## 1NC

### 1

A. Interpretation – courts affs must specify grounds for ruling in their plantext

DoJ 5. Department of Justice 2005 (“Rules of the Supreme Court of the United States,” March 14,<http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf>)

(e) A concise statement of the basis for jurisdiction in this Court, showing: (i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petiti on is ﬁled under this Court’s Rule 11); (i i) the date of any order respecting rehearing, and the date and terms of any order granting an extensi on of time to ﬁle the petiti on for a writ of certi orari; (i i i) express reliance on Rule 12.5, when a crosspetiti on for a writ of certi orari is ﬁled under that Rule, and the date of docketing of the petiti on for a writ of certi orari in connecti on with which the cross-petiti on is ﬁled; (iv) the statutory provision believed to confer on this Court jurisdicti on to review on a writ of certi orari the judgment or order in questi on; and (v) if applicable, a statement that the notiﬁcati ons required by Rule 29.4( b) or (c) have been made. (f ) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisi ons involved are lengthy, their citati on alone sufﬁces at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i). (g) A concise statement of the case setting out the facts material to considerati on of the questi ons presented, and also containing the following: (i) If review of a state-court judgment is sought, speciﬁcati on of the stage in the proceedings, both in the court of ﬁrst instance and in the appellate courts, when the federal questi ons sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of speciﬁc porti ons of the record or summary thereof, with speciﬁc reference to the places in the record where the matter appears (e. g., court opini on, ruling on excepti on, porti on of court’s charge and excepti on thereto, assignment of error), so as to show that the federal questi on was timely and properly raised and that this Court has jurisdicti on to review the judgment on a writ of certiorari. When the porti ons of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i). (i i) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdicti on in the court of ﬁrst instance. (h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10. (i) An appendix containing, in the order indicated: (i) the opinions, orders, ﬁndings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed; (i i) any other relevant opinions, orders, ﬁndings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the capti on showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

C. Limits – overruling a case creates new law, which is impossible to predict

Dunn 3 (Pintip Hompluem, JD @ Yale Law School, former editor for the Yale Law Journal, Barry S. Cohen prize winner for best paper in law and literature, “How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis,” November, 113 Yale L. J. 493)

After all, Justices create new law when they overrule a case. Although the common law may be analogous to the written law by providing judges with an external source on which to rely, the common and written law are far from the same. The common law is composed entirely of itself; every decision joins the body of judicial decisions of the common law and must itself be followed. (64) In this way, stare decisis is a doctrine that is not only backward-looking, but also forward-looking; it dictates that a decision must be made in conformity with the decisions that came before it, but it also commands that all future decisions be made in conformity with the present one. (65) Thus, when judges overrule a previous decision, they do more than disagree with that decision--they substitute the old law for the new one that has just been created. (66) 

### 2

Restrictions are prohibitions imposed on acting

**Schiedler-Brown ‘12**

Jean, Attorney, Jean Schiedler-Brown & Associates, Appellant Brief of Randall Kinchloe v. States Dept of Health, Washington, The Court of Appeals of the State of Washington, Division 1, <http://www.courts.wa.gov/content/Briefs/A01/686429%20Appellant%20Randall%20Kincheloe%27s.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. In contrast, the terms "supervise" and "supervisor" are defined as; To have general oversight over, to superintend or to inspect. See Supervisor. A surveyor or overseer. . . In a broad sense, one having authority over others, to superintend and direct. The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but required the use of independent judgment. Comparing the above definitions, it is clear that the definition of "restriction" is very different from the definition of "supervision"-very few of the same words are used to explain or define the different terms. In his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision conditions, but he did not agree to restrict his license.

### 3

Legal restraints motivated by conflict narratives naturalize exceptional violence—the impact is endless intervention and WMD warfare

John Morrissey, Lecturer in Political and Cultural Geography, National University of Ireland, Galway; has held visiting research fellowships at University College Cork, City University of New York, Virginia Tech and the University of Cambridge. 2011, “Liberal Lawfare and Biopolitics: US Juridical Warfare in the War on Terror,” Geopolitics, Volume 16, Issue 2, 2011

In the ‘biopolitical nomos’ of camps and prisons in the Middle East and elsewhere, managing detainees is an important element of the US military project. As CENTCOM Commander General John Abizaid made clear to the Senate Armed Services Committee in 2006, “an essential part of our combat operations in both Iraq and Afghanistan entails the need to detain enemy combatants and terrorists”.115 However, it is a mistake to characterize as ‘exceptional’ the US military’s broader biopolitical project in the war on terror. Both Minca’s and Agamben’s emphasis on the notion of ‘exception’ is most convincing when elucidating how the US military has dealt with the ‘threat’ of enemy combatants, rather than how it has planned for, legally securitized and enacted, its ‘own’ aggression against them. It does not account for the proactive juridical warfare of the US military in its forward deployment throughout the globe, which rigorously secures classified SOFAs with host nations and protects its armed personnel from transfer to the International Criminal Court. Far from designating a ‘space of exception’, the US does this to establish normative parameters in its exercise of legally sanctioned military violence and to maximize its ‘operational capacities of securitization’.

A bigger question, of course, is what the US military practices of lawfare and juridical securitization say about our contemporary moment. Are they essentially ‘exceptional’ in character, prompted by the so-called exceptional character of global terrorism today? Are they therefore enacted in ‘spaces of exceptions’ or are they, in fact, simply contemporary examples of Foucault’s ‘spaces of security’ that are neither exceptional nor indeed a departure from, or perversion of, liberal democracy? As Mark Neocleous so aptly puts it, has the “liberal project of ‘liberty’” not always been, in fact, a “project of security”?116 This ‘project of security’ has long invoked a powerful political dispositif of ‘executive powers’, typically registered as ‘emergency powers’, but, as Neocleous makes clear, of the permanent kind.117 For Neocleous, the pursuit of ‘security’ – and more specifically ‘capitalist security’ – marked the very emergence of liberal democracies, and continues to frame our contemporary world. In the West at least, that world may be endlessly registered as a liberal democracy defined by the ‘rule of law’, but, as Neocleous reminds us, the assumption that the law, decoupled from politics, acts as the ultimate safeguard of democracy is simply false – a key point affirmed by considering the US military’s extensive waging of liberal lawfare. As David Kennedy observes, the military lawyer who “carries the briefcase of rules and restrictions” has long been replaced by the lawyer who “participate[s] in discussions of strategy and tactics”.118

The US military’s liberal lawfare reveals how **the rule of law is simply another securitization tactic in liberalism’s ‘pursuit of security’;** a pursuit that paradoxically eliminates fundamental rights and freedoms in the ‘name of security’.119 This is a ‘liberalism’ defined by what Michael Dillon and Julian Reid see as a commitment to waging ‘biopolitical war’ for the securitization of life – ‘killing to make live’.120 And for Mark Neocleous, (neo)liberalism’s fetishization of ‘security’ **– as both a discourse and a technique of government** – has resulted in a world defined by anti-democratic technologies of power.121 In the case of the US military’s forward deployment on the frontiers of the war on terror – and its juridical tactics to secure biopolitical power thereat – this has been **made possible by constant reference to a neoliberal ‘project of security’** registered in a language of ‘endless emergency’ to ‘secure’ the geopolitical and geoeconomic goals of US foreign policy.122 The US military’s continuous and indeed growing military footprint in the Middle East and elsewhere can be read as a ‘permanent emergency’,123 the new ‘normal’ in which geopolitical military interventionism and its concomitant biopolitical technologies of power are necessitated by the perennial political economic ‘need’ to securitize volatility and threat.

Conclusion: enabling biopolitical power in the age of securitization

“Law and force flow into one another. We make war in the shadow of law, and law in the shadow of force” – David Kennedy, Of War and Law 124

Can a focus on lawfare and biopolitics help us to **critique our contemporary moment’s proliferation of practices of securitization** – practices that appear to be primarily concerned with coding, quantifying, governing and anticipating life itself? In the context of US military’s war on terror, I have argued above that it can. If, as David Kennedy points out, the “emergence of a global economic and commercial order has amplified the role of background legal regulations as the strategic terrain for transnational activities of all sorts”, this also includes, of course, ‘warfare’; and for some time, the US military has recognized the “opportunities for creative strategy” made possible by proactively waging lawfare beyond the battlefield.125 As Walter Benjamin observed nearly a century ago, at the very heart of military violence is a “lawmaking character”.126 And it is this ‘lawmaking character’ that is integral to the biopolitical technologies of power that secure US geopolitics in our contemporary moment. US lawfare **focuses “the attention of the world on this or that excess**” whilst simultaneously arming “the most heinous human suffering **in legal privilege”,** redefining horrific violence as “collateral damage, self-defense, proportionality, or necessity”.127 It involves a mobilization of the law that is precisely channelled towards “**evasion**”, securing 23 classified Status of Forces Agreements and “offering at once the experience of safe ethical distance and careful pragmatic assessment, while **parcelling out responsibility, attributing it, denying it – even sometimes embracing it – as a tactic of statecraft and war”.128**

Since the inception of the war on terror, the US military has waged incessant lawfare to legally securitize, regulate and empower its ‘operational capacities’ in its multiples ‘spaces of security’ across the globe – whether that be at a US base in the Kyrgyz Republic or in combat in Iraq. I have sought to highlight here these tactics by demonstrating how the execution of US geopolitics relies upon a proactive legal-biopolitical securitization of US troops at the frontiers of the American ‘leasehold empire’. For the US military, legal-biopolitical apparatuses of security enable its geopolitical and geoeconomic projects of security on the ground; they plan for and **legally condition the ‘milieux’ of military commanders**; and in so doing they **render operational** **the pivotal spaces of overseas intervention of contemporary US national security conceived** in terms of ‘**global governmentality’**.129 In the US global war on terror, it is lawfare that facilitates what Foucault calls the “biopolitics of security” – when life itself becomes the “object of security”.130 For the US military, this involves the eliminating of threats to ‘life’, the creating of operational capabilities to ‘make live’ and the anticipating and management of life’s uncertain ‘future’.

Some of the most key contributions across the social sciences and humanities in recent years have divulged how discourses of ‘security’, ‘precarity’ and ‘risk’ function centrally in the governing dispositifs of our contemporary world.131 In a society of (in)security, such discourses have a profound power to invoke danger as “requiring extraordinary action”.132 In the ongoing war on terror, registers of emergency play pivotal roles in the justification of military securitization strategies, where ‘risk’, it seems, has become permanently binded to ‘securitization’. As Claudia Aradau and Rens Van Munster point out, the “perspective **of risk management”** seductively effects practices of military securitization to be seen as necessary, legitimate and indeed therapeutic.133 US tactics of liberal lawfare in the long war – the conditioning of the battlefield, the sanctioning of the privilege of violence, the regulating of the conduct of troops, the interpreting, negating and utilizing 24 of international law, and the securing of SOFAs – are vital security dispositifs of a broader ‘risk- securitization’ strategy involving the deployment of liberal technologies of biopower to “manage dangerous irruptions in the future”.134 It may well be fought beyond the battlefield in “a war of the pentagon rather than a war of the spear”,135 but it is lawfare that ultimately enables the ‘toxic combination’ **of US geopolitics and biopolitics defining the current age of securitization.**

Legal restraints guarantee increasing public resistance and executive secrecy

Michael J. Glennon 14, I-law prof at Tufts, National Security and Double Government, <http://harvardnsj.org/wp-content/uploads/2014/01/Glennon-Final.pdf>

If Bagehot’s theory is correct, the United States now confronts a precarious situation. **Maintaining the appearance that** Madisonian **institutions control the course of national security policy requires that those institutions play a large enough role in the decision-making process to maintain the illusion**. But the Madisonians’ role is too visibly shrinking, and the Trumanites’ too visibly expanding, to maintain the plausible impression of Madisonian governance.504 For this reason and others, public confidence in the Madisonians has sunk to new lows.505 **The Trumanites have resisted transparency** far more **successfully** than have the Madisonians, with unsurprising results. The success of the whole dual institutional model depends upon the maintenance of public enchantment with the dignified/ Madisonian institutions. This requires allowing no daylight to spoil their magic,506 as Bagehot put it. An element of mystery must be preserved to excite public imagination. But transparency—driven hugely by modern internet technology, multiple informational sources, and social media— leaves little to the imagination. “The cure for admiring the House of Lords,” Bagehot observed, “was to go and look at it.”507 **The public has gone and looked at Congress, the Supreme Court, and the President, and their standing in public opinion surveys is the result. Justices, senators, and presidents are not masters of the universe after all, the public has discovered. They are just like us**. Enquiring minds may not have read enough of Foreign Affairs508 to assess the Trumanites’ national security polices, but they have read enough of People Magazine509 to know that the Madisonians are not who they pretend to be. While the public’s unfamiliarity with national security matters has no doubt hastened the Trumanites’ rise, **too many people will soon be too savvy to be misled by the** Madisonian **veneer**,510 and those people often are opinion leaders whose influence on public opinion is disproportionate to their numbers. There is no point in telling ghost stories, Holmes said, if people do not believe in ghosts.511

It might be supposed at this point that the phenomenon of double government is nothing new. Anyone familiar with the management of the Vietnam War 512 or the un-killable ABM program 513 knows that double government has been around for a while. Other realms of law, policy, and business also have come to be dominated by specialists, made necessary and empowered by ever-increasing divisions of labor; is not national security duality merely a contemporary manifestation of the challenge long posed to democracy by the administrative state-cum-technocracy?515 Why is national security different?

There is validity to this intuition and no dearth of examples of the frustration confronted by Madisonians who are left to shrug their shoulders when presented with complex policy options, the desirability of which cannot be assessed without high levels of technical expertise. International trade issues, for example, turn frequently upon esoteric econometric analysis beyond the grasp of all but a few Madisonians. Climate change and global warming present questions that depend ultimately upon the validity of one intricate computer model versus another. The financial crisis of 2008 posed similar complexity when experts insisted to hastily-gathered executive officials and legislators that—absent massive and immediate intervention—the nation’s and perhaps the world’s entire financial infrastructure would face imminent collapse.516 In these and a growing number of similar situations, **the “choice” made by the Madisonians is increasingly hollow;** the real choices are made by technocrats **who present options** to Madisonians **that the Madisonians are in no position to assess**. Why is national security any different?

It is different for a reason that I described in 1981: the organizations in question “do not regulate truck widths or set train schedules. They have the capability of radically and permanently altering the political and legal contours of our society.”517 An unrestrained security apparatus has throughout history been one of the principal reasons that free governments have failed. **The Trumanite network** holds within its power something far greater than the ability to recommend higher import duties or more windmills or even gargantuan corporate bailouts: it has the power to kill and arrest and jail, the power to see and hear and read peoples’ every word and action, the power to instill fear and suspicion, the power to quash investigations and quell speech, the power to shape public debate or to curtail it, and the power to hide its deeds and evade its weak-kneed overseers. It **holds**, in short, **the power of irreversibility**. No democracy worthy of its name can permit that power to escape the control of the people.

It might also be supposed that existing, non-Madisonian, external restraints pose counterweights that compensate for the weakness of internal, Madisonian checks. The press, and the public sentiment it partially shapes, do constrain the abuse of power—but only up to a point. To the extent that **the “marketplace of ideas**” analogy ever was apt, that marketplace, like other marketplaces, **is given to distortion**. **Public outrage is** notoriously **fickle, manipulable, and selective**, **particularly when driven by anger, fear, and indolence**. **Sizeable segments of the public**—often egged on by public officials—**lash out unpredictably at imaginary transgressors, failing** even in the ability **to identify** sympathetic **allies**.518 "[P]ublic opinion," Sorensen wryly observed, "is not always identical with the public interest."519 **The influence of the media**, whether to rouse or dampen, **is** thus **limited**. The handful of investigative journalists active in the United States today are the truest contemporary example of Churchill's tribute to the Royal Air Force.520 In the end, though, access remains everything to the press. Explicit or implicit threats by the targets of its inquiries to curtail access often yield editorial acquiescence. Members of the public obviously are in no position to complain when a story does not appear. Further, **even the best** of investigative **journalists confront a high wall of secrecy. Finding** and communicating with (on deep background, of course) **a knowledgeable, candid source** within an opaque Trumanite network resistant to efforts to pinpoint decision-makers 521 **can take years**. Few publishers can afford the necessary financial investment; newspapers are, after all, businesses, and the bottom line of their financial statements ultimately governs investigatory expenditures. Often, **a second** corroborating **source is required**. Even after scaling the Trumanite wall of secrecy, **reporters** and their editors often **become victims of** the **deal-making** tactics they must adopt to live comfortably with the Trumanites. Finally, members of the mass media are subject to the same organizational pressures that shape the behavior of other groups. They eat together, travel together, and think together. A case in point was the Iraq War. The Washington Post ran twenty seven editorials in favor of the war along with dozens of op-ed pieces, with only a few from skeptics.522 The New York Times, Time, Newsweek, the Los Angeles Tunes, and the Wall Street Journal all marched along in lockstep.523 As Senator Eugene McCarthy aptly put it, reporters are like blackbirds; when one flies off the telephone wire, they all fly off.524

More importantly, the premise—that a vigilant electorate fueled by a skeptical press together will successfully fill the void created by the hollowed-out Madisonian institutions—is wrong.525 This premise supposes that those outside constraints operate independently, that their efficacy is not a function of the efficacy of internal, Madisonian checks.526 But the internal and external checks are woven together and depend upon one another.527 Non-disclosure agreements (Judicially-enforced gag orders, in truth) are prevalent among those best positioned to criticize/28 Heightened efforts have been undertaken to crush vigorous investigative journalism and to prosecute and humiliate whistleblowers and to equate them with spies under the espionage laws. National security documents have been breathtakingly over-classified. **The evasion of** Madisonian **constraints** by these sorts of policies **has the net effect of narrowing the marketplace of ideas, curtaining public debate, and gutting both the media and public opinion as effective restraints**.529 The vitality of external checks depends upon the vitality of internal Madisonian checks, and the internal Madisonian checks only minimally constrain the Trumanites.

Some suggest that the answer is to admit the failure of the Madisonian institutions, recognize that for all their faults the external checks are all that really exist, acknowledge that the Trumanite network cannot be unseated, and try to work within the current framework.530 But the idea that external checks alone do or can provide the needed safeguards is false**. If politics were** the **effective** restraint that some have argued it is,531 **politics**—intertwined as it is with law—**would have produced more effective legalist constraints**. It has not. The failure of law is and has been a failure of politics. If the press and public opinion were sufficient to safeguard what the Madisonian institutions were designed to protect, the story of democracy would consist of little more than a series of elected kings, with the rule of law having frozen with the signing of Magna Carta in 1215. Even with effective rules to protect free, informed, and robust expression—which is an enormous assumption—public opinion alone cannot be counted upon to protect what law is needed to protect. The hope that it can do so recalls earlier reactions to Bagehot’s insights—the faith that “the people” can simply “throw off” their “deferential attitude and reshape the political system,” insisting that the Madisonian, or dignified, institutions must “once again provide the popular check” that they were intended to provide.532

That, however, is exactly what many thought they were doing in electing Barack Obama as President. The results need not be rehearsed; little reason exists to expect that some future public effort to resuscitate withered Madisonian institutions would be any more successful. Indeed, the added power that the Trumanite network has taken on under the BushObama policies would make that all the more difficult. It is simply naive to believe that a sufficiently large segment of informed and intelligent voters can somehow come together to ensure that sufficiently vigilant Madisonian surrogates will somehow be included in the national security decisionmaking process to ensure that the Trumanite network is infused with the right values. Those who believe that do not understand why that network was formed, how it operates, or why it survives. They want it, in short, to become more Madisonian. The Trumanite network, of course, would not mind appearing more Madisonian, bul its enduring ambilion is lo become, in reality, less Madisonian.

It is not clear what precisely might occur should Bagehot's cone of government "fall to earth." United States history provides no precedent. One possibility is a prolongation of what are now long-standing trends, with the arc of power continuing to shift gradually from the Madisonian institutions to the Trumanite network. Under this scenario, those institutions continue to subcontract national security decisionmaking to the Trumanites; a majority of the public remains satisfied with tradeoffs between liberty and security; and members of a dissatisfied minority are at a loss to know what to do and are, in any event, chilled by widely-feared Trumanite surveillance capabilities. The Madisonian institutions, in this future, fade gradually into museum pieces, like the British House of Lords and monarchy; Madisonians kiss babies, cut ribbons, and read Trumanite talking points, while the Trumanite network, careful to retain historic forms and familiar symbols, takes on the substance of a silent directorate.

Another possibility, however, is that **the fall** to earth **could entail consequences** that are **profoundly disruptive**, both **for the government** and the people. This scenario would be more likely in the aftermath of a catastrophic terrorist attack that takes place in an environment lacking the safety-valve checks that the Madisonian institutions once provided. In this future, **an initial "rally round the flag" fervor and** associated **crack-down are followed**, later, **by an increasing spiral of recriminatory reactions and counter-reactions**. The government is seen increasingly by elements of the public as hiding what they ought to know, criminalizing what they ought to be able to do, and spying upon what ought to be private. The people are seen increasingly by the government as unable to comprehend the gravity of security threats, unappreciative of its security-protection efforts, and unworthy of its own trust. Recent public opinion surveys are portentous. A September 2013 Gallup Poll revealed that Americans' trust and confidence in the federal government's ability to handle international problems had reached an all-time low;533 a June 2013 Time magazine poll disclosed that 70% of those age eighteen to thirty-four believed that Edward Snowden "did a good thing" in leaking the news of the NSA's surveillance program.534 This yawning attitudinal gap between the people and the government could reflect itself in multiple ways. Most obviously, the Trumanite network must draw upon the U.S. population to fill the five million positions needed to staff its projects that require security clearances.535 That would be increasingly difficult, however, if the pool of available recruits comprises a growing and indeterminate number of Edward Snowdens—individuals with nothing in their records that indicates disqualifying unreliability but who, once hired, are willing nonetheless to act against perceived authoritarian tendencies by leaving open the vault of secrecy.

A smaller, less reliable pool of potential recruits would hardly be the worst of it, however. Lacking perceived legitimacy, **the government could expect a lesser level of cooperation, if not outright obstruction, from the general public**. Many national security programs presuppose public support for their efficient operation. This ranges from compliance with national security letters and library records disclosure under the PATRIOT Act to the design, manufacture, and sale of drones, and cooperation with counterintelligence activities and criminal investigations involving national security prosecutions. Moreover, distrust of government tends to become generalized; people who doubt governmental officials' assertions on national security threats are inclined to extend their skepticism.

**Governmental assurances concerning everything from vaccine and food safety to the fairness of stock-market regulation and IRS investigations** (not without evidence536) **become widely suspect**. **Inevitably**, therefore, **daily life would become more difficult**. Government, after all, exists for a reason. It carries out many helpful and indeed essential functions in a highly specialized society. When those functions cannot be fulfilled, **work-arounds emerge, and social dislocation results**. Most seriously, the protection of **legitimate national security interests would** itself **suffer** if the public were unable to distinguish between measures vital to its protection and those assumed to be undertaken merely through bureaucratic inertia or lack of imagination.

