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### 1

#### Supreme Court sees eye to eye with the EPA on EPA v. EME Homer City Generation. Overturn key to Clean Air Act enforcement.

Singh, 6-24

[Tejinder, guest SCOTUS blogger, Goldstein & Russell, P.C., counsel. He has represented parties and amici before the Supreme Court and lower courts in matters involving civil rights, financial regulation, privacy rights, environmental protection, intellectual property, and gaming law. Harvard Law School graduate. “More on today’s orders: Good news for the EPA,” SCOTUS blog, June 24, 2013, <http://www.scotusblog.com/2013/06/more-on-todays-orders-good-news-for-the-epa/> //uwyo-baj]

The Supreme Court and the Environmental Protection Agency saw eye to eye today, as the Court granted the agency’s petition seeking review of a decision that invalidated an important rule relating to cross-state air pollution; at the same time, it denied a separate set of petitions by challengers to the EPA’s decision to authorize a blend of ethanol. First, the Court granted certiorari in the consolidated cases Environmental Protection Agency v. EME Homer City Generation L.P., and American Lung Association v. EME Homer City Generation L.P. In these cases, the government asked the Court to review a decision of the D.C. Circuit invalidating a major EPA rule implementing an important provision of the Clean Air Act regulating cross-state pollution. Air pollution is a complex problem because dirty air moves across state lines. Consequently, if upwind states generate a lot of pollution, the effects are likely to be felt in downwind states. To address this issue, the Clean Air Act requires the states to create implementation plans that not only bring their own air quality into compliance with federal standards, but also prevent pollution that “contribute[s] significantly” to air quality problems in downwind states. States that fail to adopt adequate implementation plans are forced to implement plans devised by the EPA. The EPA sought to implement this portion of the statute by promulgating a rule, known as the Transport Rule, which identified twenty-eight upwind states that were emitting excessive quantities of certain pollutants, and, based on prior findings that the states had failed to adopt adequate plans to control those pollutants, set forth federal implementation plans to do so. The upwind states and various industry groups challenged the rule in the D.C. Circuit, and the court held that the rule was invalid under the statute. In so holding, the court reasoned that the Transport Rule imposed too great a burden on upwind states, including because it failed to precisely account for the different contributions made by multiple upwind states to a single downwind state’s air quality problems, and because it did not ensure that the burden on upwind states would be just sufficient to meet minimum standards, and no more. The court also held that the portion of the Transport Rule enacting federal implementation plans was invalid. The EPA and the American Lung Association, a party to the case below, both sought the Court’s review. Their petitions for certiorari argued that the D.C. Circuit exceeded its jurisdiction and that the various challenges to the Transport Rule are foreclosed by prior EPA actions, including the rulemaking proceedings and EPA orders finding substantial noncompliance by the relevant states. The government argues that the decision below, “if left undisturbed, will gravely undermine the EPA’s enforcement of the Clean Air Act.” The Court granted both petitions today, and the cases will be argued next Term.

#### War powers controversies cost the Court PC, empirically they have avoided the issue

Magee, 8

[James, University of Delaware Professor, “The Supreme Court, the Constitution, and Foreign Affairs,” October 2008, <http://www.udel.edu/poscir/faculty/JMycoff/tab2/ConferencePaperMAGEE.pdf> //uwyo-baj]

When the Court confronted the Vietnam War, it ducked—very often. Even the Court

under Chief Justice Earl Warren (1953-1969)—until the current Court, perhaps the most activist

Supreme Court in American history—repeatedly without explanation denied review of cases

brought by young men challenging the constitutionality of an undeclared war escalating in

Vietnam.35 Politically alert, at least six justices could always be counted on to avoid ruling on

the matter; a minimum of four justices must consent to grant review of any case, and hence the

Court never officially faced that issue. The official resolution would inevitably have framed the

issue in those cases as a “nonjusticiable political question,” an exercise of one of the “passive

virtues” of which Professor Bickel was so fond for keeping the Court out of trouble. The Warren

Court had another agenda—indeed, many—regarding civil rights and liberties and barely enough

political capital to move that agenda forward.

#### SO2 plays a primary role in global warming

Ward 9

[Peter L., geophysicist, “Sulfur Dioxide Initiates Global Climate Change in Four Ways

Notes for Science Writers,” Teton Tectonics, February 9, 2009, <http://www.tetontectonics.org/Climate/Notes%20For%20Science%20Writers.pdf> //uwyo-baj]

The recognition that sulfur dioxide appears to play the primary role in initiating climate change is good news. We know how to reduce sulfur dioxide emissions. We did an excellent job by 1980. We have the technology and we have examples of legislation and other political agreements that led to SO2-emission reductions. We also have experience at developing new technologies. The conclusion that CO2 is much less important than SO2 in causing climate change is a political shock. Countries around the world are looking for ways to reduce CO2 emissions. It is not yet clear that reducing CO2 is not important, but it is less important than reducing SO2. 11The burning of all fossil fuels emits sulfur dioxide. A particularly strong source is the burning of high-sulfur content types of coal often used in large amounts in plants that generate electricity. The major reduction of SO2 output around 1980 came from new methods of burning such coal, scrubbing SO2 from smokestacks, and, especially in Europe, converting power plants to gas, oil, or nuclear. Known coal resources in the world are significantly greater than the known resources of all other types of fossil fuels combined. The greatest supplies of coal in the world are in the United States. Thus developing clean-coal technologies should be a high priority. Regulating the burning of high-sulfur oil used especially by ships traversing our oceans should also be a high priority.

#### Warming threatens the existence of humanity: destroys biodiversity in multiple environments, increases the probability of violent natural disasters, and kills agriculture production

Srivastava 11

(Ashnu Srivastava is a frequent writer for the Journal of International Environmental Application. “Impact of Global Warming on Flora and Fauna” April-June 2011. Proquest//wyoccd)

Pollution is the real threat to mankind, as we emit contaminants into the environment. Since it being the main cause of instability and disorder of ecosystem, it has to be eradicated or at least controlled. The nature and all its components are interrelated and man relies on these components for its existence. The action of one affects the others and human evasion has caused the extinction of many species. The nature exists with us, both go side by side and both are inevitable. We have a responsibility to take care of the nature in an appropriate manner. One of the main threats which the Earth faces is global warming. It strips Mother Earth of her aura of invincibility. As the effect of global warming the sea level arises, and the catastrophic floods which follows, displace millions of people living in the coastal belt all over the world from their home land. The rise in global sea level affects the ocean circulation. The plains are being stripped of its moisture rich soil and we are on the verge of a fodder crisis. Many of the native temperature resistant plant species are being wiped out of the earth. Vector borne diseases like dengue malaria are expected to increase sharply across the globe as the temperature variations make it more conducive for mosquitoes to thrive. Diarrhoeal disease which is associated with drought and flood is also expected to register a sudden increase. The effect which global warming has on the flora and fauna of sea is unprecedented. Warmer sea ocean temperatures destroy vast coral reefs and the balance of marine life is lost. The increase in the number of violent hurricanes, unnaturally torrential rains, unusually hot summers are all indicators of the treacherous days which are yet to come. Renewable energy reduces the global warming. Hydroelectric energy, one of the dependable and eco-friendly renewable energy produces minimum pollution. The construction of dams for this purpose helps to control floods, provide water for irrigation and at the same time produce electricity. This energy source never pollutes water; but the vegetation, that is submerged on decaying produces methane, one of the deadly accelerators of global warming. This effect is more prominent in tropical region. The positive benefits of the hydroelectric power overweigh and hence people tend to turn a blind eye towards this problem. But we must not forget the fact that even though the source is localized the effect is universal. The present change in the Arctic Glaciers is the clear indicator of negative impacts of global warming. The temperature in the Arctic region is increasing gradually. It reduces the snow cover, the wide spread glaciers are melting down and the sea level is rising alarmingly. The frequency and intensity of floods are increasing. During autumn and winter, rain is occurring, rising permafrost temperature. The depletion of highly reflective Arctic cover is increasing the pace with which global warming is affecting our environment. The changes in ocean circulation pattern, which is another direct impact of glacier melting, are gradually affecting the global climate. Some birds are migratory and they rely on Arctic for breeding. The melting down of glaciers affects the biodiversity and extinction of these species. Polar bears are an example of a species which is on the verge of extinction as a result of this unwanted phenomenon. The reduction in sea level damages the marine habitat also. The coastal areas which are exposed to storms lead to coastal erosion. Change over ways so that we can protect the Arctic Ice Cap before it is too late. There is an increase in heat related deaths. The rise in average temperature increases the diseases carrying organisms like mosquitoes, rodents and bats. The respiratory illness increases due to global warming because grasses and allergic pollen grow more profusely in warmer environment. Violent storms and other extreme climate carrying deadly diseases occur frequently.

## 2

#### The United States Congress should pass and an appropriate number of the states should ratify a constitutional amendment to release of individuals in military detention who have won their habeas corpus hearing.

#### Constitutional amendments can overturn Supreme Court decisions.

Kyvig 95

[DAVID E., Professor of History at the University of Akron. 28 Akron L. Rev. 97 “REFINING OR RESISTING MODERN GOVERNMENT? THE BALANCED BUDGET AMENDMENT TO THE U.S. CONSTITUTION”]

Nearly every Congress subsequent to the First saw the introduction of further constitutional amendments. During the two centuries after the ratification of the Bill of Rights, representatives and senators offered over ten thousand amendment resolutions. Significantly, over that span of time only seventeen amendments gained the broad consensus of support required for adoption. Seldom could proposals for reform satisfy the founders' belief that, while a simple majority should be able to bind the polity temporarily through a statute, permanent agreements about constitutional arrangements ought to have the widest sanction of any republican act. Even when Article V action did not occur, however, the ongoing conversation about authority to be granted the federal government and restraints to be placed upon it revealed a great deal about American constitutional thought and practice. n3 Those interested in the political and constitutional culture of the United States would do well to extend their focus beyond the terms of the existing Constitution and judicial interpretation thereof so as to give thoughtful attention to efforts at constitutional change, both failed and successful. The past two dozen years have spawned an unusually large number of proposals to alter the Constitution of the United States. Some of them, seeking to reverse Supreme Court rulings regarding abortion, n4 school prayer, n5 and [\*99] flag burning, n6 stirred brief but limited enthusiasm. Two, those stipulating legal equality for women n7 and federal representation for the District of Columbia, n8 gained the requisite two-thirds congressional approval but not the necessary ratification by three-fourths of the states. One, a bar on Congress raising its own pay, first offered in 1789 by James Madison, even achieved ratification in 1992. n9 But, with the possible exception of the Equal Rights Amendment, no constitutional change has been more persistently advocated or widely debated during the past twenty-four years than an amendment to require an annually balanced federal budget.

## 3

#### Deference to the executive now

Bazzle, J.D., Georgetown University Law Center, ‘12

[Timothy, “SHUTTING THE COURTHOUSE DOORS:¶ INVOKING THE STATE SECRETS PRIVILEGE TO THWART¶ JUDICIAL REVIEW IN THE AGE OF TERROR”, Civil Rights Law Journal, Vol. 23, No. 1, 2012, RSR]

The war on terror has led to an increased use of the state secrets¶ privilege by the Executive Branch—to dismiss legal challenges to¶ widely publicized and controversial government actions—ostensibly¶ aimed at protecting national security from terrorist threats.1¶ Faced¶ with complaints that allege indiscriminate and warrantless surveillance,2¶ tortious detention, and torture that flouts domestic and international law,3¶ courts have had to reconcile impassioned appeals for¶ private justice with the government’s unyielding insistence on protecting national security. Courts, almost unanimously, have cast their lot¶ with national security, granting considerable deference to government¶ assertions of the state secrets principle. This deference to state secrets¶ shows no signs of abating; indeed, the growing trend is for courts to¶ dismiss these legal challenges pre-discovery,4¶ even before the private¶ litigants have had the chance to present actual, non-secret evidence to¶ meet their burden of proof. Although many looked optimistically at¶ President Obama’s inauguration as a chance to break decisively from¶ the Bush Administration’s aggressive application of the state secrets privilege,5¶ the Obama Administration has largely disappointed on the¶ state-secrets front, asserting the privilege with just as much fervor—if¶ not as much regularity6¶ —as its predecessor.7¶ Judicial deference to such claims of state secrecy, whether the¶ claims merit privileged treatment, exacts a decisive toll on claimants,¶ permanently shutting the courthouse doors to their claims and interfering with public and private rights.8¶ Moreover, courts’ adoption of a¶ sweeping view of the state secrets privilege has raised the specter of¶ the government disingenuously invoking state secrets to conceal government misbehavior under the guise of national security.9¶ By granting greater deference to assertions of the state secrets privilege, courts¶ share responsibility for eroding judicial review as a meaningful check¶ on Executive Branch excesses. This Article argues for a return to a¶ narrowly tailored state secrets privilege—one that ensures that individuals who allege a credible claim of government wrongdoing retain¶ their due process rights.

