### 1ac adv

Contention 1: the Evidence of Pain

#### Habeas corpus has been effectively denied to Guantanamo detainees – pathetically low evidentiary requirements by Lower Court decisions allow detention without cause or charge

**Ahuja and Tutt 12** [Jasmeet K. Ahuja and Andrew Tutt, “Evidentiary Rules Governing Guantanamo Habeas Petitions: Their Effects and Consequences,” 31 Yale L. & Pol'y Rev. 185, 2012]

Beginning in 2001, the United States began transporting hundreds of persons¶ captured overseas in the "War on Terror" to the U.S. Naval Base at Guantdnamo¶ Bay, Cuba.' They were kept at Guantdnamo specifically to insulate from¶ judicial review the military's decision to detain them.' Seven years later, the Supreme¶ Court in Boumediene v. Bush granted Guantdnamo detainees the right to¶ petition for the writ of habeas corpus in the Court of Appeals for the D.C. Circuit.'¶ The Court held that detainees must have "a meaningful opportunity to¶ demonstrate that [they are] being held pursuant to the erroneous application or¶ interpretation of relevant law."4 The Court's central concern was with the habeas¶ court's power to admit and consider relevant exculpatory evidence, a power¶ necessary "[flor the writ of habeas corpus, or its substitute, to function."'¶ But while the Court's central preoccupation was with a habeas court's power¶ to independently review the evidence, the Court did not enumerate any specific¶ procedural requirements. The Court-hesitant to place burdens on the¶ military and cognizant of the need to protect classified information-sketched¶ only the broad outlines of what the Constitution requires.' In so doing, it left¶ "[t]he extent of the showing required of the Government in these cases... a¶ matter to be determined"' and charged the district courts with the task of balancing¶ the government's legitimate interests against each detainee's right to¶ have a court assess the lawfulness of his detention.'/¶ Since Boumediene, the courts within the D.C. Circuit have heard over sixty¶ habeas petitions from detainees at Guantilnamo Bay.9 At first, many writs were¶ granted. The lower courts applied a functional framework for determining the¶ admissibility, credibility, and probity of evidence, holding the government to¶ the ordinary burden of preponderance of the evidence.'o However, as the government¶ and detainees began to appeal habeas decisions on the basis of adverse¶ evidentiary rulings, the Court of Appeals announced binding evidentiary rules¶ limiting the district courts' discretion to admit, exclude, weigh, and consider¶ evidence as the district courts saw fit."¶ This Note argues that these evidentiary rules deny detainees a "meaningful¶ opportunity" to contest the factual basis of their detention. The D.C. Circuit¶ maintains that it holds the government to a preponderance standard and has¶ cast its reversals of the District Court's grants of habeas corpus as mere corrections¶ in judging evidentiary probity. 4 However, in substance, the Court of Appeals'¶ evidentiary rules have quietly but significantly eroded the evidentiary¶ burden.¶ The way in which the evidentiary standard and the evidentiary rules interact¶ to weaken Boumediene has, for the most part, escaped scrutiny. 5 Many¶ have praised the D.C. Circuit for striking an appropriate balance between the¶ needs of national security and the rights of those wrongfully detained." But this¶ underestimates the combined significance of the D.C. Circuit's evidentiary rulings.¶ Boumediene's central purpose was to withhold from the executive branch¶ the unchecked power to detain whomever it deems a threat. 7 Yet the D.C. Circuit's¶ evidentiary rules have empowered the government to detain upon so little¶ evidence that the habeas hearing no longer serves the checking role the Boumediene¶ Court intended.'"¶ The D.C. Circuit has tacitly reduced the amount and quality of evidence¶ necessary to establish the lawfulness of detention through three powerful mechanisms:¶ (1) all but eliminating corroboration requirements and restrictions¶ on the admissibility of hearsay evidence, no matter how unreliable;' 9 (2) establishing¶ that courts consider the evidence in the "whole record" when determining¶ whether a petitioner meets the requirements for detention-a determination¶ that often reduces to the Court of Appeals' deciding that the District Court¶ wrongly refused to credit sufficient government evidence;2 o and (3) developing¶ irrefutable presumptions of detainability in which a single fact once established-¶ such as a stay at an al-Qaeda affiliated guesthouse-is dispositive on¶ the question of detention, even when other facts in the record point strongly in¶ the opposite direction."¶ That these rules operate to significantly reduce the government's burden,¶ and thereby deprive detainees of a meaningful opportunity to contest the factual¶ basis of their detention, is not readily apparent from the D.C. Circuit's decisions.¶ Rather, the D.C. Circuit has framed its successive evidentiary decisions¶ as meeting Boumediene's goal of striking a careful and necessary balance between¶ the significant burdens that a higher evidentiary requirement would impose¶ on the military during wartime, and the minimal impact that these decisions¶ would have on the substantive rights of detainees in habeas proceedings."¶ This Note explains how, contrary to the Court of Appeals' rhetoric, these¶ evidentiary rules have played a dispositive role in the outcome of these cases.

#### Careful judicial fact-finding has been abandoned – deference to governmental standards means they win every petition

**Denbeaux et al. 12** [Mark Denbeaux, Seton Hall University - School of Law, Jonathan Hafetz, Seton Hall Law School, Sara Ben-David, affiliation not provided to SSRN, Nicholas Stratton, affiliation not provided to SSRN, Lauren Winchester, affiliation not provided to SSRN, May 1, 2012, Seton Hall Public Law Research Paper No. 2145554 , “NO HEARING HABEAS: D.C. CIRCUIT RESTRICTS MEANINGFUL REVIEW”, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145554>]

It is an open secret that Boumediene v. Bush’s promise of robust review of the legality of the Guantanamo detainees’ detention has been effectively negated by decisions of the United States Court of Appeals for the District of Columbia Circuit, beginning with Al-Adahi v. Obama. This Report examines the outcomes of habeas review for Guantanamo detainees, the right to both habeas and “a meaningful review” of the evidence having been established in 2008 by the Supreme Court in Boumediene.¶ There is a marked difference between the first 34 habeas decisions and the last 12 in both the number of times that detainees win habeas and the frequency in which the trial court has deferred to the government’s factual allegations rather than reject them. The difference between these two groups of cases is that the first 34 were before and the remaining 12 were after the July 2010 grant reversal by the D.C. Circuit in Al-Adahi.¶ Detainees won 59% of the first 34 habeas petitions. Detainees lost 92% of the last 12. The sole grant post-Al-Adahi in Latif v. Obama has since been vacated and remanded by the D.C. Circuit.¶ The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government’s factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations.¶ The effect of Al-Adahi on the habeas corpus litigation promised in Boumediene is clear. After Al-Adahi, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations. Now the government wins every petition.¶ Given the fact-intensive nature of district court fact-finding, the shifting pattern of lower court decisions could only be due to an appellate court’s radical revision of the legal standards thought to govern habeas petitions, raising questions about whether the D.C. Circuit has in fact correctly applied Boumediene. This Report analyzes allegations that repeatedly appear in habeas cases to reveal the actual pattern of district court fact-finding.

#### The denial of habeas to Guantanamo inmates is a unique form of cruel and unusual punishment

**Eisenberg 9** [“Guantánamo Bay: Redefining Cruel and Unusual”, NORTHEASTERN UNIVERSITY LAW JOURNAL Vol. 1 No. 1, <http://nulj.org/journal/NULJ_v1n1_Eisenberg.pdf>, Stewart “Buz” Eisenberg is Of Counsel to Weinberg & Garber, P.C. of¶ Northampton, MA, serves as President of the International Justice Network,¶ and is a Professor of Civil Liberties at Greenfield Community College. Since¶ 2004 he has provided direct representation to four Guantánamo detainees, Northeastern University Law Journal vol. 1, no. 1, Spring 2009]

Representing Guantánamo detainee Mohammed Abd Al Al¶ Qadir (Guantánamo Internee Security Number 284)¶ 1¶ has been an¶ experience unlike any other of my legal career. While serving as counsel¶ for Mr. Al Qadir (also known as Tarari Mohammed), Jerry Cohen¶ 2¶ and I encountered numerous obstacles unique to Guantánamo cases.¶ Convoluted administrative procedures, allegedly implemented to protect¶ national security, made representation difficult for lawyer and client¶ alike.¶ In 2004, the U.S. Department of Defense issued procedures¶ to assess the need to continue detaining enemy combatant detainees.¶ 3¶ Three years later, Tarari Mohammed was cleared for release or transfer.¶ 4¶ Nevertheless, he was still detained in Guantánamo Bay’s Camp 6 as of ¶ our March 20, 2008 visit.¶ 5¶ When Jerry and I arrived at the base, guards¶ escorted us to an interview cell. When the cell door was unlocked, we saw¶ our client shackled to the floor,¶ 6¶ as always, and immediately noticed he¶ was wearing a white respirator on his face. The respirator was of the sort¶ a contractor wears when working with toxic materials. Alarmed, I asked¶ if he was all right. As the interpreter began to translate my question,¶ our client interrupted, saying something in Arabic. The interpreter shot¶ us a look and said, “We will talk about it.” After the guards left the¶ room and locked the door behind them, Tarari uncharacteristically spoke¶ in a serious and determined tone. On all other occasions, he had been¶ extremely polite, deferential, and allowed us to lead the conversation.¶ Tarari Mohammed proceeded to tell his story, one he had clearly been¶ waiting to tell.¶ Approximately three weeks prior, he had an appointment with a¶ representative of the International Committee of the Red Cross (ICRC).¶ 7¶ He met with the representative, who brought a letter from our client’s¶ sister. The letter was the first and only communication our client received¶ from any member of his family in over six years of detention. In the¶ letter, Tarari’s sister informed him of their mother’s death, but did not¶ provide details as to the date or cause. The letter also stated that, prior¶ to her death, his mother had been distraught over her son’s detainment;¶ it also detailed his father’s sadness. Tarari expressed that his heart was¶ breaking and that he wanted to return to his cell. At the conclusion of¶ their meeting, the ICRC representative told Tarari that his family had not¶ received any letters from him. Tarari explained he had written and sent¶ many letters during his detainment. The military never forwarded the¶ letters.¶ Communication is a constant struggle for both detainees and¶ counsel. Lawyers must comply with a protective order (PO)¶ 8¶ entered by ¶ the court, regulating the dissemination of information.¶ 9¶ The protective¶ order renders all communication with the detainee, whether to or from¶ him, subject to review by a designated authority.¶ 10¶ More specifically, all¶ communications must be handled, transported, and stored in a secure¶ manner as described in the PO.¶ 11¶ The order places an additional burden¶ on an already strained attorney-client relationship, rendering the detainee’s¶ lawyer powerless, unable to have mail delivered between them, or between¶ the client and his family.¶ Petitioner’s counsel (“habeas counsel”) must treat all written¶ and oral communication with a detainee as classified, unless otherwise¶ determined by the reviewing authority.¶ 12¶ Even the notes we take during¶ our client meetings are subject to review.¶ 13¶ Mail is also a source of constant¶ strife for habeas counsel. There are two types of mail, “legal mail” and¶ “non-legal mail,” which are processed in different manners.¶ 14¶ Legal mail ¶ is reviewed in a secure facility in or around Washington, D.C.,¶ 15¶ while¶ non-legal mail is reviewed by the military.¶ 16¶ In theory, POs are intended to surmount the many logistical¶ obstacles generated by these cases, and to reconcile the divergent priorities¶ of the government and habeas counsel.¶ 17¶ Secrecy and national security¶ are of paramount interest to the government,¶ 18¶ while habeas counsel¶ advocates for open communication with clients, their families and home¶ countries, as well as the public at large.¶ 19¶ The government contends that¶ without the prescribed screening process, messages could be transmitted¶ to terrorist organizations, possibly endangering the United States or its¶ allies.¶ 20¶ In reality, the process operates to compound the psychological¶ and emotional damage these men suffer, further isolating them from the¶ outside world.¶ 21¶ Not only are detainees isolated from the outside world, but some,¶ like Tarari, have been punished without cause. Tarari’s few freedoms were¶ drastically reduced after his ICRC meeting. Guards came to his cell to¶ measure him for clothing, explaining he was no longer allowed to wear¶ his white jumpsuit, which indicated compliance, and instead must wear¶ orange.¶ 22¶ When asked why they were punishing him, the guards replied¶ that he was in trouble for spitting.¶ 23¶ Tarari denied ever spitting on anyone,¶ yet the guards said he would not only have to wear the orange jumpsuit,¶ but also a respirator.¶ 24¶ During our visit, Tarari asked how anyone could have such hate¶ in their hearts that they punish someone for the death of his mother.¶ He told us that at 2:00 a.m., on the morning after the guards’ visit, they¶ returned to search his cell, harassing him further.¶ 25¶ Tarari then informed us that following the status change, and before¶ our visit, he sought out a particular Non-Commissioned Officer (NCO)¶ who had always treated him fairly. He asked the NCO why he had been¶ disciplined, maintaining he had never spit and that the accusations were ¶ false. Tarari trusted the NCO, who told him he would not be punished¶ further. Yet, despite the NCO’s assurances, the punishment did not cease.¶ The NCO later told him that his superior had ordered the reprimand,¶ offering no further justification.¶ Absent another explanation, my co-counsel and I concluded¶ Tarari was punished for having learned his mother had passed away. We¶ speculated that this was a preemptive effort to ensure his compliance, for¶ should Tarari get upset over his mother’s passing, the sanctions would¶ make him easier to control—lending new meaning to the term “prior¶ restraint.”¶ 26¶ We may never know whether our client actually committed a¶ punishable offense, or whether the guards were simply acting out of spite.¶ While anything is possible, it is unlikely our client would lie to us, given¶ our long-established attorney-client relationship and the many hours we¶ have spent together.¶ Tarari celebrated the beginning of his seventh year in captivity,¶ with no charges ever having been brought against him, by learning that he¶ had lost his mother. Even if this otherwise compliant man¶ had¶ acted out¶ after learning of his mother’s death, is that so hard to understand? Tarari is¶ just one of the many Guantánamo detainees who must suffer punishment¶ without recourse. Together, their stories reveal the government’s actions¶ at Guantánamo, redefining cruel and unusual.

#### Denial of habeas ensures the continuation of torture and force-feeding policies

**Loo 13** [Dennis Loo, January 8, 2013, “Why is Guantanamo Still Open?”, Associate Professor of Sociology at Cal Poly Pomona, http://www.worldcantwait.net/index.php/torture/8455-why-is-guantanamo-still-open]

Obama promised during his 2008 campaign for the presidency that if elected:¶ “We will lead in the observance of human rights, and the rule of law, and civil rights and due process, which is why I will close Guantanamo and I will restore habeas corpus and say no to torture. Because if you elect me, you will have elected a president who has taught the Constitution, who believes in the Constitution, and who will restore and obey the Constitution of the United States of America.”[1]¶ The clear flouting of these principles by his predecessor led so many to feel such relief to hear these promises and experience great joy when Obama was elected. Elation, however, was unwarranted.¶ Six years later, Guantanamo remains open with no reasons other than the wisps of more high-sounding but empty phrasemaking by Obama to expect it to ever close. Bagram, much larger than Guantanamo, remains open. CIA torture and detention sites remain open in undisclosed locations despite the Obama administration’s public declarations of denial. Habeas corpus has not been restored and torture continues, including through gruesome force feedings.¶ Rather than reverse the Bush Regime’s judicial stances, the Obama Administration has reinforced, renewed and expanded upon those stances.

#### Force feeding detainees at Guantanamo violates medical ethics and requires health professionals to shed their clinical responsibilities in an act of medical doubling.

**McKay 13** [Donna, Executive Director of Physicians for Human Rights, “Force Feeding Violates Basic Medical Ethics and Our Core Values”, Huffington Post, 8/9, <http://www.huffingtonpost.com/donna-mckay/force-feeding-violates-basic-medical-ethics_b_3727208.html?utm_hp_ref=worldandir=World>]

Force feeding violates longstanding medical ethics, is inhuman and degrading, and is against our fundamental values. The World Medical Association states that force feeding is "never medically acceptable," and the American Medical Association has said that it "violates core ethical values of the medical profession." A federal judge recently even called the procedure "painful, humiliating, and degrading." And a bipartisan taskforce found that force feeding is "a form of abuse and must end."¶ Force feeding is inconsistent with medical ethics, as it directly infringes on detainees' rights to make their own decisions about their health. Health professionals at Guantánamo have been subjecting detainees to the procedure against their wishes, using shackles and restraints for up to four hours a day while force feeding them. Medical professionals who administer force feeding at Guantánamo are violating their clinical and ethical responsibilities, and instead should use their independent medical judgment, respond to the detainees' needs and wishes, and stop using force.¶ Everyone's reaction to force feeding is not as strong as Bey's; others find it uncomfortable, at worst. As one of Physicians for Human Rights (PHR) medical experts recently pointed out, for some, force feeding is extremely painful, while others eventually get used to it. The procedure can be particularly painful in situations like Guantánamo, where detainees are likely to resist. But regardless of varying reactions to the procedure, health professionals and leading medical groups from around the world unequivocally call to immediately end the force feeding of detainees.¶ While force feeding is a major problem and the president's administration needs to stop the practice, we have to remember that it's only a part of the ongoing crisis at Guantánamo Bay. One piece of good news is that a Senate hearing took place just last month on the larger topic of closing Guantánamo where a PHR medical expert, Brigadier General (Ret.) Stephen Xenakis, testified and said, "Force-feeding completely¶ undermines the physician-patient relationship by destroying the trust that is essential for all clinical treatment."¶ The detainees have engaged in a hunger strike as a way to express their longstanding and legitimate grievances resulting from their deplorable conditions, including solitary confinement, indefinite detention, and torture. PHR has documented the serious physical and psychological consequences of indefinite detention and the devastating effects of solitary confinement. The detainees' drastic measures represent an act of desperation, and the solution is not to violate medical standards and compromise our core values, but rather to address the appalling conditions they have been subjected to for over a decade.¶ No human being should ever have to endure such treatment. Everyone deserves to either be released or charged and tried in a court of law. No one should linger for years in detention without charge, losing all faith in our justice system.