**The government** itself, meanwhile, **could not be counted upon to remain passive in the face of growing public obduracy** in response to its efforts to do what it thinks essential to safeguard national security. Here we do have historical precedents, and none is comfortably revisited. The Alien and Sedition Acts in the 1790s;537 the Palmer Raids of 1919 and 1920;538 the round-up of Japanese-American citizens in the 1940s;539 governmental spying on and disruption of civil rights, draft protesters, and anti-war activists in the 1960s and 1970s;540 and the incommunicado incarceration without charges, counsel, or trial of "unlawful combatants" only a few short years ago541—all are examples of what can happen when government sees limited options in confronting nerve-center security threats. No one can be certain, but **the ultimate danger** posed **if the system were to fall** to earth in the aftermath of a devastating terrorist attack **could be** intensely divisive and potentially **destabilizing**—not unlike what was envisioned by conservative Republicans in Congress who opposed Truman's national security programs when the managerial network was established.542 It is therefore appropriate to move beyond explanation and to turn to possibilities for reform—to consider steps that might be taken to prevent the entire structure from falling to earth.

Vote neg to debase the aff’s reliance securitized law in favor of democratic restraints on the President

Stephanie A. Levin 92, law prof at Hampshire College, Grassroots Voices: Local Action and National Military Policy, 40 Buff. L. Rev. 372

In this sense, what is important about federalism is not that it locates power "here" or "there" — not that some things are assigned irretrievably to the federal government or others to the states — but that it creates a tension about power, so that there are competing sources of authority rather than one unitary sovereign. Hannah Arendt has written that "perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic, the insight that in the realm of human affairs sovereignty and tyranny are the same."194 Akhil Amar has expressed what is actually the same basic insight in a very different formulation, writing that the American innovation was to place sovereignty "in the People themselves. "I9S Whether one views unitary sovereignty as abolished or relocated to the people, the key point is that it is no longer considered to be in any unitary government. Governmental institutions are divided and kept in tension. At the federal level, this is the familiar doctrine of separation of powers. The same principle animates federalism. The tension is valued because it creates space for the expression of suppressed viewpoints and helps to prevent any one orthodoxy from achieving complete hegemony. Amar sums up the contribution that this governmental innovation makes to the liberty of the people by writing: "As with separation of powers, federalism enabled the American People to conquer government power by dividing it. Each government agency, state and national, would have incentives to win the principal's affections by monitoring and challenging the other's misdeeds."196 This is a compelling insight, but the way Professor Amar has framed it presents two difficulties for present purposes. First, by naming only the "state" and "national" governments, it ignores the field of local government action, a field particularly accessible to the direct involvement of the very citizens who constitute Amar's sovereign "People."197 Second, by making the subject of the verb the "government agency," the sentence makes it sound as if it were the "government agency" which acts, rather than recognizing that it is people who act though the agencies of government. Since the focus here is on federalism as a means of fostering civic participation, both of these qualifications are crucial. While state government will sometimes be an excellent locus for citizen action, often local government will provide the best forum for ordinary citizens to find their voices in civic conversation. And because the value of federalism for our purposes is in the enhanced opportunities it provides for citizen participation in policy development, the focus must be not on government institutions acting, but on people acting through them. In summary, three key attributes of participatory federalism must be highlighted. The first is that what is most important is not where government power is assigned — to the federal government, the states, or the localities — but the very fact that there are shared and overlapping powers. This dispersion of power means that the citizen is better protected from the dangers that are inherent in being subject to any one unitary sovereign.198 A second key attribute is that the value of this federalism lies not in the empowerment of government, but in the empowerment of people. Its animating purpose is not to add to or detract from the powers of any particular level of government, but to provide the most fruitful arrangements for enhancing the possibility of genuine citizen control over government. Third, the only meaningful measure of the success or failure of this type of federalism is the extent to which it contributes to increased opportunities for citizens to have a voice in government. This must be not at the level of deceptive abstraction — "the People speak" — but at the very concrete level of actual people with actual voices. The goal is for more people to be able to speak up in settings more empowering than their living rooms — and certainly state and local governments, while not the only possible settings, provide such an opportunity. In conclusion, these general principles of participatory federalism must be linked to the specific case of federalism in connection with military policy. The constitutional arrangements concerning military power which were described in Section II fit with these three attributes of participatory federalism quite well. The first attribute calls for dispersing power by sharing it. As has already been suggested, the military arrangements in the Constitution were designed to achieve exactly this sort of liberating tension between the national government's military powers and the decentralized state and locally-controlled institutions by which these powers were to be carried out. The second attribute calls for empowering people rather than governmental institutions. Here, too, the constitutional arrangements seem to fit. The purpose of the grants of power in the relevant constitutional clauses was not to endow any unit of government with the prerogatives of military power for its own sake. The reason for creating these powers was not to strengthen government but to protect the citizenry — to "provide for the common defense." Given this, it seems anomalous for the federal government — or any branch of the American government — to claim a right to control or use military violence as an inherent attribute of sovereignty.'99 The only justification for this power is in whether it contributes to the security of the citizens. Finally, the idea that federalism should serve the purpose of enhancing citizen voice can also be linked to decentralized arrangements for the control of military power. In the eighteenth century, as I have suggested earlier, the mechanism for expressing "voice" was physical: the militiamember showed up at muster, rifle on shoulder, to participate bodily in a "conversation" about military force.200 Today, it can be hoped that our civic conversation can be more verbal. However, we should translate the underlying meaning of the eighteenth century mechanism — a meaning of citizen participation and consent — into a modality more appropriate to contemporary life rather than relinquish it altogether. I would argue that such a translation leads to three central conclusions. The first is theoretical: we must challenge those mental preconceptions which favor totally centralized power in the military policy arena. We must stop seeing control over military power as belonging "naturally" to the federal government and even more narrowly to the executive branch within it. Instead, we must reconceptualize our understanding of the national arrangements to envision a dynamic and uncertain balance among different sources of power, not only among the three branches of the federal government, but between centralized and decentralized institutions of government as well.201 While the role of the federal government is, of course, crucial, the roles of the states and localities are more than interstitial and should not be allowed to atrophy. Only in this dynamic tension does the best protection for the citizenry lie.

### 4

The judiciary adheres to political question deference now—but doctrinal repudiation would reverse that.

Franck ‘12

Thomas, Murray and Ida Becker Professor of Law, New York University School of Law Wolfgang Friedmann Memorial Award 1999, *Political Questions/Judicial Answers*

Sensitive to this historical perspective, many scholars, but few judges, have openly decried the judiciary’s tendency to suspend at the water’s edge their jealous defense of the power to say what the law is. Professor Richard Falk, for example, has criticized judges’ “ad hoc subordinations to executive policy”5 and urged that if the object of judicial deference is to ensure a single coherent American foreign po1icy, then that objective is far more likely to be secured if the policy is made in accordance with rules “that are themselves not subject to political manipulation.”6 Moreover, as a nation publicly proclaiming its adherence to the rule of law, Falk notes, it is unedifying for America to refuse to subject to that rule the very aspect of its governance that is most important and apparent to the rest of the world.7 Professor Michael Tigar too has argued that the deference courts show to the political organs, when it becomes abdication, defeats the basic scheme of the Constitution because when judges speak of “the people” as “the ultimate guardian of principle” in political-question cases, they overlook the fact that “the people” are the “same undifferentiated mass” that “historically, unmistakably and, at times, militantly insisted that when executive power immediately threatens personal liberty, a judicial remedy must be available.” Professor Louis Henkin, while acknowledging that certain foreign relations questions are assigned by the Constitution to the discretion of the political branches, also rejects the notion that the judiciary can evade responsibility for deciding the appropriate limits to that discretion, particularly when its exercise comes into conflict with other rights or powers rooted in the Constitution or laws enacted in accordance with its strictures.9 His views echo earlier ones espoused by Professor Louis Jaffe, who argued that while the courts should listen to advice tendered by the political branches on matters of foreign pol icy and national security, “[t]his should not mean that the court must follow such advice, but that without it the court should not prostrate itself before the fancied needs of diplomacy and foreign policy. The claim of policy should be made concrete in the particular instance. Only so may its weight, its content, and its value be appreciated. The claims of diplomacy are not absolute; to question their compulsion is not treason.”° There has been little outright support from the judiciary for such open calls to repudiate the practice of refusing to adjudicate foreign affairs cases on their merits. While some judges do refuse to apply the doctrine, holding it inapplicable in the specific situation or passing over it in silence, virtually none have hitherto felt able to repudiate it frontally. On the other side, some judges continue to argue vigorously for the continued validity of judicial abdication in cases implicating foreign policy or national security. These proponents still rely occasion ally on the early shards of dicta and more rarely on archaic British precedents that run counter to the American constitutional ethos. More frequently today, their arguments rely primarily on a theory of constitutionalism—separation of powers—and several prudential reasons.

Court environmental restrictions wreck the PQD

Major Charles Gartland 12, J.D., United States Air Force judge advocate currently serving as the Environmental Liaison Officer for the Air Force Materiel Command, “AT WAR AND PEACE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT: WHEN POLITICAL QUESTIONS AND THE ENVIRONMENT COLLIDE,” 68 A.F. L. Rev. 27

The preceding cases illustrate, at best, inconsistent application of injunction analyses and the political question doctrine. n375 At worst they illustrate no injunction analysis and total disregard of the political question doctrine. n376 A lasting solution to this problem calls for more than merely advocating that the policy preference [\*67] that happened to be imposed by five Justices in Winter be universally applied. Over forty years of NEPA case law shows that when it collides with national defense, not all judges will agree with how the scales tipped in Winter; indeed, many judges will not agree that the factual scenario in Winter presents a Constitutional issue at all. n377 Consequently, the most manageable solution is one that removes the grounds for a disagreement over all the foregoing issues: amending NEPA to create a national defense exception. The remainder of this article will further expound on the necessity of this solution, the form this solution might take, and finally show that it is consistent with both the Constitutionally prescribed role for national defense and the statutorily prescribed role for NEPA.¶ A. The Basis for a National Defense Exemption¶ Entertaining political questions in the courtroom has consequences, both legal and practical. The argument for a national defense exemption to NEPA can be reduced to three bases: (1) the impracticality of hearing national defense political questions in the courtroom; (2) the real-world impact that results; and (3) that the very nature of injunction law causes the first two bases to blend in a manner that is particularly virulent to national defense.¶ 1. Policy and Politics in the Courtroom¶ Trident, Weinberger v. Wisconsin, and Callaway amply illustrate the issues that trial courts are unequipped to resolve, as tactical, strategic, and foreign policy elements figure into national defense undertakings. n378 One District Court judge hearing a NEPA case with foreign policy implications remarked on the oddity of the testimony given in his courtroom, more akin to a "legislative hearing" than a trial. n379 As noted in McQueary v. Laird, national security does not blend well with evidentiary hearings. n380¶ 2. Real-World Adverse Impact to the National Defense¶ The consequences of judicial intervention in national defense can be more than academic: Army units n381 and naval fleets not training adequately or at all, n382 [\*68] nuclear tests jeopardized, n383 and diplomatic missions put at risk. n384 Winter is but the most recent and highest profile example of unwieldy judicial process outcomes: uniformed personnel devoted to being lookouts with binoculars and adjusting sonar decibel levels as whales approach and disperse--in the middle of a warfighting exercise. n385¶ 3. The Nature of Injunction Law Forces Judicial Policy-Making¶ The law surrounding injunctions guarantees unsatisfactory results because the third and fourth prongs of the injunction test in essence require the courts to make a policy choice that, in the national defense context at least, involves the constitutional separation of powers. Some courts have simply avoided the dilemma by ignoring the portion of the injunction test corresponding to the agency's equity and the public interest in national defense, n386 while others have plainly considered the former to be more important. n387 Either way, the NEPA injunction often decides a question that the Constitution and statute intended to be handled differently.

PQD key to global intelligence and cooperation—solves terrorism

Dhooge ‘7

Lucien, Sue and John Staton Professor of Law, Georgia Institute of Technology, “THE POLITICAL QUESTION DOCTRINE AND CORPORATE COMPLICITY IN EXTRAORDINARY RENDITION,” 21 Temp. Int'l & Comp. L.J. 311 2007

The complaint alleges the existence of a clandestine U.S. intelligence program involving the apparent cooperation of foreign intelligence services and law enforcement authorities **throughout the world**. 145 Adjudicating the complaint would result in further disclosures regarding the means and methods utilized to seize suspected terrorists by the United States and its allies to an **undesirable degree**. Such disclosures may include the policies and practices underlying **rendition**, including the number and identity of participants in rendition operations; the identity of their employer; the extent of CIA participation; operational details associated with the flights serviced by Jeppesen; and the other operational details which have not been publicly disclosed. This information **is essential** to prove the underlying human rights violations committed by the CIA and Jeppesen's complicity as a conspirator and aider and abettor. Access to this information would also be necessary, given the enhanced degree of specificity required of claims of conspiracy and aiding and abetting, as well as claims asserted pursuant to the ATS. 146 Access could also be justified based on the serious nature of the allegations and their potential to cause considerable financial injury to Jeppesen through the magnitude of potential damage awards and resulting harm to corporate reputation. The disclosure of such information would virtually **create an extraordinary rendition playbook.** The creation of such a playbook, however, interferes with the President's responsibility for national security and authority over foreign affairs. The **continued viability of antiterrorism programs** is essential to preserving national security, a responsibility clearly within the President's constitutional obligations and which includes authority to protect national security information. 147 Publishing the details of the extraordinary rendition program, necessitated by the complaint, to a branch of the government ill-suited to evaluate the consequences of the release of such sensitive information can only further harm the program and, as a result, weaken a course of action selected by the executive branch in furtherance of fulfilling its national security obligations. 148 The possibility of compulsive disclosures regarding the extraordinary rendition program may also disrupt U.S. diplomatic relations. The extraordinary rendition program has proven controversial; it has already led to two national investigations by British and Swedish authorities, with several more currently pending.149 Further strain may be placed on U.S. relations with European states as a result of the investigation conducted by the Council of Europe into the complicity of numerous national governments in extraordinary renditions. The number of potentially impacted relations with European states is significant and includes some of the United States' closest allies in the so-called "war on terror," such as Italy, Poland, Spain, and the United Kingdom. 150 Diplomatic relations with non-European states that have permitted extraordinary renditions to occur within their territories may also be negatively impacted. This group of states includes numerous crucial allies in U.S. antiterrorism efforts such as **Canada**, **Indonesia**, **Pakistan, and Turkey**. Another set of potentially impacted diplomatic relations are those with foreign states that have accepted persons subject to rendition and have subsequently utilized detention and interrogation methods that do not comport with U.S. law or international standards. States that fall within this category include Afghanistan, **Egypt, Iraq, Jordan, Morocco, Pakistan, Poland, Syria, Romania, Thailand, and Uzbekistan**.' 51 The vast majority of these states are key participants in combating terrorism on the basis of their own struggles against terrorist organizations. Such disclosures regarding the extent of national cooperation or indifference to extraordinary renditions occurring within their territories may embarrass these governments. Western European states may suffer embarrassment for their failure to uphold human rights protections deeply engrained in their national cultures as well as in regional and global instruments. Other governments may be reluctant to confirm their cooperation with U.S. intelligence forces in extraordinary renditions for other reasons, including previous denials of such cooperation, maintenance of standing in the international community, concerns about abdication of national sovereignty, and potential inflammation of public opposition within their constituencies. Particularly susceptible governments in this regard include states with populations deeply skeptical of U.S. foreign policy in general and those with antiterrorism initiatives such as Egypt, Indonesia, Iraq, Pakistan, and Turkey. Some of these governments may re-evaluate further operations with U.S. intelligence services if their complicity is exposed. 152 Such a result is not only inimical to present U.S. foreign policy goals and future initiatives, but also undermines the international consensus **necessary** to successfully combat the spread of global terrorism. **This potential impact upon U.S. foreign relations** **compel** imposition of the political question doctrine.

Extinction

Barrett et al. 13—PhD in Engineering and Public Policy from Carnegie Mellon University, Fellow in the RAND Stanton Nuclear Security Fellows Program, and Director of Research at Global Catastrophic Risk Institute—AND Seth Baum, PhD in Geography from Pennsylvania State University, Research Scientist at the Blue Marble Space Institute of Science, and Executive Director of Global Catastrophic Risk Institute—AND Kelly Hostetler, BS in Political Science from Columbia and Research Assistant at Global Catastrophic Risk Institute (Anthony, 24 June 2013, “Analyzing and Reducing the Risks of Inadvertent Nuclear War Between the United States and Russia,” Science & Global Security: The Technical Basis for Arms Control, Disarmament, and Nonproliferation Initiatives, Volume 21, Issue 2, Taylor & Francis)

War involving significant fractions of the U.S. and Russian nuclear arsenals, which are by far the largest of any nations, could have globally catastrophic effects such as severely reducing food production for years, 1 potentially leading to collapse of modern civilization worldwide, and even the extinction of humanity. 2 Nuclear war between the United States and Russia could occur by various routes, including accidental or unauthorized launch; deliberate first attack by one nation; and inadvertent attack. In an accidental or unauthorized launch or detonation, system safeguards or procedures to maintain control over nuclear weapons fail in such a way that a nuclear weapon or missile launches or explodes without direction from leaders. In a deliberate first attack, the attacking nation decides to attack based on accurate information about the state of affairs. In an inadvertent attack, the attacking nation mistakenly concludes that it is under attack and launches nuclear weapons in what it believes is a counterattack. 3 (Brinkmanship strategies incorporate elements of all of the above, in that they involve intentional manipulation of risks from otherwise accidental or inadvertent launches. 4 ) Over the years, nuclear strategy was aimed primarily at minimizing risks of intentional attack through development of deterrence capabilities, and numerous measures also were taken to reduce probabilities of accidents, unauthorized attack, and inadvertent war. For purposes of deterrence, both U.S. and Soviet/Russian forces have maintained significant capabilities to have some forces survive a first attack by the other side and to launch a subsequent counter-attack. However, concerns about the extreme disruptions that a first attack would cause in the other side's forces and command-and-control capabilities led to both sides’ development of capabilities to detect a first attack and launch a counter-attack before suffering damage from the first attack. 5 Many people believe that with the end of the Cold War and with improved relations between the United States and Russia, the risk of East-West nuclear war was significantly reduced. 6 However, it also has been argued that inadvertent nuclear war between the United States and Russia has continued to present a substantial risk. 7 While the United States and Russia are not actively threatening each other with war, they have remained ready to launch nuclear missiles in response to indications of attack. 8 False indicators of nuclear attack could be caused in several ways. First, a wide range of events have already been mistakenly interpreted as indicators of attack, including weather phenomena, a faulty computer chip, wild animal activity, and control-room training tapes loaded at the wrong time. 9 Second, terrorist groups or other actors might cause attacks on either the United States or Russia that resemble some kind of nuclear attack by the other nation by actions such as exploding a stolen or improvised nuclear bomb, 10 especially if such an event occurs during a crisis between the United States and Russia. 11 A variety of nuclear terrorism scenarios are possible. 12 Al Qaeda has sought to obtain or construct nuclear weapons and to use them against the United States. 13 Other methods could involve attempts to circumvent nuclear weapon launch control safeguards or exploit holes in their security. 14 It has long been argued that the probability of inadvertent nuclear war is significantly higher during U.S.–Russian crisis conditions, 15 with the Cuban Missile Crisis being a prime historical example. It is possible that U.S.–Russian relations will significantly deteriorate in the future, increasing nuclear tensions. There are a variety of ways for a third party to raise tensions between the United States and Russia, making one or both nations more likely to misinterpret events as attacks. 16

### 5

The United States Congress should substantially increase National Environmental Policy Act restrictions on the introduction of Armed Forces into hostilities and clarify that there is no national security exemption to NEPA.

### Solvency

The president will circumvent the plan

**Margulies ‘11**

Joseph, Joseph Margulies is a Clinical Professor, Northwestern University School of Law. He was counsel of record for the petitioners in Rasul v. Bush and Munaf v. Geren. He now is counsel of record for Abu Zubaydah, for whose torture (termed harsh interrogation by some) Bush Administration officials John Yoo and Jay Bybee wrote authorizing legal opinions. Earlier versions of this paper were presented at workshops at the American Bar Foundation and the 2010 Law and Society Association Conference in Chicago., Hope Metcalf is a Lecturer, Yale Law School. Metcalf is co-counsel for the plaintiffs/petitioners in Padilla v. Rumsfeld, Padilla v. Yoo, Jeppesen v. Mohammed, and Maqaleh v. Obama. She has written numerous amicus briefs in support of petitioners in suits against the government arising out of counterterrorism policies, including in Munaf v. Geren and Boumediene v. Bush., “Terrorizing Academia,” http://www.swlaw.edu/pdfs/jle/jle603jmarguilies.pdf