#### Court action to limit indefinite detention makes effective warfighting impossible- and undermines deference

Chertoff 11 (Michael was the Secretary, Department of Homeland Security (2005-2009), THE DECLINE OF JUDICIAL DEFERENCE ON NATIONAL SECURITY, Rutgers Law Review, 3 February 2011, http://www.rutgerslawreview.com/wp-content/uploads/archive/vol63/Issue4/Chertoff\_Speech\_PDF.pdf, pg. 1125-1128)

So, where has this left us? It has left us in a puzzling situation. ¶ In a decision called Al-Bihani in the D.C. Circuit in 2010, Judge ¶ Janice Rogers Brown talked about the consequences—practical ¶ consequences—of having habeas review in Guantánamo as it affects ¶ the battlefield.42 And what she said is that the process at the tail end ¶ is now impacting the front end because when you conduct combat ¶ operations, you now have to worry about collecting evidence.43¶ A somewhat darker analysis has been put forward by Ben Wittes ¶ who has recently written a book called Detention and Denial, where ¶ he argues that the courts have now created an incentive system to ¶ kill rather than capture.44 And much of the law of war over the years ¶ was designed to move away from the “give no quarter” theory, where ¶ you killed everybody at the battlefield, into the theory of you would ¶ rather capture than kill. And his point, and you can agree or ¶ disagree with it, is that you have now actually loaded it the other ¶ way; you have pushed it in the direction of kill rather than capture.45 We have complete uncertainty now in the standards to be ¶ applied in the individual cases. If you read Ben Wittes‟s book ¶ Detention and Denial, he will details about ten or twelve district ¶ court cases where literally on the same facts you get different ¶ answers.46 And it is not that the district judges are not doing their ¶ best, but they have no guidance. There is no standard, and no one ¶ has offered them a standard.¶ We now have litigation about Bagram Air Force Base in ¶ Afghanistan.47 It was absolutely predictable when Boumediene was ¶ decided that the next case would be against Bagram Airbase. I do ¶ not know how it is going to come out at the end. I think it is still in ¶ the district court, but I will tell you, the logic—now they may have ¶ stopped the logic of Guantánamo—the logic of Boumediene certainly ¶ raises questions about Bagram. How do you wind up having habeas ¶ in Bagram? And then what is going to happen when you are in a ¶ forward firebase? Are you going to have habeas cases there? No one¶ knows, but the big problem is that the battlefield commanders do not ¶ know either; that is a serious operational problem.¶ In many ways, it is absolutely a great example of what the Court ¶ in Eisentrager predicted.48 When you go down this path, you are ¶ going to actually have real operational problems with warfighting. ¶ But of course, we are not in 1950 now; we are actually in active ¶ operations.¶ Finally, and I find this really to be the most interesting ¶ contemporary question posed by this series of issues, the press ¶ reports—and I cannot verify this, I am not confirming it, but I am ¶ assuming it to be true—the press reports that President Obama has ¶ authorized the killing of Anwar al-Aulaki, the American citizen in ¶ Yemen who is, in my mind for quite good reason, believed to be a ¶ major recruiter and operation leader for al-Qaeda.49 I want to be ¶ clear: I am perfectly okay with that, and I think it is exactly the right ¶ decision, so I do not want to be misunderstood. But I will say that if ¶ you read the decision and logic of Boumediene that is a very puzzling ¶ situation for al-Aulaki. Because if you need court permission to ¶ detain somebody, and if you need court permission to wiretap ¶ somebody, how can you kill that person without court permission? But that is what warfighting is. You cannot fight a war without that. ¶ There is current litigation on this issue where people are purporting ¶ to represent al-Aulaki‟s family.50 It has been tossed out, but we are ¶ just at the early stages. And frankly, I think we are going to see ¶ more of this.51 I have been reading that there are debates taking ¶ place about this. They are holding a moot court, I believe, on this ¶ issue.¶ A lot of interesting comments can be made about where we find ¶ ourselves, where the current administration finds itself if you believe ¶ the al-Aulaki allegations to be true. But to me, what it suggests is ¶ that when you abruptly change the attitude of deference—and I ¶ think you must look at Boumediene as an abrupt change—the ¶ consequences become unpredictable and very serious. And there is a ¶ reason that judges and courts in the past forswore from doing that. ¶ We may be seeing some of this play out. How it ends is difficult to ¶ predict. ¶ Before I take a few minutes of questions, let me conclude by ¶ making sure I do not cast blame only on the Court, because it is not ¶ the Court‟s fault. This is something where everybody was complicit in ¶ putting us in this situation—all three branches of government. The ¶ fact is, I was here about seven or eight years ago in 2003, at Rutgers, ¶ not here in this particular building but across the street where they ¶ have a campus, and I gave a talk. I had just left as head of the ¶ criminal division, and I said we have kind of put a lot of things ¶ together in a jerry-built way. We need to have a sustainable legal ¶ architecture that is going to make this a framework that we are ¶ comfortable with over a long period of time. Congress has to get ¶ involved—the executive branch has to go to Congress. It is seven ¶ years later, and we have not done it. So that, to me, is a failure of ¶ both branches. For the executive branch, the failure to push ¶ Congress on this has been a mistake. It has led to, for example, a lot ¶ of delay in setting up the administrative process for dealing with ¶ these detainees. Frankly, I think that was a strategic error that more ¶ or less baited the Court into doing what the Court did. I come from ¶ the old school of believing that whatever you think the right answer ¶ is, you do not want to test the limit of what you think it is if you can ¶ avoid it. You want to go into court with the strongest possible position, and you want to be the most modest and incremental in ¶ asking for power because that is how you maximize your chance to ¶ win. I do not think the executive branch was wise in pushing the ¶ envelope on this. That included also delaying the process for years. ¶ There was a lot of internal back and forth on that. It is unfortunate ¶ that the delaying impulse won. I think that some of the processes put ¶ in place in the first couple of rounds were overly scanty—it was more ¶ parsimonious than it should have been and than it needed to be. And ¶ this comes to the point: do not tempt fate. So the executive branch, by ¶ delaying and being parsimonious with how it handled these cases, ¶ essentially begged the Court—not literally but functionally—to get ¶ involved and to step into this. And that is historically, of course, ¶ what courts do.¶ Congress has never stepped up to the plate on this—other than ¶ the jurisdiction stripping in the Detainee Treatment Act and the ¶ Military Commissions Act.52 Even there, in terms of looking at what ¶ habeas might be and writing the kind of complex procedures you ¶ would need to really build the process for detaining people, Congress ¶ still has not stepped up to do that. There are people like Senator ¶ Lindsey Graham of South Carolina who are constantly out there ¶ saying that both parties should work together to identify a solution, ¶ but I have not seen the action taken yet. So, in a way, I have to say in ¶ defense of the decision in Boumediene, at some point when the Court ¶ sees that neither branch is addressing the problem, where there is a ¶ serious issue of balancing security and liberty, and where we are ¶ uncomfortable about the idea of just locking people up indefinitely ¶ without having some confidence that we can review it, the courts are ¶ going to step in. And that leads to the old adage that hard cases ¶ make bad law.¶ The best result, in my mind, would be for the executive branch ¶ and Congress to sit down and put together, like they did with the ¶ Debt Commission now, a plan that talks about how we deal with ¶ detaining people when we are not going to put them in a criminal ¶ case or in a military commission. What is the process of review? ¶ What should the procedural rights be? What should the standard be? ¶ And what is the ultimate target that the judge has to find? I would ¶ hope that if we got that kind of comprehensive and robust statute ¶ that the courts would back off and would give the deference that has ¶ traditionally been good both for the executive and for the courts when ¶ dealing with these kinds of sensitive national security issues.

#### Non-deferential judicial review kills military readiness

Chensey 9 (Robert M. is a Professor at University of Texas School of Law, NATIONAL SECURITY FACT DEFERENCE, VIRGINIA LAW REVIEW, 17 September 2009, http://www.virginialawreview.org/content/pdfs/95/1361.pdf, pg. 1426-1428)

Advocates of deference at times also emphasize the collateral ¶ consequences that non-deferential judicial review of executive ¶ branch factual judgments might have on related government operations or activities. On this view, the benefits of judicial review—¶ measured in terms of enforcement of separation of powers values ¶ or even enhancement of accuracy—in some circumstances may be ¶ outweighed by collateral costs entailed by the very process of nondeferential, or insufficiently deferential, review. ¶ When precisely does this argument come into play? Advocates ¶ of deference do not contend that collateral costs outweigh potential benefits in all national security related litigation. Indeed, the ¶ argument played no significant role in most of the examples surveyed in Part I. Most if not all judicial review of government action, after all, entails some degree of disruption to government operations. Government personnel, for example, often are obliged to ¶ spend some amount of time and resources participating, directly or ¶ indirectly, in the process of litigation, whether by serving as witnesses in a formal sense, gathering and reviewing documents, ¶ speaking informally with attorneys or investigators, and so forth. ¶ These litigation related activities to some extent are bound to disrupt the performance of ordinary government functions. ¶ But some such disruptions are more serious than others. Disruption of military activity, for example, may impose unusually high ¶ costs. So said Justice Jackson in Johnson v. Eisentrager,¶ 218 a postWorld War II decision denying habeas rights to a group of Ger-[page 1427] mans convicted of war crimes and detained in a U.S. controlled facility in Germany. Jackson gave many reasons for the decision, but ¶ placed particular emphasis on the undesirable practical consequences that would, in his view, follow from permitting any judicial ¶ review in this setting. These included: disruption of ongoing military operations, expenditure of scarce military resources, distraction of field commanders, harm to the prestige of commanders, and ¶ comfort to armed enemies.219 The government not surprisingly emphasized such concerns in the Hamdi litigation as well, though with ¶ much less success; and similar arguments continue to play a significant role today as courts grapple with still unresolved questions regarding the precise nature of habeas review of military determinations of enemy combatant status.220¶ But even in the enemy combatant setting, where disruption concerns arguably are near their zenith, this argument does not necessarily point in the direction of fact deference as the requisite solution. It did not persuade the Supreme Court in Hamdi to defer to ¶ the government’s factual judgment, nor did it do so in the more recent decision in Boumediene v. Bush dealing with noncitizen detainees held at Guantánamo. The impact of the argument in those ¶ cases instead was to prompt the Court to accept procedural innovations designed to ameliorate the impact of judicial review, rather ¶ than seeking to avoid that impact via deference.221 This is a useful ¶ reminder that even when the executive branch raises a legitimate ¶ concern in support of a fact deference argument, it does not follow ¶ automatically that deference is the only mechanism by which the ¶ judiciary can accommodate the concern. ¶ This leaves the matter of secrecy. Secrecy relates to the collateral consequences inquiry in the sense that failure to maintain secrecy with respect to national security information can have extralitigation consequences for government operations—as well as for [page 1428] individuals or even society as a whole—ranging from the innocuous ¶ to the disastrous. Without a doubt this is a significant concern. But, ¶ again, it is not clear that deference is required in order to address ¶ it. Preservation of secrecy is precisely the reason that the state secrets privilege exists, of course, and it also is the motive for the ¶ Classified Information Procedures Act, which establishes a process ¶ through which judges work with the parties to develop unclassified ¶ substitutes for evidence that must be withheld on secrecy ¶ grounds.222

#### Military readiness key to heg

Donnelly 3 (Thomas, resident fellow at AEI, The Underpinnings of the Bush Doctrine, February 1, <http://www.aei.org/article/foreign-and-defense-policy/the-underpinnings-of-the-bush-doctrine/>) ap

The preservation of today's Pax Americana rests upon both actual military strength and the perception of strength. The variety of victories scored by U.S. forces since the end of the cold war is testament to both the futility of directly challenging the United States and the desire of its enemies to keep poking and prodding to find a weakness in the American global order. Convincing would-be great powers, rogue states, and terrorists to accept the liberal democratic order--and the challenge to autocratic forms of rule that come with it--requires not only an overwhelming response when the peace is broken, but a willingness to step in when the danger is imminent. The message of the Bush Doctrine--"Don't even think about it!"--rests in part on a logic of preemption that underlies the logic of primacy.

**Solves escalation of global hotspots- retrenchment causes bickering internationally over leadership and prevents cooperation**

**Brzezinski 2012** Zbigniew K. Brzezinski (CSIS counselor and trustee and cochairs the CSIS Advisory Board. He is also the Robert E. Osgood Professor of American Foreign Policy at the School of Advanced International Studies, Johns Hopkins University, in Washington, D.C. He is cochair of the American Committee for Peace in the Caucasus and a member of the International Advisory Board of the Atlantic Council. He is a former chairman of the American-Ukrainian Advisory Committee. He was a member of the Policy Planning Council of the Department of State from 1966 to 1968; chairman of the Humphrey Foreign Policy Task Force in the 1968 presidential campaign; director of the Trilateral Commission from 1973 to 1976; and principal foreign policy adviser to Jimmy Carter in the 1976 presidential campaign. From 1977 to 1981, Dr. Brzezinski was national security adviser to President Jimmy Carter. In 1981, he was awarded the Presidential Medal of Freedom for his role in the normalization of U.S.-China relations and for his contributions to the human rights and national security policies of the United States. He was also a member of the President’s Chemical Warfare Commission (1985), the National Security Council–Defense Department Commission on Integrated Long-Term Strategy (1987–1988), and the President’s Foreign Intelligence Advisory Board (1987–1989). In 1988, he was cochairman of the Bush National Security Advisory Task Force, and in 2004, he was cochairman of a Council on Foreign Relations task force that issued the report Iran: Time for a New Approach. Dr. Brzezinski received a B.A. and M.A. from McGill University (1949, 1950) and Ph.D. from Harvard University (1953). He was a member of the faculties of Columbia University (1960–1989) and Harvard University (1953–1960). Dr. Brzezinski holds honorary degrees from Georgetown University, Williams College, Fordham University, College of the Holy Cross, Alliance College, the Catholic University of Lublin, Warsaw University, and Vilnius University. He is the recipient of numerous honors and awards) February 2012 “After America” http://www.foreignpolicy.com/articles/2012/01/03/after\_america?page=0,0

