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Indefinite detention is when a government detains without a trial

US Legal

Indefinite Detention Law & Legal Definition

<http://definitions.uslegal.com/i/indefinite-detention/>

Indefinite detention is the practice of detaining an arrested person by a national government or law enforcement agency without a trial. It may be made by the home country or by a foreign nation. Indefinite detention is a controversial practice, especially in situations where the detention is by a foreign nation. It is controversial because it seems to violate many national and international laws. It also violates human rights laws. Indefinite detention is seen mainly in cases of suspected terrorists who are indefinitely detained. The Law Lords, Britain’s highest court, have held that the indefinite detention of foreign terrorism suspects is incompatible with the Human Rights Act and the European Convention on Human Rights. [Human Rights Watch] In the U.S., indefinite detention has been used to hold terror suspects. The case relating to the indefinite detention of Jose Padilla is one of the most highly publicized cases of indefinite detention in the U.S. In the U.S., indefinite detention is a highly controversial matter and is currently under review. Organizations such as International Red Cross and FIDH are of the opinion that U.S. detention of prisoners at Guantanamo Bay is not based on legal grounds. However, the American Civil Liberties Union is of the view that indefinite detention is permitted pursuant to section 412 of the USA Patriot Act.

#### Affirmative doesn’t restrict the authority to indefinitely detain, but rather what we can do once we indefinitely detain – that’s a distinction

#### Clear limits distinction – at best the aff is a restriction on commander in chief power which is LEGALLY and SUBSTANTIVELY distinct from the topic.

Heidt 2013

Stephen, PhD candidate Georgia State University, A Memorandum on the Topic Area, http://www.cedadebate.org/forum/index.php?topic=4846.0

To summarize: War powers are enumerated in Article 1 of the Constitution. Commander in Chief power is enumerated in Article 2. The framers of the Constitution kept the two entirely distinct, on purpose, as a means for resolving the tension between the danger that a strong president would risk dictatorship and the need for unfettered power of the executive to conduct and win war. The key constitutional controversy related to war power is NOT what weapons presidents get to use or how presidents get to pursue war. It is that presidents have continuously utilized a narrow constitutional exception (defense of the nation in crisis) to engage in “acts of war” without Congressional authorization. In fact, the Congress has only formally declared war 5 times in U.S. history while the president has authorized military force at least 200 times and, by some counts, over 300 times. This is the core war powers controversy – the very thing that led to the passage of the War Powers Resolution in 1973 and the controversy the community voted for. The topic paper overrides that distinction and the topic committee would be well to heed the distinction. This distinction, if held, means that the wildest fears of tiny, unpredictable affs can only exist in a world in which Commander in Chief power is selected as the topic. That is the power presidents enjoy for running an army.

#### Topic education – commander and chief powers are about HOW wars are fought whereas war powers are IF they are fought. The aff avoids the central clash of the topic where da and cp ground stems from.

#### Limits – commander in chief powers blow the barn door off, Heidt evidence says it creates tiny unpredictable affs.

#### Vote neg – reasonability is arbitrary and mandates judge intervention.

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#### The executive branch should substantially increase restrictions on the use of the War Powers Authority in the area of indefinite detention to deny habeas corpus via invasive body searches

#### Executive orders avoid politics, have the force of law, and are rarely overturned

Cooper-prof public administration Portland State- 2 [Phillip, By Order of the President: The Use and Abuse of Executive Direct Action” p.59

Executive orders are often used because they are quick, convenient, and relatively easy mechanisms for moving significant policy initiatives. Though itis certainly true that executive orders are employed for symbolic purposes, enough has been said by now to demonstrate that they are also used for serious policymaking or to lay the basis for important actions to be taken by executive branch agencies under the authority of the orders. Unfortunately, as is true of legislation, it is not always possible to know from the title of orders which are significant and which are not, particularly since presidents will often use an existing order as a base for action and then change it in ways that make it far more significant than its predecessors.¶ The relative ease of the use of an order does not merely arise from the fact that presidents may employ one to avoid the cumbersome and time consuming legislative process. They may also use this device to avoid some times equally time-consuming administrative procedures, particularly the rulemaking processes required by the Administrative Procedure Act.84 Because those procedural requirements do not apply to the president, it is tempting for executive branch agencies to seek assistance from the White House to enact by executive order that which might be difficult for the agency itself to move through the process. Moreover, there is the added plus from the agency's perspective that it can be considerably more difficult for potential adversaries to obtain standing to launch a legal challenge to the president's order than it is to move an agency rule to judicial review. There is nothing new about the practice of generating executive orders outside the White House. President Kennedy's executive order on that process specifically pro­vides for orders generated elsewhere

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The Court’s pursuing an incremental strategy in regards to War Powers now---the plan causes massive backlash and executive non-acquiescence

Neavl Devins 10, Goodrich Professor of Law and Professor of Government, College of William & Mary., Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, 12 U. Pa. J. Const. L. 491

Congress, the President, and the Court. Throughout the enemy combatant litigation, Congress signaled to the Court that it would go along with whatever ruling the Court made in these cases. In other words, contrary to the portrayal by academics and the news media of the Supreme Court's willingness to stand up to Congress and the executive branch, lawmakers repeatedly stood behind Court rulings limiting elected branch power. At the same time, as I will detail in the next Part, the Court pursued an incremental strategy - declining to test the boundaries of lawmaker acquiescence and, instead, issuing decisions that it knew would be acceptable to lawmakers. n85¶ The 2004 rulings in Hamdi and Rasul triggered anything but a backlash. In the days following the decisions, no lawmaker spoke on the House or Senate floor about the decision, and only a handful issued [\*508] press releases about the cases. n86 And while eight members of Congress signed onto amicus briefs backing administration policy, n87 Congress did not seriously pursue legislative reform on this issue until the Supreme Court had agreed to hear the Hamdan case. n88¶ When Congress enacted the Detainee Treatment Act (DTA) in December 2005, "lawmakers made clear that they did not see the DTA as an attack on either the Court or an independent judiciary." n89 Most significant, even though the DTA placed limits on federal court consideration of enemy combatant habeas petitions, lawmakers nevertheless anticipated that the Supreme Court would decide the fate of the President's military tribunal initiative. Lawmakers deleted language in the original bill precluding federal court review of Hamdan and other pending cases. n90 Lawmakers, moreover, depicted themselves as working collegially with the Court; several Senators, for example, contended that the "Supreme Court has been shouting to us in Congress: Get involved," n91 and thereby depicted Rasul as a challenge [\*509] to Congress, n92 "asking the Senate and the House, do you intend for ... enemy combatants ... to challenge their detention [in federal courts] as if they were American citizens?" n93 Lawmakers also spoke of detainee habeas petitions as an "abuse[]" n94 of the federal courts, and warned that such petitions might unduly clog the courts, n95 thus "swamping the system" n96 with frivolous complaints. n97 Under this view, the DTA's cabining of federal court jurisdiction "respects" the Court's independence and its role in the detainee process. n98¶ Following Hamdan, lawmakers likewise did not challenge the Court's conclusions that the DTA did not retrospectively bar the Hamdan litigation and that the President could not unilaterally pursue his military tribunal policy. n99 Even though the Military Commissions Act (MCA) eliminates federal court jurisdiction over enemy combatant habeas petitions, lawmakers depicted themselves as working in tandem with the Court. Representative Duncan Hunter (R. Cal.), who introduced the legislation on the House floor, said during the debates that the bill was a response to the "mandate of the Supreme Court that Congress involve itself in producing this new structure to prosecute terrorists." n100 And DTA sponsor Lindsey Graham stated: "The Supreme Court has set the rules of the road and the [\*510] Congress and the president can drive to the destination together." n101 Even lawmakers who expressed disappointment in the Court's ruling did not criticize the Court. Senator Sessions (R. Ala.), for example, blamed Hamdan's lawyers for misleading the Court about the legislative history of the DTA. n102¶ Debates over the MCA habeas provision, moreover, reveal that lawmakers thought that the Supreme Court was responsible for assessing the reach of habeas protections. Fifty-one Senators (fifty Republicans and one Democrat) voted against a proposed amendment to provide habeas protections to Guantanamo detainees. Arguing that enemy combatants possessed no constitutional habeas rights, n103 these lawmakers contended that they could eliminate habeas claims without undermining judicial authority. One of the principal architects of the MCA, Senator Lindsey Graham, put it this way: Enemy combatants have "a statutory right of habeas ... . And if [the Supreme Court finds] there is a constitutional right of habeas corpus given to enemy combatants, that is ... totally different ... and it would change in many ways what I have said." n104 Forty-eight Senators (forty-three Democrats, four Republicans, and one Independent) argued that the habeas-stripping provision was unconstitutional, that the courts would "clean it up," n105 and that Congress therefore should fulfill its responsibility to protect "that great writ." n106¶ When the Supreme Court agreed to rule on the constitutionality of the MCA, the Congress no longer supported the MCA's habeas-stripping provisions. Democrats had gained control of both Houses of Congress. Not surprisingly, there was next-to-no lawmaker criticism of Boumediene. In the week following the decision, no member [\*511] of the House, and only two Senators, made critical comments about the decision on the House or the Senate floor. n107¶ \* \* \* Supreme Court enemy combatant decisions were not out-of-step with prevailing social and political forces. Academics (including prominent conservatives), the media (again including conservative newspapers), former judges, and bar groups had all lined up against the administration. Interest groups too opposed the administration (including some conservative groups). Over the course of the enemy combatant litigation, the American people increasingly opposed the Bush administration. This opposition, in part, was tied to policy missteps (some of which implicated enemy combatant policy-making). These missteps were highly visible and contributed to widespread opposition to the Bush administration. For its part, Congress did not question the Court's role in policing the administration's enemy combatant initiative. By the time the Court decided Boumediene, voter disapproval of the President had translated into widespread opposition to the administration's enemy combatant initiative; a Democratic Congress supported habeas protections for enemy combatants and presidential candidates John McCain and Barack Obama called for the closing of Guantanamo Bay.¶ In the next part of this Essay, I will discuss the incremental nature of the Court's decision making. This discussion will provide additional support for the claims made in this section. Specifically, I will show that each of the Court's decisions was in sync with changing attitudes towards the Bush administration. More than that, Part II will belie the myth that Court enemy combatant decisions were especially consequential. Unlike newspaper and academic commentary about these cases, Court decision making had only a modest impact. Correspondingly, the Court never issued a decision that risked its institutional capital; the Court knew that its decisions would be followed by elected officials and that its decisions would not ask elected officials to take actions that posed some national security risk. [\*512] ¶ II. Judicial Modesty or Judicial Hubris: Making Sense of the Enemy Combatant Cases ¶ From 1952 (when the Supreme Court slapped down President Truman's war-time seizure of the steel mills) n108 until 2004 (when the Court reasserted itself in the first wave of enemy combatant cases), the judiciary largely steered clear of war powers disputes. n109 In part, the Court deferred to presidential desires and expertise. The President sees the "rights of governance in the foreign affairs and war powers areas" as core executive powers. n110 Correspondingly, the President has strong incentives to expand his war-making prerogatives. n111 For its part, the Court has limited expertise in this area, and, as such, is extremely reluctant to stake out positions that may pose significant national security risks. n112 The Court, moreover, is extremely reluctant to risk elected branch opprobrium. Lacking the powers of purse and sword, the Court cannot ignore the risks of elected branch non-acquiescence. n113¶ Against this backdrop, the Court's repudiation of the Bush administration's enemy combatant initiative appears a dramatic break from past practice. Academic and newspaper commentary back up this claim - with these decisions being labeled "stunning" (Harold [\*513] Koh), n114 "unprecedented" (John Yoo), n115 "breathtaking" (Charles Krauthammer), n116 "astounding" (Neal Katyal), n117 "sweeping and categorical" (New York Times), n118 and "historic" (Washington Post and Wall Street Journal). n119 Upon closer inspection, however, the Court's decisions are anything but a dramatic break from past practice. Part I detailed how Court rulings tracked larger social and political forces. In this Part, I will show how the Court risked neither the nation's security nor elected branch non-acquiescence. n120 The Court's initial rulings placed few meaningful checks on the executive; over time, the Court - reflecting increasing public disapproval of the President - imposed additional constraints but never issued a ruling that was out-of-sync with elected government preferences. Separate and apart from reflecting growing public and elected government disapproval of Bush administration policies, the Court had strong incentives to intervene in these cases. The Bush administration had challenged the Court's authority to play any role in national security matters. n121 This frontal assault on judicial power prompted the Court to stand up for its authority to "say what the law is." In Part III, I will talk about the Court's interest in protecting its turf - especially in cases implicating individual rights.¶ [\*514] Small Steps: Hamdi and Rasul. These decisions were a minimalist opening volley in Court efforts to place judicial limits on the Bush administration. While rejecting claims of executive branch unilateralism in national security matters, the Court said next-to-nothing about how it would police the President's enemy combatant initiative. Rasul simply held that Guantanamo Bay was a "territory over which the United States exercises exclusive jurisdiction and control," and, consequently, that the President's enemy combatant initiative is subject to existing habeas corpus legislation. n122 This ruling "avoided any constitutional judgment" and offered no guidance on "what further proceedings may become necessary" after enemy combatants filed habeas corpus petitions. n123 Hamdi, although ruling that United States citizens have a constitutional right to challenge their detention as an enemy combatant, placed few meaningful limits on executive branch detentions. Noting that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive," the Court ruled both that hearsay evidence was admissible, and that "the Constitution would not be offended by a presumption in favor of the Government's evidence." n124¶ The Bush administration, as John Yoo put it, saw the limited reach of Hamdi and Rasul as creating an "opportunity" for the administration to regain control over its detention policy. n125 In particular, the administration asked Congress to enact legislation that would limit federal court review of enemy combatant claims. The administration also launched Combatant Status Review Tribunals (CSRT) as a more formal substitute for unilateral executive determinations of a detainee's enemy combatant status. n126 Capitalizing on Rasul's failure to consider the constitutional dimensions of enemy combatant claims, CSRTs largely operated as a rubber stamp of administration determinations. In 2006, ninety-nine out of 102 detainees brought before CSRTs were designated as enemy combatants. n127 The Justice Department reconvened CSRTs to reconsider the remaining three cases [\*515] and, ultimately, the remaining three were determined to be enemy combatants. n128¶ Hamdi and Rasul were both "narrow, incompletely theorized [minimalist] decisions." n129 And while newspapers and academics focused their attention on the Court's open-ended declaration that "a state of war is not a blank check for the President," n130 the decisions did not meaningfully limit the executive. Well aware that Congress and the American people supported the President's military commission initiative, n131 the Court understood that a sweeping denunciation of administration policies might trigger a fierce backlash. n132 Moreover, by ruling that Congress had authorized the President's power to detain enemy combatants (through its post-9/11 Authorization for the Use of Military Force Resolution), and by suggesting that the Court would make use of pro-government presumptions when reviewing military commission decision making, the Court formally took national security interests into account. n133 Actions taken by the executive in response to these rulings underscore that the Court's de minimis demands neither risked national security nor executive branch non-acquiescence.¶ None of this is to say that the 2004 decisions were without impact. Following Rasul, for example, the administration understood that it needed to make use of some type of military court review - a requirement that may have impacted the military's handling of enemy combatants. At the same time, the Court did not issue a potentially debilitating blow to the Bush administration by decisively and resoundingly rejecting key elements of the administration's legal policy. n134 Instead, the Court simply carved out space for itself to review administration policy-making - without setting meaningful boundaries on what the administration could or could not do.

