### Modeling

#### Plan gets modeled

Laporte 10 (Margo, JD @ Duke Law School, "BEING ALL IT CAN BE: A SOLUTION TO IMPROVE THE DEPARTMENT OF DEFENSE'S OVERSEAS ENVIRONMENTAL POLICY," 20 Duke Envtl. L. & Pol'y F. 203, lexis)

Furthermore, the DoD should negotiate environmental assessments and remediation with the host country. Like the United States' nuclear non-proliferation policy, one of the DoD's goals in negotiating with the host country should be to encourage safe environmental practices. n286 As the D.C. Circuit explained, "[n]onproliferation cannot be achieved by nonparticipation by the United States in the world commerce in nuclear machinery and materials; our policy set by the Congress recognizes that American abstention from international nuclear trade risks leaving the field to less responsible suppliers and encouraging uncontrolled proliferation." n287 This logic is applicable to environmental regulation as well - unless the United States actively participates in the environmental protection of host countries, particularly where it is responsible for the environmental damage, it will be encouraging uncontrolled environmental harm.

### T – Hostilities – 2AC

#### 2. Hostilities a state of confrontation

Hardy 84 (William H, Pacific Law Journal Issue 265, Tug of War: The War Powers Resolution and the Meaning of Hostilities, P 281-282)

The House Foreign Affairs Committee (hereinafter H.F.A.C) has adopted its own deﬁnition of hostilities. The H.F.A.C. Report discusses the background, constitutional context, and intent of the WPR. The section-by-section analysis of the H.F.A.C. Report is the clearest statement of the definition of hostilities to be found: The word hostilities was substituted for the phrase armed conﬂict during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which ﬁghting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. Imminent hostilities denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict. Hearings were held during the Ford Administration in which Chair- man Zablocki used the definition as a benchmark in questioning legal advisors to the President)” The use of this deﬁnition by Zablocki supports a broad interpretation of hostilities because **as long as a clear and present danger of armed conﬂict exists**, even though no shots have been ﬁred, hostilities are present.United States forces are not required to accompany foreign forces in combat or on operational patrols. The President, however, has persisted in defining hostilities more narrowly than Congress apparently intended. The Ford and Reagan Administrations have both adopted a narrow deﬁnition of hostilities that conﬂicts with the H.F.A.C. deﬁnition.

#### B) Education - Broad definitions are key to topic education

Hardy 84 (William H, Pacific Law Journal Issue 265, Tug of War: The War Powers Resolution and the Meaning of Hostilities, P 277-278)

The determination that “hostilities” is an ambiguous term and therefore, susceptible to different meanings, is supported by selected provisions from congressional hearings. In general, opposition to deﬁning hostilities precisely or too narrowly was evidenced throughout congressional hearing records. The idea of making a “laundry list” or spelling out the circumstances in which the President may involve the military in the absence of a declaration of war was rejected.'°’ Rather than attempting to codify the circumstances that define hostilities, Professor Bickel, a noted constitutional law expert and Professor of Law at Yale University, stated that the preferable mode was a good faith understanding of the term and an assumption that Presidents would act in good faith to discharge their duties.“ Senator Javits, one of the chief sponsors of the WPR, acknowledged that the resolu- tion did not endeavor to spell out a definition of hostilities, but adopted the term as a word of basic understanding)" Members of Congress recognized the peril in trying to be too exact with defini- tions because of the difficulties in achieving a terminology that could anticipate all the emergencies which might arise. By choosing a general approach, rather than trying to be too exact in deﬁnitions, something was “left to judgment, the intelligence, [and] the wisdom” of members of Congress and the President.'" Based on the hearings, some evidence also exists that hostilities was deliberately left undefined and ambiguous so that the meaning of the word could be clariﬁed or gradually spelled out by experience.

### T – Restriction =Prohibit– 2AC

#### 1. We meet – plan prevents the use of armed forces if their use violates environmental statutes – that’s a restriction

Lobel 8 (Jules – Professor of Law, University of Pittsburgh Law School, “Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War”, 2008, Ohio State Law Journal, 69 Ohio St. L.J. 391, lexis)

More generally, the Court held that Congress has the power to authorize limited, undeclared war in which the President's power as Commander in Chief would be restricted. In such wars, the Commander in Chief's power would extend no further than Congress had authorized. As President Adams recognized, Congress had as a functional matter "declared war within the meaning of the Constitution" against France, but "under certain restrictions and limitations." n123 Under this generally accepted principle in our early constitutional history, Congress could limit the type of armed forces used, the number of such forces available, the weapons that could be utilized, the theaters of actions, and the rules of combat. In short, it could dramatically restrict the President's power to conduct the war.

#### 2. Judicial restriction means regulation

**Kerrigan** **73** (Frank, Judge @ Court of Appeal of California, Fourth Appellate District, Division Two, 29 Cal. App. 3d 815; 105 Cal. Rptr. 873; 1973 Cal. App. LEXIS 1235, SUN COMPANY OF SAN BERNARDINO, CALIFORNIA, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE et al., Real Parties in Interest. PROGRESS-BULLETIN PUBLISHING COMPANY, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE et al., Real Parties in Interest. (Consolidated Cases.), lexis)

While the studies were in progress, the United States Supreme Court found the impact of television cameras and lights in a courtroom setting prejudicial to the conduct of a fair trial. ( Estes v. Texas (1965) 381 U.S. 532 [14 L.Ed.2d 543, 85 S.Ct. 1628].) Shortly thereafter, in Sheppard v. Maxwell (1966) 384 U.S. 333, 358 [16 L.Ed.2d 600, 618, 86 S.Ct. 1507], the defendant's conviction of his wife's murder [\*\*879] was reversed because of "[the] carnival atmosphere at trial" and pervasive publicity affecting the fairness of the hearing. In reversing Dr. Sheppard's conviction, the court stated [\*\*\*15] that: (1) the publicity surrounding a trial may become so extensive and prejudicial in nature that unless neutralized by appropriate judicial procedures, a resultant conviction may not stand; (2) the trial court has the duty of so insulating the trial from publicity as to insure its fairness; (3) a free press plays a vital role in the effective and fair administration of justice. But the court did not set down any fixed rules to guide trial courts, law enforcement officers or media as to what could or could not be printed. Instead, the majority suggested that judicial restrictions on speech might sometimes be appropriate in the following dicta: "The courts [\*823] must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. [\*\*\*16] " (Ibid., p. 363 [16 L.Ed.2d p. 620].)

#### 3. **Restrictions” means “regulations”**

Davies 30 (Major George, “CLAUSE 1.—(Scheme regulating production, supply and sale of coal.),” February, vol 235 cc2453-558, http://hansard.millbanksystems.com/commons/1930/feb/27/clause-1-scheme-regulating-production)

Major GEORGE DAVIES The hon. Member says he has heard no reason advanced for this Amendment. I am willing to give him one, and I will tell him that the reason why the benches are not full, as they were a short time ago, is that man cannot live by bread alone and, as there is a rule against the introduction of newspapers and foodstuffs, it is necessary for some of us to refresh ourselves after a late Division. I am not going to transgress the ruling of the Chair, as we have been given very great latitude, but I want to confine myself to the point at issue, which is the regulation of sale. I have had experience in the past of efforts to regulate the sale of sugar. Like the coal industry to-day, there has been in the past an over-production of many of the fundamental articles of the life of a nation. I will not dwell on the case of rubber, but the sugar situation was entirely on all fours with this situation, as it was a question of the regulation of sale. Facing a situation very similar in kind and not dissimilar in degree to the problem now before us, those connected with that particular industry in certain countries thought it an advantage to control and regulate the sale. As soon as you use the word "regulation" in this connection it is idle to suggest that it does not mean restriction. Obviously, that is the point—to restrict—and, while 2541 it is true the word "restrict" is not in this particular Clause, and cannot be argued in connection with this Amendment, yet behind the word "regulate" is the word "restrict," in other words, controlling what has been uncontrolled, production thrown on markets not able to receive it.

### Executive CP – 2AC

#### Counterpan isn’t applied extraterritorially

Hilbert 12 (Sarah – J.D. Candidate, William & Mary Law School, “A Legislative Solution to Environmental Protection in Military Action Overseas”, 2012, 37 Wm. & Mary Envtl. L. & Pol'y Rev. 263, lexis)

III. Solution A. Executive Orders It has been suggested that the solution to the inadequate DoD environmental regulation is an executive order. n119 Executive orders have been proposed because of the power of the executive branch and its ability to produce change. n120 Laporte points to President Carter's executive order as a successful way to promote NEPA's ideals overseas and cites DoD action prompted by President Carter's executive order as an indication that the executive order was successful. n121 Although Laporte acknowledges the downfalls of the DoD's response to President Carter's executive order, she attributes the response to "exemptions or ambiguities in the Order itself," rather than the DoD's response to the Order. n122 Executive orders, however, are not the best answer. It is true that executive orders can affect the extraterritorial application of environmental principles as President Carter's executive order furthered the goals of NEPA, n123 but this benefit is limited. n124 President Carter's executive order's purpose was to further the goals of NEPA, n125 but it did not have the power to override the presumption that NEPA could not apply extraterritorially. n126 The executive order may be able to capture general [\*278] ideals or priorities of the executive, but President Carter's executive order illustrated that those ideals and priorities can be implemented very differently after the DoD interprets the meaning of the executive order. n127 Laporte assumes that the executive branch has the expertise and time to draft an executive order that has the perfect amount of specificity, flexibility, and practicality, n128 but this is not realistic. Creating standards for the DoD in the way that Laporte describes the ideal executive order n129 is not a job for the executive branch.

#### E) Certainty – Legal decision key

Pildes 13 (Rick, udler Family Professor of Constitutional Law and Co-Faculty Director for the Program on Law and Security at NYU School of Law, "Does Judicial Review of National-Security Policies Constrain or Enable the Government?," 8/5, <http://www.lawfareblog.com/2013/08/does-judicial-review-of-national-security-policies-constrain-or-enable-the-government/>)

First, government actors have a need for legal clarity, particularly in national-security areas where the legal questions are novel and the stakes of guessing wrong particularly high. In the absence of more definitive court guidance, government lawyers and policymakers have spent a staggering number of hours trying to anticipate what courts might conclude is the valid scope of the government’s power to detain, or to use military trials, and similar questions. In many contexts, a significant element in what government actors need is simply legal clarity; knowledge of where the lines lie between the permitted and the forbidden can help government actors figure out how best to reach their legitimate goals. Surely there is something not fully functional about a system that requires a decade’s worth of guesswork, and all the resources involved, about exactly where the legal boundaries lie.

#### 3. Congress will roll back the counterplan during a conflict – kills solvency

Tisler **11**

[Tiffany, J.D. Candidate, University of Toledo, 2011., FEDERAL ENVIRONMENTAL LAW WAIVERS AND HOMELAND SECURITY: ASSESSING WAIVER APPLICATION IN HOMELAND SECURITY SETTINGS AT THE SOUTHERN BORDER IN COMPARISON TO NATIONAL SECURITY SETTINGS INVOLVING THE MILITARY, Spring, 2011 The University of Toledo Law Review, L/N]

In times of war, the conflict between national-security goals and environmental laws tends to come out in favor of national security, n54 and shortly after 9/11 the United States was at war. As it was, the U.S. military never particularly liked the pre-9/11 waiver system, finding the scope of waivers too narrow and the time limits incompatible with long-term activities. n55 Thus, sensing the time to strike, the military began lobbying for changes to environmental-waiver provisions in the aftermath of 9/11. n56 The military has since actively and successfully sought changes to the waiver system, giving them much broader authority to disregard environmental laws, especially for reasons of "military readiness." n57 First, the military convinced Congress to attach riders to the 2004 and 2005 Defense Appropriations Acts exempting them from provisions of the Marine Mammal Protection Act ("MMPA"), some provisions of the ESA, and the entire Migratory [\*784] Bird Treaty Act. n58 Not only did the military successfully change the application of various sections of statute, it also changed the waiver structure for the MMPA, giving the Secretary of Defense the authority to grant waivers in addition to the President. n59 Though not always successful, military lobbying efforts have removed many external checks on military activities that impact the environment, creating a dim future for the environment. n60

#### 5. **CP is misconstrued – military avoids change**

Hilbert 12 (Sarah – J.D. Candidate, William & Mary Law School, “A Legislative Solution to Environmental Protection in Military Action Overseas”, 2012, 37 Wm. & Mary Envtl. L. & Pol'y Rev. 263, lexis)

