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TOPICALITY

#### Violation-the plan restricts Congressional war powers

Ramsey-Center for the Study of Constitutional Originalism-11

Originalism and Classic Cases: Korematsu v. United States

<http://originalismblog.typepad.com/the-originalism-blog/2011/10/originalism-and-classic-cases-korematsu-v-united-statesmichael-ramsey.html>

The starting point should be whether Congress has an enumerated power to authorize the executive actions in the case. According to the Korematsu Court, Congress’ war power allows it to do anything connected to winning the war. But this was the New Deal Court, highly nonoriginalist and uninterested in enumerated-powers-based limits on Congress. Add the wartime context, and it’s no surprise that the Court found in effect no enumerated-powers limits. But is there an originalist basis for such a broad war power? Since Congress doesn't actually have an enumerated war power (only the power to declare war), the best form of the argument appears to go like this: the President has an executive power to fight a war under Congress’ authorization; Congress has power to make laws necessary and proper to carry into execution powers the Constitution grants to the President (here, to conduct the war); and if the President finds it useful to exclude Japanese-Americans from the West Coast to aid the war effort, Congress can back that up with the force of law.

#### Vote Negative-their interpretation destroys negative ground and a limited topic by changing the primary question of the resolution from who should have war power to what war power should be restricted.

Waxman 13 (Matthew Waxman is a law professor at Columbia Law School, where he co-chairs the Roger Hertog Program on Law and National Security, Adjunct Senior Fellow for Law and Foreign Policy at the Council on Foreign Relations, “The Constitutional Power to Threaten War,” http://www.lawfareblog.com/2013/08/the-constitutional-power-to-threaten-war/)

The implicit consensus that the President is constitutionally empowered to threaten military force in this situation is, in my view, correct, but it presents an anomaly: proponents of drawing that line argued that doing so was necessary to prevent a war (or at least a bigger and more destructive war) down the road, while critics argued that it would needlessly provoke or drag the United States into a war — the very sorts of concerns that usually animate strident war powers debates. More generally, the allocation of constitutional war powers is thought to be of paramount import because it could affect whether or when the United States goes to war and it implicates core questions about how our democracy should decide matters of such consequence. Yet legal discourse in this area excludes almost completely some central ways in which the United States actually wields its military power, namely, with threats of war or force. This Article breaks down that barrier and connects the legal issues with the strategic ones. As to the constitutional issues, there is wide agreement among legal scholars on the general historical saga of American war powers – by which I mean here the authority to use military force, and not the specific means or tactics by which war is waged once initiated – though there remains intense disagreement about whether this is an optimistic or pessimistic story from the perspective of constitutional values and protection of American interests. Generally speaking, the story goes like this: The Founders placed decisions whether actively to engage in military hostilities in Congress’s hands, and Presidents mostly (but not always) respected this allocation for the first century and a half of our history. At least by the Cold War, however, Presidents began exercising this power unilaterally in a much wider set of cases, and Congress mostly allowed them to; an effort to realign legislatively the allocation after the Vietnam War failed, and today the President has a very free hand in using military force that does not rise to the level of “war” (in constitutional terms, which is usually confined to large-scale and long-duration uses of ground forces). From a functional standpoint, this dramatic shift in constitutional power is seen as either good, because decisions to use force require policy dexterity inherent in the presidency, or bad, because unilateral presidential decisions to use force are more prone than congressionally-checked ones to be dangerously rash. With this story and split in resulting views in mind, lawyers and legal scholars continue to debate a series of familiar constitutional questions: Does the historical gloss of practice among the political branches – the patterns of behavior by the President and Congress with respect to using force – provide legal justification for this shift toward executive power? Without requiring congressional authorization before engaging in hostilities, are there sufficient checks on executive action? Does this shift in power lead the United States into needless and costly wars, and if so should it be remedied with more potent checks, whether led by Congress or courts, to reestablish a constitutional formula closer to the original one?

### 1NC

PASSIVE COUNTERPLAN

#### Text

The United States Federal Government should repudiate and end the ongoing legacy of the Korematsu Era war powers authority

The plans passive voice construction engages in a form of blame shifting and scapegoating that undermines responsibility for the ongoing legacy of Korematsu

Leo-senior fellow at the Manhattan Institute-98

Two Steps Ahead of the Thought Police Google Books

No-fault syntax "Obviously, some mistakes were made," said John Sununu, referring to his travel adventures as White House chief of staff. This is a wonderful non apology, which seizes the blame and casts it firmly into outer space. Having achieved quotability, Sununu rested. But he could easily have gone on, paddling along in the passive voice ("Aisle seats were reserved and filled" or "Haircuts in Hawaii and stamp auctions on Samoa were flown toward") without actually associating himself with any of these mysterious and expensive travel decisions that people keep saying he was somehow involved in. Of course, Sununu could have been protecting the identity of some loyal assistant who misguidedly put the boss on all those planes and limos. It's possible that the aide sent him hurtling along to all those ski slopes and far-off dental appointments without bothering to inform him about it. Probably not, though. More likely, Sununu was just making exceptional use of the traditional passive voice to fudge things as best he could. President Bush played right along, saying that Sununu had apol- ogized to him, not for screwing up, or for ethically dubious behavior, but for any embarrassment that the travel controversy might have caused. The president said his heart aches for the Sununu family "because they've been through a lot. . . kind of what I refer to as a piling-on syndrome." Sununu and his family are passive here, either bystanders or victims. The active and therefore blamable forces are both abstractions: the travel controversy and the piling-on syndrome."Mistakes were made." That phrase showed up in the Justice Department report on Waco too. William Schneider, a political analyst for CNN, calls this usage "the past exonerative," a sharp phrase, quoted in William Satire's language column in the Sunday New York Times Magazine. Marion Barry, the embattled ex-mayor of Washington, is a hall-of-fame performer in wielding the past exonerative. When asked why he lied about being "chemically dependent," he replied, "That was the disease talking. I did not purposely do that to you. I was a victim." By combining the three languages of addiction, victimology and political evasion, Barry thus brilliantly positioned himself as the victim of his own mouth. This is the "Night of the Living Dead" defense: As in many a scary horror movie, an outside demon invades your body, pours in some gruesome chemicals that you yourself would never ingest and then, to cap it off, uses your very own voice to lie to the press! Language indicating that one is merely the victim of one's own action is not new, just wildly popular. In the movie Heartburn, Jack Nicholson told his pregnant wife, Meryl Streep, that the crisis caused by his extramarital romance "is hard on me, too." Nice touch. Now the past exonerative and other slippery passive usages are rampant (or should that be, are being run rampantly?) throughout the press. The Washington Post reporter fired for plagiarism "had the misfortune to get caught at a moment when the press was focused on the issue of plagiarism" (The New RepiMc). Alcoholism "extracts a disproportionate toll" from minorities (The New York Times). Donald Kennedy, who resigned as president of Stanford after a funding scandal, "was caught up in a (post- Trump-age) purge" and "paid a high price for failing to meet strict standards" (various educators interviewed by the Boston Globe). Actually, he quit because under his leadership, Stanford used more than a million in federal research dollars to pay for flowers, antiques, receptions and yacht depreciation. In the modern manner, Kennedy, like Sununu, took no personal responsibility, generally positioning himself as a scapegoat.

Passive language is a slippery slope to nihilism-Language manipulation greases the wheels for authoritarian violence

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 “The Holocaust: Remembering For the Future: ‘Havel to the Castle!’ The Power of the Word, The Annals of The American Academy of Political and Social Science, November 1996, 548 Annals 45, ln

