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#### BOND DA

#### There will be a narrow ruling on Bond now but conservative advocates are pushing.

Donnelly 11-5-13

Tom, Constitutional Accountability Center’s Message Director and Counsel and former Climenko Fellow and Lecturer on Law at Harvard Law School, Constitutional law as soap opera: Bond v. United States http://blog.constitutioncenter.org/2013/11/constitutional-law-as-soap-opera-bond-v-united-states/

Colorful facts aside, in the conservatives’ rendering of Bond, the very fabric of the Republic is at stake. George Will has called it the Term’s “most momentous case,” arguing that the Roberts Court must step in to check a “government run amok.” The Heritage Foundation warns that the case challenges a key lesson that “Americans are taught from a young age” – that “our government is a government of limited powers.” And Ted Cruz frames the legal issue as follows: whether the “Treaty Clause is a trump card that defeats all of the remaining structural limitations on the federal government.” A scary proposition, indeed . . . But will the Court even get this far? Ms. Bond’s primary argument is that the chemical weapons treaty and its implementing statute should be read to exclude her conduct – a question of statutory interpretation and hardly the stuff of Tenthers’ dreams. If the Court decides the case on those grounds, Ms. Bond could very well prevail, while the ruling itself could be rather minor. The main reason that this case may prove “momentous” is that leading conservative academics, advocates, and legal groups are pushing the Roberts Court to turn this case from an interesting-but-far-from-historic statutory case into a monumental constitutional one. While the Court denied a request from Professor Nicholas Rosenkranz and the Cato Institute – the main proponents of the treaty-power-as-dangerous-trump-card theory – for time to press their argument during tomorrow’s hearing, the Court generally rejects such requests from amicus curiae, so we can’t read too much into that. And, following other recent cases addressing the scope of federal power – including, most prominently, the Affordable Care Act case – there is every reason to believe that the Court may wade into the important constitutional issues lurking just beneath the surface in Bond. The primary constitutional issue in the case involves the scope of the federal government’s treaty power – a power that was of central interest to George Washington and his Founding-era colleagues – and, in turn, Congress’s power under the Necessary and Proper Clause to pass laws to implement validly enacted treaties. However, in Bond, conservative legal groups have proceeded to turn the Constitution’s text and history on their head, arguing that the Constitution itself requires a ruling that sharply limits federal power and overturns nearly a century’s worth of precedent – dating back to a 1920 ruling by Justice Oliver Wendell Holmes. Indeed, Bond is just one of several cases this Term featuring an aggressive call by conservatives to overturn well-established precedent. Furthermore, a broad ruling by the Court’s conservatives could significantly limit Congress’s power to enact laws under the Necessary and Proper Clause, generally, opening up new challenges to various government programs and regulations. In the past, the right’s constitutional arguments may have gone unanswered. However, increasingly, leading progressive academics and practitioners have begun to stake their own claim to the Constitution’s text and history – the tired battle between the progressive community’s “living Constitution” and Justice Scalia’s “dead Constitution” replaced by new battles between the left and the right over the Constitution’s meaning. Bond is a clear example of this new dynamic. Rather than ceding the Constitution’s text and history to conservative legal groups, progressives have fought back in Bond with originalist arguments of their own in briefs authored by some of the progressive community’s leading lights, including Walter Dellinger, Marty Lederman, and Oona Hathaway. These briefs – as well as one filed by my organization, Constitutional Accountability Center – remind the Court that, in ditching the dysfunctional Articles of Confederation, the Founders sought to create a strong national government with the power to negotiate treaties with foreign nations, pass laws to fulfill those treaty obligations, and, in turn, enhance the young nation’s international reputation. With progressives fully engaged in the battle over the Constitution’s meaning, the question facing the Court in important constitutional cases is now less about whether the Constitution’s text and history should prevail and more about which side’s version rings truer.

#### Aff is a massive change – kills court capital and will be ignored by the President.

Devins 2010

Neal, Professor of Law at William and Mary, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1024&context=facpubs

Without question, there are very real differences between the factual contexts of Kiyemba and Bush-era cases. These differences, however, do not account for the striking gap between accounts of Kiyemba as likely inconsequential and Bush-era cases as "the most important decisions" on presidential power "ever., 20 In the pages that follow, I will argue that Kiyemba is cut from the same cloth as Bush-era enemy combatant decision making. Just as Kiyemba will be of limited reach (at most signaling the Court's willingness to impose further limits on the government without forcing the government to meaningfully adjust its policymaking), Bush-era enemy combatant cases were modest incremental rulings. Notwithstanding claims by academics, opinion leaders, and the media, Supreme Court enemy combatant decision making did not impose significant rule of law limits on the President and Congress. Bush-era cases were certainly consequential, but they never occupied the blockbuster status that so many (on both the left and the right) attributed to them. Throughout the course of the enemy combatant dispute, the Court has never risked its institutional capital either by issuing a decision that the political branches would ignore, or by compelling the executive branch to pursue policies that created meaningful risks to national security. The Court, instead, took limited risks to protect its turf and assert its power to "say what the law is." That was the Court's practice during the Bush years, and it is the Court's practice today.

#### Upholding Missouri v Holland is key to treaties but capital is key.

Spiro 2008

Peter J., Professor of Law, Temple University, Resurrecting Missouri v. Holland, Missouri Law Review http://law.missouri.edu/lawreview/files/2012/11/Spiro.pdf

Even with respect to the Children’s Rights Convention, the balance may change. At both levels, the game is dynamic. On the international plane, as more attention is focused on human rights regimes, the costs of nonparticipation rise. Other countries and other international actors (human rights NGOs, for example) will train a more focused spotlight on U.S. nonparticipation.28 From a human rights perspective, it’s low-hanging fruit; the mere fact that the United States finds itself alone with Somalia outside the regime suffices to demonstrate the error of the American stance as a leading example of deplored American exceptionalism. For progressive advocacy groups focusing on children’s rights, the Convention is emerging as an agenda item.29 More powerful actors, including states and such major human rights groups as Amnesty International and Human Rights Watch, may be unlikely to put significant political resources into the effort, but there is the prospect of a drumbeat effect and accompanying stress to U.S. decisionmakers. 30 In the wake of international opprobrium associated with post-9/11 antiterror strategies, U.S. conformity with human rights has come under intensive international scrutiny. That scrutiny is spilling over into other human rights-related issues; there will be no more free passes for the United States when it comes to rights.31 Human rights may present the most obvious flash point along the Holland front, but it will not be the only one. As Antonia Chayes notes, “resentment runs deep” against U.S. treaty behavior.32 International pressure on the United States to fully participate in widely-subscribed international treaty regimes, some of which could constitutionally ride on the Treaty Power alone, will grow more intense. At the same time that the international price of non-participation rises, a subtle socialization may be working to lower the domestic cost of exercising Holland-like powers. Globalization is massaging international law into the sinews of American political culture. The United States may not have ratified the Convention on the Rights of the Child, for example, but it has acceded to Hague Conventions on abduction33 and adoption,34 as well as optional protocols to the Children’s Rights Convention itself,35 and has enthusiastically pursued an agreement on the transboundary recovery of child support.36 As international law becomes familiar as a tool of family law, the Children’s Convention will inevitably look less threatening even against America’s robust sentiments regarding federalism. Regimes in other areas should be to similar effect and will span the political divide. It is highly significant, for instance, that conservative Americans have become vocal advocates of international regimes against religious persecution, a key factor in the aggressive U.S. stance on Darfur.37 To the extent that conservatives see utility in one regime they will lose traction with respect to principled category arguments against others. Which is not at all to say that Holland will be activated with consensus support. A clear assertion of the Treaty Power against state prerogatives would surely provoke stiff opposition in the Senate and among anti-internationalist conservatives, setting the scene for a constitutional showdown.38 The adoption of a treaty regime invading protected state powers would require the expenditure of substantial political capital. Any president taking the Treaty Power plunge would be well advised to choose a battle to minimize policy controversy on top of the constitutional one. A substantively controversial regime depending on Holland’s authority (say, relating to the death penalty) would increase the risk of senatorial rebuke. Perhaps the best strategy would be to plant the seeds of constitutional precedent in the context of substantively obscure treaties, ones unlikely to attract sovereigntist flak. If a higher profile treaty implicating Holland were then put on the table, earlier deployments would undermine opposition framed in constitutional terms. Such was the case with the innovation of congressional-executive agreements, which, before their use in adopting major institutional regimes in the wake of World War II, had been used with respect to minor agreements in the interwar years.39 In contrast to the story of congressional-executive agreements, advocates of an expansive Treaty Power will have the advantage of Holland itself, that is, a Supreme Court decision on point and not superseded by a subsequent ruling. That would lend constitutional credibility to the proposed adoption of any agreement requiring the Treaty Power by way of constitutional support. But it wouldn’t settle the question in the face of the consistent practice described above. Holland is an old, orphaned decision, creating ample space for contemporary rejection. An anti-Holland posture, the decision’s status as good law notwithstanding, would also be bolstered by the highly credentialed revisionist critique.40 That of course begs the question of what the Supreme Court would do with the question were it presented. The Court could reaffirm Holland, in which case its resurrection would be official and the constitutional question settled, this time (one suspects) for good. That result would comfortably fit within the tradition of the foreign affairs differential (in which Holland itself is featured).41 One can imagine the riffs on Holmes, playing heavily to the imperatives of foreign relations and the increasing need to manage global challenges effectively. The opinion might not write itself, but it would require minimal creativity. Recent decisions, Garamendi notably among them,42 would supply an updated doctrinal pedigree. And since the question would come to the Court only after a treaty had garnered the requisite two-thirds’ support in the Senate, the decision would not likely require much in the way of political fortitude on the Court’s part. It would also likely draw favorable international attention, reaffirming the justices’ membership in the global community of courts.43 IV. CONCLUSION:CONSTITUTIONAL LIFE WITHOUT MISSOURI V. HOLLAND Holland’s judicial validation would hardly be a foregone conclusion. The Supreme Court has grown bolder in the realm of foreign relations. Much of this boldness has been applied to advance the application of international norms to U.S. lawmaking, the post-9/11 terror cases most notably among them.44 The VCCR decisions, on the other hand, have demonstrated the Court’s continued resistance to the application of treaty obligations on the states. In Medellín, where the Court found the President powerless to enforce the ICJ’s Avena decision on state courts, that resistance exhibited itself over executive branch objections. The Court rebuffed the President with the result of retarding the imposition of international law on the states and at the risk of offending powerful international actors.

#### Treaties are key to cooperation on every issue – solve extinction

Koh and Smith 2003

Harold Hongju Koh, Professor of International Law, and Bernice Latrobe Smith, Yale Law School; Assistant Secretary of State for Democracy, Human Rights and Labor, “FOREWORD: On American Exceptionalism,” May 2003, 55 Stan. L. Rev. 1479

Similarly, the oxymoronic concept of "imposed democracy" authorizes top-down regime change in the name of democracy. Yet the United States has always argued that genuine democracy must flow from the will of the people, not from military occupation. 67 Finally, a policy of strategic unilateralism seems unsustainable in an interdependent world. For over the past two centuries, the United States has become party not just to a few treaties, but to a global network of closely interconnected treaties enmeshed in multiple frameworks of international institutions. Unilateral administration decisions to break or bend one treaty commitment thus rarely end the matter, but more usually trigger vicious cycles of treaty violation. In an interdependent world, [\*1501] the United States simply cannot afford to ignore its treaty obligations while at the same time expecting its treaty partners to help it solve the myriad global problems that extend far beyond any one nation's control: the global AIDS and SARS crises, climate change, international debt, drug smuggling, trade imbalances, currency coordination, and trafficking in human beings, to name just a few. Repeated incidents of American treaty-breaking create the damaging impression of a United States contemptuous of both its treaty obligations and treaty partners. That impression undermines American soft power at the exact moment that the United States is trying to use that soft power to mobilize those same partners to help it solve problems it simply cannot solve alone: most obviously, the war against global terrorism, but also the postwar construction of Iraq, the Middle East crisis, or the renewed nuclear militarization of North Korea.

### 2

#### LEGITIMACY DA

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

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

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

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

**Pushaw, Pepperdine law professor, 2004**

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

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

#### Weakening the court prevents sustainable development

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

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

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

#### Extinction

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

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

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

### 3

#### LOWER COURTS COUNTERPLAN

#### The non-Supreme court branches of the federal judiciary should restrict presidential war powers authority by overruling the D.C. Circuit Al-Maqaleh v. Gates decision on the grounds that it violates the Suspension Clause.

### 4

#### Executive Order COUNTERPLAN

#### The Executive Branch of the United States should issue an executive order establishing a policy that detainees held under his war powers authority will be tried in federal courts.

#### Trying in federal courts is key-allies are mad about military and indefinite detention-the plan only puts a few safeguards on military detention-

**Kris, Former Assistant Attorney General for National Security, 2011**

(David, “Law Enforcement as a Counterterrorism Tool”, 6-15, <http://jnslp.com//wp-content/uploads/2011/06/01_David-Kris.pdf>, ldg)

Finally, the criminal justice system may help us obtain important cooperation from other countries. That cooperation may be necessary if we want to detain suspected terrorists or otherwise accomplish our nationalsecurity objectives. Our federal courts are well-respected internationally. They are well-established, formal legal mechanisms that allow the transfer of terrorism suspects to the United States for trial in federal court, and for the provision of information to assist in law enforcement investigations – i.e., extradition and mutual legal assistance treaties (MLATs). Our allies around the world are comfortable with these mechanism**s**, as well as with more informal procedures that are often used to provide assistance to the United States in law enforcement matters, whether relating to terrorism or other types of cases. Such cooperation can be critical to the success of a prosecution, and in some cases can be **the only way in which we will gain** **custody of a suspected terrorist** who has broken our laws. 184 In contrast, many of our **key** **allies around the world** are **not willing to cooperate** with or support our efforts to hold suspected terrorists in **law of war detention** or to **prosecute them in military commissions**. While we hope that over time they will grow more supportive of these legal mechanisms, at present many countries would not extradite individuals to the United States for military commission proceedings or law of war detention. Indeed, some of our extradition treaties explicitly forbid extradition to the United States where the person will be tried in a forum other than a criminal court. For example, our treaties with Germany (Article 13) 185 and with Sweden (Article V(3)) 186 expressly forbid extradition when the defendant will be tried in an “extraordinary” court, and the understanding of the Indian government pursuant to its treaty with the United States is that extradition is available only for proceedings under the ordinary criminal laws of the requesting state. 187 More generally, the doctrine of dual criminality – under which extradition is available only for offenses made criminal in both countries – and the relatively common exclusion of extradition for military offenses not also punishable in civilian court may also limit extradition outside the criminal justice system. 188 Apart from extradition, even where we already have the terrorist in custody, many countries will not provide testimony, other information, or assistance in support of law of war detention or a military prosecution, either as a matter of national public policy or under other provisions of some of our MLATs. 189 These concerns are not hypothetical. During the last Administration, the United States was obliged to give assurances against the use of military commissions in order to obtain extradition of several terrorism suspects to the United States. 190 There are a number of terror suspects currently in foreign custody who likely would not be extradited to the United States by foreign nations if they faced military tribunals. 191 In some of these cases, it might be necessary for the foreign nation to release these suspects if they cannot be extradited because they do not face charges pending in the foreign nation.

### Legitimacy

#### Boumediene extension reduces the military to a glorified police force---collapses the war effort and U.S. hegemony

Ford, Colonel and U.S. Army Judge Advocate General's Corps, 2010

(Fred, “Essay: Keeping Boumediene off the Battlefield: Examining Potential Implications of the Boumediene v. Bush Decision to the Conduct of United States Military Operations”, Winter, 30 Pace L. Rev. 396, lexis, ldg)