IV. Call to Action Judicial action through liability for the government and government contractors in the courts is not a viable solution for the environmental degradation and human health problems that result from military action overseas because the burdens that plaintiffs must overcome are too heavy to result in consistent decisions, or in any decisions at all. n180 Executive action through an executive order would not cause the kind of change in military behavior that is needed at this point, and Executive Orders have been ineffective in the past because the DoD was able to [\*287] misconstrue each Order through its own interpretations. n181 Legislative action provides the best option for a long-term solution that will apply to all military action, will have the intent of many federal statutes that already apply within United States borders, will hold military leaders accountable to a rigid set of procedures and standards, and will effectuate the change our country needs. n182

#### Takes out solvency - Empirically proven

Hilbert 12 (Sarah – J.D. Candidate, William & Mary Law School, “A Legislative Solution to Environmental Protection in Military Action Overseas”, 2012, 37 Wm. & Mary Envtl. L. & Pol'y Rev. 263, lexis)

II. Current Government Direction The current environmental protection plan for military efforts overseas has allowed burn pits to continue to cause health and environmental problems. Through an Executive Order, President Carter first emphasized the importance of government actors considering the environmental effects of proposed actions, n60 but the DoD interpreted the key parts of the Executive Order n61 and created the environmental protection plan it currently follows. Allowing the DoD to essentially create their own regulatory regime is contrary to environmental interests and poses a classic "fox guarding the hen house" problem. A. Executive Order 12,114 President Carter issued Executive Order 12,114-Environmental Effects Abroad of Major Federal Actions ("Executive Order 12,114") on January 4, 1979. n62 Executive Order 12,114 required officials of Federal Agencies to examine environmental effects of proposed actions and consider these effects in making decisions about actions. n63 The Executive Order mandated an information exchange between the Department of State, the Council on Environmental Quality, and any other interested agency or nation to provide information to decisionmakers through the use of environmental impact statements, bilateral or multilateral environmental studies, or concise reviews of environmental issues. n64 The Executive Order sought to further the goals of the National Environmental Policy Act ("NEPA") n65 which required environmental [\*271] assessment for governmental actions having environmental effects within the United States. n66 Executive Order 12,114 forced federal agencies to consider the environmental effect of their actions abroad, but it provided no substantive requirements or procedure for ensuring that protocol was followed. n67 The Executive Order was a start down the long road of a comprehensive environmental protection plan for the United States military, yet it was hardly a binding plan for the military to live by. Because President Carter's Executive Order lacked any substantial guidance but still mandated the military to consider the environmental effects of proposed actions, the DoD was left to interpret what the Executive Order required of it. B. Department of Defense Directive 6050.7 The DoD issued Directive 6050.7 soon after President Carter issued Executive Order 12,114 to define key terms of Executive Order 12,114 and elaborate as to what the DoD must consider when approving "major actions." n68 Because Executive Order 12,114 was not specific, the DoD granted ample discretion to commanders reviewing proposed actions. n69 The DoD interpreted "major action" to mean actions "of considerable importance involving substantial expenditures of time, money, and resources, that affect[] the environment on a large geographic scale or has substantial environmental effects on a more limited geographical area," and it sought to establish procedures for review of these actions. n70 Beyond establishing what is meant by "major action," the DoD does not define any other standard for determining when an environmental assessment is necessary. There is no definition of "substantial expenditures" or an elaboration on the geographic area requirements. n71 [\*272] The DoD also defined exceptions. Included in the list of exceptions are actions taken by the President, actions taken at the direction of the President or a cabinet officer in the course of armed conflict or when a national security risk is involved, activities of intelligence components, actions of the Office of the Assistant Secretary of Defense or the Defense Security Assistance Agency, and actions relating to nuclear activities and nuclear material except actions providing to a foreign nation a nuclear production or utilization facility. n72 The DoD's interpretation of what is required from President Carter's Executive Order weighs in the favor of the DoD. The amount of discretion given to reviewing officers allows an officer to decide that a project does not require an environmental review simply by finding that it is not a major action, which, according to DoD's interpretation of a "major action," would be easy for an officer to find. n73

#### 7. Court has unique symbolic effect --- key to foreign perception of the plan

Fontana 8 (David, Associate Professor of Law – George Washington University Law School, “The Supreme Court: Missing in Action”, Dissent Magazine, Spring, http://www.dissentmagazine.org/article/?article=1165)

*The Results of Inaction*
What is the problem with this approach? The answer, simply put, is that it legitimates and even catalyzes political activity by Congress and the president, but it does so without including in this political activity the critically influential background voice of the Supreme Court on issues related to individual rights. The Court has two main powers: one has to do with law and compulsion, the other has to do with political debate. The Court can legally compel other branches of government to do something. When it told states and the federal government in Roe v. Wade that they could not criminalize all abortions, for example, the Court’s decision was a binding legal order. But the Supreme Court also plays a role in political debate, even when it does not order anyone to do anything. If the Justices discuss the potential problems for individual rights of a governmental action, even if they don’t contravene the action, their decision still has enormous import. This is because other actors (members of Congress, lawyers, newspaper editorial writers, college teachers, and many others) can now recite the Court’s language in support of their cause. Supreme Court phrases such as “one person, one vote” have enormous symbolic effect and practical influence. If there had been a case about torture, for example, and some of the justices had written in detail about its evils, then Senator Patrick Leahy (senior Democrat on the Judiciary Committee) could have used the Justices’ arguments to criticize attorney general nominee Michael Mukasey during his confirmation hearings. Attorneys for those being detained at Guantánamo could have made appearances on CNN and (even) Fox News reciting the evils of torture as described by the Court. Concerns about rights could have been presented far more effectively than if, as actually happened, the Court refused to speak to these issues. The Supreme Court’s discussion of constitutional questions is particularly important for two reasons. First, the justices view these questions from a distinct standpoint. While members of Congress and the president have to focus more on short-term and tangible goods, members of the Court (regardless of which president appointed them) focus more on the long term and on abstract values. The Court offers a perspective that the other branches simply cannot offer. Second, when the Supreme Court presents this perspective, people listen. It is and has been for some time the most popular branch of American government. Although there is some debate about terminology and measurement, most scholars agree that the Court enjoys “diffuse” rather than “specific” support. Thus, even when Americans don’t like a specific decision, they still support the Court. By contrast, when the president or Congress does something Americans don’t like, their support drops substantially. AMERICANS BECOME more aware of the Court the more it involves itself in controversies. This is because of what political scientists call “positivity bias.” The legitimating symbols of the Court (the robes, the appearance of detachment, the sophisticated legal opinions) help to separate it from other political institutions—and in a good way for the Court. If the Justices had drawn attention to violations of individual rights, most of America would have listened and possibly agreed. As it is, our politics has been devoid of a voice—and an authoritative voice—on individual rights. For most of the time since September 11, few major political figures have been willing to stand up and speak in support of these rights. Recall that the Patriot Act was passed in 2001 by a vote of ninety-eight to one in the Senate, with very little debate. Congress overwhelmingly passed the Detainee Treatment Act (DTA) of 2005, which barred many of those complaining of torture from access to a U.S. court. Congress also overwhelmingly passed the Military Commissions Act (MCA) of 2006, which prevented aliens detained by the government from challenging their detention—and barred them from looking to the Geneva Conventions as a source of a legal claim.

#### 9. Executive fails – external regulation key

Yap 05

[Julie, J.D. Candidate, 2005, Fordham University School of Law, Fordham Law Review, JUST KEEP SWIMMING: GUIDING ENVIRONMENTAL STEWARDSHIP OUT OF THE RIPTIDE OF NATIONAL SECURITY, L/N]

Environmental self-regulation solely by the executive branch is not a serious proposal. n331 **The military should not be the sole regulator of its own environmental stewardship.** The role of the military is "to fight and win the nation's wars." n332 An important part of this role is preparation and realistic training; the DOD consistently reiterates the concept that ""we need to train as we fight, but the reality is we fight as we train.'" n333 It is naive to think that military leaders and soldiers, no matter how much training in considering environmental damages that may result from their action, will place a **top level priority on environmental concerns when the job of the military is to prepare for, fight, and win wars.** The military also has a poor track record of environmental stewardship. Military readiness and preparation to protect the country's national security during the Cold War "left a legacy of hazardous waste, nuclear contamination, polluted air, water and soil, [\*1333] and resulted in the destruction of natural and cultural resources." n334 With the advent of new technology and highly advanced methods of warfare, the potential environmental dangers have become even more devastating. The military manages "unexploded and surplus ordnance, millions of gallons of liquid waste that is both extremely corrosive and highly radioactive, chemical weapons, excess nuclear warheads and weapons-grade plutonium, and defoliant production residues ... ." ,FN='335'> Given the enormous responsibilities that come with the handling of these substances, coupled with a poor history of proper environmental consideration, the military needs external regulation in order to ensure that decisions that represent all of society's values are being made. Another problem with regulation of defense activities by the executive branch alone is the unitary executive policy of the Department of Justice. n336 This policy **prevents the EPA "from issuing administrative compliance orders or filing suit against other federal agencies for violations"** n337 "without the President's [approval], if at all." n338 Under most environmental statutes, the EPA cannot levy a penalty against other agencies. n339 The principles behind the unitary executive theory have merit, "implicating very real executive branch management and separation of powers issues." n340 Regardless, the unitary executive approach eliminates another method of regulation that helps ensure environmental compliance of private entities. The military has made major improvements to its environmental policy over the past fifteen years. The DOD has created an environmental program that centers on the "four pillars" of [\*1334] restoration, compliance, pollution prevention, and conservation. n341 Environmental planning is a component to each of these four pillars and is included in DOD manuals for proposed actions. n342 Military commanders and soldiers operate under new statements of mission that include "stewardship of the land, air, water and natural ... resources." n343 The incorporation of environmental responsibility in the mission and culture of the military is an important step that should be encouraged in the future. It is not, however, a large enough step to validate internal regulation of environmental stewardship.

### Oil Spills Add- On – 2AC

#### 1AC Geis evidence indicate that Citizen Suits deter oil spills -

#### Extinction

Craig 11—Associate Dean for Environmental Programs @ Florida State University [Robin Kundis Craig, “Legal Remedies for Deep Marine Oil Spills and Long-Term Ecological Resilience: A Match Made in Hell,” Brigham Young University Law Review, 2011, 2011 B.Y.U.L. Rev. 1863

Systemic risk is as important as individual risk. Notwithstanding the National Environmental Policy Act's requirement that federal permitting agencies consider cumulative impacts to the environment, [n188](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1348065909828&returnToKey=20_T15563238106&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.735297.7128077165#n188) we currently evaluate the risks of offshore oil drilling primarily with respect to individual oil drilling operations in connection with individual permits and leases. As the Deepwater Horizon Commission recognized, however, the larger systemic context of such drilling is also important, and perhaps arguably more so. From a resilience perspective, a drilling operation that uses the only oil rig in a pristine marine environment is an inherently different risk problem than the Deepwater Horizon's situation of being one of thousands of similar rigs in a pervasively and multiply stressed Gulf. As Clark, Jones, and Holling have suggested, our trial-and-error experiments with Nature in our first-sense resilience [\*1895] dependence mode "now threaten errors larger and more costly than society can afford." [n189](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1348065909828&returnToKey=20_T15563238106&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.735297.7128077165#n189) Resilience thinking should more forcibly insist on multilayered systemic awareness, promoting limits on how much exploitation should be occurring simultaneously and encouraging more gradual resource development over longer periods of time. . Risk to the environment should be presumed, even when all actors follow all best practices. Our current first-sense resilience dependency produces laws that assume that ecosystems can be fixed—and, perhaps more importantly, as embodied in the OPA natural resource damages regulations, that natural processes will often be able to restore themselves without human effort. Resilience thinking, in contrast, effectively assumes that ecosystems could suddenly shift to a new regime at any time for any number of reasons that we do not understand and may not even be able to anticipate—the combined potential of the second and third conceptions of resilience. In the words of Clark, Jones, and Holling, "if a system has multiple regions of stability, then Nature can seem to play the practical joker rather than the forgiving benefactor." [n190](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1348065909828&returnToKey=20_T15563238106&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.735297.7128077165#n190) To exaggerate the differences in outlook just a bit, our current paradigm presumes that most ecosystems can cope with most human activities, while resilience thinking presumes that all changes to an ecosystem are at least potentially completely destabilizing—i.e., inherently risky, with the outer limits of that risk being potentially massive. To translate this change in presumption into legalese, full resilience thinking promotes a policy framework where most human activities in the environment could be—and perhaps should be—considered inherently dangerous activities. [\*1896] As every first-year law student learns, engaging in inherently dangerous activities tends to subject the actor to strict and fairly absolute liability for the kinds of harm that made the activity inherently dangerous. [n191](http://www.lexisnexis.com.proxy.library.emory.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1348065909828&returnToKey=20_T15563238106&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.735297.7128077165#n191) Under resilience thinking, those kinds of harm would include all of the unpredictable and unexpected changes to the ecosystem that might occur as a result of a disaster like the Deepwater Horizon oil spill, up to and including a substantial shift in ecosystem regime or ecosystem collapse. While full implementation of an "inherently dangerous activity" legal regime for all marine activities is unlikely, the case is fairly strong for deep sea oil exploration and drilling. It is at least worth pondering what such a consequence of resilience thinking might mean for risk assessment and behavioral incentives in this context. If nothing else, one would predict under such a new view of potential liability that oil companies' insurers might begin charging premiums that more accurately reflect the potentially catastrophic liability that resilience-minded regulations and policies would make legally cognizant—and might insist on the much more precautionary and safety-minded approach to offshore oil drilling that a multitude of commentators and the Deepwater Horizon Commission have sought in the wake of the Deepwater Horizon disaster. V. Conclusion The second and third senses of resilience, and the socio-ecological risks for humans that they underscore, should not be foreign concepts in the regulation of the marine environment, including (and perhaps especially) when it comes to regulating the offshore oil and gas exploration and drilling taking place at ever-increasing depths. Nor should the possibility that the cumulative stresses to the Gulf of Mexico have pushed its ecosystems to the brink of ecosystem thresholds be ignored in our regulatory regimes. By acknowledging that ecosystems are dynamic and subject to sudden and fairly catastrophic (at least from a human perspective) changes, full resilience thinking provides a path away from the trap of first-sense resilience dependence. Specifically, full resilience thinking recognizes that exploitative activities that affect the Gulf—not just deep sea oil drilling but also fishing and farming up the Mississippi River—put all of the human beings who depend on the ecosystem services, as well as the ecosystems themselves, at collective risk of catastrophic ecosystem collapse. A liability regime based on these unavoidable and potentially massive environmental risks would likely protect the Gulf of Mexico better than our current regime of natural resource damages, especially when injury occurs in the Gulf's murky depths.

