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#### The state of exception is the new norm. The juridico-political system is founded upon the use of law in order to justify lawlessness and violent biopolitics. The affirmative’s call to reign in executive power through law fails to recognize that the problem is the appeal to law itself. The status quo guarantees a violent norm which ensures global civil war.

Agamben 05. Giorgio Agamben, famous philosopher, The State of Exception, pg. 85

\*anomie – state or condition characterized by a breakdown or absence of norms (lawlessness)

It is perhaps possible at this point to look back upon the path trav- eled thus far and draw some provisional conclusions from our investi- gation of the state of exception. The juridical system of the West appears as a double structure, formed by two heterogeneous yet coordinated el- ements: one that is normative and juridical in the strict sense (which we can for convenience inscribe under the rubric potestas) and one that is anomic and metajuridical (which we can call by the name auctoritas).

The normative element needs the anomic element in order to be ap- plied, but, on the other hand, auctoritas can assert itself only in the val- idation or suspension of potestas. Because it results from the dialectic between these two somewhat antagonistic yet functionnally connected elements, the ancient dwelling of law is fragile and, in straining to main- tain its own order, is always already in the process of ruin and decay. The state of exception is the device that must ultimately articulate and hold together the two aspects of the juridico-political machine by instituting a threshold of undecidability between anomie and nomos, between life and law, between auctoritas and potestas. It is founded on the essential fiction according to which anomie (in the form of auctoritas, living law, or the force of law) is still related to the juridical order and the power to suspend the norm has an immediate hold on life. As long as the two el- ements remain correlated yet conceptually, temporally, and subjectively distinct (as in republican Rome’s contrast between the Senate and the people, or in medieval Europe’s contrast between spiritual and temporal powers) their dialectic—though founded on a fiction—can nevertheless function in some way. But when they tend to coincide in a single per- son, when the state of exception, in which they are bound and blurred together, becomes the rule, then **the juridico-political system transforms itself into a killing machine.**

6.10 The aim of this investigation—in the urgency of the state of ex- ception “in which we live”—was to bring to light the fiction that governs this arcanum imperii [secret of power] par excellence of our time. What the “ark” of power contains at its center is the state of exception—but this is essentially an empty space, in which a human action with no re- lation to law stands before a norm with no relation to life.

This does not mean that the machine, with its empty center, is not effective; on the contrary, what we have sought to show is precisely that it has continued to function almost **without interruption from World War One, through fascism and National Socialism, and up to our own time**. Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliter- ated and contradicted with impunity by a governmental violence that— while ignoring international law externally and producing a permanent state of exception internally—nevertheless **still claims to be applying the law.**

Of course, the task at hand is not to bring the state of exception back within its spatially and temporally defined boundaries in order to then reaffirm the primacy of a norm and of rights that are themselves ulti- mately grounded in it. From the real state of exception in which we live, **it is not possible to return to the state of law** [stato di diritto], for at issue now are the very concepts of “state” and “law.” But if it is possible to attempt to halt the machine, to show its central fiction, this is because between violence and law, between life and norm, there is no substantial articulation. Alongside the movement that seeks to keep them in rela- tion at all costs, there is a countermovement that, working in an inverse direction in law and in life, **always seeks to loosen what has been artifi- cially and violently linked**. That is to say, in the field of tension of our culture, two opposite forces act, one that institutes and makes, and one that deactivates and deposes. The state of exception is both the point of their maximum tension and—as it coincides with the rule—that which threatens today to render them indiscernible. To live in the state of ex- ception means to experience both of these possibilities and yet, by always separating the two forces, ceaselessly to try to interrupt the working of the machine that is leading the West toward global civil war.

#### Their use of law plays into a rigged game of law which adds more illusory safeguards which can be subverted whenever the government sees fit.

Krasmann 12. Susanne Krasmann, Professor of Sociology at the Institute for Criminological Research, University of Hamburg, “Law's knowledge: On the susceptibility and resistance of legal practices to security matters, “Theoretical Criminology 2012 16: 379 originally published online 4 June 2012, pg. 380

In the face of these developments, a new debate on how to contain governmental interference in the name of security has emerged. What is remarkable about this debate is that, on the one hand, it aims at establishing more civil and human rights and attendant procedural safeguards that allow for systematically calling into question the derogation of laws and the implementation of new laws in the name of security. On the other hand, it recognizes the existence of a new dimension of threats, particularly in the aftermath of the terror attacks of 11 September 2001. As John Ferejohn and Pasquale Pasquino (2004: 228), for instance, contend:

We are faced, nowadays, with serious threats to the public safety that can occur anywhere and that cannot terminate definitively. ... If we think that the capacity to deal effectively with emergencies is a precondition for republican government, then it is necessary to **ask how emergency powers can be controlled in modern circumstances.**

Adequate legal frameworks and institutional designs are required that would enable us to ‘reconcile’ security with (human) rights, as Goold and Lazarus (2007b: 15) propose, and enduring emergency situations with the rule of law.

Traditional problems in the relationship between law and security government within this debate form a point of departure of critical considerations:2 emergency government today, **rather than facing the problem of gross abuses of power,** has to deal with the persistent danger of the exceptional becoming normal (see Poole, 2008: 8). Law gradually adjusts to what is regarded as ‘necessary’.3 Hence, law not only constrains, but at the same time also authorizes governmental interference. Furthermore, mainstream approaches that try to balance security and liberty are rarely able, or willing, to expose fully the trade-offs of their normative presuppositions: ‘[T]he metaphor of balance is used as often to justify and defend changes as to challenge them’ (Zedner, 2005: 510). Finally, political responses to threats never overcome the uncertainty that necessarily accompanies any decision addressing future events. To ignore this uncertainty, in other words, is to ignore the political moment any such decision entails, thus exempting it from the possibility of dissent.

Institutional arrangements that enforce legislative control and enable citizens to claim their rights are certainly the appropriate responses to the concern in question, namely that security gradually seizes political space and transforms the rule of law in an inconspicuous manner. They establish political spaces of dispute and provide sticking points against all too rapidly launched security legislation, and thus may foster a ‘culture of justification’, as David Dyzenhaus (2007) has it: political decisions and the exercise of state power are to be ‘justified by law’, in a fundamental sense of a commitment to ‘the principles of legality and respect for human rights’ (2007: 137). Nonetheless, most of these accounts, in a way, simply add more of the same legal principles and institutional arrangements that are well known to us. To frame security as a public good and ensure that it is a subject of democratic debate, as Ian Loader and Neil Walker (2007) for example demand, is a promising alternative to denying its social relevance. The call for security to be ‘civilized’, though, once again echoes the truly modern project of dealing with its inherent discontents. The limits of such a commitment to legality and a political ‘culture of justification’ (so termed for brevity) will be illustrated in the following section. Those normative endeavours will be challenged subsequently by a Foucauldian account of law as practice. Contrary to the idea that law can be addressed as an isolated, ideal body and thus treated like an instrument according to normative aspirations, the present account renders law’s reliance on forms of knowledge more discernable. Law is susceptible, in particular to security matters. As a practice, it constantly transforms itself and, notably, articulates its normative claims depending upon the forms of knowledge brought into play. Contrary to the prevailing debate on emergency government, this perspective enables us, on the one hand, to capture how certain forms of knowledge become inscribed into the law in a way that goes largely unnoticed**.** This point will be discussed on the example of automated surveillance technologies, which facilitate a particular rationality of pre-emptive action. The conception of law as a practice, on the other hand, may also be understood as a tool of critique and dissent. The recent torture debate is an extreme example of this, whereby torture can be regarded as a touchstone of law’s resistance to its own abrogation.

#### The alternative is an absolute refusal of sovereign power to draw lines between inside and outside – any other approach simply affirms the power of the sovereign to do so in the first place

Edkins and Pin-Fat 05. Jenny Edkins, professor of international politics at Prifysgol Aberystwyth University (in Wales) and Veronique Pin-Fat, senior lecturer in politics at Manchester Universit, “Through the Wire: Relations of Power and Relations of Violence,” Millennium - Journal of International Studies 2005 34: pg. 14

One potential form of challenge to sovereign power consists of a refusal to draw any lines between zoe- and bios, inside and outside**.**59 As we have shown, sovereign power does not involve a power relation in Foucauldian terms. It is more appropriately considered to have become a form of governance or technique of administration through relationships of violence that reduce political subjects to mere bare or naked life. In asking for a refusal to draw lines as a possibility of challenge, then, we are not asking for the elimination of power relations and consequently, we are not asking for the erasure of the possibility of a mode of political being that is empowered and empowering, is free and that speaks: quite the opposite. Following Agamben, we are suggesting that it is only through **a refusal to draw any lines at all between forms of life (and indeed, nothing less will do)** that sovereign power as a form of violence can be contested and a properly political power relation (a life of power as potenza) reinstated. We could call this challenging the logic of sovereign power through refusal. Our argument is that we can evade sovereign power and reinstate a form of power relation by **contesting sovereign power’s assumption of the right to draw lines,** that is, by contesting the sovereign ban. Any other challenge always inevitably remains within this relationship of violence. To move outside it (and return to a power relation) we need not only to contest its right to draw lines in particular places, but also to resist the call to draw any lines of the sort sovereign power demands.

**The grammar of sovereign power cannot be resisted by challenging or fighting over where the lines are drawn**. Whilst, of course, this is a strategy that can be deployed, it is not a challenge to sovereign power per se as it still tacitly or even explicitly accepts that lines must be drawn somewhere (and preferably more inclusively). Although such strategies contest the violence of sovereign power’s drawing of a particular line, they risk replicating such violence in demanding the line be drawn differently**.** This is because such forms of challenge fail to refuse sovereign power’s line-drawing ‘ethos’, an ethos which, as Agamben points out, **renders us all now homines sacri or bare life.**

#### Accepting the plan as a legitimate subject of debate eviscerates solvency. Appeals to legality fail absent study and de-activation of the fictional lines of inside and outside created by the sovereign guardians

McLoughlin 13. Daniel McLoughlin, professor of law at the University of South Wales, “The Fiction of Sovereignty and the Real State of Exception: Giorgio Agamben’s Critique of Carl Schmitt,” Law, Culture and the Humanities 0(0) pg. 17

State of Exception suggests that the studious deactivation of the law is exemplified by Kafka’s characters.86 While his reading of Kafka is only one strand of the politics of inoperativity within his work, it is nonetheless an important one for our purposes, given Agamben’s tendency to illuminate the relationship between messianism, nihil- ism and law through Kafka.87 To conclude, then, I briefly examine the way in which Kafka’s characters seek to “deactivate” the law; how this might relate to the production of a “real state of exception”; and how Agamben conceives the stakes of this politics of “use.”

According to Homo Sacer, Kafka’s parable “Before the Law” represents the “struc- ture of the sovereign ban in an exemplary abbreviation.”88 The story begins with the “man from the country” approaching the door of the law, only to be informed by its gatekeeper that, although the door is open, he cannot enter at the moment. The man asks if permission will be forthcoming: the gatekeeper responds that it is possible, “but not now,”89 and that, although he is welcome to enter the door without permission, he will only encounter door after door, and guardian after guardian, each more fearsome than the last. Taking a seat before the door of the law, the man from the country then waits for days and years, all the while trying to convince the gatekeeper to grant him entry. Still before the law in old age, with little time left to live, he sees a radiance streaming from the gateway to the law. As his life begins to fade, the man from the country asks why in all this time no-one else has attempted to gain entry, to which the doorkeeper responds: “No one else could ever be admitted here, since **this gate was made only for you. I am now going to shut it.”90**

According to Agamben, “Before the Law” is usually read as a tale of “irremediable defeat,”91 a story of the impossibility of surpassing the structure of sovereignty. Agamben, by contrast, argues that the man from the country is engaged in a patient and ultimately successful attempt to deactivate the law’s “being in force without sig- nificance.” At the end of the story, despite the risk to his life entailed by his struggle with the law, the man remains alive and the door to the Law is shut. In his essay “K,” Agamben elaborates on this reading with a subtle yet important shift of emphasis: the lesson of the man from the country is, he argues, that the deactivation of the law does not require the study of law itself, but rather, the “long study of its doorkeepers.”92 While the law is absent in Kafka’s world, what keeps it at work is the fact that the guardians of the law claim to act on its behalf. If one wants to deactivate the law, then the decisive politi- cal struggle is not with law itself, which is already inoperative, but with those who cover over this fact with the claim that they represent the law. In the same essay, Agamben makes a similar point about The Castle: the land surveyor who tries to gain access to the castle does not engage in a struggle “against God or supreme sovereignty ... but against the angels, the messengers and functionaries who appear to represent it ... (it is) a conflict with the fabrications of men (or of angels) regarding the divine.”93

This helps to illuminate the sense in which the real state of exception can simultane- ously be a situation to which we are subject; a situation that has been exposed as such by Benjamin; and also a crucial political task to undertake that will “help in the struggle against Fascism.” In Agamben’s account of Paul, the coming of the messiah has deacti- vated the law and yet the law remains at work; in his analyses of the state of exception the law is suspended yet remains in force; in his reading of Kafka, the Law is absent yet still present. In each instance, then, there is a messianic tension between an “already” existing lawlessness that is “not yet” fully experienced as such, because it is being cov- ered over by authority: the katechon in Paul, the guardians of the law in Kafka, and those trying to control the state in his account of the exception. To produce a real state of exception is to deactivate the law, which requires undermining the claims of the repre- sentatives of the law and the political divisions that they maintain on this basis. While the lawlessness of the real state of exception is at work, it can only come to light in and through a “conflict with the fabrications of men” about the continued existence of law.94

Agamben sees the politics of deactivating the law as the only appropriate (and indeed conceptually viable) response to the state of emergency as rule. As we have observed, Schmitt’s analysis of sovereignty closed down the idea of pure violence and the possi- bility of a radically revolutionary act through the idea of the force-of-law, which placed the power to suspend the law into the hands of the state and those who seek to control it. However, Benjamin’s eighth thesis turns the tables on Schmitt, as the idea of sover- eignty becomes utterly implausible when the state of emergency is the rule. Within the contemporary political horizon, then, it is conceptually impossible to claim legal author- ity and legitimacy: as Agamben asserts in The Church and the Kingdom “nowhere on earth today is a legitimate power to be found.”95 What is conceptually possible, how- ever, is a politics that seeks to deactivate the law by neutralizing the claims to legality made by those who present themselves as its guardians. It is only through such a politics that the lawlessness of the ‘‘real state of exception’’ is experienced as such, as any poli- tics that makes claims to legal authority rests upon the fiction of sovereignty and hence continues to conceal the deactivation of the law.

