## 1NC K

#### Using national security to justify restraints on the executive is self-defeating. Security discourse consolidates authoritarian politics.

Aziz RANA Law at Cornell 11 [“Who Decides on Security?” Cornell Law Faculty Working Papers, Paper 87, http://scholarship.law.cornell.edu/clsops\_papers/87 p. 1-7]

Today politicians and legal scholars routinely invoke fears that the balance between liberty and security has swung drastically in the direction of government’s coercive powers. In the post-September 11 era, such worries are so commonplace that in the words of one commentator, “it has become part of the drinking water of this country that there has been a trade-off of liberty for security.”1 According to civil libertarians, centralizing executive power and removing the legal constraints that inhibit state violence (all in the name of heightened security) mean the steady erosion of both popular deliberation and the rule of law. For Jeremy Waldron, current practices, from coercive interrogation to terrorism surveillance and diminished detainee rights, provide government the ability not only to intimidate external enemies but also internal dissidents and legitimate political opponents. As he writes, “We have to worry that the very means given to the government to combat our enemies will be used by the government against its enemies.”2 Especially disconcerting for many commentators, executive judgments—due to fears of infiltration and security leaks—are often cloaked in secrecy. This lack of transparency undermines a core value of democratic decisionmaking: popular scrutiny of government action. As U.S. Circuit Judge Damon Keith famously declared in a case involving secret deportations by the executive branch, “Democracies die behind closed doors. . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”3 In the view of no less an establishment figure than Neal Katyal, now the Principal Deputy Solicitor General, such security measures transform the current presidency into “the most dangerous branch,” one that “subsumes much of the tripartite structure of government.”4 Widespread concerns with the government’s security infrastructure are by no means a new phenomenon. In fact, such voices are part of a sixty-year history of reform aimed at limiting state (particularly presidential) discretion and preventing likely abuses. What is remarkable about these reform efforts is that, every generation, critics articulate the same basic anxieties and present virtually identical procedural solutions. These procedural solutions focus on enhancing the institutional strength of both Congress and the courts to rein in the unitary executive. They either promote new statutory schemes that codify legislative responsibilities or call for greater court activism. As early as the 1940s, Clinton Rossiter argued that only a clearly established legal framework in which Congress enjoyed the power to declare and terminate states of emergency would prevent executive tyranny and rights violations in times of crisis.5 After the Iran-Contra scandal, Harold Koh, now State Department Legal Adviser, once more raised this approach, calling for passage of a National Security Charter that explicitly enumerated the powers of both the executive and the legislature, promoting greater balance between the branches and explicit constraints on government action.6 More recently, Bruce Ackerman has defended the need for an “emergency constitution” premised on congressional oversight and procedurally specified practices.7 As for increased judicial vigilance, Arthur Schlesinger argued nearly forty years ago, in his seminal book The Imperial Presidency (1973), that the courts “had to reclaim their own dignity and meet their own responsibilities” by abandoning deference and by offering a meaningful check to the political branches.8 Today, Lawrence Tribe and Patrick Gudridge once more imagine that, by providing a powerful voice of dissent, the courts can play a critical role in balancing the branches. They write that adjudication can “generate[]—even if largely (or, at times, only) in eloquent and cogently reasoned dissent—an apt language for potent criticism.”9 The hope—returned to by constitutional scholars for decades—has been that by creating clear legal guidelines for security matters and by increasing the role of the legislative and judicial branches, government abuse can be stemmed. Yet despite this reformist belief, presidential and military prerogatives continue to expand even when the courts or Congress intervene. Indeed, the ultimate result has primarily been to entrench further the system of discretion and centralization. In the case of congressional legislation (from the 200 standby statutes on the books to the postSeptember 11 and Iraq War Authorizations for the Use of Military Force to the Detainee Treatment Act and the Military Commissions Acts), this has often entailed Congress self-consciously playing the role of junior partner—buttressing executive practices by providing its own constitutional imprimatur to them. Thus, rather than rolling back security practices, greater congressional involvement has tended to further strengthen and internalize emergency norms within the ordinary operation of politics.10 As just one example, the USA PATRIOT Act, while no doubt controversial, has been renewed by Congress a remarkable ten consecutive times without any meaningful curtailments.11 Such realities underscore the dominant drift of security arrangements, a drift unhindered by scholarly suggestions and reform initiatives. Indeed, if anything, today’s scholarship finds itself mired in an argumentative loop, re-presenting inadequate remedies and seemingly incapable of recognizing past failures. What explains both the persistent expansion of the federal government’s security framework as well as the inability of civil libertarian solutions to curb this expansion? In this article I argue that the current reform debate ignores the broader ideological context that shapes how the balance between liberty and security is struck. In particular, the very meaning of security has not remained static but rather has changed dramatically since World War II and the beginning of the Cold War. This shift has principally concerned the basic question of who decides on issues of war and emergency. And as the following pages explore, at the center of this shift has been a transformation in legal and political judgments about the capacity of citizens to make informed and knowledgeable decisions in security domains. Yet, while underlying assumptions about popular knowledge—its strengths and limitations—have played a key role in shaping security practices in each era of American constitutional history, this role has not been explored in any sustained way in the scholarly literature. As an initial effort to delineate the relationship between knowledge and security, I will argue that throughout most of the American experience, the dominant ideological perspective saw security as grounded in protecting citizens from threats to their property and physical well-being (especially those threats posed by external warfare and domestic insurrection). Drawing from a philosophical tradition extending back to John Locke, politicians and thinkers—ranging from Alexander Hamilton and James Madison at the founding to Abraham Lincoln and Roger Taney—maintained that most citizens understood the forms of danger that imperiled their physical safety. The average individual knew that securing collective life was in his or her own interest, and also knew the institutional arrangements and practices that would fulfill this paramount interest. A widespread knowledge of security needs was presumed to be embedded in social experience, indicating that citizens had the skill to take part in democratic discussion regarding how best to protect property or to respond to forms of external violence. Thus the question of who decides was answered decisively in favor of the general public and those institutions—especially majoritarian legislatures and juries—most closely bound to the public’s wishes. What marks the present moment as distinct is an increasing repudiation of these assumptions about shared and general social knowledge. Today the dominant approach to security presumes that conditions of modern complexity (marked by heightened bureaucracy, institutional specialization, global interdependence, and technological development) mean that while protection from external danger remains a paramount interest of ordinary citizens, these citizens rarely possess the capacity to pursue such objectives adequately. Rather than viewing security as a matter open to popular understanding and collective assessment, in ways both small and large the prevailing concept sees threat as sociologically complex and as requiring elite modes of expertise. Insulated decision-makers in the executive branch, armed with the specialized skills of the professional military, are assumed to be best equipped to make sense of complicated and often conflicting information about safety and self-defense.12 The result is that the other branches—let alone the public writ large—face a profound legitimacy deficit whenever they call for transparency or seek to challenge presidential discretion. Not surprisingly, the tendency of procedural reform efforts has been to place greater decision-making power in the other branches and then to watch those branches delegate such power back to the very same executive bodies. How did the governing, expertise-oriented concept of security gain such theoretical and institutional dominance and what alternative formulations exist to challenge its ideological supremacy? In offering an answer to these questions, I begin in Part II by examining the principal philosophical alternatives that existed prior to the emergence of today’s approach, one of which grounded early American thought on security issues. I refer to these alternatives in the Anglo-American tradition as broadly ‘Hobbesian’ and ‘Lockean’ and develop them through a close reading of the two thinkers’ accounts of security. For all their internal differences, what is noteworthy for my purposes is that each approach rejected the idea—pervasive at present—that there exists a basic divide between elite understanding and mass uncertainty. In other words, John Locke and even Thomas Hobbes (famous as the philosopher of absolutism) presented accounts of security and self-defense that I argue were normatively more democratic than the current framework. Part III will then explore how the Lockean perspective in particular took constitutional root in early American life, focusing especially on the views of the founders and on the intellectual and legal climate in the mid nineteenth century. In Part IV, I will continue by detailing the steady emergence beginning during the New Deal of our prevailing idea of security, with its emphasis on professional expertise and insulated decision-making. This discussion highlights the work of Pendleton Herring, a political scientist and policymaker in the 1930s and 1940s who co-wrote the National Security Act of 1947 and played a critical role in tying notions of elite specialization to a new language of ‘national security.’ Part V will then show how Herring’s ‘national security’ vision increasingly became internalized by judicial actors during and after World War II. I argue that the emblematic figure in this development was Supreme Court Justice Felix Frankfurter, who not only defended security expertise but actually sought to redefine the very meaning of democracy in terms of such expertise. For Frankfurter, the ideal of an ‘open society’ was one premised on meritocracy, or the belief that decisions should be made by those whose natural talents make them most capable of reaching the technically correct outcome. According to Frankfurter, the rise of security expertise meant the welcome spread of meritocratic commitments to a critical and complex arena of policymaking. In this discussion, I focus especially on a series of Frankfurter opinions, including in Ex parte Quirin (1942), Hirabayashi v. United States (1943), Korematsu v. United States (1944), and Youngstown Steel & Tube Co. v. Sawyer (1952), and connect these opinions to contemporary cases such as Holder v. Humanitarian Law Project (2010). Finally, by way of conclusion, I note how today’s security concept—normatively sustained by Frankfurter’s judgments about merit and elite authority—shapes current discussions over threat and foreign policy in ways that often inhibit rather than promote actual security. I then end with some reflections on what would be required to alter governing arrangements. As a final introductory note, a clarification of what I mean by the term ‘security’ is in order. Despite its continuous invocation in public life, the concept remains slippery and surprisingly under-theorized. As Jeremy Waldron writes, “Although we know that ‘security’ is a vague and ambiguous concept, and though we should suspect that its vagueness is a source of danger when talk of trade-offs is in the air, still there has been little or no attempt in the literature of legal and political theory to bring any sort of clarity to the concept.”13 As a general matter, security refers to protection from those threats that imperil survival—both of the individual and of a given society’s collective institutions or way of life. At its broadest, these threats are multidimensional and can result from phenomena as wide-ranging as environmental disasters or food shortages. Thus, political actors with divergent ideological commitments defend the often competing goals of social security, economic security, financial security, collective security, human security, food security, environmental security, and—the granddaddy of them all—national security. But for my purposes, when invoked without any modifier the word ‘security’ refers to more specific questions of common defense and physical safety. These questions, emphasizing issues of war and peace, are largely coterminous with what Franklin Delano Roosevelt famously referred to in his “Four Freedoms” State of the Union Adresss as “the freedom from fear”: namely ensuring that citizens are protected from external and internal acts of “physical aggression.”14 This definitional choice is meant to serve two connected theoretical objectives. First, as a conceptual matter it is important to keep the term security analytically separate from ‘national security’—a phrase ubiquitous in current legal and political debate. While on the face of it, both terms might appear synonymous, my claim in the following pages is that ‘national security’ is in fact a relatively novel concept, which emerged in the mid twentieth century as a particular vision of how to address issues of common defense and personal safety. Thus national security embodies only one of a number of competing theoretical and historical approaches to matters of external violence and warfare. Second, and relatedly, it has become a truism in political philosophy that the concept of liberty is plural and multifaceted.15 In other words, different ideals of liberty presuppose distinct visions of political life and possibility. Yet far less attention has been paid to the fact that security is similarly a plural concept, embodying divergent assumptions about social ordering. In fact, competing notions of security—by offering different answers to the question of “who decides?”—can be more or less compatible with democratic ideals. If anything, the problem of the contemporary moment is the dominance of a security concept that systematically challenges those sociological and normative assumptions required to sustain popular involvement in matters of threat and safety.

#### National security frame justifies extinction in the name of saving human life.

Dillon 96—Michael, University of Lancaster [October 4, 1996, “Politics of Security: Towards a Political Philosophy of Continental Thought”]

The way of sharpening and focusing this thought into a precise question is first provided, however, by referring back to Foucault; for whom Heidegger was the philosopher. Of all recent thinkers, Foucault was amongst the most committed to the task of writing the history of the present in the light of the history of philosophy as metaphysics. 4 That is why, when first thinking about the prominence of security in modern politics, I first found Foucault’s mode of questioning so stimulating. There was, it seemed to me, a parallel to be drawn between what he saw the technology of disciplinary power/knowledge doing to the body and what the principle of security does to politics.

What truths about the human condition, he therefore prompted me to ask, are thought to be secreted in security? What work does securing security do for and upon us? What power-effects issue out of the regimes of truth of security? If the truth of security compels us to secure security, why, how and where is that grounding compulsion grounded? How was it that seeking security became such an insistent and relentless (inter)national preoccupation for humankind? What sort of project is the pursuit of security, and how does it relate to other modern human concerns and enterprises, such as seeking freedom and knowledge through representative-calculative thought, technology and subjectification? Above all, how are we to account—amongst all the manifest contradictions of our current (inter)national systems of security: which incarcerate rather than liberate; radically endanger rather than make safe; and engender fear rather than create assurance—for that terminal paradox of our modern (inter)national politics of security which Foucault captured so well in the quotation that heads this chapter. 5 A terminal paradox which not only subverts its own predicate of security, most spectacularly by rendering the future of terrestrial existence conditional on the strategies and calculations of its hybrid regime of sovereignty and governmentality, but which also seems to furnish a new predicate of global life, a new experience in the context of which the political has to be recovered and to which it must then address itself: the globalisation of politics of security in the global extension of nihilism and technology, and the advent of the real prospect of human species extinction.

#### Alternative—Challenge to *conceptual* framework of national security. Only our alternative displaces the source of executive overreach. Legal restraint without conceptual change is futile.

Aziz RANA Law at Cornell 11 [“Who Decides on Security?” Cornell Law Faculty Working Papers, Paper 87, http://scholarship.law.cornell.edu/clsops\_papers/87 p. 45-51]

If both objective sociological claims at the center of the modern security concept are themselves profoundly contested, what does this mean for reform efforts that seek to recalibrate the relationship between liberty and security? Above all, it indicates that the central problem with the procedural solutions offered by constitutional scholars—emphasizing new statutory frameworks or greater judicial assertiveness—is that they mistake a question of politics for one of law. In other words, such scholars ignore the extent to which governing practices are the product of background political judgments about threat, democratic knowledge, professional expertise, and the necessity for insulated decision-making. To the extent that Americans are convinced that they face continuous danger from hidden and potentially limitless assailants—danger too complex for the average citizen to comprehend independently—it is inevitable that institutions (regardless of legal reform initiatives) will operate to centralize power in those hands presumed to enjoy military and security expertise. Thus, any systematic effort to challenge the current framing of the relationship between security and liberty must begin by challenging the underlying assumptions about knowledge and security upon which legal and political arrangements rest. Without a sustained and public debate about the validity of security expertise, its supporting institutions, and the broader legitimacy of secret information, there can be no substantive shift in our constitutional politics. The problem at present, however, is that no popular base exists to raise these questions. Unless such a base emerges, we can expect our prevailing security arrangements to become ever more entrenched.

## 1NC Mech CP

#### Congress should propose and three fourths of the states should ratify an amendment to the United States Constitution that all habeas corpus hearings of persons detained under the War Powers Authority of the President of the United States be subject to due process guarantees and that such individuals who have won their habeas corpus hearings be released.

#### The CP is predictable and solves the whole case—4 other amendments have been expressly crafted to overturn Supreme Court decisions, this proves its real world

#### Amendments are vital to social change—they produce societal debates on rights that can culminate in a social consensus and permanent norm creations that provide better shields against rollback

Vermeule 4—Adrian, professor of law at the University of Chicago [“Constitutional Amendments and the Constitutional Common Law,” September, http://www.law.uchicago.edu/academics/publiclaw/resources/73-av-amendments.pdf]

We must account for the costs of decisionmaking as well as the quality of decisions. A simple view would be that the formal amendment process is too costly to serve as the principal means, or even as an important means, of constitutional updating, just as periodic constitutional conventions are too costly to be practical. Dennis Mueller denies this view. He suggests instead that the decision costs of the formal amendment process are decision benefits: The U.S. Constitution contains broad definitions of rights, and the task of amending their definitions to reflect changes in the country’s economic, social and political characteristics has been largely carried out by the Supreme Court. While this method of updating the Constitution’s definition of rights has helped to prevent them from becoming hopelessly out of date, it has failed to build the kind of support for the new definitions of rights that would exist if they had arisen from a wider consensual agreement in the society. The bitter debates and clashes among citizens over civil rights, criminal rights and abortion illustrate this point. . . . Although [alternative procedures for constitutional amendment] may appear to involve greater decision-making costs, they have the potential for building consensus over the newly formulated definitions of rights.82 On this view, it is an illusion that constitutional common law incurs lower decision costs in the long run, even if a given change may be more easily implemented through adjudication in the short run. Although at any given time it is less costly to persuade five Justices to adopt a proposed constitutional change than to obtain a formal amendment to the same effect, the former mode of change incurs higher decision costs over time, because common-law constitutionalism allows greater conflict in subsequent periods. A benefit of formal amendments, then, is to more effectively discourage subsequent efforts by constitutional losers to overturn adverse constitutional change. Precisely because the formal amendment process is more costly to invoke, formal amendments are more enduring than are judicial decisions that update constitutional rules;83 so losers in the amendment process will less frequently attempt to overturn or destabilize the new rules, in subsequent periods, than will losers in the process of common-law constitutionalism. This point does not necessarily suppose that dissenters from a given amendment come to agree with the enacting supermajority’s judgment, only that they accept the new equilibrium faute de mieux. Obviously more work might be done to specify these intuitions, but it is at least plausible to think that the simplest view, on which formal amendments incur decisionmaking costs that exceed their other benefits, is untenably crude. The overall picture, rather, is a tradeoff along the following lines. Relative to common-law constitutionalism, the Article V process requires a higher initial investment to secure constitutional change. If Mueller is right, however, constitutional settlements produced by the Article V process will tend to be more enduring over time than is judicial updating, which can be unsettled and refought at lower cost in subsequent periods.

## Advantage Counterplan

#### The United States federal government should establish through the department of defense should:

#### Adopt an anti-nuclear and biological terror doctrine stating that any attack on the United States will result in full scale conventional war against those that carried out the attack.

#### Solves the terror impact

Freilich 2010, Chuck Freilich, © The Begin-Sadat Center for Strategic Studies, Bar-Ilan University, April 2010, “The Armageddon Scenario: Israel and the Threat of Nuclear Terrorism”, THE BEGIN-SADAT CENTER FOR STRATEGIC STUDIES BAR-ILAN UNIVERSITY Mideast Security and Policy Studies No. 84 , PDF

Potential perpetrators of nuclear terrorism must be convinced that the US and Israel will retaliate devastatingly. For Israel, this means a “shoot first, no questions asked” policy. Both those clearly responsible for an attack (if any) and those reasonably suspected of involvement must be held accountable.55 There will be no room for diplomacy, and Israel must respond with all capabilities at its disposal, without waiting for the results of nuclear forensics. In the event of a declared nuclear terrorist capability, a stated intention to acquire one, or an advanced suspected one, the known or suspected perpetrator and host country should be attacked with overwhelming and if necessary devastating force, in the attempt to prevent the threat’s materialization. As things stand today, and unless virtually irrefutable and immediate evidence exists to the contrary, Israel should adopt a declared retaliatory policy which holds Iran and/or al-Qaeda responsible for any nuclear attack, regardless of who may or may not have carried it out. If the source of a terrorist nuclear attack against Israel is unknown, or if it is known to originate with al-Qaeda or Iran, Israel should make it clear that its response will be unlimited and include not just major population centers, but all sites of value, including those of major symbolic importance for the Muslim world. A declaratory policy such as this might be highly inflammatory and further exacerbate the religious dimension of the US and Israeli confrontations with the Muslim world. This policy should therefore not be announced officially, as part of Israel's declared retaliatory posture, but should be made “known,” much as the international community “knows” that Israel has nuclear weapons, whether they do or do not in fact exist. The policy can be “leaked” in a variety of manners. For Israel, its declared and actual retaliatory policy must be one and the same. There can be no difference between the two. A one-time failure to act devastatingly to prevent or retaliate for nuclear terrorism would be an invitation for further attacks and guarantee Israel's final destruction. At present, the state of the threat is such that the need for a change in Israel's deterrent policy is not yet imminent, but it must be followed closely to determine the appropriate timing. As a global power, the US presumably cannot adopt an indiscriminate “no questions asked” policy, such as recommended above, and would be hard pressed to support an Israeli policy of this sort should the need arise. For the US, especially in the case of an attack on a foreign nation, forensics will be crucial. At the same time, American determination to act decisively to prevent the emergence of a nuclear terrorist threat and to retaliate with devastating force against those responsible, must be explicit and beyond question. American declaratory policy should be strengthened in a manner designed to eliminate the doubts in the region regarding President Obama's determination and resolve as a leader.

## Circumvention

### 1NC DA

#### Wartime means Obama will ignore the decision. Noncompliance undermines the Court’s legitimacy and makes the plan worthless

Pushaw 4—Professor of law @ Pepperdine University [Robert J. Pushaw, Jr., “Defending Deference: A Response to Professors Epstein and Wells,” Missouri Law Review, Vol. 69, 2004]

Civil libertarians have urged the Court to exercise the same sort of judicial review over war powers as it does in purely domestic cases—i.e., independently interpreting and applying the law of the Constitution, despite the contrary view of the political branches and regardless of the political repercussions.54 This proposed solution ignores the institutional differences, embedded in the Constitution, that have always led federal judges to review warmaking under special standards. Most obviously, the President can act with a speed, decisiveness, and access to information (often highly confidential) that cannot be matched by Congress, which must garner a majority of hundreds of legislators representing multiple interests.55 Moreover, the judiciary by design acts far more slowly than either political branch. A court must wait for parties to initiate a suit, oversee the litigation process, and render a deliberative judgment that applies the law to the pertinent facts.56 Hence, by the time federal judges (particularly those on the Supreme Court) decide a case, the action taken by the executive is several years old. Sometimes, this delay is long enough that the crisis has passed and the Court’s detached perspective has been restored.57 At other times, however, the war rages, the President’s action is set in stone, and he will ignore any judicial orders that he conform his conduct to constitutional norms.58 In such critical situations, issuing a judgment simply weakens the Court as an institution, as Chief Justice Taney learned the hard way.59

Professor Wells understands the foregoing institutional differences and thus does not naively demand that the Court exercise regular judicial review to safeguard individual constitutional rights, come hell or high water. Nonetheless, she remains troubled by cases in which the Court’s examination of executive action is so cursory as to amount to an abdication of its responsibilities—and a stamp of constitutional approval for the President’s actions.60 Therefore, she proposes a compromise: requiring the President to establish a reasonable basis for the measures he has taken in response to a genuine risk to national security.61 In this way, federal judges would ensure accountability not by substituting their judgments for those of executive officials (as hap-pens with normal judicial review), but rather by forcing them to adequately justify their decisions.62

This proposal intelligently blends a concern for individual rights with pragmatism. Civil libertarians often overlook the basic point that constitutional rights are not absolute, but rather may be infringed if the government has a compelling reason for doing so and employs the least restrictive means to achieve that interest.63 Obviously, national security is a compelling governmental interest.64 Professor Wells’s crucial insight is that courts should not allow the President simply to assert that “national security” necessitated his actions; rather, he must concretely demonstrate that his policies were a reasonable and narrowly tailored response to a particular risk that had been assessed accurately.65

Although this approach is plausible in theory, I am not sure it would work well in practice. Presumably, the President almost always will be able to set forth plausible justifications for his actions, often based on a wide array of factors—including highly sensitive intelligence that he does not wish to dis-close.66 Moreover, if the President’s response seems unduly harsh, he will likely cite the wisdom of erring on the side of caution. If the Court disagrees, it will have to find that those proffered reasons are pretextual and that the President overreacted emotionally instead of rationally evaluating and responding to the true risks involved. But are judges competent to make such determinations? And even if they are, would they be willing to impugn the President’s integrity and judgment? If so, what effect might such a judicial decision have on America’s foreign relations? These questions are worth pondering before concluding that “hard look” review would be an improvement over the Court’s established approach.