For **if America falters**, the world is unlikely to be dominated by a single preeminent successor -- not even China. International uncertainty, **increased tension** among global competitors, **and** even outright **chaos** **would be** far more **likely** outcomes. While a sudden, massive crisis of the American system -- for instance, another financial crisis -- would produce a fast-moving chain reaction leading to global political and economic disorder**, a steady drift by America into** increasingly pervasive **decay** or endlessly widening warfare with Islam **would be unlikely to produce**, even by 2025, **an effective global successor**. No single power will be ready by then to exercise the role that the world, upon the fall of the Soviet Union in 1991, expected the United States to play: the leader of a new, globally cooperative world order. **More probable would be a protracted phase of rather inconclusive realignments of both global and regional power, with no** grand **winners and many more losers, in a setting of international uncertainty and even of potentially fatal risks to global well-being**. Rather than a world where dreams of democracy flourish, a Hobbesian world of enhanced national security based on varying fusions of authoritarianism, nationalism, and religion could ensue. RELATED 8 Geopolitically Endangered Species The leaders of the world's second-rank powers, among them **India, Japan, Russia, and** some **European countries, are already assessing the potential impact of U.S. decline** on their respective national interests. The Japanese, fearful of an assertive China dominating the Asian mainland, may be thinking of closer links with Europe. Leaders in India and Japan may be considering closer political and even military cooperation in case America falters and China rises. **Russia**, while perhaps engaging in wishful thinking (even schadenfreude) about America's uncertain prospects, **will almost certainly have its eye on the independent states of the former Soviet Union. Europe**, not yet cohesive, **would likely be pulled in several directions:** Germany and Italy toward Russia because of commercial interests, France and insecure Central Europe in favor of a politically tighter European Union, and Britain toward manipulating a balance within the EU while preserving its special relationship with a declining United States. **Others may move more rapidly to carve out their own regional spheres:** Turkey in the area of the old Ottoman Empire, Brazil in the Southern Hemisphere, and so forth. **None of these countries, however, will have the requisite combination of economic, financial, technological, and military power even to consider inheriting America's leading role.** China, invariably mentioned as America's prospective successor, has an impressive imperial lineage and a strategic tradition of carefully calibrated patience, both of which have been critical to its overwhelmingly successful, several-thousand-year-long history. China thus prudently accepts the existing international system, even if it does not view the prevailing hierarchy as permanent. It recognizes that success depends not on the system's dramatic collapse but on its evolution toward a gradual redistribution of power. Moreover, the basic reality is that **China is not yet ready to assume in full America's role in the world**. Beijing's leaders themselves have repeatedly emphasized that on every important measure of development, wealth, and power, China **will still be a modernizing and developing** state **several decades from now, significantly behind not only the United States but also Europe and Japan in the major per capita indices of modernity and national power**. Accordingly, **Chinese leaders have been restrained in laying any overt claims to global leadership.** At some stage, **however, a more assertive Chinese nationalism could arise** and damage China's international interests**. A swaggering, nationalistic Beijing would unintentionally mobilize a powerful regional coalition against itself.** None of China's key neighbors -- India, Japan, and Russia -- is ready to acknowledge China's entitlement to America's place on the global totem pole. **They might even seek support from a waning America to offset an overly assertive China. The resulting regional scramble could become intense, especially given the similar nationalistic tendencies among China's neighbors. A phase of acute international tension in Asia could ensue. Asia** of the 21st century **could then begin to resemble Europe of the 20th century -- violent and bloodthirsty.** At the same time, **the security of a number of weaker states** located geographically next to major regional powers also **depends on the international status quo reinforced by America's global preeminence** -- and would be made significantly more vulnerable in proportion to America's decline. The states in that exposed position -- **including Georgia, Taiwan, South Korea, Belarus, Ukraine, Afghanistan, Pakistan, Israel, and the greater Middle East** -- are today's geopolitical equivalents of nature's most endangered species. **Their fates are closely tied to the nature of the international environment left behind by a waning America, be it ordered and restrained or, much more likely, self-serving and expansionist. A faltering United States could also find its strategic partnership with Mexico in jeopardy.** America's economic resilience and political stability have so far mitigated many of the challenges posed by such sensitive neighborhood issues as economic dependence, immigration, and the narcotics trade. **A decline in American power, however, would likely undermine the health and good judgment of the U.S. economic and political systems. A waning United States would likely be more nationalistic, more defensive about its national identity, more paranoid about its homeland security, and less willing to sacrifice resources for the sake of others' development**. The worsening of relations between a declining America and an internally troubled Mexico could even give rise to a particularly ominous phenomenon: the emergence, as a major issue in nationalistically aroused Mexican politics, of territorial claims justified by history and ignited by cross-border incidents. **Another consequence of American decline could be a corrosion of the generally cooperative management of the global commons** -- **shared interests such as sea lanes, space, cyberspace, and the environment, whose protection is imperative to the long-term growth of the global economy and the continuation of basic geopolitical stability.** In almost every case, **the potential absence of a constructive and influential U.S. role would fatally undermine the essential communality of the global commons because the superiority and ubiquity of American power creates order where there would normally be conflict**. None of this will necessarily come to pass. Nor is the concern that America's decline would generate global insecurity, endanger some vulnerable states, and produce a more troubled North American neighborhood an argument for U.S. global supremacy. In fact, the strategic complexities of the world in the 21st century make such supremacy unattainable. But those dreaming today of America's collapse would probably come to regret it. And as **the world after America would be increasingly complicated and chaotic,** it is imperative that the United States pursue a new, timely strategic vision for its foreign policy -- or start bracing itself for a dangerous slide into global turmoil.

## Adv 1

**Democracy doesn’t solve war**

**Mueller 9**—pol sci prof and IR, Ohio State.Widely-recognized expert on terrorism threats in foreign policy. AB from U Chicago, MA in pol sci from UCLA and PhD in pol sci from UCLA (John, Faulty Correlation, Foolish Consistency, Fatal Consequence: Democracy, Peace, and Theory in the Middle East, 15 June 2007, http://psweb.sbs.ohio-state.edu/faculty/jmueller/KENT2.PDF)

In the last couple of decades there has been aburgeoning and intriguing discussion about the connection between democracy and war aversion.7 Most notable has been the empirical observation that democracies have never, or almost never, gotten into a war with each other. This relationship seems more correlative than causal,however. Like many important ideas over the last few centuries, the idea that war is undesirable and inefficacious and the idea that democracy is a good form of government have largely followed the same trajectory: they were embraced first in northern Europe and North America and then gradually, with a number of traumatic setbacks, became more accepted elsewhere. In this view, the rise of democracy not only is associated with the rise of war aversion, but also with the decline of slavery, religion, capital punishment, and cigarette smoking, and with the growing acceptance of capitalism, scientific methodology, women's rights, environmentalism, abortion, and rock music.8While democracy and war aversion have taken much the sametrajectory, however, they have been substantially out of synchronization with each other: the movement toward democracy began about 200 years ago,but the movement against war really began only about 100 years ago (Mueller 1989, 2004). Critics of the democracy/peace connection often cite examples of wars or near-wars between democracies. Most of these took place before World War I--that is, before war aversion had caught on.9 A necessary, logical connection between democracy and war aversion, accordingly, is far from clear. Thus, it is often asserted that democracies are peaceful because they apply their domestic penchant for peaceful compromise (something, obviously, that broke down in the United States in 1861) to the international arena or because the structure of democracy requires decision-makers to obtain domestic approval.10 But authoritarian regimes must also necessarily develop skills at compromisein order to survive, and they all have domestic constituencies that must be serviced such as the church, the landed gentry, potential urban rioters, the nomenklatura, the aristocracy, party members, the military, prominent business interests, the police or secret police, lenders of money to the exchequer, potential rivals for the throne, the sullen peasantry.11 Since World War I, the democracies in the developed world have been in the lead in rejecting war as a methodology. Some proponents of the democracy-peace connection suggest that this is because the democratic norm of non-violent conflict resolution has been externalized to the international arena. However,developed democracies have not necessarily adopted a pacifist approach, particularly after a version of that approach failed so spectacularly to prevent World War II from being forced upon them. In addition, they were willing actively to subvertor to threatenand sometimes apply military force when threats appeared to loom during the Cold War contest. At times this approach was used even against regimes that had some democratic credentials such as in Iran in 1953, Guatemala in 1954, Chile in 1973, and perhaps Nicaragua in the 1980s (Rosato 2003, 590-91). And, they have also sometimes used military force in their intermittent efforts to police the post-Cold War world (Mueller 2004, chs. 7, 8). It is true that they have warred little or not at all against each other--and, since there were few democracies outside the developed world until the last quarter of the twentieth century, it is this statistical regularity that most prominently informs the supposed connection between democracy and peace. However, thedeveloped democracies hardly needed democracy to decide that war among them was a bad idea.12 In addition, they also adopted a live-and-let-live approach toward a huge number of dictatorships and other non-democracies that did not seem threatening during the Cold War--in fact, they often aided and embraced such regimes if they seemed to be on the right side in the conflict with Communism. Moreover, the supposed penchant for peaceful compromise of democracies has not always served them well when confronted with civil war situations, particularly ones involving secessionist demands. The process broke down into civil warfare in democratic Switzerland in 1847 and savagely so in the United States in 1861. Democracies have also fought a considerable number of wars to retain colonial possessions--six by France alone since World War II--and these, as James Fearon and David Laitin suggest, can in many respects be considered essentially to be civil wars (2003, 76). To be sure, democracies have often managed to deal with colonial problems peacefully, mostly by letting the colonies go. But authoritarian governments have also done so: the Soviet Union, for example, withdrew from his empire in Eastern Europe and then dissolved itself, all almost entirely without violence. Thus, while democracy and war aversion have often been promoted by the same advocates, **the relationship does not seem to be a causal one**. And when the two trends are substantially out of step today, democracies will fight one another. Thus, it is not at all clear that telling the elected hawks in the Jordanian parliament that Israel is a democracy will dampen their hostility in the slightest. And various warlike sentiments could be found in the elected parliaments in the former Yugoslavia in the early 1990s or in India and then-democratic Pakistan when these two countries engaged in armed conflict in 1999. If Argentina had been a democracy in 1982 when it seized the Falkland Islands (a very popular undertaking), it is unlikely that British opposition to the venture would have been much less severe. "The important consideration," observes Miriam Fendius Elman after surveying the literature on the subject, does not seem to be "whether a country is democratic or not, but whether its ruling coalition is committed to peaceful methods of conflict resolution." As she further points out, the countries of Latin America and most of Africa have engaged in very few international wars even without the benefit of being democratic (for a century before its 1982 adventure, Argentina, for example, fought none at all) (1997, 484, 496). (Interestingly, although there has also been scarcely any warfare between Latin American states for over 100 years or among Arab ones or European ones for more that 50--in all cases whether democratic or not--this impressive phenomenon has inspired remarkably few calls for worldwide Arab colonialism or for the systematic transplant of remaining warlike states to Latin America or Europe.) And, of course, the long peace enjoyed by developed countries since World War II includes not only the one that has prevailed between democracies, but also the even more important one between the authoritarian east and the democratic west. Even if there is some connection, whether causal or atmospheric, between democracy and peace, it cannot explain this latter phenomenon. Democracy and the democratic peace become mystiques: the role of philosophers and divines Democracy has been a matter of debate for several millennia as philosophers and divines have speculated about what it is, what it might become, and what it ought to be. Associated with these speculations has been a tendency to emboss the grubby gimmick with something of a mystique. Of particular interest for present purposes is the fanciful notion that democracy does not simply express and aggregate preferences, but actually somehow creates (or should create) them. In addition, the (rough) correlation between democracy and war aversion has also been elevated into a causal relationship.

**Global democracy inevitable**

**Tow 10**—Director of the Future Planet Research Centre (David, Future Society- The Future of Democracy, 26 August 2010, http://www.australia.to/2010/index.php?option=com\_content&view=article&id=4280:future-society-the-future-of-democracy&catid=76:david-tow&Itemid=230)