### Bnd

#### Court will rule against Bond – but it’s close

Fisher 9-6 (Daniel, Senior Editor – Forbes, “Affirmative Action, Labor Law, International Suits Lead Supreme Court's Business Docket,” Forbes, 2013, <http://www.forbes.com/sites/danielfisher/2013/09/06/affirmative-action-labor-law-international-suits-lead-supreme-courts-business-docket/4/>)

Bond v. U.S.

Argument date: Nov. 5

Carol Anne Bond was convicted in Pennsylvania of using an arsenic-based chemical to try and poison a friend who had an affair with her husband. Prosecutors charged her under a federal law Congress passed to comply with an international treaty banning the use of chemical weapons. Alabama, Virginia and nine other states filed a brief in support of Bond, saying the law she was convicted under should apply only to state actors and not private citizens. Otherwise Congress could adopt plenary police powers by passing laws it says are designed to implement treaties, those states say — the same sort of plenary powers conservatives feared Congress was exercising with Obamacare.

The Feds disagree, of course. So does the Yale Law School Center for Global Legal Challenges, which notes in a brief that the Constitution made treaties “the supreme Law of the Land” and gave Congress the power to pass laws enforcing them within the U.S. because under the previous Articles of Confederation, the country was weakened by its inability to force states to abide by treaties it had signed. States are protected by the requirement that all treaties are ratified by a two-thirds majority in the Senate.

My call: Libertarians will disagree, but Bond’s conviction is upheld.

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

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

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

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

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

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

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

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

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

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

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

Trapp et al 13

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

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

#### Global arms control solves extinction

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

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

### Pltclqstndctrn

#### Judicial deference is high – there’s strict adherence to the political question doctrine

Bradley 9-2 (Curtis A., William Van Alstyne Professor of Law – Duke Law School, “War Powers, Syria, and Non-Judicial Precedent,” Lawfare Blog, 2013, http://www.lawfareblog.com/2013/09/war-powers-syria-and-non-judicial-precedent/)

As an initial matter, we need to bracket the issue of whether Obama’s action will weaken his own power as a political matter. This is a complicated issue: on the one hand, it may signal weakness both to Congress and to other nations; on the other hand, if he obtains congressional authorization, he may be in an ultimately stronger political position, as Jack Goldsmith has pointed out. As I understand it, the claim being made by Spiro, Rothkopf, and others is that the power of the presidency more generally is being weakened. How might this happen? **Not through an influence on judicial doctrine**: Although courts sometimes take account of historic governmental practices when assessing the scope of presidential authority, they have consistently invoked limitations on standing and ripeness, as well as the political question doctrine, to avoid **addressing constitutional issues relating to war powers**. In the absence of judicial review, what is the causal mechanism by which the “precedent” of Obama seeking congressional authorization for the action in Syria could constrain future presidential action? When judicial review is unavailable, the most obvious way in which the President is constrained is through the political process—pressure from Congress, the public, his party, etc. In an extreme case, this pressure could take the form of impeachment proceedings, but it does not take such an extreme case for the pressure to have a significant effect on presidential decisionmaking. Indeed, it is easy to think of political considerations that might have motivated Obama to go to Congress with respect to Syria.

#### The plan reverses court deference and rules on a political question

Lederman 11 (Martin, Professor of Law – Georgetown University Law Center, “War, Terror, and the Federal Courts, Ten Years After 9/11: Conference\*: Association of American Law Schools' Section on Federal Courts Program at the 2012 AALS Annual Meeting in Washington, D.C.,” American University Law Review, June, 61 Am. U.L. Rev. 1253, Lexis)

Number two: Numerous very important, contested, hotly debated topics have arisen in the last ten years, many of them in the Bush Administration, **involving** for example interrogation techniques, **the scope of detention authority**, habeas review, military commissions, **targeted killings, and the use of force more broadly**. On some of these questions, the federal courts - and the Supreme Court in particular - have had quite a lot to say; and on others, not so much, at least in part because of several different federal courts doctrines that prevent the courts from speaking too much about those. You're all familiar with standing limits, **political questions**, state secrets, etc. We're going to focus particularly on a couple of them, which are immunity doctrines and the weakening of the Bivens n2 and state court sorts of causes of action.

We will also discuss the fact that there are many people who think the federal courts have become too involved at supervising and resolving substantive questions involving the political branches, including some of Judge Kavanaugh's colleagues, who have been particularly vocal about that, engaging in what appears to be a form of resistance to the Supreme Court's Boumediene n3 decision. By contrast, many other people think the courts have not been nearly involved enough at resolving some of the unresolved questions about the scope of interrogation and detention and military commissions and the like, that might be lingering from the last administration, or occurring now in the new administration, such as with respect to use of force. So that's the second broad topic - whether the federal courts have been too timid or too aggressive in this area.

#### This automatically makes war powers a justiciable issue – this case-specific exception causes a slippery slope that breaks the entire doctrine

Miller 10 (Mathew Edwin, JD – University of Michigan Law School, Associate – Latham & Watkins LLP, “The Right Issue, the Wrong Branch: Arguments against Adjudicating Climate Change Nuisance Claims,” Michigan Law Review, November, 109 Mich. L. Rev. 257, Lexis)

However, to say that cases like American Electric Power are justiciable just because plaintiffs allege a public nuisance begs the question: Why should such claims **automatically be justiciable?** It contravenes the **purpose and articulation of the political question doctrine** to suggest that nuisances are categorically justiciable because political questions have historically excluded torts between private parties and have focused instead on governmental issues like gerrymandering, foreign policy, and federal employment. n70 Again, Baker demanded "discriminating" case-by-case inquiries, rejecting "resolution by any semantic cataloguing." n71 Similarly, the fact that other public nuisance claims have not presented political questions in the past should not preclude such a finding in the climate context. n72 Indeed, the argument for nonjusticiability rests on the notion that climate suits are unique and therefore defy classification among tort precedent. n73

[\*271] Extending the political question doctrine to a public nuisance allegation would surpass precedent in terms of claim-category application. Yet with respect to the theory behind the doctrine, **such an extension is proper** because cases like American Electric Power would push existing nuisance law to embrace a complex, qualitatively unique phenomenon **that cannot be prudentially adjudicated**. n74 The Supreme Court has never held that torts cannot present political questions, so prudential constitutional principles should similarly apply to them. This Note simply argues that the facts, claims, parties, and relief demanded in this particular mode of litigation should fall under the nonjusticiability umbrella, wherever its limits may lie. n75 The following analysis of Baker invokes the American Electric Power situation specifically for the sake of convenience, but the arguments therein should be read to apply to injunctive climate nuisance claims generally.

[Continues to Footnore]

n75. This Note does not purport to suggest exactly where the line ought to be drawn in applying the political question doctrine to tort claims. A consideration of the potential doctrinal "slippery slope" - where courts might improperly refuse to adjudicate claims solely on the basis of complexity - is beyond the scope of the present discussion.

#### Violating the political question doctrine on issues of war power causes a wave of litigation – that destroys the effectiveness of US defense contractors

Isenberg 10 (David, Research Fellow – Independent Institute, “Contractor Legal Immunity and the ‘Political Questions’ Doctrine,” CATO Institute, 1-19, <http://www.cato.org/publications/commentary/contractor-legal-immunity-political-questions-doctrine>)

One can easily see why most defense contractors, including private military and security firms working under U.S. government contract, would like to prevent such suits from proceeding. The sheer number of injuries alone gives them reason to want to avoid possible suits. According to ProPublica as of last September 30 the number of private contractors injured in Iraq and Afghanistan totaled 37,652. Of course, not all those injuries are the result of something done wrong. But even a small fraction of them would **entail considerable legal costs for a contractor** so it is easy to understand why they would want to preventing such suits from being filed in the first place.

As I am not a lawyer the following is derived from Maj. Carter’s article.

Traditionally, the reason given for this is that such cases may involve “political questions” that the Judicial Branch is ill-equipped to decide. Thus defense contractor advocates claim these actions must be dismissed, else there be grim consequences for Government contingency contracting.

But according to Maj. Carter, “the recent developments in political question doctrine case law are significant to the future of Government contingency contracting. However, they are not catastrophic — although portrayed as such by some defense contractor advocates. There will not be an explosion of contracting costs passed on to the Government. There will not be a mass refusal of defense contractors to accept contingency contracts. There will not be chaos on the battlefield. Such predictions are nothing more than “bellowing bungle.”

Carter wrote:

What is the political question doctrine? According to Chief Justice John Marshall, “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in [the U.S. Supreme Court].” In 2004, the Court held “[s]ometimes .. . the law is that the judicial department has no business entertaining [a] claim of unlawfulness — because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be ‘nonjusticiable,’ or ‘political questions.’”

What this means is that traditionally courts have deferred to the political branches in matters of foreign policy and military affairs. Policy decisions regarding **the employment of U.S. military forces** in combat belong to the political branches, not the courts. The Supreme Court has held that, due to their “complex, subtle, and professional” nature, decisions as to the “composition, training, equipping, and control of a military force” are “subject always” to the control of the political branches.

Tort suits that challenge the internal operations of these areas of the military are likely to be dismissed as political questions. Yet, notwithstanding the foregoing prohibitions on judicial conduct, the Supreme Court has cautioned, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” As mentioned earlier, vast precedent exists for judicial involvement in foreign and military affairs. Case law establishes that military decisions are reviewable by federal courts. An assertion of military necessity, standing alone, is not a bar to judicial action. Merely because a dispute can be tied in some way to combat activities does not prevent a court from reviewing it. Although an action arises in a contingency environment, if a case is essentially “an ordinary tort suit” it is well within the competence of the courts to entertain. Courts have underscored the point: no litmus test exists that prohibits judicial action merely because an issue involves the military in some fashion.

Where plaintiffs seek only damages and not injunctive relief, such cases are “particularly judicially manageable.” When such a damages-only lawsuit concerns only a defense contractor (as opposed to the Federal Government), courts have held that such actions do not involve “overseeing the conduct of foreign policy or the use and disposition of military power.” Thus, those actions are less likely to raise political questions than suits against the Government, suits seeking injunctive relief, or both.

Given the enormous amount of money involved in Government contingency contracting and the correspondingly large number of contractors and contractor employees performing GWOT (Global War on Terror) contingency contracts, the number of plaintiffs seeking redress for tortious conduct was certain to rise — and it did. Universally, defendant defense contractors invoked the political question doctrine in order to shield themselves from liability in their performance of GWOT contracts, some with more success than others. The first significant case centered around the tragic events at the Abu Ghraib prison in Iraq.

In Ibrahim v. Titan Corp., Iraqi plaintiffs alleged they were tortured, raped, humiliated, beaten, and starved while in U.S. custody. Apparently fearing a dismissal on sovereign immunity grounds if they sued the U.S. Government, the plaintiffs instead chose to name as defendants the contractors who provided interpreters and interrogators for the prison. The defendants filed a motion to dismiss, alleging the matter involved political questions. The court held the case should not be dismissed at such an early stage on political question grounds, especially because the United States was not a party to the case. Ibrahim is significant because it was the first GWOT case to underscore the need for full factual development of a case prior to an assessment of justiciability.

One particularly interesting point in Carter’s article is this:

Judges and scholars openly speculate about the possible consequences of defense contractor tort liability on the federal procurement process. In Boyle, the Supreme Court warned that “[t]he financial burden of judgments against [] contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability … .”

Since private military contracting advocates claim that their firms are more cost effective than the government one might reasonably believe that they can be so only by preventing tort suits against them. If the cost of such suits were factored in, the presumed cost effectiveness could conceivably be significantly less, **or perhaps not exist at all**.

Carter asks “is the situation really this dire? Are contractors at a point where, because of increased litigation risks, they will be forced to charge the Government more for their services or elect to not provide services altogether?”

The answers may not be far away. In November 2008, Joshua Eller filed suit in the U.S. District Court for the Southern District of Texas, as a result of injuries he suffered at Balad Air Base, Iraq, while deployed as a contractor employee of KBR from February to November of 2006. The complaint alleges defendants KBR and Halliburton “intentionally and negligently exposed thousands of soldiers, contract employees and other persons to unsafe water, unsafe food, and contamination due to faulty waste disposal systems … .” The complaint also includes allegations of injury from toxic smoke which emanated from an open air burn pit at Balad. The complaint alleges approximately 1,000 other individuals suffered similar injuries and it seeks to combine all of those actions into a single class action lawsuit. More significantly, this action is only one of several suits currently pending that relate to similar KBR activities in Iraq.

**The political question doctrine will be a** major factor in this coming storm of litigation. With the large number of potential plaintiffs compounded by the seriousness of the conduct and injuries alleged, these suits have the potential to dwarf the damages awards previously sought in earlier GWOT cases. Undoubtedly, KBR will seek to raise the political question doctrine as an absolute bar to these and any similar suits.

Defense contractor advocates warn of “deleterious effects” to the mission and the contractor-military relationship if tort suits against war zone defense contractors are allowed to proceed. They argue such tort claims “frustrate” and “conflict with” the Government’s ability to control contingency operations and would result in compromised logistical support and mission jeopardy. Furthermore, many companies, especially smaller ones, could be deterred from seeking contingency contracts. For those contractors who do elect to proceed, they will seek to insulate themselves from liability by either self-insuring or obtaining insurance coverage, if it is available. The argument continues that such costs will then be passed onto the Government in the form of higher contract prices. But, most alarmingly, some defense contractor advocates claim the impact of such suits “would be far more profound than financial” and defense contractors may, out of a fear of being sued, refuse to follow the military’s instructions altogether.

#### That’s key to operational success in Afghanistan

Schwartz 9 (Moshe, Specialist in Defense Acquisition – Congressional Research Service, “Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis,” Congressional Research Service, 8-23, http://fpc.state.gov/documents/organization/128824.pdf)

The Department of Defense (DOD) increasingly relies upon contractors to support operations in Iraq and Afghanistan, which has resulted in a DOD workforce in those countries comprising approximately an equal number of contractors (200,000) as uniformed personnel (194,000). The critical role contractors play in supporting such military operations and the billions of dollars spent by DOD on these services requires operational forces to effectively manage contractors during contingency operations. Lack of sufficient contract management can delay or even prevent troops from receiving needed support and can also result in wasteful spending. Some analysts believe that poor contract management has also played a role in abuses and crimes committed by certain contractors against local nationals, which likely has undermined U.S. counterinsurgency efforts in Iraq and Afghanistan.

