# 1NC Round 7

### 1NC Critique

#### Using national security to justify restraints on the executive is self-defeating. – makes their aff a self-fulfilling prophecy

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.

#### 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 T

#### judicial review doesn’t remove authority

GILBERT 98 Lieutenant Colonel USAF Academy; MSBA, Boston University; J.D., McGeorge School of Law; LL.M., Harvard Law School [Michael H. Gilbert, The Military and the Federal Judiciary: an Unexplored Part of the Civil-Military Relations Triangle, USAFA Journal of Legal Studies, 8 USAFA J. Leg. Stud. 197]

Conclusion

The judiciary can perform the critical function of judicial review of cases involving the military without unconstitutionally impinging upon the authority of Congress and the President. In matters of policy [\*224] concerning the conduct or preparation of war, courts can cautiously examine the facts to determine the propriety of their review. The greater the nexus to national security and to the conduct of purely military affairs, the greater the hesitancy courts should exercise in their review. In today's military, which is increasingly used for actions other than military operations, the concern with harming good order and discipline is less material.

By interpreting the framers' intent to grant virtually exclusive, plenary control of the military to the Congress, which regulates and maintains the armed forces, and to the President, who is the Commander-in-Chief of the armed forces, the Supreme Court removes the judiciary from the issue of civil-military relations. Entrusting the other two branches of the government to lawfully care for the military results in strengthening the authority of civilian control by two branches of Government but only at the cost of removing civilian control which should be exercised by the courts.

#### AND—The Aff isn’t topical—relying on treaties to create restrictions aren’t statutory or judicial

YOO 2—Professor of Law, School of Law, University of California, Berkeley [John C. Yoo, RESPONSE ESSAY: Rejoinder: Treaty Interpretation and the False Sirens of Delegation, California Law Review, July, 2002, 90 Calif. L. Rev. 1305]

Professor Van Alstine's argument, however, turns on the assumption that Congress also enjoys equally sweeping power to delegate rulemaking power to the federal judiciary. He claims that if Congress can delegate such power to the judiciary by statute, then the treatymakers must similarly be able to delegate it by treaty. n174 However, the underlying assumption is flawed. Delegation of rulemaking power by Congress to the judiciary differs from delegation to the executive in several crucial respects. First, unlike the executive branch, the judiciary cannot claim to be democratically accountable. n175 Second, the judiciary does not possess technocratic expertise in specific regulatory areas, at least not in the way contemplated by Chevron v. NRDC. n176 Since Congress's delegation power is not what Professor Van Alstine presumes it to be, the analogy between Congress and the treatymakers fails.

Regardless of whether such broad statutory delegation to the judiciary is constitutionally appropriate, Professor Van Alstine makes a fundamental error when he equates delegations by statute to delegations by treaty. As its placement in Article II suggests, and as I have argued above, the treaty power is an executive power and was widely understood as such during the Framing period. n177 Professor Van Alstine cannot demonstrate that an executive power has ever been delegated outside the executive branch. Perhaps the closest he could come would be Morrison v. Olson, n178 in which the Court upheld the exercise of prosecutorial power by an independent counsel who could be removed only for cause. Yet, even in that case, the Court emphasized that the independent counsel continued to be an executive-branch official responsible to the Attorney General and the President. n179 As far as I know, there is no example where any branch has successfully delegated part of the executive power to another branch of government and, certainly, no example where such power was delegated to the judicial branch. Delegations, when they occur, run in only one direction, from Congress to either the executive branch or, in limited circumstances, to the courts.

#### Vote neg for Predictable Limits—allowing treaties creates new topics in a new literature base—destroying preparedness.

### 1NC DA

#### Precedent for war powers deliberation now. It will check US militarism

**Hunter 8/31**/13 - Chair of the Council for a Community of Democracies [Robert E. Hunter (US ambassador to NATO (93-98) and Served on Carter’s National Security Council as the Director of West European Affairs and then as Director of Middle East Affairs, “Restoring Congress’ Role In Making War,” Lobe Log, August 31, 2013, pg. http://www.lobelog.com/restoring-congress-role-in-making-war/

But the most remarkable element of the President’s statement is the likely precedent he is setting in terms of engaging Congress in decisions about the use of force, not just through “consultations,” but in formal authorization. This gets into complex constitutional and legal territory, and will lead many in Congress (and elsewhere) to expect Obama — and his successors — to show such deference to Congress in the future, as, indeed, many members of Congress regularly demand.

But seeking authorization for the use of force from Congress as opposed to conducting consultations has long since become the exception rather than the rule. The last formal congressional declarations of war, called for by Article One of the Constitution, were against Bulgaria, Romania, and Hungary on June 4, 1942. Since then, even when Congress has been engaged, it has either been through non-binding resolutions or under the provisions of the [War Powers Resolution of November 1973](http://www.policyalmanac.org/world/archive/war_powers_resolution.shtml). That congressional effort to regain some lost ground in decisions to send US forces into harm’s way was largely a response to administration actions in the Vietnam War, especially the [Tonkin Gulf Resolution](https://www.mtholyoke.edu/acad/intrel/pentagon3/ps12.htm) of August 1964, which was actually prepared in draft before the triggering incident. The War Powers Resolution does not prevent a president from using force on his own authority, but only imposes post facto requirements for gaining congressional approval or ending US military action. In the current circumstances, military strikes of a few days’ duration, those provisions would almost certainly not come into play.

There were two basic reasons for abandoning the constitutional provision of a formal declaration of war. One was that such a declaration, once turned on, would be hard to turn off, and could lead to a demand for unconditional surrender (as with Germany and Japan in World War II), even when that would not be in the nation’s interests — notably in the Korean War. The more compelling reason for ignoring this requirement was the felt need, during the Cold War, for the president to be able to respond almost instantly to a nuclear attack on the United States or on very short order to a conventional military attack on US and allied forces in Europe.

With the Cold War now on “the ash heap of history,” this second argument should long since have fallen by the wayside, but it has not.  Presidents are generally considered to have the power to commit US military forces, subject to the provisions of the War Powers Resolution [WPR], which have never been properly tested. But why? Even with the 9/11 attacks on the US homeland, the US did not respond immediately, but took time to build the necessary force and plans to overthrow the Taliban regime in Afghanistan (and, anyway, if President George W. Bush had asked on 9/12 for a declaration of war, he no doubt would have received it from Congress, very likely unanimously).

As times goes by, therefore, what President Obama said on August 29, 2013 could well be remembered less for what it will mean regarding the use of chemical weapons in Syria and more for what it implies for the reestablishment of a process of full deliberation and fully-shared responsibilities with the Congress for decisions of war-peace, as was the historic practice until 1950. This proposition will be much debated, as it should be; but if the president’s declaration does become precedent (as, in this author’s judgment, it should be, except in exceptional circumstances where a prompt military response is indeed in the national interest), he will have done an important and lasting service to the nation, including a potentially significant step in reducing the excessive militarization of US foreign policy.

There would be one added benefit: members of Congress, most of whom know little about the outside world and have not for decades had to take seriously their constitutional responsibilities for declaring war, would be required to become better-informed participants in some of the most consequential decisions the nation has to take, which, not incidentally, also involve risks to the lives of America’s fighting men and women.

#### Dismantling war powers justiciability undermines deliberation. Our link is unique

**Broughton 01** – Asst Attorney General of Texas [[Broughton, J. Richard](http://www.heinonline.org.proxy.library.emory.edu/HOL/LuceneSearch?specialcollection=&terms=creator%3A%22Broughton,%20J.%20Richard%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 Broughton, J. Richard) (LL.M., with distinction, Georgetown University Law Center), “What Is It Good For--War Power, Judicial Review, and Constitutional Deliberation,” Oklahoma Law Review, Vol. 54, Issue 4 (Winter 2001), pp. 685-726

Judicial abstention from war powers disputes can mitigate the effects of the judicial overhang by encouraging Congress and the President to think more seriously about constitutional structure."' In the Vietnam era, for example, Congress enacted the War Powers Resolution to assert its own constitutional prerogatives only after the courts had consistently refused to intervene. Perhaps this was no accident. Without resort to the judiciary, Congress was forced to take responsibility for using its Article I powers in its own defense. Whatever the other flaws of the War Powers Resolution, it at least represents Congress's assertiveness in attempting to define the boundaries of constitutional war power, as the Constitution provides. (Wther Congress got it right is a separate matter, beyond the scope of this article.) Similarly, rather than resort to the courts to challenge the constitutionality of the Resolution, presidents since Nixon have simply deployed troops at their discretion, forcing Congress to either authorize the action, reject such authorization, withdraw funding, or, perhaps as a last resort, impeach the President. Thus, the modem trend of cases leaving war powers controversies to the political branches has produced somewhat more responsible political institutions, though much work must still be done to truly effectuate the Constitution's vision of prudent and reasoned constitutional discourse among the Congress and the White House.' In keeping therefore with constitutional history and design, political actors best serve republican government when they give careful attention to constitutional boundaries and constitutional weapons in the course of adopting military and foreign policy. Political actors will be more likely to do so if they have only themselves, and not the courts, to do the work.

IV. Conclusion

There is much we can learn from Madison and Marshall, statesmen who understood the value of prudent constitutional reasoning to the practical governance of a large republic. Importantly, not all such reasoning occurs in the courts, nor should it. Those matters not "of a judiciary nature," in Madison's words, must find resolution in other fora. Controversies between Congress and the President regarding the Constitution's allocation of war powers are among this class of disputes. This is not to say that courts must leave all cases involving foreign affairs to the vicissitudes of political institutions; the Constitution explicitly vests the judiciary with authority over admiralty and maritime cases, as well as cases affecting ambassadors, public ministers, and consuls, all of which may invariably touch upon foreign relations. War powers disputes are constitutionally unique, however, because the Constitution itself commits the resolution of those disputes to legislators and the chief executive. The courts have, for the most part, appropriately left these disputes where they belong, in the hands of the political branches. Through the doctrine of justiciability, courts have helped to preserve the separation of powers by recognizing both the limits on their Article In authority and the broa prerogatives that the Constitution grants to political actors who are charged with making and effecting American military and foreign policy. By continuing this trend, as the District of Columbia Circuit did in Campbell, the judiciary can encourage deliberation about constitutional structure in the political branches, as Madison and Marshall envisioned. Pg. 724-725

#### Militarism risks World War III. We must check the expansionist desires

**Boyle 12** - Professor of International Law @ University of Illinois College of Law [Francis A. Boyle (PhD. degrees in Political Science from [Harvard University](http://en.wikipedia.org/wiki/Harvard_University)), “Unlimited Imperialism and the Threat of World War III. U.S. Militarism at the Start of the 21st Century,” Global Research, December 25, 2012, pg. http://www.globalresearch.ca/unlimited-imperialism-and-the-threat-of-world-war-iii-u-s-militarism-at-the-start-of-the-21st-century/5316852

Historically, this latest eruption of American militarism at the start of the 21st Century is akin to that of America opening the 20th Century by means of the U.S.-instigated Spanish-American War in 1898.  Then the Republican administration of President  William McKinley stole their colonial empire from Spain in Cuba, Puerto Rico, Guam, and the Philippines; inflicted a near genocidal war against the Filipino people; while at the same time illegally annexing the Kingdom of Hawaii and subjecting the Native Hawaiian people (who call themselves the Kanaka Maoli) to near genocidal conditions.  Additionally, McKinley’s military and colonial expansion into the Pacific was also designed to secure America’s economic exploitation of China pursuant to the euphemistic rubric of the “open door” policy.   But over the next four decades America’s aggressive presence, policies, and practices in the “Pacific” would ineluctably pave the way for Japan’s attack at Pearl Harbor on Dec. 7, 194l, and thus America’s precipitation into the ongoing Second World War.

Today a century later the serial imperial aggressions launched and menaced by the Republican Bush Jr. administration and now the Democratic Obama administration are threatening to set off World War III.

By shamelessly exploiting the terrible tragedy of 11 September 2001 [9/11], the Bush Jr. administration set forth to steal a hydrocarbon empire from the Muslim states and peoples living in Central Asia and the Persian Gulf and Africa under the bogus pretexts of (1) fighting a war against international terrorism; and/or (2) eliminating weapons of mass destruction; and/or (3) the promotion of democracy; and/or (4) self-styled “humanitarian intervention”/responsibility to protect.  Only this time the geopolitical stakes are infinitely greater than they were a century ago:  control and domination of two-thirds of the world’s hydrocarbon resources and thus the very fundament and energizer of the global economic system – oil and gas.  The Bush Jr./ Obama  administrations  have  already targeted the remaining hydrocarbon reserves of Africa, Latin America, and Southeast Asia for further conquest or domination, together with the strategic choke-points at sea and on land required for their transportation.  In this regard, the Bush Jr. administration  announced the establishment of the U.S. Pentagon’s Africa Command (AFRICOM) in order to better control, dominate, and exploit both the natural resources and the variegated peoples of the continent of Africa, the very cradle of our human species.  Libya and the Libyans became the first victims to succumb to AFRICOM under the Obama administration. They will not be the last.