Democracy, as with all other processes engineered by human civilisation, is evolving at a rapid rate. A number of indicators are pointing to a major leap forward, encompassing a more public participatory form of democratic model and the harnessing of the expert intelligence of the Web. By the middle of the 21st century, such a global version of the democratic process will be largely in place.Democracy has a long evolutionary history. The concept of democracy - the notion that men and women have the right to govern themselves, was practised at around 2,500 BP in Athens. The Athenian polity or political body, granted all citizens the right to be heard and to participate in the major decisions affecting their rights and well-being. The City State demanded services and loyalty from the individual in return. There is evidence however that the role of popular assembly actually arose earlier in some Phoenician cities such as Sidon and Babylon in the ancient assemblies of Syria- Mesopotamia, as an organ of local government and justice. As demonstrated in these early periods, democracy, although imperfect, offered each individual a stake in the nation’s collective decision-making processes. It therefore provided a greater incentive for each individual to cooperate to increase group productivity. Through a more open decision process, improved innovation and consequently additional wealth was generated and distributed more equitably. An increase in overall economic wellbeing in turn generated more possibilities and potential to acquire knowledge, education and employment, coupled with greater individual choice and freedom. According to the Freedom House Report, an independent survey of political and civil liberties around the globe, the world has made great strides towards democracyin the 20th and 21st centuries. In 1900 there were 25 restricted democracies in existence covering an eighth of the world’s population, but none that could be judged as based on universal suffrage. The US and Britain denied voting rights to women and in the case of the US, also to African Americans. But at the end of the 20th century 119 of the world’s 192 nations were declared electoral democracies. In the current century, democracy continues to spread through Africa and Asia andsignificantly also the MiddleEast,withover 130 states invarious stages of democratic evolution.Dictatorships or quasi democratic one party states still exist in Africa, Asia and the middle east with regimes such as China, North Korea, Zimbabwe, Burma, the Sudan, Belarus and Saudi Arabia, seeking to maintain total control over their populations. However two thirds of sub-Saharan countries have staged elections in the past ten years, with coups becoming less common and internal wars gradually waning. African nations are also starting to police human rights in their own region. African Union peacekeepers are now deployed in Darfur and are working with UN peacekeepers in the Democratic Republic of the Congo. The evolution of democracy can also be seen in terms of improved human rights. The United Nations Universal Declaration of Human Rights and several ensuing legal treaties, define political, cultural and economic rights as well as the rights of women, children, ethnic groups and religions. This declaration is intended to create a global safety net of rights applicable to all peoples everywhere, with no exceptions. It also recognises the principle of the subordination of national sovereignty to the universality of human rights; the dignity and worth of human life beyond the jurisdiction of any State. The global spread of democracy isnow alsoirreversibly linked to the new cooperative globalisation model. The EU, despite its growing pains, provides a compelling template; complementing national decisions in the supra-national interest at the commercial, financial, legal, health and research sharing level. The global spread of new technology and knowledge also provides the opportunity for developing countries to gain a quantum leap in material wellbeing; an essential prerequisite for a stable democracy. The current cyber-based advances therefore presage a much more interactive public form of democracy and mark the next phase in its ongoing evolution. Web 2.0’s social networking, blogging, messaging and video services have already significantly changed the way people discuss political issues and exchange ideas beyond national boundaries. In addition a number of popular sites exist as forums to actively harness individual opinions and encourage debate about contentious topics, funnelling them to political processes. These are often coupled to online petitions, allowing the public to deliver requests to Government and receive a committed response. In addition there are a plethora of specialized smart search engines and analytical tools aimed at locating and interpreting information about divisive and complex topics such as global warming and medical stem cell advances. These are increasingly linked to Argumentation frameworks and Game theory, aimed at supporting the logical basis of arguments, negotiation and other structured forms of group decision-making. New logic and statistical tools can also provide inference and evaluation mechanisms to better assess the evidence for a particular hypothesis. By 2030 it is likely that such ‘intelligence-based’ algorithms will be capable of automating the analysis and advice provided to politicians, at a similar level of quality and expertise as that offered by the best human advisers. It might be argued that there is still a need for the role of politicians and leaders in assessing and prioritising such expert advice in the overriding national interest. But a moment’s reflection leads to the opposite conclusion. Politicians have party allegiances and internal obligations that can and do create serious conflicts of interest and skew the best advice. History is replete with such disastrous decisions based on false premises, driven by party political bias and populist fads predicated on flawed knowledge. One needs to look no further in recent times than the patently inadequate evidential basis for the US’s war in Iraq which has cost at least half a million civilian lives and is still unresolved. However there remains a disjunction between the developed west and those developing countries only now recovering from colonisation, the subsequent domination by dictators and fascist regimes and ongoing natural disasters. There is in fact a time gap of several hundred years between the democratic trajectory of the west and east, which these countries are endeavouring to bridge within a generation; often creating serious short-term challenges and cultural dislocations. A very powerful enabler for the spread of democracy as mentioned is the Internet/Web- today’s storehouse of the world’s information and expertise. By increasing the flow of essential intelligence it facilitates transparency, reduces corruption, empowers dissidents and ensures governments are more responsive to their citizen’s needs. Ii is already providing the infrastructure for the emergence of a more democratic society; empowering all people to have direct input into critical decision processes affecting their lives, without the distortion of political intermediaries. By 2040 more democratic outcomes for all populations on the planet will be the norm. Critical and urgent decisions relating to global warming, financial regulation, economic allocation of scarce resources such as food and water, humanitarian rights and refugee migration etc, will to be sifted through community knowledge, resulting in truly representative and equitable global governance. Implementation of the democratic process itself will continue to evolve with new forms of e-voting and governance supervision, which will include the active participation of advocacy groups supported by a consensus of expert knowledge via the Intelligent Web 4.0. Over time democracy as with all other social processes, will evolve to best suit the needs of its human environment. It will emerge as a networked model- a non-hierarchical, resilient protocol, responsive to rapid social change. Such distributed forms of government will involve local communities, operating with the best expert advice from the ground up; the opposite of political party self-interested power and superficial focus-group decision-making, as implemented by many current political systems. These are frequently unresponsive to legitimate minority group needs and can be easily corrupted by powerful lobby groups, such as those employed by the heavy carbon emitters in the global warming debate.

#### Court policy making crushes SOP.

Dunn 08 (Joshua, Assistant Professor of Political Science at the University of Colorado-Colorado Springs and the author of Complex Justice: The Case of Missouri v. Jenkins, “The Perils of Judicial Policymaking: The Practical Case for Separation of Powers,” September 23, 2008, http://www.heritage.org/research/reports/2008/09/the-perils-of-judicial-policymaking-the-practical-case-for-separation-of-powers)

There is an obvious constitutional implication that flows from realism's normative position: If judges are simply to make good public policy,the effect must be to erode the boundaries among institutions. The judiciary necessarily becomes another legislative branch. Institutionally, anything goes. Nothing really separates what courts do from what elected branches do. In fact, some legal realists explicitly called for judges to be "social engineers." It would be inaccurate simply to label legal realism the jurisprudential twin of political Progressivism, but one notices striking similarities between the two. Both obviously shared many of the same sentiments toward political and social reform. Most notably, legal realism shared the Progressive movement's goal of replacing politics with government by enlightened experts. In this case, however, the experts were to be judges. Likewise, their dispositions toward the Constitution were strikingly similar. For instance, the most important legal realist, Karl Llewellyn of Columbia Law School, called America's reverence for the Constitution "real" but "blind," a sentiment certainly shared by many Progressives. The Constitution functioned as a great symbol of security for Americans, but like all symbols, it could be manipulated. Llewellyn also derided what he called "orthodox" constitutional interpretation for asking questions such as "Is this within the powers granted by the Document?" This question for him addressed the "nonessential" and "accidental," by which he meant "what language happens to stand in the document." He contrasted orthodox interpretation with "sane" interpretation, which instead of consulting the text consults an "ideal picture." Thus, his "sane theory would utterly disregard a Documentary text if any relevant practices existed to offer a firmer, more living basis for the ideal picture."Ultimately, for Llewellyn, the important constitutional questions facing judges were not clearly answered by the text but instead were "penumbra-like," and the penumbra, he said, "will always be in flux."[10] Many legal realists, such as William O. Douglas and Thurman Arnold, made their way to Washington in the 1930s to assist in designing and implementing the New Deal-with Douglas eventually making his way to the Supreme Court. Few exemplified political decision making on the Supreme Court more than Douglas, whose "breezy" "polemical" opinions, Jeffrey Rosen has observed, seem "unconcerned with the fine points of legal doctrines" and "read more like stump speeches than carefully reasoned constitutional arguments."[11] Echoing Llewellyn, Douglas also blessed us, in his majority opinion in Griswold v. Connecticut, with the hopelessly obscure declaration "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[12] Undoubtedly, there is some truth to the empirical claim of legal realism. The political preferences of judges obviously affect their voting behavior. Any advocate submitting a brief to the Court would certainly consider the political preferences of the justices when crafting his or her arguments. Today, if you want to predict how judges will decide cases, the best way to do so is to get some measure of their ideology. The "attitudinal" model, which "holds that judges decide cases in light of their sincere ideological values juxtaposed against the factual stimuli presented by the case,"[13] marshals powerful statistical evidence for its position. Even the most casual observer of the Supreme Court notes the dreary, even banal, predictability of its splits into liberal and conservative blocs in cases raising divisive social and political issues. Of course, many of these cases hinge on how factual stimuli will strike the ever-mercurial Justice Anthony Kennedy. The question is whether we must be resigned to this arbitrariness or whether there is instead some method of judicial decision making, such as originalism, which holds that the Constitution's meaning was established at the time it was written and can bind judges to something other than their political preferences. It is also reasonable to ask whether legal realism was a self-fulfilling prophecy: Perhaps telling judges that they should be social engineers led judges to embrace social engineering. While legal realism faded from prominence after the 1940s, its effects are still obviously with us. This is most apparent in the debate over judicial policymaking. The most able defenders of judicial policymaking explicitly reject, as they must, separation of powers:We have invested excessive time and energy in the effort to define…what the precise scope of judicial activity ought to be. Separation of powers comes in for a good deal of veneration in our political and judicial rhetoric, but it has always been hard to classify all government activity into three, and only three, neat and mutually exclusive categories.[14] Others have gone even further and said that judges have been willing to "engage in policy making" and violate "the long-standing principles of federalism, separation of powers, and the rule of law" because "there is something seriously wrong with all three principles." Separation of powers in particular is simply a relic of Newtonian science and "no longer operationally relevant."[15] This language, of course, harkens back to another critic of separation of powers, Woodrow Wilson, who also derided the Constitution for relying on Newtonian principles of physics and wanted to move us beyond such constitutional fetishism.

#### Loss of SOP risks nuclear war.

Redish and Cisar 91 (Martin and Elizabeth, prof of law at Northwestern, clerk for judge Bauer, 41 Duke L.J. 449)

3. The Costs of Abandoning Separation of Powers. The most significant problem with the modern attacks on separation of powers is that they completely ignore the very real fears that led to the adoption of the system in the first place. No critic has adequately demonstrated either that the fearsof undue concentrations of political power that caused the Framers to impose separation of powers are unjustified, or that separation of powers is not an important means of deterring those concentrations. It might be argued that the dangers of tyranny thought to be prevented by the use of separation of powers are at best speculative. After all, no one can predict with certainty that, but for the formal separation of branch power, the nation would be likely to sink into a state of tyranny. It is, then, conceivable that all of the Framers' efforts to separate and check powers have been wasted. But that is a risk inherent in the use of any form of prophylactic protection: We cannot be sure that, but for the use of the protection, the harm we fear would result. The decision regarding whether to employ a particular prophylactic device, then, must come down to a comparison of the costs incurred as a result of the device's use with an estimate of both the likelihood and severity of the feared harm. 125 Although some undoubtedly believe that separation of powers imposes severe costs on the achievement of substantive governmental goals, it would be inaccurate to suggest that government has been paralyzed as a result of separation of powers. Too much legislation is enacted by Congress to accept such a criticism. More importantly, in critiquing the failure of the federal government to act, one [\*472] must do so behind a Rawlsian "veil of ignorance": 126 Assuming that abolition of separation of powers would result in an increase in governmental action, we cannot know whether those actions will be ones with which we agree. Moreover, the facilitation of governmental action could just as easily lead to a withdrawal of existing governmental programs that we deem to be wise and just. For example, but for separation of powers, election of Ronald Reagan could have easily led to the abolition of social welfare programs that had been instituted in previous Democratic administrations. Liberals who criticize separation of powers for the constraints it imposes on governmental action should therefore recognize how removal of separation of powers could act as a double-edged sword. Thus, the costs imposed by maintenance of separation of powers are probably nowhere near as great as critics have suggested. Whether the costs that we actually do incur are justified by the system's benefits requires us to examine the likelihood and severity of harm that could result if separation of powers were removed. As previously noted, some might question the likelihood of tyrannical abuse of power if separation of powers were abolished. After all, England lacks our system of formalistic separation of powers, and democracy still flourishes. Why, then, could we not do the same here? The same could, however, be said of the First Amendment rights of free speech and press: In England, speech and press receive no counter-majoritarian constitutional protection, yet it is probably reasonable to believe that for the most part those institutions flourish there. Yet few, we imagine, would feel comfortable with the repeal of the First Amendment. In any event, the political history of which the Framers were aware tends to confirm that quite often concentration of political power ultimately leads to the loss of liberty. Indeed, if we have begun to take the value of separation of powers for granted, we need only look to modern American history to remind ourselves about both the general vulnerability of representative government, and the direct correlation between the concentration of political power and the threat to individual liberty. 127 [\*473] The widespread violations of individual rights that took place when President Lincoln assumed an inordinate level of power, for example, are well documented. 128 Arguably as egregious were the threats to basic freedoms that arose during the Nixon administration, when the power of the executive branch reached what are widely deemed to have been intolerable levels. 129 Although in neither instance did the executive's usurpations of power ultimately degenerate into complete and irreversible tyranny, the reason for that may well have been the resilience of our political traditions, among the most important of which is separation of powers itself. In any event, it would be political folly to be overly smug about the security of either representative government or individual liberty. Although it would be all but impossible to create an empirical proof to demonstrate that our constitutional tradition of separation of powers has been an essential catalyst in the avoidance of tyranny, common sense should tell us that the simultaneous division of power and the creation of interbranch checking play important roles toward that end.To underscore the point, one need imagine only a limited modification of the actual scenario surrounding the recent Persian Gulf War. In actuality, the war was an extremely popular endeavor, thought by many to be a politically and morally justified exercise. But imagine a situation in which a President, concerned about his failure to resolve significant social and economic problems at home, has callously decided to engage [\*474] the nation in war, simply to defer public attention from his domestic failures. To be sure, the President was presumably elected by a majority of the electorate, and may have to stand for reelection in the future. However, at this particular point in time, but for the system established by separation of powers, his authority as Commander in Chief 130 to engage the nation in war would be effectively dictatorial. Because the Constitution reserves to the arguably even more representative and accountable Congress the authority to declare war, 131 the Constitution has attempted to prevent such misuses of power by the executive. 132 It remains unproven whether any governmental structure other than one based on a system of separation of powers could avoid such harmful results.In summary, no defender of separation of powers can prove with certitude that, but for the existence of separation of powers, tyranny would be the inevitable outcome. But the question is whether we wish to take that risk, given the obvious severity of the harm that might result. Given both the relatively limited cost imposed by use of separation of powers and the great severity of the harm sought to be avoided, one should not demand a great showing of the likelihood that the feared harm would result. For just as in the case of the threat of nuclear war, no one wants to be forced into the position of saying, "I told you so."