DOD officials have stated that the military’s experience in Iraq and Afghanistan, coupled with Congressional attention and legislation, has focused DOD’s attention on the importance of contractors to operational success. DOD has taken steps to improve how it manages and oversees contractors in Iraq and Afghanistan. These steps include tracking contracting data, implementing contracting training for uniformed personnel, increasing the size of the acquisition workforce in Iraq and Afghanistan, and updating DOD doctrine to incorporate the role of contractors. However, these efforts are still in progress and could take three years or more to effectively implement.

#### Afghan conflict causes global nuclear war

Morgan 7 (Stephen J., Political Writer and Former Member of the British Labour Party Executive Committee, “Better another Taliban Afghanistan, than a Taliban NUCLEAR Pakistan!?”, 9-23, http://www.freearticlesarchive.com/article/\_Better\_another\_Taliban\_Afghanistan\_\_than\_a\_Taliban\_NUCLEAR\_Pakistan\_\_\_/99961/0/)

As the war intensifies, he has no guarantees that the current autonomy may yet burgeon into a separatist movement. Appetite comes with eating, as they say. Moreover, should the Taliban fail to re-conquer al of Afghanistan, as looks likely, but captures at least half of the country, then a Taliban Pashtun caliphate could be established which would act as a magnet to separatist Pashtuns in Pakistan. Then, the likely break up of Afghanistan along ethnic lines, could, indeed, lead the way to the break up of Pakistan, as well. Strong centrifugal forces have always bedevilled the stability and unity of Pakistan, and, in the context of the new world situation, the country could be faced with civil wars and popular fundamentalist uprisings, probably including a military-fundamentalist coup d’état. Fundamentalism is deeply rooted in Pakistan society. The fact that in the year following 9/11, the most popular name given to male children born that year was “Osama” (not a Pakistani name) is a small indication of the mood. Given the weakening base of the traditional, secular opposition parties, conditions would be ripe for a coup d’état by the fundamentalist wing of the Army and ISI, leaning on the radicalised masses to take power. Some form of radical, military Islamic regime, where legal powers would shift to Islamic courts and forms of shira law would be likely. Although, even then, this might not take place outside of a protracted crisis of upheaval and civil war conditions, mixing fundamentalist movements with nationalist uprisings and sectarian violence between the Sunni and minority Shia populations. The nightmare that is now Iraq would take on gothic proportions across the continent. The prophesy of **an arc of civil war** over Lebanon, Palestine and Iraq **would spread to south Asia, stretching from Pakistan to Palestine, through Afghanistan into Iraq and up to the Mediterranean** coast. Undoubtedly, this would also spill over into India both with regards to the Muslim community and Kashmir. Border clashes, terrorist attacks, sectarian pogroms and insurgency would break out. A new war, and possibly **nuclear war,** between Pakistan and India could no be ruled out. Atomic Al Qaeda Should Pakistan break down completely, a Taliban-style government with strong Al Qaeda influence is a real possibility. Such deep chaos would, of course, open a “Pandora's box” for the region and the world. With the possibility of unstable clerical and military fundamentalist elements being in control of the Pakistan nuclear arsenal, not only their use against India, but Israel becomes a possibility, as well as the acquisition of nuclear and other deadly weapons secrets by Al Qaeda. Invading Pakistan would not be an option for America. Therefore a nuclear war would now again become a real strategic possibility. This would bring a shift in the tectonic plates of global relations. It could usher in a new Cold War with **China and Russia pitted against the US**.

### mndmnt

#### Text –

Congress should propose and three-fourths of the States should ratify an amendment to the United States Constitution that substantially increases environmental restrictions on the President of the United States’ authority to introduce armed forces into hostilities.

#### Amending the constitution solves – it establishes clear and credible war powers authority

Goldstein 88 (Yonkel, J.D. – Stanford Law School and Has the Sweetest of Names, “The Failure of Constitutional Controls over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment,” Stanford Law Review, July, 40 Stan. L. Rev. 1543, Lexis)

The scope of the **war-making powers** of the executive and legislative branches of the United States government, in the context of the nuclear age, is unclear. The tremendous destructive power of modern arsenals, especially that of atomic weapons, makes this issue one of paramount importance. As the dangers of war have increased exponentially since the time when the Constitution was ratified, the efficacy of the constitutional safeguards which were intended to limit the likelihood of war has dwindled dramatically. The lack of a major nuclear war, so far, may suggest to some that the legal system of controls over United States war powers is operating well. As Professor Spanier states, however, in discussing the principle of civilian control of the military, factors which are extrinsic to the legal system have been primarily responsible for the American military's subservience to civilians. n1 My argument is an analogous one, namely that the system of checks and balances, designed to ensure that entry into war either be in response to an emergency thrust upon the nation or the result of a thorough examination of policy alternatives and considerations, is no longer functioning. Consequently, credit for the lack of nuclear war since World War II belongs more to factors extrinsic to the legal system designed to control American war power than it does to [\*1544] any workable system intended to regulate that power. The constitutional war-making provisions have now been tested; under modern-day pressures they have been found wanting. As a result, it is time to **amend the Constitution** for both practical and symbolic reasons. A constitutional amendment would have a consciousness-raising effect on the American people. It would signal a clear change from immediate past precedent and, simultaneously, legitimate that change in the most authoritative way possible under our system. The proposed amendment would both (1) clearly establish congressional authority to set policy in all matters relating to the preparation and execution of war, hostilities, aggression, or defense of the United States, American citizens, and American interests, and (2) establish a private right of action against Congress for its failure to make diligent efforts to ascertain the relevant facts, to debate, and to set policy in this area. The first part of this amendment would help to settle any lingering debate over the proper congressional role in defense matters, yet allow the system to retain the flexibility necessary to execute a sound and responsive defense policy; Congress would be able to delegate responsibility and authority however it sees fit. The second part recognizes the appropriateness of a mechanism to allow United States citizens to stimulate congressional and judicial action in order to protect against the risks of nuclear war; courts would not be empowered to judge substantive legislative decisions, but would be able to ensure that Congress, in reaching those decisions, adhere to constitutional principles. Thus, the courts would function similarly to how they have operated in the due process area.

#### The CP builds support through consensus – key to social change and avoids the rollback DA to the aff

Vermeule 4 (Adrian, Professor of Law – Harvard Law School, “Constitutional Amendments and the Constitutional Common Law,” Public Law and Legal Theory Working Paper No. 73, University of Chicago Law School, September, <http://www.law.uchicago.edu/files/files/73-av-amendments.pdf>)

Decision costs and benefits

We must account for the costs of decision making as well as the quality of decisions. A simple view would be that the formal amendment process is too costly to serve as the principal means, or even as an important means, of constitutional updating, just as periodic constitutional conventions are too costly to be practical.

Dennis Mueller denies this view. He suggests instead that the decision costs of the formal amendment process are **decision benefits**:

The U.S. Constitution contains broad definitions of rights, and the task of amending their definitions to reflect changes in the country’s economic, social and political characteristics has been largely carried out by the Supreme Court. While this method of updating the Constitution’s definition of rights has helped to prevent them from becoming hopelessly out of date, it has **failed to build the kind of support** for the new definitions of rights that would exist if they had **arisen from a wider consensual agreement** in the society. The bitter debates and clashes among citizens over civil rights, criminal rights and abortion illustrate this point. . . . Although [alternative procedures for constitutional amendment] may appear to involve greater decision-making costs, they have the potential for building consensus over the newly formulated definitions of rights.82

On this view, it is an illusion that constitutional common law incurs lower decision costs in the long run, even if a given change may be more easily implemented through adjudication in the short run. Although at any given time it is less costly to persuade five Justices to adopt a proposed constitutional change than to obtain a formal amendment to the same effect, the former mode of change incurs **higher decision costs** over time, because **common-law constitutionalism allows** greater conflictin subsequent periods.

A benefit of formal amendments, then, is to **more effectively discourage** **subsequent efforts by constitutional losers to overturn adverse constitutional change**. Precisely because the formal amendment process is more costly to invoke, formal amendments are more enduring than are judicial decisions that update constitutional rules;83 so losers in the amendment process will less frequently attempt to overturn or destabilize the new rules, in subsequent periods, than will losers in the process of common-law constitutionalism. This point does not necessarily suppose that dissenters from a given amendment come to agree with the enacting supermajority’s judgment, only that they accept the new equilibrium faute de mieux.

Obviously more work might be done to specify these intuitions, but it is at least plausible to think that the simplest view, on which formal amendments incur decisionmaking costs that exceed their other benefits, is untenably crude. The overall picture, rather, is a tradeoff along the following lines. Relative to common-law constitutionalism, the Article V process requires a higher initial investment to secure constitutional change. If Mueller is right, however, constitutional settlements produced by the Article V process will tend to be more enduring over time than is judicial updating, which can be unsettled and refought at lower cost in subsequent periods.

[Note: from the Vermeule article: “constitutional common law is short for something like ‘judge-made constitutional law’.”]

#### Amendments are a predictable alternative to Court action – the CP is fast and solves judicial deference

Denning and Vile 2 (Brannon P., Assistant Professor of Law – Southern Illinois University School of Law, and John R., Political Science Department Chair – Middle Tennessee State University, “The Relevance of Constitutional Amendments: A Response to David Strauss,” Tulane Law Review, November, 77 Tul. L. Rev. 247, Lexis)

B. The Checking Function

Perhaps the most important function that the Article V amending process potentially plays is that it offers a **check on the Supreme Court's** decisions, short of outright **defiance**. In fact, of our twenty-seven amendments, at least four were ratified to overturn, or in reaction to, a specific Supreme Court decision. n122 Strauss's argument that many of these Court opinions were aberrant and would not have survived for very long anyway is beside the point. By resort to the amendment process, "We the People" are not dependent upon the Court seeing the errors of its ways and correcting them. The standard amending process does require the cooperation of Congress, but, even here, the Founders provided an alternative in case this institution proved to be unreliable. Although the Article V convention mechanism has not been used, it appears to have prompted Congress to propose amendments on a **number of occasions**, most notably in the case of the Seventeenth Amendment, providing for direct election of the Senate. That process can be hastened without the interference of, or dependence upon, intermediating institutions.

Strauss may be correct that, absent Article V, the Court or Congress would eventually arrive at the same place as a formal amendment, but, to paraphrase Keynes, eventually we will all be dead. [\*277] Issues of ultimate efficacy aside, it would seem to be psychologically important to have open a process for amendment, lest a polity be unable to loosen the dead hand of the past other than by severing its connections with the past completely through revolution (with all the uncertainty that accompanies such radical surgery), or be unable to escape the occasional ill-starred decision of a branch, like the Supreme Court, which is insulated from the application of ordinary political pressure.

#### Amendments avoid the link – prior, congressional guidance is key to resolve issues of justiciability – the plan and perm violate SOP by ruling on a political question

Miksha 3 (Andre, Chief Deputy Prosecuting Attorney – Hamilton County Prosecutor's Office (24th Judicial Circuit), “Declaring War on the War Powers Resolution,” Valparaiso University Law Review, 37 Val. U. L. Rev. 651, <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1264&context=vulr>)

III. THE INFIRMITIES OF THE WAR POWERS RESOLUTION

Given almost thirty years of history, the War Powers Resolution has been criticized as a dead letter and a total failure. n120 Not only has the Resolution been a total failure in fulfilling its stated purposes, but the [\*676] Resolution also suffers from inherent constitutional failings. n121 This Note argues that these ills result from several factors.

First, the Resolution fails to meet the demands of the Constitution because it designs a new system of war powers inconsistent with principles of separation of powers and accountability. n122 Second, the Resolution has been a total failure due to its weak construction of enforcement mechanisms. n123 Third, the necessities of military command and execution require a more strict and swift system. n124 This Note further argues that the solution to the Resolution's ills and to the necessities of American civilian-military decision-making is a **constitutional amendment**. n125

A. Constitutional Concerns

Although the Resolution began with genuine and virtuous aspirations, it created a system of powers inconsistent with the Constitution in several ways. The Resolution sought to rearrange the separation of the powers held by two major institutions of American government in which the third branch of government has remained reticent regarding this breach of constitutional principles. n126 The Resolution also defies the constitutional value of discourse and accountability by allowing the President to act unilaterally. n127

1. Separation of Powers and Delegation

The Constitution is the document that established the separation of powers and the structure of the federal government. n128 The Resolution reconceived one part of the separation of powers through a simple act of [\*677] Congress. n129 The reconception was improper because it was inconsistent with principles set forth explicitly in the document and with the principle of delegation of power. On the other hand, a constitutional amendment is appropriate because its subject is **the determination** of the separation of powers, and it sets the rights and responsibilities of the branches in relation to each other. An amendment would help to solidify the limits and responsibilities of the branches of government in a manner consistent with the Constitution itself.

a. General Constitutional Construction

The Constitution gives to Congress the enumerated power to declare war and to the President the power and responsibility to conduct those operations as Commander in Chief. n130 The Framers' make/declare debate shows that they wished Congress to hold the power to initiate hostilities. n131 The early courts were also clear that the President's role was the prosecution of war. n132

The Resolution allows the President to initiate hostilities in some circumstances, but the Resolution's permission is too broad to be considered a declaration because it does not contemplate an actual situation facing the United States. n133 Thus, by granting the President this power, the Resolution rewrites the separation of powers as conceived by the Constitution. Such a rewrite may not be conducted in violation of the principles laid forth in the Constitution because the Supremacy [\*678] Clause states that federal laws must be made in accordance with the Constitution. n134

Some commentators, however, argue that the Framers purposely left the war powers in a cloudy, uncertain arrangement. n135 It is hard to think that the Framers left this great potential for tyranny and abuse to a purely political process without guidance as to how the balance was to be stricken. n136 Some scholars also argue that the power of the purse was a sufficient check on the President; however, this contention is not valid today. n137 Congressional implied consent, which is argued to flow from the unused power of the purse, cannot be constitutionally sufficient either, although it may be supported by recent history. n138 The Supreme Court has only upheld a claim of implied consent in cases involving a proper delegation of power, and the Resolution does not represent a proper delegation. n139

[\*679] b. Improper Delegation of Power

Congress may delegate limited powers that it has been given by the Constitution. n140 The courts have become increasingly willing to uphold delegation against constitutional attack, especially when foreign affairs issues are involved. n141 In accordance with the Star-kist Foods test for proper delegation of power, Congress must provide (1) an "intelligible principle" for the executive to follow, (2) a specific policy or objective, and (3) limits circumscribing that power. n142 One may argue that the War Powers Resolution fit these requirements fully and represented a proper delegation of power. However, based on the historical and political developments, a closer legal analysis reveals that the Resolution was not a proper delegation.