THE political bestiality of our age is abetted by our willingness to tolerate the deconstructing of humanist values. The process begins with the cynical manipulation of language. It often ends in stupefying murderousness before which the world stands silent, frozen in impotent "attentism"--a wait-and-see stance as unsuited to the human plight as a pacifier is to stopping up the hunger of a starving child. We have let lapse our pledge to the 6 million Jewish victims of the Holocaust that their deaths might somehow be transfiguring for humankind. We allow "slaughterhouse men" tactical status at U.N. tables and "cast down our eyes when the depraved roar past." 1 Peacemakers, delegated by us and circumscribed by our fears, temporize with thugs who have revived lebensraum claims more boldly than Hitler did. In the Germany of the 1930s, a demonic idea was born in a demented brain; the word went forth; orders were given, repeated, widely broadcast; and men, women, and children were herded into death camps. Their offshore signals, cries for help, did not summon us to rescue. We had become inured to the reality of human suffering. We could no longer hear what the words meant or did not credit them or not enough of us joined the chorus. Shrieking victims perished in the cold blankness of inhumane silence. We were deaf to the apocalyptic urgency in Solzhenitsyn's declaration from the Gulag that we must check the disastrous course of history. We were heedless of the lesson of his experience that only the unbending strength of the human spirit, fully taking its stand on the shifting frontier of encroaching violence and declaring "not one step further," though death may be the end of it--only this unwavering firmness offers any genuine defense of peace for the individual, of genuine peace for mankind at large. 2 In past human crises, writers and thinkers strained language to the breaking point to keep alive the memory of the unimaginable, to keep the human conscience from forgetting. In the current context, however, intellectuals seem more devoted to abstract assaults on values than to thoughtful probing of the moral dimensions of human experience. "Heirs of the ancient possessions of higher knowledge and literacy skills," 3 we seem to have lost our nerve, and not only because of Holocaust history and its tragic aftermath. We feel insecure before the empirical absolutes of hard science. We are intimidated by the "high modernist rage against mimesis and content," 4 monstrous progeny of the union between Nietzsche and philosophical formalism, the grim proposal we have bought into that there is no truth, no objectivity, and no disinterested knowledge. 5 Less certain about the power of language, that "oldest flame of the [\*47] humanist soul," 6 to frame a credo to live by or criteria to judge by, we are vulnerable even to the discredited Paul de Man's indecent hint that "wars and revolutions are not empirical events . . . but 'texts' masquerading as facts." 7 Truth and reality seem more elusive than they ever were in the past; values are pronounced to be mere fictions of ruling elites to retain power. We are embarrassed by virtue. Words collide and crack under these new skeptical strains, dissolving into banalities the colossal enormity of what must be expressed lest we forget. Remembering for the future has become doubly dispiriting by our having to remember for the present, too, our having to register and confront what is wrong here and now. The reality to be fixed in memory shifts as we seek words for it; the memory we set down is flawed by our subjectivities. It is selective, deceptive, partial, unreliable, and amoral. It plays tricks and can be invented. It stops up its ears to shut out what it does not dare to face. 8 Lodged in our brains, such axioms, certified by science and statistics, tempt us to concede the final irrelevance of words and memory. We have to get on with our lives. Besides, memories reconstructed in words, even when they are documented by evidence, have not often changed the world or fended off the powerful seductions to silence, forgetting, or denying. Especially denying, which, in the case of the Holocaust, has become an obscene industry competing in the open market of ideas for control of our sense of the past. It is said that the Holocaust never happened. Revisionist history with a vengeance is purveyed in words; something in words must be set against it. Yet what? How do we nerve to the task when we are increasingly disposed to cast both words and memory in a condition of cryogenic dubiety? Not only before but also since 1945, the criminality of governments, paraded as politics and fattening on linguistic manipulation and deliberately reimplanted memory of past real or imagined grievance, has spread calamity across the planet. "The cancer that has eaten at the entrails of Yugoslavia since Tito's death [has] Kosovo for its locus," but not merely as a piece of land. The country's rogue adventurers use the word "Kosovo" to reinvoke as sacred the land where Serbs were defeated by Turks in 1389! 9 Memory of bloody massacres in 1389, sloganized and distorted in 1989, demands the bloody revenge of new massacres and returns civilization not to its past glory but to its gory tribal wars. As Matija Beckovic, the bard of Serb nationalism, writes, "It is as if the Serbian people waged only one battle--by widening the Kosovo charnel-house, by adding wailing upon wailing, by counting new martyrs to the martyrs of Kosovo. . . . Kosovo is the Serbianized [\*48] history of the Flood--the Serbian New Testament." 10 A cover of Suddeutsche Zeitung in 1994 was printed with blood donated by refugee women from Bosnia in an eerily perverse afterbirth of violence revisited. 11 We stand benumbed before multiplying horrors. As Vaclav Havel warned more than a decade ago, regimes that generate them "are the avant garde of a global crisis in civilization." The depersonalization of power in "system, ideology and apparat," pathological suspicions about human motives and meanings, the loosening of individual responsibility, the swiftness by which disastrous events follow one upon another "have deprived us of our conscience, of our common sense and natural speech and thereby, of our actual humanity." 12 Nothing less than the transformation of human consciousness is likely to rescue us. THE INTELLECTUALS' DILEMMA Books, essays, speeches by eyewitnesses to totalitarian experience plead for a reaffirmation of basic human rights. They are exhortations to plunder history for usable analogy. But well-schooled intellectuals know that contingency rules human history. The flow of events does not stop, does not seem to hold fast long enough, for us to use the lessons historians exact from the past. Language seems pitifully unequal to history's caprice of presenting new configurations. In midthought, examples we adduce become obsolete as news of new horrors flash onto the screens of our moral imaginations. Preachments about basic human rights, however elegantly urged, do not summon us to virtue or insulate us from the predators who have turned civilized cities into killing fields. What, then, are they worth? Are they merely the fictions they are labeled by intellectuals of skeptical chic who choose disdainful withdrawal from the chaos of history? 13 Fear of mockery tempts even the humanists among us to retreat into a stance of nonassessment. The risk of being accused of vapid moralizing ties our tongues and retards reaction. Such failures of nerve seem justified by the history we are enjoined to plunder. They precipitate descent into a fatalistic nihilism that relieves us from responsibility. Words do not matter; they rarely mean what they say. What does it matter, then, how intellectuals use their verbal virtuosity? Values are relative and truth elusive. We stand precisely where many gifted French intellectuals stood during World War II, in spite of the myth of resistance promulgated by the most brilliant among them. They remained glacially unmoved, engrossed [\*49] in vacuous verbal games, when the desperation of the situation should have aroused their moral conscience, their humane consciousness, and their civic spirit. They rushed to embrace the position "that language is not referential and the writing of history impossible," 14 because it let them off the hook. History has survived them and provides a regenerative, other view against nihilism and detachment. It testifies that our terror of being found guilty of phrases too smooth or judgment too simple is not in itself a value. Some longing for transcendence persists in the human spirit, some tenacious faith that truth and goodness exist and can prevail. What happened in the death camps, the invasion of Prague by Russian tanks, the rape of Muslim women, the dismembering of Bosnian men, the degrading of a sophisticated society to subsistence and barbarous banditry: these things do not become fictions simply because we cannot speak of them adequately or because composing abstractions is safer than responding to the heinous reality of criminal acts. No response to the Holocaust and its murderous wake or to the carnage in the former Yugoslavia could possibly be adequate to the atrocities alphabetized in file folders of perpetrators or to the unspeakable experiences burned into brains and bodies of survivors. But no response at all breeds new catastrophe. Saul Bellow warned about the "humanistic civilized moral imagination" that, seized with despair, "declines into lethargy and sleep." 15 Imagine the plight of human creatures if it were to be silenced altogether, extinguished or forgotten. "Humanism did not produce the Holocaust, and the Holocaust, knowing its enemies, was bent on the extermination of humanism. It is an odd consequence of an all-or-nothing mentality to repudiate humanist values because they are inadequate as an antidote to evil." 16 Basic human rights asserted in words cannot be restored in reality unless they are matched to practices in all the spheres of influence we occupy. We feel revulsion at the repudiation of humanist values so visible in the savagery of the battlefield and the councils of war. Yet we seem inoculated against seeing the brutalities of daily human interactions, the devaluing of values in our own intellectual spheres, the moral and ethical debunking formally incorporated into scholarly exegesis in literature, philosophy, the social sciences, and linguistics, the very disciplines that cradled humanist values. Remembering for the future by rehearsing the record, then, is not enough, as the most eloquent witnesses to Holocaust history have sorrowfully attested. We must also respond to the record with strategies that challenge humanist reductionism in places where we tend to overlook it or think it harmless. Our moral outrage should be intensified, not subdued, [\*50] by what we know. We must search out alternatives to the anomie that seizes us when the linguistic distance between words and reality seems unbridgeably vast, and reflections upon historical events ill matched to the dark complexities of the human experience we would illumine. To be fair, it is not just a desire to evade responsibility or to forget that makes our responses so feeble. At times we simply have no words. At times we are not unlike the German "executor executioners" who were interviewed for the film Shoah, "physically incapable of finding the true words and attaching them to the deeds, as a paralyzed man cannot tie his tie or lift a pen." We need fresh air in our "separate national and linguistic rooms." 17 The executioners have not earned forgiveness. We have not earned the right to "turn away from the dilemmas posed by the writers who bore witness to the ugly European past." 18 A LESSON FOR INTELLECTUALS Even though, as Americans, we have not experienced "by fire, hunger and the sword" 19 the terrible disasters in war overtaking other human beings on their home ground, we know the consequences of human hospitality to evil. We know about human perfidy: the chasm that separates proclaiming virtue from acting decently. Even those of us trained to linguistic skepticism and the relativity of moral judgment can grasp the verity in the stark warning, "If something exists in one place, it will exist everywhere." 20 That the dreadful something warned against continues to exist anywhere should fill us with an inextinguishable yearning to do something. Our impotence to action against the brutality of mass slaughter shames us. We have the historical record to ransack for precedent and corollaries--letters, documents, testaments, books--written words that would even "preserve their validity in the eyes of a man threatened with instant death." 21 The truths gleanable from the record of totalitarian barbarism cited in them may be common knowledge; they are by no means commonly acknowledged. 22 They appear in print upon many a page; they have not yet--still not yet--sufficiently penetrated human consciousness. Herein lies the supreme lesson for intellectuals, those who have the projective power to grasp what is not yet evident to the general human consciousness: it is possible to bring down totalitarian regimes either by violence or by a gradual transformation of human consciousness; it is not possible to bring them down "if we ignore them, make excuses for them, yield to them or accept their way of playing the game" 23 in order to avoid violence. The history of the gentle revolutions of Poland, Hungary, and [\*51] Czechoslovakia suggests that those revolutions would not have happened at all, and certainly not bloodlessly, without the moral engagement and political activism of intellectuals in those besieged cultures. Hundreds of thousands of students, workers, and peasants joined in the final efforts to defeat the totalitarian regimes that collapsed in 1989. Still, it was the intellectuals, during decades when they repeatedly risked careers, freedom, and their very lives, often in dangerous solitary challenges to power, who formed the unifying consensus, developed the liberating philosophy, wrote the rallying cries, framed the politics, mobilized the will and energies of disparate groups, and literally took to the streets to lead nonviolent protests that became revolutions. The most profound insights into this process that gradually penetrated social consciousness sufficiently to make revolution possible can be read in the role Vaclav Havel played before and during Czechoslovakia's Velvet Revolution. As George Steiner reflects, while "the mystery of creative and analytic genius . . . is given to the very few," others can be "woken to its presence and exposed to its demands." 24 Havel possesses that rare creative and analytic genius. We see it in the spaciousness of his moral vision for the future, distilled from the crucible of personal suffering and observation; in his poet's ability to translate both experience and vision into language that comes as close as possible to truth and survives translation across cultures; in the compelling force of his personal heroism. Characteristically, Havel raises local experience to universal relevance. "If today's planetary civilization has any hope of survival," he begins, "that hope lies chiefly in what we understand as the human spirit." He continues: If we don't wish to destroy ourselves in national, religious or political discord; if we don't wish to find our world with twice its current population, half of it dying of hunger; if we don't wish to kill ourselves with ballistic missiles armed with atomic warheads or eliminate ourselves with bacteria specially cultivated for the purpose; if we don't wish to see some people go desperately hungry while others throw tons of wheat into the ocean; if we don't wish to suffocate in the global greenhouse we are heating up for ourselves or to be burned by radiation leaking through holes we have made in the ozone; if we don't wish to exhaust the nonrenewable, mineral resources of this planet, without which we cannot survive; if, in short, we don't wish any of this to happen, then we must--as humanity, as people, as conscious beings with spirit, mind and a sense of responsibility--somehow come to our senses. 25 Somehow we must come together in "a kind of general mobilization of human consciousness, of the human mind and spirit, human responsibility, human reason." 26 The Prague Spring was "the inevitable consequence of a long drama originally played out chiefly in the theatre of the spirit and the conscience of society," a process triggered and sustained "by individuals willing to live in truth even when things [\*52] were at their worst." 27 The process was hidden in "the invisible realm of social consciousness," conscience, and the subconscious. It was indirect, long-term, and hard to measure. 28 So, too, its continuation that exploded into the Velvet Revolution, the magic moment when 800,000 citizens, jamming Wenceslas Square in Prague, jingled their house keys like church bells and changed from shouting "Truth will prevail" to chanting "Havel to the castle." Havel developed his thinking in plays, petitions, letters, samizdat essays and addresses, written both in and out of prison, circulated at peril of new imprisonment, sometimes at peril of death: his is a humanist philosophy wrested from the logic of cruel experience, an anatomy of the process of social transformation, and a practical political strategy. He specifies to post-totalitarian societies, including Western democracies, for whom his reading of the Czech experience stands as warning and instruction, the relevance to us of his passionately argued convictions. His prescience is amazing; his candid truthfulness, startling. In an utterly original departure from received wisdom, he discredits the two basic political strategies between which he thinks Western intellectuals unwittingly oscillate: (1) inventing and deploying further weapons of mass destruction "for the defense of democracy"; and (2) joining peace movements. Both strategies "colonize" human consciousness by moving it toward the same global totalitarianism; the second effectively makes the just mind ineffectual by "preoccupying it, then occupying it, and ultimately rendering it intellectually harmless." 29 Opposition to totalitarian systems is fumbling and futile if we fail to see them for what they really are: "a convex mirror of all modern civilization and a harsh, perhaps final call for a global recasting of how that civilization understands itself." 30 The enemy is the momentum of impersonal power, whether wielded by technocrats or tyrants, which defines totalitarianism of territory and spirit. Defeating the enemy depends on routing totalitarianism from the structure of contemporary humanity, from our very souls. The question is whether we shall succeed in reconstituting the natural world as the true terrain of politics, rehabilitating . . . personal experience as the initial measure of things, placing morality above politics and responsibility above our desires, in making human community meaningful, in returning content to human speech, in reconstituting, as the focus of all social action, the autonomous, integral, and dignified human "I," responsible for ourselves because we are bound to something higher, and capable of sacrificing something, in extreme cases even everything . . . for the sake of that which gives life meaning. 31 Havel translates densely philosophical probing into simple principles of action by which individuals can resist alienating pressure. True to his genius for globalizing local experience, Havel defines the alienating pressure so as to include "consumption, [\*53] advertising, repression, technology, or cliche--all of which are the blood brothers of fanaticism and the wellspring of totalitarian thought." 32 All of us, then, wherever we live, under whatever form of government, have a stake in the human struggle and a solution to try, personally, you and I, and all of us together. We are not powerless. Havel learned from his particular experiment in "anti-political politics" something of essential and universal importance: that a single, seemingly powerless person who dares to cry out the word of truth and to stand behind it with all his person and all his life, ready to pay a high price, has, surprisingly, greater power, though formally disfranchised, than do thousands of anonymous voters. 33 A realist as well as a visionary with projective imagination, Havel acknowledges that most of such individual expressions remain rudimentary revolts, but he points out, "Here and there, a more coherent and visible initiative may emerge . . . that transcends 'merely' individual revolt and is transformed into more conscious, structured, and purposeful work." 34 He cites as an example Soviet fears of just such a transformation in the case of Solzhenitsyn, who was expelled from Russia in the regime's desperate attempt "to plug up the dreadful wellspring of truth," a truth that might have caused "incalculable transformations in social consciousness, which in turn might one day produce political debacles unpredictable in their consequences." 35 Rockets aimed at this or that state are less dangerous to the enemy than human beings taking responsibility for the world, which presupposes our seeing ourselves in the convex mirror and absorbing the fearful lesson that suppression of human beings in Prague or Moscow or Mostar threatens suppression of all human beings everywhere. 36 In his speech on 8 May 1993 commemorating the Czech Liberation Day, Havel, now president, pointed to the "impotence of contemporary German democracy and the inability to present a united front to rampant Nazis." The policy of appeasement, suicidal in the 1930s and 1940s, is proving so now: It is bowing down before evil and its terrible consequences for the whole world, if politicians and whole nations forget that a threat to the freedom of one country threatens the freedom of all nations. Indifference to others and to the community opens the door to evil. The message is we cannot afford to be indifferent. This sensible statement, suggesting a Czech national moral obligation to intervene in Yugoslavia, prompted instant disavowal by the Czech prime minister. It is hard to resist seeing in that disavowal a political difference between the two men that, given the peculiar constraints of the Czech constitution, threatens to throttle the immediate effectiveness of Havel's presidency. It is, moreover, a lesson about the distance between morality and power that must be negotiated by anyone who tries to change anything from inside a political system. Havel's antipolitical politics is practical morality, service to truth, [\*54] not a technique of power and manipulation. It is evident, he writes, "that wholly personal categories like good and evil still have their unambiguous content and, under certain circumstances, are capable of shaking the seemingly unshakable power with all its armies of soldiers, policemen, and bureaucrats." 37 He grounds his hopes on a conviction that "the essential aims of life are present naturally in every person," and he defines them as a desire for dignity, for free expression of being, and "a sense of transcendence over the world of existence," a yearning to live in truth. 38 Alongside this magnanimous view of human potential, he keeps in mind its opposite pole: that we are all capable of trivializing our humanity by merging into the manipulated, unprincipled, anonymous crowd, with its insatiable demand for complicity in its lies. 39 THAT BEAUTIFUL WORD "PEACE" Havel stresses the potential of truth and humane values to transform human consciousness incrementally over time. We must constantly work for every good thing and struggle against violence. But Havel is tough-minded, his vision comprehensive and realistic. Violence may be unavoidable in the face of totalitarian savagery. Still, it must remain a means of last resort. Repeatedly, he warns that violence breeds violence. Havel is not, however, a pacifist, as that term applies to Quakers or others who organize peace movements. 40 Although the regime Havel and his fellow dissidents resisted for more than thirty years accused them of terrorist tactics and plots, they conscientiously sought legal justification for their resistance, using the letter even of unjust laws to manifest support for the principle of legality. Their attitude was "fundamentally hostile to the notion of violent change--simply because it places its faith in violence," Havel writes in one place. He immediately restates the point, however, in a powerfully significant parenthesis: "the 'dissident' attitude can only accept violence as a necessary evil in extreme situations, when direct violence can only be met by violence and where remaining passive would in effect mean supporting violence." 41 He recalls us to the tragic blindness of European pacifism that helped to prepare the ground for World War II. He points to the fact that the Czechs sent troops to the Persian Gulf and stood willing to contribute to a U.N. force in the former Yugoslavia. But he is at pains to condemn violence used as a quick fix to change political systems--the sacrifice of human beings here and now for "abstract political visions of the future." The problems in human society "lie far too deep to be settled through [\*55] mere systemic changes, either governmental or technological." 42 Havel writes and thinks out of a unique humanist tradition that has been continuous in Czech history. He has specifically identified with the humanism of the founder of the Czech state, Tomas Masaryk, who regarded "ethical, aesthetic and scientific categories" as "no less real than bread and butter." Masaryk felt the need for a social revolution "more moral and less materialistic than that envisaged by the Marxists." Like Havel, he hoped to avoid violence, but he does not rule it out altogether. His language is as circumspect as Havel's: We must consistently reject every act of violence; otherwise we shall never be able to disentangle ourselves from violence. We may, should, must protect, defend ourselves. In extreme cases with the sword. But even in self-defense we must restrain ourselves from new, active acts of violence. 43 In an address prepared for delivery at a 1985 peace conference, Havel explains the reticence of Europeans to join Western peace movements as rooted in the skepticism of those who have already been burned by succumbing to other forms of utopianism, specifically the Stalin-Leninist variety, which grotesquely deformed its utopian principles as soon as it got power. The very word "peace" has been drained of all content by the European experience of "peace in our time." 44 The Western version of peace sounds far too much like appeasement. Havel speculates whether World War II, with its millions of corpses, could have been avoided if the Western democracies had stood up to Hitler forcefully and in time. He ascribes to the Czech people as a whole the firmly rooted idea that the inability to risk, in extremis, even life itself to save what gives it meaning and a human dimension leads not only to the loss of meaning but finally and inevitably to the loss of life as well--and not one life only but thousands and millions of lives. 45 Lessons from the Munich betrayal of 1938 and the Czech submission in the Communist takeover of 1948! Disarmament negotiations, Havel argues, or opposition to particular weapons systems will not bring peace. Peace depends on fundamental restructuring of the political realities that cause the particular crises that justify the production and use of weapons. Policies based on power interests guarding the status quo or requiring the division of Europe into blocs must be abandoned to the "ideal of a democratic Europe as a friendly community of free and independent nations." 46 Havel returns to probing the troubling issue of peace in a 1989 address, "A Word About Words." In it, he celebrates the restoration, however briefly, of the word "peace" to its beautiful original meaning by the efforts of Charter 77 members and the young people of Prague's Independent Peace Association. But he uses the occasion to reflect more broadly "on the mysterious link between words and peace, and on the [\*56] mysterious power of words in human history." 47 He reminds intellectuals that responsibility for words is not just a linguistic task but "a task which is intrinsically ethical." 48 "THE RESPONSIBILITY OF INTELLECTUALS" Intellectuals are not customarily thought of as men and women of action. Our circumstances are ambiguous, our credibility precarious. While our sense of past and future is "radically linguistic," 49 we scarcely have a common human language anymore, and our fashionable linguistic skepticism elevates the denying of verities to an article of faith, out of which we build academic careers of nay-saying. We use the written word as the primary political medium for gaining attention. We are "writing people," who traffic in words and thus carry an unavoidable accountability for what we say with them. 50 Havel defines intellectuals as people who devote their lives "to thinking in general terms about the affairs of this world and the broader context of things . . . professionally," 51 for their occupation. If we aspire to be distinguished from mere scribblers, history demands that we choose between being "the apologist for rulers [and] an advisor to the people; the tragedy of the twentieth century is that these two functions have ceased to exist independently of one another, and intellectuals like Sartre who thought they were fulfilling one role were inevitably drawn to play both." 52 Alternatively, we can choose with Richard Rorty, echoing Max Weber, to stay out of politics, "where passionate commitment and sterile excitation are out of place," keeping "politics in the hands of charismatic leaders and trained officials." We can choose to pursue "[our] own private perfection." 53 That particular stance, however expedient, did not work well in Germany. In Czechoslovakia, it produced wartime Nazi collaborator Gustave Husak, the "President of Forgetting," who sought to perfect totalitarianism by systematically purging "the Party and state, the arts, the universities, and the media of everyone who dared to speak critically, independently, or even intelligently about what the regime defined as politics." 54 It produced Tudjman and Milosevic in Yugoslavia. Intellectuals can choose their roles, but cannot not choose, nor can we evade the full weight of the consequences attendant on our choices. "It is always the intellectuals, however [\*57] we may shrink from the chilling sound of that word . . . who must bear the full weight of moral responsibility." 