rise in the air’s CO2 content on mean global air temperature)? Clearly, we should pay the models no heed in the matter of future climate -- especially in terms of predictions based on the behavior of a non-meteorological parameter (CO2) -- until they can reproduce the climate of the past, based on the behavior of one of the most basic of all true meteorological parameters (temperature). And even if the models eventually solve this part of the problem, we should still reserve judgment on their forecasts of global warming; for there will yet be a vast gulf between where they will be at that time and where they will have to go to be able to meet the much greater challenge to which they aspire

#### Warming is irreversible

ANI 10 (“IPCC has underestimated climate-change impacts, say scientists”, 3-20, One India, http://news.oneindia.in/2010/03/20/ipcchas-underestimated-climate-change-impacts-sayscientis.html)

According to Charles H. Greene, Cornell professor of Earth and atmospheric science, "Even if all man-made greenhouse gas emissions were stopped tomorrow and carbon-dioxide levels stabilized at today's concentration, by the end of this century, the global average temperature would increase by about 4.3 degrees Fahrenheit, or about 2.4 degrees centigrade above pre-industrial levels, which is significantly above the level which scientists and policy makers agree is a threshold for dangerous climate change." "Of course, greenhouse gas emissions will not stop tomorrow, so the actual temperature increase will likely be significantly larger, resulting in potentially catastrophic impacts to society unless other steps are taken to reduce the Earth's temperature," he added. "Furthermore, while the oceans have slowed the amount of warming we would otherwise have seen for the level of greenhouse gases in the atmosphere, the ocean's thermal inertia will also slow the cooling we experience once we finally reduce our greenhouse gas emissions," he said. This means that the temperature rise we see this century will be largely irreversible for the next thousand years. "Reducing greenhouse gas emissions alone is unlikely to mitigate the risks of dangerous climate change," said Green.

#### No disease can cause human extinction – they either kill their hosts too quickly or aren’t lethal

Posner 05(Richard A, judge on the U.S. Court of Appeals, Seventh Circuit, and senior lecturer at the University of Chicago Law School, Winter. “Catastrophe: the dozen most significant catastrophic risks and what we can do about them.” http://findarticles.com/p/articles/mi\_kmske/is\_3\_11/ai\_n29167514/pg\_2?tag=content;col1)

Yet the fact that Homo sapiens has managed to survive every disease to assail it in the 200,000 years or so of its existence is a source of genuine comfort, at least if the focus is on extinction events. There have been enormously destructive plagues, such as the Black Death, smallpox, and now AIDS, but none has come close to destroying the entire human race. There is a biological reason. Natural selection favors germs of limited lethality; they are fitter in an evolutionary sense because their genes are more likely to be spread if the germs do not kill their hosts too quickly. The AIDS virus is an example of a lethal virus, wholly natural, that by lying dormant yet infectious in its host for years maximizes its spread. Yet there is no danger that AIDS will destroy the entire human race. The likelihood of a natural pandemic that would cause the extiinction of the human race is probably even less today than in the past (except in prehistoric times, when people lived in small, scattered bands, which would have limited the spread of disease), despite wider human contacts that make it more difficult to localize an infectious disease. The reason is improvements in medical science. But the comfort is a small one. Pandemics can still impose enormous losses and resist prevention and cure: the lesson of the AIDS pandemic. And there is always a lust time.

#### No extinction from disease – science says so

De Castro and Bolker, 2004.

(Francisco De Castro and Benjamin Bolker are professors of Zoology at the University of Florida. “Mechanisms of Disease-Induced Extinction. http://www.aseanbiodiversity.info/Abstract/51009089.pdf)

Parasites and disease are frequently cited as important drivers¶ of population and community dynamics (Anderson & May¶ 1992; McCallum & Dobson 1995; Levin et al. 1997; Hudson¶ & Greenman 1998; Norman et al. 1999; Kohler & Hoiland¶ 32001; Hudson et al. 2002; Shea & Chesson 2002; MacNeil¶ et al. 2003). In conservation biology, disease is presented as a threat to population viability and a contributing factor to disease extinction (McCallum & Dobson 1995). However, the simplest disease models – which have formed the theoretical foundation for the ﬁeld of disease ecology – suggest that disease alone cannot drive host populations extinct (Anderson & May 1992). More speciﬁcally, deterministic models of directly transmitted specialist parasites with density-dependent transmission predict that disease will always die out when the host population falls below a (nonzero) threshold density, before the host population can go extinct (Swinton et al. 1998; McCallum et al. 2001); stochastic models suggest that disease will often go extinct by so-called “fade-out” even above this threshold (Bartlett 1960; Black¶ 1966; Keeling & Grenfell 1997). The ﬁrst part of this paper¶ reviews the important exceptions to these simple conclusions – the qualitative mechanisms that drive disease-induced¶ extinction in theoretical models. The second reviews the¶ existing empirical literature on disease-induced extinction,¶ and makes a ﬁrst attempt to assess the relative importance of¶ the different mechanisms in natural systems.

# Round 6

## CP

### 1NC

#### The United States federal government should establish a nitrogen fertilizer tax of 16 cents per pound of nitrogen, and use the revenue from that tax to provide loan guarantees for farmers to procure biocharcoal technology. The United States federal judiciary should rule it illegal for biodefense contractors to use the national security exemption in the National Environmental Policy Act. The United States federal government should issue a declaratory policy to not retaliate to a bio-weapon attack.

#### Solves through sequestration without reducing coal emissions.

Technology Review, 4/26/2007. “The Case for Burying Charcoal,” published by MIT, http://www.technologyreview.com/news/407754/the-case-for-burying-charcoal/.

Several states in this country and a number of Scandinavian countries are trying to supplant some coal-burning by burning biomass such as wood pellets and agricultural residue. Unlike coal, biomass is carbon-neutral, releasing only the carbon dioxide that the plants had absorbed in the first place. But a new research [paper](http://dx.doi.org/10.1016/j.biombioe.2007.01.012) published online in the journal Biomass and Bioenergy argues that the battle against global warming may be better served by instead heating the biomass in an oxygen-starved process called pyrolysis, extracting methane, hydrogen, and other byproducts for combustion, and burying the resulting carbon-rich char. Even if this approach would mean burning more coal--which emits more carbon dioxide than other fossil-fuel sources--it would yield a net reduction in carbon emissions, according to the analysis by [Malcolm Fowles](http://technology.open.ac.uk/tm/mf.htm), a professor of technology management at the Open University, in the United Kingdom. Burning one ton of wood pellets emits 357 kilograms less carbon than burning coal with the same energy content. But turning those wood pellets into char would save 372 kilograms of carbon emissions. That is because 300 kilograms of carbon could be buried as char, and the burning of byproducts would produce 72 kilograms less carbon emissions than burning an equivalent amount of coal. ¶ Such an approach could carry an extra benefit. Burying char--known as black-carbon sequestration--enhances soils, helping future crops and trees grow even faster, thus absorbing more carbon dioxide in the future. Researchers believe that the char, an inert and highly porous material, plays a key role in helping soil retain water and nutrients, and in sustaining microorganisms that maintain soil fertility. ¶ Johannes Lehmann, an associate professor of crops and soil sciences at Cornell University and an expert on char sequestration, agrees in principle with Fowles's analysis but believes that much more research in this relatively new area of study is needed. "It heads in the right direction," he says.¶ Interest in the approach is gathering momentum. On April 29, more than 100 corporate and academic researchers will gather in New South Wales, Australia, to attend the first international conference on black-carbon sequestration and the role pyrolysis can play to offset greenhouse-gas emissions. Lehmann estimates that as much as 9.5 billion tons of carbon--more than currently emitted globally through the burning of fossil fuels--could be sequestered annually by the end of this century through the sequestration of char. "Bioenergy through pyrolysis in combination with biochar sequestration is a technology to obtain energy and improve the environment in multiple ways at the same time," writes Lehmann in a research paper to be published soon in [Frontiers in Ecology and the Environment](http://www.frontiersinecology.org/). Fowles says that there would be an incentive for farmers, logging communities, and small towns to convert their own dedicated crops, agricultural and forest residues, and municipal biowaste into char if a high enough price emerged for the sale of carbon offsets. "Every community at any scale could pyrolyse its biowaste ... motivated by doing their bit against global warming," he says. Fowles believes that storing black carbon in soil carries less risk, would be quicker to implement, and could be done at much lower cost than burying carbon dioxide in old oil fields or aquifers. And he says the secondary benefits to agriculture could be substantial: "Biochar reduces the soil's requirement for irrigation and fertilizer, both of which emit carbon." Fowles adds that it has also been shown to reduce emissions of greenhouse gases from decay processes in soil. This would include nitrous oxide, a potent greenhouse gas. "Biochar has been observed to reduce nitrous-oxide emissions from cultivated soil by 40 percent."

### 2NC

#### It’s the closest we’ve got to a silver bullet.

Alok Jha, 3/13/2009. Green technology correspondent for the Guardian (UK). “'Biochar' goes industrial with giant microwaves to lock carbon in charcoal,” The Guardian, <http://www.guardian.co.uk/environment/2009/mar/13/charcoal-carbon>.