This current bout of U.S. imperialism is what Hans Morgenthau denominated “unlimited imperialism” in his seminal work Politics Among Nations (4th ed. 1968, at 52-53):

“The outstanding historic examples of unlimited imperialism are the expansionist policies of Alexander the Great, Rome, the Arabs in the seventh and eighth centuries, Napoleon I, and Hitler. They all have in common an urge toward expansion which knows no rational limits, feeds on its own successes and, if not stopped by a superior force, will go on to the confines of the political world. This urge will not be satisfied so long as there remains anywhere a possible object of domination–a politically organized group of men which by its very independence challenges the conqueror’s lust for power. It is, as we shall see, exactly the lack of moderation, the aspiration to conquer all that lends itself to conquest, characteristic of unlimited imperialism, which in the past has been the undoing of the imperialistic policies of this kind… “

 It is the Unlimited Imperialists along the lines of Alexander, Rome, Napoleon and Hitler who are now in charge of conducting American foreign policy. The factual circumstances surrounding the outbreaks of both the First World War and the Second World War currently hover like twin Swords of Damocles over the heads of all humanity.

### 1NC CP

#### Plan: The United States congress should restrict the authority of the President of the United States to indefinitely detain without the Third Geneva Conventions Article Five rights.

#### Congressional opposition to the authority curbs Presidential action – robust statistical and empirical proof

KRINER 10 Assistant professor of political science at Boston University [Douglas L. Kriner, “After the Rubicon: Congress, Presidents, and the Politics of Waging War”, page 228-231]

Conclusion

The sequence of events leading up to the sudden reversal of administration policy and the dramatic withdrawal of U.S. Marines from Lebanon clearly demonstrates that open congressional opposition to Reagan's conduct of the mission in Beirut was critically important in precipitating the change in course. By tracing the pathways of congressional in- fluence, the case study achieves two important objectives. First, it vividly illustrates Congress's capacity to influence the scope and duration of a use of force independent of major shifts in public opinion and changing conditions on the ground. The analysis makes clear that there was no dramatic shift in public opinion after the Beirut barracks bombing that compelled the Reagan administration to withdraw the Marines; in fact, in the wake of the attack the public rallied behind the president. As such, opponents of Reagan's policies in Congress initially fought against the tide of public opinion, and the modest decline in popular support for the president's handling of the Lebanon mission occurred only after a sustained campaign against the deployment on Capitol Hilt.89 Similarly, the administration's own internal analysis of the situation in early January 1984 makes clear that changing conditions on the ground did not necessitate a dramatic change in the nature of the Marine mission. Indeed, by the National Security Council's own estimate, some conditions in the region were actually improving. Instead, administration officials repeatedly emphasized domestic pressures to curtail the scope and duration of the Marine mission.90 Moreover, as the political and military situation in Lebanon worsened in late January and early February 1984, it is interesting that a number of key administration officials publicly and privately believed that there was a direct link between congressional opposition at home and the deterioration of the situation on the ground in the Middle East.

Second, the case study illustrates how the formal and informal congressional actions examined in the statistical analyses of chapter 4 affected presidential decision-making through the proposed theoretical mechanisms for congressional influence over presidential conduct of military affairs developed in chapter 2. Vocal opposition to the president in Congress-expressed through hearings and legislative initiatives to curtail presidential authority, and the visible defection from the White House of a number of prominent Republicans and erstwhile Democratic allies-raised the political stakes of staying the course in Lebanon. Nothing shook Reagan's basic belief in the benefits to be gained from a strong, defiant stand in Beirut. But the political pressure generated by congressional opposition to his policies on both sides of the aisle raised the likely political costs of obtaining these policy benefits. Congressional opposition also influenced the Reagan administration's decision-making indirectly by affecting its estimate of the military costs that would have to be paid to achieve American objectives. In the final analysis, through both the domestic political costs and signaling mechanisms discussed in chapter 2 , congressional opposition contributed to the administration's ultimate judgment that the benefits the United States might reap by continuing the Marine mission no longer outweighed the heightened political and military costs necessary to obtain them.

Finally, while the Marine mission in Lebanon is admittedly but one case, it is a case that many in the Reagan administration believed had important implications for subsequent military policymaking. In a postmortem review, Don Fortier of the National Security Council and Steve Sestanovich at the State Department warned that the debacle in Lebanon raised the possibility that, in the future, the decision to use force might be akin to an all-or-nothing decision. "If the public and Congress reject any prolonged U.S. role (even when the number of troops is small)," the administration analysts lamented, "we will always be under pressure to resolve problems through briefer, but more massive involvements-or to do nothing at all." Thus, from the administration's "conspicuously losing to the Congress" over Lebanon policy, Fortier and Sestanovich argued that the White House would have to anticipate costly congressional opposition if similar actions were launched in the future and adjust its conduct of military operations accordingly, with the end result being a "narrowing of options" on the table and more "limited flexibility" when deploying major contingents of American military might abroad.91 This last point echoes the first anticipatory mechanism posited in chapter 2, and reminds us that Congress need not overtly act to rein in a military action of which it disapproves for it to have an important influence on the scope and duration of a major military endeavor. Rather, presidents, having observed Congress's capacity to raise the political and tangible costs of a given course of military action, may anticipate the likelihood of congressional opposition and adjust their conduct of military operations accordingly.

### Solvency

#### They 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

#### 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

#### Decision on authority triggers Congressional override. The Court knows it is coming and ties rules to avoid the backlash

Puro 2k—Professor Political Science and Public Policy @ Saint Louis University [Puro, Steven, "Congress-Supreme Court Relations: Strategies of Power,” Saint Louis University Public Law Review, Vol. 19, Issue 1 (2000), pp. 117-128]

Cross argues that "Court decisions do not automatically actualize the Court's policies and the impact of Court opinions may depend upon the compliance of Congress or other external actors." 67 The Supreme Court can encourage other institutions to comply with its decisions, and Justices often assume that noncompliance is more likely for decisions with broader scope. Additional legislation, regulation, or appropriations by Congress play an important role in achieving compliance by society with the Court's decisions. Congress may achieve additional authority through reinterpreting Court decisions. The judiciary is often faced with deciding between the authority of Congress and the President. In the last decade, on many important domestic and international matters the judiciary's constitutional and statutory interpretations appear to shift power from Congress to the President. By expanding presidential authority and limiting Congress's authority are federal courts involved in forming a more compact constitutional structure?

IV. CONCLUSION

The American system of government shares the power and responsibility of constitutional interpretation among the executive, legislative and judicial branches. The constitutional and statutory relationships among these three branches are guided by both short- and long-term considerations. In a given year or over the course of several years, Congress's authority is concerned in a wide range of constitutional and statutory issues before Congress and the Supreme Court. Congress-Supreme Court relationships involve multiple strategies which encourage consensus and coalition building among them rather than conflict. Conflicts occur due to different ideological positions, varying interpretations of specific constitutional and statutory provisions, and central questions about the scope of constitutional authority.

Congress's institutional competence in dealing with the courts and the executive will affect its attempts to maximize institutional capacity in relations with the Supreme Court. Congress may convey its institutional authority through statutory language, setting institutional boundaries for Supreme Court interpretation of statutes and regulations, and threatening increased jurisdictional or budgetary controls over federal courts. No determinative set of criteria for Congressional limitation on Court decisions was found. Such criteria should not be expected since Congress has given the Supreme Court power to set its own agenda and decide major constitutional and statutory matters. It would be difficult for Congress to use long-term institutional strategies in specific cases to fully exercise its institutional powers and abilities. Congress has increasingly received its expected payoffs from short- term reactions to Supreme Court decisions in the 1980s and 1990s, with divided governments as the national norm. Pg. 126-127

#### 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.

#### Obama will disregard the Court. He is on record

Pyle 12—Professor of constitutional law and civil liberties @ Mount Holyoke College [Christopher H. Pyle, “Barack Obama and Civil Liberties,” Presidential Studies Quarterly, Volume 42, Issue 4, December 2012, Pg. 867–880]

Preventive Detention

But this is not the only double standard that Obama's attorney general has endorsed. Like his predecessors, Holder has chosen to deny some prisoners any trials at all, either because the government lacks sufficient evidence to guarantee their convictions or because what “evidence” it does have is fatally tainted by torture and would deeply embarrass the United States if revealed in open court. At one point, the president considered asking Congress to pass a preventive detention law. Then he decided to institute the policy himself and defy the courts to overrule him, thereby forcing judges to assume primary blame for any crimes against the United States committed by prisoners following a court-ordered release (Serwer 2009).

According to Holder, courts and commissions are “essential tools in our fight against terrorism” (Holder 2009). If they will not serve that end, the administration will disregard them. The attorney general also assured senators that if any of the defendants are acquitted, the administration will still keep them behind bars. It is difficult to imagine a greater contempt for the rule of law than this refusal to abide by the judgment of a court. Indeed, it is grounds for Holder's disbarment.

As a senator, Barack Obama denounced President Bush's detentions on the ground that a “perfectly innocent individual could be held and could not rebut the Government's case and has no way of proving his innocence” (Greenwald 2012). But, three years into his presidency, Obama signed just such a law. The National Defense Authorization Act of 2012 authorized the military to round up and detain, indefinitely and without trial, American citizens suspected of giving “material support” to alleged terrorists. The law was patently unconstitutional, and has been so ruled by a court (Hedges v. Obama 2012), but President Obama's only objection was that its detention provisions were unnecessary, because he already had such powers as commander in chief. He even said, when signing the law, that “my administration will not authorize the indefinite military detention without trial of American citizens,” but again, that remains policy, not law (Obama 2011). At the moment, the administration is detaining 40 innocent foreign citizens at Guantanamo whom the Bush administration cleared for release five years ago (Worthington 2012b).

Thus, Obama's “accomplishments” in the administration of justice “are slight,” as the president admitted in Oslo, and not deserving of a Nobel Prize. What little he has done has more to do with appearances than substance. Torture was an embarrassment, so he ordered it stopped, at least for the moment. Guantanamo remains an embarrassment, so he ordered it closed. He failed in that endeavor, but that was essentially a cosmetic directive to begin with, because a new and larger offshore prison was being built at Bagram Air Base in Afghanistan—one where habeas petitions could be more easily resisted. The president also decided that kidnapping can continue, if not in Europe, then in Ethiopia, Somalia, and Kenya, where it is less visible, and therefore less embarrassing (Scahill 2011). Meanwhile, his lawyers have labored mightily to shield kidnappers and torturers from civil suits and to run out the statute of limitations on criminal prosecutions. Most importantly, kidnapping and torture remain options, should al-Qaeda strike again. By talking out of both sides of his mouth simultaneously, Obama keeps hope alive for liberals and libertarians who believe in equal justice under law, while reassuring conservatives that America's justice will continue to be laced with revenge.

It is probably naïve to expect much more of an elected official. Few presidents willingly give up power or seek to leave their office “weaker” than they found it. Few now have what it takes to stand up to the national security state or to those in Congress and the corporations that profit from it. Moreover, were the president to revive the torture policy, there would be insufficient opposition in Congress to stop him. The Democrats are too busy stimulating the economies of their constituents and too timid to defend the rule of law. The Republicans are similarly preoccupied, but actually favor torture, provided it can be camouflaged with euphemisms like “enhanced interrogation techniques” (Editorial 2011b).

#### 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.

### Rule of Law

#### 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

#### Turns afghanistan

Lieberman 10—Independent Democratic senator from Connecticut [Joseph I. Leiberman, “Back to a Bipartisan Foreign Policy,” Wall Street Journal, November 16, 2010, pg. http://tinyurl.com/m5z623w]

This year's midterm elections marked the first time since 9/11 that national security was not a major consideration for American voters. But it is precisely in the realm of foreign policy and national security that we may have the greatest opportunities for bipartisan cooperation between President Obama and resurgent Republicans in Congress.

Seizing these opportunities will require both parties to break out of a destructive cycle that has entrapped them since the end of the Cold War and caused them to depart from the principled internationalist tradition that linked Democratic presidents like Truman and Kennedy with Republican presidents like Nixon and Reagan.

During the 1990s, too many Republicans in Congress reflexively opposed President Clinton's policies in the Balkans and elsewhere. Likewise, during the first decade of the 21st century, too many Democrats came to view the post-9/11 exercise of American power under President Bush as a more pressing danger than the genuine enemies we faced in the world.

The larger truth was that the foreign policy practices and ideals of both President Clinton and Bush were within the mainstream of American history and values. And if one can see through the fog of partisanship that has continued to choke Washington since President Obama was elected in 2008, the same is true of the new administration as well.

President Obama has moved to the internationalist center on several key issues of national security. Although both parties are hesitant to acknowledge it, the story of the Obama administration's foreign policy is as much continuity as change from the second term of the Bush administration—from the surge in Afghanistan to the reauthorization of the Patriot Act, and from drone strikes against al Qaeda to a long-term commitment to Iraq.