In an observation more often repeated than defended, we are told that the attacks of September 11 “changed everything.” Whatever merit there is in this notion, it is certainly true that 9/11—and in particular the legal response set in motion by the administration of President George W. Bush—left its mark on the academy. Nine years after 9/11, it is time to step back and assess these developments and to offer thoughts on their meaning. In Part II of this essay, we analyze the post-9/11 scholarship produced by this “emergency” framing. We argue that legal scholars writing in the aftermath of 9/11 generally fell into one of three groups: unilateralists, interventionists, and proceduralists. Unilateralists argued in favor of tilting the allocation of government power toward the executive because the state’s interest in survival is superior to any individual liberty interest, and because the executive is best able to understand and address threats to the state. Interventionists, by contrast, argued in favor of restraining the executive (principally through the judiciary) precisely to prevent the erosion of civil liberties. Proceduralists took a middle road, informed by what they perceived as a central lesson of American history.1 Because at least some overreaction by the state is an inevitable feature of a national crisis, the most one can reasonably hope for is to build in structural and procedural protections to preserve the essential U.S. constitutional framework, and, perhaps, to minimize the damage done to American legal and moral traditions. Despite profound differences between and within these groups, legal scholars in all three camps (as well as litigants and clinicians, including the authors) shared a common perspective—viz., that repressive legal policies adopted by wartime governments are temporary departures from hypothesized peacetime norms. In this narrative, metaphors of bewilderment, wandering, and confusion predominate. The country “loses its bearings” and “goes astray.” Bad things happen until at last the nation “finds itself” or “comes to its senses,” recovers its “values,” and fixes the problem. Internment ends, habeas is restored, prisoners are pardoned, repression passes. In a show of regret, we change direction, “get back on course,” and vow it will never happen again. Until the next time, when it does. This view, popularized in treatments like All the Laws but One, by the late Chief Justice Rehnquist,2 or the more thoughtful and thorough discussion in Perilous Times by Chicago’s Geoffrey Stone,3 quickly became the dominant narrative in American society and the legal academy. **This narrative also figured heavily in the many challenges to Bush-era policies,** including by the authors. The narrative permitted litigators and legal scholars to draw upon what elsewhere has been referred to as America’s “civic religion”4 and to cast the courts in the role of hero-judges5 **whom we hoped would restore legal order.**6 But by framing the Bush Administration’s response as the latest in a series of regrettable but temporary deviations from a hypothesized liberal norm, the legal academy ignored the more persistent, and decidedly illiberal, authoritarian tendency in American thought to demonize communal “others” during moments of perceived threat. Viewed in this light, what the dominant narrative identified as a brief departure caused by a military crisis is more accurately seen as part of a recurring process of intense stigmatization tied to periods of social upheaval, of which war and its accompanying repressions are simply representative (and particularly acute) illustrations. It is worth recalling, for instance, that the heyday of the Ku Klux Klan in this country, when the organization could claim upwards of 3 million members, was the early-1920s, and that the period of greatest Klan expansion began in the summer of 1920, almost immediately after the nation had “recovered” from the Red Scare of 1919–20.7 Klan activity during this period, unlike its earlier and later iterations, focused mainly on the scourge of the immigrant Jew and Catholic, and flowed effortlessly from the anti-alien, anti-radical hysteria of the Red Scare. Yet this period is almost entirely unaccounted for in the dominant post-9/11 narrative of deviation and redemption, which in most versions glides seamlessly from the madness of the Red Scare to the internment of the Japanese during World War II.8 And because we were studying the elephant with the wrong end of the telescope, we came to a flawed understanding of the beast. In Part IV, we argue that the interventionists and unilateralists came to an incomplete understanding by focusing almost exclusively on what Stuart Scheingold called “the myth of rights”—the belief that if we can identify, elaborate, and secure judicial recognition of the legal “right,” **political structures and policies will adapt their behavior to the requirements of the law** and change will follow more or less automatically.9 Scholars struggled to define the relationship between law and security primarily through exploration of structural10 and procedural questions, and, to a lesser extent, to substantive rights. And they examined the almost limitless number of subsidiary questions clustered within these issues. Questions about the right to habeas review, for instance, generated a great deal of scholarship about the handful of World War II-era cases that the Bush Administration relied upon, including most prominently Johnson v. Eisentrager and Ex Parte Quirin. 11 Regardless of political viewpoint, a common notion among most unilateralist and interventionist scholars was that when law legitimized or delegitimized a particular policy, **this would have a direct and observable effect on actual behavior**. The premise of this scholarship, in other words, was that policies “struck down” by the courts, or credibly condemned as lawless by the academy, would inevitably be changed—and that this should be the focus of reform efforts. Even when disagreement existed about the substance of rights or even which branch should decide their parameters, it reflected shared acceptance of the primacy of law, often to the exclusion of underlying social or political dynamics. Eric Posner and Adrian Vermeule, for instance, may have thought, unlike the great majority of their colleagues, that the torture memo was “standard fare.”12 But their position nonetheless accepted the notion that if the prisoners had a legal right to be treated otherwise, then the torture memo authorized illegal behavior and must be given no effect.13 Recent developments, however, cast doubt on two grounding ideas of interventionist and unilateralist scholarship—viz., that post-9/11 policies were best explained as responses to a national crisis (and therefore limited in time and scope), and that the problem was essentially legal (and therefore responsive to condemnation by the judiciary and legal academy). One might have reasonably predicted that in the wake of a string of Supreme Court decisions limiting executive power, apparently widespread and bipartisan support for the closure of Guantánamo during the 2008 presidential campaign, and the election of President Barack Obama, which itself heralded a series of executive orders that attempted to dismantle many Bush-era policies, the nation would be “returning” to a period of respect for individual rights and the rule of law. Yet the period following Obama’s election has been marked by an increasingly retributive and venomous narrative surrounding Islam and national security. **Precisely when the dominant narrative would have predicted change** and redemption, we have seen retreat and retrenchment. This conundrum is not adequately addressed by dominant strands of post-9/11 legal scholarship. In retrospect, it is surprising that much post-9/11 scholarship appears to have set aside critical lessons from previous decades as to the relationship among law, society and politics.14 Many scholars have long argued in other contexts that rights—or at least the experience of rights—are subject to political and social constraints, particularly for groups subject to historic marginalization. Rather than self-executing, rights are better viewed as contingent political resources, capable of mobilizing public sentiment and generating social expectations.15 From that view, a victory in Rasul or Boumediene no more guaranteed that prisoners at Guantánamo would enjoy the right to habeas corpus than a victory in Brown v. Board16 guaranteed that schools in the South would be desegregated.17 Rasul and Boumediene, therefore, should be seen as part (and probably only a small part) of a varied and complex collection of events, including the fiasco in Iraq, the scandal at the Abu Ghraib prison, and the use of warrantless wiretaps, as well as seemingly unrelated episodes like the official response to Hurricane Katrina. These and other events during the Bush years merged to give rise to a powerful social narrative critiquing an administration committed to lawlessness, content with incompetence, and engaged in behavior that was contrary to perceived “American values.”18 Yet the very success of this narrative, culminating in the election of Barack Obama in 2008, produced quiescence on the Left, even as it stimulated massive opposition on the Right. The result has been the emergence of a counter-narrative about national security that has produced a vigorous social backlash such that most of the Bush-era policies will continue largely unchanged, at least for the foreseeable future.19 Just as we see a widening gap between judicial recognition of rights in the abstract and the observation of those rights as a matter of fact, there appears to be an emerging dominance of proceduralist approaches, which take as a given that rights dissolve under political pressure, and, thus, are best protected by basic procedural measures. But that stance falls short in its seeming readiness to trade away rights in the face of political tension. First, it accepts the tropes du jour surrounding radical Islam—namely, that it is a unique, and uniquely apocalyptic, threat to U.S. security. In this, proceduralists do not pay adequate heed to the lessons of American history and sociology. And second, it endorses too easily the idea that procedural and structural protections will protect against substantive injustice in the face of popular and/or political demands for an outcome-determinative system that cannot tolerate acquittals. Procedures only provide protection, however, if there is sufficient political support for the underlying right. Since the premise of the proceduralist scholarship is that such support does not exist, it is folly to expect the political branches to create meaningful and robust protections. In short, a witch hunt does not become less a mockery of justice when the accused is given the right to confront witnesses. And a separate system (especially when designed for demonized “others,” such as Muslims) cannot, by definition, be equal. In the end, we urge a fuller embrace of what Scheingold called “the politics of rights,” which recognizes the contingent character of rights in American society. We agree with Mari Matsuda, who observed more than two decades ago that rights are a necessary but not sufficient resource for marginalized people with little political capital.20 To be effective, therefore, we must look beyond the courts and grapple with the hard work of long-term change with, through and, perhaps, in spite of law. These are by no means new dilemmas, but the post-9/11 context raises difficult and perplexing questions that deserve study and careful thought as our nation settles into what appears to be a permanent emergency.

### Warming

No climate deal ever

**Manning 11** (Paddy, Sydney Morning Herald, 8/23/2011, “Outlook gloomy on global warming: Deutsche”, http://www.smh.com.au/environment/climate-change/outlook-gloomy-on-global-warming-deutsche-20110823-1j82k.html)

Deutsche Bank's head of carbon emissions research Mark Lewis can't see how the world can avoid dangerous global warming - judged as greater than two degrees Celsius - based on the targets agreed at climate change summits in Copenhagen and Cancun. Mr Lewis said a target to restrict global warming to those two degrees is "probably unrealistic now, because of the politics; not because the technology isn't there, not because with the right policies it's just not possible - it's just that there isn't the political will". Without the United States signing up, there's unlikely to be a global deal on emissions reduction negotiated at the next climate summit in Durban, South Africa. Without such a pact, there will be no successor to the Kyoto Protocol, which expires in 2012. "Frankly the UN process has become, not totally irrelevant, but it's not the forum where a meaningful global deal is going to be brokered that will get you on a two degrees centigrade trajectory," Paris-based Mr Lewis said on a recent visit to Australia. "That is not the political framework through which this (trajectory) is going to be delivered. I can't tell you there is a ready-made alternative framework in place that will allow a global deal to be delivered because I don't believe that either." Deutsche Bank's Australian environment, social and governance analyst, Tim Jordan, agrees government emissions reduction pledges for the post-Copenhagen period were ambitious. Still, "even if we assume that they fully deliver on their pledges there is still a several-gigatonne gap between what the scientists are telling us we need to be delivering by 2020, and what the pledges would take us to," Mr Jordan said. And that gap assumes governments will deliver on their pledges. "It's not obvious we're going to see every country live up to even the low end of their pledged emissions reduction ranges," Mr Jordan said.

6 degree warming inevitable

**AP 9** (Associated Press, Six Degree Temperature Rise by 2100 is Inevitable: UNEP, September 24, <http://www.speedy-fit.co.uk/index2.php?option=com_content&do_pdf=1&id=168>)

Earth's temperature is likely to jump six degrees between now and the end of the century even if every country cuts greenhouse gas emissions as proposed, according to a United Nations update. Scientists looked at emission plans from 192 nations and calculated what would happen to global warming. The projections take into account 80 percent emission cuts from the U.S. and Europe by 2050, which are not sure things. The U.S. figure is based on a bill that passed the House of Representatives but is running into resistance in the Senate, where debate has been delayed by health care reform efforts. Carbon dioxide, mostly from the burning of fossil fuels such as coal and oil, is the main cause of global warming, trapping the sun's energy in the atmosphere. The world's average temperature has already risen 1.4 degrees since the 19th century. Much of projected rise in temperature is because of developing nations, which aren't talking much about cutting their emissions, scientists said at a United Nations press conference Thursday. China alone adds nearly 2 degrees to the projections. "We are headed toward very serious changes in our planet," said Achim Steiner, head of the U.N.'s environment program, which issued the update on Thursday. The review looked at some 400 peer-reviewed papers on climate over the last three years. Even if the developed world cuts its emissions by 80 percent and the developing world cuts theirs in half by 2050, as some experts propose, the world is still facing a 3-degree increase by the end of the century, said Robert Corell, a prominent U.S. climate scientist who helped oversee the update. Corell said the most likely agreement out of the international climate negotiations in Copenhagen in December still translates into a nearly 5-degree increase in world temperature by the end of the century. European leaders and the Obama White House have set a goal to limit warming to just a couple degrees. The U.N.'s environment program unveiled the update on peer-reviewed climate change science to tell diplomats how hot the planet is getting. The last big report from the Nobel Prize-winning Intergovernmental Panel on Climate Change came out more than two years ago and is based on science that is at least three to four years old, Steiner said. Global warming is speeding up, especially in the Arctic, and that means that some top-level science projections from 2007 are already out of date and overly optimistic. Corell, who headed an assessment of warming in the Arctic, said global warming "is accelerating in ways that we are not anticipating." Because Greenland and West Antarctic ice sheets are melting far faster than thought, it looks like the seas will rise twice as fast as projected just three years ago, Corell said. He said seas should rise about a foot every 20 to 25 years.

It’s inevitable—REC market

Auden Schendler 7, Vice President of sustainability at Aspen Skiing Company, October 2007, “When Being Green Backfires,” Harvard Business Review, Vol. 85, Issue 10

The danger in buying RECs is that the mainstream press has begun to challenge claims about their environmental value. Articles have appeared in publications including BusinessWeek and the Financial Times pointing out that most RECs don't actually offset emissions, and the skepticism is spreading across the Internet. Indeed, most RECs don't result in the creation of clean electricity, which would have been generated anyway, whether or not an REC was printed. As consumers become increasingly savvy about evaluating companies' environmental claims, businesses that tout REC purchases may expose themselves to charges of greenwashing.¶ A report released in 2006 by an environmental organization called Clean Air--Cool Planet was among the first to rigorously examine the environmental impact of RECs. The report found that while most RECs don't lead to carbon-emissions reductions, a minority do, by directly helping to finance, say, the construction of a new wind farm. Companies that buy RECs and want to avoid charges of greenwashing should seek out these higher-quality and more costly certificates, whose purchase directly and demonstrably helps reduce carbon emissions.¶ RECs, supporters argue, create a market mechanism that spurs the development of new wind, solar, and other green-electricity plants. As demand for RECs grows, their prices will rise, encouraging developers to build more renewable power facilities that can generate income through increasingly profitable sales of the certificates. Unfortunately, because there has been such a surplus of cheap RECs--and no easy way to distinguish between high- and low-quality offerings--the market mechanism has remained stalled for the most part. If companies, mindful of their reputations, reject inferior RECs and begin demanding quality ones, that could jump-start the production of renewable electricity and actually reduce carbon emissions. Corporate scrutiny and activism might even foster the development of a badly needed tool that could clean up the entire REC industry in one masterstroke: a third-party gold standard for REC quality.

Warming won’t cause extinction

Barrett, professor of natural resource economics – Columbia University, ‘7

(Scott, Why Cooperate? The Incentive to Supply Global Public Goods, introduction)

First, climate change does not threaten the survival of the human species.5 If unchecked, it will cause other species to become extinction (though biodiversity is being depleted now due to other reasons). It will alter critical ecosystems (though this is also happening now, and for reasons unrelated to climate change). It will reduce land area as the seas rise, and in the process displace human populations. “Catastrophic” climate change is possible, but not certain. Moreover, and unlike an asteroid collision, large changes (such as sea level rise of, say, ten meters) will likely take centuries to unfold, giving societies time to adjust. “Abrupt” climate change is also possible, and will occur more rapidly, perhaps over a decade or two. However, abrupt climate change (such as a weakening in the North Atlantic circulation), though potentially very serious, is unlikely to be ruinous. Human-induced climate change is an experiment of planetary proportions, and we cannot be sur of its consequences. Even in a worse case scenario, however, global climate change is not the equivalent of the Earth being hit by mega-asteroid. Indeed, if it were as damaging as this, and if we were sure that it would be this harmful, then our incentive to address this threat would be overwhelming. The challenge would still be more difficult than asteroid defense, but we would have done much more about it by now.

#### Data disproves hegemony impacts

Fettweis, 11

Christopher J. Fettweis, Department of Political Science, Tulane University, 9/26/11, Free Riding or Restraint? Examining European Grand Strategy, Comparative Strategy, 30:316–332, EBSCO

It is perhaps worth noting that there is no evidence to support a direct relationship between the relative level of U.S. activism and international stability. In fact, the limited data we do have suggest the opposite may be true. During the 1990s, the United States cut back on its defense spending fairly substantially. By 1998, the United States was spending $100 billion less on defense in real terms than it had in 1990.51 To internationalists, defense hawks and believers in hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities,” argued Kristol and Kagan, “doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace.”52 On the other hand, if the pacific trends were not based upon U.S. hegemony but a strengthening norm against interstate war, one would not have expected an increase in global instability and violence.

The verdict from the past two decades is fairly plain: The world grew more peaceful while the United States cut its forces. No state seemed to believe that its security was endangered by a less-capable United States military, or at least none took any action that would suggest such a belief. No militaries were enhanced to address power vacuums, no security dilemmas drove insecurity or arms races, and no regional balancing occurred once the stabilizing presence of the U.S. military was diminished. The rest of the world acted as if the threat of international war was not a pressing concern, despite the reduction in U.S. capabilities. Most of all, the United States and its allies were no less safe. The incidence and magnitude of global conflict declined while the United States cut its military spending under President Clinton, and kept declining as the Bush Administration ramped the spending back up. No complex statistical analysis should be necessary to reach the conclusion that the two are unrelated.

Military spending figures by themselves are insufficient to disprove a connection between overall U.S. actions and international stability. Once again, one could presumably argue that spending is not the only or even the best indication of hegemony, and that it is instead U.S. foreign political and security commitments that maintain stability. Since neither was significantly altered during this period, instability should not have been expected. Alternately, advocates of hegemonic stability could believe that relative rather than absolute spending is decisive in bringing peace. Although the United States cut back on its spending during the 1990s, its relative advantage never wavered.

However, even if it is true that either U.S. commitments or relative spending account for global pacific trends, then at the very least stability can evidently be maintained at drastically lower levels of both. In other words, even if one can be allowed to argue in the alternative for a moment and suppose that there is in fact a level of engagement below which the United States cannot drop without increasing international disorder, a rational grand strategist would still recommend cutting back on engagement and spending until that level is determined. Grand strategic decisions are never final; continual adjustments can and must be made as time goes on. Basic logic suggests that the United States ought to spend the minimum amount of its blood and treasure while seeking the maximum return on its investment. And if the current era of stability is as stable as many believe it to be, no increase in conflict would ever occur irrespective of U.S. spending, which would save untold trillions for an increasingly debt-ridden nation.

It is also perhaps worth noting that if opposite trends had unfolded, if other states had reacted to news of cuts in U.S. defense spending with more aggressive or insecure behavior, then internationalists would surely argue that their expectations had been fulfilled. If increases in conflict would have been interpreted as proof of the wisdom of internationalist strategies, then logical consistency demands that the lack thereof should at least pose a problem. As it stands, the only evidence we have regarding the likely systemic reaction to a more restrained United States suggests that the current peaceful trends are unrelated to U.S. military spending. Evidently the rest of the world can operate quite effectively without the presence of a global policeman. Those who think otherwise base their view on faith alone.

Multilateral efforts terminally fail - plan can't solve the system

Barma et al. 13

Naazneen Barma is an assistant professor of national-security affairs at the Naval Postgraduate School. Ely Ratner is a fellow at the Center for a New American Security. Steven Weber is a professor of political science and at the School of Information at the University of California, Berkeley, The National Interest, March/April 2013, "The Mythical Liberal Order", http://nationalinterest.org/article/the-mythical-liberal-order-8146

Not only have we seen this movie before, but it seems to be on repeat. Instead of a gradual trend toward global problem solving punctuated by isolated failures, we have seen over the last several years essentially the opposite: stunningly few instances of international cooperation on significant issues. Global governance is in a serious drought—palpable across the full range of crucial, mounting international challenges that include nuclear proliferation, climate change, international development and the global financial crisis.

Where exactly is the liberal world order that so many Western observers talk about? Today we have an international political landscape that is neither orderly nor liberal.

It wasn’t supposed to be this way. In the envisaged liberal world order, the “rise of the rest” should have been a boost to global governance. A rebalancing of power and influence should have made international politics more democratic and multilateral action more legitimate, while bringing additional resources to bear. Economic integration and security-community enlargement should have started to envelop key players as the system built on itself through network effects—by making the benefits of joining the order (and the costs of opposing it) just a little bit greater for each new decision. Instead, the world has no meaningful deal on climate change; no progress on a decade-old global-trade round and no inclination toward a new one; no coherent response to major security issues around North Korea, Iran and the South China Sea; and no significant coordinated effort to capitalize on what is possibly the best opportunity in a generation for liberal progress—the Arab Spring.

It’s not particularly controversial to observe that global governance has gone missing. What matters is why. The standard view is that we’re seeing an international liberal order under siege, with emerging and established powers caught in a contest for the future of the global system that is blocking progress on global governance. That mental map identifies the central challenge of American foreign policy in the twenty-first century as figuring out how the United States and its allies can best integrate rising powers like China into the prevailing order while bolstering and reinforcing its foundations.

But this narrative and mental map are wrong. The liberal order can’t be under siege in any meaningful way (or prepped to integrate rising powers) because it never attained the breadth or depth required to elicit that kind of agenda. The liberal order is today still largely an aspiration, not a description of how states actually behave or how global governance actually works. The rise of a configuration of states that six years ago we called a “World Without the West” is not so much challenging a prevailing order as it is exposing the inherent frailty of the existing framework.

This might sound like bad news for American foreign policy and even worse news for the pursuit of global liberalism, but it doesn’t have to be so. Advancing a normative liberal agenda in the twenty-first century is possible but will require a new approach. Once strategists acknowledge that the liberal order is more or less a myth, they can let go of the anxious notion that some countries are attacking or challenging it, and the United States can be liberated from the burden of a supposed obligation to defend it. We can instead focus on the necessary task of building a liberal order from the ground up.

Loyalists are quick to defend the concept of a robust liberal order by falling back on outdated metrics of success. The original de minimis aims of the postwar order achieved what now should be considered a low bar: preventing a third world war and a race-to-the-bottom closure of the global-trade regime. Beyond that, the last seventy years have certainly seen movement toward globalization of trade and capital as well as some progress on human rights—but less clearly as a consequence of anything like a liberal world order than as a consequence of national power and interest.

What would a meaningful liberal world order actually look like if it were operating in practice? Consider an objective-based definition: a world in which most countries most of the time follow rules that contribute to progressively more collective security, shared economic gains and individual human rights. States would gradually downplay the virtues of relative advantage and self-reliance. Most states would recognize that foreign-policy choices are constrained (to their aggregate benefit) by multilateral institutions, global norms and nonstate actors. They would cede meaningful bits of sovereign authority in exchange for proactive collaboration on universal challenges. And they would accept that economic growth is best pursued through integration, not mercantilism, and is in turn the most reliable source of national capacity, advancement and influence. With those ingredients in place, we would expect to see the gradual, steady evolution of something resembling an “international community” bound by rights and responsibilities to protect core liberal values of individual rights and freedoms.

No wonder proponents of the liberal-world-order perspective hesitate to offer precise definitions of it. Few of these components can reasonably be said to have been present for any length of time at a global level in the post–World War II world. There may be islands of liberal order, but they are floating in a sea of something quite different. Moreover, the vectors today are mostly pointing away from the direction of a liberal world order.

HOW DID we get here? Consider two founding myths of liberal internationalism. The first is that expressions of post–World War II American power and leadership were synonymous with the maturation of a liberal order. The narrative should sound familiar: The United States wins World War II and controls half of global GDP. The United States constructs an international architecture aimed at promoting an open economic system and a semi-institutionalized approach to fostering cooperation on security and political affairs. And the United States provides the essential global public goods—an extended security deterrent and the global reserve currency—to make cooperation work. Some essential elements of the system survive in a posthegemony era because the advantages to other significant powers of sustained institutionalized cooperation exceed the costs and risks of trying to change the game.

In the 1990s the narrative gets more interesting, controversial and relevant. This is when the second foundational myth of the liberal world order—that it has an inexorable magnetic attraction—comes to the fore. The end of the Cold War and the attendant rejection of Communism is supposed to benefit the liberal world order in breadth and depth: on the internal front, new capitalist democracies should converge on individuals’ market-based economic choice and election-based political choice; on the external front, the relationships among states should become increasingly governed by a set of liberal international norms that privilege and protect the civic and political freedoms that capitalist democracies promise. The liberal order’s geography should then expand to encompass the non-Western world. Its multilateral rules, institutions and norms should increase in density across economic, political and security domains. As positive network effects kick in, the system should evolve to be much less dependent on American power. It’s supposedly easier—and more beneficial—to join the liberal world order than it is to oppose it (or even to try to modify it substantially). A choice to live outside the system becomes progressively less realistic: few countries can imagine taking on the contradictions of modern governance by themselves, particularly in the face of expanding multilateral free trade and interdependent security institutions.

The story culminates in a kind of magnetic liberalism, where countries and foreign-policy decisions are attracted to the liberal world order like iron filings to a magnet. With few exceptions, U.S. foreign policy over the last two decades has been predicated on the assumption that the magnetic field is strong and getting stronger. It’s a seductive idea, but it should not be confused with reality. In practice, the magnetic field is notable mainly for its weakness. It is simply not the case today that nations feel equally a part of, answerable to or constrained by a liberal order. And nearly a quarter century after 1989, it has become disingenuous to argue that the liberal world order is simply slow in getting off the ground—as if the next gust of democratic transitions or multilateral breakthroughs will offer the needed push to revive those triumphalist moments brought on by the end of World War II and the fall of the Berlin Wall. To the contrary, the aspirational liberal end state is receding into the horizon.

