# 1NC

## Offcase

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#### The plan identifies the non-Western world as a space devoid of the rule of law---makes aggressive colonial and neoliberalism violence inevitable---their evidence is based on distorted representations

Ugo Mattei 9, Professor at Hastings College of the Law & University of Turin; and Marco de Morpurgo, M.Sc. Candidate, International University College of Turin, LL.M. Candidate, Harvard Law School, 2009, “GLOBAL LAW & PLUNDER: THE DARK SIDE OF THE RULE OF LAW,” online: <http://works.bepress.com/cgi/viewcontent.cgi?article=1014&context=bocconi_legal_papers>

Within this framework, Western law has constantly enjoyed a dominant position during the past centuries and today, thus being in the position to shape and bend the evolution of other legal systems worldwide. During the colonial era, continental-European powers have systematically exported their own legal systems to the colonized lands. During the past decades and today, the United States have been dominating the international arena as the most powerful economic power, exporting their own legal system to the ‘periphery’, both by itself and through a set of international institutions, behaving as a neo-colonialist within the ideology known as neoliberalism. ¶ Western countries identify themselves as law-abiding and civilized no matter what their actual history reveals. Such identification is acquired by false knowledge and false comparison with other peoples, those who were said to ‘lack’ the rule of law, such as China, Japan, India, and the Islamic world more generally. In a similar fashion today, according to some leading economists, Third World developing countries ‘lack’ the minimal institutional systems necessary for the unfolding of a market economy. ¶ The theory of ‘lack’ and the rhetoric of the rule of law have justified aggressive interventions from Western countries into non-Western ones. The policy of corporatization and open markets, supported today globally by the so-called Washington consensus3, was used by Western bankers and the business community in Latin America as the main vehicle to ‘open the veins’ of the continent—to borrow Eduardo Galeano’s metaphor4—with no solution of continuity between colonial and post-colonial times. Similar policy was used in Africa to facilitate the forced transfer of slaves to America, and today to facilitate the extraction of agricultural products, oil, minerals, ideas and cultural artefacts in the same countries. The policy of opening markets for free trade, used today in Afghanistan and Iraq, was used in China during the nineteenth century Opium War, in which free trade was interpreted as an obligation to buy drugs from British dealers. The policy of forcing local industries to compete on open markets was used by the British empire in Bengal, as it is today by the WTO in Asia, Africa, and Latin America. ¶ Foreign-imposed privatization laws that facilitate unconscionable bargains at the expense of the people have been vehicles of plunder, not of legality. In all these settings the tragic human suffering produced by such plunder is simply ignored. In this context law played a major role in legalizing such practices of powerful actors against the powerless.5 Yet, this use of power is scarcely explored in the study of Western law. ¶ The exportation of Western legal institutions from the West to the ‘rest’ has systematically been justified through the ideological use of the extremely politically strong and technically weak concept of ‘rule of law’. The notion of ‘rule of law’ is an extremely ambiguous one. Notwithstanding, within any public discussion its positive connotations have always been taken for granted. The dominant image of the rule of law is false both historically and in the present, because it does not fully acknowledge its dark side. The false representation starts from the idea that good law (which others ‘lack’) is autonomous, separate from society and its institutions, technical, non-political, non-distributive and reactive rather than proactive: more succinctly, a technological framework for an ‘efficient’ market. ¶ The rule of law has a bright and a dark side, with the latter progressively conquering new ground whenever the former is not empowered by a political soul. In the absence of such political life, the rule of law becomes a cold technology. Moreover, when large corporate actors dominate states (affected by a declining regulatory role), law becomes a product of the economy, and economy governs the law rather than being governed by it.

#### Reject their emphasis on Western-models of law in favor of a fundamental rethink of democracy from the bottom-up

Ugo Mattei 9, Professor at Hastings College of the Law & University of Turin; and Marco de Morpurgo, M.Sc. Candidate, International University College of Turin, LL.M. Candidate, Harvard Law School, 2009, “GLOBAL LAW & PLUNDER: THE DARK SIDE OF THE RULE OF LAW,” online: <http://works.bepress.com/cgi/viewcontent.cgi?article=1014&context=bocconi_legal_papers>

In the complex spectrum of global law, both throughout the era of colonialism and neo-liberal US-led Western imperialism within a pattern of continuity, the rule of law, together with the theory of ‘lack’ and other powerful rhetorical arguments, has been used in order to legitimize political interventions and plunder in the ‘emerging’ economies. The sacred concept of rule of law, whose positive connotations are ‘naturally’ assumed, has been portrayed as the embodiment of a professional and neutral technology, thus being capable of substituting the lack of democratic legitimacy of the institutions that are protagonist in the creation of global law. But its dark side has never been shown or discussed. An imperial rule of law is now a dominant layer for the worldwide legal systems. It is produced, in the interest of international capital, by a variety of institutions, both public and private, all sharing a gap in political legitimacy sometimes referred to as ‘democratic deficit’.31 At the same time, law has been constructively turned into a technology and a mere component of an economic system of capitalism, thus hiding its intrinsic political nature, and annulling the relevance of local political systems, now impotent in front of the dynamics of global law. The ‘dry technology’ of the rule of law penetrates worldwide legal systems without any political discussion at the local level, attempting to create the conditions for the development of market economies, often without success, and causing serious consequences for the less powerful. Under the technology of the rule of law, in its imperial version capable of producing plunder, the essence of the United States’ law hides. In the aftermath of World War II, there was a dramatic change in the pattern of Western legal development. Leading legal ideas once produced in continental Europe and exported through the colonized world are now, for the first time, produced in a common law jurisdiction: the United States. Clearly, the present world dominance of the United States has been economic, military and political first, and only recently legal, so that a ready explanation of legal hegemony can be found within a simple conception of law as a product of the economy.32 Furthermore, US law has been capable of expanding worldwide thanks to its prestige, the high level of professionalization of its attorneys and a series of procedural institutions, that benefit plaintiffs, that allow US courts to have a certain capacity to attract jurisdiction, while showing themselves as courts for universal justice.33 The general attitude of the United States has been a very ethnocentric one, and precisely that of showing itself as the guardian of a universal legality, which it is legitimized to export through its courts of law, scholarly production, military and political intervention, and through a set of US-centric international institutions. In recent times, in particular after September 11th 2001 and the declaration of the ‘war on terror’, the US rule of law has come under attack 34, so that once admiring crowds of lawyers and intellectuals worldwide are now beginning to look upon the United States as an uncivilized old West from the perspective of legal culture, despite the professional prestige still enjoyed by the giant New York law firms and by the US academy. Notwithstanding, there has been no decline in the rhetoric of the rule of law when it comes to foreign relations. Bringing democracy and the rule of law is still used as a justification to keep intruding in foreign affairs. The same can be said for the international financial institutions and their innumerable ‘development’ projects that come packaged with the prestigious wrapping of the rule of law. A rethinking of the very idea of global law is necessary and it must derive from a revaluation of the local dimension, which is currently ignored by the neo-liberal model of development. The production of global law should change its direction, and follow a bottom-up approach, rather than a top-down one, thus being sensitive to the local particularities and complexities. Western spectacular ideas of democracy and the rule of law should be rethought. On this planet, resources are scarce, but there would be more than enough for all to live well. Nobody would admire and respect someone who, at a lunch buffet for seven, ate 90 percent of the food, leaving the other guests to share an amount insufficient for one. In a world history of capitalism in which the rule of law has reproduced this precise ‘buffet’ arrangement on the large scale, admiring the instruments used to secure such an unfair arrangement seems indeed paradoxical. People have to be free to build their own economies. There is nothing inevitable about the present arrangements and their dominant and taken-for granted certainties. Indeed, it may be that the present legal and political hegemonies suffer from lack: the lack of world culture and of global political realism.

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#### Debt ceiling will be raised now but it’s not certain --- Obama’s ironclad political capital is forcing the GOP to give in

Brian Beutler 10/3/13, “Republicans finally confronting reality: They’re trapped!,” Salon <http://www.salon.com/2013/10/03/republicans_finally_confronting_reality_theyre_trapped/>

After struggling for weeks and weeks in stages one through four, Republicans are finally entering the final stage of grief over the death of their belief that President Obama would begin offering concessions in exchange for an increase in the debt limit.¶ The catalyzing event appears to have been an hour-plus-long meeting between Obama and congressional leaders at the White House on Wednesday. Senior administration officials say that if the meeting accomplished only one thing it was to convey to Republican leaders the extent of Obama’s determination not to negotiate with them over the budget until after they fund the government and increase the debt limit. These officials say his will here is stronger than at any time since he decided to press ahead with healthcare reform after Scott Brown ended the Democrats’ Senate supermajority in 2010.¶ There’s evidence that it sunk in.¶ First, there’s this hot mic moment in which Senate Minority Leader Mitch McConnell tells Sen. Rand Paul, R-Ky., that the president’s position is ironclad.¶ Then we learn that House Speaker John Boehner has told at least one House Republican privately what he and McConnell have hinted at publicly for months, which is that they won’t execute their debt limit hostage. Boehner specifically said, according to a New York Times report, and obliquely confirmed by a House GOP aide, that he would increase the debt limit before defaulting even if he lost more than half his conference on a vote.¶ None of this is to say that Republicans have “folded” exactly, but they’ve pulled the curtain back before the stage has been fully set for the final act, and revealed who’s being fitted with the red dye packet.

#### Reducing war powers will end Obama’s credibility with Congress --- cause stronger GOP pushback on the debt ceiling

Seeking Alpha 9/10/13 (“Syria Could Upend Debt Ceiling Fight”, <http://seekingalpha.com/article/1684082-syria-could-upend-debt-ceiling-fight>)

Unless President Obama can totally change a reluctant public's perception of another Middle-Eastern conflict, it seems unlikely that he can get 218 votes in the House, though he can probably still squeak out 60 votes in the Senate. This defeat would be totally unprecedented as a President has never lost a military authorization vote in American history. To forbid the Commander-in-Chief of his primary power renders him all but impotent. At this point, a rebuff from the House is a 67%-75% probability.¶ I reach this probability by looking within the whip count. I assume the 164 declared "no" votes will stay in the "no" column. To get to 218, Obama needs to win over 193 of the 244 undecided, a gargantuan task. Within the "no" column, there are 137 Republicans. Under a best case scenario, Boehner could corral 50 "yes" votes, which would require Obama to pick up 168 of the 200 Democrats, 84%. Many of these Democrats rode to power because of their opposition to Iraq, which makes it difficult for them to support military conflict. The only way to generate near unanimity among the undecided Democrats is if they choose to support the President (recognizing the political ramifications of a defeat) despite personal misgivings. The idea that all undecided Democrats can be convinced of this argument is relatively slim, especially as there are few votes to lose. In the best case scenario, the House could reach 223-225 votes, barely enough to get it through. Under the worst case, there are only 150 votes. Given the lopsided nature of the breakdown, the chance of House passage is about one in four.¶ While a failure in the House would put action against Syria in limbo, I have felt that the market has overstated the impact of a strike there, which would be limited in nature. Rather, investors should focus on the profound ripple through the power structure in Washington, which would greatly impact impending battles over spending and the debt ceiling.¶ Currently, the government loses spending authority on September 30 while it hits the debt ceiling by the middle of October. Markets have generally felt that Washington will once again strike a last-minute deal and avert total catastrophe. Failure in the Syrian vote could change this. For the Republicans to beat Obama on a President's strength (foreign military action), they will likely be emboldened that they can beat him on domestic spending issues.¶ Until now, consensus has been that the two sides would compromise to fund the government at sequester levels while passing a $1 trillion stand-alone debt ceiling increase. However, the right wing of Boehner's caucus has been pushing for more, including another $1 trillion in spending cuts, defunding of Obamacare, and a one year delay of the individual mandate. Already, Conservative PACs have begun airing advertisements, urging a debt ceiling fight over Obamacare. With the President rendered hapless on Syria, they will become even more vocal about their hardline resolution, setting us up for a showdown that will rival 2011's debt ceiling fight.¶ I currently believe the two sides will pass a short-term continuing resolution to keep the government open, and then the GOP will wage a massive fight over the debt ceiling. While Obama will be weakened, he will be unwilling to undermine his major achievement, his healthcare law. In all likelihood, both sides will dig in their respective trenches, unwilling to strike a deal, essentially in a game of chicken. If the House blocks Syrian action, it will take America as close to a default as it did in 2011. Based on the market action then, we can expect massive volatility in the final days of the showdown with the Dow falling 500 points in one session in 2011.¶ As markets panicked over the potential for a U.S. default, we saw a massive risk-off trade, moving from equities into Treasuries. I think there is a significant chance we see something similar this late September into October. The Syrian vote has major implications on the power of Obama and the far-right when it comes to their willingness to fight over the debt ceiling. If the Syrian resolution fails, the debt ceiling fight will be even worse, which will send equities lower by upwards of 10%. Investors must be prepared for this "black swan" event.¶ Looking back to August 2011, stocks that performed the best were dividend paying, less-cyclical companies like Verizon (VZ), Wal-Mart (WMT), Coca-Cola (KO) and McDonald's (MCD) while high beta names like Netflix (NFLX) and Boeing (BA) were crushed. Investors also flocked into treasuries despite default risk while dumping lower quality bonds as spreads widened. The flight to safety helped treasuries despite U.S. government issues. I think we are likely to see a similar move this time.¶ Assuming there is a Syrian "no" vote, I would begin to roll back my long exposure in the stock market and reallocate funds into treasuries as I believe yields could drop back towards 2.50%. Within the stock market, I think the less-cyclical names should outperform, making utilities and consumer staples more attractive. For more tactical traders, I would consider buying puts against the S&P 500 and look toward shorting higher-beta and defense stocks like Boeing and Lockheed Martin (LMT). I also think lower quality bonds would suffer as spreads widen, making funds like JNK vulnerable. Conversely, gold (GLD) should benefit from the fear trade.¶ I would also like to address the potential that Congress does not vote down the Syrian resolution. First, news has broken that Russia has proposed Syria turn over its chemical stockpile. If Syria were to agree (Syria said it was willing to consider), the U.S. would not have to strike, canceling the congressional vote. The proposal can be found here. I strongly believe this is a delaying tactic rather than a serious effort. In 2005, Libya began to turn over chemical weapons; it has yet to complete the hand-off. Removing and destroying chemical weapons is an exceptionally challenging and dangerous task that would take years, not weeks, making this deal seem unrealistic, especially because a cease-fire would be required around all chemical facilities. The idea that a cease-fire could be maintained for months, essentially allowing Assad to stay in office, is hard to take seriously. I believe this is a delaying tactic, and Congress will have to vote within the next two weeks.¶ The final possibility is that Democrats back their President and barely ram the Syria resolution through. I think the extreme risk of a full-blown debt stand-off to dissipate. However, Boehner has promised a strong fight over the debt limit that the market has largely ignored. I do believe the fight would still be worse than the market anticipates but not outright disastrous. As such, I would not initiate short positions, but I would trim some longs and move into less cyclical stocks as the risk would still be the debt ceiling fight leading to some drama not no drama.¶ Remember, in politics everything is connected. Syria is not a stand-alone issue. Its resolution will impact the power structure in Washington. A failed vote in Congress is likely to make the debt ceiling fight even worse, spooking markets, and threatening default on U.S. obligations unless another last minute deal can be struck.

#### Debt ceiling collapses the global economy --- fast timeframe and no resiliency

Adam Davidson 9/10/13, economy columnist for The New York Times, co-founder of Planet Money, NPR’s team of economics reporters, “Our Debt to Society,” NYT, http://www.nytimes.com/2013/09/15/magazine/our-debt-to-society.html?pagewanted=all&\_r=0

If the debt ceiling isn’t lifted again this fall, some serious financial decisions will have to be made. Perhaps the government can skimp on its foreign aid or furlough all of NASA, but eventually the big-ticket items, like Social Security and Medicare, will have to be cut. At some point, the government won’t be able to pay interest on its bonds and will enter what’s known as sovereign default, the ultimate national financial disaster achieved by countries like Zimbabwe, Ecuador and Argentina (and now Greece). In the case of the United States, though, it won’t be an isolated national crisis. If the American government can’t stand behind the dollar, the world’s benchmark currency, then the global financial system will very likely enter a new era in which there is much less trade and much less economic growth. It would be, by most accounts, the largest self-imposed financial disaster in history.¶ Nearly everyone involved predicts that someone will blink before this disaster occurs. Yet a small number of House Republicans (one political analyst told me it’s no more than 20) appear willing to see what happens if the debt ceiling isn’t raised — at least for a bit. This could be used as leverage to force Democrats to drastically cut government spending and eliminate President Obama’s signature health-care-reform plan. In fact, Representative Tom Price, a Georgia Republican, told me that the whole problem could be avoided if the president agreed to drastically cut spending and lower taxes. Still, it is hard to put this act of game theory into historic context. Plenty of countries — and some cities, like Detroit — have defaulted on their financial obligations, but only because their governments ran out of money to pay their bills. No wealthy country has ever voluntarily decided — in the middle of an economic recovery, no less — to default. And there’s certainly no record of that happening to the country that controls the global reserve currency.¶ Like many, I assumed a self-imposed U.S. debt crisis might unfold like most involuntary ones. If the debt ceiling isn’t raised by X-Day, I figured, the world’s investors would begin to see America as an unstable investment and rush to sell their Treasury bonds. The U.S. government, desperate to hold on to investment, would then raise interest rates far higher, hurtling up rates on credit cards, student loans, mortgages and corporate borrowing — which would effectively put a clamp on all trade and spending. The U.S. economy would collapse far worse than anything we’ve seen in the past several years.¶ Instead, Robert Auwaerter, head of bond investing for Vanguard, the world’s largest mutual-fund company, told me that the collapse might be more insidious. “You know what happens when the market gets upset?” he said. “There’s a flight to quality. Investors buy Treasury bonds. It’s a bit perverse.” In other words, if the U.S. comes within shouting distance of a default (which Auwaerter is confident won’t happen), the world’s investors — absent a safer alternative, given the recent fates of the euro and the yen — might actually buy even more Treasury bonds. Indeed, interest rates would fall and the bond markets would soar.¶ While this possibility might not sound so bad, it’s really far more damaging than the apocalyptic one I imagined. Rather than resulting in a sudden crisis, failure to raise the debt ceiling would lead to a slow bleed. Scott Mather, head of the global portfolio at Pimco, the world’s largest private bond fund, explained that while governments and institutions might go on a U.S.-bond buying frenzy in the wake of a debt-ceiling panic, they would eventually recognize that the U.S. government was not going through an odd, temporary bit of insanity. They would eventually conclude that it had become permanently less reliable. Mather imagines institutional investors and governments turning to a basket of currencies, putting their savings in a mix of U.S., European, Canadian, Australian and Japanese bonds. Over the course of decades, the U.S. would lose its unique role in the global economy.¶ The U.S. benefits enormously from its status as global reserve currency and safe haven. Our interest and mortgage rates are lower; companies are able to borrow money to finance their new products more cheaply. As a result, there is much more economic activity and more wealth in America than there would be otherwise. If that status erodes, the U.S. economy’s peaks will be lower and recessions deeper; future generations will have fewer job opportunities and suffer more when the economy falters. And, Mather points out, no other country would benefit from America’s diminished status. When you make the base risk-free asset more risky, the entire global economy becomes riskier and costlier.