Giant microwave ovens that can "cook" wood into charcoal could become our best tool in the fight against global warming, according to a leading British climate scientist. Chris Turney, a professor of geography at the University of Exeter, said that by burying the charcoal produced from microwaved wood, the carbon dioxide absorbed by a tree as it grows can remain safely locked away for thousands of years. The technique could take out billions of tonnes of CO2 from the atmosphere every year. Fast-growing trees such as pine could be "farmed" to act specifically as carbon traps — microwaved, buried and replaced with a fresh crop to do the same thing again. Turney has built a 5m-long prototype of his microwave, which produces a tonne of CO2 for $65. He plans to launch his company, Carbonscape, in the UK this month to build the next generation of the machine, which he hopes will process more wood and cut costs further. He is not alone in touting the benefits of this type of charcoal, known as biochar or biocharcoal. The Gaia theorist, James Lovelock, and Nasa's James Hansen have both been outspoken about the potential benefits of biochar, arguing that it is one of the most powerful potential solutions to climate change. In a recent paper, Hansen calculated that producing biocharcoal by current methods of burning waste organic materials could reduce global carbon dioxide levels in the atmosphere by 8ppm (parts per million) over the next 50 years. That is the equivalent of three years of emissions at current levels. Turney said biochar was the closest thing scientists had to a silver-bullet solution to climate change. Processing facilities could be built right next to forests grown specifically to soak up CO2. "You can cut trees down, carbonise them, then plant more trees. The forest could act on an industrial scale to suck carbon out of the atmosphere." The biochar could be placed in disused coal mines or tilled into the ground to make soil more fertile. Its porous structure is ideal for trapping nutrients and beneficial micro-organisms that help plants grow. It also improves drainage and can prevent up to 80% of greenhouse gases such as nitrous oxides and methane from escaping from the soil. In a recent analysis of geo-engineering techniques published in the journal Atmospheric Chemistry, Tim Lenton, a climate scientist at the University of East Anglia, rated producing charcoal as the best technological solution to reducing CO2 levels. He compared it to other geo-engineering techniques such as dumping iron in oceans or seeding clouds to reflect the sun's radiation and calculated that by 2100 a quarter of the effect of human-induced emissions of CO2 could be sequestered with biochar production from waste organic matter, giving a net reduction of 40ppm in CO2 concentration. Johannes Lehmann of Cornell university has calculated that it is realistically possible to fix 9.5bn tonnes of carbon per year using biochar. The global production of carbon from fossil fuels stands at 8.5bn tonnes.

#### Solves quickly—we’d be out of the danger zone by the middle of the century.

Tim Flannery, 1/11/2008. Division of Environmental and Life Sciences Macquarie Uni. “Australian of the Year 2007, Tim Flannery talks bio char and why we need to move into the renewable age,” Beyond Zero Emissions, <http://www.beyondzeroemissions.org/2008/03/19/tim-flannery-australian-of-the-year-2007-talks-bio-char-why-we-need-to-move-into-the-renewable-age>.

Matthew Wright: In a recent address to the American Geophysical Union, Dr. James Hanson from NASA said that we need to go below 350 parts per million to have a stable atmosphere that we are used to experiencing for our agricultural needs, and our biodiversity and ecological systems. In terms of your call about trying to aim for say 5% sequestration per year over 20 years in order to remove that carbon debt, if we can get that going, how do you see, where do you see us going for a stable climate, a safe climate that can continue and maintain the huge populations that we've got around the world now?

Tim Flannery: Well that's a very good question. I mean I suppose implicit in James Hansons' comments is the reality that we are living right now with unacceptable climate risk, very high levels of unacceptable risk, and we need to draw that down as quickly as we can. Now if you used these agri-char based technologies and you have your aggressive reaforestation projects for the worlds tropics, you could conceivably be drawing down in the order of 10 to 15 tonnes, gigatonnes sorry, of carbon per annum by about 2030. At that rate we could bring ourselves down below the dangerous threshold as early as the middle of this century, but whether the world can actually get its act together and do that is another matter. This is the first real directed experiment at planetary engineering that we are talking about here, and we don't really have the political structures in place to enable us to implement the technology that we already have. So I would see the change basically as a political one. Its a global political change and the Kyoto process that rolls out now from Potsdam this year and then Copenhagen next year will be the key factors in the success or failure of us humans to do that.

#### a. NOx traps heat at different wavelengths, reductions cause a disproportionate drop in GHG effects.

Science Newsline, 4/2/2012. “Fertilizer Use Responsible for Increase in Nitrous Oxide in Atmosphere,” <http://www.sciencenewsline.com/articles/2012040219260050.html>.

Limiting nitrous oxide emissions could be part of a first step toward reducing all greenhouse gases and lessening global warming, Boering said, especially since immediately reducing global carbon dioxide emissions is proving difficult from a political standpoint. In particular, reducing nitrous oxide emissions can initially offset more than its fair share of greenhouse gas emissions overall, since N2O traps heat at a different wavelength than CO2 and clogs a "window" that allows Earth to cool off independent of CO2 levels.¶ "On a pound for pound basis, it is really worthwhile to figure how to limit our emissions of N2O and methane," she said. "Limiting N2O emissions can buy us a little more time in figuring out how to reduce CO2 emissions."

#### b. Inevitable increases in ag production mean NO2 will swamp CO2 in the coming century.

Dave S. Reay et al, 5/13/2012. School of GeoSciences, University of Edinburgh. “Global agriculture and nitrous oxide emissions,” Nature, <http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#/affil-auth>.