The scope of the problem the DoD may face is a bit daunting. What could happen - and, in the case of the Guantanamo detainees, what is happening - is that foreign detainees held by U.S. forces in locations deemed to be the functional equivalent of United States territory could be entitled not just to Geneva protections (for prisoners of war) or Detainee Treatment Act n34 protections (in the case of enemy combatants at Guantanamo Bay not declared prisoners of war), but also to habeas review by a federal district court. If the functional analysis test of Boumediene is extended, or is interpreted by the DoD to extend to physical locations other than Guantanamo, then foreign fighters will be afforded additional protections under the U.S. Constitution and U.S. laws - protections normally reserved for U.S. citizens or other persons in the country. n35 These new rights could include a right to counsel, Miranda warnings, heightened due process, and countless other rights and privileges normally associated with citizenship or presence in the United States. Imagine a military commander needing probable cause to detain - or worse, some higher level of proof to attack - an enemy! n36 The implications are mind-boggling to [\*404] a military professional. Our military force would essentially be converted into a de facto law enforcement organization or would have such an organization as its adjunct. Such extension would completely change the face of combat. n37 Perhaps some of these examples are far-fetched; the issue, though, is how far toward this end will the courts go? They should go no further than Boumediene. If, however, courts continue the trend and extend this holding, how would the DoD meet these new requirements? Programmatically and institutionally, extension would require a re-evaluation of the DoD's policies, regulations, training, and organization. Currently, all military personnel are trained to the Geneva standard under the DoD Law of War Program. n38 This program ensures that service members are trained in and abide by the international legal norms of warfare. Would the DoD implement a similar program to ensure compliance with domestic laws during combat operations, including detention operations? And, if so, should it be separate from the Law of War Program or integrated into it? A progressive extension of Boumediene may require service members in combat to abide by constitutional provisions normally applicable to domestic law enforcement personnel. Such an extension would require a massive training and education program to be implemented department-wide. This training might include instruction on the court-directed domestic laws that might now be applicable, essentially a shifting body of criminal law for the battlefield. In [\*405] implementing this new standard, both the DoD and the military might be required to implement several new procedures, including: training packages for new entrants at basic training installations, annual refresher training, formalized procedures for integration into major military training exercises and actual military operations, a reporting procedure for violations, and benchmarks for methods of effectiveness. The International Committee of the Red Cross ("ICRC") might choose to monitor U.S. forces not only for compliance with international law but also for compliance with our applicable domestic laws. The DoD would be interested in the ICRC's new focus area and would need to implement procedures to address these new areas of international scrutiny. As the DoD attempts to operationalize Boumediene, it must consider the new concept of how to support a federal case while concomitantly conducting military operations. Justice Scalia, in his dissent, noted that the Boumediene holding "sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner." n39 Practically speaking, this is already happening in the U.S. District Court for the District of Columbia as the Guantanamo detainees' habeas cases progress. n40 The Supreme Court is not, as Justice Scalia noted, establishing the rules under which these cases will proceed. That task has fallen on the district court judges, specifically Senior Judge Thomas F. Hogan, who has been charged with establishing general rules for the administration and management of most of these cases. n41 [\*406] These rules and procedures will be vitally important not only for the process, but also for the DoD and combat soldiers whose actions they will dictate. Courts will create, and lawyers argue endlessly about, such important matters as the definition of "enemy combatant," the standard of proof for this yet-to-be defined term, the admissibility of evidence, the scope and breadth of exclusionary rules, presumptions afforded to government evidence, whether the presence of the detainee is required, access to government witnesses, the extent of government disclosures of exculpatory evidence pursuant to Brady v. Maryland, n42 and a host of other procedural and substantive issues. Every issue that may arise in a federal criminal case will have to be addressed, interpreted, decided, and applied to the current and future unique enemy prisoner habeas actions. These procedures create daunting tasks. Enter CSI: Kandahar. Extending the Boumediene holding would require detailed procedures for the collection, preservation, and maintenance of "evidence." Normally, the military treats information regarding enemy captives as battlefield information or intelligence. Military personnel process this information, important to the conduct of military operations, through intelligence channels. Intelligence analysts and commanders use the information to determine enemy strengths, weaknesses, vulnerabilities, and locations important to the commander on the ground. Treating captured enemy information as evidence in a federal case would require an entirely new method of collecting and processing intelligence. More likely, the DoD and the intelligence agencies would choose to establish an entirely separate but parallel system to process and sanitize battlefield intelligence information for transmittal to federal courts because of the significant risk to intelligence sources and methods. The DoD may be forced to address these federal evidence requirements. Standards may have to be established, beginning with procedures to determine what constitutes the [\*407] equivalent of probable cause to detain, and including procedures for, inter alia, the seizure and collection of evidence, chain of custody, evidence storage and maintenance, evidence authentication, and witness availability. n43 This may, in turn, require procedures to formalize investigations, including a requirement of a pseudo-criminal case file for every detained enemy. Certainly, service members do not have the training to make and prove a federal case. Service members on the ground are now familiar with basic evidence collection requirements, and great strides have been taken in Iraq and Afghanistan to formalize information collection resulting from raids. n44 Site exploitation teams and specially trained personnel have assisted in gathering and maintaining site intelligence information, which may later be used as evidence, normally in an Iraqi or Afghani court. But imagine if every military operation required a police-like crime scene analysis, with the [\*408] collection of evidence to be used in a federal court. Soldiers simply cannot conduct such an undertaking, nor should they be required to. Military law enforcement personnel are a limited asset on the battlefield, busily investigating alleged misconduct by military personnel, contract fraud, and the deaths of service members. The DoD would be hard pressed to meet new stringent investigative and evidentiary requirements. The DoD may have to adjust its force structure and dramatically increase the capacity of the services' law enforcement investigative agencies, a precarious undertaking for a military already stretched thin. Or, perhaps the DoD would create a new habeas investigative agency, uniformed and/or civilian, to accompany forces on the battlefield. One solution is to use another federal law enforcement agency, such as the Federal Bureau of Investigation ("F.B.I."), to augment military forces, similar to the manner in which the U.S. Coast Guard augments U.S. Navy operations during law enforcement actions at sea. n45 In addition to programmatic and organizational challenges, the DoD may be forced to consider Boumediene in the planning and execution of military strategy in particular theaters or on specified operations. The DoD would likely take necessary steps, perhaps in consultation with the Department of State, to ensure that functional control does not attach as war plans are drafted and executed. The DoD may desire, for example, to be invited into a theater of operation, as opposed to conducting a forced entry; to have time-specific "stationing" agreements in place with the legitimate or proxy authority, trumpeting the sovereign authority of the host nation (or, at a minimum, a similar unilateral proclamation from the host nation); to have a United Nations Security Council Resolution ("UNSCR") or similar pronouncement from an international organization, containing language disavowing United States [\*409] functional control; or to avoid declaring, or taking cumulative actions amounting to, United States functional control. Consider detention operations themselves and the prisoner of war/corrections conundrum that would ensue. A new paradigm for battlefield detention, temporary holding, and transfer to permanent internment facilities may be necessary. Detaining enemy fighters may become a risky endeavor, from the perspective of ensuring compliance with new yet uncertain legal norms or in seeking to mitigate litigation risk. The DoD would need to formalize specific guidelines, perhaps a set of Standing Rules of Detention Operations. Military corrections facilities and guards currently exist, but not in the scope or breadth that would be required with an extension of the Boumediene holding. More practically, will military guards be required to provide these detainees with televisions, a law library, and other privileges determined by our courts to be constitutional rights of inmates in U.S. prisons? Clearly, facilities and leases similar to Guantanamo Bay would be avoided. The DoD may, however, be cautiously inclined to establish detention agreements with a host nation. For an Army of Occupation, where the risk of a functional control determination is greater, the United States may desire - whether through Congressional action, treaty or international agreement, or simple memoranda of understanding - to effectively cede functional control of detention facilities to the occupied nation, a third nation, or an international body. In some scenarios, it may not be operationally wise or safe to transfer prisoners in a war zone to a third party, particularly one less capable of operating and defending the facility. And, for the same reason the United States may pursue this agreement, third parties may seek to avoid it, or else risk a political backlash or a wave of detainee counsel seeking to meet with clients and file countless habeas actions on their behalf. Our coalition partners certainly are not interested in conducting - much less managing - battlefield detentions of enemy fighters. Further, the "take-no-prisoners" mantra is unacceptable, whether viewed from a national, organizational, or individual perspective. Unfortunately, some commentators and pundits [\*410] who have decried Boumediene have either endorsed a take-no-prisoners policy or at least predicted that one will eventually come into being. A policy of taking no prisoners, either express or implied, can never be an option for a civilized nation or its citizens and service members. The DoD must emphasize that such an approach, whether created intentionally or through benign neglect, is unacceptable. To achieve this goal, the DoD will need to establish procedures, a training program, and an evaluation mechanism to avoid a "take-no-prisoners" organizational tone from taking hold. The DoD is not the only entity affected. An extension of Boumediene would require a substantial investment of other federal resources not previously required for a war effort. Federal courts and the Department of Justice will bear a huge load under such an extension. Both the federal court system - specifically the U.S. District Court for the District of Columbia - and the Department of Justice have already taken exhaustive post-Boumediene measures to handle the relatively few cases currently coming out of Guantanamo Bay. n46 The 250 or so habeas cases from Guantanamo Bay detainees pale in comparison to the potential tens of thousands that could be filed by prisoners if Boumediene is extended. n47 Without major changes to meet such a scenario, judicial resources would be overwhelmed. Further, the impact of this decision on the separation of powers and an independent executive branch is uncertain, and beyond the scope of this discussion. In summary, from a department-wide perspective, the DoD is in the untenable position of having to conduct a war and plan for future engagements in an uncertain legal landscape. [\*411] Whether any DoD personnel have or will have functional control over detained enemy personnel is not a question easily answered but one that must be formally addressed, so that troops on the ground can operate effectively and in compliance with the law. III. Boumediene in Bagram and on the Battlefield Boumediene, and the potential extension of its holding, impacts U.S. detention operations not only at Guantanamo Bay but also at Bagram and other current or future detention facilities. As a preliminary matter, the natural question in light of Boumediene is how necessary or beneficial is Guantanamo Bay? If the DoD initially established Guantanamo Bay for its foreign location - more convenient for U.S.-based intelligence and interrogation personnel - then, in light of Boumediene, the base is no longer "foreign." The purported freedom from domestic legal requirements initially presumed at Guantanamo no longer exists. As the current administration seeks to close Guantanamo n48 - whether due to legal, political, or policy reasons - it is clear that Boumediene has done away with at least one benefit of housing detainees at Guantanamo. Could Boumediene impact current detention activities in Bagram? If Boumediene reaches that facility, the Eisentrager Court's worst fears would be realized. n49 Military interrogations [\*412] might require court approval, or worse, the presence of a detainee's counsel. Moving a detainee may likewise require approval from the court. Conditions of confinement might be reviewable by a court. Military prison guards may be liable to their enemy captives in constitutional tort. The implications, again, are vast. In addition to detention operations in a theater of war, Boumediene may directly impact actual day-to-day combat operations. Justice Scalia warned that Boumediene could "cause more Americans to be killed." n50 Practically speaking, he was referring to a situation where a court releases a terrorist who returns to fight against Americans. Additionally, battlefield impact and risk to service members for other reasons is not improbable. As a preliminary matter, the issue arises in determining when habeas rights attach. Habeas would attach on the battlefield only if the United States exercises functional control over a combatant - that is, if it exercises the functional equivalent of legal sovereignty over the detainee. In a country like Afghanistan, or even Iraq, there is no question that functioning governments active in inter-and intra-state affairs are operating, and the nations maintain their sovereignty. But does (or would) the United States operate in a pocket or umbrella of sovereignty in either nation for purposes of Boumediene? Liberal stationing agreements, UNSCRs, or other documents authorizing or defining the scope and breadth of authority for U.S. forces in a country could be read to grant Boumediene-like autonomy. During the heightened occupation of Iraq, and the initial invasion of Afghanistan, a stronger argument could have been made that habeas in fact attached to [\*413] in-country detentions. And, in a certain area of occupation, such as post-war Germany, or immediately following invasive hostilities, the case is again much closer. If a U.S. soldier operates in a pocket of sovereignty, habeas rights may attach to any enemy he seizes or captures on the battlefield. Those rights would remain during temporary detention, transfer, and long-term detention. In this (hopefully unlikely) situation, U.S. combat troops would have to be trained in the latest version of habeas law for the battlefield. They would need to know not only the operational requirements and details of the military operation - for example, seizing terrain or raiding a compound - but also the legal niceties associated with capturing an enemy who has constitutional rights and seizing the evidence that might be necessary to keep that enemy in detention and off of future battlefields. At the very least, these new requirements would be a distraction to an undertaking where focus and attention to detail are vital, a distraction that could be deadly. Essentially, troops on patrol would be carrying the full panoply of rights and privileges afforded under the U.S. Constitution in their assault packs. Every enemy encountered would be entitled to rummage through the pack to choose the U.S. domestic law - the legal weapon n51 - to use against the soldier. In effect, the military operation would be converted into a pseudo-law enforcement search and seizure operation. U.S. combat troops would be no different than police officers on patrol in any town or city in the United States. The military would cease to exist as we know it and would become nothing more than a deployable F.B.I. As indicated above, evidence experts and/or law enforcement experts may be integrated into the operation. These individuals are likely not familiar with military operations and have not trained with the unit to which they would be assigned. The potential for confusion, hesitation, mistaken identity, and uncertainty is great. Each creates a recipe for fratricide, enemy advantage, or worse - mission failure and defeat. [\*414] Intelligence operations will be the most vulnerable. If court-directed discovery occurs, a unit's intelligence files would become the equivalent of a law enforcement investigative file. Information deemed relevant to the defense, including information that the United States expended significant resources, and potentially lives, to obtain, would become discoverable in some form. Valuable intelligence sources and methods, some irreplaceable, would be lost. Sources would dry up or perhaps be revealed and killed. Consider the sad and dangerous contradiction. Military planners and intelligence officers study and analyze an enemy, compiling tens of thousands of pieces of information into a precise operations plan, targeted at important leaders or facilities. Troops receive an order, conduct mission-specific training, and prepare to execute. Approvals are obtained from appropriate commanders. A joint and multi-national combined arms operation ensues to attain the military objective sought. Conventional troops, special operations forces, combat aircraft, artillery support, and overhead assets all converge on the target in a dangerous and complex culmination of modern military power. Enemy, friendly, and civilian lives are lost, and prisoners are taken. Specialized teams exploit the site and sweep through the complex, retrieving valuable enemy information that will assist in future operations and save American lives. Now the contradiction is revealed. All the information relevant to a federal court case - information gained in the planning, execution, and exploitation of the mission - is transmitted back to a U.S. court, to counsel, and, perhaps, back to the same enemy captives who required so much time, effort, resources, and lives to capture. This truly is a sad and dangerous contradiction. Soldiers will have risked their lives to regurgitate the fruits of their sweat, toil, and blood back to the enemy. This example illustrates why Boumediene must stop at Guantanamo Bay. [\*415] IV. Conclusion Strikingly, in the penultimate paragraph of his dissent in Boumediene, Chief Justice Roberts asked "who has won?" n52 The apparent answer is that no one wins. Not the detainees, as Chief Justice Roberts wrote, for they are left "with only the prospect of further litigation to determine the content of their new habeas right." n53 Not the U.S. Congress, as its role in legislating "has been unceremoniously brushed aside," n54 and not the "Great Writ," (the Writ of Habeas Corpus), as it has been relegated to application at some "jurisdictionally quirky outpost" known as Guantanamo Bay. n55 Forebodingly, Chief Justice Roberts concludes that two other more important entities have also not won: [And] not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges. n56 In a Boumediene environment, military personnel would know that essentially every prisoner is a federal case. The federal court would, in a real sense, be there on the battlefield too, dictating the conduct of military operations. If Boumediene were applied to the battlefield, plans, procedures, and military tactics would undoubtedly change. In an environment where the United States exercises functional control, the Boumediene protections, and perhaps even more domestic legal protections, would apply to detained personnel. But in the traditional battlefield environment, where the United States does not [\*416] exercise functional control, it would be business as usual for our military forces. The DoD (or a court) would conduct the functional analysis, and soldiers would know, in theory, during the planning stages and execution of a mission, whether habeas rights lie with the enemy they may detain. In the worst-case scenario, the military planners would make the wrong decision on whether functional sovereignty lies with the United States. The result is, essentially, Guantanamo all over again - a painful and untenable situation not only for the military but also for the executive branch and the court system that may have to hear the cases. Soldiers know the business of seizing and holding terrain, and it is difficult enough to fight a war against an enemy that ascribes to and follows the Geneva Conventions. Fighting against terrorists who openly disregard the Conventions, behead prisoners and kill civilians is even more daunting. Extending Boumediene to the battlefield makes a difficult military situation even worse. On a spectrum of negative repercussions, extending Boumediene is the practical equivalent of placing a pile of rocks into a soldier's already full rucksack; tauntingly and spitefully laughing in the face of service members who have risked their lives on dangerous missions, not to mention the friends, family, and a Nation whose loved ones were lost on those missions; and giving the enemy, on a legal silver platter, former captives to return to the fight or valuable intelligence information with which to kill more Americans. The impact and effect would be felt from the highest levels of the DoD, to theater commanders, to commanders on the ground, to soldiers in the field executing a mission, and to a regretful Nation. Boumediene should not and cannot be extended.

#### Specifically hinders handling autocratic states

**Nzelibe et al., Northwestern law professor, 2006**

(Jide, “The Most Dangerous Branch? Mayors, Governors, Presidents, And The Rule Of Law: A Symposium On Executive Power: Essay: Rational War And Constitutional Design”, 115 Yale L.J. 2512, lexis, ldg)

Faced with the prospect that congressional participation can sometimes play a salutary role in avoiding unnecessary wars, an antecedent question naturally arises. Should the courts decide if such a congressional role would be appropriate? Indeed, a recurring theme running through much of the Congress-first literature is that judicial intervention is necessary to vindicate the congressional role in initiating conflicts. n66 But if one accepts the signaling model developed here, there are significant reasons why one ought to be wary of a judicial role in resolving war powers controversies. [\*2537] First, under our model of international crisis bargaining, judicial review would likely undermine the value of signals sent by the President when he seeks legislative authorization to go to war. In other words, it is the fact that the signal is both costly and discretionary that often makes it valuable. Once one understands that regime characteristics can influence the informational value of signaling, n67 it makes sense that the President should have the maximum flexibility to choose less costly signals when dealing with rogue states or terrorist organizations. The alternative - a judicial rule that mandates costly signals in all circumstances, even when such signals have little or no informational value to the foreign adversary - would dilute the overall value of such signals. Second, judicial review would preclude the possibility of beneficial bargaining between the President and Congress by forcing warmaking into a procedural straitjacket. In this picture, judicial review would constrain the political branches to adopt only the tying hands type of signal regardless of the nature or stage of an international crisis. n68 But the supposed restraining effect attributed to the tying hands signal can vary considerably depending on whether the democracy is deciding to initiate an international crisis or is already in the midst of an escalating crisis. Requiring legislative authorization may make it less likely that the democracy will be willing to back out of a conflict once it starts. n69 Thus, tying hand signals and judicial insistence that the President seek legislative authorization will contribute to greater international instability once a conflict has already started. Thus far, our argument presupposes that there are only two institutional models of judicial review from which to choose: a judicial approach that mandates legislative authorization for all conflicts and a hands-off judicial approach that gives the President wide latitude to decide if such costly signaling would be beneficial. But there is a third possibility. The courts could make the initial determination as to whether a foreign adversary is the type that would benefit from costly signaling. n70 At first blush, such a judicial choice of an interpretive approach might appear to resolve the problem of over-inclusive signaling identified above. But [\*2538] here the objection to judicial review would be on institutional competence grounds. Simply put, it would take a leap of faith to believe that courts would be able to discern correctly the regime type of a foreign adversary and decide whether legislative participation would prove to be valuable in any specific war. Of course, courts sometimes make case-by-case judgments about factual predicates in other contexts, but decisions about the signaling value of legislative authorization would not only require access to possibly classified information about foreign threats but also the resources to analyze such threats - information and resources that courts clearly lack. Nor can one assume that all democratic regimes will behave alike in their proclivity to initiate or reciprocate hostility. For instance, the President might conclude that although a foreign adversary is nominally a democratic regime, it would not be responsive to costly tying hands signals because it is facing domestic political turmoil. n71 In any event, the judiciary's insulation from the political process makes it particularly ill suited to decide whether the President's decision about the value of signaling in a particular conflict is wrong or not. n72

#### Rogue states multiply and cause extinction

**Johnson, Forbes contributor and Presidential Medal of Freedom winner, 2013**

(Paul, “A Lesson For Rogue States”, 5-8, <http://www.forbes.com/sites/currentevents/2013/05/08/a-lesson-for-rogue-states/>, ldg)

Although we live in a violent world, where an internal conflict such as the Syrian civil war can cost 70,000 lives over a two-year period, there hasn’t been a major war between the great powers in 68 years. Today’s three superpowers–the U.S., Russia and China–have no conflicts of interest that can’t be resolved through compromise. All have hair-trigger nuclear alert systems, but the sheer scale of their armories has forced them to take nuclear conflict seriously. Thus, in a real sense, nuclear weapons have succeeded in abolishing the concept of a winnable war. The same cannot be said, however, for certain paranoid rogue states, namely North Korea and Iran. If these two nations appear to be prospering–that is, if their nuclear threats are winning them attention and respect, financial bribes in the form of aid and all the other goodies by which petty dictators count success–other prospective rogues will join them. One such state is Venezuela. Currently its oil wealth is largely wasted, but it is great enough to buy entree to a junior nuclear club. Another possibility is Pakistan, which already has a small nuclear capability and is teetering on the brink of chaos. Other potential rogues are one or two of the components that made up the former Soviet Union. All the more reason to ensure that North Korea and Iran are dramatically punished for traveling the nuclear path. But how? It’s of little use imposing further sanctions, as they chiefly fall on the long-suffering populations. Recent disclosures about life in North Korea reveal how effectively the ruling elite is protected from the physical consequences of its nuclear quest, enjoying high standards of living while the masses starve. Things aren’t much better in Iran. Both regimes are beyond the reach of civilized reasoning, one locked into a totalitarian vise of such comprehensiveness as to rule out revolt, the other victim of a religious despotism from which there currently seems no escape. Either country might take a fatal step of its own volition. Were North Korea to attack the South, it would draw down a retribution in conventional firepower from the heavily armed South and a possible nuclear response from the U.S., which would effectively terminate the regime. Iran has frequently threatened to destroy Israel and exterminate its people. Were it to attempt to carry out such a plan, the Israeli response would be so devastating that it would put an end to the theocracy forthwith. The balance of probabilities is that neither nation will embark on a deliberate war but instead will carry on blustering. This, however, doesn’t rule out war by accident–a small-scale nuclear conflict precipitated by the blunders of a totalitarian elite. Preventing Disaster The most effective, yet cold-blooded, way to teach these states the consequences of continuing their nuclear efforts would be to make an example of one by destroying its ruling class. The obvious candidate would be North Korea. Were we able to contrive circumstances in which this occurred, it’s probable that Iran, as well as any other prospective rogues, would abandon its nuclear aims. But how to do this? At the least there would need to be general agreement on such a course among Russia, China and the U.S. But China would view the replacement of its communist ally with a neutral, unified Korea as a serious loss. Compensation would be required. Still, it’s worth exploring. What we must avoid is a jittery world in which proliferating rogue states perpetually seek to become nuclear ones. The risk of an accidental conflict breaking out that would then drag in the major powers is too great. This is precisely how the 1914 Sarajevo assassination broadened into World War I. It is fortunate the major powers appear to have understood the dangers of nuclear conflict without having had to experience them. Now they must turn their minds, responsibly, to solving the menace of rogue states. At present all we have are the bellicose bellowing of the rogues and the well-meaning drift of the Great Powers–a formula for an eventual and monumental disaster that could be the end of us all.