#### Congress will backlash against the plan and cut judicial pay

Philip A. Talmadge 99, Justice, Washington State Supreme Court, Winter, Seattle University Law Review, 22 Seattle Univ. L. R. 695, p. 701-704

The doctrine of judicial restraint has been encrusted in recent years with considerable ideological cant of both the left and the right. 17 The ideological discussion highlights particular political issues of the day. Many conservatives decry judicial activism with respect to the courts' role in racial desegregation in America or [\*702] reproductive rights issues. 18 Liberals complain today of judicial activism in property and economic issues. 19 But this doctrine need not be the captive of the left or the right. The doctrine itself has become "political" largely because it is not susceptible to rigorous and predictable definition. That the courts are not entirely trusted by the partisan branches of government to announce constitutional principles is illustrated by recent Washington legislation. In 1997, a bill was introduced in the Washington State House of Representatives with thirty-three sponsors. The bill challenged the doctrine of judicial review: "The doctrine of judicial review that the courts have the sole and final say in interpreting the Constitution on behalf of all three branches of government has been subject to serious analysis and criticism by scholars, jurists, and others for almost two hundred years." 20 The legislation's apparent intent was to undercut the finality and authority of judicial review of constitutional questions by permitting the legislature to disagree with a judicial interpretation of the Washington Constitution and to submit the issue to the voters in a statewide referendum. 21 [\*703] The sense that the courts are too powerful sometimes conflicts with direction to judges from the partisan branches to state their views more publicly. In 1997, twenty-two sponsors introduced in the Washington State House of Representatives a measure urging the Supreme Court to amend Canon 7 of the Code of Judicial Conduct to afford judges and judicial candidates the right to "speak freely and without fear of governmental retaliation, on issues that are not then before the court." 22 The United States Congress has also raised serious questions about judicial performance through a different methodology. The United States Senate's recent glacial pace in confirming nominees to judicial vacancies increases judicial workloads and instills trepidation in the minds of the nominees. 23 In recent legislation, 24 Congress [\*704] sought to restrain "judicial activism" by denying judges cost-of-living salary adjustments and limiting federal court jurisdiction. Various versions of the legislation would deny federal courts the power to release federal prisoners because of bad prison conditions and establish special procedures to hear challenges to state initiative measures. In summary, these issues illustrate the need for the courts continually to revisit and review the core constitutional functions of the judiciary. 25 Within the constitutional sphere, however, the courts should be active and the other branches of government constrained not to act unconstitutionally. The judiciary cannot "restrain" itself from declaring the enactments of legislative bodies violative of constitutional norms. The courts must vigorously protect individuals, particularly minorities, from majoritarian tyranny. But this protective role does not allow the courts to "constitutionalize" every controversy. Judicial self-restraint lends support to the legitimacy of judicial independence. In our system of separation of powers, achievement of the necessary balance between a judiciary vigorous within its constitutional sphere and independent of the partisan branches of government, and a judiciary restrained in its inclination to right every wrong, is no easy task. That necessary balance is, however, the essence of ordered liberty in the American constitutional system. Likewise, the other branches of government must regard the authority and independence of the judiciary by respecting judicial review, properly funding the courts, and avoiding the imposition of nonjudicial duties or ever-escalating caseloads. The fulfillment of separation of powers is found in the principles of restraint employed in the federal and state court systems.

#### Adequate funding for the judiciary is key to the rule of law – it’s watched internationally

Testimony of Associate Justice Anthony M. Kennedy 7 before the United States Senate Committee on the Judiciary Judicial Security and Independence February 14, http://judiciary.senate.gov/testimony.cfm?id=2526&wit\_id=6070

The provision of judicial resources by Congress over the years is admirable in most respects. Your expeditious consideration of the pending court-security bill is just one example of your understanding of our needs. Our facilities have been, and are, the envy of the judiciaries of the several States and, indeed, of judges throughout the world. Our staff, our libraries, our electronic data systems, and our courthouses are excellent. These resources have been the special concern of Congress. Your interest, your oversight, and your understanding of our needs set a standard for our own States and for nations around the world. Just one example is the Federal Judicial Center. When visitors come to Washington, we recommend they observe it to learn how a successful judicial-education center functions. Those visitors are awed by what they see. As you know, the Center produces an elaborate series of programs for judicial education, under a small budget emphasizing turn-key projects. Around the world, the allocation of scarce resources to judiciaries is, to be candid, a tough sell. There are urgent demands for funds for defense; for roads and schools; for hospitals, doctors, and health care; and for basic utilities and necessities such as clean water. Even rich countries like our own find it hard to marshal the necessary resources for all these endeavors. What, then, is the reception an elected representative receives when he or she tells constituents the legislature has increased funding for judicial resources? The report, to be frank, is not likely to generate much excitement. Perhaps this is an educational failure on our part, for there is a proper response to this predictable public reaction. It is this: An efficient, highly qualified judiciary is part of the infrastructure necessary in any society that seeks to safeguard its freedom. A judiciary committed to excellence secures the Rule of Law; and the Rule of Law is a building block no less important to the advance of freedom and prosperity than infrastructure systems such as roads and utilities. Without a functioning, highly qualified, efficient judiciary, no nation can hope to guarantee its prosperity and secure the liberties of its people. The Committee knows that judges throughout the United States are increasingly concerned about the persisting low salary levels Congress authorizes for judicial service. Members of the federal judiciary consider the problem so acute that it has become a threat to judicial independence. This subject is a most delicate one and, indeed, is difficult for me to address. It is, however, an urgent matter requiring frank and open exchange of views. Please permit me to make some remarks on the subject.

#### That causes nuclear war [gender paraphrased].

Charles S. Rhyne 58, Founder and Senior Partner of Rhyne & Rhyne law firm. “Law Day Speech for Voice of America.” May 1, American Bar Association. http://www.abanet.org/publiced/lawday/rhyne58.html

In these days of soul-searching and re-evaluation and inventorying of basic concepts and principles brought on by the expansion of man’s vision to the new frontiers and horizons of outer space, we want the people of the world to know that we in America have an unshakable belief in the most essential ingredient of our way of life—the rule of law. The law we honor is the basis and foundation of our nation’s freedom and the freedom for the individual which exists here. And to Americans our freedom is more important than our very lives. The rule of law has been the bulwark of our democracy. It has afforded protection to the weak, the oppressed, the minorities, the unpopular; it has made it possible to achieve responsiveness of the government to the will of people. It stands as the very antithesis of Communism and dictatorship. When we talk about “justice” under our rule of law, the absence of such justice behind the Iron Curtain is apparent to all. When we talk about “freedom” for the individual, Hungary is recalled to the minds of all men. And when we talk about peace under law—peace without the bloodbath of war—we are appealing to the foremost desire of all peoples everywhere. The tremendous yearning of all peoples for peace can only be answered by the use of law to replace weapons in resolving international disputes. We in our country sincerely believe that [hu]mankind’s best hope for preventing the tragic consequences of nuclear-satellite-missile warfare is to persuade the nations of the entire world to submit all disputes to tribunals of justice for all adjudication under the rule of law. We lawyers of America would like to join lawyers from every nation in the world in fashioning an international code of law so appealing that sentiment will compel its general acceptance. Man’s relation to man is the most neglected field of study, exploration and development in the world community. It is also the most critical. The most important basic fact of our generation is that the rapid advance of knowledge in science and technology has forced increased international relationships in a shrunken and indivisible world. Men must either live together in peace or in modern war we will surely die together. History teachers that the rule of law has enabled [hu]mankind to live together peacefully within nations and it is clear that this same rule of law offers our best hope as a mechanism to achieve and maintain peace between nations. The lawyer is the technician in man’s relationship to man. There exists a worldwide challenge to our profession to develop law to replace weapons before the dreadful holocaust of nuclear war overtake our people.

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#### There will be a narrow ruling on Bond now but conservative advocates are pushing.

Donnelly 11-5-13

Tom, Constitutional Accountability Center’s Message Director and Counsel and former Climenko Fellow and Lecturer on Law at Harvard Law School, Constitutional law as soap opera: Bond v. United States http://blog.constitutioncenter.org/2013/11/constitutional-law-as-soap-opera-bond-v-united-states/

Colorful facts aside, in the conservatives’ rendering of Bond, the very fabric of the Republic is at stake. George Will has called it the Term’s “most momentous case,” arguing that the Roberts Court must step in to check a “government run amok.” The Heritage Foundation warns that the case challenges a key lesson that “Americans are taught from a young age” – that “our government is a government of limited powers.” And Ted Cruz frames the legal issue as follows: whether the “Treaty Clause is a trump card that defeats all of the remaining structural limitations on the federal government.” A scary proposition, indeed . . . But will the Court even get this far? Ms. Bond’s primary argument is that the chemical weapons treaty and its implementing statute should be read to exclude her conduct – a question of statutory interpretation and hardly the stuff of Tenthers’ dreams. If the Court decides the case on those grounds, Ms. Bond could very well prevail, while the ruling itself could be rather minor. The main reason that this case may prove “momentous” is that leading conservative academics, advocates, and legal groups are pushing the Roberts Court to turn this case from an interesting-but-far-from-historic statutory case into a monumental constitutional one. While the Court denied a request from Professor Nicholas Rosenkranz and the Cato Institute – the main proponents of the treaty-power-as-dangerous-trump-card theory – for time to press their argument during tomorrow’s hearing, the Court generally rejects such requests from amicus curiae, so we can’t read too much into that. And, following other recent cases addressing the scope of federal power – including, most prominently, the Affordable Care Act case – there is every reason to believe that the Court may wade into the important constitutional issues lurking just beneath the surface in Bond. The primary constitutional issue in the case involves the scope of the federal government’s treaty power – a power that was of central interest to George Washington and his Founding-era colleagues – and, in turn, Congress’s power under the Necessary and Proper Clause to pass laws to implement validly enacted treaties. However, in Bond, conservative legal groups have proceeded to turn the Constitution’s text and history on their head, arguing that the Constitution itself requires a ruling that sharply limits federal power and overturns nearly a century’s worth of precedent – dating back to a 1920 ruling by Justice Oliver Wendell Holmes. Indeed, Bond is just one of several cases this Term featuring an aggressive call by conservatives to overturn well-established precedent. Furthermore, a broad ruling by the Court’s conservatives could significantly limit Congress’s power to enact laws under the Necessary and Proper Clause, generally, opening up new challenges to various government programs and regulations. In the past, the right’s constitutional arguments may have gone unanswered. However, increasingly, leading progressive academics and practitioners have begun to stake their own claim to the Constitution’s text and history – the tired battle between the progressive community’s “living Constitution” and Justice Scalia’s “dead Constitution” replaced by new battles between the left and the right over the Constitution’s meaning. Bond is a clear example of this new dynamic. Rather than ceding the Constitution’s text and history to conservative legal groups, progressives have fought back in Bond with originalist arguments of their own in briefs authored by some of the progressive community’s leading lights, including Walter Dellinger, Marty Lederman, and Oona Hathaway. These briefs – as well as one filed by my organization, Constitutional Accountability Center – remind the Court that, in ditching the dysfunctional Articles of Confederation, the Founders sought to create a strong national government with the power to negotiate treaties with foreign nations, pass laws to fulfill those treaty obligations, and, in turn, enhance the young nation’s international reputation. With progressives fully engaged in the battle over the Constitution’s meaning, the question facing the Court in important constitutional cases is now less about whether the Constitution’s text and history should prevail and more about which side’s version rings truer.

#### Aff is a massive change – kills court capital and will be ignored by the President.

Devins 2010

Neal, Professor of Law at William and Mary, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1024&context=facpubs

Without question, there are very real differences between the factual contexts of Kiyemba and Bush-era cases. These differences, however, do not account for the striking gap between accounts of Kiyemba as likely inconsequential and Bush-era cases as "the most important decisions" on presidential power "ever., 20 In the pages that follow, I will argue that Kiyemba is cut from the same cloth as Bush-era enemy combatant decision making. Just as Kiyemba will be of limited reach (at most signaling the Court's willingness to impose further limits on the government without forcing the government to meaningfully adjust its policymaking), Bush-era enemy combatant cases were modest incremental rulings. Notwithstanding claims by academics, opinion leaders, and the media, Supreme Court enemy combatant decision making did not impose significant rule of law limits on the President and Congress. Bush-era cases were certainly consequential, but they never occupied the blockbuster status that so many (on both the left and the right) attributed to them. Throughout the course of the enemy combatant dispute, the Court has never risked its institutional capital either by issuing a decision that the political branches would ignore, or by compelling the executive branch to pursue policies that created meaningful risks to national security. The Court, instead, took limited risks to protect its turf and assert its power to "say what the law is." That was the Court's practice during the Bush years, and it is the Court's practice today.