Projected N2O emissions associated with agriculture are sensitive to drivers such as human population, per capita caloric intake, and consumption of livestock products. Alongside continuing growth in global population27, per capita food consumption is projected to increase in the next few decades[28](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref28), with demand for meat and dairy products being especially strong28, 29, 30 (Fig. 2). These projections represent changes in global average per capita intake, much of the expected increase being driven by greater per capita cereal, meat and dairy consumption in developing-world nations[29](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref29). As a result of the necessary expansion in crop and livestock production to meet this demand, a substantial increase in N2O emissions from agricultural soils is projected through to 2030[10](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref10), [31](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref31).¶ Overall, N2O emissions associated with agriculture (including human sewage) are projected to rise from around 6.4 Tg N2O-N yr−1 in 2010 to 7.6 Tg N2O-N yr−1 by 2030[10](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref10) ([Fig. 1](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#f1)), with much of this growth resulting from increased nitrogen-fertilizer use in non-OECD Asia, Latin America and Africa. Although these projections provide a useful indicator of future emissions, uncertainties around agricultural demand, interactions with climate change, and the extent of mitigation efforts remain significant.¶ Agricultural demand and bioenergy. As discussed previously, future changes in human population and diet are a central determinant of global food demand, and so of agricultural N2O emissions. In addition to the challenge of developing robust scenarios for food-related emissions, projections must also take account of potential increases in demand for bioenergy.¶ Several recent studies have shown that an outcome of imposing mitigation regimes that value only carbon from energy and industrial sources is that they can create incentives to increase bioenergy production and use[32](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref32), [33](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref33). Global production of wheat, coarse grains and vegetable oils for biofuels use, for example, is projected to rise from around 160 million tonnes in 2010 to over 200 million tonnes by 2020[29](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref29). Expanded bioenergy programmes can, in turn, increase terrestrial carbon emissions globally by increasing the conversion of forests and unmanaged ecosystems to agricultural use — a perverse result of curbing fossil-fuel-related emissions[34](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref34). Increased production of first-generation energy crops (for liquid transport fuels — bioethanol and biodiesel) may also increase N2O emissions, as large areas of these crops are fertilized to maximize production. However, many second-generation energy crops do not require large nitrogen-fertilizer additions, and their impact on N2O emissions is likely to be much lower[35](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref35). A central question therefore, is the degree to which global biofuel crop production will transition to second-generation energy crops, and the extent to which any expansion in production will be confined to existing managed land.¶ A recent analysis of global biofuels programmes that employ advanced cellulosic (second generation) technologies estimates that, over the twenty-first century, N2O emissions will be larger than the carbon losses associated with land-use change and land clearing[36](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref36). Cumulative projected N2O emissions in the analysis by Melillo et al.[36](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref36) range between 510 and 620 Tg N2O-N for the period 2000–2100, depending on how much of the new biofuels production is confined to already managed land, and so minimizes new forest clearing. Whereas cumulative N2O losses continually grow over the twenty-first century, net carbon flux influenced by biofuels production exhibits one of two distinct patterns: a substantial flux to the atmosphere (a land source) if the increase in biofuels production involves extensive forest clearing to establish biofuels crops (deforestation case); or a small flux to the land from the atmosphere (a land sink) as carbon slowly accumulates in the soil fertilized in the biofuels areas (intensification case). A global greenhouse-gas emissions policy that both protects forests and encourages best practices for nitrogen-fertilizer use[37](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref37) may therefore dramatically reduce emissions associated with biofuels production.¶ Feedbacks and interactions. Further increases in anthropogenic Nr inputs to both managed and natural ecosystems are predicted[38](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref38). Agriculture accounts for about 75–85% of projected global NH3 emissions throughout 2000–2050 and it is likely that regions with soils and ecosystems where Nr loads are already high are more prone to Nr deposition-induced N2O emissions[39](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref39), [40](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref40). Indeed, significant enhancements (50–60%) in the proportion of new Nr input emitted as N2O have been reported for riparian forest soils exposed to a decade of NO3-rich runoff[41](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref41). Insufficient field data exist to confidently include a positive feedback response in regional or global-scale projections of indirect N2O emissions from agriculture, but it is possible that an expansion in the area of nitrogen-saturated natural ecosystems globally will serve to increase N2O emissions per unit of Nr deposition in the future. As the microbial processes of nitrification and denitrification are responsible for the bulk of agricultural N2O emissions[42](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref42), [43](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref43), [44](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref44), a greater understanding of the microbiological basis of N2O fluxes may also help to improve such feedback projections[45](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref45).¶ Likewise, the impacts of future climate change on soil nitrogen cycling and net N2O emissions from agriculture are potentially significant[46](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref46), yet remain difficult to quantify at a global scale. A recent examination of modelled N2O emissions from Australian pasture-based dairy systems under future climate change scenarios indicated an increase in emissions of up to 40% (ref. [47](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref47)). Here, warmer soil temperatures coupled with wet, but unsaturated, soils during cooler months resulted in an increased opportunity for N2O production. Enhanced N2O emissions from upland agricultural soils under increased atmospheric CO2 concentrations have also been reported[48](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref48). Conversely, modelling of N2O emissions from a humid pasture in Ireland under future climate change indicated that a significant increase in above-ground biomass and associated nitrogen demand would serve to avoid significant increases in N2O emissions[49](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref49). Although direct studies of agricultural N2O fluxes under simulated future climates do suggest increased emissions in response to warming[50](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref50) or increased CO2[48](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref48), examination of the combined effects of warming, summer drought and increased CO2 indicate that temperature change may be of most importance in temperate, extensively managed grasslands[51](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref51). Overall, it is likely that changes in food demand, land management and nitrogen-use efficiency will be much more important determinants of global N2O emissions than climate change in the twenty-first century. However, significant indirect effects of climate change on agricultural N2O fluxes, such as reduced crop productivity[52](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref52), altered nitrogen leaching rates[53](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref53), and enhanced ammonia volatilization[54](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref54), [55](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref55) require further investigation and quantification.¶ Agriculture accounted for approximately 60% (~6 Tg N2O-N) of total global anthropogenic emissions of N2O in 2005, largely through emissions from agricultural soils after application of nitrogen fertilizer, meaning that the agricultural sector offers the greatest potential for N2O mitigation[31](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref31).¶ Nitrogen-use efficiency. On average, of every 100 units of nitrogen used in global agriculture, only 17 are consumed by humans as crop, dairy or meat products[56](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref56). Global nitrogen-use efficiency of crops, as measured by recovery efficiency in the first year (that is, fertilized crop nitrogen uptake — unfertilized crop N uptake/N applied), is generally considered to be less than 50% under most on-farm conditions[57](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref57), [58](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref58), [59](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref59), [60](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref60).¶ In the agricultural mitigation (Working Group III) chapter of the IPCC's fourth assessment report[31](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref31), the global mitigation potential for N2O reduction in agriculture was quantified using outputs from the DAYCENT model[61](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref61). Projections in demand for food were considered to require an overall increase in fertilizer nitrogen requirements, and large improvements in nitrogen-use efficiency by 2030 (for agronomic rather than climate change mitigation reasons) were assumed in the baseline, leading to a limited potential for mitigation[31](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref31), [62](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref62). However, given significant over-fertilization in some regions such as China and India[63](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref63), [64](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref64), the mitigation potential may be larger than reported by the IPCC in 2007[65](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref65). Potential mitigation options for N2O reduction rely on improving nitrogen-use efficiency, which could be increased by up to 50%[66](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref66), [67](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref67) by practices such as changing the source of N, using fertilizers stabilized with urease or nitrification inhibitors or slow- or controlled-release fertilizers, reducing rates of nitrogen application in over-fertilized regions, and optimizing nitrogen fertilizer placement and timing[65](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref65), [68](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref68), [69](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref69), [70](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref70). In some under-fertilized regions (such as Africa[71](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref71), [72](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref72)) more fertilizer nitrogen may be needed to increase yields. Although the N2O emissions would be expected to increase, the N2O emissions per unit of agricultural product may be significantly decreased.¶ Given the increased demand for fertilizer nitrogen to feed >9 billion people by 2050 (for example, from ~100 Tg to 135 Tg N by 2030[67](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref67)) and the potentially very large expansion in biofuel production discussed earlier, N2O emissions from agriculture are likely to rise in absolute terms. The risk is that large increases in anthropogenic N2O emissions from the agricultural sector will partly offset efforts to reduce CO2 emissions from the energy supply sector and others — undermining global efforts to avoid 2 °C of post-industrial warming. A key mitigation challenge, therefore, is to reduce N2O emissions per unit of fertilizer nitrogen applied, and per unit of agricultural product[73](http://www.nature.com/nclimate/journal/v2/n6/full/nclimate1458.html#ref73).

#### Second, methane—biochar increases soil efficiency, which decreases emissions.

John Gaunt and Johannes Lehmann, 2008. College of Agriculture and Life Sciences, Cornell University. “Energy Balance and Emissions Associated with Biochar Sequestration and Pyrolysis Bioenergy Production,” Environ. Sci. Technol. 2008, 42, 4152–4158, http://pubs.acs.org/doi/abs/10.1021/es071361i.

Preliminary research (12) suggests that nitrous oxide (N2O) and methane (CH4) emissions from soil may be significantly reduced by biochar application. Rondon et al. (12) found that CH4 emissions were completely suppressed and N2O emissions were reduced by 50% when biochar was applied to soil. Yanai et al. (13) also found suppression of N2O when biochar was added to soil. The mechanisms by which N2O and CH4 emissions are reduced are not clear. However, the reduction in N2O emissions observed by these authors is consistent with the more widespread observation that fertilizer is used more efficiently by crops in situations where biochar is applied to soil.

#### Methane leakage is 105 times worse than carbon causes runaway climate change

Frongillo 12 (Dominic, deputy town supervisor of Caroline, Tompkins County, and founder of Elected Officials to Protect New York , “Wrong Time to Push Fracking,” August 15, 2012 <http://www.timesunion.com/opinion/article/Wrong-time-to-push-fracking-3788647.php>)

Why should this ring alarm bells for Cuomo and every New Yorker?

Far from being a climate solution, fracking may be a disaster. Research indicates the methane leakage may mean that fracking is worse for the climate than coal and oil, particularly in the short term. Gas from fracking is mostly methane, a dangerous greenhouse gas that is up to 105 times more powerful at trapping heat in the atmosphere than carbon dioxide over 20 years. A recent United Nations Environment Program report shows that it is more urgent to reduce methane than CO2, given that methane is so much more powerful, has quicker climate impacts, and will trigger runaway climate change sooner. In February, the journal Nature reported on one of the first studies to look at methane emissions from fracking, a Colorado study led by researchers at the National Oceanic and Atmospheric Administration. The study found 4 percent of gas drilled in fracking is venting directly into the atmosphere — even greater than the high-end estimate of the Cornell study and twice what was reported by the industry. This is cause for grave concern. According to the Nobel Prize-winning Intergovernmental Panel on Climate Change, we must reduce our greenhouse gas emissions to avoid dangerous tipping points for the climate. Failing to do so will cause catastrophic impacts, far worse than the extreme heat and droughts this summer. It may be that preventing hydraulic fracturing is crucial to stop a large new source of greenhouse gas emissions in New York. Fracking would release large amounts of methane that is now safety underground — cooking the planet further at the time when we most need to reduce methane emissions. In Tompkins County, our Planning Department estimates that one well pad will release more climate pollution over its operational life than all of our county's 100,000 residents do in one year. Fracking may overwhelm and undermine the work of our governments, businesses, and institutions across the state to lessen our impact on the global climate. New York State's Climate Action Plan interim report contains ambitious and necessary strategies to cut greenhouse gas emissions 80 percent by 2050. How would fracking in New York affect our ability to meet these targets?

## Case Defense

### Warming

#### No impact to warming

Idso and Idso 11 (Craig D., Founder and Chairman of the Board – Center for the Study of Carbon Dioxide and Global Change, and Sherwood B., President – Center for the Study of Carbon Dioxide and Global Change, “Carbon Dioxide and Earth’s Future Pursuing the Prudent Path,” February, http://www.co2science.org/education/reports/ prudentpath/prudentpath.pdf)