#### Challenging medical doubling is a prerequisite to establishing ethical orientations towards life and death

**Lifton 4** [Robert, Professor of Psychiatry at Harvard University, “Doctors and Torture”, New England Journal of Medicine, 6/29, <http://www.nejm.org/doi/full/10.1056/NEJMp048065>]

There is increasing evidence that U.S. doctors, nurses, and medics have been complicit in torture and other illegal procedures in Iraq, Afghanistan, and Guantanamo Bay. Such medical complicity suggests still another disturbing dimension of this broadening scandal.¶ Abu Ghraib.¶ We know that medical personnel have failed to report to higher authorities wounds that were clearly caused by torture and that they have neglected to take steps to interrupt this torture. In addition, they have turned over prisoners' medical records to interrogators who could use them to exploit the prisoners' weaknesses or vulnerabilities. We have not yet learned the extent of medical involvement in delaying and possibly falsifying the death certificates of prisoners who have been killed by torturers.¶ A May 22 article on Abu Ghraib in the New York Times states that “much of the evidence of abuse at the prison came from medical documents” and that records and statements “showed doctors and medics reporting to the area of the prison where the abuse occurred several times to stitch wounds, tend to collapsed prisoners or see patients with bruised or reddened genitals.”1 According to the article, two doctors who gave a painkiller to a prisoner for a dislocated shoulder and sent him to an outside hospital recognized that the injury was caused by his arms being handcuffed and held over his head for “a long period,” but they did not report any suspicions of abuse. A staff sergeant–medic who had seen the prisoner in that position later told investigators that he had instructed a military policeman to free the man but that he did not do so. A nurse, when called to attend to a prisoner who was having a panic attack, saw naked Iraqis in a human pyramid with sandbags over their heads but did not report it until an investigation was held several months later.¶ A June 10 article in the Washington Post tells of a long-standing policy at the Guantanamo Bay facility whereby military interrogators were given access to the medical records of individual prisoners.2 The policy was maintained despite complaints by the Red Cross that such records “are being used by interrogators to gain information in developing an interrogation plan.” A civilian psychiatrist who was part of a medical review team was “disturbed” about not having been told about the practice and said that it would give interrogators “tremendous power” over prisoners.¶ Other reports, though sketchier, suggest that the death certificates of prisoners who might have been killed by various forms of mistreatment have not only been delayed but may have camouflaged the fatal abuse by attributing deaths to conditions such as cardiovascular disease.3¶ Various medical protocols — notably, the World Medical Association Declaration of Tokyo in 1975 — prohibit all three of these forms of medical complicity in torture. Moreover, the Hippocratic Oath declares, “I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrongdoing.”¶ To be a military physician is to be subject to potential moral conflict between commitment to the healing of individual people, on the one hand, and responsibility to the military hierarchy and the command structure, on the other. I experienced that conflict myself as an Air Force psychiatrist assigned to Japan and Korea some decades ago: I was required to decide whether to send psychologically disturbed men back to the United States, where they could best receive treatment, or to return them to their units, where they could best serve combat needs. There were, of course, other factors, such as a soldier's pride in not letting his buddies down, but for physicians this basic conflict remained.¶ American doctors at Abu Ghraib and elsewhere have undoubtedly been aware of their medical responsibility to document injuries and raise questions about their possible source in abuse. But those doctors and other medical personnel were part of a command structure that permitted, encouraged, and sometimes orchestrated torture to a degree that it became the norm — with which they were expected to comply — in the immediate prison environment.¶ The doctors thus brought a medical component to what I call an “atrocity-producing situation” — one so structured, psychologically and militarily, that ordinary people can readily engage in atrocities. Even without directly participating in the abuse, doctors may have become socialized to an environment of torture and by virtue of their medical authority helped sustain it. In studying various forms of medical abuse, I have found that the participation of doctors can confer an aura of legitimacy and can even create an illusion of therapy and healing.¶ The Nazis provided the most extreme example of doctors' becoming socialized to atrocity.4 In addition to cruel medical experiments, many Nazi doctors, as part of military units, were directly involved in killing. To reach that point, they underwent a sequence of socialization: first to the medical profession, always a self-protective guild; then to the military, where they adapted to the requirements of command; and finally to camps such as Auschwitz, where adaptation included assuming leadership roles in the existing death factory. The great majority of these doctors were ordinary people who had killed no one before joining murderous Nazi institutions. They were corruptible and certainly responsible for what they did, but they became murderers mainly in atrocity-producing settings.¶ When I presented my work on Nazi doctors to U.S. medical groups, I received many thoughtful responses, including expressions of concern about much less extreme situations in which American doctors might be exposed to institutional pressures to violate their medical conscience. Frequently mentioned examples were prison doctors who administered or guided others in giving lethal injections to carry out the death penalty and military doctors in Vietnam who helped soldiers to become strong enough to resume their assignments in atrocity-producing situations.¶ Physicians are no more or less moral than other people. But as heirs to shamans and witch doctors, we may be seen by others — and sometimes by ourselves — as possessing special magic in connection with life and death. Various regimes have sought to harness that magic to their own despotic ends. Physicians have served as actual torturers in Chile and elsewhere; have surgically removed ears as punishment for desertion in Saddam Hussein's Iraq; have incarcerated political dissenters in mental hospitals, notably in the Soviet Union; have, as whites in South Africa, falsified medical reports on blacks who were tortured or killed; and have, as Americans associated with the Central Intelligence Agency, conducted harmful, sometimes fatal, experiments involving drugs and mind control.¶ With the possible exception of the altering of death certificates, the recent transgressions of U.S. military doctors have apparently not been of this order. But these examples help us to recognize what doctors are capable of when placed in atrocity-producing situations. A recent statement by the Physicians for Human Rights addresses this vulnerability in declaring that “torture can also compromise the integrity of health professionals.”5

#### Torture exists prior to other ethical questions – uses the body and mind as vessels to capture and control consciousness in a totality of pain – horrible beyond imagination

**Scarry**, Professor of Philosophy at Harvard University, **87**

(Elaine, The Body in Pain, 1987)

A fifth dimension of physical pain is its ability to destroy language, the power of verbal objectification, a major source of our self-extension, a vehicle through which the pain could be lifted out into the world and eliminated. Before destroying language, it first monopolizes language, becomes its only subject: complaint, in many ways the nonpolitical equivalent of confession, becomes the exclusive mode of speech. Eventually the pain so deepens that the coherence of complaint is displaced by the sounds anterior to learned language. The tendency of pain not simply to resist expression but to destroy the capacity for speech is in torture reenacted in overt, exaggerated form. Even where the torturers do not permanently eliminate the voice through mutilation or murder, they mime the work of pain by temporarily breaking off the voice, making it their own, making it speak their words, making it cry out when they want it to cry, be silent when they want its silence, turning it on and off, using its sound to abuse the one whose voice it is as well as other prisoners. The derisive connotations of "betrayal" surrounding confession also reveal in heightened form the process by which in nonpolitical contexts a person's complaint-filled, deteriorating, or absent language obscures and discredits his needs at the very moment when they are most acute. Even in 1976 and 1977 when the American news media for the first time began to devote space and sympathetic attention to the problems of physical pain, it was not unusual to see sometimes in local papers articles with headlines such as "A pain is a pain if you complain" and "Chronic pain can make you one. —A sixth element of physical pain, one that overlaps but is not quite coterminous with the previous element, is its obliteration of the contents of consciousness. Pain annihilates not only the objects of complex thought and emotion but also the objects of the most elemental acts of perception. It may begin by destroying some intricate and demanding allegiance, but it may end (as is implied in the expression "blinding pain") by destroying one's ability simply to see. In torture, this world dissolution, acknowledged in confession, is mimed in the conversion into weapons and resulting cancellation of all parts of the room as well as all parts of the larger world that can be bodied forth in the torturer's action and speech. —A seventh aspect of pain, built on the first six, is its totality. Pain begins by being "not oneself" and ends by having eliminated all that is "not itself." At first Occurring only as an appalling but limited internal fact, it eventually occupies the entire body and spills out into the realm beyond the body, takes over all that is inside and outside, makes the two obscenely indistinguishable, and systematically destroys anything like language or world extension that is alien to itself and threatening to its claims. Terrifying for its narrowness, it nevertheless exhausts and displaces all else Until it seems to become the single broad and omnipresent fact of existence. From no matter what perspective pain is approached, its totality is again and again faced. Even neurological and physiological descriptions repeatedly acknowledge the breadth of its presence. Its mastery of the body, for example, is suggested by the failure of many surgical attempts to remove pain pathways because the body quickly, effortlessly, and endlessly generates new pathways.64 Of its location in the brain, Melzack writes: It is traditionally assumed that pain sensation and response are subserved by a "pain centre" in the brain. The concept of a pain centre, however, is totally inadequate to account for the complexity of pain. Indeed, the concept is pure fiction, unless virtually the whole brain is considered to be the pain centre, because the thalamus, hypothalamus, brainstem reticular formation, limbic system, parietal cortex, and frontal cortex are all implicated in pain perception. Other brain areas are obviously involved in the emotional and motor features of pain.65 This same totality is equally descriptive of felt-experience. Although other sensations sometimes have the power to diminish pain by distracting the person's attention, in prolonged and acute pain the body often begins to interpret all sensations as pain. S. W. Mitchell, a Civil War surgeon, a minor though prolific novelist, and a major figure in medical research and observation of wounds and wound pain, writes, Perhaps few persons who are not physicians can realize the influence which longcontinued and unendurable pain may have upon both body and mind. The older books are full of cases in which, after lancet wounds, the most terrible pain and local spasms resulted. When these had lasted for days or weeks, the whole surface became hyperaesthetic, and the senses grew to be only avenues for fresh and increasing tortures, until every vibration, every change of light, and even... the effort to read brought on new agony.66 Torture aspires to the totality of pain. Antonin Artaud once described the way in which a pain "as it intensifies and deepens, multiplies its resources and means of access at every level of the sensibility."67 So the torturers, like pain itself, continually multiply their resources and means of access until the room and everything in it becomes a giant externalized map of the prisoner's feelings, Almost as obsessively narrow and repetitive as the pain on which it models itself, torture can be more easily seen because it has dimension and depth, a space that can be walked around in though not walked out of. Here there is nothing audible or visible, there is nothing that can be touched, or tasted, or smelled that is not the palpable manifestation of the prisoner's pain.

### 1ac plan

**The United States federal government should apply burdens of proof and presumptions regarding evidence in habeas corpus hearings that favor individuals in military detention.**

### 1ac solvency

#### The plan solves: low-burden presumptions reflect a post 9-11 heuristic of deference to the executive and acceptance of its claims of imminent threat based on irrational fears

**Cover 13** [Avidan, 2013, Assistant Professor and Associate Director at the Global Institute for National Security Law, Attorney in Newark, NJ with 10 years of experience, “PRESUMED IMMINENCE: JUDICIAL RISK ASSESSMENT IN THE POST-9/11 WORLD” works.bepress.com/avidan\_cover/3/‎]

It is difficult to determine the risk of a terrorist attack. The government always runs the chance of underestimating or overestimating the probability of an attack, both of which have costs. The 9/11 attacks themselves were attributed to a failure to appreciate the risk. In its report on the September 11 attacks, the 9/11 Commission criticized the government for its failure to imagine the likelihood of an attack by al Qaeda. Yet based upon this failure of imagination, the pendulum has swung in the other direction. The threat of terrorism summons a post-9/11 impression that although terrible harm is uncertain we must act as though it is imminent. Such thinking is a variant of the Precautionary Principle, which Cass Sunstein describes as positing that “action should be taken to correct a problem as soon as there is evidence that harm may occur, not after the harm has already occurred.” This mindset explains the capacious definition of imminence that the government purportedly relies on as part of it legal justification of targeted killings of American citizens. No one wants to be wrong again. This post-9/11 heuristic now pervades our society, our government, and our courts. Part of this transformation entails an emphasis on, and preference for, an intelligence-based preventative strategy. The preventative approach, which necessarily incorporates fear and uncertainty, is a hallmark of what legal scholars Jack Balkin and Sanford Levinson have called the National Surveillance State. This governing regime “is increasingly statistically oriented, ex ante and preventative, rather than focused on deterrence and ex post prosecution of individual wrongdoing.” In this system advances in technology and globalization may erode distinctions between international and domestic spheres. The blurring of military, intelligence, and criminal lines also wreaks havoc with previously understood standards of proof, suspicion and evidence. The preventative emphasis sets the foundation for “a parallel track of preventative law enforcement” Guantanamo, extraordinary renditions, torture that evades constitutional rights protections. Moreover, the parallel track can creep into established criminal law enforcement and distort the traditional protections afforded in that realm. The Supreme Court has directly addressed a number of the government’s post-9/11 counterterrorism measures. While a number of the Court’s post-9/11 decisions the enemy combatant decisions, in particular were often characterized by the media and some scholars as significant defeats for the government, there is reason to question that narrative. A few years removed, the decisions appear fairly modest in their limitations on the government. These opinions were invariably quite deferential to the political branches. Though the opinions assuredly marked a territorial role for the courts in the post-9/11 world, they offered more heat than light. The opinions derived from Separation of Powers structural principles rather than from the Bill of Rights. Thus the decisions were more procedural than substantive, offering little insight on the nature of detainees’ rights. The decisions also provided minimal guidance even as to process, relegating many of the decisions on the details to lower courts and to the political branches. Finally, consider what the Court has not thus far addressed or done. Richard Fallon points out that the Court has not limited the movement of military and intelligence officers in their counterterrorism operations; it has not opined on the state secrets doctrine; nor has it permitted lawsuits seeking relief for abuses suffered as a consequence of counterterrorism abuses to go forward. More specifically, it has not ordered a release in a habeas case and it does not appear poised to do so anytime soon. Fallon attributes such restraint to the notion that judicial review is “politically constructed,” that is, Justices may decide cases based in part on how their opinions may be popularly received, and the Court’s authority respected. This Article offers another explanation of the Court’s deference: the Justices are afraid. They are afraid of terrorism. They are afraid of what could happen to our security if they rein in government. This Article examines the ways in which fear has affected and influenced judges in addressing terrorism. Importantly, the discussion is not limited to enemy combatant cases or to the Supreme Court, but examines the ways in which the post-9/11 heuristic has affected a range of judicial opinions, from limits on political protests to airport security measures to criminal prohibitions of material support of terrorism. Such rulings invariably entail the courts making their own risk assessments. Yet forecasts of uncertain catastrophic events are notoriously unreliable. This is due to cognitive errors and biases that Cass Sunstein and others have documented. What then is a court to do? Many suggest courts should defer to the political branches. Deference is untenable for a number of reasons. First, it is unclear whether political actors are any more adept at making predictions. Second, the arguments for deference in the terrorism threat context are less compelling than in war because, the Court has intimated, the geographic and temporal limitations to fighting terrorism are not evident. Deference would not be a short-term or limited posture, as it might be for a military armed conflict, but one that would endure as long as the seemingly permanent crisis of terrorism. Third, deferring to the government in all events terrorism-related threatens to upset domestic criminal law jurisprudence because counterterrorism measures involve a mélange of military, intelligence, and criminal approaches that employ differing standards of proof. Finally, even when invoking judicial deference and lack of national security expertise, what can be seen at work in many judges’ post-9/11 opinions are their own risk assessments, which evidence their own cognitive biases impacted by the fears engendered by terrorism. Ironically, their frequent fact finding of risks or lack of threat is wholly at odds with the purported deferential stance that judges insist they are taking in addressing the terrorism cases. This tendency can be seen in various Justices and lower court judges’ opinions, regardless of whether they uphold or strike down government actions. This Article takes Holder v. Humanitarian Law Project as its case study. Part I of the Article reviews the Supreme Court’s 2010 decision upholding application of the criminal prohibition on material support of a foreign terrorist organization to human rights advocates’ training of such groups in international humanitarian law and human rights law. The case reveals much about how the Court undertakes terrorism risk assessments and how the judiciary is likely to handle most terrorism cases going forward. The opinion also illustrates the Court’s tendency to fall prey to cognitive errors and biases in undertaking risk assessments even when stating it is deferring to other branches’ factual determinations. The decision also presages a reduced standard of evidence and suspicion in the name of preventing terrorism in the criminal context. Given the government’s increased emphasis on terrorism, there is reason to worry the standard will infect the criminal justice system. Finally, these findings of fact undermine the Court’s credibility because they will be perceived by the public as bad faith efforts to masquerade personal policy preferences as empirical facts. Part II of the Article explores the literature on decision making and risk assessment and how certain dread risks can influence people’s decisions, particularly those of judges. Part II does not limit the discussion to Sunstein’s focus on cognitive errors but builds on Dan Kahan, Paul Slovic, and others’ critique of that account by also reviewing social and cultural influences that affect a person or a judge’s perception of risk. Part III then examines various court opinions, in particular Humanitarian Law Project, to explore how these errors and influences manifest. Next Part IV addresses and ultimately rejects judicial deference as a means to adapting to the concomitant errors of judicial review of terrorism-related matters. Finally, Part V proposes solutions that will enable courts to overcome cognitive biases and other social and cultural influences. The Article concludes that evidentiary standards favoring those whose civil liberties are targeted is a necessary step toward overcoming particular biases that ignore probability. In addition, courts should resist writing in terms of certainty, including findings of fact, but should instead candidly disclose their uncertainty and anxiety over terrorism threats.

#### This causes ineffective risk analysis that produces bad decisionmaking and mass racial discrimination—aff solves

**Cover 13** [Avidan, 2013, Assistant Professor and Associate Director at the Global Institute for National Security Law, Attorney in Newark, NJ with 10 years of experience, “PRESUMED IMMINENCE: JUDICIAL RISK ASSESSMENT IN THE POST-9/11 WORLD” works.bepress.com/avidan\_cover/3/‎]