Moreover, such searching scrutiny will be useless in situations where the President has made a wartime decision that he will not change, even if judicially ordered to do so. For instance, assume that the Court in Korematsu had applied “hard look” review and found that President Roosevelt had wildly exaggerated the sabotage and espionage risks posed by Japanese-Americans and had imprisoned them based on unfounded fears and prejudice (as appears to have been the case). If the Court accordingly had struck down FDR’s order to relocate them, he would likely have disobeyed it.

Professor Wells could reply that this result would have been better than what happened, which was that the Court engaged in “pretend” review and stained its reputation by upholding the constitutionality of the President’s odious and unwarranted racial discrimination. I would agree. But I submit that the solution in such unique situations (i.e., where a politically strong President has made a final decision and will defy any contrary court judgment) is not judicial review in any form—ordinary, deferential, or hard look. Rather, the Court should simply declare the matter to be a political question and dismiss the case. Although such Bickelian manipulation of the political question doctrine might be legally unprincipled and morally craven, 67 at least it would avoid giving the President political cover by blessing his unconstitutional conduct and instead would force him to shoulder full responsibility. Pg. 968-970

#### Fight with President devastates court legitimacy. Two centuries of judicial decisions prove they can’t solve without his support

Devins & Fisher 98—Professor of Law and Government @ College of William and Mary & Senior Specialist in Separation of Powers @ Congressional Research Service [Neal Devins & Louis Fisher, “Judicial Exclusivity and Political Instability,” Virginia Law Review Vol. 84, No. 1 (Feb. 1998), pp. 83-106]

Lacking the power to appropriate funds or command the military, 73 the Court understands that it must act in a way that garners public acceptance." In other words, as psychologists Tom Tyler and Gregory Mitchell observed, the Court seems to believe "that public acceptance of the Court's role as interpreter of the Constitution that is, the public belief in the Court's institutional legitimacy enhances public acceptance of controversial Court decisions."75 This emphasis on public acceptance of the judiciary seems to be conclusive proof that Court decisionmaking cannot be divorced from a case's (sometimes explosive) social and political setting.

A more telling manifestation of how public opinion affects Court decisionmaking is evident when the Court reverses itself to conform its decisionmaking to social and political forces beating against it.76 Witness, for example, the collapse of the Lochner era under the weight of changing social conditions. Following Roosevelt's 1936 election victory in all but two states, the Court, embarrassed by populist attacks against the Justices, announced several decisions upholding New Deal programs.' In explaining this transformation, Justice Owen Roberts recognized the extraordinary importance of public opinion in undoing the Lochner era: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country-for what in effect was a unified economy.""8

Social and political forces also played a defining role in the Court's reconsideration of decisions on sterilization and the eugenics movement," state-mandated flag salutes,' the Roe v. Wade trimester standard, 8 the death penalty,' states' rights, 3 and much more.' It did not matter that some of these earlier decisions commanded an impressive majority of eight to one." Without popular support, these decisions settled nothing. Justice Robert Jackson instructed us that "[t]he practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority.""6 As such, for a Court that wants to maximize its power and legitimacy, taking social and political forces into account is an act of necessity, not cowardice. Correspondingly, when the Court gives short shrift to populist values or concerns, its decisionmaking is unworkable and destabilizing.87

The Supreme Court may be the ultimate interpreter in a particular case, but not in the larger social issues of which that case is a reflection. Indeed, it is difficult to locate in the more than two centuries of rulings from the Supreme Court a single decision that ever finally settled a transcendent question of constitutional law. When a decision fails to persuade or otherwise proves unworkable.' elected officials, interest groups, academic commentators, and the press will speak their minds and the Court, ultimately, will listen."

Even in decisions that are generally praised, such as Brown, the Court must calibrate its decisionmaking against the sentiments of the implementing community and the nation. In an effort to temper Southern hostility to its decision, the Court did not issue a remedy in the first Brown decision.' A similar tale is told by the Court's invocation of the so-called "passive virtues," that is, procedural and jurisdictional mechanisms that allow the Court to steer clear of politically explosive issues.91 For example, the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it," not "formulate a rule of constitutional law broader than is required," nor "pass upon a constitutional question... if there is... some other ground," such as statutory construction, upon which to dispose of the case.' This deliberate withholding of judicial power reflects the fact that courts lack ballot-box legitimacy and need to avoid costly collisions with the general public and other branches of government.'

It is sometimes argued that courts operate on principle while the rest of government is satisfied with compromises." This argument is sheer folly. A multimember Court, like government, gropes incrementally towards consensus and decision through compromise, expediency, and ad hoc actions. "No good society," as Alexander Bickel observed, "can be unprincipled; and no viable society can be principle-ridden."'95

Courts, like elected officials, cannot escape "[t]he great tides and currents which engulf" the rest of us.96 Rather than definitively settling transcendent questions, courts must take account of social movements and public opinion.' When the judiciary strays outside and opposes the policy of elected leaders, it does so at substantial risk. The Court maintains its strength by steering a course that fits within the permissible limits of public opinion. Correspondingly, "the Court's legitimacy-indeed, the Constitution's-must ultimately spring from public acceptance," for ours is a "political system ostensibly based on consent."98 pg. 93-98

#### Weakening the court prevents sustainable development

Stein 5—Former Judge of the New South Wales Court of Appeal and the New South Wales Land and Environment Court [Justice Paul Stein (International Union for Conservation of Nature (IUCN) Specialist Group on the Judiciary), “Why judges are essential to the rule of law and environmental protection,” Judges and the Rule of Law: Creating the Links: Environment, Human Rights and Poverty, IUCN Environmental Policy and Law Paper No. 60, Edited by Thomas Greiber, 2006]

The Johannesburg Principles state:

“We emphasize that the fragile state of the global environment requires the judiciary, as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.”

There can be no argument that environmental law, and sustainable development law in particular, are vibrant and dynamic areas, both internationally and domestically. Judge Weeramantry (of the ICJ) has reminded us that we judges, as custodians of the law, have a major obligation to contribute to its development. Much of sustainable development law is presently making the journey from soft law into hard law. This is happening internationally but also it is occurring in many national legislatures and courts.

Fundamental environmental laws relating to water, air, our soils and energy are critical to narrowing the widening gap between the rich and poor of the world. Development may be seen as the bridge to narrow that gap but it is one that is riddled with dangers and contradictions. We cannot bridge the gap with materials stolen from future generations. Truly sustainable development can only take place in harmony with the environment. Importantly we must not allow sustainable development to be duchessed and bastardized.

A role for judges?

It is in striking the balance between development and the environment that the courts have a role. Of course, this role imposes on judges a significant trust. The balancing of the rights and needs of citizens, present and future, with development, is a delicate one. It is a balance often between powerful interests (private and public) and the voiceless poor. In a way judges are the meat in the sandwich but, difficult as it is, we must not shirk our duty. Pg. 53-54

#### Extinction of all complex life

Barry 13—Political ecologist with expert proficiencies in old forest protection, climate change, and environmental sustainability policy [Dr. Glen Barry (Ph.D. in "Land Resources" and Masters of Science in "Conservation Biology and Sustainable Development” from the University of Wisconsin-Madison), “ECOLOGY SCIENCE: Terrestrial Ecosystem Loss and Biosphere Collapse,” Forests.org, February 4, 2013, pg. http://forests.org/blog/2013/02/ecology-science-terrestrial-ec.asp

Blunt, Biocentric Discussion on Avoiding Global Ecosystem Collapse and Achieving Global Ecological Sustainability

Science needs to do a better job of considering worst-case scenarios regarding continental- and global-scale ecological collapse. The loss of biodiversity, ecosystems, and landscape connectivity reviewed here shows clearly that ecological collapse is occurring at spatially extensive scales. The collapse of the biosphere and complex life, or eventually even all life, is a possibility that needs to be better understood and mitigated against. A tentative case has been presented here that terrestrial ecosystem loss is at or near a planetary boundary. It is suggested that a 66% of Earth's land mass must be maintained in terrestrial ecosystems, to maintain critical connectivity necessary for ecosystem services across scales to continue, including the biosphere. Yet various indicators show that around 50% of Earth's terrestrial ecosystems have been lost and their services usurped by humans. Humanity may have already destroyed more terrestrial ecosystems than the biosphere can bear. There exists a major need for further research into how much land must be maintained in a natural and agroecological state to meet landscape and bioregional sustainable development goals while maintaining an operable biosphere.

It is proposed that a critical element in determining the threshold where terrestrial ecosystem loss becomes problematic is where landscape connectivity of intact terrestrial ecosystems erodes to the point where habitat patches exist only in a human context. Based upon an understanding of how landscapes percolate across scale, it is recommended that 66% of Earth's surface be maintained as ecosystems; 44% as natural intact ecosystems (2/3 of 2/3) and 22% as agroecological buffer zones. Thus nearly half of Earth must remain as large, connected, intact, and naturally evolving ecosystems, including old-growth forests, to provide the context and top-down ecological regulation of both human agroecological, and reduced impact and appropriately scaled industrial activities.

Given the stakes, it is proper for political ecologists and other Earth scientists to willingly speak bluntly if we are to have any chance of averting global ecosystem collapse. A case has been presented that Earth is already well beyond carrying capacity in terms of amount of natural ecosystem habitat that can be lost before the continued existence of healthy regional ecosystems and the global biosphere itself may not be possible. Cautious and justifiably conservative science must still be able to rise to the occasion of global ecological emergencies that may threaten our very survival as a species and planet.

Those knowledgeable about planetary boundaries—and abrupt climate change and terrestrial ecosystem loss in particular—must be more bold and insistent in conveying the range and possible severity of threats of global ecosystem collapse, while proposing sufficient solutions. It is not possible to do controlled experiments on the Earth system; all we have is observation based upon science and trained intuition to diagnose the state of Earth's biosphere and suggest sufficient ecological science–based remedies.

If Gaia is alive, she can die. Given the strength of life-reducing trends across biological systems and scales, there is a need for a rigorous research agenda to understand at what point the biosphere may perish and Earth die, and to learn what configuration of ecosystems and other boundary conditions may prevent her from doing so. We see death of cells, organisms, plant communities, wildlife populations, and whole ecosystems all the time in nature—extreme cases being desertification and ocean dead zones. There is no reason to dismiss out of hand that the Earth System could die if critical thresholds are crossed. We need as Earth scientists to better understand how this may occur and bring knowledge to bear to avoid global ecosystem and biosphere collapse or more extreme outcomes such as biological homogenization and the loss of most or even all life. To what extent can a homogenized Earth of dandelions, rats, and extremophiles be said to be alive, can it ever recover, and how long can it last?

The risks of global ecosystem collapse and the need for strong response to achieve global ecological sustainability have been understated for decades. If indeed there is some possibility that our shared biosphere could be collapsing, there needs to be further investigation of what sorts of sociopolitical responses are valid in such a situation. Dry, unemotional scientific inquiry into such matters is necessary—yet more proactive and evocative political ecological language may be justified as well. We must remember we are speaking of the potential for a period of great dying in species, ecosystems, humans, and perhaps all being. It is not clear whether this global ecological emergency is avoidable or recoverable. It may not be. But we must follow and seek truth wherever it leads us.

Planetary boundaries have been quite anthropocentric, focusing upon human safety and giving relatively little attention to other species and the biosphere's needs other than serving humans. Planetary boundaries need to be set that, while including human needs, go beyond them to meet the needs of ecosystems and all their constituent species and their aggregation into a living biosphere. Planetary boundary thinking needs to be more biocentric.

I concur with Williams (2000) that what is needed is an Earth System–based conservation ethic—based upon an "Earth narrative" of natural and human history—which seeks as its objective the "complete preservation of the Earth's biotic inheritance." Humans are in no position to be indicating which species and ecosystems can be lost without harm to their own intrinsic right to exist, as well as the needs of the biosphere. For us to survive as a species, logic and reason must prevail (Williams 2000).

Those who deny limits to growth are unaware of biological realities (Vitousek 1986). There are strong indications humanity may undergo societal collapse and pull down the biosphere with it. The longer dramatic reductions in fossil fuel emissions and a halt to old-growth logging are put off, the worse the risk of abrupt and irreversible climate change becomes, and the less likely we are to survive and thrive as a species. Human survival—entirely dependent upon the natural world—depends critically upon both keeping carbon emissions below 350 ppm and maintaining at least 66% of the landscape as natural ecological core areas and agroecological transitions and buffers. Much of the world has already fallen below this proportion, and in sum the biosphere's terrestrial ecosystem loss almost certainly has been surpassed, yet it must be the goal for habitat transition in remaining relatively wild lands undergoing development such as the Amazon, and for habitat restoration and protection in severely fragmented natural habitat areas such as the Western Ghats.

The human family faces an unprecedented global ecological emergency as reckless growth destroys the ecosystems and the biosphere on which all life depends. Where is the sense of urgency, and what are proper scientific responses if in fact Earth is dying? Not speaking of worst-case scenarios—the collapse of the biosphere and loss of a living Earth, and mass ecosystem collapse and death in places like Kerala—is intellectually dishonest. We must consider the real possibility that we are pulling the biosphere down with us, setting back or eliminating complex life.

The 66% / 44% / 22% threshold of terrestrial ecosystems in total, natural core areas, and agroecological buffers gets at the critical need to maintain large and expansive ecosystems across at least 50% of the land so as to keep nature connected and fully functional. We need an approach to planetary boundaries that is more sensitive to deep ecology to ensure that habitable conditions for all life and natural evolutionary change continue. A terrestrial ecosystem boundary which protects primary forests and seeks to recover old-growth forests elsewhere is critical in this regard. In old forests and all their life lie both the history of Earth's life, and the hope for its future. The end of their industrial destruction is a global ecological imperative.

Much-needed dialogue is beginning to focus on how humanity may face systematic social and ecological collapse and what sort of community resilience is possible. There have been ecologically mediated periods of societal collapse from human damage to ecosystems in the past (Kuecker and Hall 2011). What makes it different this time is that the human species may have the scale and prowess to pull down the biosphere with them. It is fitting at this juncture for political ecologists to concern themselves with both legal regulatory measures, as well as revolutionary processes of social change, which may bring about the social norms necessary to maintain the biosphere. Rockström and colleagues (2009b) refer to the need for "novel and adaptive governance" without using the word revolution. Scientists need to take greater latitude in proposing solutions that lie outside the current political paradigms and sovereign powers.

Even the Blue Planet Laureates' remarkable analysis (Brundtland et al. 2012), which notes the potential for climate change, ecosystem loss, and inequitable development patterns neither directly states nor investigates in depth the potential for global ecosystem collapse, or discusses revolutionary responses. UNEP (2012) notes abrupt and irreversible ecological change, which they say may impact life-support systems, but are not more explicit regarding the profound human and ecological implications of biosphere collapse, or the full range of sociopolitical responses to such predictions. More scientific investigations are needed regarding alternative governing structures optimal for pursuit and achievement of bioregional, continental, and global sustainability if we are maintain a fully operable biosphere forever. An economic system based upon endless growth that views ecosystems necessary for planetary habitability primarily as resources to be consumed cannot exist for long.   
Planetary boundaries offer a profoundly difficult challenge for global governance, particularly as increased scientific salience does not appear to be sufficient to trigger international action to sustain ecosystems (Galaz et al. 2012). If indeed the safe operating space for humanity is closing, or the biosphere even collapsing and dying, might not discussion of revolutionary social change be acceptable? Particularly, if there is a lack of consensus by atomized actors, who are unable to legislate the required social change within the current socioeconomic system. By not even speaking of revolutionary action, we dismiss any means outside the dominant growth-based oligarchies.

In the author's opinion, it is shockingly irresponsible for Earth System scientists to speak of geoengineering a climate without being willing to academically investigate revolutionary social and economic change as well. It is desirable that the current political and economic systems should reform themselves to be ecologically sustainable, establishing laws and institutions for doing so. Yet there is nothing sacrosanct about current political economy arrangements, particularly if they are collapsing the biosphere. Earth requires all enlightened and knowledgeable voices to consider the full range of possible responses now more than ever.

One possible solution to the critical issues of terrestrial ecosystem loss and abrupt climate change is a massive and global, natural ecosystem protection and restoration program—funded by a carbon tax—to further establish protected large and connected core ecological sustainability areas, buffers, and agro-ecological transition zones throughout all of Earth's bioregions. Fossil fuel emission reductions must also be a priority. It is critical that humanity both stop burning fossil fuels and destroying natural ecosystems, as fast as possible, to avoid surpassing nearly all the planetary boundaries.

In summation, we are witnessing the collective dismantling of the biosphere and its constituent ecosystems which can be described as ecocidal. The loss of a species is tragic, of an ecosystem widely impactful, yet with the loss of the biosphere all life may be gone. Global ecosystems when connected for life's material flows provide the all-encompassing context within which life is possible. The miracle of life is that life begets life, and the tragedy is that across scales when enough life is lost beyond thresholds, living systems die.

### 1nc—Comstock

#### Article III trials will encourage Congress to pass a Comstock statute for terrorist. They will remain indefinitely detained

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

Article III trials, therefore, seem to offer the greatest protection against arbitrary and indefinite detention. Regardless what process the courts followed, alleged terrorists would still receive a sentence matching the crime for which they were convicted. But a recent Supreme Court decision and a proposed rule from the Bureau of Prisons cast doubt on whether Article III trials—and, more importantly, Article III sentences—will continue to protect against indefinite detention.

The Supreme Court's ruling in United States v. Comstock sets a disturbing precedent for terrorist-detainees. 89 Comstock involved sentencing issues for sex offenders, a topic seemingly unrelated to terrorism. Yet the Court held that Congress may use its Necessary and Proper Clause powers to permanently detain dangerous sex offenders if they appear to pose a threat to the surrounding community upon release." That Congress may order the civil commitment of dangerous prisoners after completing their sentences sets the stage for transplanting an indefinite detention regime into the criminal sphere. The possibility that this reasoning would or could be extended to cover terrorists subject to Article III criminal sentencing is far from remote. Indeed, many commentators noticed instantly Comstock's potential impact on terror connected inmates.91

The statute at issue in Comstock authorizes a court to civilly commit a soon-to-be-released prisoner if he (1) previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) "suffers from a serious mental illness, abnormality, or disorder," and (3) as a result of the disorder, remains "sexually dangerous to others" such that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 92 If a court finds all of these factors, it may commit the prisoner to the Attorney General's custody, who must make "all reasonable efforts" to return the prisoner to the state in which he was tried or in which he is domiciled.9 3 If the Attorney General is unsuccessful in this endeavor, the prisoner is sent to a federal treatment facility and remains there until he is no longer dangerous.94

By its terms, this statute applies to sex criminals, not terrorists.

Nevertheless, this opinion, which garnered the support of seven justices, clears away any foreseeable barriers to Congress issuing a similar statute aimed at terrorists. After Comstock, Congress may authorize the Attorney General to detain "dangerous" criminals in perpetuity after the termination of their sentences under its Necessary and Proper Clause powers. A statute codifying that notion would alter terrorism prosecutions radically. Pg. 24

### 1nc—Seepage

#### Article III trials will just become Kangaroo Courts that facilitate indefinite detention. Fear of terror will turn them into the mirror image of military tribunals

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

V. CONCLUSION

The pressure to convict "dangerous" terrorists against a backdrop of a decade-long war has taken its toll on the federal courts. Rather than vindicating the accused's constitutional rights in all circumstances, the federal courts have too often become complicit in distorting them.179 Federal courts have begun to resemble the military tribunal system that was once defined by how distinct it was from the Article III system. The past decade has seen federal courts' power to review executive detention heavily circumscribed. Federal prisons have begun to approximate Guantinamo Bay's indefinite detention regime, and federal criminal trial proceedings of terrorists at times bear an eerie resemblance to military commission norms.

As much as one may endorse the apparent move from military commissions to federal courts, that move should be rejected if it comes at the cost of scarring the Article III system. Therefore, both those in favor of military commissions and those in favor of federal court trials should pause. Regardless of whether it may be desirable that the criminal justice system has the flexibility to adjust to these wartime conditions, these developments have eviscerated the largest disparities between the tribunal and criminal spheres. Even persons in favor of a separate judicial system in the form of tribunals no longer have much justification for such a proposal.

Wars invariably have a corrosive effect on democratic institutions. 180 Courts are no different. Perhaps, as some have suggested, the solution would be to remove courts from the fast-paced business of trying terror with a common law process.18' However, that solution is too simplistic. It is apparent that, no matter where terrorists are tried, our societal fear of the threat they pose has led us to create mirror-image systems that tend toward kangaroo courts, state secrets, prolonged interrogation, and indefinite detention. Until we confront and deal with this inclination, any system in which we try terrorists is doomed to repeat these errors. Pg. 37-38

#### Article III courts will give in to wartime pressures. Seepage will create bad law for nonterror cases

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

Wars have a corrosive effect on courts. Many of the darkest moments in federal jurisprudential history have resulted from wartime cases. This is because, "[in an idealized view, our judicial system is insulated from the ribald passions of politics. [But] in reality, those passions suffuse the criminal justice system."26 Wars especially tend to excite passions to a fever pitch. As the D.C. Circuit has lamented,

[t]he common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple. None of those factors exist in the Guantinamo context .... [11n the midst of an ongoing war, time to entertain a process of trial and error is not a luxury we have.27

The war in Afghanistan, presenting a host of thorny legal issues, 28 is now the longest war in United States history.29 This means that thefederal courts have never endured wartime conditions for so long. As a result of this prolonged martial influence, it is clear that this war is corroding federal court jurisprudence. Court-watchers have long feared the danger of "seepage"—the notion that, if terrorists were tried in Article III courts, the pressure to convict would spur the creation of bad law that would "seep" into future non-terror trials."g In this Note, I argue that this hypothetical fear of seepage has become concrete. Indeed, judges already admit that the war has taken a regrettable toll on courts' opinions. In Al-Bihani v. Obama g1 a recent D.C. Circuit decision about Guantdnamo detention, habeas corpus review, and criminal procedure, the opinion's author admits how the courts have bent to accommodate the pressures of war:

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedures, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.32 pg. 13-14

#### They rollback due process rights for all cases

Mukasey 7—US district judge [MICHAEL B. MUKASEY, “Jose Padilla Makes Bad Law,” Wall Street Journal, August 22, 2007, pg. http://tinyurl.com/lmhup5x]

And third, consider the distortions that arise from applying to national security cases generally the rules that apply to ordinary criminal cases.