As presently constituted, earth’s atmosphere contains just slightly less than 400 ppm of the colorless and odorless gas we call carbon dioxide or CO2. That’s only four-hundredths of one percent. Consequently, even if the air's CO2 concentration was tripled, carbon dioxide would still comprise only a little over one tenth of one percent of the air we breathe, which is far less than what wafted through earth’s atmosphere eons ago, when the planet was a virtual garden place. Nevertheless, a small increase in this minuscule amount of CO2 is frequently predicted to produce a suite of dire environmental consequences, including dangerous global warming, catastrophic sea level rise, reduced agricultural output, and the destruction of many natural ecosystems, as well as dramatic increases in extreme weather phenomena, such as droughts, floods and hurricanes. As strange as it may seem, these frightening future scenarios are derived from a single source of information: the ever-evolving computer-driven climate models that presume to reduce the important physical, chemical and biological processes that combine to determine the state of earth’s climate into a set of mathematical equations out of which their forecasts are produced. But do we really know what all of those complex and interacting processes are? And even if we did -- which we don't -- could we correctly reduce them into manageable computer code so as to produce reliable forecasts 50 or 100 years into the future? Some people answer these questions in the affirmative. However, as may be seen in the body of this report, real-world observations fail to confirm essentially all of the alarming predictions of significant increases in the frequency and severity of droughts, floods and hurricanes that climate models suggest should occur in response to a global warming of the magnitude that was experienced by the earth over the past two centuries as it gradually recovered from the much-lower-than-present temperatures characteristic of the depths of the Little Ice Age. And other observations have shown that the rising atmospheric CO2 concentrations associated with the development of the Industrial Revolution have actually been good for the planet, as they have significantly enhanced the plant productivity and vegetative water use efficiency of earth's natural and agro-ecosystems, leading to a significant "greening of the earth." In the pages that follow, we present this oft-neglected evidence via a review of the pertinent scientific literature. In the case of the biospheric benefits of atmospheric CO2 enrichment, we find that with more CO2 in the air, plants grow bigger and better in almost every conceivable way, and that they do it more efficiently, with respect to their utilization of valuable natural resources, and more effectively, in the face of environmental constraints. And when plants benefit, so do all of the animals and people that depend upon them for their sustenance. Likewise, in the case of climate model inadequacies, we reveal their many shortcomings via a comparison of their "doom and gloom" predictions with real-world observations. And this exercise reveals that even though the world has warmed substantially over the past century or more -- at a rate that is claimed by many to have been unprecedented over the past one to two millennia -- this report demonstrates that none of the environmental catastrophes that are predicted by climate alarmists to be produced by such a warming has ever come to pass. And this fact -- that there have been no significant increases in either the frequency or severity of droughts, floods or hurricanes over the past two centuries or more of global warming -- poses an important question. What should be easier to predict: the effects of global warming on extreme weather events or the effects of elevated atmospheric CO2 concentrations on global temperature? The first part of this question should, in principle, be answerable; for it is well defined in terms of the small number of known factors likely to play a role in linking the independent variable (global warming) with the specified weather phenomena (droughts, floods and hurricanes). The latter part of the question, on the other hand, is ill-defined and possibly even unanswerable; for there are many factors -- physical, chemical and biological -- that could well be involved in linking CO2 (or causing it not to be linked) to global temperature. If, then, today's climate models cannot correctly predict what should be relatively easy for them to correctly predict (the effect of global warming on extreme weather events), why should we believe what they say about something infinitely more complex (the effect of a rise in the air’s CO2 content on mean global air temperature)? Clearly, we should pay the models no heed in the matter of future climate -- especially in terms of predictions based on the behavior of a non-meteorological parameter (CO2) -- until they can reproduce the climate of the past, based on the behavior of one of the most basic of all true meteorological parameters (temperature). And even if the models eventually solve this part of the problem, we should still reserve judgment on their forecasts of global warming; for there will yet be a vast gulf between where they will be at that time and where they will have to go to be able to meet the much greater challenge to which they aspire

#### Previous temperature spikes disprove the impact

Singer 11 (S. Fred, Robert M. and Craig, PhD physics – Princeton University and professor of environmental science – UVA, consultant – NASA, GAO, DOE, NASA, Carter, PhD paleontology – University of Cambridge, adjunct research professor – Marine Geophysical Laboratory @ James Cook University, and Idso, PhD Geography – ASU, “Climate Change Reconsidered,” 2011 Interim Report of the Nongovernmental Panel on Climate Change)

Research from locations around the world reveal a significant period of elevated air temperatures that immediately preceded the Little Ice Age, during a time that has come to be known as the Little Medieval Warm Period. A discussion of this topic was not included in the 2009 NIPCC report, but we include it here to demonstrate the existence of another set of real-world data that do not support the IPCC‘s claim that temperatures of the past couple of decades have been the warmest of the past one to two millennia. In one of the more intriguing aspects of his study of global climate change over the past three millennia, Loehle (2004) presented a graph of the Sargasso Sea and South African temperature records of Keigwin (1996) and Holmgren et al. (1999, 2001) that reveals the existence of a major spike in surface air temperature that began sometime in the early 1400s. This abrupt and anomalous warming pushed the air temperatures of these two records considerably above their representations of the peak warmth of the twentieth century, after which they fell back to pre-spike levels in the mid-1500s, in harmony with the work of McIntyre and McKitrick (2003), who found a similar period of higher-than-current temperatures in their reanalysis of the data employed by Mann et al. (1998, 1999).

#### Can’t solve developing countries

Socolow and Glaser 09 – Professor of Mechanical and Aerospace Engineering at Princeton University and Assistant Professor at the Woodrow Wilson School of Public and International Affairs and in the Department of Mechanical and Aerospace Engineering at Princeton University (Robert H. and Alexander, Fall. “Balancing risks: nuclear energy & climate change.” Dædalus Volume 138, Issue 4, pp. 31-44. MIT Press Journals.)

In this paper we consider a nuclear future where 1,500 GW of base load nuclear power is deployed in 2050. A nuclear fleet of this size would contribute about one wedge, if the power plant that would have been built instead of the nuclear plant has the average CO2 emissions per kilowatt hour of all operating plants, which might be half of the value for a coal plant. Base load power of 1,500 GW would contribute one fourth of total electric power in a business-as-usual world that produced 50,000 terawatt-hours (TWh) of electricity per year, two-and-a-half times the global power consumption. However, **in a world focused on climate change mitigation, one would expect massive global investments in energy efficiency–more efficient motors, compressors, lighting, and circuit boards–that by 2050 could cut total electricity demand in half, relative to business as usual**. In such a world, 1,500 GW of nuclear power would provide half of the power. We can get a feel for the geopolitical dimension of climate change mitigation from the widely cited scenarios by the International Energy Agency (iea) presented annually in its World Energy Outlook (weo), even though these now go only to 2030. The weo 2008 estimates energy, electricity, and CO2 emissions by region. Its 2030 world emits 40.5 billion tons of CO2, 45 percent from electric power plants. The countries of theOrganisation for Economic Co-operation and Development (oecd) emit less than one third of total global fossil fuel emissions and less than one third of global emissions from electric power production. By extrapolation, at midcentury the oecd could contribute only one quarter of the world’s greenhouse gas emissions. It is hard for Western analysts to grasp the importance of these numbers. **The focus of climate change mitigation today is on leadership from the OECD countries**, **which are wealthier and more risk averse. But within a decade, the targets under discussion today can be within reach only if mitigation is in full gear in those parts of the developing world that share production and consumption patterns with the industrialized world**. The map (see Figure 1) shows a hypothetical global distribution of nuclear power in the year 2050 based on a highnuclear scenario proposed in a widely cited mit report published in 2003. Three-fifths of the nuclear capacity in 2050 as stated in the mit report is located in the oecd, and more nuclear power is deployed in the United States in 2050 than in the whole world today. The worldview underlying these results is pessimistic about electricity growth rates for key developing countries, relative to many other sources. Notably, per capita electricity consumption in almost every developing country remains below 4,000 kWh per year in 2050, which is one-fifth of the assumed U.S. value for the same year. Such a ratio would startle many analysts today–certainly many in China. It is well within limits of credulity that nuclear power in 2050 could be nearly absent from the United States and the European Union and at the same time widely deployed in several of the countries rapidly industrializing today. Such a bifurcation could emerge, for example, if public opposition to nu clear power in the United States and Europe remains powerful enough to prevent nuclear expansion, while elsewhere, perhaps where modernization and geopolitical considerations trump other concerns, nuclear power proceeds vigorously. It may be that the United States and other countries of the oecd will have substantial leverage over the development of nuclear power for only a decade or so. Change will not happen overnight**. Since 2006, almost 50 countries that today have no nuclear power plants have approached the International Atomic Energy Agency (iaea) for assistance, and many of them have announced plans to build one or more reactors by 2020. Most of these countries, however, are not currently in a good position to do so. Many face important** technical and economic constraints**, such as grid capacity, electricity demand, or gdp. Many have too few trained nuclear scientists and engineers, or lack an adequate regulatory framework and related legislation, or have not yet had a public debate about the rationale for the project**. Overall, **the iaea has estimated that “for a State with little developed technical base the implementation of the first [nuclear power plant] would, on average, take about 15 years**.” 11 **This lead time constrains rapid expansion of nuclear energy today**. **A wedge of nuclear power is, necessarily, nuclear power deployed widely– including in regions that are politically unstable today. If nuclear power is suf-ficiently unattractive in such a deployment scenario,** nuclear power is not on the list of solutions **to climate change**.

#### Warming is irreversible

ANI 10 (“IPCC has underestimated climate-change impacts, say scientists”, 3-20, One India, http://news.oneindia.in/2010/03/20/ipcchas-underestimated-climate-change-impacts-sayscientis.html)

According to Charles H. Greene, Cornell professor of Earth and atmospheric science, "Even if all man-made greenhouse gas emissions were stopped tomorrow and carbon-dioxide levels stabilized at today's concentration, by the end of this century, the global average temperature would increase by about 4.3 degrees Fahrenheit, or about 2.4 degrees centigrade above pre-industrial levels, which is significantly above the level which scientists and policy makers agree is a threshold for dangerous climate change." "Of course, greenhouse gas emissions will not stop tomorrow, so the actual temperature increase will likely be significantly larger, resulting in potentially catastrophic impacts to society unless other steps are taken to reduce the Earth's temperature," he added. "Furthermore, while the oceans have slowed the amount of warming we would otherwise have seen for the level of greenhouse gases in the atmosphere, the ocean's thermal inertia will also slow the cooling we experience once we finally reduce our greenhouse gas emissions," he said. This means that the temperature rise we see this century will be largely irreversible for the next thousand years. "Reducing greenhouse gas emissions alone is unlikely to mitigate the risks of dangerous climate change," said Green.