Republicans have also stayed loyal to the internationalist policies they supported under President Bush. When they have criticized the Obama administration, it has reflected this worldview—arguing that the White House has not been committed enough in its prosecution of the war in Afghanistan or done enough to defend human rights and democracy in places like Iran and China.

The critical question now, as we look forward to the next two years, is whether this convergence of the two parties towards the internationalist center can be sustained and strengthened. There are three national security priorities where such a consensus is urgently needed.

The first is the war in Afghanistan. To his credit, President Obama last December committed more than 30,000 additional troops to Afghanistan as part of a comprehensive counterinsurgency campaign, despite opposition within the Democratic Party.

Having just returned from Afghanistan, I am increasingly confident that the tide there is turning in our favor, with growing signs of military progress. But as Gen. David Petraeus, the top U.S. commander in Afghanistan, has warned, success will come neither quickly nor easily, and there is still much tough fighting ahead. It is all but certain that no more than a small number of U.S. forces will be able to withdraw responsibly in July 2011, and that success in Afghanistan is going to require a long-term commitment by the U.S. beyond this date.

Sustaining political support for the war in Afghanistan therefore will increasingly require President Obama and Republicans in Congress to stand together. Failure to sustain this bipartisan alliance runs the risk that an alternative coalition will form in Congress, between antiwar Democrats and isolationist Republicans. That would be the single greatest political threat to the success of the war effort in Afghanistan, which remains critical to our security at home.

#### Also causes another AUMF – turns the case

Brooks 13—Professor of Law @ Georgetown University [Rosa Brooks (Senior Fellow @ New America Foundation, Former Counselor to the Undersecretary of Defense for Policy @ Department of Defense, Former Special Coordinator for Rule of Law and Humanitarian Policy @ DOD and Recipient of the Secretary of Defense Medal for Outstanding Public Service), “Mission Creep in the War on Terror” Foreign Policy | MARCH 14, 2013, pg. http://www.foreignpolicy.com/articles/2013/03/14/mission\_creep\_in\_the\_war\_on\_terror?page=0,0

With Option 3 -- lie, lie, lie -- off the table, and fudging and obfuscation growing harder to comfortably sustain, the thoughts of administration officials turn naturally to Option 2: change the law. Thus, as the Washington Post reported last weekend, some administration officials are apparently considering asking Congress for a new, improved "AUMF 2.0," one that would place U.S. drone policy on firmer legal footing.

Just who is behind this notion is unclear, but the idea of a revised AUMF has been gaining considerable bipartisan traction outside the administration. In a recent Hoover Institution publication, for instance, Bobby Chesney, who served in the Obama Justice Department, teams up with Brookings's Ben Wittes and Bush administration veterans Jack Goldsmith and Matt Waxman to argue for a revised AUMF -- one that can provide "a new legal foundation for next-generation terrorist threats."

I'm as fond of the rule of law as the next gal, so in a general sense, I applaud the desire to ensure that future executive branch counterterrorist activities are consistent with the laws passed by Congress. But "laws" and "the rule of law" are two different animals, and an expanded new AUMF is a bad idea.

Sure, legislative authorization for the use of force against "next generation" terrorist threats would give an additional veneer of legality to U.S. drone policy, and make congressional testimony less uncomfortable for John Brennan and Eric Holder. But an expanded AUMF would also likely lead to thoughtless further expansion of targeted killings. This would be strategically foolish, and would further undermine the rule of law.

#### 1. Judicial foreign affairs rulings don’t create precedent

NZELIBE 04 Bigelow Fellow and Lecturer in Law, University of Chicago Law School [Jide Nzelibe, The Uniqueness of Foreign Affairs, March, 2004, 89 Iowa L. Rev. 941]

One of the most obvious and persistent problems in judicial interpretation of the constitutional foreign affairs powers concerns the role of definition. In other words, the Constitution is unambiguously silent as to the meaning of the relevant terms that define the scope of the foreign affairs powers, such as "war" or "treaties." Furthermore, the Supreme Court has yet to supply its own understanding of what these terms mean from a constitutional standpoint. n159 Understandably, without the benefit of any guidance as to the definition of these terms, lower courts have been reluctant to resolve controversies regarding the constitutional allocation of the foreign affairs powers. Perhaps this explains why, in refusing to hear such controversies, the courts often declare that the underlying issues involve the "lack of judicially manageable or discoverable standards." n160

In many respects, it is not difficult to understand why the courts have balked at imposing any substantive limitations on the scope of the foreign affairs powers. The political branches have a demonstrable institutional advantage over the courts in understanding the international political norms that inform the substantive meaning of the various terms underlying the [\*977] foreign affairs powers. The early constitutional history of the foreign affairs powers strongly suggests that the Framers understood the constitutional meaning of these terms would be consistent with that of early British constitutional practice and the prevailing international norms at the time. n161 In the international context, however, the meanings of these foreign affairs terms are dynamic and tend to evolve with changing conditions and the demands of the international environment. Since the political branches are better suited than the courts in tracking these norms, it makes sense that the courts would also defer to the political branches' understandings of the scope of the foreign affairs powers. More importantly, as a descriptive matter, many of the disputes that implicate foreign affairs involve considerations of "realpolitik" that are largely absent in domestic controversies. n162

#### No impact to indo-pak war

**Williscroft, 2** (R.G., Former NOAA Officer and Commentator for Defense Watch, “Don't Fear an India-Pakistan Nuclear War”, June 12, <http://www.sftt.us/dw06122002.html#4)//different> architecture, not enough radiation, recovery in 2 to 3 weeks

What might be the consequences of such an exchange? We have only one historical example against which we can measure potential damage from a nuclear strike. Both Hiroshima and Nagasaki were "paper cities," in the sense that a large portion of the residential areas consisted of flimsy traditional Japanese domestic dwellings constructed of light wood and paper. The architectural infrastructure of likely target areas in both Pakistan and India are dramatically different. This opens our analysis to significant speculation, since brick-and-mortar structures can absorb a lot more blast energy than paper and wood, and offer dramatically increased protection against radiation. Furthermore, modern nukes typically do not produce as much hard radiation as their ancestors, except for specifically designed "neutron" devices. These are designed to produce a high-level flood of initial high energy neutrons intended to kill living beings quickly and efficiently, while leaving as much infrastructure intact as possible. Both India and Pakistan would gain the greatest benefit from neutron devices, because of the very large armies each can deploy on short notice. Intelligence estimates indicate, however, that only Pakistan is likely to have a neutron device, but the evidence is circumstantial, based primarily on the certain knowledge that Pakistan has received material assistance from China, and it is likely that China has such devices. From intelligence estimates we know that Pakistan probably has 15 or so nuclear devices, based upon its ability to manufacture highly enriched uranium, which forms the basis of its nuclear program. They all may be sufficiently small to fit inside their ballistic missiles, and at least half may be neutron devices. India may have as many as 50 nukes based upon its ability to produce weapons grade plutonium, employed by its design. These devices probably range from relatively unsophisticated devices manufactured in the 1970s to fairly complex systems of recent manufacture. From these numbers one can assume that a total nuclear exchange might produce over 40 actual nuclear explosions, which assumes an Indian preemptive strike followed by full-scale retaliation by Pakistan, with 60-70 percent of the weapons actually exploding with a yield near their design parameters. If one assumes that the Pakistani devices are primarily anti-personnel weapons, the overall projections regarding death and destruction are significantly less than the numbers typically tossed around by politicians and journalists ignorant of nuclear weapons effects. Instead of 20 million killed in the first two or three exchanges, it is much more likely that the number of those killed will range from the high hundreds of thousands to the low millions, depending on whether the Indian bombers make it through Pakistani defenses to Islamabad. Because all the devices on both sides are relatively modern when compared with the bombs dropped on Japan, the global impact will be relatively small. Regional fallout will follow local wind patterns. Sensitive measuring devices will be able to pick up radioactive debris on a worldwide basis during the following months, but only because of the distinctive character of this fallout. The level will be well below normal background radiation from the sun and cosmic rays, and will pose absolutely no hazard to world populations. While a nuclear exchange would be horrific to the soldiers and civilians caught in the cross-fire and would vastly complicate our ongoing war on terror, the one thing Americans, Europeans and most of the rest of the world don't have to worry about is radiation poisoning from such an exchange. Obviously, we would lose Pakistan as an active partner in our ongoing Afghanistan operations, but other than a place from which to launch, it is arguable whether we are getting any other real value from our partnership anyway. Whatever complications we would experience in prosecuting our offensive against al Qaeda, they would experience in spades. An international effort would certainly mount to assist survivors. We would clearly be part of that effort, and this would tend to distract us from the reason we are there in the first place. Since the probable outcome of a nuclear exchange between India and Pakistan would be considerably smaller than current public perceptions, our level of involvement would also be significantly smaller. Ironically, if the Pakistanis rely on neutron devices, which really do very little damage to the surrounding countryside, the net effect may be far less hungry mouths impacting a food supply that will not be very much different than before the conflict. Within two or three weeks following such an exchange, the world should come to realize that the situation really is not so catastrophic. The world stock markets should recover quickly, and **most of the world** probably will **go back to business as usual**.

### Human rights

#### Climate change does not create refugees - empirically proven

AC 11 (Asian Correspondent April 11, 2011 What happened to the climate refugees? http://asiancorrespondent.com/52189/what-happened-to-the-climate-refugees/)

In 2005, the United Nations Environment Programme predicted that climate change would create 50 million climate refugees by 2010. These people, it was said, would flee a range of disasters including sea level rise, increases in the numbers and severity of hurricanes, and disruption to food production. The UNEP even provided a handy map. The map shows us the places most at risk including the very sensitive low lying islands of the Pacific and Caribbean. It so happens that just a few of these islands and other places most at risk have since had censuses, so it should be possible for us now to get some idea of the devastating impact climate change is having on their populations. Let’s have a look at the evidence: Bahamas: Nassau, The Bahamas – The 2010 national statistics recorded that the population growth increased to 353,658 persons in The Bahamas. The population change figure increased by 50,047 persons during the last 10 years. St Lucia: The island-nation of Saint Lucia recorded an overall household population increase of 5 percent from May 2001 to May 2010 based on estimates derived from a complete enumeration of the population of Saint Lucia during the conduct of the recently completed 2010 Population and Housing Census. Seychelles: Population 2002, 81755 Population 2010, 88311 Solomon Islands: The latest Solomon Islands population has surpassed half a million – that’s according to the latest census results. It’s been a decade since the last census report, and in that time the population has leaped 100-thousand. Meanwhile, far from being places where people are fleeing, no fewer than the top six of the very fastest growing cities in China, Shenzzen, Dongguan, Foshan, Zhuhai, Puning and Jinjiang, are absolutely smack bang within the shaded areas identified as being likely sources of climate refugees. Similarly, many of the fastest growing cities in the United States also appear within or close to the areas identified by the UNEP as at risk of having climate refugees. More censuses are due to come in this year, and we await the results for Bangladesh and the Maldives - said to be places most at risk - with interest. However, **a** very cursory look at the first available evidence seems to show that the places identified by the UNEP as most at risk of having climate refugees are not only not losing people, they are actually among the fastest growing regions in the world. (Footnote: As requested, credit goes to the cartographer of the UNEP map, Emmanuelle Bournay.)

# Block

## Counterplan

### 2NC – CP Solves Judicial Modeling

#### Only the counterplan results in a stable international democratic transition—a strong legislature is comparatively more important than an independent judiciary

**Fish 6 -** is associate professor of political science at the University of California at Berkeley (M. Steven Fish, Journal of Democracy 17.1 (2006) 5-20, proquest)

How does weakness on the part of the legislature inhibit democratization? First, it undermines "horizontal accountability," which Guillermo O'Donnell defines as "the controls that state agencies are supposed to exercise over other state agencies."" In polities where authoritarian regimes have broken down and new regimes are taking their place, the temptation to concentrate power in the executive is great. People often confuse concentrated power with effective power, and the president is usually the beneficiary. While one might expect the judiciary to provide some protection against abuse of power, habits of judicial quiescence inherited from the authoritarian period often ensure that the courts will not counterbalance executive power in the early years of transition.12 Under such circumstances, the legislature is the only agency at the national level that is potentially capable of controlling the chief executive. Where the legislature lacks muscle, presidential abuses of power-including interference in the media, societal organizations, and elections-frequently ensue, even under presidents who take office with reputations as democrats.

#### Legislatures are the best vehicle for democracy

**Fish 6 -** is associate professor of political science at the University of California at Berkeley (M. Steven Fish, Journal of Democracy 17.1 (2006) 5-20, proquest)

Legislative weakness also inhibits democratization by undermining the development of political parties. In polities with weak legislatures, political parties drift and stagnate rather than develop and mature. Parties are the main vehicles for structuring political competition and for linking the people and their elected officials. The underdevelopment of parties therefore saps political competition of its substance and vigor and checks the growth of "vertical accountability," meaning the ability of the people to control their representatives.