On one end of the spectrum, the rules that apply to routine criminals who pursue finite goals are skewed, and properly so, to assure that only the highest level of proof will result in a conviction. But those rules do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means.

Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, is said to have told his American captors that he wanted a lawyer and would see them in court. If the Supreme Court rules -- in a case it has agreed to hear relating to Guantanamo detainees -- that foreigners in U.S. custody enjoy the protection of our Constitution regardless of the place or circumstances of their apprehension, this bold joke could become a reality.

The director of an organization purporting to protect constitutional rights has announced that his goal is to unleash a flood of lawyers on Guantanamo so as to paralyze interrogation of detainees. Perhaps it bears mention that one unintended outcome of a Supreme Court ruling exercising jurisdiction over Guantanamo detainees may be that, in the future, capture of terrorism suspects will be forgone in favor of killing them. Or they may be put in the custody of other countries like Egypt or Pakistan that are famously not squeamish in their approach to interrogation -- a practice, known as rendition, followed during the Clinton administration.

At the other end of the spectrum, if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.

## Case

### Judicial Legit

#### 1. Deference is always in flux

BERGER 11 Assistant Professor of Law, University of Nebraska [Eric Berger, INDIVIDUAL RIGHTS, JUDICIAL DEFERENCE, AND ADMINISTRATIVE LAW NORMS IN CONSTITUTIONAL DECISION MAKING, December, 2011, Boston University Law Review, 91 B.U.L. Rev. 2029]

The theory presented here also has the advantage of taking account of the numerous and complicated variables surrounding the exercise of governmental power. Critics might contend that a multi-factor inquiry like the one proposed here will only sow uncertainty into the law and give too much power to courts. n397 But the world is complicated, and legal doctrine should be nuanced enough to appreciate important differences. n398 In particular, agencies exist in many shapes and take many kinds of actions, and a one-size-fits-all approach to deference does not take proper account of those differences. As the Supreme Court explained, "Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety." n399 Thus, just as the Court in Mead reinvigorated Skidmore v. Swift Co. and allowed for judicial deference to agency action based upon "those factors which give [the agency] the power to persuade," n400 the theory proposed here allows courts to consider various factors cutting for or against deference. [\*2096] Such an approach might be especially useful for constitutional challenges to state administrative action, given the great "variety among state administrative laws." n401

Moreover, to the extent that the Court already offers deference to government agencies in some individual rights cases, this theory does not complicate the judicial inquiry so much as it encourages more systematic, consistent examination. While the numerous factors considered here admittedly will give judges flexibility that may result in uncertainty, the Court's current approach to deference entertains numerous (sometimes unarticulated) factors and is far from predictable. More explicit attention to the variety of agency action, then, would encourage courts to discuss more transparently what they already do anyway.

#### 2. One case isn’t enough

SCHEPPELE 12 Laurance S. Rockefeller Professor of Sociology and Public Affairs in the Woodrow Wilson School and University Center for Human Values; Director of the Program in Law and Public Affairs, Princeton University [Kim Lane Scheppele, The New Judicial **Deference**, Boston University Law Review, 92 B.U. L. Rev. 89 2012]

Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference.7 **Deference** counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, inter anna silent leges: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still "hot," courts jumped right in, dealing governments one loss after another.8 After 9/11, it appears that deference is dead.

But, I will argue, **deference** is still alive and well. We are simply seeing a new sort of **deference** born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice. 9 Suspected terrorists have received from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives.

Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference.

#### 3. The court will act in extreme cases—means deference abuses will be checked

CASTO 05 Allison Professor of Law, Texas Tech University School of Law [William R. Casto, ESSAY: EXECUTIVE ADVISORY OPINIONS AND THE PRACTICE OF JUDICIAL DEFERENCE IN FOREIGN AFFAIRS CASES, George Washington International Law Review, 37 Geo. Wash. Int'l L. Rev. 501]

In theory the judicial branch also serves as an independent constraint upon the executive, but the practice does not approach the [\*506] potential of the theory - especially in foreign affairs cases. In practice the courts tend to defer to the executive in matters of foreign policy. The normative desirability of judicial deference is debatable, but the empirical reality of frequent deference is not. n16 Much of this judicial deference is a function of a panoply of principles and prudential considerations that, in many situations, effectively disable the courts from addressing issues of law related to foreign policy. In particular there is the fundamental constitutional provision that the judicial power of the United States extends only to judicial cases and controversies. n17 Thus federal courts may not render advisory opinions, n18 a plaintiff must have standing, n19 and a case must be ripe n20 but must not be moot. n21 These corollaries are not limited to disputes implicating foreign policy issues but are often raised in that context. n22

In addition a bundle of considerations loosely labeled as the political question doctrine frequently influences the courts to subordinate their authority to the political branches. n23 In a leading case, the Court explained: "Not only does resolution of [foreign relations] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or the legislature; but many such questions uniquely demand single-voiced statement of the Government's views." n24 Finally the lower federal courts in the District of Columbia have relied upon their equitable discretion to [\*507] deny remedies to members of Congress in foreign affairs and other cases. n25

Judicial deference to the president in matters of foreign affairs or national security is an empirical fact, but deference is not abdication. The Constitution provides scant guidance regarding the extent of the president's foreign affairs powers, but the mantle of foreign affairs cannot cloak all presidential actions. For example there is a consensus that under the Constitution the president lacks unilateral authority to start a war. Among the founders of the Constitution, even the strongest advocates of presidential authority agreed that only Congress is constitutionally empowered to "transfer the nation from a state of Peace to a state of War." n26 Many of the founders affirmatively took the same position, and there is no record of even a single founder ever stating the president may lawfully start a war. n27

Although the Constitution clearly vests Congress with the exclusive power to start a war, the small word, war, does not provide the courts with very much guidance. Do petty presidential adventures in banana republics like Grenada, Panama, and Haiti constitute "wars" forbidden by the Constitution, or are they merely dramatic and bloody shows of force within the president's unilateral authority? Courts have been reluctant to answer these questions in the absence of supplemental guidance from Congress, and perhaps the judges are right. If Congress lacks the will to protect its own exclusive power in a close case, why should the courts intervene? On the other hand, military action can be so clearly war-making that the theoretically troubling vagueness of the constitutional standard becomes irrelevant. In the first Iraq War, a federal district judge signaled to the president that moving hundreds of thousands of U.S. troops to the Middle East as part of a combined [\*508] allied force of over a half million troops and launching an all-out attack on one of the region's strongest military powers would infringe on the Congress's exclusive war power. n28 The president took the hint and sought congressional authorization for the war. n29

Except for extreme cases like the first Iraq War, the courts may be right to stay clear of disputes regarding presidential authority over foreign affairs. In the rough and tumble realm of politics, a congressional reluctance to constrain the president may properly be viewed as acquiescence. n30 The case for judicial deference, however, may not be as compelling when the constitutional issue shifts from the president's extensive but vague foreign affairs powers to positive constitutional prohibitions designed to protect individuals. Certainly most of the tactics of deference do not work in situations where individual rights come into play. A criminal defendant's defense during the course of a criminal prosecution cannot be dismissed as moot, not ripe, not supported by standing, a political question, or involving remedial discretion. Nor are these avoidance techniques appropriate in the context of a petition for habeas corpus. In these situations the courts must enforce the Constitution's guarantees of individual rights.

Of course, the courts' inclination to defer to the president may reappear as a significant consideration in shaping the actual substantive scope of the individual protections under the Constitution. For example, in the current war on terrorism, some judges are inclined to defer to a presidential decision to incarcerate U.S. citizens indefinitely without trial. n31 Surely many of the Constitution's protections do not extend to U.S. citizens engaged in combat operations against the United States in a foreign country, n32 but what of U.S. citizens engaged in allegedly terrorist criminal activities within the United States? n33 Determining the scope of the Constitution's protections in these cases is a difficult task. The critical preliminary [\*509] inquiry is which branch of government should make this determination. If the courts defer to the executive, the substantive scope of the Constitution's individual protections will be entrusted to the president and his advisers.

It must be remembered that the practice of judicial deference takes many subtle forms. In particular the practice typically is to defer to presidential action rather than to technical legal arguments advanced by the executive. For example in a case of torture performed pursuant to the arguably legal advice in the DOJ's torture memorandum, a court would not necessarily defer to the breathtaking argument for exclusive presidential power. A court might very well, however, defer to the underlying executive action by finding some other, technical reason for refusing a remedy. n34 The net result would be a judicial refusal to restrain executive action taken pursuant to an arguably legal analysis. Under these circumstances the executive would continue to chart its course in reliance upon unreviewed legal advice. In effect the practice of deference lends an aura of authenticity to dubious claims of executive authority, and the president would continue to act on the assumption that in matters related to war he is bound by neither international law, nor treaties of the United States, nor even acts of Congress.

#### AT: CMR

**Their impact claims are hype that have been consistently empirically disproven**

**Feaver and Kohn 5** - Peter Feaver, professor of Political Science and Public Policy and the director of the Triangle Institute for Security Studies at Duke University, and Richard H. Kohn, Professor of History at the University of North Carolina, 2005, “The Gap: Soldiers, Civilians, and Their Mutual Misunderstanding,” in American Defense Policy, 2005 edition, ed. Paul J. Bolt, Damon V. Coletta, Collins G. Shackelford, p. 339

Concerns about a troublesome divide between the armed forces and the society they serve are hardly new **and** in fact goback to the beginning of the Republic. Writing in the 1950s, Samuel Huntington argued that the divide could best be bridged by civilian society tolerating, if not embracing, the conservative values that animate military culture. Huntington also suggested that politicians allow the armed forces a substantial degree of cultural autonomy. Countering this argument, the sociologist Morris Janowitz argued that in a democracy, military culture necessarily adapts to changes in civilian society, adjusting to the needs and dictates of its civilian masters.2 The end of the Cold War and the extraordinary changes in American foreign and defense policy that resulted have revived the debate. The contemporary heirs of Janowitz see the all volunteer military as drifting too far away from the norms of American society, thereby posing problems for civilian control. They make tour principal assertions. First, the military has grown out of step ideologically with the public, showing itself to be inordinately right-wing politically, and much more religious (and fundamentalist) than America as a whole, having a strong and almost exclusive identification with the Republican Party. Second, the military has become increasingly alienated from, disgusted with, and sometimes even explicitly hostile to, civilian culture. Third, the armed forces have resisted change, particularly the integration of women and homosexuals into their ranks, and have generally proved reluctant to carry out constabulary missions. Fourth, civilian control and military effectiveness will both suffer as the military—seeking ways to operate without effective civilian oversight and alienated from the society around it—loses the respect and support of that society. By contrast, the heirs of Huntington argue that a degenerate civilian culture has strayed so far from traditional values that it intends to eradicate healthy and functional civil-military differences, particularly in the areas of gender, sexual orientation, and discipline. This camp, too, makes four key claims. First, its members assert that the military is divorced in values from a political and cultural elite that is itself alienated from the general public. Second, it believes this civilian elite to be ignorant of, and even hostile to, the armed forces—eager to employ the military as a laboratory for social change, even at the cost of crippling its warfighting capacity. Third, it discounts the specter of eroding civilian control because it sees a military so thoroughly inculcated with an ethos of subordination that there is now too much civilian control, the effect of which has been to stifle the military's ability to function effectively Fourth, because support for the military among the general public remains sturdy, any gap in values is inconsequential. The problem, if anything, is with the civilian elite. The debate has been lively (and inside the Beltway, sometimes quite vicious), but it has rested on very thin evidence**—(**tunneling anecdotes and claims and counterclaims about the nature of civilian and military attitudes. Absent has been a body of systematic data exploring opinions, values, perspectives, and attitudes inside the military compared with those held by civilian elites and the general public. Our project provides some answers.

**Impact inevitable -- CMR in the U.S. will always be strained -- opposing values**

**Cohen 2000** Former Secretary of Defense.

Eliot A. Cohen. Why the Gap Matters - gap between military and civilian world. The National Interest. http://www.dtic.mil/miled/pamphlet/AFO18.pdf.

To do so, they must begin by purging themselves of the notion that if there is no threat of a coup, there is no problem. The truth is that the civil-military relationship in a democracy is almost invariably difficult, setting up as it does opposing values, powerful institutions with great resources, and inevitable tensions between military professionals and statesmen. Those difficulties have become more acute in the United States as a result of two great changes: the end of a centuries-old form of military organization, and a transformation in America's geopolitical circumstances.

**Military doctrines make CM gap inevitable**

**Cohen 2000.** Former Secretary of Defense.

Eliot A. Cohen. Why the Gap Matters - gap between military and civilian world. The National Interest. http://www.dtic.mil/miled/pamphlet/AFO18.pdf.

The major doctrinal statements about the use of force in the last twenty years--Secretary of Defense Caspar Weinberger's six rules for intervention, and General Powell's doctrine of overwhelming force--reflect views dominant in the officer corps, views in turn molded by the military's understanding of the Vietnam War. They were echoed by politicians who believed, or found it convenient to declare that they believed, that the job of politicians was merely to set objectives, not scrutinize military plans, monitor the conduct of operations, and adjust strategy to circumstances. This trend reflects a combination of developments, including a common (mis)reading of the Vietnam War, an unwillingness on the part of civilian leaders to accept the responsibilities levied upon them by their offices, and a confidence in the technical expertise of soldiers. Recent doctrine, however, has flaws of the most terrible kind, for it presumes a kind of universal, apolitical and objective military expertise, when military judgmen t is, in fact, highly contextual and contingent, intimately connected with the politics of a situation and subject to a variety of prejudices and personal experiences. Still, the truth is that for the most part civilian political leaders have given up on the kind of hard questioning and probing that characterized the leadership style of those presidents who believed in civilian control and exercised it best--Lincoln, Roosevelt and Eisenhower among them. Each of these leaders, in different and large ways, violated massively the simplistic doctrine of civilian control that is current in the military and Congress: namely, politicians should set objectives and then get out of the way.

**Deployment of bioweapons dramatically reduces their death toll.**

Mueller ‘10 (John, Woody Hayes Chair of National Security Studies at the Mershon Center for International Security Studies and a Professor of Political Science at The Ohio State University, A.B. from the University of Chicago, M.A. and Ph.D. @ UCLA, *Atomic Obsession – Nuclear Alarmism from Hiroshima to Al-Qaeda*, Oxford University Press, Accessed @ Emory)

Properly developed and deployed, biological weapons could potentially, if thus far only in theory, kill hundreds of thousands, perhaps even millions, of people. The discussion remains **theoretical** because biological weapons have scarcely ever been used. For the most destructive results, they need to be **dispersed** in very **low-altitude** aerosol clouds. Since aerosols do not appreciably settle, pathogens like anthrax (which is not easy to spread or catch and is not contagious) would probably have to be sprayed **near nose level**. Moreover, **90 percent** of the microorganisms are likely to **die** during the process of aerosolization, while their effectiveness could be reduced still further by **sunlight**, **smog**, **humidity**, and **temperature changes**. Explosive methods of dispersion may destroy the organisms, and, except for anthrax spores, long-term **storage** of lethal organisms in bombs or warheads is difficult: even if refrigerated, most of the organisms have a **limited lifetime**. Such weapons can take days or **weeks** to have **full effect**, during which time they can be **countered** with medical and civil defense measures. In the summary judgment of two careful analysts, delivering microbes and toxins over a wide area in the form most suitable for inflicting mass casualties-as an aerosol that could be inhaled-requires a delivery system of **enormous sophistication**, and **even then** effective dispersal could **easily be disrupted** by unfavorable environmental and meteorological conditions.

**The empirical death toll is minimal.**

**Leitenberg ‘5** (Milton, Senior research scholar at the University of Maryland, Trained as a Scientist and Moved into the Field of Arms Control in 1966, First American Recruited to Work at the Stockholm International Peace Research Institute, Affiliated with the Swedish Institute of International Affairs and the Center for International Studies Peace Program at Cornell University, Senior Fellow at CISSM, ASSESSING THE BIOLOGICAL WEAPONS AND BIOTERRORISM THREAT, <http://www.cissm.umd.edu/papers/files/assessing_bw_threat.pdf>)

The conclusions from these independent studies were uniform and mutually reinforcing. There is an extremely low incidence of real biological (or chemical) events, in contrast to the number of hoaxes, the latter spawned by administration and media hype since 1996 concerning the prospective likelihood and dangers of such events. A massive second wave of hoaxes followed the anthrax incidents in the United States in October-November 2001, running into global totals of tens of thousands. It is also extremely important that analysts producing tables of “biological” events not count hoaxes. A hoax is not a “biological” event, nor is the word “anthrax” written on a slip of paper the same thing as anthrax, or a pathogen, or a “demonstration of threat”—all of which various analysts and even government advisory groups have counted hoaxes as being on one occasion or another.79 Those events that were real, and were actual examples of use, were overwhelmingly chemical, and even in that category, involved the use of easily available, off-the-shelf, nonsynthesized industrial products. Many of these were instances of personal murder, and not attempts at mass casualty use. The Sands/Monterey compilation indicated that exactly one person was killed in the United States in the 100 years between 1900 and 2000 as a result of an act of biological or chemical terrorism. Excluding the preparation of ricin, a plant toxin that is relatively easier to prepare, there are only a few recorded instances in the years 1900 to 2000 of the preparation or attempted preparation of pathogens in a private laboratory by a nonstate actor. The significant events to date are: • 1984, the Rajneesh, The Dalles, Oregon, use of salmonella on food; • 1990-94, the Japanese Aum Shinrikyo group’s unsuccessful attempts to procure, produce and disperse anthrax and botulinum toxin;80 • 1999, November 2001, al-Qaida,81 the unsuccessful early efforts to obtain anthrax and to prepare a facility in which to do microbiological work; October-November 2001, the successful “Amerithrax” distribution of a high-quality dry-powder preparation of anthrax spores, which had been prepared within the preceding 24 months.

**There is a low probability risk of high mortality rates.**

**Pearson ‘4** (Alan, Director of the Biological and Chemical Weapons Program at the Center for Arms Control and Non-Proliferation in Washington DC, The Problem of Biological Weapons, Book Review by Milton Leitenberg, http://www.issues.org/21.3/br\_pearson.html)

“The age of bioterrorism is now,” the Washington Post said in January 2005. Many politicians, policymakers, and scientists agree, and so billions of dollars are being spent on biodefense R&D. A dramatic increase in classified threat-assessment research is imminent, including the exploration of potential new bioweapons agents and technologies. Senate Majority Leader Bill Frist says that bioterrorism is “the greatest existential threat we have in the world today” and calls for a biodefense R&D effort that “even dwarfs the Manhattan Project.” Many others agree. Milton Leitenberg does not agree. He believes that the threat of catastrophic bioterrorism has been grossly and irresponsibly exaggerated. He says that faulty threat assessments are legion, that the bioweapons problem is larger and more complex than the focus on bioterrorism suggests, and that current U.S. policies are making the problem worse. Leitenberg, a senior research scholar at the University of Maryland’s Center for International and Security Studies, is a bioweapons and arms control expert with nearly 40 years of experience. In his provocative new book, The Problem of Biological Weapons, he presents what he considers a more reasoned, comprehensive, and evidence-based assessment of the bioweapons threat. Focusing on events of the past 15 years, Leitenberg examines national bioweapons programs, bioterrorism, international efforts to bring bioweapons under control, and current U.S. policies and activities. He concludes that the primary threat today is not bioterrorism but rather the proliferation of bioweapons programs among states. Widespread U.S. concern about bioterrorism first emerged in 1995 after the Aum Shinrikyo cult released sarin (a chemical nerve agent) in the Tokyo subway system and was then found to have made earlier, unsuccessful attempts to use bioweapons. Nonetheless, a dramatic increase in biodefense funding didn’t occur until after the 9/11 terrorist attacks demonstrated that some terrorists were willing to kill unlimited numbers of people. The anthrax attacks that followed shortly thereafter sealed the case for the biodefense R&D boom. Leitenberg agrees that terrorists are interested in bioweapons, but he concludes from a detailed review of the evidence that there is little or no trend indicating that terrorist capabilities are improving. Whereas others see Aum Shinrikyo as demonstrating the ease with which nonstate actors could develop and use bioweapons, Leitenberg sees the opposite: a group incapable of mounting a successful bioweapons attack despite significant interest and major effort. He says that al Qaeda remains far behind Aum in its capabilities. Finally, he notes that the U.S. government maintains that someone closely connected to the U.S. biodefense program probably perpetrated the 2001 anthrax attacks. As for damage assessments, Leitenberg says that those used in recent planning exercises are unreasonable and reflect only the most extreme and least likely consequences of worst-case scenarios. His conclusion is clearly stated: “A terrorist use of a BW agent is best characterized as an event of extremely low probability, which might—depending on the agent, its quality and its means of dispersion—produce high mortality.”