### AT: Soft Power

**Soft power is exaggerated – hard power is still the only thing that matters**

**Kagan, ‘12** [Robert Kagan, Senior Fellow, Foreign Policy, Center on the United States and Europe, 1/5/12, <http://www.brookings.edu/opinions/2012/0105_international_relations_kagan.aspx>]

Military force matters: At a time when all we hear about is “soft” and “smart” power, it is ironic that some of the toughest challenges in the coming year will be about old-fashioned hard, dumb military power. Will Israel use force against Iran? Will the United States? Will Washington and its allies end up playing a role in Syria to protect civilians as they did in Libya? Similar questions exist for Asia. And will the Obama administration’s loudly advertised “pivot” to Asia include the promised visible military component, or has that promise already been cast in doubt by President Obama’s new defense plan? Pentagon officials talk about “demilitarizing” U.S. foreign policy, which one can understand after the long wars in Iraq and Afghanistan. But the conventional wisdom now puts too much weight on “soft” power. We should not overestimate how much the world loves us because of our virtues, nor underestimate how much our influence still depends on hard power and our ability to provide protection in a pinch. Europe matters: It’s the Asian century, right? It’s all about the BRICS (Brazil, Russia, India, China, South Africa) plus Turkey. Well, not so fast. One of the year’s biggest issues will be whether Europe can work through its economic crisis and remain intact. This affects more than the U.S. and world economies: The fact is, Europe remains a large and vital player. The European Union still has the world’s largest economy. The fact that many if not all of its neighbors would like to join the E.U., even now, is significant. Its military capability is, unfortunately, diminishing, but even so Europe remains America’s go-to ally in major crises. Meanwhile, the much-discussed “rise of the rest” has been overhyped. U.S. business leaders, and their pals in the punditocracy, have been mesmerized by these emerging markets. But emerging markets do not equate to emerging great powers. Russia is no longer “rising.” Brazil’s role in the world is underwhelming. Turkey’s impact has yet to be demonstrated. India has not decided what it wants to be. Even China, though unquestionably a major player, has not yet taken on a great power’s role. For the United States, Europe remains the key ally in shoring up the norms and principles of a liberal world order. Should Europe fall, the blow to U.S. interests would be staggering. America matters: Reports of U.S. decline are extraordinarily premature. The country remains the central player in all regions of the world. Washington may not be able to have its way on all issues or provide solutions for all the world’s problems. But, then, it never could. Many today have nostalgia for an era of U.S. predominance that never existed. But in the coming months, whether the issue is Iran, Syria or Asian security, regional players will continue to look to the United States. No other nation or group of nations comes close to enjoying America’s global web of alliances. None wields more political influence in international forums. And unless and until the United States renders itself weak by unnecessary defense budget cuts, there will be no substitute for it as a provider of security and defender of an open political and economic order. Perhaps 2012 will be the year Americans gain a renewed understanding of that enduring reality.

**Soft power is a myth. States won’t buy it – tangible power is all that matters, not intentions**

Christopher Layne, visiting fellow in foreign policy studies at Cato, Los Angeles Times, October 6, 2002

U.S. strategists believe that "it can't happen to us," because the United States is a different kind of hegemon, a benign hegemon that others will follow willingly due to the attractiveness of its political values and culture. While flattering, this self-serving argument misses the basic point: Hegemons are threatening because they have too much power. And it is America's power--not the self-proclaimed benevolence of its intentions--that will shape others' response to it. A state's power is a hard, measurable reality, but its intentions, which can be peaceful one day but malevolent the next, are ephemeral. Hegemony's proponents claim that the United States can inoculate itself against a backlash by acting multilaterally. But other states are not going to be deceived by Washington's use of international institutions as a fig leaf to cloak its ambitions of dominance. And in any event, there are good reasons why the U.S. should not reflexively embrace multilateralism. When it comes to deciding when and how to defend American interests, Washington should want a free hand, not to have its

## Trade Turns

### 1NC

#### That causes protectionism and violates the WTO

Rivkin 09 [Attorney David B. Rivkin, Jr., has studied the U.S. Constitution and related historical documents with

scholarly rigor, and has authored critical commentary on critical constitutional issues of our day. In private practice and partner at Baker Hostetler in Washington, D.C., Mr. Rivkin has had a lengthy career distinguished by service under Presidents Ronald Reagan and George H. W. Bush, in the U.S. Department of Justice, and in the U.S. Department of Energy. He is a well-known writer and media commentator on matters of constitutional and international law, as well as foreign and defense policy. He is a Visiting Fellow at the Nixon Center, Contributing Editor at the National Review, and a member of the Advisory Council at The National Interest magazine. He currently serves as Co-Chairman of the Center for Law and Counterterrorism at the Foundation for Defense of Democracies. He previously served on the United Nations Commission on Human Rights. A trusted representative of conservative viewpoints, he frequently testifies before the Senate Judiciary Committee and other Congressional committees. On July 30, 2009, Mr. Rivkin testified as a minority party witness in the confirmation hearings of Supreme Court Justice nominee Sonia Sotomayor. He had previously testified on June 9, 2009, before the Senate Judiciary Committee's Subcommittee on the Constitution regarding "The Legal, Moral, and National Security Consequences of 'Prolonged Detention.'" His extensive legal opinion articles and commentary include more than 350 articles and numerous guest appearances on radio, and network and cable televisions programs, such as CNN, NPR, BBC, Fox News, NBC, ABC, CBS, Al Jazeera, and The Laura Ingraham Show. Mr. Rivkin's editorial contributions include constitutional law, international law, defense and national security, intelligence, foreign policy, energy policy, and healthcare reform. He develops his positions on critical public and legal matters not from political ideology, but from a reasoned interpretation of the U.S. constitution, legislation, judicial rulings, and legal opinions.] David's Senate Committee Testimony on Climate Change Thursday, 30 July 2009 17:26 Senate Committee on the Environment and Public Works Hearings On Climate Change and National Security July 30, 2009 <http://davidrivkin.com/index.php?option=com_content&view=article&id=50>

D. Attempting To Enforce GHG Emissions Reductions Through Trade Penalties Would Be Highly Problematic. Having made it all but impossible to obtain a comprehensive GHG emissions limitation treaty by trading concessions with other governments, advocates of the unilateral cap-and-trade approach must rely on either the moral example of the United States imposing emission limits on itself, or on the threat or use of trade penalties, to induce other countries to reduce their emissions. These strategies are unlikely to work. The moral example of U.S. abstention from GHG emissions will have little impact on foreign leaders who must worry about feeding their populations. The leaders of more developed societies “particularly in Europe“ have long been able to call for U.S. reduction of GHG emissions secure in the knowledge that the prior Administration of President George W. Bush was unlikely to take any action in the area. It is an open question whether Europe's enthusiasm for emissions reductions will persist once, as is likely, the moral example of Waxman-Markey proves, in fact, to be a cautionary one. Trade penalties are similarly unlikely to be a very effective tool in this context, for a number of reasons. First, carbon tariffs are very likely illegal under WTO rules. Numerous countries, as well as senior U.N. officials, have already denounced the possibility of carbon tariffs as a violation of WTO principles. See Dina Capiello, U.N. Climate Expert Warns Against Carbon Tariffs, The Washington Post (July 22, 2009).[7] They will be able to make a strong argument that a carbon tariff is trade protectionism in the disguise of environmental protection. See Remarks by Yao Jian, Spokesman for Ministry of Commerce of People's Republic of China, reported in Alan Beatie & Kathrin Hille, China joins carbon tax protest, The Financial Times (July 3, 2009).[8] This argument draws strength from the popularity of the Waxman-Markey bill among protectionist labor groups.Â Whether illegal under the WTO or not, it is a certainty that carbon tariffs would be challenged “repeatedly and acrimoniously“ before the WTO Dispute Resolution System. Climate-based protectionism would carry with it all the negative consequences of other forms of protectionism. If the United States puts carbon tariffs in place, other countries will likely retaliate. Protectionism pries countries apart. It widens oceans, divides friends and pushes rivals further apart. Trade would be impaired just as the world economy is struggling to recover from the worst downturn since the Great Depression (which was itself largely caused by retaliatory tariffs). Attempts to pressure other countries into reducing emissions through tariffs will also complicate relations with countries from whom the United States needs help on a range of issues, many of which have little to do with the environment. If, for example, the United States is shackled by a unilateral cap-and-trade scheme, its foreign policy will increasingly be dominated by a desperate need to get India, China, and others to commit to emissions reductions, lest U.S. competitiveness be entirely lost. This will put the U.S. in a far worse position vis-a-vis such countries with regard to extracting cooperation on counterterrorism, counter-proliferation programs, human rights, and a legion of other concerns. In other words, it can be argued that Waxman-Markey drives the U.S. to adopt a demanding and confrontational strategy, even while greatly reducing the leverage that would be available to the U.S. in dealing with other major emitters.