#### Capital key is to uphold the Missouri precedent.

Spiro 2008

Peter J., Professor of Law, Temple University, Resurrecting Missouri v. Holland, Missouri Law Review http://law.missouri.edu/lawreview/files/2012/11/Spiro.pdf

At the same time that the international price of non-participation rises, a subtle socialization may be working to lower the domestic cost of exercising Holland-like powers. Globalization is massaging international law into the sinews of American political culture. The United States may not have ratified the Convention on the Rights of the Child, for example, but it has acceded to Hague Conventions on abduction33 and adoption,34 as well as optional protocols to the Children’s Rights Convention itself,35 and has enthusiastically pursued an agreement on the transboundary recovery of child support.36 As international law becomes familiar as a tool of family law, the Children’s Convention will inevitably look less threatening even against America’s robust sentiments regarding federalism. Regimes in other areas should be to similar effect and will span the political divide. It is highly significant, for instance, that conservative Americans have become vocal advocates of international regimes against religious persecution, a key factor in the aggressive U.S. stance on Darfur.37 To the extent that conservatives see utility in one regime they will lose traction with respect to principled category arguments against others. Which is not at all to say that Holland will be activated with consensus support. A clear assertion of the Treaty Power against state prerogatives would surely provoke stiff opposition in the Senate and among anti-internationalist conservatives, setting the scene for a constitutional showdown.38 The adoption of a treaty regime invading protected state powers would require the expenditure of substantial political capital. Any president taking the Treaty Power plunge would be well advised to choose a battle to minimize policy controversy on top of the constitutional one. A substantively controversial regime depending on Holland’s authority (say, relating to the death penalty) would increase the risk of senatorial rebuke. Perhaps the best strategy would be to plant the seeds of constitutional precedent in the context of substantively obscure treaties, ones unlikely to attract sovereigntist flak. If a higher profile treaty implicating Holland were then put on the table, earlier deployments would undermine opposition framed in constitutional terms. Such was the case with the innovation of congressional-executive agreements, which, before their use in adopting major institutional regimes in the wake of World War II, had been used with respect to minor agreements in the interwar years.39 In contrast to the story of congressional-executive agreements, advocates of an expansive Treaty Power will have the advantage of Holland itself, that is, a Supreme Court decision on point and not superseded by a subsequent ruling. That would lend constitutional credibility to the proposed adoption of any agreement requiring the Treaty Power by way of constitutional support. But it wouldn’t settle the question in the face of the consistent practice described above. Holland is an old, orphaned decision, creating ample space for contemporary rejection. An anti-Holland posture, the decision’s status as good law notwithstanding, would also be bolstered by the highly credentialed revisionist critique.40 That of course begs the question of what the Supreme Court would do with the question were it presented. The Court could reaffirm Holland, in which case its resurrection would be official and the constitutional question settled, this time (one suspects) for good. That result would comfortably fit within the tradition of the foreign affairs differential (in which Holland itself is featured).41 One can imagine the riffs on Holmes, playing heavily to the imperatives of foreign relations and the increasing need to manage global challenges effectively. The opinion might not write itself, but it would require minimal creativity. Recent decisions, Garamendi notably among them,42 would supply an updated doctrinal pedigree. And since the question would come to the Court only after a treaty had garnered the requisite two-thirds’ support in the Senate, the decision would not likely require much in the way of political fortitude on the Court’s part. It would also likely draw favorable international attention, reaffirming the justices’ membership in the global community of courts.43 IV. CONCLUSION:CONSTITUTIONAL LIFE WITHOUT MISSOURI V. HOLLAND Holland’s judicial validation would hardly be a foregone conclusion. The Supreme Court has grown bolder in the realm of foreign relations. Much of this boldness has been applied to advance the application of international norms to U.S. lawmaking, the post-9/11 terror cases most notably among them.44 The VCCR decisions, on the other hand, have demonstrated the Court’s continued resistance to the application of treaty obligations on the states. In Medellín, where the Court found the President powerless to enforce the ICJ’s Avena decision on state courts, that resistance exhibited itself over executive branch objections. The Court rebuffed the President with the result of retarding the imposition of international law on the states and at the risk of offending powerful international actors.

#### Key to the chemical industry – patchwork regulation.

ACC 2013

American Chemistry Council, leading chemical manufacturing industry trade group, BRIEF FOR AMICUS CURIAE THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF RESPONDENT http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/08\_16\_13-American-Chemistry-Council-Amicus-Brief\_115164106\_1.pdf

Like the federal statute considered by this Court in Gonzales v. Raich, 545 U.S. 1 (2005), Section 229 is a component of a “comprehensive framework” for prohibiting the “production, distribution, and possession,” id. at 24, of chemical weapons. That the statute may reach the intrastate production, transfer, possession, or use of such weapons in order to extinguish the interstate market for them is of no constitutional significance. Congress could reasonably have concluded that eradicating the interstate and foreign markets in chemical weapons required prohibiting intrastate activity. As this Court has determined, “[t]he notion that … a discrete activity … [may be] hermetically sealed off from the larger interstate … market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.” Id. at 30. That is decidedly the case here: Like the possession or consumption of homegrown marijuana, the intrastate manufacture, possession, or use of chemicals for illicit purposes could easily affect interstate or foreign markets. To be sure, many chemicals within the ambit of the CWC and Section 229 are “dual-use”: they have the potential to be used as chemical weapons or as precursors to chemical weapons, but they also have extensive beneficial uses in manufacturing, agriculture, industry, education, and the arts. That fact, however, does nothing to alter that Section 229 is a pillar in a comprehensive scheme to eradicate the national and international market in chemicals for illicit purposes. Under this Court’s Commerce Clause precedents, it does not matter that Congress is attempting to suppress a market for the manufacture, transfer, and possession of certain chemicals only for particular purposes and not commerce in such chemicals altogether. Section 229, moreover, is not merely part of a larger regulatory framework aimed at eradicating a commercial market; it is also squarely aimed at fostering the lawful national and international trade in chemicals for their beneficial uses. Petitioner’s narrow focus on the disarmament objectives of the CWC ignores this vital commerce-enhancing objective. See Wickard v. Filburn, 317 U.S. 111, 128 (1942) (“The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36- 37 (1937). Indeed, the text and history of the CWC and its implementing legislation make clear that one of its principal goals was the promotion of “free trade in chemicals.” Conv. pmbl. ¶¶ 9, 10 (Pet. App. 147). Encouraging that commerce, the signatories (“States Parties”) agreed, required a comprehensive prohibition on the use, production, or acquisition of chemicals for illicit purposes, not only by signatory nations but also by corporations and individuals. Otherwise, the everyday commerce in chemicals would be in constant jeopardy of piecemeal trade-restricting measures aimed at securing what only uniform controls could accomplish. Such was the importance of the prohibition’s scope that “[v]arious chemical industry spokespersons consider[ed] the CWC a trade enabling regime that could counteract trends in the future, in which U.S. chemical trade and investment could be constricted under even tighter export controls.” Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Relations, 104th Cong. 25 (1996) (statement of Sen. Lugar) (emphasis added). Petitioner is thus wrong to insist that her conduct is far afield from the goals of the CWC and its implementing legislation. Even one misuse of a toxic chemical for malicious purposes—and certainly such misuses when viewed in the aggregate—could prompt a patchwork of severe domestic or international restrictions on the lawful trade in chemicals. Only by imposing comprehensive criminal controls on the diversion of chemicals into illicit channels and on the subsequent misuse of such chemicals could the CWC fully achieve its objectives. Just as Congress may regulate local wheat production to help stabilize the interstate market in wheat (per Wickard), Congress may regulate local misuses of chemicals that could lead to the impairment of lawful interstate or international trade in chemicals for their beneficial uses

#### The chemical industry solves extinction

Baum 1999 (Rudy, C&EN Washington, MILLENNIUM SPECIAL REPORT, Volume 77, Number 49 CENEAR 77 49 pp.46-47, <http://pubs.acs.org/cen/hotarticles/cenear/991206/7749spintro2.html>)

Here is the fundamental challenge we face: The world's growing and aging population must be fed and clothed and housed and transported in ways that do not perpetuate the environmental devastation wrought by the first waves of industrialization of the 19th and 20th centuries. As we increase our output of goods and services, as we increase our consumption of energy, as we meet the imperative of raising the standard of living for the poorest among us, we must learn to carry out our economic activities sustainably. There are optimists out there, C&EN readers among them, who believe that the history of civilization is a long string of technological triumphs of humans over the limits of nature. In this view, the idea of a "carrying capacity" for Earth—a limit to the number of humans Earth's resources can support—is a fiction because technological advances will continuously obviate previously perceived limits. This view has historical merit. Dire predictions made in the 1960s about the exhaustion of resources ranging from petroleum to chromium to fresh water by the end of the 1980s or 1990s have proven utterly wrong. While I do not count myself as one of the technological pessimists who see technology as a mixed blessing at best and an unmitigated evil at worst, I do not count myself among the technological optimists either. There are environmental challenges of transcendent complexity that I fear may overcome us and our Earth before technological progress can come to our rescue. Global climate change, the accelerating destruction of terrestrial and oceanic habitats, the catastrophic loss of species across the plant and animal kingdoms—these are problems that are not obviously amenable to straightforward technological solutions. But I know this, too: Science and technology have brought us to where we are, and only science and technology, coupled with innovative social and economic thinking, can take us to where we need to be in the coming millennium. Chemists, chemistry, and the chemical industry—what we at C&EN call the chemical enterprise—will play central roles in addressing these challenges. The first section of this Special Report is a series called "Millennial Musings" in which a wide variety of representatives from the chemical enterprise share their thoughts about the future of our science and industry. The five essays that follow explore the contributions the chemical enterprise is making right now to ensure that we will successfully meet the challenges of the 21st century. The essays do not attempt to predict the future. Taken as a whole, they do not pretend to be a comprehensive examination of the efforts of our science and our industry to tackle the challenges I've outlined above. Rather, they paint, in broad brush strokes, a portrait of scientists, engineers, and business managers struggling to make a vital contribution to humanity's future. The first essay, by Senior Editor Marc S. Reisch, is a case study of the chemical industry's ongoing transformation to sustainable production. Although it is not well known to the general public, the chemical industry is at the forefront of corporate efforts to reduce waste from production streams to zero. Industry giants DuPont and Dow Chemical are taking major strides worldwide to manufacture chemicals while minimizing the environmental "footprint" of their facilities. This is an ethic that starts at the top of corporate structure. Indeed, Reisch quotes Dow President and Chief Executive Officer William S. Stavropolous: "We must integrate elements that historically have been seen as at odds with one another: the triple bottom line of sustainability—economic and social and environmental needs." DuPont Chairman and CEO Charles (Chad) O. Holliday envisions a future in which "biological processes use renewable resources as feedstocks, use solar energy to drive growth, absorb carbon dioxide from the atmosphere, use low-temperature and low-pressure processes, and produce waste that is less toxic." But sustainability is more than just a philosophy at these two chemical companies. Reisch describes ongoing Dow and DuPont initiatives that are making sustainability a reality at Dow facilities in Michigan and Germany and at DuPont's massive plant site near Richmond, Va. Another manifestation of the chemical industry's evolution is its embrace of life sciences. Genetic engineering is a revolutionary technology. In the 1970s, research advances fundamentally shifted our perception of DNA. While it had always been clear that deoxyribonucleic acid was a chemical, it was not a chemical that could be manipulated like other chemicals—clipped precisely, altered, stitched back together again into a functioning molecule. Recombinant DNA techniques began the transformation of DNA into just such a chemical, and the reverberations of that change are likely to be felt well into the next century. Genetic engineering has entered the fabric of modern science and technology. It is one of the basic tools chemists and biologists use to understand life at the molecular level. It provides new avenues to pharmaceuticals and new approaches to treat disease. It expands enormously agronomists' ability to introduce traits into crops, a capability seized on by numerous chemical companies. There is no doubt that this powerful new tool will play a major role in feeding the world's population in the coming century, but its adoption has hit some bumps in the road. In the second essay, Editor-at-Large Michael Heylin examines how the promise of agricultural biotechnology has gotten tangled up in real public fear of genetic manipulation and corporate control over food. The third essay, by Senior Editor Mairin B. Brennan, looks at chemists embarking on what is perhaps the greatest intellectual quest in the history of science—humans' attempt to understand the detailed chemistry of the human brain, and with it, human consciousness. While this quest is, at one level, basic research at its most pure, it also has enormous practical significance. Brennan focuses on one such practical aspect: the effort to understand neurodegenerative diseases like Alzheimer's disease and Parkinson's disease that predominantly plague older humans and are likely to become increasingly difficult public health problems among an aging population. Science and technology are always two-edged swords. They bestow the power to create and the power to destroy. In addition to its enormous potential for health and agriculture, genetic engineering conceivably could be used to create horrific biological warfare agents. In the fourth essay of this Millennium Special Report, Senior Correspondent Lois R. Ember examines the challenge of developing methods to counter the threat of such biological weapons. "Science and technology will eventually produce sensors able to detect the presence or release of biological agents, or devices that aid in forecasting, remediating, and ameliorating bioattacks," Ember writes. Finally, Contributing Editor Wil Lepkowski discusses the most mundane, the most marvelous, and the most essential molecule on Earth, H2O. Providing clean water to Earth's population is already difficult—and tragically, not always accomplished. Lepkowski looks in depth at the situation in Bangladesh—where a well-meaning UN program to deliver clean water from wells has poisoned millions with arsenic. Chemists are working to develop better ways to detect arsenic in drinking water at meaningful concentrations and ways to remove it that will work in a poor, developing country. And he explores the evolving water management philosophy, and the science that underpins it, that will be needed to provide adequate water for all its vital uses. In the past two centuries, our science has transformed the world. Chemistry is a wondrous tool that has allowed us to understand the structure of matter and gives us the ability to manipulate that structure to suit our own purposes. It allows us to dissect the molecules of life to see what makes them, and us, tick. It is providing a glimpse into workings of what may be the most complex structure in the universe, the human brain, and with it hints about what constitutes consciousness. In the coming decades, we will use chemistry to delve ever deeper into these mysteries and provide for humanity's basic and not-so-basic needs.

### Case

#### Squo solves but courts can’t do anything

Savage 9-23-2013

Charlie, NYT, Guantánamo Hunger Strike Is Largely Over, U.S. Says http://www.nytimes.com/2013/09/24/us/guantanamo-hunger-strike-largely-over-us-says.html?\_r=0

When dozens of detainees began requiring force-feeding, the military brought additional nurses and corpsmen to the base to assist in the procedure. At one point, a federal judge rejected a legal motion to block the practice, saying she had no authority to intervene, but pointedly urged Mr. Obama to address the issues raised by the strike. As news media attention focused on the events at Guantánamo, Mr. Obama in late April recommitted himself to his efforts to close the prison — or, at least, to further winnow its population. The next month he lifted a moratorium on repatriating low-level detainees to Yemen, the home country of 56 of the approximately 86 detainees who had long since been recommended for transfer if security conditions could be met, though none have yet left. The State Department in June also appointed a new envoy, Cliff Sloan, to work on issues related to closing Guantánamo. The Pentagon belatedly moved to start holding parole-board-like hearings for detainees designated to be held without trial, a procedure the administration had announced two years earlier. The first such hearing, for a Yemeni named Mahmoud al Mujahid, is scheduled for Nov. 8. And in late July, the administration announced plans for the first transfer of low-level detainees — two men from Algeria — in more than two years. They were transferred in late August, bringing the inmate population down to 164. Meanwhile, earlier in July, at the start of the Muslim holy month of Ramadan — when communal prayers are particularly important to observant Muslims — the military began moving compliant detainees back into communal housing. To be eligible, the detainees could not be on a hunger strike.