This section examines how courts often neglect probability in undertaking risk assessments. This cognitive error is not, however, unique to post-9/11 jurisprudence. Indeed, it appears that at times of crisis and through the special needs doctrine, the Supreme Court has long sanctioned probability neglect as an analytical tool. In Humanitarian Law Project Roberts accepted as a foregone conclusion that acts of terrorism were very likely: “The Government,” Roberts explained, “when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.” The reference to “imminent harms” is jarring; nowhere in the opinion was there any discussion of the likelihood of a terrorist attack. There was no basis for believing an attack was imminent. This was simply Roberts’ default position in the face of uncertain harm. The presumption of imminence ups the stakes. In so doing Roberts presented the Court with a form of the ticking time bomb hypothetical, or the “one percent doctrine.” That is, whatever the odds really may be, and we cannot know what they are, we should assume and act as though an attack is about to occur. The standard permits just about any imagined outcome to justify the prohibition of speech to a designated foreign terrorist group. It is also then an invitation to always err on the side of the government and feed cognitive errors and emotions rather than facilitate more deliberative reflection. Though the post-9/11 risk of terrorism may be different from prior threats, the Supreme Court has historically adopted the worst-case scenario, presuming imminence in times of perceived existential dangers. 1. Historical Examples of Presumed Imminence In Korematsu v. United States, the Court upheld the exclusion and internment of over 112,000 Japanese Americans on the grounds of the elastic idea of military necessity. Writing for the six-justice majority, Justice Black justified the decision based upon deference to the military’s determination “that all citizens of Japanese ancestry be segregated from the West Coast” because the “disloyal members of that population . . . could not be precisely and quickly ascertained.” Writing in dissent, Justice Murphy would have required the government to show that a constitutional deprivation based on “military necessity” “is reasonably related to a public danger that is so ‘immediate, imminent, and impending’ as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger,” before simply accepting the military’s judgment. The near total deference and lack of any evidentiary requirement aided the Court in its approval of “obvious racial discrimination.” Looking back at his vote upholding the exclusion, Justice Douglass acknowledged that psychological and social fears and biases inevitably played a role in the decision. The Court’s “‘members are very much a part of the community and know the fears, anxieties, cravings and wishes of their neighbors . . . The state of public opinion will often make the Court cautious when it should be bold.’” Dennis v. United States, in which the Court upheld convictions of American Communist party leaders for conspiring to “advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence,” also prescribed an approach to national security matters that permitted worst-case scenarios to trump lack of evidence of probability or imminence. Unsatisfied with earlier iterations of the “clear and present danger” test, which the Dennis Court determined were not apposite because they did not deal with a “substantial threat to the safety of the community,” such as the existential crisis posed by Communism, the Court adopted Judge Learned Hand’s rule, crafted in the Court of Appeals. The rule provided that for cases involving free speech, courts “‘must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.’” Under this analysis, however, what the rule permitted was that the graver the danger or perceived harm, the lesser the probability of such harm required in order to uphold the government action. Thus the Dennis Court articulated an iteration of the clear and present danger test that operationalized cognitive errors such as probability neglect. Brandenburg, invoked by Breyer in dissent, seemingly overruled the Dennis test, holding unconstitutional the proscription of advocacy of the use of force unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Probability becomes a more significant concern at least under First Amendment analysis. Yet as Humanitarian Law Project suggests, a variant of the Dennis rule, or its psychological antecedents, is alive and well. The threat of catastrophic attack weighs heavily on justices, justifying, it would seem, government restrictions on civil liberties, notwithstanding a low or unidentified probability. 2. Special Needs Cases The Supreme Court’s special needs line of cases also evidences a general willingness on the part of courts to ignore calculations of probability or require specific evidence where the potential harm is great. For example, in Nat’l Treasury Employees Union v. Von Raab, the Supreme Court upheld 5-4 the United States Customs Service’s required urinalysis testing for all those seeking certain promotions or transfer to certain position in the service. Justice Kennedy explained that where “the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government’s goal.” Justice Scalia dissented, objecting to the lack of evidence that there was a high level of drug use or that such drug use presented a serious harm. Attributing the policy to only a “generalization” that drug use pervades all workplaces, Scalia indicated he would, however, accept simplification where “catastrophic social harm” is involved, and “no risk whatever is tolerable.” Thus we see in high risk contexts a judicial propensity to weight the harm heavily in disregard of evidence supporting the probability or imminence of that harm. Special needs cases seem to reify the “gravity of the evil” analysis of Dennis. How could the prevention of terrorism be anything but a special need that would render government efforts, however intrusive, reasonable? 3. Terrorism Hypotheticals The Supreme Court has also hypothesized in several cases that the threat of terrorism could demand deference to the political branches and diminish civil liberties protections. In City of Indianapolis v. Edmond, the Court struck down a suspicionless checkpoint intended to catch drug offenders as a violation of the Fourth Amendment because its primary purpose was crime control. Justice O’Connor, noted with approval, however, the Seventh Circuit’s assumption in its opinion below that an otherwise criminal objective would not preclude setting up a suspicionless checkpoint in an emergency situation such as “an imminent terrorist attack.” The Seventh Circuit’s full scenario involved “a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis,” leading the Indianapolis police to “block[ ] all the roads to the downtown area even though this would amount to stopping thousands of drivers without suspecting any one of them of criminal activity.” Judge Posner explained that suspicionless checks would not offend the Fourth Amendment because “[w]hen urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. The Constitution is not a suicide pact.” Posner’s hypothetical involved an imminent attack; the probability was therefore high. This is the proverbial ticking time bomb. The problem with the hypothetical is it writes in to the equation a level of high probability. What level of urgency is there if it is unclear where or when the terrorist attack may be perpetrated? Justice Souter answered this question five years later with his own revealing hypothetical. The Court held in Illinois v. Caballes that the use of a narcotics detecting dog outside of a car in connection with a lawful traffic stop did not violate the Fourth Amendment. Justice Souter dissented, contending the dog sniffing constituted an unauthorized search that was not justified. While insisting that dog sniffs should be treated as searches and subjected to traditional Fourth Amendment scrutiny, Souter offered a footnoted disquisition on the terrorism exception. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion. Suffice it to say here that what is a reasonable search depends in part on demonstrated risk. Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk. Souter’s discussion of reasonableness appears rooted in a definition of risk that focuses on the potential harm, but is not concerned with the probability of that harm. Although he references a “demonstrated risk,” that evidence of risk appears focused solely on the “destructive or deadly” outcome, not the likelihood. This calculus, which we as a society have seemed to accept as a commonplace, is deeply rooted in probability neglect. Imminence is presumed. The bomb is always ticking. 4. Post-9/11 Worst-Case Scenarios Since the 9/11 attacks some lower courts have employed risk analyses that implicitly and explicitly consider worst-case scenarios. A worst-case scenario is, by definition, an imagining of the gravest evil. These decisions, not unlike the Court’s hypotheticals or the Dennis test, are particularly susceptible to cognitive errors of probability neglect and the affect heuristic. In its first ever written decision, the Foreign Intelligence Surveillance Court of Review addressed a FISA court’s surveillance order which restricted law enforcement officials’ communications with intelligence officials regarding the surveillance and use of it for criminal prosecution. The court observed that while the threat may not be “dispositive,” it is “a crucial factor” in determining whether a search is reasonable. One can only imagine how crucial it was for this court. In the next sentence, the court speculated, “[o]ur case may well involve the most serious threat our country faces.” Again, the court’s apprehension of the potential harm “the gravity of the evil” appeared to overwhelm any other analysis of what was a reasonable search, including probability or imminence of an attack. In similar fashion, the Second Circuit upheld New York City’s random, suspicionless searches of peoples’ bags on the subway, explaining that where the danger of a terrorist attack was so great, “immediacy” and “a specific, extant threat” were not relevant under the special needs analysis. In another case, the Second Circuit upheld restrictions on political protesters at the Republican National Convention notwithstanding objections that the security risks were “unspecified” and “generic.” Instead of requiring a specific or immediate threat, the court stated that government limitations of speech could be justified on the basis of “managing potential risks,” “consideration of the worst-case scenario” and “possible security threats.” A variant of the worst-case scenario also figured prominently in at one D.C. Circuit judge’s evaluation of the standard of proof for determining a detainee at Guantanamo is a member of al Qaeda or associated forces. Addressing the possible release of a terrorism suspect, Judge Laurence Silberman explained that “unusual incentives and disincentives” affected judges in their decisions concerning habeas for Guantanamo detainees. In contrast to the usual criminal case, in which a “good judge” might overturn a conviction where evidence is lacking even if she were certain of the defendant’s guilt, the detainee case presented a different risk analysis. Silberman expanded: “When we are dealing with detainees, candor obliges me to admit that one cannot help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism. One does not have to be a “Posnerian”—a believer that virtually all law and regulation should be judged in accordance with a cost/benefit analysis—to recognize this uncomfortable fact.” Therefore, Silberman reasoned, a “preponderance of the evidence” standard would be too burdensome. He speculated that none of his colleagues would “vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter.” Judge Silberman may have been only speculating, but it offers a glimpse into how at least one judge, and surely some of his colleagues, undertakes risk analysis. Strikingly, Silberman not only focused on the worst-case scenario, but maintained that a lower burden of proof, lower than what the government advocated, was necessary, making it less likely the “gravity of the evil” could be “discounted by its improbability.” As we can see, in a post-9/11 world, a System 1 fear of terrorism and concomitant probability neglect might not be offset by System 2’s more deliberative faculties. As Kahneman has noted, where attitudes and beliefs are involved, which they assuredly are in the assessment of risk and related government responses, System 2 may instead function as an “apologist” or “endorser” of System 1 responses to terrorism. Thus in contemplating worst-case scenarios, judges may employ System 2 to reduce evidentiary requirements for government action intended to prevent terrorism.

#### Race and executive power are inevitably intertwined—war on terror presents a key opportunity for a judicial challenge – aff solves

**Joo 2** [Fall, 2002; Thomas W. Joo, Professor, University of California, Davis, School of Law (King Hall), “PRESUMED DISLOYAL: EXECUTIVE POWER, JUDICIAL DEFERENCE, AND THE CONSTRUCTION OF RACE BEFORE AND AFTER SEPTEMBER 11”, 34 Colum. Human Rights L. Rev. 1]

It is far from clear that the racially unbalanced compromises in civil liberties in the wake of September 11 will advance the fight against terrorism. Indeed, as of December 2002, the aggressive post-September 11 detentions of Arab and Muslim immigrants had not produced any significant breakthroughs in the investigation. n196 The categories of "Arab" and "Muslim" are simply too broad to narrow the list of suspects in any meaningful way. n197 As Arab American activist James Zogby put it, "If you're looking for a needle in a haystack, [\*42] adding hay isn't going to help." n198 Focusing on Muslim men of "Arab appearance" would not only remain too broad a category, it would exclude some of the most notorious accused terrorists apprehended since September 11: John Walker Lindh (a White American); Zaccarias Moussaoui (of Moroccan descent, born and raised in France); Richard Reid (a British citizen of West Indian and White ancestry); and Jose Padilla (a Latino American). n199 Furthermore, even if a man of Arab descent is relatively more likely to be a terrorist than a non-Arab, the likelihood that any given Arab man is a terrorist remains negligible. n200 Long-term, systematic reforms of airport security n201 and basic police work n202 are more likely than racial profiling to succeed in fighting terrorism. As the internment and the Lee case show, judicial review is not a panacea for racial profiling by law enforcement or the military. Judges may suffer from the same biases as executive agents, or from excessive deference to national security concerns. But judges have the opportunity for contemplation that military and law enforcement authorities often lack. Furthermore, judges, unlike executive agents, are expected to provide reasoned justifications for their decisions. Judges must perform searching and independent review, and the press, public, and legal commentators must demand it. Unfortunately, like past wars, the current "war on terrorism" is eroding independent judicial, political, and public review in the name of expediency without considering how it may endanger justice. [\*43] Not only have the Department of Justice practices and new USA PATRIOT Act powers expanded the Executive's discretionary authority, the shroud of secrecy over post-September 11 detentions has made it difficult for courts or the public to tell whether law enforcement is observing the bounds of its authority. n203 For example, the federal government ordered New Jersey county jails holding INS detainees to withhold the detainees' names, the attorneys' names, the detention dates, the locations of detainees' arrests, and the locations where they were held. n204 Shortly after the September 11 terrorist attacks, Chief Immigration Judge Michael Creppy sent a memorandum instructing all immigration judges to hear certain immigration cases in secret when so directed by the Attorney General. n205 In "special interest" cases so designated by the Attorney General, immigration judges (who are officers of the Executive and not Article III judges) must hold separate hearings closed to all visitors, family members, and the press. n206 The memo prohibits immigration judges from "disclosing any information about the case to anyone outside the Immigration Court." n207 Immigration judges are prohibited from even "confirming or denying whether [a] [special interest case] is on the docket or scheduled for a hearing." n208 [\*44] Despite history's repeated lessons about the danger of excessive deference to the Executive, unquestioning unity with the President is a recurring and unsettling theme of the "war on terrorism." The current Administration, like most presidential administrations, seeks to expand its power and defends it jealously against oversight by the other branches. n209 The secrecy and expansion of executive power in the war on terrorism are consistent with a more general program to expand executive power that predates September 11. n210 For example, beginning in June 2001, Congress requested records of Vice President Cheney's Energy Task Force. n211 Despite judicial orders, Cheney refused to produce the records, and continued to do so after the Enron scandal increased concerns about the task force's activities. n212 Since September 11, the Administration has redoubled its efforts to expand its power, and has encountered much less resistance. For example, in quickly passing the USA PATRIOT Act, Congress gave the Administration much of the authority it requested and used little independent judgment. n213 The USA PATRIOT Act did not create a study commission to evaluate its effectiveness. n214 Furthermore, although the USA PATRIOT Act requires the collection of data regarding complaints of racial profiling and other violations of civil liberties, the Department of Justice itself is to collect the data [\*45] without independent oversight. n215 In the summer and fall of 2002, the Administration sought further expansion of its power by insisting it did not need congressional authority to take military action against Iraq. n216 No showdown with the legislature was necessary, however. In October 2002, Congress readily approved a resolution giving the Administration broad authority to use military force, requiring only that the White House inform Congress within forty-eight hours of initiating action. n217 In some instances, the theme of unity with the Executive has been twisted into an attempt to silence criticism. In testimony before the Senate Judiciary Committee, Attorney General John Ashcroft claimed that his critics "aid terrorists" and "give ammunition to America's enemies." n218 Similarly, when Democratic Senator Tom Daschle stated that the White House would have to justify requests for congressional funding approval by clearly explaining the goals of the "war on terrorism," Republican Senator Trent Lott responded: "How dare Senator Daschle criticize President Bush while we are fighting our war on terrorism?" n219 Uncritical deference to the executive branch is a threat to justice. Compromises in principle may seem justified by immediate purposes, but create unjust results and lasting dangerous precedents. In Ex parte Quirin, n220 for example, the Supreme Court deviated from its normal procedures to quickly uphold the government's use of military tribunals during World War II. The defendants were a group of would-be saboteurs from Germany, two of whom were U.S. citizens. After a special session and less than twenty-four hours of deliberation, the Court rejected the defendants' constitutional objections with little explanation. n221 The Court promised to provide a full opinion later. During deliberations, Justice Felix Frankfurter [\*46] encouraged his fellow Justices to avoid technical legal distinctions and issue a unanimous opinion in order to show support for the war effort. n222 Three months passed before the Court issued its unanimous opinion holding that that the trial did not violate the Constitution's guarantee of due process. By that time, six of the eight defendants (including one U.S. citizen) had already been executed, and President Franklin D. Roosevelt had ordered the record of the case sealed for the remainder of the war. n223 At least some of the Justices who participated in the Quirin case came to regret their hasty support of the military. According to Justice William O. Douglas, Quirin "indicated ... to all of us that it is extremely undesirable to announce a decision without an opinion accompanying it. Because once the search for the grounds ... is made, sometimes those grounds crumble." n224 VI. Conclusion The historical treatment of Other non-Whites in American law give important insights into the Wen Ho Lee case and the war on terrorism. History shows that the "Oriental" racial category has been constructed to be synonymous with disloyalty. White Americans are presumed to be loyal to America unless there is proof to the contrary. For "Oriental" Americans, however, the presumption runs in the opposite direction. While the Bellows Report found no "smoking gun" proving explicit racial animus in the Lee case, it also failed to offer an explanation for why the investigation focused on Lee to the exclusion of so many other potential suspects. It is, of course, impossible to conclusively disprove that racial assumptions influenced the government's decision to focus on Lee. But the court did not even ask the government to offer an explanation until the case had dragged on for years, at which point the government abruptly dropped its case. The racial category of the "Arab" has historically been less familiar to most Americans than that of the "Oriental." But the [\*47] "Arab" racial construct has rapidly taken center stage in the wake of September 11. As in the internment and in the Wen Ho Lee case, many Americans cast race-and religion-based suspicion and blame on Muslims and persons of Arab descent, and even on members of other groups mistaken for Arabs or Muslims. Law enforcement's broad discretion to apply race-neutral factors and general immigration regulation poses special dangers to those believed to "look like terrorists." The absence of explicitly race-based laws makes it far more difficult to determine whether racial factors are driving government action. Of course, the fact that racial assumptions are accepted as "common sense" does not mean that they underlie every government decision that affects people of color. But it does mean that they often escape notice. Courts and the public must acknowledge the subtle and pervasive nature of racial bias and be aware that it can exist even in the absence of overt racial hostility. Race and executive power are closely intertwined in the current national security crisis, as they have been in past crises, real and perceived. Excessive deference to the Executive may legitimate racial reasoning, and racial reasoning may legitimate expansion of executive power. The judiciary and the public must be wary of such developments and their potential for lasting negative effects on law and democracy.

### 1ac risk

Contention 3: The Looking Glass

#### The dominance of “any risk logic” that pervades judicial decision-making is a direct parallel to the debate community: Don’t assume every part of their DA is true – instead you should have inherent skepticism

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**we do not endorse this author’s intent of ableist language and apologize for it**

(CNN) -- At a security conference recently, the moderator asked the panel of distinguished cybersecurity leaders what their nightmare scenario was. The answers were the predictable array of large-scale attacks: against our communications infrastructure, against the power grid, against the financial system, in combination with a physical attack. I didn't get to give my answer until the afternoon, which was: "My nightmare scenario is that people keep talking about their nightmare scenarios." There's a certain ~~blindness~~ that comes from worst-case thinking. An extension of the precautionary principle, it involves imagining the worst possible outcome and then acting as if it were a certainty. It substitutes imagination for thinking, speculation for risk analysis and fear for reason. It fosters powerlessness and vulnerability and magnifies social ~~paralysis~~. And it makes us more vulnerable to the effects of terrorism. Worst-case thinking means generally bad decision making for several reasons. First, it's only half of the cost-benefit equation. Every decision has costs and benefits, risks and rewards. By speculating about what can possibly go wrong, and then acting as if that is likely to happen, worst-case thinking focuses only on the extreme but improbable risks and does a poor job at assessing outcomes. Second, it's based on flawed logic. It begs the question by assuming that a proponent of an action must prove that the nightmare scenario is impossible. Third, it can be used to support any position or its opposite. If we build a nuclear power plant, it could melt down. If we don't build it, we will run short of power and society will collapse into anarchy. If we allow flights near Iceland's volcanic ash, planes will crash and people will die. If we don't, organs won't arrive in time for transplant operations and people will die. If we don't invade Iraq, Saddam Hussein might use the nuclear weapons he might have. If we do, we might destabilize the Middle East, leading to widespread violence and death. Of course, not all fears are equal. Those that we tend to exaggerate are more easily justified by worst-case thinking. So terrorism fears trump privacy fears, and almost everything else; technology is hard to understand and therefore scary; nuclear weapons are worse than conventional weapons; our children need to be protected at all costs; and annihilating the planet is bad. Basically, any fear that would make a good movie plot is amenable to worst-case thinking. Fourth and finally, worst-case thinking validates ignorance. Instead of focusing on what we know, it focuses on what we don't know -- and what we can imagine. Remember Defense Secretary Donald Rumsfeld's quote? "Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns -- the ones we don't know we don't know." And this: "the absence of evidence is not evidence of absence." Ignorance isn't a cause for doubt; when you can fill that ignorance with imagination, it can be a call to action. Even worse, it can lead to hasty and dangerous acts. You can't wait for a smoking gun, so you act as if the gun is about to go off. Rather than making us safer, worst-case thinking has the potential to cause dangerous escalation. The new undercurrent in this is that our society no longer has the ability to calculate probabilities. Risk assessment is devalued. Probabilistic thinking is repudiated in favor of "possibilistic thinking": Since we can't know what's likely to go wrong, let's speculate about what can possibly go wrong. Worst-case thinking leads to bad decisions, bad systems design, and bad security. And we all have direct experience with its effects: airline security and the TSA, which we make fun of when we're not appalled that they're harassing 93-year-old women or keeping first-graders off airplanes. You can't be too careful! Actually, you can. You can refuse to fly because of the possibility of plane crashes. You can lock your children in the house because of the possibility of child predators. You can eschew all contact with people because of the possibility of hurt. Steven Hawking wants to avoid trying to communicate with aliens because they might be hostile; does he want to turn off all the planet's television broadcasts because they're radiating into space? It isn't hard to parody worst-case thinking, and at its extreme it's a psychological condition. Frank Furedi, a sociology professor at the University of Kent, writes: "Worst-case thinking encourages society to adopt fear as one of the dominant principles around which the public, the government and institutions should organize their life. It institutionalizes insecurity and fosters a mood of confusion and powerlessness. Through popularizing the belief that worst cases are normal, it incites people to feel defenseless and vulnerable to a wide range of future threats." Even worse, it plays directly into the hands of terrorists, creating a population that is easily terrorized -- even by failed terrorist attacks like the Christmas Day underwear bomber and the Times Square SUV bomber. When someone is proposing a change, the onus should be on them to justify it over the status quo. But worst case thinking is a way of looking at the world that exaggerates the rare and unusual and gives the rare much more credence than it deserves. It isn't really a principle; it's a cheap trick to justify what you already believe. It lets lazy or biased people make what seem to be cogent arguments without understanding the whole issue. And when people don't need to refute counterarguments, there's no point in listening to them.