### Blowback

#### No nuclear terrorism – no capability nor intent reject their alarmism

* Many reasons to doubt both the capability and interest of terrorists getting nuclear devices
* Dangers of a loose nuke from Russia is far over-stated
* Even if a terrorist group got a nuclear weapon using it would be very difficult
* Terrorists and connections between rogue states is exaggerates
* Iran and North Korea are not going to give terrorists nukes because their arsenals are small
* What can go wrong will go wrong – multiple intensifying and compounding probability make terrorist failure inevitable
* Their evidence uses worst case scenarios which is alarmist and false
* Insider documents within Al-Qaeda show they don’t want nuclear weapons and prefer convention weapons
* Their evidence about them wanting nukes is wrong the 90s and out of date
* Even if they did want a nuke it was only to deter a U.S. invasion

Gavin 2010, Francis J. Gavin is Tom Slick Professor of International Affairs and Director of the Robert S. Strauss Center¶ for International Security and Law, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin, 2010, International Security, Vol. 34, No. 3 (Winter 2009/10), pp. 7–37¶ © 2010 by the President and Fellows of Harvard College and the Massachusetts Institute of Technology, “Same As It Ever Was ¶ Nuclear Alarmism, Proliferation, and the¶ Cold War”, http://www.mitpressjournals.org/doi/pdf/10.1162/isec.2010.34.3.7

Nuclear Terrorism. The possibility of a terrorist nuclear attack on the¶ United States is widely believed to be a grave, even apocalyptic, threat and a¶ likely possibility, a belief supported by numerous statements by public¶ ofªcials. Since the collapse of the Soviet Union, “the inevitability of the spread¶ of nuclear terrorism” and of a “successful terrorist attack” have been taken for¶ granted.48¶ Coherent policies to reduce the risk of a nonstate actor using nuclear weapons clearly need to be developed. In particular, the rise of the Abdul Qadeer¶ Khan nuclear technology network should give pause.49 But again, the news is¶ not as grim as nuclear alarmists would suggest. Much has already been done¶ to secure the supply of nuclear materials, and relatively simple steps can produce further improvements. Moreover, there are reasons to doubt both the capabilities and even the interest many terrorist groups have in detonating a¶ nuclear device on U.S. soil. As Adam Garªnkle writes, “The threat of nuclear¶ terrorism is very remote.”50¶ Experts disagree on whether nonstate actors have the scientific, engineering,¶ financial, natural resource, security, and logistical capacities to build a nuclear¶ bomb from scratch. According to terrorism expert Robin Frost, the danger of a¶ “nuclear black market” and loose nukes from Russia may be overstated. Even¶ if a terrorist group did acquire a nuclear weapon, delivering and detonating it¶ against a U.S. target would present tremendous technical and logistical¶ difficulties.51 Finally, the feared nexus between terrorists and rogue regimes¶ may be exaggerated. As nuclear proliferation expert Joseph Cirincione argues,¶ states such as Iran and North Korea are “not the most likely sources for terrorists since their stockpiles, if any, are small and exceedingly precious, and hence¶ well-guarded.”52 Chubin states that there “is no reason to believe that Iran today, any more than Sadaam Hussein earlier, would transfer WMD [weapons of¶ mass destruction] technology to terrorist groups like al-Qaida or Hezbollah.”53¶ Even if a terrorist group were to acquire a nuclear device, expert Michael¶ Levi demonstrates that effective planning can prevent catastrophe: for nuclear terrorists, what “can go wrong might go wrong, and when it comes to¶ nuclear terrorism, a broader, integrated defense, just like controls at the source¶ of weapons and materials, can multiply, intensify, and compound the possibilities of terrorist failure, possibly driving terrorist groups to reject nuclear terrorism altogether.” Warning of the danger of a terrorist acquiring a nuclear¶ weapon, most analyses are based on the inaccurate image of an “infallible tenfoot-tall enemy.” This type of alarmism, writes Levi, impedes the development¶ of thoughtful strategies that could deter, prevent, or mitigate a terrorist attack:¶ “Worst-case estimates have their place, but the possible failure-averse, conservative, resource-limited ªve-foot-tall nuclear terrorist, who is subject not only¶ to the laws of physics but also to Murphy’s law of nuclear terrorism, needs to¶ become just as central to our evaluations of strategies.”54¶ A recent study contends that al-Qaida’s interest in acquiring and using nuclear weapons may be overstated. Anne Stenersen, a terrorism expert, claims¶ that “looking at statements and activities at various levels within the al-Qaida network, it becomes clear that the network’s interest in using unconventional¶ means is in fact much lower than commonly thought.”55 She further states that¶ “CBRN [chemical, biological, radiological, and nuclear] weapons do not play a¶ central part in al-Qaida’s strategy.”56 In the 1990s, members of al-Qaida debated whether to obtain a nuclear device. Those in favor sought the weapons¶ primarily to deter a U.S. attack on al-Qaida’s bases in Afghanistan. This assessment reveals an organization at odds with that laid out by nuclear alarmists of¶ terrorists obsessed with using nuclear weapons against the United States regardless of the consequences. Stenersen asserts, “Although there have been¶ various reports stating that al-Qaida attempted to buy nuclear material in the¶ nineties, and possibly recruited skilled scientists, it appears that al-Qaida central have not dedicated a lot of time or effort to developing a high-end CBRN¶ capability.... Al-Qaida central never had a coherent strategy to obtain¶ CBRN: instead, its members were divided on the issue, and there was an¶ awareness that militarily effective weapons were extremely difficult to obtain.”57 Most terrorist groups “assess nuclear terrorism through the lens of¶ their political goals and may judge that it does not advance their interests.”58¶ As Frost has written, “The risk of nuclear terrorism, especially true nuclear terrorism employing bombs powered by nuclear fission, is overstated, and that¶ popular wisdom on the topic is significantly fiawed.”59

#### Terrorism doesn’t cause extinction – no capability or escalation

* Al-Qaeda does not have the capability to attack the US
* Even if terrorists had the capability to deploy a WMD it would not cause extinction
* Even the best terrorists can’t get or deploy a WMD
* In the event of disaster nations come together and solve
* Terrorism is worst case thinking that is not really a problem

Fettweis 10 - Professor of national security affairs @ U.S. Naval War College.¶ (Christopher J. Fettweis, “Threat and Anxiety in US Foreign Policy,” \_\_Survival\_\_, Volume \_\_52\_\_, Issue \_\_2\_\_ April 2010 , http://www.tandfonline.com/doi/abs/10.1080/00396331003764603#.Ud5DOWTwI0M)

Conventional war, much less outright assault, is not the leading security challenge in the minds of most Americans today. Instead, irregular or non-state actors, especially terrorists, top the list of threats to the West since 11 September 2001. The primary guiding principle of US foreign policymaking, for better or worse, is the continuing struggle against terrorism. President Bush repeatedly used the term ‘Islamofascists’ to describe the enemy that he re-oriented the US defence establishment to fight, transforming al-Qaeda from a ragtag band of lunatics into a threat to the republic itself. It is not uncommon for even sober analysts to claim that Islamic terrorists present an ‘existential threat’ to the United States, especially if they were ever to employ nuclear, biological or chemical weapons. Perhaps it is Parkinson's Law that inspires some analysts to compare Islamic fundamentalists with the great enemies of the past, such as the Nazis or the Communists, since no rational analysis of their destructive potential would allow such a conclusion. Threat is a function of capabilities and intent; even if al-Qaeda has the intent to threaten the existence of the United States, it does not possess the capability to do so.¶ This is not to deny that Islamist terrorists pose a danger to the United States, or to suggest that policymakers are poised to ‘let down their guard’, as President Bush has worried. A rational United States, however, would interpret this issue for what it is: a law-enforcement challenge of the first order rather than an existential strategic threat. Fortunately, there is no meaningful dissension in the industrialised world about modern transnational problems such as terrorism, weapons proliferation, human trafficking, drug smuggling or piracy. Multilateral cooperation, coordination and intelligence-sharing to address such issues are in the interest of every state and occur at high, if often under-reported, levels. Police action against terrorism is much less expensive than war, and is likely to be far more productive.¶ Even terrorists equipped with nuclear, biological or chemical weapons would be incapable of causing damage so cataclysmic that it would prove fatal to modern states. Though the prospect of terrorists obtaining and using such weapons is one of the most consistently terrifying scenarios of the new era, it is also highly unlikely and not nearly as dangerous as sometimes portrayed. As the well-funded, well-staffed Aum Shinrikyo cult found out in the 1990s, workable forms of weapons of mass destruction are hard to purchase, harder still to synthesise without state help, and challenging to use effectively. The Japanese group managed to kill a dozen people on the Tokyo subway system at rush hour. While tragic, the attack was hardly the stuff of apocalyptic nightmares. Super-weapons are simply not easy for even the most sophisticated non-state actors to use.31 If terrorists were able to overcome the substantial obstacles and use the most destructive weapons in a densely populated area, the outcome would of course be terrible for those unfortunate enough to be nearby. But we should not operate under the illusion that doomsday would arrive. Modern industrialised countries can cope with disasters, both natural and man-made. As unpleasant as such events would be, they do not represent existential threats.¶ Responsibility lies with those who ought to know better¶ The American public can be forgiven for being afraid of nuclear-, biological-or chemical-armed terrorists, since the messages they have been receiving from US leaders have been uniformly apocalyptic, informed by worst-case thinking. The responsibility for this pathological fear lies with those who ought to know better – who know, for instance, that plastic sheeting and duct tape are not realistic protections against anything, but who recommend their stockpiling anyway.¶ Terrorists can kill people and scare many more, but the localised damage they can cause is by itself incapable of changing the character of Western civilisation. Only the people of the West, largely through their own overreaction, can accomplish that. While US analysts spend time worrying about such events, it is worth recalling that the diplomats of any prior age would likely have been quite grateful to have our problems in lieu of their own.

#### Pakistan relations on brink – terror attacks key to sustained international aid – prevents Pakistan collapse – risks nuclear conflict

* Prior to 9/11 Pakistan was dysfunctional and the US did not care about it
* War with India over Kashmir is a real possibility
* Only the United States has the historical tied and resources to stabilize Pakistan
* Aid is the best hope for stability in South Asia and Pakistan
* Current relations are headed for inevitable break up due to lack of US aid
* History fades in memory and 9/11 was key to aid
* Abandonment will cause negative outcomes
* Withdraw causes prolif, loose nukes, military strikes

TAYLOR 2008, SCOTT R. TAYLOR, Master of Strategic Studies Degree, 2008, “STABILIZING US-PAKISTAN ¶ RELATIONS: A WAY FORWARD”, http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA480198

In the decade prior to 9/11, it was easily argued that Pakistan’s problems ¶ constituted a significant hindrance to stability solely in South Asia. Pakistan’s ¶ dysfunction did not overly concern US policymakers, though a nuclear exchange with ¶ India over Kashmir was a serious policy concern to prevent. The US willingness to ¶ repeatedly sanction and abandon engagement with Pakistan, however, makes the point ¶ that Pakistan and its legitimate security interests were never major priorities in ¶ Washington. But the US disengagement from Pakistan following the Afghan-Soviet war ¶ has had significant consequences and changed that calculus: foremost being a ¶ renewed Afghan civil war which led to the subsequent rise of the Taliban and the ¶ coming of Al Qaeda to South Asia.71 What followed a decade later, orchestrated by ¶ those same individuals, were the 9/11 attacks. In addition, the Afghan-Soviet war deeply ¶ altered Pakistan as a violent culture of guns, drug-addiction, and large-scale opium ¶ smuggling mixed with religious radicalism took root.72 And Pakistan continues to reel ¶ from those profound social changes today. ¶ To stabilize the Pakistani state, only the US has the combination of resources and historical ties that resonant from 60 years of interaction. The Chinese and the Saudis ¶ 23will naturally compete for influence, and could win out, but for the foreseeable future, the ¶ US still has the lead role in shaping Pakistan’s future. The oft-used, colloquial phrase of ¶ Allah, Army, and America remains unmodified, and is used, only half-jokingly, to ¶ describe who and what decides matters in Pakistan.73 The phrase demonstrates that ¶ the US remains the dominant influencer or external consideration for policy decisions. ¶ A long-term commitment to helping Pakistan develop into a normal state that ¶ transcends the current US focus on the GWOT (and the military aid that distorts the ¶ creation of a freer, more democratic society) represents the best hope for containing the ¶ spread of extremist violence that threatens stability in South Asia and beyond. There ¶ remains, despite opinion polls to the contrary, a deep repository of mutual goodwill and ¶ affection between the two countries, notably between the two militaries.74 Moreover, ¶ even if past history suggests that the current round of US-Pakistan relations is headed ¶ for an inevitable break-up due to a diverging interests, such as a Pakistani unwillingness ¶ to tackle the FATA or US congressional reluctance to sustain high assistance levels, the ¶ future has yet to be written. Past histories can fall away, and 9/11 was likely an altering ¶ event. If so, then a new commitment to developing Pakistan that the US can resource ¶ over time could do much to change Pakistan’s conception of its real national interests, ¶ reduce distrust, and strengthen its efforts to fight terrorism. ¶ If the US commits itself to the long-term development of a more normal Pakistan, ¶ and demonstrates the will to resource that vision, then a new relationship and a new ¶ Pakistan are possible. Abandonment or gradual disengagement, while policy options, ¶ are likely to hasten less than desirable outcomes, such as a Pakistan more aligned with ¶ Saudi Arabian religious sentiments or beholden to China. In either case, the US would ¶ 24confront a more uncooperative Pakistan less likely to assist the US in pursuing ¶ terrorists. Nor could US policymakers, under such conditions, work closely with Pakistan ¶ to ensure the long term security of its nuclear weapons, or prevent further proliferation. ¶ What is clear, however, is that less US investment in building a comprehensive ¶ relationship—or a general retreat—will result in less US influence on Pakistan’s future, ¶ and with that the likelihood of unfavorable outcomes in the FATA, Afghanistan, and ¶ beyond. ¶ Should the US fail to take the long view and resource it accordingly, the Pakistanis ¶ will do likewise by reverting to behaviors that run contrary to wider US interests. History ¶ makes that clear. In that alternative future, the next likely US-Pakistan interaction could ¶ involve military action on Pakistani soil—with decidedly uncertain outcomes. The US ¶ should do everything it can to prevent that.

#### Syria tanked resolve --- the process of backing down invites attack

Cordesman 9/1/13 (Anthony, SCIS burke chair, “President Obama and Syria: The ‘Waiting for Godot’ Strategy,” <http://csis.org/publication/president-obama-and-syria-waiting-godot-strategy>)

Instead, the Administration first rushed into the kind of rhetoric you only use if you actually intend to act regardless of domestic and international support. It tied its entire effort to Syrian use of chemical weapons and the precedent for using such weapons forever. And only then did it suddenly spun around and talked about then need for delay, measured action, and Congressional approval.

While Beckett might not appreciate my efforts to define Godot as the Syrian Civil war, the Administration followed the script of Beckett’s play to the extent it never defined the reasons for what the actors were doing, why they were waiting, or what would happen after Godot came. Chemical weapons are a very real issue, but they are only a subset of the real issue: the overall level of suffering and growing regional instability coming out of the Syrian civil war.

We now face the inevitable reaction. The President’s decisions have reinforced all of the doubts about American strength, and our willingness to act, of both our friends and foes. We now have ten days of confusion and uncertainty to deal with, and then Congress will be evidently be asked to act only on a strike tailored to deter the future use of chemical weapons. It will still lack a meaningful plan for dealing with the Syrian civil war and its impact on the region.

Israel is threatening to return to hawk mode over Iran. Russia and China are in the “we told you so” mode. Assad has already launched new conventional artillery barrages against Syrian civilian areas and now has time enough to disperse a significant number of key physical assets from fixed target sites. France is left hanging – as is Britain for very different reasons. Our Arab allies and Turkey have no clear lead to follow. Our whole strategy in the Middle East remains unclear, as is our entire national security posture in an era of Sequestration and funding crises.

If the Congress does support the President, it will only be after we have openly faltered, and after having rushed forward before deciding on a course of delay. The President will have set a uniquely dangerous precedent by turning to Congress only after he appeared weak, rather than doing from the start, and will have then committed himself to wait at least ten days for the congress to return for its holiday. The message to the world is obvious.

#### Others fill in

Ikenberry, 08 professor of Politics and International Affairs at Princeton University (John, The Rise of China and the Future of the West Can the Liberal System Survive?, Foreign Affairs, Jan/Feb)

Some observers believe that the American era is coming to an end, as the Western-oriented world order is replaced by one increasingly dominated by the East. The historian Niall Ferguson has written that the bloody twentieth century witnessed "the descent of the West" and "a reorientation of the world" toward the East. Realists go on to note that as China gets more powerful and the United States' position erodes, two things are likely to happen: China will try to use its growing influence to reshape the rules and institutions of the international system to better serve its interests, and other states in the system -- especially the declining hegemon -- will start to see China as a growing security threat. The result of these developments, they predict, will be tension, distrust, and conflict, the typical features of a power transition. In this view, the drama of China's rise will feature an increasingly powerful China and a declining United States locked in an epic battle over the rules and leadership of the international system. And as the world's largest country emerges not from within but outside the established post-World War II international order, it is a drama that will end with the grand ascendance of China and the onset of an Asian-centered world order. That course, however, is not inevitable. The rise of China does not have to trigger a wrenching hegemonic transition. The U.S.-Chinese power transition can be very different from those of the past because China faces an international order that is fundamentally different from those that past rising states confronted. China does not just face the United States; it faces a Western-centered system that is open, integrated, and rule-based, with wide and deep political foundations. The nuclear revolution, meanwhile, has made war among great powers unlikely -- eliminating the major tool that rising powers have used to overturn international systems defended by declining hegemonic states. Today's Western order, in short, is hard to overturn and easy to join. This unusually durable and expansive order is itself the product of farsighted U.S. leadership. After World War II, the United States did not simply establish itself as the leading world power. It led in the creation of universal institutions that not only invitedglobal membershipbut also brought democracies and market societies closer together. It built an order that facilitated the participation and integration of both established great powers and newly independent states. (It is often forgotten that this postwar order was designed in large part to reintegrate the defeated Axis states and the beleaguered Allied states into a unified international system.) Today, China can gain full access to and thrive within this system. And if it does, China will rise, but the Western order -- if managed properly -- will live on.

#### Cred no worko

Mercer 8/28/13 (Jonathan, 2013, associate professor of political science at the University of Washington in Seattle and a Fellow at the Center for International Studies at the London School of Economics. Bad Reputation, 28 August 2013, [www.foreignaffairs.com/articles/139376/jonathan-mercer/bad-reputation](http://www.foreignaffairs.com/articles/139376/jonathan-mercer/bad-reputation))

Even if Assad were so simpleminded, the administration’s critics are wrong to suggest that the president should have acted sooner to protect U.S. credibility. After the red line was first crossed, Obama could have taken the United States to war to prevent Assad from concluding that an irresolute Obama would not respond to any further attacks -- a perception on Syria’s part that seems to have now made a U.S. military response all but certain. But going to war to prevent a possible misperception that might later cause a war is, to paraphrase Bismarck, like committing suicide out of fear that others might later wrongly think one is dead.

It is also possible that the United States did not factor into Assad’s calculations. A few months before the United States invaded Iraq, Saddam Hussein’s primary concerns were avoiding a Shia rebellion and deterring Iran. Shortsighted, yes, but also a good reminder that although the United States is at the center of the universe for Americans, it is not for everyone else. Assad has a regime to protect and he will commit any crime to win the war. Finally, it is possible that Assad never doubted Obama’s resolve -- he just expects that he can survive any American response. After all, if overthrowing Assad were easy, it would already have been done.

Instead of worrying about U.S. credibility or the president’s reputation, the administration should focus on what can be done to reinforce the longstanding norm against the use of weapons of mass destruction.

#### No modeling

**Law & Versteeg 12**—Professor of Comparative Constitutional Law @ Washington University & Professor of Comparative Constitutional Law @ University of Virginia [David S. Law & Mila Versteeg, “The Declining Influence of the United States Constitution,” New York University Law Review, Vol. 87, 2012

The appeal of American constitutionalism as a model for other countries appears to be waning in more ways than one. Scholarly attention has thus far focused on global judicial practice: There is a growing sense, backed by more than purely anecdotal observation, that foreign courts cite the constitutional jurisprudence of the U.S. Supreme Court less frequently than before.267 But the behavior of those who draft and revise actual constitutions exhibits a similar pattern. Our empirical analysis shows that the content of the U.S. Constitution is¶ becoming increasingly atypical by global standards. Over the last three decades, other countries have become less likely to model the rights-related provisions of¶ their own constitutions upon those found in the Constitution. Meanwhile, global adoption of key structural features of the Constitution, such as federalism, presidentialism, and a decentralized model of judicial review, is at best stable and at worst declining. In sum, rather than leading the way for global¶ constitutionalism, the U.S. Constitution appears instead to be losing its appeal as¶ a model for constitutional drafters elsewhere. The idea of adopting a constitution may still trace its inspiration to the United States, but the manner in which constitutions are written increasingly does not.

If the U.S. Constitution is indeed losing popularity as a model for other countries, what—or who—is to blame? At this point, one can only speculate as to the actual causes of this decline, but four possible hypotheses suggest themselves: (1) the advent of a superior or more attractive competitor; (2) a general decline in American hegemony; (3) judicial parochialism; (4) constitutional obsolescence; and (5) a creed of American exceptionalism.

With respect to the first hypothesis, there is little indication that the U.S. Constitution has been displaced by any specific competitor. Instead, the notion that a particular constitution can serve as a dominant model for other countries may itself be obsolete. There is an increasingly clear and broad consensus on the types of rights that a constitution should include, to the point that one can articulate the content of a generic bill of rights with considerable precision.269 Yet it is difficult to pinpoint a specific constitution—or regional or international human rights instrument—that is clearly the driving force behind this emerging paradigm. We find only limited evidence that global constitutionalism is following the lead of either newer national constitutions that are often cited as influential, such as those of Canada and South Africa, or leading international and regional human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Although Canada in particular does appear to exercise a quantifiable degree of constitutional influence or leadership, that influence is not uniform and global but more likely reflects the emergence and evolution of a shared practice of constitutionalism among common law countries.270 Our findings suggest instead that the development of global constitutionalism is a polycentric and multipolar¶ process that is not dominated by any particular country.271 The result might be likened to a global language of constitutional rights, but one that has been collectively forged rather than modeled upon a specific constitution.

Another possibility is that America’s capacity for constitutional leadership is at least partly a function of American “soft power” more generally.272 It is reasonable to suspect that the overall influence and appeal of the United States and its institutions have a powerful spillover effect into the constitutional arena. The popularity of American culture, the prestige of American universities, and the efficacy of American diplomacy can all be expected to affect the appeal of American constitutionalism, and vice versa. All are elements of an overall American brand, and the strength of that brand helps to determine the strength of each of its elements. Thus, any erosion of the American brand may also diminish the appeal of the Constitution for reasons that have little or nothing to do with the Constitution itself. Likewise, a decline in American constitutional influence of the type documented in this Article is potentially indicative of a broader decline in American soft power.

There are also factors specific to American constitutionalism that may be¶ reducing its appeal to foreign audiences. Critics suggest that the Supreme Court has undermined the global appeal of its own jurisprudence by failing to acknowledge the relevant intellectual contributions of foreign courts on questions of common concern,273 and by pursuing interpretive approaches that lack acceptance elsewhere.274 On this view, the Court may bear some responsibility for the declining influence of not only its own jurisprudence, but also the actual U.S. Constitution: one might argue that the Court’s approach to constitutional issues has undermined the appeal of American constitutionalism more generally, to the point that other countries have become unwilling to look either to American constitutional jurisprudence or to the U.S. Constitution itself for inspiration.275

It is equally plausible, however, that responsibility for the declining appeal of American constitutionalism lies with the idiosyncrasies of the Constitution itself rather than the proclivities of the Supreme Court. As the oldest formal constitution still in force, and one of the most rarely amended constitutions in the world,276 the U.S. Constitution contains relatively few of the rights that have become popular in recent decades,277 while some of the provisions that it does contain may appear increasingly problematic, unnecessary, or even undesirable with the benefit of two hundred years of hindsight.278 It should therefore come as little surprise if the U.S. Constitution¶ strikes those in other countries–or, indeed, members of the U.S. Supreme Court279–as out of date and out of line with global practice.280 Moreover, even if the Court were committed to interpreting the Constitution in tune with global fashion, it would still lack the power to update the actual text of the document.

Indeed, efforts by the Court to update the Constitution via interpretation may actually reduce the likelihood of formal amendment by rendering such amendment unnecessary as a practical matter.281 As a result, there is only so much that the U.S. Supreme Court can do to make the U.S. Constitution an¶ attractive formal template for other countries. The obsolescence of the Constitution, in turn, may undermine the appeal of American constitutional jurisprudence: foreign courts have little reason to follow the Supreme Court’s lead on constitutional issues if the Supreme Court is saddled with the interpretation of an unusual and obsolete constitution.282 No amount of ingenuity or solicitude for foreign law on the part of the Court can entirely divert attention from the fact that the Constitution itself is an increasingly atypical document.