55 Humanist intellectuals can aspire to be judged by more specifically exacting criteria: as those whose work is worthwhile because it has human uses; survives the test of reality; corresponds to history; represses rationalizing in favor of fact; challenges the veracity of rulers; refuses the safety of abstraction; recognizes words as forms of action, as likely to be lethal as to be liberating; scruples to heal the rupture between words and things, between things and ideas; remains incorruptibly opposed to the service of ideological ends pursued by unnecessary violence or inhumane means; and, finally, takes risks for the sake of true witness to events, to the truth even of unpopular ideas or to the lies in popular ones. Above all, intellectuals can resist the dreary relativism that neutralizes good and evil as if in defense of the theoretical pseudo-notion that distinguishing between them is not possible. The hour is too late, the situation too grave for such pettifoggery. THE CONSEQUENCES OF LINGUISTIC ABUSE AND CYNICISM Bearing witness is not enough, but it is something. At the dedication of the U.S. Holocaust Memorial Museum in Washington, D.C., Elie Wiesel spoke. "We must bear witness," he said. "What have we learned? . . . We are all responsible. We must do something to stop the bloodshed in Yugoslavia." He told a story of a woman from the Carpathian Mountains who asked of the Warsaw Uprising, "Why don't they just wait quietly until after the war?" In one year she was packed into a cattle car with her whole family on the way to Auschwitz. "That woman was my mother," Wiesel said. Vaclav Havel, the humanist intellectual from Bohemia, spoke too: of the Holocaust as a memory of democratic appeasement, live memory of indifference to the danger of Hitler's coming to power, of indifference to the Munich betrayal of Prague. "Our Jews went to concentration camps. . . . Later we lost our freedom." We have lost our metaphysical certainties, our sense of responsibility for what comes in the future. For we are all responsible, humanly responsible for what happens in the world. Do we have the right to interfere in internal conflict? Not just the right but the duty. Remember the Holocaust. To avoid war, we watched--silently and, so, complicitly, unleashing darker, deadlier demons. What should we have done about Yugoslavia? Something. Much earlier. We must vigilantly listen for the early warning signs of threats to freedoms and lives everywhere. We must keep the clamorous opposition to oppression and violence around the world incessant and loud. Cry out! Cry havoc! Call murderers murderers. Do not avoid violence when avoidance begets more violence. There are some things worth dying for. Do not legitimize the bloodletting [\*58] in Bosnia or anywhere by negotiating with the criminals who plotted the carnage. Do not join the temporizers. Take stands publicly: in words; in universities and boardrooms; in other corridors of power; and at local polling places. Take stands preferably in written words, which have a longer shelf life, are likelier to stimulate debate, and may have a lasting effect on the consciousnesses of some among us. Havel lived under a system "in which words [proved] capable of shaking the entire structure of government," in which the words of a poet like Solzhenitsyn "were regarded as so dangerous that their author was bundled into an airplane and shipped out." 56 Havel himself paid in deprivation, humiliation, continual harassment, and life-threatening imprisonment for his stubborn insistence on "living in truth," an allegiance consistently annunciated in the words he uttered and wrote and refused to recant. He was denied the education his intellect would ordinarily have entitled him to. His books were removed from schoolrooms and libraries, his plays banned from the stage. He did odd jobs, rolling beer kegs in a brewery for a time, hard labor as a welder in prison. He never ceased committing his conscience to words in letters, petitions, and essays, circulated in secret in hand-copied samizdat. Words that gradually, over time, helped to create the climate for a shift in the social consciousness of citizens who had been terrorized into silence and schizophrenic complicity for half a century by two succeeding totalitarian regimes. Inevitably, Havel was arrested again and condemned to the dreaded Ruzyne prison. His crime? Seeking to deliver to authorities Charter 77, a declaration of basic human rights he helped to compose and distribute, each word of which was meant to be taken at face value. He refused to sign a false retraction that would have secured his release. He was freed, after four and a half years, only because word that he was near death in the prison hospital reached the outside world and the world protested--in words. The Velvet Revolution he led, his rise to the Czech presidency, were spelled out, argued, fueled, and sustained by words, and always they were words consonant with conscience and a sense of responsibility for the common good. During the most crucial days of the 1989 revolution, tens of thousands of Prague citizens flowed into Wenceslas Square, chanting "freedom, freedom!" as if the word were a freshly minted coinage. Hundreds queued up hourly in the freezing November fog for copies of a newspaper called The Free Word. 57 "Truth shall prevail," the Hussite slogan on the flag waving atop Hradcany Castle since the days of Masaryk, suddenly became words to be taken literally, words understood to mean what they seem to mean, words with radiant power to galvanize and regenerate. Czechs shouted them joyously in the streets, in a spontaneous eruption of civic courage [\*59] against the Communist regime that had been kept running not only by their fear but by their silence. Successive Nazi and Communist conquests of Czechoslovakia, enforced by guns and tanks, had been reinforced by conquest of human speech and conscience through the poisoning of the linguistic environment and the going-along of citizens who fatalistically stopped protesting. The deadly consequences of linguistic abuse and skepticism, including their insidious seduction to silence, passivity, and nihilism, were vividly prefigured more than a century earlier by Georg Buchner in his plays and in his private correspondence. In Danton's Death, Robespierre and his followers mouth "empty and impersonal and formalistic oratory and rhetoric," not to enlighten but to delude citizens into accepting absolute state control without protest. The shouting of idealists and intellectuals had come to seem like idle foolishness to Buchner, as he reveals in a letter to his parents: "They write, but no one reads them; they shout, but no one hears them; they act, but no one helps them." 58 Driven by his obsessive conviction that all attempts to break the impenetrable barriers isolating people from each other were doomed, Buchner cries out in a letter to his fiancee: I am alone as though in the grave; when will your words waken me? My friends desert me, we scream in each other's ears like deaf men; I wish we were dumb, then we could only look at one another--nowadays I can hardly look at anyone without tears coming to my eyes. 59 In another letter he confides, "I am afraid of my voice and--of my mirror. . . . This silence is my damnation." 60 The central figure in Danton's Death cannot believe in the existence of a God who would not stop the ceaseless pain and suffering man is heir to. Woyzeck's statement in the play bearing his name, "When God goes, everything goes," anticipates the prescient Nietzsche, whose madman officially announces the death of God and accuses us: "We have killed him--you and I. All of us are his murderers." 61 Unluckily, the French deconstructionist Jacques Derrida seized on the linguistic implications of that death to announce a radical crisis of the Word. Michel Foucault wrote the epitaph: "The death of God profoundly influenced our language; the silence that replaced its source remains impenetrable." 62 Such untested pronouncements signaled a linguistic relativism as profligately spawned by scholars as by scoundrels. It has cast such a blight upon words like "love," "friendship," "truth," "goodness," and "responsibility" that we mumble in selfdepreciation when we use them, lest [\*60] someone think we honor still the values they once called to mind. Curiously, the values attached to their opposites, words like "hate," "enmity," "lies," "corruption," and "venality," remain credible in our moral vocabularies. We seem to have no trouble comprehending the evil that people do or tolerating excuses that confirm our misanthropy. We are embarrassed by virtue. Stalin and Hitler debased and manipulated language as a terroristic strategy to make citizens easier prey to a corruption of values that proved hospitable to catastrophe of monumental scale. So, too, in the killing fields of Yugoslavia, where we became so used to slaughter sanitized as "ethnic cleansing" that rescuing the helpless from carnage seemed outside our tidy moral categories, shielded by definition from the combined might and will of the United Nations. The world watched, dumbly passive, as before, in the Holocaust against Jews. Killing the Jews began with "reducing them to the 'other,'" warned Croatian journalist and fiction writer Slavenka Drakulic, eyewitness to genocide in the bloody Balkan war: Today it is the slaughtering of civilians in Croatia or Bosnia. For Serbians, Croatians and Muslims are the "other." . . . For Europe, the "other" is the wild "Balkans" that they pretend not to understand. For the United States it's more or less a "European problem." . . . We don't seem to know that by such divisions . . . we expose ourselves to the possibility of one day becoming the "others." 63 Yet, knowing that, hearing the reiteration of the historical lesson, we still hesitated to intervene, or we intervened too tentatively, against wanton butchery, partly because our definitions of responsibility are bounded by arbitrary verbal categories. The wars in African countries are "tribal," a word with pejorative echoes and distancing force. The war between Muslims and Serbs was "civil." "Anarchy" prevails, placing the strife outside those exclusionary categories. In local matters, political correctness often ties our tongues, and we excuse murder by calling it mass hysteria. When Drakulic wrote the words cited previously, she still clung to faith in the power of words. But under the deranging prolongation of the war, her faith faded. Astonishment, then fear, gave way to anger and defeat as hope of Western intervention, which seemed merely logical, was extinguished. The utterly despairing tone of her later writing tragically echoes Buchner's terrible disillusion: My words--any words--have no real meaning. I am sick and tired of them. Finally, all we have achieved with words is to establish Sarajevo as a metaphor for tragedy. So what? . . . I can write about the war as long as I believe in the power of communication and my own moral right to do it. But . . . I do not believe in that power any longer. I somehow have used all my words, given to me as a writer, to make people understand pain, fear and suffering. With the coming winter in Bosnia, I am afraid that my words would just melt away. 64 [\*61] Words do not matter? Do not mean? No, they are terrifyingly potent. A woman who escaped to Prague from Auschwitz and took part in the resistance against the Nazis wrote, "No act is too horrible . . . as long as no one speaks of it, no one calls it by its name, no one puts it into words. Just because of that, words are the only weapons of the defenseless." 65 Truth prevails when enough people, willing to proclaim it, come together in sufficient numbers to defend it. Words become deeds either for good or for ill. A Slovenian journalist, too, specifically indicts the lethal connection between words and deeds in the Balkan war: All the bestialities of this war were triggered by words--cliches put forward by intellectuals and eagerly appropriated by politicians. These words undermined an informed and refined democratic public discourse that was slowly developing after Tito's death and opened the way for the destruction of the institutions and social mechanisms that kept the multinational culture alive. 66 In 1987 when Slobodan Milosevic seized power, the language of Communist ideology was dead. But "a new discourse, simplistic and strong, was invented by intellectuals," the Slovenian continues. "These writings by intellectuals were recycled by journalists; soon draftees were sent to be killed with writers' words on their lips." 67 His charge against intellectuals is chilling. Candid regard for the integrity of words was once again a matter of life and death. Intellectuals are answerable for the ethics of the word in statement, reaction, and analysis. RESTORING THE INTEGRITY OF THE WORD Words have histories and power in the making of histories. They are predictive and they have consequences. "All important events in the real world . . . always have their prologue in words," writes Havel. Like the Slovenian writer, he traces the connections between words and events. He attests the potency of words. He weighs their mysterious ambiguity and warns intellectuals especially "to listen carefully to the words of the powerful, to be watchful of them, to forewarn of their danger, and to proclaim their dire implications or the evil they might invoke." 68 The connivances of political doublespeak, which have become staples of statesmanship, the cynical rationalizations deemed realistic adjustments in day-to-day politics, and the cliches that pass for conversation have no place in Havel's notions of how to live a life or conduct the affairs of a country. Havel did not succumb to the debased jargon of Communist ideology, nor did he lapse into the safety of silence, passively complicit in the "semantic occupation of the public sphere," 69 that typical preemptive strategy of tyrants. Havel stubbornly insists on equal regard for the liberating and redeeming potential of words even as he acknowledges their ambiguous, perfidious, terrifying, even lethal destructiveness. [\*62] He shows that the seemingly powerless are empowered by recovering confidence in language, and courage to bear public witness against the public lies that amnesty slaughters. It is sometimes possible to change history by calling things by their proper names. Calling the emperor naked when he is, refuting the lie out loud, insisting on verbal veracity against bombast and other linguistic distortions may not work, but, then again, they might, Havel argues. What certainly foredooms to failure is doing nothing. Of course, the effectiveness of words in particular historical events depends on who says them, to whom, under what circumstances, and when. Effective response to inhumane totalitarianisms cannot be improvisationally applied or delayed. Havel's philosophical and political strategies have both an immediate and a long-range aspect. Violence, in the short run, in particular situations, may be the only defense against human brutality. But unless we are also taking steps at the same time to change human consciousness so that violence of any kind becomes simply unthinkable as a solution for human problems, then we are condemned to an endless cycle of barbarous savagery. On his unanimous election to the presidency of Czechoslovakia, Havel offered a cautionary observation as stunningly portentous in the West now as in Eastern Europe then: "We have become morally ill, because we have become accustomed to saying one thing and thinking another." 70 The schizophrenic pathology begins within the individual, but it also corrupts the relationship and drives a wedge of mistrustful incomprehension between the individual and those in power, thereby making dishonesty the norm in social and political interactions. Healing that schizophrenic split can begin by guarding the integrity of one's own word and holding others, especially those who wield power, accountable for theirs. In dozens of public statements, Havel presses his theme that we are rooted in the universe with a responsibility to other people and to the human community. He asserts as ethical imperative for a civil society that citizens refuse to forgive mendacity, especially in the name of expediency or pragmatic politics. We must cry down especially the formal lie. When we do so in sufficient numbers, the game is up. "Even something as seemingly ephemeral as the truth spoken aloud, as an openly expressed concern for the humanity of humans, bears within itself a certain power and . . . even a word is capable of a certain radiation, of leaving a mark on the 'hidden consciousness' of a community." 71 On the morning after the 1989 revolutions, the distinguished Polish poet Czeslaw Milosz wrote: The failure of Marx's vision has created the need for another vision, not for a rejection of all visions. I do not speak of "socialism with a human face," for that belongs to the past. I speak instead about a concern for society, civilization and humanity in a period when the 19th century idea of progress has died out and a related idea, communist revolution, has disintegrated. What remains today is the [\*63] idea of responsibility, which works against the loneliness and indifference of an individual living in the belly of a whale. 72 Havel offers precisely such a vision, such a concern for society, civilization, and humanity. It restores to individuals the power to create history, to play a dynamic part in the polis, whether thought of as a local community or as the universal human family. It asks citizens to be responsible, not only to themselves but to something higher than themselves: the community, the family of humankind, to some notion, however inchoate, of good and evil. Havel's writing calls philosophers, critics, professors, theorists, and other public purveyors of the word to account for the undermining of faith in human communication. He reminds us that men who burn books know what they are doing. His moral authority resonates in every sentence. He writes, to borrow George Steiner's eloquently precise language, after an "intolerable wrestle with word and meaning," stripping language to the bone, choosing words from the common store as if "borrowed at high interest," assessing them with "supreme scruple" lest they lie. 73 Using language so that it comes as close as humanly possible to truth and intention, to choosing words with "supreme scruple," and reacting to words with like scruple, transforms literacy into "humane literacy." 74 To conceive of such nice precision as the civic duty of ordinary citizens, as a way of stirring the general consciousness, is the starting place for any individual who aspires to live in truth, according to Havel. Events have proved the virtue and validity of Havel's vision. It is practical politics acting continuously as a check on any system kept in power by "appearances, distortions, oppression or lies." It refers to any way a person resists manipulation. When even one person publicly refutes the lie by daring to cry out, "certain changes happen in communal moral and spiritual sensibility" that indirectly, over time, gain in significance and effect change. 75 Structures built on lies, any structures, from governments to block committees, work only as long as people are complicit by silence. THE POWER OF THE WORD FOR GOOD OR ILL One can see, as through a glass darkly, what Milosz apprehends as "the elimination of emotional luxuries" among the intellectuals who lived through the atrocities of war in Eastern Europe. Psychoanalytic novels make them laugh, he says. They consider "literature of erotic complications" as trash. Imitative abstract painting bores them. "They are hungry--but [\*64] they want bread, not hors d'oeuvres." 76 Their latter-day Western counterparts, under less compelling exigencies, too often incline to careers devoted to theoretical deconstructions of literature and reality that, having no basis in lived experience, come to seem frivolously trivial. Intellectuals have much to answer for. In Germany, members and fellow travelers of the intellectual community were co-opted by the Nazis. Scholars, professors, clerics, writers, and philosophers rationalized and legitimized lebensraum and racial purity in shrouding clouds of linguistic theory and disingenuous metaphor, then kept silent about the daily exterminations in death camps by exterminators who nightly in their homes played Schubert and Brahms or read Christian Bibles. We know who they are. Franklin Littell, often called the father of Holocaust studies in America, has written of them with indignant righteousness for fifty years, as he has also written of morally courageous intellectuals like Bonhoeffer and Niemoller, who, in the name of decent human values they had no trouble defining, committed wit, pen, hands, indeed, their very lives to save the lives of others otherwise doomed to the ovens. 77 Intellectuals, "always a hindrance to a well-ordered strict regime," come in 57 varieties, "restless students and . . . eccentrics, truthseekers and holy fools" among them. 78 They wear coats of many colors and do not scruple to turn them. Intellectuals of the Left and intellectuals of the Right contradict themselves and betray each other. Distinction between intellectuals is wildly imprecise and transitory, but, for our purposes, not entirely irrelevant. There are behavioral commonalities separating one variety from another, betrayed in their responses to specific historical circumstances. Developments in Germany, France, Czechoslovakia, and the United States serve as cases in point. In Germany, Thomas Mann tried to answer the question of how the Nazi barbarism could be possible in the heart of a "civilized" country by pointing out that from Luther to Goethe, "German intellectuals had failed to incorporate the imperative of political and social responsibility into their central notion of what it is to be a civilized person." They neglected "the political obligations of true Humanitat--of being fully human." 79 In France, more baffling was the silence already alluded to among French intellectuals during and about the Nazi occupation; more baffling still the "silencing of the Holocaust literature that started appearing in France and in the French language as early as 1946." 80 French intellectuals of the 1960s through the 1980s, writers and thinkers of great learning and sensitivity, continued to [\*65] ignore, though they could not have been ignorant of, Holocaust books. Even Elie Wiesel's Night, in its French version, La Nuit, was passed over by mainstream critics. 81 During the 1940s and 1950s, internationally prominent intellectuals--novelists, philosophers, playwrights, and moralists--were swept into the vortex of communism, even when they did not formally affiliate. Their writing still shocks and surprises us. As Tony Judt remarks, we cannot read "without discomfort of their insouciance in the face of violence, human suffering, and painful moral choices" or of the perfidious terms by which they "explained and justified the practice of contemporary Stalinism." 82 Indeed, a dominant theme in French intellectual life since the 1970s has been the question, "How in the face of literary evidence, not to mention the testimony of their own eyes, could intelligent people wilfully defend communism as the hope of the future and Stalin as the riddle of History?" 83 In Czechoslovakia, on 17 November 1939, Adolf Hitler, enraged by Czech resistance to German occupation, executed nine protesting student leaders and deported 1200 to the Sachsenhausen concentration camp. All Czech universities were closed down, their teaching staffs thrown out of work. Dark pink cards posted on every radio warned, "You are reminded that listening to broadcasts from abroad is forbidden and punishable by death." 84 The slightest linguistic misunderstanding led to death on the spot. The terrorizing of Czech youths "and the softening up of a significant part of the intelligentsia" is "retained in the [Czech] national consciousness by the annual act of homage to the memory of a young medical student, Jan Opletal, who was one of those fatally shot during an anti-German demonstration." 85 Remembering for the future. On 17 November 1989, at a cemetery in Prague, 15,000 people, led by a group of university students, gathered once more to remember the Czech student murdered by the Nazis fifty years earlier. Remembering for the future. This time the memorial became the spark that lit the Velvet Revolution. The way had been prepared, externally by the revolutions in Warsaw and Budapest, by perestroika and glasnost, and by the whispered word from Gorbachev that brought down the Berlin Wall; internally by the cumulative moral force of patient argument, exhortation, and remembrances of Czech cultural traditions circulated in samizdat by morally courageous dissident writers, Vaclav Havel preeminent among them, and by the distribution of Charter 77, signed by a coalition of disparate political groups agreed on the need for an ethical basis to politics. They were led by students and writers--intellectuals. Banners waved in the air, calling for "Democracy and Law," "Genuine Perestroika," and "Free Elections" [\*66] and asking, "Who If Not Us? When If Not Now?" Memorial tributes to Opletal shortly gave way to shouts for academic freedom, human rights, and the liberation of political prisoners and to impassioned speeches more explicitly demanding. Demonstrators urged a march to Wenceslas Square. As if spontaneously, the swelling crowds surged toward the Vltava, marched along the embankment, then turned right, down Narodni Avenue, chanting "Freedom," singing the Czech national anthem and, in Czech, "We Shall Overcome." They were cut off and surrounded by riot police who began beating them with truncheons. They offered flowers to the police and placed lighted candles on the ground, then raised their hands to show they were not armed. Still the white-helmeted security forces continued ruthlessly beating men, women, even children. Units of the Red Beret "picked out individuals at random and worked them over" with truncheons and boots. The sight of bloodied heads sent shock waves through the demonstrators, and they began to flee the scene, but not the cause. 86 By 19 November, the crowds that swarmed to Wenceslas Square numbered 500,000 and more. Slogans began to appear in shop windows, at the metro stations, on walls: "Havel didn't keep quiet when we were frightened to speak. It's our turn now." 87 By then, Civic Forum, which Havel had created, was in charge of the revolution, its headquarters in the basement of the Magic Lantern Theatre. A few days later Havel was at work in Hradcany Castle, president of the new republic. The "old mendacious phrases with which people had lived for so long" were challenged, first by intellectuals, writers, and students, who labored to find "new, plain, true words" for what they wanted to say. Timothy Garton Ash, eyewitness to the meetings of Civic Forum, composed of leading dissidents in the Velvet Revolution of 1989, reports that "a great deal of what was happening was precisely about words." 88 Putting together a constitution for the new democracy, Havel and members of Civic Forum argued a whole hour over the single word "resignation," Ash reports. 89 A false vocabulary, they feared, would put the debate on false ground and make analysis of concrete reality impossible. They did not want to jeopardize even the slightest claims to justice and dignity that the very government they were bent on replacing might still have. They set for themselves high standards of ethical excellence! They had learned that means do become ends. They found words so close to the reality of Czech lives and hopes that they were taken up and shouted in the streets by hundreds, then thousands, and then tens of thousands of men and women, citizens who had not spoken truthfully in public for decades. The empire that had seemed impregnable began to collapse. American intellectuals bought into the utopian promises of communism, too. In spite of evidence that [\*67] nowhere on the globe had communism been established without the most hideous record of persecution and murder, and ruthless suppression of human and civil rights, intellectuals rationalized to protect the purity of Marxist ideals, which have not yet been tried. Disillusion came too slowly. The influence of the French intellectuals took hold in the United States, and with it came the undermining of linguistic content and destructive assaults on values as inventions of bourgeois ideology. It still prevails, despite growing identification of its covert hostility to human rights and democratic institutions. From the safety of those institutions, theorists continue to argue the impotence of language, while its raw power, exploding from the propaganda arsenals of political opportunists, foments violence across the world and seeks sanctions for it afterward. While we quibble about the efficacy of speech, as if silence or nonverbal signifiers were preferable, murderers recast familiar words to erase geography, rewrite history, and disguise human exterminations. Distracted by lexemes, paroxytones, and phenomenological subjectivisms, we mindlessly neglect the connection between language and power. It really does matter that intellectuals undermine confidence in words. In the real world, words are means to power and powerful catalysts to action. When we are convinced that we cannot hold the word to account or take it at face value, we are muddled about what is going on in our own lives as well as in the larger human community. Yes, we must qualify inferences by all the variables we can bring to bear. But without a sense that language can be decipherable, we will not know what we know or be able to pass it on. The relation of language to "the murderous falsehoods it has been made to articulate and hallow in certain totalitarian regimes and to the great load of vulgarity, imprecision and greed it is charged with in a mass-consumer democracy" are problems Steiner wrestles with in Language and Silence. They are more disturbing now than when he raised them at the end of World War II. His consciousness was possessed "by the barbarism in modern Europe"; his anguish was deepened because the unanswered cries of the murdered "sounded in earshot of universities." 90 Is our consciousness less acute, our anguish immunized? Havel's concept of the parallel polis offers a way for individuals to lead society out of such moral obtuseness. He proposes that honest words spoken in one community and context have powerful ethical resonance that can gradually reach into other communities, fifth columns of truth that can gain acceptance in a vast variety of contexts composed of the widening and multiple spheres in which human activity occurs. Truthful words in daily interaction have power to ameliorate the general condition, even to change history. Truth ventured bravely and habitually can be as infectious as lies. Havel calls attention not only to the dislocations but also to the connections between words--words read, thought, spoken, written, heard--and all the aims and transactions [\*68] of human existence. Words vigilantly guarded against corruption can become the weapon of choice in the human struggle to secure and protect peaceful, humane, human communities. Not the Czech experience alone but the whole of twentieth-century history starkly reminds us that we are language creatures who lie as well as speak truth. We use the word--sometimes the same word--to enlighten and deceive, to destroy and create. There are at least two meanings packed into every word, two ways for words to squint. The evidence of millennia shows we have the wit to tell the difference, to choose the better over the worse and to make a difference when we do. We seem to have gotten out of the habit of it. Even in America, where the ultimate sacrifice is never asked, the habit of public truth is uncommon. Otherwise, we would not tolerate the transparent dishonesty and smarmy pandering in political rhetoric--a "snowdrift of lies," 91 calculated ambiguities, distortions, pufferies, obfuscations, evasions, and diversions. While eloquence may not be absolute evidence of noble character, some proportional relation exists between reason and expression. As Emerson's essay Nature puts it, A man's power to connect his thought with its proper symbol, and so utter it, depends on the simplicity of his character, that is, upon his love and truth and his desire to communicate it without loss. The corruption of man is followed by the corruption of language. 92 We all make it possible. We allow it to happen. There is no them and us. There is only one us and, yes, we are responsible for each other. Where to begin? Who's to start? It is I. "It is I who must begin," writes Havel. 93 CONCLUSION: A CHALLENGE George Orwell connected political chaos with the decay of language. He thought it possible to arrest both by starting at the verbal end. He offers rules to improve linguistic clarity and exactness. Language, he said, "becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier to have foolish thoughts." 94 The question of whether words or thoughts come first, travel different parallel paths, are interdependent, or even whether we think in words at all must not hang us up! If language does "not determine the way we think," psycholinguists now concede, "it does influence the way we perceive and remember and it affects the ease in which we perform mental tasks." 95 The "genuine politics" that Havel defines as "simply a way of serving those around us: serving the community, and serving those who will come after us" accustoms us to seeing the moral dimension in every aspect of human experience, including the way we use and understand language, because [\*69] it is there. His genuine politics recognize that "directness can never be established by indirection, or truth through lies, or the democratic spirit through authoritarian directives." 96 As Havel wrote in his Summer Meditations, "People want to hear that decency and courage make sense, that something must be risked in the struggle against dirty tricks." 97 His reelection to the Czech presidency proves that "politics as the practice of morality is possible." 98 He matches his words to deeds and in the process restores to language something of its original integrity and moral authority. His way of being in the world is a victory of language over silence, of reason and decency over ignorance and mendacity. What he writes is primarily addressed to intellectuals, "warriors of the pen," like himself, but what he means permeates the consciousness of millions to revive moribund human hopefulness. We must, he says, be like Cassandra: predicting, warning, bearing witness, "always at odds with hard and fast categories"; like Sisyphus in persistence, even in the face of what looks like sure defeat 99 and is likelier to win us calumny than kudos. "Havel to the Castle!" Those words became reality when tens of thousands of Czech citizens swept Havel to the very doors of Prague's Hradcany. The words themselves still resonate with the vibrancy of Havel's most strikingly daring idea: "that the world might actually be changed by the force of truth, the power of a truthful word, the strength of a free spirit, conscience, and responsibility." 100 Perhaps, like the Czechs during their revolution, we need, at this crisis moment in human civilization just such an unembarrassed embrace of virtue, beginning with the will to restore and respect the integrity of the word in human interaction.