### 2NC – CP Solves Ilaw

#### Congressional passage of implementing legislation will substantially boost compliance with international law

**Strossen, 92**—professor of law at New York Law School (Nadine, “UNITED STATES RATIFICATION OF THE INTERNATIONAL BILL OF RIGHTS: A FITTING CELEBRATION OF THE BICENTENNIAL OF THE U.S. BILL OF RIGHTS”, 24 U. Tol. L. Rev. 203, lexis)

Of overriding importance, the U.S. ratification was subject to a declaration that the ICCPR provisions are not "self-executing," which  [\*204]  means that they are not legally enforceable against federal or state governments in the U.S. in any American courts; they will be binding in domestic courts only if Congress passes implementing legislation. [n5](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1260159734883&returnToKey=20_T8086610640&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.388558.16817797825" \l "n5) Moreover, the U.S. ratification makes exceptions for all ICCPR provisions that set more protective human rights standards than those currently recognized under U.S. law. Therefore, even assuming that the U.S. has satisfied the international standards for ratification of the ICCPR in a technical sense, that ratification is not meaningful in terms of extending the human rights of people in the U.S.

In order to bridge the gap between the exception-ridden ratification of the U.S. and the human rights standards in the ICCPR, Congress should pass corrective legislation. For example, the proposed International Human Rights Conformity Act of 1992, although not correcting every respect in which U.S. law fails to conform with international human rights standards, would achieve substantial U.S. compliance with the ICCPR. [n6](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1260159734883&returnToKey=20_T8086610640&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.388558.16817797825" \l "n6)

The central point of this article is that meaningful U.S. ratification [n7](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1260159734883&returnToKey=20_T8086610640&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.388558.16817797825" \l "n7) of the rights-enhancing provisions of the covenants would be a significant step in fostering human rights in the U.S. That conclusion follows from the fact that, in certain important respects, international human rights norms are more rights-protective than the corresponding domestic law standards. As the Rehnquist Court continues to construe domestic human rights norms in an increasingly narrow fashion, the situations in which international standards afford more protection will increase. Therefore, it behooves U.S. human rights activists to seek the incorporation of international human rights norms into domestic law. Even if the U.S. does not ratify the covenants, U.S. human rights lawyers should urge U.S. courts to rely on more rights-protective international human rights standards through the doctrine of unwritten or "customary" international law. To the extent that international standards are less protective of human rights than their domestic counterparts, the U.S. should not incorporate them into U.S. law; international human rights precepts should be invoked only to expand, and not to curtail, Americans' human rights. [n8](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1260159734883&returnToKey=20_T8086610640&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.388558.16817797825" \l "n8)

#### Congressional declarations of self-executing treaties solve

**Carpenter, 2k**—Assistant Professor of Law at Stetson University (Kristen, 26 N.C.J. Int'l L. & Com. Reg. 1, “The International Covenant on Civil and Political Rights: A Toothless Tiger?,” lexis)

The United States' issuance of a valid declaration that the International Covenant on Civil and Political Rights is to be  [\*53]  deemed non-self-executing precludes an across-the-board application of the Covenant in United States courts at this time. Indeed, perhaps the best long-term solution is a political one, in which Senators are urged to allow treaties to provide the rights and protections they promise, by either declaring that they are to be self-executing or by refraining from declaring that they are not and permitting the courts to decide this issue. In the meantime, the task remains to determine what effect the Covenant may appropriately have in United States courts today. Currently, consistent with both the Senate Declaration and the body of case law that has developed in this area, the Alien Tort Claims Act may be used to provide alien plaintiffs with a cause of action under the International Covenant. [n169](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1256376341832&returnToKey=20_T7682650432&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.49991.050908736346" \l "n169) When suit is brought against alien defendants, it should be approached under the customary international law prong of the Act; when suit is brought against United States defendants, the treaty prong of the Act should be employed. One possible area in which this approach, though insufficient to provide a global solution, may be expanded is by further exploring the extent to which plaintiffs other than foreign citizens, such as Native Americans, might fall within the Act's definition of "alien." Ultimately, I hope that by showing that the best use of the International Covenant at this time is an incomplete solution that compromises the intent of the treaty, this article will encourage reform in the United States' flawed treaty-making process to effectuate fairer and more humane results in the future.

#### Support for international law requires a balance—defering to Congressional interpretation and not setting a precedent is the only way to avoid a backlash that is net worse

**Young, 05—**professor of law, University of Texas (Ernest**, “**INSTITUTIONAL SETTLEMENT IN A GLOBALIZING JUDICIAL SYSTEM,” 54 Duke L.J. 1143, lexis)

Failure to develop thoughtful accommodations between supranational and domestic institutions will undermine international law, especially in a community like the U.S. that is already ambivalent about constraints on national sovereignty. Speaking of cases like Loewen, for example, Renee Lettow Lerner has observed that "our desire for international trade is starting to collide with our unusual (by international standards) system of civil justice, and that collision may generate tension that saps support for international trade agreements." [n463](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265850138398&returnToKey=20_T8533601300&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.882078.0951306019" \l "n463) And the U.S.'s recent withdrawal from the Vienna Convention's dispute resolution protocol in the wake of Avena demonstrates this risk of backlash in the most concrete way. [n464](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265850138398&returnToKey=20_T8533601300&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.882078.0951306019" \l "n464) Demonstrably workable accommodations, by contrast, should allay  [\*1260]  fears about the loss of sovereignty and to build public confidence in international institutions. To be sure, both nationalist opponents and internationalist proponents of international norms have something to lose in this sort of compromise. But the benefit of the bargain is a stronger, if more moderate, international law.

#### Judicial incorporation of international law spurs a massive public and Congressional backlash

Sanchez 05 (Ernesto, J.D. University of Pennsylvania, 2004, ASIL member and law clerk at the U.S. Court of Federal Claims, December, 38 Conn. L. Rev. 185, lexis)

Proponents of the internationalist approach to constitutional interpretation that such cases as Lawrence and Roper illustrated would do well to consider whether this prospect is truly consistent with the concept of a sovereign nation. Judges who choose to use their power to pick and choose foreign legal principles to impose on the American people **may face a well-deserved backlash from at least some segments of the general population.**

These sorts of crises are not unprecedented. One recent news article noted that many representatives and senators regard recent Supreme Court decisions as unconstitutional and unwarranted usurpations of power that only legislators may rightfully exercise. 259 And what members of a certain generation of attorneys can forget the popular movement, which some congressmen and senators supported, to impeach Earl Warren and William O. Douglas, who were supposedly guilty of the crime of excessive judicial activism? Yet **to ask Americans to put up with court decisions because foreigners happen to approve of them would risk a far greater backlash**. As Professor Jeremy Rabkin of Cornell University has stated:

We implicitly appeal to our citizens to put up with court rulings they find objectionable in the interest of maintaining a common constitutional framework. [Accordingly,] **it is a big leap** beyond this understanding to ask Americans to put up with a ruling because it is what foreigners happen to approve. 260

#### the backlash is empirically true in a more limited context—it creates Congressional legislation that turns any future productive international law effects—the plan is net worse for international law and judicial independence

**Margulies, 09**—professor of law at Roger Williams University (Peter, 57 Buffalo L. Rev. 347, “The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror”, April, lexis)

Crossover advocacy involving international or foreign forums can also spark mobilization for opposing forces with greater power. Advocacy fails if addressing one problem creates an even more formidable obstacle. Unfortunately, here, as elsewhere, the temporal discounting deficit plays a substantial role, encouraging advocates to overweigh immediate success and underestimate the consequences of backlash.

To illustrate how a predictable response by the political branches can make matters worse for those similarly situated to clients, consider the 1990s Haitian HIV litigation involving Guantanamo. In part because the lawsuit brought by the Center for Constitutional Rights (CCR) and the Yale Human Rights Clinic raised the profile of Haitian refugees and immigrants with HIV, the political branches took two momentous steps. First, Congress expressly wrote into the Immigration and Nationality Act (INA) an exclusion for people with HIV. [n255](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n255) Second, the executive branch expanded its policy of interdicting vessels carrying Haitians on the high seas, and summarily returning passengers to Haiti. [n256](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n256) Although precursors to these policies had been in place at the beginning of the lawsuit, action by Congress and the president made the policies far more pervasive. [n257](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n257) The publicity generated by  [\*419]  the lawyers in the case helped to free the detainees, but also galvanized an adverse political response with significant long-term adverse effects for prospective immigrants with HIV and refugees. Unfortunately, the self-serving bias impeded advocates' ability to appreciate that their own well-intentioned efforts had contributed to these adverse consequences. As another example, consider recent efforts by CCR to initiate legal proceedings against former Defense Secretary Rumsfeld and others through the invocation of universal jurisdiction in France and Germany. [n258](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n258) The argument for such efforts is that they create accountability for senior officials who made decisions that violated rights and hurt America's reputation. The downside of such efforts, however, is that they have a counter-productive effect on mobilization domestically. An effective transition from the monolithic approach of the post-9/11 period requires a consensus between different political factions. Recourse to universal jurisdiction will not further a consensus of this kind. Indeed, recourse to universal jurisdiction and international forums too often discounts the importance of domestic political participation. Federalism, for example, is a powerful political force domestically that also carries weight in the American legal system, but receives far less recognition in international forums. [n259](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n259)  [\*420]  Using these forums to try Americans will not encourage political participation aimed at a progressive consensus; indeed, such measures will encourage a domestic political backlash. Asserting universal jurisdiction in foreign tribunals will often set up an "us versus them" dialectic that will discredit forces for change at home. [n260](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n260) It may also encourage officials to stay in power, rather than retire gracefully, thus making for more volatile legal and political processes and rockier transitions. [n261](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n261)

Finally, crossover advocates seeking accountability for United States officials from another sovereign's tribunals may underestimate the ability and inclination of Congress to reject international obligations. [n262](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n262) Congress has this power under the last-in-time rule. [n263](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n263) Legislative measures would create grave obstacles to adjudication in foreign tribunals. [n264](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n264) Even more seriously, a political backlash could target international law remedies currently available in American courts. [n265](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n265) Unfortunately, even the most able  [\*421]  crossover advocates sometimes fail to appreciate that mobilization is a two-way street: advocates who sharpen their mobilization game inspire adversaries to do the same. [n266](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1265849848033&returnToKey=20_T8533574355&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.194439.00644419043" \l "n266)

### 2NC – A2 – Perm Do Both

#### Link to all court DA + question of magnitude

#### The plan and permutation create an independent judicial role in enforcing international law

Wu, 07 - Professor, Columbia Law School (Tim, 93 Va. L. Rev. 571, “TREATIES' DOMAINS”, lexis)

Congressional breach poses more complicated problems for the judiciary. Unlike with respect to the States, the Supremacy Clause does not clearly command courts to prevent Congressional breach of treaties. Instead, the judiciary shares the job of treaty enforcement with Congress (and also with the President, as discussed below). In addition, Congress has the power, accepted since at least 1798, to terminate, or repudiate, treaty obligations altogether.

When Congress acts inconsistently with a U.S. treaty obligation, the rule of deference has been clear: the judiciary refuses to enforce the treaty independently. [n45](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1260159135474&returnToKey=20_T8086556005&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.828285.2806508485" \l "n45) Arguably, in the realm of treaty enforcement, Congress is an alternative, and perhaps predominant, enforcement agency for American treaties. That is not to say that Congress enforces treaties in the usual legal sense of the term but rather that Congress enforces them through implementation. By passing implementing legislation, Congress can decide how it wants a particular treaty to be enforced in the United States. The judiciary, in turn, looks for signs that Congress has taken charge of treaty enforcement in a given area. That can be evidenced most clearly by the passage of implementing legislation, but sometimes the passage of prior legislation in a field can demonstrate that  [\*588]  Congress has exerted its control over an area of treaty enforcement. [n46](http://www.lexisnexis.com.proxy.library.emory.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1260159135474&returnToKey=20_T8086556005&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.828285.2806508485" \l "n46) In either case (more obviously the former), potential inconsistency with the treaty represents a Congressional choice.