#### Economic collapse causes global nuclear war

Cesare Merlini 11, nonresident senior fellow at the Center on the United States and Europe and chairman of the Board of Trustees of the Italian Institute for International Affairs, May 2011, “A Post-Secular World?”, Survival, Vol. 53, No. 2

Two neatly opposed scenarios for the future of the world order illustrate the range of possibilities, albeit at the risk of oversimplification. The first scenario entails the premature crumbling of the post-Westphalian system. One or more of the acute tensions apparent today evolves into an open and traditional conflict between states, perhaps even involving the use of nuclear weapons. The crisis might be triggered by a collapse of the global economic and financial system, the vulnerability of which we have just experienced, and the prospect of a second Great Depression, with consequences for peace and democracy similar to those of the first. Whatever the trigger, the unlimited exercise of national sovereignty, exclusive self-interest and rejection of outside interference would self-interest and rejection of outside interference would likely be amplified, emptying, perhaps entirely, the half-full glass of multilateralism, including the UN and the European Union. Many of the more likely conflicts, such as between Israel and Iran or India and Pakistan, have potential religious dimensions. Short of war, tensions such as those related to immigration might become unbearable. Familiar issues of creed and identity could be exacerbated. One way or another, the secular rational approach would be sidestepped by a return to theocratic absolutes, competing or converging with secular absolutes such as unbridled nationalism**.**

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#### Court will uphold treaty power in Bond now but it’s close.

Greve 2013

Michael S., professor at George Mason University School of Law, Straight Up, With Multiple Twists: Bond v. United States, January 21 2013, http://www.libertylawsite.org/2013/01/21/straight-up-with-multiple-twists-bond-v-united-states/

In truth, you don’t have to read Missouri so broadly. The treaty at issue dealt with things that cross international and national borders. There was no daylight between the treaty and the implementing legislation. And the state’s federalism argument was, as Holmes noted, a “thin reed.” There, in a nutshell, you have “proper” bounds of the treaty power. (For more on this, see the exchange between Rick Pildes, Nick Rosenkranz and Ilya Somin on the volokhconspiracy.) Having articulated those bounds, you could then say—as the Bond cert petition argues—that at the very least, courts should read treaties and implementing statutes to avoid constitutional doubts. The exemption for “peaceful” uses indicates that Congress intended to combat the spread of chemical weapons and materials for war-like purposes, as opposed to arming criminal prosecutors with yet another all-purpose club. The argument is more difficult than one might think. The government’s ready reply is that you can’t use a constitutional avoidance canon to create doubt where none exists. Holland isn’t really an issue here because Congress didn’t do anything that it could not also do under the Commerce Clause. Congress in its infinite wisdom decided that it needed a closed and complete regulatory system, just as it does for purposes of, say, the Controlled Substances Act. Under that statute, the plants on your window sill are fair game for the feds, see Raich. Well then: so is the stuff under your kitchen sink. No point in speculating about the outcome. This much, one can say with a tolerable degree of confidence: The justices know this case. Four justices on one side or the other voted to grant because they want to get to the grand themes of Missouri, and they would not have done so if they weren’t reasonably sure of a fifth vote on the merits. The difficulty of obtaining at least an implicit “fifth” precommitment is to my mind the readiest explanation for the multiple relists. (If someone has a better guess, let’s hear it.) If that’s right, the briefing and argument task is to shake or hold that vote, however it cuts. One more point of near-certainty: whichever way the case goes, what the justices say along the way will shape the contours of treaty law and its constitutional boundaries for many, many years to come.

#### Ruling on war powers is controversial, causes political retaliation, and trades off with other cases

Devins and Fitts 97 (Neal, Ernest W. Goodrich Professor of Law and Lecturer in Government – College of William and Mary, and Michael A., Robert G. Fuller, Jr. Professor of Law – University of Pennsylvania, “The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations,” Georgetown Law Journal, November, 86 Geo. L.J. 351, Lexis)

In contrast, the Supreme Court has good reason to steer clear of these cases. Concerns of interbranch harmony matter more to a Court whose influence and reputation do not hinge on the resolution of separation of powers and administrative law disputes. For example**,** to maximize its power to speak the last word on individual rights disputes**,** the Court may find it advantageous to trade off to the elected branches the power to sort out foreign affairs, war powers, and other structural matters. n67 Beyond the Court's particularized interest in individual [\*364] rights, the Supreme Court is far more likely than lower courts to take social and political forces into account. Acknowledging that it can neither appropriate funds nor command the military, the Court recognizes that its power lies "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary." n68 As psychologists Tom Tyler and Gregory Mitchell observed, the Court seems to believe that "public acceptance of the Court's role as interpreter of the Constitution -- that is, the public belief in the Court's institutional legitimacy -- enhances public acceptance of controversial Court decisions." n69 Throwing itself into the middle of disputes between disappointed lawmakers and either the Congress or the White House opens the Court up to political retaliation and, as such, is a gambit the Court is disinclined to take. n70 The Court in Raines was well aware of these high stakes, acknowledging the "risk[s]" to its "public esteem" by "improperly and unnecessarily" participating in political battles over the separation of powers. n71

#### Court capital is finite – controversial rulings trade-off

Young 99 – Ernest A. Young, Assistant Professor at the University of Texas School of Law, 1999, “ARTICLE: State Sovereign Immunity and the Future of Federalism,” Supreme Court Review, 1999 Sup. Ct. Rev. 1, p. lexis

1. The opportunity cost of immunity rulings. The first reason, and the simplest, is that the Court has limited political capital. n261 As Dean Choper has argued, "the federal judiciary's ability to persuade the populace and public leaders that it is right and they are wrong is determined by the number and frequency of its attempts [\*59] to do so, the felt importance of the policies it disapproves, and the perceived substantive correctness of its decisions." n262 There is thus likely to be, at some point, a limit on the Court's ability to continue striking down federal statutes in the name of states' rights. n263 To the extent that this limit exists, then the Court's extended adventure in aggressive enforcement of state sovereign immunity will trade off with its ability to develop a meaningful jurisprudence of process or power federalism. If protecting state authority to regulate private conduct is the key to a viable state/federal balance, then a considered reaffirmation, explanation, or extension of Lopez may do more good than another expansion of Seminole Tribe.

"Political capital," of course, is a pretty vague concept. It might be that the Court's ability to enforce federalism limits is more like muscles than money: it atrophies unless it is exercised regularly. n264 The National League of Cities story arguably illustrates this phenomenon, in that the Court's failure to apply the doctrine to check federal power in a series of subsequent cases may have helped lead to the outright rejection of the doctrine in Garcia. n265 The important point, however, is that the Justices who matter most on these issues tend to think in terms of limited capital and worry about judicial actions that may draw down the reserves. n266 Political capital [\*60] is thus likely to function as an internal constraint on the Court's willingness repeatedly to confront Congress.

#### Court capital is key – upholding Congress’s treaty powers is controversial

Consovoy 13 (William S., Attorney and Counsel of Record, “BRIEF AMICUS CURIAE OF THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF PETITIONER,” in Bond v. The United States of America, 5-13, <http://www.judicialnetwork.com/wp-content/uploads/2013/05/12-158-tsac.pdf>)

Of course, Congress has a constitutional role too. Treaty ratiﬁcation requires approval by a supermajority of the Senate. U.S. Const. art. II, § 2. Yet the Senate’s role does not alter the treaty power’s executive character. The treaty power is part of “the executive power” vested in the President. The Treaty Clause did not create that power; it constrained it by granting the Senate a procedural check against presidential excess. If Congress has a greater role in the treaty realm, it must derive from the “Power … To make all Laws which shall be necessary and proper for carrying into Execution … all other Powers vested by this Constitution in the Government of the United States … .” U.S. Const. art. I, § 8, cl. 18. But Congress’s reliance on the Necessary and Proper Clause is controversial, see Nicholas Quinn Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867 (2005), as it could vastly expand the substantive reach of the treaty power to include Article I subjects or provide Congress an avenue for implementing non-self-executing treaties, or both, or neither. The Court should avoid deciding these difﬁcult constitutional issues if it is appropriate to do so.

#### Even a narrow ruling for Bond collapses global arms control on chemical, biological and nuclear weapons

Trapp et al 13

Ralf Trapp served as a member of the German delegation to the Organisation for the Prohibition of Chemical Weapons, Professor Julian Robinson is now retired from the University of Sussex, Thomas Graham Jr. served as Special Representative of the President for Arms Control, Non-Proliferation and Disarmament, Graham S. Pearson is a Visiting Professor of International Security in the Division of Peace Studies of the University of Bradford. Guy Roberts was the Deputy Assistant Secretary General for Weapons of Mass Destruction Policy for the North Atlantic Treaty Organization, Amy E. Smithson, PhD, is a Senior Fellow at the James Martin Center for Nonproliferation Studies, David A. Koplow served as Special Counsel for Arms Control to the General Counsel of the U.S. Department of Defense, Barry Kellman is Director of the International Weapons Control Center at DePaul University College of Law, David P. Fidler is the James Louis Calamaras Professor of Law at the Indiana University, BRIEF OF AMICI CURIAE CHEMICAL WEAPONS CONVENTION NEGOTIATORS AND EXPERTS IN SUPPORT OF RESPONDENT Bond V. United States <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/Amicus-Brief1.pdf>

Finally, Congress recognized that national and international consistency in CWC implementing legislation had signiﬁcant law enforcement beneﬁts for the United States. S. Exec. Rep. No. 104-33, at 210-11. The Senate Report underscored that the CWC implementing legislation “contains the clearest, most comprehensive and internationally recognized deﬁ nition of a chemical weapon available,” which would facilitate early detection, prosecution and prevention, help with obtaining search warrants, and raise public awareness. Id. Reliance on the priorities of individual state legislators, law enforcement ofﬁ cers and prosecutors, who were not attuned to the challenges of implementing an effective regime abolishing chemical weapons, would make it impossible for the United States to take a coordinated approach to the national— and international—problem of preventing the diversion and misuse of dangerous chemicals by non-state actors. Uniform national legislation, backed up by national law enforcement, was considered essential. Although Bond suggests that local law enforcement should have sufﬁ ced, local police were unwilling in this case itself to devote resources to the complaints of Bond’s victim. Bond was caught only when the federal authorities became involved. U.S. Br. 5–6. Other states parties to the Convention with federal systems of government have implemented the Convention through national legislation, including Australia, Canada, Germany, Mexico, Switzerland and others.20 Requiring the United States to rely on the laws of the 50 states would have made it extremely difﬁ cult for the United States to negotiate and ratify the CWC, would make it impossible as a practical matter for the United States to comply fully with the CWC, and would severely hobble the ability of the United States to exert diplomatic power and inﬂ uence in order to secure uniform global implementation and compliance with the CWC. Judicially created limitations on the United States’ ability to implement the CWC could also adversely affect other arms control treaties, including those related to biological and nuclear weapons, that mandate adoption of domestic legislation to subject individual conduct to penal measures.21

#### Global arms control solves extinction

Müller 00 (Harold, Director of the Peace Research Institute-Frankfurt and Professor of International Relations at Goethe University, “Compliance Politics: A Critical Analysis of Multilateral Arms Control Treaty Enforcement”, The Nonproliferation Review, 7(2), Summer)

In this author's view,3 at least four distinct missions continue to make arms control, disarmament, and nonproliferation agreements useful, even indispensable parts of a stable and reliable world security structure: • As long as the risk of great power rivalry and competition exists—and it exists today—constructing barriers against a degeneration of this competition into major violence remains a pivotal task of global security policy. Things may be more complicated than during the bipolar age since asymmetries loom larger and more than one pair of competing major powers may exist. With overlapping rivalries among these powers, arms races are likely to be interconnected, and the stability of any one pair of rivals might be affected negatively by developments in other dyads. Because of this greater risk of instability, the increased political complexity of the post-bipolar world calls for more rather than less arms control. For these competitive relationships, stability or stabilization remains a key goal, and effectively verified agreements can contribute much to establish such stability. • Arms control also has a role to play in securing regional stability. At the regional level, arms control agreements can create balances of forces that reassure regional powers that their basic security is certain, and help build confidence in the basically non-aggressive policies of neighbors. Over time, a web of interlocking agreements may even create enough of a sense of security and confidence to overcome past confrontations and enable transitions towards more cooperative relationships. • At the global level, arms limitation or prohibition agreements, notably in the field of weapons of mass destruction, are needed to ban existential dangers for **global stability, ecological safety**, and maybe the **very survival of human life on earth**. In an age of increasing interdependence and ensuing complex networks that support the satisfaction of basic needs, international cooperation is needed to secure the smooth working of these networks. Arms control can create underlying conditions of security and stability that reduce distrust and enable countries to commit themselves to far-reaching cooperation in other sectors without perceiving undesirable risks to their national security. Global agreements also affect regional balances and help, if successful, to reduce the chances that regional conflicts will escalate. Under opportune circumstances, the normative frameworks that they enshrine may engender a feeling of community and shared security interests that help reduce the general level of conflict and assist in ushering in new relations of global cooperation.\

### 1NC

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

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

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

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

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

#### Nuclear terrorism is feasible---high risk of theft and attacks escalate

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Hundreds of scientific papers and reports have been published on nuclear terrorism. International conferences have been held on this threat with participation of Russian organizations, including IMEMO and the Institute of U.S. and Canadian Studies. Recommendations on how to combat the threat have been issued by the International Luxembourg Forum on Preventing Nuclear Catastrophe, Pugwash Conferences on Science and World Affairs, Russian-American Elbe Group, and other organizations. The UN General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism in 2005 and cooperation among intelligence services of leading states in this sphere is developing.¶ At the same time, these efforts fall short for a number of reasons, partly because various acts of nuclear terrorism are possible. Dispersal of radioactive material by detonation of conventional explosives (“dirty bombs”) is a method that is most accessible for terrorists. With the wide spread of radioactive sources, raw materials for such attacks have become much more accessible than weapons-useable nuclear material or nuclear weapons. The use of “dirty bombs” will not cause many immediate casualties, but it will result into long-term radioactive contamination, contributing to the spread of panic and socio-economic destabilization.¶ Severe **consequences can be caused by sabotaging nuclear power plants, research reactors, and radioactive materials storage facilities. Large cities are especially vulnerable to such attacks. A large city may host dozens of research reactors with a nuclear power plant or a couple of spent nuclear fuel storage facilities and dozens of large radioactive materials storage facilities located nearby.** The past few years have seen significant efforts made to enhance organizational and physical aspects of security at facilities, especially at nuclear power plants. Efforts have also been made to improve security culture. But these efforts do not preclude the possibility that well-trained terrorists may be able to penetrate nuclear facilities.¶ Some estimates show that sabotage of a research reactor in a metropolis may expose hundreds of thousands to high doses of radiation. A formidable part of the city would become uninhabitable for a long time.¶ Of all the scenarios, it is building an improvised nuclear device by terrorists that poses the maximum risk. **There are no engineering problems that cannot be solved if terrorists decide to build a simple “gun-type” nuclear device.** Information on the design of such devices, as well as implosion-type devices, is available in the public domain. It is the acquisition of weapons-grade uranium that presents the sole serious obstacle. Despite numerous preventive measures taken, we cannot rule out the possibility that such materials can be bought on the black market. Theft of weapons-grade uranium is also possible. Research reactor fuel is considered to be particularly vulnerable to theft, as it is scattered at sites in dozens of countries. There are about 100 research reactors in the world that run on weapons-grade uranium fuel, according to the International Atomic Energy Agency (IAEA).¶ A terrorist “gun-type” uranium bomb can have a yield of least 10-15 kt, which is comparable to the yield of the bomb dropped on Hiroshima. The explosion of such a bomb in a modern metropolis can kill and wound hundreds of thousands and cause serious economic damage. There will also be long-term sociopsychological and political consequences.¶ The vast majority of states have introduced unprecedented security and surveillance measures at transportation and other large-scale public facilities after the terrorist attacks in the United States, Great Britain, Italy, and other countries. These measures have proved burdensome for the countries’ populations, but the public has accepted them as necessary. A nuclear terrorist attack will make the public accept further measures meant to enhance control even if these measures significantly restrict the democratic liberties they are accustomed to. Authoritarian states could be expected to adopt even more restrictive measures.¶ If a nuclear terrorist act occurs, nations will delegate tens of thousands of their secret services’ best personnel to investigate and attribute the attack. Radical Islamist groups are among those capable of such an act. We can imagine what would happen if they do so, given the anti-Muslim sentiments and resentment that conventional terrorist attacks by Islamists have generated in developed democratic countries. Mass deportation of the non-indigenous population and severe sanctions would follow such an attack in what will cause **violent protests in the Muslim world**. **Series of armed clashing terrorist attacks may follow**. The prediction that Samuel Huntington has made in his book “The Clash of Civilizations and the Remaking of World Order” may come true. Huntington’s book clearly demonstrates that it is not Islamic extremists that are the cause of the Western world’s problems. Rather there is a deep, intractable conflict that is rooted in the fault lines that run between Islam and Christianity. This is especially dangerous for Russia because these fault lines run across its territory. To sum it up, the political leadership of Russia has every reason to revise its list of factors that could undermine strategic stability.  BMD does not deserve to be even last on that list because its effectiveness in repelling massive missile strikes will be extremely low. BMD systems can prove useful only if deployed to defend against launches of individual ballistic missiles or groups of such missiles. Prioritization of other destabilizing factors—that could affect global and regional stability—merits a separate study or studies. But even without them I can conclude that nuclear terrorism should be placed on top of the list. The threat of nuclear terrorism is real, and a successful nuclear terrorist attack would lead to a radical transformation of the global order.  All of the threats on the revised list must become a subject of thorough studies by experts. States need to work hard to forge a common understanding of these threats and develop a strategy to combat them.