### Generic Legalism K – 2AC

#### 1. Framework- the role of the ballot is to weigh the plan against a competitive policy option

#### Net benefits-

#### First- Fairness- they moot the entirety of the 1ac, makes it impossible to be affirmative

#### Second – Education- Policy education is good- it teaches future decisionmaking

#### 2. K doesn’t come first

**Owens 2002** (David – professor of social and political philosophy at the University of Southampton, Re-orienting International Relations: On Pragmatism, Pluralism and Practical Reasoning, Millenium, p. 655-657)

Commenting on the ‘philosophical turn’ in IR, Wæver remarks that ‘[a] frenzy for words like “epistemology” and “ontology” often signals this philosophical turn’, although he goes on to comment that these terms are often used loosely.4 However, loosely deployed or not, it is clear that debates concerning ontology and epistemology play a central role in the contemporary IR theory wars. In one respect, this is unsurprising since it is a characteristic feature of the social sciences that periods of disciplinary disorientation involve recourse to reflection on the philosophical commitments of different theoretical approaches, and there is no doubt that such reflection can play a valuable role in making explicit the commitments that characterise (and help individuate) diverse theoretical positions. Yet, such a philosophical turn is not without its dangers and I will briefly mention three before turning to consider a confusion that has, I will suggest, helped to promote the IR theory wars by motivating this philosophical turn. The first danger with the philosophical turn is that it has an inbuilt tendency to prioritise issues of ontology and epistemology **over explanatory** and/or interpretive **power** as if the latter two were merely a **simple function** of the former. But while the explanatory and/or interpretive power of a theoretical account is not wholly independent of its ontological and/or epistemological commitments (otherwise criticism of these features would not be a criticism that had any value), **it is by no means clear that it is**, in contrast, wholly dependent **on these philosophical commitments**. Thus, for example, one need not be sympathetic to rational choice theory to recognise that it can provide powerful accounts of certain kinds of problems, such as the tragedy of the commons in which dilemmas of collective action are foregrounded. It may, of course, be the case that the advocates of rational choice theory cannot give a good account of why this type of theory is powerful in accounting for this class of problems (i.e., how it is that the relevant actors come to exhibit features in these circumstances that approximate the assumptions of rational choice theory) and, if this is the case, it is a philosophical weakness—but **this does not undermine** the point that, for a certain class of problems, rational choice theory may provide the best account available to us. In other words, while the critical judgement of theoretical accounts in terms of their ontological and/or epistemological sophistication is one kind of critical judgement, **it is not the only or even necessarily the** most important kind. The second danger run by the philosophical turn is that because prioritisation of ontology and epistemology promotes theory-construction from philosophical first principles, it cultivates a theory-driven rather than problem-driven approach to IR. Paraphrasing Ian Shapiro, the point can be put like this: since it is the case that there is always a plurality of possible true descriptions of a given action, event or phenomenon, the challenge is to decide which is the most apt in terms of getting a perspicuous grip on the action, event or phenomenon in question given the purposes of the inquiry; yet, from this standpoint, ‘theory-driven work is part of a reductionist program’ in that it ‘dictates always opting for the description that calls for the explanation that flows from the preferred model or theory’.5 The justification offered for this strategy rests on the mistaken belief that it is necessary for social science because general explanations are required to characterise the classes of phenomena studied in similar terms. However, as Shapiro points out, this is to misunderstand the enterprise of science since ‘whether there are general explanations for classes of phenomena is a **question for social-scientific inquiry**, not to be prejudged before conducting that inquiry’.6 Moreover, this strategy easily slips into the promotion of the pursuit of generality over that of empirical validity. The third danger is that the preceding two combine to encourage the formation of a particular image of disciplinary debate in IR—what might be called (only slightly tongue in cheek) ‘the Highlander view’—namely, an image of warring theoretical approaches with each, despite occasional temporary tactical alliances, dedicated to the strategic achievement of sovereignty over the disciplinary field. It encourages this view because the turn to, and prioritisation of, ontology and epistemology stimulates the idea that there can only be one **theoretical approach which gets things right**, namely, the theoretical approach that gets its ontology and epistemology right. This image feeds back into IR exacerbating the first and second dangers, and so a potentially vicious circle arises.

#### 3. Extinction outweighs

Bok 88

(Sissela, Professor of Philosophy at Brandeis, Applied Ethics and Ethical Theory, Rosenthal and Shehadi, Ed.)

The same argument can be made for Kant’s other formulations of the Categorical Imperative: “So act as to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means”; and “So act as if you were always through your actions a law-making member in a universal Kingdom of Ends.” No one with a concern for humanity could consistently will to risk eliminating humanity in the person of himself and every other or to risk the death of all members in a universal Kingdom of Ends for the sake of justice. To risk their collective death for the sake of following one’s conscience would be, as Rawls said, “irrational, crazy.” And to say that one did not intend such a catastrophe, but that one merely failed to stop other persons from bringing it about would be beside the point when the end of the world was at stake. For although it is true that we cannot be held responsible for most of the wrongs that others commit, the Latin maxim presents a case where we would have to take such responsibility seriously – perhaps to the point of deceiving, bribing, even killing an innocent person, in order that the world not perish. To avoid self-contradiction, the Categorical Imperative would, therefore, have to rule against the Latin maxim on account of its cavalier attitude toward the survival of mankind. But the ruling would then produce a rift in the application of the Categorical Imperative. Most often the Imperative would ask us to disregard all unintended but foreseeable consequences, such as the death of innocent persons, whenever concern for such consequences conflicts with concern for acting according to duty. But, in the extreme case, we might have to go against even the strictest moral duty precisely because of the consequences. Acknowledging such a rift would post a strong challenge to the unity and simplicity of Kant’s moral theory.

#### 4. Perm do both

#### 5. True constraints are possible – court rulings are binding – past decisions prove

#### 6. External checks are effective

Aziz Z. Huq 12, Assistant Professor of Law, University of Chicago Law School, "Binding the Executive (by Law or by Politics)", May 25, www.law.uchicago.edu/files/file/400-ah-binding.pdf

Paulson ’ s genuflection and Obama ’ s reticence, I will contend here, are symptomatic of our political system ’ s operation rather than being aberration al . It is generally the case that even in the heart of crisis, and even on matters where executive competence is supposedly at an acme , legislators employ formal institutional powers not only to delay executive initiatives but also affirmatively to end presidential policies. 20 Numerous examples from recent events illustrate the point. Congressional adversaries of Obama, for instance, cut off his policy of emptying Guantánamo Bay via appropriations riders. 21 Deficit hawks spent 2011 resisting the President’s solutions to federal debt, while the President declined to short - circuit negotiations with unilateral action. 22 Even in military matters, a growing body of empirical research suggests Congress often successfully influences the course of overseas engagements to a greater degree than legal scholars have discerned or acknowledged. 23¶ That work suggests that the failure of absolute congressional control over military matters cannot be taken as evidence of “the inability of law to constrain the executive ” in more subtle ways (p 5). The conventional narrative of executive dominance , in other words, is at best incomplete and demands supplementing .¶ This Review uses The Executive Unbound as a platform to explore how the boundaries of discretionary executive action are established. As the controversial national security policies of the Bush administration recede in time, the issue of executive power becomes ripe for reconsideration. Arguments for or against binding the executive are starting to lose their partisan coloration. There is more room to investigate the dynamics of executive power in a purely positive fashion without the impinging taint of ideological coloration.¶ Notwithstanding this emerging space for analys i s, t here is still surprising inattention to evidence of whether the executive is constrained and to the positive question of how constraint works. The Executive Unbound is a significant advance because it takes seriously this second “ mechanism question. ” Future studies of the executive branch will ignore its i mportant and trenchant analysis at their peril. 24 Following PV ’ s lead, I focus on the descriptive , positive question of how the executive is constrained . I do speak briefly and in concluding to normative matters . B ut f irst and foremost, my arguments should be understood as positive and not normative in nature unless otherwise noted.¶ Articulating and answering the question “ W hat binds the executive ?” , The Executive Unbound draws a sharp line between legal and political constraints on discretion — a distinction between laws and institutions on the one hand, and the incentives created by political competition on the other hand . While legal constraints usually fail, it argues, political constraints can prevail. PV thus postulate what I call a “strong law/ politics dichotomy. ” My central claim in this Review is that this strong law/politics dichotomy cannot withstand scrutiny. While doctrinal scholars exaggerate law ’s autonomy, I contend, the realists PV underestimate the extent to which legal rules and institutions play a pivotal role in the production of executive constraint. Further, the political mechanisms they identify as substitutes for legal checks cannot alone do the work of regulating executive discretion. Diverging from both legalist and realist positions, I suggest that law and politics do not operate as substitutes in the regulation of executive authority. 25 They instead work as interlocking complements. An account of the borders of executive discretion must focus on the interaction of partisan and electoral forces on the one hand and legal rules. It must specify the conditions under which the interaction of political actors’ exertions and legal rules will prove effective in limiting such discretion.

#### **7.** Even if they aren’t – the president will go along with them anyway – takes out the impact

Bradley and Morrison 13

[Curtis, William Van Alstyne Professor of Law, Duke Law School. and Trevor, Liviu Librescu Professor of Law, Columbia Law School, Presidential Power, Historical Practice, And Legal Constraint, 2013 Directors of The Columbia Law Review Association, Inc. Columbia Law Review May, 2013, L/N]

Insisting on a sharp distinction between the law governing presidential authority that is subject to judicial review and the law that is not also takes for granted a phenomenon that merits attention - that Presidents follow judicial decisions. n118 That assumption is generally accurate in the United States today. To take one relatively recent example, despite disagreeing with the Supreme Court's determination in Hamdan v. Rumsfeld that Common Article 3 of the Geneva Conventions applies to the war on terror, the Bush Administration quickly accepted it. n119 But the reason why Presidents abide by court decisions has a connection to the broader issue [\*1131] of the constraining effect of law. An executive obligation to comply with judicial decisions is itself part of the practice-based constitutional law of the United States, so presidential compliance with this obligation may demonstrate that such law can in fact constrain the President. This is true, as we explain further in Part III, even if the effect on presidential behavior is motivated by concerns about external political perceptions rather than an internal sense of fidelity to law (or judicial review). n120

#### 8. No impact

 **Dickinson 4** (Dr. Edward Ross, Professor of History – University of Cincinnati, “Biopolitics, Fascism, Democracy: Some Reflections on Our Discourse About ‘Modernity’”, Central European History, 37(1), p. 18-19)

In an important programmatic statement of 1996 Geoff Eley celebrated the fact that Foucault’s ideas have “fundamentally directed attention away from institutionally centered conceptions of government and the state . . . and toward a dispersed and decentered notion of power and its ‘microphysics.’”48 The “broader, deeper, and less visible ideological consensus” on “technocratic reason and the ethical unboundedness of science” was the focus of his interest.49 But the “power-producing effects in Foucault’s ‘microphysical’ sense” (Eley) of the construction of social bureaucracies and social knowledge, of “an entire institutional apparatus and system of practice” ( Jean Quataert), simply do not explain Nazi policy.50 The destructive dynamic of Nazism was a product not so much of a particular modern set of ideas as of a particular modern political structure, one that could realize the disastrous potential of those ideas. What was critical was not the expansion of the instruments and disciplines of biopolitics, which occurred everywhere in Europe. Instead, it was the principles that guided how those instruments and disciplines were organized and used, and the external constraints on them. In National Socialism, biopolitics was shaped by a totalitarian conception of social management focused on the power and ubiquity of the völkisch state. In democratic societies, biopolitics has historically been **constrained** by a rights-based strategy of social management. This is a point to which I will return shortly. For now, the point is that what was decisive was actually politics at the level of the state. A comparative framework can help us to clarify this point. Other states passed compulsory sterilization laws in the 1930s — indeed, individual states in the United States had already begun doing so in 1907. Yet they **did not proceed** tothe next steps adopted by National Socialism — mass sterilization, mass “eugenic” abortion and murder of the “defective.” Individual figures in, for example, the U.S. did make such suggestions. But **neither** the **political structures** of democratic states **nor** their **legal and political principles** **permitted** such policies actually being enacted. Nor did the scale of forcible sterilization in other countries match that of the Nazi program. I do not mean to suggest that such programs were not horrible; but in a **democratic** political **context** they did not develop the dynamic of constant radicalization and escalation that characterized Nazi policies.