#### First, Non-Unique— US will always refuse to comply with IL

Global Policy Forum ’12

[an independent publication that monitors UN and global political activity, “US Opposition to the International Criminal Court,” Global Policy Forum, http://www.globalpolicy.org/us-un-and-international-law-8-24/us-opposition-to-the-icc-8-29.html>//wyo-hdm]

The United States government has consistently opposed an international court that could hold US military and political leaders to a uniform global standard of justice. The Clinton administration participated actively in negotiations towards the International Criminal Court treaty, seeking Security Council screening of cases. If adopted, this would have enabled the US to veto any dockets it opposed. When other countries refused to agree to such an unequal standard of justice, the US campaigned to weaken and undermine the court. The Bush administration, coming into office in 2001 as the Court neared implementation, adopted an extremely active opposition. Washington began to negotiate bilateral agreements with other countries, insuring immunity of US nationals from prosecution by the Court. As leverage, Washington threatened termination of economic aid, withdrawal of military assistance, and other painful measures. The Obama administration has so far made greater efforts to engage with the Court. It is participating with the Court's governing bodies and it is providing support for the Court's ongoing prosecutions. Washington, however, has no intention to join the ICC, due to its concern about possible charges against US nationals.

#### Second, Poor International Behavior by troops removes the perception of American Rule of Law

Younge ’12

[Gary Younge, columnist The Guardian, “Comment: Abroad, Obama coasts on a wave of disappointment: Significant hope was invested in the chance to repair America's global reputation - but there's been precious little return”, The Guardian [London (UK)], 4/23/2012

One can only account for so many isolated incidents before it becomes necessary to start dealing with a pattern. The fact is that when Americans travel abroad to serve their country they have a record of not observing even the most basic human standards. The problem here is not with Americans per se but with military might, global economic pretensions and the skirmishes and occupations that inevitably accompany them. The French, Belgians and British were no more humane or less hypocritical in the administration of their colonies, including in Kenya where Obama's grandfather was tortured by the British.¶ Nor is the issue that American foreign policy is designed to serve US interests - that is the nature of every country's foreign policy. But that it's policy lies in such sharp contradiction to its rhetoric, and its practice so clearly undermines its national interests.¶ Take Afghanistan. Five days after revelations about the secret service in Colombia surfaced, the Los Angeles Times published photographs of US marines posing with the mangled corpses of Afghan insurgents. One featured the unofficial platoon patch, "Zombie hunter", over the remains of someone who had blown themselves up accidentally.¶ This "most certainly does not represent the character and the professionalism of the great majority of our troops in Afghanistan", insisted Captain John Kirby, a spokesman for the Pentagon, which pressured the LA Times not to release the photos. This incident, which occurred two years ago, should not be confused with the professionalism of the marines videoed urinating on Afghan corpses or the sergeant who ran amok in two Afghan villages leaving 17 civilians dead.¶ Nor are these contradictions new. In June 1964, President Lyndon Johnson told the Greek ambassador to Washington: "Fuck your parliament and your constitution . . . We pay a lot of good American dollars to the Greeks, Mr Ambassador. If your prime minister gives me talk about democracy, parliament and constitution, he, his parliament and his constitution may not last long . . ." Within three years Greece was under a brutal military junta backed by the US, from which it did not emerge for a decade.¶ What is different now is that significant hope abroad was invested in Obama to both repair America's international reputation and reorient its policies - and there has been precious little return.¶ "The diplomatic historian traces foreign affairs as if domestic affairs were offstage disturbances," writes Walter Karp in his book The Politics of War. "The historian of domestic politics treats the explosions of war as if they were offstage disturbances. Were that true, we would have to believe that presidents who faced a mounting sea of troubles at home have nonetheless conducted their foreign policy without the slightest regard for those troubles - that individual presidents were divided into watertight compartments, one labelled 'domestic' and the other 'foreign'."¶ Abroad as at home, Obama is coasting to the end of his first term on a wave of disappointment. A recent Gallup poll shows US global standing still holding up far better than it ever did under Bush. But it is softening considerably, particularly in Africa and the Americas, as the promise of those early years gives way to his record. On the doorstep, where the presidential race is tightening, as on the international stage, where goodwill is waning, the response is the same: better than the rest is a long way from good enough.

#### Fifth, International law allows torturing terrorists -solves for future attacks

Preist and Smith ‘04

[Dana & R. Jeffrey, American author and Pulitzer Prize-winning journalist. Priest has worked almost 20 years for The Washington Post. Before becoming a full-time investigative reporter, Priest specialized in national security reporting for The Post, and wrote many articles on the United States' "War on terror." In 2006 she won the Pulitzer Prize for Beat Reporting for her reporting on black site prisons. In 2008 The Washington Post was awarded the Pulitzer Prize for Public Service for the reporting of Priest and Anne Hull and photographer Michel du Cille at Walter Reed Army Medical Center. & a reporter at the Washington Post and was awarded the Pulitzer Prize for Investigative Reporting in 2006 (University of California, Santa Cruz). Smith was a senior writer from 1977 to 1986 for Science magazine and he won two Science in Society Journalism Awards during that period. Afterward, his career has developed at the Washington Post. From 1986 to 1998, he was a national security correspondent and, after that, he has been the Post's southern Europe bureau chief )Duke University, John Hopkins & Columbia University), “Memo Offered Justification for Use of Torture Justice Dept. Gave Advice in 2002,” The Washington Post, 06.08.2004//wyo-hdm]

In August 2002, the Justice Department advised the White House that torturing al Qaeda terrorists in captivity abroad "may be justified," and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in President Bush's war on terrorism, according to a newly obtained memo. If a government employee were to torture a suspect in captivity, "he would be doing so in order to prevent further attacks on the United States by the Al Qaeda terrorist network," said the memo, from the Justice Department's office of legal counsel, written in response to a CIA request for legal guidance. It added that arguments centering on "necessity and self-defense could provide justifications that would eliminate any criminal liability" later. The memo seems to counter the pre-Sept. 11, 2001, assumption that U.S. government personnel would never be permitted to torture captives. It was offered after the CIA began detaining and interrogating suspected al Qaeda leaders in Afghanistan and elsewhere in the wake of the attacks, according to government officials familiar with the document. The legal reasoning in the 2002 memo, which covered treatment of al Qaeda detainees in CIA custody, was later used in a March 2003 report by Pentagon lawyers assessing interrogation rules governing the Defense Department's detention center at Guantanamo Bay, Cuba. At that time, Defense Secretary Donald H. Rumsfeld had asked the lawyers to examine the logistical, policy and legal issues associated with interrogation techniques. Bush administration officials say flatly that, despite the discussion of legal issues in the two memos, it has abided by international conventions barring torture, and that detainees at Guantanamo and elsewhere have been treated humanely, except in the cases of abuse at Abu Ghraib prison in Iraq for which seven military police soldiers have been charged. Still, the 2002 and 2003 memos reflect the Bush administration's desire to explore the limits on how far it could legally go in aggressively interrogating foreigners suspected of terrorism or of having information that could thwart future attacks. In the 2002 memo, written for the CIA and addressed to White House Counsel Alberto R. Gonzales, the Justice Department defined torture in a much narrower way, for example, than does the U.S. Army, which has historically carried out most wartime interrogations. In the Justice Department's view -- contained in a 50-page document signed by Assistant Attorney General Jay S. Bybee and obtained by The Washington Post -- inflicting moderate or fleeting pain does not necessarily constitute torture. Torture, the memo says, "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." By contrast, the Army's Field Manual 34-52, titled "Intelligence Interrogations," sets more restrictive rules. For example, the Army prohibits pain induced by chemicals or bondage; forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time; and food deprivation. Under mental torture, the Army prohibits mock executions, sleep deprivation and chemically induced psychosis. Human rights groups expressed dismay at the Justice Department's legal reasoning yesterday. "It is by leaps and bounds the worst thing I've seen since this whole Abu Ghraib scandal broke," said Tom Malinowski of Human Rights Watch. "It appears that what they were contemplating was the commission of war crimes and looking for ways to avoid legal accountability. The effect is to throw out years of military doctrine and standards on interrogations." But a spokesman for the White House counsel's office said, "The president directed the military to treat al Qaeda and Taliban humanely and consistent with the Geneva Conventions." Mark Corallo, the Justice Department's chief spokesman, said "the department does not comment on specific legal advice it has provided confidentially within the executive branch." But he added: "It is the policy of the United States to comply with all U.S. laws in the treatment of detainees -- including the Constitution, federal statutes and treaties." The CIA declined to comment. The Justice Department's interpretation for the CIA sought to provide guidance on what sorts of aggressive treatments might not fall within the legal definition of torture. The 2002 memo, for example, included the interpretation that "it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture." The memo named seven techniques that courts have considered torture, including severe beatings with truncheons and clubs, threats of imminent death, burning with cigarettes, electric shocks to genitalia, rape or sexual assault, and forcing a prisoner to watch the torture of another person. "While we cannot say with certainty that acts falling short of these seven would not constitute torture," the memo advised, ". . . we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law." "For purely mental pain or suffering to amount to torture," the memo said, "it must result in significant psychological harm of significant duration, e.g., lasting for months or even years." Examples include the development of mental disorders, drug-induced dementia, "post traumatic stress disorder which can last months or even years, or even chronic depression." Of mental torture, however, an interrogator could show he acted in good faith by "taking such steps as surveying professional literature, consulting with experts or reviewing evidence gained in past experience" to show he or she did not intend to cause severe mental pain and that the conduct, therefore, "would not amount to the acts prohibited by the statute." In 2003, the Defense Department conducted its own review of the limits that govern torture, in consultation with experts at the Justice Department and other agencies. The aim of the March 6, 2003, review, conducted by a working group that included representatives of the military services, the Joint Chiefs of Staff and the intelligence community, was to provide a legal basis for what the group's report called "exceptional interrogations." Much of the reasoning in the group's report and in the Justice Department's 2002 memo overlap. The documents, which address treatment of al Qaeda and Taliban detainees, were not written to apply to detainees held in Iraq. In a draft of the working group's report, for example, Pentagon lawyers approvingly cited the Justice Department's 2002 position that domestic and international laws prohibiting torture could be trumped by the president's wartime authority and any directives he issued. At the time, the Justice Department's legal analysis, however, shocked some of the military lawyers who were involved in crafting the new guidelines, said senior defense officials and military lawyers. "Every flag JAG lodged complaints," said one senior Pentagon official involved in the process, referring to the judge advocate generals who are military lawyers of each service. "It's really unprecedented. For almost 30 years we've taught the Geneva Convention one way," said a senior military attorney. "Once you start telling people it's okay to break the law, there's no telling where they might stop." A U.S. law enacted in 1994 bars torture by U.S. military personnel anywhere in the world. But the Pentagon group's report, prepared under the supervision of General Counsel William J. Haynes II, said that "in order to respect the President's inherent constitutional authority to manage a military campaign . . . [the prohibition against torture] must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority." The Pentagon group's report, divulged yesterday by the Wall Street Journal and obtained by The Post, said further that the 1994 law barring torture "does not apply to the conduct of U.S. personnel" at Guantanamo Bay. It also said the anti-torture law did apply to U.S. military interrogations that occurred outside U.S. "maritime and territorial jurisdiction," such as in Iraq or Afghanistan. But it said both Congress and the Justice Department would have difficulty enforcing the law if U.S. military personnel could be shown to be acting as a result of presidential orders. The report then parsed at length the definition of torture under domestic and international law, with an eye toward guiding military personnel about legal defenses. The Pentagon report uses language very similar to that in the 2002 Justice Department memo written in response to the CIA's request: "If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network," the draft states. "In that case, DOJ [Department of Justice] believes that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions." The draft goes on to assert that a soldier's claim that he was following "superior orders" would be available for those engaged in "exceptional interrogations except where the conduct goes so far as to be patently unlawful." It asserts, as does the Justice view expressed for the CIA, that the mere infliction of pain and suffering is not unlawful; the pain or suffering must be severe.

## Adv 2

### \*\*1NC – AT: Rule of Law\*\*

#### US Constitution is losing global popularity

Liptak ‘12

[Adam Liptak, Supreme Court Coorespondent; New York Times, We the People’ Loses Appeal With People Around the World, New York Times, 2/6/12, <http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?pagewanted=all>, //wyo TL]