THE PICTURE half a century ago looked more promising, with the initial rounds of the General Agreement on Tariffs and Trade and the successful establishment of NATO setting expectations about what multilateral governance could achieve. But international institutions picked off the low-hanging fruit of global cooperation decades ago and have since stalled in their attempts to respond to pressing international challenges. The 1990s served up the best possible set of conditions to advance global liberalism, but subsequent moves toward political and economic liberalization that came with the end of the Cold War were either surprisingly shallow or fragile and short-lived.

Ask yourself this: Have developing countries felt and manifested over time the increasing magnetic pull of the liberal world order? A number of vulnerable developing and post-Communist transitional countries adopted a “Washington Consensus” package of liberal economic policies—freer trade, marketization and privatization of state assets—in the 1980s and 1990s. But these adjustments mostly arrived under the shadow of coercive power. They generally placed the burden of adjustment disproportionately on the most disempowered members of society. And, with few exceptions, they left developing countries more, not less, vulnerable to global economic volatility. The structural-adjustment policies imposed in the midst of the Latin American debt crisis and the region’s subsequent “lost decade” of the 1980s bear witness to each of these shortcomings, as do the failed voucher-privatization program and consequent asset stripping and oligarchic wealth concentration experienced by Russians in the 1990s.

If these were the gains that were supposed to emerge from a liberal world order, it’s no surprise that liberalism came to have a tarnished brand in much of the developing world. The perception that economic neoliberalism fails to deliver on its trickle-down growth pledge is strong and deep. In contrast, state capitalism and resource nationalism—vulnerable to a different set of contradictions, of course—have for the moment delivered tangible gains for many emerging powers and look like promising alternative development paths. Episodic signs of pushback against some of the excesses of that model, such as anti-Chinese protests in Angola or Zambia, should not be confused with a yearning for a return to liberal prescriptions. And comparative economic performance in the wake of the global financial crisis has done nothing to burnish liberalism’s economic image, certainly not in the minds of those who saw the U.S. investment banking–led model of capital allocation as attractive, and not in the minds of those who held a vision of EU-style, social-welfare capitalism as the next evolutionary stage of liberalism.

There’s just as little evidence of sustained liberal magnetism operating in the politics of the developing world, where entrenched autocrats guarding their legitimacy frequently caricature democracy promotion as a not-very-surreptitious strategy to replace existing regimes with either self-serving instability or more servile allies of the West. In practice, the liberal order’s formula for democratic freedom has been mostly diluted down to observing electoral procedures. The results have been almost uniformly disappointing, as the legacy of post–Cold War international interventions from Cambodia to Iraq attests. Even the more organic “color revolutions” of Eastern Europe and Central Asia at the beginning of the twenty-first century have stalled into equilibria Freedom House identifies as only “partly free”—in reality affording average citizens little access to political or economic opportunities. Only two years past the initial euphoria of the Arab Spring a similar disillusionment has set in across the Middle East, where evidence for the magnetic pull of a liberal world order is extremely hard to find.

Contemporary developments in Southeast Asia illustrate where the most important magnetic forces of change actually come from. The Association of Southeast Asian Nations (ASEAN) has successfully coordinated moves toward trade liberalization in the region, but this has not been underpinned by a set of liberal principles or collective norms. Instead, the goals have been instrumental—to protect the region from international economic volatility and to cement together some counterweight to the Chinese economy. And ASEAN is explicitly not a force for individual political and economic freedom. Indeed, it acts more like a bulwark against “interference” in internal affairs. The aspirations one occasionally hears for the organization to implement collective-governance measures come from Western observers much more frequently than from the people and states that comprise the group itself.

Global governistas will protest that the response to the global financial crisis proves that international economic cooperation is more robust than we acknowledge. In this view, multilateral financial institutions passed the stress test and prevented the world from descending into the economic chaos of beggar-thy-neighbor trade policies and retaliatory currency arbitrage and capital controls. The swift recovery of global trade and capital flows is often cited as proof of the relative success of economic cooperation. The problem with this thesis is that very real fears about how the system could collapse, including the worry that states would retreat behind a mercantilist shell, are no different from what they were a hundred years ago. It’s not especially indicative of liberal progress to be having the same conversation about global economic governance that the world was having at the end of the gold-standard era and the onset of the Great Depression. Global economic governance may have helped to prevent a repeat downward spiral into self-defeating behaviors, but surely in a world order focused on liberal progress the objectives of global economic governance should have moved on by now. And the final chapter here has yet to be written. From the perspective of many outside the United States, the Federal Reserve’s unprecedented “quantitative easing” policies are not far off from monetary warfare on the exchange and inflation rates of others. Astute analysts have observed that as banks have operated more nationalistically and cautiously, the free flow of capital across borders has declined. A global climate that is at serious risk of breeding currency and trade wars is hardly conducive to the health and expansion of any liberal world order.

On matters of war and peace, the international community is fighting similar battles and for the most part experiencing similar failures to provide a system of collective security. In Africa’s Great Lakes region, more than five million people have died directly and indirectly from fifteen years of civil war and conflict. Just to the north, the international community stood by and watched a genocide in Sudan. In places more strategically important to leading nations, the outcome—as showcased in Syria—is geopolitical gridlock.

The last time the Security Council managed to agree on what seemed like serious collective action was over Libya, but both China and Russia now believe they were intentionally misled and that what was sold as a limited humanitarian mission was really a regime-change operation illegitimately authorized by the UN. This burst of multilateralism has actually made global-security governance down the road less likely. Meanwhile, international cooperation on security matters has been relegated to things like second-tier peacekeeping operations and efforts to ward off pirates equipped with machine guns and speedboats. These are worthy causes but will not move the needle on the issues that dominate the international-security agenda. And on the emerging issues most in need of forward-looking global governance—cybersecurity and unmanned aerial vehicles, for example—there are no rules and institutions in place at all, nor legitimate and credible mechanisms to devise them.

Assessed against its ability to solve global problems, the current system is falling progressively further behind on the most important challenges, including financial stability, the “responsibility to protect,” and coordinated action on climate change, nuclear proliferation, cyberwarfare and maritime security. The authority, legitimacy and capacity of multilateral institutions dissolve when the going gets tough—when member countries have meaningfully different interests (as in currency manipulations), when the distribution of costs is large enough to matter (as in humanitarian crises in sub-Saharan Africa) or when the shadow of future uncertainties looms large (as in carbon reduction). Like a sports team that perfects exquisite plays during practice but fails to execute against an actual opponent, global-governance institutions have sputtered precisely when their supposed skills and multilateral capital are needed most.

WHY HAS this happened? The hopeful liberal notion that these failures of global governance are merely reflections of organizational dysfunction that can be fixed by reforming or “reengineering” the institutions themselves, as if this were a job for management consultants fiddling with organization charts, is a costly distraction from the real challenge. A decade-long effort to revive the dead-on-arrival Doha Development Round in international trade is the sharpest example of the cost of such a tinkering-around-the-edges approach and its ultimate futility. Equally distracting and wrong is the notion held by neoconservatives and others that global governance is inherently a bad idea and that its institutions are ineffective and undesirable simply by virtue of being supranational.

The root cause of stalled global governance is simpler and more straightforward. “Multipolarization” has come faster and more forcefully than expected. Relatively authoritarian and postcolonial emerging powers have become leading voices that undermine anything approaching international consensus and, with that, multilateral institutions. It’s not just the reasonable demand for more seats at the table. That might have caused something of a decline in effectiveness but also an increase in legitimacy that on balance could have rendered it a net positive.

Instead, global governance has gotten the worst of both worlds: a decline in both effectiveness and legitimacy. The problem is not one of a few rogue states acting badly in an otherwise coherent system. There has been no real breakdown per se. There just wasn’t all that much liberal world order to break down in the first place. The new voices are more than just numerous and powerful. They are truly distinct from the voices of an old era, and they approach the global system in a meaningfully different way.

### Bioterror

No risk of bioterror

Keller 13 (Rebecca, 7 March 2013, Analyst at Stratfor, “Bioterrorism and the Pandemic Potential,” Stratfor, http://www.stratfor.com/weekly/bioterrorism-and-pandemic-potential)

The risk of an accidental release of H5N1 is similar to that of other infectious pathogens currently being studied. Proper safety standards are key, of course, and experts in the field have had a year to determine the best way to proceed, balancing safety and research benefits. Previous work with the virus was conducted at biosafety level three out of four, which requires researchers wearing respirators and disposable gowns to work in pairs in a negative pressure environment. While many of these labs are part of universities, access is controlled either through keyed entry or even palm scanners. There are roughly 40 labs that submitted to the voluntary ban. Those wishing to resume work after the ban was lifted must comply with guidelines requiring strict national oversight and close communication and collaboration with national authorities. The risk of release either through accident or theft cannot be completely eliminated, but given the established parameters the risk is minimal. The use of the pathogen as a biological weapon requires an assessment of whether a non-state actor would have the capabilities to isolate the virulent strain, then weaponize and distribute it. Stratfor has long held the position that while terrorist organizations may have rudimentary capabilities regarding biological weapons, the likelihood of a successful attack is very low. Given that the laboratory version of H5N1 -- or any influenza virus, for that matter -- is a contagious pathogen, there would be two possible modes that a non-state actor would have to instigate an attack. The virus could be refined and then aerosolized and released into a populated area, or an individual could be infected with the virus and sent to freely circulate within a population. There are severe constraints that make success using either of these methods unlikely. The technology needed to refine and aerosolize a pathogen for a biological attack is beyond the capability of most non-state actors. Even if they were able to develop a weapon, other factors such as wind patterns and humidity can render an attack ineffective. Using a human carrier is a less expensive method, but it requires that the biological agent be a contagion. Additionally, in order to infect the large number of people necessary to start an outbreak, the infected carrier must be mobile while contagious, something that is doubtful with a serious disease like small pox. The carrier also cannot be visibly ill because that would limit the necessary human contact.

No impact – slow spread and defense mechanisms

Mueller 99, John Mueller, Prof. Pol. Sci. @ Ohio State and Karl Mueller, June, ’99 (Foreign Affairs, l/n)

Biological weapons seem a promising candidate to join nuclear ones in the WMD club because, properly developed and deployed, they might indeed kill hundreds of thousands, perhaps even millions, of people. The discussion remains theoretical, however, because biological weapons have scarcely ever been used, even though knowledge of their destructive potential goes back centuries. (The English, for example, made some efforts to spread smallpox among American Indians during the French and Indian War.) Belligerents have eschewed such weapons with good reason, because biological weapons are extremely difficult to deploy and control. Although terrorist groups or rogue states may overcome such problems in the future through advances in knowledge and technology, the record thus far is not likely to encourage them. Japan reportedly infected wells in Manchuria and bombed several Chinese cities with plague-infested fleas before and during World War II. These ventures may have killed thousands of Chinese but apparently also caused thousands of unintended casualties among Japanese troops and had little military impact. In the 1990s the large and extremely well funded Japanese cult Aum Shinrikyo apparently tried at least nine times to set off biological weapons by spraying pathogens from trucks and wafting them from rooftops. these efforts failed to cause a single fatality -- in fact, nobody even noticed that the attacks had taken place. For best results biological weapons need to be dispersed in very low-altitude aerosol clouds, which is very difficult to do. Explosive methods of dispersion, moreover, may destroy the organisms. And except for anthrax spores, long-term storage of lethal organisms in bombs or warheads is difficult; even if refrigerated, most have a limited lifetime. The effects of such weapons are gradual, very hard to predict, and could spread back onto the attacker, and they can be countered with civil defense measures.

Their evidence is biased

[note: answers the WMD commission/Graham and Talent]

Reynolds, senior fellow – Cato, frmr director of economic research – Hudson Institute, 3/11/’10

(Alan, “Anthrax and the WMD Fear Lobby,” <http://original.antiwar.com/alan-reynolds/2010/03/10/anthrax-and-the-wmd-fear-lobby/>)

Nuclear warfare is still counted as WMD, yet the WMD Commission is more afraid of anthrax or Botox. Weapons of Mass Destruction used to include chemical warfare, but no longer. Fretting about nerve gas turned out to be a less lucrative fear-mongering industry than lobbying for juicy biological research grants, and for mountainous stockpiles of vaccines and antiviral drugs.

"Especially troubling," says the Commission, "is the lack of priority given to the development of… new vaccines, drugs, and production processes required to meet the modern threats from man-made and naturally occurring epidemics." Priority means an extra $17 billion of deficit spending over five years. But notice how "naturally occurring epidemics" were snuck into a report ostensibly dealing with terrorist weapons.

Alleged sources of a bioterrorist threats "include the bacteria that cause anthrax and plague, the viruses that cause smallpox and Ebola hemorrhagic fever, and poisons of natural origin such as ricin and botulinum toxin."

The Commission knows those agents are far less credible terrorist weapons than bombs, guns, airplanes and arson. (Anyone who tries to kill you with Ebola would die trying).

So they are stuck with anthrax, claiming "a bioterrorist attack involving anthrax bacterial spores [is] the most likely near-term biological threat to the United States." Billions were wasted because of anthrax in 2001, and the Commission is determined to waste billions more. For those receiving federal loot, Bruce Ivins was a gift that keeps on giving.

The Commission report said, "The 2001 anthrax mailings were not the first incident of bioterrorism in the United States. In 1984, the Rajneeshees, a religious cult in Oregon, sought to reduce voter turnout and win control of the county government in an upcoming election by temporarily incapacitating local residents with a bacterial infection. In . . . September 1984, cult members contaminated 10 restaurant salad bars in a town in Oregon with salmonella, a common bacterium that causes food poisoning. The attack sickened 751 people, some seriously." Sickened seriously! If that isn’t WMD, what is?

"A decade later," the report goes on, "members of a Japanese doomsday cult called Aum Shinrikyo released anthrax bacterial spores from the roof of a building in Tokyo. Fortunately, this attack failed. . . Had Aum succeeded in acquiring a virulent strain and delivered it effectively, the casualties could have been in the thousands." That is illiterate nonsense. There is no effective way of dispersing anthrax from the roof of a building.

Lacking evidence, the WMD lobby dreams up scenarios. The report tells us White House insecurity experts "created a chilling scenario of how terrorists could launch an anthrax attack in the United States [with] a single aerosol attack in one city delivered by a truck using a concealed improvised spraying device." This "chilling scenario" is science fiction.

In "WMD Doomsday Distractions," an April 2005 column available at Cato.org, I explained that, "Scenario spinners speculate about mixing anthrax with water and somehow spraying it (without detection) from trucks, crop dusters or unmanned aircraft. But to die from anthrax, you need to inhale thousands of spores. Those spores clump together and mix with dust, yet they must end up neither too large nor too small, or else they would be sneezed out, coughed up or swallowed. Even if enough particles of the perfect size could be sprayed into the breezes, the odds are extremely low of infecting more than few dozen people that way. And none would die if they took Cipro promptly."

Tallying up all of the world’s bioterrorism attacks to date, the final score is five killed from anthrax, plus one Bulgarian assassinated by being injected with ricin. That brings the world total of bioterrorist fatalities up to half a dozen — a bizarre concept of "mass destruction," and a feeble excuse for dispensing billions more federal dollars to those using scare tactics to raid the empty Treasury.

Disease threats are overhyped

Malcolm **Gladwell**, writer for The New Yorker and best-selling author The New Republic, July 17 and 24, 19**95**, excerpted in Epidemics: Opposing Viewpoints, 1999, p. 31-32

Every infectious agent that has ever plagued humanity has had to adapt a specific strategy but every strategy carries a corresponding cost and this makes human counterattack possible. Malaria is vicious and deadly but it relies on mosquitoes to spread from one human to the next, which means that draining swamps and putting up mosquito netting can all hut halt endemic malaria. Smallpox is extraordinarily durable remaining infectious in the environment for years, but its very durability its essential rigidity is what makes it one of the easiest microbes to create a vaccine against. AIDS is almost invariably lethal because it attacks the body at its point of great vulnerability, that is, the immune system, but the fact that it targets blood cells is what makes it so relatively uninfectious. Viruses are not superhuman. I could go on, but the point is obvious. Any microbe capable of wiping us all out would have to be everything at once: as contagious as flue, as durable as the cold, as lethal as Ebola, as stealthy as HIV and so doggedly resistant to mutation that it would stay deadly over the course of a long epidemic. But viruses are not, well, superhuman. They cannot do everything at once. It is one of the ironies of the analysis of alarmists such as Preston that they are all too willing to point out the limitations of human beings, but they neglect to point out the limitations of microscopic life forms.

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The grounda re as important

Wu, 2 (Frank, professor of law at Howard University, Criminal Justice Magazine, “Profiling in the Wake of September 11” <http://www.abanet.org/crimjust/cjmag/17-2/japanese.html>)

In that context, the conclusion that the internment was wrong is not enough. The reasons it was wrong must be articulated again. As lawyers well know, the rationale may be as important as the result by itself in comprehending the meaning of legal authority. What is constitutional is not necessarily advisable. Technically, for all the contempt directed at the Supreme Court’s internment cases, it is worth noting that the decisions have never been repudiated and actually have been followed consistently. Indeed, Chief Justice William H. Rehnquist penned a book a few years ago intimating that if a similar matter were to come before the Court again he would not expect it do otherwise. (William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime(Knopf 1998).) Imagining the counterfactual hypothetical of a Supreme Court that struck down the internment, then, also entails supplying an intellectual foundation. There are multiple possibilities. They lead to different outcomes in today’s circumstances. If the internment was wrong because racial classifications are to be regarded as immoral or unconstitutional as an absolute rule, then there is no distinction to be made between Japanese Americans on the one hand and Arab Americans or Muslim Americans on the other hand. The form of the argument does not vary by specific groups. If the internment was wrong because the particular racial generalization was in the aggregate false, then it may well be possible and appropriate to distinguish between the Japanese Americans and Arab Americans or Muslim Americans. The premise is that the conduct of Japanese Americans on the whole does not predict the conduct of Arab Americans or Muslim Americans on the whole. There are more possibilities. If the internment was wrong because of the lack of any semblance of due process, then even the German Americans and Italian Americans in isolated cases had their rights violated. Individual Arabs and Muslims who are aliens may be entitled to more due process than equal protection.

Our argument indicts solvency – no grounds means all precedent flies out the window and the aff never spills over

Banks, 99 (Christopher P., Assistant Professor of Political Science, Butchel College of Arts and Sciences, “Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change,” 32 Akron L. Rev. 233, lexis)

A typical discussion of stare decisis and its impact on precedent often begins  [\*235]  with posing the question of whether there is a "special justification" [n9](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n9) for overruling past law. While this term defies simple definition, it is clear that the Court tries to adopt a principled approach in its stare decisis decision-making where "society [can] presume that bedrock principles are founded in law rather than in the proclivities of individuals." [n10](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n10) Using this rhetoric allows the Supreme Court to preserve the popular conception that it is a legitimate and neutral arbiter of public law. Justice Antonia Scalia's comments in Hubbard v. U.S. [n11](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n11) illustrate this point. Scalia, who has said that stare decisis is merely an "administrative convenience," [n12](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n12) cautioned in Hubbard against calling the underlying decision "wrongly decided." [n13](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n13) More justification in reversing precedent is needed, he said, because a judge "who ignores [stare decisis] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong." [n14](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n14) To do otherwise would completely nullify the doctrine's effect. [n15](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n15) Where to draw the judicial line between whimsical and principled behavior is less than clear if one acknowledges the inherent tendency of judges to manipulate the doctrine politically. Nevertheless, an examination of the Court's precedent cases indicates that there are at least five traditional legal criteria that the Court looks to whenever it tries to justify a departure from precedent. [n16](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n16) Ironically, the preeminent legal realist, Justice Benjamin Cardozo, best expressed these traditional legal standards. In his classic The Nature of the Judicial Process Cardozo reminds us that "adherence to precedent should be the rule and not the exception." [n17](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n17) But, while remaining true to the values of stare decisis boasts several advantages (including stability, predictability, and uniformity of law), [n18](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n18) Cardozo accepts the reality that judges are not irrevocably committed to what has gone on before. Rather, when faced with a decision to depart from stare decisis, he states that judges  [\*236]  should give more or less weight to precedent according to several factors, including: First, whether the court is deciding a constitutional or statutory case; second, whether the underlying decision is inconsistent with justice or the social welfare; and third, whether the precedent has produced a substantial reliance interest that prevents the court from overruling it. [n19](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n19) Supplementing the Cardozo formulation are two other legal criteria which are integral components of the judicial decision to overrule. The fourth factor is whether the underlying court spoke with one voice in pronouncing the rule of law; that is, the force of precedent depends upon whether the court making the precedent is unanimous or divided. [n20](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n20) The last key variable of the traditional paradigm is the age of the precedent, where the weight afforded the principle is contingent upon whether it has emerged as an authoritative rule over time. [n21](http://www.lexisnexis.com.lib.pepperdine.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265392687458&returnToKey=20_T8490994564&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.568568.9636997798" \l "n21)

### 2nc circumvention

Court oversight is a myth – judges are cherrypicked for being pro-executive hacks – empirics are overwhelming

Michael J. Glennon 14, I-law prof at Tufts, National Security and Double Government, <http://harvardnsj.org/wp-content/uploads/2014/01/Glennon-Final.pdf>

**The courts**, which Hamilton called the “least dangerous” branch, 243 **pose the least danger to the** silent transfer of power from the nation’s Madisonian institutions to the **Trumanite network. Federal judicial appointees are selected, and vetted** along the way, **by those whose cases they will later hear**: the Trumanites and their associates in the White House and Justice Department. Before an individual is named to the federal bench, a careful investigation takes place to ensure that that individual is dependable. What this means, in practice, is that **appointees end up as trusted friends of the Trumanites** in matters touching upon national security. Presidents do not appoint individuals who are hostile to the Trumanites, nor does the Senate confirm them. The deck is stacked **from the start against challenges to Trumanite policies**.