#### Specificity and empirics of our scenario mean you prefer it.

Dipert 6 (Randall, PhD, Professor of Philosophy, University at Buffalo, Buffalo, “Preventive War and the Epistemological Dimension of the Morality of War,” https://www.law.upenn.edu/live/files/1291-dipert-preventive-war)

We have seen a number of reasons why some preventive wars are morally justified. Nevertheless, this justification hinges on what I have called an epistemic threshold. This threshold is the minimum amount of ‘objective certainty’ about the enemy’s intentions, bellicosity, and present and future military resources necessary to justify preemptive or preventive war. It is not merely a subjective certainty in feeling strongly about the extent of evidence for these factors. To be morally justified, one must have, and appreciate, extensive evidence for these factors and the other usual criteria for Just War except Just Cause; one must lack substantial evidence that goes against one of these factors, after a reasonable effort to acquire such evidence. A ‘second order’ objective certainty is also necessary: one must be justified in believing that one’s past record of judging intentions, resources and so on, from the information sources one is now using (e.g., satellite imagery), has usually been correct. It may be instructive here to reflect on the 2003 Iraq War.27 The fact that Iraq turned out not to have weapons of mass destruction, and did not even have quickly constructable facilities to produce them, shows that the Bush administration did not have knowledge of the weapons or facilities. It does not, however, alone entail that it was not objectively certain to the extent required by the epistemic threshold criterion for preventive war. In fact I believe that it was highly rational to believe, and in Grotius’ words was ‘morally certain’, that Iraq had chemical weapons despite what would prove to be its falsehood. (This is a consequence of permitting defeasible or nonabsolutely-certain justification or warrant for knowledge that is now almost universally accepted by epistemologists.) This is debatable, to be sure. However, I am not totally convinced that having chemical weapons of the kind Iraq was reasonably believed to possess alone posed a sufficient threat to justify preventive war. The case for morally justifying preventive war with regard to biological or nuclear weapons almost certainly did not meet the epistemic threshold. This is not to suggest that there were not other morally sufficient reasons, or that there might be some accumulative effect of arguments that are separately, in various respects, weak. Grotius, for one, diminishes the importance of intent, and allows one to change intents in midwar, while retaining its morally justified character. Especially in the recent 2003 Iraq War, there was a constant refrain about the need to acquire international moral approval of the coalition efforts.28 Intuitively, some international assent, especially by sympathetic nations if not the Security Council of the UN, is desirable. Yet it is very difficult to see how this fits into the moral theory of the permissibility of war. However, this reasoning, contrary to our intuitions, seems to leave no place at all for ‘internationalism’ in the moral justification of war (at least as regards its moral permissibility). I would propose that considering the epistemological dimension of morally justified war does give a proper place to our internationalistic inclinations. As is now all too well known, political discussions of the conditions of just war are prone to being blinded by already firm geopolitical worldviews, as well as by past political rhetoric that tend to chain politicians to certain views for the sake of ‘consistency’. The facts of the case, such as intelligence on WMDs, are likewise prone to a certain institutional conformist tendencies\*/and this tendency was well known long before the supposed influences of neoconservatives on the US, and apparently also on foreign intelligence services. For example, when critical policy decisions rest on intelligence, the legendary Sherman Kent,29 proposes that we critically examine existing intelligence, and apply in my terminology ‘second order’ principles, explicitly attaching the probability that various truths are mistaken, based on past incidents of the type of information from such sources. International approval, plays a role in the moral justification of war primarily in this epistemological dimension. I do not think approval of the oddly chosen UN Security Council30 is necessary for a morally justified war, even if it is desirable and should often be sought (for various prudential reasons). The moral criteria must be independent of the Security Council, since they have to reason by some principles and presumably these are the pure moral principles\*/they cannot appeal to a still higher authority. But now suppose that these pure moral principles that the Security Council should use, applied to a single nation’s situation, permits it to go to war. However, the Security Council does not agree to this (perhaps because of a veto) or even prohibits the nation’s action. Rather, the underlying principle is something like this: a failure to persuade numerous like-minded nations of both the relevant facts (e.g., the existence of WMDs), when these nations preferably have some independent intelligence capability, or failure to persuade them of the relevant moral principle embodied in a policy (e.g., that if a nation is as chronically belligerent as Iraq, and has such a WMD capacity, then it can be attacked in advance of its attack), is strong evidence against one’s having met the epistemological threshold for anticipatory war. In the recent situation, the opposition of Russia and France, especially Germany and Mexico, and the unenthusiastic acquiescence of China gave prima facie evidence against having met this threshold; the support of the UK, Italy, Spain, and Poland were, however, probably sufficient to meet my condition. In any case, it is in this epistemological dimension of the philosophy of war, and not anywhere else, that international or international-organization approval plays a role in moral justification.31 It might appear difficult to say much about what precisely this epistemic threshold is. It need not be ‘warrant’ as it is used by epistemologists when discussing conditions for knowledge. 32 Roughly, I think that the evidence at hand both for bellicosity and for the enemy’s possession of military resources constituting, or soon to constitute, a threat (and of their probable offensive nature) must be overwhelming and ‘all but certain’. I do not think that ‘manifest preparations’ for an attack (in Walzer’s terms) are necessary, whatever this means.33 Additionally, our second-order assessment of this evidence must be such that we have good reason to believe that it constitutes good evidence: this source has not mislead us in the past, etc. A second-order assessment is our reasonable estimate of the probability of evidence for our first-order assessment of harm, bellicosity, etc., being correct. The military resources must be such that they are likely, if used in a first-strike, to endanger our nation itself or to pose a severe threat of incapacitating our own military resources. It seems to me\*/although I have not studied this matter at all thoroughly\*/that chemical and biological weapons are indeed terrifying, but are unlikely to be serious in this precise sense. Their dispersal problems as well as the existence of countermeasures tend to lessen their military danger. Nuclear weapons, including dirty bombs, are almost certainly in the ‘severe threat’ category. Several factors raise and lower this threshold. One is the seriousness of the threat. Another is the amount of time until these military resources pose this threat. Still another is a kind of proportionality: minimizing civilian and even military deaths. The epistemic threshold never gets so low that, for example, one may launch a preventive war based on evidence of a nation’s bellicosity or resources that is ‘somewhat likely’.

#### ---Envisioning the dystopic world of our harms is politically enabling – it’s a catalyst for public debate and socio-political action.

Kurasawa 2004

Fuyuki, Constellation, v. 11, no. 4, “Cautionary Tales,” Blackwell

Returning to the point I made at the beginning of this paper, the significance of foresight is a direct outcome of the transition toward a dystopian imaginary (or what Sontag has called “the imagination of disaster”).11 Huxley’s Brave New World and Orwell’s Nineteen Eighty-Four, two groundbreaking dystopian novels of the first half of the twentieth century, remain as influential as ever in framing public discourse and understanding current techno-scientific dangers, while recent paradigmatic cultural artifacts – films like The Matrix and novels like Atwood’s Oryx and Crake – reflect and give shape to this catastrophic sensibility.12 And yet dystopianism need not imply despondency, paralysis, or fear. Quite the opposite, in fact, since the pervasiveness of a dystopian imaginary can help notions of historical contingency and fallibilism gain traction against their determinist and absolutist counterparts.13 Once we recognize that the future is uncertain and that any course of action produces both unintended and unexpected consequences, the responsibility to face up to potential disasters and intervene before they strike becomes compelling. From another angle, dystopianism lies at the core of politics in a global civil society where groups mobilize their own nightmare scenarios (‘Frankenfoods’ and a lifeless planet for environmentalists, totalitarian patriarchy of the sort depicted in Atwood’s Handmaid’s Tale for Western feminism, McWorld and a global neoliberal oligarchy for the alternative globalization movement, etc.). Such scenarios can act as catalysts for public debate and socio-political action, spurring citizens’ involvement in the work of preventive foresight.

#### Attempts to foresee existential risks is the best approach to policy-making

Bostrom 02, Professor of Philosophy at Oxford University and Director of the Future of Humanity Institute, ’2 (Nick, March, “Existential Risks: Analyzing Human Extinction Scenarios and Related Hazards” Journal of Evolution and Technology, Vol 9, http://www.nickbostrom.com/existential/risks.html

I shall use the following definition of existential risks: Existential risk – One where an adverse outcome would either annihilate Earth-originating intelligent life or permanently and drastically curtail its potential. An existential risk is one where humankind as a whole is imperiled. Existential disasters have major adverse consequences for the course of human civilization for all time to come. 2 The unique challenge of existential risks Risks in this sixth category are a recent phenomenon. This is part of the reason why it is useful to distinguish them from other risks. We have not evolved mechanisms, either biologically or culturally, for managing such risks. Our intuitions and coping strategies have been shaped by our long experience with risks such as dangerous animals, hostile individuals or tribes, poisonous foods, automobile accidents, Chernobyl, Bhopal, volcano eruptions, earthquakes, draughts, World War I, World War II, epidemics of influenza, smallpox, black plague, and AIDS. These types of disasters have occurred many times and our cultural attitudes towards risk have been shaped by trial-and-error in managing such hazards. But tragic as such events are to the people immediately affected, in the big picture of things – from the perspective of humankind as a whole – even the worst of these catastrophes are mere ripples on the surface of the great sea of life. They haven’t significantly affected the total amount of human suffering or happiness or determined the long-term fate of our species. With the exception of a species-destroying comet or asteroid impact (an extremely rare occurrence), there were probably no significant existential risks in human history until the mid-twentieth century, and certainly none that it was within our power to do something about. The first manmade existential risk was the inaugural detonation of an atomic bomb. At the time, there was some concern that the explosion might start a runaway chain-reaction by “igniting” the atmosphere. Although we now know that such an outcome was physically impossible, it qualifies as an existential risk that was present at the time. For there to be a risk, given the knowledge and understanding available, it suffices that there is some subjective probability of an adverse outcome, even if it later turns out that objectively there was no chance of something bad happening. If we don’t know whether something is objectively risky or not, then it is risky in the subjective sense. The subjective sense is of course what we must base our decisions on.[2] At any given time we must use our best current subjective estimate of what the objective risk factors are.[3] A much greater existential risk emerged with the build-up of nuclear arsenals in the US and the USSR. An all-out nuclear war was a possibility with both a substantial probability and with consequences that might have been persistent enough to qualify as global and terminal. There was a real worry among those best acquainted with the information available at the time that a nuclear Armageddon would occur and that it might annihilate our species or permanently destroy human civilization.[4] Russia and the US retain large nuclear arsenals that could be used in a future confrontation, either accidentally or deliberately. There is also a risk that other states may one day build up large nuclear arsenals. Note however that a smaller nuclear exchange, between India and Pakistan for instance, is not an existential risk, since it would not destroy or thwart humankind’s potential permanently. Such a war might however be a local terminal risk for the cities most likely to be targeted. Unfortunately, we shall see that nuclear Armageddon and comet or asteroid strikes are mere preludes to the existential risks that we will encounter in the 21st century. The special nature of the challenges posed by existential risks is illustrated by the following points: · Our approach to existential risks cannot be one of trial-and-error. There is no opportunity to learn from errors. The reactive approach – see what happens, limit damages, and learn from experience – is unworkable. Rather, we must take a proactive approach. This requires foresight to anticipate new types of threats and a willingness to take decisive preventive action and to bear the costs (moral and economic) of such actions. · We cannot necessarily rely on the institutions, moral norms, social attitudes or national security policies that developed from our experience with managing other sorts of risks. Existential risks are a different kind of beast. We might find it hard to take them as seriously as we should simply because we have never yet witnessed such disasters.[5] Our collective fear-response is likely ill calibrated to the magnitude of threat. · Reductions in existential risks are global public goods [13] and may therefore be undersupplied by the market [14]. Existential risks are a menace for everybody and may require acting on the international plane. Respect for national sovereignty is not a legitimate excuse for failing to take countermeasures against a major existential risk.

#### Utilitarianism is key---calculative thought is key to make objective decisions, prevents dogmatism

Whitman 7 (Jeffery, Prof of Philosophy, Religion, and Classical Studies Susquehanna University, “Just War Theory and the War on Terrorism A Utilitarian Perspective,” http://www.mesharpe.com/PIN/05Whitman.pdf)

Nonetheless, many argue that utilitarianism suffers from a multitude of sins and is thus an inappropriate basis for morality in general, let alone for moral judgments concerning war. For example, the coldly calculating nature of utilitarian thinking, along with its emphasis solely on the consequences of actions, tends to ignore other equally (or perhaps more important) aspects of moral value and the moral life. The lost values include certain absolutist moral principles (e.g., respect for persons as such, human rights, our moral integrity), the felt connections to friends and family that motivate much of human morality, the intentions of the moral agent despite the outcome of his or her actions, and higher, aesthetic values that may have no or minimal utility. These criticisms are important and serious criticisms of utilitarianism, but they are criticisms that seem more appropriate to utilitarianism as a personal moral code than as a moral framework for public policy. And when the subject is just war theory, especially as it concerns decisions about war made by states, the perceived weaknesses of utilitarianism as a private morality actually turn into strengths (Goodin 1995, 8–11).16 The impersonal nature of utilitarianism, while it may not be appropriate when dealing with, for example, the everyday moral dilemmas of family life, seems entirely appropriate in the public policy arena, because it guarantees a measure of impartiality. In just war theory, this impartiality seems crucial so as not to overinflate the dangers to one’s own country when contemplating resort to war, or give preference to one’s own side when applying the laws of war as they pertain to “protected persons,” just to give a few examples.17 As for the coldly calculating “sin” of utilitarianism, it becomes a virtue insofar as it enjoins public officials not to allow their hearts to rule their heads. Having attained victory in a war, a nation might issue a public outcry for onerous compensation or revenge against the former enemy. And while government officials may be sympathetic to such sentiments, they must overcome these natural feelings of the public through the application of “coldly calculating” reason if they are to attain the goal of a better state of peace, as jus post bellum principles dictate. Furthermore, while we may wish that officials would aim carefully at the production of public good, the results are all that we are really interested in from a public policy perspective. Motives and intentions seem superfluous. Perhaps President George H.W. Bush’s primary motive for going to war against Saddam Hussein in the 1991 Gulf War was to protect the oil interests of multinational corporations, and he and his administration had little interest in restoring the sovereignty of Kuwait. Nonetheless, the Gulf War has been largely judged to have been morally justified because it was a response to the aggression of Iraq and had the effect of restoring Kuwaiti sovereignty, regardless of the Bush administration’s “real” intentions. Additionally, as this example also illustrates, what officials do in the public realm may be the product of a number of different intentions, some more noble than others. In the end, however, the only thing we can morally judge is the outcome of the policy decisions. Motivations and intentions are subject to endless speculation and may even be falsely recalled and reported. Utilitarianism operating at the public policy level recognizes this problem and correctly discounts the motives and intentions of policymakers in favor of results. So it is true that the consequentialism of utilitarianism means that the focus of decision-making is on results and not on absolutist moral principles. When it comes to public policy decisions, however, this focus seems entirely correct, rather than a weakness. In making decisions for the greater public good, officials may be morally obligated to violate seemingly inviolate moral principles and “dirty their hands.” Hard as this choice may be, it is a choice officials are expected to make. “Doing right though the heavens may fall is not (nowadays anyway) a particularly attractive posture for public officials to adopt” (Goodin 1995, 10). Even Walzer (2000), a strong advocate of a human rights perspective on just war theory, recognizes that there may be instances in war (what he labels a “supreme emergency”) where the rights of innocent people may be violated in the service of the public good (chap. 16).18