#### 9. Liberalism is inevitable

Sparer ‘84

[Ed, Prof. Law and Soc Welfare @ Pennsylvania, “Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement,” 36 Stan. L. Rev. 509, January, ln//uwyo-ajl]

The thrust of CLS critique is devoted, in turn, to the exposure of the contradictions in liberal philosophy and law. This strand of the Critical legal critique is quite powerful and makes a much-needed contribution. In my view, however, it suffers from two general problems. First, the critique lends itself to exaggeration. This observation may be appreciated by considering what happens when Critical legal theorists themselves make tentative gestures at the social direction in which we should move. Such gestures, even from the most vigorous critics of liberalism, do not escape from liberalism and, indeed, liberal rights theory. Nevertheless, those gestures have great merit, particularly because of their use of liberal rights. For example, Frug, while expounding his vision of the city as a site of localized power and participatory democracy, attacks liberal theory and its dualities as an obstacle to his vision. n19 At the same time, without [\*518] acknowledging the significance of what he is doing, Frug relies on the liberal image of law and rights to defend the potential of his vision. He writes: It should be emphasized that participatory democracy on the local level need not mean the tyranny of the majority over the minority. Cities are units within states, not the state itself; cities, like all individuals and entities within the state, could be subject to state-created legal restraints that protect individual rights. Nor does participatory democracy necessitate the frustration of national political objectives by local protectionism; participatory institutions, like others in society, could still remain subject to general regulation to achieve national goals. The liberal image of law as mediating between the need to protect the individual from communal coercion and the need to achieve communal goals could thus be retained even in the model of participatory democracy. n20

#### 10. Alt Can’t solve --Appeals for institutional restrain are a crucial supplement to political resistance to executive power.

David COLE Law @ Georgetown ’12 “The Politics of the Rule of Law: The Role of Civil Society in the Surprising Resilience of Human Rights in the Decade after 9/11” http://www.law.uchicago.edu/files/files/Cole%201.12.12.pdf p. 51-53

As I have shown above, **while political forces played a significant role in checking** President **Bush**, what was significant was the particular substantive content of that politics; **it was not just any political pressure**, **but pressure to maintain** fidelity to **the rule of law**. **Politics standing alone is as likely to fuel as to deter executive abuse; consider the lynch mob, the Nazi Party** in Germany, or **xenophobia** more generally. **What we need if we are to check abuses of executive power is a politics that champions the rule of law.** Unlike the politics Posner and Vermeule imagine, **this** type of **politics cannot be segregated neatly from the law**. On the contrary, **it will often coalesce around a distinctly legal challenge, objecting to departures from distinctly legal norms**, heard in a court case, as we saw with Guantanamo. **Congress’s actions make clear that had Guantanamo been left to the political process, there would have been few if any advances**. **The litigation generated and concentrated political pressure on claims for a restoration of the values of legality,** and, as discussed above, **that pressure then played a critical role in the litigation’s outcome, which in turn affected the political pressure for reform. T**here is, to be sure, something paradoxical about this assessment. The rule of law, the separation of powers, and human rights are designed to discipline and constrain politics, out of a concern that pure majoritarian politics, focused on the short term, is likely to discount the long-term values of these principles. Yet without a critical mass of political support for these legal principles, they are unlikely to be effective checks on abuse, for many of the reasons Posner andVermeule identify. **The answer, however, is not to abandon the rule of law for politics, but to develop and nurture a political culture that values the rule of law itself.** **Civil society organizations devoted to such values**, **such as Human Rights Watch, the Center for Constitutional Rights, and the American Civil Liberties Union, play a central role in facilitating, informing, and generating that politics**. Indeed, **they have no alternative.** Unlike governmental institutions, civil society groups have no formal authority to impose the limits of law themselves. Their recourse to the law’s limits is necessarily indirect: they can file lawsuits seeking judicial enforcement, lobby Congress for statutory reform or other legislative responses, or seek to influence the executive branch. **But they necessarily and simultaneously pursue these goals through political avenues – by appealing to the public for support, educating the public, exposing abuses, and engaging in public advocacy around rule-of-law values**. Unlike ordinary politics, which tends to focus on the preferences of the moment, **the politics of the rule of law is committed to a set of long-term principles.** **Civil society organizations are uniquely situated to bring these long-term interests to bear on the public debate.** Much like a constitution itself, civil society groups are institutionally designed to emphasize and reinforce our long-term interests. When the ordinary political process is consumed by the heat of a crisis, organizations like the ACLU, Human Rights First, and the Center for Constitutional Rights, designed to protect the rule of law, are therefore especially important. While Congress and the courts were at best compromised and at worst complicit in the abuses of the post-9/11 period, civil society performed admirably. The Center for Constitutional Rights brought the first lawsuit seeking habeas review at Guantanamo, and went on to coordinate a nationwide network of volunteer attorneys who represented Guantanamo habeas petitioners. The ACLU filed important lawsuits challenging secrecy and government excesses, and succeeded in disclosing many details about the government’s illegal interrogation program. Both the ACLU and CCR filed lawsuits and engaged in public advocacy on behalf of torture and rendition victims, and challenging warrantless wiretapping. Human Rights Watch and Human Rights First wrote important reports on detention, torture, and Guantanamo, and Human Rights First organized former military generals and admirals to speak out in defense of humanitarian law and human rights. These efforts are but a small subset of the broader activities of civil society, at home and abroad, that helped to bring to public attention the Bush administration’s most questionable initiatives, and to portray the initiatives as contrary to the rule of law. At their best, civil society organizations help forge a politics of the rule of law, in which **there is a symbiotic relationship between politics and law**: **the appeal to law informs a particular politics, and that politics reinforces the law’s appeal, in a mutually reinforcing relation**. **Posner and Vermeule understand the importance of politics as a checking force in the modern world, but fail to see the critical qualification that the politics must be organized around a commitment to fundamental principles of liberty, equality, due process, and the separation of powers** – in short, the rule of law. Margulies and Metcalf recognize that politics as much as law determines the reality of rights protections, but fail to identify the unique role that civil society organizations play in that process**. It is not that the “rule of politics” has replaced the “rule of law,” but that, properly understood, a politics of law is a critical supplement to the rule of law.** We cannot survive as a constitutional democracy true to our principles without both. And our survival turns, not only on a vibrant constitution, but on a vibrant civil society dedicated to reinforcing and defending constitutional values.

### Schuette Thumper – 2AC

#### Schuette decision coming now – saps capital

Feder 9/2

[Jody, Legislative Attorney, Banning the Use of Racial Preferences in Higher Education: A Legal Analysis of Schuette v. Coalition to Defend Affirmative Action, 9/2/13, <http://www.fas.org/sgp/crs/misc/R43205.pdf>]

In the more than three decades since the Supreme Court’s ruling in Regents of the University of California v. Bakke affirmed the constitutionality of affirmative action in public colleges and universities, many institutions of higher education have implemented race-conscious admissions programs in order to achieve a racially and ethnically diverse student body or faculty. Nevertheless, the pursuit of diversity in higher education remains controversial, and legal challenges to such admissions programs routinely continue to occur. Currently, the Court is poised to consider a novel question involving affirmative action in higher education during its upcoming 2013-2014 term. Unlike earlier rulings, in which the Court considered whether it is constitutional for a state to use racial preferences in higher education, the new case, Schuette v. Coalition to Defend Affirmative Action, raises the question of whether it is constitutional for a state to ban such preferences in higher education. Schuette arose in the wake of a pair of cases involving admissions to the University of Michigan’s law school and undergraduate programs. Although the Court struck down the undergraduate admissions program, it upheld the law school’s program in a decision that affirmed the constitutionality of the limited use of race-conscious admissions programs in public higher education. In the wake of the University of Michigan cases, opponents of affirmative action in Michigan successfully lobbied for the passage of Proposal 2, which amended the Michigan state constitution to prohibit preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting. Opponents of Proposal 2 sued, and a federal appeals court ruled that Proposal 2’s ban on racial preferences in public education violates the equal protection clause of the United States Constitution. This decision was subsequently upheld in a divided ruling by the full court of appeals, sitting en banc, and the Supreme Court will review the case during the upcoming term.

### A2: McCutcheon vs. FEC – U 2AC

#### Will uphold limits now – perception of corruption

Kennedy 13

[Liz, Demos, Another Citizens United—But This Time We’ll Win, 7/31/13, <http://www.demos.org/blog/7/31/13/another-citizens-united%E2%80%94-time-we%E2%80%99ll-win>]

Toobin paints a dreary picture of the prospects for the case, encapsulated in a quote from the lower court that upheld the contribution limits but raised the “possibility that Citizens United undermined the entire contribution limits scheme.” But he is wrong that Citizens United itself “said nothing about direct contributions to the candidates themselves.” In fact, Kennedy’s opinion reiterates the legitimate need for contribution limits to fight the reality and appearance of corruption. He wrote: With regard to large direct contributions, Buckley reasoned that they could be given “to secure a political quid pro quo ,” and that “the scope of such pernicious practices can never be reliably ascertained,” The practices Buckley noted would be covered by bribery laws if a quid pro quo arrangement were proved. The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements. The Buckley Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. (citations omitted). He also wrote that “the Buckley Court explained that the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures.” The aggregate limits are necessary to fight the growing perception that our representative government is corrupted by huge sums of money flowing from a few individuals directly to candidates who are supposed to represent all of us. They are a valid means of preventing circumvention of the base limits. And they are an important tool to guide against improper solicitation of huge hard money sums from individuals directly to candidates and parties, a toxic adaptation of the huge “soft money” contributions banned by McCain-Feingold. As the amicus brief that Demos and membership groups representing 9.5 million submitted demonstrates, Americans believe their government has been corrupted by money in politics. They believe that their elected representatives respond to the interests of their financial supporters rather than to the needs of their constituents or even the larger common good. And they are right to think that, as new research has shown, that government is in fact responsive to the policy preferences of the donor class rather than to average Americans. The McCutcheon case also surfaces the question of who gets to make the decisions about which appropriate tools are necessary for a democratic government to protect itself from capture by private economic powers. Linda Greenhouse argued this week that because the current Justices of the Supreme Court are all, save Kagan, former appellate judges, they can be unusually out of touch with the complexities of the real world, a greater sense of which allows for informed judging to take place. While she wrote in the context of blindness to issues in the workplace, the blinkers are on just as tightly when this Court has examined campaign finance laws. Here’s hoping the Court, and specifically Justice Kennedy, sees the great harm to citizen’s trust and confidence in government being done by the increasing dominance of a small wealthy elite over our politics and policy and upholds the aggregate contribution limits at stake in McCutcheon.