**Judicial nominees** often **come from the ranks of** prosecutors, law enforcement, and **national security officials, and they have often participated in the same** sorts of **activities the lawfulness of which they will later be asked to adjudicate**.244 A prominent example was former Chief Justice William Rehnquist.245 Before his 1971 appointment to the Supreme Court by President Richard Nixon, Justice Rehnquist served as Assistant Attorney General for the Office of Legal Counsel (“OLC”) under Attorney General John Mitchell.246 In that capacity, Rehnquist participated directly in military surveillance of domestic political groups, including the preparation of a memorandum for Mitchell in 1969 dealing with the Army’s role in the collection of intelligence on civilians in the United States.247 He also “played a critical role in drafting the 1969 presidential order that established the division of responsibility between the military and the Justice Department for gathering of intelligence concerning during civil disturbances.”248 He testified before the Senate Judiciary Committee’s Subcommittee on Constitutional Rights in March 1971 that there were no serious constitutional problems with respect to collecting data or keeping under surveillance persons who are merely exercising their right of a peaceful assembly or petition to redress a grievance.249 After his confirmation hearings to become Chief Justice, however, he wrote in August 1986 in response to written questions from Senator Mathias that he could not recall participating in the formulation of policy concerning the military surveillance of civilian activities.250 The Senate confirmed his appointment by a vote of sixty-eight to twenty-six on December 10, 1971.251 Shortly thereafter, the Court began considering Laird v. Tatum, 252 a case involving the lawfulness of Army surveillance of civilians who were engaged in political activities critical of the government.253 Justice Rehnquist declined to recuse himself, and the case was decided five to four.254 The result was that the case was not sent back to the trial court to determine, as the Court of Appeals had ordered, the nature and extent of military surveillance of civilian groups.255 Instead, Justice Rehnquist’s vote most likely prevented the discovery of his own prior role and that of his Justice Department colleagues in developing the Nixon Administration’s military surveillance policy.256

Justice Rehnquist’s case is but one example of the symbiosis that binds the courts to the Trumanite network. Justice Rehnquist was not the only member of the judiciary with Trumanite links. Other potential appointees had ample opportunity to prove their reliability. Justice Antonin Scalia, before his appointment to the Supreme Court, also served as Assistant Attorney General for OLC and also was appointed initially by President Nixon.257 During his tenure from 1974 to 1977 at OLC, Scalia later recalled, it fell to him to pass upon the legality of proposed covert operations by the intelligence community: “believe it or not, for a brief period of time, all covert actions had to be approved by me.”258 He attended daily meetings in the White House Situation Room with Director of Central Intelligence William Colby and other top intelligence officials and decided what classified documents should be made available to Congress.259 He was the legal point-person in dealing with congressional requests for information on intelligence matters; on behalf of the Ford Administration he asserted executive privilege before a House investigating committee when it recommended that Henry Kissinger be cited for contempt of Congress for failing to produce classified documents concerning U.S. covert operations abroad.260

Justice Samuel Alito is a former captain in the Army Signal Corps, which manages classified communication systems for the military. He later became an Assistant U.S. Attorney, prosecuting drug and organized crime cases, and then an assistant to Attorney General Ed Meese before moving to OLC. There he worked, as he put it, to “increase the power of the executive to shape the law.”261 He was nominated to be a federal court of appeals judge in 1990 by President (and former Director of Central Intelligence) George H. W. Bush. Once confirmed, Judge Alito established his reliability by voting against the daughters of civilians killed in a military plane crash to uphold the government’s refusal to show a federal judge the official accident report, on grounds of the state secrets privilege.262

Chief Justice John Roberts was a law clerk for Justice Rehnquist.263 In that capacity he reportedly264 contributed significantly to the preparation of Rehnquist’s opinion in Dames & Moore v. Regan, 265 in which the Court upheld the Executive’s power to extinguish pending law suits by Americans seeking compensation from Iran for property seized by the Iranian government.266 He moved on to the Justice Department and then President Reagan’s White House Office of General Counsel, where he drafted a letter for the President responding to retired Justice Arthur Goldberg, who had written Reagan that the U.S. invasion of Grenada was of doubtful constitutionality.267 Roberts wrote in the reply that the President had “inherent authority in international affairs to defend American lives and interests and, as Commander-in-Chief, to use the military when necessary in discharging these responsibilities.”268 Roberts’s memos, Charlie Savage has reported, “regularly took more extreme positions on presidential power than many of his colleagues.”269 Appointed to the U.S. Court of Appeals for the District of Columbia in 2003,270 Roberts, like Alito, further confirmed his reliability. He voted to uphold the system of military tribunals established by the Bush Administration271 (which the Supreme Court overturned in Hamdan v. Rumsfeld, 272 a decision in which Roberts recused himself)273 and to uphold the power of the President, pursuant to statute, to prevent the courts from hearing certain lawsuits (in that case, brought by members of the U.S. military who had been captured and tortured during the Gulf War).274

It might be thought that these and other similarly inclined judges who adhere to views congenial to the Trumanite network have been appointed not because of Trumanite links but because of their judicial philosophy and particular interpretation of the Constitution—because they simply believe in a strong Executive Branch, a viewpoint that appointing Presidents have found attractive. Justice Scalia seemingly falls into this category.275 As Assistant Attorney General he testified twice before Congress in opposition to legislation that would have limited the President’s power to enter into sole executive agreements.276 In judicial opinions and speeches before his appointment to the Supreme Court he frequently expressed opposition to judicial involvement in national security disputes. “[J]udges know little” 277 about such issues, as he wrote in one such case decided while he was a member of the U.S. Court of Appeals for the District of Columbia.278 He argued again for deference in another national security case that came before that court that raised claims of “summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities.”279 It was brought by plaintiffs that included twelve members of Congress, who argued violations of the Constitution, War Powers Resolution,280 and the Boland Amendments281 (which cut off funds for the activities at issue).282 Judge Scalia refused to hear arguments on the merits; where a policy had been approved by "the President, the Secretary of State, the Secretary of Defense, and the Director of the CIA," he wrote, discretionary relief is inappropriate.283 After his appointment to the Supreme Court, Justice Scalia supported the executive oriented approach to treaty interpretation that the Reagan Administration relied upon in arguing that deployment of a space-based anti-ballistic missile ("ABM") system would not violate the ABM treaty (referring in his opinion to various Washington Post articles on the controversy).284 Later, in Rasul v. Bush,2\*5 the Court's majority held that federal district courts may exercise jurisdiction under the federal habeas statute to hear claims by foreign nationals detained by the United States. Justice Scalia dissented, denouncing the majority for "judicial adventurism of the worst sort."286 In Hamdan v. Rumsfeld?\*1 the majority held that a military commission established by the Executive lacked power to try the defendant; Justice Scalia dissented again, insisting that that conclusion was "patently erroneous."288 In Boumediene v. Bush,2\*9 the majority held that the defendant, a foreign national, had a constitutional privilege of habeas corpus; again Justice Scalia dissented. It came as no surprise when Justice Scalia expressed concern in a 2013 speech that the lawfulness of NSA surveillance could ultimately be decided by judges—"the branch of government that knows the least about the issues in question, the branch that knows the least about the extent of the threat against which the wiretapping is directed."290 **When the Trumanites' actions are at issue, submissiveness, not second-guessing, is the appropriate judicial posture**.

It is of course true that Justice Scalia and other such judges were and are appointed because of their judicial philosophy. The cause of their beliefs, however, is as irrelevant as it is unknowable; whatever the cause, the effect is the same—**they are reliable supporters** of the Trumanites. People tend to end up in organizations with missions compatible with their larger worldview, just as people once in an organization tend to adopt a worldview supportive of their organization’s mission. Position and judicial philosophy both are indicia of reliability. The question is not why a potential judicial appointee will come down the right way. The question is whether the appointee might reasonably be expected to do so.

It might also be argued that these justices were not sufficient in number ever to comprise a majority on the Supreme Court. In an era of increasingly close decisions, however, **one or two votes can be decisive**, and it must be remembered that this cursory review embraces only the Supreme Court; **numerous district and appellate court judges with ties to the Trumanite network also adjudicate national security cases. This group includes**, most prominently, the closest that the nation has to a national security court 291—the eleven members of the Foreign Intelligence Surveillance Court.

The court, or FISC as it is commonly called, was established in 1978 to grant warrants for the electronic surveillance of suspected foreign intelligence agents operating in the United States.292 Each judge is selected by the Chief Justice of the Supreme Court from the pool of sitting federal judges.293 They are appointed for a maximum term of seven years; no further confirmation proceedings take place, either in the Senate or the Executive Branch.294 The Chief Justice also selects a Chief Judge from among the court’s eleven judges.295 **All eleven of the sitting judges** on the FISC **were selected by** Chief Justice John **Roberts**; ten of the eleven were initially appointed to the federal bench by Republican presidents.296 A study by the New York Times concluded that since Roberts began making appointments to the court, 50% have been former Executive Branch officials.297

Normally, of course, courts proceed in public, hear arguments from opposing counsel, and issue opinions that are available for public scrutiny. Not so with the FISC. **All of its proceedings are closed to the public**.298 **The adversarial system** integral to American jurisprudence **is absent**. **Only government lawyers appear as counsel**, unanswered by any real or potential adverse party.299 The FISC has pioneered a two-tiered legal system, one comprised of public law, the other of secret law. FISC opinions—even redacted portions of opinions that address only the FISC’s interpretation of the constitutional rights of privacy, due process, or protection against unreasonable search or seizure—are rarely available to the public.300 Nancy Gertner, a former federal judge in Massachusetts, summed up the court: “The judges that are assigned to this court are judges that are not likely to rock the boat . . . . **All of the structural pressures that keep a judge independent are missing** there. **It’s one-sided, secret, and the judges are chosen in a selection process by one man**.”301 The Chief Judge of the FISC candidly described its fecklessness. “The FISC is forced to rely upon the accuracy of the information that is provided to the Court,” said Chief Judge Reggie B. Walton. “The FISC does not have the capacity to investigate issues of noncompliance, and in that respect the FISC is in the same position as any other court when it comes to enforcing [government] compliance with its orders.”302 The NSA’s own record proved him correct; an internal NSA audit revealed that it had broken privacy rules or overstepped its legal authority thousands of times since 2008.303 The judiciary, in short, does not have the foremost predicate needed for Madisonian equilibrium: “a will of its own.”304 Whatever the court, judges normally are able to find what appear to the unschooled to be sensible, settled grounds for tossing out challenges to the Trumanites’ projects. **Dismissal of** those **challenges is couched in arcane doctrine that harks back to early precedent, invoking implicitly the courts’ mystical pedigree and an aura of politics-transcending impartiality. But challenges to the Trumanites’ projects regularly get dismissed before the plaintiff ever has a chance to argue the merits** either before the courts or, sometimes more importantly, the court of public opinion. Try challenging the Trumanites’ refusal to make public their budget 305 on the theory that the Constitution does, after all, require “a regular statement and account of the receipts and expenditures of all public money”;306 or the membership of Members of Congress in the military reserve 307 on the theory that the Constitution does, after all, prohibit Senators and Representatives from holding “any office under the United States”;308 or the collection of phone records of the sort given by Verizon to the NSA on the theory that the law authorizing the collection is unconstitutional.309 Sorry, no standing, case dismissed.310 Try challenging the domestic surveillance of civilians by the U.S. Army311 on the theory that it chills the constitutionally protected right to free assembly,312 or the President’s claim that he can go to war without congressional approval 313 on the theory that it is for Congress to declare war.314 Sorry, not ripe for review, case dismissed.315 Try challenging the introduction of the armed forces into hostilities in violation of the War Powers Resolution.316 Sorry, political question, non-justiciable, case dismissed.317 Try challenging the Trumanites’ refusal to turn over relevant and material evidence about an Air Force plane accident that killed three crew members through negligence,318 or about racial discrimination against CIA employees,319 or about an “extraordinary rendition” involving unlawful detention and torture.320 Sorry, state secrets privilege, case dismissed.321Sometimes the courts have no plausible way of avoiding the merits of national security challenges. Still, the Trumanites win. The courts eighty years ago devised a doctrine—**the "non-delegation doctrine**"—that forbids the delegation of legislative power by Congress to administrative agencies.322 Since that time it **has rarely been enforced, and never has the Court struck down any delegation of national security authority to the Trumanite apparatus**.323 **Rather, judges stretch to find "implied" congressional approval of Trumanite initiatives.** Congressional silence**, as construed by the courts,** constitutes acquiescence.324 Even if that hurdle can be overcome, the **evidence** necessary to succeed **is difficult to get**; as noted earlier,325 **the most** expert **and informed** witnesses **all** have signed nondisclosure agreements, which prohibit any discussion of "classifiable" information without pre-publication review by the Trumanites. As early as 1988, over three million present and former federal employees had been required to sign such agreements as a condition of employment.326 Millions more have since become bound to submit their writings for editing and redaction before going to press. And as the ultimate trump card, **the Trumanites are cloaked in**, as the Supreme Court put it, "the very delicate, **plenary** and exclusive **power** of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."327 The basis of their power, the Court found, is, indeed, not even the Constitution itself; the basis of Trumanile power is external sovereignly—the membership of the United States in the community of nations, which confers extra-constitutional authority upon those charged with exercising it.32s

As is true with respect to the other Madisonian institutions, there are, of course, instances in which the judiciary has poached on the Trumanites' domain. The courts rebuffed an assertion of the commander-in chief power in ordering President Truman to relinquish control of the steel mills following their seizure during the Korean War.329 Over the Trumanites' objections, the courts permitted publication of the Pentagon Papers that revealed duplicity, bad faith, and ineptitude in the conduct of the Vietnam War.330 The Supreme Court did overturn military commissions set up to try enemy combatants for war crimes,331 and two years later found that Guantanamo detainees had unlawfully been denied habeas corpus rights.332 Personnel does sometimes matter. **Enough apparent** counterexamples **exist to** preserve the facade.

Yet the larger picture remains valid. Through the long list of military conflicts initiated without congressional approval—Grenada, Panama, Kosovo, and, most recently, Libya—**the courts have never stopped a war**, with one minor (and temporary) exception. In 1973, Justice William O. Douglas did issue an order to halt the bombing of Cambodia 333—which lasted a full nine hours, until the full Supreme Court overturned it.-34 The Court's "lawless" reversal was effected through an extraordinary telephone poll of its members conducted by Justice Thurgood Marshall. "[S]ome Nixon men." Douglas believed, "put the pressure on Marshall to cut the corners."135 Seldom do judges call out even large-scale constitutional violations that could risk getting on the wrong side of an angry public, as American citizens of Japanese ethnicity discovered during World War II.-36 Whatever the cosmetic effect, the four cases representing the Supreme Court's supposed "push-back" against the War on Terror during the Bush Administration freed, at best, a tiny handful of detainees.337 As of 2010 fewer than 4% of releases from Guantanamo followed a judicial release order.338 A still-unknown number of individuals, numbering at least in the dozens, fared no better. These individuals were detained indefinitely— without charges, based on secret evidence, sometimes without counsel—as "material witnesses" following 9/11.339 One can barely find a case in which anyone claiming to have suffered even the gravest injury as the result of the Bush-Obama counterterrorism policies has been permitted to litigate that claim on the merits—let alone to recover damages. The Justice Department's seizure of Associated Press ("AP") records was carried out pursuant to judicially-approved subpoenas, in secret, without any chance for the AP to be heard.340 **The FISC** 341 **has barely pretended to engage in real judicial review**. Between 1979 and 2011, the court received 32,093 requests for warrants. It granted 32,087 of those requests, and it turned down eleven.342 In 2012, the court received 1,789 requests for electronic surveillance, one of which was withdrawn. All others were approved.343 The occasional counterexample notwithstanding, the courts cannot seriously be considered a check on America's Trumanite network.

Judges can do whatever they want

McGuire, 2005

Kevin McGuire, associate professor of Political Science at UNC, and Michael MacKuen, professor of Political Science at UNC, ‘5, “Precedent and Preferences on the U.S. Supreme Court,” http://www.unc.edu/~kmcguire/papers/precedent.pdf

An alternative approach examines the alteration of precedent, analyzing when and why the Supreme Court overturns its past policies. If stare decisis genuinely constrained the members of the Court, then they should be unwilling to reconsider precedents, even those with which they may personally disagree. It turns out, however, that precedents are quite vulnerable, especially those that conflict with the policy dispositions of the justices (see, e.g., Brenner and Spaeth 1995; Segal and Howard 2000). Again, the evidence supports the attitudinal, rather than the legal model. No doubt the best evidence on the importance of stare decisis measures the degree to which justices who oppose a newly established precedent modify their behavior by accepting the authority of that precedent in subsequent cases (Spaeth and Segal 1999). In landmark decisions (i.e., cases for which there are no genuine precedents), the members of the Court are not bound by the dictates of stare decisis and are free to follow their preferences. If the justices were truly affected by precedent, then they would adjust accordingly, supporting the application of that new precedent in later litigation. By this standard, **precedent does not exert much influence**; it turns out that, **across the Court’s entire history**, the justices have rarely modified their behavior after the Court adopts new policies with which they disagree. This is quite powerful; it convincingly demonstrates that individual justices see little need to support the decisions of their brethren, even when there are strong legal reasons for doing so. Given the choice between a disagreeable principle and their own attitudinal inclinations, most members of the Court simply stand by their preferences.

In a time of crisis, the plan becomes meaningless

Gordon Silverstein 11, Assistant Professor of Political Science at the University of California, Berkeley and a Fellow in the Program on Law and Public Affairs at Princeton University, can constitutional democracies and emergency powers coexist?, Tulsa Law Review 45:619

Law, of course, facilitates a role for judges, and it is independent judges in whom David Dyzenhaus places his confidence. And, indeed, judges are more insulated and more likely to be able to resist some of the pressure to trade liberty for security in time of crisis. But while their institutional isolation and professional norms and training all suggest reasons to believe they might be less likely to give in, or slower or more resistant, there is no reason to believe they are utterly immune to the same pressures, biases and fears of other leaders and other citizens. Faced with what they are convinced is a society-threatening crisis, why would we really expect them to stand against an overwhelming tide? Indeed, it is precisely the difficulty of such a situation that Justice Jackson so cogently addressed in his dissent in Korematsu. At the end of the day, he did as Dyzenhaus would expect Supreme Court Justices to do, and voted to uphold the underlying moral and normative values of American law – but his was, let us remember, a dissent. The majority voted to allow the government‟s relocation of Japanese Americans without even the most rudimentary wave at due process. This really should not surprise us. As Lee Epstein and her colleagues demonstrate, Supreme Court rulings in civil liberties cases during formal periods of wartime tend to be less favorable to individual rights than in non-war circumstances.28 Together with John Hanley, I have argued that in crisis times (periods more broadly defined than when the nation is formally at war) the Justices of the Supreme Court (rather unsurprisingly) tend to rule in a way that is more or less consistent with public opinion. When emergency power claims arise at the peak of presidential popularity (as happened with Korematsu), the Court is loathe to stand in the way; where cases arise concerning highly unpopular claims to power (as was the case with Truman and the steel seizure), the Court has sided with individual rights and against the president. This is not a causal claim – but more a recognition that judges are people too, and while they may lead public opinion, in the midst of crisis, they are not often likely to stand in direct opposition to it.29 This is not to say that Courts cannot play a vitally important role, but we might want to think about the courts ex ante role in building and fortifying the norms and values of our society in advance such that they are more likely to be able to withstand cross pressures in a future crisis. But the time and place for the Court to play its most important role might well not be in the midst of a genuine (or perceived) threat to national survival.

### Adv 1

### No agreement

BUT---the assertion that the US can still drive the international system despite terminal decline is exactly the type of hubris and belief in a US-led international legal system that systematizes lashout and colonial violence

McClintock ‘9 (Anne, chaired prof of English and Women’s and Gender Studies at UW–Madison. MPhil from Cambridge; PhD from Columbia, “Paranoid Empire: Specters from Guantánamo and Abu Ghraib,” Small Axe Mar2009, Issue 28, p50-74, 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 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**. 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 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 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.** 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 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 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 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. 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? A critical question still remains: does not something terrible have to happen to ordinary people (military police, soldiers, interrogators) to instill in them, as ordinary people, in the most intimate, fleshly ways, a paranoid cast that enables them to act compliantly with, and in obedience to, the paranoid visions of a paranoid state? Perhaps we need to take a long, hard look at the simultaneously humiliating and aggrandizing rituals of militarized institutions, whereby individuals are first broken down, then reintegrated (incorporated) into the larger corps as a unified, obedient fighting body, the methods by which schools, the military, training camps— not to mention the paranoid image-worlds of the corporate media—instill paranoia in ordinary people and fatally conjure up collective but unstable fantasies of omnipotence.10 In what follows, I want to trace the flashpoints of imperial paranoia into the labyrinths of torture in order to illuminate three crises that animate our moment: the crisis of violence and the visible, the crisis of imperial legitimacy, and what I call “the enemy deficit.” I explore these flashpoints of imperial paranoia as they emerge in the torture at Guantánamo and Abu Ghraib. I argue that Guantánamo is the territorializing of paranoia and that torture itself is paranoia incarnate, in order to make visible, in keeping with Hazel Carby’s brilliant work, those contradictory sites where imperial racism, sexuality, and gender catastrophically collide.11 C. P. Cavafy wrote “Waiting for the Barbarians” in 1927, but the poem haunts the aftermath of 9/11 with the force of an uncanny and prescient déjà vu. To what dilemma are the “barbarians a kind of solution? Every modern empire faces an abiding crisis of legitimacy in that it flings its power over territories and peoples who have not consented to that power. Cavafy’s insight is that an imperial state claims legitimacy **only** by evoking the threat of the barbarians. It is only the threat of the barbarians that constitutes the silhouette of the empire’s borders in the first place. On the other hand, the hallucination of the barbarians disturbs the empire with perpetual nightmares of impending attack. The enemy is the abject of empire: the rejected from which we cannot part. And without the barbarians the legitimacy of empire vanishes like a disappearing phantom. Those people were a kind of solution. With the collapse of the Soviet Union in December 1991, the grand antagonism of the United States and the USSR evaporated like a quickly fading nightmare. The cold war rhetoric of totalitarianism, Finlandization, present danger, fifth columnist, and infiltration vanished. Where were the enemies now to justify the continuing escalation of the military colossus? “And now what shall become of us without any barbarians?” By rights, the thawing of the cold war should have prompted **an immediate downsizing of the military**; any plausible external threat had simply ceased to exist. Prior to 9/11, General Peter Schoomaker, head of the US Army, bemoaned the enemy deficit: “It’s no use having an army that did nothing but train,” he said. “There’s got to be a certain appetite for what the hell we exist for.” Dick Cheney likewise complained: “The threats have become so remote. So remote that they are difficult to ascertain.” Colin Powell agreed: “Though we can still plausibly identify specific threats—North Korea, Iran, Iraq, something like that—**the real threat is the unknown,** the uncertain.” Before becoming president, George W. Bush likewise fretted over the post–cold war dearth of a visible enemy: “We do not know who the enemy is, but we know they are out there.” It is now well established that the invasion of Iraq had been a long-standing goal of the US administration, but there was no clear rationale with which to sell such an invasion. In 1997 a group of neocons at the Project for the New American Century produced a remarkable report in which they stated that to make such an invasion palatable would require “a catastrophic and catalyzing event—like a new Pearl Harbor.”12 The 9/11 attacks came as a dazzling solution, both to the enemy deficit and the problem of legitimacy, offering the Bush administration what they would claim as a political casus belli and the military unimaginable license to expand its reach. General Peter Schoomaker would publicly admit that the attacks were an immense boon: “There is a huge silver lining in this cloud. . . . War is a tremendous focus. . . . Now we have this focusing opportunity, and we have the fact that (terrorists) have actually attacked our homeland, which gives it some oomph.” In his book Against All Enemies, Richard Clarke recalls thinking during the attack, “Now we can perhaps attack Osama Bin Laden.” After the invasion of Afghanistan, Secretary of State Colin Powell noted, “America will have a continuing interest and presence in Central Asia of a kind we could not have dreamed of before.” Charles Krauthammer, for one, called for a declaration of total war. “We no longer have to search for a name for the post-Cold War era,” he declared. “It will henceforth be known as the age of terrorism.”13

Deals inevitably fail because they’re stuck in a system of Western legal imperialism that flatten other cultures and causes imperial wars

Scott Newton 6, Lecturer in Law and Chair of the Centre of Contemporary Central Asia and the Caucasus in the School of Oriental and African Studies at the University of London, Constitutionalism and imperialism Sub Specie Spinozae, Law and Critique17.3 (Nov 2006): 325-355

Turning from these sparse Spinozan allusions, one confronts a bewildering complexity and variety of legal-institutional arrangements undergirding the organisation and administration of colonial empires. One might, at least provisionally and schematically, discern three possible, nested levels of constitution in imperialism: colonies or imperial units, empire, and the imperial order. The ﬁrst two can be understood as relatively straightforward: respectively, the constitutionalising one after the other of the diverse individual spaces or regions of empire as so many quasi-polities (subordinate, subjugated) with territorial agencies and institutions of rule (for example, the Colonial Government of India, with its centralised structures and its local Government Agencies) and the constitutionalising of the general imperial space that encompasses them all (with its valence to the metropolitan pole), the properly imperial co-ordinating agencies and institutions of rule (e.g. the Colonial Ofﬁce, Parliamentary legislation relating to speciﬁc colonies or general colonial administration, etc.). The third level, the constitution of imperialism, would then equate to the overarching international legal order, which authorises and legitimises the amassing of empires on the part of European sovereigns and organises their relations inter se. It is in this sense that international law has, from its inception (an inception contemporaneous with that of the ﬁrst European empires), been fashioned as the constitution of the imperial order.25 As a ﬁrst step in understanding the Spinozan relations of imperialism to constitutionalism, it can now be suggested that modern empires arose ultimately by constituting and constitutionalising, and thus formally controlling/administering through the institutions thereby established, ever more expansive and diverse spaces for the exercise of potestas – not just geographic spaces, but spaces of activity (exchange, social interaction, scientiﬁc research, artistic production). To constitutionalise means to design and set up institutions of rule (and institutions of exchange) along the lines of existing municipal institutions in European states, systematically. The fact that the entities thus constitutionalised are constitutionalised ab initio as subordinate and not co-ordinate, as colonies and not as sovereignties (they are designed and organised to be ruled from outside), does not alter the analysis. Imperialism, then, would be the propagation or extension – whether by outright conquest and annexation or by subtler, more insidious hegemonic means – of particular legal-institutional arrangements, of particular sorts of constitutional paradigms, and of the general logic (establishing and conﬁguring basic institutions of rule and exchange) and juridical rationality (fundamental and entrenched structural forms and procedural norms to which subordinate forms and norms must conform) of constitutionalism. Imperialism is constitutionalism, writ larger, but partaking of the same structure or dynamics. A constitution creates a common juridical space over a national territory; an empire creates a common juridical space over a territory not bounded by national borders and establishes a series of subordinate bounded juridical spaces within that common space (which in time may become national territories ‘in their own right’).