#### Focus on preserving life is the best way to access what they claim is key to value

Etzioni, 2007 (Amitai, Ph.D. in Sociology from Berkeley, professor of international affairs at The George Washington University, Security First, pp. pp. 7-8)

The better that life is protected, the stronger the support is for nonsecurity rights—and not the other way around, as has been suggested by many supporters of the drive for global democratization, as well as by those who argue that regime change is required to make nations into peaceful mem­bers of the international community. A review of public opinion polls concerning attitudes toward civil liberties following 9 / 11 indicates that shortly after al-Qaeda's attack on America, nearly 70 percent of the public was strongly inclined to give up various constitutionally protected rights in order to prevent further attacks. However, as no new attacks occurred on American territory and a sense of security gradually was restored, as revealed by the return of passengers to air traffic, support for rights increased. By 2004-05, about 70 percent of Americans were more concerned with protecting civil rights than with enhancing security. (Granted, the polls are not fully comparable.)10 Along the same lines, if an American city were wiped out tomorrow in a nuclear terrorist attack, rights would surely be suspended on a large scale (as the writ of habeas corpus was suspended in the United Kingdom at the height of the Nazi attacks, and in the United States during the Civil War). In short, this evidence, too, shows that the better that security is protected, the more secure are our other rights. The same relationship between the right to security and all other rights was evident during the period in which violent crime rates were very high in major American cities. For instance, when Los Angeles po­lice chief Daryl Gates suggested that the riots following the Rodney King verdict might have been stopped had police officers "gone down there and shot a few people," many sympathized with his viewpoint." In recent years, as violent crime has significantly declined in American cities, a police chief who favored a policy that disregarded rights in such a sum­mary way would likely be dismissed before the day was over. The safer that people are, the more concerned they will be for their other rights. Finally, evidence shows that liberal-democratic regimes have been undermined primarily by their failure to provide for basic public needs, such as security, and not by the gradual erosion of legal-political rights, as is so often assumed. The main case in point is the Weimar Republic. From the extensive literature written on the question of what caused the fall of the Weimar Republic and the rise of the Third Reich, it is reason­able to conclude that liberal democracy lost legitimacy because it failed to address peoples' need for physical and economic security.'2 Another example is post-Soviet Russia. Although Russia has never met the standards of a liberal democracy, a good part of what was achieved under Mikhail Gorbachev and Boris Yeltsin has gradually been eroded as Russians responded to their alarmingly high levels of crime. President Vladimir Putin, who has been moving his government in a strongly au­thoritarian direction, is widely regarded in Russia not as too powerful but as not powerful enough, because many still believe, and believe correctly, that basic security is lacking. In short, moral arguments and empirical evidence support the same proposition: in circumstances under which a full spectrum of rights can­not be advanced simultaneously—a common situation—basic security must lead.

#### Rule utilitarianism solves a war of ideology which is the only time when conflict devolves into atrocity, limits imperialism and solves blowback

Whitman 7 (Jeffery, Prof of Philosophy, Religion, and Classical Studies Susquehanna University, “Just War Theory and the War on Terrorism A Utilitarian Perspective,” <http://www.mesharpe.com/PIN/05Whitman.pdf>)

How might the rule-utilitarian perspective for just war theory helpfully inform the war on terrorism? Several potential benefits seem especially salient. The first major advantage that such a perspective lends to the fight against terrorismis that itavoids the temptation to turn the fight into a utopiancrusade againstevil.27 While it is true that some of theperpetrators of the current terrorism have taken on the nihilistic perspective described earlier (and therefore represent a kind of evil beyond compromise), most of the people who seem to sympathize with their attacks against U.S. and Western interests are not evil people. Many of them have genuine grievances with the polices of Western nations, and their support for terrorism can be weakened or even eliminated if some of those grievances are addressed. Casting the war against global terrorism as a struggle between good and evil would seem to invoke a fight-to-the-death struggle, but seeing the struggle in this way defies the reality of the situation, a reality better addressed in utilitarian terms. While there can be no compromise between good and evil, a more nuanced understanding of what motivates support for Islamic terrorism (e.g., the real or perceived bias of U.S. policy against Arab and Muslim interests) would show that not all of our foes are part of some undifferentiated evil. Recognizing this fact would enable us to recognize that moral considerations place limits on the use of military force—in terms of both means and ends—in prosecuting this war. Andthese limits can be best applied through the tenets of just war theory supported by a ruleutilitarian foundation. The struggle against terrorism will be a long struggle, and it will require the kind of balancing of means to ends that the utilitarian calculus promotes. The proper goal in the end is notthecomplete destruction of all terrorist groups and their supporters (as if such a goal were even possible). Instead, the goal must be more moderate, though no less challenging. Quoting Joseph Boyle. The state of affairs in which the prospect of terrorist activity is not a serious threat to people’s conduct of their lives but part of the disagreeable but acceptable risks of modern life is a reasonable public goal in relationship to terrorism generally, as it is in relationship to criminal activity more generally. (2003, 168)

## 2NC

### Link

#### DC court is a lightning rod – overturned often and quickly.

White 2013

Adam, Lawyer and former clerk for the DC Circuit, August 26 2013, Weekly Standard, The Regulatory Court http://www.weeklystandard.com/articles/regulatory-court\_748494.html?page=3

It certainly did clash—not just with the administration, but with the Supreme Court, which took up cases from the D.C. Circuit three times faster than from other circuits, and reversed the D.C. Circuit four times faster than the other courts, according to a 1984 study in the New York Law Review. “We were, if you will, a trustee for the ghosts of Congresses past,” Judge Patricia Wald, a Carter appointee, later reflected. In 1982, after the court had ruled against the administration in several cases, a public interest lawyer would tell the Times’s Taylor that the D.C. Circuit had become the federal government’s “last bastion of liberalism,” and he hoped that it would stay that way. It didn’t. In 1986, the same public interest lawyer would tell another Times reporter, “Mr. Reagan has taken the most liberal court in America and turned it into the most conservative. .  .  . If you were on their side, you’d be cheering. For us, it’s tears.” By then, Reagan had appointed five judges to the D.C. Circuit, including future Supreme Court justice Antonin Scalia and Supreme Court nominee Robert Bork; he would eventually appoint two more, to be joined by President George H.W. Bush’s three appointees (including future justice Clarence Thomas). The D.C. Circuit’s transition away from the Bazelon Era spurred liberals to press the Clinton administration to respond aggressively with prominent progressives. In 1995, when Chief Judge Abner Mikva, a Carter appointee, left the bench to become President Clinton’s White House Counsel, the New Republic’s Jeffrey Rosen criticized the White House for considering a Health and Human Services official for the vacancy instead of other “promising legal scholars.” (The administration considered nominating then-U.S. attorney Eric Holder for the job, according to the Washington Post, precisely because it saw him as “a candidate who is scandal-free and more acceptable to Senate Republicans” than HHS’s Peter Edelman. “They say he probably would sail through the confirmation process, because his tough-on-crime approach would resonate with Republicans.”) Senate Republicans, well aware of the D.C. Circuit’s role in government, scrutinized President Clinton’s nominations. The Senate confirmed three of his nominees (two by voice votes, the third by a vote of 76-23 ), but the Senate took no vote on a fourth nominee, and the Senate Judiciary Committee declined altogether to proceed on a fifth nomination—that of future solicitor general and Supreme Court justice Elena Kagan. In the subsequent Bush administration, Senate Democrats took even stronger action against D.C. Circuit nominees. They successfully filibustered the nomination of Miguel Estrada, and they delayed the nominations of Janice Rogers Brown and Brett Kavanaugh for several years before the Senate ultimately confirmed them by narrow margins. The Senate did confirm John Roberts, who later was appointed chief justice (and who had previously been nominated to the D.C. Circuit by the first President Bush but had failed to get a Senate vote), and Judge Thomas Griffith, but it declined to act on a seventh nominee. (Senator Obama voted against confirming Brown and Kavanaugh but for confirming Griffith.) Furthermore, the Bush administration’s nominations occurred against the backdrop of still greater expansion of the D.C. Circuit’s day-to-day role in national policy, as the court became the venue for all manner of Guantánamo detainee appeals. Having played an influential (and occasionally controversial) role in national politics for nearly two centuries, the D.C. Circuit might have been expected to be an early focus of the Obama administration—all the more so in light of President Obama’s own 2005 speech on the D.C. Circuit’s “special” role in regulatory policy. But in fact, his first term included no substantial effort to reshape the court.

#### Federal courts don’t set precedent – you don’t solve anything.

Dorf 2012

Michael, Cornell Law Professor, SDNY Indefinite Detention Decision Misunderstands Implications of Facial Invalidation, Dorf on Law, http://www.dorfonlaw.org/2012/09/sdny-indefinite-detention-decision.html

A ruling by a federal court that a law is unconstitutional "on its face" is one way of finding that the plaintiffs may not be subject to that law, but it is not authorization for issuing rulings applicable to persons who are not parties. Such persons can only take advantage of such a ruling by the ordinary means by which judicial decisions have force: (1) The ruling may be a precedent to be followed in other cases; or (2) The ruling may have issue-preclusive effect (under a doctrine formerly called collateral estoppel). Neither approach works here. A ruling of a single federal district judge has no binding precedential effect. It may be cited by litigants as persuasive precedent in subsequent cases involving other parties, but no judge must follow it in the way that a district court must follow the precedents of the appeals court in the circuit that encompasses the district court or that district courts and appeals courts must follow Supreme Court precedent. Indeed, a district judge's ruling in one case is not even binding as a matter of precedent on the very same judge in a subsequent case involving different parties (although a district judge would look rather foolish if she failed to follow her own prior decisions, absent some good reason for a change of heart). What about preclusion? Couldn't litigants in subsequent cases use the facial invalidation in the earlier case to preclude the government from re-litigating the law's validity? The short answer is no. The modern law of issue preclusion sometimes permits non-mutual issue preclusion--that is, it sometimes permits persons who were not party to an earlier case to use the result of that case to estop relitigation by the losing party in the earlier case--but non-mutual issue preclusion is not permitted against the government. The reason is that the government is involved in so much litigation, that it would not be fair or sensible to make the first case that happens to come to judgment decisive of all future cases.

### discourse

#### Changing representational practices won’t alter policy—looking to structures and politics is more vital

Tuathail, Professor of Geography at Virginia Polytechnic Institute, 96 (Gearoid, Political Geography, Vol 15 No 6-7, p. 664, Science Direct)

While theoretical debates at academic conferences are important to academics, the discourse and concerns of foreign-policy decision- makers are quite different, so different that they constitute a distinctive problem- solving, theory-averse, policy-making subculture. There is a danger that academics assume that the discourses they engage are more significant in the practice of foreign policy and the exercise of power than they really are. This is not, however, to minimize the obvious importance of academia as a general institutional structure among many that sustain certain epistemic communities in particular states. In general, I do not disagree with Dalby’s fourth point about politics and discourse except to note that his statement-‘Precisely because reality could be represented in particular ways political decisions could be taken, troops and material moved and war fought’-evades the important question of agency that I noted in my review essay. The assumption that it is representations that make action possible is inadequate by itself. Political, military and economic structures, institutions, discursive networks and leadership are all crucial in explaining social action and should be theorized together with representational practices. Both here and earlier, Dalby’s reasoning inclines towards a form of idealism. In response to Dalby’s fifth point (with its three subpoints), it is worth noting, first, that his book is about the CPD, not the Reagan administration. He analyzes certain CPD discourses, root the geographical reasoning practices of the Reagan administration nor its public-policy reasoning on national security. Dalby’s book is narrowly textual; the general contextuality of the Reagan administration is not dealt with. Second, let me simply note that I find that the distinction between critical theorists and post- structuralists is a little too rigidly and heroically drawn by Dalby and others. Third, Dalby’s interpretation of the reconceptualization of national security in Moscow as heavily influenced by dissident peace researchers in Europe is highly idealist, an interpretation that ignores the structural and ideological crises facing the Soviet elite at that time. Gorbachev’s reforms and his new security discourse were also strongly self- interested, an ultimately futile attempt to save the Communist Party and a discredited regime of power from disintegration. The issues raised by Simon Dalby in his comment are important ones for all those interested in the practice of critical geopolitics. While I agree with Dalby that questions of discourse are extremely important ones for political geographers to engage, there is a danger of fetishizing this concern with discourse so that we neglect the institutional and the sociological, the materialist and the cultural, the political and the geographical contexts within which particular discursive strategies become significant. Critical geopolitics, in other words, should not be a prisoner of the sweeping ahistorical cant that sometimes accompanies ‘poststructuralism nor convenient reading strategies like the identity politics narrative; it needs to always be open to the patterned mess that is human history.