One way to put a more positive spin upon the U.S. Constitution’s status as a global outlier is to emphasize its role in articulating and defining what is unique about American national identity. Many scholars have opined that formal constitutions serve an expressive function as statements of national identity.283 This view finds little support in our own empirical findings, which suggest instead that constitutions tend to contain relatively standardized packages of rights.284 Nevertheless, to the extent that constitutions do serve such a function, the distinctiveness of the U.S. Constitution may simply reflect the uniqueness of America’s national identity. In this vein, various scholars have argued that the U.S. Constitution lies at the very heart of an “American creed of exceptionalism,” which combines a belief that the United States occupies a unique position in the world with a commitment to the qualities that set the United States apart from other countries.285 From this perspective, the Supreme Court’s reluctance to make use of foreign and international law in constitutional cases amounts not to parochialism, but rather to respect for the exceptional character of the nation and its constitution.286

Unfortunately, it is clear that the reasons for the declining influence of American constitutionalism cannot be reduced to anything as simple or attractive as a longstanding American creed of exceptionalism. Historically, American exceptionalism has not prevented other countries from following the example set by American constitutionalism. The global turn away from the American model is a relatively recent development that postdates the Cold War. If the U.S. Constitution does in fact capture something profoundly unique about the United States, it has surely been doing so for longer than the last thirty years. A complete explanation of the declining influence of American constitutionalism in other countries must instead be sought in more recent history, such as the wave of constitution-making that followed the end of the Cold War.287 During this period, America’s newfound position as lone superpower might have been expected to create opportunities for the spread of American constitutionalism. But this did not come to pass.

Once global constitutionalism is understood as the product of a polycentric evolutionary process, it is not difficult to see why the U.S. Constitution is playing an increasingly peripheral role in that process. No evolutionary process favors a specimen that is frozen in time. At least some of the responsibility for the declining global appeal of American constitutionalism lies not with the Supreme Court, or with a broader penchant for exceptionalism, but rather with the static character of the Constitution itself. If the United States were to revise the Bill of Rights today—with the benefit of over two centuries of experience, and in a manner that addresses contemporary challenges while remaining faithful to the nation’s best traditions—there is no guarantee that other countries would follow its lead. But the world would surely pay close attention. Pg. 78-83

#### Decisions will be guided by political needs. Russian judiciary is not independent

**Volkov 13** - Vice rector for international affairs @ European University in St. Petersburg and head of its Research Institute for the Rule of Law [Vadim Volkov, “Why Do Russian Judges Act That Way?,” Transtions Online, Interviewed By: Sergey Chernov, 6 February 2013

TOL: Russian Prime Minister Dmitry Medvedev, a lawyer by education, attributed the high conviction rate in Russia to judges feeling awkward about investigations. “Judges are ashamed to acquit a person and thus question the work done by the investigation bodies,” he told German newspaper Neue Zurcher Zeitung. What do you say to this?

Vadim Volkov: Medvedev means that the judges don’t want to go against the investigation and the prosecution, because if they acquit someone it means that system worked in vain. Basically, they held in custody and interrogated an innocent person, and they just do not want to go against it, so they are ashamed.

 Medvedev’s main idea is right: the judges are weak. The judiciary has a weak position vis-à-vis the prosecution and the investigation. He said also that this is the Soviet legacy, which is also correct. Criminal courts in Russia were officially part of the so-called pravookhranitelnaya sistema [the law-enforcement system]. Now, according to the constitution, they are separate and independent. They are not part of the pravookhranitelniye organy [the law-enforcement organs], so to speak. In the Soviet Union, they were. They were part of the same machine—the last instance of checking on the work of preceding instances in the criminal process, meaning the militia, the investigation, the prosecution. This wasn’t an independent system.

 Now in Russia, the judiciary has become an independent institution and its independence is guaranteed by the constitution and a number of other laws, but in fact, in practice, it doesn’t work as independent. It remains the last element of the law-enforcement system, in practice.

 But Medvedev didn’t say anything about how we can change this situation. There’s a very hard dilemma: it’s not in the interests of political authorities to increase the independence of the judiciary, because the judges can make the work of the police, the investigation, and the prosecutor very hard. They may give them a hard time. The political powers don’t want this conflict. On the other hand, this is a matter of the international prestige of Russia, and the investment climate, to have independent judges and independent courts. So Medvedev, as usual, stopped halfway. He said more or less about how things are, but he said nothing about how we can make things better, because a radical decision is needed here.

#### Russian anti-Americanism is high

**Dale 12**—Heritage Foundations Senior Fellow in Public Diplomacy studies [[Helle Dale](http://blog.heritage.org/author/hdale/), “ Russia with Hate: Anti-Americanism Rampant in Putin’s Kremlin,” The Foundry, April 23, 2012 at 4:30 pm, pg. http://tinyurl.com/d4x8y7m

For the Russian government, using the U.S. as variously a whipping boy and a scarecrow is extremely convenient. Indeed, [anti-Americanism](http://www.mendeley.com/research/russian-antiamericanism-priority-target-u-s-public-diplomacy/) is a long-standing and fundamental pillar of Russian foreign policy and public diplomacy. As noted by Heritage’s [Ariel Cohen](http://www.heritage.org/research/reports/2012/03/how-the-us-should-deal-with-putins-russia), “Anti-Americanism in Russia is rampant. Putin has relentlessly created an image of Russia under attack from Western enemies. It worked for the elections and is likely to continue as a pillar of Russia’s domestic and foreign policy.”

Anti-American rhetoric is also a standard feature of the broadcasts of Russia Today, the Kremlin’s international news channel, which can be found on many American cable systems. However, while Russian commentators can spew allegations with impunity, the U.S. government’s Radio Liberty and Voice of America (VOA) are banned or severely curtailed in most Russian media markets. In fact, prior to the Russian presidential election, VOA broadcasters were warned against covering Russian election issues under threat of being kicked off the market altogether. The fact that the U.S. media market is free leaves it open to abuses. Nevertheless, a tougher approach to reciprocity in media access is clearly needed.\

#### It will infect the court

**Schor 08** - Professor of Law @ Suffolk University Law School. [Miguel Schor, “Judicial Review and American Constitutional Exceptionalism,” Osgoode Hall Law Journal, Vol. 46, 2008

This article questions the conventional wisdom that the logic of Marbury has conquered the world’s democracies by exploring two questions: why do social movements contest constitutional meaning by fighting over judicial appointments in the United States, and why does such a strategy make little sense in democracies that constitutionalized rights in the late twentieth century?6 The short answer is that the United States has been both a model and an anti-model 7 in the worldwide spread of judicial review. The United States stood astride the world after the Second World War and elements of American constitutionalism such as judicial review proved irresistible to democracies around the globe.8 Polities that adopted judicial review in the late twentieth century, however, rejected the key assumption on which judicial review in the United States is founded.. American constitutionalism assumes that law is separate from politics and that courts have the power and the duty to maintain that distinction.

This assumption was rejected because other democracies learned from the American experience that courts that exercise judicial review are powerful political as well as legal actors. The fear of providing constitutional courts with too much power played an important role in shaping judicial review outside the United States. 9 When judicial review began to spread around the globe in the second half of the twentieth century, the hope of Marbury (the promise of constitutionalized rights) became fused with the fear of Lochner 10 (the possibility that courts might run amok). In seeking to thread a needle between Marbury and Lochner , the American assumption that a constitution is a species of law was rejected in favour of a very different baseline assumption that constitutions are neither law nor politics, but an entirely new genus of “political law.” 11Consequently, democracies abroad adopted stronger mechanisms by which citizens can hold constitutional courts accountable 12and which make it less likely that social forces will use appointments as a vehicle for constitutional battles. Pg. 37-38

**No risk of U.S.-Russian war – Russia knows the U.S. is infinitely more powerful and that it couldn’t be a threat.**

**Bandow, 8** (Doug, former senior fellow at the Cato Institute and former columnist with Copley News Service, 3/“Turning China into the Next Big Enemy.” <http://www.antiwar.com/bandow/?articleid=12472>)

In fact, America remains a military colossus. The Bush administration has proposed spending $515 billion next year on the military; more, adjusted for inflation, than at any time since World War II. The U.S. accounts for roughly half of the world's military outlays. Washington is allied with every major industrialized state except China and Russia. America's avowed enemies are a pitiful few: Burma, Cuba, Syria, Venezuela, Iran, North Korea. The U.S. government could destroy every one of these states with a flick of the president's wrist. Russia has become rather contentious of late, but that hardly makes it an enemy. Moreover, the idea that Moscow could rearm, reconquer the nations that once were part of the Soviet Union or communist satellites, overrun Western Europe, and then attack the U.S. – without anyone in America noticing the threat along the way – is, well, a paranoid fantasy more extreme than the usual science fiction plot. The Leninist Humpty-Dumpty has fallen off the wall and even a bunch of former KGB agents aren't going to be able to put him back together.

# 2NC

### 2NC – A2 – Addon

**No impact to Afghanistan**

**Haass 10/11/09** – President, Council on Foreign Relations, former Director of the State Department's Policy Planning Staff

(Richard N. “In the Afghan War, Aim for the Middle.” Washington Post Op-Ed. http://www.cfr.org/publication/20383/in\_the\_afghan\_war\_aim\_for\_the\_middle.html)

Why does Afghanistan matter? We generally hear four arguments. First, if the Taliban returns to power, Afghanistan will again be a haven for terrorist groups. Second, if the Taliban takes over, Afghanistan will again become a human rights nightmare. Third, a perceived defeat of the United States in Afghanistan would be a blow to U.S. prestige everywhere and would embolden radicals. Fourth, an Afghanistan under Taliban control would be used by extremists as a sanctuary from which to destabilize Pakistan. None of these assumptions is as strong as proponents maintain. Afghanistan certainly matters -- the question is how much. Al-Qaeda does not require Afghan real estate to constitute a regional or global threat. Terrorists gravitate to areas of least resistance; if they cannot use Afghanistan, they will use countries such as Yemen or Somalia, as in fact they already are. No doubt, the human rights situation would grow worse under Taliban rule, but helping Afghan girls get an education, no matter how laudable, is not a goal that justifies an enormous U.S. military commitment. And yes, the taking of Kabul by the Taliban would become part of the radicals' narrative, but the United States fared well in Asia after the fall of South Vietnam, and less than a decade after an ignominious withdrawal from Beirut, the United States amassed the international coalition that ousted Saddam Hussein from Kuwait. There are and always will be opportunities to demonstrate the effectiveness of U.S. power.

**Others will fill in to solve stability.**

**Prashad ‘9** (Vijay, George and Martha Kellner Chair of South Asian History – Trinity College, GazetteNET, “Don't escalate Afghanistan war, reach out to country's neighbors”, 12-5, http://www.gazettenet.com/2009/12/05/dont-escalate-afghanistan-war?SESSf793588a8482ac7b45e5aa116b4d4c76=gnews)

Instead, the U.S. backed one group of nasty warlords (the Northern Alliance) against the Taliban, throwing to the wind the progressive forces within Afghan society. The SCO was also disregarded. This was a costly mistake. The SCO continues to have influence in the region. This summer, elements in the Taliban insurgency sent a letter to the SCO, asking it to intervene against the occupation. Of course the SCO is sitting on its hands, but it is able. The regional solution will be difficult, given that it would have to scrub off the effects of 30 years of warfare. Right after the Taliban fled in 2001, the U.S. convened a "donor's conference" in Bonn, where Europe, Japan and the U.S. gathered to promise money for the reconstruction of the country. No one invited the SCO players. This has not changed. Europe, Japan and the U.S., the countries with the least legitimacy in Afghanistan are the ones calling the shots. Rather than conference calls with Brussels (the NATO headquarters), Paris, London and Kabul (with the shaky government of Karzai), the Obama administration should have called a political conference of the SCO, to see what it would have taken to hand over the Afghan imbroglio to them. The SCO met in Bishkek (capital of Kyrgyzstan) on Nov. 24 to discuss the problem of the region, and made all kinds of suggestions. None of these are operational till the U.S.-NATO forces withdraw from Kabul. China is the only power in the region with the wealth and expertise to genuinely rebuild Afghanistan (people might criticize its development policy in Africa, but mark this: Chinese investment enters countries in Africa without IMF-type conditionalities and Chinese engineers and managers live in modest conditions, not creating the kind of high-overhead NGO lifestyles of the European and U.S. humanitarian workers). The U.S. media has portrayed the escalation of the occupation in a very simplistic fashion: Either the U.S. solves the problem, or the Taliban returns. This is a false choice, one that assumes that only the U.S. can act, the White Knight riding in to save the world. Others are ready. But they don't want to act unless they have a commitment that the U.S. is not going to use their blood and treasure to build its empire.

#### Terrorist’s won’t collapse Pakistan – economics outweighs

Mohan 2005, C. Raja Mohan is professor of South Asian studies at Jawaharlal Nehru University, 2005, “What If Pakistan Fails?¶ India Isn't Worried ... Yet”, The Washington Quarterly, Project Muse, http://muse.jhu.edu.proxy.library.emory.edu/journals/washington\_quarterly/v028/28.1mohan.html

These types of conflicts, however, are not characteristic of the Pakistani situation. No serious and organized popular challenge to state authority exists in Pakistan, nor do people question the basis for the organization of the Pakistani state and its ideology. The attempted car bombings against President Gen. Pervez Musharraf by Islamic extremist groups at the end of 2003 also do not suggest any impending failure of the Pakistani state. Although these groups might be motivated by ideology, they scarcely enjoy popular support. Political assassination, in any case, has long been a tradition in South Asia. Although it has often weakened states temporarily, it has rarely led to the collapse of state structures in the subcontinent.¶ A primary feature of failing states is a fatal weakening of the central authority. Although India appreciates the many problems that Pakistan faces today, Indian leaders do not believe that the Pakistani state is in its terminal stages. On the contrary, many in India point to the extraordinary strength of Pakistan's army, which lies at the core of the Pakistani nation-state. The army is capable of disciplining any particular section of society at any given moment. The expansion of its profile in national politics since Musharraf's coup in 1999 has faced little resistance from the established political parties. Musharraf's ability to exile the leader of the largest political party in Pakistan—Benazir Bhutto of the People's Party of Pakistan—and to destroy the base of support of the next most popular political leader—Nawaz Sharif of the Muslim League—speaks volumes about the political dominance of the army and the rapid erosion of the two major political parties' credibility. [End Page 119]¶ The Pakistani courts have justified the army's repeated manipulation of the constitution as a necessity. Musharraf, unlike his predecessors who had ruled without any need for political justification, requires some measure of political and constitutional legitimization for his rule. A relatively free and vibrant press in Pakistan continuously questions Musharraf's legitimacy and attacks many of his domestic policies. Although political parties have been marginalized, Musharraf has to buy or persuade at least part of the political class to go along with him. Yet, this has by no means reduced the overwhelming power that the army exercises in Pakistan today. In fact, India believes that the army is in a position to crack down fully on the sources of terrorism and religious extremism in Pakistan. Whether it chooses to do so is an entirely different question.¶ A second measure of a failed state is a bitter and enduring contest among warring factions. Pakistan has survived many types of internal conflicts, including sectarian and ethnic disputes. Although one of these conflicts led to the secession of Bangladesh from Pakistan in 1971, there appears to be no real danger of this recurring today. Few other provinces in Pakistan today have the kind of ethnic homogeneity or unity of purpose that East Pakistan had more than 30 years ago. Although Baluch and Pushtun nationalism in the provinces of Baluchistan and the North West Frontier provinces, respectively, are often perceived as potentially threatening, the capacity of the state either to discipline or co-opt them remains fairly strong. Although sectarian clashes between Shi'a and Sunni Muslims have become a localized menace in recent years, they have not acquired much intensity or a pervasive hold over the entire population.¶ Another commonly accepted distinguishing feature of a failed state is the inability to exercise border control. The porous, uncontrolled border that Pakistan shares with Afghanistan has allowed members and leaders of Al Qaeda to move at will across its difficult terrain and could be seen as an indication of impending state failure in Pakistan. The uncontrolled western frontier, however, is part of Pakistan's geographic inheritance. Since the British Raj cut through kindred tribal communities to draw the artificial Durand Line in 1893, separating Afghanistan from British India, state practice has been to leave the tribal populations to their own devices while ensuring their support for the purpose of maintaining access to the outlying regions of the empire.¶ Although this vision of defensible frontiers served the empire well, it laid the foundation for a problem when Pakistan was created in 1947, after the [End Page 120] British partitioned the subcontinent. In continuing the British policy, Islamabad virtually ceded its responsibilities over territories on its side of the border along the Durand Line, which remained the border between Pakistan and Afghanistan, to local sovereignty. The wars in Afghanistan from 1979 to the present have further complicated the situation. Pakistan's western frontiers became the front line in the final years of the Cold War. Pakistan's support of a variety of insurgent groups trying to oust the Soviet army-backed Afghan regime had the full backing of the West, as well as many Arab states. Large-scale migration from Afghanistan to Pakistan across the war-torn Durand Line made things even worse. Pakistan's policy of creating a friendly regime in Kabul after the withdrawal of the Soviet troops in the late 1980s exacerbated the post-Soviet civil war in Afghanistan. As a result, the regions across the Durand Line became a haven for international terrorism beyond the control of any state.¶ In the last few months, under pressure from the United States, Pakistan has demonstrated the political will to depart from its tradition of noninterference in the tribal affairs of its frontier regions by conducting unpopular military operations inside Waziristan, on the border with Afghanistan, for the first time since 1893. Musharraf has hinted at massive plans to extend the reach of the state and its activities into many previously untouched parts of the federally administered tribal areas along the Afghanistan border. Although these operations cause resentment within the general population and the armed forces, Islamabad does seem to have the ability to absorb the political consequences.¶ Finally, from the Indian perspective, the relationship between failed states and terrorism, often posited in U.S. international relations literature, has little relevance to the Pakistani case. The principal argument in the literature is that a failing state allows its sovereign territory to become a haven for international terrorism. The rise of religious extremism and terrorism on Pakistani soil, however, has had little to do with the weakening of the state in the last few decades. Rather, it was the result of deliberate decisions by the Pakistani army to instrumentalize political Islam and employ terrorism as a conscious tool in foreign and national security policies since the late 1970s.¶ Although Gen. Zia-ul Haq, who led Pakistan after a military coup in 1977 until his death in a plane crash in 1988, was personally religious, he chose to begin the process by promoting religion for his own political legitimacy in a predominantly moderate Pakistani society. Not until after the Soviet invasion of Afghanistan in December 1979 did the Pakistani state, supported by the strategy and tactics adopted by the United States, begin to employ religious extremism and terrorism as tools of its foreign policy. The United [End Page 121] States found it politically ingenious to nurture and mobilize the mujahideen, or holy warriors, from within Pakistan as well as elsewhere in the Islamic world to challenge the occupation of Afghanistan by the "godless" Communists. This crusade strategy turned out to be enormously successful in bleeding the Soviet bear in Afghanistan and ultimately driving it out. Once the Americans turned their back on Afghanistan, however, Pakistan continued with the strategy of using the deadly cocktail of religious extremism and terrorism to pursue its long-standing objectives in Afghanistan as well as in Jammu and Kashmir. In Afghanistan, Pakistan had long sought a friendly if not pliable regime while Kashmir offered the final retribution to India's vivisection of Pakistan in 1971 with the creation of Bangladesh.¶ Therefore, the weakening of the state did not produce Pakistan's sources of terrorism. Rather, supporting these groups was part of a conscious national security strategy. Although these forces have arguably now acquired a life of their own, threatening the future of the Pakistani state, nothing currently suggests that the Pakistani army is badly positioned to confront and defeat these forces. To an extent, Musharraf, under pressure from the United States, has already undertaken this task, at least on the western frontiers with Afghanistan. On the eastern frontiers, Musharraf has often said that a resolution of the Kashmir issue would allow him to rein in the extremist forces. Thus, the persistence of destabilizing forces in Pakistan reflects Islamabad's self-defined fundamental interests for its regional policy, not the inability of a failing state to control sources of extremism and terrorism.

### 2NC – Terror Political

Lowther 2008, Dr. Adam B. Lowther, Adam B. Lowther is a faculty researcher and defense analyst at the Air Force Research Institute, ¶ 2008, “Terrorism and the Weapons of Mass Destruction Threat to the United States”, Air Force Research Institute, Midsouth Political Science Review, 2007-2008, Vol. 9, PDF, http://www.arkpsa.org/MPSR%20articles/5%20Lowther.pdf

It should never be forgotten that terrorists, in this case, Islamic fundamentalists, ¶ are not the crazy fanatics many Americans believe them to be. Instead, they are ¶ rational individuals who carefully plan their acts of terror to achieve political¶ objectives. As Bruce Hoffman notes, “International terrorism disdains any concept ¶ of delimited areas of combat or demarcated battlefields, much less respect for neutral ¶ territory,” (Hoffman, 2006: 28). Where states seek to fight wars that are largely¶ conventional, because it is in military might that they possess a distinct advantage, ¶ the terrorist is fully aware of his limited capacity to wage a conventional conflict. ¶ Thus, terrorism is the tactic of the weak, not the lunatic. The sooner the American¶ public comes to understand the nature of the threat America faces, the sooner victory ¶ may be achieved in the Global War on Terror. It is also useful to point out that the ¶ next terrorist attack on the United States, should there be one, is likely to take the ¶ form of a conventional attack. As the previous pages have demonstrated, WMD are ¶ no magic bullet.

### 2NC – No Loose Nukes

#### No risk of loose nukes – multiple barriers

Mueller 2008, John Mueller ¶ Department of Political Science ¶ Ohio State University ¶ January 1, 2008, “THE ATOMIC TERRORIST: ASSESSING THE LIKELIHOOD”, http://politicalscience.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). ¶ It might be added that Russia has an intense interest in controlling any weapons on its territory ¶ since it is likely to be a prime target of any illicit use by terrorist groups, particularly, of course, Chechen ¶ ones with whom it has been waging an vicious on-and-off war for over a decade (Cameron 2004, 84). ¶ Officials there insist that all weapons have either been destroyed or are secured, and the experts polled by ¶ Linzer (2004) point out that "it would be very difficult for terrorists to figure out on their own how to ¶ work a Russian or Pakistan bomb" even if they did obtain one because even the simplest of these "has ¶ some security features that would have to be defeated before it could be used

" (see also Kamp 1996, 34; ¶ Wirz and Egger 2005, 502; Langewiesche 2007, 19). One of the experts, Charles Ferguson, stresses ¶ You'd have to run it through a specific sequence of events, including changes in temperature, ¶ pressure and environmental conditions before the weapon would allow itself to be armed, for the ¶ fuses to fall into place and then for it to allow itself to be fired. You don't get off the shelf, enter a ¶ code and have it go off. ¶ Moreover, continues Linzer, most bombs that could conceivably be stolen use plutonium which emits a ¶ great deal of radiation that could relatively easily be detected by passive sensors at ports and other points ¶ of transmission. ¶ The government of Pakistan, which has been repeatedly threatened by al-Qaeda, has a similar ¶ very strong interest in controlling its nuclear weapons and material--and scientists. Notes Stephen ¶ Younger, former head of nuclear weapons research and development at Los Alamos and director of the ¶ Defense Department's Defense Threat Reduction Agency from 2001 to 2004, "regardless of what is ¶ reported in the news, all nuclear nations take the security of their weapons very seriously" (2007, 93; see ¶ also Kamp 1996, 22; Milhollin 2002, 47-48). ¶ It is conceivable that stolen bombs, even if no longer viable as weapons, would be useful for the ¶ fissile material that could be harvested from them. However, Christoph Wirz and Emmanuel Egger, two ¶ senior physicists in charge of nuclear issues at Switzerland's Spiez Laboratory, point out that even if a ¶ weapon is not completely destroyed when it is opened, its fissile material yield would not be adequate for ¶ a primitive design, and therefore several weapons would have to be stolen and then opened successfully ¶ (2005, 502). Moreover, those weapons use (or used) plutonium, a substance that is not only problematic to transport, but far more difficult and dangerous to work with than is highly enriched uranium.