#### U.S. legitimacy and liberalism fails

**Ratner, Berkeley political science PhD, 2013**

(Ely, “The Mythical Liberal Order”, 3-1, <http://www.cnas.org/node/10121>, ldg)

Liberal internationalists like to say that “global problems require global solutions,” but that’s just not true. On most of the issues that matter, a solution worthy of the effort is possible through the cooperation of only a few countries, generally fewer than ten. The world doesn’t need big institutions to support that kind of bargaining. And foreign-policy makers don’t need concepts like a “concert of democracies” that constrain the bargaining game on the basis of regime type, or anything else. Solving global challenges requires a hardheaded assessment of which players really matter in getting to an acceptable answer and a process of bargaining to get them aligned. And, on different issues, different countries will matter more than others. In some and perhaps many instances, this “coalition of the relevant” will need to find ways of legitimating the bargaining outcome to others. This can be tricky, but one thing is for sure—today’s big, multilateral global-governance institutions are not the right place to try to do that, since they are just not good at it anymore (if they ever were). It may be that performance and effective problem solving themselves serve as sufficient legitimation for a younger generation, outside the United States in particular, that is all too ready to jettison the irrelevant baggage of the postwar international system as it used to be and as only aging Americans and Europeans could be nostalgic about. The core policy challenge within this new approach will probably be less about legitimation and more about how to minimize the losses, costs and damage done by countries that cheat and free ride, because some certainly will. Part of the answer is that the process of bargaining will factor this into the equation, so that any gains worthy of a consensus will have to outweigh the costs of free riding. We simply must let go of the dysfunctional assumption that mostly everyone has to be on board to make a solution work and stick. That mind-set gives spoilers more leverage than they deserve. Instead, we should build the coalitions that demonstrate results and effectiveness, entice the reluctant to sign up for selective benefits and let them go if they won’t. The Trans-Pacific Partnership (TPP) trade agreement is a reasonable example of what bargaining toward liberalism looks like in practice. The pact, albeit a work in progress, has brought together nearly a dozen countries to devise a “gold standard” trade agreement for the twenty-first century. It is open to all who are willing to commit to a series of liberal economic and trade principles, and it holds the best promise for advancing a liberal trade agenda. The TPP should stand not just as a model for future trade agreements but more broadly as a model for partial global governance. The relevant question for U.S. foreign-policy makers now is: Where can similar coalitions be constructed across the full spectrum of foreign-policy challenges, whether they are designed to address human rights, maritime safety, development or nonproliferation? Piecing together issue-by-issue solutions from the bottom up is a practical means by which committed partners can make visible progress on global challenges. Short-term but palpable results are needed now and in some instances can be leveraged to tackle more difficult issues and possibly build broader coalitions. For example, nontraditional security threats such as natural disasters, trafficking in persons, counternarcotics and illegal fishing are ripe for delivering tangible benefits to participants and practicing the habits of collective action. This, we believe, is the most effective way to advance liberal objectives and values at present. Can it work with America’s domestic politics? We think so, because an ad hoc, problem-solving approach to global governance does not have to be postideological. Instead, it aims to deliver upon the goals that liberalism seeks to realize and to meet its aspirations through the pursuit of tangible results, not the pursuit of institutions or world-order solutions. In this alternative framework, getting to a solution drives the form of collaboration rather than the other way around. We are advocating the pursuit of a multigenerational liberal project that can and should be advanced without the anxiety of trying to lock in interim gains through global institutions. Let’s focus instead on laying the material foundations for a future liberal order—let the ideology follow, and the institutions after that.

#### No spillover — lack of credibility in one commitment doesn’t affect others at all

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

Second, pessimists overstate the extent to which a policy of retrenchment can damage a great power's capabilities or prestige. Gilpin, in particular, assumes that a great power's commitments are on equal footing and interdependent. In practice, however, great powers make commitments of varying degrees that are functionally independent of one another. Concession in one area need not be seen as influencing a commitment in another area.25 Far from being perceived as interdependent, great power commitments are often seen as being rivalrous, so that abandoning commitments in one area may actually bolster the strength of a commitment in another area. During the Korean War, for instance, President Harry Truman's administration explicitly backed away from total victory on the peninsula to strengthen deterrence in Europe.26 Retreat in an area of lesser importance freed up resources and signaled a strong commitment to an area of greater significance.

### Adventurism

#### We have learned the lessons of failed intervention- political and economic incentives means we will avoid starting protracted wars

Mandelbaum, 11 – John Hopkins University International Studies professor

[Michael, "CFR 90th Anniversary Series on Renewing America: American Power and Profligacy," CFR, 1-18-11, www.cfr.org/united-states/cfr-90th-anniversary-series-renewing-america-american-power-profligacy/p23828?cid=rss-fullfeed-cfr\_90th\_anniversary\_series\_on-011811&utm\_source=feedburner&utm\_medium=feed&utm\_campaign=Feed:+cfr\_main+(CFR.org+-+Main+Site+Feed)

HAASS: Michael, I think I know the answer to this question, but let me ask you anyhow, which is, the last 10 years of American foreign policy has been dominated by two extremely expensive interventions, one in Iraq, one now in Afghanistan. Will this sort of pressure both accelerate the end, particularly of Afghanistan? But, more important, will this now -- is this the end of that phase of what we might call "discretionary American interventions?" Is this basically over? MANDELBAUM: Let's call them wars of choice. (Laughter.) HAASS: I was trying to be uncharacteristically self-effacing here. But clearly it didn't hold. Okay. MANDELBAUM: I think it is, Richard. And I think that this period really goes back two decades. I think the wars or the interventions in Somalia, in Bosnia, in Kosovo, in Haiti belong with the interventions in Afghanistan and Iraq, although they were undertaken by different administrations for different reasons, and had different costs. But all of them ended up in the protracted, unexpected, unwanted and expensive task of nation building. Nation building has never been popular. The country has never liked it. It likes it even less now. And I think **we're not going to do it again**. We're not going to do it because there won't be enough money. We're not going to do it because there will be other demands on the public purse. We won't do it because we'll be busy enough doing the things that I think ought to be done in foreign policy. And we won't do it because it will be clear to politicians that the range of legitimate choices that they have in foreign policy will have narrowed and will exclude interventions of that kind. So I believe and I say in the book that the last -- the first two post-Cold War decades can be seen as a single unit. And that unit has come to an end.

#### They reduce the complexity of executive decision-making- Syria proves Obama is preserving the flexibility to accomplish war-fighting objectives but not abandoning the political process

Savage, 13 -- NYT reporter

[Charlie, master's degree in 2003 from Yale Law School,, recipient of the 2007 Pulitzer Prize for national reporting on the issue of Presidential Signing Statements, specifically the use of such statements by the Bush administration, "Obama Tests Limits of Power in Syrian Conflict," NYT, 9-8-13, www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html?pagewanted=all&\_r=1&)

In asking Congress to authorize an attack on Syria over claims it used chemical weapons, President Obama has chosen to involve lawmakers in deciding whether to undertake a military intervention that in some respects resembles the limited types that many presidents — Ronald Reagan in Grenada, Bill Clinton in Kosovo and even Mr. Obama in Libya — have launched on their own. On another level, the proposed strike is unlike anything that has come before — an attack inside the territory of a sovereign country, without its consent, without a self-defense rationale and without the authorization of the United Nations Security Council or even the participation of a multilateral treaty alliance like NATO, and for the purpose of punishing an alleged war crime that has already occurred rather than preventing an imminent disaster. The contrasting moves, ceding more of a political role to Congress domestically while expanding national war powers on the international stage, **underscore the complexity of** Mr. **Obama’s** **approach** to the Syrian crisis. His administration pressed its case on Sunday, saying it had won Saudi backing for a strike, even as the Syrian president warned he would retaliate. Mr. Obama’s strategy ensures that no matter what happens, the crisis is likely to create an important precedent in the often murky legal question of when presidents or nations may lawfully use military force.

#### Courts won’t follow up-cant solve deference

Jonathan L. Entin 12, Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations, 45 Case W. Res. J. Int'l L. 443

Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive's position, it generally has done so on relatively narrow grounds.¶ Consider the Espionage Act cases that arose during World War I. Schenck v. United States, n63 which is best known for Justice Holmes's [\*452] announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant's having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." n64 The circumstances in which the speech took place affected the scope of First Amendment protection: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." n65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort n66 and of Eugene Debs for a speech denouncing the war. n67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States, n68 but only Justice Brandeis agreed with his position. n69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes's opinions for the Court in the earlier cases. n70¶ Similarly, the Supreme Court rejected challenges to the government's war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs. n71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts. n72 In addition, the Court upheld the validity of the Japanese internment program. n73 Of course, the Court did limit the scope of the [\*453] program by holding that it did not apply to "concededly loyal" citizens. n74 But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated. n75 Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees. n76¶ The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region. n77 The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, n78 but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone. n79 The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges. n80¶ The picture in the post-2001 era is less clear. In three different cases the Supreme Court has rejected the executive branch's position, but all of those rulings were narrow in scope. For example, Hamdi v. Rumsfeld n81 held that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to have a neutral decision-maker determine the factual basis for his detention. There was no majority opinion, however, so the implications of the ruling were ambiguous to say the least. Justice O'Connor's plurality opinion for four members of the Court concluded that Congress had authorized the president to detain enemy combatants by passing the Authorization for Use of Military Force n82 and that the AUMF satisfied the statutory requirement of congressional authorization for the detention of U.S. [\*454] citizens. n83 Justice Souter, joined by Justice Ginsburg, thought that the AUMF had not in fact authorized the detention of American citizens as required by the statute, n84 which suggested that Hamdi should be released. But the Court would have been deadlocked as to the remedy had he adhered to his view of how to proceed. This was because Justices Scalia and Stevens also believed that Hamdi's detention was unlawful and that he should be released on habeas corpus, n85 whereas Justice Thomas thought that the executive branch had acted within its authority and therefore would have denied relief. n86 This alignment left four justices in favor of a remand for more formal proceedings, four other justices in favor of releasing Hamdi, and one justice supporting the government's detention of Hamdi with no need for a more elaborate hearing. To avoid a deadlock, therefore, Justice Souter reluctantly joined the plurality's remand order. n87¶ Hamdi was atypical because that case involved a U.S. citizen who was detained. The vast majority of detainees have been foreign nationals. In Hamdan v. Rumsfeld, n88 the Supreme Court ruled that the military commissions that the executive branch had established in the wake of the September 11 attacks had not been authorized by Congress and therefore could not be used to try detainees. n89 A concurring opinion made clear that the president could seek authorization from Congress to use the type of military commissions that had been established unilaterally in this case. n90¶ Congress responded to that suggestion by enacting the Military Commissions Act of 2006, n91 which sought to endorse the executive's detainee policies and to restrict judicial review of detainee cases. In Boumediene v. Bush, n92 the Supreme Court again rejected the government's position. First, the statute did not suspend the writ of [\*455] habeas corpus. n93 Second, the statutory procedures for hearing cases involving detainees were constitutionally inadequate. n94 At the same time, the Court emphasized that the judiciary should afford some deference to the executive branch in dealing with the dangers of terrorism n95 and should respect the congressional decision to consolidate judicial review of detainee cases in the District of Columbia Circuit. n96¶ Detainees who have litigated in the lower federal courts in the District of Columbia have not found a sympathetic forum. The U.S. Court of Appeals for the D.C. Circuit has not upheld a single district court ruling that granted any sort of relief to detainees, and the Supreme Court has denied certiorari in every post-Boumediene detainee case in which review was sought. n97 In only one case involving a detainee has the D.C. Circuit granted relief, and that case came up from a military commission following procedural changes adopted in the wake of Boumediene. n98 About a month after this symposium took place, in Hamdan v. United States n99 the court overturned a conviction for providing material support for terrorism. The defendant was the same person who successfully challenged the original military commissions in Hamdan v. Rumsfeld. n100 This very recent ruling emphasized that the statute under which he was prosecuted did not apply to offenses committed before its enactment. n101 It remains to be seen how broadly the decision will apply. [\*456] ¶ Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In Arar v. Ashcroft, n102 the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. n103 And in Mohamed v. Jeppesen Dataplan, Inc., n104 the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. n105 Unlike Arar, in which the defendants were federal officials, n106 this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. n107 Although at least four judges on the en banc courts dissented from both rulings, n108 the Supreme Court declined to review either case. n109

#### Deference is goldilocks now---court isn’t letting the executive get away with murder

Scheppele 12 (KIM LANE SCHEPPELE is a Laurance S. Rockefeller Professor of Sociology and Public Affairs in the Woodrow Wilson School and University Center for Human Values; Director of the Program in Law and Public Affairs, Princeton University, “THE NEW JUDICIAL DEFERENCE,” http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SCHEPPELE.pdf)

The anti-terrorism cases also show that many judges were braver than we might have expected them to be under the circumstances. This is something constitutionalists can rightly applaud. In the cases we have reviewed, the government was not permitted to carry out draconian terrorism policies without challenge after 9/11. In that sense, new deference is no longer deference at all. This is a huge contrast with the old deference cases in which federal courts permitted the executive branch to act with extraordinary powers during crises.404 But while it was taken for granted, as we have seen, that courts would defer to the political branches in times of crisis, up through and including World War II, it was simply not an option for courts to walk away from their serious constitutional responsibilities after 9/11. Of course, some judges wanted to increase the President’s power and thereby give up any limiting role that they, as judges, might play. But such judges were in the minority, especially as one went up the judicial hierarchy. After 9/11, the vocabulary of judging in times of crisis has changed so that now courts are cogovernors with the political branches in times of conflict. The U.S. Supreme Court was not alone in finding fault with post-9/11 policies. As we saw earlier in this Article, many other courts around the world did the same.405

#### No chance of a tyrannical wartime president---not in the culture

Posner and Vermeule 9 (Eric, Kirkland & Ellis Professor of Law, The University of Chicago and Adrian, John H. Watson Professor of Law, Harvard Law School. “TYRANNOPHOBIA,” http://www.law.uchicago.edu/files/file/276-eap-tyrannophobia.pdf)

But if American presidents have gained more legal and political power over time, they remain vastly more constrained, at least politically, than the Caesars and the Cromwells that the founders feared. Indeed, the United States—unlike many other countries, including Germany, of course—has never had a dictator, nor has it come close. Every president has humbly submitted to an election after four years and stepped down (except for FDR) after eight. George Washington, in many respects a model of the constrained executive, devoted much of his Farewell Address to warning his fellow citizens about the risks and evils of tyranny.35 Lincoln violated the law at the start of the Civil War but felt that he needed to obtain congressional ratification of his actions after the fact, and stood for election at the end of his first term. Wilson and Roosevelt also had tremendous power to conduct war, but presidential power has always contracted with the return to peace—or, put differently, while presidents are understood to have broad warmaking powers, these powers have not resulted in peacetime dictatorships. The peculiar danger reflected by Caesar and Cromwell, and later Napoleon, was that a charismatic military leader would become a dictator by popular acclimation. This never happened in the United States. The closest example is Andrew Jackson, and while he used his powers aggressively—notably, by ignoring a supreme court ruling and by refusing to comply with a statute that required the Treasury to deposit funds with the Bank of the United States—no historian considers him a dictator. Although Jackson’s impact on the presidency was large in the long term—he was the first charismatic, populist president, and helped establish the modern party system—like so many other strong presidents, he provoked a backlash36 and was followed by a string of mediocrities. A few historians think that Douglas MacArthur could have staged a coup d’état after being fired by Truman. This judgment is questionable, to say the least; MacArthur quickly became a figure of ridicule.37 Eisenhower, while arguably a strong president, used his powers moderately. Americans admire the military but the culture is not militaristic; aside from Washington, Eisenhower, and Jackson, no great military leader has had any success as a politician.38 The worst decade for democracy was the 1930s, when global economic upheaval produced dictatorships around the world. Conditions were worse in the United States than in many of these countries. For a very brief period, some Americans admired Mussolini, who seemed to be able to get things done. In 1927, Studebaker even named one of its cars the “Dictator.”39 But the rise of dictatorship in Europe and elsewhere, especially when it took an ugly turn in the 1930s, did not lead to imitation in the United States. The only serious American politician who could even remotely seem to fit the fascist mold was Huey Long, the governor of Louisiana from 1928 to 1932, and senator from 1932 to 1935. As governor and leader of a political party, Long advanced a populist platform of redistribution and public works. He was a charismatic leader who some believe sought to create a cult of personality and to obtain dictatorial powers.40 Whether or not he had this goal, he never came close to achieving it. He obtained power in Louisiana through democratic means; maintained power by cooperating with the political establishment; and was assassinated before he had any serious prospect of running for president and obtaining national power.