#### simulataneous action links - only prior Congressional approval solves the link

**Christenson 97** (Gordon, University Professor of Law @ University of Cincinnati, Summer, 6 J. Transnat'l L. & Pol'y 405)

In an era of world civil society, however, programs encouraging federal judges to use the sources of customary international law (which include writings of academics as well as state practice and decisions of international tribunals) as formal authority for U.S. law, which binds all judges under the supremacy clause of the Constitution without approval first by the appropriate political branches, is **likely to encounter profound resistance**. More valuable would be a judicial architecture for making decisions in each phase of transnational civil litigation involving foreign and domestic parties whose interests are determined from their international scope and perspectives. 145 Even more important would be a critical analysis of some of the more obvious biases in judicial presumptions and attitudes about the use of international law and treaty interpretation in practical decision-making. 146

#### Independent judicial interpretation of international law undermines Congressional treaty power

**Neuman, 04** (Gerald, professor of jurisprudence at Columbia University, 98 A.J.I.L. 82, “THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW: The Uses of International Law in Constitutional Interpretation”, January, lexis)

Normative reasoning borrowed from international human rights sources will not necessarily prevail in the process of constitutional interpretation. Other normative considerations omitted there may be relevant, and consensual and institutional factors may also come into play. The Court may conclude that the normatively compelling interpretation of a right cannot be adopted at the constitutional level but, rather, should await political implementation. I emphasize again that the international human rights regime does not call for implementation at the constitutional level, only compliance. Thus, the Supreme Court has reason to examine international human rights norms and decisions interpreting them for the normative and functional insights that they may provide on analogous issues of constitutional right. They certainly cannot control constitutional interpretation, but they may inform it.

The use of human rights treaties as an aid in construing constitutional rights might seem superficially in tension with the Supreme Court's reassurance in Reid v. Covert that the treaty power cannot be employed to violate constitutional rights. [31](http://web.lexis-nexis.com.proxy.library.emory.edu/universe/document?_m=bada676bb4baa725951323fc4072765a&_docnum=1&wchp=dGLbVlz-zSkVA&_md5=9e0b9b4819b1f34f50ef18d67ad4845a#n31) That appearance should dissolve on closer examination. The treaty makers cannot override constitutional norms, and they cannot order the Supreme Court to alter its interpretation of a constitutional provision. [32](http://web.lexis-nexis.com.proxy.library.emory.edu/universe/document?_m=bada676bb4baa725951323fc4072765a&_docnum=1&wchp=dGLbVlz-zSkVA&_md5=9e0b9b4819b1f34f50ef18d67ad4845a#n32) But treaties, like legislation, can contribute to a shift in the factual, institutional, and normative environment within which the Court carries on its task of constitutional interpretation. The resulting doctrinal evolution is unavoidable in any candid account of U.S. constitutional history. Nothing in Reid v. Covert and its progeny precludes this indirect influence of treaty making on constitutional law. Treaties and the case law arising under them thus become data available for the Court's consideration in elaborating the contemporary meaning of constitutional norms. The political branches can neither require the Court to follow international or foreign law in interpreting the Constitution nor prohibit the Court from considering international or foreign law. Under current circumstances, the Supreme Court correctly does not engage in the practice, pursued by some other constitutional courts, of construing constitutional rights for the purpose of judicially implementing the positive international obligations of the nation under human rights treaties. The positive effect of treaty norms differs from the moral or functional insight that they may provide. Human rights treaties do not require implementation at the constitutional level, and in the U.S. legal system Congress retains ultimate control over the means of implementing--or breaching--a treaty. Entrenching positive human rights standards as  [\*89]  constitutional interpretation, for the purpose of ensuring compliance with the treaty as such, would deprive the political branches of their authority to choose methods of treaty implementation, and would not be consistent with current constitutional understandings. [33](http://web.lexis-nexis.com.proxy.library.emory.edu/universe/document?_m=bada676bb4baa725951323fc4072765a&_docnum=1&wchp=dGLbVlz-zSkVA&_md5=9e0b9b4819b1f34f50ef18d67ad4845a#n33)

## ROL

### 2NC – Uniqueness

#### Afghanistan stability is at risk. Lack of clear signal of US commitment bungles the withdrawal process

Allen et al.13—Former Commander of the NATO International Security Assistance Force and U.S. Forces-Afghanistan (2011-2013) [General John R. Allen, USMC (Ret.); Michèle Flournoy (Co-Chair of the Board of Directors of the Center for a New American Security. Former Under Secretary of Defense for Policy from (2009-2012) & Michael O’Hanlon (Senior fellow in Foreign Policy Studies @ Brookings Institution), “Toward a Successful Outcome in Afghanistan,” Center for a New American Security, May 2013]

Conclusion: 2015 and Beyond

With his decision to reduce U.S. forces in Afghanistan by half between February 2013 and February 2014, President Obama answered most remaining questions about American military strength in Afghanistan through the end of the ISAF mission in December 2014. Most of the planned reductions from the current strength of some 66,000 American troops to 34,000 will occur this upcoming fall and winter. After that, the force levels will probably hold relatively steady through the Afghan elections in April and perhaps a bit longer, before the drawdown to the “Enduring Force” begins in late summer or fall of next year. Already, the U.S. force presence is focused on supporting the ANSF—American brigade combat teams and Marine regiments have been replaced now by security force assistance brigades, which essentially oversee, support and help enable the work of individual small-unit security force assistance teams working with individual Afghan units.

But there are still a number of critical questions to be worked through, some military and others political.

Specifically:

• What will the Enduring Force do and how large should it be in 2015 and beyond?

• Should the United States move straight to the Enduring Force, or have a somewhat larger “bridging force” for two to three years after 2014?

• How many allied forces are needed? What is politically realistic in various foreign capitals, especially in Europe?

• Should the ANSF be sustained at the level of 352,000 personnel beyond 2015? Say, to 2018 or 2020?

• What should come first, a clear U.S. commitment to a given Enduring Force (premised on reasonable Afghan elections and governance), or a deal on legal immunity for American troops through the so-called Bilateral Security Accord?

On the last point, we favor stating the rough contours of an American force soon. Actual deployment of any such force would of course be contingent on an acceptable immunity/status of forces agreement down the road. But clarifying the U.S. commitment would make it clear to Afghans that only their own reluctance, and specifically that of the Karzai government, stands in the way of firming up the partnership. Given Afghanistan’s historical fear of abandonment, we believe the psychology of such a clear American commitment of intent would be all to the good. It would also help persuade NATO allies to firm up their own plans. This does not mean that the United States should convey impatience to conclude a Bilateral Security Accord on a rushed basis, which would potentially weaken Washington’s negotiating position (since some Afghans wrongly believe that the United States desperately wants bases on their nation’s territory for broader regional purposes in multiple directions). But being clear about the nature of our commitment would serve American national security interests if Afghans do their part, too.

As for what the Enduring Force package should include, the United States needs several things as a matter of prudence. First, there should be enough force to advise and assist the ANSF effectively, including geographic distribution to cover the ANA corps in Kabul and the “four corners” of the country, and capacity to get below the Afghan Corps level with mobile teams if necessary, to support Afghan brigades in pre-operational preparations, and should problems develop here or there.

In the country’s north and west in particular, there should be enough enablers to keep U.S. allies in the game, as their logistics capabilities are not adequate to sustain small forces without modest U.S. help. (Germany and Italy seem ready to step up with their contributions, for example, but need assurance of certain U.S. support.) Of course the United States needs counterterrorism capabilities, for strikes within Afghanistan or in some cases along the border. Finally, for two to three years after 2014, the United States may need an additional force package of several thousand personnel to help the Afghans finish building their air force, their special operations forces and certain other enablers in medical realms, in counter-IED capability and in intelligence collection. This might be viewed as an additional bridging force, above and beyond the Enduring Force.

To achieve this, the United States should deploy an Enduring Force sized and shaped for these tasks after 2014. It is not our purpose to recommend a specific figure now, and in fact a band of numbers is probably acceptable, as suggested by some of the parameters staked out in the recent public debate on this subject—though greater risk would be associated with smaller force sizes. With clear U.S. commitments, allies would likely contribute an additional 3,000 to 5,000 uniformed personnel themselves.

Despite the near-term challenges in realms ranging from security to corruption to narcotics to difficult neighbors, we are fundamentally optimistic about Afghanistan’s mid- to long-term future. The greatest cause for hope is the next generation. Youth make up 60 percent of Afghanistan’s population, and they are being educated in unprecedented numbers. Some 180,000 students are in university this year, with nearly 10 million overall in school. Beyond the numbers, there is the passion, the commitment, the patriotism and the resilience that distinguishes this community of remarkable individuals, many of whom we have been lucky to meet and work with through the years.

In Afghanistan, many of these next-generation leaders have formed a “1400 group,” based on the Afghan Islamic calendar (it is now 1392, so 1400 is roughly the time when this new generation will begin to step up to run the nation). They include individuals who left Afghanistan during the wars of the last 30 years, as well as some who stayed; they include activists and members of civil society, as well as professionals and technocrats; they include Pashtuns and Tajiks and Hazaras and Uzbeks and others, though all tend to see themselves first and foremost as Afghans. And it is their own country that they now want to rebuild. Most encouraging, perhaps, is the growing role of women in Afghan society. Girls make up about 40 percent of this new generation of students, and women are an increasingly important voice speaking on behalf of minority rights, countering corruption and embracing the rule of law. From our experience in other post-conflict societies, countries able to assimilate women into the mainstream of society were far better able to transition into developing societies. Without the Afghan women playing a major role in the future of Afghanistan, we are not optimistic real reform can occur in this traditional society.

Despite its promise, one cannot forget, of course, that Afghanistan will remain one of the poorest, least developed and more corrupt countries in the world for years to come. But the United States and its partners, which have invested and sacrificed so much, have a chance to ensure that the land of the Hindu Kush does not return to being a safe haven for international terrorists and that it stays on the path toward greater stability, as well as human and economic development. Compared to what the international community has collectively invested already, in blood and treasure, the costs associated with this future effort to lock in gains seem a wise investment. Pg. 12-14

#### US is positioned well t meet it core objectives is Afghanistan. Their ev is media speculation by people who are not on the ground – only changing the policy can cause collapse

Allen et al.13—Former Commander of the NATO International Security Assistance Force and U.S. Forces-Afghanistan (2011-2013) [General John R. Allen, USMC (Ret.); Michèle Flournoy (Co-Chair of the Board of Directors of the Center for a New American Security. Former Under Secretary of Defense for Policy from (2009-2012) & Michael O’Hanlon (Senior fellow in Foreign Policy Studies @ Brookings Institution), “Toward a Successful Outcome in Afghanistan,” Center for a New American Security, May 2013

Although media coverage of the war has led many Americans to believe that Afghanistan is a lost cause, this is not the case. It is true that the war has been a long, hard slog, by far the longest in U.S. history (and three times as long for Afghans as for Americans, since today’s fight logically connects back to the Soviet invasion in 1979). It is also true that the U.S./NATO-led mission has achieved only partial results, when measured against the initial goals of President George W. Bush during his stewardship of the war effort or the goals of President Barack Obama early in his time in office. Leaving aside former Secretary of Defense Robert Gates’ apt warning that the United States would not achieve “Valhalla” in the Hindu Kush, there have been far more fundamental problems. In particular, corruption in Kabul has remained very serious, Pakistan’s cooperation with the war effort has been fickle and the enemy has proved quite resilient.

However, the United States has wound up with a reasonable “Plan B” for achieving its core objective of preventing Afghanistan from once again becoming a safe haven for al Qaeda and its affiliates. This plan is not guaranteed to work, of course, and whatever its short-term gains, it cannot hold up over time unless there is at least some further progress on the broader political and strategic challenges mentioned above. But in fact, the development of the Afghan security forces, combined with the gradual emergence of a new generation of remarkable Afghan reformers working across many sectors of society, hold out great hope for this troubled land.

While the surge has not achieved everything originally envisioned, the United States can still likely meet its fundamental objectives by continuing to work with partners to degrade the Taliban-led insurgency and create a strong enough Afghan state to hold the country intact. President Obama has been careful to articulate a clear and limited set of objectives for Afghanistan, and these are still largely within reach—even if at greater cost and with somewhat more fragility than initially hoped. Future American policy should therefore be motivated not by a desire to cut losses but with a determination to loc in hard-fought gains.

The Security Situation

Although the Taliban insurgency remains resilient, particularly in the east and south, and though it retains its sanctuary in Pakistan, its momentum on the ground in Afghanistan has stalled. The insurgency is still capable of high-profile suicide bombings, small-scale attacks and intimidation tactics at the local level, but it has not succeeded in winning over Afghan hearts and minds or expanding control and influence over the country’s major populated areas.

Moreover, the Taliban’s shift to more brutal tactics, such as assassinations of Afghan officials and perceived government or foreign collaborators, is having a polarizing impact. Specifically, it is engendering harsh retaliation measures by some Afghan power brokers and creating the conditions for anti- Taliban uprisings. These include local movements in places such as Zhary and Panjwa’i, in western Kandahar province, and Andar, in Ghazni province between Kabul and Kandahar.

At this stage of the war, the central security question is: Have the United States and its partners degraded the Taliban enough and built the Afghan National Security Forces (ANSF) to be strong enough so the insurgency no longer poses a threat of overrunning the central government? The short answer is: yes, for the most part, though there is still a ways to go. Some 80 percent of the population is now largely protected from Taliban violence, which is increasingly limited to the country’s more remote regions.