### 2NC – A2 – Toon

#### No impact – multiple nuclear tests

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

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

### 2NC – Pakistan On Brink

#### Pakistan is on the brink and will collapse absent US AID assistance

* US made sure the IMF didn’t let Pakistan off with their last loan
* Pakistan has a weak economy
* IMF funds and Aid are crucial
* Absent aid crisis and a run on the rupee is inevitable
* Military intervention is inevitable if the economy collapse

Perera and ¶ Jones 5/4, ¶ Sampath Perera and Keith Jones, WSWS, World Socialist Website, 5/4, 2013, “Pakistan staggers toward elections amid civil war and impending economic collapse”, https://www.wsws.org/en/articles/2013/05/04/paki-m04.html

With the US’s approval, the IMF refused to release the final tranches of Pakistan’s last loan, because the political elite, fearing a popular explosion, balked at implementing IMF demands for price-subsidy and social-spending cuts and for higher taxes, including regressive consumption taxes.¶ Now, with Pakistan’s weak economy being battered by the world recession and chronic power shortages, Islamabad can no longer postpone accessing IMF funds. For weeks, the Pakistani press has been full of warnings of an impending balance of payments crisis and run on the rupee. Pakistan’s foreign reserves have fallen to just US $6.6 billion and, when funds being used to prop up the rupee are subtracted, stand at $4.3 billion, equal to less than a month’s imports.¶ With the backing of big business, the interim government sent a team to the annual meetings of the IMF and World Bank held in Washington late last month that, in flagrant violation of its limited mandate as a caretaker regime, conducted negotiations with the IMF on an emergency loan.¶ According to the Daily Times, the team established the framework for an IMF loan, reaching “a three point understanding.” Shahid Amjad, financial advisor to the caretaker prime minister, told reporters, “It will be the prerogative of the new elected government” to finalize and access this loan.¶ Whatever the composition of Pakistan’s next government, it will impose the IMF measures on Pakistan’s workers and toilers. The PPP repeatedly accepted the IMF’s austerity demands but despite its repeated pleas could not convince its allies and the opposition parties to drop their two-faced opposition. In its election platform the PML (N) has baldly called for sweeping pro-investor reforms. The TTP is no less a party of the ruling elite, enjoying the support of a section of the military and prominent big businessmen like Asad Umar, the former CEO of Engro.¶ With the country so manifestly in crisis, there is much discussion in the press as to whether the military will intervene. In response to the election violence, Pakistani military chief Ashfaq Parvez Kayani has issued pro forma statements of the military’s support for democracy.

### 2NC – Pak Collapse Impacts

#### Collapse ensures nuclear war – arms racing, preemptive strikes, retaliation – prefer a consensuses aid is key to solve nuclear conflict

* Aid is key to sustain Pakistan
* Experts are worrying about a large conflict with India
* Pakistan and India have deep roots that make Pakistan dependent on aid
* Pakistan collapse spills over into Kashmir forces preemptive strikes and retaliation
* 9/11 changed everything
* Pakistan is key to all security in South Asia

Cohen 2011, Stephen P. Cohen, senior fellow in Foreign Policy at Brookings. He came to Brookings in ¶ 1998 after a long career as professor of political science and history at the University of ¶ Illinois, January 2011, “THE FUTURE OF PAKISTAN”, The Brookings Institution, http://www.brookings.edu/~/media/research/files/papers/2010/9/bellagio%20conference%20papers/01\_pakistan\_cohen.pdf

This optimistic narrative has recently been challenged by gloom-and-doom scenarios that portray Pakistan as ¶ an already-failed state, a malign supporter of radical Islamic causes, and the epicenter of global terrorism. ¶ “Failed,” “flawed,” and “unraveling,” are adjectives that are now widely used to describe the country. It is ¶ now typically described as having failed, in the process of failing, or a “monster state” of one sort or ¶ another.85 Many Western states see Pakistan as so close to failure, and so important, that assistance is ¶ essential because of its weakness, not because of its strength. ¶ Several analyses of Pakistan completed before Musharraf’s departure anticipated the current crisis. Perhaps ¶ the toughest was the view of a group of experts on Pakistan convened by the National Intelligence Council in ¶ 2000 as part of its projection of global developments in the ¶ year 2015.86 The passages on Pakistan and India are worth quoting in full, because the predictions were ¶ presumably gathered before 9/11 and at the peak of President Musharraf’s popularity. ¶ Regionally, the collective judgment of experts was that by 2025 South Asian strategic relations would be ¶ defined by the growing gap between India and Pakistan and their seemingly irreducible hostility. The experts ¶ were wary of the possibility of small or large-scale conflict. ¶ India will be the unrivaled regional power with a large military – including naval and nuclear capabilities – and a dynamic and¶ growing economy. The widening India-Pakistan gap – destabilizing in its own right – will be accompanied by deep political, ¶ economic, and social disparities within both states. Pakistan will be more fractious, isolated, and dependent on international ¶ financial assistance. ¶ The threat of major conflict between India and Pakistan will overshadow all other regional issues during the next 15 years. ¶ Continued turmoil in Afghanistan and Pakistan will spill over into Kashmir and other areas of the subcontinent, prompting ¶ Indian leaders to take more aggressive preemptive and retaliatory actions. India’s conventional military advantage over Pakistan ¶ will widen as a result of New Delhi’s superior economic position. India will also continue to build up its ocean-going navy to ¶ dominate the Indian Ocean transit routes used for delivery of Persian Gulf oil to Asia. The decisive shift in conventional military power in India’s favor over the coming years potentially will make the region more volatile and unstable. Both India and ¶ Pakistan will see weapons of mass destruction as a strategic imperative and will continue to amass nuclear warheads and build a¶ variety of missile delivery systems. ¶ This assumes that India will be able to translate its new global status into regional hegemony, at best, or at ¶ worst, that a rising India and a declining Pakistan are likely to clash. As for Pakistan itself, by 2050, the ¶ conferees concluded that: ¶ It will not recover easily from decades of political and economic mismanagement, divisive politics, lawlessness, corruption and¶ ethnic friction. Nascent democratic reforms will produce little change in the face of opposition from an entrenched political elite and ¶ radical Islamic parties. Further domestic decline would benefit Islamic political activists, who may significantly increase their role ¶ in national politics and alter the makeup and cohesion of the military – once Pakistan’s most capable institution. In a climate of ¶ continuing domestic turmoil, the central govern-ment’s control probably will be reduced to the Punjabi heartland and the economic ¶ hub of Karachi. ¶ A few years later, despite these experts’ concerns, the NIC barely mentioned Pakistan, and then only in the ¶ context of one of three global change scenarios.87¶ In 2004, a project by the Center for Strategic and International Studies (CSIS) came to a cautiously optimistic ¶ conclusion about Paki-stan.88 Completed after Musharraf’s third year in power it looked at the prospect for ¶ change and reform in Pakistan, dealing mostly with macro-political and economic factors, stress-ing the ¶ importance of rebuilding Pakistan’s institutions. Pakistan’s external relations and American interests were the ¶ framework for the analysis: ¶ The two and a half years since the attacks on New York and Washington in 2001 have intensified the internal pressures ¶ Pakistan faces. The U.S. decision to start its antiterrorism offensive by seeking Pakistani support was based on the presumption, ¶ widely shared in policy and academic circles in the United States, that Pakistan is central to the prospects for stability in South ¶ Asia. This study bears out that assumption. Every major aspect of Pakistan’s internal stresses that we examined – the economic ¶ prospects, the role of the army and of political parties, the role of Islam and of the militants, and even the tensions between states ¶ and regions – is linked to developments outside Pakistan’s borders. Positive scenarios from the point of view of key U.S. interests ¶ – regional stability, diminution of terrorism, reduced risk of conflict with India, and nuclear control – all involve a stabilized ¶ Pakistan and a strengthened Pakistani state. If one adds U.S. economic interests and hopes to the list, the importance of a ¶ Pakistani revival is even greater.89

#### Largest existential risk

* A nuclear armed state collapse is the largest risk
* The chance of a nuclear war is very small but a risk of conflict post state nuclear armed state collapse is very high
* Terrorists will not get nuclear weapons on their own
* Terrorists only possibility to get nuclear weapons are if a state collapse
* Pakistan is that state where terrorists would get nuclear weapons from and is perpetually close to collapse

O'Hanlon 2006, Michael Edward O'Hanlon is a senior fellow at The Brookings Institution, specializing in defense and foreign policy issues2006, “What If a Nuclear-Armed State Collapses?”, Current History, DOC, http://webcache.googleusercontent.com/search?q=cache:ogSap\_\_3B1gJ:www.oakton.edu/user/2/emann/his140class/CURRENTHISTORYreadings/What%2520If%2520a%2520Nuclear%2520-%2520Armed%2520State%2520Collapses.doc+&cd=1&hl=en&ct=clnk&gl=us

Few dangers in the twenty-first century can compete with the altogether too plausible scenario in which a nuclear-armed state collapses, with the custody of its weapons immediately becoming a national security threat of the highest order to the United States and some of its allies. In fact, there is a strong case that in the post-cold war and post-9-11 world, this danger represents the single greatest existential threat to Western survival.¶ The chances of nuclear war between the United States and Russia are now very small, those between the United States and China nontrivial but also limited. Also very small are the chances that Al Qaeda or a related terrorist organization could develop its own nuclear arms. But a terrorist group that somehow got its hands on one or more nuclear arms could pose an extraordinary risk to the United States and other prominent Western countries with controversial foreign policies, such as the United Kingdom. It may well be that the most plausible route to such an eventuality is the collapse of a nuclear-armed country-most likely Pakistan or North Korea, given their fragile politics-and the subsequent purchase or confiscation of nuclear weapons by a terrorist group in the anarchical environment that ensued.

### 2NC – Heg

#### Others fill in and liberal norms

#### Heg decline inevitable- this is the same card…..

Zhang and Shi 11 (Both MA candidates at Columbia University. \*Yuhan, researcher @ Carnegie Endowment for international peace and \*\*Lin, consultant for the World Bank. “America’s decline: A harbinger of conflict and rivalry.” January 22nd, 2011) <http://www.eastasiaforum.org/2011/01/22/americas-decline-a-harbinger-of-conflict-and-rivalry/>

Paul Kennedy was probably right: the US will go the way of all great powers — down. The individual dramas of the past decade — the September 2001 terrorist attacks, prolonged wars in the Middle East and the financial crisis — have delivered the world a message: US primacy is in decline. This does not necessarily mean that the US is in systemic decline, but it encompasses a trend that appears to be negative and perhaps alarming. Although the US still possesses incomparable military prowess and its economy remains the world’s largest, the once seemingly indomitable chasm that separated America from anyone else is narrowing. Thus, the global distribution of power is shifting, and the inevitable result will be a world that is less peaceful, liberal and prosperous, burdened by a dearth of effective conflict regulation. Over the past two decades, no other state has had the ability to seriously challenge the US military. Under these circumstances, motivated by both opportunity and fear, many actors have bandwagoned with US hegemony and accepted a subordinate role. Canada, most of Western Europe, India, Japan, South Korea, Australia, Singapore and the Philippines have all joined the US, creating a status quo that has tended to mute great power conflicts.

### 2NC – Russia

#### Decisions will be guided by political needs. Russian judiciary is not independent

**Volkov 13** - Vice rector for international affairs @ European University in St. Petersburg and head of its Research Institute for the Rule of Law [Vadim Volkov, “Why Do Russian Judges Act That Way?,” Transtions Online, Interviewed By: Sergey Chernov, 6 February 2013

TOL: Russian Prime Minister Dmitry Medvedev, a lawyer by education, attributed the high conviction rate in Russia to judges feeling awkward about investigations. “Judges are ashamed to acquit a person and thus question the work done by the investigation bodies,” he told German newspaper Neue Zurcher Zeitung. What do you say to this?

Vadim Volkov: Medvedev means that the judges don’t want to go against the investigation and the prosecution, because if they acquit someone it means that system worked in vain. Basically, they held in custody and interrogated an innocent person, and they just do not want to go against it, so they are ashamed.

 Medvedev’s main idea is right: the judges are weak. The judiciary has a weak position vis-à-vis the prosecution and the investigation. He said also that this is the Soviet legacy, which is also correct. Criminal courts in Russia were officially part of the so-called pravookhranitelnaya sistema [the law-enforcement system]. Now, according to the constitution, they are separate and independent. They are not part of the pravookhranitelniye organy [the law-enforcement organs], so to speak. In the Soviet Union, they were. They were part of the same machine—the last instance of checking on the work of preceding instances in the criminal process, meaning the militia, the investigation, the prosecution. This wasn’t an independent system.

 Now in Russia, the judiciary has become an independent institution and its independence is guaranteed by the constitution and a number of other laws, but in fact, in practice, it doesn’t work as independent. It remains the last element of the law-enforcement system, in practice.

 But Medvedev didn’t say anything about how we can change this situation. There’s a very hard dilemma: it’s not in the interests of political authorities to increase the independence of the judiciary, because the judges can make the work of the police, the investigation, and the prosecutor very hard. They may give them a hard time. The political powers don’t want this conflict. On the other hand, this is a matter of the international prestige of Russia, and the investment climate, to have independent judges and independent courts. So Medvedev, as usual, stopped halfway. He said more or less about how things are, but he said nothing about how we can make things better, because a radical decision is needed here.

#### Russian anti-Americanism is high

**Dale 12**—Heritage Foundations Senior Fellow in Public Diplomacy studies [[Helle Dale](http://blog.heritage.org/author/hdale/), “ Russia with Hate: Anti-Americanism Rampant in Putin’s Kremlin,” The Foundry, April 23, 2012 at 4:30 pm, pg. http://tinyurl.com/d4x8y7m

For the Russian government, using the U.S. as variously a whipping boy and a scarecrow is extremely convenient. Indeed, [anti-Americanism](http://www.mendeley.com/research/russian-antiamericanism-priority-target-u-s-public-diplomacy/) is a long-standing and fundamental pillar of Russian foreign policy and public diplomacy. As noted by Heritage’s [Ariel Cohen](http://www.heritage.org/research/reports/2012/03/how-the-us-should-deal-with-putins-russia), “Anti-Americanism in Russia is rampant. Putin has relentlessly created an image of Russia under attack from Western enemies. It worked for the elections and is likely to continue as a pillar of Russia’s domestic and foreign policy.”

Anti-American rhetoric is also a standard feature of the broadcasts of Russia Today, the Kremlin’s international news channel, which can be found on many American cable systems. However, while Russian commentators can spew allegations with impunity, the U.S. government’s Radio Liberty and Voice of America (VOA) are banned or severely curtailed in most Russian media markets. In fact, prior to the Russian presidential election, VOA broadcasters were warned against covering Russian election issues under threat of being kicked off the market altogether. The fact that the U.S. media market is free leaves it open to abuses. Nevertheless, a tougher approach to reciprocity in media access is clearly needed.\

#### It will infect the court

**Schor 08** - Professor of Law @ Suffolk University Law School. [Miguel Schor, “Judicial Review and American Constitutional Exceptionalism,” Osgoode Hall Law Journal, Vol. 46, 2008

This article questions the conventional wisdom that the logic of Marbury has conquered the world’s democracies by exploring two questions: why do social movements contest constitutional meaning by fighting over judicial appointments in the United States, and why does such a strategy make little sense in democracies that constitutionalized rights in the late twentieth century?6 The short answer is that the United States has been both a model and an anti-model 7 in the worldwide spread of judicial review. The United States stood astride the world after the Second World War and elements of American constitutionalism such as judicial review proved irresistible to democracies around the globe.8 Polities that adopted judicial review in the late twentieth century, however, rejected the key assumption on which judicial review in the United States is founded.. American constitutionalism assumes that law is separate from politics and that courts have the power and the duty to maintain that distinction.

This assumption was rejected because other democracies learned from the American experience that courts that exercise judicial review are powerful political as well as legal actors. The fear of providing constitutional courts with too much power played an important role in shaping judicial review outside the United States. 9 When judicial review began to spread around the globe in the second half of the twentieth century, the hope of Marbury (the promise of constitutionalized rights) became fused with the fear of Lochner 10 (the possibility that courts might run amok). In seeking to thread a needle between Marbury and Lochner , the American assumption that a constitution is a species of law was rejected in favour of a very different baseline assumption that constitutions are neither law nor politics, but an entirely new genus of “political law.” 11Consequently, democracies abroad adopted stronger mechanisms by which citizens can hold constitutional courts accountable 12and which make it less likely that social forces will use appointments as a vehicle for constitutional battles. Pg. 37-38

# 1NR

## AT: Disease

**No disease can cause human extinction – they either kill their hosts too quickly or aren’t lethal**

**Posner 05** (Richard A, judge on the U.S. Court of Appeals, Seventh Circuit, and senior lecturer at the University of Chicago Law School, Winter. “Catastrophe: the dozen most significant catastrophic risks and what we can do about them.” http://findarticles.com/p/articles/mi\_kmske/is\_3\_11/ai\_n29167514/pg\_2?tag=content;col1)

Yet the fact that Homo sapiens has managed to survive every disease to assail it in the 200,000 years or so of its existence is a source of genuine comfort, at least if the focus is on extinction events. There have been enormously destructive plagues, such as the Black Death, smallpox, and now AIDS, but none has come close to destroying the entire human race. There is a biological reason. Natural selection favors germs of limited lethality; they are fitter in an evolutionary sense because their genes are more likely to be spread if the germs do not kill their hosts too quickly. The AIDS virus is an example of a lethal virus, wholly natural, that by lying dormant yet infectious in its host for years maximizes its spread. Yet there is no danger that AIDS will destroy the entire human race. The likelihood of a natural pandemic that would cause the extiinction of the human race is probably even less today than in the past (except in prehistoric times, when people lived in small, scattered bands, which would have limited the spread of disease), despite wider human contacts that make it more difficult to localize an infectious disease. The reason is improvements in medical science. But the comfort is a small one. Pandemics can still impose enormous losses and resist prevention and cure: the lesson of the AIDS pandemic. And there is always a lust time.

## AT: Afghanistan

#### Internal link from 07

**No impact to Afghanistan**

**Haass 10/11/09** – President, Council on Foreign Relations, former Director of the State Department's Policy Planning Staff

(Richard N. “In the Afghan War, Aim for the Middle.” Washington Post Op-Ed. http://www.cfr.org/publication/20383/in\_the\_afghan\_war\_aim\_for\_the\_middle.html)

Why does Afghanistan matter? We generally hear four arguments. First, if the Taliban returns to power, Afghanistan will again be a haven for terrorist groups. Second, if the Taliban takes over, Afghanistan will again become a human rights nightmare. Third, a perceived defeat of the United States in Afghanistan would be a blow to U.S. prestige everywhere and would embolden radicals. Fourth, an Afghanistan under Taliban control would be used by extremists as a sanctuary from which to destabilize Pakistan. None of these assumptions is as strong as proponents maintain. Afghanistan certainly matters -- the question is how much. Al-Qaeda does not require Afghan real estate to constitute a regional or global threat. Terrorists gravitate to areas of least resistance; if they cannot use Afghanistan, they will use countries such as Yemen or Somalia, as in fact they already are. No doubt, the human rights situation would grow worse under Taliban rule, but helping Afghan girls get an education, no matter how laudable, is not a goal that justifies an enormous U.S. military commitment. And yes, the taking of Kabul by the Taliban would become part of the radicals' narrative, but the United States fared well in Asia after the fall of South Vietnam, and less than a decade after an ignominious withdrawal from Beirut, the United States amassed the international coalition that ousted Saddam Hussein from Kuwait. There are and always will be opportunities to demonstrate the effectiveness of U.S. power.

**Others will fill in to solve stability.**

**Prashad ‘9** (Vijay, George and Martha Kellner Chair of South Asian History – Trinity College, GazetteNET, “Don't escalate Afghanistan war, reach out to country's neighbors”, 12-5, http://www.gazettenet.com/2009/12/05/dont-escalate-afghanistan-war?SESSf793588a8482ac7b45e5aa116b4d4c76=gnews)

Instead, the U.S. backed one group of nasty warlords (the Northern Alliance) against the Taliban, throwing to the wind the progressive forces within Afghan society. The SCO was also disregarded. This was a costly mistake. The SCO continues to have influence in the region. This summer, elements in the Taliban insurgency sent a letter to the SCO, asking it to intervene against the occupation. Of course the SCO is sitting on its hands, but it is able. The regional solution will be difficult, given that it would have to scrub off the effects of 30 years of warfare. Right after the Taliban fled in 2001, the U.S. convened a "donor's conference" in Bonn, where Europe, Japan and the U.S. gathered to promise money for the reconstruction of the country. No one invited the SCO players. This has not changed. Europe, Japan and the U.S., the countries with the least legitimacy in Afghanistan are the ones calling the shots. Rather than conference calls with Brussels (the NATO headquarters), Paris, London and Kabul (with the shaky government of Karzai), the Obama administration should have called a political conference of the SCO, to see what it would have taken to hand over the Afghan imbroglio to them. The SCO met in Bishkek (capital of Kyrgyzstan) on Nov. 24 to discuss the problem of the region, and made all kinds of suggestions. None of these are operational till the U.S.-NATO forces withdraw from Kabul. China is the only power in the region with the wealth and expertise to genuinely rebuild Afghanistan (people might criticize its development policy in Africa, but mark this: Chinese investment enters countries in Africa without IMF-type conditionalities and Chinese engineers and managers live in modest conditions, not creating the kind of high-overhead NGO lifestyles of the European and U.S. humanitarian workers). The U.S. media has portrayed the escalation of the occupation in a very simplistic fashion: Either the U.S. solves the problem, or the Taliban returns. This is a false choice, one that assumes that only the U.S. can act, the White Knight riding in to save the world. Others are ready. But they don't want to act unless they have a commitment that the U.S. is not going to use their blood and treasure to build its empire.

## Defense

### 2NC Circumvention

#### 2AC has NO answer to our circumvention arguments – you should hold the 1AR to a very SPECIFIC threshold for analasys – I spent a LONG time reading SPECIFIC link args – they just blew them off – reject that type of poor debating

#### 1. Obama will defy the court’s attempt to overrule his indefinite detention policy—He perceives it as essential tools to fight against terrorism and is on record that he will disregard the Court’s attempt to reign in his policy.

#### 2. Restriction on the authority makes the policy uniquely vulnerable to circumvention—No president is will to leave the office weaker than she found it.