No chance of coop on climate change

Young et al 13

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Climate change

Gridlock exists across a range of different areas in global governance today, from security arrangements to trade and finance. This dynamic is, arguably, most evident in the realm of climate change. The diffusion of industrial production across the world—a process enabled by economic globalization—has created a situation in which the basic consumption of each individual directly affects the life chances of every other individual on the planet, as well as the life chances of future generations.

This is a powerful and entirely new form of global interdependence. Bluntly put, the future of our civilization depends on our ability to cooperate across borders. And yet, despite twenty years of multilateral negotiations under the UN, a global deal on climate change mitigation or adaptation remains elusive, with differences between developed countries, which have caused the problem, **and developing countries**, which will drive future emissions, forming the core barrier to progress. Unless we overcome gridlock in climate negotiations, as in other issue areas, we will be unable to continue to enjoy the peace and prosperity we have inherited from the postwar order.

There are, of course, several forces that might work against gridlock. These include the potential of social movements to uproot existing political constraints, catalysed by IT innovation and the use of associated technology for coordination across borders; the capacity of existing institutions to adapt and accommodate factors such as emerging multipolarity (the shift from the G-5/7 to the G-20 is one example); and efforts at institutional reform which seek to alter the organizational structure of global governance (for example, proposals to reform the Security Council or to establish a financial transaction tax).

Whether there is the political will or leadership to move beyond gridlock remains a pressing question. Social movements find it difficult to convert protests into consolidated institutional change. At the same time, the political leadership of the great power blocs appears dogged by national concerns: Washington is sharply divided, Europe is preoccupied with the future of the Euro and China is absorbed by the challenge of sustaining economic growth as the prime vehicle of domestic legitimacy. Against this background, the further deepening of gridlock and the continuing failure to address global collective action problems appears likely.

In the aftermath of the Second World War the institutional breakthroughs that occurred provided the momentum for decades of sustained economic growth and geopolitical stability sufficient for the transformation of the world economy, the shift from the Cold War to a multipolar order, and the rise of new communication and network societies.

However, what worked then does not work as well now, as gridlock freezes problem solving capacity in global governance. The search for a politics beyond gridlock, in theory and in practice, is a hugely significant task – nationally and globally – if global governance is to be once again both effective and fit for purpose.

### 2nc no extinction

Experts agree

Hsu 10 (Jeremy, Live Science Staff, July 19, pg. <http://www.livescience.com/culture/can-humans-survive-extinction-doomsday-100719.html>)

His views deviate sharply from those of most experts, who don't view climate change as the end for humans. Even the worst-case scenarios discussed by the Intergovernmental Panel on Climate Change don't foresee human extinction. "The scenarios that the mainstream climate community are advancing are not end-of-humanity, catastrophic scenarios," said Roger Pielke Jr., a climate policy analyst at the University of Colorado at Boulder. Humans have the technological tools to begin tackling climate change, if not quite enough yet to solve the problem, Pielke said. He added that doom-mongering did little to encourage people to take action. "My view of politics is that the long-term, high-risk scenarios are really difficult to use to motivate short-term, incremental action," Pielke explained. "The rhetoric of fear and alarm that some people tend toward is counterproductive." Searching for solutions One technological solution to climate change already exists through carbon capture and storage, according to Wallace Broecker, a geochemist and renowned climate scientist at Columbia University's Lamont-Doherty Earth Observatory in New York City. But Broecker remained skeptical that governments or industry would commit the resources needed to slow the rise of carbon dioxide (CO2) levels, and predicted that more drastic geoengineering might become necessary to stabilize the planet. "The rise in CO2 isn't going to kill many people, and it's not going to kill humanity," Broecker said. "But it's going to change the entire wild ecology of the planet, melt a lot of ice, acidify the ocean, change the availability of water and change crop yields, so we're essentially doing an experiment whose result remains uncertain."

### Legitimacy

The blue

Long 8 Professor of Law @ Florida Coastal School of Law [Andrew Long, “International Consensus and U.S. Climate Change Litigation,” 33 Wm. & Mary Envtl. L. & Pol'y Rev. 177, Volume 33 | Issue 1 Article 4 (2008)

1. Enhancing U.S. International Leadership In a time of unfavorable global opinion toward the United States, explicit judicial involvement with international norms will move the United States **closer to the international community** by acknowledging the relevance of international environmental norms for our legal system. As in other contexts, explicit **judicial internalization of climate change norms would "build**[ ] **U.S. 'soft power,**' [enhance] its moral authority, and strengthen[ ] U.S. capacity for global leadership"2 °3 on climate change, and other global issues. More specifically, domestic judicial consideration of the global climate regime would reaffirm that although the United States has rejected Kyoto, we take the obligation to respect the global commons seriously by recognizing that obligation as a facet of the domestic legal system. U.S. courts' overall failure to interact with the international climate regime, as in other issue areas, has "serious consequences for their roles in international norm creation."2" As judicial understandings of climate change law converge, the early and consistent contributors to the transnational judicial dialogue will likely play the strongest role in shaping the emerging international normative consensus.2"' As Justice L'Heureux- Dube of the Canadian Supreme Court noted in an article describing the decline of the U.S. Supreme Court's global influence, "[decisions which look only inward ... have less relevance to those outside that jurisdiction." °6 Thus, if U.S. courts hope to participate in shaping the normative position on climate change adopted by judiciaries throughout the world, explicit recognition of the relationship between domestic and international law is vital. With climate change in particular, norm development through domestic application should be an important aspect of global learning. The problem requires a global solution beyond the scope of any prior multilateral environmental agreements. This provides a situation in which U.S. judicial reasoning in applying aspects of climate regime thinking to concrete problems will fall into fertile international policy soil. Accordingly, the recognition of international norms in **domestic climate change litigation may play a strengthening role in** the perception **of U.S. leadership**, encourage U.S. development and exportation of effective domestic climate strategies, and promote international agreements that will enhance consistency with such approaches. In short, explicit judicial discussion of international climate change norms as harmonious with U.S. law can **enhance U.S. ability to regain** a **global leadership** position on the issue and, thereby, more significantly shape the future of the international climate regime. 2. Promoting the Effectiveness of the International Response Along with promoting U.S. interests and standing in the international community, climate change litigation has a direct role to play in developing the international regime if courts directly engage that regime." 7 Just as the United States as an actor may benefit from acknowledging and applying international norms, the regime in which the actions occur will benefit through application and acceptance. Indeed, a case such as Massachusetts v. EPA that directly engages only domestic law can nonetheless be understood to impact international lawmaking by considering its actors."' More important, however, will be cases in which the domestic judiciary gives life to international agreements through direct engagement-a "role [that] is particularly important as a check on the delegitimization of international legal rules that are not enforced."" 9 Assuming, as we must in the arena of climate change, that international law can only effect significant changes in behavior through penetration of the domestic sphere, domestic litigation that employs international law not only provides an instance in which the international appears effective but, more importantly, molds it into a shape that will enable further use in domestic cases or suggest necessary changes internationally. By engaging the international, domestic cases can also provide articulation for the norms that have emerged. The precise meaning of the UNFCCC obligation that nations take measures must be hammered out on the ground. In the United States, if Congress has not acted, it is appropriate for the courts to begin this process by measuring particular actions against the standard. 3. Encouraging Consistency in Domestic Law and Policy In the absence of national climate change law and policy, explicit discussion of international sources and norms in litigation will provide a well-developed baseline for a uniform judicial approach in the domestic realm. This could occur both within and beyond the United States. Within the United States, bringing international environmental law into the mix of judicial reasoning would provide common grounding that unifies the decisions and begins to construct a more systematic preference for development of an effective legal response to international threats. Specifically, if an international climate change norm is found relevant to interpretation of a domestic statute, reference will be appropriate to that norm when future questions of interpretation of the domestic statute arise.210 Thus, to the extent that climate change cases rely upon consensus concerning the scientific evidence of climate change, future cases should use that consensus as a measuring stick for claims of scientific uncertainty.2n The same can occur with norm development. For example, had the Court in Massachusetts tied its jurisdictional or substantive holding to an identifiable norm, the opinion would have greater clarity and value as a precedent in other contexts within the United States. Outside the United States, this approach would provide value to other, more transnationally oriented domestic courts.212 This would serve a norm entrepreneurship function and likely increase agreement among domestic courts on how to approach climate change issues raised under statutes designed for other purposes. 4. Enabling a Check at the Domestic-International Interface Finally, climate change litigation has something to offer for the growth of administrative law at the interface of domestic and international law. At least two points are noteworthy. First, U.S. courts can serve a unique function of providing legal accountability for U.S. failure to honor its UNFCCC commitments.213 Although this might be achieved implicitly, arguably the approach of Massachusetts, doing so explicitly would provide a check of a different magnitude. An explicit check here would serve the purposes identified above, as well as offering the practical benefit of increasing compliance. The dualist tradition, and perhaps concerns of domestic political backlash, weigh against grounding a decision solely in the UNFCC. However, looking to it as a major point in a narrative defining the development of a partly domestic obligation to take national action for the redress of climate change would serve the same beneficial purpose. This approach has the advantage of building a significant bridge over the dualist divide between domestic and international law without ripping the Court's analysis from traditional, dualist moorings. Pg. 212-216

### 2nc heg impact

Their laundry list of vague impacts is academic junk – conflicts can’t just emerge

Fettweis, 11

Christopher J. Fettweis, Department of Political Science, Tulane University, 9/26/11, Free Riding or Restraint? Examining European Grand Strategy, Comparative Strategy, 30:316–332, EBSCO

Assertions that without the combination of U.S. capabilities, presence and commitments instability would return to Europe and the Pacific Rim are usually rendered in rather vague language. If the United States were to decrease its commitments abroad, argued Robert Art, “the world will become a more dangerous place and, sooner or later, that will redound to America’s detriment.”53 From where would this danger arise? Who precisely would do the fighting, and over what issues? Without the United States, would Europe really descend into Hobbesian anarchy? Would the Japanese attack mainland China again, to see if they could fare better this time around? Would the Germans and French have another go at it? In other words, where exactly is hegemony is keeping the peace? With one exception, these questions are rarely addressed.

That exception is in the Pacific Rim. Some analysts fear that a de facto surrender of U.S. hegemony would lead to a rise of Chinese influence. Bradley Thayer worries that Chinese would become “the language of diplomacy, trade and commerce, transportation and navigation, the internet, world sport, and global culture,” and that Beijing would come to “dominate science and technology, in all its forms” to the extent that soon the world would witness a Chinese astronaut who not only travels to the Moon, but “plants the communist flag on Mars, and perhaps other planets in the future.”54 Indeed China is the only other major power that has increased its military spending since the end of the Cold War, even if it still is only about 2 percent of its GDP. Such levels of effort do not suggest a desire to compete with, much less supplant, the United States. The much-ballyhooed, decade-long military buildup has brought Chinese spending up to somewhere between one-tenth and one-fifth of the U.S. level. It is hardly clear that a restrained United States would invite Chinese regional, must less global, political expansion. Fortunately one need not ponder for too long the horrible specter of a red flag on Venus, since on the planet Earth, where war is no longer the dominant form of conflict resolution, the threats posed by even a rising China would not be terribly dire. The dangers contained in the terrestrial security environment are less severe than ever before.

Believers in the pacifying power of hegemony ought to keep in mind a rather basic tenet: When it comes to policymaking, specific threats are more significant than vague, unnamed dangers. Without specific risks, it is just as plausible to interpret U.S. presence as redundant, as overseeing a peace that has already arrived. Strategy should not be based upon vague images emerging from the dark reaches of the neoconservative imagination.

Overestimating Our Importance

One of the most basic insights of cognitive psychology provides the final reason to doubt the power of hegemonic stability: Rarely are our actions as consequential upon their behavior as we perceive them to be. A great deal of experimental evidence exists to support the notion that people (and therefore states) tend to overrate the degree to which their behavior is responsible for the actions of others. Robert Jervis has argued that two processes account for this overestimation, both of which would seem to be especially relevant in the U.S. case.55 First, believing that we are responsible for their actions gratifies our national ego (which is not small to begin with; the United States is exceptional in its exceptionalism). The hubris of the United States, long appreciated and noted, has only grown with the collapse of the Soviet Union.56 U.S. policymakers famously have comparatively little knowledge of—or interest in—events that occur outside of their own borders. If there is any state vulnerable to the overestimation of its importance due to the fundamental misunderstanding of the motivation of others, it would have to be the United States. Second, policymakers in the United States are far more familiar with our actions than they are with the decision-making processes of our allies. Try as we might, it is not possible to fully understand the threats, challenges, and opportunities that our allies see from their perspective. The European great powers have domestic politics as complex as ours, and they also have competent, capable strategists to chart their way forward. They react to many international forces, of which U.S. behavior is only one. Therefore, for any actor trying to make sense of the action of others, Jervis notes, “in the absence of strong evidence to the contrary, the most obvious and parsimonious explanation is that he was responsible.”57

It is natural, therefore, for U.S. policymakers and strategists to believe that the behavior of our allies (and rivals) is shaped largely by what Washington does. Presumably Americans are at least as susceptible to the overestimation of their ability as any other people, and perhaps more so. At the very least, political psychologists tell us, we are probably not as important to them as we think. The importance of U.S. hegemony in contributing to international stability is therefore almost certainly overrated.

In the end, one can never be sure why our major allies have not gone to, and do not even plan for, war. Like deterrence, the hegemonic stability theory rests on faith; it can only be falsified, never proven. It does not seem likely, however, that hegemony could fully account for twenty years of strategic decisions made in allied capitals if the international system were not already a remarkably peaceful place. Perhaps these states have no intention of fighting one another to begin with, and our commitments are redundant. European great powers may well have chosen strategic restraint because they feel that their security is all but assured, with or without the United States.

### Oil war

No oil war

Hu, 2008

Richard Hu, Center for Northeast Asian Policy Studies,2008, “Promotoing China-U.S. Energy Cooperation Issues and Prospects,” <http://www.keia.org/Publications/Other/HuFINAL.pdf>

No doubt, China and the United States have mutual anxiety about the other side’s intension in pursuing energy security, and both sides could view each other as undermining their respective pursuits of energy security. Robert Zoellick, former U.S. deputy secretary of state, echoed such a popular view of Washington in a speech in September 2005 that Beijing is taking actions to “lock up” energy resources around the world and is pursuing a mercantilist strategy in energy security. Moreover, China’s oil investment in Sudan, Venezuela, and other states with poor human rights records is frequently criticized as irresponsible behavior.13 Similarly, not a small number of people in China are concerned that the American intention is to “block” China’s way to acquire oil assets and to possibly threaten China’s oil transportation through maritime routes. These mutual suspicions and anxieties seem not to have disappeared despite the ongoing energy policy and strategic dialogues at various levels. Washington and Beijing should fi nd ways to manage strategic anxieties on both sides. Both countries feel very strongly about sustaining global economic growth and ensuring energy security. This feeling represents a great confl uence for policy dialogues. But at the same time, the two governments should consider different factors in defi ning “energy security” and how to achieve it. China and the United States have similar oil interests and face common challenges. They should not view each other through a zero-sum lens. Political leaders in both countries should do more to reduce mutual suspicion and to raise strategic comfort with each other. Senator Joseph Lieberman, in a major address to the Council on Foreign Relations in November 2005, put the issue of energy security between the United States and China as a stark choice between cooperation and collision. Like a 21-century version of what the arms control and arms race between the United States and the former Soviet Union were in the 20th century, the two sides could run into a dangerous global race for oil if they do not start discussing with each other their mutual energy security concerns.14 China’s pursuit for energy resources worldwide has major repercussions for the rest of the world, in particular about China’s relations with the United States. But a collision course between the United States and China over energy is far from inevitable, as long as (a) Washington and Beijing can cooperate rather than rival each other and (b) the global oil market mechanism operates reasonably effi ciently.

### 1nc retaliation

Public won’t demand retaliation

Smith and Herron 5, \*Professor, University of Oklahoma, \* University of Oklahoma Norman Campus, (Hank C. Jenkins-Smith, Ph.D., and Kerry G., "United States Public Response to Terrorism: Fault Lines or Bedrock?" Review of Policy Research 22.5 (2005): 599-623, <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=hjsmith>)

Our final contrasting set of expectations relates to the degree to which the public will support or demand retribution against terrorists and supporting states. Here our data show that support for using conventional United States military force to retaliate against terrorists initially averaged above midscale, but did not reach a high level of demand for military action. Initial support declined significantly across all demographic and belief categories by the time of our survey in 2002. Furthermore, panelists both in 2001 and 2002 preferred that high levels of certainty about culpability (above 8.5 on a scale from zero to ten) be established before taking military action. Again, we find the weight of evidence supporting revisionist expectations of public opinion.

Overall, these results are inconsistent with the contention that highly charged events will result in volatile and unstructured responses among mass publics that prove problematic for policy processes. The initial response to the terrorist strikes demonstrated a broad and consistent shift in public assessments toward a greater perceived threat from terrorism, and greater willingness to support policies to reduce that threat. But even in the highly charged context of such a serious attack on the American homeland, the overall public response was quite measured. On average, the public showed very little propensity to undermine speech protections, and initial willingness to engage in military retaliation moderated significantly over the following year.

Perhaps most interesting is that the greatest propensity to change beliefs between 2001 and 2002 was evident among the best-educated and wealthiest of our respondents— hardly the expected source of volatility, but in this case they may have represented the leading edge of belief constraints reasserting their influence in the first year following 9/11. This post-9/11 change also reflected an increasing delineation of policy preferences by ideological and partisan positions. Put differently, those whose beliefs changed the most in the year between surveys also were those with the greatest access to and facility with information (the richest, best educated), and the nature of the changes was entirely consistent with a structured and coherent pattern of public beliefs. Overall, we find these patterns to be quite reassuring, and consistent with the general findings of the revisionist theorists of public opinion. Our data suggest that while United States public opinion may exhibit some fault lines in times of crises, it remains securely anchored in bedrock beliefs.

### 2nc no risk

There’s a low threshold for risk mitigation – we just have to win that terrorists would prefer convention means, not that they don’t want to attack at all.

Stratfor 8, (“Busting the Anthrax Myth,” July 30, <http://www.stratfor.com/print/120756>)

In fact, based on the past history of nonstate actors conducting attacks using biological weapons, we remain skeptical that a nonstate actor could conduct a biological weapons strike capable of creating as many casualties as a large strike using conventional explosives — such as the October 2002 Bali bombings that resulted in 202 deaths or the March 2004 train bombings in Madrid that killed 191.

We do not disagree with Runge’s statements that actors such as al Qaeda have demonstrated an interest in biological weapons. There is ample evidence [4] that al Qaeda has a rudimentary biological weapons capability. However, there is a huge chasm of capability that separates intent and a rudimentary biological weapons program from a biological weapons program that is capable of killing hundreds of thousands of people.

Misconceptions About Biological Weapons

There are many misconceptions involving biological weapons. The three most common are that they are easy to obtain, that they are easy to deploy effectively, and that, when used, they always cause massive casualties.

While it is certainly true that there are many different types of actors who can easily gain access to rudimentary biological agents, there are far fewer actors who can actually isolate virulent strains of the agents, weaponize them and then effectively employ these agents in a manner that will realistically pose a significant threat of causing mass casualties. While organisms such as anthrax are present in the environment and are not difficult to obtain, more highly virulent strains of these tend to be far more difficult to locate, isolate and replicate. Such efforts require highly skilled individuals and sophisticated laboratory equipment.

Even incredibly deadly biological substances such as ricin [5] and botulinum toxin are difficult to use in mass attacks. This difficulty arises when one attempts to take a rudimentary biological substance and then convert it into a weaponized form — a form that is potent enough to be deadly and yet readily dispersed. Even if this weaponization hurdle can be overcome, once developed, the weaponized agent must then be integrated with a weapons system that can effectively take large quantities of the agent and evenly distribute it in lethal doses to the intended targets.

During the past several decades in the era of modern terrorism, biological weapons have been used very infrequently and with very little success. This fact alone serves to highlight the gap between the biological warfare misconceptions and reality. Militant groups desperately want to kill people and are constantly seeking new innovations that will allow them to kill larger numbers of people. Certainly if biological weapons were as easily obtained, as easily weaponized and as effective at producing mass casualties as commonly portrayed, militant groups would have used them far more frequently than they have.

Militant groups are generally adaptive and responsive to failure. If something works, they will use it. If it does not, they will seek more effective means of achieving their deadly goals. A good example of this was the rise and fall of the use of chlorine [6] in militant attacks in Iraq.