Sure, it is the nation’s founding document and sacred text. And it is the oldest written national constitution still in force anywhere in the world. But its influence is waning.¶ In 1987, on the Constitution’s bicentennial, [Time magazine calculated](http://www.time.com/time/magazine/article/0,9171,964901,00.html) that “of the 170 countries that exist today, more than 160 have written charters modeled directly or indirectly on the U.S. version.”¶ A quarter-century later, the picture looks very different. “The U.S. Constitution appears to be losing its appeal as a model for constitutional drafters elsewhere,” according to [a new study](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923556) by [David S. Law](http://law.wustl.edu/faculty_profiles/profiles.aspx?id=6629) of Washington University in St. Louis and [Mila Versteeg](http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/2301734) of the University of Virginia.¶ The study, to be published in June in The New York University Law Review, bristles with data. Its authors coded and analyzed the provisions of 729 constitutions adopted by 188 countries from 1946 to 2006, and they considered 237 variables regarding various rights and ways to enforce them.¶ “Among the world’s democracies,” Professors Law and Versteeg concluded, “constitutional similarity to the United States has clearly gone into free fall. Over the 1960s and 1970s, democratic constitutions as a whole became more similar to the U.S. Constitution, only to reverse course in the 1980s and 1990s.”¶ “The turn of the twenty-first century, however, saw the beginning of a steep plunge that continues through the most recent years for which we have data, to the point that the constitutions of the world’s democracies are, on average, less similar to the U.S. Constitution now than they were at the end of [World War II](http://topics.nytimes.com/top/reference/timestopics/subjects/w/world_war_ii_/index.html?inline=nyt-classifier).”¶ There are lots of possible reasons. The United States Constitution is terse and old, and it guarantees relatively few rights. The commitment of some members of the Supreme Court to interpreting the Constitution according to its original meaning in the 18th century may send the signal that it is of little current use to, say, a new African nation. And the Constitution’s waning influence may be part of a general decline in American power and prestige.¶ In an interview, Professor Law identified a central reason for the trend: the availability of newer, sexier and more powerful operating systems in the constitutional marketplace. “Nobody wants to copy Windows 3.1,” he said.¶ In a [television interview](http://www.youtube.com/watch?v=vzog2QWiVaA) during a visit to Egypt last week, Justice Ruth Bader Ginsburg of the Supreme Court seemed to agree. “I would not look to the United States Constitution if I were drafting a constitution in the year 2012,” she said. She recommended, instead, the[South African Constitution](http://www.info.gov.za/documents/constitution/), the [Canadian Charter of Rights and Freedoms](http://laws.justice.gc.ca/eng/charter/) or the[European Convention on Human Rights](http://www.hri.org/docs/ECHR50.html).¶ The rights guaranteed by the American Constitution are parsimonious by international standards, and they are frozen in amber. As [Sanford Levinson](http://www.utexas.edu/law/faculty/svl55/) wrote in 2006 in [“Our Undemocratic Constitution,”](http://www.utexas.edu/law/faculty/slevinson/undemocratic/) “the U.S. Constitution is the most difficult to amend of any constitution currently existing in the world today.” (Yugoslavia used to hold that title, but Yugoslavia did not work out.)¶ Other nations routinely trade in their constitutions wholesale, replacing them on average every 19 years. By odd coincidence, Thomas Jefferson, in [a 1789 letter to James Madison](http://teachingamericanhistory.org/library/index.asp?document=2220), once said that every constitution “naturally expires at the end of 19 years” because “the earth belongs always to the living generation.” These days, the overlap between the rights guaranteed by the Constitution and those most popular around the world is spotty.¶ Americans recognize rights not widely protected, including ones to a speedy and public trial, and are outliers in prohibiting government establishment of religion. But the Constitution is out of step with the rest of the world in failing to protect, at least in so many words, a right to travel, the presumption of innocence and entitlement to food, education and health care.¶ It has its idiosyncrasies. Only 2 percent of the world’s constitutions protect, as the Second Amendment does, a right to bear arms. (Its brothers in arms are Guatemala and Mexico.)¶ The Constitution’s waning global stature is consistent with [the diminished influence of the Supreme Court](http://www.nytimes.com/2008/09/18/us/18legal.html?ref=americanexception), which “is losing the central role it once had among courts in modern democracies,” Aharon Barak, then the president of the Supreme Court of Israel, [wrote in The Harvard Law Review in 2002](https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=116+Harv.+L.+Rev.+16&srctype=smi&srcid=3B15&key=0bacc7c7026c426ae19a031de806c331).¶ Many foreign judges say they have become less likely to cite decisions of the United States Supreme Court, in part because of what they consider its parochialism.¶ “America is in danger, I think, of becoming something of a legal backwater,” Justice Michael Kirby of the High Court of Australia said in [a 2001 interview](https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=4+Green+Bag+2d+287&srctype=smi&srcid=3B15&key=27e2ae15f94c08a6f86b86181db67a34). He said that he looked instead to India, South Africa and New Zealand.¶ Mr. Barak, for his part, identified a new constitutional superpower: “Canadian law,” he wrote, “serves as a source of inspiration for many countries around the world.” The new study also suggests that the Canadian Charter of Rights and Freedoms, adopted in 1982, may now be more influential than its American counterpart.¶ The Canadian Charter is both more expansive and less absolute. It guarantees equal rights for women and disabled people, allows affirmative action and requires that those arrested be informed of their rights. On the other hand, it balances those rights against “such reasonable limits” as “can be demonstrably justified in a free and democratic society.”¶ There are, of course, limits to empirical research based on coding and counting, and there is more to a constitution than its words, as Justice Antonin Scalia [told the Senate Judiciary Committee in October](http://www.judiciary.senate.gov/hearings/hearing.cfm?id=8bbe59e76fc0b6747b22c32c9e014187). “Every banana republic in the world has a bill of rights,” he said.¶ “The bill of rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours,” he said, adding: “We guarantee freedom of speech and of the press. Big deal. They guaranteed freedom of speech, of the press, of street demonstrations and protests, and anyone who is caught trying to suppress criticism of the government will be called to account. Whoa, that is wonderful stuff!”¶ “Of course,” Justice Scalia continued, “it’s just words on paper, what our framers would have called a ‘parchment guarantee.’ ”

## Solv

#### Congress’s current legislation on use of drones in Libya shows the judicial branch will not budge or change the original lawsuit

John Patera, 12

J.D., May 2012, Hamline University School of Law. “War Powers Resolution in the Age of Drone Warfare:¶ How Drone Technology has Dramatically Reduced the¶ Resolution's Effectiveness as a Curb on Executive¶ Power” Book, online, accessed 8/2/13,WYO/JF

Several key members of Congress voiced their concem over¶ the President's decision to unilaterally support NATO's operation¶ in Libya without first obtaining Congressional approval. 10¶ members of Congress brought a lawsuit against President Obama,¶ and, predictably, it was dismissed on procédural grounds without¶ reaching the merits. The offensive use of drones represented a key¶ sticking point with Congress, as House Majority Speaker John¶ Boehner stated:¶ The White House says there are no hostilities taking place.¶ Yet we've got drone attacks underway. We're spending $10 million¶ a day. We're part of an effort to drop bombs on Qaddafi's¶ compounds. It just doesn't pass the straight-face test, in my view,¶ that we're not in the midst of hostilities.^^

# 2nc

## cp

### turns case

#### Plan destroys democracy due to constitutional interpretations of the Court—Congressional action is needed to reinvigorate liberal democracy

**Roberts 98**

[Paul Craig, Business Week, January 26, , ECONOMIC VIEWPOINT; Number 3562; Pg. 18, CONGRESS ]SHOULD GRAB BACK THE REINS OF POWER, accessedvia Lexis, [rapp/vandy]

Democracy in America is being hollowed out, not because of organized interest groups or the way campaigns are financed. Democracy has become the exercise of holding a plebiscite on the economy every four years: We the People cannot rule ourselves when our elected representatives do not make the laws or impose the taxes. The unraveling of the separation of powers is leaving power unrestrained. This is the opposite of liberalism and repudiates its historic achievement. Congress is empowered to make laws. It is not empowered to make other legislators by placing its lawmaking mandate in other hands. Political clout is up for grabs when the U.S. Supreme Court reads into the Constitution all manner of rights nowhere mentioned in it but does not enforce the right to self-rule and the separation of powers that are explicitly stated in the document's main articles. Eventually, unrestrained force becomes, in Lenin's words, ''unlimited power, resting directly on force. Nothing else but that.''

#### Amendment is better for democracy—engages citizens

Siegel ‘06

[Reva B. Siegel, Nicholas deB. Katzenbach Professor of Law at Yale Law School, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era. 2005-06 Brennan Center Symposium Lecture,” California Law Review, Vol. 94, No. 5 (Oct., 2006), pp. 1323-1419, [http://www.jstor.org/stable/20439068 //](http://www.jstor.org/stable/20439068%20//) wyo-ch]

The Lecture does not use the concept of constitutional culture as some in constitutional theory employ it: as social values relevant to matters of constitutional law that an official engaged in responsive interpretation incorporates into the fabric of constitutional law. Rather than focus on officials as change-agents, I employ the concept of constitutional culture to explore how changes in constitutional understanding emerge from the interaction of citizens and officials. In this usage, constitutional culture shapes both popular and professional claims about the Constitution and enables the forms of communication and deliberative engagement among citizens and officials that dynamically sustain the Constitution's democratic authority in history.7 The Lecture analyzes constitutional culture as a field in which citizens and officials interact; some interactions are formalized, like the procedures for amending the Constitution set forth in Article V, while others are not and require complex literacy about the forms of authority and argument that citizens and officials may employ in various institutional settings. For example, ERA proponents correctly anticipated that officials responsible for interpreting the Constitution might respond to the shifts in popular opinion that a campaign to amend the Constitution produced, even if, by formal measures, the People endorsed the status quo.8 These kinds of role-literacy are well recognized within constitutional law, but they are more likely to be understood as matters of practical judgment and professional craft than theorized as crucial to securing the Constitution's democratic authority.9 There is reticence to analyze these pathways of responsiveness as providing goods we expect formal constitutional lawmaking to provide, because we see no ground to distinguish licit from illicit forms of constitutional change, in the absence of any procedure or metric for measuring democratic will.10 Without such criteria, it is easier to conceive of such pressures as threats to the Constitution's democratic legitimacy than as sources of it. Thus, even as Americans regularly mobilize to shape the ways that officials enforce the Constitution's commitments, Americans are deeply ambivalent about acknowledging the influence of movements on constitutional meaning. At times, Americans see in constitutional mobilizations de Tocqueville's democratizing civic associations;" as often, they see the factions Madison feared. 12 Acknowledging the pathways through which constitutional mobilizations influence constitutional meaning threatens the distinction between law and politics, creating uncertainty about the legitimacy of social movement influence that has in turn produced uneasy silence, internal to constitutional law, about the role of constitutional mobilizations in constitutional change. This Lecture employs the framework of constitutional culture to analyze the ways mobilized citizens influence officials who enforce the Constitution. Constitutional culture mediates the relation of law and politics. The Lecture shows how constitutional culture supplies understandings of role and practices of argument through which citizens and officials can propose new ways of enacting the society's defining commitments-as well as resources to resist those proposals. Constitutional culture preserves and perpetually destabilizes the distinction between politics and law by providing citizens and officials the resources to question and to defend the legitimacy of government, institutions of civil society, and the Constitution itself. Constitutional culture both licenses and limits change. It supplies citizens and officials understandings about authority and advocacy that empower them to act as effective change agents and to block, manage, and diffuse threats to the status quo. When constitutional culture can harness the energies of social conflict, agents of deeply agonistic views remain engaged in constitutional dispute, speaking through the Constitution rather than against it. On the traditional account there is one avenue for mobilized citizens to pursue change within the constitutional order: through constitutional lawmaking. But we know that movements regularly succeed in changing the Constitution without amending it-the de facto ERA is by no means the only such case. Constitutional culture enables mobilized citizens to influence the officials who enforce the Constitution, through lawmaking and outside of it. Change through these informal pathways regularly occurs and, with equal regularly, elicits passionate protest, yet citizen confidence in the Constitution persists. This Lecture shows how constitutional culture enables proposals for change, as well as protest directed at officials who respond to these claims, giving rise to conflict that can discipline constitutional advocacy into understandings that officials can enforce and the public will recognize as the Constitution.

#### Court not perceived

Schauer 6

[Frederick. (Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University). “THE SUPREME COURT, 2005 TERM: FOREWORD: THE COURT'S AGENDA - AND THE NATION'S.” November 2006. l/n //wyo-jamie]

My central point may still seem counterintuitive, but recall again what the Court did not address. 91 Our general impressions as well as the polling data tell us that the public is concerned about Iraq more [\*32] than anything else, but neither the wisdom nor the legality nor the conduct of that conflict constituted any part of the Court's work, nor have they since the war in Iraq started, nor did they for the first Iraq war in 1991. Immigration has absorbed the nation's citizens, pundits, and policymakers at least since the beginning of 2006, but the Court's two narrow and procedural immigration decisions in the 2005 Term were leagues away from engagement with the central issues of immigration policy. 92 And the Court dealt not at all with fuel prices, the minimum wage, income taxes, the estate tax, Social Security, inflation, interest rates, avian flu, or the nuclear capabilities of Iran and North Korea, while taking on issues related to healthcare, 93 employment, 94 and education 95 that could not seriously be described as in any way connected with current or past policy debates on these topics. While the Court was thus working on problems and issues about which the public and their representatives at best cared little, the people and the policymakers were devoting their attention and energies to topics the Court simply did not touch. When we remove our blinders and survey what the Supreme Court did not do as well as what it did, we see clearly just how few of the public's major issues of concern or the nation's first-order policy decisions come anywhere near the purview of the judiciary.

#### No loose nukes – Russian materials can’t be used to create a bomb.

John Mueller 08, Dept of Poli Sci Ohio State U, 1/1/2008, The Atomic Terrorist: Assessing the Likelihood, p. http://polisci.osu.edu/faculty/jmueller/APSACHGO.PDF

**There has been a lot of worry about "loose nukes**," particularly **in** post-Communist **Russia**--weapons, "suitcase bombs" in particular, that can be stolen or bought illicitly. However, when asked, **Russian nuclear officials and experts** on the Russian nuclear programs "adamantly **deny that al Qaeda or any other terrorist group could have** bought **Soviet-made** suitcase **nukes." They further point out that the bombs**, all built before 1991, **are difficult to maintain and have a lifespan of one to three years after which they become "radioactive scrap metal**" (Badkhen 2004). Similarly, **a careful assessment** of the concern conducted **by the Center for Nonproliferation Studies has concluded that it is unlikely that any of these devices have actually been lost and that**, regardless, **their effectiveness would be** very low or even **non-existent because they require continual maintenance** (2002, 4, 12; see also Smith and Hoffman 1997; Langewiesche 2007, 19). By 2007, **even** such **alarmists** at Anna Pluto and Peter Zimmerman **were concluding that** "It is probably true that **there are no 'loose nukes**', transportable nuclear weapons missing from their proper storage locations and available for purchase in some way (2007, 56).

## solv

#### More solid framework is needed to maintain the constitution on issues like indefinite detention than the courts or congressional legislation—Bush proves

Chemerinsky 6

[Chemerinsky, Erwin: Alston & Bird Professor of Law and Political Science, Duke University. "Assault on the Constitution: Executive Power and the War on Terrorism." *UC Davis Law Review*. 40.1 (2006): n. page. Web. 30 Jul. 2013. <http://heinonline.org/HOL/Page?handle=hein.journals/davlr40&div=7&g\_sent=1&collection=journals>. //Wyo-BF]

Over thirty years ago, during the Nixon presidency, noted historian Arthur M. Schlesinger, Jr., wrote The Imperial Presidency.1 Nothing Schlesinger described begins to approach what has occurred during the presidency of George W. Bush. The Bush administration has claimed the authority to detain American citizens indefinitely as enemy combatants without warrants, grand jury indictments, or trial by jury and proof beyond a reasonable doubt.2 The administration has asserted the power to ignore statutes and treaties prohibiting torture.3 It has maintained that the administration can engage in warrantless electronic eavesdropping in violation of the Fourth Amendment and federal statutes.' The Bush administration has argued that it can detain foreign citizens indefinitely at Guantanamo Bay, Cuba, without judicial review.