### 1NC

STATES COUNTERPLAN

#### Text

#### The appropriate number of the fifty states will invoke their power under Article V of the Constitution to call a limited constitutional convention for the purpose of repudiating and ending the ongoing legacy of the Korematsu Era war powers.

Plan

The ongoing legacy of the Korematsu Era war powers authority cases should be repudiated

and ended.

#### Solves the case

Schaffner 2005, American University Law Review, Associate Professor of Law, George Washington University Law School 54 Am. U.L. Rev. 1487

Because the judicial branch has the ultimate authority over constitutional interpretation and construction, **the only "check" on judicial power** of constitutional interpretation **is the constitutional amendment process**. The amendment process should be used to overturn the Court only when it acts beyond its powers or inconsistently with constitutional principles. Otherwise, the careful balance of powers among the branches is compromised. The history of amending the Constitution to overrule Supreme Court decisions is consistent with this view and is particularly relevant here. While the U.S. Supreme Court is not being overturned by the FMA, the Massachusetts Supreme Judicial Court's Goodridge decision is in jeopardy. Goodridge was the catalyst for the fervor behind the proposed marriage amendment. Moreover, the FMA will forever prevent the U.S. Supreme Court from addressing the issue. Only **four constitutional amendments have been adopted to overrule the Supreme Court**. n186 They are: (1) the Eleventh Amendment, which overruled Chisolm v. Georgia; n187 (2) the Thirteenth Amendment and, most specifically, the first sentence of the [\*1519] Fourteenth Amendment, n188 which overruled Dred Scott v. Sanford; n189 (3) the Sixteenth Amendment, which overruled Pollack v. Farmer's Loan & Trust Co.; n190 and (4) the Twenty-Sixth Amendment, which overruled Oregon v. Mitchell. n191 As we will see, **each amendment was in harmony with the basic principles that underlie the Constitution** - individual rights, separation of powers, and federalism. Moreover, in the cases where fundamental liberty interests were at stake, **the amendment reestablished individual rights in light of the Court's limited interpretation of those rights.** Without analyzing the propriety of the individual Supreme Court decisions, the following will demonstrate that, unlike the FMA, **the use of the amendment power to overrule these cases was proper and consistent with basic democratic principles.**

### 1NC

LEGITIMACY DA

#### The court is avoiding warpower rulings because they are sensitive to the institutional costs---the plan crushes court legitimacy

Deeks 10/11/13 (Associate Professor of Law, University of Virginia Law School, “THE OBSERVER EFFECT: NATIONAL SECURITY LITIGATION, EXECUTIVE POLICY CHANGES, AND JUDICIAL DEFERENCE,” http://fordhamlawreview.org/assets/pdfs/Vol\_82/Deeks\_November.pdf)

Another goal in separating powers—and in placing all of the power to execute the laws in a single entity—is to promote the accountability of the decisionmakers to the people they represent.283 Those who favor national security deference emphasize that the president (and Congress, when it chooses to get involved in national security decisions) are far more politically accountable to the people than the courts. The executive in particular is best positioned to make the difficult decisions that protect individuals from or expose individuals to danger during times of crises. At the same time, the public may and will hold the president accountable for those decisions. Courts are less directly accountable to the people, and, according to this argument, should therefore tread carefully when invalidating executive policies established to protect the citizenry. Courts are sensitive to the reputational costs of deciding controversial cases—and cases involving wartime or emergency policies are particularly likely to be controversial. Many scholars have highlighted the institutional costs of deciding such cases.284 Judicial decisions on the merits force courts to bear certain reputational costs. The operation of the observer effect means that courts need to decide fewer such cases (or decide them in a more modest manner) than they may think in order to preserve separation of- powers values. This approach allows courts largely (though not entirely) to avoid making politically controversial decisions that might cast questions on their institutional competence, while allowing the courts on limited occasions to stake out their more popular role as defender of rights.285 At the same time, there are ways in which courts can distance themselves from the policies in question, thus ensuring that political accountability for the policy falls squarely on the executive.