Nearly half of the country’s violence is concentrated in just 17 of the country’s 400 or so districts. In addition, almost all of the country’s major cities are now secured by the Afghan security forces rather than foreign troops—and the biggest cities have all seen substantial further improvements in security in the last year. Life is generally buzzing in these places; the war is a concern, but not the predominant reality in people’s daily lives. Pg. 5-6

### 2NC – Link

#### Wartime will force Obama to resist. The intractable battle creates a national diversion and impairs military wartime decisions

Lobel 8—Professor of Law @ University of Pittsburgh [Jules Lobel, “Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War,” Ohio State Law Journal, Vol. 69, 2008, pg. 391]

The critical difficulty with a contextual approach is its inherent ambiguity and lack of clarity, which tends to sharply shift the balance of power in favor of a strong President acting in disregard of congressional will. For example, the application of the Feldman and Issacharoff test asking whether the congressional restriction makes realistic sense in the modern world would yield no coherent separation of powers answer if applied to the current Administration’s confrontation with Congress. It would undoubtedly embolden the President to ignore Congress’s strictures. The President’s advisors would argue that the McCain Amendment’s ban on cruel and inhumane treatment, or FISA’s requirement of a warrant, does not make realistic sense in the context of the contemporary realities of the war on terror in which we face a shadowy, ruthless nonstate enemy that has no respect for laws or civilized conduct, a conclusion hotly disputed by those opposed to the President’s policies. Focusing the debate over whether Congress has the power to control the treatment of detainees on the President’s claim that the modern realities of warfare require a particular approach will merge the separation of powers inquiry of who has the power with the political determination of what the policy ought to be. Such an approach is likely to encourage the President to ignore and violate legislative wartime enactments whenever he or she believes that a statute does not make realistic sense—that is, when it conflicts with a policy the President embraces. 53

The contextual approach has a “zone of twilight” quality that Justice Jackson suggested in Youngstown. 54 Often constitutional norms matter less than political realities—wartime reality often favors a strong President who will overwhelm both Congress and the courts. While it is certainly correct— as Jackson noted—that neither the Court nor the Constitution will preserve separation of powers where Congress is too politically weak to assert its authority, a fluid contextual approach is an invitation to Presidents to push beyond the constitutional boundaries of their powers and ignore legislative enactments that seek to restrict their wartime authority.

Moreover, another substantial problem with a contextual approach in the war powers context is that the judiciary is unlikely to resolve the dispute. 55 The persistent refusal of the judiciary to adjudicate the constitutionality of the War Powers Resolution strongly suggests that courts will often refuse to intervene to resolve disputes between the President and Congress over the constitutionality of a statute that a President claims impermissibly interferes with her conduct of an ongoing war. 56 This result leaves the political branches to engage in an intractable dispute over the statute’s constitutionality that saps the nation’s energy, diverts focus from the political issues in dispute, and endangers the rule of law.

Additionally, in wartime it is often important for issues relating to the exercise of war powers to be resolved quickly. Prompt action is not usually the forte of the judiciary.

If, however, a constitutional consensus exists or could be consolidated that Congress has the authority to check the President’s conduct of warfare, that consensus might help embolden future Congresses to assert their power. Such a consensus might also help prevent the crisis, chaos, and stalemate that may result when the two branches assert competing constitutional positions and, as a practical matter, judicial review is unavailable to resolve the dispute.

Moreover, the adoption of a contextual, realist approach will undermine rather than aid the cooperation and compromise between the political branches that is so essential to success in wartime. In theory, an unclear, ambiguous division of power between the branches that leaves each branch uncertain of its legal authority could further compromise and cooperation. However, modern social science research suggests that the opposite occurs. 57 Each side in the dispute is likely to grasp onto aspects or factors within the ambiguous or complex reality to support its own self-serving position. This self-serving bias hardens each side’s position and allows the dispute to drag on, as has happened with the ongoing, unresolved dispute over the constitutionality of the War Powers Resolution. Pg. 407-409

#### War powers stalemate signals a lack of commitment and emboldens our adversaries

Kahn 2k—Professor of Law and Humanities @ Yale Law School [Paul W. Kahn, “"War Powers and the Millennium" Faculty Scholarship Series, Paper 328, 2000, http://digitalcommons.law.yale.edu/fss\_papers/328]

With respect to foreign affairs, however, these techniques of congressional decision-making work poorly. The differentiation that marks the parties as distinct and separate, and is domestically an initial step toward compromise, serves the same differentiating function in foreign policy, but there it tends to freeze party positions. Treaties come before the Senate too late in the process for compromise to be an option, particularly when they are multiparty covenants.62 Moreover, compromises can look like concessions of U.S. interests to foreign states, rather than a distribution among competing elements of the polity. Nor is there a great deal of pressure to compromise. Rejecting foreign policy initiatives is a way of preserving the status quo, and preserving the international status quo is rarely a policy for which one is held politically accountable. It is hard to make an issue out of a failure to change the conditions that prevail internationally, when the country is enjoying power, prestige, and wealth. Unable to compromise, the Senate can end up doing nothing, and then treaty ratification fails. Difference leads to stalemate, rather than to negotiation. The problem is greatly exacerbated by the two-thirds requirement for ratification.63 This structural bias toward inaction accounts in part for the use of executive agreements in place of treaties.64 These agreements make use of some of the tactical advantages of presidential initiative. Many of the structural problems remain, however, when executive agreements require subsequent congressional approval.

If the issue involves the use of force, compromise is particularly difficult. A compromise that produces a less substantial response to a foreign policy crisis can look like a lack of commitment. Disagreement now threatens to appear to offer an “exploitable weakness” to adversaries. Congress cannot simply give the president less of what he wants, when what he wants is a military deployment. There cannot easily be compromises on a range of unrelated issues in order to achieve support for a military deployment. While that may happen, it has the look of disregard for the national interests and of putting politics ahead of the public interest. Nor can Congress easily adopt the technique of the expert commission.65 The timeframe of a crisis usually will not allow it. More importantly, the military— particularly in the form of the Joint Chiefs of Staff—has already preempted the claim of expertise, as well as the claim to be “apolitical.” Finally, there is little room for the private lobbyist with respect to these decisions.

Congress, in short, is not capable of acting because it only knows how to reach compromise across dissensus. When disagreement looks unpatriotic, and compromise appears dangerous, Congress is structurally disabled. This produces the double consequence for American foreign policy of a reluctance to participate in much of the global development of international law—outside of those trade and finance arrangements that are in our immediate self-interest— and a congressional abdication of use of force decisions to the president.The same structural incapacities are behind these seemingly contradictory results. Pg. 27-30

#### Restriction on authority risks a constitutional crisis and military paralysis.

Posner & Vermeule 7—Professor of Law @ The University of Chicago & Professor of Law @ Harvard Law School [Eric A. Posner & Adrian Vermeule, “Constitutional Showdown,” University of Chicago Law School, John M. Olin Law & Economics Working Paper NO. 348, July 2007, pg. http://ssrn.com/abstract\_id=1002996]

So far, we have explained why the president and Congress might disagree about when to terminate the war, but mere policy disagreement does not result in a showdown. Showdowns arise only when there is a disagreement about authority. If Congress believes that the president has the sole authority to terminate the war, then his view will prevail. Congress may try to pressure him or influence him by offering support for other programs desired by the president, or by trying to rile up the public, but these activities are part of normal politics, and do not provoke a constitutional showdown. Similarly, if the president believes that Congress has the sole authority to terminate the war, then Congress’s view will prevail. This outcome is shown in cell (3) in Table 1. Similarly, no showdown occurs when the two branches agree both about authority and policy—for example, that the president decides, and Congress agrees with his decision (cell (1)). The first column represents the domain of normal politics.

Showdowns can arise only when Congress and the president disagree about who decides. Here, there are two further possibilities. First, Congress and the president disagree about who decides but agree about the correct policy outcome (cell (2)). In these situations, which arise with some frequency, the two branches are often tempted to paper over their differences because an immediate policy choice is not at stake. But sometimes a showdown will occur. We will discuss this special case in Part II.B. Second, Congress and the president disagree about the policy outcome and about authority (cell (4)). In this case, showdowns are likely, because a policy decision must be made, and if the parties cannot agree about what it should be, then they cannot avoid resolving the question of authority. We focus on this case for now.

Why showdowns occur. In our war example, Congress and the president disagree about when the war should end, and who should make the decision. Let us suppose that they can both make reasonable constitutional arguments, and that the judiciary will not step in to resolve the dispute. What happens next? If each branch asserts its power, we have a full-blown constitutional crisis. No ordinary political or legal means exists for resolving the dispute. Consider how this crisis might play out. One possibility is that Congress enacts a law declaring the war at an end, and the president directs the military to disobey the law. The military would need to decide whether to obey the president or Congress. The military might make this decision on the basis of a good-faith legal analysis, or it might not. Whether or not it does, there is a further question whether soldiers would obey the decisions of the generals, and the public would support the decisions of the soldiers. The soldiers might fear that if the generals take an unlawful stance, the soldiers might subsequently be found guilty of committing crimes. And even if they do not, they might fear that the public might fault them for obeying (or disobeying) the generals. A great deal of delay and paralysis could result as people decide for themselves what they ought to do. But eventually only two outcomes are possible. One is that the nation divides into factions and a civil war erupts—a real possibility in many countries, but one sufficiently remote in the United States today that we can safely ignore it. The other is that through the mysterious process by which public opinion forms, the public will throw its weight behind one branch or the other, and the branch that receives public support will prevail. Pg. 14-15

#### Showdown paralyzes the military. The dispute will spillover

Posner & Vermeule 7—Professor of Law @ The University of Chicago & Professor of Law @ Harvard Law School [Eric A. Posner & Adrian Vermeule, “Constitutional Showdown,” University of Chicago Law School, John M. Olin Law & Economics Working Paper NO. 348, July 2007, pg. http://ssrn.com/abstract\_id=1002996]

The cost of a showdown is simply that the government does not act—or, more precisely, that the energy of government officials is diverted from the problem at hand to the problem of asserting authority (in the case of top officials) or the problem of ascertaining the lines of authority (in the case of subordinate officials). Top officials stop arguing about whether the war should be terminated, a question involving difficult judgments about troop strength, home-front morale, and so forth, and start arguing about who should have the authority to terminate the war, a question involving difficult judgments about relative institutional advantage in conducting wars. Subordinate officials, like generals and soldiers, must make predictions about how the argument about top officials will be resolved. If they guess wrong, they could find themselves in trouble for disobeying the institution that ends up winning the showdown. Subordinate officials might end up acting excessively cautiously, so as to avoid offending the different authorities, or allowing policy and military judgments to be influenced by their implications for the resolution of the conflict about authority, to the extent that subordinate officials have preferences regarding it. And a showdown over one issue, like executive privilege, might metastasize, as each side refuses to cooperate in other policy dimensions (appointments, budgets, other areas of substantive legislation) until the other backs down with respect to the original source of dispute. Pg. 21-22

#### “Say Yes” is no better. It triggers US isolationism

Kahn 2k—Professor of Law and Humanities @ Yale Law School [Paul W. Kahn, “"War Powers and the Millennium" Faculty Scholarship Series, Paper 328, 2000, http://digitalcommons.law.yale.edu/fss\_papers/328]

If the president is publicly accountable, then it is not necessarily the case that Congress’s failure has produced a sort of democracy deficit. Indeed, our most compelling problem today is not democratic accountability for the use of force, but Congress’s structural weakness in assessing American participation in an emerging global order. To insist that the constitutional text requires congressional approval of any commitment of American military forces that places them at risk would put the war-declaring function in the same position as the treaty-making function. The consequence would be an effective withdrawal of American forces from an active international role.

One unfortunate consequence of our domestic, ideological wars of the ’60s and the ’70s, and particularly of our experience over Vietnam, is an academic tendency to argue for the further democratization of use of force decisions. This is the lens through which the war-declaring power of Congress is viewed. For the reasons sketched above, however, the political and institutional underpinnings for such a view are unrealistic. More importantly, we are already at a point at which there is too much “public accountability,” given the ends for which force is deployed today. The democratization of the war powers is a Cold War agenda that no longer makes sense in a post-Cold War era. To understand this we have to investigate the changing character of the international legal order. Pg. 32

#### That coalition will trigger “Zero Option”. Residual force is currently the preferred choice

Laurenti 13—Senior fellow of international affairs @ The Century Foundation [Jeffrey Laurenti (Former director for TCF’s international task force on Afghanistan and Former deputy director of the UN and Global Security initiative), “Afghan 'Zero' Option Moves Front But Not Center,” Huffington Post, Posted: 07/11/2013 12:51 pm, pg. http://tinyurl.com/lz44nrn]

President Obama's determination to keep on the table the so-called "zero option" of a complete withdrawal of all American military forces from Afghanistan next year is not simply a bargaining ploy to bring to heel the country's mercurial president, Hamid Karzai, as readers of the New York Times this week might imagine. There are policy reasons for a complete military departure the president could find persuasive.