#### The impact is trade war

Panzner 08 – faculty at the New York Institute of Finance, 25-year veteran of the global stock, bond, and currency markets who has worked in New York and London for HSBC, Soros Funds, ABN Amro, Dresdner Bank, and JPMorgan Chase (Michael, “Financial Armageddon: Protect Your Future from Economic Collapse,” p. 136-138)

Continuing calls for curbs on the flow of finance and trade will inspire the United States and other nations to spew forth protectionist legislation like the notorious Smoot-Hawley bill. Introduced at the start of the Great Depression, it triggered a series of tit-for-tat economic responses, which many commentators believe helped turn a serious economic downturn into a prolonged and devastating global disaster. But if history is any guide, those lessons will have been long forgotten during the next collapse. Eventually, fed by a mood of desperation and growing public anger, restrictions on trade, finance, investment, and immigration will almost certainly intensify. Authorities and ordinary citizens will likely scrutinize the cross-border movement of Americans and outsiders alike, and lawmakers may even call for a general crackdown on nonessential travel. Meanwhile, many nations will make transporting or sending funds to other countries exceedingly difficult. As desperate officials try to limit the fallout from decades of ill-conceived, corrupt, and reckless policies, they will introduce controls on foreign exchange. Foreign individuals and companies seeking to acquire certain American infrastructure assets, or trying to buy property and other assets on the cheap thanks to a rapidly depreciating dollar, will be stymied by limits on investment by noncitizens. Those efforts will cause spasms to ripple across economies and markets, disrupting global payment, settlement, and clearing mechanisms. All of this will, of course, continue to undermine business confidence and consumer spending. In a world of lockouts and lockdowns, any link that transmits systemic financial pressures across markets through arbitrage or portfolio-based risk management, or that allows diseases to be easily spread from one country to the next by tourists and wildlife, or that otherwise facilitates unwelcome exchanges of any kind will be viewed with suspicion and dealt with accordingly. The rise in isolationism and protectionism will bring about ever more heated arguments and dangerous confrontations over shared sources of oil, gas, and other key commodities as well as factors of production that must, out of necessity, be acquired from less-than-friendly nations. Whether involving raw materials used in strategic industries or basic necessities such as food, water, and energy, efforts to secure adequate supplies will take increasing precedence in a world where demand seems constantly out of kilter with supply. Disputes over the misuse, overuse, and pollution of the environment and natural resources will become more commonplace. Around the world, such tensions will give rise to **full-scale military encounters,** often with minimal provocation. In some instances, economic conditions will serve as a convenient pretext for conflicts that stem from cultural and religious differences. Alternatively, nations may look to divert attention away from domestic problems by channeling frustration and populist sentiment toward other countries and cultures. Enabled by cheap technology and the waning threat of American retribution, terrorist groups will likely boost the frequency and scale of their horrifying attacks, bringing the threat of random violence to a whole new level. Turbulent conditions will encourage aggressive saber rattling and interdictions by rogue nations running amok. Age-old clashes will also take on a new, more heated sense of urgency. China will likely assume an increasingly belligerent posture toward Taiwan, while Iran may embark on overt colonization of its neighbors in the Mideast. Israel, for its part, may look to draw a dwindling list of allies from around the world into a growing number of conflicts. Some observers, like John Mearsheimer, a political scientist at the University of Chicago, have even speculated that an “intense confrontation” between the United States and China is “inevitable” at some point. More than a few disputes will turn out to be almost wholly ideological. Growing cultural and religious differences will be transformed from wars of words to battles **soaked in blood**. Long-simmering resentments could also degenerate quickly, spurring the basest of human instincts and triggering genocidal acts. Terrorists employing biological or nuclear weapons will vie with conventional forces using jets, cruise missiles, and bunker-busting bombs to cause widespread destruction. Many will interpret stepped-up conflicts between Muslims and Western societies as the beginnings of a new world war.

### Link – Protectionism

#### Assures a trade war

**Kreutzer 09** David Kreutzer, Senior Policy Analyst, Heritage Foundation, Testimony before the House Energy and Commerce Committee, 4-22-09, www.heritage.org/Research/Testimony/The-Economic-Impact-of-Cap-and-Trade, accessed 5-2-10.

**Cap-and-trade programs frequently include provisions to protect domestic industries from competition with firms in countries that have not adopted similarly costly mechanisms for reducing CO2.** While the intent is certainly understandable, the **provisions create the possibility of a protectionist wolf in global-warming clothes. Putting these protectionist policies into operation is a bureaucratic nightmare**. Every product from every country will need to be judged to determine the level of advantage it may have due to different carbon-cutting regimes. **Since different countries can have different approaches and since different manufacturers can use different technologies and processes, assigning an offsetting CO2 tariff will necessarily involve arbitrary decisions. The potential for a trade war is very real.**

#### More ev

CEI 97 Competitive Enterprise Institute, Kyoto Media Advisory: December 2, 1997 By CEI Staff December 01, 1997 <http://cei.org/news-releases/kyoto-media-advisory-december-2-1997>

Still, policy does have implications. To sanction anti-energy use policies anywhere will have ramifications everywhere. If Kyoto leads to further energy restrictions in the U.S. the world will notice the impacts of declining economic and technological progress. Kyoto is all too likely to produce what CEI President Fred Smith terms "a baby step on the escalator to oblivion." Even such initial economic costs would likely exacerbate already troubling protectionist tendencies in the U.S. and elsewhere. Any effort by the U.S. to use the Kyoto Treaty to curtail energy would mobilize the business community into arguing for treaty enforcement via trade sanctions. David Montgomery, an economist with Charles River Associates, discussed this protectionist risk at the Competitive Enterprise Institute’s Costs of Kyoto conference. He noted that the pressures and the tools for enforcing climate treaty measures will be trade -- not environmentally -- driven. Few outside the environmental establishment believes that trade wars will prove beneficial. In a world of "differentiated" compliance, the Byrd-Hagel resolution may well evolve into a new force for protectionism.

### Turns Warming

#### AND it makes environmental cooperation impossible – that makes leadership useless – assumes tariffs for the environment

Anderson and Grewell 01 [Terry Anderson is a professor of economics @ Montana State and J. Bishop Grewell is a Research Associate @ the PERC, 2 Chi. J. Int'l L. 427, Lexis]

The unintended consequences of punishment for violating environmental agreements with trade restrictions should be considered. Trade offers the most likely route for acceptable punishments. Yet invoking sanctions, tariffs, and other economic penalties to ensure compliance with international environmental agreements could rebuild the wall against free trade that the United States and other countries are working so hard to tear down. And once the wall is up, the wealth and prosperity that accrue under free trade will be staunched, as will the potential for environmental progress. In addition, the effort to subject future trade agreements to more stringent environmental review risks slowing and even halting future trade agreements altogether, with enormous impacts on trade and world prosperity. The long-term effects of stifling wealth creation will harm environmental quality, as developing countries and former Communist countries take longer to grow wealthy enough to afford improving environmental quality. Subjecting free trade to subjective environmental review is shortsighted and misses the bigger picture of long-run environmental consequences.

#### AND trade is the only way to adapt to warming

Tamiotti et al. 09 (Ludivine, Counsellor in the Trade and Environment Division of the World Trade Organisation, Robert Teh is Counsellor in the Economic Research and Statistics Division of the World Trade Organization, Vesile Kulaçoğlu, Director, Trade and Environment Division, WTO, Anne Olhoff, Sustainable Development and Climate Change Coordinator / Senior Economist, Benjamin Simmons is Head of the Trade, Policy and Planning Unit with UNEPs Economics and Trade Branch, Hussein Abaza is the Chief of the Economics and Trade Branch of UNEP's Division of Technology, Industry, and Economics, “Trade and Climate Change”, <http://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf>)

As discussed in the previous section, the technique effect can be a major mechanism through which trade opening can lead to mitigation of climate change. More open trade can increase the availability of goods and services that are more energy efficient. The increased income made possible through trade opening can lead to greater demand for better environmental quality and thus to reduced greenhouse gas emissions. Related to this, **trade** (or trade opening) **encourages the spread from one country to another of technological innovations that are beneficial in mitigating climate change**. Furthermore, **allowing international markets to remain open could help countries adapt to supply disruptions** that may be triggered by climate change, such as a shortage in food supplies. 1. **Technological spillovers** from trade International trade **can serve as a means for** diff **using new technologies and know-how** (Grossman and Helpman, 1991). International technology **diffusion is important because of the highly skewed distribution of spending on research and development** (R&D) **around the world**. Coe, Helpman and Hoff maister (1997) estimate that 96 per cent of global expenditure on R&D is undertaken by only a handful of industrialized countries. The distribution of expenditure on R&D is even more skewed than the distribution of world income. Keller (2004) notes that the G-7 countries (the world’s leading industrialized countries) accounted for 84 per cent of global spending on R&D in 1995, but represented only 64 per cent of global gross domestic product (GDP). Since Solow (1956), economists have understood the importance of technological change in raising productivity and underpinning economic growth. **The greater a country’s exposure to the international economy, the more it gains from R&D activities in other countries** (Helpman, 1997). **This suggests a similar role for trade in** diff **using technologies that mitigate climate change.** The available information indicates that 90 per cent of what is termed the environmental goods and services industry is located in member countries of the OECD.38 Since many OECD countries were among the first to adopt climate change mitigation measures, the already lopsided distribution of technological know-how may become more distorted as the adoption of mitigation measures leads to further innovation in environmental technologies in OECD countries. Porter and van der Linde (1995) have argued that domestic firms’ compliance with environmental regulations can trigger technological innovations, since such inventions will lower firms’ cost of compliance.39 **The existence of spillovers in climate change technology** (i.e. transfers of technological know-how from one country to another) **provides one mechanism by which developing countries’ own efforts to combat climate change can benefit from innovations in OECD countries**. Section III.B provides information on trade opening in goods that may mitigate greenhouse gas emissions. There are several channels by which technological dissemination through trade can occur (Grossman and Helpman, 1991; Helpman, 1997). As explained in Section I.B.4(a), one channel is through the importation of innovations embodied in both intermediate goods (i.e. manufactured or processed goods which are used in further production processes) and capital goods (e.g. machinery or equipment used in the production of other goods and services) which a country could not have produced on its own. A second channel is through the transfer of knowledge about new production methods and design from developed countries. Third, **international trade can increase the available opportunities for adapting foreign technologies to meet local conditions**. Lastly, the **learning opportunities arising from international economic relations will reduce the cost of future innovation and imitation**, making them more accessible to developing countries.