#### Nuke terror causes extinction---equivalent to full-scale nuclear war

Owen B. Toon 7, chair of the Department of Atmospheric and Oceanic Sciences at CU-Boulder, et al., April 19, 2007, “Atmospheric effects and societal consequences of regional scale nuclear conflicts and acts of individual nuclear terrorism,” online: http://climate.envsci.rutgers.edu/pdf/acp-7-1973-2007.pdf

To an increasing extent, people are congregating in the world’s great urban centers, creating megacities with populations exceeding 10 million individuals. At the same time, advanced technology has designed nuclear explosives of such small size they can be easily transported in a car, small plane or boat to the heart of a city. We demonstrate here that a single detonation in the 15 kiloton range can produce urban fatalities approaching one million in some cases, and casualties exceeding one million. Thousands of small weapons still exist in the arsenals of the U.S. and Russia, and there are at least six other countries with substantial nuclear weapons inventories. In all, thirty-three countries control sufficient amounts of highly enriched uranium or plutonium to assemble nuclear explosives. A conflict between any of these countries involving 50-100 weapons with yields of 15 kt has the potential to create fatalities rivaling those of the Second World War. Moreover, even a single surface nuclear explosion, or an air burst in rainy conditions, in a city center is likely to cause the entire metropolitan area to be abandoned at least for decades owing to infrastructure damage and radioactive contamination. As the aftermath of hurricane Katrina in Louisiana suggests, the economic consequences of even a localized nuclear catastrophe would most likely have severe national and international economic consequences. Striking effects result even from relatively small nuclear attacks because low yield detonations are most effective against city centers where business and social activity as well as population are concentrated. Rogue nations and terrorists would be most likely to strike there. Accordingly, an organized attack on the U.S. by a small nuclear state, or terrorists supported by such a state, could generate casualties comparable to those once predicted for a full-scale nuclear “counterforce” exchange in a superpower conflict. Remarkably, the estimated quantities of smoke generated by attacks totaling about one megaton of nuclear explosives could lead to significant global climate perturbations (Robock et al., 2007). While we did not extend our casualty and damage predictions to include potential medical, social or economic impacts following the initial explosions, such analyses have been performed in the past for large-scale nuclear war scenarios (Harwell and Hutchinson, 1985). Such a study should be carried out as well for the present scenarios and physical outcomes.

#### Judicial deference is stable now but the plan’s precedent collapses it

John O’Connor 7, Former officer in the Marine Corp and Judge Advocate; JD, U Maryland Law School. Statistics and the Military Deference Doctrine: a Response to Professor Lichtman, 66 Md. L. Rev. 668, Lexis

As I have written elsewhere, one of the most important aspects of the military deference doctrine, and one that many commentators misunderstand,176 is that the military deference doctrine is not a venerable doctrine that has existed since the early days of the Republic. 177 Indeed, a review of the Court’s military deference jurisprudence could lead one to the conclusion that the doctrine was more or less the brainchild of Chief Justice Rehnquist, who wrote virtually every important military deference decision that the Court has issued.178 While notions of stare decisis may militate against a retreat from the military deference doctrine by the Court, the fact remains that the doctrine is one of fairly recent vintage, which was developed and perpetuated mainly through judicial opinions written by a Justice who is no longer on the Court. Moreover, while stare decisis is a nice concept in the abstract, that doctrine did not prevent the Court from radically changing its approach to constitutional challenges to military practices twice before. Therefore, **it is not out of the realm of possibility that the military deference doctrine could recede in importance** with personnel changes on the Court. This could occur through an express overruling of the doctrine, through decisions narrowing the doctrine’s application, or through a moresubtle process whereby the Court continues to pay lip service to its need to defer to political branch judgments but nevertheless **accords little or no actual deference to the policy determinations of Congress and the President.**

But early indications from the Roberts Court, with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O’Connor, respectively, provide reason to believe that the military deference doctrine will continue to be a robust feature of the Court’s military jurisprudence, at least in the near term. In FAIR, the first “military” case decided by the Roberts Court, the Court upheld the Solomon Amendment against a constitutional challenge and, in so doing, began its constitutional analysis by extolling the virtues of the military deference doctrine when Congress legislates pursuant to its constitutional power to raise and support armies:

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Congress’ power in this area “is broad and sweeping,” and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in Rostker, “judicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies.179

While it is always dangerous to draw conclusions from a single case, all participating members of the Court—Justice Alito did not participate—joined Chief Justice Roberts’s opinion, which invoked the military deference doctrine as its first step in constitutional analysis once the Court resolved what the statute in fact provided.180 Moreover, this is a case that could have been decided on a number of grounds, such as a pure Spending Clause or First Amendment basis, 181 without invoking the military deference doctrine, and the Court’s prominent reliance on the military deference doctrine to support its decision suggests that there is no move afoot to eradicate the doctrine, explicitly or through subtle narrowing. For his part, Justice Alito noted prominently in his confirmation hearing that he had joined a conservative Princeton alumni group because, as an alumnus who attended Princeton on an ROTC scholarship, he was unhappy that the school had decided to abolish the campus ROTC program.182 While, again, predicting judicial attitudes based on personal history is always a risky proposition, Justice Alito’s background makes him seem like an unlikely candidate to take up the sword against the military deference doctrine, particularly when every other member of the Court joined an opinion applying it in FAIR.

V. Conclusion

This Article is by no means an attempt to catalogue every military deference case decided by the Court, or to discuss every nuance in its application. n183 It is important, however, that the doctrine be understood, both in terms of the facts surrounding its development and the limited scope of the doctrine as evidenced by the framework in which it is applied. Professor Lichtman's article on the military deference doctrine is thought provoking in that it challenges the orthodoxy by which the military deference doctrine is viewed - through the lens of time rather than through the lens of subject matter irrespective of time. n184 Ultimately, however, I have come to the conclusion that Professor Lichtman's analysis of the military deference doctrine is flawed in several important respects, all of which result in a fundamental misunderstanding [\*706] of the doctrine. In my estimation, the principal flaws in Professor Lichtman's analysis include: focusing on "win-loss" records rather than on the analytical framework in which those wins and losses occurred; failing to perceive that the military deference doctrine should - and does - apply only to a narrow category of "military" cases; incorrectly casting the military deference doctrine as a longstanding and relatively stable doctrine that has only subtly evolved since the early twentieth century; determining that subject matter, rather than timing, is the proper variable around which to organize an analysis of military deference decisions; and concluding that the military deference doctrine does not - and should not - apply to statutes and regulations burdening civilians instead of military personnel.

The military deference doctrine is, at once, both historically immature and limited, yet potent when applicable. After the disruption that occurred in the course of the Court's prior rejection of the doctrine of noninterference, the Court ultimately landed on the military deference doctrine as an appropriate analytical framework, where applicable, in the mid-1970s, and the Court has largely remained in the same place with its military jurisprudence ever since. The Court's rejection of its noninterference policy beginning in the mid-1950s likely came about as a result of what the Court perceived as overreaching by the political branches in subjecting persons - military and civilian - to courts-martial in a willy-nilly fashion. If the military deference doctrine were to recede in importance in the future, it would be a good bet that it happens because some collection of Supreme Court Justices perceives that Congress and the President are overreaching in the exercise of their constitutional powers to raise armies and regulate the armed forces. At present, though, there is no sign that such an upheaval is anywhere on the horizon.

### 1NC

#### The United States federal judiciary should interpret the current statutory framework governing indefinite detention to avoid allowing the continued detention of individuals in military detention who have won their habeas corpus hearing, as such a reading would raise serious Constitutional problems.

#### Competes---the plan orders the release of detainees that have won their hearings---the CP interprets the framework governing detention as being incompatible with continued detention of those detainees, but does not order their release---it leaves a solution to the Constitutional question up to the political branches.

#### Solves the Case:

#### Avoidance doctrine rulings set a precedent and spill over---immigration rulings prove

Hooper 2 – Sanford G. Hooper, Associate of Lightfoot, Franklin & White, LLC, Summer 2002, “NOTE: Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in Zadvydas v. Davis,” Washington & Lee Law Review, 59 Wash & Lee L. Rev. 975, p. lexis

In Zadvydas, the Court relied in part on the fact that it had imposed constitutional limitations on plenary power in the past to reject the Government's argument that the Attorney General had the statutory authority to hold deportable aliens indefinitely in the interests of protecting the community. n117 The Court found that, notwithstanding Congress's plenary power, the Attorney General's reading of the provision that an alien "may be detained beyond [\*994] the removal period" indefinitely would cause serious constitutional problems, given the Fifth Amendment's Due Process Clause. n118 Specifically, the Court worried that indefinite detention of an alien might amount to a deprivation of liberty without due process of law. n119 Fearful of the statute's potential to violate the Due Process Clause, the Court felt that its duty was to avoid any interpretation allowing for indefinite detention. n120

The use of the avoidance doctrine in Zadvydas is consistent with Dean Kloppenberg's thesis that the Court relies most heavily on this doctrine when "socially sensitive cases" are at stake. n121 Kloppenberg's contention is particularly salient in light of society's heightened interest in immigration matters since September 11. n122 But the complaints and frustrations leveled at the avoidance doctrine by scholars such as Kloppenberg are inapplicable to Zadvydas. One of Kloppenberg's chief criticisms of the avoidance doctrine is that courts' reliance on it hampers the development of constitutional law. n123 Kloppenberg further claims that courts use the avoidance doctrine to issue "narrow or piecemeal rulings" that hamper the development of law in cases dealing with race and gender discrimination. n124

With respect to Zadvydas, one can imagine that proponents of clear constitutional development would like to know whether the Constitution permits the Attorney General to hold indefinitely an alien whom the INS has ordered deported - a question that bears on an alien's liberty interest and, indirectly, on whether the government may abridge certain rights on account of alienage. However, the mere fact that the Zadvydas Court applied the avoidance doctrine, and thereby did not reach that question, does not mean [\*995] that the Court's holding will not contribute to the development of constitutional law regarding alien rights. Professor Sunstein has noted that "narrow and unambitious rulings have been central to the elaboration of constitutional rights. The modern law of free speech was built not in a year or even in a decade, but through a century of mostly incremental decisions." n125 In effect, Sunstein seems to be telling proponents of an aggressive Court to "be patient."

Sunstein's point is particularly applicable in the area of immigration law. Though it did not involve the avoidance doctrine, the well-known case Yick Wo v. Hopkins n126 supports the contention that a narrow ruling on constitutional rights can be a springboard for elaboration of other constitutional rights. n127 Yick Wo involved a facially-neutral ordinance requiring those operating wooden laundries in the city of San Francisco to obtain permits. n128 The board issuing the permits denied permits to all two hundred Chinese applicants while it granted permits to all non-Chinese applicants but one. n129 The Court found that despite their status as subjects of the Emperor of China, the laundry operators nonetheless deserved the protections of the Fourteenth Amendment's Equal Protection Clause. n130 Accordingly, the Court held that the discrimination against the aliens was illegal. n131

The holding in Yick Wo that aliens were due the protections of the Fourteenth Amendment was arguably a narrow decision because the Court might [\*996] have gone much further by stating that aliens were entitled to the full panoply of constitutional protections. But Yick Wo's narrow holding was nevertheless significant because it signaled that aliens were to some extent under the constitutional umbrella. n132 In subsequent years, the Court built on the basic precept of Yick Wo to expand the constitutional rights of aliens. To wit, in Wong Wing v. United States, n133 ten years after Yick Wo, the Court gave aliens the full range of Fifth and Sixth Amendment protections. n134 In the 1931 case of Russian Volunteer Fleet v. United States, n135 the Court relied on Yick Wo to apply the Fifth Amendment's Takings Clause to aliens. n136 [\*997]

This line of decisions following Yick Wo that protected the rights of aliens did not spring from constitutional claims in admission and expulsion cases. n137 Rather, they involved the fundamental rights of aliens and individuals generally. n138 One scholar has argued that because Yick Wo and its progeny dealt with fundamental human rights rather than narrower admission and expulsion decisions, these cases helped lead to an eventual attenuation of the plenary power doctrine in immigration law. n139 Furthermore, Yick Wo and its progeny prove Professor Sunstein's underlying point that modest rulings in constitutional law build on one another and together can have a powerful cumulative effect. n140

Net-Beneficial:

#### Avoidance rulings don’t link to any Courts disads---they build political support and avoid controversy

Hooper 2 – Sanford G. Hooper, Associate of Lightfoot, Franklin & White, LLC, Summer 2002, “NOTE: Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in Zadvydas v. Davis,” Washington & Lee Law Review, 59 Wash & Lee L. Rev. 975, p. lexis

The following subpart analyzes the discussion of immigration policy in Congress, American society, and the Department of Justice following the September 11, 2001 terrorist attacks and will demonstrate how the Zadvydas Court's decision to avoid a constitutional question resulted in a surprisingly rich, more robust debate of immigration policy. One advantage of the avoidance doctrine is that it allows judges, who are sensitive to the limitations of their own constitutional authority, to refrain from issuing a broad ruling on the nation n141 or from trenching on the province of the political branches of government. n142 [\*998] In some cases, courts simply will not want to act, even when they have the authority, if the ruling is likely to spark an adverse public reaction. n143 Although Zadvydas was decided several months before the September 11, 2001 terrorist attacks, immigration policy was nevertheless critically important to American society before the attacks, given the role of immigrants in the high-tech, agriculture, and service sectors of the economy. n144 It is not implausible to think that even prior to September 11, the Court preferred that Congress carry the burden of deciding important immigration issues, such as the government's power to detain deportable aliens indefinitely.