Yet at this point, he would do well to leave that option on the table. The case for leaving a "residual" military presence in the country, not for combat but for training and emergency back-up, is still the stronger.

Decisions on the size and capabilities of any residual American force remain linked to the successful conclusion of a bilateral security agreement between Washington and Kabul, on which Karzai suspended negotiations in the wake of the debacle over the opening of the Taliban office in Qatar. The Afghan leader's petulance, however, has only reinforced the appeal to Obama of making a clean break, and the failure of the U.S. military campaign over many years to meet the promises of commanders to eradicate the insurgency has understandably made him skeptical about their assessments on force levels.

So far only Germany and Italy have committed to maintaining residual forces after the International Security Assistance Force mandate runs out late next year, and even they have been assuming there will be a complementary American presence they can rely on if things really get ugly. U.S. military commanders have reportedly pressed for 20,000 American troops to stay on -- a troop level the Bush administration only reached in 2006, four years into the U.S. war. The White House plainly isn't interested in a Bush war-fighting troop level, and is said to be looking at a number under 10,000 -- or then again, zero. And talk of zero is galvanizing antiwar activists in the president's Democratic base.

#### Antiwar movement will push for “Zero Option”. It will cause an Afghani civil war.

The Economist 13 [“Why zero is not an option,” Jul 20th 2013, pg. http://tinyurl.com/nwzgvs4

The immediate cause of the row is last month’s bungled opening of a Taliban political office in Doha. It is not clear who is to blame for allowing the Taliban to grandstand by flying their own flag and claiming the office as the embassy of the “Islamic Emirate of Afghanistan”. But Mr Karzai was quick to accuse America—unfairly—of sidelining his government in a peace process that is meant to be Afghan-led. He angrily suspended negotiations over the bilateral security agreement that is needed to keep a residual American force in Afghanistan after the combat troops have left. A video conference with Mr Obama failed to clear the air. Since then, an exasperated White House has hinted that the pace of the planned drawdown may be accelerated and that there is a real possibility of no troops at all being left behind after 2014—the “zero option”.

Both sides are taking up positions that risk damaging what should be their real objectives. From Afghanistan’s point of view, the bilateral pact with America and a related “status of forces agreement” with NATO are essential for stability, as they would define the role and legal standing of international troops after 2014. Afghan National Security Forces are now leading the fight against insurgents in all parts of the country, and they are acquitting themselves well. However, they still need assistance with logistics, air support, intelligence, medical evacuation and dealing with improvised explosive devices (see article). Denying Afghan soldiers this help would damage their morale, while encouraging the Taliban to believe that time is on their side. It does not mean that the Taliban will take over the country again—they are too small and ineffective for that. But they could re-establish a grip on large parts of the south and east of the country, give succour to al-Qaeda, and sow the seeds for a new civil war.

None of those outcomes is remotely in the West’s interests. Yet through a mixture of miscalculation and mutual frustration, it could happen. In Iraq failure to reach a similar security agreement led to the sudden and premature departure of all American forces.

The problem is that both Mr Karzai and Mr Obama are playing to their [his] political bases. Most of Mr Obama’s supporters would be delighted if all American forces came home yesterday. Many Americans fail to appreciate the real—if dearly bought—progress that NATO has brought to Afghanistan and underestimate the damage that a resurgent Taliban would do.

### 2NC – Afghan Modeling Fails

#### 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

#### Our dataset is better and Canada solves the impact

**Liptak 12** [Adam Liptak, “‘We the People’ Loses Appeal With People Around the World,” The New York Times, February 6, 2012, pg. http://tinyurl.com/88mmfq7

A quarter-century later, the picture looks very different. “The U.S. Constitution appears to be losing its appeal as a model for constitutional drafters elsewhere,” according to [a new study](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923556) by [David S. Law](http://law.wustl.edu/faculty_profiles/profiles.aspx?id=6629) of Washington University in St. Louis and [Mila Versteeg](http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/2301734) of the University of Virginia.

The study, to be published in June in The New York University Law Review, bristles with data. Its authors coded and analyzed the provisions of 729 constitutions adopted by 188 countries from 1946 to 2006, and they considered 237 variables regarding various rights and ways to enforce them.

“Among the world’s democracies,” Professors Law and Versteeg concluded, “constitutional similarity to the United States has clearly gone into free fall. Over the 1960s and 1970s, democratic constitutions as a whole became more similar to the U.S. Constitution, only to reverse course in the 1980s and 1990s.”

“The turn of the twenty-first century, however, saw the beginning of a steep plunge that continues through the most recent years for which we have data, to the point that the constitutions of the world’s democracies are, on average, less similar to the U.S. Constitution now than they were at the end of [World War II](http://topics.nytimes.com/top/reference/timestopics/subjects/w/world_war_ii_/index.html?inline=nyt-classifier).”

There are lots of possible reasons. The United States Constitution is terse and old, and it guarantees relatively few rights. The commitment of some members of the Supreme Court to interpreting the Constitution according to its original meaning in the 18th century may send the signal that it is of little current use to, say, a new African nation. And the Constitution’s waning influence may be part of a general decline in American power and prestige.

In an interview, Professor Law identified a central reason for the trend: the availability of newer, sexier and more powerful operating systems in the constitutional marketplace. “Nobody wants to copy Windows 3.1,” he said.

In a [television interview](http://www.youtube.com/watch?v=vzog2QWiVaA) during a visit to Egypt last week, Justice Ruth Bader Ginsburg of the Supreme Court seemed to agree. “I would not look to the United States Constitution if I were drafting a constitution in the year 2012,” she said. She recommended, instead, the [South African Constitution](http://www.info.gov.za/documents/constitution/), the [Canadian Charter of Rights and Freedoms](http://laws.justice.gc.ca/eng/charter/) or the [European Convention on Human Rights](http://www.hri.org/docs/ECHR50.html).

The rights guaranteed by the American Constitution are parsimonious by international standards, and they are frozen in amber. As [Sanford Levinson](http://www.utexas.edu/law/faculty/svl55/) wrote in 2006 in [“Our Undemocratic Constitution,”](http://www.utexas.edu/law/faculty/slevinson/undemocratic/) “the U.S. Constitution is the most difficult to amend of any constitution currently existing in the world today.” (Yugoslavia used to hold that title, but Yugoslavia did not work out.)

Other nations routinely trade in their constitutions wholesale, replacing them on average every 19 years. By odd coincidence, Thomas Jefferson, in [a 1789 letter to James Madison](http://teachingamericanhistory.org/library/index.asp?document=2220), once said that every constitution “naturally expires at the end of 19 years” because “the earth belongs always to the living generation.” These days, the overlap between the rights guaranteed by the Constitution and those most popular around the world is spotty.

Americans recognize rights not widely protected, including ones to a speedy and public trial, and are outliers in prohibiting government establishment of religion. But the Constitution is out of step with the rest of the world in failing to protect, at least in so many words, a right to travel, the presumption of innocence and entitlement to food, education and health care.

It has its idiosyncrasies. Only 2 percent of the world’s constitutions protect, as the Second Amendment does, a right to bear arms. (Its brothers in arms are Guatemala and Mexico.)

The Constitution’s waning global stature is consistent with [the diminished influence of the Supreme Court](http://www.nytimes.com/2008/09/18/us/18legal.html?ref=americanexception), which “is losing the central role it once had among courts in modern democracies,” Aharon Barak, then the president of the Supreme Court of Israel, [wrote in The Harvard Law Review in 2002](https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=116+Harv.+L.+Rev.+16&srctype=smi&srcid=3B15&key=0bacc7c7026c426ae19a031de806c331).

Many foreign judges say they have become less likely to cite decisions of the United States Supreme Court, in part because of what they consider its parochialism.

“America is in danger, I think, of becoming something of a legal backwater,” Justice Michael Kirby of the High Court of Australia said in [a 2001 interview](https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=4+Green+Bag+2d+287&srctype=smi&srcid=3B15&key=27e2ae15f94c08a6f86b86181db67a34). He said that he looked instead to India, South Africa and New Zealand.

Mr. Barak, for his part, identified a new constitutional superpower: “Canadian law,” he wrote, “serves as a source of inspiration for many countries around the world.” The new study also suggests that the Canadian Charter of Rights and Freedoms, adopted in 1982, may now be more influential than its American counterpart.

## Impact Defense

#### 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.

## Defense

### 2NC Kangaroo Courts

#### They trigger an across the board rollback of due process rights. Seepage will impact all criminal cases at every level.

Weisselberg 08—Professor of Law @ UC Berkley [Charles D. Weisselberg, “Terror in the courts: Beginning to assess the impact of terrorism-related prosecutions on domestic criminal law and procedure in the USA,” Crime, Law and Social Change, September 2008, Volume 50, Issue 1-2, pp 25-46

We should not expect that all terrorism-related prosecutions in civilian courts have the potential to influence the development of domestic law and practice in precisely the same way, if indeed they have any such potential at all [41]. We should consider the reasons why terrorism-related issues and suspects may be treated differently, and whether certain types of decisions by judges and juries may shape domestic law to a greater or lesser degree. Prosecutions that result in appellate decisions may produce precedents that will apply to non-terrorism-related matters. Yet even trial court rulings that do not lead to published decisions on appeal may tell law enforcement what they can and cannot do. There are potential influences on aspects of criminal procedure and substantive criminal law.

Criminal procedure

Mukasey has suggested several ways that criminal procedure doctrine might be affected in terrorism-related cases, such as by “relaxed standards for conviction, searches, the admissibility of evidence or otherwise” [32]. It is possible that the alleged harm threatened by these defendants or by organizations supported by the defendants may be so significant that it inevitably will influence the way in which judges decide legal issues and juries consider the evidence. This might be due to a sometimes-asserted tendency of the judiciary to defer to the executive’s decisions in time of war or conflict [38] or, perhaps less legitimately, to a simple inclination to put a thumb on the government’s side of the scale given the high stakes. However, there are certain instances in which judges may appropriately consider harm to the public. For instance, in ruling upon a motion to suppress evidence following a warrantless search, judges might ask (among other things) whether or not the search was reasonable, and whether the lack of a warrant was excused by exigent circumstances. In dicta, the Supreme Court has hinted that officers might make an investigatory stop based on an anonymous tip of a person carrying a bomb, even though the tip might not contain sufficient indicia of reliability to uphold a search for an ordinary firearm [56]. A strong risk to the public might justify some actions by law enforcement that would not be acceptable in an ordinary criminal investigation.

On the other hand, it would not be legitimate for juries to fail to hold the government to proof beyond a reasonable doubt in terrorism-related cases. And the law governing admission of evidence should be the same in all cases. For instance, we should not see different legal standards develop with respect to hearsay evidence in terrorism-related cases.

If there are changes in the standards for conviction, searches, and the admission of evidence in these cases, we would expect to observe them primarily in tier one and tier two prosecutions. We might anticipate some distortions in tier three prosecutions only to the extent that the government manages to communicate to judges and juries its belief in the defendants’ alleged potential for harm; after all, by definition, tier three prosecutions are for offenses that are not expressly linked to those alleged harms. There could be some interesting rulings in these cases on the admission of “other acts” evidence, or on the question of whether certain evidence should be excluded from trial as unduly prejudicial.

It is important to ask another question. If criminal procedure issues are decided differently in terrorism-related cases, will these decisions “infect” ordinary criminal cases and shape the development of criminal procedure doctrine? Theoretically, these decisions could. Trial court rulings in cases that result in dismissals or guilty pleas (which are not generally appealed) are unlikely to lead to important precedents, though they might shape some law enforcement practices. However, trial court decisions that result in convictions that are appealed may well result in precedents that influence our law. Criminal procedure doctrines govern all types of cases, including ordinary criminal cases. Whether any distortions of criminal procedure law emanate from tier one, two or three cases, they could potentially impact federal criminal cases of all types. And to the extent appellate rulings are on principles of constitutional law, they may also influence state courts.

### Obama No Care about Courts

#### 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.

### AT: Boumadine

#### Boumedience solves your precedent advantages

SIEGEL 12 J.D., Boston University School of Law, 2012; B.A. Philosophy and Political Science, Simmons College, 2007 [Ashley E. Siegel, SOME HOLDS BARRED: EXTENDING EXECUTIVE DETENTION HABEAS LAW BEYOND GUANTANAMO BAY, July, 2012, Boston University Law Review, 92 B.U.L. Rev. 1405]

Conclusion

The September 11, 2001, terrorist attacks and the United States' war on terror changed the face of modern warfare. As military operations continue to become less formal and more global, American jurisprudence will need to adjust to novel situations. The Supreme Court did just that in Boumediene and its line of cases, recognizing alien detainees' rights to challenge their indefinite detentions by the U.S. government. This led to dozens of Guantanamo detainees' "enemy combatant" statuses being overturned by courts and to the release of those detainees. Habeas law, however, remains unsettled. It will continue to develop as new scenarios arise and federal courts grapple with consistently applying the flexible, functionalist approach that the Supreme Court elucidated in Boumediene. The Boumediene functionalist approach should allow for greater alien detainees' rights in myriad scenarios, including those in which alien detainees are held by foreign governments solely at the U.S. government's behest. It is only by holding the Executive accountable for such actions that the judiciary can maintain separation-of-powers principles vital to the American tripartite system and thereby protect fundamental individual rights.