### Court Politics DA – 2AC

#### 1. [Insert won’t pass/Controversy inevitable]

#### 2. Kennedy’s down for the environment – he’s the swing vote

Blumm 07

[Michael, Lewis & Clark College, Justice Kennedy and the Environment: Property, States' Rights, and the Search For Nexus, 2007, <http://works.bepress.com/michael_blumm/2/>]

Justice Anthony Kennedy, now clearly the pivot of the Roberts Court, is the Court’s crucial voice in environmental and natural resources law cases. Kennedy’s central role was never more evident than in the two most celebrated environmental and natural resources law cases of 2006: Kelo v. New London and Rapanos v. U.S., since he supplied the critical vote in both: upholding local use of the condemnation power for economic development under certain circumstances, and affirming federal regulatory authority over wetlands which have a significant nexus to navigable waters. In each case Kennedy’s sole concurrence was outcome determinative. Justice Kennedy has in fact been the needle of the Supreme Court’s environmental and natural resources law compass since his nomination to the Court in 1988. Although Kennedy wrote surprisingly few environmental and natural resources law opinions during his tenure on the Rehnquist Court, over his first eighteen years on the Court, he was in the majority an astonishing 96 percent of the time in environmental and natural resources law cases—as compared to his generic record of being in the majority slightly over 60 percent of the time. And Kennedy now appears quite prepared to assume a considerably more prominent role on the Roberts Court in the environmental and natural resources law field. This article examines Kennedy’s environmental and natural resources law record over his first eighteen years on the Supreme Court and also on of the Ninth Circuit in the thirteen years before that. The article evaluates all of the environmental law and natural resources law cases in which he wrote an opinion over those three decades, and it catalogues his voting record in all of the cases in which he participated on the Supreme Court in an appendix. One striking measure of Justice Kennedy’s influence is that, after eighteen years on the Court, he has written **just one environmental dissent**—and that on states’ rights grounds, which is one of his chief priorities. The article maintains that Kennedy is considerably more interested in allowing trial judges to resolve cases on the basis of context than he is in establishing broadly applicable doctrine: Kennedy is a doctrinal minimalist. By consistently demanding a demonstrated “nexus” between doctrine and facts, he has shown that he will not tolerate elevating abstract philosophy over concrete justice. For example, he is interested in granting standing to property owners alleging regulatory takings, but he is quite skeptical about the substance of their claims. Another example of his nuanced approach concerns his devotion to states’ rights—which is unassailable—yet he has been quite willing to find federal preemption when it serves deregulation purposes. On the other hand, as his opinion in Rapanos reflects, Kennedy is far from an anti-regulatory zealot. But he does seem to prefer only one level of governmental regulation. At what might be close to the mid-point in his Court career—and with his power perhaps at its zenith—Justice Kennedy is clearly not someone any litigant can ignore. By examining every judicial opinion he has written in the environmental and natural resources law field, this article hopes to give both those litigants and academics a fertile resource to till. Although Kennedy has been purposefully difficult to interpret in this field (writing very few opinions until lately), his record suggests that he may be receptive to environmental and natural resources claims if they are factually well-grounded and do not conflict with Kennedy’s overriding notions of states’ rights. The article concludes with some comparisons between Justice Kennedy and Justice Holmes.

#### 3. Not intrninsic – the supreme court can rule for the plan and \_\_\_ - key to effective decisionmaking

#### 4. Ideology outweighs on controversies

Feldman 08

[Stephen, Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming, Southern California Interdisciplinary Law Journal, Fall 2008, L/N]

So, did Roberts and Alito lie during their confirmation hearings? n4 Did they duplicitously proclaim dedication to the rule of law while secretly planning to implement their political agendas? While I disagree with the justices' votes in practically every controversial case, Roberts and Alito most likely answered senators' questions sincerely, and the justices have probably applied the rule of law in good faith during their initial terms. But, one might ask, how is this possible when they repeatedly vote for the conservative judicial outcome? Most simply, law and politics are not opposites. Roberts, Alito, and the other justices do not necessarily disregard the law merely because they vote to decide cases con**sistent with their respective political ideologies.** As a general matter, Supreme Court justices can decide legal disputes in accordance with law while simultaneously following their political preferences. [\*18] I elaborate this thesis by critiquing the theories of Judge Richard Posner n5 and Professor Ronald Dworkin, n6 two of the most prominent jurisprudents of this era. Embattled opponents, Posner and Dworkin have, for years, relentlessly attacked each other while developing strikingly different depictions of law and adjudication. n7 Despite their opposition, however, Posner and Dworkin together challenge a primary assumption of traditional jurisprudence - an assumption featured during Roberts's and Alito's Senate confirmation hearings. Most senators, jurists, and legal scholars assume that legal interpretation and judicial decision making can be separated from politics, that a judge or justice who decides according to political ideology skews or corrupts the judicial process. n8 Posner and Dworkin reject this traditional approach, particularly for hard cases at the level of the Supreme Court. Each in his own way asserts and explains the power of politics in adjudication: the justices self-consciously vote and thus decide cases according to their political ideologies. Posner and Dworkin agree that the justices do not, and should not, decide hard cases by applying an ostensibly clear rule of law in a mechanical fashion. The justices must be political in an open and expansive manner. n9 Supreme Court adjudication is, in other words, politics writ large. The conflicts between Posner and Dworkin stem from their distinct views of politics. Posner views politics as a pluralist battle among self-interested individuals and groups. He therefore argues that Supreme Court adjudication, manifesting politics writ large, should (and in fact does) entail a pragmatic focus on consequences. The justices should resolve cases by looking to the future and by aiming to do what is best in both the short and long term. n10 Dworkin, repudiating a pragmatic politics of self-interest, favors instead a politics of principles. Thus, according to Dworkin, the justices should resolve hard cases by applying law as integrity. They should theorize about the political-moral principles that fit the doctrinal history - including [\*19] case precedents and constitutional provisions - and that cast the history in its best moral light. n11 Consequently, although Posner and Dworkin both describe the Supreme Court as a political institution - as engaging in politics writ large - their theories otherwise clash tumultuously. Posner sees an adjudicative politics of interest and unmitigated practicality, while Dworkin sees an adjudicative politics of principles and coherent theory. Unfortunately, both Posner and Dworkin - like Roberts, Alito, and the senators who questioned them - remain stuck within the magnetic field of the traditional law-politics dichotomy. While most jurists, legal scholars, and senators are pulled to the law pole - maintaining that law mandates case results - Posner and Dworkin are pulled to the opposite pole. If politics matter to adjudication, they seem to say, then politics must become the overriding determinant of judicial outcomes. Supreme Court adjudication must be politics writ large. If their view is true, then Supreme Court nominees who declare their fidelity to the rule of law do, in fact, lie: current and future justices decide cases by hewing to their political ideologies, not to legal doctrines and precedents. But in their struggle against the forces of the law-politics dichotomy, Posner and Dworkin overcompensate. They neglect another possibility: namely, that Supreme Court adjudication is politics writ small. As Posner and Dworkin emphasize, the Court is a political institution: the justices' political ideologies always and inevitably influence their votes and decisions. But usually the justices do not self-consciously attempt to impose their politics in an expansive manner. To the contrary, the justices sincerely interpret and apply the law. Yet, because legal interpretation is never mechanical, the justices' political ideologies necessarily shape how they understand the relevant legal texts, whether in constitutional or other cases.

#### 5. No spillover --- there’s no reason \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ would be picked for make-up. The Court would choose another case that requires capital.

#### 5. Capital is compartmentalized

Redish 87 (Martin H., Professor of Law – Northwestern University, and Karen L. Drizin, Clerk – Illinois State Supreme Court, New York University Law Review, April, Lexis)

a. The fallacy of the concept of fungible institutional capital. The basis for Dean Choper's suggested judicial abstention on issues of federalism [143](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n143) is the desire "to ease the commendable and crucial task of judicial review in cases of individual consitutional liberties. It is in the latter that the Court's participation is both vitally required and highly provocative." [144](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n144) Judicial efforts in the federalism area, he asserts, "have expended large sums of institutional capital. This is prestige desperately needed elsewhere." [145](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n145) Dean Choper's fundamental assumption, then, is that Supreme Court abstention on issues of constitutional federalism would somehow increase, or at least curtail loss of, limited capital for the more vital area of individual liberty. However, even if one were to concede that judicial review is more fundamental to our constitutional scheme in the area of individual liberty than in matters of federalism, acceptance of Dean Choper's proposal would not necessarily follow. The problem is that it is neither intuitively nor empirically clear that the Court's so-called capital is transferable from one area of constitutional law to another. As one of the current authors has previously argued: It is difficult to imagine . . . that the widespread negative public reactions to Miranda v. Arizona, Engle v. Vitale, or Roe v. Wade would  [\*37]  have been affected at all by the Court's practices on issues of separation of powers and federalism. Rather, public reaction in each seems to have focused on the specific, highly charged issues of rights for criminals, prayer in public schools, and abortions. It is doubtful that the Court would have had an easier time if it had chosen to stay out of interbranch and intersystemic conflicts. [146](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n146)

#### 6. Fiat solves --- normal means is plan’s announced at the same time as the other decision, so it wouldn’t affect capital

#### 7. Capital resilient

Chemerinsky 99 (Erwin, Professor of Law – USC, South Texas Law Review, Fall, 40 S. Tex. L. Rev. 943, Lexis)

Interestingly, though, the Supreme Court has been immune from that cynicism. At a time when other government institutions are often held in disrepute, the Court's credibility is high. Professors John M. Scheb and Williams Lyons set out to measure and determine this. [2](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n2) They conducted a survey to answer the question: "How do the American people regard the U.S. Supreme Court?" [3](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n3) Their conclusion is important: According to the survey data, Americans render a relatively positive assessment of the U.S. Supreme Court. Not surprisingly, the Court fares considerably better in public opinion than does Congress. The respondents are almost twice as likely to rate the Court's performance as "good' or "excellent'  [\*945]  as they are to give these ratings to Congress. By the same token, they are more than twice as likely to rate Congress' performance as "poor.' [4](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n4) This survey was done in 1994, [5](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n5) before the recent events that likely further damaged Congress' public image. Strikingly, Scheb and Lyons found that the "Court is fairly well-regarded across the lines that usually divide Americans." [6](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n6) For example, there are no significant differences between how Democrats and Republicans rate the Court's performance. In short, the Court is a relatively highly regarded institution, more so certainly than Congress or the presidency. [7](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n7) This is not a new phenomena. Throughout this century, the Court has handed down controversial rulings. Yet the Court has retained its legitimacy and its rulings have not been disregarded. Judge John Gibbons remarked that the "historical record suggests that far from being the fragile popular institution that scholars like Professor Choper... and Alexander Bickel have perceived it to be, judicial review is in fact quite robust." [8](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n8) In fact, even at the times of the most intense criticism of the Supreme Court, the institution has retained its credibility. For example, opposition to the Court was probably at its height in the mid-1930s. In the midst of a depression, the Court was striking down statutes thought to be necessary for economic recovery. In an attempt to change the Court's ideology, President Franklin D. Roosevelt - fresh from a landslide reelection - proposed changing the size of the Court. This "Court packing" plan received little public support. The Senate Judiciary Committee, controlled by Democrats, rejected the proposal and strongly reaffirmed the need for an independent judiciary: Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress,... declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or  [\*946]  factional passion, approves any measure we may enact. [9](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n9) This is a telling quotation and a powerful example because if anything should have undermined the Court's legitimacy, it was an unpopular Court striking down popular laws enacted by a popular administration in a time of crisis. Public opinion surveys reflect that this Committee report reflected general support for the Supreme Court, despite the unpopularity of its rulings. In 1935 and 1936, most respondents, 53% and 59% respectively, did not favor limiting the power of the Supreme Court in declaring laws unconstitutional. [10](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n10) Indeed, the Court's high regard, described by Professors Scheb and Lyons, has been remarkably constant over time. [11](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n11) Professor Roger Handberg studied public attitudes about the Supreme Court over several decades and concluded that public support for the institution has not changed significantly and that the "Court has a basic core of support which seems to endure despite severe shocks." [12](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n12) Professor John Hart Ely noted this and observed: The possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience. The warnings probably reached their peak during the Warren years; they were not notably heeded; yet nothing resembling destruction materialized. In fact, the Court's power continued to grow and probably never has been greater than it has been over the past two decades. [13](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n13) Why has the Court maintained its legitimacy even when issuing highly controversial rulings? Social science theories of legitimacy offer some explanation. The renowned sociologist Max Weber wrote that there are three major bases for an institution's legitimacy: tradition, rationality and affective ties. [14](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n14) That which historically has existed tends to be accepted as legitimate. Therefore, 200 years of  [\*947]  judicial review grants the Court enormous credibility. Additionally, that which is rational is likely to be regarded as legitimate. The judiciary's method of giving detailed reasons for its conclusions thus helps to provide it credibility. Finally, that which is charismatic, things to which people have strong affective ties, are accorded legitimacy. It has long been demonstrated that people feel great loyalty to the Constitution. The Court's relationship to the document and its role in interpreting it likely also enhances its legitimacy. More specifically, I suggest that the Court's robust public image is a result of its processes and its producing largely acceptable decisions over a long period of time. The Court is rightly perceived as free from direct political pressure and lobbying, bound by the convention of reaching rational decisions that are justified in opinions, and capable of protecting people from arbitrary government. Social scientists have shown that an institution receives legitimacy from following established procedures. The Court's legitimacy, in part, is based on the perception and reality that it does not decide cases based on the personal interests of the Justices or based on external lobbying and pressures. In a recent book highly critical of the Court, Edward Lazarus lambastes the current Justices, yet he never even suggests a single instance of improper influence or conflict of interest. [15](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n15) The Court's credibility is a product of the correct perception that it decides cases based on a formalized procedure: it reads briefs, hears arguments, deliberates, and writes opinions. Indeed, the very process of opinion writing, regardless of their content, is crucial because it makes the Court's decisions seem a product of reason, not simply acts of will. Although the Court's high credibility is a result of this process, I believe that this is necessary for its institutional legitimacy, but not sufficient. The Court also has produced a large body of decisions, that over a long period of time, have generally been accepted by the public. If the Court were to produce a large number of intensely unpopular rulings over a long period of time, its credibility would suffer. In the short-term, its processes ensure its continued legitimacy; in the long-term, overall acceptability of its decisions is sufficient to preserve this credibility. Recognition of the Court's robust legitimacy is important in the on-going debate over judicial review. Many, including those as  [\*948]  prominent as Felix Frankfurter, Alexander Bickel, and Jesse Choper, have proclaimed a need for judicial restraint so as to preserve the Court's fragile institutional legitimacy. [16](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n16) They argue that the Court must depend on voluntary compliance with its rulings from the other branches of government and that this will not occur unless the Court preserves its fragile legitimacy. Justice Frankfurter dissented in Baker v. Carr, the Supreme Court's landmark decision holding that challenges to malapportionment were justiciable, arguing that the Court was putting its fragile legitimacy at risk. [17](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n17) Frankfurter urged restraint, stating: "The Court's authority - possessed of neither the purse nor the sword - ultimately rests on public confidence in its moral sanction." [18](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n18) Choper, for example, concludes from this premise that the Court should not rule on federalism or separation of powers issues so as to not squander its political capital in these areas that he sees as less important than individual rights cases. Bickel argued that the Court should practice the "passive virtues" and use justiciability doctrines to avoid highly controversial matters so as to preserve its political capital. [19](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n19) Other scholars reason from the same assumption. Daniel Conkle, for example, speaks of the "fragile legitimacy that attaches to Supreme Court pronouncements of constitutional law." [20](http://www.lexis.com/research/retrieve?_m=0effd92084fac48f67935d88a05d02d0&docnum=59&_fmtstr=FULL&_startdoc=51&wchp=dGLzVzz-zSkAW&_md5=239ef674acc9939fafe9043b5f3a0a84&focBudTerms=federalism%20or%20state%21%20right%20or%20commerce%20clause%20w/35%20institutional%20capital%20or%20political%20capital&focBudSel=all#n20) I am convinced that these scholars are wrong and that the public image of the Court is not easily tarnished, and preserving it need not be a preoccupation of the Court or constitutional theorists. There is no evidence to support their assertion of fragile public legitimacy and almost 200 years of judicial review refute it.