#### The Court is vulnerable to cuts---perceptions of judges being political causes their funding to be delayed which collapses effectiveness

MPN 10/15 (Mint Press News, “Federal Courts At Brink Of Collapse Due To Shutdown,” http://www.mintpressnews.com/federal-courts-at-brink-of-collapse-due-to-shutdown/170562/)

Fundamentally, unlike the executive branch, the judiciary has no advocate. It has no secretary to argue for it before Congress; nor do the courts have access to the public to push for popular support. As the judiciary is a responsive agency — dealing with the cases assigned to it with little internal capacity to change its workflow — it cannot easily adjust to changes in funding with personnel shifts or changes to programming, as other federal entities can. “We don’t exert the kind of control to keep up resources to match the need,” said Richard Roberts, the chief judge of the U.S. District Court for the District of Columbia. “We don’t have ultimately any authority to set appropriations Congress decides on. We do not necessarily get to decide what the White House sends to [the Office of Management and Budget] and to Congress. We can’t go out and stir up constituents to do talking for us. Structurally, there’s a bit of an imbalance.” A common mentality in the Republican Party that the court is being controlled by “advocate judges” has not helped in convincing the party to preserve judicial budgets. While it is unfair to say that this is the primary reason why the judiciary is often an afterthought in budget negotiations, it helps to explain — in part, along with the fact that the court is typically not engaged in public political discussions — why court budget cuts tend to be underreported. Yet their effects are clear to see. The courts are increasingly being challenged to find ways to keep their doors open without impairing access to justice and endangering the public safety at a whole. In a March sequestration hearing, U.S. Supreme Court Justices Stephen Breyer and Anthony Kennedy spoke to the House Appropriations subcommittee on addressing the sequestration levels facing the Judiciary. “Please consider the 0.2 percent of the federal budget for the entire third branch of the federal government is more than reasonable. What’s at stake here is the efficiency of the courts, and they are … not only part of the constitutional structure, they are part of the economic structure of the country,” Kennedy said. “If it’s for any long term, it will be inconsistent with the constitutional obligation of the Congress to fund the courts,” Kennedy continued. “We don’t control our workload. Cases come to us, we don’t go looking for cases.” The court considers some 9,000 petitions for certiorari in a year, Kennedy said. “We can’t say arbitrarily, we’re only going to consider 6,000 and let the others go by the wayside.” Sequestration cut $350 million of the federal judiciary budget last year, bringing current funding levels to $6.6 billion.

#### Independently, the plan clogs the court

**Wittes, Brookings governance studies senior fellow, 2010**

(Benjamin, Detention and Denial: The Case for Candor After Guantanamo, 117-8, ldg)

The system's major disadvantages involve its limited capacity with respect to processing large numbers of detainees. It works best when dealing with small numbers, and using it as a mecha¬nism for processing sudden influxes of hundreds or thousands of detainees is inconceivable. Its legitimacy comes from the care with which it considers the evidence of each element of each offense alleged against each captive, a feature that makes it far too labor intensive and evidence intensive to handle huge volumes of detainees. Still, for periods in which the number of captives remains low—periods in which U.S. combat forces can rely on well-developed proxies for overseas detentions—the justice sys¬tem can and will bear a great deal of the weight. That is by and large a good thing, as its use oftentimes achieves the best balance of society's many interests in a detention. That said, the system is far from perfect, and its use often has real costs and dangers. If there exist ways to augment its capacity and to allow it to handle a greater percentage of captives more comfortably, that could both minimize controversy and maximize the effectiveness of what is, in many instances, the most effective system

Collapses the court and the economy

Peters 13 (Katie Peters, CAP analyst, economy education healthcare, “Legal Progress Toolkit: Sequestration and the Federal Judiciary,” http://www.americanprogress.org/issues/general/news/2013/02/27/54926/sequestration-and-the-federal-judiciary/)

The sequester – across-the-board budget cuts of $1.2 trillion — could have a drastic and harmful impact on public services that affect members of the public every day. This extends to the entire third branch of government – the federal judiciary. Under the sequester it will be even more difficult for Americans to get access to justice and the courts, which protect our constitutional rights every day. It’s already hard enough to get your day in court, thanks to widespread judicial vacancies and a large backlog of cases caused by unprecedented obstruction in the U.S. Senate. Millions of Americans are already seeing justice delayed and denied by vacancies, a situation that would be made even worse under cuts to the judiciary’s budget. How much will be cut? If Congress doesn’t take action, the federal judiciary could see 5.3 percent of its budget eviscerated. That’s about $323 million below the 2012 funding level. What will be cut? Much of judicial spending is mandatory – judges can’t be laid off or furloughed and rents must be paid. This means the cuts fall unevenly on certain court services and personnel, without which our federal judiciary cannot operate, and courthouse doors will shut. Up to 4, 400 staff could be laid off including law clerks, court security officers and probation officers. Funding would be cut for necessary security equipment. Without proper safeguards, the entire judicial process could be compromised. The courts won’t be able to pay for jurors and commissioners, inevitably suspending all civil jury trials. The courts won’t be able to pay for defender services, meaning the courts won’t be able to meet the constitutional right of defendants to a court-appointed attorney. Why does it matter? Put simply, under sequestration, our federal courts – the third branch of government — cannot operate. The administration of justice would continue to slow and put a greater strain on an already overburdened justice system. Our federal courts hear cases on many issues, and since criminal defendants have a constitutional guarantee of a speedy trial, criminal trials could move forward while civil trials would not. Civil cases on a variety of issues would slow or come to a halt, including hearings on Social Security benefits, immigration, employment and civil liberties. Many leaders in the legal community from both parties are warning about the dangers of the cross-the-board budget cuts to the federal judiciary, including: Chief Justice John G. Roberts (George W. Bush appointee) said: “Because the judiciary has already pursued cost containment so aggressively, it will become increasingly difficult to economize further without reducing the quality of judicial services… Virtually all of the judiciary’s core functions are constitutionally and statutorily required. Unlike executive branch agencies, the courts do not have discretionary programs they can eliminate or projects they can postpone.” Former Rep. Norm Dicks (D-WA) said: “As a consequence, the federal courts would be unable to properly supervise thousands of persons under pretrial release and convicted felons released from federal prisons, thus compromising public safety in the community.” 6th Circuit Judge Julia Gibbons (George W. Bush appointee), Chair of the Committee on the Budget of the Judicial Conference of the United States said: “[A] reduction of this magnitude would cripple the operation of the federal Judiciary and our constitutional mission would be compromised due to these sudden, arbitrary budget cuts.” Laurel Bellows, president of the American Bar Association said: “Withering court funding when our economy is emerging from the worst economic disaster since the Great Depression would cause costly delays that would sap resources and prevent businesses from investing in their communities. Commerce thrives on the certainty that our courts provide. Keeping the courthouse doors open is essential for our nation’s recovery.”

#### Nuclear war

Merlini, Senior Fellow – Brookings, 11

[Cesare Merlini, nonresident senior fellow at the Center on the United States and Europe and chairman of the Board of Trustees of the Italian Institute for International Affairs (IAI) in Rome. He served as IAI president from 1979 to 2001. Until 2009, he also occupied the position of executive vice chairman of the Council for the United States and Italy, which he co-founded in 1983. His areas of expertise include transatlantic relations, European integration and nuclear non-proliferation, with particular focus on nuclear science and technology. A Post-Secular World? DOI: 10.1080/00396338.2011.571015 Article Requests: Order Reprints : Request Permissions Published in: journal Survival, Volume 53, Issue 2 April 2011 , pages 117 - 130 Publication Frequency: 6 issues per year Download PDF Download PDF (~357 KB) View Related Articles To cite this Article: Merlini, Cesare 'A Post-Secular World?', Survival, 53:2, 117 – 130]

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

#### No Africa war or too many alternate causes

**Straus, Wisconsin politics professor, 2012**

(Scott, “Wars Do End! Changing Patterns Of Political Violence In Sub-Saharan Africa”, afraf.oxfordjournals.org/content/early/2012/03/01/afraf.ads015.full, ldg)

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

#### No Korean war-provocations are the norm

**Lankov, ANU adjunct research fellow, 2013**

(Andrei, “Serious armed clash on the Korean Peninsula unlikely”, 3-28, <http://www.eastasiaforum.org/2013/03/28/a-serious-armed-clash-on-the-korean-peninsula-is-unlikely/>, ldg)

The international community is worried, to be sure, and some media outlets have begun to dispatch their correspondents to Seoul on the assumption that a conflict might break out very soon. But these media companies are likely to be wasting their money. The likelihood of any confrontation, let alone war, in Korea remains pretty low. What we are seeing now is just another round of political manipulation by Pyongyang. The DPRK’s show of menacing bellicosity is a performance aimed at both foreign and domestic audiences. This is well understood in Seoul — not only by the government but also by the public at large. While the South Korean media dutifully report the gothic threats that emanate from Pyongyang, the general public pays surprisingly little attention to these outbursts and seeming signs of danger. It is also telling that the South Korean stock market has not reacted in any noticeably negative way to the ‘crisis’. The reason for this calm is simple: South Koreans have seen this many, many times. As a matter of fact, they see such histrionics as often as once every year or two. North Korea has claimed that the 1953 armistice is null and void on a number of occasions in the past — the last time such statements were made was in May 2009, as part of a reaction against an earlier UN resolution, which, like the recent one, condemned a nuclear test. As for the recent promise to transform Seoul into a ‘sea of fire’, it has been repeated a number of times. It was first used in 1994 and repeated in 2003. Sometimes, the North Korean media has not limited itself to such general threats, but has become very specific about their supposed targets. For example, in July 2012, the North Korean official media threatened to blow up the headquarters of a major South Korean newspaper, which had published articles and materials not to Pyongyang’s liking. But nothing has happened to the newspaper’s headquarters or, for that matter, to the South Korean capital itself. North Korea has never made good on its threats, so the South Korean public is probably right to take another Pyongyang broadside very lightly. So why does North Korea behave this way? There seem to be at least two reasons behind Pyongyang’s noisy behaviour. First, this rhetoric seems to have become a standard reaction to UN Security Council resolutions that condemn nuclear and missile tests in the North. In spite of its high pitch this is a diplomatic gesture, a way to express North Korea’s dissatisfaction with the resolution and its resolute unwillingness to bow to outside pressure. But there is another reason for the DPRK’s verbal bellicosity. The North Korean populace has to be regularly reminded that their country is surrounded by scheming enemies. Otherwise, they might start asking politically dangerous questions — for example, they might wonder why their country, once the most industrially advanced in all of continental East Asia, is increasingly lagging behind China and, especially, South Korea. Outside threats are the best way to explain away never-ending economic difficulties, and an air raid drill or two does wonders when it comes to keeping people afraid and stopping them from having heretical thoughts. It will also remind North Koreans of the need to maintain discipline and unite around the current leader and his ‘glorious’ family. It therefore appears that the world has overreacted somewhat to North Korean rhetoric. This does not mean that the Korean Peninsula is a peaceful place. On the contrary, as decades of experience teaches us, we can be pretty sure that from time to time some clashes (of relatively small scale) are bound to happen on the land and sea borders between the two Koreas. But right now the chances of such clashes are low. The noise emanating from Pyongyang is, well, just noise.

## 2nc

## DA

### Turns

#### Political branch counter measures would wreck judicial legitimacy

**Chesney, Texas law professor, 2009**

(Robert, “National Security Fact Deference”, 95 Va. L. Rev. 1361, lexis, ldg)

Judicial involvement in national security litigation, as noted at the outset, poses unusual risks for the judiciary as an institution. Such cases are more likely than most to involve claims of special, or even exclusive, executive branch authority. They are more likely than most to involve a perception - on the part of the public, the government, or judges themselves - of unusually high stakes. They are more likely than most to be in the media spotlight and hence in view of the public in a meaningful sense. These cases are, as a result of all this, especially salient as a political matter. And therein lies the danger for the courts. Because of these elements, an inappropriate judicial intervention in national security litigation is unusually likely to generate a response from the other branches or the public at large that might harm the institutional interests of the judiciary, either by undermining its prestige and authority or perhaps even by triggering some form of concrete political response.

### Link

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

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

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

Congress, the President, and the Court. Throughout the enemy combatant litigation, Congress signaled to the Court that it would go along with whatever ruling the Court made in these cases. In other words, contrary to the portrayal by academics and the news media of the Supreme Court's willingness to stand up to Congress and the executive branch, lawmakers repeatedly stood behind Court rulings limiting elected branch power. At the same time, as I will detail in the next Part, the Court pursued an incremental strategy - declining to test the boundaries of lawmaker acquiescence and, instead, issuing decisions that it knew would be acceptable to lawmakers. n85 The 2004 rulings in Hamdi and Rasul triggered anything but a backlash. In the days following the decisions, no lawmaker spoke on the House or Senate floor about the decision, and only a handful issued [\*508] press releases about the cases. n86 And while eight members of Congress signed onto amicus briefs backing administration policy, n87 Congress did not seriously pursue legislative reform on this issue until the Supreme Court had agreed to hear the Hamdan case. n88 When Congress enacted the Detainee Treatment Act (DTA) in December 2005, "lawmakers made clear that they did not see the DTA as an attack on either the Court or an independent judiciary." n89 Most significant, even though the DTA placed limits on federal court consideration of enemy combatant habeas petitions, lawmakers nevertheless anticipated that the Supreme Court would decide the fate of the President's military tribunal initiative. Lawmakers deleted language in the original bill precluding federal court review of Hamdan and other pending cases. n90 Lawmakers, moreover, depicted themselves as working collegially with the Court; several Senators, for example, contended that the "Supreme Court has been shouting to us in Congress: Get involved," n91 and thereby depicted Rasul as a challenge [\*509] to Congress, n92 "asking the Senate and the House, do you intend for ... enemy combatants ... to challenge their detention [in federal courts] as if they were American citizens?" n93 Lawmakers also spoke of detainee habeas petitions as an "abuse[]" n94 of the federal courts, and warned that such petitions might unduly clog the courts, n95 thus "swamping the system" n96 with frivolous complaints. n97 Under this view, the DTA's cabining of federal court jurisdiction "respects" the Court's independence and its role in the detainee process. n98 Following Hamdan, lawmakers likewise did not challenge the Court's conclusions that the DTA did not retrospectively bar the Hamdan litigation and that the President could not unilaterally pursue his military tribunal policy. n99 Even though the Military Commissions Act (MCA) eliminates federal court jurisdiction over enemy combatant habeas petitions, lawmakers depicted themselves as working in tandem with the Court. Representative Duncan Hunter (R. Cal.), who introduced the legislation on the House floor, said during the debates that the bill was a response to the "mandate of the Supreme Court that Congress involve itself in producing this new structure to prosecute terrorists." n100 And DTA sponsor Lindsey Graham stated: "The Supreme Court has set the rules of the road and the [\*510] Congress and the president can drive to the destination together." n101 Even lawmakers who expressed disappointment in the Court's ruling did not criticize the Court. Senator Sessions (R. Ala.), for example, blamed Hamdan's lawyers for misleading the Court about the legislative history of the DTA. n102 Debates over the MCA habeas provision, moreover, reveal that lawmakers thought that the Supreme Court was responsible for assessing the reach of habeas protections. Fifty-one Senators (fifty Republicans and one Democrat) voted against a proposed amendment to provide habeas protections to Guantanamo detainees. Arguing that enemy combatants possessed no constitutional habeas rights, n103 these lawmakers contended that they could eliminate habeas claims without undermining judicial authority. One of the principal architects of the MCA, Senator Lindsey Graham, put it this way: Enemy combatants have "a statutory right of habeas ... . And if [the Supreme Court finds] there is a constitutional right of habeas corpus given to enemy combatants, that is ... totally different ... and it would change in many ways what I have said." n104 Forty-eight Senators (forty-three Democrats, four Republicans, and one Independent) argued that the habeas-stripping provision was unconstitutional, that the courts would "clean it up," n105 and that Congress therefore should fulfill its responsibility to protect "that great writ." n106 When the Supreme Court agreed to rule on the constitutionality of the MCA, the Congress no longer supported the MCA's habeas-stripping provisions. Democrats had gained control of both Houses of Congress. Not surprisingly, there was next-to-no lawmaker criticism of Boumediene. In the week following the decision, no member [\*511] of the House, and only two Senators, made critical comments about the decision on the House or the Senate floor. n107 \* \* \* Supreme Court enemy combatant decisions were not out-of-step with prevailing social and political forces. Academics (including prominent conservatives), the media (again including conservative newspapers), former judges, and bar groups had all lined up against the administration. Interest groups too opposed the administration (including some conservative groups). Over the course of the enemy combatant litigation, the American people increasingly opposed the Bush administration. This opposition, in part, was tied to policy missteps (some of which implicated enemy combatant policy-making). These missteps were highly visible and contributed to widespread opposition to the Bush administration. For its part, Congress did not question the Court's role in policing the administration's enemy combatant initiative. By the time the Court decided Boumediene, voter disapproval of the President had translated into widespread opposition to the administration's enemy combatant initiative; a Democratic Congress supported habeas protections for enemy combatants and presidential candidates John McCain and Barack Obama called for the closing of Guantanamo Bay. In the next part of this Essay, I will discuss the incremental nature of the Court's decision making. This discussion will provide additional support for the claims made in this section. Specifically, I will show that each of the Court's decisions was in sync with changing attitudes towards the Bush administration. More than that, Part II will belie the myth that Court enemy combatant decisions were especially consequential. Unlike newspaper and academic commentary about these cases, Court decision making had only a modest impact. Correspondingly, the Court never issued a decision that risked its institutional capital; the Court knew that its decisions would be followed by elected officials and that its decisions would not ask elected officials to take actions that posed some national security risk. [\*512] II. Judicial Modesty or Judicial Hubris: Making Sense of the Enemy Combatant Cases From 1952 (when the Supreme Court slapped down President Truman's war-time seizure of the steel mills) n108 until 2004 (when the Court reasserted itself in the first wave of enemy combatant cases), the judiciary largely steered clear of war powers disputes. n109 In part, the Court deferred to presidential desires and expertise. The President sees the "rights of governance in the foreign affairs and war powers areas" as core executive powers. n110 Correspondingly, the President has strong incentives to expand his war-making prerogatives. n111 For its part, the Court has limited expertise in this area, and, as such, is extremely reluctant to stake out positions that may pose significant national security risks. n112 The Court, moreover, is extremely reluctant to risk elected branch opprobrium. Lacking the powers of purse and sword, the Court cannot ignore the risks of elected branch non-acquiescence. n113 Against this backdrop, the Court's repudiation of the Bush administration's enemy combatant initiative appears a dramatic break from past practice. Academic and newspaper commentary back up this claim - with these decisions being labeled "stunning" (Harold [\*513] Koh), n114 "unprecedented" (John Yoo), n115 "breathtaking" (Charles Krauthammer), n116 "astounding" (Neal Katyal), n117 "sweeping and categorical" (New York Times), n118 and "historic" (Washington Post and Wall Street Journal). n119 Upon closer inspection, however, the Court's decisions are anything but a dramatic break from past practice. Part I detailed how Court rulings tracked larger social and political forces. In this Part, I will show how the Court risked neither the nation's security nor elected branch non-acquiescence. n120 The Court's initial rulings placed few meaningful checks on the executive; over time, the Court - reflecting increasing public disapproval of the President - imposed additional constraints but never issued a ruling that was out-of-sync with elected government preferences. Separate and apart from reflecting growing public and elected government disapproval of Bush administration policies, the Court had strong incentives to intervene in these cases. The Bush administration had challenged the Court's authority to play any role in national security matters. n121 This frontal assault on judicial power prompted the Court to stand up for its authority to "say what the law is." In Part III, I will talk about the Court's interest in protecting its turf - especially in cases implicating individual rights. [\*514] Small Steps: Hamdi and Rasul. These decisions were a minimalist opening volley in Court efforts to place judicial limits on the Bush administration. While rejecting claims of executive branch unilateralism in national security matters, the Court said next-to-nothing about how it would police the President's enemy combatant initiative. Rasul simply held that Guantanamo Bay was a "territory over which the United States exercises exclusive jurisdiction and control," and, consequently, that the President's enemy combatant initiative is subject to existing habeas corpus legislation. n122 This ruling "avoided any constitutional judgment" and offered no guidance on "what further proceedings may become necessary" after enemy combatants filed habeas corpus petitions. n123 Hamdi, although ruling that United States citizens have a constitutional right to challenge their detention as an enemy combatant, placed few meaningful limits on executive branch detentions. Noting that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive," the Court ruled both that hearsay evidence was admissible, and that "the Constitution would not be offended by a presumption in favor of the Government's evidence." n124 The Bush administration, as John Yoo put it, saw the limited reach of Hamdi and Rasul as creating an "opportunity" for the administration to regain control over its detention policy. n125 In particular, the administration asked Congress to enact legislation that would limit federal court review of enemy combatant claims. The administration also launched Combatant Status Review Tribunals (CSRT) as a more formal substitute for unilateral executive determinations of a detainee's enemy combatant status. n126 Capitalizing on Rasul's failure to consider the constitutional dimensions of enemy combatant claims, CSRTs largely operated as a rubber stamp of administration determinations. In 2006, ninety-nine out of 102 detainees brought before CSRTs were designated as enemy combatants. n127 The Justice Department reconvened CSRTs to reconsider the remaining three cases [\*515] and, ultimately, the remaining three were determined to be enemy combatants. n128 Hamdi and Rasul were both "narrow, incompletely theorized [minimalist] decisions." n129 And while newspapers and academics focused their attention on the Court's open-ended declaration that "a state of war is not a blank check for the President," n130 the decisions did not meaningfully limit the executive. Well aware that Congress and the American people supported the President's military commission initiative, n131 the Court understood that a sweeping denunciation of administration policies might trigger a fierce backlash. n132 Moreover, by ruling that Congress had authorized the President's power to detain enemy combatants (through its post-9/11 Authorization for the Use of Military Force Resolution), and by suggesting that the Court would make use of pro-government presumptions when reviewing military commission decision making, the Court formally took national security interests into account. n133 Actions taken by the executive in response to these rulings underscore that the Court's de minimis demands neither risked national security nor executive branch non-acquiescence. None of this is to say that the 2004 decisions were without impact. Following Rasul, for example, the administration understood that it needed to make use of some type of military court review - a requirement that may have impacted the military's handling of enemy combatants. At the same time, the Court did not issue a potentially debilitating blow to the Bush administration by decisively and resoundingly rejecting key elements of the administration's legal policy. n134 Instead, the Court simply carved out space for itself to review administration policy-making - without setting meaningful boundaries on what the administration could or could not do.