### China impact

#### Extinction

Straits Times 00

[6-25, Regional Fallout: No one gains in war over Taiwan, Lexis Nexis]

THE high-intensity scenario postulates a cross-strait war escalating into **a full-scale war between the US and China**. If Washington were to conclude that splitting China would better serve its national interests, then a full-scale war becomes unavoidable. Conflict on such a scale **would embroil other countries far and near and** -- horror of horrors -- **raise the possibility of** a **nuclear war. Beijing** has already told the US and Japan privately that it **considers any country providing bases and logistics** support **to** any **US forces** attacking China **as belligerent parties open to its retaliation.** In the region, this means South Korea, Japan, the Philippines and, to a lesser extent, Singapore. If China were to retaliate, **east Asia will be set on fire**. And the conflagration may not end there as opportunistic powers elsewhere may try to overturn the existing world order. With the US distracted, **Russia may seek to redefine Europe**'s political landscape. The balance of power in **the Middle East may be similarly upset** by the likes of Iraq. In south Asia, hostilities between **India and Pakistan**, each armed with its own nuclear arsenal, could **enter a new and dangerous phase.** Will a full-scale Sino-US war lead to a nuclear war? According to General Matthew Ridgeway, commander of the US Eighth Army which fought against the Chinese in the Korean War, the US had at the time thought of using nuclear weapons against China to save the US from military defeat. In his book The Korean War, a personal account of the military and political aspects of the conflict and its implications on future US foreign policy, Gen Ridgeway said that US was confronted with two choices in Korea -- truce or a broadened war, which could have led to the use of nuclear weapons. If the US had to resort to nuclear weaponry to defeat China long before the latter acquired a similar capability, **there is little hope of winning a war against China** 50 years later, **short of using nuclear weapons.** The US estimates that **China possesses about 20 nuclear warheads that can destroy major American cities. Beijing also seems prepared to go for the nuclear option.** A **Chinese** military officer disclosed recently that Beijing was considering a review of its "non first use" principle regarding nuclear weapons. Major-General Pan Zhangqiang, president of the military-funded Institute for Strategic Studies, told a gathering at the Woodrow Wilson International Centre for Scholars in Washington that although the government still abided by that principle, there were strong pressures from the military to drop it. He said military leaders considered the use of nuclear weapons mandatory if the country risked dismemberment as a result of foreign intervention. Gen Ridgeway said that **should that come to pass, we would see the destruction of civilisation.** There would be no victors in such a war. **While the prospect of a nuclear Armaggedon** over Taiwan **might seem inconceivable, it cannot be ruled out** entirely, **for China puts sovereignty above everything else.**

### 2NC Impact – Manufacturing

#### AND that destroys manufacturing – high elec prices.

Stavins 07Robert N. Stavins Harvard University National Bureau of Economic Research A U.S. Cap-and-Trade System to Address Global Climate Change http://www.brookings.edu/~/media/research/files/papers/2007/10/climate%20stavins/10\_climate\_stavins.pdf

A cap will have broad economic effects because it raises the cost of fossil fuel use and electric power generation. But certain sectors and firms will be particularly affected, including fossil fuel producers, the electric power sector, and energy-intensive industries. Variation in a cap’s economic impacts on different fossil fuel producers illustrates that impacts on a particular sector do not depend on the sector’s carbon intensity alone, and that some impacts can be counterintuitive. Coal production will be the most affected because coal is the most carbon-intensive fuel, and opportunities exist for electric power generators and some industrial consumers to switch to less carbon-intensive fuels. Petroleum sector output will be much less affected, partly because demand for gasoline and other petroleum products is fairly insensitive to increased prices, at least in the short term. Finally, even though natural gas accounts for about 20 percent of U.S. fuel-related CO2 emissions, it is uncertain whether a cap would increase or reduce the output and profitability of natural gas producers (U.S. Energy Information Administration 2003, 2006c).58 Assessments of impacts on the natural gas industry are complicated by changing conditions in natural gas markets. The increased cost of natural gas use under a cap-and-trade system tends to reduce the quantity of natural gas demanded, but demand may increase because natural gas is the least carbon-intensive fossil fuel, leading users to switch to it. However, as the price of natural gas has increased considerably in recent years, so, too, has the cost of achieving emissions reductions through fuel switching. The cost of natural gas for electric power generation was little more than twice that of an equivalent amount of coal (on an energy content basis) in 1999 but rose to more than five times the cost of coal in 2005 (U.S. Energy Information Administration 2007). Of course, the impacts on coal producers and other industries depend on the stringency of the emissions cap—the more stringent the cap, the higher the market price of allowances, and the greater the impact on affected industries. Rather than creating abrupt and significant impacts, policies that gradually increase a cap’s stringency may only slow the expansion of even the most affected industries, lessening transition costs as workers, communities, and regions adjust.59 Among firms that consume fossil fuels and electricity, energy- and emissions-intensive industries will likely suffer the severest impacts (Bovenberg and Goulder 2003; Smith, Ross, and Montgomery 2002; U.S. Energy Information Administration 2003; Jorgensen et al. 2000). Some of the hardest hit industries will be petroleum refiners and manufacturers of chemicals, primary metals, and paper.60 Among industries experiencing similar increases in costs, the impacts will be greatest in those globally competitive industries that are least able to pass through higher costs. Also, some of the most economically affected industries may be relatively small, even with respect to their contribution to aggregate CO2 emissions.61 Finally, average industry level impacts may obscure significant variation in firm-level impacts within an industry. The electric power sector is an important example.

#### Spills over to all manufacturing

Lind 12 **(**Policy director of New America’s Economic Growth Program and a co-founder of the New America Foundation (Michael, “Value Added: America’s Manufacturing Future,” http://growth.newamerica.net/sites/newamerica.net/files/policydocs/Lind,%20Michael%20and%20Freedman,%20Joshua%20-%20NAF%20-%20Value%20Added%20America%27s%20Manufacturing%20Future.pdf )