### 2nc no extinction

Empirics are the trump card

Easterbrook, senior editor – The New Republic, ‘3

(Gregg, <http://www.wired.com/wired/archive/11.07/doomsday_pr.html>)

3. Germ warfare!Like chemical agents, biological weapons have never lived up to their billing in popular culture. Consider the 1995 medical thriller Outbreak, in which a highly contagious virus takes out entire towns. The reality is quite different. Weaponized smallpox escaped from a Soviet laboratory in Aralsk, Kazakhstan, in 1971; three people died, no epidemic followed. In 1979, weapons-grade anthrax got out of a Soviet facility in Sverdlovsk (now called Ekaterinburg); 68 died, no epidemic. The loss of life was tragic, but no greater than could have been caused by a single conventional bomb. In 1989, workers at a US government facility near Washington were accidentally exposed to Ebola virus. They walked around the community and hung out with family and friends for several days before the mistake was discovered. No one died. The fact is, evolution has spent millions of years conditioning mammals to resist germs. Consider the Black Plague. It was the worst known pathogen in history, loose in a Middle Ages society of poor public health, awful sanitation, and no antibiotics. Yet it didn’t kill off humanity. Most people who were caught in the epidemic survived. Any superbug introduced into today’s Western world would encounter top-notch public health, excellent sanitation, and an array of medicines specifically engineered to kill bioagents. Perhaps one day some aspiring Dr. Evil will invent a bug that bypasses the immune system. Because it is possible some novel superdisease could be invented, or that existing pathogens like smallpox could be genetically altered to make them more virulent (two-thirds of those who contract natural smallpox survive), biological agents are a legitimate concern. They may turn increasingly troublesome as time passes and knowledge of biotechnology becomes harder to control, allowing individuals or small groups to cook up nasty germs as readily as they can buy guns today. But no superplague has ever come close to wiping out humanity before, and it seems unlikely to happen in the future.

### link – bioterror

Bioterror threat discourse is a self-fulfilling prophecy---root cause of why we have unregulated research institutes

Leitenberg 9 senior research scholar, Center for Int. and Security Studies, School of Public Policy, U Maryland. Original academic training in Bio and Chem; researched at Albert Einstein Medical School, Department of Neurology; Vassar College; Northeastern University; and Washington University, St. Louis (Milton, The Self Fulfilling Prophecy of Bioterrorism, <http://www.cissm.umd.edu/papers/files/leitenberg_prophecy.pdf>)

The meat of the book arrives in its final fifty pages. In the penultimate chapter, Clark turns to the book’s subtitle to examine ‘‘the politics of bioterrorism in America’’ and asks, ‘‘How did we arrive at our current national posture regarding bioterrorism?’’ Answering this question should have been given significantly more pages than the eleven Clark dedicates to it. The answer is provided by a too-brief survey of developments between 1985 and 2001. (Presumably because it is targeted at a general reader, the book also contains only a short reference section. If the book appears in a second edition, it should expand the sources provided and correct a small number of technical errors. For example, the destruction of the U.S. BW stockpile took place in 1970 and 1971, before the 1972 signature of the BWC, not between signature in 1972 and ratification in 1975.)

To explain the situation after 2001, Clark quotes terrorism expert Bruce Hoffman:

[Bioterrorism] was where the funding was, and people were sticking their hands in the pot. It was the sexiest of all the terrorism threats and it was becoming a cash cow. So the threat of bioterrorism became a kind of self-fulfilling prophecy. It was archetypical Washington politics in the sense that you generate an issue and it takes on a life of its own. 29

The depiction is valid, although a bit expressionistic, but much more substantive detail should have been provided, such as the instrumental role of Vice President Dick Cheney, described briefly below. Clark’s final chapter, ‘‘Assessing the Threat,’’ examines the lessons of the Rajneeshshee, Aum Shinrikyo, and Amerithrax events and why these respectively failed or succeeded. He again reviews the specific pathogens usually considered likely candidates for illegitimate use and considers who might carry out a bioterrorist attack. He compares the potential consequences of such an event to natural disease mortality (specifically HIV/AIDS mortality in the United States). Clark concludes:

It’s time . . . to refocus our attention\*and our resources and creative energies\*more specifically toward some of nature’s own threats, rather than depending on spin-offs from our concern about bioterrorism. . . . The social and economic disruptions accompanying a bioterrorist attack do not even show up as a single pixel on the screen of what will happen when the world’s glaciers are gone and sea levels have risen by twenty feet.

This even-keeled assessment is a very far cry from that reached in another 2008 book, Bioviolence: Preventing Biological Terror and Crime, which author Barry Kellman of DePaul University says is based on ‘‘the realization that no other problem facing humanity is so potentially cataclysmic and has been so inadequately addressed.’’ 30

The intellectual history of touting the bioterrorist threat is a dubious one. It began in 1986 with an attack on the validity of the BWC by Douglas Feith, then an assistant to Richard Perle in President Ronald Reagan’s Defense Department and more recently undersecretary of defense for policy until August 2005. Feith introduced the idea that advances in the microbiological sciences and the global diffusion of the relevant technology heighten the threat of BW use. Though advances in molecular genetics and globalization increased drastically by 2008 in comparison to 1986, the number of states that maintain offensive BW programs has not. And despite the global diffusion of knowledge and technology, the threat of terrorist networks creating BW is low. But the invocation of overly alarmist themes continues. In 2005, Tara O’Toole, chief executive officer and director of the Center for Biosecurity at the University of Pittsburgh Medical Center, said, ‘‘This is not science fiction. The age of Bioterror is now.’’ 31 It hardly comes as a surprise to learn that the office of Vice President Cheney was the driving force behind the Bush administration’s emphasis on bioterrorism. 32 But one vital point missed by Clark is that Cheney was influenced by, among other things, the very same ‘‘Dark Winter’’ scenario with which Clark opens his book. The other influences on Cheney were a veritable hysteria of fears and phantoms in the White House following the 9/11 and the Amerithrax attacks, several of which concerned the potential of terrorist use of BW and which reportedly led Cheney to believe he might soon become a victim. 33

What must be noted is that although Al Qaeda’s interest in BW failed, the group’s efforts were specifically provoked by the severely overheated discussion in the United States about the imminent dangers of bioterrorism. A message from Ayman al-Zawahiri to his deputy on April 15, 1999, noted that ‘‘we only became aware of them [BW] when the enemy drew our attention to them by repeatedly expressing concerns that they can be produced simply with easily available materials.’’ 34 (In a similar vein, terrorism expert Brian Jenkins of the RAND Corporation has been at pains to point out that, ‘‘We invented nuclear terror.’’) 35 If in the coming decades we do see a successful attempt by a terrorist organization to use BW, **blame for it can be** in large part **pinned on** the **incessant scaremongering** about bioterrorism in the United States, which has emphasized and reinforced its desirability to terrorist organizations.

In a recent book written by former national security advisers Brent Scowcroft and Zbigniew Brzezinski, Scowcroft refers to the propagation of an ‘‘environment of fear’’ in the United States, which Brzezinski adds has made us ‘‘more susceptible to demagogy’’ which ‘‘distorts your sense of reality’’ and ‘‘channels your resources into areas which perhaps are not of first importance.’’ He continues:

We have succumbed to a fearful paranoia that the outside world is conspiring through its massive terrorist forces to destroy us. Is that a real picture of the world, or is it a classic paranoia that’s become rampant and has been officially abetted? If I fault our high officials for anything, it is for the deliberate propagation of fear. 3

I know of no statistical survey, but warnings regarding the bioterrorist threat have certainly been one of the major components in producing that ‘‘environment of fear.’’ A major contribution to that has been the work of a few, very determined, and very vocal nongovernmental purveyors of the bioterrorism threat, backed by one or two private foundations. The Sloan Foundation has also funded at least fourteen conferences in the United States and overseas; four of these were held by Interpol and three by the Department of Homeland Security. 37 Building on the fear emerging from the 9/11 and the Amerithrax attacks, this movement has generated $57 billion in federal budget authority to date, a large federal bureaucracy, strong congressional advocates, multiple research institutes and journals, and a thriving contractor industry\*the same ‘‘stakeholders’’ who now call for the continuation of efforts to fight and prevent bioterrorism.

In October 2008, David Koplow, professor of law at Georgetown University Law Center and a former deputy legal counsel in the Department of Defense, wrote:

It’s bad enough when an important federal government program designed to deal with a pressing national security threat turns out to be mostly a waste of money; it’s worse when that program also turns out to distract people and agencies from the more serious and fruitful approaches to the problem; it’s worst of all if that program actually contributes to making the problem even worse than it otherwise would be. The current bioterrorism program, tragically, accomplishes all three of these. . . .

[F]ar too little has been done to address the genuine biological threats to Americans and to suffering people around the world\*the quotidian scourges of AIDS, tuberculosis, malaria, measles, and cholera\*that not just ‘‘threaten’’ us in the abstract, but that actually kill and incapacitate millions of people annually. The most pressing public health threat to our national well-being might be the annual surge of ordinary influenza, but it has not benefited from the same sort of political anguish, emergency funding, and public attention that the national security entrepreneurs have discovered in the ever-looming fear of international bioterrorism. . . .

Bioterrorism is a serious, important danger, one that deserves serious, focused attention. But empowering a bioterrorism-industrial complex, and fostering a needless climate of fear, paranoia, and helplessness cannot lead to fashioning reliable, long-term solutions. Rational policy requires a genuine, level-headed risk assessment, and a sustained, balanced approach, not a knee-jerk public relations drama. 38

That same month, a World Health Organization report noted that, ‘‘Disproportionate investment in a limited number of disease programmes considered as global priorities in countries that are dependent on external support has diverted the limited energies of ministries of health away from their primary role.’’ 39 Attempting to convince ministries of health in African countries to make bioterrorism a primary concern, as Barry Kellman has advocated, can only divert them further from their primary role. Nor is this a concern only in the developing world. Even as the United States authorized $57 billion since 2001 to defend against select agents, U.S. life expectancy stood at forty-second in the world, and child mortality ranked twenty-ninth\*despite the fact that the United States spends more on health care per person than any other country. 40

### link – disease

Their discursive construction of health and disease is mediated by colonialist understandings of the “foreign” and “dangerous” other—epidemiological discourses reproduce power relations that make disease a threat in the first place.

Bradley Lewis 07, Professor at New York University—Department of Psychiatry and the Department of Social and Cultural Analysis, 2007, “The New Global Health Movement: Rx for the World,” New Literary History, Vol. 38 No. 3, pp. 459-477

Of course, *Rx* was made for popular audiences in the U.S. and so in its populist format, some may argue, it is more likely to reproduce these kinds of stereotypes than other more professional or expert discourses. This does not mean, however, that other medical discourses are devoid of these problematic "othering" stereotypes. All discourses deployed by the global health movement—whether they are political statements or funding agendas or the finite descriptions of disease behaviors in scientific papers—**are mediated by the culture, society, and politics in which they are produced.** Intentionally or not, they reproduce and relocate cultural, societal, and political ideas and constructions, including problematic **constructions of the contagious foreign "other."** § Marked 16:02 § The association of "foreignness" with contagion has **long been established in scientific discourses.** As Cindy Patton observes, the conflation of foreigners and "immigrants" with germs has been apparent since the emergence of "germ theory" in the late 1800s: a theory which was compounded by the emergence of immunology and virology in the twentieth century.36 This theory, and its more modern incarnations, represents germs—or, more belatedly, viruses—**as "foreign," "dangerous," "contagious," and a threat to the "pristine, clean, uninvaded, untouched**" body; a body which itself is commonly figured as "the 'virgin' land of the new world."37 Scientific discourses associated with HIV/AIDS—such as immunology and epidemiology—offer recent examples of the way these constructions continue to be reproduced. Immunologic discourses frequently deploy a language of **"foreignness and invasion"** in their accounts of HIV infection.38 Emily Martin cites one popular textbook that describes the process of "foreign antigen recognition" as the "human body's police force" being "programmed to distinguish between *bona fide* residents and illegal aliens."39 Epidemiological discourses on HIV/AIDS have similarly reinvigorated these stereotypes when they have designated entire populations—such as Haitians or sub-Saharan Africans—as "risk groups." The near consensus among AIDS immunologists and epidemiologists that Africa is the primary site of HIV also **powerfully reinstalls the link** between foreignness and contagion. Whether latent or manifest, **such exclusionary "othering" and racist stereotypes keep being reinstated**, *even* by the world health advocates (such as the makers of *Rx*) and scientists who are concerned with saving the globe against disease and ill health. If the global health movement does not take this into account it may well, in McFadden's words, **reproduce the very relations of exploitation, supremacy, and servitude underlying the social and survival crises that currently face our world.**

## 1NR

### ov

**B – greenwashing – this only matters because we as citizens choose to be hoodwinked by corporations, care about the environment is a prerequisite to consumption practices**

Byrne et al 12

<http://www.ceep.udel.edu/energy/publications/2012_ge_WIRE_Energy&Environment_social-change-to-avert-climate-change_jb+lado+job.pdf>

CONCLUSION It is our hope that the picture of social change etched in the paper will help researchers and policy analysts seeking to better define what is needed by country/ region. By grouping options for social change into menus that dramatically reduce the carbon intensity of human acitivty and the rate of energy use to develop, we believe practical agendas of action can begin to be formed. Elsewhere50,53,54 we have discussed needed political and economic changes to realize a long-term sustainable and equitable rate of per capita emissions (defined in Ref 52). We are heedful of the record of international gridlock and the particularly disappointing inaction of the United States as we now consider what is to be done with the pictures of social change we have presented here. Recognizing that many have tried their hand at drafting blueprints for climate action and, importantly none has worked, we have decided against what would be an arrogant answer from us—another blueprint. Instead, we offer principles for building a new strategy that bear in mind the less than encouraging evidence on the possibilities of significant social change. In concluding with principles, we admit that our approach is still a long way from answering the challenge. We simply do not have anything better to offer to the research community at this time. The principles are from a paper prepared by CEEP for the COP-17 meeting in Durban, South Africa.55 The paper argues for a reconsideration of what consitutes ‘success’ and offers a specific redefinition of success for the international community to pursue. CEEP’s paper argues that international strategies to date have prioritized commodity based paradigm, which has failed because (1) it concentrates attention on negotiating emission reductions as though we could trade off marginal risks of climate change and marginal economic cost; (2) such a paradigm treats the interests of peoples and nations in an equitable and just solution as secondary; and (3) market-based approaches significantly reduce developing country autonomy to select a development pathway in line with their sustainable development objectives, priorities, and needs. In place of a commodity-based paradigm, CEEP’s paper advocates a new approach, which prioritizes social and ecological relations and emphasizes an equitable distribution of capabilities to fulfill human needs and wants. The approach emphasizes sustainable development defined through bottom-up discourses and encourages investigation of a commons-based paradigm, which elevates the principles of autonomy, sustainability, equity, and ecological justice in the (inter)national efforts to address climate change. The strategy outlined in the paper recognizes several recent developments in international negotiations on climate change that would allow for the formulation of bottom-up discourses guided by the principles of autonomy, sustainability, equity, and ecological justice. Incorporating these principles into the core of decision-making would emphasize the shared responsibility for livelihoods and environments and prioritize social and ecological relations over carbon commerce per se. Considerations of sustainability inform the decision portfolio by highlighting the prerequisite of an emissions trajectory that limits climatic change to a temperature increase of 2◦C. In turn, recognition of the need to uphold the principles of equity and justice would call attention to the highly uneven patterns of energy use and GHG emissions now observed among the world’s nations and the inequitable dsitribution of the effects of climate change. The adoption of these principles would provide insight into the particular social and ecological benefits and disbenefits of the various menus of social change available. Further, the outgrowth of governance opportunities through the specific inclusion of autonomy in the form of a participatory bottom-up discourse allows for a proper and inclusive selection of the menus of social change in line with the countryor region-specific characteristics and social relations. In conclusion, we see the positioning of these principles at the basis of decision-making as a core first step in effectively addressing climate change through social change. We would like to note that the alternative principles and paradigm we propose are not meant to presume that market-based mechanisms are inappropriate or off limits. Rather, we are suggesting priority be given to bottom-up discourses to identify the appropriate menus for social change—these discourses can decide the suitability of markets or other tools. In effect, we are encouraging the view that we should not choose tools first and purposes, principles, and paradigms later, but the other way around. We are also convinced from the pictures of needed social change provided in the analysis given above that the mentality and associated politics and economics of commodity-based strategies are dampening the level of action and the range of consensus required to avert further, still more dangerous climate change. Humanity has no authority to trade an increment of climate risk for an increment of lowered economic cost. The atmosphere and our ties to it cannot be expressed in this marginal reasoning. It is wrong to assume it can be. It wastes time when we dwell only or mainly on this idea.

### fw

Their ev says reps don’t shape reality, but their card also says we should use an ‘ontology of history’ to compare truth claims – that’s a reason the methodology of the law needs to come first, otherwise their education is bankrupt

Craig Jones 13, PhD student at the University of British Columbia, Vancouver. Department of Geography. Scholar at the Liu Institute for Global Issues at UBC. Research update – method in the madness?, warlawspace.com/2013/09/30/research-update-method-in-the-madness/

Steven Keeva called the First Gulf War the first ‘lawyers war’, though in fact this isn’t quite correct because lawyers were involved in Panama a couple of years earlier and – albeit in a very different way – in Vietnam too; but that’s for a later post. While the last two decades have witnessed an unprecedented rise in the provision of legal advice in operational decision making, crucial questions still remain about what military lawyers do and how they contribute to the targeting process, and I’ll get to these questions in a moment. Before asking the more theoretical questions that interest me, I have found it more useful to begin with seemingly straightforward and pragmatic questions. I use ‘seemingly’ advisedly: targeting is a very technical process and to understand the role that the lawyer plays, one first has to understand how targeting works. There is a lot of jargon; there are many different types of targeting; many different ‘phases’ and ‘rhythms’; many different rules; endless information feeds; numerous intelligence (re)sources and analyses; countless technicalities and calibrations; and, I could go on. My point is that, just as the military lawyer must learn the technical specifics of military operations (and I mean everything from RoE and ‘place-based’ knowledge to munitions and weaponeering), we, as scholars and publics, too must understand how the thing gets done if we want write and think responsibly and – I hope – critically and authoritatively about the role of the lawyer in targeting and (more broadly) the role of law in war. Of course, such proximity requires extra vigilance, else understanding quickly turns on empathizing and with it comes an apology for pragmatism – what Costas Douzinas once called the ideology of Empire.

Research update – method in the madness?

September 30, 2013 by jonescraig

After a long radio silence – my apologies – I’m back in the UK (although whether I’m back ‘home’, I’m not so sure…). I’m here for a number of reasons, and want to thank Peter Adey and the Department of Geography at Royal Holloway University of London for hosting me as a visiting scholar for the semester. It has been an action-packed first week, and I’m glad to confirm that I’ll be giving a departmental talk, ‘The War Lawyers & The Targeting Machine’, later in the semester and will be leading a one-off guest seminar, ‘war/law/space’ (!), for the MSc Geopolitics & Security group, a bright and diverse bunch who I had the pleasure of meeting last week.

The other reason I’m here is to conduct the final component of my research: to try to figure out how the Royal Air Force approaches and executes its targeting missions in Afghanistan and Iraq. For those who are new to the blog, my study is a multi-site investigation of the role that legal advice and operational law play in the conduct of lethal targeting operations. So far my focus has been on Israel and the U.S. and I have been busy (hence the silence, I think) interviewing former and current legal advisors on their practical and often nail-biting role in what is a tremendously complicated and variegated targeting process. It is impossible to condense the lawyers role into a few sentences, not least because it changes from one state/air force to another and is a highly contextual practice which also varies from one operation to the next. I have written very some preliminary notes on the U.S. and Israeli cases here and here and I promise to fill in the U.K. blanks shortly.

Steven Keeva called the First Gulf War the first ‘lawyers war’, though in fact this isn’t quite correct because lawyers were involved in Panama a couple of years earlier and – albeit in a very different way – in Vietnam too; but that’s for a later post. While the last two decades have witnessed an unprecedented rise in the provision of legal advice in operational decision making, crucial questions still remain about what military lawyers do and how they contribute to the targeting process, and I’ll get to these questions in a moment. Before asking the more theoretical questions that interest me, I have found it more useful to begin with seemingly straightforward and pragmatic questions. I use ‘seemingly’ advisedly: targeting is a very technical process and to understand the role that the lawyer plays, one first has to understand how targeting works. There is a lot of jargon; there are many different types of targeting; many different ‘phases’ and ‘rhythms’; many different rules; endless information feeds; numerous intelligence (re)sources and analyses; countless technicalities and calibrations; and, I could go on. My point is that, just as the military lawyer must learn the technical specifics of military operations (and I mean everything from RoE and ‘place-based’ knowledge to munitions and weaponeering), we, as scholars and publics, too must understand how the thing gets done if we want write and think responsibly and – I hope – critically and authoritatively about the role of the lawyer in targeting and (more broadly) the role of law in war. Of course, such proximity requires extra vigilance, else understanding quickly turns on empathizing and with it comes an apology for pragmatism – what Costas Douzinas once called the ideology of Empire.

Fortunately, the airforces in my study are more open and frank than is frequently assumed, and I am only repeating what my supervisor Derek Gregory first told me years ago when I say that the U.S. armed forces are prolific publishers on these matters (for the tip of the ice-berg see here). CIA and secret and classified operations are, of course, something else entirely and often so too are the RAF and Israeli Air Force. Anyhow, I am slowly reconstructing and understanding the targeting process and will be sharing any new material that I find over the coming months. In the meantime, Derek Gregory remains our best source for a critical understanding of the kill-chain (at the very least see his ‘drones’ tab here). I should also say that targeting/military language is not the only lexicon I have had to learn – or at least have tried to learn – in this project; I am also trying my best to become conversational in law and legalese. Needless to say, one wouldn’t get very far with a military lawyer who has 30 years service under his/her belt without at least some knowledge of the relevant law. As one former military lawyer for the IDF told me, “you’d have no chance; they’d eat you for breakfast”. But as it was, one or two of the lawyers invited me to breakfast not to eat (me) but to talk, and it is through such discussions that I have been realising that – surprise surprise – the text is not the practice and that what happens in the manual is one thing; the real world of military operations and legal advice, quite another.