#### Presidents will never comply with a direct court refutation of war time policy-he’ll always use extenuating justifications-this wrecks the Court’s institutional strength

**Pushaw, Pepperdine law professor, 2004**

(Robert, Defending Deference: A Response to Professors Epstein and Wells,” Missouri Law Review, lexis, ldg)

Civil libertarians have urged the Court to exercise the same sort of judicial review over war powers as it does in purely domestic cases—i.e., independently interpreting and applying the law of the Constitution, despite the contrary view of the political branches and regardless of the political repercussions.54 This proposed solution ignores the institutional differences, embedded in the Constitution, that have always led federal judges to review warmaking under special standards. Most obviously, the President can act with a speed, decisiveness, and access to information (often highly confidential) that cannot be matched by Congress, which must garner a majority of hundreds of legislators representing multiple interests.55 Moreover, the judiciary by design acts far more slowly than either political branch. A court must wait for parties to initiate a suit, oversee the litigation process, and render a deliberative judgment that applies the law to the pertinent facts.56 Hence, by the time federal judges (particularly those on the Supreme Court) decide a case, the action taken by the executive is several years old. Sometimes, this delay is long enough that the crisis has passed and the Court’s detached perspective has been restored.57 At other times, however, the war rages, the President’s action is set in stone, and he will ignore any judicial orders that he conform his conduct to constitutional norms.58 In such critical situations, issuing a judgment simply weakens the Court as an institution, as Chief Justice Taney learned the hard way.59 Professor Wells understands the foregoing institutional differences and thus does not naively demand that the Court exercise regular judicial review to safeguard individual constitutional rights, come hell or high water. Nonetheless, she remains troubled by cases in which the Court’s examination of executive action is so cursory as to amount to an abdication of its responsibilities—and a stamp of constitutional approval for the President’s actions.60 Therefore, she proposes a compromise: requiring the President to establish a reasonable basis for the measures he has taken in response to a genuine risk to national security.61 In this way, federal judges would ensure accountability not by substituting their judgments for those of executive officials (as hap-pens with normal judicial review), but rather by forcing them to adequately justify their decisions.62 This proposal intelligently blends a concern for individual rights with pragmatism. Civil libertarians often overlook the basic point that constitutional rights are not absolute, but rather may be infringed if the government has a compelling reason for doing so and employs the least restrictive means to achieve that interest.63 Obviously, national security is a compelling governmental interest.64 Professor Wells’s crucial insight is that courts should not allow the President simply to assert that “national security” necessitated his actions; rather, he must concretely demonstrate that his policies were a reasonable and narrowly tailored response to a particular risk that had been assessed accurately.65 Although this approach is plausible in theory, I am not sure it would work well in practice. Presumably, the President almost always will be able to set forth plausible justifications for his actions, often based on a wide array of factors—including highly sensitive intelligence that he does not wish to dis-close.66 Moreover, if the President’s response seems unduly harsh, he will likely cite the wisdom of erring on the side of caution. If the Court disagrees, it will have to find that those proffered reasons are pretextual and that the President overreacted emotionally instead of rationally evaluating and responding to the true risks involved. But are judges competent to make such determinations? And even if they are, would they be willing to impugn the President’s integrity and judgment? If so, what effect might such a judicial decision have on America’s foreign relations? These questions are worth pondering before concluding that “hard look” review would be an improvement over the Court’s established approach. Moreover, such searching scrutiny will be useless in situations where the President has made a wartime decision that he will not change, even if judicially ordered to do so. For instance, assume that the Court in Korematsu had applied “hard look” review and found that President Roosevelt had wildly exaggerated the sabotage and espionage risks posed by Japanese-Americans and had imprisoned them based on unfounded fears and prejudice (as appears to have been the case). If the Court accordingly had struck down FDR’s order to relocate them, he would likely have disobeyed it. Professor Wells could reply that this result would have been better than what happened, which was that the Court engaged in “pretend” review and stained its reputation by upholding the constitutionality of the President’s odious and unwarranted racial discrimination. I would agree. But I submit that the solution in such unique situations (i.e., where a politically strong President has made a final decision and will defy any contrary court judgment) is not judicial review in any form—ordinary, deferential, or hard look. Rather, the Court should simply declare the matter to be a political question and dismiss the case. Although such Bickelian manipulation of the political question doctrine might be legally unprincipled and morally craven, 67 at least it would avoid giving the President political cover by blessing his unconstitutional conduct and instead would force him to shoulder full responsibility. Pg. 968-970

#### Weakening the court prevents sustainable development

**Stein, New South Wales Court of Appeal former judge, 2005**

(Paul Stein, “Why judges are essential to the rule of law and environmental protection”, IUCN Environmental Policy and Law Paper No. 60, online, ldg)

The Johannesburg Principles state: “We emphasize that the fragile state of the global environment requires the judiciary, as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.” There can be no argument that environmental law, and sustainable development law in particular, are vibrant and dynamic areas, both internationally and domestically. Judge Weeramantry (of the ICJ) has reminded us that we judges, as custodians of the law, have a major obligation to contribute to its development. Much of sustainable development law is presently making the journey from soft law into hard law. This is happening internationally but also it is occurring in many national legislatures and courts. Fundamental environmental laws relating to water, air, our soils and energy are critical to narrowing the widening gap between the rich and poor of the world. Development may be seen as the bridge to narrow that gap but it is one that is riddled with dangers and contradictions. We cannot bridge the gap with materials stolen from future generations. Truly sustainable development can only take place in harmony with the environment. Importantly we must not allow sustainable development to be duchessed and bastardized. A role for judges? It is in striking the balance between development and the environment that the courts have a role. Of course, this role imposes on judges a significant trust. The balancing of the rights and needs of citizens, present and future, with development, is a delicate one. It is a balance often between powerful interests (private and public) and the voiceless poor. In a way judges are the meat in the sandwich but, difficult as it is, we must not shirk our duty. Pg. 53-54

#### Extinction

**Barry, Wisconsin land resources PhD, 2013**

(Glen, “ECOLOGY SCIENCE: Terrestrial Ecosystem Loss and Biosphere Collapse”, 2-4, <http://forests.org/blog/2013/02/ecology-science-terrestrial-ec.asp>, ldg)

Blunt, Biocentric Discussion on Avoiding Global Ecosystem Collapse and Achieving Global Ecological Sustainability Science needs to do a better job of considering worst-case scenarios regarding continental- and global-scale ecological collapse. The loss of biodiversity, ecosystems, and landscape connectivity reviewed here shows clearly that ecological collapse is occurring at spatially extensive scales. The collapse of the biosphere and complex life, or eventually even all life, is a possibility that needs to be better understood and mitigated against. A tentative case has been presented here that terrestrial ecosystem loss is at or near a planetary boundary. It is suggested that a 66% of Earth's land mass must be maintained in terrestrial ecosystems, to maintain critical connectivity necessary for ecosystem services across scales to continue, including the biosphere. Yet various indicators show that around 50% of Earth's terrestrial ecosystems have been lost and their services usurped by humans. Humanity may have already destroyed more terrestrial ecosystems than the biosphere can bear. There exists a major need for further research into how much land must be maintained in a natural and agroecological state to meet landscape and bioregional sustainable development goals while maintaining an operable biosphere. It is proposed that a critical element in determining the threshold where terrestrial ecosystem loss becomes problematic is where landscape connectivity of intact terrestrial ecosystems erodes to the point where habitat patches exist only in a human context. Based upon an understanding of how landscapes percolate across scale, it is recommended that 66% of Earth's surface be maintained as ecosystems; 44% as natural intact ecosystems (2/3 of 2/3) and 22% as agroecological buffer zones. Thus nearly half of Earth must remain as large, connected, intact, and naturally evolving ecosystems, including old-growth forests, to provide the context and top-down ecological regulation of both human agroecological, and reduced impact and appropriately scaled industrial activities. Given the stakes, it is proper for political ecologists and other Earth scientists to willingly speak bluntly if we are to have any chance of averting global ecosystem collapse. A case has been presented that Earth is already well beyond carrying capacity in terms of amount of natural ecosystem habitat that can be lost before the continued existence of healthy regional ecosystems and the global biosphere itself may not be possible. Cautious and justifiably conservative science must still be able to rise to the occasion of global ecological emergencies that may threaten our very survival as a species and planet. Those knowledgeable about planetary boundaries—and abrupt climate change and terrestrial ecosystem loss in particular—must be more bold and insistent in conveying the range and possible severity of threats of global ecosystem collapse, while proposing sufficient solutions. It is not possible to do controlled experiments on the Earth system; all we have is observation based upon science and trained intuition to diagnose the state of Earth's biosphere and suggest sufficient ecological science–based remedies. If Gaia is alive, she can die. Given the strength of life-reducing trends across biological systems and scales, there is a need for a rigorous research agenda to understand at what point the biosphere may perish and Earth die, and to learn what configuration of ecosystems and other boundary conditions may prevent her from doing so. We see death of cells, organisms, plant communities, wildlife populations, and whole ecosystems all the time in nature—extreme cases being desertification and ocean dead zones. There is no reason to dismiss out of hand that the Earth System could die if critical thresholds are crossed. We need as Earth scientists to better understand how this may occur and bring knowledge to bear to avoid global ecosystem and biosphere collapse or more extreme outcomes such as biological homogenization and the loss of most or even all life. To what extent can a homogenized Earth of dandelions, rats, and extremophiles be said to be alive, can it ever recover, and how long can it last? The risks of global ecosystem collapse and the need for strong response to achieve global ecological sustainability have been understated for decades. If indeed there is some possibility that our shared biosphere could be collapsing, there needs to be further investigation of what sorts of sociopolitical responses are valid in such a situation. Dry, unemotional scientific inquiry into such matters is necessary—yet more proactive and evocative political ecological language may be justified as well. We must remember we are speaking of the potential for a period of great dying in species, ecosystems, humans, and perhaps all being. It is not clear whether this global ecological emergency is avoidable or recoverable. It may not be. But we must follow and seek truth wherever it leads us. Planetary boundaries have been quite anthropocentric, focusing upon human safety and giving relatively little attention to other species and the biosphere's needs other than serving humans. Planetary boundaries need to be set that, while including human needs, go beyond them to meet the needs of ecosystems and all their constituent species and their aggregation into a living biosphere. Planetary boundary thinking needs to be more biocentric. I concur with Williams (2000) that what is needed is an Earth System–based conservation ethic—based upon an "Earth narrative" of natural and human history—which seeks as its objective the "complete preservation of the Earth's biotic inheritance." Humans are in no position to be indicating which species and ecosystems can be lost without harm to their own intrinsic right to exist, as well as the needs of the biosphere. For us to survive as a species, logic and reason must prevail (Williams 2000). Those who deny limits to growth are unaware of biological realities (Vitousek 1986). There are strong indications humanity may undergo societal collapse and pull down the biosphere with it. The longer dramatic reductions in fossil fuel emissions and a halt to old-growth logging are put off, the worse the risk of abrupt and irreversible climate change becomes, and the less likely we are to survive and thrive as a species. Human survival—entirely dependent upon the natural world—depends critically upon both keeping carbon emissions below 350 ppm and maintaining at least 66% of the landscape as natural ecological core areas and agroecological transitions and buffers. Much of the world has already fallen below this proportion, and in sum the biosphere's terrestrial ecosystem loss almost certainly has been surpassed, yet it must be the goal for habitat transition in remaining relatively wild lands undergoing development such as the Amazon, and for habitat restoration and protection in severely fragmented natural habitat areas such as the Western Ghats. The human family faces an unprecedented global ecological emergency as reckless growth destroys the ecosystems and the biosphere on which all life depends. Where is the sense of urgency, and what are proper scientific responses if in fact Earth is dying? Not speaking of worst-case scenarios—the collapse of the biosphere and loss of a living Earth, and mass ecosystem collapse and death in places like Kerala—is intellectually dishonest. We must consider the real possibility that we are pulling the biosphere down with us, setting back or eliminating complex life. The 66% / 44% / 22% threshold of terrestrial ecosystems in total, natural core areas, and agroecological buffers gets at the critical need to maintain large and expansive ecosystems across at least 50% of the land so as to keep nature connected and fully functional. We need an approach to planetary boundaries that is more sensitive to deep ecology to ensure that habitable conditions for all life and natural evolutionary change continue. A terrestrial ecosystem boundary which protects primary forests and seeks to recover old-growth forests elsewhere is critical in this regard. In old forests and all their life lie both the history of Earth's life, and the hope for its future. The end of their industrial destruction is a global ecological imperative. Much-needed dialogue is beginning to focus on how humanity may face systematic social and ecological collapse and what sort of community resilience is possible. There have been ecologically mediated periods of societal collapse from human damage to ecosystems in the past (Kuecker and Hall 2011). What makes it different this time is that the human species may have the scale and prowess to pull down the biosphere with them. It is fitting at this juncture for political ecologists to concern themselves with both legal regulatory measures, as well as revolutionary processes of social change, which may bring about the social norms necessary to maintain the biosphere. Rockström and colleagues (2009b) refer to the need for "novel and adaptive governance" without using the word revolution. Scientists need to take greater latitude in proposing solutions that lie outside the current political paradigms and sovereign powers. Even the Blue Planet Laureates' remarkable analysis (Brundtland et al. 2012), which notes the potential for climate change, ecosystem loss, and inequitable development patterns neither directly states nor investigates in depth the potential for global ecosystem collapse, or discusses revolutionary responses. UNEP (2012) notes abrupt and irreversible ecological change, which they say may impact life-support systems, but are not more explicit regarding the profound human and ecological implications of biosphere collapse, or the full range of sociopolitical responses to such predictions. More scientific investigations are needed regarding alternative governing structures optimal for pursuit and achievement of bioregional, continental, and global sustainability if we are maintain a fully operable biosphere forever. An economic system based upon endless growth that views ecosystems necessary for planetary habitability primarily as resources to be consumed cannot exist for long. Planetary boundaries offer a profoundly difficult challenge for global governance, particularly as increased scientific salience does not appear to be sufficient to trigger international action to sustain ecosystems (Galaz et al. 2012). If indeed the safe operating space for humanity is closing, or the biosphere even collapsing and dying, might not discussion of revolutionary social change be acceptable? Particularly, if there is a lack of consensus by atomized actors, who are unable to legislate the required social change within the current socioeconomic system. By not even speaking of revolutionary action, we dismiss any means outside the dominant growth-based oligarchies. In the author's opinion, it is shockingly irresponsible for Earth System scientists to speak of geoengineering a climate without being willing to academically investigate revolutionary social and economic change as well. It is desirable that the current political and economic systems should reform themselves to be ecologically sustainable, establishing laws and institutions for doing so. Yet there is nothing sacrosanct about current political economy arrangements, particularly if they are collapsing the biosphere. Earth requires all enlightened and knowledgeable voices to consider the full range of possible responses now more than ever. One possible solution to the critical issues of terrestrial ecosystem loss and abrupt climate change is a massive and global, natural ecosystem protection and restoration program—funded by a carbon tax—to further establish protected large and connected core ecological sustainability areas, buffers, and agro-ecological transition zones throughout all of Earth's bioregions. Fossil fuel emission reductions must also be a priority. It is critical that humanity both stop burning fossil fuels and destroying natural ecosystems, as fast as possible, to avoid surpassing nearly all the planetary boundaries. In summation, we are witnessing the collective dismantling of the biosphere and its constituent ecosystems which can be described as ecocidal. The loss of a species is tragic, of an ecosystem widely impactful, yet with the loss of the biosphere all life may be gone. Global ecosystems when connected for life's material flows provide the all-encompassing context within which life is possible. The miracle of life is that life begets life, and the tragedy is that across scales when enough life is lost beyond thresholds, living systems die.