#### This undermines all decisionmaking and makes robust national security policymaking impossible by substituting cultural anxieties for real analysis

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Students of regulatory policy know of the precautionary principle, an idea about risk favored by advocates of various health and environmental regulations. The concept can be stated as follows: Whenever some activity poses a possible risk to health, safety, or the environment, the government should take preventive action. Government intervention is warranted even if the evidence that the activity is harmful is uncertain and the cost of preventive action is high. In Laws of the Fear, University of Chicago law professor Cass Sunstein demonstrates that the precautionary principle is incoherent. The principle fails to acknowledge that decisions about risk, whether they regulate health hazards or arm against a state, cannot deal with one risk alone. Because resources are always limited, efforts to head off a particular danger take resources away from other government programs and from private investment that also reduce risk. Also, because of unintended consequences, actions that prevent one danger can create new ones. If we took the precautionary principle seriously, we would have to be cautious about all the dangers a particular decision touches. That includes the danger of doing nothing. Taken literally, the principle prevents all action and inaction, making it useless. States often ignore this logical failure and apply the precautionary principle to particular hazards. Sunstein argues that in many of those cases, precautionary action will be more harmful to society than running the risk. Those are cases where the danger is small and the cost of prevention is large. The use of asbestos as building insulation is an example. When contained in walls, asbestos is harmless. If the materials containing it deteriorate, however, the asbestos might be inhaled or ingested and, in very rare cases, could cause respiratory diseases including lung cancer. The precautionary principle can be evoked by those demanding the material’s removal. But removal creates new cancer risks and its cost is enormous. Whoever bears it, that cost will take money away from other risk-reducing uses, be it savings, health care, or education. Removal harms society more than leaving the asbestos in place. Another example is genetically modified foods. European regulators argue that the uncertain risks of genetically modified crops justify limiting trade flows and the resulting higher prices on consumers. They exchange an uncertain risk for a sure one. The illogic of the precautionary principle does not mean that states should not regulate against uncertain dangers. The point is that dangers should be evaluated by cost-benefit analysis. This means that decisions about risk should consider the cost that preventive action would avert, the likelihood that preventive action will work, and the action’s cost. Decisionmakers should also consider, as Sunstein notes, not just total costs and benefits, but the equity of their distribution. The problem with cost-benefit analysis is that it relies on unavailable information about the magnitude and likelihood of the harm. Everyone would agree to head off disaster at low cost and to avoid costly defenses against tiny dangers. Everyone agrees that research is helpful to getting policy right. But some degree of uncertainty is hard to extinguish. You never know, some will say, what the true cost is of asbestos as insulation . If science is never complete, cost-benefit analysis is impossible. The problem with this critique of cost-benefit analysis is that its virtue does not depend on getting rid of uncertainty. Analysts use cost-benefit analysis to get all the potential costs into the debate and force recognition of choice. They show that the pursuit of perfect safety, of chasing a danger out of existence, creates other dangers. This point shows why debate about the precautionary principle is often phony. Inherent uncertainty means that the decisions about risk are likely to be made by some criteria other than a principle about risk. That criterion will be a prior political preference — in the case of genetically modified foods, probably protection of domestic producers. Critics of the precautionary principle charge that it is a justification for regulation, not its cause — that the principle’s defenders care more about the environment than other public goods. Defenders of the principle claim that cost-benefit analysis serves corporate bottom lines. They are both part right. Fights about regulating risks are about which risks to confront and which to accept, not about how much risk to accept. All government policies ultimately reduce one risk or another. Politics is competition between risk preferences. Societies are not consistent in their approach to dangers. They are precautionary about certain risks and acceptant of others. Americans are less fearful — less precautionary — than Europeans about global warming and genetically modified foods. We are more cautious about secondhand smoke, drug approval, and nuclear proliferation. The differences cannot be justified by objective appeals to science. Scholars offer various explanations for the origins of those preferences. In Risk and Culture, Mary Douglas and Aaron Wildavsky argued that culture causes risk perception. They claimed that groups are organized by preferences about what dangers ought to be confronted collectively and that the rise of new political coalitions brings new priorities about danger. University of Oregon psychologist Paul Slovic points to people’s psychological tendencies to react to certain risks — such as those that are novel or involve a perceived loss of control — and the way those perceptions spread by social interaction and media. mit’s Harvey Sapolsky argues that risk perception results from the balance of the various special interests that benefit from society either confronting or running the risk. The groups compete to guide public opinion about danger. The variance in the balance of interest groups’ power across countries explains their variant reaction to risks. Whatever their origin, political preferences drive demand for regulation of risks. Statements about the certainty or uncertainty of science are often disguises for those preferences. This discussion about the precautionary principle applies to national security dangers in two ways. First, American national security policy is explicitly precautionary and is thus subject to the same problems as the application of the precautionary principle in other policy areas. Second, the precautionary reasoning advanced to defend our security policies hides political motives. As with the regulatory arena, cost-benefit analysis can help expose choices among risks that advocates of precaution shroud with claims of uncertainty. Some will argue that security dangers are so distinct from health and safety risks that the comparison is useless. Certainly the two sorts of risk are different. Politics produces national security dangers, making them more uncertain than environmental risks that result from physical phenomena. Moreover, national security dangers — conquest, mass death, economic devastation — are generally catastrophic and sudden. Some health and safety risks share that quality, but in most cases they exact a creeping toll. The unique attributes of security dangers do not remove the danger of precautionary reasoning. True, uncertain dangers of potentially great and irreversible consequence merit extensive preventive efforts. That is why states have traditionally devoted large portions of their budgets to defense. But high uncertainty and potential consequences do not mean that states can ignore the costs of defenses. Moreover, national security dangers are not always as uncertain and dangerous as we hear.

#### Moreover, the race to high-magnitude impacts promotes illogical decisionmaking and limits out meaningful discussion of structural violence, racism, and gendered violent. The inevitable answer to this argument will be: but you have internal links too! Yes, obviously, but the path to solving habeas trials is fraught with several magnitudes of fewer assumptions than the path to nuclear war – basic math proves.

**Cohn 13** [Nate, debate coach at Georgia, politics writer for the New York Times, Kyle Deming’s roommate, Nov 24, “Improving the Norms and Practices of Policy Debate”, <http://www.cedadebate.org/forum/index.php?action=printpage;topic=5416.0>]

The fact that policy debate is wildly out of touch—the fact that we are “a bunch of white folks talking about nuclear war”—is a damning indictment of nearly every coach in this activity. It’s a serious indictment of the successful policy debate coaches, who have been content to continue a pedagogically unsound game, so long as they keep winning. It’s a serious indictment of policy debate’s discontents who chose to disengage.¶ That’s not to say there hasn’t been any effort to challenge modern policy debate on its own terms—just that they’ve mainly come from the middle of the bracket and weren’t very successful, focusing on morality arguments and various “predictions bad” claims to outweigh.¶ Judges were receptive to the sentiment that disads were unrealistic, but negative claims to specificity always triumphed over generic epistemological questions or arguments about why “predictions fail.” The affirmative rarely introduced substantive responses to the disadvantage, rarely read impact defense. All considered, the negative generally won a significant risk that the plan resulted in nuclear war. Once that was true, it was basically impossible to win that some moral obligation outweighed the (dare I say?) obligation to avoid a meaningful risk of extinction.¶ There were other problems. Many of the small affirmatives were unstrategic—teams rarely had solvency deficits to generic counterplans. It was already basically impossible to win that some morality argument outweighed extinction; it was totally untenable to win that a moral obligation outweighed a meaningful risk of extinction; it made even less sense if the counterplan solved most of the morality argument. The combined effect was devastating: As these debates are currently argued and judged, I suspect that the negative would win my ballot more than 95 percent of the time in a debate between two teams of equal ability.¶ But even if a “soft left” team did better—especially by making solvency deficits and responding to the specifics of the disadvantage—I still think they would struggle. They could compete at the highest levels, but, in most debates, judges would still assess a small, but meaningful risk of a large scale conflict, including nuclear war and extinction. The risk would be small, but the “magnitude” of the impact would often be enough to outweigh a higher probability, smaller impact. Or put differently: policy debate still wouldn’t be replicating a real world policy assessment, teams reading small affirmatives would still be at a real disadvantage with respect to reality. .¶ Why? Oddly, this is the unreasonable result of a reasonable part of debate: the burden of refutation or rejoinder, the responsibility of debaters to “beat” arguments. If I introduce an argument, it starts out at 100 percent—you then have to disprove it. That sounds like a pretty good idea in principle, right? Well, I think so too. But it’s really tough to refute something down to “zero” percent—a team would need to completely and totally refute an argument. That’s obviously tough to do, especially since the other team is usually going to have some decent arguments and pretty good cards defending each component of their disadvantage—even the ridiculous parts. So one of the most fundamental assumptions about debate all but ensures a meaningful risk of nearly any argument—even extremely low-probability, high magnitude impacts, sufficient to outweigh systemic impacts.¶ There’s another even more subtle element of debate practice at play. Traditionally, the 2AC might introduce 8 or 9 cards against a disadvantage, like “non-unique, no-link, no-impact,” and then go for one and two. Yet in reality, disadvantages are underpinned by dozens or perhaps hundreds of discrete assumptions, each of which could be contested. By the end of the 2AR, only a handful are under scrutiny; the majority of the disadvantage is conceded, and it’s tough to bring the one or two scrutinized components down to “zero.”¶ And then there’s a bad understanding of probability. If the affirmative questions four or five elements of the disadvantage, but the negative was still “clearly ahead” on all five elements, most judges would assess that the negative was “clearly ahead” on the disadvantage. In reality, the risk of the disadvantage has been reduced considerably. If there was, say, an 80 percent chance that immigration reform would pass, an 80 percent chance that political capital was key, an 80 percent chance that the plan drained a sufficient amount of capital, an 80 percent chance that immigration reform was necessary to prevent another recession, and an 80 percent chance that another recession would cause a nuclear war (lol), then there’s a 32 percent chance that the disadvantage caused nuclear war.¶ I think these issues can be overcome. First, I think teams can deal with the “burden of refutation” by focusing on the “burden of proof,” which allows a team to mitigate an argument before directly contradicting its content.¶ Here’s how I’d look at it: modern policy debate has assumed that arguments start out at “100 percent” until directly refuted. But few, if any, arguments are supported by evidence consistent with “100 percent.” Most cards don’t make definitive claims. Even when they do, they’re not supported by definitive evidence—and any reasonable person should assume there’s at least some uncertainty on matters other than few true facts, like 2+2=4.¶ Take Georgetown’s immigration uniqueness evidence from Harvard. It says there “may be a window” for immigration. So, based on the negative’s evidence, what are the odds that immigration reform will pass? Far less than 50 percent, if you ask me. That’s not always true for every card in the 1NC, but sometimes it’s even worse—like the impact card, which is usually a long string of “coulds.” If you apply this very basic level of analysis to each element of a disadvantage, and correctly explain math (.4\*.4\*.4\*.4\*.4=.01024), the risk of the disadvantage starts at a very low level, even before the affirmative offers a direct response.¶ Debaters should also argue that the negative hasn’t introduced any evidence at all to defend a long list of unmentioned elements in the “internal link chain.” The absence of evidence to defend the argument that, say, “recession causes depression,” may not eliminate the disadvantage, but it does raise uncertainty—and it doesn’t take too many additional sources of uncertainty to reduce the probability of the disadvantage to effectively zero—sort of the static, background noise of prediction.¶ Now, I do think it would be nice if a good debate team would actually do the work—talk about what the cards say, talk about the unmentioned steps—but I think debaters can make these observations at a meta-level (your evidence isn’t certain, lots of undefended elements) and successfully reduce the risk of a nuclear war or extinction to something indistinguishable from zero. It would not be a factor in my decision.¶ Based on my conversations with other policy judges, it may be possible to pull it off with even less work. They might be willing to summarily disregard “absurd” arguments, like politics disadvantages, on the grounds that it’s patently unrealistic, that we know the typical burden of rejoinder yields unrealistic scenarios, and that judges should assess debates in ways that produce realistic assessments. I don’t think this is too different from elements of Jonah Feldman’s old philosophy, where he basically said “when I assessed 40 percent last year, it’s 10 percent now.”¶ Honestly, I was surprised that the few judges I talked to were so amenable to this argument. For me, just saying “it’s absurd, and you know it” wouldn’t be enough against an argument in which the other team invested considerable time. The more developed argument about accurate risk assessment would be more convincing, but I still think it would be vulnerable to a typical defense of the burden of rejoinder.¶ To be blunt: I want debaters to learn why a disadvantage is absurd, not just make assertions that conform to their preexisting notions of what’s realistic and what’s not. And perhaps more importantly for this discussion, I could not coach a team to rely exclusively on this argument—I’m not convinced that enough judges are willing to discount a disadvantage on “it’s absurd.” Nonetheless, I think this is a useful “frame” that should preface a following, more robust explanation of why the risk of the disadvantage is basically zero—even before a substantive response is offered.¶ There are other, broad genres of argument that can contest the substance of the negative’s argument. There are serious methodological indictments of the various forms of knowledge production, from journalistic reporting to think tanks to quantitative social science. Many of our most strongly worded cards come from people giving opinions, for which they offer very little data or evidence. And even when “qualified” people are giving predictions, there’s a great case to be extremely skeptical without real evidence backing it up. The world is a complicated place, predictions are hard, and most people are wrong. And again, this is before contesting the substance of the negative’s argument(!)—if deemed necessary.¶ So, in my view, the low probability scenario is waiting to be eliminated from debate, basically as soon as a capable team tries to do it.¶ That would open to the door to all of the arguments, previously excluded, de facto, by the prevalence of nuclear war impacts. It’s been tough to talk about racism or gender violence, since modest measures to mitigate these impacts have a difficult time outweighing a nuclear war. It’s been tough to discuss ethical policy making, since it’s hard to argue that any commitment to philosophical or ethical purity should apply in the face of an existential risk. It’s been tough to introduce unconventional forms of evidence, since they can’t really address the probability of nuclear war.¶ Yes, the affirmative would still need to debate counterplans. Sometimes, I get the impression that’s a point of controversy, too. Quite frankly, I think counterplans are good. I don’t think the negative should only be forced to exclusively debate about harms. There’s no way we can have a fair topic about, say, prison reform, if the negative can only defend the status quo. That’s especially true if you don’t want to debate the political cost of the action—which, in many instances, is the reason why the government hasn’t made obvious policy changes.¶ Yet at the same time, I think it’s probably time to retire a few genres of generic counterplans. I think it’s time to retire the “alternative actor” counterplan, which isn’t a logical response to the affirmative.

#### The impact is delinking the debate community from academia – rethinking how you evaluate risk assessment is necessary to avoid the destruction of the community

**Hester 13** [Mike, dean at West Georgia, an extremely successful and influential policy debate coach at University of West Georgia, “Mike Hester: USA Policy Debate in a "Hot Mess"”, Nov 22, 2013]

To whom it may concern,¶ CEDA-NDT Debate is a hot mess right now. There are so many things wrong, it can sometimes seem like they're all related. Maybe they are (reference Homer Simpson's "one big ball of lies" explanation to Marge), but a delineation may still provide some guidance as to what we can change, what we may have to accept, and where (if anywhere) we may go from here...¶ the foundation¶ We no longer have one, and haven't for more than two decades. Fewer and fewer debate coaches are communication scholars, which is fine because Communication Departments don't consider us anything more than the bastard cousins who show up at the family reunion piss-drunk and demanding more potato salad. Our activity long ago (40 years?) lost any resemblance to a public speaking event attracting outside audiences. The problem is we vacated that academic space without being able to find a home anywhere else. Despite the pious assumptions of some with "policy" in mind, we are not a legitimate "research" community of scholars. The "portable skills" we currently engrain in our students via practice are: all sources are equivalent, no need for qualifications; "quoting" a source simply means underlining ANY words found ANYWHERE in the document, context and intent are irrelevant; and we are the only group outside of Faux News that believes one's argument is improved by taking every point of logic to its most absurd extreme. Simply put, 99.9% of the speech docs produced in debates would receive no better than a C (more likely F) in any upper division undergraduate research-based class. Comically, we are the public speaking research activity that is atrocious at oral persuasion and woefully in violation of any standard research practices. But this letter is not intended to bury Debate, even though it's hard to praise it in its current state. Before any peace treaty ending the Paradigm Wars can be signed and ratified, an honest appraisal of where Debate fits in the Academy is necessary.

### 2ac drone shift

#### Obama won’t use drones if he’s no longer forced too---sustainable detention and allies fix this

Robert Chesney 11, Charles I. Francis Professor in Law at the UT School of Law as well as a non-resident Senior Fellow at Brookings, "Examining the Evidence of a Detention-Drone Strike Tradeoff", October 17, www.lawfareblog.com/2011/10/examining-the-evidence-of-a-detention-drone-strike-tradeoff/

Yesterday Jack linked to this piece by Noah Feldman, which among other things advances the argument that the Obama administration has resorted to drone strikes at least in part in order to avoid having to grapple with the legal and political problems associated with military detention:¶ Guantanamo is still open, in part because Congress put obstacles in the way. Instead of detaining new terror suspects there, however, Obama vastly expanded the tactic of targeting them, with eight times more drone strikes in his first year than in all of Bush’s time in office.¶ Is there truly a detention-drone strike tradeoff, such that the Obama administration favors killing rather than capturing? As an initial matter, the numbers quoted above aren’t correct according to the New America Foundation database of drone strikes in Pakistan, 2008 saw a total of 33 strikes, while in 2009 there were 53 (51 subsequent to President Obama’s inauguration). Of course, you can recapture something close to the same point conveyed in the quote by looking instead to the full number of strikes conducted under Bush and Obama, respectively. There were relatively few drone strikes prior to 2008, after all, while the numbers jump to 118 for 2010 and at least 60 this year (plus an emerging Yemen drone strike campaign). But what does all this really prove?¶ Not much, I think. Most if not all of the difference in drone strike rates can be accounted for by specific policy decisions relating to the quantity of drones available for these missions, the locations in Pakistan where drones have been permitted to operate, and most notably whether drone strikes were conditioned on obtaining Pakistani permission. Here is how I summarize the matter in my forthcoming article on the legal consequences of the convergence of military and intelligence activities:¶ According to an analysis published by the New America Foundation, two more drone strikes in Pakistan’s FATA region followed in 2005, with at least two more in 2006, four more in 2007, and four more in the first half of 2008.[1] The pattern was halting at best. Yet that soon changed. U.S. policy up to that point had been to obtain Pakistan’s consent for strikes,[2] and toward that end to provide the Pakistani government with advance notification of them.[3] But intelligence suggested that on some occasions “the Pakistanis would delay planned strikes in order to warn al Qaeda and the Afghan Taliban, whose fighters would then disperse.”[4] A former official explained that in this environment, it was rare to get permission and not have the target slip away: “If you had to ask for permission, you got one of three answers: either ‘No,’ or ‘We’re thinking about it,’ or ‘Oops, where did the target go?”[5]¶ Declaring that he’d “had enough,” Bush in the summer of 2008 “ordered stepped-up Predator drone strikes on al Qaeda leaders and specific camps,” and specified that Pakistani officials going forward should receive only “‘concurrent notification’…meaning they learned of a strike as it was underway or, just to be sure, a few minutes after.”[6] Pakistani permission no longer was required.[7] ¶ The results were dramatic. The CIA conducted dozens of strikes in Pakistan over the remainder of 2008, vastly exceeding the number of strikes over the prior four years combined.[8] That pace continued in 2009, which eventually saw a total of 53 strikes.[9] And then, in 2010, the rate more than doubled, with 188 attacks (followed by 56 more as of late August 2011).[10] The further acceleration in 2010 appears to stem at least in part from a meeting in October 2009 during which President Obama granted a CIA request both for more drones and for permission to extend drone operations into areas of Pakistan’s FATA that previously had been off limits or at least discouraged.[11] ¶ There is an additional reason to doubt that the number of drone strikes tells us much about a potential detention/targeting tradeoff: most of these strikes involved circumstances in which there was no feasible option for capturing the target. These strikes are concentrated in the FATA region, after all. ¶ Having said all that: it does not follow that there is no detention-targeting tradeoff at work. I’m just saying that drone strikes in the FATA typically should not be understood in that way (though there might be limited exceptions where a capture raid could have been feasible). Where else to look, then, for evidence of a detention/targeting tradeoff?¶ Bear in mind that it is not as if we can simply assume that the same number of targets emerge in the same locations and circumstances each year, enabling an apples-to-apples comparison. But set that aside.¶ First, consider locations that (i) are outside Afghanistan (since we obviously still do conduct detention ops for new captures there) and (ii) entail host-state government control over the relevant territory plus a willingness either to enable us to conduct our own ops on their territory or to simply effectuate captures themselves and then turn the person(s) over to us. This is how most GTMO detainees captured outside Afghanistan ended up at GTMO. Think Bosnia with respect to the Boumediene petitioners, Pakistan’s non-FATA regions, and a variety of African and Asian states where such conditions obtained in years past. In such locations, we seem to be using neither drones nor detention. Rather, we either are relying on host-state intervention or we are limiting ourselves to surveillance. Very hard to know how much of each might be going on, of course. If it is occurring often, moreover, it might reflect a decline in host-state willingness to cooperate with us (in light of increased domestic and diplomatic pressure from being seen to be responsible for funneling someone into our hands, and the backdrop understanding that, in the age of wikileaks, we simply can’t promise credibly that such cooperation will be kept secret). In any event, this tradeoff is not about detention versus targeting, but something much more complex and difficult to measure.