### XO

### 2NC CP Illegitimate (Agent CPs/Object Fiat)

#### E. Literature makes the counterplan germane and predictable-The Executive order counterplan is key to topic education

Rudalevige ‘12

[Rudalevige, A. (March 2012). The contemporary presidency: executive orders and presidential unilateralism.  Presidential Studies Quarterly, 42, 1. p.138(23). ETB]

In the last decade or so, students of the American presidency have renewed their interest in the formal authorities and unilateral possibilities of presidential power, driven both by methodological logic and by events. On the theoretic side, scholars working within the broad framework of the "new institutionalism," especially its rational choice variant, have made a case that the formal, legal, and organizational aspects of the presidency--and the incentives and constraints for presidential behavior these implied--had been too long neglected in favor of impressionistic accounts of the "personal presidency." A focus on the formal powers that underlay the presidential office, and the way these could be used to enhance an incumbent's influence, was needed to fill that gap (e.g., Howell 2003; Kelley 2007; Moe 1985, 1993; Moe and Howell 1999). After all, as Kenneth Mayer argued (2001, 11), "in most cases, presidents retain a broad capacity to take significant action on their own, action that is meaningful both in substantive policy terms and in the sense of protecting and furthering the president's political and strategic interests."¶ The assertive--even "imperial"--stance taken by recent presidents provided empirical grist for this mill. President George W. Bush was particularly notable in acting aggressively to expand his office's powers vis-a-vis other political actors (Cooper 2002; Goldsmith 2007; Rudalevige 2005, 2010; Savage 2007). Redressing the perceived constriction of the presidential office after the Watergate/Vietnam years provided a new rationale for unilateral command--even before the terrorist attacks of September 11, 2001. Barack Obama, while disavowing some of his predecessor's rationales, has acted in a similar manner in a number of areas. The assassination of American citizens acting with al-Qaeda in Yemen; the evasion of the War Powers Resolution in Libya; the use of the state secrets act in fending off judicial inquiry--all these suggest a continuing approach to presidential authority that overrides shifts in the incumbent's personality.¶ From either direction, the upshot has been important recent work on a presidential administrative toolkit that includes appointments (Lewis 2008), signing statements (Evans 2011; Kelley and Marshall 2010; Korzi 2011), executive agreements (Krutz and Peake 2009), proclamations (Rottinghaus and Bailey 2010; Rottinghaus and Maier 2007), rulemaking and guidance (Graham 2010; Kerwin and Furlong 2010), and especially executive orders (Gibson 2009; Howell 2003; Mayer 1999, 2001; Rodrigues 2007; Warber 2006; Wigton 1996). Indeed, at this point it is safe to say that a standard textbook in the field could not--as it did even after Watergate--exclude "executive orders" and "signing statements" from the index (Koenig 1975). The study of the contemporary presidency thus requires serious attention to that office's executive authority.

### 2NC Perm-Do CP-Statutory

#### It’s a severance permutation

#### A. It severs congressional action

Kershner-JD Candidate, Cardoza-10 (Joshua, Articles Editor, Cardozo Law Review. J.D. Candidate (June 2011), Benjamin N. Cardozo School of Law, “Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional” Cardozo Law Review de novo 2010 Cardozo L. Rev. De Novo 615)

n17 The phrase "statutory restrictions" is used hereinafter to mean statutory language that restricts the President's powers of nomination and appointment to those individuals meeting specific criteria. Examples include gender, state of residence, and most importantly political party. n18 Since 1980, more than one hundred Presidential signing statements have specifically mentioned the Appointments Clause. See The Public Papers of the Presidents, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws (search for "Appointments Clause"). n19 These signing statements typically invoke the authority of the Appointments Clause to argue that statutory restrictions on appointment or removal of Officers of the United States are merely advisory. For numerous examples, see id. See also infra note 175. n20 The phrase "hyper-partisan atmosphere" has been frequently used by the news media and commentators to describe the political gridlock in Washington during the first years of the Obama administration. See, e.g., Eric Moskowitz, Hundreds Brave Cold to Hear From Scott Brown, THE BOSTON GLOBE, Jan. 29, 2010, http://www.boston.com/news/local/breaking\_news/2010/01/scores\_wait\_for.html (reporting on then Senator-Elect Scott Brown explaining that "he felt the hyper-partisan atmosphere in Washington was already changing as a result of his election" ten days earlier); Editorial, Bayh Bailout No Cause to Mourn Moderation, ORANGE COUNTY REG., Feb. 17, 2010, at H, available at http://www.ocregister.com/opinion/bayh-234673-sen-one.html (describing Senator Bayh's verbal attacks on the operation of the Senate after announcing his decision not to run for reelection as "using the occasion to decry the hyperpartisan atmosphere in Washington"). n21 As political battles over delays in approving Presidential nominations continue to be the norm, it is progressively more likely that Presidents will seek to bypass the Senate in the nomination process. This could include recess appointments bypassing both the "advice and consent" of the Senate, as well as any statutory restrictions. See, e.g., Scott Wilson, Obama Considers Recess Appointments, WASH. POST, Feb. 9, 2010 ("President Obama is considering recess appointments to fill some or all of the nominations held up in the Senate. President Bush used a recess appointment to make John Bolton the U.S. ambassador to the United Nations bypassing Democrats."). n22 Statutory restrictions date back to the first Congress and continue today. See infra notes 116, 118, 122. n23 See discussion infra Part I.D and note 128. n24 The phrase "political party restrictions" is used hereinafter to mean statutory restrictions on the President's powers of nomination and appointment by political party.

### Only CP Solves

#### Only the counterplan solves – Congress blocks the aff.

Savage 2013

Charlie, Judge Urges President to Address Prison Strike, NYT, http://www.nytimes.com/2013/07/09/us/judge-urges-president-to-address-prison-strike.html

In a four-page ruling, Judge Gladys Kessler of the Federal District Court for the District of Columbia, rejected a request by the detainee, Jihad Ahmed Mujstafa Diyab, a 41-year-old Syrian man, to issue an injunction barring the military from forcing him to eat through a gastric tube inserted in his nose after restraining him in a chair. Judge Kessler noted that the force-feeding of detainees had been condemned as a violation of medical ethics and human rights by groups as varied as the American Medical Association and top United Nations officials. And while the Obama administration defended its treatment of detainees as compassionate, she wrote, “it is perfectly clear” that “force-feeding is a painful, humiliating and degrading process.” Nevertheless, Judge Kessler said she could not issue an injunction because Congress had barred the courts from intervening on issues involving conditions at the prison. But Mr. Obama, she wrote, “does have the authority to address the issue,” and she cited a speech in May in which he appeared to lament force-feedings. She noted that as commander in chief, Mr. Obama would seem to have the power “to directly address the issue of force-feeding of the detainees at Guantánamo Bay.” Still, the judge also noted that transfer restrictions imposed by Congress had made repatriations to countries with troubled security conditions difficult, and she did not say what she thought Mr. Obama should do. A White House spokeswoman declined to comment. A Pentagon spokesman, Col. Todd Breasseale, said it was humane not to let prisoners commit suicide and noted that at a news conference in April, Mr. Obama had explained, “I don’t want these individuals to die.” Mr. Diyab, who has been held at Guantánamo for nearly 11 years, was recommended for transfer four years ago if security measures could be met. He is among 45 detainees who are “approved” for force-feedings if they refuse to eat, out of the 106 detainees participating in the hunger strike, according to the military. He is also one of at least four detainees who have asked judges to halt the practice. Jon Eisenberg, a lawyer working on the case with the British human-rights group Reprieve, said they were considering appealing but were waiting for a ruling about the other detainees. But he noted that “not often do you see a federal judge appealing to the president to do something the judge would like to do but feels she lacks jurisdiction to do.”

### 2NC Future Presidents Rollback

#### ---Political barriers check – new, stronger constituencies

Branum-Associate Fulbright and Jaworski- 2

Tara L, Associate, Fulbright & Jaworski L.L.P, “President or King? The Use and Abuse of Executive Orders in Modern Day America” Journal of Legislation 28 J. Legis. 1

Congressmen and private citizens besiege the President with demands  [\*58]  that action be taken on various issues. [n273](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.689002.875983458&target=results_DocumentContent&reloadEntirePage=true&rand=1220903297496&returnToKey=20_T4511783216&parent=docview" \l "n273) To make matters worse, once a president has signed an executive order, he often makes it impossible for a subsequent administration to undo his action without enduring the political fallout of such a reversal. For instance, President Clinton issued a slew of executive orders on environmental issues in the weeks before he left office. [n274](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.689002.875983458&target=results_DocumentContent&reloadEntirePage=true&rand=1220903297496&returnToKey=20_T4511783216&parent=docview" \l "n274) Many were controversial and the need for the policies he instituted was debatable. [n275](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.689002.875983458&target=results_DocumentContent&reloadEntirePage=true&rand=1220903297496&returnToKey=20_T4511783216&parent=docview" \l "n275) Nevertheless, President Bush found himself unable to reverse the orders without invoking the ire of environmentalists across the country. [n276](http://www.lexisnexis.com/us/lnacademic/frame.do?tokenKey=rsh-20.689002.875983458&target=results_DocumentContent&reloadEntirePage=true&rand=1220903297496&returnToKey=20_T4511783216&parent=docview" \l "n276) A policy became law by the action of one man without the healthy debate and discussion in Congress intended by the Framers. Subsequent presidents undo this policy and send the matter to Congress for such debate only at their own peril. This is not the way it is supposed to be.

#### ---Future administrations rarely overturn previous executive orders

Washington Times 8/23/99

 “Clinton’s Executive Orders are Still Packing a Punch: Other Presidents Issued More, but His are Still Sweeping” Frank Murray [http://www.questia.com/library/1G1-55543736/clinton-s-executive-orders-still- are-packing-a-punch](http://www.questia.com/library/1G1-55543736/clinton-s-executive-orders-still-%20are-packing-a-punch)

Clearly, Mr. Clinton knew what some detractors do not: Presidential successors of the opposite party do not lightly wipe the slate clean of every order, or even most of them. Still on the books 54 years after his death are 80 executive orders issued by Franklin D. Roosevelt. No less than 187 of Mr. Truman's orders remain, including one to end military racial segregation, which former Joint Chiefs of Staff Chairman Colin Powell praised for starting the "Second Reconstruction." "President Truman gave us the order to march with Executive Order 9981," Mr. Powell said at a July 26, 1998 ceremony marking its 50th anniversary. Mr. Truman's final order, issued one day before he left office in 1953, created a national security medal of honor for the nation's top spies, which is still highly coveted and often revealed only in the obituary of its recipient.

### Util T/ All

#### Utilitarianism prevents violent crackdown in crises

Scarre 96 Lecturer – Philosophy – University of Durham 1996 Utilitarianism

Utilitarian thinking about killing seems then, most intuitively acceptable to many people during public emergencies. When society’s very survival is in question, the niceties of normal moral thought are found to be dispensable. Even medical cannibalism might be seen as tolerable if no other means were available to save certain individuals who were crucial to a nation’s war effort. If Black were designing the weapon which would ensure his country’s victory and White were its most brilliant general, not only their survival might depend upon Green losing his kidneys. Cruel necessities may seem no less cruel but they seem more necessary when the chips are down for the whole community.

### 2NC – A/T Right Wing Takeover

#### ---Envisioning the dystopic world of our harms is politically enabling – it’s a catalyst for public debate and socio-political action.

Kurasawa 2004

Fuyuki, Constellation, v. 11, no. 4, “Cautionary Tales,” Blackwell

Returning to the point I made at the beginning of this paper, the significance of foresight is a direct outcome of the transition toward a dystopian imaginary (or what Sontag has called “the imagination of disaster”).11 Huxley’s Brave New World and Orwell’s Nineteen Eighty-Four, two groundbreaking dystopian novels of the first half of the twentieth century, remain as influential as ever in framing public discourse and understanding current techno-scientific dangers, while recent paradigmatic cultural artifacts – films like The Matrix and novels like Atwood’s Oryx and Crake – reflect and give shape to this catastrophic sensibility.12 And yet dystopianism need not imply despondency, paralysis, or fear. Quite the opposite, in fact, since the pervasiveness of a dystopian imaginary can help notions of historical contingency and fallibilism gain traction against their determinist and absolutist counterparts.13 Once we recognize that the future is uncertain and that any course of action produces both unintended and unexpected consequences, the responsibility to face up to potential disasters and intervene before they strike becomes compelling. From another angle, dystopianism lies at the core of politics in a global civil society where groups mobilize their own nightmare scenarios (‘Frankenfoods’ and a lifeless planet for environmentalists, totalitarian patriarchy of the sort depicted in Atwood’s Handmaid’s Tale for Western feminism, McWorld and a global neoliberal oligarchy for the alternative globalization movement, etc.). Such scenarios can act as catalysts for public debate and socio-political action, spurring citizens’ involvement in the work of preventive foresight.

#### Prediction forces theoretical context shifts, resolves complexity. Key to policy relevance, they leave prediction to the DOD.

Ward et al 2012

Michael D., Political Science Professor @ Duke, LEARNING FROM THE PAST AND STEPPING INTO THE FUTURE: THE NEXT GENERATION OF CRISIS PREDICTION, Working Paper, December 4 2012, http://mdwardlab.com/sites/default/files/FORECASTING1212\_0.pdf

Prediction also creates particular incentives which are may be useful for political science as a whole. Because true out-of-sample prediction could involve a shifting context, it requires integrated theories to be successful. When conducting all analyses ex post, the researcher will choose the theory she thinks is most likely to apply, often focusing on the novel or unusual. For example, parts of the Arab Spring were organized by social media, hence many commentators focused on this novel tool as an explanation for the success of the revolution. However, there were a host of other factors that made revolutions in Arab world highly likely. High unemployment, low growth rates, aging dictators, and religious divisions are long-standing explanations for popular uprisings that were all present in this context. When creating predictions, it becomes much harder to inadvertently select advantageous models for a particular context. The choices between competing models have to be \endogenized" in the model in order to have a durable and portable tool for prediction. This requirement{that we delimit the context in which our theory applies{makes our understanding and use of theory more precise. Making models portable across time also brings our focus to what societies have in common, leading us toward a more systematic understanding of social processes. 1.3. Policy relevance. Developing theoretically motivated, cross-validated models can make our findings more accessible to a wider audience. Sharing the knowledge generated by our research is an important part of the enterprise. In addition, the practice of generating these predictions, for researchers, gives us a reminder of and an answer to the often embarrasing question, \so what?" Predictions bind our independent variables to outcomes in a concrete way, bringing clarity, both to ourselves and to others, as to the mechanisms in our models. Current events make predictions of civil con ict even more desirable. The Arab Spring and its aftermath, continuing violence in Afghanistan, and sudden agreements between Georgia and Russia always raise the same question: could we have predicted these events to prepare for or even influence their emergence? Our profession struggles to do so. There are, of course, many who are interested in generating a predictive, analytical social science in the policy realm. During the Vietnam war, Je ry S. Milstein, a new Ph.D. from Stanford University, conducted quantitative and simulation studies that were among the rst-ever, real predictions in the discipline of international relations. 12 These were aimed at elucidating the dynamics of the then ongoing con ict in South East Asia. Robert McNamara, the US Secretary of Defense, was promoting a systems analytic perspective which suggested that a war of attrition would allow the US to outlast the Viet Cong. Milstein's analysis was the first (outside of the DoD) to illustrate that the dynamics were likely to turn out differently. Since Milstein's early work, there have been a variety of reports within the policy community to craft accurate predictive models that can guide policy. 13 This article is a reminder that despite every crisis's unique features, we, as a discipline, should strive for the main prize: the identification of general mechanisms that allow us to make predictions about future events. In fact, the ability to predict future crises can be understood as the gold standard to scientifically advance the study of conflict, peace, and crises. The goal is to have something as theoretically sound as the Fearon & Laitin models that can also actually explain the data that have not yet been collected; namely, the future.