## Case

### Outweighs---Impact---2NC

#### No one will care about the plan in a crisis

**Young, Purdue associate fellow, 2013**

(Laura, “Unilateral Presidential Policy Making and the Impact of Crises”, Presidential Studies Quarterly, 43.2, JSTOR, ldg)

During periods of crisis, the time available to make decisions is limited. Because the decision-making process is often arduous and slow in the legislative branch, it is not uncommon for the executive branch to receive deference during a crisis because of its ability to make swift decisions. The White House centralizes policies during this time, and presidents seize these opportunities to expand their power to meet policy objectives. Importantly, presidents do so with limited opposition from the public or other branches of government (Howell and Kriner 2008). In fact, despite the opposition presidents often face when centralizing policies, research shows policies formulated via centralized processes during times of crisis receive more support from Congress and the American people (Rudalevige 2002, 148-49). For several reasons, a crisis allows a president to promote his agenda through unilateral action. First, a critical exogenous shock shifts attention and public opinion (Birkland 2004, 179). This shift is a phenomenon known as the “rally round the flag” effect (Mueller 1970). The rally effect occurs because of the public's increase in “its support of the president in times of crisis or during major international events” (Edwards and Swenson 1997, 201). Public support for the president rises because he is the leader and, therefore, the focal point of the country to whom the public can turn for solutions. Additionally, individuals are more willing to support the president unconditionally during such times, hoping a “united front” will increase the chance of success for the country (Edwards and Swenson 1997, 201). As a result, a crisis or focusing event induces an environment that shifts congressional focus, dispels gridlock and partisanship, and increases positive public opinion—each of which is an important determinant for successful expansion of presidential power (Canes-Wrone and Shotts 2004; Howell 2003). In other words, a crisis embodies key elements that the institutional literature deems important for presidential unilateral policy making. The president's ability to focus attention on a particular issue is also of extreme importance if he wishes to secure support for his agenda (Canes-Wrone and Shotts 2004; Edwards and Wood 1999; Howell 2003; Neustadt 1990). The role the media play is pivotal in assisting a president in achieving such a result because of its ability to increase the importance of issues influencing the attention of policy makers and the priorities of viewers. Although it is possible a president can focus media attention on the policies he wishes to pursue through his State of the Union addresses or by calling press conferences, his abilities in this regard are limited, and the media attention he receives is typically short lived (Edwards and Wood 1999, 328-29). High-profile events, on the other hand, are beneficial because they allow the president to gain focus on his agenda. This occurs because the event itself generates attention from the media without presidential intervention. Thus, the ability of crises to set the agenda and shift media and public attention provides another means for overcoming the constraints placed upon the president's ability to act unilaterally. Finally, Rudalevige finds support that a crisis increases the success of presidential unilateral power even if the policy process is centralized. A crisis allows little time to make decisions. As a result, “the president and other elected officials are under pressure to ‘do something’ about the problem at hand” (2002, 89, 148). Because swift action is necessary, presidents rely on in-house advice. As a result, the policy formation process is centralized, and the president receives deference to unilaterally establish policies to resolve the crisis. During a crisis, the president has greater opportunity to guide policy because the event helps him overcome the congressional and judicial obstacles that typically stand in his way.2 This affords the president greater discretion in acting unilaterally (Wildavsky 1966). It is possible the institutional make-up of the government will align so that the president will serve in an environment supportive of his policy decisions. It is also likely a president will have persuasive powers that enable him to gain a great deal of support for his policy agenda. An event with the right characteristics, however, enhances the president's ability to act unilaterally, regardless of the institutional make-up of government or his persuasive abilities.

#### Our impact is more probable- state on state war is largely obsolete

**Hooker, Virginia IR PhD, 2012**

(Richard, “Beyond Vom Kriege: The Character and Conduct of Modern War”, <http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/2011winter/Hooker2.pdf>, ldg)

Modern war, at least as practiced in the West, trades on American and European technology and wealth, not on manpower and ideology. Western militaries are typically small, professional organizations officered by the middle class and filled by working-class volunteers. Their wars are universally “out of area”—that is, not fought in direct defense of national borders—placing a premium on short, sharp campaigns won with relatively few casualties. Although land forces remain indispensable, whenever possible Western militaries fight at a distance using standoff precision weapons, whose accuracy and lethality make it difficult or impossible for less-sophisticated adversaries to fight conventionally with any chance of success. Increasingly, the West’s advantage in rapid data transmission on the battlefield is changing how American and European militaries wage war, as control and use of information assumes decisive importance. The qualitative gap between the armed forces of the West and their likely opponents is not likely to narrow for the foreseeable future. In this sense the West’s absolute military advantage, arguably in force since the Battle of Lepanto in 1571, is likely to persist for generations. Although challengers may pursue niche technologies like anti-ship weapons, theater ballistic or cruise missiles, or computer attack systems, their inability to match the capital expenditures and technological sophistication of the United States and its NATO allies will make military parity highly doubtful, even when they act in coalitions. Nor will nuclear weapons change this calculus. While the small nuclear arsenals of potential adversary states may yield some deterrent benefits, their offensive use as weapons of war (as distinct from their use in terrorism) is doubtful given the vastly more capable nuclear forces belonging to the United States, Britain, and France. This gap in economic and technological capacity suggests other approaches for weaker adversaries. Here there is real danger. A quick look at the protracted insurgencies of the past one hundred years is not encouraging. In China, Vietnam, and Algeria, the West or its surrogates struggled for decades and lost. Russia is experiencing the same agony in Chechnya. Even Western “successes” in Nicaragua, El Salvador, Malaysia, and Aden proved painful and debilitating.14The ability of Western democracies to sustain major military ventures over time, particularly in the face of casualties suffered for less than truly vital stakes, represents a real vulnerability. The sheer cost of maintaining large fighting forces in action at great distances from the homeland is a liability that can be exploited by opponents able to tie down Western forces in extended conflicts. The costs of waging long, drawn-out conflicts will be counted in more than dollars and lives. By a curious logic, the loss of many Americans in a single event or short campaign is less harmful to our political and military institutions than the steady drain of casualties over time. By necessity, the military adapts to the narrower exigencies of the moment, focusing on the immediate fight, at some cost to the future investment, professional growth, and broader warfighting competencies which can be vital in other potential conflicts of greater import. A subsidiary effect is loss of confidence in the military as an institution when it is engaged in protracted operations involving mounting losses without apparent progress. It is too soon to tell if ongoing military operations in Iraq and Afghanistan will yield timely and fruitful results. But if they do not, the long-term effect on the health of the American military could and probably will be damaging. The experience of the Vietnam conflict, while not an exact fit, suggests that very long and enervating campaigns, fought for less than truly vital objectives, delay necessary modernization, absorb military resources earmarked for other, more dangerous contingencies, drive long-service professionals out of the force, and make it harder to recruit qualified personnel. These direct effects may then be mirrored more indirectly in declining popular support, more strident domestic political conflict, damage to alliances and mutual security arrangements, and economic dislocation. These factors will fall more heavily on ground forces, since air and naval forces typically spend less time deployed in the combat theater between rotations, suffer fewer losses, and retain career personnel in higher numbers. Viewed as a case study in the application of Clausewitzian thought, current military operations offer a vivid contrast to the wars fought in Afghanistan in 2001-02 and in Iraq in the spring of 2003. There, coalition military power could be directed against organized military forces operating under the control of regularly constituted political entities. Political objectives could be readily translated into military tasks directed against functioning state structures (“destroy the Taliban and deny al Qaeda refuge in Afghanistan; destroy the Iraqi military and topple Saddam’s regime”). In the aftermath, the focus shifted to nation-building, a more amorphous and ambiguous undertaking with fuzzier military tasks. In Iraq, for example, there is no central locus of decisionmaking power against which military force can be applied. Large-scale combat operations are rare, and military force, while a key supporting effort, is focused on stabilizing conditions so that the main effort of political reconciliation and economic reconstruction can proceed. Resistance appears to be local and fragmented, directed by a loose collection of Sunni Baathist remnants, Shia religious zealots, foreign jihadists, and, increasingly, local tribal fighters seeking revenge for the incidental deaths of family and tribal members. Access to military supplies and to new recruits is enabled both by neighboring powers like Iran and Syria and by local religious and cultural sentiment. In many ways the military problem in Iraq is harder today than it was during major combat operations. Only rarely can we expect to know in advance our enemy’s intentions, location, and methods. In this sense, seizing and maintaining the initiative, at least tactically, is a difficult challenge. Clausewitz was well aware of this environment, which he called “people’s war.” We can be confident that he would be uncomfor table with openended and hard-to-define strategic objectives. However much we may scoff at classical notions of strategy, with their “unsophisticated” and “unnuanced” focus on destroying enemy armies, seizing enemy capitals, installing more pliable regimes, and cowing hostile populations, ignoring them has led to poor historical results. A close reading of Vom Kriege shows that Clausewitz did not neglect the nature of the problem so much as he cautioned against ventures which could not be thoroughly rationalized. Put another way, he recognized there are limits to the power of any state and that those limits must be carefully calculated before, and not after, the decision to go to war. In Iraq, it may well be that American and coalition forces will destroy a critical mass of insurgents sufficient to collapse large-scale organized resistance, an outcome devoutly to be wished for. But if so, we are in a race against time. For the American Army and Marine Corps, and for our British and other coalition partners, the current level of commitment probably does not represent a sustainable steady state unless the forces available are considerably increased. If the security situation does not improve to permit major reductions in troop strength, eventually the strain will tell. At that point, the voting publics of the coalition partners and their governments may face difficult choices about whether and how to proceed.15These choices will be tempered by the knowledge that the homeland itself has now become a battleground. Open societies with heterogeneous populations make Western states particularly vulnerable to terrorist attack, always an option open to hostile states or the terrorist groups they harbor. And however professional, the armies of the West are not driven by religious or ideological zeal. That too can be a weapon—as the Americans and French learned in Indochina and as we see today in the Middle East. The foregoing suggests that in future wars the United States and its Western allies will attempt to fight short, sharp campaigns with superior technology and overwhelming firepower delivered at standoff ranges, hoping to achieve a decisive military result quickly with few casualties. In contrast to the industrial or attrition-based strategies of the past, in future wars we will seek to destroy discrete targets leading to the collapse of key centers of gravity and overall system failure, rather than annihilating an opponent’s military forces in the field. Our likely opponents have two options: to inflict high losses early in a conflict (most probably with weapons of mass destruction, perhaps delivered unconventionally) in an attempt to turn public opinion against the war; or to avoid direct military confrontation and draw the conflict out over time, perhaps in conjunction with terrorist attacks delivered against the homeland, to drain away American and European resolve. In either case our enemies will not attempt to mirror our strengths and capabilities. Our airplanes and warships will not fight like systems, as in the past, but instead will serve as weapon platforms, either manned or unmanned, to deliver precision strikes against land targets. Those targets will increasingly be found under ground or in large urban areas, intermixed with civilian populations and cultural sites that hinder the use of standoff weapons.

### Extra---Yes---2nc

Lawfare No date

Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010)

Here, the D.C. Circuit applied Boumediene’s three-factor test to the habeas petitions of three individuals detained at Bagram Air Force base, thus extending Justice Kennedy’s analysis to the context of Afghanistan. Considering those three factors, the court held that habeas jurisdiction did not extend to the detainees at Bagram. Specifically, the court found that, while the detainees here had received less process than those in Boumediene, these detainees were held in the theater of war and in the territory of another sovereign, thus giving rise to such substantive practical difficulties that habeas jurisdiction was not required.

### Chilling---Link---2NC

#### Deference is key to maintain military strategy and decisiveness

**Fenster et al., Mckenna Long & Aldridge LLP, 2010**

(Herbert, Phillip Carter, “Brief Of The Veterans Of Foreign Wars Of The United States As Amicus Curiae In Support Of Defendants And Dismissal”, http://ccrjustice.org/files/Amicus\_Curiae\_Brief\_of\_VFW.pdf)

War is the province of chance. “If we now consider briefly the subjective nature of war—the means by which war has to be fought—it will look more than ever like a gamble . . . [i]n the whole range of human activities, war most closely resembles a game of cards.” Clausewitz, 86-87. Within this field of human endeavor, the most successful armies are those led by decisive commanders who visualize the operational environment and make rapid, sound decisions. Combat leadership involves the motivation of others to risk their lives, and only the most decisive and confident leaders can inspire this kind of self-sacrifice. Leadership is the multiplying and unifying element of combat power. Confident, competent, and informed leadership intensifies the effectiveness of all other elements of combat power by formulating sound operational ideas and assuring discipline and motivation in the force . . . Leadership in today’s operational environment is often the difference between success and failure. Dept. of the Army, Field Manual 3-0, Operations, at ¶¶ 4-6 - 4-8 (2008), available at http://www.army.mil/fm3-0/fm3-0.pdf. Battle command is a subset of combat leadership—it is how wartime leaders operationalize their intent and transmit their guidance to subordinate units. Battle command is the art and science of understanding, visualizing, describing, directing, leading, and assessing forces to impose the commander’s will on a hostile, thinking, and adaptive enemy. Battle command applies leadership to translate decisions into actions—by synchronizing forces and warfighting functions in time, space, and purpose—to accomplish missions. Battle command is guided by professional judgment gained from experience, knowledge, education, intelligence, and intuition. It is driven by commanders. Id. at ¶ 5-9. Battlefield decisionmaking involves the visualization of the battlefield and all its components, the deliberate assessment of operational risk, and the selection of a course of action which accepts certain risks in order to achieve tactical, operational or strategic success. Id. at ¶ 5-10; see also Gen. Frederick M. Franks, Jr., Battle Command: A Commander’s Perspective, Military Review, May-June 1996, at 120-121. “Given the inherently uncertain nature of war, the object of planning is not to eliminate or minimize uncertainty but to foster decisive and effective action in the midst of such uncertainty.” Army Field Manual 3-07, Stability Operations, at ¶ 4-4 (2008), available at http://usacac.army.mil/cac2/repository/FM307/FM307.pdf. In bringing this case, Plaintiff asks this Court to substitute itself as the battlefield commander, and to second-guess the strategic, operational and tactical decisions made by this nation’s military chain of command in the campaign against Al Qaeda. Judicial decisionmaking is incompatible with military decisionmaking. Rather than produce rapid, confident, decisive actions, judicial resolution of this matter would produce deliberate and measured decisions which are the product of adversarial process, and which would reflect judicial considerations, not strategic or tactical ones. Also, judicial involvement may induce risk aversion among commanders, who would worry about how their actions might be judged in courtrooms far removed from the battlefield, and thus hedge their battlefield decisions in order to protect themselves and their units from future judicial scrutiny. This is particularly true of Plaintiff’s prayer for relief, which calls upon the Court to enjoin the Government from using lethal force “except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats.” Such decisions about the use of force can often be made by soldiers in a split-second, on the basis of intuition and training. The specter of judicial involvement will affect the way soldiers and leaders approach these decisions, potentially complicating and slowing their decisions by injecting judicial considerations which have no place on the battlefield.