### Case

#### Circumvention- the court would side with the executive if they were to challenge the plan.

Pushaw 11, Pepperdine University School of Law James Wilson endowed professor, 2011

(Robert, 39 Pepp. L. Rev. 173, “SYMPOSIUM: SUPREME MISTAKES: Explaining Korematsu: A Response to Dean Chemerinsky” Lexis)

As our debate over Korematsu illustrates, Dean Chemerinsky and I have adopted quite different approaches to constitutional law. He believes that the Court should use the Constitution instrumentally to identify and protect rights that embody liberal ideals of social and moral justice. By contrast, I adhere to a "Neo-Federalist" methodology, which seeks to restrain the Justices' discretion by requiring them to (1) formulate rules of law that are rooted in the Constitution's language, structure, history, and early precedent; and (2) apply such rules without regard to whether they conform to the Justices' ideology or politics. I believe that a Neo-Federalist perspective would clarify and improve almost all areas of constitutional law. One notable exception is judicial review of the exercise of war powers. Although my textual and historical approach provides some valuable insights on this subject, I readily confess that it does not yield workable legal principles that can be applied consistently and apolitically. Indeed, I have concluded that this problem is intractable because each military situation is unique and raises myriad legal, political, and pragmatic considerations that resist facile lawyerly categorization and analysis. It is against this backdrop that I have examined Dean Chemerinsky's seemingly irrefutable argument that Korematsu is one of the worst decisions in American history. My modest purpose has been to explain, not defend, Korematsu. I have tried to show that this case follows a historical pattern in which the Court treats constitutional rights and liberties with far less respect during military crises. The Justices have always properly recognized that the Constitution commits all war powers to the political branches, which have a paramount duty to protect national security. Even when the assertion of those powers allegedly violates individual rights, the Court has tended to defer to the President's judgment that a particular action is militarily necessary, which rests upon the expert advice of his executive subordinates who have [\*196] processed huge amounts of information. Furthermore, the Court often has no realistic option but to yield to a strong President who enjoys popular and congressional support when he makes such decisions. Thus, Korematsu is not an aberration, but rather followed precedent set during the Civil War (such as The Prize Cases and Vallandigham) and World War I. 144 My study of history convinces me that it is simply wishful thinking to hope that the Court will avoid similar decisions in the future.

#### 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’.

#### ---Rejecting consequentialism is a conservative strategy that prevents criticism of utopian neoliberal policies which destroy the environment and increase poverty.

McMurry 1996

Andrew, “The Slow Apocalypse: A Gradualistic Theory of The World's Demise,” Popular Culture, Muse

Skeptical of totalizing theories, postmodern intellectuals are reluctant to prophesy doom, but without coherent oppositional narratives to clarify such effects those who profit from the positive spin have the stage to themselves. Thus every sign gets read as its opposite, every trend that points to a decline is seen as the prelude to improvement, and every person becomes a shareholder in the fantasies of the boosters. In this environment of doublethink, the now-routine failure of corporations or nations to provide even short-term security for their members can be glossed as bitter but necessary "medicine," or as the "growing pains" associated with increasing economic "rationalization." We are left in the paradoxical position described in game theory as the "prisoner's dilemma" and in environmental thought as the "tragedy of the commons": the incentive for individuals to ignore the evidence for unqualified disaster far outweighs the personal risks involved in seeking to slow it. Everyone proceeds according to this same calculation, indeed is encouraged to do so, and everyone suffers minimally -- that is, until the collective moment of reckoning is reached. Four Horsemen # What is the hard evidence that taking the long view reveals an apocalypse already in progress? To keep our metaphor intact, we could speak in terms of the "four horsemen." There are the usual ones -- war, famine, disease, pestilence -- but to put a finer point on the apocalypse I'm describing we are better to call our riders 1) arms proliferation, 2) environmental degradation, 3) the crisis of meaning, and, crucially, 4) the malignant global economy.

#### 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.

#### 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

#### ---The position of human subjectivity makes consequentialism is inevitable.

Ratner 1984

Leonard G. Ratner, professor of law at USC, Hofstra Law Journal, 12 Hofstra L. Rev. 723, spring, 1984

All systems of morality, however transcendental, rest ultimately on utilitarian self interest (i.e., on personal need/want fulfillment), because those who fashion such systems, like those who accept or reject them, cannot escape their own humanness. The physically controllable acts of each individual 221 are the choice of that individual, though all of the consequences may not be foreseen or desired. 222 Behavior choices are necessarily determined by the experience, feelings, habits, and attitudes; the concerns and beliefs; the needs and wants -- in short, by the ultimate self interest -- of the individual.

#### 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 terrorism is that it avoids the temptation to turn the fight into a utopian crusade against evil.27 While it is true that some of the perpetrators 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. And these 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 not the complete 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)

#### Plan doesn’t end internment authority- the 2012 NDAA gives that authority to the president through statute.

Cummings 12 (Ryan Cummings lives in the United States and is the co-editor of fawkesfilter.com, The U.S. Internment Camp: Prison for a New American Century, May 7, http://www.activistpost.com/2012/05/us-internment-camp-prison-for-new.html)

The topic of civilian internment camps in the United States has been largely dismissed as a paranoid “conspiracy theory” by the mainstream media. Recent legislation and newly uncovered government documents, however, reveal the sad truth: The United States is quickly descending into a full-blown authoritarian police state. NDAA 2012: Patriot Act Part Two On December 31, 2011, while the majority of Americans were busy watching balls drop and drinking themselves into oblivion, President Obama quietly signed into law the National Defense Authorization Act for Fiscal Year 2012. This unprecedented legislation effectively codified the executive branch’s authority to indefinitely detain American citizens without trial, stripping them of their Constitutional right to due process and habeas corpus. Under this legislation, if you are simply “suspected” of providing support to a group the government classifies as a terrorist organization—or an affiliate or associated force of said organization—you can be rounded up and detained until the end of the “War on Terror”—a war, according to policy makers, that has no end.

## 2NC

### T

The court upheld Congressional war power in Korematsu

Brooklyn Law Review 88 Lupo 54 Brooklyn L. Rev. 171

COMMENT: UNITED STATES V. SALERNO \*: "A LOADED WEAPON READY FOR THE HAND". \*\*

Chief Justice Rehnquist does not discuss the logical complement to this class of cases, Korematsu v. United States, 257 although the government used this case in its brief. 258 As noted by Judge Newman, this is the "one instance in the constitutional jurisprudence of this country [where] . . . the Supreme Court [has] upheld the preventive detention of competent adults prior to conviction of any crime." 259 Although it is doubtful whether Korematsu is still valid, 260 even the use of detention in that case was upheld based upon Congress's war power. 261

### CP

#### B. Confusion- passive voice confuses our understanding and obscures discourse-the permutation only makes it worse

Bilbo 7

<http://bilbosrandomthoughts.blogspot.com/2007/03/past-exonerative-tense.html>

The Past Exonerative Tense

Those of you less fascinated with language than I probably suffer from glazed eyes during discussions of verb forms. Past, present, future, perfect, imperfect, active, passive, transitive, intransitive, reflexive - who cares? Actually, you do, but you don't think about it in normal conversation because your brain processes it all without any effort on your part. But let's talk for a minute about the passive voice, the exonerative tense, because it's very important to your understanding of the political drivel that gushes from Washington every day. When you speak in the active voice, your listeners know that the subject of the sentence performed some action. If I say "I made a mistake," there's no doubt in your mind who made the mistake - I did. If, however, I resort to the passive voice and say "Mistakes were made," who was responsible? Was it me? My next-door neighbor? Some unpatriotic and obstructionist Democrat/Republican? The Attorney General? The President? You don't know...and in Washington, not knowing can be every bit ––as important as knowing for sure...just for different reasons. The passive voice can be used to obscure discourse, confuse issues, and deflect responsibility. It's the exonerative tense because it protects actors from owning up to the consequences of their actions - a mistake was made, but since we don't say who made it, nobody has to be held responsible.

#### Passive voice construction is especially dangerous in the political context-the plan undermines responsibility for Korematsu, turning the case

Hale 4/30/12

The Pleasures and Perils of the Passive

Constance Hale, a journalist based in San Francisco, is the author of “Sin and Syntax

<http://opinionator.blogs.nytimes.com/2012/04/30/the-pleasures-and-perils-of-the-passive/?_php=true&_type=blogs&_r=0>

Then there is the passive voice. Some people rely too heavily on it. When lawyers want to please the court, they follow scads of lawyers before them (The filing deadline was unintentionally missed). Business writers who want to stick to convention reflexively use the passive voice (The review of all positions has been completed). And C.E.O.s hide behind the passive voice after carrying out harsh actions (The work force has been downsized) or to blunt criticism (“Finally, it must be said that today’s economic crisis is the result of a lot of mistakes made by a lot of people …”). The most pilloried use of the passive voice might be that famous expression of presidents and press secretaries, “mistakes were made.” From Ronald Ziegler, President Richard M. Nixon’s press aide, through Presidents Ronald Reagan and Bill Clinton — not to mention Attorney General Alberto Gonzales — pols have used the passive voice to spin the news, avoid responsibility or hide the truth. One political guru even dubbed this usage “the past exonerative.” Whether you are writing the next novel, a scholarly paper, a legal brief or a brief Tweet, be aware of the voice of your verbs. Try letting each sentence tell a little story, with an agent right there at the start. Set your protagonist in action. Do you want him, as Hamlet would say, “to take arms against a sea of troubles,” or would you rather he be left lying flat on his back, leaving his destiny up to someone else?

#### The plan is the equivalent of “Mistakes were made”-It undermines our understanding of –history

Language for you 7

Passive Voice as “Past Exonerative”

<http://language4you.wordpress.com/2007/05/24/passive-voice/>

In mid-March 2007 Attorney General Gonzalez said, “Mistakes were made.” His boss, President Bush, echoed this sentiment, also using the passive voice. Many prominent citizens have resorted to this grammatical construction over the years, because saying “mistakes were made” enables them to avoid saying “I made some mistakes.” In other words, they can apologize without apologizing. Hence, William Schneider has called this use of the passive voice the “past exonerative.” The passive voice is quite useful in politics and diplomacy, but this example illustrates why we should not use it in history, where the question of agency is important. It is not enough to know that something was done. We want to know who did it and why.

#### They can’t win offense when the 1AC strongly supports the CP:

#### First, They’re playing games-their Somin evidence says the Supreme Court should be the agent of action to Repudiate the Korematsu legacy.

Ilya Somin 13, Professor of Law at George Mason University School of Law; earned his B.A., Summa Cum Laude, at Amherst College, M.A. in Political Science from Harvard University, and J.D. from Yale Law School, March 13th, 2013, "Repudiating the Japanese Internment Decisions," www.volokh.com/2013/03/13/repudiating-the-japanese-internment-decisions/

I. The Case for Repudiation.¶ As Irons notes, the overwhelming majority of legal scholars and jurists now recognize that the Japanese internment cases were outrageous injustices. They are among the most reviled decisions in Supreme Court history. In 1988, Congress and President Ronald Reagan formally denounced the internment, apologized to the surviving victims, and enacted a law compensating them for their losses (albeit, inadequately, given that each was paid only $20,000 in compensation for some three years of imprisonment, and the loss of large amounts of income and property). The Supreme Court itself has made negative references to these cases in more recent decisions, but has never formally overruled any of them. While lawyers today would be ill-advised to rely on these cases in their arguments, they are technically still on the books, and could potentially be used as precedents in the future – especially if changes in public or elite opinion make racially discriminatory war policies more popular than they are now.

#### Second, Their Irons evidence says the Court has an OBLIGATION to repudiate the Korematsu

Peter Irons 13, Civil Rights Attorney, and professor emeritus of political science, "UNFINISHED BUSINESS: THE CASE FOR SUPREME COURT REPUDIATION OF THE JAPANESE AMERICAN INTERNMENT CASES," 2013, http://lawprofessors.typepad.com/files/case-for-repudiation-1.pdf-http://lawprofessors.typepad.com/files/case-for-repudiation-1.pdf

CONCLUSION¶ Over the past seven decades, many distinguished scholars and judges have implored the Court to repudiate the internment decisions. It seems appropriate to note the first and perhaps most distinguished of these voices: just months after the Korematsu decision in December 1944, Eugene V. Rostow, the justly esteemed professor and dean at Yale Law School, published an article in the Yale Law Journal entitled “The Japanese American Cases – A Disaster.” [24] In his article, which eviscerated the Court’s opinions in these cases as based on unsupported racial stereotypes (and without the benefit of the evidence of governmental misconduct discussed above), Professor Rostow wrote that those opinions, “[b]y their acceptance of ethnic differences as a criterion for discrimination . . . are a breach, potentially a major breach, in the principle of equality. Unless repudiated, they may encourage devastating and unforeseen social and political conflicts.” He continued: “In the political process of American life, these decisions were a negative and reactionary act. The Court avoided the risks of overruling the Government on an issue of war policy. But it weakened society’s control over military authority—one of those polarizing forces on which the organization of our society depends. And it solemnly accepted and gave the prestige of its support to dangerous racial myths about a minority group, in arguments which can be applied easily to any other minority in our society.” (emphasis added) Id. at 492.¶ “[T]hat the Supreme Court has upheld imprisonment on such a basis constitutes an expansion of military discretion beyond the limit of tolerance in democratic society. It ignores the rights of citizenship, and the safeguards of trial practice which have been the historical attributes of liberty. . . . What are we to think of our own part in a program which violates every democratic social value, yet has been approved by the Congress, the President and the Supreme Court?” Id. at 533.¶ Professor Rostow urged in 1945 that “the basic issues should be presented to the Supreme Court again, in an effort to obtain a reversal of these war-time cases. In the history of the Supreme Court there have been important occasions when the Court itself corrected a decision occasioned by the excitement of a tense and patriotic moment. After the Civil War, Ex parte Vallandigham was followed by Ex parte Milligan. The Gobitis case has recently been overruled by West Virginia v. Barnette. Similar public expiation in the case of the interment of Japanese Americans from the West Coast would be good for the Court, and for the country.” Id. Failing to heed Professor Rostow’s words in 1945 and in the years since then, the Court should now feel an obligation to provide the “expiation” for which he prophetically called.