The Court's decision in Zadvydas was unquestionably a significant victory for immigrant rights in the United States. n145 While a declaration by the Court that the detention statute was unconstitutional would have been even more cause for celebration, the Court's decision to avoid the constitutional question was an acknowledgment of immigrant rights under the Fifth Amendment Due Process Clause. n146 Although this was not the first time that the Court acknowledged that immigrants enjoy constitutional protections, n147 it was eerily [\*999] prophetic for the Court to invoke this principle just months prior to the September 11 terrorist attacks and the vigorous debate over immigrant rights that has followed. Indeed, the Zadvydas Court's statements on immigrants' rights have not gone unnoticed in lower courts in cases heard since September 11. n148 Nor was the Court's mention of terrorists as a possible exception to its holding lost on those who favor stricter immigration policy. n149 In short, the Court's decision to avoid the constitutional question in Zadvydas informed, but did not decide, the subsequent immigrant-rights debate - a proposition supported by the fact that both immigration proponents and national security hawks rely on the Zadvydas opinion to support their respective positions. n150 This type of cautious approach to socially- sensitive issues is exactly the role that the Court plays so masterfully, according to Sunstein, n151 and so frustratingly, according to Kloppenberg. n152

Furthermore, the Zadvydas Court's decision to abstain from determining whether indefinite detention of aliens violated due process vindicated one of the avoidance doctrine's underlying purposes by allowing the Court to decide only the case at hand and not to decide the law for the future. n153 Given that [\*1000] immigration policy soon became the central focus for lawmakers and for much of the American public after September 11, n154 the narrow decision in Zadvydas likely helped to create an atmosphere for a freer and fuller discussion of immigrant rights because the Court had kept open important questions relating to the extent of such rights. n155

Sunstein has noted two major advantages of judicial minimalism, both of which arguably are on display in Zadvydas. One advantage, writes Sunstein, is that "certain forms of minimalism are democracy promoting, not only in the sense that they leave issues open for democratic deliberation, but also and more fundamentally in the sense that they promote reason-giving and ensure that certain important decisions are made by democratically accountable actors." n156 Justice Breyer may have referenced these same concerns in Zadvydas when he noted that "if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms." n157

Sunstein suggests that a second justification for taking the minimalist path exists "when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided." n158 In Zadvydas, the complex constitutional issue at stake was the liberty interest of aliens, the scope of which the Court clearly struggled with throughout the opinion, stating that "the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary." n159 The Court continued, "[w]e believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether . . . the Constitution permits detention that is indefinite." n160 The Court's refusal to provide a definitive rule about the scope of an alien's interest proved to be a harbinger of American society's own uncertainty about immigrants and the extent of their rights, as the debate following the terrorist attacks of September 11 aptly displayed. n161

#### The CP avoids the court capital disad---it preserves institutional capital while solving the case

Hasen 9 – Richard L. Hasen, the William H. Harmon Distinguished Professor of Law, Loyola Law School, Los Angeles, 2009, “Constitutional Avoidance and Anti-Avoidance By the Roberts Court,” The Supreme Court Review, 2009 Sup. Ct. Rev. 181, p. lexis

Second, the canon may provide "a low salience mechanism for giving effect to what Larry Sager calls 'underenforced constitutional norms.'" n28 As Eskridge explains: "While a Court that seeks to avoid judicial activism will be reluctant to invalidate federal statutes in close cases, it might seek other ways to protect constitutional norms. One way is through canons of statutory construction." n29 Avoidance in effect remands the statute to Congress. The canon "makes it harder for Congress to enact constitutionally questionable statutes and forces legislatures to reflect and deliberate before plunging into constitutionally sensitive issues." n30

Third, the canon may help "courts conserve their institutional capital," n31 what I term the "political legitimacy" rationale. Phil Frickey has defended the early Warren Court avoidance decisions (many involving government action against Communists n32 ) on legitimacy grounds, seeing avoidance as allowing "the [Warren] Court to slow down a political process that is moving too hastily and overriding human rights, but without incurring the full wrath of a political process that doesn't like to be thwarted." n33

## Adv 1---Legitimacy

### Alt Cause---Drones

#### Drones destroy U.S. credibility---outweighs detention

Stephen Holmes 13, the Walter E. Meyer Professor of Law, New York University School of Law, July 2013, “What’s in it for Obama?,” The London Review of Books, <http://www.lrb.co.uk/v35/n14/stephen-holmes/whats-in-it-for-obama>

On the basis of undisclosed evidence, evaluated in unspecified procedures by rotating personnel with heterogeneous backgrounds, the US is continuing to kill those it classifies as suspected terrorists in Somalia, Yemen and Pakistan. It has certainly been eliminating militants who had nothing to do with 9/11, including local insurgents fighting local battles who, while posing no realistic threat to America, had allied themselves opportunistically with international anti-American jihadists. By following the latter wherever they go, the US is allowing ragtag militants to impose ever new fronts in its secret aerial war. Mistakes are made and can’t be hidden, at least not from local populations. Nor can the resentment of surrounding communities be easily assuaged. This is because, even when it finds its target, the US is killing not those who are demonstrably guilty of widely acknowledged crimes but rather those who, it is predicted, will commit crimes in the future. Of course, the civilian populations in the countries where these strikes take place will never accept the hunches of CIA or Pentagon futurologists. And so they will never accept American claims about the justice of Obama’s slimmed-down war on terror, but instead claim the right of self-defence, and this would be true even if drone operators could become as error-free as Brennan once claimed they already are. But of course collateral damage and mistaken-identity strikes will continue. They are inevitable accompaniments of all warfare. And they, too, along with intentional killings that are never publicly justified, will communicate resoundingly to the world that the arbitrary and unpredictable killing of innocent Muslims falls within America’s commodious concept of a just war.

The rage such strikes incite will be all the greater if onlookers believe, as seems likely, that the killing they observe makes relatively little contribution to the safety of Americans. Indeed, this is already happening, which is the reason that the drone, whatever its moral superiority to land armies and heavy weaponry, has replaced Guantánamo as the incendiary symbol of America’s indecent callousness towards the world’s Muslims. As Bush was the Guantánamo president, so Obama is the drone president. This switch, whatever Obama hoped, represents a worsening not an improvement of America’s image in the world.

### AT: Legitimacy

#### Legitimacy’s inevitable and not key to heg

Brooks and Wohlforth, 9 (Stephen Brooks and William Wohlforth, both are professors of Government at Dartmouth, “Reshaping the world order: how Washington should reform international institutions,” Foreign Affairs, March-April)

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

### AT: Hegemony

#### Unipolarity causes policy failure---they can’t access any impact

Charles L. Glaser 11, professor in the Elliott School of International Affairs and the Department of Political Science at the George Washington University and the director of the Elliott School’s Institute for Security and Conﬂict Studies, June 2011, “Why unipolarity doesn’t matter (much),” Cambridge Review of International Affairs, Vol. 24, No. 2, p. 135-147

A still different type of argument holds that unipolar powers tend to adopt expanded interests and associated goals that unipolarity then enables them to achieve. To the extent that these goals are actually in the unipole’s true interest, unipolarity is good for the unipole. In broad terms, this argument follows the claim that states’ interests and goals grow with their power. 19¶ These expanded goals can be attributed to three different types of factors. 20 The ﬁrst is a permissive structure, which allows the state to pursue more ambitious goals. The state’s interests do not change, but its increased ability to pursue them results in a redeﬁnition of its goals. A state could have goals that were previously unachievable at acceptable cost; by lowering the costs, unipolarity places these goals within reach, enabling the state to make itself better off. A unipole’s desire for a higher degree of security can be an example of this type of expanded goal, reﬂecting the means that it can wield. Second, the state can acquire new interests, which are generated by the unipole’s greater territorial and institutional reach. For example, a state that controls more territory may face new threats and, as a result, conclude that it needs to control still more territory, acquire still more power, and/or restructure international institutions to further protect its interests. Third, the unipole’s goals can be inﬂuenced by what is commonly described as human nature and by psychology. A unipolar state will be inclined to lose track of how secure it is and consequently pursue inappropriate policies that are designed to increase its security but turn out to be too costly and/or to have a high probability of backﬁring. One variant of this type of argument expects unipolar powers to conclude that they need to spread their type of governance or political ideology to be secure. These dangers can be reinforced by a tendency for a unipolar power to see its new interests, which are optional, as necessary ones.¶ The ﬁrst two types of expanded interests and goals can make the unipole better off. The question here is whether the interests the United States might ﬁnd within its reach due to its unipolar position are very valuable. With respect to security, the answer is ‘no’. For the reasons summarized above, the United States can be very secure in bipolarity, and unipolarity is important only in an extreme and unlikely case. Other US goals, for example, spreading democracy and free markets, do not depend on unipolarity, at least not its military dimension. Instead, whether these liberal systems spread will depend most heavily on their own effectiveness. Regarding the down side, there does not appear to be an overwhelming reason that the United States cannot avoid the dangers of unipolar overreach. The Bush administration certainly proved itself vulnerable to these dangers and the United States is continuing to pay for its ﬂawed judgments. Arguably, strands of overreach can be traced back to the Clinton administration’s emphasis on democratic enlargement, although the means that it chose were much more in line with US interests. 21 And the Obama administration’s decision to escalate the war in Afghanistan may well be an example of striving for too much security. Nevertheless, none of the basic arguments about unipolarity explain why these errors are unavoidable. The overreach claim is more an observation about the past than a well-supported prediction about the future. We do not have strong reasons for concluding that the United States will be unable to beneﬁt from analyses of its grand strategy options, learning to both appreciate how very secure it is and at the same time to respect the limits of its power.¶ In sum, then, under current conditions, unipolarity does little to enable the United States to increase its security. Given the limited beneﬁts of unipolarity and the not insigniﬁcant dangers of unipolar overreach, the United States will have to choose its policies wisely if it is going to be better off in a unipolar world than a bipolar one.

#### Retrenchment doesn’t cause conflict, lashout, or draw-in---all their studies are wrong

Paul K. MacDonald 11, Assistant Professor of Political Science at Williams College, and Joseph M. Parent, Assistant Professor of Political Science at the University of Miami, Spring 2011, “Graceful Decline?: The Surprising Success of Great Power Retrenchment,” International Security, Vol. 35, No. 4, p. 7-44

How do great powers respond to acute decline? The erosion of the relative power of the United States has scholars and policymakers reexamining this question. The central issue is whether prompt retrenchment is desirable or probable. Some pessimists counsel that retrenchment is a dangerous policy, because it shows weakness and invites attack. Robert Kagan, for example, warns, "A reduction in defense spending . . . would unnerve American allies and undercut efforts to gain greater cooperation. There is already a sense around the world, fed by irresponsible pundits here at home, that the United States is in terminal decline. Many fear that the economic crisis will cause the United States to pull back from overseas commitments. The announcement of a defense cutback would be taken by the world as evidence that the American retreat has begun."1 Robert Kaplan likewise argues, "Husbanding our power in an effort to slow America's decline in a post-Iraq and post-Afghanistan world would mean avoiding debilitating land entanglements and focusing instead on being more of an offshore balancer. . . . While this may be in America's interest, the very signaling of such an aloof intention may encourage regional bullies. . . . [L]essening our engagement with the world would have devastating consequences for humanity. The disruptions we witness today are but a taste of what is to come should our country flinch from its international responsibilities."2 The consequences of these views are clear: retrenchment should be avoided and forward defenses maintained into the indefinite future.3¶ Other observers advocate retrenchment policies, but they are pessimistic [End Page 7] about their prospects.4 Christopher Layne, for instance, predicts, "Even as the globe is being turned upside down by material factors, the foreign policies of individual states are shaped by the ideas leaders hold about their own nations' identity and place in world politics. More than most, America's foreign policy is the product of such ideas, and U.S. foreign-policy elites have constructed their own myths of empire to justify the United States' hegemonic role."5 Stephen Walt likewise advocates greater restraint in U.S. grand strategy, but cautions, "The United States . . . remains a remarkably immature great power, one whose rhetoric is frequently at odds with its conduct and one that tends to treat the management of foreign affairs largely as an adjunct to domestic politics. . . . [S]eemingly secure behind its nuclear deterrent and oceanic moats, and possessing unmatched economic and military power, the United States allowed its foreign policy to be distorted by partisan sniping, hijacked by foreign lobbyists and narrow domestic special interests, blinded by lofty but unrealistic rhetoric, and held hostage by irresponsible and xenophobic members of Congress."6 Although retrenchment is a preferable policy, these arguments suggest that great powers often cling to unprofitable foreign commitments for parochial reasons of national culture or domestic politics.7¶ These arguments have grim implications for contemporary international politics. With the rise of new powers, such as China, the international pecking order will be in increasing flux in the coming decades.8 Yet, if the pessimists are correct, politicians and interests groups in the United States will be unwilling or unable to realign resources with overseas commitments. Perceptions of weakness and declining U.S. credibility will encourage policymakers to hold on to burdensome overseas commitments, despite their high costs in blood and treasure.9 Policymakers in Washington will struggle to retire from profitless military engagements and restrain ballooning current accounts and budget deficits.10 For some observers, the wars in Iraq and Afghanistan represent the ill-advised last gasps of a declining hegemon seeking to bolster its plummeting position.11¶ In this article, we question the logic and evidence of the retrenchment pessimists. To date there has been neither a comprehensive study of great power retrenchment nor a study that lays out the case for retrenchment as a practical or probable policy. This article fills these gaps by systematically examining the relationship between acute relative decline and the responses of great powers. We examine eighteen cases of acute relative decline since 1870 and advance three main arguments.¶ First, we challenge the retrenchment pessimists' claim that domestic or international constraints inhibit the ability of declining great powers to retrench. In fact, when states fall in the hierarchy of great powers, peaceful retrenchment is the most common response, even over short time spans. Based on the empirical record, we find that great powers retrenched in no less than eleven and no more than fifteen of the eighteen cases, a range of 61-83 percent. When international conditions demand it, states renounce risky ties, increase reliance on allies or adversaries, draw down their military obligations, and impose adjustments on domestic populations.¶ Second, we find that the magnitude of relative decline helps explain the extent of great power retrenchment. Following the dictates of neorealist theory, great powers retrench for the same reason they expand: the rigors of great power politics compel them to do so.12 Retrenchment is by no means easy, but [End Page 9] necessity is the mother of invention, and declining great powers face powerful incentives to contract their interests in a prompt and proportionate manner. Knowing only a state's rate of relative economic decline explains its corresponding degree of retrenchment in as much as 61 percent of the cases we examined.¶ Third, we argue that the rate of decline helps explain what forms great power retrenchment will take. How fast great powers fall contributes to whether these retrenching states will internally reform, seek new allies or rely more heavily on old ones, and make diplomatic overtures to enemies. Further, our analysis suggests that great powers facing acute decline are less likely to initiate or escalate militarized interstate disputes. Faced with diminishing resources, great powers moderate their foreign policy ambitions and offer concessions in areas of lesser strategic value. Contrary to the pessimistic conclusions of critics, retrenchment neither requires aggression nor invites predation. Great powers are able to rebalance their commitments through compromise, rather than conflict. In these ways, states respond to penury the same way they do to plenty: they seek to adopt policies that maximize security given available means. Far from being a hazardous policy, retrenchment can be successful. States that retrench often regain their position in the hierarchy of great powers. Of the fifteen great powers that adopted retrenchment in response to acute relative decline, 40 percent managed to recover their ordinal rank. In contrast, none of the declining powers that failed to retrench recovered their relative position.

## Adv 2---Democracy

### 1NC No Impact

#### Friendly democracies can decipher between good and bad US norms, and authoritarian nations don’t care either way

John O. McGinnis 7, Professor of Law, Northwestern University School of Law. \*\* Ilya Somin \*\* Assistant Professor of Law, George Mason University School of Law. GLOBAL CONSTITUTIONALISM: GLOBAL INFLUENCE ON U.S. JURISPRUDENCE: Should International Law Be Part of Our Law? 59 Stan. L. Rev. 1175

The second benefit to foreigners of distinctive U.S. legal norms is information. The costs and benefits of our norms will be visible for all to see. n268 Particularly in an era of increased empirical social science testing, over time we will be able to analyze and identify the effects of differences in norms between the United States and other nations. n269 Such diversity benefits foreigners as foreign nations can decide to adopt our good norms and avoid our bad ones.

The only noteworthy counterargument is the claim that U.S. norms will have more harmful effects than those of raw international law, yet other nations will still copy them. But both parts of this proposition seem doubtful. First, U.S. law emerges from a democratic process that creates a likelihood that it will cause less harm than rules that emerge from the nondemocratic processes [\*1235] that create international law. Second, other democratic nations can use their own political processes to screen out American norms that might cause harm if copied.

Of course, many nations remain authoritarian. n270 But our norms are not likely to have much influence on their choice of norms. Authoritarian states are likely to select norms that serve the interests of those in power, regardless of the norms we adopt. It is true that sometimes they might cite our norms as cover for their decisions. But the crucial word here is "cover." They would have adopted the same rules, anyway. The cover may bamboozle some and thus be counted a cost. But this would seem marginal compared to the harm of allowing raw international law to trump domestic law.

### AT: Uighurs

#### Uighur terrorism unlikely---it’s Chinese propaganda

Joshua Foust 10, former senior intelligence analyst for the U.S. military, “Terrorism in China?” http://www.pbs.org/wnet/need-to-know/opinion/terrorism-in-china/3050/

In fairness to China, there are legitimate terrorist groups with ties to Xinjiang. One group, the East Turkestan Islamic Movement, is based in Waziristan, in Northwest Pakistan, and has stated its goal is the independence of East Turkestan (the Uighur name for Xinjiang), as well as the conversion of all of China to Islam. While the ETIM has been accused repeatedly of terrorism — and has been designated a Foreign Terrorist Organization by the UN and U.S. State Department, it is unclear how much terrorism they actually do. Dru Gladney, an expert on Uighur politics at the Pacific Basin Institute at Pomona College, has said few experts “had ever heard of” ETIM before China declared them a threat; similarly, Gladney noted that most information available on the group was traced back to Chinese sources, making “a real credibility gap” for gauging what threat they may pose.¶ China doesn’t help its case, either: they tar all Uighur-oriented groups with separatism and terrorism. One, the World Uighur Congress, is an international group of Uighur exiles and expatriates who advocate for non-violent opposition to Chinese rule (they allege Mao Zedong reneged on his promise to allow self-determination in the region when he formed the People’s Republic of China in 1950). China added the WUC to its list of known terrorist organizations in 2003 and accused its leadership of terrorism even though the government didn’t accuse them of doing anything besides protesting until 2009.