### CoC---Link---2NC

#### Deference is key to the chain of command; the plan cracks the foundation for unity and readiness

**Fenster et al., Mckenna Long & Aldridge LLP, 2010**

(Herbert, Phillip Carter, “Brief Of The Veterans Of Foreign Wars Of The United States As Amicus Curiae In Support Of Defendants And Dismissal”, http://ccrjustice.org/files/Amicus\_Curiae\_Brief\_of\_VFW.pdf)

“Unity of command,” and its corollary, “unity of effort,” are fundamental principles of warfare which are central to the effectiveness of Western militaries. See Carl von Clausewitz, On War 200-210 (Michael Howard & Peter Paret, ed. and trans., Princeton University Press 1976) (1832) (hereinafter “Clausewitz”). There “is no higher and simpler law of strategy” than to apply this principle in order to concentrate a nation’s military power its adversaries’ “center of gravity.” Id. at 204. This principle was first embraced by the American military during the 19th Century, and has subsequently shaped the organizational structure of American warfighting through two world wars and countless other conflicts. See James F. Schnabel, History of the Joints Chiefs of Staff, Vol. 1 at 80-87 (1996); Russell F. Weigley, History of the United States Army at 422-423 (Bloomington: Indiana University Press, 1984). Unity of command requires the integration of all combat functions into a single organizational element, with command authority vested in a single individual. See U.S. Joint Chiefs of Staff, Joint Pub. 3-0, Joint Operations at Appx. A, p. A-2 (2010), available at http://www.dtic.mil/doctrine/new\_pubs/jp3\_0.pdf. The U.S. military implements “unity of command” through its chain of command—a hierarchical organizational structure which transmits command authority from the President through the Secretary of Defense, through subordinate military officers, down to the lowest ranking soldier, sailor, airman or Marine on the frontlines of America’s armed conflicts. This chain of command serves important organizational purposes, by vesting command authority in individual officers who are responsible for specific missions, and are empowered to command their personnel to achieve those missions. The chain of command also supports important normative and legal policy purposes, such as the doctrine of “command responsibility,” which renders battlefield commanders responsible for all their units do or fail to do, whether they knew about such conduct, or should have known about it. See Application of Yamashita, 327 U.S. 1, 14-16 (1946); see also Army Field Manual 27-10, The Law of Land Warfare at ¶ 501 (1956) (stating U.S. Army doctrine on “command responsibility”). “Everything in war is very simple,” Clausewitz noted “Everything in war is very simple,” Clausewitz noted, “but the simplest thing is difficult.” Clausewitz at 119. The dangers of war, the fatigue of close combat, and the uncertainty which lurks within the fog of war, all combine to create a kind of “friction” which impedes the progress of armies. Id. A more contemporary author and veteran describes this fog: For the common soldier, at least, war has the feel, the spiritual texture, of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over into wrong. Order blends into chaos, love into hate, ugliness into beauty, law into anarchy, civility into savagery. The vapor sucks you in. You can’t tell where you are, or why you’re there, and the only certainty is overwhelming ambiguity . . . . You lose your sense of the definite, hence your sense of truth itself. Tim O’Brien, The Things They Carried 88 (1990). The military chain of command is designed to counteract this fog and friction of war, by providing clarity of orders and purpose to individual soldiers and their units. Similarly, this organizational structure exists to impose some order on the behavior and actions of soldiers and units, aligning their conduct with national goals, framing their actions in the context of strategic and operational campaigns, and focusing their efforts on the missions which support these broader endeavors. It is this structure which differentiates the armed forces of a nation from an armed group of thugs, and which ensures that national armed forces conduct themselves in accordance with the laws of armed conflict. Cf. Annex to the Convention, Hague Convention No. IV Respecting the Laws and Customs of War on Land, art. 1, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277; Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364. Our nation’s military personnel depend on their chain of command to provide them with certainty, clarity and authority in the heat of battle. Into this ordered system, Plaintiff wishes to inject the uncertainty of the American adversarial litigation process, by seeking, inter alia, that this Court declare there is no armed conflict in Yemen, and that orders issued by the President in response to that conflict should be enjoined. Not only would this force the court to go far beyond the “limited institutional competence of the judiciary” by involving it in sensitive matters of national security, cf. Arar v. Ashcroft, 585 F.3d 559, 576 (2d Cir. 2009) (citations omitted), but this also would undermine the chain of command by literally interposing this Court between the President and his subordinate officers, thereby contravening the core doctrinal principle of “unity of command,” which has served American military forces in good stead since the Civil War. In asking the Court to hear this case, and to entertain the extraordinary remedy of injunctive relief against the President and his cabinet, the Plaintiff is asking the court to overturn the political judgment of the President and Congress that the nation is at war; that this war is an armed conflict against Al Qaeda; and that it is appropriate to use a blend of military, intelligence and diplomatic force to wage this war. All three branches of Government have decided that “[w]e are [] at war with al Qaeda and its affiliates.” Remarks of the President on National Security, May 21, 2009; see also Authorization for Use of Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224 (2001); Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006). Political leaders from both political parties, over the course of two presidencies and five elected Congresses, have agreed upon, authorized, and appropriated funds for this war against Al Qaeda. It is a fundamental axiom among American strategists that, “[a]s a nation, the United States wages war employing all instruments of national power – diplomatic, informational, military, and economic.” U.S. Joint Chiefs of Staff, Joint Pub. 1, Doctrine for the Armed Forces of the United States at I-1 (2009), available at http://www.dtic.mil/doctrine/new\_pubs/jp1.pdf. Plaintiff would seek to overturn the considered judgment of this nation’s political leaders in choosing the national strategy for this war, including the Attorney General of the United States, who has written that, in this war against Al Qaeda, “we must use every weapon at our disposal . . . [including] direct military action, military justice, intelligence, diplomacy, and civilian law enforcement.” See Letter from Attorney General Eric H. Holder, Jr. to Sen. Mitch McConnell, February 3, 2010 (emphasis added). The relief requested by plaintiff is both extraordinary and inappropriate, and completely inconsistent with the strategic imperative for “unified action [which] ensures unity of effort focused on [national] objectives and leading to the conclusion of operations on terms favorable to the United States.” See Joint Pub. 1 at I-1.

### IBC---Link---2NC

#### This spurs harsh interbranch conflicts

Entin 12 (Jonathan L. Entin Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. “War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations,” http://law.case.edu/journals/JIL/Documents/45CaseWResJIntlL1&2.21.Article.Entin.pdf)

Whatever the merits of the decisions discussed in the previous section, those rulings should give pause to those who might rely on the judiciary as a check on what they regard as executive overreaching. When combined with the procedural and jurisdictional obstacles discussed in Part I, a more general lesson emerges: the judiciary cannot resolve all the questions that might arise in connection with war powers and foreign affairs. Nonetheless, the substantive and procedural limitations of judicial review provide an opportunity for greater civic and political engagement in decisions that can have profound consequences for our nation and the world. If the courts cannot resolve these matters, questions of war and diplomacy, it should come as no surprise that they are getting worked out largely through political accommodation and negotiation. These accommodations and negotiations necessarily reflect the differing constitutional views of the legislative and executive branches as well as of the persons and groups that engage on these issues. Although many lament the quality of current political discourse, excessive reliance on the judicial process has undesirable consequences. The Supreme Court has had difficulty rendering consistent or principled decisions about legislative-executive relationships.110 Sometimes the Court has taken a formalistic approach that emphasizes the need to maintain clear lines between the branches.111 At other times, the Court has used a functional approach that emphasizes the importance of checks and balances to prevent the accumulation of excessive power in any particular branch.112 In other words, judicial review does not always provide clear answers to complex questions. The complexity of those questions is particularly evident in the military and diplomatic arenas. Reliance on the political process recognizes the uncertainties and contingencies involved in many of these matters.113 Moreover, interbranch negotiation rather than litigation recognizes that an effective government requires a degree of comity that is inconsistent with frequent reliance on the judiciary.114 Our system rests on a rich set of subtle understandings and an implicit sense of political limits.115 As a result, structural and institutional factors often dampen the inevitable conflicts that arise between Congress and the president. Excessive reliance on the judiciary tends to raise the stakes of conflict by clearly identifying winners and losers and by encouraging the assertion of extreme positions for short-term litigation advantage that might complicate the resolution of future disagreements.116 In addition, the litigation process takes time. Of course, the Pentagon Papers case was resolved in less than three weeks after the New York Times published its first article on the subject.117 Ordinarily, however, the judicial process proceeds at a much statelier pace. Consider another landmark case, albeit one that dealt with domestic issues. Cooper v. Aaron118 was decided approximately one year after President Eisenhower dispatched federal troops to enforce the desegregation of Little Rock Central High School in the face of massive resistance encouraged by Arkansas Governor Orval Faubus.119 Often, disputes over military and diplomatic matters are timesensitive. Expedited judicial review might help, but events on the ground might well frustrate orderly judicial disposition.

#### The impact is great power war

Haass 13 (Richard N. Haass, President, Council on Foreign Relations, “What is the effect of U.S. domestic political gridlock on international relations?” http://www.cfr.org/us-strategy-and-politics/effect-us-domestic-political-gridlock-international-relations/p30725)

There is a well-known adage that politics stops at the water's edge, but this tends to be more hope than reality. American history is filled with examples in which political disagreement at home has made it difficult for the United States to act, much less lead, abroad. Division within Congress or between the legislative and executive branches can make it impossible for individuals to be placed in senior positions. Such divisions can also make it impossible to conclude treaties, appropriate funds for foreign assistance, or pass specific reforms, such as the current proposed reform for immigration policy. A lack of consensus also can undermine investment in the foundations of American power, from resources for defense and diplomacy to education and infrastructure. Gridlock at home can also work against the ability of the United States to set an example that other societies will want to emulate. And it makes the United States less predictable, something that can unnerve allies and others who depend on this country, and embolden adversaries. All this tends to contribute to global disorder—one reason I titled my new book Foreign Policy Begins at Home.

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

Many U.S. allies were highly critical (at least publicly) of the Bush Administration’s “war on terror” policies. Lord Johan Steyn, one of the United Kingdom’s top Law Lords, famously described Guantánamo as a “legal black hole” in a public speech in November 2003.202 Several reports sponsored by the Council of Europe criticized the U.S. use of harsh interrogation techniques, renditions to third countries, and the use of the Guantánamo Bay facility to conduct long-term military detention.203 The United States unquestionably had to expend significant diplomatic energy responding to concerns and questions from allies about the legality and wisdom of its policies. There is little evidence, however, that the United States altered its approach to its conflict with al Qaeda or its use of renditions and the Guantánamo Bay facility as a result of allied interest or criticism. It may be that those NATO member states that have forces in Afghanistan have had some influence on what U.S. detention procedures look like at Bagram Air Base, but few of those states conduct any detention operations of their own. This suggests that any influence they have over changes to detention procedure is relatively limited. Furthermore, several of the policies that the executive altered in the past eight years were policies with very strong domestic aspects but limited international aspects, such as the use of the state secrets doctrine.204 Finally, on several issues on which European states have been most vocal, little has changed since 2001. The United States has not committed to stop using renditions, ceased to use an armed conflict paradigm as a basis for its struggle against al Qaeda, or foregone the use of security detentions. In short, pressure from U.S. allies may have an atmospheric effect, and it may influence the views of the American elite, but there is little evidence to suggest that U.S. allies have had a significant effect on most U.S. national security policies.

## Cred

### 2NC-No Credibility

#### Credibility theory is incoherent — empirically denied

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

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

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

### 2NC-Support Inev

#### No impact — allies won’t abandon us and adversaries can’t exploit it

Stephen M. Walt 11, the Robert and Renée Belfer professor of international relations at Harvard University, December 5, 2011, “Does the U.S. still need to reassure its allies?,” online: <http://walt.foreignpolicy.com/posts/2011/12/05/us_credibility_is_not_our_problem>

A perennial preoccupation of U.S. diplomacy has been the perceived need to reassure allies of our reliability. Throughout the Cold War, U.S. leaders worried that any loss of credibility might cause dominoes to fall, lead key allies to "bandwagon" with the Soviet Union, or result in some form of "Finlandization." Such concerns justified fighting so-called "credibility wars" (including Vietnam), where the main concern was not the direct stakes of the contest but rather the need to retain a reputation for resolve and capability. Similar fears also led the United States to deploy thousands of nuclear weapons in Europe, as a supposed counter to Soviet missiles targeted against our NATO allies.

The possibility that key allies would abandon us was almost always exaggerated, but U.S. leaders remain overly sensitive to the possibility. So Vice President Joe Biden has been out on the road this past week, telling various U.S. allies that "the United States isn't going anywhere." (He wasn't suggesting we're stuck in a rut, of course, but saying that the imminent withdrawal from Iraq doesn't mean a retreat to isolationism or anything like that.)

There's nothing really wrong with offering up this sort of comforting rhetoric, but I've never really understood why U.S. leaders were so worried about the credibility of our commitments to others. For starters, given our remarkably secure geopolitical position, whether U.S. pledges are credible is first and foremost a problem for those who are dependent on U.S. help. We should therefore take our allies' occasional hints about realignment or neutrality with some skepticism; they have every incentive to try to make us worry about it, but in most cases little incentive to actually do it.

#### Obama won’t capitalize on the plan to bolster U.S. cred — and just funding assistance doesn’t solve

Jackson Diehl 11, Deputy Editorial Page Editor at The Washington Post, December 11, 2011, “Obama is lagging on Egypt,” online: http://www.washingtonpost.com/opinions/obama-lagging-on-the-arab-spring/2011/12/08/gIQApQzCoO\_story.html

Early on the morning of Nov. 25, the Obama administration significantly shifted its public position in the then-ongoing standoff between Egypt’s ruling military and pro-democracy demonstrators in Cairo’s Tahrir square. Dropping its weak appeals for “restraint on all sides,” the White House “condemned the excessive use of force” against the protesters and sided with their main demand by asserting that “the full transfer of power to a civilian government must take place . . . as soon as possible.” The generals got the message and reacted furiously. But most other Egyptians were oblivious — including the young revolutionaries and civilian political elite the administration was trying to support. When I spoke to a range of politicians and demonstrators in Cairo several days later, most were still fuming over the wishy-washy words of press secretary Jay Carney on Nov. 21. Maybe that’s because Carney’s comments were televised — while the subsequent statement was issued off camera, in the name of “the press secretary,” at 3 a.m. Washington time. The story of that statement is a good example of how President Obama continues to lag on what his own top advisers have called the greatest foreign policy challenge of his administration. A president who began his presidency with a much-promoted public address to the Muslim world from Cairo has rarely found his voice since Egypt and other Arab states tumbled into a new era in which public opinion — the proverbial “Arab street” — matters more than ever. In the past half-year Obama has given two big set-piece speeches about the events in the Middle East, at the State Department and the United Nations. In both cases he made headlines for what he said about the frozen Israeli-Palestinian conflict, rather than the revolutionary change underway in Arab states. Outside those addresses the president has rarely spoken about the roller-coaster of change underway in Egypt, or the violent repression in Bahrain, or the pivotal civil conflict in Syria. Months of presidential silence go by, while the press shops at State and the White House issue perfunctory statements. It’s hard to escape the conclusion that Obama simply isn’t much engaged by the fight for freedom in the Middle East or sees it as a distraction from his own priorities. After all, he continues to speak frequently and often provocatively about the causes of Palestinian statehood and nuclear nonproliferation, which he brought with him to office. He recently launched a much-promoted “pivot” of his foreign policy to Asia — a critically important area for the United States but one where no crisis, much less an epochal upheaval, is underway. Why does this matter? Because for the first time in a generation, the United States needs to reforge its strategic relations with countries such as Egypt — and it can no longer do it by writing checks or supplying tanks. Over the next couple of years the 80 million people of Egypt, and their elected representatives, will need to be convinced that an alliance with the United States is worth preserving. So far the trend is not good. According to the 2011 Arab Opinion poll, conducted by Shibley Telhami of the University of Maryland with Zogby International, the share of Arabs saying they have a positive view of Obama stands at 34 percent, compared with 39 percent in 2009. The president’s ratings have increased since the Arab Spring began, but when people were asked which countries have “played the most constructive role,” Turkey and France finished first; the United States barely edged out China for third. Administration officials often argue that Washington is better off keeping a low public profile on Mideast events. Yet France has clearly benefited from Nicolas Sarkozy’s aggressive public support for the revolutions. And the reality is that a large number of Arabs either don’t know what U.S. policy is or misunderstand it. Most Egyptians I talked to during a recent visit to Cairo — including sophisticated political players — believed that Obama’s priorities are to support the Egyptian military and Israel, regardless of what they do. There are, of course, ways for the United States to demonstrate its continuing value to Egypt and its neighbors that may be more important than public statements. Help for economies devasted by revolution could be crucial in the next couple of years. Security cooperation in places such as the Sinai Peninsula, where al-Qaeda may be seeking a foothold, may also pay off. But Arabs also need to hear and see that American leaders support their democratic aspirations. The administration is slowly moving in that direction: Secretary of State Hillary Rodham Clinton, for example, has recently prodded both Egypt’s Islamists and the military about sticking to democratic principles. The message, however, needs to be more consistent. And more often than it has, it needs to come from the president.

### 2NC-Allies Hold US Back

#### Alliances don’t solve anything – Gulf War proves that countries will hate us no matter what.

Krauthammer, ‘3 (Charles, The National Interest, Winter 2002/2003)

A third critique comes from what might be called pragmatic realists, who see the new unilateralism I have outlined as hubristic, and whose objections are practical. They are prepared to engage in a pragmatic multilateralism. They value great power concert. They seek Security Council support not because it confers any moral authority, but because it spreads risk. In their view, a single hegemon risks far more violent resentment than would a power that consistently acts as primus inter pares, sharing rule-making functions with others.12 I have my doubts. The United States made an extraordinary effort in the Gulf War to get un support, share decision-making, assemble a coalition and, as we have seen, deny itself the fruits of victory in order to honor coalition goals. Did that diminish the anti-American feeling in the region? Did it garner support for subsequent Iraq policy dictated by the original acquiescence to the coalition? The attacks of September 11 were planned during the Clinton Administration, an administration that made a fetish of consultation and did its utmost to subordinate American hegemony and smother unipolarity. The resentments were hardly assuaged. Why? Because the extremist rage against the United States is engendered by the very structure of the international system, not by the details of our management of it.