#### Plan’s legal path for detention solves drone shift

Craig Whitlock 13, Washington Post, "Renditions continue under Obama, despite due-process concerns", January 1, articles.washingtonpost.com/2013-01-01/world/36323571\_1\_obama-administration-interrogation-drone-strikes

The three European men with Somali roots were arrested on a murky pretext in August as they passed through the small African country of Djibouti. But the reason soon became clear when they were visited in their jail cells by a succession of American interrogators.¶ U.S. agents accused the men — two of them Swedes, the other a longtime resident of Britain — of supporting al-Shabab, an Islamist militia in Somalia that Washington considers a terrorist group. Two months after their arrest, the prisoners were secretly indicted by a federal grand jury in New York, then clandestinely taken into custody by the FBI and flown to the United States to face trial.¶ The secret arrests and detentions came to light Dec. 21 when the suspects made a brief appearance in a Brooklyn courtroom.¶ The men are the latest example of how the Obama administration has embraced rendition — the practice of holding and interrogating terrorism suspects in other countries without due process — despite widespread condemnation of the tactic in the years after the Sept. 11, 2001, attacks.¶ Renditions are taking on renewed significance because the administration and Congress have not reached agreement on a consistent legal pathway for apprehending terrorism suspects overseas and bringing them to justice.¶ Congress has thwarted President Obama’s pledge to close the military prison at Guantanamo Bay, Cuba, and has created barriers against trying al-Qaeda suspects in civilian courts, including new restrictions in a defense authorization bill passed last month. The White House, meanwhile, has resisted lawmakers’ efforts to hold suspects in military custody and try them before military commissions.¶ The impasse and lack of detention options, critics say, have led to a de facto policy under which the administration finds it easier to kill terrorism suspects, a key reason for the surge of U.S. drone strikes in Pakistan, Yemen and Somalia. Renditions, though controversial and complex, represent one of the few alternatives.

#### Attempts to impose a rational world order on the international system produces a system of naturalized violence and warfare

Burke 7 [Anthony, Senior Lecturer in International Relations at the University of New South Wales, Sydney, Johns Hopkins University Press, Ontologies of War: Violence, Existence and Reason, 2007, http://muse.jhu.edu/journals/theory\_and\_event/v010/10.2burke.html]

The epistemology of violence I describe here (strategic science and foreign policy doctrine) claims positivistic clarity about techniques of military and geopolitical action which use force and coercion to achieve a desired end, an end that is supplied by the ontological claim to national existence, security, or order. However in practice, technique quickly passes into ontology. This it does in two ways. First, instrumental violence is married to an ontology of insecure national existence which itself admits no questioning. The nation and its identity are known and essential, prior to any conflict, and the resort to violence becomes an equally essential predicate of its perpetuation. In this way knowledge-as-strategy claims, in a positivistic fashion, to achieve a calculability of effects (power) for an ultimate purpose (securing being) that it must always assume. Second, strategy as a technique not merely becomes an instrument of state power but ontologises itself in a technological image of 'man' as a maker and user of things, including other humans, which have no essence or integrity outside their value as objects. In Heidegger's terms, technology becomes being; epistemology immediately becomes technique, immediately being. This combination could be seen in the aftermath of the 2006 Lebanon war, whose obvious strategic failure for Israelis generated fierce attacks on the army and political leadership and forced the resignation of the IDF chief of staff. Yet in its wake neither ontology was rethought. Consider how a reserve soldier, while on brigade-sized manoeuvres in the Golan Heights in early 2007, was quoted as saying: 'we are ready for the next war'. Uri Avnery quoted Israeli commentators explaining the rationale for such a war as being to 'eradicate the shame and restore to the army the "deterrent power" that was lost on the battlefields of that unfortunate war'. In 'Israeli public discourse', he remarked, 'the next war is seen as a natural phenomenon, like tomorrow's sunrise.' The danger obviously raised here is that these dual ontologies of war link being, means, events and decisions into a single, unbroken chain whose very process of construction cannot be examined. As is clear in the work of Carl Schmitt, being implies action, the action that is war. This chain is also obviously at work in the U.S. neoconservative doctrine that argues, as Bush did in his 2002 West Point speech, that 'the only path to safety is the path of action', which begs the question of whether strategic practice and theory can be detached from strong ontologies of the insecure nation-state. This is the direction taken by much realist analysis critical of Israel and the Bush administration's 'war on terror' Reframing such concerns in Foucauldian terms, we could argue that obsessive ontological commitments have led to especially disturbing 'problematizations' of truth. However such rationalist critiques rely on a one-sided interpretation of Clausewitz that seeks to disentangle strategic from existential reason, and to open up choice in that way. However without interrogating more deeply how they form a conceptual harmony in Clausewitz's thought -- and thus in our dominant understandings of politics and war -- tragically violent 'choices' will continue to be made The essay concludes by pondering a normative problem that arises out of its analysis: if the divisive ontology of the national security state and the violent and instrumental vision of 'enframing' have, as Heidegger suggests, come to define being and drive 'out every other possibility of revealing being', how can they be escaped? How can other choices and alternatives be found and enacted? How is there any scope for agency and resistance in the face of them? Their social and discursive power -- one that aims to take up the entire space of the political -- needs to be respected and understood. However, we are far from powerless in the face of them. The need is to critique dominant images of political being and dominant ways of securing that being at the same time, and to act and choose such that we bring into the world a more sustainable, peaceful and non-violent global rule of the political.

### 2ac executive counterplan

#### Self restraint mechanism fails—executive can’t internalize costs to future actions—ensures racism

Gott 5, Professor of International Studies

[01/01/05, Gil Gott is a Professor of International Studies at DePaul University, “The Devil We Know: Racial Subordination and National Security Law” Villanova Law Review, Vol. 50, Iss. 4, p. 1075-1076, http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1235&context=vlr]

Tushnet's social learning hypothesis posits a public awareness that the government has exaggerated the existence of threats in the past and has dealt ineffectively with real threats that existed. The public is thus less inclined to trust governmental claims regarding threats, and governmental actors who know of this social learning will limit the scope of their responses to such perceived threats. 22 Tushnet, however, also asserts a qualified defense of policymakers who he sees as facing ex ante decision contexts wherein exaggerations and overreactions are "entirely rational and ought not be criticized in retrospect."23 He admonishes those who would constrain policy-makers in such contexts, warning that "we should be careful not to constrain them because of our hindsight wisdom-unless we are confident that the constraints we put in place really do respond only to tendencies to exaggerate uncertain threats or to develop ineffective policy responses to real ones."24 Tushnet, however, fails to consider how racism informs the "rational" exaggerations and overreactions of policy makers that he views as beyond critique. In the end, Tushnet's social learning-based model promises little, if any, protection or remedy for demonized Others. Tushnet counsels too much caution for civil society actors who would otherwise presumably embody and operationalize social learning in their deployment of "hindsight wisdom" to challenge repressive security policies. Absent the use of such wisdom, however, it is hard to imagine how civil rights can be championed in the face of ex ante state monopoly over relevant information. 25 Moreover, Tushnet's reliance on the Whig version of social learning allows him to remove the judiciary from an active, let alone robust, role in overseeing security state actors. What we are left with is a historically unsupported faith that state actors will themselves have sufficiently internalized social learning to prevent abuses of the Other. In other words, Tushnet's offer to demonized groups amounts to little more than a form of political decisionism cloaked in the hope that social learning (among state actors) can stanch the negative synergy of hysteria and racism. Deploying the notion of social learning from a critical race perspective, we might be able to take a more complete account of the subordinationist problem in state security power exercises and provide effective racial remedies. As opposed to a white-normative deployment of social learning, a critical race perspective would reject a Whig narrative that presents the internment as something that has been transcended, as a symbol of a redeemed/enlightened national identity. The concept of social learning, in this sense, would have to be refined substantially to focus on the more critical problem of "racial learning." What exactly has white America learned from the internment? To what extent have the state's culturally and demographically white security institutions and policy-makers actually internalized critical race perspectives on group subordination, racial injury and racial remedy? Indeed, to what extent has the legal academy and the judiciary internalized these perspectives?

#### Only the courts can solve – The Executive tried and congress removed their funding for transfer

Chow 11, JD from Cardozo

(Samuel, THE KIYEMBA PARADOX: CREATING A JUDICIAL FRAMEWORK TO ERADICATE INDEFINITE, UNLAWFUL EXECUTIVE DETENTIONS, www.cjicl.com/uploads/2/9/5/9/2959791/cjicl\_19.3\_chow\_note.pdf)

After the D.C. Circuit Court issued its opinion and while the petition for certiorari was pending, the Executive expressly recognized the troubling scenario that the continued detention of the Kiyemba petitioners posed. Defense Secretary Robert M. Gates concluded that it was "difficult for the State Department to make the argument to other countries they should take these people that we have deemed, in this case, not to be dangerous, if we won't take any of them ourselves." Indeed, the Executive was poised to send as many as seven of the petitioners to the United States in 2009. However, in response to the threat of such action. Congress attached a rider to the Supplemental Appropriations Act which prevented the use of defense funds to release any Guantanamo detainees into the United States. Congress also passed two additional pieces of legislation restricting the ability of Guantanamo detainees to enter the United States. The National Defense Authorization Act granted Congress a substantial degree of control over such releases and a spending provision banned the Department of Homeland Security from effectuating such release. The detainees' hope for release, therefore, turned again on the pending petition for certiorari.

#### Either the counterplan doesn’t compete with the 1AC as a rhetorical artifact because it doesn’t present a critique of judicial or it does compete and its focus on process kills productive potential

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(Glis, “A Machine That Would Go of Itself: Interpassivity and Its Impact on Political Life” Theory & Events 9:2, dml)

This metaphor signifies of course that the hierarchical relation between government and citizens is being replaced by one of 'equal standing' – conjunctive instead of subjunctive, we might say. But it also symbolizes how the 'interest' in politics itself is changing. The 'locus' of involvement with politics shifts from the 'product', or social praxis that it aims to realize, towards the earlier phases of preparation, consultation and policy-formation. This shift implicit in the growth of 'interactivity' serves the interests of both parties involved in political life. In the official rhetoric, interactivity strengthens the involvement of citizens in politics, by committing them not only to the results of the political process but also to that process itself. In this way they become 'co-producers of policy', dedicated citizens so to speak. In turn, government is able to 'fine tune' its policies and in general stay in close contact with its citizens, enabling it to reach its objectives in a more precise and secure way. More realistically, citizens become interactive because they see this as a better option to safeguard their (partial) interests than the traditional options of party membership or voting behavior. They feel that interactivity will let their voice more forcefully be heard. Or even more straightforwardly, their attitude towards politics in general is one of 'what is in it for me?' In such a self-centered view, politics appears primarily as an institution that may facilitate one's own plans and preferences, rather than as a process of collective will formation furthering socially desirable practices. Government, in turn, sees interactivity as an effective way of 'polling' views and interests, which are usually better accommodated in an early stage of policy formation than in later stages, that may involve troublesome renegotiations, or protracted litigation. But more importantly, the official view or 'ideology' underwriting interactivity denies that a shift in political interest is taking place. It suggests that the interest of both citizens and government in what politics 'produces' – some form of collective good – is enhanced and supplemented by an increased interest in the process of policy formation. Against this 'win-win' view, I want to suggest that the increase in involvement in the political process, the sphere of policy formation, goes along with a loss of involvement in the 'product' of the process. The point here is not merely that people lack sufficient time or means to be involved in both process and result. Rather it seems that people nowadays feel more attached to the process than to its eventual product. Being actively involved in the process has acquired a sense and meaning of its own, that may compete with, or actually override, the interest in what the process aimed to realize. In other words, what the process now mainly realizes, its main 'product', is involvement with itself. Slavoj Zizek once explained the difference between Verstand and Vernunft in Hegel by saying that Vernunft is the state in which we realize that Verstand suffices. Vernunft is Verstand minus the illusion that there is something beyond it.17 Interactivity and interpassivity, the third and the fourth mode of the political process we are studying, are related to each other in much the same way. Interpassivity constitutes a radicalization of interactivity, in the following sense: it expresses the view, or rather the habitus, that interactivity in fact suffices. The loss of the product of politics, or rather the loss of the sense that this product is what matters primarily, characterizes the condition of political interpassivity. The main interest, or perhaps we should say obsession, lies with the process, not with its eventual product. We may also recall here Jean Baudrillard's account of 'the end of production'. Baudrillard argues that 'there is no longer any production' and, consequently, we cannot be liberated, or regain authenticity, through revolution (that is to say, through the socialization of the means of production).18 Especially relevant here is his analysis of the relation of 'the sign' to reality, represented as a four-stage sequence.19 From being a 'reflection of a basic reality', the sign evolves into a 'mask' of this reality, and later into a mask of the absence of a basic reality; finally, the sign no longer bears a relation to any reality whatsoever. Baudrillard's four stages may well be viewed as the (postmodernist) philosophical equivalent of the stages of politics I have distinguished. Of course, the difference between the philosophical and the political case I discuss is that in the latter, the 'detachment' from the end-product is not necessarily reflective – either at the individual or at the collective level. We do not consciously realize that we have lost our interest to move beyond the state of policy-making, preparation and planning. But neither does it seem correct to say that we believe, even more resolutely than before, that we are strongly interested in politics. Somehow we suspect that our continuous 'access' to politics does not provide us with what we want or need, but we feel powerless to change our condition, or even uninterested in doing so. In other words, we feel ambiguous. On the one hand, we indulge in unwarranted optimism concerning the possible benefits of a hyper-interactive political process. The political system tries to enhance its legitimacy by promising to be in ever-closer contact with its citizens. The fine-tuning of the political process by interactive means promises an unprecedented capacity to accommodate the plural and diverging demands of individuals and groups. The unrealistic nature of these promises is of course itself a source of disappointment. In an attempt to win back our flagging interest, politics redoubles its promises, only to fail again to deliver on them, etc. But this sustained failure does not yet sufficiently explain the sense of discontentment with politics that constitutes the other pole of our ambiguous state. Politics fails us, or we fail politics, in a deeper sense.

#### Don’t mix security and HR justification – focus on security at the expense of every day violence is problematic – endorsing the 1ac is a starting point for a rejection of the flawed policy that is a condition for war in the first place

**Kuhn, 2008**[ Florian P. Kühn, M.A./M.P.S., Research Assistant, Institute for International Politics, Helmut-SchmidtUniversity Hamburg, Holstenhofweg 85, 22043 Hamburg, P +49-40-6541-3566, florian.p.kuehn@hsu-hh.de Draft Paper prepared for the 49 th International Studies Association Annual Convention, San Francisco, March 26-29, 2008: Panel “Securitization of Development or Developmentalization of Security?” Equal Opportunities: Exploring the turning point between Securitization and Developmentalization <http://opus.unibw-hamburg.de/opus/volltexte/2010/2329/pdf/isa08_proceeding_252911.pdf>]