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Together, these actions are an assault on the Constitution. The Bush administration's positions on these and other issues share several characteristics. First, they all aggrandize executive power. In fact, the Bush administration's approach to executive power can be traced back to Republican presidencies over the last forty years. The Nixon administration's efforts to increase presidential powers were intensified during the Reagan and first Bush presidencies and have come to fruition under President George W. Bush. Second, the Bush administration rejects the ability of the courts to review its actions and even of Congress to check its conduct. Its actions and positions cannot be reconciled with a system based on checks and balances. Third, the Bush administration's approach to presidential power is at odds with the traditional, conservative approach to interpreting the Constitution. For decades, conservatives have argued that the meaning of the Constitution should be determined by looking to its text and the framers' intent.6 But if anything is clear about the framers, it is that they deeply distrusted executive power. Unchecked executive authority cannot be reconciled with the text of the Constitution, and the framers accepted significant executive power only as a necessary evil. This essay discusses why the Bush administration's approach to presidential power is an assault on the Constitution. Part I suggests a framework for analyzing claims of presidential power. Part 11 describes some of the claims of executive power made by the Bush administration. Part III explains why this administration's approach to executive power is unprecedented and antithetical to basic constitutional principles.

### 2NC A2 Timeframe

#### Legislators are more efficient than the Court

Prakash and Yoo 5

[Saikrishna Prakash, Professor, Law, University of San Diego and John Yoo, Professor, Law, University of California, Review of The People Themselves: Popular Constitutionalism and Judicial Review, by Larry D. Kramer, MICHIGAN LAW REVIEW v. 103, May 2005, p. 1560.]

[\*1560] At times, the scholarly obsession with judicial review and the counter-majoritarian difficulty exaggerates the power of the courts. As an institution, the federal courts have relatively few personnel and only about $ 3 billion in annual funds. Sitting at the top of a slow, decentralized decisionmaking process, the Supreme Court hears roughly eighty cases a year. These limited resources restrict the ability of the federal courts to hear cases of all kinds, not just constitutional cases. Federal courts depend on private parties to bring constitutional issues to them, and they raise numerous procedural barriers - such as standing, ripeness, mootness, the political question doctrine, and the avoidance doctrine - to the decision of those issues. Because of their greater responsibilities and scope for action, the other branches will encounter constitutional issues more often and have greater resources to reach decisions and enforce them. Not only does Congress enact many more laws than the Supreme Court can review, but because Congress often delegates rulemaking authority to the agencies, administrative regulations produce a large number of laws every year that the courts cannot possibly review.

### 2NC A2 Amendments Bad

#### The case against constitutional amendments fails—the only real alternative is a flexible judicial interpretation that trivializes the constitution

Vermeule 4

[Adrian, Prof of Law @ The University of Chicago, “Constitutional Amendments and the Constitutional Common Law” September 2004. Accessed 28 July 2013. <http://ssrn.com/abstract=590341> //Wyo-BF]

The discussion is organized as follows. Part I critiques Strauss’ thesis that constitutional amendments are systematically irrelevant. First, even if constitutional amendments are neither necessary nor sufficient to produce legal change, they may nonetheless be causally efficacious in producing legal change. Strauss has overlooked that the causal force of amendments is probabilistic: even if an amendment neither guarantees a desired legal change nor is indispensable to it, the amendment may nonetheless make the change more likely than it would have been in the amendment’s absence. Second, the irrelevance view slips imperceptibly from the denial that any particular amendment is relevant to the denial that the total set of amendments is relevant. But if the reason that particular amendments are irrelevant is that other amendments would have been interpreted to produce the same effect—and this is the form of Strauss’ argument in many cases --- then the irrelevance claim cannot hold true of all amendments at once. Even if every particular constitutional amendment can be shown to be irrelevant through a seriatim procedure, we cannot generalize the conclusion that all constitutional amendments might be irrelevant simultaneously. In Part II, the core of the paper, I argue that the generic case against constitutional amendment fails. The generic case rests on a nirvana fallacy that implicitly contrasts a jaundiced view of the amendment process with a romanticized view of constitutional common law. The real alternative to constitutional amendment is flexible judicial interpretation that updates the Constitution over time—a practice that can also be seen as tampering with or trivializing the Constitution, that is at least as polarizing or divisive as constitutional amendment, that equally risks bad unintended consequences, and so on. Moreover, a public norm of the kind embodied in the generic case against amendment would produce either a suboptimal rate of constitutional amendments, or an optimal rate at excessive cost. The generic case can be reconstructed as a weak presumption, but in that form it loses its distinctive force. Once we have dispelled the nirvana fallacy underlying the generic case against amendment, constitutional updating is seen to pose a comparative institutional question. Part III compares constitutional amendment, on the one hand, and constitutional common law, on the other, as institutional alternatives for managing the inevitable updating of constitutional law over time. Under what circumstances might one process or the other prove superior? What institutional considerations, or variables, determine their relative performance? I suggest that amendments show to best advantage, relative to common-law constitutionalism, where the constitutional changes in question involve large value choices as opposed to technical improvements in the law, where constitutional change must be systemic and simultaneous rather than piecemeal, and where irreversible change is more valuable than reversible change. A brief conclusion follows.

#### The alternative to constitutional amendments is less stable and institutional performance is less consistent

Vermeule 4

[Adrian, Prof of Law @ The University of Chicago, “Constitutional Amendments and the Constitutional Common Law” September 2004. Accessed 28 July 2013. <http://ssrn.com/abstract=590341> //Wyo-BF]

This argument is the clearest statement of a view that I take to be widespread both within and without the legal academy.33 In the academic and popular commentaries that track Sullivan’s argument, the verbal formulas vary—sometimes the injunction is against “tampering” with the Constitution, sometimes the emphasis is on the “divisiveness” of constitutional amendments, sometimes the core point is that only “structural” amendments or amendments expanding “individual rights” are permissible—but the common intellectual premise is something like Sullivan’s idea: there is a generic class of reasons to believe that the amendment process is systematically or presumptively suspect. I will claim, however, that the generic case against amendment rests on the nirvana fallacy: generic arguments typically fail to compare amendments with the institutional alternatives for producing constitutional change, principally constitutional common law. The alternative to constitutional amendment is not, as generic arguments often imply, a stable subconstitutional order; the alternative is continual judicial updating of the Constitution through flexible common-law constitutionalism. That practice fares no better, and in many cases worse, on the margins of institutional performance the generic case takes to be valuable.Section A examines some ambiguities in the generic case against constitutional amendment, attempting a charitable reconstruction of the position before proceeding to the business of critique. Sections B considers a series of generic arguments. In each case, the infirmity in the argument is some version of the nirvana fallacy; in each case the main alternative to formal constitutional amendment, constitutional updating by judges, is equally susceptible to the concerns that underpin the generic arguments.

### 2NC A2 Rollback

#### The Court is bound by the amendment’s text—means no rollback

Paulson 8

[Paulson, Michael: University of St. Thomas School of Law. "Can a Constitutional Amendment Overrule a Supreme Court Decision?." *Social Science Research Network*. Social Science Research Network, 2008. Web. 28 Jul 2013. <http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1104529>. //Wyo-BF]

I consider it the moral imperative of the first six days of a good Constitutional Law class – or, perhaps, the first six weeks or six months – to lead students to the realization of the seriousness of this error in their thinking and so to undo the harm of what Mrs. Krueger or Mr. McCormack or Mr. Ostertag (probably their real names) taught them in fourth grade and again in eighth, and in tenth, and that Professor Polisci confirmed in American Government class at the University of Mischiefsota because that is what he was taught in junior high, too. But back to the core question: Exactly why does the Thirteenth Amendment and the Fourteenth Amendment trump – overrule, displace, blow out of the constitutional water – the Supreme Court’s decision Dred Scott? The answer has to be some form of the proposition that the words of the amendment’s text bind the Supreme Court, notwithstanding whatever the justices might otherwise have been inclined to think and say about the Constitution or whatever they said in a prior case addressing the issue. Thus, even though the Supreme Court had said “Dred Scott!” in 1857, they simply could not say “Dred Scott!” again in 1869. If they did, they would be blatantly, flagrantly, outrageously misinterpreting the Constitution. Is there anything – anything at all – wrong with this proposition? Careful now, gentle reader: For once you concede this proposition, it might be hard to resist what follows. A persistent student, more deeply in need of re-education and de-programming than the norm, may raise this objection: But by the logic of Professor Polisci’s lectured truth – one hopes the good professor was simply misunderstood by the student – that Marbury v. Madison makes the Supreme Court’s decisions . . . well, supreme, why wouldn’t it follow that the Supreme Court could overrule the Thirteenth and the Fourteenth Amendments too? Is the Supreme Court supreme or not?

### 1NC Doesn’t Link to Courts Politics

#### The CP dodges politics

Vermule 4

[Adrian Vermeule, Professor, Law, University of Chicago, “Constitutional Amendments and The Constitutional Common Law,” CHICAGO PUBLIC LAW AND LEGAL THEORY WORKING PAPER n. 73, September 2004. Available from the World Wide Web at: <http://www.law.uchicago.edu/academics/publiclaw/resources/73-av-amendments.pdf>, accessed 12/3/06.]

The “mutiny” metaphor here is Sullivan’s, and it is striking. What if the Supreme Court is Captain Bligh, and we are all Fletcher Christian, to be condemned as mutineers no matter how grievous the provocation? Here is the argument behind the metaphor: We have lasted two centuries with only twenty-seven amendments because the Supreme Court has been given enough interpretive latitude to adapt the basic charter to changing times. Our high court enjoys a respect and legitimacy uncommon elsewhere in the world. The legitimacy is salutary, for it enables the Court to settle or at least defuse society’s most ideologically charged disputes.41 One of the premises here is an argument about the supply and demand of constitutional change. Changing circumstances produce demand for changing constitutional law. The supply of new constitutional law is limited; although many institutions participate in its creation, the two most prominent sources are the amendment process, on the one hand, and judge-made constitutional law on the other. Those two sources are at least partial substitutes: judicial updating reduces the demand for constitutional amendment, all else equal, just as the Hughes Court’s switch in time may have pre-empted various New Deal reform proposals. The basic intuition about comparative statics is sensible, and it is broadly confirmed by empirical work in political science.42 But it does not at all support the conclusion offered in the remainder of the passage. We may reconstruct the argument as follows: (i) judicial updating of the Constitution is at least a partial substitute for formal amendments; (ii) formal amendments reduce judicial legitimacy; (iii) maximizing judicial legitimacy is good for the polity as a whole. Of these, only (i) is explicit; and there is a further assumption, which I will not question, that “legitimacy” is to be interpreted in a purely sociological sense—as something like the Supreme Court’s standing in opinion polls over time. Even if (i) is correct, and I believe that it is, the current state of the evidence gives us little reason to subscribe to (ii). There is no reason to assume, a priori, or to believe, empirically, that the use of the amendment process tends to undermine the judiciary’s legitimacy. (I also bracket the large question raised in (iii), whether maximizing the Court’s legitimacy is good for the larger polity). Premise (ii) embodies the nirvana illusion that afflicts generic arguments against amendment. Here the illusion takes the form of the unjustified belief that the Court’s (sociological) legitimacy is necessarily at a maximum so long as no outside agitators produce amendments that intrude upon judicially-managed change. On this assumption, the Court’s public standing is diminished whenever the amendment process produces outcomes that differ from those the Court would independently choose—perhaps because the amendment effects a visible public rebuke to the judiciary. Behind this assumption doubtless lurks some sort of picture in which amendments enacted to overturn particular Supreme Court decisions (such as the 11th and 16th ) reduce the Court’s public standing. There is another side to the ledger, however. Premise (i) holds that the lower the rate of amendment, the more updating that the Court must supply; and the need to update constitutional law can itself damage the Court’s public standing in straightforward ways. Overrulings, switches in time, creative and novel interpretation, all the tools that judges use to change the course of constitutional adjudication, themselves may draw down the Court’s political capital by fracturing the legalistic façade of constitutional interpretation. An equally plausible causal hypothesis, then, is that increasing the rate of amendments might increase the Court’s sociological legitimacy by reducing the need for judicial self-correction. In particular cases, legitimacy-granting publics might react poorly to judicial flip-flops, while viewing formal amendments that overturn judicial decisions as the proper legal channel for change—the very use of which assumes that the judges have done their job well, not poorly. This is rankly speculative, but the point is that (ii) is rankly speculative as well. It is hard to know about any of this in the abstract; but we cannot simply assume (ii), in the faith that a world without (nonjudicial) amendments is the best of all possible worlds to inhabit.