### Heg o/w Allies

#### Capability outweighs credibility — US actions appear irrational, so countries don’t interpret our signals

Steve Chapman 9/5/13, columnist and editorial writer for the Chicago Tribune, “War in Syria: The Endless Quest for Credibility,” http://reason.com/archives/2013/09/05/war-in-syria-the-endless-quest-for-credi

The United States boasts the most powerful military on Earth. We have 1.4 million active-duty personnel, thousands of tanks, ships and planes, and 5,000 nuclear warheads. We spend more on defense than the next 13 countries combined. Yet we are told we have to bomb Syria to preserve our credibility in world affairs.¶ Really? You'd think it would be every other country that would need to confirm its seriousness. Since 1991, notes University of Chicago security scholar John Mearsheimer, the U.S. has been at war in two out of every three years. If we haven't secured our reputation by now, it's hard to imagine we ever could.¶ On the surface, American credibility resembles a mammoth fortress, impervious to anything an enemy could inflict. But to crusading internationalists, both liberal and conservative, it's a house of cards: The tiniest wrong move, and it collapses.¶ In a sense, though, they're right. The U.S. government doesn't have to impress the rest of the world with its willingness to defend against actual attacks or direct threats. But it does have to continually persuade everyone that we will lavish blood and treasure for purposes that are irrelevant to our security.¶ Syria illustrates the problem. Most governments don't fight unless they are attacked or have dreams of conquest and expansion. War is often expensive and debilitating even for the winners, and it's usually catastrophic for losers. Most leaders do their best to avoid it.¶ So even though the Syrian government is a vicious, repressive dictatorship with a serious grudge against Israel, it has mostly steered clear of military conflict. Not since 1982 has it dared to challenge Israel on the battlefield. When Israeli warplanes vaporized a Syrian nuclear reactor in 2007, Bashar al-Assad did nothing. The risks of responding were too dire.¶ But the U.S. never faces such sobering considerations. We are more secure than any country in the history of the world. What almost all of our recent military interventions have in common is that they involved countries that had not attacked us: Libya, Iraq, Serbia, Haiti, Somalia, Panama, Grenada and North Vietnam.¶ With the notable exception of the Afghanistan invasion, we don't fight wars of necessity. We fight wars of choice.¶ That's why we have such an insatiable hunger for credibility. In our case, it connotes an undisputed commitment to go into harm's way even when -- especially when -- we have no compelling need to do so. But it's a sale we can never quite close.¶ Using force in Iraq or Libya provides no guarantee we'll do the same in Syria or Iran or Lower Slobbovia. Because we always have the option of staying out, there's no way to make everyone totally believe we'll jump into the next crisis.¶ The parallel claim of Washington hawks is that we have to punish Assad for using nerve gas, because otherwise Iran will conclude it can acquire nuclear weapons. Again, our credibility is at stake. But how could the Tehran regime draw any certain conclusions based on what happens in Syria?¶ Two American presidents let a troublesome Saddam Hussein stay in power, but a third one decided to take him out. George W. Bush tolerated Moammar Gadhafi, but Barack Obama didn't. Ronald Reagan let us be chased out of Lebanon, only to turn around and invade Grenada. If you've seen one U.S. intervention, you've seen one.¶ What should be plain to Iran is that Washington sees nuclear proliferation as a unique threat to its security, which Syria's chemical weapons are not. Just because we might let Assad get away with gassing his people doesn't mean we will let Iran acquire weapons of mass destruction that would be used only against other countries. Heck, we not only let Saddam get away with using chemical weapons against Iran -- we took his side.¶ Figuring out the U.S. government's future impulses is hard even for Americans. There's no real rhyme or reason. But because we're so powerful, other governments can ill afford to be wrong. What foreigners have to keep in the front of their minds is not our inclination to act but our capacity to act -- which remains unparalleled whatever we do in Syria.¶ Credibility is overrated. Sure, it's possible for hostile governments to watch us squabble over Syria and conclude that they can safely do things we regard as dangerous. But there are graveyards full of people who made that bet.

#### Threats are easier to maintain than promises

Etzioni 11 (Amitai, Amitai Etzioni is a professor of international relations at George Washington ¶ University and author of Security First: ¶ For a Muscular, Moral Foreign Policy, “The Coming Test ¶ of U.S. Credibility,” Military Review, The Institute for Communitarian Policy Studies, The George Washington University, March/April 2011, <http://icps.gwu.edu/files/2011/03/credibility.pdf>, p.3)

T¶ HE RELATIVE POWER of the United States is declining—both ¶ because other nations are increasing their power and because the U. S. ¶ economic challenges and taxing overseas commitments are weakening it. In ¶ this context, the credibility of U.S. commitments and the perception that the ¶ United States will back up its threats and promises with appropriate action ¶ is growing in importance. In popular terms, high credibility allows a nation ¶ to get more mileage out of a relatively small amount of power, while low ¶ credibility leads to burning up much greater amounts of power. ¶ The Theory of Credibility¶ One definition of power is the ability of A to make B follow a course of ¶ action that A prefers. The term “make” is highly relevant. When A convinces ¶ B of the merit of the course A prefers, and B voluntarily follows it, we can ¶ refer to this change of course as an application of “persuasive power” or ¶ “soft power.” However, most applications of power are based either on ¶ coercion (if you park in front of a fire hydrant, your car is towed) or economic ¶ incentives and disincentives (you are fined to the point where you would ¶ be disinclined to park there). In these applications of power, B maintains ¶ his original preferences but is either prevented from following them or is ¶ pained to a point where he will suspend resistance. ¶ Every time A calls on B to change course, A is tested twice. First, if B does ¶ not follow A’s call, A will fail to achieve its goals (Nazi Germany annexes ¶ Austria, despite protests by the United Kingdom and France). Second, A¶ loses some credibility, making B less likely to heed A’s future demands (Nazi ¶ Germany becomes more likely to invade Poland). On the other hand, if B ¶ heeds A’s demand, A wins twice: it achieves its goal (e.g., the United States ¶ dismantles the regime of Saddam Hussein and establishes that there are no ¶ WMDs in Iraq), and it increases the likelihood that future demands will be¶ heeded without power actually being exercised (e.g. ¶ Libya voluntarily dismantles its WMD program ¶ following the invasion of Iraq). In short, the higher ¶ a nation’s credibility, the more it will be able to ¶ achieve without actually employing its power or by ¶ employing less of it when it must exercise its power. ¶ Political scientists have qualified this basic ¶ version of the power/credibility theory. In his ¶ detailed examination of three historical cases, Daryl ¶ G. Press shows that in each instance, the Bs made ¶ decisions based upon their perception of the current ¶ intentions and capabilities of A, rather than on the ¶ extent to which A followed up on previous threats. ¶ Thus, if A does not have the needed forces or if ¶ A’s interests in the issue at hand are marginal, its ¶ threats will not carry much weight no matter how ¶ “credible” A was in the past. For example, if the ¶ United States had announced that it would invade ¶ Burma unless it released opposition leader Aung ¶ San Suu Kyifrom house arrest (she was eventually ¶ released in November 2010), such a threat would ¶ not have carried much weight—regardless of past ¶ U.S. actions—because the issue did not seem reason ¶ enough for the United States to invade Burma, ¶ and because the U.S. Army was largely committed ¶ elsewhere. ¶ Another political scientist, Kathleen Cunningham, ¶ has shown that the credibility of promises—as ¶ opposed to the credibility of threats—is much more ¶ difficult to maintain because the implementation ¶ of promises is often stretched over long periods ¶ of time.1¶ The bulk of this essay focuses on dealing ¶ with threats, rather than promises.

## 1nr

## case

### 1NR Adventurism Defense

#### No Africa war, escalation or intervention

**Straus, Wisconsin politics professor, 2012**

(Scott, “Wars Do End! Changing Patterns Of Political Violence In Sub-Saharan Africa”, afraf.oxfordjournals.org/content/early/2012/03/01/afraf.ads015.full, ldg)

Domestic factors such as stronger civil societies, consistent economic growth, or stronger states are good candidates to explain the change. But following some recent work on global patterns of warfare,44 I emphasize geo-political shifts. These include a decline in external state support for insurgencies, the promotion of multi-party elections, significant investments in conflict prevention and mediation after the Cold War, and the rise of China. During the Cold War, the United States and the Soviet Union were major sources of funding for insurgencies and states fighting insurgencies. From the Horn of Africa to the southern states, the superpower rivalry meant that states and insurgencies had access to weaponry, training, ideological discipline, and diplomatic support. When the Cold War ended, some states that had received previous external support during the Cold War became newly vulnerable, such as Mengistu's Ethiopia, Siad Barre's Somalia, Mobutu Sese Seko's Zaire, and Liberia's Samuel Doe. By the same token, some rebel groups that had received funding through Cold War channels became weaker, such as UNITA in Angola. In other locations, the end of the Cold War created a new window of opportunity for armed opposition groups who had been waiting for the right moment to start their insurgencies, as in Rwanda and Mali. Thus, the first decade following the end of the Cold War saw an immediate increase in warfare, as belligerents saw new conditions and opportunities to start or settle conflicts. But thereafter the frequency of wars declined and their character changed. Beginning in the late 1990s, the external opportunities for insurgents to garner weaponry, training, advisory input, and ideological discipline became much more meagre. States such as Sudan supported insurgencies to disrupt their neighbours, as with the Lord's Resistance Army, but large-scale international support for insurgencies as structured fighting forces and governments in waiting sharply declined. New insurgencies started across the continent, and in places they survived because of access to mineral resources or because the states they fought were weak. But these insurgencies did not develop into the kinds of well-structured guerrilla armies that evolved during and just after the Cold War. A related change is the rise of multi-party electoral rules that followed the end of the Cold War. On balance, the opening of the electoral terrain, however flawed in some cases, attracted would-be insurgents away from the lure of the bush and toward the political arena. The onset of multi-party elections meant that, from a would-be insurgent's point of view, governments were at least nominally vulnerable outside the context of armed resistance. Moreover, the weight of international funding flowed toward sponsoring elections and civil society organizations. For talented opposition figures, the opening of the political arena – combined with the change in international funding streams – created a strong pull away from the battlefield toward the domestic political arena.

#### No North Korean war-they know they would get crushed

**Fisher, Washington Post foreign affairs blogger, 2013**

(Max, “Why North Korea loves to threaten World War III (but probably won’t follow through)”, 3-12, <http://www.washingtonpost.com/blogs/worldviews/wp/2013/03/12/why-north-korea-loves-to-threaten-world-war-iii-but-probably-wont-follow-through/>, ldg)

But is North Korea really an irrational nation on the brink of launching “all-out war,” a mad dog of East Asia? Is Pyongyang ready to sacrifice it all? Probably not. The North Korean regime, for all its cruelty, has also shown itself to be shrewd, calculating, and single-mindedly obsessed with its own self-preservation. The regime’s past behavior suggests pretty strongly that these threats are empty. But they still matter. For years, North Korea has threatened the worst and, despite all of its apparent readiness, never gone through with it. So why does it keep going through these macabre performances? We can’t read Kim Jong Eun’s mind, but the most plausible explanation has to do with internal North Korean politics, with trying to set the tone for regional politics, and with forcing other countries (including the United States) to bear the costs of preventing its outbursts from sparking an unwanted war. Starting World War III or a second Korean War would not serve any of Pyongyang’s interests. Whether or not it deploys its small but legitimately scary nuclear arsenal, North Korea could indeed cause substantial mayhem in the South, whose capital is mere miles from the border. But the North Korean military is antiquated and inferior; it wouldn’t last long against a U.S.-led counterattack. No matter how badly such a war would go for South Korea or the United States, it would almost certainly end with the regime’s total destruction.

## da

### 1NR Impact Overview

#### And warming is the only existential threat

Deibel-prof IR National War College-7—Prof IR @ National War College (Terry, “Foreign Affairs Strategy: Logic for American Statecraft,” Conclusion: American Foreign Affairs Strategy Today)

Finally, there is one major existential threat to American security (as well as prosperity) of a nonviolent nature, which, though far in the future, demands urgent action. It is the threat of global warming to the stability of the climate upon which all earthly life depends. Scientists worldwide have been observing the gathering of this threat for three decades now, and what was once a mere possibility has passed through probability to near certainty. Indeed not one of more than 900 articles on climate change published in refereed scientific journals from 1993 to 2003 doubted that anthropogenic warming is occurring. “In legitimate scientific circles,” writes Elizabeth Kolbert, “it is virtually impossible to find evidence of disagreement over the fundamentals of global warming.” Evidence from a vast international scientific monitoring effort accumulates almost weekly, as this sample of newspaper reports shows: an international panel predicts “brutal droughts, floods and violent storms across the planet over the next century”; climate change could “literally alter ocean currents, wipe away huge portions of Alpine Snowcaps and aid the spread of cholera and malaria”; “glaciers in the Antarctic and in Greenland are melting much faster than expected, and…worldwide, plants are blooming several days earlier than a decade ago”; “rising sea temperatures have been accompanied by a significant global increase in the most destructive hurricanes”; “NASA scientists have concluded from direct temperature measurements that 2005 was the hottest year on record, with 1998 a close second”; “Earth’s warming climate is estimated to contribute to more than 150,000 deaths and 5 million illnesses each year” as disease spreads; “widespread bleaching from Texas to Trinidad…killed broad swaths of corals” due to a 2-degree rise in sea temperatures. “The world is slowly disintegrating,” concluded Inuit hunter Noah Metuq, who lives 30 miles from the Arctic Circle. “They call it climate change…but we just call it breaking up.” From the founding of the first cities some 6,000 years ago until the beginning of the industrial revolution, carbon dioxide levels in the atmosphere remained relatively constant at about 280 parts per million (ppm). At present they are accelerating toward 400 ppm, and by 2050 they will reach 500 ppm, about double pre-industrial levels. Unfortunately, atmospheric CO2 lasts about a century, so there is no way immediately to reduce levels, only to slow their increase, we are thus in for significant global warming; the only debate is how much and how serous the effects will be. As the newspaper stories quoted above show, we are already experiencing the effects of 1-2 degree warming in more violent storms, spread of disease, mass die offs of plants and animals, species extinction, and threatened inundation of low-lying countries like the Pacific nation of Kiribati and the Netherlands at a warming of 5 degrees or less the Greenland and West Antarctic ice sheets could disintegrate, leading to a sea level of rise of 20 feet that would cover North Carolina’s outer banks, swamp the southern third of Florida, and inundate Manhattan up to the middle of Greenwich Village. Another catastrophic effect would be the collapse of the Atlantic thermohaline circulation that keeps the winter weather in Europe far warmer than its latitude would otherwise allow. Economist William Cline once estimated the damage to the United States alone from moderate levels of warming at 1-6 percent of GDP annually; severe warming could cost 13-26 percent of GDP. But the most frightening scenario is runaway greenhouse warming, based on positive feedback from the buildup of water vapor in the atmosphere that is both caused by and causes hotter surface temperatures. Past ice age transitions, associated with only 5-10 degree changes in average global temperatures, took place in just decades, even though no one was then pouring ever-increasing amounts of carbon into the atmosphere. Faced with this specter, the best one can conclude is that “humankind’s continuing enhancement of the natural greenhouse effect is akin to playing Russian roulette with the earth’s climate and humanity’s life support system. At worst, says physics professor Marty Hoffert of New York University, “we’re just going to burn everything up; we’re going to heat the atmosphere to the temperature it was in the Cretaceous when there were crocodiles at the poles, and then everything will collapse.” During the Cold War, astronomer Carl Sagan popularized a theory of nuclear winter to describe how a thermonuclear war between the Untied States and the Soviet Union would not only destroy both countries but possibly end life on this planet. Global warming is the post-Cold War era’s equivalent of nuclear winter at least as serious and considerably better supported scientifically. Over the long run it puts dangers from terrorism and traditional military challenges to shame. It is a threat not only to the security and prosperity to the United States, but potentially to the continued existence of life on this planet

#### Upholding bond is key to the chemical industry patchwork regulation.

ACC 2013

American Chemistry Council, leading chemical manufacturing industry trade group, BRIEF FOR AMICUS CURIAE THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF RESPONDENT http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/08\_16\_13-American-Chemistry-Council-Amicus-Brief\_115164106\_1.pdf

Like the federal statute considered by this Court in Gonzales v. Raich, 545 U.S. 1 (2005), Section 229 is a component of a “comprehensive framework” for prohibiting the “production, distribution, and possession,” id. at 24, of chemical weapons. That the statute may reach the intrastate production, transfer, possession, or use of such weapons in order to extinguish the interstate market for them is of no constitutional significance. Congress could reasonably have concluded that eradicating the interstate and foreign markets in chemical weapons required prohibiting intrastate activity. As this Court has determined, “[t]he notion that … a discrete activity … [may be] hermetically sealed off from the larger interstate … market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.” Id. at 30. That is decidedly the case here: Like the possession or consumption of homegrown marijuana, the intrastate manufacture, possession, or use of chemicals for illicit purposes could easily affect interstate or foreign markets. To be sure, many chemicals within the ambit of the CWC and Section 229 are “dual-use”: they have the potential to be used as chemical weapons or as precursors to chemical weapons, but they also have extensive beneficial uses in manufacturing, agriculture, industry, education, and the arts. That fact, however, does nothing to alter that Section 229 is a pillar in a comprehensive scheme to eradicate the national and international market in chemicals for illicit purposes. Under this Court’s Commerce Clause precedents, it does not matter that Congress is attempting to suppress a market for the manufacture, transfer, and possession of certain chemicals only for particular purposes and not commerce in such chemicals altogether. Section 229, moreover, is not merely part of a larger regulatory framework aimed at eradicating a commercial market; it is also squarely aimed at fostering the lawful national and international trade in chemicals for their beneficial uses. Petitioner’s narrow focus on the disarmament objectives of the CWC ignores this vital commerce-enhancing objective. See Wickard v. Filburn, 317 U.S. 111, 128 (1942) (“The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36- 37 (1937). Indeed, the text and history of the CWC and its implementing legislation make clear that one of its principal goals was the promotion of “free trade in chemicals.” Conv. pmbl. ¶¶ 9, 10 (Pet. App. 147). Encouraging that commerce, the signatories (“States Parties”) agreed, required a comprehensive prohibition on the use, production, or acquisition of chemicals for illicit purposes, not only by signatory nations but also by corporations and individuals. Otherwise, the everyday commerce in chemicals would be in constant jeopardy of piecemeal trade-restricting measures aimed at securing what only uniform controls could accomplish. Such was the importance of the prohibition’s scope that “[v]arious chemical industry spokespersons consider[ed] the CWC a trade enabling regime that could counteract trends in the future, in which U.S. chemical trade and investment could be constricted under even tighter export controls.” Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Relations, 104th Cong. 25 (1996) (statement of Sen. Lugar) (emphasis added). Petitioner is thus wrong to insist that her conduct is far afield from the goals of the CWC and its implementing legislation. Even one misuse of a toxic chemical for malicious purposes—and certainly such misuses when viewed in the aggregate—could prompt a patchwork of severe domestic or international restrictions on the lawful trade in chemicals. Only by imposing comprehensive criminal controls on the diversion of chemicals into illicit channels and on the subsequent misuse of such chemicals could the CWC fully achieve its objectives. Just as Congress may regulate local wheat production to help stabilize the interstate market in wheat (per Wickard), Congress may regulate local misuses of chemicals that could lead to the impairment of lawful interstate or international trade in chemicals for their beneficial uses