To protect the ‘own’ as well as to transform the ‘other’, securitization comes very handy. In line with what is seen to be the characteristics of liberal-capitalist states, everything deviant can easily be securitized. If problems originate from within the state and its citizens, they appear on the politicized arena, “meaning the issue is part of public policy, requiring government decision and resource allocations or, more rarely, some other form of communal governance” (Buzan et al. 1998: 23). To move them into the depoliticized arena “beyond the state’s standard political procedures” (Emmers 2007: 111) they need to be plausibly presented as existential risks. For problems of external origin that seems to be easier: First, because information is harder to get and potentially less reliable; second, because a problem existing on the state level could be by its very nature an existential challenge to statehood; and third, because the means to counter these risks are, by definition, beyond the habitual field of political activity, which is within the sovereign national state. Hence, securitization of domestic disturbances is comparatively harder than securitization of what are perceived to be international disturbances. Because of the unsettled news situation for the public, which can be countered by ruling elites with claims to be in possession of ‘secret’ information, and the estimation of potential means to overcome the threat 1 , state agencies have a decisive advantage in securitizing an issue (for an account of the normative debate of securitization and securitization theory see Taureck 2006: 56f.). Still, as could be observed with George W. Bush’s attempts to convince the public and the World of the danger of Iraq’s weapons of mass destruction, the securitizing speech act may also fail. Domestically, even in an atmosphere marked by fears of further attacks like 9/11, it took the WMD and their potential transfer to Al-Qa’ida-Terrorists as well as the developmentalized argument of the suppressed Iraqis tied together to make the Iraqi invasion possible. Weak, or failed, in any way non-liberal, states have recently been securitized, as “the fruits of liberal-democracy are under threat from a new global danger”, as Duffield (2006: 26) puts it with regard to terrorism (see also Patrick 2007). If liberal-democratic states are more peaceful, as the ‘democratic’ (or ‘liberal’) peace theory contends, conversely, any non-liberal state necessarily puts international peace at risk. Because liberal states are held to be able to monopolize violence within and also conduct their external relations peacefully, states which are seen to have ‘failed’ – which, from an international state-relations point of view, not even qualify as states – appear to be even more dangerous. Thus, the classical notion of threats stemming from predatory ‘strong’ states, while “peripheral states with sovereignty deficits” appeared to Western politicians as “at best third tier security concerns” (Patrick 2007: 645) fades into insignificance. Foreign policy as well as defence planning consequently invented holistic approaches to strengthen struggling states’ capabilities towards those of liberal-democratic states: Citizens as well as borders controlled by democratically elected executive branches of government, internal peace achieved through welfare and wealth, and a culture that understands and constantly reproduces democratic values. States where governance is weak, where warlords take control of parts of the territory, and where - more importantly - terrorists can go uncontrolled, establish training and stage attacks from these countries (without being subjected to punishment or at least retaliatory measures), on the other hand pose a threat to other states and the international system. This disregards evidence that weak, or failed, states may well be subject to violent domestic competition as well as terrorism, but only in rare cases actively support international terrorism; that they hardly have the means to even produce WMD possibly proliferable, but rather are the markets for conventional weapons; and that organized crime may also flourish in countries where stable governments exist. However, all internal disturbances were transcended to the international level, turning them into threats for the liberal-democratic West. 2 Securitization started its sweeping career after the end of the Cold War, which opened up new policy areas, as the constant threat of ‘mutually assured destruction’ had ceased to trump all other concerns. The standard measure facing the enemy during the Cold War was deterrence. Even at the cost of taking their own citizenry hostage against nuclear extinction, this was seen as the most promising strategy to achieve stability and power balance. However, it underestimated the risk of accidental launch of nuclear attacks as well as accidents (see Rogers 2002: 17-30), and at the same time relied heavily on the rationality of the opponents. This assumption vanished in security policy. Instead, “security has been a more amorphous articulation of concerns about various rogue actors, post-Cold War disintegrations, the proliferation of weapons of mass destruction, and the rise of (Islamic) fundamentalists” (Solvacool/Halfon 2007: 229). As indistinguishable actors, not responsible to a population and with inconceivable ends have taken the stage in the eyes of Western policy-makers, the lack of states capable of taking care of these undesirable characters is no longer tolerable. As these sources of insecurity are not locatable, there is little chance to act against them with military means (the prospect of fighting an endless Small War (Daase 1999) against an invisible enemy, which can attack anywhere and at all times, obviously was not considered seriously beforehand in the cases of Iraq and Afghanistan, however; see Kühn 2005: 30). The loss of a clear foe allowed for securitization to broaden the notions of risks. Buzan et al. identified five sectors that needed consideration: Beside the classical military sector, these are the environment, economy, society and politics, interacting within a matrix with global, nonregional subsystemic, regional and local factors (1998: 165). This catch-all idea has the advantage to give room to the analysis of the dynamics of several causes of risk and these risks’ relative increase or decrease – or securitization and de-securitization, in other words. However, it lacks a clear orientation of the implications securitization has on the respective sectors as well as a hierarchical notion of how the sectors influence each other, considering that they have different referent objects for each sector (each of which is disputable itself; see Buzan et al. 1998: 22f.). Nevertheless, a broader understanding of security has allowed for very distinct phenomena to be securitized over the last couple of years: undocumented migration by refugees (caused by intra-state wars, despotic regimes, drought) or due to economic motivation; trafficking of humans, organized by criminal networks, who also smuggle drugs and other illicit goods, in turn jeopardizing the social fabric of society and economic welfare in the target countries; migration of infectious diseases such as HIV/AIDS (see Emmers 2007: 117-121). Also, global warming, scarcity of (energy) resources or societal ageing have been subject to securitizing moves – to different success. All of these supposed causes of security threats are heavily interconnected with other phenomena, so that it is hard to tell where “politics beyond the established rules of the game” (Buzan et al. 1998: 23) ought to set in. With all these issues in the sphere of security relevance but impossible to be solved by ‘classical’ security policy schemes, it becomes clear why developmentalization was the logical and necessary supporting concept. 4. DevelopMENTALization and SecuRITUALization If we accept that the development paradigm rests upon a liberal-democratic notion of what states ought to be, the aims of development must be seen as utilitarian: As long as development serves the (newly emerging) state, it is good, otherwise it is undesirable. That 6 Florian Kühn: Equal Opportunities has been different for a while, as the Cold War provided a lid on overtly political support, which had been granted to states in the 1950s and 1960s in order to keep them in line with western ideology (and vice versa, by the Soviets). Development specialists were educated not to be involved too closely with politics, and also “15 years ago it was unusual for policy makers to talk of development and security policies in the same breath. Today the reverse is true” (Tschirgi 2006: 39). Accordingly, there is a debate going on about **the degree and sorts of co-operation** of **development organizations** with the **military** in countries of intervention. These disputes, in extreme cases leading to an exit of organizations or a reshuffling of projects away from areas of military activity, stem from the often cited assumption ‘No development without security. No security without development.’ (see Duffield 2006: 28; Klingebiel/Roehder 2005: 391). This mantra has led to what I would like to call a ritualization of security and a mentalization of development: SecuRITUALization and DevelopMENTALization. Recalling the **speech** **act** of securitization as proposed by Wæver (1995), we can assume that securitization is successful if the audience **accepts something as a security problem**. To achieve this acceptance, repetition is not an unusual tactic. A case in point is the message given by the former German Defence Minister Struck that “Deutschlands Sicherheit wird am Hindukush verteidigt” 3 This utterance, repeated whenever a microphone was near, helped not only to . legitimize German participation in the military campaigns of ISAF and Operation Enduring Freedom, but it also took some time before severe doubts were raised as to the truth of this statement (see Kühn 2007). However, these doubts have not led to successful desecuritization (Wæver 1995), as the campaign meanwhile had triggered enough resistance to claim that a long duration of the security forces’ deployment was necessary. Similarly, since George W. Bush’s arguments for an intervention in Iraq were not entirely convincing, his administration had to amend them with several other themes (including the moral duty to help the suppressed and unable to help themselves Iraqi people) and repeat and exaggerate them to make securitization work (see for example accounts by Richard Clarke, Hans Blix, Seymore Hersh, or Scott Ritter). This means that in single cases of securitization the **ritual invocation of threats** **plays a role** in lending the **speech** **act** **success**; also, it means that the broader discourse about security, especially with regard to terrorism, has become a political field stressed so frequently to have it nearly overplayed. Hence, my suggestion is that it has lost part of its ability to move a topic out of the politicized sphere and “above politics” (Buzan et al. 1998: 23). Stepping in is the mentality of development, which can be hinted at by developMENTALization 4 It contains aspects of cultural superiority as well as moral . obligation, technocratic and technologic beliefs and defeatism facing the ills of a globalized economic system. But as contemporary security risks have fallen behind nuclear extinction, and because military solutions so obviously fail to produce viable solutions to securitized problems, development becomes security’s supporting argument. I would argue that the very concept of development fits well into the liberal-democratic image Western states have of themselves. Development, which is frequently conflated with aid 5 , bears a positive notion: the public is educated by starving children, flood, drought on TV; the liberal worldview urges us to see ourselves in the other. What, then, could be more convincing than the idea to develop other societies into societies like our own? This consensus has transformed into a global governance paradigm (read: liberal-democratic expansion), wherein development extends the sphere of relief and humanitarian assistance to conflict prevention and/or resolution. That is logical under the cross-fertilizing effects of securitization and developmentalization, which suggest that to develop efficiently one must tackle the roots of the problem –which are violence, forced migration, banditry etc. Choosing whom to assist with development, which inevitably has to be done, politicizes (and, for the opponent group, securitizes) development projects. Donors, because they are working side by side with the recipient government, become part of a conflict which they view as regressive, but which is also a process of societal transformation (see Degnbol-Martinussen/EngbergPedersen 2003: 208-210; Duffield 2002: 1053). Regardless of their non-political aims, implementing organizations, because they are seen as part of the global governance invaders, lose their status as neutral, hence becoming targets of violent resistance. The donor community, believing their own rhetoric of liberal-democratic peace-building, stands astounded by the amount of violence it faces and wonders why they never managed to solve the conflict albeit being a non-partisan broker of interests. The deployment of military ads another link to the chain of arguments: The more resistance shows, the more the military’s presence deems necessary. To gain legitimacy locally, civilmilitary cooperation makes tactical use of genuinely civil tasks, such as community projects, digging wells etc., in order to gain intelligence, public goodwill and, in turn, protect the forces (see Klingebiel/Roehder 2005: 393). One of the oft repeated arguments is that their presence actually makes civilian development project possible in the first place. While non-state organizations often see their personal safety jeopardized by military instead 6 , for stateagencies the engagement in a strategically planning environment, such as joint councils of Foreign, Defence and Commerce Ministries, seems appealing. This leads to less strict distinction in finances of military engagements and development endeavours. While competition for - usually not unlimited - funds sets in in the donor countries, preparation and planning of different departments may enhance efficiency (see Klingebiel/Roehder 2005: 394f.). What turns out to be a credibility problem for liberal-democratic engagement in recipient countries, at least in Afghanistan, is the discrepancy between the vast expenses needed for fortification, weaponry and wages on the Westerner’s side and the little welfare progress the population is making (for a detailed analysis of the welfare problem see Richmond 2008). 5 In German for example, Entwicklungshilfe is one word, tying together aid and development, mindfully separate in English, into one term. 6 All representatives of non-state development organizations in Afghanistan interviewed in Kabul, Kunduz, and Herat in April – June 2006 stated that the military presence worked not in their favour. Asked if the military presence as a whole stabilized the country and hence – at least indirectly – contributed to their work, the majority maintained that they would be running their projects anyway, even without a Karzai government in place. Conversely, the military departments of CIMIC criticized civilian organizations’ lack of willingness to cooperate or share information. Interviews by the author, kindly supported by the Konrad-Adenauer-Foundation’s country office Afghanistan in Kabul. 8 Florian Kühn: Equal Opportunities From the populations point of view the amount money for building administrative structures and equipping an elite seen as corrupt, unable and illegitimate anyway, is quite irrelevant. The elites, including the bad guys with stained human rights records, together with the international community, appear to be wasting funds, e.g. as a ‘cow that drinks its own milk’. Both developmentalization and securitization taken together in a case like Afghanistan account for **indefinitely** **prolonged** **engagement**, serving as justification for each others presence: As long as development has not achieved more visible progress, the resistance won’t stop and hence military deployment is necessary, is the military’s narrative. As long as the security situation is grave, development won’t show overwhelming results, might be the developmentalists’ answer. What is important politically is that the effect of one policy becomes the justification for the other, while the effect of the latter becomes the justification for the former. **A vicious circle has been set in motion**, in which interestingly the local population has little part to play. 5. Making use of Developmentalization to legitimize rule in Afhanistan One of the main obstacles in the construction of Afghanistan was the image of the West as a unitary actor. In reality, it is a “mix of national, regional, governmental and non-governmental actors with their own interests and agenda” (Tschirgi 2006: 39). Also, neither was clear, which direction development or political reform should take (e.g. parliamentarian vs. Presidential system), nor was the mandate of the military engagement homogenous. While, as usual, a free market strategy was chosen, for Afghanistan also the question remains unanswered “why income replacement is generally not taken to be part of the short-term peacebuilding attempt to consolidate transitions from war to process of peace” (Richmond 2008). Indeed, the social situation in Afghanistan is still grave, with little employment opportunities in cities and little relevant alternatives to poppy production in rural areas. Hence, many Afghans voted for President Karzai in the first elections in 2005 thinking he was the only candidate accepted by the West and thus able to mobilize ongoing support – which eventually might improve their situation. In this light, the elections might be interpreted as a subsistence strategy rather than the free expression of a political will. But 7 years after toppling the Taliban, there is still no continual electricity supply in Kabul, further dividing international, who rely on generators, and average Kabulis, who suffer the pollution caused that way without benefitting. They “today have less electricity than they did five years ago” (Rubin 2007: 67). It is these everyday obstacles to building a normal life that disenfranchises the population as well as counter-elites like the Taliban, who exploit the hardships caused by the military campaign or poppy eradication policies. In certain areas, the Taliban have established a semi-state entity Schetter (2007) calls ‘Talibanistan’. The government itself has developed to be the prime demanders of international funds, reestablishing a rentier state that has existed in Afghanistan long before the Soviet invasion. That the ruling elites are being paid by external donors isolates them from the population’s demands, which, generally, can be expressed with reference to taxes paid. In Afghanistan taxes are hardly collected, and thus, the government is far from developing close relations to the governed (see Kühn 2008). While development aims are implicitly downgraded over time as success fails to materialize, the very dynamics of economic malfunctions, political stasis 9 Florian Kühn: Equal Opportunities and societal resistance has not been captured in their depth. Instead, calls for ‘more coordination’ or more aid and, of course, more troops, continue to dominate policy discourse, although “policy prescription of ‘more of the same’ clearly will not do. Theoretically, a certain level of money, troops and a rock-solid political commitment might produce sufficient benefits and force to outweigh the negative consequences of intrusive assistance, which is precisely what its proponents hope” (Suhrke 2006: 32). But with military spending at current level, rising funds for civilian project, which already need high percentages to protect their projects, is not in sight. So, instead of directing the blame on the modernization agenda, pursued by liberal-democratic developmentalization, the level of underdevelopment substantiates the failure of the modernization project; this, in turn, leads to more developmentalization (see Sovacool/Halfon 2007: 226), which tends to incorporate more policy fields while not changing the initial setup. In Afghanistan for example, during the first intervention stages, the drug trade stayed out of consideration (albeit it was included in Security Sector Reform) and only over time became subject to securitization. The connection between the drug trade’s revenues and financing Taliban insurgency even only recently found its way into official UN documents (see UNODC 2007; UNODC 2006). Likewise, a focus was laid on infra-structure and market environment rather than employment and production – leading to constant import dependency, further accelerated by dutch disease effects caused by the overarching influence of the opium economy on domestic product. The liberal-democratic developmentalists evade analysing the problems they themselves cause, which allows for calls to intensify intervention, (in fact illiberal) policy intrusion and exacerbates “the already existing resentment to what is perceived as foreign domination” (Jahn 2007b: 225). But it is not only a circular and self-enhancing repetition of the developmentalization paradigm that follows Western intervention. Developmentalization **as** **ontological** **twin** of securitization may also serve for outright **justification of war**. 6. Developmentalization as legitimation of War Some **developmentalization/securitization speech acts lead to (military) interventionist strategies.** As has been shown, the pure security orientation which allowed for the second Gulf War in 1991 has continually decreased in significance, creating space subsequently filled by development arguments. Within the developmentality of liberal-democratic policy makers and public, the inseparable trias of economy, politics and society leads to a strong merger of security and development policies – even more so in statements than in actual practise. These two policy fields **tied** **together** find their expression in the term “reconstruction” (Sovacool/Halfon 2007: 225). Using a discourse analytical approach, these authors show that **discourses** **shape** **meaning** and establish causal chains of interpretation, **delimiting the range of alternative explanations** or potential action, respectively. Out of historical experience, societal structures, power struggles and conflicting intentions emerge conceptualizations of **security**, which do not have to be analytically sound and may include different aspects than one would expect. The discourses are open and hence “they are not only struggles over security among nations, but also struggles over security among notions” (Lipschutz 1995: 8; italics in original). Within this discourse, which provides the frame for securitization, threats tend to be naturalized (e.g. presumed as given), actors homogenized and own intentions disguised. 10 Florian Kühn: Equal Opportunities Securitization, which has **expanded** security to areas such as crime, human and drug trafficking, diseases and climate change, also encompasses such fields formerly regarded as aid, policing or environmental cooperation. As has been described, development is increasingly prescribed by Western knowledge, and reason, geared to Western economic and political systems. Approaching third countries with a ‘One size fits all’ approach implicated a hierarchical position that denigrates deviant cultures and societies. Establishing ‘underdevelopment’ in this way opens up international politics for virtually any kind of intrusive policy, or direct intervention. So, as Sovacool and Halfon’s argument convincingly states, “[w]hile development is often conceived as a way to maintain a stable and secure world, and thus avoid conflict, reconstruction [that is security and development merged into one concept; FPK] discourse increasingly posits military action as a crucial way to achieve political and economic development” (2007: 232). Merging both concepts into ‘reconstruction’ or, more overtly, ‘construction’ is the **far end** of possible interrelations between securitization and development. Since ‘construction’ requires a fair amount of destruction of military capacity, but also of political structures and societal habits, cultural values and conceptions of reality, it perpetuates the notion of the target country’s inferiority, as violent resistance serves to demonstrate ‘their’ inability for peaceful conduct. External actors necessarily have to apply a reduction of complexity, which may well incorporate local practices (according to a ‘do no harm’-orientation), which have to accommodate into their top-down models (Richmond 2008). Thus, problems of **poverty** and instability remain **underdiscussed** and unresolved, while potential voice of local stakeholders is being co-opted. In any way, the external concepts miss the dynamics of the (post-)conflict situation: “the approach to reconstruction taken in Iraq, when applied to other conflicts, will only create more instability and violence, and more need for reconstruction, making failure another justification for further action, which will invariably fail” (Sovacool/Halfon 2007: 243). Contemporary understanding of development has distanced itself from core concepts of **self determination, cultural sensitivity or least intrusion in a way which threatens to turn its basic intention of helping people head down.** **Technocratic, instrumental**, **half**-**securitized** development efforts, **disregarding** the aspects of culture and intra-societal as well as statesociety relations, face a future of losing their normative credit once they **begin to be viewed as just another hegemonic, imperial strategy of dominance.** 7. Conclusion The situation after the Cold War, described by Fukuyama as the end of history, provided policy makers with a comfortable lack of choices: Since alternative models of societal organizations where inconceivable or discredited, the liberal-democratic model became the dominant ideal to measure the non-Western state against. Classical security thinking had to adapt to a new situation characterized not by direct confrontation but amorphous disturbances of obscure relevance for Western states. Securitization helped to **shape the understanding** of these risks, although without supplying the adequate tools for policy formulation. Development, and developmentalization, readily delivered the concepts based on the firm, yet teleological, belief in liberal-democratic mechanisms of governance and conflict management. To expand this system to underdeveloped, failing, or underachieving states became a hegemonic paradigm of foreign policy. The liberal state idea, which conceives the state as contract-based institution to protect property and proprietors, who may codetermine policy holds inseparable the trias of economy, politics, and society. As the economic individual rests at the concept’s centre, legitimacy stems from a balanced relation of the parts. In this notion, to develop one means to trigger follow-up effects in the other segments. Development is meant to achieve this, assuming that economy, society, and state automatically balance each other. This thinking turns a **blind** **eye** to the in-built **inequality** between **proprietors and have-nots** internally, and states able to fulfil their tasks and deviant ones. Developing ‘them’ brings a distinction and hence creates identity, but referring to individuals’ suffering also allows to extend global governance, which in turn can be analysed as security concept. The void left by the disappearance of, for example, deterrence as column of security policy has now been filled by a statebuilding and development paradigm. Within this paradigm, states are homogenized, stretching the systemic level to the societal level, and disregarding local differences. Globally, developmentalization and securitization appear to be the same side of the same coin. Where securitizing a certain phenomenon lost its explanatory power, developmentalizing it served as substitute and vice versa. While development enjoyed a period of relatively apolitical agency until the early 1990s, it is on the brink to merge with security. **As mutual justifications,** securitization and developmentalization serve to promote the liberal-democratic expansion, which **causes** **most of what it is claiming to avert,** **including war**.

### 2ac word pic

**masking—focusing solely on the language used to describe something masks the problem and makes it harder to confront**

**Meisner 1996** - professor of environmental studies at York University (Mark, “Resourcist Language: The Symbolic Enslavement of Nature”, Proceedings of the Conference on Communication and Our Environment, ed: David Sachsman, p. 242)

Changing the language we use to talk about non­human nature is not a solution. As I suggested, language is not the problem. Rather, it seems more like a contagious symptom of a deeper and multi-faceted problem that has yet to be fully defined. Resourcist language is both an indicator and a carrier of the pathology of rampant ecological degradation. Further­more, language change alone can end up simply being a band-aid solution that gives the appearance of change and makes the problem all the less visible. In a recent article on feminist language reform, Susan Ehrlich and Ruth King (1994) argue that because meanings are socially constructed, attempts at introducing nonsexist language are being undermined by a culture that is still largely sexist. The words may have shifted, but the meanings and ideologies have not. The real world cure for the sick patient matters more than the treatment of a single symptom. Consequently, language change and cultural change must go together with social-moral change. It is naive to believe either that language is trivial, or that it is deterministic.

**They assume static language—our use of language to effect a desirable outcome re-appropriates its meaning to make it less oppressive**

**Kurtz and Oscarson 2003** Anna Kurtz and Christopher Oscarson, Members of National Council of Teachers of English Conference on College, Composition and Communication, 2003 ("BookTalk: Revising the Discourse of Hate," ProQuest)

However, Butler also argues that the daily, repeated use of words owns a space for another, more empowering kind of performance. This alternative performance, Butler insists, can be "the occasion for something we might still call agency, the repetition of an original subordination for another purpose. one whose future is partially open" (p. 38). To think of words as having an "open" future is to recognize that their authority lies less in their historical than in their present uses; it is to acknowledge that people can revise the meaning of words even as we repeat them; it is to embrace the notion that the instability of words opens the possibility that we can use them to (reconstruct a more humane future for ourselves and others. Because words can be revised, Butler contends that it would be counterproductive simply to stop using terms that we would deem injurious or oppressive. For when we choose not to use offensive words under any circumstance, we preserve their existing meanings as well as their power to injure. If as teachers, for instance, we were simply to forbid the use of speech that is hurtful to LGBT students we would be effectively denying the fact that such language still exists. To ignore words in this way, Butler insists, won't make them go away. Butler thus suggests that we actually use these words in thoughtful conversation in which we work through the injuries they cause (p. 1.02). Indeed, Butler insists that if we are to reclaim the power that oppressive speech robs from us, we must use, confront. and interrogate terms like "queer." We must ask how such terms affect both the speaker and the subject, what the purpose of their use is, and how their meaning can be altered to empower those whom they name. Thus, as Butler helps us see, language is violence, but only if we allow it to be. She encourages us to believe that words can take on new meanings-ones which forbid stasis, challenge our habits, and open the possibility that teachers and students might be able Lo create spaces for learning in which everyone feels safe.