### AT: Obama Wants ID

#### Their ev doesn’t account for the “reset” in Obama’s detention policy

Pious 11—Professor of political science @ Barnard College [Richard M. Pious (Chair in History and American Studies @ Barnard College), “Prerogative Power in the Obama Administration: Continuity and Change in the War on Terrorism,” Presidential Studies Quarterly 41, no. 2 (June)]

Once in office, Obama found the situation to be complicated: after the Boumediene v. Bush decision recognized the right of Guantánamo detainees to petition federal courts with the privilege of the writ of habeas corpus, 22 detainees sued for habeas corpus and were released by federal district courts. In order to sort out the situation and develop a new policy, Obama issued Executive Order 13493, “Review of Detention Policy Options” January 22, 2009, which created a special interagency task force (consisting of the attorney general and secretaries of a number of departments, as well as the director of the CIA, director of National Intelligence, and the chairman of the Joint Chiefs of Staff), to identify the options for disposition of individuals captured in connection with armed conflicts and counterterrorism operations.

Soon the weight of the national security bureaucracy began to show in a “reset” of Obama’s rhetoric. At a meeting on May 20, 2009, Obama told representatives from some human rights organizations that he was thinking about creating a “preventive detention system” on a legal basis to hold indefinitely detainees that presented a threat to national security but could not be tried. He referred to a “long game” that would preserve the legal right to detain for future presidents (Stolberg 2009). In what he referred to as a “fifth category” of detainees, he mentioned 75 at Guantánamo whom he claimed could not be released and could not be brought to trial. By November, it seemed that Obama would not even seek congressional authorization but would rely on his constitutional powers as commander in chief to continue with indefinite detention. Shortly after the Christmas Bomber was apprehended, a Department of Justice (DOJ) Task Force briefed reporters that of the 196 detainees remaining at Guantánamo, 50 would be held indefinitely under the laws of war–which is quite a stretch of the conventional understandings involved in holding prisoners of war under the laws of war and the Geneva Conventions. Pg. 265

### AT: Courts Don’t Enforce the treaty

#### Congress rejects court interference with the president’s war powers. It will initiate a legislative corrective to expand her authority

Paulsen 9—Chair and Professor of Law @ University of St. Thomas [Michael Stokes Paulsen, “The War Power,” University of St. Thomas School of Law, Legal Studies Research Paper No. 09-23, 2009]

What, then, do you do when the judiciary suddenly begins to intrude on the Constitution’s allocation of powers, interfering with the proper Article II presidential power to wage war, detain prisoners, and impose military punishments on unlawful enemy combatants? One option is simple legislative correction. This is available where the Court rests its decision on a separation-of-powers ground that the President’s action legally requires congressional authorization and such authorization has not been given. Regardless of whether such a judicial decision is sound or unsound, it often can be remedied by the expedient of going to Congress for the authorization the Court thought necessary. This is what happened in the aftermath of the Court’s 2006 decision in Hamdan—an egregious and potentially dangerous decision, but one that proved capable of legislative correction because it ultimately rested on the ground that the President’s military commission procedures were unconstitutional only because not legislatively authorized. President George W. Bush chose to put the issue to Congress—and raised the stakes by transferring several high-value terrorist unlawful combatants to Guantanamo. Congress responded with the Military Commissions Act of 2006 (MCA).50 The MCA was, in effect, a sweeping legislative repudiation of Hamdan, and a broad reaffirmation of President Bush’s position and a buttressing of presidential power.51 Congress (to use Youngstown-speak) added its legislative powers to all those that the President possesses in this area by virtue of his exclusive Article II powers. Presidential actions consistent with the MCA fall within the safest harbor of Youngstown’s “Category I” of most-indisputably-authorized presidential actions. This essentially gave President Bush, at the time—and now President Obama—all the authority he could possibly need with respect to military commissions and war prisoner detentions. When one adds the MCA to the already-existing authorizations for use of military force, it is impossible not to conclude that the waging of the war on terror, with respect to matters of capture, detention, interrogation, and military punishment, stands on anything but the firmest of constitutional footings. The President is at the very height of his constitutional powers. One could think of this as Youngstown-Category-I on steroids—a sort of a super-duper Youngstown Category I situation. Just about the only aspect of Hamdan that the MCA did not repudiate was the proposition that such legislative authorization was constitutionally necessary in the first place. Is there not a certain implicit weakening of presidential power by the very act of acquiescing to the supposed need to get Congress’s approval? Not necessarily, but one can certainly understand the concern that asking Congress for authority implies, or could be taken to imply, a lack of independent authority. There is also the concern that Congress might refuse to act, or might legislate in support of the President’s position in a not fully-supportive way. (This concern no doubt influenced the Bush administration’s decisions not to seek specific legislative authority, or support, in the first instance.) With respect to the MCA, the story had a mostly happy legislative ending. But what if it hadn’t?

### AT: Power of the Purse

#### President will just reallocate funds. Reagan proves

Heder 9—JD, magna cum laude, from Brigham Young University [Adam S. Heder, “The Power to End War: The Extent and Limits of Congressional Power,” St Mary’s Law Journal, Volume 41 Number 3, 2009]

Moreover, Congress’s appropriation power may not be an altogether effective or efficient tool with which to limit or end a war. Professor Louis Fisher strenuously makes this point. He points out that, despite Congress’s best efforts to ensure otherwise, the Reagan Administration secured financing for the Nicaraguan Contras for many years before it finally was forced to stop.27 Congress not only denied the President any appropriations for the operations, but also held hearings to ensure the President was not securing funding from other sources.28 While arguing that the President’s arguments and actions were unconstitutional, Fisher points out that the Administration was able to accomplish its goals for some time even in the absence of properly appropriated funds.29 Indeed, he points out in a later article that at any given time a President has “billions of dollars in previously appropriated funds” and always can reallocate money from other accounts to achieve his purposes.30 Assuming the President and Congress disagree about how and whether a war ought to be concluded, Congress’s appropriation power is not always an effective limit on the President’s powers.31 pg. 452-453

### AT: Impeach

## Legitimacy

### Overview

### Turns Precedent

#### Override destroys their precedent based advantages

Eskridge 91—Professor of Law @ Georgetown University [Eskridge, William N. Jr., "Overriding Supreme Court Statutory Interpretation Decisions" Yale Law Review, 101 Yale Law Journal 331 (1991)]

1. This Article will use the term "override" to mean any time Congress reacts consciously to, and modifies a statutory interpretation decision. A congressional "override" includes a statute that: (I) completely overrules the holding of a statutory interpretation decision, just as a subsequent Court would overrule an unsatisfactory precedent; (2) modifies the result of a decision in some material way, such that the same case would have been decided differently; or (3) modifies the consequences of the decision, such that the same case would have been decided in the same way but subsequent cases would be decided differently. With only a few exceptions, this Article will not use the term "override" to include statutes for which the legislative history-mainly committee reports and hearings-does not reveal a legislative focus on judicial decisions. Pg. 332

### AT: UQ

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#### \*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

### AT: No Internal link

#### US judicial decisions protecting the environment will create a global norm. US must internalize an appreciation for the environment before it can exercise leadership. The can’t access their modeling advantage if we win a link to the DA

Long 8—Professor of Law @ Florida Coastal School of Law [Andrew Long, “International Consensus and U.S. Climate Change Litigation,” 33 Wm. & Mary Envtl. L. & Pol'y Rev. 177, Volume 33 | Issue 1 Article 4 (2008)]

1. Enhancing U.S. International Leadership

In a time of unfavorable global opinion toward the United States, explicit judicial involvement with international norms will move the United States closer to the international community by acknowledging the relevance of international environmental norms for our legal system. As in other contexts, explicit judicial internalization of climate change norms would "build[ ] U.S. 'soft power,' [enhance] its moral authority, and strengthen[ ] U.S. capacity for global leadership"2 °3 on climate change, and other global issues. More specifically, domestic judicial consideration of the global climate regime would reaffirm that although the United States has rejected Kyoto, we take the obligation to respect the global commons seriously by recognizing that obligation as a facet of the domestic legal system.

U.S. courts' overall failure to interact with the international climate regime, as in other issue areas, has "serious consequences for their roles in international norm creation."2" As judicial understandings of climate change law converge, the early and consistent contributors to the transnational judicial dialogue will likely play the strongest role in shaping the emerging international normative consensus.2"' As Justice L'Heureux- Dube of the Canadian Supreme Court noted in an article describing the decline of the U.S. Supreme Court's global influence, "[decisions which look only inward ... have less relevance to those outside that jurisdiction." °6 Thus, if U.S. courts hope to participate in shaping the normative position on climate change adopted by judiciaries throughout the world, explicit recognition of the relationship between domestic and international law is vital.

With climate change in particular, norm development through domestic application should be an important aspect of global learning. The problem requires a global solution beyond the scope of any prior multilateral environmental agreements. This provides a situation in which U.S. judicial reasoning in applying aspects of climate regime thinking to concrete problems will fall into fertile international policy soil.

Accordingly, the recognition of international norms in domestic climate change litigation may play a strengthening role in the perception of U.S. leadership, encourage U.S. development and exportation of effective domestic climate strategies, and promote international agreements that will enhance consistency with such approaches. In short, explicit judicial discussion of international climate change norms as harmonious with U.S. law can enhance U.S. ability to regain a global leadership position on the issue and, thereby, more significantly shape the future of the international climate regime.

2. Promoting the Effectiveness of the International Response

Along with promoting U.S. interests and standing in the international community, climate change litigation has a direct role to play in developing the international regime if courts directly engage that regime." 7 Just as the United States as an actor may benefit from acknowledging and applying international norms, the regime in which the actions occur will benefit through application and acceptance. Indeed, a case such as Massachusetts v. EPA that directly engages only domestic law can nonetheless be understood to impact international lawmaking by considering its actors."' More important, however, will be cases in which the domestic judiciary gives life to international agreements through direct engagement-a "role [that] is particularly important as a check on the delegitimization of international legal rules that are not enforced."" 9

Assuming, as we must in the arena of climate change, that international law can only effect significant changes in behavior through penetration of the domestic sphere, domestic litigation that employs international law not only provides an instance in which the international appears effective but, more importantly, molds it into a shape that will enable further use in domestic cases or suggest necessary changes internationally.

By engaging the international, domestic cases can also provide articulation for the norms that have emerged. The precise meaning of the UNFCCC obligation that nations take measures must be hammered out on the ground. In the United States, if Congress has not acted, it is appropriate for the courts to begin this process by measuring particular actions against the standard.

3. Encouraging Consistency in Domestic Law and Policy

In the absence of national climate change law and policy, explicit discussion of international sources and norms in litigation will provide a well-developed baseline for a uniform judicial approach in the domestic realm. This could occur both within and beyond the United States.

Within the United States, bringing international environmental law into the mix of judicial reasoning would provide common grounding that unifies the decisions and begins to construct a more systematic preference for development of an effective legal response to international threats. Specifically, if an international climate change norm is found relevant to interpretation of a domestic statute, reference will be appropriate to that norm when future questions of interpretation of the domestic statute arise.210 Thus, to the extent that climate change cases rely upon consensus concerning the scientific evidence of climate change, future cases should use that consensus as a measuring stick for claims of scientific uncertainty.2n The same can occur with norm development. For example, had the Court in Massachusetts tied its jurisdictional or substantive holding to an identifiable norm, the opinion would have greater clarity and value as a precedent in other contexts within the United States.

Outside the United States, this approach would provide value to other, more transnationally oriented domestic courts.212 This would serve a norm entrepreneurship function and likely increase agreement among domestic courts on how to approach climate change issues raised under statutes designed for other purposes.

4. Enabling a Check at the Domestic-International Interface

Finally, climate change litigation has something to offer for the growth of administrative law at the interface of domestic and international law. At least two points are noteworthy.

First, U.S. courts can serve a unique function of providing legal accountability for U.S. failure to honor its UNFCCC commitments.213 Although this might be achieved implicitly, arguably the approach of Massachusetts, doing so explicitly would provide a check of a different magnitude. An explicit check here would serve the purposes identified above, as well as offering the practical benefit of increasing compliance. The dualist tradition, and perhaps concerns of domestic political backlash, weigh against grounding a decision solely in the UNFCC. However, looking to it as a major point in a narrative defining the development of a partly domestic obligation to take national action for the redress of climate change would serve the same beneficial purpose. This approach has the advantage of building a significant bridge over the dualist divide between domestic and international law without ripping the Court's analysis from traditional, dualist moorings. Pg. 212-216