### 2NC – A/T Calculation Bad

#### Ethical policymaking requires calculation of consequences

Gvosdev 5 – Rhodes scholar, PhD from St. Antony’s College, executive editor of The National Interest (Nikolas, The Value(s) of Realism, SAIS Review 25.1, pmuse)

As the name implies, realists focus on promoting policies that are achievable and sustainable. In turn, the morality of a foreign policy action is judged by its results, not by the intentions of its framers. A foreign policymaker must weigh the consequences of any course of action and assess the resources at hand to carry out the proposed task. As Lippmann warned, Without the controlling principle that the nation must maintain its objectives and its power in equilibrium, its purposes within its means and its means equal to its purposes, its commitments related to its resources and its resources adequate to its commitments, it is impossible to think at all about foreign affairs.8 Commenting on this maxim, Owen Harries, founding editor of The National Interest, noted, "This is a truth of which Americans—more apt to focus on ends rather than means when it comes to dealing with the rest of the world—need always to be reminded."9 In fact, Morgenthau noted that "there can be no political morality without prudence."10 This virtue of prudence—which Morgenthau identified as the cornerstone of realism—should not be confused with expediency. Rather, it takes as its starting point that it is more moral to fulfill one's commitments than to make "empty" promises, and to seek solutions that minimize harm and produce sustainable results. Morgenthau concluded: [End Page 18] Political realism does not require, nor does it condone, indifference to political ideals and moral principles, but it requires indeed a sharp distinction between the desirable and the possible, between what is desirable everywhere and at all times and what is possible under the concrete circumstances of time and place.11 This is why, prior to the outbreak of fighting in the former Yugoslavia, U.S. and European realists urged that Bosnia be decentralized and partitioned into ethnically based cantons as a way to head off a destructive civil war. Realists felt this would be the best course of action, especially after the country's first free and fair elections had brought nationalist candidates to power at the expense of those calling for inter-ethnic cooperation. They had concluded—correctly, as it turned out—that the United States and Western Europe would be unwilling to invest the blood and treasure that would be required to craft a unitary Bosnian state and give it the wherewithal to function. Indeed, at a diplomatic conference in Lisbon in March 1992, the various factions in Bosnia had, reluctantly, endorsed the broad outlines of such a settlement. For the purveyors of moralpolitik, this was unacceptable. After all, for this plan to work, populations on the "wrong side" of the line would have to be transferred and resettled. Such a plan struck directly at the heart of the concept of multi-ethnicity—that different ethnic and religious groups could find a common political identity and work in common institutions. When the United States signaled it would not accept such a settlement, the fragile consensus collapsed. The United States, of course, cannot be held responsible for the war; this lies squarely on the shoulders of Bosnia's political leaders. Yet Washington fell victim to what Jonathan Clarke called "faux Wilsonianism," the belief that "high-flown words matter more than rational calculation" in formulating effective policy, which led U.S. policymakers to dispense with the equation of "balancing commitments and resources."12 Indeed, as he notes, the Clinton administration had criticized peace plans calling for decentralized partition in Bosnia "with lofty rhetoric without proposing a practical alternative." The subsequent war led to the deaths of tens of thousands and left more than a million people homeless. After three years of war, the Dayton Accords—hailed as a triumph of American diplomacy—created a complicated arrangement by which the federal union of two ethnic units, the Muslim-Croat Federation, was itself federated to a Bosnian Serb republic. Today, Bosnia requires thousands of foreign troops to patrol its internal borders and billions of dollars in foreign aid to keep its government and economy functioning. Was the aim of U.S. policymakers, academics and journalists—creating a multi-ethnic democracy in Bosnia—not worth pursuing? No, not at all, and this is not what the argument suggests. But aspirations were not matched with capabilities. As a result of holding out for the "most moral" outcome and encouraging the Muslim-led government in Sarajevo to pursue maximalist aims rather than finding a workable compromise that could have avoided bloodshed and produced more stable conditions, the peoples of Bosnia suffered greatly. In the end, the final settlement was very close [End Page 19] to the one that realists had initially proposed—and the one that had also been roundly condemned on moral grounds.

### 2NC – A/T Probability

#### The probability of our impacts is irrelevant – any chance of existential dangers warrants attention and debate

Bostrom 02, Professor of Philosophy at Oxford University and Director of the Future of Humanity Institute, ’2 (Nick, March, “Existential Risks: Analyzing Human Extinction Scenarios and Related Hazards” Journal of Evolution and Technology, Vol 9, http://www.nickbostrom.com/existential/risks.html

8.6 Weighing up the evidence In combination, these indirect arguments add important constraints to those we can glean from the direct consideration of various technological risks, although there is not room here to elaborate on the details. But the balance of evidence is such that it would appear unreasonable not to assign a substantial probability to the hypothesis that an existential disaster will do us in. My subjective opinion is that setting this probability lower than 25% would be misguided, and the best estimate may be considerably higher. But even if the probability were much smaller (say, ~1%) the subject matter would still merit very serious attention because of how much is at stake.

### 2NC – Util Good

#### Maximizing all lives is the only way to affirm equality

Cummiskey 90 – Professor of Philosophy, Bates (David, Kantian Consequentialism, Ethics 100.3, p 601-2, p 606, jstor,)

We must not obscure the issue by characterizing this type of case as the sacrifice of individuals for some abstract "social entity." It is not a question of some persons having to bear the cost for some elusive "overall social good." Instead, the question is whether some persons must bear the inescapable cost for the sake of other persons. Nozick, for example, argues that "to use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has."30 Why, however, is this not equally true of all those that we do not save through our failure to act? By emphasizing solely the one who must bear the cost if we act, one fails to sufficiently respect and take account of the many other separate persons, each with only one life, who will bear the cost of our inaction. In such a situation, what would a conscientious Kantian agent, an agent motivated by the unconditional value of rational beings, choose? We have a duty to promote the conditions necessary for the existence of rational beings, but both choosing to act and choosing not to act will cost the life of a rational being. Since the basis of Kant's principle is "rational nature exists as an end-in-itself' (GMM, p. 429), the reasonable solution to such a dilemma involves promoting, insofar as one can, the conditions necessary for rational beings. If I sacrifice some for the sake of other rational beings, I do not use them arbitrarily and I do not deny the unconditional value of rational beings. **Persons** may **have "dignity**, an unconditional and incomparable value" that transcends any market value (GMM, p. 436), **but**, as rational beings, persons **also** have **a fundamental equality which dictates that some must** sometimes **give way for the sake of others.** The formula of the end-in-itself thus does not support the view that we may never force another to bear some cost in order to benefit others. If one focuses on the equal value of all rational beings, then equal consideration dictates that one sacrifice some to save many. [continues] According to Kant, the objective end of moral action is the existence of rational beings. Respect for rational beings requires that, in deciding what to do, one give appropriate practical consideration to the unconditional value of rational beings and to the conditional value of happiness. Since agent-centered constraints require a non-value-based rationale, the most natural interpretation of the demand that one give equal respect to all rational beings lead to a consequentialist normative theory. We have seen that there is no sound Kantian reason for abandoning this natural consequentialist interpretation. In particular, a consequentialist interpretation does not require sacrifices which a Kantian ought to consider unreasonable, and it does not involve doing evil so that good may come of it. It simply requires an uncompromising commitment to the equal value and equal claims of all rational beings and a recognition that, in the moral consideration of conduct, one's own subjective concerns do not have overriding importance.

Util’s the only moral framework

**Murray 97** (Alastair, Professor of Politics at U. Of Wales-Swansea, *Reconstructing Realism*, p. 110)

Weber emphasised that, while the 'absolute ethic of the gospel' must be taken seriously, it is inadequate to the tasks of evaluation presented by politics. Against this 'ethic of ultimate ends' — Gesinnung — he therefore proposed the 'ethic of responsibility' — Verantwortung. First, whilst the former dictates only the purity of intentions and pays no attention to consequences, the ethic of responsibility commands acknowledgement of the divergence between intention and result. Its adherent 'does not feel in a position to burden others with the results of his [OR HER] own actions so far as he was able to foresee them; he [OR SHE] will say: these results are ascribed to my action'. Second, the 'ethic of ultimate ends' is incapable of dealing adequately with the moral dilemma presented by the necessity of using evil means to achieve moral ends: Everything that is striven for through political action operating with violent means and following an ethic of responsibility endangers the 'salvation of the soul.' If, however, one chases after the ultimate good in a war of beliefs, following a pure ethic of absolute ends, then the goals may be changed and discredited for generations, because responsibility for consequences is lacking. The 'ethic of responsibility', on the other hand, can accommodate this paradox and limit the employment of such means, because it accepts responsibility for the consequences which they imply. Thus, Weber maintains that only the ethic of responsibility can cope with the 'inner tension' between the 'demon of politics' and 'the god of love'. 9 The realists followed this conception closely in their formulation of a political ethic.10 This influence is particularly clear in Morgenthau.11 In terms of the first element of this conception, the rejection of a purely deontological ethic, Morgenthau echoed Weber's formulation, arguing tha/t:the political actor has, beyond the general moral duties, a special moral responsibility to act wisely ... The individual, acting on his own behalf, may act unwisely without moral reproach as long as the consequences of his inexpedient action concern only [HER OR] himself. What is done in the political sphere by its very nature concerns others who must suffer from unwise action. What is here done with good intentions but unwisely and hence with disastrous results is morally defective; for it violates the ethics of responsibility to which all action affecting others, and hence political action par excellence, is subject.12 This led Morgenthau to argue, in terms of the concern to reject doctrines which advocate that the end justifies the means, that the impossibility of the logic underlying this doctrine 'leads to the negation of absolute ethical judgements altogether'.13

## 1NR

### Overview

#### Climate treaty is inevitable but Bond means the US can’t comply.

Borden 10-1-13

Theresa, JD Candidate Harvard, A global solution to climate change: the possible impact of Bond v. United States, Harvard Environmental Law Review Blog, http://www3.law.harvard.edu/journals/elr/2013/10/01/bondvus/

New legislation to deal with the global problem of climate change may seem politically unrealistic given the current inhospitable environment in Congress, but there are reasons to think that the prospect of reaching an international agreement may be more viable now than it was in the past. UN Secretary-General Ban Ki-Moon recently called for world leaders to meet in anticipation of the 2015 international climate meeting in Paris and the Intergovernmental Panel on Climate Change (IPCC) recently announced that humans are the dominant cause of global warming since the 1950s. Although climate change denial still exists in the U.S., the international community generally accepts the science. Interestingly, this could indicate that reaching an international agreement is easier than reaching a domestic agreement. Of course, Congressional action would still be necessary to ratify any treaty, but if the enumerated shortcomings of the Kyoto Protocol are addressed in the 2015 negotiations, domestic action may be facilitated, especially if the President stands behind the agreement. But even if the legislature and the executive get behind an international climate change agreement, there is still the judiciary. The Supreme Court recently granted cert for Bond v. U.S., which challenges Congressional authority to enact a federal statute enforcing the Chemical Weapons Convention on the grounds that it intrudes on areas of police power reserved to the states. The Court found that Ms. Bond lacks standing to bring a claim that applying the chemical weapons treaty to her violated the Tenth Amendment, thus avoiding revisiting Missouri v. Holland. However, the Court did certify one question that may have implications for international climate change agreements: “Do the Constitution’s structural limits on federal authority impose any constraints on the scope of Congress’ authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state prerogatives, and is concededly unnecessary to satisfy the government’s treaty obligations?” Although Bond may not have a direct effect on international climate change negotiations, it could provide some guidance on how to frame the scope of the treaty and the government’s treaty obligations. If an international agreement is reached, the U.S. must promulgate implementing legislation that will pass not only the political process, but also judicial review — it is possible that climate change deniers will try to undermine any climate change agreement in court. Bond, along with EPA v. EME Homer City Generation,[1] will provide some insight into how the Court determines the scope of “traditional state prerogatives” and how such considerations play out in environmental regulation. Meaningful climate change regulation is inevitable; the question is when it will come. Environmentalists must be aware of not only possible political solutions, but also potential fallout of judicial determinations. If an international deal is brokered, it would be counterproductive to provide domestic dissenters with any fodder to challenge it. Hopefully the Court will rule narrowly in Bond, and not make any pronouncements that would confuse settled federal authority to regulate interstate pollution. Even if it would be preposterous for domestic dissenters to challenge federal authority on such grounds, the commerce clause challenge to the Affordable Care Act — which many commentators dismissed as irrelevant — cautions against completely ignoring the possibility.