### AT: Asia War

#### Economic integration comparatively outweighs security concerns

Peter Drysdale ‘12, Editor of East Asia Forum, 5/28/12, “Asia’s economic and political interdependence,” www.eastasiaforum.org/2012/05/28/asias-economic-and-political-interdependence/

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Despite the political and diplomatic tensions, East Asia’s economy has prospered and economic relationships thrived. Only North Korea and Myanmar have remained apart from East Asia’s spectacular economic integration. Up to this point, they have been a major source of regional security anxieties, though it appears Myanmar is about to change course. The positive economic relationships have also come to dominate conflictual political relationships.¶ Asia’s economies were huge beneficiaries of the open trading system that was set in place in the post-war period. In the early stages of their economic transformation, open markets provided them with an outlet for simple manufactures produced by their large pools of relatively unskilled labour. Their growth was initially driven by labour-intensive exports and with rising incomes, higher rates of investment in human and physical capital have allowed progress up the value-add chain.¶ The open system had other benefits, strengthening bilateral economic relationships — built on increasing trade flows and greater levels of integration — and acting as ballast insensitive bilateral political and strategic relations. Growing regional economic interdependence has reinforced a more stable strategic and political environment in the region.¶ In this week’s lead essay Shiro Armstrong underlines the importance of the global trading framework not only in delivering large income gains from trade but also in improving political relations between China and Japan, two countries that have the third-biggest trading relationship in the world.¶ ‘Japan and China are often seen as adversaries’, Armstrong points out, ‘locked into bickering and an historically antagonistic relationship’. They may be neighbouring economic giants but they would appear to have a host of unresolved historical issues to deal with and a natural rivalry for regional and now global influence. ‘But the rivalry and historical baggage no longer dominates the China–Japan relationship today’, Armstrong argues. The huge economic relationship that has grown between the two countries over the past two decades has changed the tone of their political relationship since China embraced the global trading rules and norms, under which Japan has operated with American support since the Second World War. The ‘scale and depth of the economic relationship is reshaping their political relationship in ways that underline its cooperative more than its conflictual elements’, says Armstrong.¶¶ Nor is the China–Japan relationship a narrowly bilateral relationship. It underpins regional growth and prosperity and plays a major role in the East Asian economic interdependence and the regional production networks that have created it. The bilateral relationship is nestled in a complex set of links led by trade and investment throughout the region. Regional economic partners cannot view their relationships with Japan in isolation of their relationships with China. And Japan’s relationships with them are closely bound up with China. Japanese firms — once manufacturing powerhouses confined largely to Japan— now produce over 45 per cent of their electronics output and 33 per cent of all their manufacturing output offshore, a very large portion of that in China. Like most international brands, Sony, Panasonic and the Japanese big-name brand products are put together in China and elsewhere in Asia, and products made in China frequently come with a Japanese name.¶ Tensions will continue to arise from time to time between the two big neighbours — as they did around the maritime incident of 2010 — but what stands out is that stronger economic relationships have reinforced a more stable strategic and political environment in East Asia. The relative stability of the region and the lessening of political tensions that has accompanied regional economic integration have importantly been secured within the framework of global economic institutions that made the growing economic interdependence possible.

### AT: Africa Impact – Alt-Causes

#### Lots of alt-causes to African judicial independence

Brian Odhiambo, 1-31-2012, “On Judicial Independence in Africa,” Yale Undergraduate Law Review, http://yulr.org/on-judicial-independence-in-africa/

Given the disparity between the theoretical and practical aspects of the African judicial process, there is a dire need for a reconstruction of the judicial institution. Corruption of the judiciary is a function of several problems: a) Poor payment of judicial officers thus making them gullible to corruption. b) Lack of information by the populace of their rights within the judicial system c) Poor investigative work by state law enforcement agencies resulting in half-baked prosecutions often resolved by paying the judge for a verdict. d) Lack of a sufficient number of judges prompting individuals to pay in order to get a hearing Before Africa can boast an independent judiciary, these and other problems not directly related to the judiciary will have to be addressed. The independence of the judiciary is not only an end in itself, but also a tool to be used to discover the truth and do justice and promote political, social and economic progress.

### AT: Africa Impact – US Not Key Model

#### Africa models England for judicial independence not the US

Brian Odhiambo, 1-31-2012, “On Judicial Independence in Africa,” Yale Undergraduate Law Review, http://yulr.org/on-judicial-independence-in-africa/

In Africa, the question of judicial independence is often reflective of medieval England, from whose common law most of the African Commonwealth countries have derived their national legal systems. Justice, in England, was a royal prerogative, which the ruler carried out via appointed officials. Not only was separation of powers was non-existent, but also those who judged were puppets of the rulers. For a long time, post-colonial Africa has elicited similar traits where the heads of state have crippled the judiciary by placing their cronies in any critical judicial office in order to secure their position in office.

### AT: Africa

#### No Africa war or they can’t solve

Straus 12—professor of politics at the University of Wisconsin (Scott, WARS DO END! CHANGING PATTERNS OF POLITICAL VIOLENCE IN SUB-SAHARAN AFRICA, afraf.oxfordjournals.org/content/early/2012/03/01/afraf.ads015.full)

The principal finding is that in the twenty-first century both the volume and the character of civil wars have changed in significant ways.5 Civil wars are and have been the dominant form of warfare in Africa, but they have declined steeply in recent years, so that today there are half as many as in the 1990s. This change tracks global patterns of decline in warfare.6 While some students of African armed conflicts, such as Paul Williams, note the recent trend,7 it is fair to say that the change in the prevalence of civil wars is not recognized by most Africanists and generalists. Equally important but even less noted is that the character of warfare in Africa has changed. Today's wars are typically fought on the peripheries of states, and insurgents tend to be militarily weak and factionalized. The large wars that pitted major fighting forces against each other, in which insurgents threatened to capture a capital or to have enough power to secede, and in which insurgents held significant territory – from the Biafra secessionists in Nigeria, to UNITA in Angola, RENAMO in Mozambique, the TPLF in Ethiopia, the EPLF in Eritrea, the SPLM in Sudan, the NRM in Uganda and the RPF in Rwanda – are few and far between in contemporary sub-Saharan Africa. Somalia's Al-Shabab holds territory and represents a significant threat to the Somali federal transitional government, but given the 20-year void at the centre of Somalia the case is not representative. In April 2011, rebel forces in Côte d'Ivoire captured Abidjan, but they did so with external help and after incumbent Laurent Gbagbo, facing a phalanx of domestic, regional, and international opposition, tried to steal an election.8 More characteristic of the late 2000s and the early 2010s are the low-level insurgencies in Casamance (Senegal), the Ogaden (Ethiopia), the Caprivi strip (Namibia), northern Uganda (the Lord's Resistance Army), Cabinda (Angola), Nigeria (Boko Haram), Chad and the Central African Republic (various armed groups in the east), Sudan (Darfur), and South Sudan, as well as the insurgent-bandits in eastern Congo (a variety of armed actors, including Rwandan insurgents) and northern Mali (al-Qaeda in the Maghreb). Although these armed groups are in some cases capable of sowing terror and disruption, they tend to be small in size, internally divided, poorly structured and trained, and without access to heavy weapons.9 Several of today's rebel groups have strong transnational characteristics, that is, insurgents move fluidly between states. Few are at present a significant military threat to the governments they face or in a position to seize and hold large swaths of territory.

# 2NC

## CP

### OV

### Avoidance Canon CP---Solves the Case---2NC

#### The CP solves the case better than the plan:

#### 1) Precedent-Setting:

#### a) Courts under-enforce Constitutional norms---avoidance rulings create on-balance stronger precedent

Harvard Law Review 8 – Harvard Law Review, unsigned article, February 2008, “NOTE: THE CHARMING BETSY CANON, SEPARATION OF POWERS, AND CUSTOMARY INTERNATIONAL LAW,” 121 Harv. L. Rev. 1215, p. lexis

It is important to note that Judge Posner's "penumbra" criticism of the constitutional question canon is itself susceptible to criticism. According to Professor Alexander Bickel, instead of unjustifiably cabining congressional lawmaking, the constitutional avoidance canon reduces friction between the legislature and the judiciary. Professor Bickel reasons that unnecessary judicial discussions of constitutional matters - even in upholding a congressional statute - may affect other legislation and cast a prohibitory pall over the U.S. Code. n38 Preventing such discussion therefore avoids interbranch conflict and preserves the separation of powers. Professor Cass Sunstein also finds value in the constitutional question canon, arguing that the canon compensates for the judiciary's underenforcement of some constitutional norms. n39 Because judicial nullification of statutes on constitutional grounds presents an antidemocratic problem, courts do not enforce some constitutional norms with the vigor necessary to fully vindicate them. Therefore, a canon that pushes statutes away from areas of constitutional doubt and seemingly expands the scope of constitutional [\*1223] prohibitions is actually bringing the law into greater conformity with the true contours of the Constitution. n40

#### b) Starting with avoidance rulings sets the key groundwork for acceptance of future overrules that expand judicial review in the area of the plan---it’s the only way the Court will perceive aggressive enforcement as legitimate

Hasen 9 – Richard L. Hasen, the William H. Harmon Distinguished Professor of Law, Loyola Law School, Los Angeles, 2009, “Constitutional Avoidance and Anti-Avoidance By the Roberts Court,” The Supreme Court Review, 2009 Sup. Ct. Rev. 181, p. lexis

Political calculus. The political calculus explanation is that the Court uses constitutional avoidance and similar doctrines (such as the use of "as-applied" constitutional challenges n201 ) to soften public and Congressional resistance to the Court's efforts to move the law in the Justices' preferred policy direction. n202 Like the political legitimacy argument, the political calculus argument too is one about the Court's legitimacy, but it is one that views the Court as strategically pursuing an agenda, rather than as fearfully anticipating a backlash. It advances a view of the Court, and of the [\*220] Chief Justice in particular, as sophisticated and calculating. A recent portrayal of Chief Justice Roberts in a critical New Yorker article by Jeffrey Toobin referred to the Chief as a "stealth hard liner." n203 The view also has echoes in Justice Scalia's lament in the WRTL II case that the Roberts-Alito "as applied" decision on BCRA section 203 was "faux judicial restraint." n204

Under this positive political theory explanation n205 of the Court's actions, the difference between NAMUDNO and Citizens United is simply one of timing. The Court had already laid the groundwork for a deregulatory campaign finance regime through its earlier campaign finance rulings which exhibited some of that faux judicial restraint: it is now ready to put a stake in the heart of the corporate spending limits, if not in Citizens United, then in another challenge soon to come. If that reading is correct, the Voting Rights Act's time of demise will come, and the public will come to expect it once the Court first raised constitutional doubts in NAMUDNO. The avoidance canon is just another doctrinal tool in the Court's arsenal to move constitutional law and policy in the Court's direction and at the Court's chosen speed.

Tom Goldstein seems to take this view of the Court, seeing the conservative majority using the avoidance doctrine and similar doctrines as laying the groundwork for subsequent overruling.

I am struck in particular by the opinions of the Chief Justice that seem to lay down markers that will be followed in later generations of cases. NAMUDNO details constitutional objections to Section 5 of the Voting Rights Act that seem ready-made for a later decision invalidating the statute if it is not amended. . . .

If I'm right about the direction of the case law, the Court's methodology is striking. It is reinforcing its own legitimacy with [\*221] opinions that later can be cited to demonstrate that it is not rapidly or radically changing the law. This approach may be in the starkest relief if next Term the Court cites its recent decision in Wisconsin Right to Life as precedent for concluding that McConnell v. FEC and Austin v. Michigan have been significantly undermined and should be overruled. The plurality and concurrence in Wisconsin Right to Life famously debated how aggressively the Court should go in overruling prior campaign finance precedent. The Chief Justice urged patience--not moving more quickly than required--and the wait may not have been long. n206

The political calculus explanation meshes particularly well with the peculiar nature of the NAMUDNO statutory decision. Ordinarily when Congress considers overriding a statutory interpretation decision of the Supreme Court, doing so will restore a popular law enacted by Congress (leaving open the possibility that the Court will later strike the law down on constitutional grounds). n207 Here, the situation is different: Congress is not going to consider overriding the Court's interpretation of the bailout provision in the Voting Rights Act; there is not much to gain by doing so (we do not know how many jurisdictions will now seek bailout that could not before) and an override could goad the Court into striking down section 5. Either Congress will do nothing--in which case the Court has laid the groundwork for invalidating section 5 in a future case--or the Congress will pass legislation watering down section 5's key provisions to please the conservatives on the Court. It is a win-win situation for a Court making strategic calculations to move the law toward its policy preferences.

#### 2) Judicial Strength:

#### a) The Court will inevitably be cautious and limited in enforcing the plan---but avoidance rulings increase judicial confidence in their own authority---solves better overall

Frickey 5 – Philip P. Frickey, the Richard W. Jennings Professor of Law at the University of California, Berkeley School of Law, March 2005, “ARTICLE: Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court,” California Law Review, 93 Calif. L. Rev. 397

Reconsider Yates as well. In retrospect, Harlan's opinion is an important way station of doctrinal development - a bridge from judicial deference to security concerns in cases like Schenck, n368 Abrams, n369 and Dennis n370 to judicial confidence in constructing a much more protective doctrinal [\*463] regime in Brandenburg. n371 Harlan wrote opaquely for a purpose: to provide a testing ground, leave open future possibilities, and attempt to avoid a congressional repudiation that would have stunted First Amendment law for much longer than the dozen years it took for Brandenburg to emerge.

Robert Post's provocative suggestion that "judicial authority might best be reconceived as a relationship of trust that courts forge with the American people" n372 is, in my judgment, a fitting description of what the avoidance cases in the early Warren Court were all about. If, as Post suggests, "constitutional law emerges from an ongoing dialectic between constitutional culture and the institutional practices of constitutional adjudication," n373 one important tool for those practices - as Frankfurter recognized, a rule of constitutional adjudication more than of statutory interpretation n374 - is the avoidance canon. It helped the Court bridge the public law and culture of the 1950s with the public law and culture of the 1960s. In retrospect, it gave public law a way of getting from Joe to Gene McCarthy.

3) Avoidance Rulings are Comparatively Better:

#### a) Err neg---avoidance rulings create net-stronger rights protections and link to zero disads

Slocum 7 – Brian G. Slocum, Assistant Professor of Law, Florida Coastal School of Law, Winter 2007, “COMMENT: CANONS, THE PLENARY POWER DOCTRINE, AND IMMIGRATION LAW,” Florida State University Law Review, 34 Fla. St. U.L. Rev. 363, p. lexis

Regardless of the theory used to defend the canons chosen by the Court, the careful application of canons by courts in immigration cases is part of the legitimate, appropriate, and historical use of canons by courts generally. n278 All of the canons discussed in this Article serve important functions in helping judges resolve statutory uncertainty in a way that promotes sound public policy and protects vulnerable aliens. The benefits of abandoning the guidance of well-established canons such as the immigration rule of lenity or the presumption against retroactivity on the ground that they are not useful in interpreting statutes are dubious, while the benefits of retaining such canons are numerous. n279 Moreover, changing canons would undermine, at least temporarily, the value and stability of canons as background rules guiding Congress and would create difficult issues such as whether the new canons should be applied retroactively to statutes passed before their creation. n280

The canons currently applied in immigration cases are not, of course, universally celebrated by scholars and courts. Some canons, particularly the avoidance canon, have been subjected to harsh criticism and calls for their abolishment. n281 Nevertheless, the beauty of any particular canon is a matter of taste. Whether one sees the canons currently applied in immigration cases as legitimate devices for courts to use when interpreting statutes, or as illegitimate usurpations of policymaking authority by courts, is a function of one's jurisprudential philosophy. One crucial point that cannot be debated, though, is that the Court approves of the use of the canons described in this Article and shows no signs of abandoning their use any time soon.

VII. Conclusion

Substantive canons of statutory interpretation occupy an important place in the law. In immigration cases, they are especially significant because they usually direct courts to interpret statutes in favor of aliens and have the potential, through the application of the [\*413] avoidance canon, of giving aliens as a whole greater rights, even if sometimes only temporarily, than would a decision based on constitutional grounds. Despite their importance, the role of canons in immigration law has largely been either ignored or impugned by the academy. Unfortunately, the role of canons will never receive the attention lavished on the plenary power doctrine because statutory decisions do not result in permanent rights for aliens. In addition, canons will always be the subject of criticism because they do not always reflect congressional intent and are both over- and underutilized by courts. Yet, considering the relative lack of constitutional rights afforded aliens, canons are especially important devices in protecting this vulnerable part of the population. When used properly, the application of canons in immigration cases adds predictability to the law and helps to promote important public values, a phenomenon sorely lacking elsewhere in immigration law.

### Avoidance Canon CP---Solves the Case---Precedent---2NC

Under-enforcement turns their precedent args---only the CP creates a sustainable legal norm and influences Congressional practice

Hasen 9 – Richard L. Hasen, the William H. Harmon Distinguished Professor of Law, Loyola Law School, Los Angeles, 2009, “Constitutional Avoidance and Anti-Avoidance By the Roberts Court,” The Supreme Court Review, 2009 Sup. Ct. Rev. 181, p. lexis

Second, the canon may provide "a low salience mechanism for giving effect to what Larry Sager calls 'underenforced constitutional norms.'" n28 As Eskridge explains: "While a Court that seeks to avoid judicial activism will be reluctant to invalidate federal statutes in close cases, it might seek other ways to protect constitutional norms. One way is through canons of statutory construction." n29 Avoidance in effect remands the statute to Congress. The canon "makes it harder for Congress to enact constitutionally questionable statutes and forces legislatures to reflect and deliberate before plunging into constitutionally sensitive issues." n30

### Avoidance Canon CP---Solves the Case---Influencing Congress---2NC

#### The CP’s ruling is perceived and internalized by Congress---that prevents unconstitutional legislation:

#### a) Political climate---avoidance rulings change the debate in Congress and make enactment of unconstitutional aid legislation legislation politically impossible---more so than the plan

Metzger 10 – Gillian E. Metzger, Professor of Law, Columbia Law School, March 2010, “ESSAY: ORDINARY ADMINISTRATIVE LAW AS CONSTITUTIONAL COMMON LAW,” Columbia Law Review, 110 Colum. L. Rev. 479, p. lexis

Even Fox acknowledged, moreover, that one likely alternative to requiring that agencies take constitutional concerns into account will be judicial enforcement of those concerns through the mechanism of the constitutional canons, in particular the canon of constitutional avoidance. n202 Much recent scholarship on the constitutional canons has argued that, despite their seemingly milder appearance, decisions applying the canons can be as intrusive on Congress - indeed, perhaps more so - as decisions holding statutes to be unconstitutional. n203 If these canons [\*532] are in fact doing any work, then they are yielding statutory interpretations different from the reading that would otherwise obtain. n204 The effect is to trump the political compromise that initially underlay enactment of the measure; worse, the courts' interpretations may change political dynamics in a way that precludes easy enactment of clarifying or reversing legislation by Congress. n205 Whether or not the formal possibility of congressional reenactment deserves more weight in the equation than these arguments allow, n206 it is hard to dispute that application of the canons can prove a substantial obstacle for Congress, given the difficulties involved in getting federal legislation enacted.