#### Third, use of the passive voice is obviously just an attempt to avoid process arguments. It is entirely inconsistent with the rest of the 1AC. Their Green evidence makes our impact for us-it isn’t enough to share in the memory of Korematus-Responsibility must be taken to stop future acts of racial classification.

Craig Green 11, Professor of Law, Temple University Beasley School of Law; John Edwin Pomfret Fellowship, Princeton University; J.D., Yale Law School, 2011, "Ending the Korematsu Era: An Early View from the War on Terror Cases," Northwestern University School of Law, Vol. 105, No. 3,www.law.northwestern.edu/lawreview/v105/n3/983/LR105n3Green.pdf

Since 2004, the Supreme Court has issued a historically unmatched number of decisions limiting executive war powers.19 Each of these cases has been decided narrowly, on specific legal grounds, with little effort to explicitly contradict Korematsu-era precedents or upset the constitutional status quo.20 Nonetheless, I propose that the Court’s recent decisions undermine the Korematsu era’s most basic principle: that courts are institutionally unable to second guess presidential claims of military necessity. Even as the modern Court has focused on doctrinal technicalities, it has repeatedly set aside military claims about what is necessary to keep our country safe. My approach suggests that these rulings mark an important repudiation of the Korematsu era, which might thereby guard against future executive abuse. Part III explores how this Article’s arguments against the Korematsu era might affect modern legal culture. Correcting abusive executive policies— whether or not they include racial classifications—requires more than shame and regret over past wrongs. Vigilance against future repetition is important, and attorneys have a crucial role to play.

#### Fourth, Their Watanabe evidence locates responsibility in the Judiciary and calls for a end to the Korematsu precedent.

Nathan Watanabe 4, J.D. Candidate, University of Southern California Law School, 2004, "Internment, Civil Liberties, and a Nation in Crisis," Southern California Interdisciplinary Law Journal, 13 S. Cal. Interdisc. L. J. 2003-2004, Hein Online

Lastly, Zadvydas did not contain any references to either Internment Case, so it is probably safe to assume that the Court did not intend to overrule them in the process.¶ The greatest evidence, however, that the Internment Cases are still live precedents is that current cases still cite to them. Ninth Circuit decision Johnson v. State of California 99 cited to Hirabayashi on February 25, 2003, and American Federation of Government Employees (AFL-CIO) v. United States referred to Korematsu on March 29, 2002.0° Both cases used Hirabayashi and Korematsu as authority for strictly scrutinizing government racial classifications. Additionally, the United States Supreme Court cited the Internment Cases as authority on the relationship between strict scrutiny and race.'0' In fact, many cases have referred to the Internment Cases for this purpose, as they represent the Supreme Court's first formulation of heightened scrutiny. The scope of the Internment Cases' precedent, however, extends beyond simply establishing strict scrutiny for racial classifications, and includes the Supreme Court's commentary on the circumstances in which such "odious'1T2 measures are justifiable. The recalcitrant position that this justification occupies in Supreme Court case history poses the greatest threat to present-day civil liberties.¶

### 1NC Structural Violence

#### War turns structural violence but not the other way around

Joshua Goldstein, Int’l Rel Prof @ American U, 2001, War and Gender, p. 412

First, peace activists face a dilemma in thinking about causes of war and working for peace. Many peace scholars and activists support the approach, “if you want peace, work for justice.” Then, if one believes that sexism contributes to war one can work for gender justice specifically (perhaps among others) in order to pursue peace. This approach brings strategic allies to the peace movement (women, labor, minorities), but rests on the assumption that injustices cause war. The evidence in this book suggests that causality runs at least as strongly the other way. War is not a product of capitalism, imperialism, gender, innate aggression, or any other single cause, although all of these influence wars’ outbreaks and outcomes. Rather, war has in part fueled and sustained these and other injustices.9 So,”if you want peace, work for peace.” Indeed, if you want justice (gender and others), work for peace. Causality does not run just upward through the levels of analysis, from types of individuals, societies, and governments up to war. It runs downward too. Enloe suggests that changes in attitudes towards war and the military may be the most important way to “reverse women’s oppression.” The dilemma is that peace work focused on justice brings to the peace movement energy, allies, and moral grounding, yet, in light of this book’s evidence, the emphasis on injustice as the main cause of war seems to be empirically inadequate.

### 2NC – Yudkowsky

#### Assess our extinction scenarios in terms of plausibility. We have drivers and events based in evidence and empirics.

Tonn and McGregor 2009

Bruce and Donald, Department of Political Science, University of Tennessee, A singular chain of events, Futures 41 (2009) 706–714

A true human extinction scenario ends in failure; humans are unable to prevent their own demise. Humans are faced with a series of threats that in the end we are unable to overcome. For various reasons, we may not take these threats seriously, may act on them too late, may implement poorly thought-out responses, and/or simply may not know how to properly react to the threats. Our adaptations generally are too little and too late. For a human extinction scenario to be of value to policy makers, it must possess verisimilitude. That is, the threats included in the scenario need to be plausible and have a ring of truth. The driving forces behind the threats need to be well explained. Human responses to the threats need to be probed. The path of events and adaptations must show how today’s human population that exceeds six billion people decreases over time until the last human in the universe breathes his or her last breath. Generally, then, human extinction scenarios can be constructed with these four generic elements: Events, Drivers, Adaptations, and Pathways. To keep a scenario plausible, some criteria need to be established for what each of these elements can legitimately constitute, such as: Events: There must be some evidence or a valid model to suggest that a major event in the scenario either has occurred previously in the past or could occur in the future. Drivers: There must be some evidence or a valid model that the forces causing major events exist either in society or in the natural or physical world. Adaptations: There must be some evidence that the adaptations actually do occur, could occur or have occurred in the past in response to the conditions present in the scenario. The evidence could be in the form of citations of historical adaptations or could be derived or inferred from theoretical and/or empirical research in the social or behavioral sciences. Pathways: The scenario must explicitly describe the events, drivers, and adaptations over time that leads from the current population to human extinction. Events and drivers that could lead to massive loss of human life may be quite easily imaginable, but how those last few most resilient humans perish must also be directly addressed and could be relatively more challenging to imagine. The dynamic relationship between these basic elements can be seen in Fig. 1. Population declines over period of time as a function of the impact of events and the recovery effects of adaptations. Nonetheless the net effect of events and adaptations is a continuous downward trend in population, ultimately leading to extinction. Thus, human extinction scenarios ought to be based on plausible events and drivers. Have we witnessed the events and drivers in the past and/or can we forecast the events using current scientific knowledge? If so, those events and drivers can be used in a human extinction scenario. If not, then maybe those events and drivers belong to the world of science fiction or religion and not future policy studies. Does the scenario allow for human adaptation? It should. Of course, the key characteristic of a human extinction scenario is that all adaptations eventually fail, as should be clearly explained in the scenario itself.

### 2NC – Consequences k2 Politics

#### Consider the consequences of enacting the plan---otherwise you are shirking political responsibility which makes you complicit in injustice

**Issac 2**—Professor of Political Science at Indiana-Bloomington, Director of the Center for the Study of Democracy and Public Life, PhD from Yale (Jeffery C., Dissent Magazine, Vol. 49, Iss. 2, “Ends, Means, and Politics,” p. Proquest)

As a result, the most important political questions are simply not asked. It is assumed that U.S. military intervention is an act of "aggression," but no consideration is given to the aggression to which intervention is a response. The status quo ante in Afghanistan is not, as peace activists would have it, peace, but rather terrorist violence abetted by a regime--the Taliban--that rose to power through brutality and repression. This requires us to ask a question that most "peace" activists would prefer not to ask: What should be done to respond to the violence of a Saddam Hussein, or a Milosevic, or a Taliban regime? What means are likely to stop violence and bring criminals to justice? Calls for diplomacy and international law are well intended and important; they implicate a decent and civilized ethic of global order. But they are also vague and empty, because they are not accompanied by any account of how diplomacy or international law can work effectively to address the problem at hand. The campus left offers no such account. To do so would require it to contemplate tragic choices in which moral goodness is of limited utility. Here what matters is not purity of intention but the intelligent exercise of power. Power is not a dirty word or an unfortunate feature of the world. It is the core of politics. Power is the ability to effect outcomes in the world. Politics, in large part, involves contests over the distribution and use of power. To accomplish anything in the political world, one must attend to the means that are necessary to bring it about. And to develop such means is to develop, and to exercise, power. To say this is not to say that power is beyond morality. It is to say that power is not reducible to morality. As writers such as Niccolo Machiavelli, Max Weber, Reinhold Niebuhr, and Hannah Arendt have taught, an unyielding concern with moral goodness **undercuts political responsibility**. The concern may be morally laudable, reflecting a kind of personal integrity, but it suffers from three fatal flaws: (1) It fails to see that the purity of one's intention does not ensure the achievement of what one intends. Abjuring violence or refusing to make common cause with morally compromised parties may seem like the right thing; but if such tactics entail impotence, then it is hard to view them as serving any moral good beyond the clean conscience of their supporters; (2) it fails to see that in a world of real violence and injustice, moral purity is not simply a form of powerlessness; it is often a form of **complicity in injustice**. This is why, from the standpoint of politics--as opposed to religion--pacifism is always a potentially immoral stand. In categorically repudiating violence, it refuses in principle to oppose certain violent injustices with any effect; and (3) it fails to see that **politics is as much about unintended consequences as it is about intentions**; it is the effects of action, rather than the motives of action, that is most significant. Just as the alignment with "good" may engender impotence, it is often the pursuit of "good" that generates evil. This is the lesson of communism in the twentieth century: it is not enough that one's goals be sincere or idealistic; it is equally important, always, to ask about the effects of pursuing these goals and to judge these effects in pragmatic and historically contextualized ways. Moral absolutism inhibits this judgment. It alienates those who are not true believers. It promotes arrogance. And it undermines political effectiveness.

## 1NR

### Overview

Substantive rulings will be outright ignored by the executive because of lack of precedent; the plan fails to be enforced while also creating a terrible model---that’s McGinnis

Losing legitimacy collapses the effectiveness of Judicial Review

Jackson 11 (Lester, state Senator from Chatham County,“The Threat Of Liberal Judicial Activism Reaches New Heights,” http://www.americanthinker.com/2011/08/the\_threat\_of\_liberal\_judicial\_activism\_reaches\_new\_heights.html)

From time to time, there are calls for making Supreme Court nominations a major issue in presidential elections. These calls have never been really met. This time, the presidential candidates should wake up. They should be talking seriously and often about justices who have contempt for the law, so that the American people will also wake up to the danger. If they don't wake up in 2012, they surely will wake up in 2013 to a Supreme Court that a majority of Americans do not respect because the majority of the Court lacks respect for them. In turn, that will call into question the very legitimacy of judicial review for which Chief Justice Marshall so eloquently laid the groundwork.

Turn outweighs solvency-without support activism crashes-legitimacy is a pre-requisite

Hirsch 4 (Ran Hirsch is an Associate Professor of Political Science and Law at the University of Toronto, “'Juristocracy' - Political, not Juridical,” Project Muse)

In sum, the existence of an active, non-deferential constitutional court is a necessary, but not a sufficient condition, for persistent judicial activism and the judicialization of mega politics. Assertion of judicial supremacy cannot take place, let alone be sustained, without the tacit or explicit support of influential political stakeholders. It is unrealistic, and indeed utterly naïve, to assume that core political questions such as the struggle over the nature of Canada as a confederation of two founding peoples, Israel's wrestling with the question of "who is a Jew?" and its status as a Jewish and democratic state, the struggle over the status of Islamic law in predominantly Muslim countries, or the transition to democracy in South Africa could have been transferred to courts without at least the tacit support of pertinent political stakeholders in these countries. And we have not yet said a word about the contribution of ineffective political institutions, the spread of litigation oriented NGOs, or opposition and interest group use of the courts to the judicialization of mega-politics. A political sphere conducive to judicial activism is at least as significant to its emergence and sustainability as the contribution of courts and judges. In short, judicial power does not fall from the sky. It is politically constructed. The portrayal of constitutional courts and judges as the major culprits in the all-encompassing judicialization of politics worldwide is simply too simple a tale.

#### Activism turns independence-gendered language said in context

O’Scannlain 6 (diarmuind, Judge, US Court of Appeals for the Ninth Circuit, “On Judicial Activism,” Open Spaces 3:1 <http://open-spaces.com/article-v3n1-oscannlain.php>)

Judicial activism generates a vicious cycle: it triggers a lack of confidence in judicial decisions which triggers political meddling which reinforces a lack of confidence in judicial decisions. A politician in robes is no judge at all. Once a judge imposes his will as legislator, he loses his democratic legitimacy. No one person in a democratic society of 270 million citizens should wield legislative power if only fifty-two people have approved of him. A judge who wields power like a politician enters the political process. Having forsaken neutrality, he will soon lose his independence. The people will allow a judge to be independent only for as long as they perceive him as truly neutral-forsaking decisions based upon his own interests and biases. Thus, judicial activism encourages political interference both in the process of judging and selection of judges. One need look no further than the current battle between the White House and the Senate over judicial nominees for a glimpse of the extent to which the judicial appointments process has become politicized. Nor does the threat of political interference end after the judge is selected. A multitude of proposals have been offered in Congress to weaken the independence of the judiciary. Some take the form of constitutional amendments to impose term limits on judges; others have been nothing more sophisticated than calls for the impeachment of particular judges who have rendered unpopular decisions. These may be only harbingers of what is to come. Fortunately, judges retain-at least for now-their independence to apply the law neutrally and faithfully. But so long as one judge indulges his own sympathies rather than following the text of the law before him, he will only make it harder for his colleagues to retain the courage to decide cases in faithful, predictable, and uniform ways.

### AT Defense

#### ---Biodiversity loss causes extinction.

Diner 1994

David N., Judge Advocate General’s Corps of US Army, Military Law Review, Winter, 143 Mil. L. Rev. 161

No species has ever dominated its fellow species as man has. In most cases, people have assumed the God-like power of life and death -- extinction or survival -- over the plants and animals of the world. For most of history, mankind pursued this domination with a single-minded determination to master the world, tame the wilderness, and exploit nature for the maximum benefit of the human race. n67 In past mass extinction episodes, as many as ninety percent of the existing species perished, and yet the world moved forward, and new species replaced the old. So why should the world be concerned now? The prime reason is the world's survival. Like all animal life, humans live off of other species. At some point, the number of species could decline to the point at which the ecosystem fails, and then humans also would become extinct. No one knows how many [\*171] species the world needs to support human life, and to find out -- by allowing certain species to become extinct -- would not be sound policy. In addition to food, species offer many direct and indirect benefits to mankind. n68 2. Ecological Value. -- Ecological value is the value that species have in maintaining the environment. Pest, n69 erosion, and flood control are prime benefits certain species provide to man. Plants and animals also provide additional ecological services -- pollution control, n70 oxygen production, sewage treatment, and biodegradation. n71 3. Scientific and Utilitarian Value. -- Scientific value is the use of species for research into the physical processes of the world. n72 Without plants and animals, a large portion of basic scientific research would be impossible. Utilitarian value is the direct utility humans draw from plants and animals. n73 Only a fraction of the [\*172] earth's species have been examined, and mankind may someday desperately need the species that it is exterminating today. To accept that the snail darter, harelip sucker, or Dismal Swamp southeastern shrew n74 could save mankind may be difficult for some. Many, if not most, species are useless to man in a direct utilitarian sense. Nonetheless, they may be critical in an indirect role, because their extirpations could affect a directly useful species negatively. In a closely interconnected ecosystem, the loss of a species affects other species dependent on it. n75 Moreover, as the number of species decline, the effect of each new extinction on the remaining species increases dramatically. n76 4. Biological Diversity. -- The main premise of species preservation is that diversity is better than simplicity. n77 As the current mass extinction has progressed, the world's biological diversity generally has decreased. This trend occurs within ecosystems by reducing the number of species, and within species by reducing the number of individuals. Both trends carry serious future implications. Biologically diverse ecosystems are characterized by a large number of specialist species, filling narrow ecological niches. These ecosystems inherently are more stable than less diverse systems. "The more complex the ecosystem, the more successfully it can resist a stress. . . . [l]ike a net, in which each knot is connected to others by several strands, such a fabric can resist collapse better than a simple, unbranched circle of threads -- which if cut anywhere breaks down as a whole." n79 By causing widespread extinctions, humans have artificially simplified many ecosystems. As biologic simplicity increases, so does the risk of ecosystem failure. The spreading Sahara Desert in Africa, and the dustbowl conditions of the 1930s in the United States are relatively mild examples of what might be expected if this trend continues. Theoretically, each new animal or plant extinction, with all its dimly perceived and intertwined affects, could cause total ecosystem collapse and human extinction. Each new extinction increases the risk of disaster. Like a mechanic removing, one by one, the rivets from an aircraft's wings, mankind may be edging closer to the abyss.