The War Powers Resolution states a purpose and policy but does not provide any guidance as to when the President may introduce forces into hostilities. n143 Section 2(a) of the Resolution states the purpose as an effort to "fulfill the intent of the Framers of the Constitution" and "insure that the collective judgment of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities." n144 Although the purpose is allegedly to guarantee the collective judgment of both the Congress and the President, the provisions of the War Powers Resolution are very weak. n145

Section 2(b) states that Congress has the power to make all laws necessary and proper for carrying into execution its own powers and all other constitutional powers. n146 However, Congress may not wholly delegate legislative powers. n147 The courts have allowed Congress some [\*680] leeway in this area, but only where Congress has provided sufficient guidance that the President is not working in a vacuum.

Section 2(c) states that the President may only act pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack upon the United States. n148 This section approaches the sort of guidance that **the courts have contemplated**; however, **this construction relies on** specific congressional action in two situations and an attack upon the United States in the third. n149 Given the post-Resolution activities of the President, this paragraph seems to have had no import to the Executive. n150 Thus, through the Resolution's application, presidents have failed to comply with this section by claiming a general unilateral right to take action.

Through these provisions, the Resolution does not create an "intelligible principle" by which the President is guided to decide whether to introduce forces. The President has unbridled discretion. In addition, apart from the three specific situations described in section 2(c), the statute lacks a policy for when the President may act. The only prong of the Star-kist Foods test that may actually be satisfied by the Resolution is the limit on the power delegated because the President is allowed to act only within certain but broad circumstances. However, the Resolution does not suggest to the President how he or she must make the determination to introduce armed forces into hostilities. A proper delegation of power requires no less.

c. Impossible Delegation of Legislative Power

Nevertheless, Congress generally lacks the constitutional ability to delegate legislative powers. n151 Article I of the Constitution makes it clear that all enumerated legislative powers are vested in Congress. n152 In 1892, the Supreme Court recognized the principle that Congress cannot [\*681] constitutionally delegate legislative power to the President. n153 As recently as 1989, the Court reaffirmed that mandate. n154 The war powers are indeed legislative powers and may not be delegated in whole. n155 However, the courts have allowed Congress to delegate purely legislative powers under some circumstances, such as the Federal Sentencing Guidelines, but those delegations involved only a part of the legislative power as Congress merely used the agencies to work out the minute details. n156 This is not the case with the Resolution because Congress neither provided clear guidance nor limited the actual role of the subordinate.

d. The Courts

The courts have been very reserved in foreign affairs matters, but an amendment may make the interpretation of war powers a clear constitutional issue requiring the Supreme Court's analysis. The courts have avoided adjudication of disputes arising under the War Powers Resolution because of the justiciability doctrines of impasse, ripeness, standing, and political question. n157

### Ctzn stz

#### Warming’s irreversible

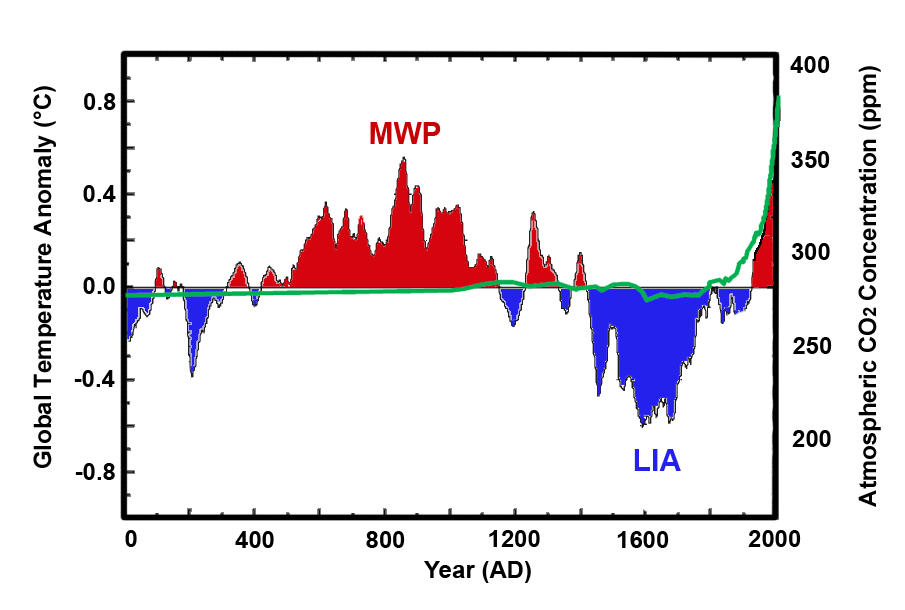
**Solomon et al ‘10** Susan Solomon et. Al, Chemical Sciences Division, Earth System Research Laboratory, National Oceanic and Atmospheric Administration, Ph.D. in Climotology University of California, Berkeley, Nobel Peace Prize Winner, Chairman of the IPCC, Gian-Kasper Plattner, Deputy Head, Director of Science, Technical Support Unit Working Group I, Intergovernmental Panel on Climate Change Affiliated Scientist, Climate and Environmental Physics, Physics Institute, University of Bern, Switzerland, John S. Daniel, research scientist at the National Oceanic and Atmospheric Administration (NOAA), Ph.D. in physics from the University of Michigan, Ann Arbor, Todd J. Sanford, Cooperative Institute for Research in Environmental Science, University of Colorado Daniel M. Murphy, Chemical Sciences Division, Earth System Research Laboratory, National Oceanic and Atmospheric Administration, Boulder Gian-Kasper Plattner, Deputy Head, Director of Science, Technical Support Unit Working Group I, Intergovernmental Panel on Climate Change, Affiliated Scientist, Climate and Environmental Physics, Physics Institute, University of Bern, Switzerland Reto Knutti, Institute for Atmospheric and Climate Science, Eidgenössiche Technische Hochschule Zurich and Pierre Friedlingstein, Chair, Mathematical Modelling of Climate Systems, member of the Science Steering Committee of the Analysis Integration and Modeling of the Earth System (AIMES) programme of IGBP and of the Global Carbon Project (GCP) of the Earth System Science Partnership (ESSP) (Proceedings of the National Academy of the Sciences of the United States of America, "Persistence of climate changes due to a range of greenhouse gases", October 26, 2010 Vol 107.43: 18354-18359)

Carbon dioxide, methane, nitrous oxide, and other greenhouse gases increased over the course of the 20th century due to human activities. The human-caused increases in these gases are the primary forcing that accounts for much of the global warming of the past fifty years, with carbon dioxide being the most important single radiative forcing agent (1). Recent studies have shown that the human-caused warming linked to carbon dioxide is nearly irreversible for more than 1,000 y, even if emissions of the gas were to cease entirely (2–5). The importance of the ocean in taking up heat and slowing the response of the climate system to radiative forcing changes has been noted in many studies (e.g., refs. 6 and 7). The key role of the ocean’s thermal lag has also been highlighted by recent approaches to proposed metrics for comparing the warming of different greenhouse gases (8, 9). Among the observations attesting to the importance of these effects are those showing that climate changes caused by transient volcanic aerosol loading persist for more than 5 y (7, 10), and a portion can be expected to last more than a century in the ocean (11–13); clearly these signals persist far longer than the radiative forcing decay timescale of about 12–18 mo for the volcanic aerosol (14, 15). Thus the observed climate response to volcanic events suggests that some persistence of climate change should be expected even for quite short-lived radiative forcing perturbations. It follows that the climate changes induced by short-lived anthropogenic greenhouse gases such as methane or hydrofluorocarbons (HFCs) may not decrease in concert with decreases in concentration if the anthropogenic emissions of those gases were to be eliminated. In this paper, our primary goal is to show how different processes and timescales contribute to determining how long the climate changes due to various greenhouse gases could be expected to remain if anthropogenic emissions were to cease. Advances in modeling have led to improved AtmosphereOcean General Circulation Models (AOGCMs) as well as to Earth Models of Intermediate Complexity (EMICs). Although a detailed representation of the climate system changes on regional scales can only be provided by AOGCMs, the simpler EMICs have been shown to be useful, particularly to examine phenomena on a global average basis. In this work, we use the Bern 2.5CC EMIC (see Materials and Methods and SI Text), which has been extensively intercompared to other EMICs and to complex AOGCMs (3, 4). It should be noted that, although the Bern 2.5CC EMIC includes a representation of the surface and deep ocean, it does not include processes such as ice sheet losses or changes in the Earth’s albedo linked to evolution of vegetation. However, it is noteworthy that this EMIC, although parameterized and simplified, includes 14 levels in the ocean; further, its global ocean heat uptake and climate sensitivity are near the mean of available complex models, and its computed timescales for uptake of tracers into the ocean have been shown to compare well to observations (16). A recent study (17) explored the response of one AOGCM to a sudden stop of all forcing, and the Bern 2.5CC EMIC shows broad similarities in computed warming to that study (see Fig. S1), although there are also differences in detail. The climate sensitivity (which characterizes the long-term absolute warming response to a doubling of atmospheric carbon dioxide concentrations) is 3 °C for the model used here. Our results should be considered illustrative and exploratory rather than fully quantitative given the limitations of the EMIC and the uncertainties in climate sensitivity. Results One Illustrative Scenario to 2050. In the absence of mitigation policy, concentrations of the three major greenhouse gases, carbon dioxide, methane, and nitrous oxide can be expected to increase in this century. If emissions were to cease, anthropogenic CO2 would be removed from the atmosphere by a series of processes operating at different timescales (18). Over timescales of decades, both the land and upper ocean are important sinks. Over centuries to millennia, deep oceanic processes become dominant and are controlled by relatively well-understood physics and chemistry that provide broad consistency across models (see, for example, Fig. S2 showing how the removal of a pulse of carbon compares across a range of models). About 20% of the emitted anthropogenic carbon **remains in the atmosphere for** many **thousands of years** (with a range across models including the Bern 2.5CC model being about 19 4% at year 1000 after a pulse emission; see ref. 19), until much slower weathering processes affect the carbonate balance in the ocean (e.g., ref. 18). Models with stronger carbon/climate feedbacks than the one considered here could display larger and more persistent warmings due to both CO2 and non-CO2 greenhouse gases, through reduced land and ocean uptake of carbon in a warmer world. Here our focus is not on the strength of carbon/climate feedbacks that can lead to differences in the carbon concentration decay, but rather on the factors that control the climate response to a given decay. The removal processes of other anthropogenic gases including methane and nitrous oxide are much more simply described by exponential decay constants of about 10 and 114 y, respectively (1), due mainly to known chemical reactions in the atmosphere. In this illustrative study, we do not include the feedback of changes in methane upon its own lifetime (20). We also do not account for potential interactions between CO2 and other gases, such as the production of carbon dioxide from methane oxidation (21), or changes to the carbon cycle through, e.g., methane/ozone chemistry (22). Fig. 1 shows the computed future global warming contributions for carbon dioxide, methane, and nitrous oxide for a midrange scenario (23) of projected future anthropogenic emissions of these gases to 2050. Radiative forcings for all three of these gases, and their spectral overlaps, are represented in this work using the expressions assessed in ref. 24. In 2050, the anthropogenic emissions are stopped entirely for illustration purposes. The figure shows nearly irreversible warming for at least 1,000 y due to the imposed carbon dioxide increases, as in previous work. **All published studies to date**, which use multiple EMICs and one AOGCM, show largely irreversible warming due to future carbon dioxide increases (to within about 0.5 °C) on a timescale of at least 1,000 y (3–5, 25, 26). Fig. 1 shows that the calculated future warmings due to anthropogenic CH4 and N2O also persist notably longer than the lifetimes of these gases. The figure illustrates that emissions of key non-CO2 greenhouse gases such as CH4 or N2O could lead to warming that both temporarily exceeds a given stabilization target (e.g., 2 °C as proposed by the G8 group of nations and in the Copenhagen goals) and remains present longer than the gas lifetimes even if emissions were to cease. A number of recent studies have underscored the important point that reductions of non-CO2 greenhouse gas emissions are an approach that can indeed reverse some past climate changes (e.g., ref. 27). Understanding how quickly such reversal could happen and why is an important policy and science question. Fig. 1 implies that the use of policy measures to reduce emissions of short-lived gases will be less effective as a rapid climate mitigation strategy than would be thought if based only upon the gas lifetime. Fig. 2 illustrates the factors influencing the warming contributions of each gas for the test case in Fig. 1 in more detail, by showing normalized values (relative to one at their peaks) of the warming along with the radiative forcings and concentrations of CO2 , N2O, and CH4 . For example, about two-thirds of the calculated warming due to N2O is still present 114 y (one atmospheric lifetime) after emissions are halted, despite the fact that its excess concentration and associated radiative forcing at that time has dropped to about one-third of the peak value.

#### Co2 warming is a hoax

**Carter 10** – Robert, PhD, Adjuct Research Fellow, James Cook University, Craig Idso, PhD, Chairman at the Center for the Study of Carbon Dioxide and Global Change, Fred Singer, PhD, President of the Science and Environmental Policy Project, Susan Crockford, evolutionary biologist with a specialty in skeletal taxonomy , paleozoology and vertebrate evolution, Joseph D’Aleo, 30 years of experience in professional meteorology, former college professor of Meteorology at Lyndon State College, Indur Goklany, independent scholar, author, and co-editor of the Electronic Journal of Sustainable Development, Sherwood Idso, President of the Center for the Study of Carbon Dioxide and Global Change, Research Physicist with the US Department of Agriculture, Adjunct Professor in the Departments of Geology, Botany, and Microbiology at Arizona State University, Bachelor of Physics, Master of Science, and Doctor of Philosophy, all from the University of Minnesota, Madhav Khandekar, former research scientist from Environment Canada and is an expert reviewer for the IPCC 2007 Climate Change Panel, Anthony Lupo, Department Chair and Professor of Atmospheric Science at the University of Missouri, Willie Soon, astrophysicist at the Solar and Stellar Physics Division of the Harvard-Smithsonian Center for Astrophysics, Mitch Taylor (Canada) (December 22, “[Irreversible CO2-Induced Global Warming?](http://www.nipccreport.org/articles/2010/dec/22dec2010a5.html)” <http://www.nipccreport.org/articles/2010/dec/22dec2010a5.html>) Jacome

Lastly, with respect to the first of Solomon et al.'s three criteria -- their assumption that the modeled atmospheric warming is already occurring, and that there is evidence for anthropogenic (i.e., CO2-induced) contributions to it -- the situation is much the same: real-world data provide little to no support for this contention. It shold be noted, for example, that the global warming of the past few decades was actually part of a much longer warming, which began in many places throughout the world a little over three centuries ago (about 1680) with the dramatic "beginning of the end" of the Little Ice Age (LIA, see figure below), well before there was any significant increase in the air's CO2 content. And this observation suggests that a continuation of whatever phenomenon -- or combination of phenomena -- may have caused the greater initial warming could well have caused the lesser final warming, the total effect of which was to transport the earth from the chilly depths of the Little Ice Age into the relative balm of the Current Warm Period.