#### 8. Normal means is courts will announce their decision at the end of the term and that solves the link

Mondak 92 [Jeffery J., assistant professor of political science @ the University of Pittsburgh. “Institutional legitimacy, policy legitimacy, and the Supreme Court.” American Politics Quarterly, Vol. 20, No. 4, Lexis]

The process described by the political capital hypothesis acts as expected in the laboratory, and the logic of the link between institutional and policy legitimacy has thus gained strong empirical corroboration. However, the dynamic's pervasiveness defies precise estimation due to the limitations of available public opinion data. Still, the results reported here are provocative. First, this view of legitimation may apply to institutions beyond the Supreme Court. Consequently, efforts to use this theory in the study of other institutions may yield evidence supportive of a general process. A second concern is how the Court responds to its institutional limits. Specifically, strategy within the Court can be considered from the context of legitimacy. For example, what tactics may the Court employ to reduce the erosion of political capital? By releasing controversial rulings at the end of a term, for instance, the Court may afford itself a healing period, a time to repair damaged credibility prior to the next round of efforts at conferring policy legitimacy. This suggests a third issue, the manner in which institutional approval is replenished. Does institutional support return to some equilibrium once dispute surrounding a particular ruling fades, or must the Court release popular edicts to offset the effects of its controversial actions?

#### 9. Winners win --- plan boosts capital

Little 00 (Laura, Professor of Law – Temple University, Beasley School of Law, November, 52 Hastings L.J. 47, Lexis)

Other scholars bolster Redish's position by pointing out that judicial review of both federalism and separation of powers questions presents something of a self-fulfilling prophesy. Through review of these sensitive issues of power, the judiciary bolsters its own position or amasses "political capital" and, thereby, legitimates its own power to engage in such review . 237 The judiciary has therefore established  [\*98]  itself as an effective watchdog to ensure that governmental structures are functioning appropriately. n237. Perry, supra note 11, at 57 (Supreme Court has "amassed a great deal of the political capital it now enjoys ... precisely by resolving problems arising under the doctrines of federalism and of the separation-of-powers "); see also Archibald Cox, The Role of the Supreme Court in American Government 30 (1972) (explaining that "history legitimated the power [of judicial review], and then habit took over to guide men's actions so long as the system worked well enough").

#### 10. Controversial decisions don’t affect capital – Bush v. Gore proves

Balkin 01

[Jack, Knight Professor of Constitutional Law and the First Amendment, Yale Law School, Bush v. Gore and the Boundary Between Law and Politics, June 2001, L/N]

The Court's legitimacy is often described in terms of its "political capital." n143 The term "political capital" is generally not defined. It is likely that it has many facets. One element of political capital might be the likelihood that people will follow the Court's decisions and treat them as binding law, especially in controversial cases. Yet if the question is merely whether the Court's decisions will be obeyed, it seems clear that its capital was hardly damaged at all. No one doubted for a second that Al Gore would obey the Court's order, or that the Florida Supreme Court would cease the recounts immediately. The Court's ability to command obedience remains largely unaffected by Bush v. Gore. There is little doubt that people will continue to follow the Supreme Court's decisions. Lawyers will continue to cite them, and lower courts and legal officials will continue to apply them as before. Thus, if legitimacy or political capital means only brute [\*1451] acceptance of the Court and its decisions as a going concern, **the Court will not lose any legitimacy as a result of its decision in Bush v. Gore**. If the Court's political capital is judged by whether politicians are well-or ill-disposed toward the Supreme Court, then the Supreme Court may well have increased its political capital in the short term by halting the recounts. n144 After all, there is now a Republican president, and Republicans control both houses of Congress. They are no doubt delighted with the Supreme Court's exercise of judicial review, for it guarantees them a period of one-party rule. As a result, they are probably much more favorably disposed to granting the Justices the pay raise that Chief Justice Rehnquist has been requesting for several years. n145 Judged in raw political terms, the Supreme Court made much more powerful friends than enemies when it decided Bush v. Gore. n146 Nevertheless, legitimacy might mean something more than the two senses of "political capital" that I have just described. When people speak of "legitimacy" - not in a rigorously philosophical sense but in an everyday sense of the word - they are often referring to basic questions of trust and confidence in public officials: Do people believe that public officials are honest and trustworthy, and do they have confidence that public officials will act in the public interest and not for purely partisan or selfish reasons? These forms of legitimacy are crucial to the courts because the courts rely so heavily on the appearance of fairness and reasonableness. To be sure, sometimes people speak of "moral legitimacy" - whether what government officials do is in fact just and fair - and "procedural legitimacy" - whether government officials have employed fair procedures. But often people do not know what government officials are doing - for example, most people do not read judicial opinions - and even then what is actually just and fair is often difficult to determine. So in practice when [\*1452] people speak of a court's "moral legitimacy" or "procedural legitimacy," they may not mean whether courts actually are fair and just but whether people believe that they are fair and just. According to this analysis, moral and procedural legitimacy are elements of trust and confidence in public officials - in this case, trust and confidence that these officials are upright and honest and will do the right thing. Understood in this broader sense, the question of the Court's legitimacy concerns whether people will continue to have faith in the Court as a fair-minded arbiter of constitutional questions, whether they trust the Court, whether they have confidence in its decisions, and whether they believe its decisions are principled and above mere partisan politics. That sort of confidence and trust probably has been shaken, particularly among lawyers and legal academics, but also in portions of the public at large. Even so, the effects of Bush v. Gore on the Court's legitimacy may differ markedly for different populations and social groups. Perhaps trust and confidence have been damaged among Democratic voters - who are a sizeable proportion of the population - and within the legal academy, which tends to be liberal. But in other groups, the evidence of a loss of faith is quite mixed. Republican politicians like Tom DeLay and Trent Lott probably now have renewed confidence in the Court. After Bush v. Gore, they know that they can rely on the Court to do the right thing (in all the different senses of the word "right"). Although liberal legal academics have been badly shaken by the decision, conservative legal academics have come to the Court's defense, and one expects that we will see more spirited endorsements in the future. n147 Finally, most Americans are not privy to the niceties of constitutional argument and so may not be able to judge whether the Court has played fast and loose with the law. Indeed, the polling data do not seem to suggest a sharp drop off in the Court's approval ratings. A Gallup Poll conducted from January 10 to 14, 2001, indicated that 59% of those surveyed approved of how the Court was handling its job while 34% disapproved, only a three percentage point drop from its 62% approval rating in a similar poll taken from August 29 to September 5, 2000, long before the Florida controversy occurred. n148 Make no mistake: Many people are very, very angry at the Supreme Court, and the Court probably has lost their trust and confidence. But these citizens may not constitute a majority [\*1453] of all Americans. Perhaps more importantly, the persons who are currently in power like what the Court is doing just fine. In any case, there is no doubt in my mind that the Supreme Court will eventually regain whatever trust and confidence among the American public that it lost in Bush v. Gore. The Supreme Court has often misbehaved and squandered its political capital foolishly. It has done some very unjust and wicked things in the course of its history, and yet people still continue to respect and admire it. If the Court survived Dred Scott v. Sandford, it can certainly survive this.

#### 11. Strong public support for the plan

ENS 01

[Environmental News Service , U.S. Military Under Attack on Environmental Grounds, 6/25/01, <http://www.ens-newswire.com/ens/jun2001/2001-06-25-03.asp>]

A coalition of citizen’s organizations is challenging the U.S. Armed Forces, alleging that the health and safety of communities across the country is under assault from past and current polluting military operations. In a new national campaign, citizens impacted by military operations **from Hooper Bay, Alaska to Vieques, Puerto Rico** are participating in the Military Toxics Project�s effort to hold the U.S. military accountable to the same laws that apply to all other sectors of society. The military is not subject to most laws that protect communities and workers, either because it is completely exempt or because the Environmental Protection Agency has no enforcement authority, says Steve Taylor, national coordinator for the Maine based Military Toxics Project. The campaign is timed to support the introduction of a bill by Congressman Bob Filner, a California Democrat, who represents San Diego, home to a large contingent of U.S. Navy ships in the Pacific Fleet, the Space and Naval Warfare Systems Center, and the Naval Air Force. On June 13, Filner introduced the Military Environmental Responsibility Act, which seeks to remove all military exemptions from existing environmental, worker and public safety laws and regulations. To back up the new bill, the Military Toxics Project (MTP) released to Congress a report entitled "Defend Our Health: The U.S. Military�s Environmental Assault On Communities." Prepared by MTP and Environmental Health Coalition, an environmental justice organization based in San Diego, the report shows how military exemptions from laws and lax enforcement by regulatory agencies have contributed to the existence of more than 27,000 toxic hot spots on 8,500 military properties across the country. Based on the findings of this report, the citizens' groups charge that military activities like legal and illegal toxic dumping, testing and use of munitions, manufacture and use of depleted uranium ammunition, hazardous waste generation, nuclear propulsion, toxic air emissions have created "an environmental catastrophe.

#### Public key to the court

Hoeksta 3 (Valerie, Arizona State U., Public Reaction to Supreme Court Decisions, Cambridge U. Press)

In some respects, comparisons with Congress or the presidency are neither appropriate nor fair. Unlike its democratically selected and accountable counterparts, the Supreme Court appears relatively isolated from and unconstrained by public opinion. Its members do not run for election, and once in office, they essentially serve for life. While this certainly places them in an enviable position, the justices must rely on public support for the implementation of their policies since they possess “neither the purse nor the sword.” The Court’s lack of many enforcement mechanisms makes public support even more essential to the Court than it is to other institutions. This public support may generate an important source of political capital for the Court (Choper 1980).