#### Turns the Heg advantage- - it’s about US cred based around perceptions of hu ri cred

#### DOESN’T cause terror cuz its based off ID happening which means this just acts as a SOLVENCY SHIELD

#### Obvi turns the deference argument

#### 3. The court is a paper tiger. Preponderance of the lit is on our side

Wheeler 9—Professor of political science @ Ball State University [Darren A. Wheeler, “Checking Presidential Detention Power in the War on Terror: What Should We Expect from the Judiciary?” Presidential Studies Quarterly, December 2009, pg. 677–700]

However, a closer examination of the process that followed the Supreme Court's detainee decisions reveals that the Bush administration was actually quite adept at retaining significant power over detainee matters (Ball 2007; Fisher 2008; Schwarz and Huq 2007; Wheeler 2008). Consequently, it is possible to make the argument that, despite media and Bush administration rhetoric to the contrary, the Supreme Court actually serves as a poor check on presidential detention power in the war on terror. A significant body of academic literature, amassed over a considerable period of time, lends support to this alternative argument, as these authors conclude that the courts are generally a poor check on executive war powers (Fisher 2005; Henkin 1996; Howell 2003; Koh 1990; Rossiter and Longaker 1976; Scigliano 1971). Which view on judicial power in the war on terror is accurate? Is the Supreme Court severely limiting the president's detention powers, or are the courts merely a paper tiger—at worst, an inconvenience to presidential administrations determined to retain control over detainees in the war on terror? This article examines the question, does the Supreme Court serve as a significant check on presidential detention power in the war on terror? It concludes that there are important institutional and political factors that mitigate the Court's ability to be a significant check on presidential detention power in this context.

#### 4. No tag can do this card justice—I’ll read it slowly instead because it wins us the debate

Scheppele 12—Professor of Sociology and Public Affairs @ Princeton University [Kim Lane Scheppele (Dir. of the Program in Law and Public Affairs @ Princeton University), “The New Judicial Deference,” Boston University Law Review, 92 B.U.L. Rev. 89, January 2012]

In this Article, I will show that American courts have often approached the extreme policies of the anti-terrorism campaign by splitting the difference between the two sides—the government and suspected terrorists. One side typically got the ringing rhetoric (the suspected terrorists), and the other side got the facts on the ground (the government). In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge. The government continued to treat suspected terrorists almost as badly as it did before the suspected terrorists "won" their cases. And any change in terrorism suspects' conditions that did result from these victorious decisions was slow and often not directly attributable to the judicial victories they won.

Does this gap between suspected terrorists' legal gains and their unchanged fates exist because administration officials were flouting the decisions of the courts? The Bush Administration often responded with sound and fury and attempted to override the Supreme Court's decisions or to comply minimally with them when they had to. n6 But, as this Article will show, these decisions did not actually require the government to change its practices very quickly. The decisions usually required the government to change only its general practices in the medium term. Judges had a different framework for analyzing the petitioners' situation than the petitioners themselves did; judges generally couched their decisions in favor of the suspected terrorists as critiques of systems instead of as solutions for individuals. In doing so, however, courts allowed a disjuncture between rights and remedies for those who stood before them seeking a vindication of their claims. Suspected terrorists may have won  [\*92]  in these cases—and they prevailed overwhelmingly in their claims, especially at the Supreme Court—but courts looked metaphorically over the suspects' heads to address the policies that got these suspects into the situation where the Court found them. Whether those who brought the cases actually got to benefit from the judgments, either immediately or eventually, was another question.

Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference. n7 Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, inter arma silent leges: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still "hot," courts jumped right in, dealing governments one loss after another. n8 After 9/11, it appears that deference is dead.

 [\*93]  But, I will argue, deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice. n9 Suspected terrorists have received  [\*94]  from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives.

Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference.

This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted—often bold, ambitious, and brave solutions—nonetheless fail to address the plights of the specific individuals who brought the cases.

This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something—an appearance not entirely false in the long run—while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

### Ext Wedel—Comstock

#### Ext Wedel—Comstock statute will be used to keep them indefinitely detained

#### 1. Comstock statute for sex offenders sets the precedent—the Court’s decision paves the way for Congress to use its Necessary and Proper Clause powers to permanently detain dangerous terrorists after the termination of their sentences.

#### 2. The President will just have to classify them as dangerous

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

The obvious and ominous portent of the Comstock decision is that the government may obtain a conviction for a suspected terrorist on a relatively minor charge carrying a light sentence and then, after the conclusion of the sentence, declare the prisoner to be "dangerous" and thus subject to indefinite detention. Indeed, Obama Administration officials have admitted that part of the government's unwillingness to release Guantanamo inmates to criminal authorities is driven by the perceived difficulty the government will have in obtaining an adequately long sentence for "known" terrorists if sufficient evidence is lacking.0 1 If a conviction for a lesser crime could be obtained, Comstock's logic would offer an attractive avenue for closing Guantanamo while detaining its former inmates indefinitely. Pg. 25

#### 3. They will not Comstock’s dangerousness test

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

It is not hard to imagine a slightly altered version of the statute at issue in Comstock applying in a terrorism context. Congress could tweak the Comstock statute to allow indefinite detention based on a finding that a prisoner (1) previously "engaged or attempted to engage in [terrorism-related] violent conduct," (2) remains committed to his terrorist cause, and (3) as a result of his terrorism connections, remains "dangerous to others" such that "he would have serious difficulty in refraining from [terrorist or] violent conduct if released." In essence, Comstock permits the Executive to entertain the notion: "once a danger to children, always a danger to children." This, in itself, is troubling. The more troubling analogue, though, is "once a terrorist, always a terrorist," which seems a likely conclusion given predictions that Al Qaeda will never cease to exist. 02 If Al Qaeda or its analogues are still operational upon a prisoner's scheduled release, it is difficult to see how a terrorist could ever overcome the Government's assertions of "dangerousness." Regardless of whether this is a wise step, it is a significant departure from our standard approach to prison sentences. Pg. 25-26

#### 4. American citizens to be indefinitely detained. Comstock is net offense.

Wedel 11—JD Candidate @ Stanford Law School [Collin P. Wedel (Prospective Law Clerk to the Honorable Ruggero J. Aldisert, United States Court of Appeals for the Third Circuit), “War Courts: Terror's Distorting Effects on Federal Courts,” Legislation and Policy Brief, Volume 3 1 Issue 1, 1-6-2011]

The combination of Comstock and the CMU regulations resembles a legally sanctioned Guantanamo-type detention regime set up lawfully within the United States. Suspected terrorists can be held in highly monitored and austere containment, indefinitely. This not only mirrors the military tribunal detention system, but in many ways, exacerbates its perceived infirmities. For, although the Obama Administration has acknowledged that it will indefinitely detain some terrorists even after they complete their tribunal-imposed sentences, 119 the range of those persons implicated by military tribunals is much smaller than the reach of Comstock and the CMU regulations. 12 The Government has conceded that the Authorization for Use of Military Force permits Executive (AUMF) detention only of non-citizen enemy combatants and unprivileged belligerents. 12 ' Thus, the biggest single exception to the Executive's broad military detention authority had been American citizens, precluded from military commission jurisdiction.2 2 Diplomatic concerns had further barred full tribunal trials for British, Australian, and Canadian citizens.12 Since a growing number of recent terror suspects have been American or British, 24 it appeared that indefinite and segregated Executive detention would have limited future application. But neither Comstock nor the CMU regulation is so limited: both would apply fully to American and foreign citizens alike. And because a criminal's offense conduct, which cannot be changed, serves as the underlying justification for Comstock and CMU detention, both have the capacity to last indefinitely.125 pg. 28

### 2NC Seepage Overview

#### Extend the Seepage DA—federal court trials will just become Kangaroo Courts which will facilitate indefinite detention.

#### One—wartime conditions will pressure the courts to have high conviction rates. This pressure will force the Courts to lower certain standard for evidence, eviscerating any distinction between the military and criminal spheres. Societal fear of the threat of terrorism will just turn the affirmative’s court solution into a mirror image of the tribunal system they criticize—that’s Wedel.

#### Two—this weakening of standards will seep into the criminal sphere, harming due process in every day cases. The pressure to convict terrorists would create bad law which will seep into the rest of the federal court system—that’s Wedel and Mukasey

#### Three—that turns the case. Any signaling/legitimacy/or credibility advantage depends on them effectively creating a Court regime that preserves due process rights and procedural justice. If we win the aff just renames the same system, you have to ask yourself the question how can they access their advantages. Don’t trust their spin when we have made very strong link arguments which implicate the effectiveness of their solution.

## Offense

### Overview

#### Their restriction triggers a fight between the President and the Court that eviscerates judicial legitimacy needed to establish a legal framework for sustainable development. That’s Devins, Fisher, and Stein

#### The impact massively outweighs the case. Failure risks the destruction of all complex life on Earth. We will cross the planetary boundaries that sustain our food production, nutrient cycling, and climate regulation. That’s Barry

#### Backlash means no precedent will be set

Baum & Devins 10—Professor of Political Science @ Ohio State University & Professor of Law and Professor of Government @ College of William and Mary [LAWRENCE BAUM & NEAL DEVINS, “ARTICLE: Why the Supreme Court Cares About Elites, Not the American People,” Georgetown Law Journal, 98 Geo. L.J. 1515, August 2010]

C. ELECTED GOVERNMENT BACKLASH

The Supreme Court sometimes takes into account the risk of elected government backlash, by which we mean any negative action directed at the Court or its decisions. n48 In particular, lacking the powers of purse and sword, the Court cannot assume that other parts of government will implement its decisions. For this reason, the Court sometimes takes implementation concerns into account when deciding a case. The Court, moreover, sometimes beats a retreat from an earlier decision in response to elected government opprobrium.

Justices are well aware of the potential backlash risks of a sweeping constitutional ruling. For example, the Justices thought that President Richard Nixon might disobey a divided Court ruling in the Watergate tapes case--so, in order to speak unanimously, they compromised with each other and issued a narrow, indeterminate ruling. n49 Likewise, Chief Justice Earl Warren, recognizing potential  [\*1526]  Southern resistance to Brown v. Board of Education, felt strongly that the Court should issue a unanimous holding--even if it meant that the decision would be watered down in order to accommodate the competing preferences of different Justices. n50 The Justices can also take potential backlash risks into account either by issuing narrow, minimalist constitutional rulings or by ruling on statutory, rather than constitutional, grounds. For example, by ducking a constitutional challenge to the 2006 Voting Rights Act reauthorization, n51 the Roberts Court--as Barry Friedman put it--may well have recognized that "[o]ver-ruling a key provision of the recently-renewed congressional law might have brought the Court in for some serious and uncomfortable criticism." n52

The most vivid examples of the Justices taking backlash into account are decisions in which the Court distances itself from earlier, unpopular decisions. n53 In some cases, the Court's composition has changed--so it may be that appointments and confirmation politics explains the change of position. n54 In other  [\*1527]  cases, the Court is clearly responding to elected government attacks on its earlier rulings. n55 Following a spate of 1956-1957 Term rulings rejecting (on statutory grounds) governmental efforts to clamp down on subversives, the Court reversed course in the wake of legislative efforts to strip the Supreme Court of jurisdiction in five domestic security areas. n56 Moreover, after turning the Court into an election issue in 1972 by abolishing the death penalty as it was then administered, n57 the Burger Court subsequently approved reinstatement of the death penalty. n58

#### \*Prez backlash jacks their modeling advantage. Presidential actions determine the image of the nation

**Marshall 08** – Professor of Law @ University of North Carolina [ [William P.](http://www.heinonline.org.proxy.library.emory.edu/HOL/LuceneSearch?specialcollection=&terms=creator%3A%22Marshall,%20William%20P.%20%22&yearlo=&yearhi=&subject=ANY&journal=ALL&sortby=relevance&collection=journals&searchtype=advanced&submit=Search&base=js&all=true&solr=true" \t "_blank" \o "Search for results by Marshall, William P. ) Marshall, “Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters,” Boston University Law Review, Vol. 88, Issue 2 (April 2008), pp. 505-522

As Justice Jackson recognized in Youngstown, the power of the Presidency has also been magnified by the nature of media coverage. This coverage, which focuses on the President as the center of national power,66 has only increased since Jackson's day as the dominance of television has increasingly identified the image of the nation with the image of the particular President holding office. 67 The effects of this image are substantial. Because the President is seen as speaking for the nation, the Presidency is imbued with a unique credibility. The President thereby holds an immediate and substantial advantage in any political confrontation. 68 Additionally, unlike the Congress or the Court, the President is uniquely able to demand the attention of the media and, in that way, can influence the Nation's political agenda to an extent that no other individual, or institution, can even approximate. Pg. 516

#### Lower courts will not follow. They will deviate if the ruling threatens their legitimacy

Westerland et al. 10—Professor of Political Science @ University of Arizona [Chad Westerland, Jeffrey A. Segal (Chair of Political Science and SUNY Distinguished Professor @ StonyBrook University), Lee Epstein (Professor of Law and Political Science @ Northwestern University), Charles M. Cameron (Professor of Politics and Public Affairs @ Princeton University) Scott Comparato (Professor of Political Science @ Southern Illinois University), “Strategic Defiance and Compliance in the U.S. Courts of Appeals,” American Journal of Political Science, Vol. 54, No. 4, October 2010, Pg. 891–905

Scholars and journalists alike spilt much ink over Hopwood, as well as decisions by other courts overturning well-established Supreme Court precedents—cases such as the Fourth Circuit’s United States v. Dickerson (1999), holding that states under its supervision need not follow Miranda v. Arizona (1966); and the Missouri Supreme Court’s overruling of Stanford v. Kentucky (1989) in Simmons v. Roper (2003). And, yet, these decisions are merely the most striking instances of a more general phenomenon, lower court deviation from earlier precedents set by a higher court—a phenomenon that can take far subtler forms (e.g., distinguishing or limiting precedents). Indeed, as one observer noted well over half a century ago, “[Many] precedents have been rejected through the stratagem of distinguishment; others have been the subject of conscious judicial oversight. As a consequence, judicial discretion among ‘inferior’ judges is not so confined and limited as legal theorists would have it” (Comment 1941, 1448–49; see also Canon and Johnson 1998; Murphy 1959).

This observation raises a question that, depending on one’s perspective, may be posed two different ways: Why do lower courts defy higher court precedent, or, given the minute percentage of lower court cases that are heard and reversed (currently well under 1%), why do lower courts comply with higher court precedent?

Scholarly attempts to address these questions take several forms.1 One line of inquiry seeks to identify the circumstances that lead to deviations, subtle or overt. Baum (1978), for example, suggests that lower courts will be less responsive to the U.S. Supreme Court in controversial civil liberties cases, and that the clarity of the precedent, the perceived legitimacy of the Court’s ruling, and perception by lower court judges of the chances of review also affect the likelihood of compliance (see also Canon and Johnson 1998). Another has focused on socialization and conformity to legal culture as the critical causal mechanism. Robert Cover’s (1975) noted study of the enforcement of the Fugitive Slave Act by abolitionist judges, for example, emphasizes the moral quandary posed by the judges’ twin commitments to abolition and the rule of law (see also Howard 1981). Pg. 892

#### Turns Heg

#### Judicial intervention destabilizes US military policy. It undermines US deterrence

Barnes 12—JD Candidate @ Boston University School of Law (13) & MA Candidate in Law and Diplomacy @ The Fletcher School of Law and Diplomacy at Tufts University (13) [Barnes, Beau D., “Reauthorizing the War on Terror: The Legal and Policy Implications of the AUMF's Coming Obsolescence,” Military Law Review, Vol. 211, 211 Mil. L. Rev. 57 (2012) pp. 57-114]

Second, basing U.S. counterterrorism efforts on the President's constitutional authority as Commander in Chief is legally unstable, and therefore unsound national security policy, because a combination of legal difficulties and political considerations make it unlikely that such a rationale could be sustained. This type of strategy would likely run afoul of the courts and risk destabilizing judicial intervention,"26 because the Supreme Court has shown a willingness to step in and assert a more proactive role to strike down excessive claims of presidential authority. Politically, using an overly robust theory of the Commander in Chief's powers to justify counterterrorism efforts would, ultimately, be difficult to sustain. President Obama, who ran for office in large part on the promise of repudiating the excesses of the Bush Administration, and indeed any president, would likely face political pressure to reject the claims of executive authority made "politically toxic" by the writings of John Yoo.128 Because of the likely judicial resistance and political difficulties, claiming increased executive authority to prosecute the armed conflict against Al Qaeda would prove a specious and ultimately futile legal strategy. Simply put, forcing the Supreme Court to intervene and overrule the Executive's national security policy is anathema to good public policy. In such a world, U.S. national security policy would lack stability-confounding cooperation with allies and hindering negotiations with adversaries. Pg. 88-89

#### Small risk of the DA should be interpreted as having a massive impact. Our ecological overshoot impact makes CBA inappropriate

Guth 7—Legal Director of the Science & Environmental Health Network [Dr. Joseph H. Guth (PhD in Biochemistry from University Of Wisconsin and JD from NYU), “LAW FOR THE ECOLOGICAL AGE,” Vermont Journal of Environmental Law 9 Vt. J. Envtl. L. 431, Winter, 2007-2008]

The central presumption of the common law that environmental damage can be economically justified can be true only so long as the world is "empty." It becomes false when the world is "full," when cumulative environmental damage exceeds the capacity of the Earth to assimilate it. Thus, the belief of Justices Livingston and Holmes that economic activity tends to benefit the public will not always be true. Once we overshoot the Earth's assimilative capacity, and begin to devastate the ecological systems on which we depend, the law can no longer justify a starting presumption that economic activity furthers the public welfare even where it causes ecological damage.

Moreover, under these conditions, cost-benefit analysis can no longer be justified as a tool for evaluating the reasonableness of individual increments of environmental damage. Each incremental impact, if taken alone, might have caused little or even no harm at all in an empty world. But under conditions of ecological overshoot each increment of damage contributes to an immeasurable, indeed infinite, loss. This infinite loss cannot be meaningfully allocated among the various increments of damage. Once we are degrading the environment at an unsustainable rate, attempting to justify increments of damage using cost-benefit principles is profoundly misguided and represents a denial of the biological realities of life on the Earth. Under conditions of ecological overshoot, the core structure of the modern common law cannot be justified as one that furthers the public welfare. At that point, it is no longer legitimate as an American rule of law.

### AT: Thumpers

#### Their ev says Court ACTIVISM MAY BE HAPPENING NOW

This is not our link arg – our ev is about judicial FIGHTS that happen between the courts and the president – the president WINS those fights which flips their VERY VERY GENERIC ev. Their 1AC proves our UQ arg which is about COURT DEFERENCE

#### Substantial deference now

Entin 12—Professor of Law and Political Science @ Case Western Reserve University [Jonathan L. Entin (Associate Dean for Academic Affairs (School of Law), “Presidential Powers and Foreign Affairs: Presidential Power to Implement International Law After Medellin: War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations,” Case Western Reserve Journal of International Law, Fall 2012, 45 Case W. Res. J. Int'l L. 443]

I. Deference to the Executive on the Merits

Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive's position, it generally has done so on relatively narrow grounds.

Consider the Espionage Act cases that arose during World War I. Schenck v. United States, n63 which is best known for Justice Holmes's  [\*452]  announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant's having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." n64 The circumstances in which the speech took place affected the scope of First Amendment protection: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." n65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort n66 and of Eugene Debs for a speech denouncing the war. n67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States, n68 but only Justice Brandeis agreed with his position. n69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes's opinions for the Court in the earlier cases. n70

Similarly, the Supreme Court rejected challenges to the government's war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs. n71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts. n72 In addition, the Court upheld the validity of the Japanese internment program. n73 Of course, the Court did limit the scope of the  [\*453]  program by holding that it did not apply to "concededly loyal" citizens. n74 But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated. n75 Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees. n76

The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region. n77 The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, n78 but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone. n79 The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges. n80

The picture in the post-2001 era is less clear. In three different cases the Supreme Court has rejected the executive branch's position, but all of those rulings were narrow in scope. For example, Hamdi v. Rumsfeld n81 held that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to have a neutral decision-maker determine the factual basis for his detention. There was no majority opinion, however, so the implications of the ruling were ambiguous to say the least. Justice O'Connor's plurality opinion for four members of the Court concluded that Congress had authorized the president to detain enemy combatants by passing the Authorization for Use of Military Force n82 and that the AUMF satisfied the statutory requirement of congressional authorization for the detention of U.S.  [\*454]  citizens. n83 Justice Souter, joined by Justice Ginsburg, thought that the AUMF had not in fact authorized the detention of American citizens as required by the statute, n84 which suggested that Hamdi should be released. But the Court would have been deadlocked as to the remedy had he adhered to his view of how to proceed. This was because Justices Scalia and Stevens also believed that Hamdi's detention was unlawful and that he should be released on habeas corpus, n85 whereas Justice Thomas thought that the executive branch had acted within its authority and therefore would have denied relief. n86 This alignment left four justices in favor of a remand for more formal proceedings, four other justices in favor of releasing Hamdi, and one justice supporting the government's detention of Hamdi with no need for a more elaborate hearing. To avoid a deadlock, therefore, Justice Souter reluctantly joined the plurality's remand order. n87

Hamdi was atypical because that case involved a U.S. citizen who was detained. The vast majority of detainees have been foreign nationals. In Hamdan v. Rumsfeld, n88 the Supreme Court ruled that the military commissions that the executive branch had established in the wake of the September 11 attacks had not been authorized by Congress and therefore could not be used to try detainees. n89 A concurring opinion made clear that the president could seek authorization from Congress to use the type of military commissions that had been established unilaterally in this case. n90

Congress responded to that suggestion by enacting the Military Commissions Act of 2006, n91 which sought to endorse the executive's detainee policies and to restrict judicial review of detainee cases. In Boumediene v. Bush, n92 the Supreme Court again rejected the government's position. First, the statute did not suspend the writ of  [\*455]  habeas corpus. n93 Second, the statutory procedures for hearing cases involving detainees were constitutionally inadequate. n94 At the same time, the Court emphasized that the judiciary should afford some deference to the executive branch in dealing with the dangers of terrorism n95 and should respect the congressional decision to consolidate judicial review of detainee cases in the District of Columbia Circuit. n96

Detainees who have litigated in the lower federal courts in the District of Columbia have not found a sympathetic forum. The U.S. Court of Appeals for the D.C. Circuit has not upheld a single district court ruling that granted any sort of relief to detainees, and the Supreme Court has denied certiorari in every post-Boumediene detainee case in which review was sought. n97 In only one case involving a detainee has the D.C. Circuit granted relief, and that case came up from a military commission following procedural changes adopted in the wake of Boumediene. n98 About a month after this symposium took place, in Hamdan v. United States n99 the court overturned a conviction for providing material support for terrorism. The defendant was the same person who successfully challenged the original military commissions in Hamdan v. Rumsfeld. n100 This very recent ruling emphasized that the statute under which he was prosecuted did not apply to offenses committed before its enactment. n101 It remains to be seen how broadly the decision will apply.  [\*456]

Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In Arar v. Ashcroft, n102 the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. n103 And in Mohamed v. Jeppesen Dataplan, Inc., n104 the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. n105 Unlike Arar, in which the defendants were federal officials, n106 this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. n107 Although at least four judges on the en banc courts dissented from both rulings, n108 the Supreme Court declined to review either case. n109

III. The Benefits of Political Resolution of Interbranch Disputes

Whatever the merits of the decisions discussed in the previous section, those rulings should give pause to those who might rely on  [\*457]  the judiciary as a check on what they regard as executive overreaching. When combined with the procedural and jurisdictional obstacles discussed in Part I, a more general lesson emerges: the judiciary cannot resolve all the questions that might arise in connection with war powers and foreign affairs. Nonetheless, the substantive and procedural limitations of judicial review provide an opportunity for greater civic and political engagement in decisions that can have profound consequences for our nation and the world.