#### The chemical industry solves extinction

Baum 1999 (Rudy, C&EN Washington, MILLENNIUM SPECIAL REPORT, Volume 77, Number 49 CENEAR 77 49 pp.46-47, <http://pubs.acs.org/cen/hotarticles/cenear/991206/7749spintro2.html>)

Here is the fundamental challenge we face: The world's growing and aging population must be fed and clothed and housed and transported in ways that do not perpetuate the environmental devastation wrought by the first waves of industrialization of the 19th and 20th centuries. As we increase our output of goods and services, as we increase our consumption of energy, as we meet the imperative of raising the standard of living for the poorest among us, we must learn to carry out our economic activities sustainably. There are optimists out there, C&EN readers among them, who believe that the history of civilization is a long string of technological triumphs of humans over the limits of nature. In this view, the idea of a "carrying capacity" for Earth—a limit to the number of humans Earth's resources can support—is a fiction because technological advances will continuously obviate previously perceived limits. This view has historical merit. Dire predictions made in the 1960s about the exhaustion of resources ranging from petroleum to chromium to fresh water by the end of the 1980s or 1990s have proven utterly wrong. While I do not count myself as one of the technological pessimists who see technology as a mixed blessing at best and an unmitigated evil at worst, I do not count myself among the technological optimists either. There are environmental challenges of transcendent complexity that I fear may overcome us and our Earth before technological progress can come to our rescue. Global climate change, the accelerating destruction of terrestrial and oceanic habitats, the catastrophic loss of species across the plant and animal kingdoms—these are problems that are not obviously amenable to straightforward technological solutions. But I know this, too: Science and technology have brought us to where we are, and only science and technology, coupled with innovative social and economic thinking, can take us to where we need to be in the coming millennium. Chemists, chemistry, and the chemical industry—what we at C&EN call the chemical enterprise—will play central roles in addressing these challenges. The first section of this Special Report is a series called "Millennial Musings" in which a wide variety of representatives from the chemical enterprise share their thoughts about the future of our science and industry. The five essays that follow explore the contributions the chemical enterprise is making right now to ensure that we will successfully meet the challenges of the 21st century. The essays do not attempt to predict the future. Taken as a whole, they do not pretend to be a comprehensive examination of the efforts of our science and our industry to tackle the challenges I've outlined above. Rather, they paint, in broad brush strokes, a portrait of scientists, engineers, and business managers struggling to make a vital contribution to humanity's future. The first essay, by Senior Editor Marc S. Reisch, is a case study of the chemical industry's ongoing transformation to sustainable production. Although it is not well known to the general public, the chemical industry is at the forefront of corporate efforts to reduce waste from production streams to zero. Industry giants DuPont and Dow Chemical are taking major strides worldwide to manufacture chemicals while minimizing the environmental "footprint" of their facilities. This is an ethic that starts at the top of corporate structure. Indeed, Reisch quotes Dow President and Chief Executive Officer William S. Stavropolous: "We must integrate elements that historically have been seen as at odds with one another: the triple bottom line of sustainability—economic and social and environmental needs." DuPont Chairman and CEO Charles (Chad) O. Holliday envisions a future in which "biological processes use renewable resources as feedstocks, use solar energy to drive growth, absorb carbon dioxide from the atmosphere, use low-temperature and low-pressure processes, and produce waste that is less toxic." But sustainability is more than just a philosophy at these two chemical companies. Reisch describes ongoing Dow and DuPont initiatives that are making sustainability a reality at Dow facilities in Michigan and Germany and at DuPont's massive plant site near Richmond, Va. Another manifestation of the chemical industry's evolution is its embrace of life sciences. Genetic engineering is a revolutionary technology. In the 1970s, research advances fundamentally shifted our perception of DNA. While it had always been clear that deoxyribonucleic acid was a chemical, it was not a chemical that could be manipulated like other chemicals—clipped precisely, altered, stitched back together again into a functioning molecule. Recombinant DNA techniques began the transformation of DNA into just such a chemical, and the reverberations of that change are likely to be felt well into the next century. Genetic engineering has entered the fabric of modern science and technology. It is one of the basic tools chemists and biologists use to understand life at the molecular level. It provides new avenues to pharmaceuticals and new approaches to treat disease. It expands enormously agronomists' ability to introduce traits into crops, a capability seized on by numerous chemical companies. There is no doubt that this powerful new tool will play a major role in feeding the world's population in the coming century, but its adoption has hit some bumps in the road. In the second essay, Editor-at-Large Michael Heylin examines how the promise of agricultural biotechnology has gotten tangled up in real public fear of genetic manipulation and corporate control over food. The third essay, by Senior Editor Mairin B. Brennan, looks at chemists embarking on what is perhaps the greatest intellectual quest in the history of science—humans' attempt to understand the detailed chemistry of the human brain, and with it, human consciousness. While this quest is, at one level, basic research at its most pure, it also has enormous practical significance. Brennan focuses on one such practical aspect: the effort to understand neurodegenerative diseases like Alzheimer's disease and Parkinson's disease that predominantly plague older humans and are likely to become increasingly difficult public health problems among an aging population. Science and technology are always two-edged swords. They bestow the power to create and the power to destroy. In addition to its enormous potential for health and agriculture, genetic engineering conceivably could be used to create horrific biological warfare agents. In the fourth essay of this Millennium Special Report, Senior Correspondent Lois R. Ember examines the challenge of developing methods to counter the threat of such biological weapons. "Science and technology will eventually produce sensors able to detect the presence or release of biological agents, or devices that aid in forecasting, remediating, and ameliorating bioattacks," Ember writes. Finally, Contributing Editor Wil Lepkowski discusses the most mundane, the most marvelous, and the most essential molecule on Earth, H2O. Providing clean water to Earth's population is already difficult—and tragically, not always accomplished. Lepkowski looks in depth at the situation in Bangladesh—where a well-meaning UN program to deliver clean water from wells has poisoned millions with arsenic. Chemists are working to develop better ways to detect arsenic in drinking water at meaningful concentrations and ways to remove it that will work in a poor, developing country. And he explores the evolving water management philosophy, and the science that underpins it, that will be needed to provide adequate water for all its vital uses. In the past two centuries, our science has transformed the world. Chemistry is a wondrous tool that has allowed us to understand the structure of matter and gives us the ability to manipulate that structure to suit our own purposes. It allows us to dissect the molecules of life to see what makes them, and us, tick. It is providing a glimpse into workings of what may be the most complex structure in the universe, the human brain, and with it hints about what constitutes consciousness. In the coming decades, we will use chemistry to delve ever deeper into these mysteries and provide for humanity's basic and not-so-basic needs.

### 1NR A2: No Link

#### Their application of extra-territorial due process is a massive change THAT ISN’T INCREMENTAL and kills the courts legitimacy – the reason Boumediene happened was so we can give due process on Gitmo but not everywhere else – the plan reverses court precedent and puts them on the wrong side of the public, pushing them toward a conservative decision on Bond

Devins 2010

Neal, Professor of Law at William and Mary, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1024&context=facpubs

What is striking here, is that the Court never took more than it could get—it carved out space for itself without risking the nation’s security or political backlash. Its 2004 and 2006 rulings provided ample opportunity for the President to pursue his enemy combatant initiative. Its 2008 ruling in Boumediene, while clearly constraining the political branches, reflected the views of the new Democratic majority in Congress and (to a lesser extent) the views of presidential candidates Obama and McCain.185 Its decision to steer clear of early Obama-era disputes likewise avoids the risks of a costly backlash while creating incentives for the Obama administration to take judicial authority into account (by settling these cases outside of court).186 Put another way, by taking prevailing social and political forces into account, the Court was able to flex its muscles without meaningfully undermining the policy preferences of the President and Congress. I, of course, recognize that the Court’s willingness to engage the executive and, in so doing, to nullify a signature campaign of the Bush administration, is a significant break from the judiciary’s recent practice of steering clear of disputes tied to unilateral presidential war making.187 At the same time, I see the Court’s willingness to challenge, and not defer, as not at all surprising. The Bush administration made arguments that backed the Court into a corner. The Court could either bow at the altar of presidential power, or it could find a way to slap the President down. It is to be expected that the Court chose to find a way to preserve its authority to “say what the law is.”188 The Justices, after all, have incentives to preserve the Court’s role in our system of checks and balances—especially when their decisions enhance their reputations with media and academic elites.189 This is true of the Supreme Court in general, and arguably more true of the current Court—given its penchant to claim judicial supremacy and given the importance of these institutional concerns to the Court’s so-called swing Justices.190 It is also noteworthy that the enemy combatant cases were at the very core of the judicial function. At oral arguments in Hamdan, Justice Kennedy emphasized the importance of habeas corpus relief,191 suggesting that limitations on habeas relief would “threaten[] the status of the judiciary as a co-equal partner of the legislature and the executive.”192

#### The plan produces political backlash to the court – it changes their calculus and sets a massive precedent

Devins 2010

Neal, Professor of Law at William and Mary, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1024&context=facpubs

In Part III of this Essay, I will argue that the Court’s actions in the first year of the Obama administration are cut from the same cloth as its decision to intervene in Bush-era disputes. As this section has suggested, the Court has never risked national security or executive branch non-acquiescence in its enemy combatant decision making. Moreover, as I argued in Part I, Court decision making in this area has largely tracked social and political forces. For reasons I will now detail, the Court’s decisions both to steer clear of this issue in the spring and summer of 2009 and its fall 2009 decision to hear the Uighur petition match past Court practices. Throughout the enemy combatant dispute, the Court has found ways to expand its authority without risking an institutionally costly backlash. III. CONCLUSION: THE PAST IS PROLOGUE Supreme Court interventions in the enemy combatant disputes never pushed the limits of what was acceptable to the political branches of government. The Court, instead, maximized its authority by moving incrementally and expanding judicial power in ways generally acceptable to the political branches. This was true of Bush-era decision making and there is no reason to think that the Court will depart from past practices during the Obama administration.

#### The link only goes one direction-Negative reactions to court decisions are more intense and last longer than positive ones.

Friedman-prof law NYU-05**,** Jacob D. Fuchsberg Professor of Law, New York University School of Law, December, 2005 (Texas Law Review, Article: The Politics of Judicial Review, 84 Tex. L. Rev. 257, p. Lexis)  
  
The critical question thus becomes how deep the Court's diffuse support among the general public is; for if theory holds, this is the leash on which the Court operates. Actually, a bungee cord might be a better analogy; for, in operation, the diffuse support hypothesis suggests that the judiciary can stray a certain distance from public opinion but that ultimately it will be snapped back into line. n393 Testing the length and flexibility of the cord is hard to do, however. It may be that there is greater tolerance for judicial deviation in some directions, such as with regard to the First Amendment. n394 Although the Court's degree of freedom of movement around public opinion may not be certain, positive scholars are fairly confident that one major determinant is information. The dynamics here are complex, but some generalities may be possible. Both negative and positive reactions to the Court influence public opinion, but negative reactions seem to be more intense and have a shorter half-life. n395 Perhaps it is for this reason that the [\*328] less people hear about the Court, the better for it. n396 As time passes, people develop a store of good feelings about the Supreme Court, reflected in the Court's relatively strong performance in public mood indicators. n397 Commentators who have studied public opinion and the Court regularly advise it to keep a low profile. n398

### 1NR A2: Link Uniqueness

#### Second, All their issues have already been ruled on – no one cares the second time.

Walsh 10-1-13

Mark, Campaign funding and affirmative action come back before the Supreme Court, writer for the ABA Journal, covering the U.S. Supreme Court, ABA Journal http://www.abajournal.com/magazine/article/campaign\_funding\_and\_affirmative\_action\_come\_back\_before\_the\_supreme\_court/

The last two terms of the U.S. Supreme Court were blockbusters, each capped off with dramatic, landmark decisions: the Affordable Care Act in 2012 and gay marriage this past June. The new court term is shaping up, in a sense, as a season of sequels. Big cases on campaign finance, affirmative action and, potentially, the federal health care law follow recent decisions in those areas. But like many Hollywood film sequels, the original stars are absent, the script may lack originality and the stakes are somewhat lower. “I think we’re going to have nothing as historic as the last two terms,” says Irving L. Gornstein, executive director of the Supreme Court Institute at Georgetown University Law Center and a visiting professor there. “On the other hand, there are quite a few fairly significant cases. I think the docket is relatively deep.”

#### Third, the court won’t spend capital on a broad ruling for campaign finance and small rulings don’t matter.

Hasen 2011

Richard, Distinguished Professor of Law, Loyola Law School–Los Angeles, CITIZENS UNITED AND THE ILLUSION OF COHERENCE, Michigan Law Review Volume 109 http://occupysanluisobispo.org/DATA/resources/Citizens\_United\_and\_the\_Illusion\_of\_coherence-hasen.pdf

If 80% of the public “oppose[s] the recent ruling by the Supreme Court that says corporations and unions can spend as much money as they want to help political candidates win elections,”258 how many people would welcome a ruling allowing direct corporate contributions to candidates? A Gallup poll conducted right after the Court decided Citizens United found that although a majority of Americans believed that giving campaign contributions is a form of free speech and that the corporations, labor unions, and others should be subject to the same campaign finance rules as individuals, 76% of respondents supported corporate and labor union contribution limits, and 61% supported individual contribution limits.259 In the same poll, a majority of Americans thought it was more important to limit campaign donations than to protect free speech rights.260 Although these findings would likely give the Justices considerable pause before overturning core campaign contribution limitations, it does not mean that the Court’s campaign finance jurisprudence is likely to remain stagnant. Campaign finance issues are barely understood by the public and generally not a national priority.261 Only extreme opinions like Citizens United are likely to get the public’s attention. Assuming this same fiveJustice majority stays on the Court, the Justices will be presented with many less-salient ways to loosen the campaign finance rules.262 However, complete deregulation, along the lines proposed by Justice Thomas, would take political courage to issue additional politically unpopular decisions. It is not clear that there are five Justices willing to spend considerable goodwill and political capital on such a strategy.

### 1NR A2: No Spillover

#### Their ideology argument isn’t true for prez powers cases – extremely visible.

Curry 2006

Todd, PoliSci Master’s Thesis, THE ADJUDICATION OF PRESIDENTIAL POWER IN THE U.S. SUPREME COURT: A PREDICTIVE MODEL OF INDIVIDUAL JUSTICE VOTING, University of Central Florida Summer 2006

If the predominant theory of Supreme Court decision-making, the attitudinal model, were applied to this subset of cases, despite the uniqueness of the political ramifications (which amount to direct judicial interaction with the executive branch), the balance of power issues that arise, and the distinct constitutional questions, it may be expected that justices would still simply vote their policy preferences because the attitudinal model assumes that all individual level decision-making by the Supreme Court justices is a function of ideology. This theory is too simplistic to account for the complexities that arise in separation of power cases, in particular in cases that involve presidential power. Therefore, while acknowledging the importance of a justice’s attitude in decision-making, this study postulates that there are multiple attitudinal and extra-attitudinal factors that may influence a justice’s individual level decision-making. Following the research of Yates (2002) and others, this study theorizes that, Supreme Court cases in which the president or presidential power is being adjudicated, the attitudinal model of judicial decision-making may not completely account for the justices’ individual decision-making process because in these highly salient cases, the presence of external and political cues may influence the justices because highly salient cases such as these may call into question the very legitimacy of the Court. Since there are numerous political and external factors that can affect the justices’ decision-making process in cases involving presidential power, there will be numerous hypotheses in order to test this theory.

#### Institutional capital governs court decisions

Davidov and Davidov 2013

Guy Davidov and Maayan Davidov How Judges Use Weapons of Inuence: The Social Psychology of Courts Israel Law Review / Volume 46 / Issue 01 / March 2013

It would hardly be surprising to learn that professional judges – like other humans – might use the weapons of inﬂuence identiﬁed in the literature in their personal interactions with other people, including fellow judges. Consider, for example, judges A and B, who are sitting on the same bench and have disagreements about the merits of a case. It is certainly plausible that A would try to convince B not only by putting forward her best arguments, but also by subtly reminding him that she sided with him in the past (thus relying on the principle of reciprocation); by trying to show how her position can be derived from his own previous judgments (relying on the principle of consistency); by pointing out that other judges support her position (relying on the principle of social proof); by being socially likeable (relying on the principle of liking); by emphasising her knowledge and credentials in the speciﬁc area under consideration (relying on the principle of authority); or by arguing that her position is unique and original and therefore likely to attract the attention of appeal court judges (relying on the principle of scarcity). Surely not all judges use such methods, but nothing in such interactions would be especially noteworthy. It is, however, much less obvious to argue that weapons of inﬂuence are also used by courts institutionally (that is, in their judgments). In this article we make this argument, proposing that courts may be seen as using such inﬂuence methods in their relationship vis-à-vis other institutional actors – particularly the government and the legislature – as well as the public at large. From a formalistic (and in our opinion, naïve) viewpoint, it could be argued that courts do not try to inﬂuence anyone. They are not making requests and they are not selling anything; they have the power to make legally binding rulings unilaterally. But courts, in fact, work within a complex web of relations with the government, the legislature, the legal community and the public at large. While courts generally develop the law within the conﬁnes of their legal mandate, the boundaries of this mandate are far from clear. Moreover, formal authority aside, they frequently prefer to minimise conﬂict with the other branches of government,

to secure broad support for their judgments and preserve legitimacy. Holding neither sword nor purse,3 courts often have to manage conﬂicts with the other branches – and they have limited ‘institutional capital’ to do so.4 It is therefore clear that courts do not simply lay down the law; rather, they need to convince the other branches to accept it with minimum resistance. Weapons of inﬂuence can thus become useful, as courts attempt to inﬂuence others or secure their support.

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### Deeks

Their *application* of Deeks’ argument is all wrong; the court breaking deference doesn’t stop the executive, they will be confident they can win the cases

Deeks 10/21 (Ashley, is an associate professor of law at the University of Virginia, “Courts Can Influence National Security Without Doing a Single Thing,” http://www.newrepublic.com/article/115270/courts-influence-national-security-merely-watching)

The third factor that helps secure the observer effect’s operation is the likelihood of future litigation on related issues. If a court declines to defer to the Executive in a particular case, that decision is unlikely to create an observer effect if the Executive has confidence that the factual and legal questions at issue in that case will not arise again. In contrast, when the Executive perceives that a set of policies is likely to come under sustained litigation (and thus under the potential oversight of multiple judges over time), it is more likely to concertedly review—and alter—those policies.