#### b) Rules of the road---avoidance decisions successfully set guidance rules for Congress to follow

Slocum 7 – Brian G. Slocum, Assistant Professor of Law, Florida Coastal School of Law, Winter 2007, “COMMENT: CANONS, THE PLENARY POWER DOCTRINE, AND IMMIGRATION LAW,” Florida State University Law Review, 34 Fla. St. U.L. Rev. 363, p. lexis

These second-best interpretations do not necessarily make the statutory decisions that apply canons unpredictable. If applied correctly and consistently, well-established canons can act as background rules that guide Congress by sending signals about how statutes will be interpreted. n97 The Court has endorsed this theory, stating in the immigration case McNary v. Haitian Refugee Center, Inc., n98 that "[i]t is presumable that Congress legislates with knowledge of our basic rules of statutory construction." n99

The recent history of habeas corpus jurisdiction in immigration cases is a good example of the background rules theory at work. In 1996, Congress passed AEDPA and IIRIRA, which made significant changes to the judicial review provisions of the Immigration and Nationality Act (INA). n100 The Court in INS v. St. Cyr applied the avoidance canon, the presumption in favor of judicial review of administrative action, and the "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," thereby rejecting the government's argument that Congress had clearly divested courts of jurisdiction under 28 U.S.C. § 2241 over habeas corpus actions filed by criminal aliens to challenge removal orders. n101

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### Avoidance Canon CP---Solves the Case---Judicial Independence---2NC

#### Comparative evidence---avoidance rulings signal a more independent judiciary than the plan

Frickey 5 – Philip P. Frickey, the Richard W. Jennings Professor of Law at the University of California, Berkeley School of Law, March 2005, “ARTICLE: Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court,” California Law Review, 93 Calif. L. Rev. 397

As this discussion suggests, some applications of the avoidance canon might be even more activist than judicial review. In effect, the canon creates a penumbra around the Constitution that dooms statutes raising serious constitutional questions to creative judicial rewriting, even though, if push came to shove, courts would presumably uphold the constitutionality of at least some of these laws. n295 In fact, in addition to Barenblatt and Cafeteria Workers, the Court's admonitions have sometimes proved merely hortatory, as in later cases when the Court upholds a statute against the same constitutional challenge avoided by the canon in an earlier case. n296

### Avoidance Canon CP---AT: Perm Do CP---General---2NC

#### b) This proves competition---the plan bans a current practice while the CP only sets up obstacles to it

Morrison 6 – Trevor W. Morrison, Associate Professor of Law, Cornell Law School, October 2006, “ARTICLE: CONSTITUTIONAL AVOIDANCE IN THE EXECUTIVE BRANCH,” Columbia Law Review, 106 Colum. L. Rev. 1189

Although the most common accounts of modern avoidance proceed along the lines of the judicial restraint theory discussed above, the judicial and scholarly literatures also provide an alternative account. n89 One of the most detailed elaborations of that account is found in Ernest Young's work on "resistance norms." n90 According to Professor Young, the avoidance canon should be viewed as "designed not to reflect what Congress might have wanted under particular conditions, but rather to give voice to certain normative values." n91 In any given case implicating the avoidance canon, those values "are simply those embodied in the underlying constitutional provisions that create the constitutional 'doubt.'" n92 When implemented by means of avoidance, those constitutional provisions do not dictate the invalidation of the legislation in the mode of conventional judicial review. Instead, they operate as resistance norms - constitutionally grounded "rules that raise obstacles to particular governmental actions without barring those actions entirely." n93

#### c) The CP explicitly precludes invalidating statutes

Kloppenberg 6 – Lisa A. Kloppenberg, Dean and Professor of Law, University of Dayton School of Law, Summer 2006, “SYMPOSIUM: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY: SEARCHING FOR THE RIGHT BALANCE: Does Avoiding Constitutional Questions Promote Judicial Independence?,” Case Western Reserve Law Review, 56 Case W. Res. 1031, p. lexis

In some circumstances, courts have used the canon to rewrite statutes to contravene fairly clear legislative intent, undercutting the law significantly without invalidating it. Courts essentially "remand" a controversial law to the legislature. The legislature may not have the time or political will to reconsider the issue. Thus, while the canon is advanced as a rich mechanism for dialogue between courts and legislature on constitutional issues, it is often used as a way of deciding constitutional issues on the merits without a full airing of the issue, without sufficient reasoned elaboration, and without purporting to rule on the merits at all.

### Avoidance Canon CP---AT: Perm Do Both---General---2NC

#### b) The CP functionally bans the plan---avoidance rulings require reading statutes to prevent their invalidation---the perm incoherently re-interprets the statute and then invalidates it, in contradiction of that new interpretation

Hooper 2 – Sanford G. Hooper, Associate of Lightfoot, Franklin & White, LLC, Summer 2002, “NOTE: Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in Zadvydas v. Davis,” Washington & Lee Law Review, 59 Wash & Lee L. Rev. 975, p. lexis

These measures raise important questions about how much deference courts should give Congress and the executive as they examine these and other post-September 11 legislative and regulatory provisions. In particular, what role will the constitutional avoidance doctrine play as courts confront the difficult task of interpreting new immigration statutes? Will courts heed Justice Kennedy's insistence that the political branches enjoy "primacy in foreign affairs" n15 and interpret the statutes in such a way as to respect the wishes of a government that is struggling to respond to a new threat? Or will the courts follow the direction of Justice Breyer's majority opinion in Zadvydas by "read[ing] significant limitations into other immigration statutes in order to avoid their constitutional invalidation"? n16

#### Doing both links to the net-benefits:

#### a) Inclusion of the plan destroys the CP’s ability to limit controversy and political backlash---means it links to every net-benefit

Geyh 6 - Charles Geyh, Professor of Law at Indiana University, 2006, When Courts and Congress Collide, p. 223-225

The restraint that Congress has traditionally exhibited toward the judiciary in most contexts has been reciprocated by the courts in three ways. First, the courts have developed myriad conflict-avoidance doctrines to sidestep controversies that could provoke congressional retaliation. Second, the courts have sometimes averted crises by acquiescing to congressional will in key cases when cycles or court-directed hostility have reached their peak. Third, the courts have traditionally exercised their powers of self-government in ways deferential to and solicitous of the desires of Congress.

If one looks only at the ways in which the third branch of government has acquiesced to the first, it suggests the possibility that the courts are not so much independent decision makers paying their respects to a coequal as they are victims paying tribute to an extortionist—an implication belied by studies revealing that courts do not routinely kowtow to congressional preferences.1 When, however, the judiciary's occasional genuflections to the legislature are reexamined in tandem with the evolution of independence norms in Congress, a more nuanced explanation emerges, in which the courts' occasional, short-term displays of deference, offered in a spirit of comity, have promoted long-term congressional acceptance of customary independence.

Conflict Avoidance Devices; The "Passive Virtues"

There is an extensive literature addressing the ways in which a motivated court can avoid deciding controversial cases that could provoke congressional ire. Professors John Ferejohn and Larry Kramer link that literature to the study of judicial dependence and independence. They set out to "chart the major lines of institutionalized judicial self-restraint," in support of their hypothesis that "if Congress and the executive have seldom exercised their power to impair the judiciary, . . . this may be because the judiciary has acted in such a way that Congress and the executive have seldom felt the need to do so."2 Courts have at their disposal a range of conflict-avoidance mechanisms that enable them to retreat from deciding cases that may be too contentious for their comfort. As described shortly, justiciability doctrines allow courts to dodge questions that are too abstract, that arc asked too soon or too late, or that are simply too "political"; rules of constitutional construction minimize the need for courts to reach constitutional questions that might require them to invalidate congressional enactments or executive branch actions; federalism-promoting doctrines ostensibly aimed at reducing federal court interference with state prerogatives also permit courts to avoid decisions that could prompt an angry response from a Congress solicitous of states' rights;' and the Supreme Court may simply manipulate its case agenda by denying petitions for certiorari that seek review of cases the Court regards as too volatile

### NB

Avoidance rulings preserve relations between the Court and Congress---prevents legislative backlash and Court stripping

Hooper 2 – Sanford G. Hooper, Associate of Lightfoot, Franklin & White, LLC, Summer 2002, “NOTE: Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in Zadvydas v. Davis,” Washington & Lee Law Review, 59 Wash & Lee L. Rev. 975, p. lexis

Indeed, far from stirring up conflict between Congress and the Supreme Court, the Zadvydas opinion seems to have set the stage for a dialogue between the two branches about immigration rights in the context of Congress's attempts to adopt antiterrorism legislation. Testimony submitted at congressional [\*1009] committee hearings on the government's detention policies routinely cited the Zadvydas Court's view that the due process rights afforded to immigrants - that ultimately caused the Court to invoke the avoidance canon to arrive at a statutory construction that was not violative of immigrants' due process rights - were the same as those afforded to regular citizens. n210 Some members of Congress appear to have noticed the Zadvydas Court's statements on immigrant rights. For instance, Senator John Edwards stated during a Senate floor debate that any legislation Congress adopted to fight terrorism should include due process protections for aliens detained because of national security threats. n211 That the legislation Congress ultimately passed was sensitive to aliens' due process rights n212 demonstrates that the Court's invocation of the avoidance doctrine to send an important message to Congress does not necessarily contribute to friction between the two branches. In fact, when Congress accepted the Court's statutory construction, greater comity argAuably resulted because Congress vindicated the Court's decision not to make an unnecessary constitutional ruling. n213 In effect, the Zadvydas decision served the separation of powers principle because the Court, by avoiding a constitutional showdown, [\*1010] was able to prod Congress into considering aliens' constitutional rights rather than invalidating the statute outright; this tactic left Congress's supremacy in legislative matters intact. n214

#### Court stripping turns every advantage

Andrew D. Martin 1, Prof of Political Science at Washington University 2001. Statuatory Battles and Constitutional Wars: Congress and the Supreme Court

But the large policy payoff in the constitutional cases. What does the ability of the President and Congress to attack through overrides or other means constitutional court decisions imply in terms of the cost of the justices bear? If an attack succeeds and the court does not back down, it effectively removes the court from the policy game and may seriously or, even irrevocably harm its reputation, credibility, and legitimacy. Indeed, such an attack would effectively remove the court from policy making, thus incurring an infinite cost. With no constitutional prescription for judicial review, this power is vulnerable, and would be severely damaged if congress and the president were effective in attack on the Court. But even if the attack is unsuccessful, the integrity of the court may be damaged, for the assault may compromise its ability to make future constitutional decisions and, thus, more long-lasting policy. One does not have to peer as far back as scott v. sandford to find examples; Bush v. Gore (2000, U.S.) may provide one. To be sure, the new President and Congress did not attack the decision, but other members of government did of course, unsuccessfully at least in terms of the ruling’s impact. Yet, there seems little doubt that the critics (not to mention the decision itself) caused some major damage to the reputation of the court, the effects of which the justices may feel in the not-so-distant future.

## Heg Adv

### Legitimacy Inevitable

#### No legitimacy impact

Rachman, 9 (Gideon, chief foreign affairs commentator at the Financial Times, “Obama and the limits of soft power,” June 1, FT,

http://www.ft.com/cms/s/0/e608b556-4ee0-11de-8c10-00144feabdc0.html#axzz2b85RSNek)

Barack Obama is a soft power president. But the world keeps asking him hard power questions. From North Korea to Guantánamo Bay, from Iran to Afghanistan, Mr Obama is confronting a range of vexing issues that cannot be charmed out of existence. The problem is epitomised by the US president’s trip to the Middle East this week. Its focal point will be a much-trailed speech in Cairo on Thursday June 4, in which he will directly address the Muslim world. The Cairo speech is central to Mr Obama’s efforts to rebuild America’s global popularity and its ability to persuade – otherwise known as soft power. The president has been trying out potential themes for the speech on aides and advisers for months. He is likely to emphasise his respect for Islamic culture and history, and his personal links to the Muslim world. He will suggest to his audience that both the US and the Islamic world have, at times, misjudged and mistreated each other – and he will appeal for a new beginning. George W. Bush launched a military offensive in the Middle East. Mr Obama is launching a charm offensive. There is plenty to be said for this approach. Mr Bush embroiled America in a bloody war in Iraq that strengthened Iran and acted as a recruiting sergeant for America’s enemies. Mr Obama’s alternative strategy is based on diplomacy, engagement and empathy. Mr Bush had a shoe thrown at him in his last appearance in the Middle East. So if Mr Obama receives his customary standing ovation in Cairo, that will send a powerful symbolic message. But the president should not let the applause go to his head. Even if his speech is a success, the same foreign-policy problems will be sitting in his in-tray when he gets back to the Oval Office – and they will be just as dangerous as before. In particular, there is chatter in official Washington that the Israelis may be gearing up to attack Iran’s nuclear facilities before the end of the year. The Obama administration is against any such move and it is normally assumed that Israel would not dare to pull the trigger without the go-ahead from Washington – not least because the Israelis would have to fly across US-controlled airspace to get to their targets. But the Americans do not have a complete veto over Israel’s actions. One senior US official asks rhetorically: “What are we going to do? Shoot down their planes?” A conflict between Israel and Iran would scatter the Obama administration’s carefully laid plans for Middle East peace to the winds. It would also make talk of improving American soft power around the world seem beside the point. The immediate task would be to prevent a wider regional war. In the meantime, the US will press on with the effort to achieve peace between the Israelis and the Palestinians. But even that goal is unlikely to be advanced much by Mr Obama’s trip to the Middle East. Many in the audience in Cairo and in the wider Islamic world will want and even expect the new president to lay out a complete vision for a peace settlement and to apply unambiguous pressure on Israel. For reasons of domestic politics, diplomacy and timing, Mr Obama is highly unlikely to do this. Yet while his Arab audience may be disappointed by what he has to say about the Middle East peace process, Mr Obama is already facing an increasingly tense relationship with the new Israeli government. The administration has now clashed openly with the Israelis over the Netanyahu government’s tolerance of expanded settlements in occupied Palestinian land. Mr Obama is also running up against the limits of soft power elsewhere. Closing the prison camp at Guantánamo was meant to be the ultimate tribute to soft power over hard power. The Obama team argued consistently that the damage that Guantánamo did to America’s image in the world outweighed any security gains from holding al-Qaeda prisoners there. Yet, faced with the backlash against releasing the remaining 240 prisoners or imprisoning them in the US, the Obama administration has back-tracked. It is not clear whether Guantánamo will be closed on schedule or what will happen to the riskier-sounding prisoners, who may still be held indefinitely. The much-criticised military trials are likely to be revived. In Afghanistan, Mr Obama is trying a mixture of hard and soft power. There will be a military surge – but also a “civilian surge”, designed to build up civil society and governance in Afghanistan. Old hands in Washington are beginning to shake their heads and mutter about Vietnam. Mr Obama’s preferred tools of diplomacy, engagement and charm do not seem to be of much use with Kim Jong-il of North Korea, either. The North Koreans have just tested a nuclear weapon – leaving the Obama administration scratching its head about what to do. The president’s charisma and rhetorical skill are real diplomatic assets. If Mr Obama can deploy them to improve America’s image and influence around the world, that is all to the good. There is nothing wrong with trying to re-build American “soft power”. The danger is more subtle. It is that President Yes-we-can has raised exaggerated hopes about the pay-off from engagement and diplomacy. In the coming months it will become increasingly obvious that soft power also has its limits.

### Heg I/E

#### Hegemony’s inevitable and resilient

Eric S. Edelman 10, former Under Secretary of Defense for Policy, was Principal Deputy Assistant to the Vice President for National Security Affairs, 2010, “Understanding America’s Contested Primacy,” Center for Strategic and Budgetary Assessments

A rigorous assessment should consider the strengths and weaknesses of the United States’ putative competitors on the global scene as well as the enduring strengths and sources of resilience that have enabled America to extend its primacy and maintain a stabilizing, global hegemonic role against all expectations. There is a need for a framework to inform how US policymakers might think about the problem of developing strategies and policies to extend that role yet again, since it is at least an arguable proposition that rather than a multipolar world, the global system, after the current Great Recession passes, will continue to be unipolar but with some additional challenges for US leadership.