  
The mean relative temperature history of the earth (blue, cool; red, warm) over the past two millennia - adapted from Loehle and McCulloch (2008) - highlighting the Medieval Warm Period (MWP) and Little Ice Age (LIA), together with a concomitant history of the atmosphere's CO2 concentration (green).

It should also be added that earth's current temperature is no higher now (and maybe just a tad less, in fact) than it was during the peak warmth of the Medieval Warm Period (MWP), when (just as at the "beginning of the end" of the LIA) there was over 100 ppm less CO2 in the air than there is today. Consequently, since the great MWP-to-LIA cooling occurred without any significant change in the atmosphere's CO2 concentration, just the opposite could occur just as easily, and the planet could warm, and by an equal amount -- just as it actually did over the past three centuries -- all without any help from an increase in the atmosphere's CO2 content, which remained essentially constant for the first 1850 years of the 2000-year record depicted in the figure above, and which did not begin to really take off until just the last few decades of the 20th century, which **brief period of correlation is simply too short to** use as justification for claiming that the late 20th-century CO2 increase was responsible for the late 20th-century warming of the globe, and especially since that warming actually ceased at the end of the 20th century, even though the atmosphere's CO2 content has subsequently continued to climb at an unprecedented rate and to ever greater heights.

#### Solar activity explains the climate

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The study of sun-climate connections long has been plagued by the lack of suitably extensive and continuous data for solar activity and climatic variables. Helama et al. (2010), however, overcame some of those difficulties by examining the sun-climate relationship **in unprecedented detail** from the Mid- to Late-Holocene, beginning a new exploration of sun-climate co-variations on bimillennial and millennial timescales. In conducting their study, for example, they produced a well-dated and annually resolved tree-ring proxy temperature reconstruction from 5500 BCE to 2004 CE, which was representative of the high Arctic region of Northern Lapland, Finland, and Norway (68–70°N, 20–30°E), after which they employed the reconstructed sunspot series for the past 11,000 years that was developed by Solanki and colleagues in 2004 as a proxy for their solar activity index. Although Helama et al. were able to confirm relevant temperature oscillations on centennial and bicentennial timescales, they chose to focus their study on bimillennial and millennial timescale variations. Figure 2.3.1 shows the band-pass filtered (900–1100 years) millennial-scale variations of the sunspot number series and reconstructed tree-ring temperature series are very well correlated if one introduces a time lag of about 70 years. The statistical correlations between the two sun-climate variables change with time but become more significant during the last 2,000 years with r = 0.796 and p = 0.0066. In contrast, the authors cannot demonstrate similar positive or significant correlations for the sun-climate variables for bimillennial (band-pass filtering of 1,150 to 3,000 years) scale variations for the last two thousand years (late Holocene), but stronger correlations (with r = 0.877 and p = 0.0121) were shown to exist between sunspot activity and temperatures at high-latitude Lapland for the Mid Holocene interval at the bimillennial timescale (not shown). Helama et al. (2010) suggest the statistical correlations for the sun and temperature series on millennial timescales depicted in the figure above are probably **realistic and physically meaningful**, especially if one takes into account the time lag of 60–80 years. They explain that the probable scenario for explaining this relationship would be that solar activity could have driven the advection of cold surface waters southward and eastward in the subpolar North Atlantic and that cold water perturbation may ultimately influence the production of the North Atlantic deep water down to a depth of 2,000 meters. This chain of processes would probably need to include a time delay for actions within the high Arctic to propagate further south to affect the formation and working of the famous North Atlantic oceanic flywheel known as the North Atlantic Meridional Overturning Circulation. It also should be noted that such physical time delays, although in a shorter time range of five to 30 years, have been pointed out to be necessary for a physical connection between changes in the Sun and climatic conditions around Europe and North and tropical Atlantic regions by Eichler et al. (2010) and Soon (2009). The authors also provide a brief discussion of plausible sun-climate mechanisms through the atmosphere, invoking changing tropospheric-stratospheric temperature gradients. But they ultimately conclude that a pathway and mechanism involving the ocean for both memory and redistribution of heat are probably needed to explain what they observed for bimillennial and millennial temperature variations during the Mid to Late Holocene in the high Arctic. Finally, it is important to note Helama et al.‘s observation that ―the near-centennial delay in climate in responding to sunspots indicates that the Sun‘s influence on climate arising from the current episode of high sunspot numbers [which are the most pronounced of the entire record] may not yet have manifested itself fully in climate trends,‖ and ―if neglected in climate models, this lag could cause an underestimation of twenty-first-century warming trends.‖

#### No extinction – empirically denied

**Carter 11–** Robert, PhD, Adjuct Research Fellow, James Cook University, Craig Idso, PhD, Chairman at the Center for the Study of Carbon Dioxide and Global Change, Fred Singer, PhD, President of the Science and Environmental Policy Project, Susan Crockford, evolutionary biologist with a specialty in skeletal taxonomy , paleozoology and vertebrate evolution, Joseph D’Aleo, 30 years of experience in professional meteorology, former college professor of Meteorology at Lyndon State College, Indur Goklany, independent scholar, author, and co-editor of the Electronic Journal of Sustainable Development, Sherwood Idso, President of the Center for the Study of Carbon Dioxide and Global Change, Research Physicist with the US Department of Agriculture, Adjunct Professor in the Departments of Geology, Botany, and Microbiology at Arizona State University, Bachelor of Physics, Master of Science, and Doctor of Philosophy, all from the University of Minnesota, Madhav Khandekar, former research scientist from Environment Canada and is an expert reviewer for the IPCC 2007 Climate Change Panel, Anthony Lupo, Department Chair and Professor of Atmospheric Science at the University of Missouri, Willie Soon, astrophysicist at the Solar and Stellar Physics Division of the Harvard-Smithsonian Center for Astrophysics, Mitch Taylor (Canada) (March 8th, “[Surviving](file:///C:\Users\Marc\Desktop\Surviving) the Unpreceented Climate Change of the IPCC” <http://www.nipccreport.org/articles/2011/mar/8mar2011a5.html>) Jacome

On the other hand, they indicate that some biologists and climatologists have pointed out that "many of the predicted increases in climate have happened before, in terms of both magnitude and rate of change (e.g. Royer, 2008; Zachos *et al*., 2008), and yet biotic communities have remained remarkably resilient (Mayle and Power, 2008) and in some cases thrived (Svenning and Condit, 2008)." But they report that those who mention these things are often "placed in the 'climate-change denier' category," although the purpose for pointing out these facts is simply to present "a sound scientific basis for understanding biotic responses to the magnitudes and rates of climate change predicted for the future through using the vast data resource that we can exploit in fossil records." Going on to do just that, Willis *et al*. focus on "intervals in time in the fossil record when atmospheric CO2 concentrations increased up to 1200 ppm, temperatures in mid- to high-latitudes increased by greater than 4°C within 60 years, and sea levels rose by up to 3 m higher than present," describing studies of past biotic responses that indicate "the scale and impact of the magnitude and rate of such climate changes on biodiversity." And what emerges from those studies, as they describe it, "is evidence for rapid community turnover, migrations, development of novel ecosystems and thresholds from one stable ecosystem state to another." And, most importantly in this regard, they report "there is very little evidence for broad-scale extinctions due to a warming world." In concluding, the Norwegian, Swedish and UK researchers say that "based on such evidence we urge some caution in assuming broad-scale extinctions of species will occur due solely to climate changes of the magnitude and rate predicted for the next century," reiterating that "the fossil record indicates remarkable biotic resilience to wide amplitude fluctuations in climate.

#### oversight has no precedent – previous presidents show that there’s no chance of congressional deferral

**Alter 13 –** American journalist and best-selling author who was a [columnist](http://en.wikipedia.org/wiki/Columnist) and senior [editor](http://en.wikipedia.org/wiki/Editing) for [*Newsweek*](http://en.wikipedia.org/wiki/Newsweek) magazine, graduated from [Phillips Academy](http://en.wikipedia.org/wiki/Phillips_Academy) in 1975[[5]](http://en.wikipedia.org/wiki/Jonathan_Alter#cite_note-NYTEngaged-5)[[8]](http://en.wikipedia.org/wiki/Jonathan_Alter#cite_note-tws-8) and [Harvard University](http://en.wikipedia.org/wiki/Harvard_University) in 1979 where he was one of the lead editors on the Harvard Crimson (Jonathan, September 9th, “The Big Loser from a No Vote on Syria Could Be Congress” <http://www.newyorker.com/online/blogs/newsdesk/2013/09/the-big-loser-from-a-no-vote-on-syria-could-be-congress.html>)

It is a myth that American Presidents through the Second World War uniformly went to Congress for declarations of war. In the early twentieth century, several launched small military operations without congressional authorization, especially in the Western Hemisphere, where the Monroe Doctrine was interpreted as to allow the President a fairly free hand. The nineteen-sixties saw the growth of what the historian Arthur M. Schlesinger, Jr., called “the Imperial Presidency.” In 1964, President Lyndon Johnson used a trumped-up naval engagement with North Vietnamese ships in the Gulf of Tonkin to win a resolution that gave him carte blanche in Vietnam. (“It was like grandma’s nightshirt,” L.B.J. said privately. “It covered everything.”) A decade later, in response to losing fifty thousand Americans in an undeclared war, a liberal Congress passed the War Powers Resolution over President Richard Nixon’s veto. It allowed Presidents to bomb or even invade countries on their own, but required that they then inform Congress within forty-eight hours and get its approval within sixty days. (They can get [an additional thirty days](http://www.lawfareblog.com/2013/08/the-war-powers-resolution-and-using-force-in-syria/) to withdraw troops.)

While the War Powers Resolution has never gone to the Supreme Court, lower courts consistently have sided with the executive branch. For the past thirty years, Presidents contemplating limited military operations haven’t bothered much with Capitol Hill beyond letting the congressional leadership know that a decision had been made. The U.S. invaded Grenada, Panama, and Haiti, and bombed Bosnia, Kosovo, Afghanistan, the Sudan, and, most recently, Libya, all without formal congressional support. In the case of Bosnia, Bill Clinton bombed Serbian positions in defiance of the Republican-controlled House of Representatives.

#### The plan can not change executive insularity

Tushnet 07. Mark Tushnet, William Nelson Cromwell Professor of Law, Harvard Law School, “The Political Constitution of Emergency Powers: Some Lessons from Hamdan,” Minnesota Law Review 91:5 (2007): 1451–72

Alternatively, the President might have signed the statute and announced his intention to disregard its unconstitutional restrictions on presidential power, openly inviting a judicial challenge to his actions. Note that, structurally, this would simply replicate the pre-Hamdan situation: There would be a statute on the books, and a pending legal challenge that might be resolved against the President. Until that challenge was resolved, the status quo would be, again, the status quo pre-Hamdan: enemy combatants held without access to a military tribunal. Nor could we be confident that the constitutional challenge would be resolved quickly on the basis of the Hamdan precedent, because, as I have argued, Hamdan says nothing about the constitutional distribution of substantive power between President and Congress.41

Now, suppose that—one, two, or more years from now—the courts definitively resolve the constitutional questions against the President. What happens next? Not necessarily the implementation of the (hypothesized) statutory procedures. A President in a weak political position would of course have to implement those procedures, as would a President (remember, we might be dealing with the person in office in 2009 or after) who agreed that the congressionally prescribed procedures were good policy. What, though, of a President who both rejected those procedures and was in a strong political position? Such a President would, I am sure, propose new legislation to deal with enemy combatants, and might obtain it because of the political strength of his or her position.

To return to Justice Jackson’s analysis, I have argued that the way in which tests of power are resolved when Congress purports to restrict the President’s powers is indistinguishable from the way in which they are resolved in the “zone of twilight.” Everything will “depend on the imperatives of events and contemporary imponderables,” not “law” in the usual sense. Or, put another way, and as I would prefer, the interplay of events and contemporary imponderables—that is, politics—is constitutional law in this domain.

#### Courts will never act and defer whenever possible

**Bradley and Morrison 2013** – \*William Van Alstyne Professor of Law, Duke Law School, \*\*Liviu Librescu Professor of Law, Columbia Law School (May, Curtis and Trevor, Columbia Law Review, “PRESIDENTIAL POWER, HISTORICAL PRACTICE, AND LEGAL CONSTRAINT”, 113 Colum. L. Rev. 1097, Lexis)

If courts routinely reviewed contested issues of presidential power, they could decide whether and when to credit historical practice in this area. They could also decide whether novel presidential assertions of authority were justified, before such assertions became established practice. But judicial review in this area is anything but routine. Courts obviously do review issues of presidential power in some instances, especially when individual rights are perceived to be at stake, as both Youngstown and the series of Supreme Court decisions concerning the "war on terror" illustrate. n49 When individual rights are not directly implicated, [\*1110] however, courts often abstain from addressing questions surrounding the allocation of authority between Congress and the President.