### Uniqueness/il

#### Court’s public trust doctrine is key to sustainable development. Now is the key time. We are dangerously close to planetary boundaries

**Sagarin et al., Arizona Institute of the Environment research scientist, 2012**

(Raphael, “The Public Trust Doctrine: Where Ecology Meets Natural Resources Management”, Annual Review of Environment and Resources, ScienceDirect, ldg)

We are failing to preserve ecosystems and their services on which humanity relies. Forests, freshwater sources, oceans, and the atmosphere itself are all at degraded states and may be hovering dangerously close to “planetary boundaries” (1), where they will no longer provide the services of food production, nutrient cycling, and climate regulation as they do currently. These resources are common-pool resources, meaning resources from which it is hard (i.e., costly) to exclude users but simultaneously are subject to degradation from overuse (2). It has proven difficult to devise ways of governing our sustainable use of common-pool resources. A particular legal doctrine called the public trust doctrine (PTD), which appears in several countries but initially evolved in the United States, is appealing to environmental law and policy scholars on both philosophical and practical grounds. In its most basic interpretation, it states that certain natural resources cannot be subject to private ownership and must be held in trust for the people of a State (or US state) by the government. Governments must manage trust resources for the exclusive benefit of their citizens, both current and future, and if they fail to do so, citizens can seek remedy in the courts. Philosophically, the PTD is appealing because it provides a framework for structuring the relationship among citizens, both current and future, the governments they elect, and natural resources and the services they provide. Additionally, by protecting the rights of both current and future citizens to functioning ecosystems, the PTD is tied to the important notion in international environmental governance of intergenerational equity. Practically, the PTD is appealing because it scales well from backyard creeks to international waters, and from resources with clear monetary value (e.g., fish) to those with more diffuse values (e.g., intact ecosystems). It is widely incorporated in US states’ law and has increasingly been used in other countries by their legislatures to prescribe a more accountable way forward for environmental governance and by their courts to prevent harm to trust resources or demand their restoration. Achieving laws and policies that prevent overuse of natural resources is an imperative in the enduring global effort to achieve sustainable development (3). With the current global negotiations about sustainable development, climate change, and high seas governance, not to mention ongoing environmental conflicts at every level, now is an opportune time to clarify the PTD and its potential opportunities and pitfalls as a tool for more effective and sustainable natural resources management. Depending on one’s perspective, the PTD could be a powerful tool for recognizing ecological advances in law and policy or a dangerously unwieldy cudgel that threatens democracy and property rights. Those who advocate in academic discussions, court cases, legislative debates, or as delegates to international environmental conferences for an expanded PTD need to understand the many facets of the PTD concept. The vast majority of recent PTD discussion has occurred in law review journals, which have both benefits and drawbacks. Law review articles are built on extensive knowledge of legal precedent, but because they are essentially framed as arguments, they tend to rely on judicial opinions and other articles that support the commentator’s viewpoint and relegate opposing views to an unelaborated “but see . . .” citation in the footnotes. Pg. 474-475

#### The court needs to act now – the plan kills their ability to – strong court action solves climate – three warrants

Flynn 13 (James, J.D. Candidate, 2013, Georgia State University College of Law; Assistant Legislation Editor, Georgia State University Law Review; Visiting Student, Florida State University College of Law, “CLIMATE OF CONFUSION: CLIMATE CHANGE LITIGATION IN THE WAKE OF AMERICAN ELECTRIC POWER V. CONNECTICUT”, lexis, accessed 1/5/2014)

2. Turning Up the Heat on Congress: Litigating to Legislate The only solution to anthropogenic global warming is a concerted global effort. 264 Such an effort cannot succeed without the leadership, or at least support, of the United States. 265 Real change in the United States requires comprehensive legislation that covers all facets of global warming: greenhouse gas emissions, land use, efficiency, and sustainable growth. In addition to maximizing time until the EPA either issues regulations or is prevented from doing so by Congress, litigation advances the goal of such comprehensive legislation in three ways. First, litigation keeps the pressure on fossil fuel companies and other large emitters. Comprehensive legislation is a near impossibility as long as the largest contributors to global greenhouse gas emissions are able to exert powerful control over the nation's [\*862] energy policy and the climate change discussion. 266 While the companies have the financial resources to battle in court, it is imperative that advocates and states make them do so. One need only look at the tobacco litigation of the 1960s through the 1990s to understand that success against a major industry is possible. 267 Here, though, the stakes are even higher. The chances of obtaining a largescale settlement from the fossil fuel industry is likely smaller now that the Court has ruled that some federal common law nuisance claims are displaced, because lower courts may hold that nuisance claims for money damages are also displaced. 268 However, advocates of climate change legislation should keep trying to obtain such a settlement through other tort remedies. A substantially damaging settlement may encourage fossil fuel companies to reposition their assets into more sustainable technologies to avoid more settlements, thus minimizing future emissions. Alternatively, if the fossil fuel companies feel threatened enough, they may begin to use their clout to persuade Congress to pass comprehensive legislation to protect their industry from such wide-ranging suits. 269 Second, litigation keeps the issue in the public consciousness during a time when the media is failing at its responsibilities to the public. 270 The media's coverage of climate change has been both inadequate and misleading. 271 Indeed, some polls suggest Americans [\*863] believe less in climate change now than just a few years ago. 272 Litigation, especially high-profile litigation, forces the issue into the public sphere, even though it may receive a negative connotation in the media. The more the public hears about the issue, the greater chance that people will demand their local and state politicians take action. Finally, litigation sends a clear message to Congress that simple appeasements will not suffice. 273 Comprehensive legislation is needed--legislation that mandates consistently declining emissions levels while simultaneously propping up replacement sources of energy. 274 Fill-in measures, like the EPA's authority to regulate emissions from power plants, are not sufficient. Humans need energy, and there can be no doubt that we must strike a balance between energy needs and risks to the environment. Catastrophic climate change, however, is simply a risk that we cannot take; it overwhelms the short-term benefits we receive from the burning of fossil fuels. 275 Advocates and states must demonstrate to Congress [\*864] through continuing litigation that the issue is critical and that plaintiffs like those in Kivalina and Comer are suffering genuine losses that demand redress that current statutes do not currently provide. CONCLUSION American Electric proved less important for the precedent it set than for the questions it left unanswered. While courts wrestled over standing, the political question doctrine, and displacement in climate change nuisance cases in the years preceding American Electric, the Supreme Court relied only on the clear displacement path illuminated by its earlier decision in Massachusetts. While the decision in American Electric narrowed the litigation options that climate change advocates have at their disposal, it subtly sent a message to Congress that greater federal action is needed. In writing such a narrow ruling, Justice Ginsburg also sent a message to states and advocates--whether intentionally or not--that climate change litigation is not dead. Until Congress enacts comprehensive climate change legislation, global warming lawsuits will, and must, continue.

#### Climate change ends all life – runaway climate hothouse earth.

Farley 2010

John, Professor of physics and astronomy @ UNLV, Monthly Review Vol 62 issue 4 september 2010 <http://monthlyreview.org/2010/09/01/our-last-chance-to-save-humanity>

If the sea level rises 70 meters (250 feet), it would not extinguish all human life. After all, hominids have existed on earth for several million years, and homo sapiens more than a hundred thousand, surviving numerous ice ages, during which ice sheets a mile thick covered areas that came to be Boston and New York City. But the world population during the last ice age, ten thousand years ago, has been estimated at five million. It is now six billion. It is human civilization that is unlikely to survive a flooding catastrophe. According to the penultimate chapter, The Venus Syndrome, it might be even worse. Hansen posits a possible future earth, in which a “runaway greenhouse effect” takes over: anthropogenic global warming from greenhouse gases causes increased water vapor in the atmosphere, which in turn causes further warming. The methane clathrate deposits are destabilized, releasing vast amounts of methane in the atmosphere. The oceans become acidified by dissolution of carbon dioxide from the atmosphere. This could eliminate all life on Earth. This is speculation, of course. But Venus, the planet most similar to earth, has a very strong greenhouse effect, much stronger than earth’s. In the absence of atmospheric greenhouse gases, the surface temperature of the earth would be -18°C (0°F). The actual observed temperature of the Earth is 15°C (59°F). Thus, the greenhouse effect on the Earth raises the temperature by 33°C (59°F). On Venus, the surface temperature, in the absence of the greenhouse effect, would be -41°C (-42°F), well below the melting point of ice. A very strong greenhouse effect raises the surface temperature to the observed temperature of 464°C (867°F). The greenhouse effect on Venus is a staggering 505°C (909°F), creating a planetary surface hot enough to melt lead (!!), which requires “only” 327°C (621°F).

### AT: Link Turn

#### Overrules collapse the predictability of the rule of law

O’SCANNLAIN 2006 – JUDGE

*ON JUDICIAL ACTIVISM, JUDGES AND THE CONSTITUTION TODAY*, 10-3

Preserving the constitutional compromise between **law and liberty** requires federal judges to **defer to the legislative and executive branches** on all issues properly within the realm of the law. If the text of the Constitution does not preclude the government's action, the judge must uphold it. He must do so even if the government's action is patently unfair or plainly inappropriate, for determining that something is "unfair" or "inappropriate" without an independent standard for fairness or appropriateness requires an exercise of sheer will. And the power to direct government action pursuant to one's own will is precisely the power that a judge lacks. The judge's duty to apply the law faithfully demands that he do more than merely defer to the political branches of government when they permissibly exercise governmental power. The very concept of law requires the judge to apply it in a manner that is both predictable and uniform. **Predictability ensures that everyone knows what the law is at any given point in time. Uniformity ensures that the law is applied in the same way by any judge to any party anywhere in the country.** When a judge is swayed by his own sentiment rather than considerations of deference, predictability, and uniformity, he **fails by definition to apply the law faithfully.** This is the essence of judicial activism. It is impossible to say with certainty in any given case that the judge's sentiments will lead him to a "bad" decision, but no one could say that they never would. Any of us would appreciate a judge's merciful departure from a draconian law. How many of us, though, would appreciate a judge's draconian departure from a merciful law**? The remedy for a bad law is to change the law through legislative action, not to depart from it one way or the other in the courts. The solution, in short, is democracy-the political process-and not judicial activism.**

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

**Devins, William & Mary government professor, 2010**

(Neavl, “Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants”, 12 U. Pa. J. Const. L. 491, lexis, ldg)

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.

### AT: Uniqueness

#### Legitimacy is on the brink---collapses threatens the rule of law

Burke 8/23 (Kevin Burke is a partner in Sidley's New York office. He litigates class actions and other complex disputes in the areas of securities, LLP, “How Low Public Trust Threatens the Legitimacy of Court Decisions,” http://proceduralfairnessblog.org/2013/08/23/how-low-public-trust-threatens-the-legitimacy-of-court-decisions/)

Trust is an essential component of procedural fairness, which, in turn, has been shown to be a key source of legitimacy for decision-makers. All public institutions now face serious skepticism from the public about their trustworthiness. However, a trust deficit – and the resulting lack of legitimacy – are of particular threat to the judiciary. Legitimacy is essential if courts are to be respected and, indeed, if court orders are to be obeyed. Simply put, failure to maintain and enhance the legitimacy of court decisions imperils the judiciary as an institution and the vital role assigned to the judiciary in our Constitutional tradition. The threat is real. Today, 75% of the American public thinks judges’ decisions are, to a moderate to significant extent, influenced by their political or personal philosophy. Of course, judges have a range of philosophical views and exercise discretion, so some differences of opinion among judges are to be expected. But 75% of the American public also believes judges’ decisions are, to a moderate to significant extent, influenced by their desire to be appointed to a higher court. Two recent articles explain the potentially grave implications. First, Politico recently published a contribution by law professors Charles Geyh and Stephen Gillers advocating for a bill to make the Supreme Court adopt a code of ethics. They argue: [I]t would be a mistake for the Court to view the [ethics] bill as a challenge to its power. It is rather an invitation. No rule is thrust on the justices. Under the … bill, the justices are asked to start with the code governing other federal judges, but are then free to make ‘any amendments or modifications’ they deem ‘appropriate.’ A response that says, in effect, ‘We won’t do it because you can’t make us’ will hurt the court and the rule of law. Second, Linda Greenhouse, a regular commentator on the New York Times Blog “Opinionator,” recently wrote this post about the Foreign Intelligence Surveillance Court entitled Too Much Work?. Greenhouse writes: As Charlie Savage reported in The Times last month, Chief Justice John G. Roberts Jr. has used that authority to name Republican-appointed judges to 10 of the court’s 11 seats. (While Republicans in Congress accuse President Obama of trying to “pack” the federal appeals court in Washington simply by filling its vacant seats, they have expressed no such concern over the fact that the chief justice has over-weighted the surveillance court with Republican judges to a considerably greater degree than either of the two other Republican-appointed chief justices who have served since the court’s creation in 1978.) What do these two pieces mean for judges? Both articles highlight how the judiciary itself, if not careful, can contribute to the erosion of public trust in our decisions. To be sure, the erosion of the legitimacy of judicial decisions is not entirely the fault of the Supreme Court, nor of judges in general. The media, for example, often refers to which President appointed a judge as a shorthand way to explain a decision. But that is, in part, why Ms. Greenhouse’s piece is important. The Chief Justice is recognized as a brilliant man. He and every other judge in the United States know the inevitable shorthand the media will use to describe judges and to explain their decisions. And so the Chief Justice, the members of the United States Supreme Court, indeed every judge in this country needs to be particularly sensitive to what we are doing that might either advance trust in courts or contribute to the erosion of the legitimacy of our courts. The bottom line is: Appearances make a difference. There will be decisions by judges at every level of court that test the public’s trust in our wisdom. It is therefore imperative that judges act in a manner that builds a reservoir of goodwill so that people will stand by courts when a decision is made with which they disagree. There may have been an era when trust in the wisdom and impartiality of judicial decisions could be taken as a given. But if there was such an era, we no longer live in it. Trust and legitimacy today must be earned.