Arguments for US national decline are not new. They have been made repeatedly in the past, and before they are accepted as the prevailing conventional wisdom it would be worthwhile to review the history of “declinism” and to submit some of the arguments that undergird the declinist persuasion to a searching re-examination. This paper, in the remaining pages, will consider the declinist arguments and will raise several questions. Will the undeniable relative decline of the United States, in fact, lead to the end of unipolarity? Do the BRIC countries really represent a bloc? What would multipolarity look like? How does one measure national power anyhow, and how can one measure the change in the power distribution globally? Is the rise of global competitors inevitable? What are some of the weaknesses that might hamper the would-be competitors from staying on their current favorable economic and political trajectory? Does the United States possess some underappreciated strengths that might serve as the basis for continued primacy in the international system and, if so, what steps would a prudent government take to extend that primacy into the future?

The history of straight-line projections of economic growth and the rise of challengers to the dominance of the United States has not been kind to those who have previously predicted US decline. It is not necessarily the case that the United States will be caught between the end of the “unipolar moment” of post- Cold War predominance and a global multipolar world. The emerging international environment is likely to be different than either of the futures forecast by the NIC in Mapping the Global Future in 2004 or Global Trends 2025 in 2008. It would seem more likely that the relative decline of American power will still leave the United States as the most powerful actor in the international system. But the economic rise of other nations and the spread of nuclear weapons in some key regions are likely to confront the United States with difficult new challenges.

### AT: Hegemony

### AT: Retrenchment Causes War---2NC

#### There’s zero data-based support for the claims that retrenchment causes war---our MacDonald ev is the only highly robust scholarly study of the effects of hegemonic retrenchment---it concludes peaceful retrenchment is the most likely result---declining power’s are less likely to initiate or be the target of aggression than states that maintain hegemony. Prefer it---it cites hacks like Kagan and uses a robust quantitative method to disprove their claims.

#### No transition wars and heg isn’t key---int’l institutions check

Fordham 12—professor of political science at Binghamton University (Ben, International Economic Institutions and Great Power Peace, 8/12/12, http://gt2030.com/2012/08/15/international-economic-institutions-and-great-power-peace/)

I enjoyed Jack Levy’s comments on how the world would have looked to people writing in 1912. As part of my current research, I’ve been spending a lot of time thinking about the three decades before World War I. As Levy pointed out, this last period of great power peace has some interesting parallels with the present one. Like today, the international economy had become increasingly integrated. For good reason, some even refer to this period as the “first age of globalization.” The period also saw the emergence of several new great powers, including Japan, Germany, and the United States. Like emerging powers today, each of these states sought to carve out its own world role and to find, as the German Foreign Secretary put it, a “place in the sun.” Like Levy, I don’t think these parallels we are doomed to repeat the catastrophe of 1914. I want to highlight the different institutional rules governing the international economic system today. The dangers discussed in the NIC report are real, but there is reason for hope when it comes to avoiding great power war. The rules of the game governing the “first age of globalization” encouraged great powers to pursue foreign policies that made political and military conflict more likely. Declining transportation costs, not more liberal trade policies, drove economic integration. There was no web of international agreements discouraging states from pursuing protectionist trade policies. As Patrick McDonald‘s recent book, The Invisible Hand of Peace, explains nicely, protectionism went hand-in-hand with aggressive foreign policies. Many of the great powers, including the emerging United States, sought to shut foreign competitors out of their home markets even as they sought to expand their own overseas trade and investment. Even though markets and investment opportunities in less developed areas of the world were small, great power policy makers found these areas attractive because they would not export manufactured products. As one American policy maker put it in 1899, they preferred “trade with people who can send you things you ant and cannot produce, and take from you in return things they want and cannot produce; in other words, a trade largely between different zones, and largely with less advanced peoples….” Great powers scrambled to obtain privileged access to these areas through formal or informal imperial control. This zero-sum competition added a political and military component to economic rivalry. Increasing globalization made this dangerous situation worse, not better, in spite of the fact that it also increased the likely cost of a great power war. In large part because of the international economic institutions constructed after World War II, present day great powers do not face a world in which protectionism and political efforts to secure exclusive market access are the norm. Emerging as well as longstanding powers can now obtain greater benefits from peaceful participation in the international economic system than they could through the predatory foreign policies that were common in the late 19th and early 20th centuries. They do not need a large military force to secure their place in the sun. Economic competition among the great powers continues, but it is not tied to imperialism and military rivalry in the way it was in 1914. These international institutional differences are probably more important for continuing great power peace than is the military dominance of the United States. American military supremacy reduces uncertainty about the cost and outcome of a hegemonic war, making such a war less likely. However, as in the 19th Century, higher growth rates in emerging powers strongly suggest that the current American military edge will not last forever. Efforts to sustain it will be self-defeating if they threaten these emerging powers and set off a spiral of military competition. Similarly, major uses of American military power without the support (or at least the consent) of other great powers also risk leading these states to build up their military capabilities in order to limit American freedom of action. The United States will be better served by policies that enhance the benefits that emerging powers like China receive from upholding the status quo.

## Democracy Adv

#### No modeling---their evidence is delusional

Eric Black 12, former reporter for the Star Tribune and Twin Cities blogger, Some ideas to limit the ‘supremacy’ of the U.S. Supreme Court, 11/27/12, www.minnpost.com/eric-black-ink/2012/11/some-ideas-limit-supremacy-us-supreme-court

It seems to be part of our national DNA. We see ourselves as so unlike the rest of the world that we have developed a semi-religious belief in what we call “American exceptionalism.” Maybe the upside is some kind of boost to our collective self-esteem. But one of the downsides is a reluctance to look around the world and see if anyone (especially not France) has a good idea from which we might benefit.

Especially on democracy. We see ourselves as the world’s model for democracy and the “rule of law.” We expect others to copy us, although they have long since stopped doing so with reference to the specifics of how to design a government. We grumble a good deal about the breakdowns in our system, but we are not much open to ideas for improving it.

University of Minnesota political scientist Lisa Hilbink, whose specialties include comparative constitutional systems around the world, said that basically, since the end of World War II, most of the world outside of Latin America came to the conclusion that the U.S. system was “pretty crazy.”

#### 1AC author proves – no modeling

Suto 11, Research Associate at Tahrir Institute and J.D.

[07/15/11, Ryan Suto is a Research Associate at Tahrir Institute for Middle East Policy, has degrees in degrees in law, post-conflict reconstruction, international relations and public relations from Syracuse Law, “Judicial Diplomacy: The International Impact of the Supreme Court”, http://jurist.org/dateline/2011/07/ryan-suto-judicial-diplomacy.php]

Nonetheless, foreign court decisions that cite to the Supreme Court have generally declined. This likely reflects either a decreased foreign interest in the US legal system or the US's decreased interest in public legal diplomacy. Either way, it remains important that the US recover its jurisprudential influence, as this is a tool too valuable to lose.

# 1NR

## WOT DA

### Impact

#### Risk of nuclear terrorism is real and high now

Bunn 13 10/2/13 et al. [Matthew Bunn, Valentin Kuznetsov, Martin B. Malin, Yuri Morozov, Simon Saradzhyan, William H. Tobey, Viktor I. Yesin, and Pavel S. Zolotarev. "Steps to Prevent Nuclear Terrorism." Paper, Belfer Center for Science and International Affairs, Harvard Kennedy School, October 2, 2013, Matthew Bunn. Professor of the Practice of Public Policy at Harvard Kennedy School andCo-Principal Investigator of Project on Managing the Atom at Harvard University’s Belfer Center for Science and International Affairs. • Vice Admiral Valentin Kuznetsov (retired Russian Navy). Senior research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, Senior Military Representative of the Russian Ministry of Defense to NATO from 2002 to 2008. • Martin Malin. Executive Director of the Project on Managing the Atom at the Belfer Center for Science and International Affairs. • Colonel Yuri Morozov (retired Russian Armed Forces). Professor of the Russian Academy of Military Sciences and senior research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, chief of department at the Center for Military-Strategic Studies at the General Staff of the Russian Armed Forces from 1995 to 2000. • Simon Saradzhyan. Fellow at Harvard University’s Belfer Center for Science and International Affairs, Moscow-based defense and security expert and writer from 1993 to 2008. • William Tobey. Senior fellow at Harvard University’s Belfer Center for Science and International Affairs and director of the U.S.-Russia Initiative to Prevent Nuclear Terrorism, deputy administrator for Defense Nuclear Nonproliferation at the U.S. National Nuclear Security Administration from 2006 to 2009. • Colonel General Viktor Yesin (retired Russian Armed Forces). Leading research fellow at the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences and advisor to commander of the Strategic Missile Forces of Russia, chief of staff of the Strategic Missile Forces from 1994 to 1996. • Major General Pavel Zolotarev (retired Russian Armed Forces). Deputy director of the Institute for U.S. and Canadian Studies of the Russian Academy of Sciences, head of the Information and Analysis Center of the Russian Ministry of Defense from1993 to 1997, section head - deputy chief of staff of the Defense Council of Russia from 1997 to 1998.<http://belfercenter.ksg.harvard.edu/publication/23430/steps_to_prevent_nuclear_terrorism.html>

I. Introduction In 2011, Harvard’s Belfer Center for Science and International Affairs and the Russian Academy of Sciences’ Institute for U.S. and Canadian Studies published “The U.S. – Russia Joint Threat Assessment on Nuclear Terrorism.” The assessment analyzed the means, motives, and access of would-be nuclear terrorists, and concluded that the threat of nuclear terrorism is urgent and real. The Washington and Seoul Nuclear Security Summits in 2010 and 2012 established and demonstrated a consensus among political leaders from around the world that nuclear terrorism poses a serious threat to the peace, security, and prosperity of our planet. For any country, a terrorist attack with a nuclear device would be an immediate and catastrophic disaster, and the negative effects would reverberate around the world far beyond the location and moment of the detonation. Preventing a nuclear terrorist attack requires international cooperation to secure nuclear materials, especially among those states producing nuclear materials and weapons. As the world’s two greatest nuclear powers, the United States and Russia have the greatest experience and capabilities in securing nuclear materials and plants and, therefore, share a special responsibility to lead international efforts to prevent terrorists from seizing such materials and plants. The depth of convergence between U.S. and Russian vital national interests on the issue of nuclear security is best illustrated by the fact that bilateral cooperation on this issue has continued uninterrupted for more than two decades, even when relations between the two countries occasionally became frosty, as in the aftermath of the August 2008 war in Georgia. Russia and the United States have strong incentives to forge a close and trusting partnership to prevent nuclear terrorism and have made enormous progress in securing fissile material both at home and in partnership with other countries. However, to meet the evolving threat posed by those individuals intent upon using nuclear weapons for terrorist purposes, the United States and Russia need to deepen and broaden their cooperation. The 2011 “U.S. - Russia Joint Threat Assessment” offered both specific conclusions about the nature of the threat and general observations about how it might be addressed. This report builds on that foundation and analyzes the existing framework for action, cites gaps and deficiencies, and makes specific recommendations for improvement. “The U.S. – Russia Joint Threat Assessment on Nuclear Terrorism” (The 2011 report executive summary): • Nuclear terrorism is a real and urgent threat. Urgent actions are required to reduce the risk. The risk is driven by the rise of terrorists who seek to inflict unlimited damage, many of whom have sought justification for their plans in radical interpretations of Islam**;** by the spread of information about the decades-old technology of nuclear weapons; by the increased availability of weapons-usable nuclear materials; and by globalization, which makes it easier to move people, technologies, and materials across the world. • Making a crude nuclear bomb would not be easy, but is potentially within the capabilities of a technically sophisticated terrorist group, as numerous government studies have confirmed. Detonating a stolen nuclear weapon would likely be difficult for terrorists to accomplish, if the weapon was equipped with modern technical safeguards (such as the electronic locks known as Permissive Action Links, or PALs). Terrorists could, however, cut open a stolen nuclear weapon and make use of its nuclear material for a bomb of their own. • The nuclear material for a bomb is small and difficult to detect, making it a major challenge to stop nuclear smuggling or to recover nuclear material after it has been stolen. Hence, a primary focus in reducing the risk must be to keep nuclear material and nuclear weapons from being stolen by continually improving their security, as agreed at the Nuclear Security Summit in Washington in April 2010. • Al-Qaeda has sought nuclear weapons for almost two decades. The group has repeatedly attempted to purchase stolen nuclear material or nuclear weapons, and has repeatedly attempted to recruit nuclear expertise. Al-Qaeda reportedly conducted tests of conventional explosives for its nuclear program in the desert in Afghanistan. The group’s nuclear ambitions continued after its dispersal following the fall of the Taliban regime in Afghanistan. Recent writings from top al-Qaeda leadership are focused on justifying the mass slaughter of civilians, including the use of weapons of mass destruction, and are in all likelihood intended to provide a formal religious justification for nuclear use. While there are significant gaps in coverage of the group’s activities, al-Qaeda appears to have been frustrated thus far in acquiring a nuclear capability; it is unclear whether the the group has acquired weapons-usable nuclear material or the expertise needed to make such material into a bomb. Furthermore, pressure from a broad range of counter-terrorist actions probably has reduced the group’s ability to manage large, complex projects, but has not eliminated the danger. However, there is no sign the group has abandoned its nuclear ambitions. On the contrary, leadership statements as recently as 2008 indicate that the intention to acquire and use nuclear weapons is as strong as ever.

**Their evidence is all just like “there are a lot of steps” --- ya obviously, and our authors considered all of them --- the risk is real**

Peter **Beinart 8**, associate professor of journalism and political science at CUNY, The Good Fight; Why Liberals – and only Liberals – Can Win the War on Terror and Make America Great Again, 106-7

For all these reasons, jihadists seem less intent on acquiring a finished nuclear weapon than on acquiring weapons- grade uranium and building the bomb themselves. In the early 1990s, Al Qaeda bought a 3- foot- long cylinder from a Sudanese military officer who said it contained South African highly enriched uranium. It turned out to be a hoax. Jihadists have reportedly made other failed attempts as well. Eventually, however, they could succeed. Moscow may adequately protect its nuclear weapons, but the National Academy of Sciences has warned that “large inventories of SNM [fissile material] are stored at many sites that apparently lack inventory controls.” And the Russians reportedly experience one or two attempted thefts of that material a year—that they know of. ¶ If Al Qaeda obtained 50 kilograms of weapons-g rade uranium, the hardest part would be over. The simplest nuke to build is the kind the United States dropped on Hiroshima, a “gun- type,” in which a mass of highly enriched uranium is fired down a large gun barrel into a second uranium mass. Instructions for how to make one are widely available. Just how widely available became clear to an elderly nuclear physicist named Theodore Taylor in 2002, when he looked up “atomic bomb” in the World Book Encyclopedia in his upstate New York nursing home, and found much of the information you’d need. ¶ Even with directions, building a nuclear bomb would still be a monumental task. According to a New York Times Magazine article by Bill Keller, in 1986 five Los Alamos nuke builders wrote a paper called “Can Terrorists Build Nuclear Weapons?” They concluded that it would require people who understood “the physical, chemical and metallurgical proper-¶ 107¶ ties of the various materials to be used, as well as characteristics affecting their fabrication; neutronic properties; radiation effects, both nuclear and biological; technology concerning high explosives and/or chemical pro- pellants; some hydrodynamics; electrical circuitry.” That sounds daunting. **Yet, at the end of the paper, the scientists answered their question: “Yes, they can.”** ¶Finally, once terrorists built a nuclear weapon, they’d still have to smuggle it into the United States. The best way might be to put it in a shipping container, on one of the many supertankers that bring oil into American ports every day. The containers are huge, more than big enough to fit a gun-t ype nuke, which could be as small as 6 feet in length and 6 inches in diameter. Highly enriched uranium emits much less radiation than plutonium, and inside a supertanker’s thick double-steel hull it would be hard for sensors to detect. What’s more, a single ship can carry several thousand containers, most of which are never searched. On September 11, 2002, ABC News smuggled a 15- pound cylinder of depleted uranium in a cargo container past U.S. customs. On September 11, 2003, they performed the same exercise—and got the uranium past customs again.

**High risk of nuke terror---there’s motivation and capability**

Kenneth C. **Brill 12**, is a former U.S. ambassador to the I.A.E.A. Kenneth N. Luongo is president of the Partnership for Global Security. Both are members of the Fissile Material Working Group, a nonpartisan nongovernmental organization. Nuclear Terrorism: A Clear Danger, www.nytimes.com/2012/03/16/opinion/nuclear-terrorism-a-clear-danger.html?\_r=0

Terrorists exploit gaps in security. The current global regime for protecting the nuclear materials that terrorists desire for their ultimate weapon is far from seamless. It is based largely on **unaccountable**, voluntary arrangements that are **inconsistent** across borders. Its weak links make it **dangerous and inadequate to prevent nuclear terrorism.**¶ Later this month in Seoul, the more than 50 world leaders who will gather for the second Nuclear Security Summit need to seize the opportunity to start developing an accountable regime to prevent nuclear terrorism.¶ There is a **consensus** among international leaders that the threat of nuclear terrorism is real, not a Hollywood confection. President Obama, the leaders of 46 other nations, the heads of the International Atomic Energy Agency and the United Nations, and numerous experts have called nuclear terrorism one of the most serious threats to global security and stability. It is also **preventable with more aggressive action**.¶ At least four terrorist groups, including Al Qaeda, have demonstrated interest in using a nuclear device. These groups operate in or near states with histories of questionable nuclear security practices. Terrorists do not need to steal a nuclear weapon. It is quite possible to make an improvised nuclear device from highly enriched uranium or plutonium being used for civilian purposes. And there is a black market in such material. There have been 18 confirmed thefts or loss of weapons-usable nuclear material. In 2011, the Moldovan police broke up part of a smuggling ring attempting to sell highly enriched uranium; one member is thought to remain at large with a kilogram of this material.