Judicial abstention is particularly common in the foreign affairs area. Consider, for example, the question of whether the President is constitutionally required to obtain congressional authorization before initiating military hostilities. Despite numerous presidential initiations of hostilities without congressional authorization in the post-World War II period, courts have generally refused to consider the issue. n50 Courts have similarly avoided addressing whether Presidents must obtain congressional or senatorial approval before terminating a treaty, n51 and whether and to what extent Presidents may use executive agreements in lieu of treaties. n52

Courts invoke a variety of doctrines in support of this abstention. They enforce general standing requirements strictly, and, at least since the Supreme Court's 1997 decision in Raines v. Byrd, n53 they typically find that individual members of Congress lack standing to challenge presidential action. n54 Some lower courts also invoke ideas of "political ripeness," pursuant to which they will not intervene in interbranch disputes until the affected branch has exhausted its own political resources to address the purported problem, a requirement that is rarely if ever satisfied. n55 Another potential barrier to judicial review is the political question [\*1111] doctrine, which the lower courts apply with some frequency in the foreign affairs area. n56

Academic defenders of this judicial abstention have argued either that the political branches have adequate resources to protect their interests, n57 or that the courts lack sufficient competence to resolve separation of powers issues, especially in the foreign affairs and national security areas. n58 Other scholars have bemoaned this abstention as an abdication of the judicial role and have blamed it for contributing to what they perceive to be an undesirable growth in executive power in the modern era. n59 The bottom line is that many issues of presidential power are resolved, if at all, outside the courts. Moreover, even when the courts do intervene, they are likely to give significant deference to patterns of governmental practice, especially if the patterns are longstanding and appear to reflect interbranch agreement. n60

[\*1112]

C. Skepticism About Legal Constraint

The general posture of judicial abstention in this area raises questions about whether presidential power is truly subject to legal constraints. It is often easier - or at least more familiar - to talk meaningfully about law if there is a reasonable prospect that the actions in question will face judicial review. Because the courts are unlikely to intervene in many con-troversies relating to presidential power - and because any such intervention is likely to be deferential to the actions of the political branches - some scholars are inclined to say that Presidents face (or will soon face) virtually no constraints at all. Part of the concern here is that Congress by itself often seems either unable or unwilling to provide adequate checks on executive power. Compounding the problem, in the view of some scholars, is that institutional arrangements within the executive branch are not able to constrain presidential decisionmaking. Bruce Ackerman, for example, claims to identify a range of developments in "politics and communications, bureaucratic and military organization," as well as "executive constitutionalism," that threaten to turn the presidency into "a vehicle for demagogic populism and lawlessness." n61

#### The courts are toothless – they defer from making decisions and when they do, they simply rubberstamp what the executive wants

Devins 10 – Professor of Law and Professor of Government, College of William & Mary (February, Neal, “Symposium: Presidential Power In Historical Perspective: Reflections on Calabresi and Yoo's the Unitary Executive: Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants” 12 U. Pa. J. Const. L. 491, Lexis)

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.

### Nvrnmt dvntg

Past wars empirically prove the resilience of the environment

#### No impact to the environment

Doremus 2k – Holly Professor of Law at UC Davis, "The Rhetoric and Reality of Nature Protection: Toward a New Discourse," Winter 2000 Washington & Lee Law Review 57 Wash & Lee L. Rev. 11, lexis

In recent years, this discourse frequently has taken the form of the ecological horror story . That too is no mystery. The ecological horror story is unquestionably an attention-getter, especially in the hands of skilled writers [\*46] like Carson and the Ehrlichs. The image of the airplane earth, its wings wobbling as rivet after rivet is carelessly popped out, is difficult to ignore. The apocalyptic depiction of an impending crisis of potentially dire proportions is designed to spur the political community to quick action . Furthermore, this story suggests a goal that appeals to many nature lovers: that virtually everything must be protected. To reinforce this suggestion, tellers of the ecological horror story often imply that the relative importance of various rivets to the ecological plane cannot be determined. They offer reams of data and dozens of anecdotes demonstrating the unexpected value of apparently useless parts of nature. The moth that saved Australia from prickly pear invasion, the scrubby Pacific yew, and the downright unattractive leech are among the uncharismatic flora and fauna who star in these anecdotes. n211 The moral is obvious: because we cannot be sure which rivets are holding the plane together, saving them all is the only sensible course.

Notwithstanding its attractions, the material discourse in general, and the ecological horror story in particular, are not likely to generate policies that will satisfy nature lovers. The ecological horror story implies that there is no reason to protect nature until catastrophe looms. The Ehrlichs' rivet-popper account, for example, presents species simply as the (fungible) hardware holding together the ecosystem. If we could be reasonably certain that a particular rivet was not needed to prevent a crash, the rivet-popper story suggests that we would lose very little by pulling it out. Many environmentalists, though, would disagree. n212

Reluctant to concede such losses, tellers of the ecological horror story highlight how close a catastrophe might be, and how little we know about what actions might trigger one. But the apocalyptic vision is **less credible today than it seemed in the 1970s.** Although it is clear that the earth is experiencing a mass wave of extinctions, n213 the **complete elimination of life on earth seems unlikely.** n214 **Life is remarkably robust**. **Nor is human extinction probable** any time soon. Homo sapiens is **adaptable to nearly any environment**. Even if the world of the future includes far fewer species, it likely will hold people. n215 One response to this credibility problem tones the story down a bit, arguing not that humans will go extinct but that ecological disruption will bring economies, and consequently civilizations, to their knees. n216 But this too may be **overstating the case**. Most ecosystem functions are **performed by multiple species**. This **functional redundancy** means that **a high proportion of species can be lost without precipitating a collapse**. n217

#### No Iran war—capabilities beat rhetoric

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To accurately gauge the strategic challenges from Iran over a ten- to fifteen-year horizon, this study sought to assess the motivations of the Islamic Republic, not just its capabilities. This approach, although difficult given the complexities of the Iranian system, is critical in identifying potential sources of caution and pragmatism in Iran’s policy formulation. Our exploration of Iranian strategic thinking revealed that **ideology and bravado** frequently **mask** a preference for opportunism and realpolitik—the qualities that define “**normal**” state **behavior**. Similarly, when we canvassed Iran’s power projection options, we identified not only the extent of the threats posed by each but also their limitations and liabilities. In each case, we found significant barriers and buffers to Iran’s strategic reach rooted in both the regional geopolitics it is trying to influence and in its limited conventional military capacity, diplomatic isolation, and past strategic missteps. Similarly, tensions between the regime and Iranian society—segments of which have grown disenchanted with the Republic’s revolutionary ideals— can also **act as a constraint** on Iranian external behavior.

This leads to our conclusion that analogies to the Cold War are mistaken: The Islamic Republic does not seek territorial aggrandizement or even, despite its rhetoric, the forcible imposition of its revolutionary ideology onto neighboring states. Instead, it feeds off existing grievances with the status quo, particularly in the Arab world. Traditional containment options may actually create further opportunities for Tehran to exploit, thereby amplifying the very influence the United States is trying to mitigate. A more useful strategy, therefore, is one that exploits existing checks on Iran’s power and influence. These include the gap between its aspiration for asymmetric warfare capabilities and the reality of its rather limited conventional forces, disagreements between Iran and its militant “proxies,” and the potential for sharp criticism from Arab public opinion, which it has long sought to exploit. In addition, we recommend a new U.S. approach to Iran that integrates elements of engagement and containment while de-escalating unilateral U.S. pressure on Tehran and applying increased multilateral pressure against its nuclear ambitions. The analyses that informed these conclusions also yielded the following insights for U.S. planners and strategists concerning Iran’s strategic culture, conventional military, ties to Islamist groups, and ability to influence Arab public opinion.

#### Deterrence

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The possibility of variation in the intensity of the security dilemma has dramatic implications for structural realist theory, making its predictions less consistently bleak than often assumed. When the security dilemma is severe, competition will indeed be intense and war more likely. These are the classic behaviors predicted by realist pessimism. But when the security dilemma is mild, a structural realist will see that the international system creates opportunities for restraint and peace. Properly understood, moreover, the security dilemma suggests that a state will be more secure when its adversary is more secure-because insecurity can pressure an adversary to adopt competitive and threatening policies. This dynamic creates incentives for restraint and cooperation. If an adversary can be persuaded that all one wants is security (as opposed to domination), the adversary may itself relax.

What does all this imply about the rise of China? At the broadest level, the news is good. Current international conditions should enable both the United States and China to protect their vital interests without posing large threats to each other.Nuclear weapons make it relatively easy for major powers to maintain highly effective deterrent forces. Even if Chinese power were to greatly exceed U.S. power somewhere down the road, the United States would still be able to maintain nuclear forces that could survive any Chinese attack and threaten massive damage in retaliation. Large-scale conventional attacks by China against the U.S. homeland, meanwhile, are virtually impossible because the United States and China are separated by the vast expanse of the Pacific Ocean, across which it would be difficult to attack. No foreseeable increase in China's power would be large enough to overcome these twin advantages of defense for the United States. The same defensive advantages, moreover, apply to China as well. Although China is currently much weaker than the United States militarily, it will soon be able to build a nuclear force that meets its requirements for deterrence. And China should not find the United States' massive conventional capabilities especially threatening, because the bulk of U.S. forces, logistics, and support lie across the Pacific.

#### No Asian domino

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Despite concerns about falling atomic dominos in the region (Associated Press 2006), a North Korean nuclear arsenal is unlikely to spur countries like South Korea and Japan to go nuclear in the short run. There are several major reasons for this restraint. One is that the U.S. nuclear umbrella reassures these regional allies. Although Kim Jong II tends to be overconfident and risk acceptant, U.S. nuclear superiority is too obvious for him to overlook. Washington currently possesses thousands of sophisticated nuclear weapons and an array of advanced delivery vehicles. Tokyo does not want to undercut this robust protection by pursuing a less potent indigenous arsenal in opposition to Washington's policy of global nonproliferation. The versatile U.S. alliance also can protect a wide range of Japanese security interests such as sea lanes, while an indigenous arsenal can only ensure territorial integrity. For these very reasons, the Japanese government decided against a nuclear option in the wake of China's maiden nuclear test in 1964. Thus, in the immediate aftermath of the North Korean nuclear test, the then Japanese-Foreign Minister Aso Taro was quick to reassure U.S. Secretary of State Con-doleezza Rice that Japan was "absolutely not considering" nuclear development, receiving a strong reconfirmation of the U.S. nuclear commitment to Japan in return (Pinkston and Sakurai 2006). The Roh Moo Hyun government also thought that the nuclear test could not destroy the balance of power buttressed by the U.S. military alliance as well as the qualitatively superior South Korean military and that an independent arsenal was therefore unnecessary (Roh 2006b). Another brake against a nuclear domino effect is missile defense technology, which provides an apparent alternative to an indigenous nuclear deterrent. Since the North Korean missile and nuclear tests in 2006, Japan has augmented its programs to develop a next-generation missile defense system jointly with the United States and to deploy current-technology interceptors, including Patriot Advanced Capability (PAQ-3 systems and sea-based SM-3 platforms (Associated Press 2007b). Tokyo views missile defense as the least politically burdensome countermeasurc to North Korea's nuclear weapons. Although the development of missile defense has drawn protests from Beijing, possible alternatives (such as the acquisition of a nuclear deterrent or a preemptive strike capability) would meet even stronger opposition from Japan's neighbors as well as the Japanese public. In a July 2006 poll of Japanese citizens, 48.8 percent of respondents disapproved of an offensive strike capability, while 40.G percent acknowledged its necessity for national security (Pinkston and Sakurai 2006). Facing similar if lesser political constraints, Seoul also has decided to pursue a missile defense capability instead of a nuclear arsenal, establishing a missile defense command and allocating an emergency budget for procurement of the Patriot missile system and control equipment. Unlike Japan, however. South Korea is building an independent system out of concern that cooperation with the United States would elicit a negative reaction from China.

# 2NC

### 2NC Overview

#### And if we win the thesis of the kritik they have no offense – The system is destroying itself now, making the only appropriate question whether to reform it or let it die—all the system is capable of is the inflicting of death and doing nothing

Prozorov 10. Sergei Prozorov, professor of political and economic studies at the University of Helsinki, “Why Giorgio Agamben is an optimist,” Philosophy Social Criticism 2010 36: pg. 1065

In a later work, Agamben generalizes this logic and transforms it into a basic ethical imperative of his work: ‘[There] is often nothing reprehensible about the individual behavior in itself, and it can, indeed, express a liberatory intent. What is disgraceful – both politically and morally – are the apparatuses which have diverted it from their possible use. We must always wrest from the apparatuses – from all apparatuses – the possibility of use that they have captured.’32 As we shall discuss in the following section, this is to be achieved by a subtraction of ourselves from these apparatuses, which leaves them in a jammed, inoperative state. What is crucial at this point is that the apparatuses of nihilism themselves prepare their demise by emptying out all positive content of the forms-of-life they govern and increasingly running on ‘empty’, capable only of (inflict- ing) Death or (doing) Nothing.

On the other hand, this degradation of the apparatuses illuminates the ‘inoperosity’ (worklessness) of the human condition, whose originary status Agamben has affirmed from his earliest works onwards.33 By rendering void all historical forms-of-life, nihi- lism brings to light the absence of work that characterizes human existence, which, as irreducibly potential, logically presupposes the lack of any destiny, vocation, or task that it must be subjected to: ‘Politics is that which corresponds to the essential inoperability of humankind, to the radical being-without-work of human communities. There is pol- itics because human beings are argos-beings that cannot be defined by any proper oper- ation, that is, beings of pure potentiality that no identity or vocation can possibly exhaust.’34

Having been concealed for centuries by religion or ideology, this originary inoperos- ity is fully unveiled in the contemporary crisis, in which it is manifest in the inoperative character of the biopolitical apparatuses themselves, which succeed only in capturing the sheer existence of their subjects without being capable of transforming it into a positive form-of-life:

[T]oday, it is clear for anyone who is not in absolutely bad faith that there are no longer historical tasks that can be taken on by, or even simply assigned to, men. It was evident start- ing with the end of the First World War that the European nation-states were no longer capa- ble of taking on historical tasks and that peoples themselves were bound to disappear.35

Agamben’s metaphor for this condition is bankruptcy: ‘One of the few things that can be

declared with certainty is that all the peoples of Europe (and, perhaps, all the peoples of the Earth) have gone bankrupt’.36 Thus, the destructive nihilistic drive of the biopolitical machine and the capitalist spectacle has itself done all the work of emptying out positive forms-of-life, identities and vocations, leaving humanity in the state of destitution that Agamben famously terms ‘bare life’. Yet, this bare life, whose essence is entirely con- tained in its existence, is precisely what conditions the emergence of the subject of the coming politics: ‘this biopolitical body that is bare life must itself be transformed into the site for the constitution and installation of a form-of-life that is wholly exhausted in bare life and a bios that is only its own zoe.’37

The ‘happy’ form-of-life, a ‘life that cannot be segregated from its form’, is nothing but bare life that has reappropriated itself as its own form and for this reason is no longer separated between the (degraded) bios of the apparatuses and the (endangered) zoe that functions as their foundation.38 Thus, what the nihilistic self-destruction of the appara- tuses of biopolitics leaves as its residue turns out to be the entire content of a new form-of-life. Bare life, which is, as we recall, ‘nothing reprehensible’ aside from its con- finement within the apparatuses, is reappropriated as a ‘whatever singularity’, a being that is only its manner of being, its own ‘thus’.39 It is the dwelling of humanity in this irreducibly potential ‘whatever being’ that makes possible the emergence of a generic non-exclusive community without presuppositions, in which Agamben finds the possi- bility of a happy life.