Having nearly completed the Israeli and U.S. components of my study I am now better placed to understand what the pertinent questions are. Now that I am in the U.K., I’ll be asking questions which will help me to compare the different approaches taken by the U.S., Israel and the U.K. toward legal advice and targeting. The following are some tensions which have arisen thus far:

a) What is the formal and non-formal (by which I mean unspoken, implicit and de facto) role of the legal advisor? Does s/he merely (sic) advise and leave it for the commander to decide, or has the legal advisor gained an effective veto power as to whether a strike goes ahead? Many lawyers have been reticent to admit the latter, though others have assured me that it frequently takes place and that they have been personally responsible for giving the effective final word on life and death operations.

b) Where should the lawyer be located? Should s/he accompany troops on potentially life-threatening missions (as is common in the U.S. Army) or should s/he stay at the military base or the Air Operations Centre (AOC) (as is common in the U.S. Air Forces)? It may be surprising to some – it certainly was to me – that U.S. legal advisors die on the battlefield while on active duty. Not in Israel, because they are not forward deployed. One U.S. lawyer spoke of going out on multiple IED de-activation missions as a way of gaining respect from soldiers whose daily life and death was marked by ‘tours’ outside of the green zone in Baghdad. There are many commentators who think lawyers have no place at what the military call the ‘tip of the spear’, but the commanders who rely on their legal advice beg to differ; to them the lawyer has been likened to a priest bringing redemption. Not quite ‘forgive me Lord for I have sinned’, but ‘advise me Lawyer so that I may not’, perhaps?

c) When should the lawyer be involved? Few in the respective military establishments now doubt that military lawyers perform an important role in operations; they provide a clear legal analysis as to whether this or that action is legal and thus serve as a safety valve for the commander who is not so sure. This may or may not be a good thing and many question whether the power to decide has not been delegated away from the commander, only to be taken by a lawyer who may have little experience in military operations. But the crux of the issue here is whether legal advisors should be involved only in the planning part of the targeting process, or whether they should also be involved in time-sensitive decision making where legal calls are required in seconds, not hours and days. The cartoon parable of this, which I can’t find now, is of the military lawyer, rule book in hand ,running after the soldier onto the battlefield and the soldier asks “can I…”

I am putting all of this (and much more) together to ask a different kind of question at once practical yet also political and philosophical: what effects do the military lawyer and operational law have on the targeting process? This Foucauldian inspired question seeks to understand the functioning of a legal practice and of certain legal experts in the production of a discourse which we might broadly characterize as the ‘judicialization of war’. As legal questions have come, more and more, to dominate discussions about war, I think it is worth pausing to reflect on the consequences and to ask at what cost have legal questions come to the fore? The problem with law (though clearly not everyone sees it as a problem) is that it confers legitimacy and at the political level, this legal-legitimate amalgam has come to stand in for the other questions we might be asking about war; not ‘is it legal?’ but rather ‘is it right?’ or more simply, ‘why war?’ Military lawyers are not stupid people and modern militaries are not the buffoons they may once have been; both are attuned to and tune into how publics perceive what they do, hence why the Israeli military have become social media fanatics. To paraphrase Foucault, and to borrow from Derek Gregory, modern militaries have become obsessed with the ‘conduct of their conduct’. This means that they are surprisingly reflective and reflexive about what they do and how it is represented. Representing war – or targeted killing – as legal provides lethal action with a skein of legitimacy, but what difference does the law make, and *on what difference is international law founded?* For, and at my most provocative I ask, what difference does it make to the victim of a drone strike whether or not the strike was legal? The answer for a legalistic discourse of war is that many never stop to consider that there is something beyond the law.

### links

They say the public fails – they’ve conceded that interrogating the logics behind securitization independently solve our K’s on the case, but fiat is backwards – technocracy is a reason it’s try to die to crack open the apparatus that, THEY’RE RIGHT, is specifically designed to shut out deliberation

Stephanie A. Levin 92, law prof at Hampshire College, Grassroots Voices: Local Action and National Military Policy, 40 Buff. L. Rev. 372

We are so accustomed to thinking of military policy as exclusively a matter of federal concern that it is easy to forget that, in fact, as in all policy-making, there is a complex relationship between local interests and national decisions.8 The question is not whether local interests are represented, but how they are represented; whether they are filtered exclusively through national government officials, elected or appointed, or are expressed directly at the grassroots level. One important form of grassroots action is popular protest. In the area of military policy there is a rich history of such protest, stretching from the individual conscientious objection of pre-Revolutionary Quakers9 and celebrated civil disobedients like William Lloyd Garrison10 and Henry David Thoreau11 to the mass anti-war demonstrations of World War I, the Vietnam War, and the nuclear freeze movement of the early 1980's.'2 Popular protest plays a critical, if often overlooked, role in the shaping of official policy that eventually takes on the force of law.13 My focus here is more specific. This article is directed not at grassroots action which takes place "out of doors," in the streets and unofficial gathering places of our communities, but only at those grassroots actions which operate through the official channels of local government. The theme is the use of local power to affect military policy decisions. The issue is one not only of individual rights, but also of federalism. The key question is what role, if any, the Constitution permits for decentralized decision-making in the area of military policy. Part I will demonstrate the surprising variety of local activity in this field, ranging from local referenda on specific issues of military policy, to community decisions to resist certain Defense Department projects on health or environmental grounds, to a vigorous nuclear free zone movement Such activity has become more frequent and more self-aware in recent years, part of a broader "municipal foreign policy" movement which has grown in strength during the past decade.14 Action at the local level is often the most accessible means for citizens feeling otherwise shut out from participation in military policy decision-making to express themselves and be heard. Recently, this grassroots movement has provoked a direct counterresponse from the federal government, which views such local action as an unconstitutional invasion of federal prerogative.15 One of the first legal prongs of that response was the Justice Department's suit, in September of 1989, against the City of Oakland, California, to invalidate that city's nuclear free zone ordinance. The district court decision favoring the United States in that case is currently on appeal to the Ninth Circuit'6 In Part II, I will assess the competing claims that either military policy is exclusively a matter of federal concern or that there is constitutional space for input from the state or local level. Part II concludes that while conventional wisdom and the trend of recent precedent favor increasingly centralized control over military matters, in fact the constitutional text and its history leave open an ambiguous and contested space for the interaction of local action and federal control. Part III urges that this space receive legal protection. As I will demonstrate, two important currents in contemporary legal thought — neo-repubhcanism and feminist jurisprudence — both underscore the importance of direct citizen voice and participation. Such participation serves at least two critical goals. First, grassroots activity permits each citizen to express and affirm her own sense of self while making a larger commitment to the community and the nation. Individual citizens need not be silent and frequently cynical observers of national politics; they can be vocal participants. Second, such decentralized action has creative and revitalizing effects upon national policy. War, and our now-permanent state of preparation for war, affect our daily lives and the lives of our communities at the most intimate levels. This Article argues that our constitutional values would be enriched by stimulating, rather than choking off, grassroots voices that speak to these concerns.

### threats real

Our arg is not that their authors are conspiring, but their disciplinary blinders produce ideological readings of data that they present as neutral. Appeals to truthiness are a link, not an indict

Bigo 6

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Translation, biopolitics, colonial difference

 By Naoki Sakai, Jon Solomon

In the approach to (in)securitization processes that I propose here, it will be important to avoid the reigning tendency (the doxa) of the field. This commonly involves attributing a coherent set of beliefs to the professionals involved in the field, an approach I avoid in order not to gratuitously unify their divergent interests, by analyzing them wrongly as willing allies or accomplices. On the contrary, it is important to differentiate clearly between various parties' standpoints on how to prioritize threats that may include terrorism, war, organized crime, and what is called migratory invasion or reverse colonization, while at the same time marking the correlation between various metiers, which may include professions of urban policing, criminal policing, anti-terrorist policing, customs, immigration control, intelligence, counter-espionage, information technologies, long-distance systems of surveillance and detection of human activities, maintenance of order, reestablishment of order, pacification, protection, urban combat, and psychological action. These metiers do not share the same logic of experience or practice, and do not converge neatly into a single function under the rubric of security. Rather, they are both heterogeneous and in competition with each other. As we will see, this is true, even if the differentiations mapped out by the near-mythical idea of the national impervious state-controlled border tends to disappear, given the effects of trans-nationalization. Three key events are taking place, now that it has taken several centuries for these metiers to differentiate in the first place: a de- differentiation of professional activities as a result of this configuration; a growth in struggles to re-define the systems that classify the social and cultural struggles as security threats; and a practical redefinition of systems of knowledge and know-how that connect the public and private security agencies who claim to possess a "truth" founded on numerical data and statistics, applied to the cases of persons who feel the effects of the in-securitization, living in a state of unease. Such professional managers of unease then claim, through the "authority of the statistics," that they have the capacity to class and prioritize the threats, to determine what exactly constitutes security. Here, this concept is reduced to the correlation between war, crime, and migration, and does not include (the loss of employment, car accidents, good health itself abruptly made in-secure as social benefits are dismantled) all elements which are considered, on the contrary, as normal risks. Finally, this "authority" of the statistics and the routine of collecting them with their technologies and categories, allows such professionals to establish a "field" of security in which they recognize themselves as mutually competent, but at the same time find themselves in competition with each other for the monopoly of the legitimate knowledge on what constitutes a legitimate unease, a "real" risk.

### romm

Their way of approaching the problem is bad – economic discourse hijacks climate policy, enforces bad solutions, limits political possibilities

Methmann ‘10 (Chris Paul, Prof. @ U. of Hamburg, “‘Climate Protection’ as Empty Signifier: A Discourse Theoretical Perspective on Climate Mainstreaming in World Politics” Millenium Journal of International Studies, Vol. 39, pp. 364-366)

As to the ethics of government, climate protection is justified by the logic of economic calculation.90 Only if its overall benefits exceed its costs does climate protection appear to be justified. Especially under conditions of uncertainty, this definitely narrows the scope for political action to those policies that are already established as economically efficient. It prefers so-called win-win solutions that are both economically profitable and climate-friendly.91 As a result, it privileges such policies that do not negatively affect economic growth to any significant extent. Moreover, growth often appears as an **unquestioned fundamental condition** for any policy. The fundamental significance that is assigned to economic growth is even embodied by the United Nations Framework Convention on Climate Change (UNFCCC) Article 3(5) obliging parties ‘to promote a supportive and open international economic system that would lead to sustainable eco- nomic growth’. Furthermore, its significance is expressed in the debates about a green new deal which emerged during the recent economic crisis.92

Unsurprisingly, the ethics of growth is also to be found in most of the documents of economic organisations. Economic growth here often appears as an unquestioned fundamental condition for acting on climate change. The problem is to ‘make a low-carbon society compatible with economic growth’93 and to meet ‘the wider ambitions for economic growth’.94 Two inclusive strategies incorporate economic growth into the climate discourse and turn it into a prerequisite for achieving climate protection. According to the idea that **growth greens**, it is argued that ‘wealthier societies demand higher environmental standards’.95 Moreover, increased economic activity offers countries the opportunity for ‘investing this growth in pollution prevention’.96 The relation of equivalence between growth and climate protection is reinforced by the idea of green growth which has in particular emerged during the economic recession at the end of the last decade. According to this storyline, ‘climate protection has a part to play in supporting the economic recovery and sustainable growth’.97 Because investing in climate- friendly technology can ‘stimulate new clean tech businesses’,98 ‘we can make going green compatible with increased prosperity’.99 In this sense, concentrating on economi- cally profitable areas of climate protection can generate win-win situations so that ‘green and growth are working hand in hand’.100 In sum, this equivalence means it is possible that even in the face of climate change the basic social structure of economic growth is not questioned as such.

The idea of green growth is particularly convincing because it also draws on other patterns of climate protection. First of all, as was found in some of the texts, the problem structure of climate change is also defined as an ‘externality problem’.101 It is one of the ‘tensions that accompany growth’,102 but obviously it is not necessarily linked to it. Rather, economic activity produces a ‘human footprint on the global climate’.103 The metaphor of a footprint implies that it can easily be cleared while the object it appears on remains more or less untouched. We just have to make sure that we walk on the ‘low greenhouse gas emission-intensive paths’104 in order not to leave footprints on the climate anymore. This externality image supports the growth articulations. Secondly, as mentioned earlier also, scientific uncertainty defends growth because we do not know for sure what its environmental consequences will be. We have to be aware that ‘economic growth can surprise us’.105 Finally, also the idea of efficient technology (which is explained below) is crucial in that it makes the transition from growth to green growth possible: ‘innovation can lead to a greener growth model’.106 Thus, the idea of green growth shows how the basic patterns of climate protection can be combined into more complex articulations that include the status quo in the climate protection discourse.

### dickinson

Dickenson is wrong—Liberalism is incapable of checking the worst excesses of biopolitics

Dean ‘1 (Mitchell, Professor of Sociology at Macquarie University, 2001, “Demonic Societies: Liberalism, biopolitics, and sovereignty.” Ethnographic Explorations of the Postcolonial State, ed. Hanson and Stepputat, p. 50-1)

Finally, although liberalism may try to make safe the biopolitical imperative of the optimization of life, it has shown itself permanently incapable of arresting—from eugenics to contemporary genetics---the emergence of rationalities that make the optimization of the life of some dependent on the disallowing of the life of others. I can only suggest some general reasons for this. Liberalism is fundamentally concerned to govern through what it conceives as processes that are external to the sphere of government limited by the respect for rights and liberties of individual subjects. Liberal rule thus fosters forms of knowledge of vital processes and seeks to govern through their application. Moreover, to the extent that liberalism depends on the formation of responsible and autonomous subjects through biopolitics and discipline, it fosters the type of governmental practices that are the ground of such rationalities. Further, and perhaps more simply, we might consider the possibility that sovereignty and biopolitics are so heterogeneous to one another that the derivation of political norms from the democratization of the former cannot act as a prophylactic for the possible outcomes of the latter. We might also consider the alternative to this thesis, that biopolitics captures and expands the division between political life and mere existence, already found within sovereignty. In either case, the framework of right and law can act as a resource for forces engaged in contestation of the effects of biopower; it cannot provide a guarantee as the efficacy of such struggle and may even be the means of the consolidation of those effects.

### pipelines

Oceans are resilient

Bjørn Lomborg, Director, Environmental Assessment Institute, THE SKEPTICAL ENVIRONMENTALIST, ‘1 p. 189

But the oceans are so incredibly big that our impact on them has been astoundingly insignificant - the oceans contain more than 1,000 billion liters of water. The UN’s overall evaluation of the oceans concludes: “The open sea is still relatively clean. Low levels of lead, synthetic compounds and artificial radionuclides, though widely detectable, are biologically insignificant. Oil slicks and litter are common among sea leans, but are, at present, a minor consequences to communities of organisms living in ocean waters.

### huq

Huq votes neg

Aziz Z. Huq 12, Chicago law prof, “binding the executive (by law or by politics)”, August, <http://www.law.uchicago.edu/files/file/400-ah-binding.pdf>

First, the capacity of our political system to generate meaningful checks on the national executive may be waning. National legislative politics in the United States are characterized by **growing polarization** between the two main parties. Legislative caucuses for both parties are more ideologically coherent than they were a generation ago; ideological overlap between the parties has vanished.229 The combination of ideologically homogenous and distinct parties with bicameralism and presentment predictably generates legislative gridlock.230 Either one side or the other can be relied upon to leverage vetogates in the legislative process. This affects not only fiscal matters—as the 2011 debt ceiling debate illustrated—but also impedes the possibility of effective political checks on the executive. In the absence of a major partisan realignment, the conditions for neither significant political nor legal constraint may be met.231 More subtly, deepening ideological commitments may render voters less receptive to new information. Revelation of executive abuse—whether it is the exploitation of Chrysler’s creditors or Guantánamo detainees—may consequently be less likely to influence a chief executive’s credibility or popularity. It may not be law’s weakness but the short-term deliquescence of American politics that drives changes to the scope of executive power in coming decades. Second, the exercise of executive discretion, especially in emergencies, may have troubling distributional consequences. If politics plays a role in shaping executive constraint, it is to be expected that the distribution of losses among social groups will be a function of those groups’ influence in national politics. In the current structure of national politics, “affluent people have considerable clout, while the preferences of people in the bottom third of the income distribution have no apparent impact on the behavior of their elected officials.” 232 Information about national politics is similarly unevenly distributed within the electorate. 233 As a result, “policy outcomes strongly reflect the preferences of the most affluent but bear virtually no relationship to the preferences of poor or middle-income Americans.” 234 In moments of crisis, when the politically ill-connected have the least opportunity to compensate for their impoverished leverage through time-consuming political mobilization, the effects of asymmetrical influence may be especially pronounced. Emergencies often impose sudden, large losses on the polity though their immediate impact (for example, Hurricane Katrina) or indirectly due to a costly government response (for example, 9/11). In a world in which political mechanisms bear heavily on executive responses, losses will be allocated disproportionately to those with the least political influence, exacerbating their ex ante disenfranchisement.235 Returning to that fraught Thursday in September 2008, consider again the Troubled Asset Relief Program236 (TARP) created by Congress in response to Treasury Secretary Paulson’s pleas. 237 TARP provides a useful platform for analysis here because its implementation was largely a matter of executive discretion rather than legislative direction. Although losses on TARP were not as great as feared,238 the primary beneficiaries of the intervention were “creditors and counterparties” of financial institutions.239 By contrast, elements of TARP meant to serve broad swaths of the public, such as its mortgage restructuring program, were later deemed at best a “qualified” success.240 TARP also aggravated the “too big to fail” problem, leaving the financial industry more concentrated and more confident of its implicit taxpayer-funded subsidy.241 The risk of a future crisis, which will likely be remedied from the public purse, is thus greater at the time of this writing than it was in early 2008. The political foundations of executive constraint, in short, may be fraying as greater legislative polarization and political inequality create political dynamics in which political elites are increasingly unlikely to converge on opposition to a President. This in turn will change both the quantity of constraint and the downstream distributive effects of executive initiatives.

CONCLUSION

The general tenor of The Executive Unbound is optimistic. Increased presidential authority is a boon. When it is not, there are political checks in reserve. The book’s normative implication is quietist. Effort to constrain the executive is pointless and unnecessary. But the account developed in this Review suggests more cause for pessimism about both the current state of affairs and future prospects for national governance. Just as liberal legalists hoped for too much from the law, so PV’s aspirations for politics may be disappointed. Rather than emphasizing law alone or politics alone, I have argued that the executive is constrained most by complementary action of legal and political mechanisms. My primary goal has been to posit an alternative description of executive restraint and to suggest that much more work needs to be done specifying the precise mechanics whereby legal and political mechanisms interact to produce checks under diverse background institutional and political circumstances. In closing I have also suggested that my alternative account of executive checks has normative implications. This account at a minimum implies that the current optimality of executive action cannot be assumed. And it hints that talk of an “unbounded” executive may be increasingly descriptively correct because national politics is becoming more polarized and more elite-driven. The burden of this emerging political economy of executive power, I suspect, will fall hardest on those who can least afford to bear its costs. Inevitable or not, this to me hardly seems cause for celebration.

### at: perm

The kneejerk jump to legalism crowds out critical examination of state power

Robert Knox, PhD Candidate, London School of Economics and Political Science.2012, paper presented at the Fourth Annual Conference of the Toronto Group for the Study of International, Transnational and Comparative Law and the Towards a Radical International Law workshop, “Strategy and Tactics,”

this warning is of great relevance to the type of ‘strategic’ interventions advocated by the authors. there are serious perils involved in making any intervention in liberal-legalist terms for critical scholars. the first is that – as per their own analysis – liberal legalism is not a neutral ground, but one which is likely to favour certain claims and positions. Consequently, it will be incredibly difficult to win the argument. Moreover, **even if** the argument is won, the victory is likely to be a very particular one – inasmuch as **it will foreclose any wider consideration of the structural or systemic causes** of any particular ‘violation’ of the law. All of these issues are to some degree considered by the authors.44 However, given the way in which ‘strategy’ is understood, the effects of these issues are generally confined to the immediate, conjunctural context. As such, the emphasis was placed upon the way that the language of liberal legalism blocked effective action and criticism of the war.45 Much less consideration is placed on the way in which advancing such argument impacts upon the long term effectiveness of achieving the strategic goals outlined above. Here, the problems become even more widespread. Choosing to couch the intervention in liberal legal terms ultimately reinforces the structure of liberal legalism, rendering it more difficult to transcend these arguments.46 In the best case scenario that such an intervention is victorious, this victory would precisely seem to underscore the liberal position on international law. Given that international law is in fact bound up with processes of exploitation and domination on a global scale, such a victory contributes to the legitimation of this system, **making it very difficult to argue against its logic.** this process takes place in three ways. Firstly, by intervening in the debate on its own terms, critical scholars reinforce those very terms, as their political goals are incorporated into it.47 It can then be argued the law is in fact neutral, because it is able to encompass such a wide variety of viewpoints. Secondly, in discarding their critical tools in order to make a public intervention, these scholars abandon their structural critique **at the very moment when they should hold to it most strongly**. that is to say, that at the point where there is actually a space to publicise their position, they choose instead to cleave to liberal legalism. thus, even if, in the ‘purely academic’ context, they continue to adhere to a ‘critical’ position, in public political terms, they advocate liberal legalism. Finally, from a purely ‘personal’ standpoint, in advocating such a position, they undercut their ability to articulate a critique in the future, precisely because they will be contradicting a position that they have already taken. the second point becomes increasingly problematic absent a guide for when it is that liberal legalism should be used and when it should not. Although the ‘embrace’ of liberal legalism is always described as ‘temporary’ or ‘strategic’**,** there is actually very little discussion about the specific conditions in which it is prudent to adopt the language of liberal legalism. It is simply noted at various points that this will be determined by the ‘context’.48 As is often the case, the term ‘context’ is invoked49 without specifying precisely which contexts are those that would necessitate intervening in liberal legal terms. Traditionally, such a context would be provided by a strategic understanding. that is to say, that the specific tactics to be undertaken in a given conjunctural engagement would be understood by reference to the larger structural aim. But here, there are simply no considerations of this. It seems likely therefore, that again context is understood in purely **tactical terms.** Martti Koskenniemi can be seen as representative in this respect, when he argued: What works as a professional argument depends on the circumstances. I like to think of the choice lawyers are faced with as being not one of method (in the sense of external, determinate guidelines about legal certainty) but of language or, perhaps better, of style. the various styles – including the styles of ‘academic theory’ and ‘professional practice’ – are neither derived from nor stand in determinate hierarchical relationships to each other. the final arbiter of what works is nothing other than the context (academic or professional) in which one argues.50 On this reading, the ‘context’ in which prudence operates seems to the immediate circumstances in which an intervention takes place. this would be consistent with the idea, expressed by the authors, that the ‘strategic’ context for adopting liberal legalism was that the debate was conducted in these terms. But the problem with this understanding is surely evident. As critical scholars have shown time and time again, the contemporary world is one that is deeply saturated with, and partly constituted by, **juridical relations**.51 Accordingly, there are really very few contexts (indeed perhaps none) in which political debate is not conducted in juridical terms. A brief perusal of world events would bear this out.52 the logical conclusion of this would seem to be that in terms of abstract, immediate effectiveness, the ‘context’ of public debate will almost always call for an intervention that is couched in liberal legalist terms. This raises a final vital question about what exactly distinguishes critical scholars from liberal scholars. If the above analysis holds true, then the ‘strategic’ interventions of critical scholars in legal and political debates will almost always take the form of arguing these debates in their own terms, and simply picking the ‘left’ side. thus, whilst their academic and theoretical writings and interventions may (or may not) retain the basic critical tools, the public political interventions will basically be ‘liberal’. The question then becomes, in what sense can we really characterise such interventions (and indeed such scholars) as ‘critical’? The practical consequence of understanding ‘strategy’ in essentially tactical terms seems to mean always struggling within the coordinates of the existing order. Given the exclusion of strategic concerns as they have been traditionally understood, **there is no practical account for how these coordinates will ever be transcended** (or how the debate will be reconfigured). As such, **we have a group of people struggling within liberalism, on liberal terms,** who may or may not also have some ‘critical’ understandings which are never actualised in public interventions. We might ask then, apart from ‘good intentions’ (although liberals presumably have these as well) what differentiates these scholars from liberals? Because of course liberals too can sincerely believe in political causes that are ‘of the left’. It seems therefore, that just as – in practical terms – strategic essentialism collapses into essentialism, so too does ‘strategic’ liberal legalism collapse into plain old liberal legalism.53