### Link

#### Yes dangerous, would have gone right back to the battlefield

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

The principle that a nation at war has the power to hold members of the enemy’s armed forces until the cessation of hostilities is as old as warfare itself and should be uncontroversial.2 The purpose of military detention, former Justice Sandra Day O’Connor explained in 2004, “is to prevent captured individuals from returning to the field of battle and taking up arms once again.”3 As the Nuremberg Tribunal noted, the captivity and detention of enemy soldiers is “neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.”4 Military detention of enemy soldiers is the military equivalent of the longstanding practice of non-criminal administrative or preventive detention of dangerous persons such as the mentally ill, those infected with contagious diseases, or sexual predators.5¶ The wisdom of the rule of detention to prevent return to the battlefield has become clear as we learn more about what has happened to some of the released Guantánamo detainees. Although reports about the severity of the problem differ, it is clear that a good number of the detainees released on grounds that they were “non-dangerous” have ended up back on the battlefield, shooting at Americans or non-American civilians abroad.6 One such person, Said Ali al-Shihri, became the deputy leader of Al Qaeda’s Yemeni branch and is suspected of involvement in the 2008 bombing of the U.S. Embassy in Yemen.7¶ Yet if the detention rule is so clear, why is it so controversial in the war against Al Qaeda and its affiliates? One reason is that many observers believe we are not, or cannot be, at war against non-state actors. This is simply wrong. The United States has fought congressionally authorized wars against non-state actors such as slave traders and pirates.8 During the Mexican-American War, the Civil War, and the Spanish-American War, U.S. military forces engaged military opponents who had no formal connection to the state enemy.9 Presidents also have used force against non-state actors outside of congressionally authorized conflicts. President McKinley's use of military force to put down the Chinese Boxer Rebellion was primarily directed at non-state actors.10 President Wilson sent more than seven thousand U.S. troops into Mexico to pursue Pancho Villa, the leader of a band of rebels opposed to the recognized Mexican government.11 And President Clinton authorized cruise missile strikes against Al Qaeda targets in Sudan and Afghanistan.12 In all of these instances, presidents as commanders-in-chief exercised full military powers against non-state actors—sometimes with congressional authorization and sometimes without. ¶ Consistent with these precedents, every branch of our government today agrees that we are in an “armed conflict” (the modern legal term for “war”) with Al Qaeda, its affiliates and other Islamist militants in Afghanistan, Iraq, and elsewhere. Former President Bush took this view beginning in September 2001 and President Obama shows no sign of adopting a different stance. Congress embraced this view in the September 2001 Authorization to Use Military Force (“AUMF”) and reaffirmed it in the Military Commissions Act of 2006 (“MCA”).13 And the Supreme Court has stated or assumed that we are at war many times.14

### Deference Impact

#### Deference is vital to effective executive crisis response --- solves terror and rogue states

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the unique [\*883] constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats. n16

The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22

 [\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation

Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations.

(1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27

(2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28

(3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30

(4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32

(5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34

 [\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39

Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

### UQ

#### The President has complete discretion --- Courts have struck down injunctions on ID

Thomas Eddlem 7/19/13, writer for The New American, “ NDAA Indefinite Detention Without Trial Approved by Appeals Court,” http://www.thenewamerican.com/usnews/constitution/item/16026-ndaa-indefinite-detention-without-trial-approved-by-appeals-court

The U.S. Court of Appeals for the Second District struck down an injunction against indefinite detention of U.S. citizens by the president under the National Defense Authorization Act of 2012 in a July 17 ruling that is a blow to civil liberties protected by the U.S. Constitution. The appellate court ruled:¶ Plaintiffs lack standing to seek preenforcement review of Section 1021 and vacate the permanent injunction. The American citizen plaintiffs lack standing because Section 1021 says nothing at all about the President’s authority to detain American citizens.¶ The Section 1021 of the NDAA allows “detention under the law of war without trial until the end of the hostilities” for “a person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.” The court is technically correct in stating that the law does not specifically mention U.S. citizens when it uses the term “person,” but like the vaguely worded “supported such hostilities in aid of such enemy forces,” it appears to be all-encompassing and subject solely to the president's discretionary whims.

#### Court deference is at an all-time high --- most recent cases prove

George D. Brown 11, Interim Dean and Robert F. Drinan, S.l., Professor of Law, Boston College Law School, 1/7/11, “Accountability, Liability, and the War on Terror -- Constitutional Tort Suits as Truth and Reconciliation Vehicles,” Florida Law Review, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1337&context=lsfp>

Still, the notion of national security deference is deeply ingrained in our constitutional tradition. Its institutional foundations make sense, as ably demonstrated by Professor Pushaw.415 The question that arises is whether things have changed with the Court's decisions in a series of "enemy combatant" cases since the onset ofthe war on terror.416 These cases have arisen in the context of petitions for habeas corpus. The Court, as Professor Pushaw puts it, "interpreted the habeas corpus statute generously,'.417 even to the point of distortion.418 On the other hand, the substantive results represented a mixed bag of defects and victories for the President. "[T]hese three cases did not necessarily signal a major shift in the Court's jurisprudence in which individual liberties will be upheld vigorously against executive claims of national security.'.419 Professor Pushaw wrote these words before Boumediene v. Bush,420 in which the Court took on both political branches. Boumediene, far more than its immediate predecessors, might be seen as the case that broke the back of national security deference.421 The majority opinion emphasized the judiciary's Marburybased role as the branch that says "what the law is,' 22 echoing its earlier statement in Hamdi v. Rumsfeld that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake. ,.424 ¶ On the other hand, it is possible to see Boumediene as resting primarily on the key role of habeas corpus. The Court proclaimed the writ's "centrality," noting that "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. ,.425 I have raised elsewhere the argument that one should not extrapolate too far from the habeas cases, even if they are viewed as an assertion of the judicial role.426 Habeas raises the fundamental question of the lawfulness of executive detention and often presents the judiciary with familiar issues of the validity of procedures. Reverse war on terror suits would take the courts much further. ¶ Certainly, the Court's two most recent war on terror decisions show a reluctance to go further and may even constitute a retrenchment. The importance of Ashcroft v. I{lbar27 has already been noted. Holder v. Humanitarian Law Project's points in the same direction. Holder upheld a criminal statute that is a crucial component of the war on terror.429 It did so in the face of a vigorous First Amendment challenge, supported by three Justices.43o Both cases show deference toward the government and appreciation of the difficulties of waging the war on terror. Iqbal noted that "the Nation's top law enforcement officers [were acting] in the aftermath of a devastating terrorist attack .... ,.431 Holder's language is even stronger. The Court stated explicitly that deference was appropriate because "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs.'.432 Indeed, the opinion went further endorsing the preventive approach to counterterrorism and recognizing the government's need to often act "based on informed judgment rather than concrete evidence.'.433 In perhaps the ultimate demonstration of the importance of rhetoric, the Court's opinion closed with a citation of the Preamble to the Constitution and its recognition of the need to provide '''for the common defence [sic].".434 Iqbal and Holder stand in stark contrast to the habeas decisions of a few years earlier.

### Democracy Adv

#### Democracy spillover is a joke and the US can’t affect it---their evidence ignores … everything

Walt 11/28/11—IR, Harvard (Stephen, Requiem for the "Arab Spring?," 11/28/11, online at walt.foreignpolicy.com)

But if the history of revolutions tells us anything, it is that rebuilding new political orders is a protracted, difficult, and unpredictable process, and having a few Mandelas around is no guarantee of success. Why? Because once the existing political order has collapsed, the stakes for key groups in society rise dramatically. The creation of new institutions -- in effect, the development of new rules for ordering political life -- inevitably creates new winners and losers. And everyone knows this. Not only does this situation encourage more and more groups to join the process of political struggle, but awareness that high stakes are involved also gives them incentives to use more extreme means, including violence.

Under these conditions, it is a pipedream to think that key actors in a complex and troubled society like Egypt or Libya (or in the future, Syria) could quickly agree on new political institutions and infuse them with legitimacy. Even if interim rulers write a quick constitution, hold a referendum, or elect new representatives, those whose interests are undermined by the outcomes are bound to question the new rules and the process and to do what they can to undermine or amend them. What one should expect, therefore, are half-measures, false starts, prolonged uncertainty, and highly contingent events, where seemingly random events (a riot, an accident, an episode of overt foreign interference, an unexpected flurry of violence, etc.) can alter the course of events in far-reaching ways. Tunisia notwithstanding, what you are unlikely to get is a quick and easy consensus on new institutions.

Remember the French Revolution? The storming of the Bastille took place in July 1789, the nobility was abolished by the National Assembly the following year, and Louis XVI tried unsuccessfully to flee in 1791 before being forced to accept a new constitution. Internal turmoil and foreign interference eventually lead to war in 1792, Louis and Marie Antoinette were executed in 1793, and Paris was soon engulfed by the Jacobin terror, which eventually burns itself out. A new constitution is adopted in 1795, establishing a government known as the "Directory," which is eventually overthrown by Napoleon's coup d'etat on 18 Brumaire, 1799. By the time Napoleon seized power, it had been more than ten years since the initial revolutionary upheaval.

To judge by that timetable, the "Arab spring" has a long way to go. And other cases offer a similar lesson. The Russian revolution starts with the fall of the Tsarist regime in March 1917 and the formation of Kerensky's provisional government, which is subsequently overthrown by the Bolshevik coup a few months later. But the Bolsheviks' hold on power isn't fully established until their victory in the Russian Civil War, which isn't fully won until 1923. The Soviet political order endured recurrent power struggles over the next decade, until Joseph Stalin vanquished his various opponents and established a personal dictatorship.

Or take a more recent case, Iran. The revolution begins in 1978, with a steadily escalating series of street demonstrations. The shah flees into exile in January 1979, the Ayatollah Khomeini returns in February and appoints Mehdan Bazegar as Prime Minister of an interim government. A new constitution is drafted by October, but there is a continuing struggle for power between liberal, Islamist, and other groups.

The first president of the new "Islamic Republic," Abdolhassan Bani-Sadr, is impeached in 1981, and the outbreak of the Iran-Iraq war strengthens hardliners and provides an opportunity for a crackdown against some prominent members of the original revolutionary movement. The Islamic republic remains a work-in-progress to this day, with the role of the "Supreme Jurisprudent," the Revolutionary Guards, the clergy, the presidency, and the Majlis remaining in flux.

Even the comparatively benign American Revolution was hardly a done-deal when the peace treaty with England was signed in 1783. Independence from England had required the colonists to fight a lengthy war of independence, and the fledgling republic then faced several armed rebellions, most notably Shays' Rebellion in 1786. These challenges revealed the inadequacies of the original Articles of Confederation (1777-1786) leading to the drafting and adoption of what is now the U.S. Constitution.

In short, anybody who thought that the events that swept through the Arab world in 2011 were going to produce stable and orderly outcomes quickly was living in a dream world. To say this is not to oppose what has happened, or to believe that the old orders could or should have continued. Rather, it is to recognize that radical reform -- even revolution -- is a long, difficult, and uncertain process, and that the ride is likely to be a bumpy one for years to come.

History also warns that outside powers have at best limited influence over the outcomes of a genuine revolutionary process. Even well-intentioned efforts to aid progressive forces can backfire, as can overt efforts to thwart them. Overall, a policy of "benevolent neglect" may be the more prudent course, making it clear that outsiders are prepared to let each country's citizens choose their own order, provided that important foreign policy redlines are not crossed. But for a country like the United States, which still sees itself as a model for others and tends to think that it has the right and the wisdom to tell them what to do, patience and restraint can be hard to sustain. And patience is what is needed most these days.

#### No democracy impact---Prefer our ev---theirs doesn’t assume weak democracies

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Theoretical and empirical work in economics and political science has investigated the relationship between political systems and war. Jackson and Morelli (2007) formalize the idea that leaders start wars when their preferences are sufficiently biased away from their citizens' preferences. Levy and Razin (2004) provide a theory of the democratic peace based on incomplete information. They assume the representative citizen is less well informed about the benefit of concessions than the leader and show that democratically elected leaders are more likely to reveal information truthfully. In Bueno De Mesquita et al. (1999), political leaders must bribe key supporters to stay in power when foreign policy fails. A dictator has to bribe fewer supporters and is therefore more likely to go to war than a democratically elected leader. On the other hand, in order to avoid being replaced, a leader may “gamble for resurrection” with an aggressive foreign policy (Downs and Rocke, 1994, Bueno De Mesquita and Silverson, 1995, Hess and Orphanides, 1995). Fearon (1994) assumes leaders suffer “audience costs” if they back down during a war of attrition. If audience costs are higher in democracies, then democracies are more committed to a conflict and may be more reluctant to enter into one. Tangeras (2008) assumes that leaders have private information about the probability of winning a war. Democratically elected leaders are more reluctant to start a war because they will lose power if the war ends badly. According to Leeds (1999), democratic leaders are more able to commit to honouring agreements and thus more able to cooperate.

These theories provide underpinnings for the democratic peace hypothesis, but it is not obvious how they can be extended to explain the non-monotonicity we find in the data. For example, a natural extension of Fearon (1994) model would be to assume the audience costs of limited democracies lie between those of dictatorships and full democracies, but this would not produce non-monotonicity. Similarly, if the leader of a limited democracy has less biased preferences than a dictator, then the Jackson and Morelli (2007) model would predict that limited democracies go to war less often than dictatorships.

Our theory incorporates an important feature of Bueno De Mesquita et al. (1999): the support for the leader's action is derived from heterogeneous preferences among the citizens. In our model, leaders of full and limited democracies suffer audience costs (as in Fearon, 1994) if they are dovish when the opposing leader is hawkish; in addition, a leader of a full democracy faces audience costs (from the median voter) if he is hawkish against a dovish opponent; a dictator faces no audience costs at all. The result is a non-monotonic relationship between democracy and peace.

Mansfield and Snyder (2005) argue that increased nationalism can cause conflict during a period of transition when a regime is being democratized. However, in our baseline empirical model, dyads of limited democracies are the most conflict ridden even when controlling for regime transitions (using Mansfield and Snyder's, 2005, transitional dummies). This suggests that limited democracies are not only prone to conflict during periods of transition.

Several articles have investigated the hypothesis that dyads consisting of countries with similar regime types, and thus perhaps “shared values” are relatively peaceful. Peceny, Beer and Sanchez-Terry (2004) classify autocratic regimes as personalist, military and single-party dictatorships and find evidence that dyads consisting of two autocracies of the same type are relatively peaceful. Bennett (2006) analyses plots of conflict probabilities for dyads with different Polity scores. He finds that the hypothesized relationship between similarity and peace holds for dyads with either very high or very low Polity scores, but not in the intermediate range. This is consistent with our finding that dyads of two limited democracies (which have intermediate Polity scores by definition) are relatively conflict prone. However, it is challenging within Bennett's pooled logit specification to formally test for non-monotonicity and to assess robustness within higher-order parametric specifications because the functional form is bidimensional and marginal effects are non-linear functions of explanatory variables. In addition, his specification cannot include dyadic fixed effects. Our dummy variable non-parametric approach has dyad-specific fixed effects, and non-monotonicity can be assessed through simple tests on coefficients. Unlike Bennett's continuous specification, we define limited democracies by cut-off Polity scores, but we verify the robustness of our results by varying the cut-off points.

Other authors have analysed limited democracies along other dimensions and found reasons for why such regimes might experience conflicts. Fearon and Laitin (2003) find that limited democracies are more prone to civil wars, as insurgencies are more likely to succeed in weaker political regimes. Epstein et al. (2006) find that political transitions from limited democracies to other political regimes are harder to explain than political transitions of autocracies and full democracies.

Determining the underlying motives behind conflicts, based on a subjective reading of history, will always leave scope for disagreement. Our theoretical model, building on Baliga and Sjöström (2004), assumes that conflicts can be sparked by fear (“Schelling's dilemma”). Historians have uncovered many examples of such “fear spirals”.3 For example, Thucydides (1.23, p. 49 1972) argued that the Peloponnesian War was caused by “the growth of Athenian power and the fear which this caused in Sparta.” The period that preceded World War I was characterized by mutual distrust and fear (Sontag, 1933, Tuchman, 1962, Wainstein, 1971). A spiral of fear was evident during the Cold War arms race (Leffler, 1992). The India–Pakistan arms race is a current example of escalation fuelled by mutual distrust, and Bobbitt (p. 10 2008) suggests a similar logic will continue to operate in the wars of the twenty-first century: “We think terrorists will attack; so they think we think the terrorists will attack; so they think we shall intervene; so they will attack; so we must.” Nevertheless, there is disagreement about the number of large-scale wars that can be said to have been triggered by fear (see Van Evera, 1999, Reiter, 2000). Reiter (1995) argues that leaders who understand the spiraling logic can prevent conflict by communicating. Baliga and Sjöström (2004) verify that, in theory at least, cheap talk can sometimes prevent a conflict, but it cannot always do so. Our current model assumes that leaders are partly motivated by domestic political concerns and may behave hawkishly in order to maintain political support. Thus, fear is not the only reason for starting a war, and the argument by Reiter (1995) that World War I was not a pure fear spiral is consistent with our model:

Domestic politics in a number of nations set the stage for war, though some …have gone further to argue that Germany sought war … to shore up the threatened domestic political order at home (Reiter, 1995, p. 22).