[If] instead of continuing to search for a proper identity in the already improper and sense- less form of individuality, humans were to succeed in belonging to this impropriety as such, in making of the proper being-thus not an identity and individual property but a singularity without identity, a common and absolutely exposed singularity, then they would for the first time enter into a community without presuppositions and without subjects.40

Thus, rather than seek to reform the apparatuses, we should simply leave them to their self-destruction and only try to reclaim the bare life that they feed on. This is to be achieved by the practice of subtraction that we address in the following section.

### 2NC Framework

#### As an individual, you must adopt the role of “the new attorney,” to study and deactivate the force of law – voting negative is an instance of resisting the sovereign’s current deployment of the laq in favor of an alternative

Agamben 05. Giorgio Agamben, famous philosopher, The State of Exception, pg. 63

In the Kafka essay, the enigmatic image of a law that is studied but no longer practiced corresponds, as a sort of remnant, to the unmasking of mythico-juridical violence effected by pure violence. There is, therefore, still a possible figure of law after its nexus with violence and power has been deposed, but it is a law that no longer has force or application, like the one in which the “new attorney,” leafing through “our old books,” buries himself in study, or like the one that Foucault may have had in mind when he spoke of a “new law” that has been freed from all disci- pline and all relation to sovereignty.

What can be the meaning of a law that survives its deposition in such a way? The difficulty Benjamin faces here corresponds to a problem that can be formulated (and it was effectively formulated for the first time in primitive Christianity and then later in the Marxian tradition) in these terms: What becomes of the law after its messianic fulfillment? (This is the controversy that opposes Paul to the Jews of his time.) And what becomes of the law in a society without classes? (This is precisely the de- bate between Vyshinsky and Pashukanis.) These are the questions that Benjamin seeks to answer with his reading of the “new attorney.” Obvi- ously, it is not a question here of a transitional phase that never achieves its end, nor of a process of infinite deconstruction that, in maintain- ing the law in a spectral life, can no longer get to the bottom of it. The decisive point here is that the law—no longer practiced, but studied— is not justice, but only the gate that leads to it. What opens a passage toward justice is not the erasure of law, but its deactivation and inactivity [inoperosità]—that is, another use of the law. This is precisely what the force-of-law (whichkeepsthelawworking[inopera]beyonditsformal suspension) seeks to prevent. Kafka’s characters—and this is why they interest us—have to do with this spectral figure of the law in the state of exception; they seek, each one following his or her own strategy, to “study” and deactivate it, to “play” with it.

One day humanity will play with law just as children play with dis- used objects, not in order to restore them to their canonical use but to free them from it for good. What is found after the law is not a more proper and original use value that precedes the law, but a new use that is born only after it. And use, which has been contaminated by law, must also be freed from its own value. This liberation is the task of study, or of play. And this studious play is the passage that allows us to arrive at that justice that one of Benjamin’s posthumous fragments defines as a state of the world in which the world appears as a good that absolutely cannot be appropriated or made juridical (Benjamin 1992, 41).

### AT: Political Action Good

#### Political action good is only offense for us – the kritik does not forgo politics. Our alternative is a prerequisite to a better political paradigm. Policymakers must interrogate sovereign violence and security politics in order to prevent inevitable catastrophe. Absent this interrogation, the security politics will ensure the depoliticization of society which turns their offense

Agamben 02. Giorgio Agamben, famous philosopher, “Security and Terror,” Theory and Event 5:4

The risk is not merely the development of a clandestine complicity of opponents but that the hunt for security leads to a worldwide civil war which destroys all civil coexistence. In the new situation -- created by the end of the classical form of war between sovereign states -- security finds its end in globalisation: it implies the idea of a new planetary order which is, in fact, the worst of all disorders. But there is yet another danger. Because they require constant reference to a state of exception, measures of security work towards a growing depoliticization of society. In the long run, they are irreconcilable with democracy.

Nothing is therefore more important than a revision of the concept of security as the basic principle of state politics. European and American politicians finally have to consider the catastrophic consequences of uncritical use of this figure of thought. It is not that democracies should cease to defend themselves, but the defense of democracy demands today a change of political paradigms and not a world civil war which is just the institutionalization of terror. Maybe the time has come to work towards the prevention of disorder and catastrophe, and not merely towards their control. Today, there are plans for all kinds of emergencies (ecological, medical, military), but there is no politics to prevent them. On the contrary, we can say that politics secretly works towards the production of emergencies. It is the task of democratic politics to prevent the development of conditions which lead to hatred, terror, and destruction -- and not to reduce itself to attempts to control them once they occur.

# 1NR

### 1NR Case

#### Judicial deference is structurally inevitable – the best the plan can achieve is the inconsistent application of precedent.

**Posner and Vermeule, 10** - \*professor of law at the University of Chicago AND \*\*professor of law at Harvard (Eric and Adrian, The Executive Unbound, p. 52-54)

THE COURTS

We now turn from Congress to the courts, the other main hope of liberal legalism. In both economic and security crises, courts are marginal participants. Here two Schmittian themes are relevant: that courts come too late to the crisis to make a real difference in many cases, and that courts have pragmatic and political incentives to defer to the executive, whatever the nominal standard of review. The largest problem, underlying these mechanisms, is that courts possess legal authority but not robust political legitimacy. Legality and legitimacy diverge in crisis conditions, and the divergence causes courts to assume a restrained role. We take up these points in turn.

The Timing of Review

A basic feature of judicial review in most Anglo-American legal systems is that courts rely upon the initiative of private parties to bring suits, which the courts then adjudicate as “cases and controversies” rather than as abstract legal questions. This means that there is always a time lag, of greater or lesser duration, between the adoption of controversial government measures and the issuance of judicial opinions on their legal validity ensures that courts are less likely to set precedents while crises are hot, precedents that will be warped by the emotions of the day or by the political power of aroused majorities.70

Delayed review has severe costs, however. For one thing, courts often face a fait accompli. Although it is sometimes possible to strangle new programs in the crib, once those measures are up and running, it is all the more difficult for courts to order that they be abolished. This may be because new measures create new constituencies or otherwise entrench themselves, creating a ratchet effect, but the simpler hypothesis is just that officials and the public believe that the measures have worked well enough. Most simply, returning to the pre-emergency status quo by judicial order seems unthinkable; doing so would just re-create the conditions that led the legislature and executive to take emergency measures in the first place.

For another thing, even if courts could overturn or restrict emergency measures, by the time their review occurs, those measures will by their nature already have worked, or not. If they have worked, or at least if there is a widespread sense that the crisis has passed, then the legislators and public may not much care whether the courts invalidate the emergency measures after the fact. By the time the courts issue a final pronouncement on any constitutional challenges to the EESA, the program will either have increased liquidity and stabilized financial markets, or not. In either case, the legal challenges will interest constitutional lawyers, but will lack practical significance.

Intensity of Review

Another dimension of review is intensity rather than timing. At the level of constitutional law, the overall record is that courts tend to defer heavily to the executive in times of crisis, only reasserting themselves once the public sense of imminent threat has passed. As we will discuss in chapter 3, federal courts deciding administrative cases after 9/11 have tended to defer to the government’s assertion of security interests, although more large number work is necessary to understand the precise contours of the phenomenon. Schmitt occasionally argued that the administrative state would actually increase the power of judges, insofar as liberal legislatures would attempt to compensate for broad delegations to the executive by creating broad rights of judicial review; consider the Administrative Procedure Act (APA), which postdates Schmitt’s claim. It is entirely consistent with the broader tenor of Schmitt’s thought, however, to observe that the very political forces that constrain legislatures to enact broad delegations in times of crisis also hamper judges, including judges applying APA-style review. While their nominal power of review may be vast, the judges cannot exercise it to the full in times of crisis.

Legality and Legitimacy

At a higher level of abstraction, the basic problem underlying judicial review of emergency measures is the divergence between the courts’ legal powers and their political legitimacy in times of perceived crisis. As Schmitt pointed out, emergency measures can be “exceptional” in the sense that although illegal, or of dubious legality, they may nonetheless be politically legitimate, if they respond to the public’s sense of the necessities of the situation.71 Domesticating this point and applying it to the practical operation of the administrative state, courts reviewing emergency measures may be on strong legal ground, but will tend to lack the political legitimacy needed to invalidate emergency legislation or the executive’s emergency regulations. Anticipating this, courts pull in their horns.

When the public sense of crisis passes, legality and legitimacy will once again pull in tandem; courts then have more freedom to invalidate emergency measures, but it is less important whether or not they do so, as the emergency measure will in large part have already worked, or not. The precedents set after the sense of crisis has passed may be calmer and more deliberative, and thus of higher epistemic quality—this is the claim of the common lawyers, which resembles an application of the Madisonian vision to the courts—but the public will not take much notice of those precedents, and they will have little sticking power when the next crisis rolls around.

#### The courts are toothless – they defer from making decisions and when they do, they simply rubberstamp what the executive wants

Devins 10 – Professor of Law and Professor of Government, College of William & Mary (February, Neal, “Symposium: Presidential Power In Historical Perspective: Reflections on Calabresi and Yoo's the Unitary Executive: Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants” 12 U. Pa. J. Const. L. 491, Lexis)

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.

#### Executive power within the status quo legal system is limitless. The plan can never solve

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(Clement, *Outside the Law: Emergency and Executive Power* pg 1-5, dml)

But the problem for any legal order is that law aims at fixity in a world beset by flux. The greatest challenge to legally established order comes not from the resistance of particular groups or individuals who object to any of its substantive aims but from the unruliness of the world itself. The stability, predictability, and regularity sought by law eventually runs up against **the unavoidable instability, unpredictability, and irregularity of the world**. Events constantly threaten to disrupt and destabilize the artificial order established by law. Emergencies-sudden and extreme occurrences such as the devastating terrorist attacks of September 11, an overwhelming natural disaster like Hurricane Katrina, a pandemic outbreak of avian flu, a catastrophic economic collapse, or a severe food shortage, to name just a few-dramatize **the limitations of the law** in dealing with unexpected and incalculable contingencies. Designed for the ordinary and the normal, law cannot always provide for such extraordinary occurrences in spite of its aspiration to comprehensiveness. When such events arise, the responsibility for formulating a response usually falls to the executive.

The executive has a unique relationship to the law and the order that it seeks, especially in a liberal constitutional system committed to the rule of law. Not only is the executive the authority most directly responsible for enforcing the law and maintaining order in ordinary circumstances, it is also the authority most immediately responsible for restoring order in extraordinary circumstances. But while the executive is expected to uphold and follow the law in normal times, **emergencies** sometimes **compel the executive to** exceed the strict letter of the law. Given the unique and irrepressible nature of emergencies, the law often provides **little effective guidance**, leaving executives to their own devices. Executives possess special resources and characteristics that enable them to **formulate responses more** rapidly**,** flexibly**, and** decisively **than can legislatures, courts, and bureaucracies**. Even where the law seeks to anticipate **and** provide **for emergencies by** specifying the kinds of actions **that** public **officials are permitted or required to take**, **emergencies create** unique opportunities **for the executive to** exercise an extraordinary degree of discretion. And when the law seems to be inadequate to the situation at hand, executives often claim that it [is] necessary to **go beyond its dictates** by consolidating those powers ordinarily exercised by other branches of government or **even by expanding the range of powers ordinarily permitted**. But in seeking to bring order to the chaos that emergencies instigate, executives who take such action also **bring attention to** the deficiencies of the law **in maintaining order**, often with serious consequences for the rule of law.

The kind of extralegal action that executives are frequently called upon to take in response to emergencies **is** deeply problematic **for liberal constitutionalism**, which gives pride of place to the rule of law, both in its self-definition and in its standard mode of operation. If emergencies test the limits of those general and prospective rules that are designed to make governmental action limited and predictable, that is because **emergencies are** largely unpredictable **and** potentially limitless.1 Yet the rule of law, which has enjoyed a distinguished position in constitutional thought going back to Aristotle, has always sought to place limits on what government may do by substituting the arbitrariness and unpredictability of extemporary decrees with the impartiality and regularity of impersonal rules promulgated in advance. The protection of individual freedom within liberal constitutionalism has come to be unimaginable where government does not operate according to general and determinate rules.2 The rule of law has achieved primacy within liberal constitutionalism because it is considered vital to the protection of individual freedom. As Max Weber famously explained of the modern bureaucratic state, legitimacy in the liberal state is not based on habitual obedience to traditions or customs sanctified by time or on personal devotion to a charismatic individual endowed with superhuman gifts but on belief in the legality of a state that is functionally competent in administering highly impersonal but "rational rules." 3 In fact, its entire history and aim can be summed up as an attempt to curtail the kind of discretionary action associated with the arbitrary "rule of men"-by making government itself subject to the law.

The apparent primacy of law in liberal constitutionalism has led some critics to **question its capacity to deal with emergencies**. Foremost among these critics is German political and constitutional theorist Carl Schmitt, who concluded that liberalism is incapable of dealing with the "exception" or "a case of extreme peril" that poses "a danger to the existence of the state" without resorting to measures that contradict and undermine its commitments to the rule of law, the separation of powers, the preservation of civil liberties, and other core values.4 In Schmitt's view, liberalism is wedded to a "normativistic" approach that seeks to regulate life according to strictly codified legal and moral rules that not only **obscure the "decisionistic" basis of all law** but also **deny the role of** personal decision-making **in the** interpretation**,** enforcement**, and** application **of law**. 5 Because legitimacy in a liberal constitutional order is based largely on adherence to formal legal procedures that restrict the kinds of actions governments are permitted to take, actions that have not been specified or authorized in advance **are simply ruled out**. According to Schmitt, the liberal demand that governmental action always be controllable **is** **based on the naive belief that the world is thoroughly calculable**. 6 If it expects regularity and predictability in government, it is because it understands the world in those terms, **making it** oblivious **to the problems of contingency**. Not only does this belief that the world is subject to a rational and predictable order make it difficult for liberalism to justify actions that stand outside that order, it also **makes it difficult for liberalism** even to acknowledge emergencies when they do arise. But Schmitt's critique goes even further than this. When liberal constitutionalism does acknowledge the exception, its commitment to the rule of law forces it to choose between potential suicide if it adheres strictly to its legalistic ideals and undeniable hypocrisy if ignores those ideals? Either way, the argument goes, **emergencies expose the inherent shortcomings and weaknesses of liberalism**.