### 2ac terror da

#### The major terrorist event of our lifetime involved box cutters, the majority of foiled terrorist plots involve non-WMD weapons, and the greatest death toll of a so called “WMD” terrorist attack has been twelve people, so why the focus on WMD?—even if their discussions of terrorism are good, their focus on WMD level terrorist threats overprescribes its importance in policymaking and leads to blunders

Silke 9 [2009, Professor Andrew Silke (BSc Hons, AFBPsS, CSci, CPsych, PhD) holds a Chair in Criminology at the University of East London where he is the Field Leader for Criminology, and the Programme Director for Terrorism Studies, “Contemporary terrorism studies: Issues in Research”, Critical Terrorism Studies: A New Research Agenda, pp. 34-38]

The increased work being focused on suicide terrorism is arguably both¶ overdue and useful. However, increased research is also being focused on other¶ aspects of terrorism which are less obviously of growing importance. Of particular¶ concern was the rapid growth in research investigating the (potential) use of¶ Chemical, Biological, Radiological, and Nuclear weapons (CBRN) – also often¶ referred to as weapons of mass destruction (WMD) – by terrorists. Figure 2.7¶ shows that the amount of research focused on CBRN terrorism more than¶ doubled in the first three years after 9/11.¶ Yetwhy did this happen? After all, 9/11 was not a CBRN attack. Nearly¶ 3,000 people may have been killed, but the hijackers did not use a nuclear bomb¶ to cause the carnage, they did not spray poisonous chemicals into the atmosphere¶ or release deadly viruses. They used box-cutters. Nevertheless, CBRN¶ research experienced major growth in the aftermath.¶ Arguably,CBRN research has always been over-subscribed. Prior to 9/11,¶nearly six times more research was being conducted on CBRN terrorist tactics than on suicide tactics. Indeed, no other terrorist tactic (car-bombings, hijackings,¶assassinations, and the like) received anywhere near as much research¶ attention in the run-up to 9/11 as CBRN. If the relatively low amount of research¶ attention which was given to al-Qaeda is judged to be the most serious failing of¶ terrorism research in the years prior to 9/11, the relatively high amount of¶ research focused on the terrorist use of CBRN must inevitably be seen as the¶ next biggest blunder.¶ To date, in the few cases where terrorists have attempted to develop CBRN¶ weapons, they have almost always failed. In the handful of instances where they¶ have actually managed to develop and use such weapons, the highest number of¶ individuals they have ever been able to kill is twelve people. In the list of the¶ 300 most destructive terrorist attacks of the past twenty years, not a single one¶ involved the use of CBRN weapons. Yet somehow, one impact of the 9/11¶ attacks was that CBRN research – already the most studied terrorist tactic during¶ the 1990s – actually managed to attract even more research attention and¶ funding, doubling the proportion of articles focused on CBRN in the journals.¶ A degree of research looking at CBRN terrorism is justified. Instances such as¶ the 1995 Tokyo subway attack and the post-9/11 anthrax letters show that CBRN¶ attacks can happen (albeit only rarely). Such attacks have never caused mass¶ fatalities however, and the popular acronym of Weapons of Mass Destruction¶ (WMD) in describing CBRN weapons is desperately misleading. Despite the¶ rarity – and the extreme unlikelihood of terrorists being able to accomplish a¶ truly devastating attack using these weapons – CBRN remains a popular topic¶ for government and funding bodies. They will award research grants for work on¶ this topic when other far more common and consistently far more deadly terrorist¶ tactics are ignored. This popularity with funding sources partly helps to explain¶ the continuing high profile of CBRN in the literature. It has to be acknowledged,¶ however, that some articles on the subject in the core journals are actually¶ arguing that the issue is blown out of proportion and does not warrant the¶ research funding it has and continues to receive (see Claridge, 1999; Leitenberg,¶ 1999).¶ Those who had hoped that 9/11 – a stunning example of how non-CBRN¶ weapons can be used to kill thousands of people – might then have heralded at¶ least a modest shift away from CBRN research, would have been disappointed¶ by the initial reaction. Thankfully, the 2005–7 period shows an improvement¶ and the level of research on CBRN dropped notably, though it is still receiving¶ more attention than prior to 9/11 (and still remains the most heavily researched¶ terrorist tactic after suicide attacks).

#### No risk of nuclear terrorism---too many obstacles

John J. Mearsheimer 14, R. Wendell Harrison Distinguished Service Professor of Political Science at the University of Chicago, “America Unhinged”, January 2, nationalinterest.org/article/america-unhinged-9639?page=show

Am I overlooking the obvious threat that strikes fear into the hearts of so many Americans, which is terrorism? Not at all. Sure, the United States has a terrorism problem. But it is a minor threat. There is no question we fell victim to a spectacular attack on September 11, but it did not cripple the United States in any meaningful way and another attack of that magnitude is highly unlikely in the foreseeable future. Indeed, there has not been a single instance over the past twelve years of a terrorist organization exploding a primitive bomb on American soil, much less striking a major blow. Terrorism—most of it arising from domestic groups—was a much bigger problem in the United States during the 1970s than it has been since the Twin Towers were toppled.¶ What about the possibility that a terrorist group might obtain a nuclear weapon? Such an occurrence would be a game changer, but the chances of that happening are virtually nil. No nuclear-armed state is going to supply terrorists with a nuclear weapon because it would have no control over how the recipients might use that weapon. Political turmoil in a nuclear-armed state could in theory allow terrorists to grab a loose nuclear weapon, but the United States already has detailed plans to deal with that highly unlikely contingency.¶ Terrorists might also try to acquire fissile material and build their own bomb. But that scenario is extremely unlikely as well: there are significant obstacles to getting enough material and even bigger obstacles to building a bomb and then delivering it. More generally, virtually every country has a profound interest in making sure no terrorist group acquires a nuclear weapon, because they cannot be sure they will not be the target of a nuclear attack, either by the terrorists or another country the terrorists strike. Nuclear terrorism, in short, is not a serious threat. And to the extent that we should worry about it, the main remedy is to encourage and help other states to place nuclear materials in highly secure custody.

#### War powers is NOT a political question

Author: Fisher, Louis Date: Sep 1, 2005

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The sharp disagreements between Judges Silberman and Tatel in the D.C. Circuit underscore the rift that still exists among federal "judges on war power issues and the political question doctrine. Contrary to the general impression that war power disputes present delicate political issues beyond the scope of judicial scrutiny, courts have gener­ ally regarded the exercise of war powers by the political departments as subject to inde­ pendent judicial scrutiny. Throughout the past two centuries, federal courtS accepted decided a broad range of issues involving military operations. Most of those lawsuits were brought by private individuals who expected their legal claims to be settled on the legal and constitutional merits.

While courts often acknowledge the president's broad discretionary powers in foreign policy and military actions, they usually do so after interpreting what Congress has authorized by statute. Even at the height of judicial unwillingness to reach the con­ stitutional merits of the Vietnam War, the courts looked for some form of congressional approval or at least ratification of presidential war initiatives. While courts often acknowledge the president's broad discretionary powers in foreign policy and military actions, they usually do so after interpreting what Congress has authorized by statute.

#### Their DA already happened

Kaufman 8, Marc Kaufman is a staff writer at the Washington Post, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/03/AR2008010303887.html

A federal judge yesterday severely limited the Navy's ability to use mid-frequency sonar on a training range off the Southern California coast, ruling that the loud sounds would harm whales and other marine mammals if not tightly controlled.

The decision is a blow to the Navy, which has argued that it needs the flexibility to train its sonar operators without undue restrictions. In her decision, however, U.S. District Judge Florence-Marie Cooper said the Navy could conduct productive training under the limitations, which she said were required under several environmental laws.

### 2ac deference da

#### Democracy solves the impact and exec flex isn’t key—their impact assumes cold war era fears

Spiro 2, Professor at Hofstra Law School

[Winter 2002, Peter J. Spiro is a Professor, Hofstra Law School, “Explaining the End of Plenary Power”, 16 Geo. Immigr. L.J. 339]

Building on those two girders, one can describe how plenary power was generated by the international context from which it emerged. That context was historically characterized by the proto-anarchical nature of relations among states and the resulting need to centralize foreign policymaking in non-judicial institutions. Immigration policy inherently implicated foreign relations, and those relations were, up until recently, characterized by great instability and risk. In the late nineteenth century, nations still routinely made war on each other, for reasons of pure power projection; there was little in the way of a normative or institutional superstructure to act as a brake on conflict. That conflict posed a serious threat, not the least to the not-yet-superpower United States. In a world in which the use of force remained a legitimate means of extending state power, foreign relations were the ultimate high-stakes arena. The world that bore plenary power was also one that demanded unitary decisionmaking. In the face of potentially catastrophic downside risk, the state needed to centralize the formulation of foreign policy. The courts were least suited to assume that institutional task. As famously propounded in Curtiss-Wright, traditional foreign policymaking required speed, secrecy, and singular responsibility, qualities antithetical to judicial process. n42 Nor could the courts claim any substantive competence in the area. Foreign relations were an area that could not tolerate judicial freelancing. n43 In the worst scenario, a court would make the wrong call for want of accurate information and foreign policy expertise, leading us into conflict with another country with all the dangers such conflict posed. n44 Alternatively, the [\*350] courts would make their rulings and have them ignored by the political branches, diminishing critical institutional capital in the process. n45 Either way, there were powerful incentives for the courts to remain on the sidelines when it came to foreign relations. Hence the political question doctrine in matters involving foreign relations, of which plenary power is a variant. n46 Indeed, all of the major plenary power cases stress the foreign relations element of immigration lawmaking and the dangers posed by judicial intervention in such matters. n47 Until recent years, that abnegation was justifiable, if not always justified. Even in such cases as Knauff and Mezei, which have appropriately fallen into disrepute with the passage of time, there were ways of filling out the picture that would have dictated restraint, given the magnitude of the perceived threat. n48 So strong was the judicial reticence that the Court refused anything more than cursory constitutional review even where an immigration controversy implicated no apparent foreign policy sensitivities. n49 The Court feared, perhaps, that to impose constitutional constraints in an innocuous case might dictate their application in ones involving greater foreign policy dangers (or, alternatively, give rise to transparently unprincipled decisional criteria that [\*351] could be used to undermine rights in the domestic context). Better to stay out of the area altogether. And that the Court has largely done until the cases this past Term. n50 There is nothing in the cases themselves to suggest that the shift is owed to the international context. But the context has witnessed an architectural transformation away from those features that sustained plenary power. First, the world is a far less dangerous place today, at least as between states (bracketing for a moment the problem of terrorism). In its traditional conception, war has become something of an anachronism. Democracies have been shown not to make war on each other as a historical matter, n51 and as the realm of democracy expands, so too does the zone of peace. That has lowered the stakes of foreign relations. The downside risk of upsetting relations among nations is now significantly less daunting than in the heyday of plenary power. Compared to the context in which plenary power was spawned (the late nineteenth century), there are more effective institutional brakes on the way to armed conflict. The chances of the United States finding [\*352] itself in real war with a major power -- of the sort of the World Wars -- is virtually nil. Compared to the context in which plenary power found its most extreme form, during the Cold War, the strength of hostile adversaries is not nearly as threatening. It is easy to forget the Cold War perception that the world stood at the brink of nuclear annihilation. That fear has dissipated. The fact that foreign relations no longer pose its historical dangers makes it a less weighty interest relative to individual rights. Foreign relations, in theory, used to pose the ultimate threat, with survival in the balance. That rendered it almost an incommensurable value, a trump against which all others lost. Now that major conflict is unlikely and annihilation improbable (at least as undertaken by another country), it no longer presents a showstopper. Foreign relations interests can be assessed and balanced. They can also be incorrectly assessed and balanced without risk of catastrophic results. It is no longer so easy to frame these interests as imperatives, qualitatively distinguishable from other societal concerns. The transformed nature of foreign relations also puts less of a premium on the decisionmaking anomalies that distinguished it from other areas of lawmaking. The hallmarks of centralization, secrecy, and dispatch no longer present a clear functional advantage. On the contrary, most of the issues that have come to the fore in the new global order (human rights, environmental protection, health, trade, market regulation, etc.) demand a counter-approach at both the domestic and international levels. These issues are, first of all, better addressed through decentralized institutional mechanisms, both governmental and non-governmental. Anne-Marie Slaughter has highlighted the "disaggregation" of central governments in international policymaking. n53 No longer do foreign ministries hold a monopoly on foreign policymaking; other kinds of agencies are forming decisionmaking networks among their international counterparts and undertaking international policy with only marginal participation of diplomatic corps. Beyond the decentralization of central government actors, other entities, including subnational governments and non-governmental organizations, are also emerging as independent players on the international stage. n54 Secrecy is antithetical to efficient decisionmaking on most of the new global issues; one cannot make good policy with respect to environmental protection, for instance, without the full dissemination of relevant data. This observation ties into the decentralization phenomenon. As entities other than foreign ministries come to play an important part in international decisionmaking they need to be afforded full information; [\*353] traditional national security classification schemes pose an impediment to efficient decisionmaking rather than a premise to it. n55 Finally, speed is no longer of the essence in most international policymaking. Because it poses less of a competitive proposition (at least among nation-states), international affairs no longer require the battlefield agility -- real and proverbial -- of earlier times. These developments -- the diminished risks of foreign relations and the changed nature of international decisionmaking -- are what allow the retreat from plenary power and the more vigorous participation of the courts in immigration lawmaking. The diminished risks of foreign relations (again, bracketing for now the question of terrorism) reduce the risk of judicial error. No longer, as they did in the Cold War, do the courts have to fret that a misstep on their part will lead us into World War III or irretrievably undermine national security in the traditional sense of protecting against state adversaries. Nor do they have to conceive of foreign policy as a finely calibrated enterprise not admitting of multiple actors. American judges are themselves increasingly active on the international stage and are developing sustained relationships with their foreign counterparts. n56 In the immigration realm that translates into greater possible institutional discretion for the courts. First, it will allow courts to entertain constitutional challenges to elements of the immigration law regime that have only an attenuated connection to foreign policy. n57 The Fiallo and Nguyen cases present examples. Although both involved foreign nationals (as do all immigration cases), the cases could not have been of much concern to other countries. n58 In the past, such cases might have been avoided for fear of impacting foreign policy in even a marginal fashion or for fear of making judicial involvement unavoidable in other cases with more apparent foreign policy implications. But even such cases that do have a clear foreign policy element are fair judicial game. Because the stakes are lower and because foreign policymaking is now a multilevel game, the courts can assert themselves in the way they assert themselves in other contexts. Zadvydas presents an example. The case clearly involved foreign policy; the United States had been negotiating for [\*354] the return of the detained aliens with their homeland governments. n59 But that no longer posed an obstacle to review, as it almost surely would have in the past.

#### Judicial review key to detention restraint—avoids false leads

O’Neil 11 [Winter, 2011, Robin O'Neil, “THE PRICE OF PURITY: WEAKENING THE EXECUTIVE MODEL OF THE UNITED STATES' COUNTER-TERROR LEGAL SYSTEM”, 47 Hous. L. Rev. 1421]

While providing for judicial review may not make sense in every anti-terror context, absent limitation, the executive may offend the Constitution in any number of ways, leaving those affected no recourse. n152 Further, the lack of judicial review compromises counter-terror activities by not requiring the President to provide plausible reasons for and explanations of his actions; n153 for example, "by failing to provide even perfunctory individualized hearings [to detainees at Guantanamo Bay], ... the U.S. government ... misspent our scarce interrogation capacities on individuals of minimal or no intelligence value." n154 Had the President's orders been subject to [\*1445] judicial oversight, he would have had to explain how the unilaterally implemented deprivations of due process were narrowly tailored to effect an important purpose, prompting a more thorough analysis of what was to be gained by the President's detention policies. n155 The weak form of the executive model gives the President limited flexibility in exigent circumstances to move forward without congressional authorization, while retaining a strong preference for specifically authorized executive action and the judicial recourse it usually provides. n156 The fact that both Congress and the Bush Administration made a concerted effort to cut the courts out of the counter-terrorism legal scheme altogether supports the proposition that the anti-terrorism legal system developed during the Bush Administration has brought the U.S. executive model perilously close to operating in its pure form, notwithstanding the broad legislative mandates enacted in support of the President's unilateral activities. n157 President Obama should heed the Boumediene Court's admonitions regarding the centrality of judicial review to the preservation of American democracy and press Congress to lift what barriers to judicial recourse the MCA continues to impose on War on Terror detainees. n158 In those rare circumstances in which legislative authorization is not practicable, the President should provide for meaningful judicial recourse by his own order. n159

#### **The aff’s hegemonic politics is maintained by a farce of legitimacy which justifies endless destruction**

Gulli 13 [Bruno Gulli, professor of history, philosophy, and political science at Kingsborough College in New York, “For the critique of sovereignty and violence,” pg. 5, 2013, http://academia.edu/2527260/For\_the\_Critique\_of\_Sovereignty\_and\_Violence]

*\*\*We disagree with the author’s use of gendered language*

I think that we have now an understanding of what the situation is: **The sovereign everywhere**, be it the political or financial elite, **fakes the legitimacy** on which its power and authority supposedly rest. In truth, they **rest on violence and terror**, or the threat thereof. This is an **obvious and essential aspect** of the singularity of the present crisis. In this sense, the singularity of the crisis lies in the fact that the struggle for dominance is at one and the same time impaired and made more brutal by **the lack of hegemony**. This is true in general, but it is perhaps particularly true with respect to the greatest power on earth, **the United States**, whose hegemony has **diminished or vanished**. It is a fortiori true of whatever is called ‘the West,’ of which the US has for about a century represented the vanguard. Lacking hegemony, the **sheer drive for domination** has to show **its true face**, its **raw violence**. The usual, traditional **ideological justifications for dominance** (such as bringing democracy and freedom here and there) have now become **very weak** because of **the contempt** that the dominant nations (the US and its most powerful allies) **regularly show** toward legality, morality, and humanity. Of course, the so-called rogue states, thriving on corruption, do not fare any better in this sense, but for them, when they act autonomously and against the dictates of ‘the West,’ the specter of punishment, in the form of retaliatory war or even indictment from the International Criminal Court, remains a clear limit, a possibility. **Not so for the dominant nations**: who will stop the United States from striking anywhere at will, or Israel from regularly massacring people in the Gaza Strip, or envious France from once again trying its luck in Africa? Yet, though still dominant, these nations are painfully aware of their **structural, ontological and historical, weakness**. All attempts at concealing that weakness (and the uncomfortable awareness of it) **only heighten the brutality** in the exertion of **what remains of their dominance**. Although they rely on a **highly sophisticated military machine** (the technology of drones is a clear instance of this) and on an equally sophisticated diplomacy, which has **traditionally** been and **increasingly** is an outpost for **military operations and global policing** (now excellently **incarnated by Africom**), **they know that they have lost their hegemony**.

### 2ac politics da

#### You should refuse the logic of the DA—subordinating ethics to political concerns in just one instance undermines our capacity to make any ethical choices

Hedges 11

[05/23/11, Chris Hedges is an American journalist specializing in American politics and society. Hedges is also known as the best-selling author of several books including War Is a Force That Gives Us Meaning (2002)—a finalist for the National Book Critics Circle Award for Nonfiction—Empire of Illusion: The End of Literacy and the Triumph of Spectacle (2009), Death of the Liberal Class (2010) and his most recent New York Times best seller, written with the cartoonist Joe Sacco, Days of Destruction, Days of Revolt (2012), “Why Liberal Sellouts Attack Prophets Like Cornel West”, http://empirestrikesblack.com/2011/05/why-liberal-sellouts-attack-prophets-like-cornel-west/]

The liberal class, which attempted last week to discredit the words my friend Cornel West spoke about Barack Obama and the Democratic Party, prefers comfort and privilege to justice, truth and confrontation. Its guiding ideological stance is determined by what is most expedient to the careers of its members. It refuses to challenge, in a meaningful way, the decaying structures of democracy or the ascendancy of the corporate state. It glosses over the relentless assault on working men and women and the imperial wars that are bankrupting the nation. It proclaims its adherence to traditional liberal values while defending and promoting systems of power that mock these values. The pillars of the liberal establishment—the press, the church, culture, the university, labor and the Democratic Party—all honor an unwritten quid pro quo with corporations and the power elite, as well as our masters of war, on whom they depend for money, access and positions of influence. Those who expose this moral cowardice and collaboration with corporate power are always ruthlessly thrust aside. The capitulation of the liberal class to corporate capitalism, as Irving Howe once noted, has “bleached out all political tendencies.” The liberal class has become, Howe wrote, “a loose shelter, a poncho rather than a program; to call oneself a liberal one doesn’t really have to believe in anything.” The decision to subordinate ethics to political expediency has led liberals to steadily surrender their moral autonomy, voice and beliefs to the dictates of the corporate state. As Dwight Macdonald wrote in “The Root Is Man,” those who do not make human beings the center of their concern soon lose the capacity to make any ethical choices, for they willingly sacrifice others in the name of the politically expedient and practical.