Manufacturing, R&D and the U.S. Innovation Ecosystem Perhaps the greatest contribution of manufacturing to the U.S. economy as a whole involves the disproportionate role of the manufacturing sector in R&D. The expansion in the global market for high-value-added services has allowed the U.S. to play to its strengths by expanding its trade surplus in services, many of them linked to manufacturing, including R&D, engineering, software production and finance. Of these services, by far the most important is R&D**.** The United States has long led the world in R&D. In 1981, U.S. gross domestic expenditure on R&D was more than three times as large as that of any other country in the world. And the U.S. still leads: in 2009, the most recent year for which there is available data, the United States spent more than 400 billion dollars. European countries spent just under 300 billion dollars combined, while China spent about 150 billion dollars.14 In the United States, private sector manufacturing is the largest source of R&D. The private sector itself accounts for 71 percent of total R&D in the United States, and although U.S. manufacturing accounts for only 11.7 percent of GDP in 2012, the manufacturing sector accounts for 70 percent of all R&D spending by the private sector in the U.S.15 And R&D and innovation are inextricably connected: a National Science Foundation survey found that 22 percent of manufacturers had introduced product innovations and the same percentage introduced process innovations in the period 2006-2008, while only 8 percent of nonmanufacturers reported innovations of either kind.16 Even as the manufacturing industry in the United States underwent major changes and suffered severe job losses during the last decade, R&D spending continued to follow a general upward growth path. A disproportionate share of workers involved in R&D are employed directly or indirectly by manufacturing companies; for example, the US manufacturing sector employs more than a third of U.S. engineers.17 This means that manufacturing provides much of the demand for the U.S. innovation ecosystem, supporting large numbers of scientists and engineers who might not find employment if R&D were offshored along with production. Why America Needs the Industrial Commons Manufacturing creates an industrial commons, which spurs growth in multiple sectors of the economy through linked industries. An “industrial commons” is a base of shared physical facilities and intangible knowledge shared by a number of firms. The term “commons” comes from communallyshared pastures or fields in premodern Britain. The industrial commons in particular in the manufacturing sector includes not only large companies but also small and medium sized enterprises (SMEs), which employ 41 percent of the American manufacturing workforce and account for 86 percent of all manufacturing establishments in the U.S. Suppliers of materials, component parts, tools, and more are all interconnected; most of the time, Harvard Business School professors Gary Pisano and Willy Shih point out, these linkages are geographic because of the ease of interaction and knowledge transfer between firms.18 Examples of industrial commons surrounding manufacturing are evident in the United States, including the I-85 corridor from Alabama to Virginia and upstate New York.19 Modern economic scholarship emphasizes the importance of geographic agglomeration effects and co-location synergies. 20 Manufacturers and researchers alike have long noted the symbiotic relationship that occurs when manufacturing and R&D are located near each other: the manufacturer benefits from the innovation, and the researchers are better positioned to understand where innovation can be found and to test new ideas. While some forms of knowledge can be easily recorded and transferred, much “know-how” in industry is tacit knowledge. This valuable tacit knowledge base can be damaged or destroyed by the erosion of geographic linkages, which in turn shrinks the pool of scientists and engineers in the national innovation ecosystem. If an advanced manufacturing core is not retained, then the economy stands to lose not only the manufacturing industry itself but also the geographic synergies of the industrial commons, including R&D. Some have warned that this is already the case: a growing share of R&D by U.S. multinational corporations is taking place outside of the United States.21 In particular, a number of large U.S. manufacturers have opened up or expanded R&D facilities in China over the last few years.22 Next Generation Manufacturing A dynamic manufacturing sector in the U.S. is as important as ever. But thanks to advanced manufacturing technology and technology-enabled integration of manufacturing and services, the very nature of manufacturing is changing, often in radical ways. What will the next generation of manufacturing look like? In 1942, the economist Joseph Schumpeter declared that “the process of creative destruction is the essential fact about capitalism.” By creative destruction, Schumpeter did not mean the rise and fall of firms competing in a technologically-static marketplace. He referred to a “process of industrial mutation— if I may use that biological term—that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating the new one.” He noted that “these revolutions are not strictly incessant; they occurred in discrete rushes that are separated from each other by spaces of comparative quiet. The process as a whole works incessantly, however, in the sense that there is always either revolution or absorption of the results of revolution.”23 As Schumpeter and others have observed, technological innovation tends to be clustered in bursts or waves, each dominated by one or a few transformative technologies that are sometimes called “general purpose technologies.” Among the most world-transforming general purpose technologies of recent centuries have been the steam engine, electricity, the internal combustion engine, and information technology.24 As epochal as these earlier technology-driven innovations in manufacturing processes and business models proved to be, they are rapidly being superseded by new technologydriven changes as part of the never-ending process of Schumpeterian industrial mutation. The latest wave of innovation in industrial technology has been termed “advanced manufacturing.” The National Science and Technology Council of the Executive Office of the President defines advanced manufacturing as “a family of activities that (a) depend on the use and coordination of information, automation, computation, software, sensing, and networking, and/or (b) make use of cutting edge materials and emerging capabilities enabled by the physical and biological sciences, for example, nanotechnology, chemistry, and biology. It involves both new ways to manufacture existing products and the manufacture of new products emerging from new advanced technologies.”25 Already computer-aided design (CAD) and computer-aided manufacturing (CAM) programs, combined with computer numerical control (CNC), allow precision manufacturing from complex designs, eliminating many wasteful trials and steps in finishing. CNC is now ubiquitous in the manufacturing sector and much of the employment growth occurring in the sector requires CNC skills or training. Information technology has allowed for enterprise resource planning (ERP) and other forms of enterprise software to connect parts of the production process (both between and within a firm), track systems, and limit waste when dealing with limited resources. Other areas in which advanced manufacturing will play a role in creating new products and sectors and changing current ones are: Supercomputing. America’s global leadership in technology depends in part on whether the U.S. can compete with Europe and Asia in the race to develop “exascale computing,” a massive augmentation of computer calculating power that has the potential to revolutionize predictive sci ences from meteorology to economics. According to the Advanced Scientific Computing Advisory Committee (ASCAC), “If the U.S. chooses to be a follower rather than a leader in exascale computing, we must be willing to cede leadership” in industries including aerospace, automobiles, energy, health care, novel material development, and information technology.26 Robotics**:** The long-delayed promise of robotics is coming closer to fulfillment. Google and other firms and research consortiums are testing robotic cars, and Nevada recently amended its laws to permit autonomous automobiles.27 Amazon is experimenting with the use of robots in its warehouses.28 Nanotechnology may permit manufacturing at extremely small scales including the molecular and atomic levels.29 Nanotechnology is also a key research component in the semiconductor indusmanutry, as government funding is sponsoring projects to create a “new switch” capable of supplanting current semiconductor technology.30 Photonics or optoelectronics, based on the conversion of information carried by electrons to photons and back, has potential applications in sectors as diverse as telecommunications, data storage, lighting and consumer electronics. Biomanufacturing is the use of biological processes or living organisms to create inorganic structures, as well as food, drugs and fuel. Researchers at MIT have genetically modified a virus that generates cobalt oxide nanowires for silicon chips.31 Innovative materials include artificial “metamaterials” with novel properties. Carbon nanotubes, for example, have a strength-to-weight ratio that no other material can match.32 Advanced manufacturing using these and other cuttingedge technologies is not only creating new products and new methods of production but is also transforming familiar products like automobiles. The rapid growth in electronic and software content in automobiles, in forms like GPS-based guidance systems, information and entertainment technology, anti-lock brakes and engine control systems, will continue. According to Ford, around 30 percent of the value of one of its automobiles is comprised by intellectual property, electronics and software. In the German automobile market, electronic content as a share of production costs is expected to rise from 20-30 percent in 2007 to 50 percent by 2020.33

#### Advanced manufacturing is key to the pharmaceutical industry

Swezey 11 (Project Director for Breakthrough Institute where he works as an energy and climate policy analyst, Devon, 2011, “Manufacturing Growth Advanced Manufacturing and the Future of the American Economy,” http://thebreakthrough.org/blog/BTI\_Third\_Way\_Idea\_Brief\_-\_Manufacturing\_Growth\_.pdf)

New manufacturing thrives on and drives innovation. Manufacturing is a core component of the nation’s innovation ecosystem. Firms engaged in manufacturing re-invest a significant portion of revenues in research and development (R&D). Overall, the manufacturing sector comprises two-thirds of industry investment in R&D and employs nearly 64% of the country’s scientists and engineers. 10 Manufacturers also have unique opportunities to apply new technologies for specialized functions and achieve economies of scale at the plant or firm, 11 making the return on manufacturing R&D significant. The transition to advanced manufacturing will enhance the sector’s role in fostering innovation and developing and commercializing new technologies. Advanced manufacturing industries, including semiconductors, computers, pharmaceuticals, clean energy technologies, and nanotechnology, play an outsized role in generating the new technologies, products, and processes that drive economic growth. Advanced manufacturing is also characterized by the rapid transfer of science and technology into manufacturing processes and products, which in and of itself drives innovation. The research-to-manufacturing process is cyclical, with multiple feedbacks between basic R&D, pre-competitive research, prototyping, product development, and manufacturing. This opens new possibilities for product development and manufacturing. 12

#### The pharmaceutical industry is key to preventing bioterrorism

Washington Post 01 (Justin Gillis, 2001 "Scientists Race for Vaccines," lexis)

U.S. scientists, spurred into action by the events of Sept. 11, have begun a concerted assault on bioterrorism, working to produce an array of new medicines that include treatments for smallpox, a safer smallpox vaccine and a painless anthrax vaccine.    At least one major drug company, Pharmacia Corp. of Peapack, N.J., has offered to let government scientists roam through the confidential libraries of millions of compounds it has synthesized to look for drugs against bioterror agents. Other companies have signaled that they will do the same if asked. These are unprecedented offers, since a drug company's chemical library, painstakingly assembled over decades, is one of its primary assets, to which federal scientists usually have no access. "A lot of peoplewould say we won World War II with the help of a mighty industrial base," said Michael Friedman, a onetime administrator at the Food and Drug Administration who was appointed days ago to coordinate the pharmaceutical industry's efforts. "In this new war against bioterrorism, the mighty industrial power is the pharmaceutical industry."    One example of the new urgency is an initiative launched by Eli Lilly & Co. One of the company's infectious-disease experts, Gail Cassell, realized during the anthrax scare that her company had three drugs that might work as treatments for smallpox, even scarier than anthrax as a potential terrorist weapon.    In a matter of days Cassell, a Lilly vice president, tore through paperwork that normally would have taken months, put samples of the drugs on a plane and flew them to government laboratories in the Washington area to be tested against smallpox. It's not clear yet whether the drugs will prove effective.    "We all have to think of the situation as being rather urgent," Cassell said. "You're kind of waiting for the next shoe to drop, given the events of the last two months." Researchers say a generation of young scientists never called upon before to defend the nation is working overtime in a push for rapid progress. At laboratories of the National Institutes of Health, at universities and research institutes across the land, people are scrambling.  "This has been such a shock to so many people," said Carole Heilman, a division director at NIH, which is paying for much of the bioterror research. "People aren't sleeping anymore. Everybody is working as much as they possibly can. Bureaucracy is not a word that's acceptable anymore." But the campaign, for all its urgency, faces hurdlesboth scientific and logistical. The kind of research now underway would normally take at least a decade before products appeared on pharmacy shelves. Scientists are talking about getting at least some new products out the door within two years, a daunting schedule in medical research.    If that happens, it will be with considerable assistance from the nation's drug companies. They are the only organizations in the country with the scale to move rapidly to produce pills and vials of medicine that might be needed by the billions.  The companies and their powerful lobby in Washington have been working over the past few weeks to seize the moment and rehabilitate their reputations, tarnished in recent years by controversy over drug prices and the lack of access to AIDS drugs among poor countries.    The companies have already made broad commitments to aid the government in the short term, offering free pills with a wholesale value in excess of $ 1 billion, as well as other help. The question now is whether that commitment will extend over the several years it will take to build a national stockpile of next-generation medicines.  "This is a time of crisis," Friedman said. "I think the industry is going to be very patient and going to be making a long-term commitment.It's the right thing to do."