It is undeniable that the rule of law occupies a privileged position within liberal constitutionalism, but it is a mistake to identify liberal constitutionalism with an excessively legalistic orientation that renders it incapable of dealing effectively with emergencies. Schmitt is correct in pointing out that liberal normativism seeks to render government action as impersonal and predictable as possible in normal circumstances, but the history of liberal 'I· constitutional thought leading up to the American Founding reveals that its main proponents recognized the need to supplement the rule of law with a personal element in cases of emergency. The political writings of John Locke, David Hume, William Blackstone, and those Founders who advocated a strong presidency indicate that many early liberal constitutionalists were **highly attuned** to the limitations of law in dealing with events that disrupt the regular order. They were well aware that rigid adherence to the formalities of law, both in responding to emergencies and in constraining the official who formulates the response, **could undermine important substantive aims and values**, thereby sacrificing the ends for the means.

Their reflections on the chronic instability and irregularity of politics reveal an appreciation for the **inescapable**-albeit temporary-**need** for the sort of discretionary action that the law ordinarily seeks to circumscribe. As Locke explained in his classic formulation, that "it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick means that the formal powers of the executive specified in law must be supplemented with "prerogative," the "Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it." 8 Unlike the powers of the Hobbesian sovereign, which are effectively absolute and unlimited, the exercise of prerogative is, in principle, limited in scope and duration to cases of emergency. The power to act outside and even against the law **does not mean that the executive is "above the law”**—morally or politically unaccountable—**but it does mean that** executive power isultimately irreducible to law**.**

### 1NR Alternative

#### The alternative is not some utopian dream, quite the opposite – we do not need to create a new form of politics, simply re-appropriate the state of exception as a chance to highlight the arbitrariness of law in order to de-activate the sovereign’s power

Prozorov 10. Sergei Prozorov, professor of political and economic studies at the University of Helsinki, “Why Giorgio Agamben is an optimist,” Philosophy Social Criticism 2010 36: pg. 1057

The second principle of Agamben’s optimism is best summed up by Ho ̈lderlin’s phrase, made famous by Heidegger: ‘where danger grows, grows saving power also’.20 Accord- ing to Agamben, radical global transformation is actually made possible by nothing other than the unfolding of biopolitical nihilism itself to its extreme point of vacuity. On a number of occasions in different contexts, Agamben has asserted the possibility of a radi- cally different form-of-life on the basis of precisely the same things that he initially set out to criticize. Agamben paints a convincingly gloomy picture of the present state of things only to undertake a majestic reversal at the end, finding hope and conviction in the very despair that engulfs us.21 Our very destitution thereby turns out be the condition for the possibility of a completely different life, whose description is in turn entirely devoid of fantastic mirages. Instead, as Agamben repeatedly emphasizes, in the redeemed world ‘everything will be as is now, just a little different’,22 no momentous transformation will take place aside from a ‘small displacement’ that will nonetheless make all the difference. While we shall deal with this ‘small displacement’ in the follow- ing section, let us now elaborate the logic of redemption through the traversal of ‘danger’ in more detail.

It is evident that the danger at issue in Agamben’s work is nihilism in its dual form of the sovereign ban and the capitalist spectacle. If, as we have shown in the previous sec- tion, the reign of nihilism is general and complete, we may be optimistic about the pos- sibility of jamming its entire apparatus since there is nothing in it that offers an alternative to the present ‘double subjection’. Yet, where are we to draw resources for such a global transformation? It would be easy to misread Agamben as an utterly utopian thinker, whose intentions may be good and whose criticism of the present may be valid if exaggerated, but whose solutions are completely implausible if not outright embarras- sing.23 Nonetheless, we must rigorously distinguish Agamben’s approach from utopian- ism. As Foucault has argued, utopias derive their attraction from their discursive structure of a fabula, which makes it possible to describe in great detail a better way of life, precisely because it is manifestly impossible.24 While utopian thought easily pro- vides us with elaborate visions of a better future, it cannot really lead us there, since its site is by definition a non-place. In contrast, Agamben’s works tell us quite little about life in a community of happy life that has done away with the state form, but are remark- ably concrete about the practices that are constitutive of this community, precisely because these practices require nothing that would be extrinsic to the contemporary condition of biopolitical nihilism. Thus, Agamben’s coming politics is manifestly anti-utopian and draws all its resources from the condition of contemporary nihilism.

Moreover, this nihilism is the only possible resource for this politics, which would otherwise be doomed to continuing the work of negation, vainly applying it to nihilism itself. Given the totality of contemporary biopolitical nihilism, any ‘positive’ project of transformation would come down to the negation of negativity itself. Yet, as Agambens demonstrates conclusively in Language and Death, nothing is more nihilistic than a negation of nihilism.25 Any project that remains oblivious to the extent to which its valorized positive forms have already been devalued and their content evacuated would only succeed in plunging us deeper into nihilism. As Heidegger adds in his commentary on Ho ̈lderlin, ‘It may be that any other salvation than that, which comes from where the danger is, is still within non-safety’.26 Moreover, as Roberto Esposito’s work on the par- adox of immunity in biopolitics demonstrates, any attempt to combat danger through ‘negative protection’ (immunization) that seeks to mediate the immediacy of life through extrinsic principles (sovereignty, liberty, property) necessarily introjects within the social realm the very negativity that it claims to battle, so that biopolitics is always at risk of collapsing into thanatopolitics.27 In contrast, Agamben’s coming politics does not attempt to introduce anything new or ‘positive’ into the condition of nihilism but to use this condition itself in order to reappropriate human existence from its biopolitical confinement.28

Thus, while the aporia of the negation of negativity might lead other thinkers to res- ignation about the possibilities of political praxis, it actually enhances Agamben’s opti- mism. Renouncing any project of reconstructing social life on the basis of positive principles, his work illuminates the way the unfolding of biopolitical nihilism itself pro- duces the conditions of possibility for radical transformation. We can now see that the state of total crisis that Agamben has diagnosed must be understood in the strict medical sense. In pre-modern medicine, the crisis of the disease is its kairos, the moment in which the disease truly manifests itself and allows for the doctor’s intervention that might finally defeat it.29 For this reason, the crisis is not something to be feared and avoided but an opportunity that must be seized. Similarly, insofar as the sovereign state of excep- tion and the absolutization of exchange-value completely empty out any content of pos- itive forms-of-life, the contemporary biopolitical apparatus prepares its self-destruction by fully manifesting its own vacuity.

#### Politics is at a crossroads for structural change – we must support the global countermovement by deactivating the sovereign’s authority over law. This is the only way to avert global violence.

Gulli 13. Bruno Gulli, professor of history, philosophy, and political science at Kingsborough College in New York, “For the critique of sovereignty and violence,” <http://academia.edu/2527260/For_the_Critique_of_Sovereignty_and_Violence>, pg. 1

We live in an unprecedented time of crisis. The violence that characterized the twentieth century, and virtually all known human history before that, seems to have entered the twenty-first century with exceptional force and singularity. True, this century opened with the terrible events of September 11. However, September 11 is not the beginning of history. Nor are the histories of more forgotten places and people, the events that shape those histories, less terrible and violent – though they may often be less spectacular. The singularity of this violence, this paradigm of terror, does not even simply lie in its globality, for that is something that our century shares with the whole history of capitalism and empire, of which it is a part. Rather, it must be seen in the fact that terror as a global phenomenon has now become self-conscious. Today, the struggle is for global dominance in a singularly new way, and war –regardless of where it happens—is also always global. Moreover, in its self-awareness, terror has become, more than it has ever been, an instrument of racism. Indeed, what is new in the singularity of this violent struggle, this racist and terrifying war, is that in the usual attempt to neutralize the enemy, there is a cleansing of immense proportion going on. To use a word which has become popular since Michel Foucault, it is a biopolitical cleansing. This is not the traditional ethnic cleansing, where one ethnic group is targeted by a state power – though that is also part of the general paradigm of racism and violence. It is rather a global cleansing, where the sovereign elites, the global sovereigns in the political and financial arenas (capital and the political institutions), in all kinds of ways target those who do not belong with them on account of their race, class, gender, and so on, but above all, on account of their way of life and way of thinking. These are the multitudes of people who, for one reason or the other, are liable for scrutiny and surveillance, extortion (typically, in the form of over- taxation and fines) and arrest, brutality, torture, and violent death. The sovereigns target anyone who, as Giorgio Agamben (1998) shows with the figure of homo sacer, can be killed without being sacrificed – anyone who can be reduced to the paradoxical and ultimately impossible condition of bare life, whose only horizon is death itself. In this sense, the biopolitical cleansing is also immediately a thanatopolitical instrument.

The biopolitical struggle for dominance is a fight to the death. Those who wage the struggle to begin with, those who want to dominate, will not rest until they have prevailed. Their fanatical and self-serving drive is also very much the source of the crisis investing all others. The point of this essay is to show that the present crisis, which is systemic and permanent and thus something more than a mere crisis, cannot be solved unless the struggle for dominance is eliminated. The elimination of such struggle implies the demise of the global sovereigns, the global elites – and this will not happen without a global revolution, a “restructuring of the world” (Fanon 1967: 82). This must be a revolution against the paradigm of violence and terror typical of the global sovereigns. It is not a movement that uses violence and terror, but rather one that counters the primordial terror and violence of the sovereign elites by living up to the vision of a new world already worked out and cherished by multitudes of people. This is the nature of counter-violence: not to use violence in one’s own turn, but to deactivate and destroy its mechanism. At the beginning of the modern era, Niccolò Machiavelli saw the main distinction is society in terms of dominance, the will to dominate, or the lack thereof. Freedom, Machiavelli says, is obviously on the side of those who reject the paradigm of domination:

[A]nd doubtless, if we consider the objects of the nobles and of the people, we must see that the first have a great desire to dominate, whilst the latter have only the wish not to be dominated, and consequently a greater desire to live in the enjoyment of liberty (Discourses, I, V).

Who can resist applying this amazing insight to the many situations of resistance and revolt that have been happening in the world for the last two years? From Tahrir Square to Bahrain, from Syntagma Square and Plaza Mayor to the streets of New York and Oakland, ‘the people’ speak with one voice against ‘the nobles;’ the 99% all face the same enemy: the same 1%; courage and freedom face the same police and military machine of cowardice and deceit, brutality and repression. Those who do not want to be dominated, and do not need to be governed, are ontologically on the terrain of freedom, always-already turned toward a poetic desire for the common good, the ethics of a just world. The point here is not to distinguish between good and evil, but rather to understand the twofold nature of power – as domination or as care.

The biopolitical (and thanatopolitical) struggle for dominance is unilateral, for there is only one side that wants to dominate. The other side –ontologically, if not circumstantially, free and certainly wiser—does not want to dominate; rather, it wants not to be dominated. This means that it rejects domination as such. The rejection of domination also implies the rejection of violence, and I have already spoken above of the meaning of counter-violence in this sense. To put it another way, with Melville’s (2012) Bartleby, this other side “would prefer not to” be dominated, and it “would prefer not to” be forced into the paradigm of violence. Yet, for this preference, this desire, to pass from potentiality into actuality, action must be taken – an action which is a return and a going under, an uprising and a hurricane. Revolution is to turn oneself away from the terror and violence of the sovereign elites toward the horizon of freedom and care, which is the pre- existing ontological ground of the difference mentioned by Machiavelli between the nobles and the people, the 1% (to use a terminology different from Machiavelli’s) and the 99%. What is important is that the sovereign elite and its war machine, its police apparatuses, its false sense of the law, be done with. It is important that the sovereigns be shown, as Agamben says, in “their original proximity to the criminal” (2000: 107) and that they be dealt with accordingly. For this to happen, a true sense of the law must be recuperated, one whereby the law is also immediately ethics. The sovereigns will be brought to justice. The process is long, but it is in many ways already underway. The recent news that a human rights lawyer will lead a UN investigation into the question of drone strikes and other forms of targeted killing (The New York Times, January 24, 2013) is an indication of the fact that the movement of those who do not want to be dominated is not without effect. An initiative such as this is perhaps necessarily timid at the outset and it may be sidetracked in many ways by powerful interests in its course. Yet, even positing, at that institutional level, the possibility that drone strikes be a form of unlawful killing and war crime is a clear indication of what common reason (one is tempted to say, the General Intellect) already understands and knows. The hope of those who “would prefer not to” be involved in a violent practice such as this, is that those responsible for it be held accountable and that the horizon of terror be canceled and overcome. Indeed, the earth needs care. And when instead of caring for it, resources are dangerously wasted and abused, it is imperative that those who know and understand revolt –and what they must revolt against is the squandering and irresponsible elites, the sovereign discourse, whose authority, beyond all nice rhetoric, ultimately rests on the threat of military violence and police brutality.

### AT: Permutation Do Both

#### The permutation is a red herring—detracts from a systemic critique which is the best way to understand the status quo

Saas 12. William O. Saas, PhD in communications from Penn State University, “Critique of Charismatic Violence,” symploke, Volume 20, Numbers 1-2, 2012, pg. 65

Hidden in plain sight: a sprawling bureaucracy designed to justify and deliver military violence—clothed in the new war lexicon—to the world. How might one critique this massive network of violence that has become so enmeshed in our contemporary geo-socio-political reality? Is there any hope for reversing the expansion of executive violence in the current politi- cal climate, in which the President enjoys minimal resistance to his most egregious uses of violence? How does exceptional violence become routine? Answers to these broad and difficult questions, derived as they are from the disorientingly vast and hyper-accelerated retrenchment of our current politi- cal situation, are best won through the broad strokes of what Slavoj Žižek calls “systemic” critique. For Žižek, looking squarely at interpersonal or subjec- tive violences (e.g., torture, drone strikes), drawn as we may be by their grue- some and immediate appeal, distorts the critic’s broader field of vision. For a fuller picture, one must pull one’s critical focus back several steps to reveal the deep, objective structures that undergird the spectacular manifestations of everyday, subjective violence (Žižek 2008, 1-2). Immediately, however, one confronts the limit question of Žižek’s mandate: how does one productively draw the boundaries of a system without too severely dampening the force of objective critique?