### A2: Econ T/Heg

No ev crisis now

No ev key to heg – wouldn’t cause basing withdrawal

#### 1. Economic decline doesn’t turn heg

**Kagan** **12**

 (Robert – senior fellow in foreign policy at the Brookings Institution, Not Fade Away, The New Republic, p. International Relations Theory and the Consequences of Unipolarity, p. http://www.tnr.com/article/politics/magazine/99521/america-world-power-declinism?passthru=ZDkyNzQzZTk3YWY3YzE0OWM5MGRiZmIwNGQwNDBiZmI)

SOME OF THE ARGUMENTS for America’s relative decline these days would be more potent if they had not appeared only in the wake of the financial crisis of 2008. Just as one swallow does not make a spring, one recession, or even a severe economic crisis, need not mean the beginning of the end of a great power. The United States suffered deep and prolonged economic crises in the 1890s, the 1930s, and the 1970s. In each case, it rebounded in the following decade and actually ended up in a stronger position relative to other powers than before the crisis. The 1910s, the 1940s, and the 1980s were **all high points of American global power and influence**.

**2. No impact in the context of relative power**

**Naím 11**

(Moisés Naím, Internationally renowned columnist and commentator on globalization, international

politics and economics whose columns are published every Sunday by Spain’s El País and Italy's Il Sole 24Ore and reprinted by more than forty leading newspapers worldwide, Carnegie Endowment for Peace, “Why the United States Will Remain the Strongest Country in the World”, <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=45320&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+CarnegieEndowmentForInternationalPeaceGeneralPublicationsAndEvents+%28DC+-+General+Publications+and+Events%29>, August 9, 2011, LEQ)

The downgrade crisis, and the financial mess that preceded it, has resulted in a raft of doomsday-like pronouncements on the future of the United States. According to the well-known author Christopher Hitchens, "the U.S. financial crisis is just the latest example of the trend that threatens to put the country on a par with Zimbabwe, Venezuela and Equatorial Guinea." Not only that, counters Nicholas Kristof, the New York Times columnist: "It is the unequal distribution of wealth that puts the United States on the same level as banana republics like Nicaragua, Venezuela or Guyana.” Russian President Vladimir Putin goes even further: “In fact, the U.S. is a parasite that lives off of the global economy." American political leaders, meanwhile, respond with finger-pointing. For Mitt Romney, one of the leading Republican presidential hopefuls, the problem is that the U.S. is "...only inches away from ceasing to be a free market economy." And President Barack Obama regrets that his country "does not have an AAA political system to match its AAA credit." It is too easy, these days, to conclude that the United States is a political and economic disaster-zone and that it may not remain the most powerful country in the world. For those who already had doubts about American supremacy, the shameful negotiations about the debt ceiling were the final confirmation that the superpower is in freefall. And, of course, the collapse of the stock market and the possibility that the economy is diving back into recession are yet further manifestations of an unstoppable American debacle. This conclusion, so obvious to so many, is wrong. Here’s why: 1) Some of the main pillars of America’s international dominance are still the world’s strongest. Wall Street, the Pentagon, Hollywood, Silicon Valley, universities and many other sources continue to be unmatched by their foreign rivals. The stock market is taking a beating and budget cuts will weaken many sectors, including, for the first time in decades, the Armed Forces. Still, the current U.S. advantage over its rivals is so large that these cuts will not threaten its position at the top. For example: America’s Coast Guard has more ships than the entire fleets of the 12 largest navies in the world. It is not for nothing that the U.S. spends more on defense than any other country. And in other strategic areas, U.S. supremacy, while under stress and challenged, is still strong. 2) Absolute power does not matter. What matters is relative power compared to rivals. Although the U.S. may be declining in absolute power, its closest competitors also have grave problems and face difficult internal and external threats, both political and economic. These problems weaken them as much or more than those besetting the U.S. 3) Demographics. In almost all rich countries the population is growing slowly or declining. In the U.S. it is increasing. In addition, it remains a magnet for the world's most talented and entrepreneurial people. It is also a country that not only integrates immigrants quickly but it also knows better than most others how to give them opportunities and use them more productively, especially those who are more skilled and better educated. 4) When there’s a global financial panic and investors are seeking a safe haven for their savings, where do they turn? To the United States. As all stock markets are tumbling, the appetite for buying U.S. Treasuries continues unabated. Such was the demand for these bonds, last week that their yields fell to their lowest level in history. The first Monday of trading after the Standard and Poor's downgrade, the demand for U.S. treasury bonds soared. Investors did not care that they would get a minimal return on their capital, their priority was to ensure that they were investing in the bonds of a government that would keep their capital safe. Amazing, huh? We are talking about the same government and the same bonds whose solvency is being fiercely contested. Even a downgrading by the rating agency Standard & Poor's of U.S. sovereign bonds did not produce capital flight from that market. The global financial market gave a resounding answer to those who maintain that the unfortunate debate in Washington over the debt ceiling did irreversible damage to U.S. credit. That idea may play well in editorials and talk shows, but it has been dismissed by those who know about money. Investors speak with deeds, not words. And their decisions show that they believe the U.S. government bonds still offer the safest investment in the world. In the long run the S&P downgrade may end up hurting the credibility of S&P more than the credit of the United States government. 5) The influence of radical and destructive political factions will be temporary. The rise of extremist groups with ideas, which suddenly dominate the political scene only to disappear just as quickly as they appeared, is a recurrent phenomenon in the U.S. McCarthyism and the various populist movements are examples of this. Ross Perot is another. And the Tea Party will be just one more. This will become clear as the practical consequences of the Tea Party ideology will become better known and, more importantly, felt. This includes the groups that have been so easily energized by the Tea Party's anti-Washington rhetoric. Is the United States facing enormous problems? Yes. Does it have more global competitors challenging its supremacy? Of course. Has it been weakened? Yes. More than other countries? No. Will it remain, for the foreseeable future, the most powerful country in the world? Yes.

### 1NC Bioterror

#### No bioterror impact

Keller 3/7 -- Analyst at Stratfor, Post-Doctoral Fellow at University of Colorado at Boulder (Rebecca, 2013, "Bioterrorism and the Pandemic Potential," http://www.stratfor.com/weekly/bioterrorism-and-pandemic-potential)

It is important to remember that the risk of biological attack is very low and that, partly because viruses can mutate easily, the potential for natural outbreaks is unpredictable. The key is having the right tools in case of an outbreak, epidemic or pandemic, and these include a plan for containment, open channels of communication, scientific research and knowledge sharing. In most cases involving a potential pathogen, the news can appear far worse than the actual threat. Infectious Disease Propagation Since the beginning of February there have been occurrences of H5N1 (bird flu) in Cambodia, H1N1 (swine flu) in India and a new, or novel, coronavirus (a member of the same virus family as SARS) in the United Kingdom. In the past week, a man from Nepal traveled through several countries and eventually ended up in the United States, where it was discovered he had a drug-resistant form of tuberculosis, and the Centers for Disease Control and Prevention released a report stating that antibiotic-resistant infections in hospitals are on the rise. In addition, the United States is experiencing a worse-than-normal flu season, bringing more attention to the influenza virus and other infectious diseases. The potential for a disease to spread is measured by its effective reproduction number, or R-value, a numerical score that indicates whether a disease will propagate or die out. When the disease first occurs and no preventive measures are in place, the reproductive potential of the disease is referred to as R0, the basic reproduction rate. The numerical value is the number of cases a single case can cause on average during its infectious period. An R0 above 1 means the disease will likely spread (many influenza viruses have an R0 between 2 and 3, while measles had an R0 value of between 12 and 18), while an R-value of less than 1 indicates a disease will likely die out. Factors contributing to the spread of the disease include the length of time people are contagious, how mobile they are when they are contagious, how the disease spreads (through the air or bodily fluids) and how susceptible the population is. The initial R0, which assumes no inherent immunity, can be decreased through control measures that bring the value either near or below 1, stopping the further spread of the disease. Both the coronavirus family and the influenza virus are RNA viruses, meaning they replicate using only RNA (which can be thought of as a single-stranded version of DNA, the more commonly known double helix containing genetic makeup). The rapid RNA replication used by many viruses is very susceptible to mutations, which are simply errors in the replication process. Some mutations can alter the behavior of a virus, including the severity of infection and how the virus is transmitted. The combination of two different strains of a virus, through a process known as antigenic shift, can result in what is essentially a new virus. Influenza, because it infects multiple species, is the hallmark example of this kind of evolution. Mutations can make the virus unfamiliar to the body's immune system. The lack of established immunity within a population enables a disease to spread more rapidly because the population is less equipped to battle the disease. The trajectory of a mutated virus (or any other infectious disease) can reach three basic levels of magnitude. An outbreak is a small, localized occurrence of a pathogen. An epidemic indicates a more widespread infection that is still regional, while a pandemic indicates that the disease has spread to a global level. Virologists are able to track mutations by deciphering the genetic sequence of new infections. It is this technology that helped scientists to determine last year that a smattering of respiratory infections discovered in the Middle East was actually a novel coronavirus. And it is possible that through a series of mutations a virus like H5N1 could change in such a way to become easily transmitted between humans. Lessons Learned There have been several influenza pandemics throughout history. The 1918 Spanish Flu pandemic is often cited as a worst-case scenario, since it infected between 20 and 40 percent of the world's population, killing roughly 2 percent of those infected. In more recent history, smaller incidents, including an epidemic of the SARS virus in 2003 and what was technically defined as a pandemic of the swine flu (H1N1) in 2009, caused fear of another pandemic like the 1918 occurrence. The spread of these two diseases was contained before reaching catastrophic levels, although the economic impact from fear of the diseases reached beyond the infected areas. Previous pandemics have underscored the importance of preparation, which is essential to effective disease management. The World Health Organization lays out a set of guidelines for pandemic prevention and containment. The general principles of preparedness include stockpiling vaccines, which is done by both the United States and the European Union (although the possibility exists that the vaccines may not be effective against a new virus). In the event of an outbreak, the guidelines call for developed nations to share vaccines with developing nations. Containment strategies beyond vaccines include quarantine of exposed individuals, limited travel and additional screenings at places where the virus could easily spread, such as airports. Further measures include the closing of businesses, schools and borders. Individual measures can also be taken to guard against infection. These involve general hygienic measures -- avoiding mass gatherings, thoroughly washing hands and even wearing masks in specific, high-risk situations. However, airborne viruses such as influenza are still the most difficult to contain because of the method of transmission. Diseases like noroviruses, HIV or cholera are more serious but have to be transmitted by blood, other bodily fluids or fecal matter. The threat of a rapid pandemic is thereby slowed because it is easier to identify potential contaminates and either avoid or sterilize them. Research is another important aspect of overall preparedness. Knowledge gained from studying the viruses and the ready availability of information can be instrumental in tracking diseases. For example, the genomic sequence of the novel coronavirus was made available, helping scientists and doctors in different countries to readily identify the infection in limited cases and implement quarantine procedures as necessary. There have been only 13 documented cases of the novel coronavirus, so much is unknown regarding the disease. Recent cases in the United Kingdom indicate possible human-to-human transmission. Further sharing of information relating to the novel coronavirus can aid in both treatment and containment. Ongoing research into viruses can also help make future vaccines more efficient against possible mutations, though this type of research is not without controversy. A case in point is research on the H5N1 virus. H5N1 first appeared in humans in 1997. Of the more than 600 cases that have appeared since then, more than half have resulted in death. However, the virus is not easily transmitted because it must cross from bird to human. Human-to-human transmission of H5N1 is very rare, with only a few suspected incidents in the known history of the disease. While there is an H5N1 vaccine, it is possible that a new variation of the vaccine would be needed were the virus to mutate into a form that was transmittable between humans. Vaccines can take months or even years to develop, but preliminary research on the virus, before an outbreak, can help speed up development. In December 2011, two separate research labs, one in the United States and one in the Netherlands, sought to publish their research on the H5N1 virus. Over the course of their research, these labs had created mutations in the virus that allowed for airborne transmission between ferrets. These mutations also caused other changes, including a decrease in the virus's lethality and robustness (the ability to survive outside the carrier). Publication of the research was delayed due to concerns that the results could increase the risk of accidental release of the virus by encouraging further research, or that the information could be used by terrorist organizations to conduct a biological attack. Eventually, publication of papers by both labs was allowed. However, the scientific community imposed a voluntary moratorium in order to allow the community and regulatory bodies to determine the best practices moving forward. This voluntary ban was lifted for much of the world on Jan. 24, 2013. On Feb. 21, the National Institutes of Health in the United States issued proposed guidelines for federally funded labs working with H5N1. Once standards are set, decisions will likely be made on a case-by-case basis to allow research to continue. Fear of a pandemic resulting from research on H5N1 continues even after the moratorium was lifted. Opponents of the research cite the possibility that the virus will be accidentally released or intentionally used as a bioweapon, since information in scientific publications would be considered readily available. The Risk-Reward Equation 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. As far as continued research is concerned, there is a risk-reward equation to consider. The threat of a terrorist attack using biological weapons is very low. And while it is impossible to predict viral outbreaks, it is important to be able to recognize a new strain of virus that could result in an epidemic or even a pandemic, enabling countries to respond more effectively. All of this hinges on the level of preparedness of developed nations and their ability to rapidly exchange information, conduct research and promote individual awareness of the threat.