If the courts cannot resolve these matters, questions of war and diplomacy, it should come as no surprise that they are getting worked out largely through political accommodation and negotiation. These accommodations and negotiations necessarily reflect the differing constitutional views of the legislative and executive branches as well as of the persons and groups that engage on these issues. Although many lament the quality of current political discourse, excessive reliance on the judicial process has undesirable consequences. The Supreme Court has had difficulty rendering consistent or principled decisions about legislative-executive relationships. n110 Sometimes the Court has taken a formalistic approach that emphasizes the need to maintain clear lines between the branches. n111 At other times, the Court has used a functional approach that emphasizes the importance of checks and balances to prevent the accumulation of excessive power in any particular branch. n112 In other words, judicial review does not always provide clear answers to complex questions.

### AT: individual Decision

#### 1) our arg is about a FIGHT with the president – it’s not about overturning a decision but SPECIFIC fights between the courts and president

#### 2) Court supported trust doctrine will be modeled. It is a powerful tool for environmental preservation

Wood & O’Toole 9—Professor of Law at University of Oregon & Executive Committee and Issue Editor for the Environmental and Natural Resources Section at Oregon State Bar [Mary Wood & Susan O’Toole (Faculty Director, Environmental and Natural Resources Law Program), “How to Sue for Climate Change: The Public Trust Doctrine,” Outlook, Vol. 10, No. 2, Winter 2009]

Trust litigation, by contrast, draws upon fundamental principles that are increasingly invoked by today’s visionaries. In economic terms, the trust doctrine dovetails with principles of natural capitalism. On the moral level, trust principles reflect an ethic toward children and underscore the strong urge of human beings to pass estates along to future generations. On a political level, by defining the atmosphere as common property, the trust positions all nations of the world in a logical relationship to each other and towards Nature. The trust framework defines respective sovereign obligations in quantifiable, straightforward terms, and once presented in U.S. courts could be invoked by citizens of other countries.

By defining the trust obligation in a litigation venue, courts may play a tremendous role in harnessing the collective momentum from various other realms in which a paradigm shift is necessary and already taking place. This issue explores various aspects of the public trust doctrine, climate change, and future generations, and also offers insights into one lawyer’s choice to work for sustainability and the environment. As lawyers we have a tremendous ability to bring about change, and the public trust doctrine offers a powerful tool for addressing the complex issue of climate change facing all of humanity.

#### Obama’s reconstructive politics will force him to resist the judiciary. They are competing over the same constitutional space

Steilen 13—Professor of law @ SUNY Buffalo Law School [ MATTHEW STEILEN, “Collaborative Departmentalism,” Buffalo Law Review, Volume 61, 2013]

Keith Whittington extends Skowronek’s analysis to the constitutional dimension of leadership. According to Whittington, constitutional claims are an essential aspect of political leadership, and thus, a variety of political actors assert such claims. History evidences major shifts in whose constitutional claims are regarded as authoritative; as Whittington describes, presidents, legislative leaders, the Supreme Court, state governors, citizens, and associations have all claimed, and exercised, independent interpretative authority.102 Success for one of these actors comes at the expense of the others. Leaders strengthen their position by resting their agenda on constitutional foundations, and by undermining the interpretative claims of their competitors. The result, at least at times, is an open struggle for interpretative supremacy. As Whittington describes it, “various political actors have struggled for the authority to interpret the Constitution. They have sought to displace other potential constitutional interpreters, and to assert their own primary authority to determine the content of contested constitutional principles.”103

Reconstructive presidents, in particular, regard interpretative authority as essential to their task.104 Consider again the features of reconstructive politics, in which the president comes to power while the extant regime is faltering, perhaps because it has failed to meet the challenges of the day. The reconstructive president stakes his “warrant” for exercising power on a fundamental opposition to that regime.105 That opposition, argues Whittington, must be expressed in constitutional terms. Reconstructive efforts rest on the ability of the president to articulate a compelling “constitutional vision”: a “positive vision of how political power should be used” that is both rooted in the Constitution and supports the president’s specific public policy objectives.106 For example, Jefferson’s election in 1800 “meant saving the Constitution from the Federalists’ centralizing and monarchical tendencies.”107 Similarly, Roosevelt’s defense of the New Deal aimed to provide a constitutional basis for policies securing economic social justice.108

These claims bring the president into conflict with the courts. The judiciary, Whittington says, poses “an intrinsic challenge” to the president’s effort to articulate a new constitutional vision, and ongoing judicial interpretation of the Constitution “necessarily frustrates” presidential reconstructive ambitions.109 This is true regardless of whether the courts actively attack presidential initiatives; their authority alone constitutes a “threat” to the reconstruction.110 The threat leads reconstructive presidents to attack the courts, framing any judicial efforts to defend the dominant regime as “political” interference rather than proper “legal” decision-making.111 Once the Court is viewed as “simply taking sides,” the president’s interpretative authority is enhanced.112 In Whittington’s words, the reconstructive president and the judiciary “compete over the same constitutional space, with the authority of presidents to reconstruct the inherited order supplanting judicial authority to settle disputed constitutional meaning.”113 pg. 368-370

#### Your decision model should privilege the preservation Court legitimacy. It is the only path that provides real equity without fatal judicial cost. Sua sponte judicial action makes it impossible for them to access a link turn

Luna 97—JD from Stanford University [Erik Grant Luna (Member of the State Bar of California), “ARTICLE: OF GYPSIES, JURIES AND JUDGES: CONSTITUTIONAL ADJUDICATION IN TRIAL COURTS,” Southwestern University Law Review, 26 Sw. U. L. Rev. 303, 1997]

2. Maintaining Judicial Legitimacy  
Uniform application of the last resort rule can also engender credibility for the courts' actions n140 and continued respect for the institution of judicial review. Constitutional decisions depend in no small part on voluntary compliance by the political branches and their constituents. The perception of authority—both moral and legal—provides the slender basis for the finality of any court decision. n141 Since a court only has "limited resources of enforcement," n142 while public distrust and animosity can be inexhaustible, appropriate application of the last resort rule allows the courts to "husband" their judicial resources to preserve their credibility: "The indispensability of husbanding what powers one had, of keeping within bounds if action is not to outrun wisdom." n143

As posited by the Framers of the Constitution, the judiciary represents the "least dangerous branch"—it has neither the power of the purse (i.e., it cannot collect or spend taxes) nor the authority of the sword (i.e., it does not command the armed forces). n144 Further, there is an inherent distrust for an institution unaccountable to the populace, whose operations are wholly foreign to common knowledge. If constitutional rulings are to be heeded and enforced, a court must have a solid foundation for its decisions, tempered by time and buttressed by accretions of acceptance. This is not to suggest that extra-judicial material or cognition should taint the merits of an issue. But when the choice is between (1) an ignored ruling today attended by de jure or de facto abatement of judicial review, or (2) an accepted and enforced decision tomorrow bolstering the judiciary's constitutional authority—only the latter provides real equity without exorbitant (and possibly fatal) judicial costs. n145

So in one sense, the last resort rule allows the judiciary to discretely and shrewdly "pick a fight." For example, in Railroad Commission of Texas v. Pullman Co., n146 the Court abstained from determining the constitutionality of a state agency's order that only white Pullman conductors, but not black Pullman porters, could operate sleeping cars: "The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." n147 The Court understood that a ruling for the porters would have been unacceptable in the  [\*333]  bigoted South of 1941. n148 A half-century ago, candidates for public office ran on separatist platforms, promising the continued subjugation of minorities, while the Klan served as an unofficial enforcement arm of local government. Forcing the constitutionally and morally correct decision down the throats of an obstinate, backward society would have been a formidable task for the political branches of the federal government. But sua sponte judicial action without express support from Congress or the Oval Office (as was the case in the early 1940's) would have been impossible. n149 By husbanding its limited judicial resources and public support, the Court set the stage for the desegregation decisions a decade later, as argued by one constitutional scholar: "While the public was more prepared for the Court's decision in 1954, Brown still did not meet with widespread acceptance. If the Court had found an equal protection violation in Pullman, resistance to desegregation might have been even more fervent and extended than it has been." n150

Thus the judiciary—whether manifested in a trial or appellate court—can succor its legitimacy and husband its limited resources by applying the last resort rule to sensitive constitutional issues which the public or the political branches are unprepared or unwilling to confront.

### AT: Resiliant Legitmacy

#### Their ev is about court support by the public, our internal link is about court support by congress and other countries – the courts will lose that fight

#### Congress will use an end-run to constrain the decision. It’s expansion of executive authority will be insulated from judicial review

Milligan 10—Professor of Law @ University of Louisville [Milligan, Luke M., “Congressional End-Run: The Ignored Constraint on Judicial Review, Georgia Law Review, Vol. 45, Issue 1 (Fall 2010), pp. 211-274

VI. CONCLUSION

Ignored by political scientists, congressional end-runs undoubtedly constrain the decisionmaking of the strategic Justices assumed by judicial politics scholars. End-runs occur when Congress mitigates the policy costs of adverse judicial review through neither formal limits on the Court's authority nor substitution of its own constitutional interpretation for that of the Court, but through a different decision that cannot, as a practical if not legal matter, be invalidated by the Court. End-runs come in several forms, including congressional decisions to adjust appropriations, grant authority to the Executive Branch, modify certain contingent laws, and reorient legislation in alternate constitutional clauses. Importantly, end-runs are generally more affordable for Congress than either of the two congressional constraints addressed in the prevailing judicial politics literature.

Within the field of judicial politics there remains a lingering uncertainty about Congress's practical impact on the Supreme Court's exercise of judicial review. This uncertainty has been compounded by the literature's failure to study the constraining role of congressional end-runs. Going forward, judicial politics scholars should incorporate the end-run into their formal SOP models and related empirical studies. Such incorporation promises to give political scientists a fuller sense of how their strategic Justices interact with Congress in our constitutional democracy. pg. 273

### AT: Public Link Turn

#### 1) Our ev is better about US prez, courts fight

#### President will nullify the decision. Court legitimacy is at risk

Fallon 9—Professor of Law @ Harvard Law School [Richard H. Fallon, Jr., “Article: Constitutional Constraints,” California Law Review, 97 Calif. L. Rev. 975, August 2009]

1. Inefficacy or Nullity Under Applicable Rules of Recognition

Judges and justices are constrained by the prospect that some decisions they might imaginably render would be treated as nullities or otherwise prove inefficacious. n189 While some rules of recognition tell justices how to identify valid law, others, applicable to other officials, characteristically direct those other officials to accept judicial interpretations as binding—even when those other officials think the judges made mistakes. n190 But there are limits. For example, as I have said before, a judicial directive purporting to raise or lower interest rates solely for policy reasons would not be recognized as legally authoritative. n191

This conclusion may appear trivial, but I do not believe that it is. As Fred Schauer has documented, the Supreme Court's docket typically includes few of the issues that most American regard as most pressing. n192 Matters of war and peace, economic boom and bust, and priorities in the provision of public services seldom come within the province of judicial decision-making. In light of familiar assumptions that unchecked power tends to expand, n193 we might ask why this is so. Part of the answer lies in the justices' awareness of external constraints.

 [\*1016]  As a historical matter, the prospect of judicial pronouncements being treated as nullities or otherwise proving inefficacious is hardly hypothetical. n194 President Thomas Jefferson and Secretary of State James Madison credibly threatened to defy the Supreme Court if it awarded mandamus relief to William Marbury in Marbury v. Madison. n195 Abraham Lincoln directed his subordinates to ignore the ruling of Chief Justice Taney in Ex parte Merryman. n196

Another example may come from the World War II case of Ex parte Quirin, n197 in which the Court upheld executive authority to try alleged Nazi saboteurs before military tribunals rather than civilian courts. n198 While the case was pending, President Franklin D. Roosevelt made it known to the justices that if they ruled for the petitioners, he would order military trials and summary executions to proceed anyway. n199 In the wartime circumstances, military personnel would almost certainly have obeyed presidential orders to ignore a judicial ruling—a consideration that may well have affected the Court's decision to uphold the constitutionality of military trials. n200 The Court may also have framed its famous order that local schools boards should enforce the rights recognized in Brown v. Board of Education n201 "with all deliberate speed," n202 rather than posthaste, partly because it knew that a mandate of immediate desegregation might have proved inefficacious. n203

 [\*1017]  Without attempting to account systematically for all possible external constraints that arise from the prospect that judicial rulings might be null under the rules of recognition practiced by nonjudicial officials, or might otherwise provoke defiance, I offer three observations.

First, in cases in which the justices worry that executive officials or lower courts might defy their rulings, they may feel a tension between the direct normative constraints and the external constraints to which they are subject. In other words, they may believe that they have a legal duty to do what they may feel externally constrained from doing. In Quirin, for example, the justices might easily have believed that at least one of the alleged saboteurs—a U.S. citizen who had been apprehended within the United States—had a constitutional right to civilian trial. n204

As I noted above, however, it also seems plausible that in a case such as Quirin, external constraints might affect the justices' perceptions of their legal duties. For example, in reflecting upon precedents such as Marbury v. Madison n205 and Stuart v. Laird, n206 in which the Court bowed to political threats, the justices may have concluded that the "rule of recognition" authorizes them to avoid rulings that would likely provoke broadly supported defiance and thereby threaten the long-or short-term authority of the judicial branch. As I have written elsewhere:   
Looking at the Supreme Court's long-term pattern of decisions, I would surmise that the Justices have internalized the constraint that the Court must conduct itself in ways that the public will accept as lawful and practically tolerable ... : the Court's interpretations of the Constitution must be likely to be accepted and enforced by at least a critical mass of the officials normally counted on to implement judicial decisions, and they should not trigger a strong and enduring sense of mass outrage by political majorities that the Court has overstepped its constitutional powers. n207  
 [\*1018]  Second, while assent to judicial mandates is today the norm, and official defiance of court rulings the exception, some observers believe that nonjudicial officials should feel freer than they presently do to treat judicial rulings as not binding on them. In a much discussed book, Larry Kramer has argued that nonjudicial officials once regarded themselves as being entitled as judges to interpret the Constitution, even after the courts had spoken, and to treat judicial rulings as limited to the particular cases in which they were issued or even to ignore them. n208 Whatever historical practice may have been, the recognition practices of nonjudicial officials could change in the future, with official defiance of judicial rulings becoming more common. n209 The external constraints on judges and justices are thus potential variables.

Third, if we ask why elected officials, in particular, currently accede so readily to claims of judicial authority that are not clearly ultra vires, part of the answer can be traced to the external constraint that public expectations impose. The public expects governmental officials to obey the law, and the public has been socialized to believe that judicial interpretations are legally binding. n210 But reference to current norms only postpones the question of how a state of affairs developed in which judicial authority to resolve disputable constitutional questions is so widely accepted.

In addressing this question, it is just as important to recognize that the domain of recognized judicial authority is bounded—that there are some issues committed almost wholly to resolution by politically accountable officials—as it is to note that judicial authority is seldom seriously questioned within its sphere. In accounting for these phenomena, political scientists increasingly argue that the domain within which the Court possesses recognized authority is politically "constructed." n211 With respect to the kinds of issues concerning which the courts speak authoritatively, elected officials prefer that the courts do speak authoritatively. n212 Maintenance of a relatively independent judiciary within a limited sphere may be the preferred strategy of risk-averse political leaders who willingly forego some opportunities to exercise power while they  [\*1019]  hold office in order to prevent unbounded power by their political adversaries when the adversaries triumph at the polls. n213 Perhaps of even greater significance, politicians may find it to their electoral advantage to leave a range of contentious issues for judicial resolution. n214 Congress and the president may also be happy to see dominant national visions enforced against the states n215 and to delegate to the courts a number of issues possessing low political salience. n216

If political scientists are correct that the domain of judicial authority is politically constructed, however, there is no guarantee that the political forces that define that domain will remain in long-term equilibrium. From the perspective of some political scientists, every election is a potential external shock to the system. n217 Keith Whittington advances the more architectonic thesis that, from time to time, "reconstructive" presidents have confronted the Supreme Court, sometimes successfully, and have forced a redefinition of the substantive bounds within which acceptable judicial decision-making can occur. n218 According to Professor Whittington, Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt all achieved this effect to greater or lesser degrees. n219 They did so partly by persuading the public to accept their visions of constitutional meaning and partly, having prevailed in the court of public opinion, by appointing justices who shared their constitutional visions. Thus, to take the starkest example, the prevailing constitutional understandings that emerged from the Roosevelt Revolution of the 1930s—in the country as well as on the Court—differed vastly from those of the 1920s, and the principal engine driving the change was Franklin Roosevelt. n220

 [\*1020]  In order for external constraints to be effective, judges and justices need not respond to them self-consciously, "for the constitutional understandings shared by those affiliated" with the dominant political coalition or "regime"—including jurists who have been nominated and confirmed with their constitutional visions in mind—"will be entrenched and assumed." n221 Nevertheless, the external constraints that define the domain of politically acceptable judicial action can exert important influence as parts of the process through which current and future judges identify and internalize legal norms. As Thomas Keck puts it, "The justices' ostensibly political preferences have themselves been constituted in part by legal ideas, and those legal ideas, in turn, have been derived in large part from ongoing debates in the broader political system." n222

2. Concurrent Agreement or Acquiescence Requirements  
 The Supreme Court "is a they, not an it." n223 In considering constraints on the Court as an institution, it is easy to forget that the Court is comprised of nine justices, each of whom is constrained individually by the need to secure the agreement of at least four colleagues in order to render legally efficacious constitutional rulings. n224 Judges of courts of appeals are similarly constrained by the need to muster majority support for their conclusions. Unlike Supreme Court justices, lower court judges are of course further constrained by the Supreme Court's power to reverse their decisions. n225

 [\*1021]  As I have noted, nonjudicial officials can defy or refuse to implement judicial decisions. Indeed, they have sometimes done so. n226 The courts, however, are virtually never constrained by the need to earn the formal approval or acquiescence of officials in another branch in order to act with the authority of law. The reason, I would speculate, is that the Constitution is written, and surrounding norms and expectations have developed, on the hypothesis that the judiciary is the least dangerous branch. n227 If the judiciary is assumed to be relatively impotent to inflict affirmative damage, and if the other branches are more threatening, it may be more desirable to preserve an efficacious checking power for the judiciary than to establish concurrent agreement or acquiescence requirements as formal checks against judicial action.

Having said this, I hasten to add that there may be circumstances under which the exercise of a judicial negative does indeed do affirmative harm—for example, if the Court unwisely invalidates legislation that would further important public interests or protect moral rights. n228 Perceptions that the Court has done so partly explain some of the instances in which "reconstructive" presidents—including Abraham Lincoln and Franklin Roosevelt—have mounted successful attacks on previously prevailing visions of appropriate judicial authority under the Constitution. n229

3. Sanctions  
The Constitution insulates the Supreme Court, as it does all federal judges, against certain kinds of sanctions. The justices cannot be removed from office during good behavior, nor can Congress reduce their salaries. n230 All judges, justices included, also enjoy immunity from suits for civil damages based on their official acts. n231

Despite these safeguards of judicial independence, the Constitution provides for some sanctions against Supreme Court justices. Most formally and conspicuously, justices can be impeached and removed from office. n232 They are  [\*1022]  also subject to the criminal law, including its prohibitions against bribery and extortion.

Less formally, justices confront the possibility of sanctioning by their colleagues. If the justices thought one of their number to be reckless or cavalier in her constitutional judgments, they could deprive the wayward colleague of the privilege of speaking authoritatively for the Court simply by refusing to join her opinions. Or they could vote to rehear any case in which that colleague cast the decisive vote—as apparently happened with the aged William O. Douglas. n233 The justices' capacity to write opinions exposing their colleagues' constitutionally faithless reasoning (if such were ever to occur), and thus to hold up offenders to contempt or ridicule, may also qualify as a constitutionally authorized, albeit informal, sanction. n234

Beyond the sanctions available against Supreme Court justices, the Constitution provides mechanisms for the imposition of institutional sanctions, directed not against individual justices but the Court as a whole. The Constitution permits Congress to withdraw at least some cases from the Court's jurisdiction. n235 If so minded, Congress and the president could also "pack" the Court and thereby not only reduce the power of incumbent justices, but also diminish the Court's prestige. n236

Lower federal court judges are vulnerable to virtually the same sanctions as Supreme Court justices, but with one conspicuous addition. Unlike the justices, lower court judges are subject to being reversed, and potentially to being upbraided, on appeal. n237

 [\*1023]  Insofar as threats of sanctions function as a constraint on judicial action, their directive force could sometimes create a tension with applicable normative constraints. n238 This prospect appears most visibly in the case of state judges, who may incur electoral or other political sanctions if their decisions displease a majority of voters. n239 But it is at least imaginable that an irate or partisan Congress might sanction federal judges by impeaching them and removing them from office for rendering unpopular but legally correct decisions. n240

This possibility—which exemplifies the age-old dilemma of who should guard the guardians—is almost surely an unhappy one. But the threat has seldom if ever come to fruition. There are at least three lessons to be drawn.

First, nonjudicial actors within the American political system, including the public, have largely internalized a norm against attempts to interfere with the exercise of independent judgment by the federal judiciary, and especially the Supreme Court. Early in American constitutional history, the Jeffersonian Republicans threatened to impeach judges as an instrument of ideological discipline, but the effort foundered before it gained momentum. n241 More than a century later, when Franklin Roosevelt sought authority to "pack" a Supreme Court that had appeared poised to scuttle hugely popular New Deal policies, Congress and public opinion rallied against the president. n242 Similarly, although members of Congress have recurrently introduced legislation that would curb the authority of the federal courts to rule on controversial issues, n243 such proposals have generally collapsed in the face of protests that they would violate the Constitution's spirit if not its letter. n244

 [\*1024]  Second, as I have noted already, other powerful political actors have good reasons to wish to maintain a relatively powerful, relatively independent judiciary. n245 Granted, "reconstructive" presidents have sometimes sought to challenge the prevailing ideologically inflected assumptions through which the Constitution has predominantly come to be viewed. But even reconstructive presidents and their normal allies have either had normative compunctions about subjecting the Supreme Court to significant sanctions or have encountered external resistance when they attempted to do so.

Third, saying that the sanctioning of federal judges and especially the Supreme Court has occurred infrequently is different from saying that the prospect of sanctions has had no effect. As I have noted, judicial decision-making in the United States has long exhibited a streak of prudentialism, through which the Court has avoided not only particular decisions that might provoke defiance, but also broader patterns of rulings that could arouse political majorities to impose sanctions. n246 Although I would stop considerably short of Judge Richard Posner's conclusion that "constitutional law is a function ... of ideology" checked principally if not exclusively by the justices' "awareness, conscious or unconscious, that they cannot go "too far' without inviting reprisals by the other branches of government spurred on by an indignant public," n247 it seems only commonsensical to assume that sanctions or other external constraints have some effect.

### AT: Absentation Spills Over