#### Global warming is real, anthropogenic and results in extinction – only existential risk

Deibel-prof IR National War College-7—Prof IR @ National War College (Terry, “Foreign Affairs Strategy: Logic for American Statecraft,” Conclusion: American Foreign Affairs Strategy Today)

Finally, there is one major existential threat to American security (as well as prosperity) of a nonviolent nature, which, though far in the future, demands urgent action. It is the threat of global warming to the stability of the climate upon which all earthly life depends. Scientists worldwide have been observing the gathering of this threat for three decades now, and what was once a mere possibility has passed through probability to near certainty. Indeed not one of more than 900 articles on climate change published in refereed scientific journals from 1993 to 2003 doubted that anthropogenic warming is occurring. “In legitimate scientific circles,” writes Elizabeth Kolbert, “it is virtually impossible to find evidence of disagreement over the fundamentals of global warming.” Evidence from a vast international scientific monitoring effort accumulates almost weekly, as this sample of newspaper reports shows: an international panel predicts “brutal droughts, floods and violent storms across the planet over the next century”; climate change could “literally alter ocean currents, wipe away huge portions of Alpine Snowcaps and aid the spread of cholera and malaria”; “glaciers in the Antarctic and in Greenland are melting much faster than expected, and…worldwide, plants are blooming several days earlier than a decade ago”; “rising sea temperatures have been accompanied by a significant global increase in the most destructive hurricanes”; “NASA scientists have concluded from direct temperature measurements that 2005 was the hottest year on record, with 1998 a close second”; “Earth’s warming climate is estimated to contribute to more than 150,000 deaths and 5 million illnesses each year” as disease spreads; “widespread bleaching from Texas to Trinidad…killed broad swaths of corals” due to a 2-degree rise in sea temperatures. “The world is slowly disintegrating,” concluded Inuit hunter Noah Metuq, who lives 30 miles from the Arctic Circle. “They call it climate change…but we just call it breaking up.” From the founding of the first cities some 6,000 years ago until the beginning of the industrial revolution, carbon dioxide levels in the atmosphere remained relatively constant at about 280 parts per million (ppm). At present they are accelerating toward 400 ppm, and by 2050 they will reach 500 ppm, about double pre-industrial levels. Unfortunately, atmospheric CO2 lasts about a century, so there is no way immediately to reduce levels, only to slow their increase, we are thus in for significant global warming; the only debate is how much and how serous the effects will be. As the newspaper stories quoted above show, we are already experiencing the effects of 1-2 degree warming in more violent storms, spread of disease, mass die offs of plants and animals, species extinction, and threatened inundation of low-lying countries like the Pacific nation of Kiribati and the Netherlands at a warming of 5 degrees or less the Greenland and West Antarctic ice sheets could disintegrate, leading to a sea level of rise of 20 feet that would cover North Carolina’s outer banks, swamp the southern third of Florida, and inundate Manhattan up to the middle of Greenwich Village. Another catastrophic effect would be the collapse of the Atlantic thermohaline circulation that keeps the winter weather in Europe far warmer than its latitude would otherwise allow. Economist William Cline once estimated the damage to the United States alone from moderate levels of warming at 1-6 percent of GDP annually; severe warming could cost 13-26 percent of GDP. But the most frightening scenario is runaway greenhouse warming, based on positive feedback from the buildup of water vapor in the atmosphere that is both caused by and causes hotter surface temperatures. Past ice age transitions, associated with only 5-10 degree changes in average global temperatures, took place in just decades, even though no one was then pouring ever-increasing amounts of carbon into the atmosphere. Faced with this specter, the best one can conclude is that “humankind’s continuing enhancement of the natural greenhouse effect is akin to playing Russian roulette with the earth’s climate and humanity’s life support system. At worst, says physics professor Marty Hoffert of New York University, “we’re just going to burn everything up; we’re going to heat the atmosphere to the temperature it was in the Cretaceous when there were crocodiles at the poles, and then everything will collapse.” During the Cold War, astronomer Carl Sagan popularized a theory of nuclear winter to describe how a thermonuclear war between the Untied States and the Soviet Union would not only destroy both countries but possibly end life on this planet. Global warming is the post-Cold War era’s equivalent of nuclear winter at least as serious and considerably better supported scientifically. Over the long run it puts dangers from terrorism and traditional military challenges to shame. It is a threat not only to the security and prosperity to the United States, but potentially to the continued existence of life on this planet

#### ---Climate security is good --- Mobilizes international action & transforms security into a focus on collective energy cooperation without the nationalism or enemy creation.

Trombetta 2008

Maria Julia, Environmental security and climate change: analyzing the discourse, Cambridge Review of International Affairs, 21:4, 585-602

How can these developments be read through the lens of the framework previously elaborated? Can this be considered as a securitization which is transforming security practices? The renewal of the debate on climate change and security appears as an attempt to transform it into an existential threat, requiring urgent measures. It has mobilized political action, emergency measures and even attempts to institutionalize the debate at an international level. So far the securitization of climate has succeeded in persuading even the reluctant Bush administration to undertake discussion on emissions reduction. It has also contributed to the formulation of the Bali Roadmap to set a strategy for the postKyoto period. The UN Security Council, at the initiative of the UK, discussed the potential impact of climate change on peace and security for the first time ever (UK Mission to the UN 2007). The most impressive results have been within the EU, since it has contributed to the EU developing a common energy policy—an issue that has previously been delayed for decades. Traditionally energy issues have been considered a prerogative of member states and security of supply has been considered a national security issue. The EU Commission is promoting a nonantagonistic approach that relies on liberalization and cooperation to promote a common energy policy and to secure energy supply and climate stability. The impact of this strategy is evident in the reaction to the Ukrainian gas crisis in 2006. When Russia cut the gas supply to Ukraine, due to their dispute over gas prices, the amount of gas transiting through Ukraine and destined for European countries fell dramatically (Jon Stern 2006). Despite the rapid solution of the crisis it was considered a wakeup call which prompted a significant debate on energy security. Within NATO the point was discussed in terms of new roles for the alliance, including the possibility of military involvement to patrol the supply routes, suggesting an antagonistic approach (Shea 2006), but within the EU the crisis provided an opportunity to expedite the development of a common energy policy. The common energy policy set ambitious targets, mobilizing consensus through the double lever of climate security and energy security. In January 2007 the Commission presented the ‘Energy and Climate package’ (Commission of the European Communities 2007). It included a Strategic Energy Review which focused on both internal and external aspects of EU energy policy. In March 2007, EU leaders approved the plan, agreeing on a binding target of 20 per cent reduction of greenhouse gas emissions by the EU by 2020, compared to 1990 levels. Central to the agreement was the recognition that energy and environment should go hand in hand. The plan committed member states to raising the European share of renewable energy to 20 per cent, increasing energy efficiency, completing the internal market for electricity and gas, and the development of a common external energy policy. Although the focus is on the EU interest and security, the means to achieve them are market mechanisms, promotion of liberal order and multilateralism. Thus far appeals to climate security have mobilized actions even if the emergency measures have not exceeded the ordinary policy debate. Hence these appeals can be considered as proper securitization rather than failed securitizing moves.9 The securitization of climate change has avoided the identification of enemies and has involved actors other than states, both in the securitizing moves and in the security provisions.

#### Chemical volatility wrecks the fertilizer industry

IECA 3 [Industrial Energy Consumers of America, nonprofit organization created to promote the interests of manufacturing companies for which the availability, use and cost of energy, power or feedstock play a significant role in their ability to compete, July 22 2003, “IMPACT OF THE U.S. NATURAL GAS CRISIS ON THE NORTH AMERICAN NITROGEN FERTILIZER INDUSTRY,” http://www.ieca-us.com/wp-content/uploads/072203Fertilizerbriefing.pdf]

Natural gas is the principal and only economically feasible feedstock raw material used for producing anhydrous ammonia, the building block product for nitrogen fertilizer. The fertilizer industry accounts for approximately three percent of the total natural gas consumed in the United States, while natural gas costs at current price levels account for nearly 90 percent of the cost to produce ammonia. ¶ Natural gas is the primary feedstock in the production of virtually all commercial nitrogen fertilizers in the United States. It is important to be very clear about this: natural gas is not simply an energy source for us; it is the raw material from which nitrogen fertilizers are made. The production process involves a catalytic reaction between ¶ elemental nitrogen derived from the air with hydrogen derived from natural gas. The primary product from this reaction is anhydrous ammonia (NH3). Anhydrous ammonia is used directly as a commercial fertilizer or as the basic building block for producing virtually all other forms of nitrogen fertilizers such as urea, ammonium nitrate and nitrogen solutions, as well as diammonium phosphate and mono-ammonium phosphate.¶ The volatility and high level of U.S. natural gas prices, virtually unprecedented in the history of our country, has resulted in the permanent closure of almost 20 percent of U.S. nitrogen fertilizer capacity and the idling of an additional 25 percent. ¶ By the end of December 2000, the U.S. nitrogen operating rate fell to below 70 percent of capacity. By the end of January 2001, operating rates dropped to an all-time low of only 46 percent. To put this into perspective, the average U.S. operating rate during the 1990s was 92 percent. ¶ During the gas spike in late February and early March of 2003, working capital requirements for one Mid-Western nitrogen manufacturer to buy gas for its operations nearly doubled--an increase of nearly $40 million in one month.2¶ Impact on U.S. Farmers¶ Natural gas prices began to steadily increase during calendar year 2000, rising from an average of $2.36 per MMBtu in January to over $6.00 per MMBtu in December 2000 and to a record $10 per MMBtu in January 2001 (Figure 3). In turn, this forced fertilizer production costs to unprecedented levels. Ammonia production costs, for example, spiked up from approximately $100 per ton to $170 per ton by June 2000, to $220 per ton in December 2000, and to an average of over $350 per ton in January 2001. ¶ The sharp rise in natural gas prices and the resulting curtailment of U.S. fertilizer production also has had a dramatic impact on fertilizer prices throughout the marketing chain and, in particular, at the farm level. Nitrogen prices at the farm level, for example, jumped this year to near-record high levels. According to U.S. Department of Agriculture data, the U.S. average farm-level price for ammonia jumped this spring to $373 per ton compared to an average spring price last year of $250. Similarly, urea prices have climbed from $191 to $261 and UAN prices from $127 to $161 in the same time period. This translates into an increase in cost to a typical Midwest corn farmer of $10 to $15 per acre. It is important to understand that most U.S. nitrogen fertilizer is consumed within a very short time frame in the fall and spring application seasons.

#### Solves food crises

The Fertilizer Institute 9 [Trade Group representing the fertilizer industry, “The U.S. Fertilizer Industry and Climate Change Policy,” April 2 2009, http://www.kochfertilizer.com/pdf/TFI2009ClimateChange.pdf]

Fertilizer nutrients – nitrogen, phosphorus and potassium – are all naturally occurring elements that are “fed” to plants and crops for healthy and abundant food and fiber production. They are currently responsible for 40 to 60 percent of the world’s food supply. Harvest after harvest, fertilizers replenish our soils by replacing the nutrients removed by each season’s crop. Each year, the world’s population grows by 80 million and fertilizers – used in an environmentally sensitive way – are critical to ensuring that our nation’s farmers grow an adequate supply of nutritious food for American and international consumers.¶ As consumers around the world demand improved diets, the global demand for fertilizers is growing rapidly. Under these circumstances, U.S. farmers compete with farmers from around the world for a limited supply of nutrients. For example, over 85 percent of our potash and over 50 percent of the nitrogen used on U.S. farms is now imported from other countries.¶ The United States needs a strong domestic fertilizer industry to ensure this valuable resource is available for a stable food production system. Today, the world’s food supply, as represented by the grain stocks-to-use ratio, is near its lowest level in 35 years. In six of the last seven years, consumption of grains and oilseeds has exceeded production. Many experts believe that we are just one natural disaster or substandard world harvest away from a full-scale food crisis.

### AT: No Link

#### A. D.C. Court – it’s a lightning rod – overturned quickly and often – also proves that the court will have to be appealed – that’s the White evidence from the 2NC

#### B. Political Question – Aff results in interbranch conflicts by becoming involved in fights with the executive – that’s proven above with the analysis of the first case and the stay – that politicizes the courts and turn case.

Entin 12 (Jonathan L. Entin Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. “War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations,” http://law.case.edu/journals/JIL/Documents/45CaseWResJIntlL1&2.21.Article.Entin.pdf)

Whatever the merits of the decisions discussed in the previous section, those rulings should give pause to those who might rely on the judiciary as a check on what they regard as executive overreaching. When combined with the procedural and jurisdictional obstacles discussed in Part I, a more general lesson emerges: the judiciary cannot resolve all the questions that might arise in connection with war powers and foreign affairs. Nonetheless, the substantive and procedural limitations of judicial review provide an opportunity for greater civic and political engagement in decisions that can have profound consequences for our nation and the world. If the courts cannot resolve these matters, questions of war and diplomacy, it should come as no surprise that they are getting worked out largely through political accommodation and negotiation. These accommodations and negotiations necessarily reflect the differing constitutional views of the legislative and executive branches as well as of the persons and groups that engage on these issues. Although many lament the quality of current political discourse, excessive reliance on the judicial process has undesirable consequences. The Supreme Court has had difficulty rendering consistent or principled decisions about legislative-executive relationships.110 Sometimes the Court has taken a formalistic approach that emphasizes the need to maintain clear lines between the branches.111 At other times, the Court has used a functional approach that emphasizes the importance of checks and balances to prevent the accumulation of excessive power in any particular branch.112 In other words, judicial review does not always provide clear answers to complex questions. The complexity of those questions is particularly evident in the military and diplomatic arenas. Reliance on the political process recognizes the uncertainties and contingencies involved in many of these matters.113 Moreover, interbranch negotiation rather than litigation recognizes that an effective government requires a degree of comity that is inconsistent with frequent reliance on the judiciary.114 Our system rests on a rich set of subtle understandings and an implicit sense of political limits.115 As a result, structural and institutional factors often dampen the inevitable conflicts that arise between Congress and the president. Excessive reliance on the judiciary tends to raise the stakes of conflict by clearly identifying winners and losers and by encouraging the assertion of extreme positions for short-term litigation advantage that might complicate the resolution of future disagreements.116 In addition, the litigation process takes time. Of course, the Pentagon Papers case was resolved in less than three weeks after the New York Times published its first article on the subject.117 Ordinarily, however, the judicial process proceeds at a much statelier pace. Consider another landmark case, albeit one that dealt with domestic issues. Cooper v. Aaron118 was decided approximately one year after President Eisenhower dispatched federal troops to enforce the desegregation of Little Rock Central High School in the face of massive resistance encouraged by Arkansas Governor Orval Faubus.119 Often, disputes over military and diplomatic matters are timesensitive. Expedited judicial review might help, but events on the ground might well frustrate orderly judicial disposition.

### AT: Link N/U

#### And any blockbusters they can point to have already been ruled on – means that our uniqueness assumes any capital loss from them

Walsh 10-1-13

Mark, Campaign funding and affirmative action come back before the Supreme Court, writer for the ABA Journal, covering the U.S. Supreme Court, ABA Journal http://www.abajournal.com/magazine/article/campaign\_funding\_and\_affirmative\_action\_come\_back\_before\_the\_supreme\_court/

The last two terms of the U.S. Supreme Court were blockbusters, each capped off with dramatic, landmark decisions: the Affordable Care Act in 2012 and gay marriage this past June. The new court term is shaping up, in a sense, as a season of sequels. Big cases on campaign finance, affirmative action and, potentially, the federal health care law follow recent decisions in those areas. But like many Hollywood film sequels, the original stars are absent, the script may lack originality and the stakes are somewhat lower. “I think we’re going to have nothing as historic as the last two terms,” says Irving L. Gornstein, executive director of the Supreme Court Institute at Georgetown University Law Center and a visiting professor there. “On the other hand, there are quite a few fairly significant cases. I think the docket is relatively deep.”