### Perms

#### A. Perm has the court rule on a moot issue

Watson 91

[Corey C. (NQA). “Mootness and the Constitution.” Fall, 1991. 86 Nw. U.L. Rev. 143 l/n //wyo-jamie]

A case becomes "moot" when "its factual or legal context changes in such a way that a justiciable question no longer is before the court." 32 [\*147] Defining mootness as the absence of a justiciable issue, however, merely raises the question of what is meant by the term "justiciability." 33 The Supreme Court has distinguished a justiciable controversy "from one that is academic or moot." 34 Accordingly, a justiciable controversy is one that is "definite and concrete, touching the legal relations of parties having adverse legal interests." 35 The controversy must be "real and substantial[,] . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." 36 The rule that a court will not decide a moot case is recognized in virtually every American jurisdiction. 37 With the concepts of mootness and justiciability so loosely formulated, some scholars have attempted to understand mootness jurisprudence by cataloguing the various circumstances which render a case moot. 38 A case may become moot because the alleged wrong passes and cannot be expected to recur; 39 because a defendant pays money owed [\*148] and no longer wishes to appeal; 40 because a criminal defendant dies while appealing his case; 41 because the law under which the suit was brought has since changed; 42 or because a party is no longer affected by the challenged statute. 43 Indeed, the Court has attempted to generalize the causes of mootness by declaring a case moot when it finds either (a) that the issues presented are no longer "live" or (b) that the "'parties lack a legally cognizable interest in the outcome.'" 44 These are commonly referred to as the "live issue" and "personal stake" requirements. 45 For a party to satisfy the live issue test, he must show more than abstract injury. 46 The plaintiff must demonstrate that he "'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" 47 Finally, the "personal stake" criterion requires a "logical nexus between the status asserted and the claim sought to be adjudicated" 48 and a sufficient degree of "contentiousness." 49

## Tix

### UQ

#### Overturn now; empirics and the Court agreeing to hear the case

Garrone, 7/24

[Angela, Southeast Energy Research Attorney, “Return of the Friendly Ghost? Supreme Court Visited by CSAPR” cleanenergy.org, July 24, 2013, <http://blog.cleanenergy.org/2013/07/24/return-of-the-friendly-ghost-supreme-court-visited-by-csapr/#sthash.dZ8Kxwr5.dpuf> //uwyo-baj]

In January 2013, the D.C. Circuit denied EPA’s petition for a rehearing of the August 2012 decision, leaving the Supreme Court as EPA’s only hope for reinstating CSAPR. In it’s petition to the Supreme Court EPA asserted that the D.C. Circuit decision made “a series of fundamental errors that, if left undisturbed, will gravely undermine the EPA’s enforcement of the Clean Air Act.” It would seem that the Supreme Court agreed with EPA, at least to the extent that the Court finds the controversy compelling enough to take under consideration. This recent Supreme Court decision comes after nine states, five cities and the District of Columbia filed briefs in support of the petitions filed by EPA and environmental groups challenging a lower court’s ruling that CSPAR exceeded EPA’s authority under the Clean Air Act. The Mississippi Public Service Commission was one of the groups who filed briefs in opposition to a Supreme Court review of the D.C. Circuit opinion, along with fourteen states and two cities. When the Supreme Court hears the case it will focus on three questions: 1) whether the Court of Appeals lacked jurisdiction for part of its decision; 2) whether states can wait to adopt State Implementation Plans (SIPs) for controlling cross-state pollution until after EPA quantifies their interstate pollution obligations; 3) whether EPA can consider the cost-effectiveness of cross-state pollution reductions. Although it’s far too early to predict any outcome from the Supreme Court, some have highlighted the Supreme Court’s history of upholding EPA rules after initially agreeing to hear the case. We will continue to track the fate of CSAPR, the friendly ghost of cross-state air regulation. The Supreme Court isn’t expected to hear the case and come to a decision until July 2014. If the Supreme Court decides in favor of reinstating CSAPR, we will be one step closer to cleaning up the air in our downwind, Southeastern states. As we all know, cleaner air means healthier communities and implementation of CSAPR is expected to save thousands of lives each year. If reinstated, CSAPR is expected to yield $120 to $280 billion in annual health and environmental benefits, including the value of avoiding 13,000 to 34,000 premature deaths.

#### The Supreme Court taking the case signifies a reversal, Environmental Law and Policy Center says

Stohr, 6-28

[Greg, Supreme Court reporter, “Obama’s EPA Gets Supreme Court Hearing on Coal Pollution,” Bloomberg, June 28, 2013, <http://www.bloomberg.com/news/2013-06-24/obama-s-epa-gets-supreme-court-hearing-on-coal-pollution.html> //uwyo-baj]

“The U.S. Supreme Court is likely taking this case in order to reverse the D.C. Circuit panel’s decision that is contrary to law and would further delay long-needed clean air standards necessary to protect our public health,” Howard Lerner, executive director of the Environmental Law and Policy Center, said today in an e-mailed statement.

#### The soliciter general’s involvement means a win for the EPA highlight down

Baum, 13

[Lawrence, professor emeritus of political science at Ohio State University and holds a doctorates from the University of Wisconsin, The Supreme Court: 11th Edition, pg 94//uwyo-baj]

The number of Supreme Court cases in which the solicitor general participates leads to another advantage. Because attorneys in the office gain so much experience, they develop considerable expertise in writing briefs and in what appeals to the justices. As a result, the government can do more than most other litigants to make cases appear worthy of acceptance. The federal government seldom files an amicus brief on its own at the certiorari stage. When the solicitor general responds to the Court's invitation to file an amicus brief, the justices give considerable weight to the office's recommendation.

### Il

#### **PC finite for the Court, it will switch on rulings in order to preserve PC**

Tolson, 12

[Franita, Florida State University College of Law Professor, “Benign partisanship, Notre Dame Law Review Nov. 2012: 427+. Academic OneFile, //uwyo-baj]

This series of 5-4 decisions regarding the scope of congressional authority under the Commerce Clause made the Rehnquist Court (and the Roberts Court, to some extent) more cautious going forward, particularly in light of the early precedents expanding the scope of congressional power in the years directly after the Founding and following the New Deal. (149) The Court has sacrificed its institutional and political capital because of the ~~schizophrenia~~ with which it has approached these cases. Its position has alternated from circumscribing congressional authority after years of expanding it, relegating federalism questions to the political process out of frustration, and then, shortly thereafter, reentering the fray again. As a result, the costs of exit are considerable because of the magnitude of the issues and the inconsistency of the Court's prior positions; as the New Deal period illustrates, the Court will, at times, switch paths, but only when faced with a threat to its legitimacy as an institution. (150) To avoid losing its credibility, the Court will often retain a legal principle that is outdated and inefficient in order to avoid expending the political capital that comes with changing the rule. (151) In an oft-cited piece, Richard Fallon argued that rather than reversing precedent, the Rehnquist Court opted to use sub-constitutional doctrines such as Eleventh Amendment state sovereign immunity, official immunity rules, and judge-made equitable doctrines in order to indirectly advance federalism values and reshape Congress's regulatory authority. (152) The Court took this approach, according to Fallon, in order to respect precedent and avoid the pitfalls that had characterized its earlier attempts to articulate bright line rules. (153)

# 1nr

### Deference

#### The disad outweighs and turns case:

#### [1] Timeframe- Courts undermining the rule of law will immediately unravel the global democratic order that the U.S. has set. –That’s Magen

#### [2] Probability- Democratic peace theory guarantees nuclear restraint. –That’s Muravchik

#### [3] Magnitude- Loss of democracy leads to widespread nuclear war.

#### Judicial interference undermines wartime efforts and delegitimizes democracy

Kwoka ‘11

[Lindsay, University of Pennsylvania Law School, “TRIAL BY SNIPER: THE LEGALITY OF TARGETED KILLING IN THE WAR ON TERROR” 2011 <<https://www.law.upenn.edu/journals/conlaw/articles/volume14/issue1/Kwoka14U.Pa.J.Const.L.301(2011).pdf>>//wyo-hdm]

Advocates for judicial deference argue that the executive branch should be given extensive authority during wartime, and the judicial branch should not interfere with executive decisionmaking. Justice Thomas’ dissent in Hamdi reflects this sentiment. He argues that allowing process on the battlefield would undermine the executive’s authority.129 He asserts that the constitutional structure is based upon the notion of a unitary executive with extensive war powers, and that this structure would be undermined by judicial interference.130 As a result of this structure, he argues that due process merely requires a “good-faith executive determination.”131 Similarly, others argue that the lack of judicial deference during a war could disrupt the system of political cooperation in wartime.132 Under this argument, the executive branch is better suited to interpret laws relating to wartime and foreign affairs.133 As a result, the executive branch is better able to make determinations regarding wartime issues not only because it has expertise in this area, but also because the executive branch is more politically accountable than the judicial branch.134 Because the judicial branch lacks expertise in these areas, the judicial branch must afford significant deference to the executive branch during wartime.

#### Deference key to successful policies, complete reform, court legitimacy, and reputation – this turns case

Kavanagh 10 (Aileen, Reader in Law, University of Oxford and Fellow of St Edmund Hall, University of Toronto Law Journal, Volume 60, Number 1, Winter 2010, Judicial restraint in the pursuit of justice, Project MUSE, p. 28 – 29)

One can identify at least four institutional reasons for judicial restraint. These are concerns about (1) judicial expertise, (2) the incrementalist nature of judicial law making, (3) institutional legitimacy, and (4) the reputation of the courts. Let us go through these one by one. The constraint of ‘limited expertise’ reflects the epistemic limitations of the courts in evaluating certain issues. In situations where judges do not know (or are unsure about) how a particular issue should be resolved or, indeed, are unsure what consequences will follow from a particular decision, such uncertainty may warrant a degree of judicial restraint.13 The second reason for restraint arises from the incrementalist nature of judicial law making. While legislators are relatively free to initiate legislation on any topic and can engage in radical, root-and-branch reform of a whole area of law, judges are much more constrained. In general, judicial law reform tends to be incremental and piecemeal – filling in gaps in existing legal frameworks, tackling one single legislative provision at a time rather than reforming an entire statute or a whole area of law. This presents what Joseph Raz has called ‘the dilemma of partial reform’14 – a dilemma, because the courts often have to choose between leaving a legislative provision intact (i.e., not interfering with it) or reforming it in a necessarily piecemeal or partial way. Judges are aware that partial reform can be fraught with danger because it carries the risk of being counter-productive or failing to achieve the hoped-for aim.15 This concern may give rise to judicial restraint. The third reason for restraint reflects concerns about relative institutional legitimacy. Sometimes, the courts exercise restraint before interfering with primary legislation out of a concern that a decision that changed the law would not be accepted by the public or indeed by the other branches of government due to the courts’ perceived lack democratic legitimacy and accountability. While this has attracted some controversy in UK public law scholarship,16 judicial dicta to the effect that courts should respect decisions made by the elected legislature due to its¶ superior democratic legitimacy are not hard to come by.17 The fourth reason is grounded in reputational concerns. When handing down their decisions, judges have to do so in a way that preserves the reputation of the courts and inspires public confidence in them as impartial, fair decision makers. The courts must ensure, to the extent¶ that they can, that their decisions are respected – both by the other political organs of government (Parliament and the executive) and by the public at large – and should strive to avoid decisions that would bring the courts into disrepute. This reason for restraint will be discussed in more detail later in the paper.

### Courts tix

#### Second, Court PC finite, the Court’s legitimacy and basic functions are at risk

Gibson 7

[James L., Sidney W. Souers Professor of Government, Professor of African and African American Studies Department of Political Science, Director, Program on Citizenship and Democratic Values, Weidenbaum Center on the Economy, Government, and Public Policy, Washington University in St. Louis, “The Legitimacy of the U.S. Supreme Court in a Polarized Polity,” Journal of Empirical Legal Studies, Volume 4, Issue 3, 507–538, November 2007, Wiley, //uwyo-baj]

Indeed, one of the most interesting unresolved questions in this literature has to do with the “legitimacy conferring” powers of courts. First clearly articulated by Dahl (1957), this theory asserts that a court ruling can induce people to accept the decision of other political institutions because the court has ratified and sanctified the decision. Since courts rarely challenge the ruling coalition in the United States (Dahl 1957), the American judiciary essentially places its imprimatur on policies, thereby encouraging citizens to accept outcomes with which they disagree (see Clawson et al. 2001). Mondak and others (e.g., Choper 1980) refer to this as the “political capital” of courts, and note that institutions must husband this capital and spend it wisely if they are to be effective. As Mondak (1992:461) notes: “sponsoring a policy is a type of gamble; the possibility of negative reaction endangers the institution’s lifeblood, institutional legitimacy.” Exactly this theory was cited when scholars asserted that the Court “wounded” itself by its decision in Bush v. Gore.15 To the extent that courts are perceived as legitimate, citizens tend to acquiesce to unpopular judicial rulings, even ones with which they strongly disagree. Thus, to lose this legitimacy conferring capacity— especially in the context of deep political divisions in American politics— would deal a serious blow to the function of the Supreme Court in the American political system and to the ability of the Court to contain and manage political conflict.

#### A decision regarding indefinite detention would spark massive backlash – past decisions and the status quo prove.

Devins, Goodrich Professor of Law and Professor of Government, College of William & Mary, ‘10

[Neal, “Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants”, Journal of Constitutional Law, Vol. 12, No. 2, February 2010, RSR]

Throughout the course of its enemy combatant decision making, the Court has moved incrementally. In so doing, the Court has expanded its authority vis-A-vis the President. Obama administration efforts to moot al-Marri and to relocate Uighur detainees (thereby mooting that litigation) speak to the administration's desire to avoid Supreme Court rulings that might limit the scope of presidential power. Unlike the Bush administration (whose politically tone deaf arguments paved the way for anti-administration rulings), 84 the Obama administration understands that the Court has become a player in the enemy combatant issue. What is striking here, is that the Court never took more than it could get-it carved out space for itself without risking the nation's security or political backlash. Its 2004 and 2006 rulings provided ample opportunity for the President to pursue his enemy combatant initiative. Its 2008 ruling in Boumediene, while clearly constraining the political branches, reflected the views of the new Democratic majority in Congress and (to a lesser extent) the views of presidential candidates Obama and McCain. 8 Its decision to steer clear of early Obama-era disputes likewise avoids the risks of a costly backlash while creating incentives for the Obama administration to take judicial authority into account (by settling these cases outside of court).186 Put another way, by taking prevailing social and political forces into account, the Court was able to flex its muscles without meaningfully undermining the policy preferences of the President and Congress.