### Flexibility DA – 2AC

#### Obama will continue to consult for military actions – takes out the link

Rothkopf 13

[David, CEO and editor at large of Foreign Policy, The Gamble, 8/31/13, <http://www.foreignpolicy.com/articles/2013/08/31/the_gamble?page=0,1>]

Whatever happens with regard to Syria, the larger consequence of the president's action will resonate for years. The president has made it highly unlikely that at any time during the remainder of his term he will be able to initiate military action without seeking congressional approval. It is understandable that many who have opposed actions (see: Libya) taken by the president without congressional approval under the War Powers Act would welcome Obama's newly consultative approach. It certainly appears to be more in keeping with the kind of executive-legislative collaboration envisioned in the Constitution. While America hasn't actually required a congressional declaration of war to use military force since the World War II era, the bad decisions of past presidents make Obama's move appealing to the war-weary and the war-wary. But whether you agree with the move or not, it must be acknowledged that now that Obama has set this kind of precedent -- and for a military action that is exceptionally limited by any standard (a couple of days, no boots on the ground, perhaps 100 cruise missiles fired against a limited number of military targets) -- it will be very hard for him to do anything comparable or greater without again returning to the Congress for support. And that's true whether or not the upcoming vote goes his way. 4. This president just dialed back the power of his own office. Obama has reversed decades of precedent regarding the nature of presidential war powers -- and whether you prefer this change in the balance of power or not, as a matter of quantifiable fact he is transferring greater responsibility for U.S. foreign policy to a Congress that is more divided, more incapable of reasoned debate or action, and more dysfunctional than any in modern American history. Just wait for the Rand Paul filibuster or similar congressional gamesmanship. The president's own action in Libya was undertaken without such approval. So, too, was his expansion of America's drone and cyber programs. Will future offensive actions require Congress to weigh in? How will Congress react if the president tries to pick and choose when this precedent should be applied? At best, the door is open to further acrimony. At worst, the paralysis of the U.S. Congress that has given us the current budget crisis and almost no meaningful recent legislation will soon be coming to a foreign policy decision near you. Consider that John Boehner was instantly more clear about setting the timing for any potential action against Syria with his statement that Congress will not reconvene before its scheduled September 9 return to Washington than anyone in the administration has been thus far. Perhaps more importantly, what will future Congresses expect of future presidents? If Obama abides by this new approach for the next three years, will his successors lack the ability to act quickly and on their own? While past presidents have no doubt abused their War Powers authority to take action and ask for congressional approval within 60 days, we live in a volatile world; sometimes security requires swift action. The president still legally has that right, but Obama's decision may have done more -- for better or worse -- to **dial back the imperial presidency than anything his predecessors or Congress have done for decades.**

#### Court rules against executive now

Wong 13 -- PhD dissertation in Government to Georgetown University (U Jin, 4/22/2013, "THE BLANK CHECK: SUPREME COURT DECISION - MAKING IN NATIONAL SECURITY CLAIMS AND DURING WARTIME," http://repository.library.georgetown.edu/bitstream/handle/10822/558286/Wong\_georgetown\_0076D\_12276.pdf?sequence=1)

This study started out with two questions. The first was: ?Does war influence judicial decision - making?? The second was: ?Do **national security** claims influence judicial decision - making?? The answer to the first question is: In a general hypothetical s ignificant war, there is a **statistically significant finding** of voting against the government. In the models run using the Spaeth database where the government is a party, the influence of all significant wars on judicial decision - making generally was to vote against the government. Presidential approval ratings are statistically significant only in wartime, but with a positive coefficient. Outside of wartime, presidential approval ratings are not statistically likely to influence Supreme Court behavior. This result suggests that while Courts vote strategically and support a popular president, they are still statistically likely to find against the government in a significant war. These findings altogether suggest that that the Supreme Court votes strat egically with an eye towards the popularity of the president, but revert to skepticism of government‘s wartime claims as the war progresses. The answer to the second question is: National security claims brought by the government achieve a **statistically significant likelihood** that the Supreme Court will vote against the government. National security claims were statistically significant with a negative signifier. **This finding is consistent across all the major wars as well as peacetime**. It also suggest s that the Supreme Court generally is not predisposed to defer to the executive branch‘s arguments when it comes to national security claims

#### 2. Plan doesn’t affect all power – the president will do what he wants absent direct prohibition

Marshall 08

[William, Kenan Professor of Law, University of North Carolina, Eleven Reasons Presidential Power Inevitably Expands and Why It Matters, 2008,

<http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/MARSHALL.pdf>]

The first and perhaps overarching reason underlying the growth of presidential power is that the constitutional text on the subject is notoriously unspecific, allowing as one writer maintains, for the office “to grow with the developing nation.”19 Unlike Article I, which sets forth the specific powers granted to Congress,20 the key provisions of Article II that grant authority to the President are written in indeterminate terms such as “executive power,”21 or the duty “to take care that the laws be faithfully executed.”22 Moreover, unlike the other branches, the Presidency has consistently been deemed to possess significant inherent powers.23 Thus, many of the President’s recognized powers, such as the authority to act in times of national emergency24 or the right to keep advice from subordinates confidential,25 are nowhere mentioned in the Constitution itself. In addition, case law on presidential power is underdeveloped. Unlike the many precedents addressing Congressional26 or federal judicial27 power, there are remarkably few Supreme Court cases analyzing presidential power. And the leading case on the subject, Youngstown Sheet & Tube Co. v. Sawyer, 28 is known less for its majority opinion than for its concurrence by Justice Jackson, an opinion primarily celebrated for its rather less-than-definitive announcement that much of presidential power exists in a “zone of twilight.”29 Accordingly, the question whether a President has exceeded her authority is seldom immediately obvious because the powers of the office are so openended.30 This fluidity in definition, in turn, allows presidential power to readily expand when factors such as national crisis, military action, or other matters of expedience call for its exercise.31 Additionally, such fluidity allows political expectations to affect public perceptions of the presidential office in a manner that can lead to expanded notions of the office’s power.32 This perception of expanded powers, in turn, can then lead to the perceived legitimacy of the President actually exercising those powers. Without direct prohibitions to the contrary, expectations easily translate into political reality.33

#### 4. Judicial review doesn’t hinder the President’s ability to act quickly and decisively

**Wells 04** (Christina, Prof of law @ U of Missouri – Columbia, Missouri Law Review, Fall)

Thus, the threat of judicial review is still a necessary component of making executive actors accountable.  Second, one could argue that judicial review unreasonably burdens the executive's ability to act quickly and decisively in response to an emergent situation. [**238**](http://www.lexis.com/research/retrieve?_m=de0216e9953095373f699f9d14bbb843&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAV&_md5=9a947f66e07ba5718a84bf5f543141da#n238) National security emergencies are presumably the last instance in which we want such burdens on executive decision making. [**239**](http://www.lexis.com/research/retrieve?_m=de0216e9953095373f699f9d14bbb843&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAV&_md5=9a947f66e07ba5718a84bf5f543141da#n239) While this argument is reasonable as it pertains to executive decisions regarding the actual prosecution of a war -- i.e., decisions to invade a country, troop movements -- the historic patterns described above never involved such decisions. Rather, they involved decisions to pursue groups or individuals via domestic criminal or administrative measures, decisions made over long periods of time. Such actions taken in the name of national security rarely require quick and decisive action. [**240**](http://www.lexis.com/research/retrieve?_m=de0216e9953095373f699f9d14bbb843&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAV&_md5=9a947f66e07ba5718a84bf5f543141da#n240) The argument for executive flexibility thus carries less weight in this context than when military decisions are involved. Furthermore, given what we know of past skewed decision making, we may actually want to slow down that decision-making process when restricting civil liberties.

#### 6. **Rules during crises don’t hurt flexibility**

Holmes 9 -- Walter E. Meyer Professor of Law, New York University School of Law (Stephen, 4/30/2009, "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1140&context=californialawreview)

Thus, it also illustrates the truism, profoundly relevant to the war on terror, that limiting options available during emergencies can be good or bad, depending on what emergency responders, who may be tempted by sheer exhaustion to take hazardous shortcuts, will do with the latitudes they seize or receive. Campaigners for executive discretion routinely invoke the imperative need for "**flexibility**" to explain why counterterrorism cannot be successfully conducted within the Constitution and the rule of law. But general rules and situation-specific improvisation, far from being mutually exclusive, are perfectly compatible. 1 8 There is no reason why mechanically following protocols designed to prevent harried nurses from negligently administering the wrong blood type should preclude the same nurses from improvising unique solutions to the unique problems of a particular trauma patient. Drilled-in emergency protocols provide a **psychologically stabilizing floor**, shared by co- workers, on the basis of which **untried solutions can then be improvised**. 9 In other words, there is no reason to assert, at least not as a matter of general validity, that the importance of flexibility excludes reliance on rules during emergencies, including national-security emergencies. The emergency-room example can also deepen our understanding of national-security crises by bringing into focus an important but sometimes neglected distinction between threats that are novel and threats that are urgent. **Dangers may be unprecedented without demanding a split-second response**. Contrariwise, urgent threats that have appeared repeatedly in the past can be managed according to protocols that have become automatic and routine. Emergency-room emergencies are urgent even when they are perfectly familiar. Terrorists with access to weapons of mass destruction ("WMD"), by contrast, present a novel threat that is destined to endure for decades, if not longer. **Such a threat is not an "emergency"** in the sense of a sudden event, such as a house on fire, **requiring genuinely split-second decision making**, with no opportunity for serious consultation or debate. **Managing the risks of nuclear terrorism requires sustained policies, not short-term measures**. This is feasible precisely because, in such an enduring crisis, national-security personnel have **ample time to think and rethink, to plan ahead and revise their plans**. In depicting today's terrorist threat as "an emergency," executive-discretion advocates almost always blur together urgency and novelty. This is a consequential intellectual fallacy. But it also provides an opportunity for critics of executive discretion in times of crisis. If classical emergencies, in the house- on-fire or emergency-room sense, turn out to invite and require rule-governed responses, then the justification for dispensing with rules in the war on terror seems that much more tenuous and open to question. In crises where "time is of the essence" 2 1 and serious consultation is difficult or impossible, it is imperative for emergency responders to follow previously crafted first-order rules (or behavioral commands) to enable prompt remedial action and coordination. In crises that are not sudden and transient but, instead, endure over time and that therefore allow for extensive consultation with knowledgeable parties, it is essential to rely on previously crafted second-order rules (or decision-making procedures) designed to **encourage decision makers to consider the costs and benefits of, and feasible alternatives to, proposed action plans**. In medicine, a typical first-order rule is "always wash your hands before inserting a stent," and a typical second-order rule is "always get a second opinion before undertaking major surgery."

#### 9. Pre-9/11 restrictions disprove the DA – no significant effect on readiness

Dycus 05

[Stephen, Professor, Vermont Law School, Osama's Submarine: National Security and

Environmental Protection After 9/11, William & Mary Environmental Law and Policy Review, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1112&context=wmelpr>]

The evidence that compliance with environmental laws has seriously impaired U.S. preparations for war is, however, far from conclusive. After all, the U.S. military's successes in Afghanistan and Iraq were achieved using troops trained and weapons tested under **pre-September 11th environmental statutes** and regulations. A Navy Admiral, testifying before Congress in support of RRPI in 2003, declared that "the readiness of the Navy is excellent. 32 According to a General Accounting Office report in 2002, "[d]espite the loss of some capabilities, service readiness data do not indicate the extent to which encroachment has significantly affected reported training readiness.” 33 In fact, the report concluded, "Training readiness, as reported in official readiness reports, remains high for most units.,34 Environmental Protection Agency ("EPA") Administrator Christine Todd Whitman went further in early 2003, stating, "**I don't believe that there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulation**."35 A more recent study by the Congressional Research Service noted that "[a]lthough DOD has cited some examples of training restrictions or delays at certain installations and has used these as the basis for seeking legislative remedies, the department does not have a system in place to comprehensively track these cases and determine their impact on readiness.' "36 Some have taken a dimmer view of DOD's protests. EPA complained that the definition of "military readiness activities" in the DOD proposal was "broad and unclear and could be read to encompass more than the Department intends."37 Congressman John Dingell, a Democrat from Michigan, was much more emphatic: "I have dealt with the military for years and they constantly seek to get out from under environmental laws. But using the threat of 9-11 and al Qaeda to get unprecedented environmental immunity is despicable. 38