#### Not real world, and their approach causes violence

**Ruby-Sachs, 08** (Emma, Lawyer, November 24, 2008, “Ranking the Issues: Gay Rights in an Economic Crisis,” Huffington Post, http://www.huffingtonpost.com/emma-rubysachs/ranking-the-issues-gay-ri\_b\_146023.html, Hensel)

The classic approach to politics is to rank priorities and measure the finite bowl of political capital. If Obama pushes hard on a green new deal, he likely won't have much left for universal health care. If he backs off of serious economic regulation, then he might get more support for social programs from Republicans.¶Because gay civil rights struggles affect fewer individuals and relate to less quantifiable harms, it's hard to justify putting them at the top of the list.¶ The alternative is to reject the ranked priorities political model altogether.¶ There is little evidence that sway and support is finite in the American political system. Political capital relates to the actions of the leader, yes, but can be infinitely large or non-existent at any point in time. In some ways, the more you get done, the more the bowl of capital swells.¶ Ranking America's problems to conserve political influence is a narrow minded approach to solving this crisis. Putting banks at the top of the list avoids the plight of large employers (like car companies - as much as we love to hate their executives). Sending health care and other social programs to second or third place, leaves those immediately affected by the crisis with nothing to fall back on.¶ Finally, ignoring the disenfranchisement of a segment of the population breeds discontent, encourages protest, boycotts (a definite harm in this economy) and violence. It divides families (especially those who are still unable to sponsor their partner into the United States), imposes higher tax burdens on gay couples, denies benefits to gay spouses in many employment situations and polarizes social conservatives and social liberals in a time when consensus is essential.

#### No risk of aggressive Chinese expansion or destabilization now and pivot makes things worse

Zheng Yongnian 9-29-2012; director of the East Asian Institute of the National University of Singapore. “US Asia-Pacific strategy destabilizes region” http://www.china.org.cn/opinion/2012-09/29/content\_26675703.htm

The United States claims that its high-profile “pivot to Asia” strategy aims to “deter” the threat from a rising China in order to maintain the existing order in Asia. But the effects of this strategy seem to prove just the opposite. Is Asia now more stable than it was before the U.S.’s adoption of this Asia-Pacific strategy? Obviously not. China and the U.S. had been living on relatively good terms before. But dramatic changes have happened in Asia due to America’s new policy. Before this new policy, China and other Asian nations had been constantly adjusting themselves to cater to the needs of others. Most Asian countries, ASEAN nations in particular, adopted a pragmatic foreign policy. They regarded China’s economic growth as an opportunity and accordingly adjusted their relations with China. Meanwhile, China prioritized its economic and trade relations with other Asian countries, and accordingly kept a low profile on political and strategic issues and recognized the leading role of ASEAN. It was because of this mutual effort that the relationship between ASEAN nations and China had rapidly progressed, and the bilateral relations between China and other Asian countries became gradually institutionalized through various regional, international, bilateral and multilateral channels. Some Western scholars have already realized the fact that during the past three decades, Asia maintained peace despite China’s rapid growth, seemingly disproving the “tragedy of great power politics” in which an emerging power will eventually challenge the existing great power. Peace in Asia, to a large extent, was a result of rational choices and mutual adjustment of Asian countries including China. China placed its strategic priorities on economy and trade instead of the military. The so called “threat” that the U.S. faces in Asia ― fears that China will eventually push it out of Asia ― is therefore more cognitive than real. Where do these fears come from? There are many contributing factors, including the so-called “security dilemma” caused by structural anarchy in international relations, differences in political ideology, and a lack of mutual trust.

#### No aggressive China rise or war now

Dr Jian Junbo 9-26-2012; assistant professor of the Institute of International Studies at Fudan University, Shanghai. “US pivots toward trouble in West Pacific” http://www.atimes.com/atimes/China/NI26Ad01.html

A careful review of China's positions and claims on islands and waters in the South and East China seas will show that Beijing has not changed its stance for decades. It is not new. It should also be noted that similar positions and claims are also held by Taiwan, a democratic island politically separated from mainland China. What does this mean? It means Beijing's positions over territorial disputes have nothing to do with its rise, its political system or its internal politics. The challenge is from the outside - its neighbors, with the backing of the US.

#### Keystone thumps

**Mann, 2/6/14 -** DR. MICHAEL E. MANN, DIRECTOR, EARTH SYSTEM SCIENCE CENTER, PENN STATE UNIV (The Real News Network, “"Climate Hubs" a Good Step, but Obama's Policies Still Leading to Climate Disaster” http://truth-out.org/news/item/21703-climate-hubs-a-good-step-but-obamas-policies-still-leading-to-climate-disaster)

NOOR: Alright. Last question for you before we move on to our next segment. But do you think Obama, he doesn't understand the urgency? Or he's doing what he thinks is politically feasible in this current climate?

MANN: Well, you know, I'm sure that the president faces pressure from all sides. And I don't envy the position that he's in. And, of course, there is quite a bit of pressure by special interest groups like the Koch brothers, who stand to make billions of dollars if the Keystone XL Pipeline is built. Of course there's pressure from industry groups, front groups, right-wing foundations advocating for the fossil fuel industry. And the president understands that. He's got a certain amount of political capital, and he has to calculate how much of that he's willing to expend on this particular issue.

That having been said, he made a commitment in his State of the Union address last week. He basically said that he will do all he can to make sure that we don't look back decades from now and have to explain to our children and grandchildren that we made this tragic decision: at a time where we needed to be ramping down our fossil fuel burning and our carbon emissions to avoid dangerous and potentially irreversible climate change, at that pivotal moment we gave in to the pressure and we opened the floodgates for this dirty fossil fuel energy that will commit us to even more climate change.

Hopefully, the president will be true to his word and will fulfill that promise that he made to us in his State of the Union address and not allow this pipeline to be built.

#### Their impact framing causes necrophilia – reducing debate to mere number crunching and body counts – cause ethical inability to process death impacts

**Fromm, 64 – PhD in sociology from Heidelberg in 1922, psychology prof at MSU in the 60’s** (Erich, “CREATORS AND DESTROYERS,” <http://72.52.202.216/~fenderse/Fromm.htm>)

People are aware of the possibility of nuclear war; they are aware of the destruction such a war could bring with it – and yet they seemingly make no effort to avoid it. Most of us are puzzled by this behavior because we start out from the premise that people love life and fear death. Perhaps we should be less puzzled if we questioned this premise. Maybe there are many people who are indifferent to life and many others who do not love life but who do love death. There is an orientation which we may call love of life (biophilia); it is the normal orientation among healthy persons. But there is also to be found in others a deep attraction to death which, following Unamuno's classic speech made at the University of Salamanca (1938), I call necrophilia. It is the attitude which a Franco general, Millán Astray, expressed in the slogan "Long live death, thus provoking Unamuno’s protest against this "necrophilous and senseless cry.“ Who is a necrophilous person? He is one who is attracted to and fascinated by all that is not alive, to all that is dead; to corpses, to decay, to feces, to dirt. **Necrophiles are those people who love to talk about sickness, burials, death**. They come to life precisely when they can talk about death. A clear example of the pure necrophilous type was Hitler. He was fascinated by destruction, and the smell of death was sweet to him. While in the years of success it may have appeared that he wanted only to destroy those whom he considered his enemies, the days of the Götterdämmerung at the end showed that his deepest satisfaction lay in witnessing total and absolute destruction: that of the German people, of those around him, and of himself. The necrophilous dwell in the past, never in the future. Their feelings are essentially sentimental; that is, they nurse the memory of feelings which they had yesterday – or believe that they had. They are cold, distant, devotees of "law and order.“ Their values are precisely the reverse of the values we connect with normal life; not life, but death excites and satisfies them. If one wants to understand the influence of men like Hitler and Stalin, it lies precisely in their unlimited capacity and willingness to kill. For this they' were loved by the necrophiles. Of the rest, many were afraid of them and so preferred to admire, rather than to be aware of, their fear. Many others did not sense the necrophilous quality of these leaders and saw in them the builders, saviors, good fathers. If the necrophilous leaders had not pretended that they were builders and protectors, the number of people attracted to them would hardly have been sufficient to help them seize power, and the number of those repelled by them would probably soon have led to their downfall. While life is characterized by growth in a structured, functional manner, the necrophilous principle is all that which does not grow, that which is mechanical. The necrophilous person is driven by the desire to transform the organic into the inorganic, to approach life mechanically**, as if all living persons were things**. All living processes, feelings, and thoughts are transformed into things. Memory, rather than experience – having, rather than being – are what counts. The necrophilous person can relate to an object – a flower or a person – only if he possesses it; hence, a threat to his possession is a threat to himself; if he loses possession he loses contact with the world. That is why we find the paradoxical reaction that he would rather lose life than possession, even though, by losing life, he who possesses has ceased to exist. He loves control, and in the act of controlling he kills life. He is deeply afraid of life, because it is disorderly and uncontrollable by its very nature. The woman who wrongly claims to be the mother of the child in the story of Solomon's judgment is typical of this tendency; she would rather have a properly divided dead child than lose a living one. To the necrophilous person justice means correct division, and they are willing to kill or die for the sake of what they call, justice. "Law and order“ for them are idols, and everything that threatens law and order is felt as a satanic attack against their supreme values. The necrophilous person is attracted to darkness and night. In mythology and poetry (as well as in dreams) he is attracted to caves, or to the depth of the ocean, or depicted as being blind. (The trolls in Ibsen's Peer Gynt are a good example.) All that is away from or directed against life attracts him. He wants to return to the darkness {23} of the womb, to the past of inorganic or subhuman existence. He is essentially oriented to the past, not to the future, which he hates and fears. Related to this is his craving for certainty. But life is never certain, never predictable, never controllable; in order to make life controllable, it must be transformed into death; death, indeed, is the only thing about life that is certain to him. The necrophilous person can often be recognized by his looks and his gestures. He is cold, his skin looks dead, and often he has an expression on his face as though he were smelling a bad odor. (This expression could be clearly seen in Hitler's face.) He is orderly and obsessive. This aspect of the necrophilous person has been demonstrated to the world in the figure of Eichmann. Eichmann was fascinated by order and death. His supreme values were obedience and the proper functioning of the organization. He transported Jews as he would have transported coal. That they were human beings was hardly within the field of his vision; hence, even the problem of his having hated or not hated his victims is irrelevant. **He was the perfect bureaucrat who had transformed all life into the administration of things**. But examples of the necrophilous character are by no means to be found only among the inquisitors, the Hitlers and the Eichmanns. There are any number of individuals who do not have the opportunity and the power to kill, vet whose necrophilia expresses itself in other and (superficially seen) more harmless ways. An example is the mother who will always be interested in her child's sickness, in his failures, in dark prognoses for the future; at the same time she will not be impressed by a favorable change nor respond to her child's joy, nor will she notice anything new that is growing within him. We might find that her dreams deal with sickness, death, corpses, blood. She does not harm the child in any obvious way, yet she may slowly strangle the child's joy of life, his faith – in growth, and eventually infect him with her own necrophilous orientation. My description may have given the impression that all the features mentioned here are necessarily found in the necrophilous person. It is true that such divergent features as the wish to kill, the worship of force, the attraction to death and dirt, sadism, the wish to transform the organic into the inorganic through "order“ are all part of the same basic orientation. Yet so far as individuals are concerned, there are considerable differences with respect to the strength of these respective trends. Any one of the features mentioned here may be more pronounced in one person than in another. Furthermore, the degree to which a person is necrophilous in comparison with his biophilous aspects and the degree to which a person is aware of necrophilous tendencies and rationalizes them vary considerably from person to person. Yet the concept of the necrophilous type is by no means an abstraction or summary of various disparate behavior trends. Necrophilia constitutes a fundamental orientation; it is the one answer to life that is in complete opposition to life; it is **the most morbid and the most dangerous among the orientations to life of which man is capable**. It is true perversion; **while living, not life but death is loved--not growth, but destruction. The necrophilous person, if he dares to be aware of what he feels, expresses the motto of his life when he says: "Long live death**!“ the opposite of the necrophilous orientation is the biophilous one; its essence is love of life in contrast to love of death. Like necrophilia, biophilia is not constituted by a single trait but represents a total orientation, an entire way of being. It is manifested in a person's bodily processes, in his emotions, in his thoughts, in his gestures; the biophilous orientation expresses itself in the whole man. The person who fully loves life is attracted by the process of life in all spheres. He prefers to construct, rather than to retain. He is capable of wondering, and he prefers to see something new to the security of finding the old confirmed. He loves the adventure of living more than he does certainty. His approach to life is functional rather than mechanical. He sees the whole rather than only the parts, structures rather than summations. He wants to mold and to influence by love, by reason, by his example – not by force, by cutting things apart, by the bureaucratic manner of administering people as if they were things. He enjoys life and all its manifestations, rather than mere excitement. Biophilic ethics has its own principle of good and evil. Good is all that serves life; evil is all that serves death. Good is reverence for life (this is the main thesis of Albert Schweitzer, one of the great representatives of the love of life – both in his writings and in his person), and all that enhances life. Evil is all that stifles life, narrows it down, {24} cuts it into pieces. Thus it is from the standpoint of lifeethics that the Bible mentions as the central sin of the Hebrews: "Because thou didst not serve thy Lord with joy and gladness of heart in the abundance of all things.“ The conscience of the biophilous person is not one of forcing oneself to refrain from evil and to do good. It is not the superego described by .Freud, a strict taskmaster employing sadism against oneself for the sake of virtue. The biophilous conscience is motivated by its attraction to life and joy; the moral effort consists in strengthening the life-loving side in oneself. For this reasons the biophile does not dwell in remorse and guilt, which are, after all, only aspects of selfloathing and sadness. He turns quickly to life and attempts to do good. Spinoza's Ethics is a striking example of biophilic morality. "Pleasure,“ he says, "in itself is not bad but good; contrariwise, pain in itself is bad.“ And in the same spirit: "A free man thinks of death least of all things; and his wisdom is a meditation not of death but of life.“ Love of life underlies the various versions of humanistic philosophy. In various conceptual forms these philosophies are in the same vein as Spinoza's; they express the principle that the same man loves life; that man's aim in life is to be attracted by all that is alive and to separate himself from all that is dead and mechanical. The dichotomy of biophilia-necrophilia is the same as Freud's life-and-death instinct. I believe, as Freud did, that this is the most fundamental polarity that exists. However, there is one important difference. Freud assumes that the striving toward death and toward life are two biologically given tendencies inherent in all living substance that their respective strengths are relatively constant, and that there is only one alternative within the operation of the death instinct – namely, that it can be directed against the outside world or against oneself. In contrast to these assumptions I believe that necrophilia is not a normal biological tendency, but a pathological phenomenon – in fact, the most malignant pathology that exists in mail. What are we, the people of the United States today, with respect to necrophilia and biophilia? Undoubtedly our spiritual tradition is one of love of life. And not only this. Was there ever a culture with more love of "fun“ and excitement, or with greater opportunities for the majority to enjoy fun and excitement? But even if this is so, fun and excitement is not the same as joy and love of life; perhaps underneath there is indifference to life, or attraction to death? To answer this question we must consider the nature of our bureaucratized, industrial, mass civilization. **Our approach to life becomes increasingly mechanical.** The aim of social efforts is to produce things, and. in the process of idolatry of things we transform ourselves into commodities. The question here is not whether they are treated nicely and are well fed (things, too, can be treated nicely); the question is whether people are things or living beings. People love mechanical gadgets more than living beings. The approach to man is intellectual-abstract. One is interested in people as objects, in their common properties, in the statistical rules of mass behavior, not in living individuals. All this goes together with the increasing role of bureaucratic methods. In giant centers of production, giant cities, giant countries, men are administered as if they were things; men and their administrators are transformed into things, and they obey the law of things. In a bureaucratically organized and centralized industrialism, men's tastes are manipulated so that they consume maximally and in predictable and profitable directions. Their intelligence and character become standardized by the ever-increasing use of tests, which select the mediocre and unadventurous over the original and daring. Indeed, the bureaucratic-industrial civilization that has been victorious in Europe and North America has created a new type of man. He has been described as the "organization man“ and as homo consumens. He is in addition the homo mechanicus. By this I mean a "gadget man,“ deeply attracted to all that is mechanical and inclined against all that is alive. It is, of course, true that man's biological and physiological equipment provides him with such strong sexual impulses that even the homo mechanicus still has sexual desires and looks for women. But there is no doubt that the gadget man's interest in women is diminishing. A New Yorker cartoon pointed to this very amusingly: a sales girl trying to sell a certain brand of perfume to a young female customer recommends it by remarking, "It smells like a new sports car.“ Indeed, any observer of men's behavior today will confirm that this cartoon is more than a clever joke. There are apparently a great number of men who are more interested in sports-cars, television and radio sets, space travel, and any number of gadgets than they are in women, love, nature, food; who are more stimulated by the manipulation of non-organic, mechanical things than by life. Their attitude toward a woman is like that toward a car: you push the button and watch it race. It is not even too far-fetched to assume that homo mechanicus has more pride in and is more fascinated by, devices that can kill millions of ,people across a distance of several thousands of miles within minutes than he is frightened and depressed by the possibility of such mass destruction. Homo mechanicus still likes sex {25} and drink. But all these pleasures are sought for in the frame of reference of the mechanical and the unalive. He expects that there must be a button which, if pushed, brings happiness, love, pleasure. (Many go to a psychoanalyst under the illusion that he can teach them to find the button.) The homo mechanicus becomes more and more interested in the manipulation of machines, rather than in the participation in and response to life. Hence he becomes indifferent to life, fascinated by the mechanical, and eventually **attracted by death and total destruction**. This affinity between the love of destruction and the love of the mechanical may well have been expressed for the first time in Marinetti's Futurist Manifesto (1909). "A roaring motor-car, which looks as though running on a shrapnel is more beautiful than the Victory of Samothrace. … We wish to glorify war – the only health-giver of the world – militarism, patriotism, the destructive arm of the Anarchist, the beautiful Ideas that kill the contempt for woman.“ Briefly then, intellectualization, quantification, abstractification, bureaucratization, and reification – the very characteristics of modern industrial society – when applied to people rather than to things are not the principles of life but those of mechanics. People living in such a system must necessarily become indifferent to life, even attracted to death. They are not aware of this. They take the thrills of excitement for the joys of life and live under the illusion that they are very much alive when they only have many things to own and to use. The lack of protest against nuclear war and the discussion of our "atomologists“ of the balance sheet of total or half-total destruction show how far we have already gone into the "valley of the shadow of death. 2 To speak of the necrophilous quality of our industrial civilization does not imply that industrial production as such is necessarily contrary to the principles of life. The question is whether the principles of social organization and of life are subordinated to those of mechanization, or whether the principles of life are the dominant ones. Obviously, the industrialized world has not found thus far an answer, to the question posed here: How is it possible to create a humanist industrialism as against the bureaucratic mass industrialism that rules our lives today? The danger of nuclear war is so grave that man may arrive at a new barbarism before he has even a chance to find the road to a humanist industrialism. Yet not all hope is lost; hence we might ask ourselves whether the hypothesis developed here could in any way contribute to finding peaceful solutions. I believe it might be useful in several ways. First of all, an awareness of our pathological situation, while not yet a cure, is nevertheless a first step. If more people became aware of the difference between love of life and love of death, **if they became aware that they themselves are already far gone in the direction of indifference or of necrophilia, this shock alone could produce new and healthy reactions.** Furthermore, the sensitivity toward those who recommend death might be increased. Many might see through the pious rationalizations of the death lovers and change their admiration for them to disgust. Beyond this, our hypothesis would suggest one thing to those concerned with peace and survival: that every effort must be made to weaken the attraction of death and to strengthen the attraction of life. Why not declare that there is only one truly dangerous subversion, the subversion of life? Why do not those who represent the traditions of religion and humanism speak up and say that there is no deadlier sin than love for death and contempt for life? Why not encourage our best brains – scientists, artists, educators – to make suggestions on how to arouse and stimulate love for life as opposed to love for gadgets? I know love for gadgets brings profits to the corporations, while love for life requires fewer things and hence is less profitable. Maybe it is too late. Maybe the neutron bomb, which leaves entire cities intact, but without life, is to be the symbol of our civilization. But again, those of us who love life will not cease the struggle against necrophilia.

#### Won’t pass

**The Economist, 2/22/14** (“Taking aim at imports: Protectionists in Congress could scupper crucial free-trade deals” <http://www.economist.com/news/united-states/21596939-protectionists-congress-could-scupper-crucial-free-trade-deals-taking-aim-imports>)

A PLAGUE of Asian carp afflicts the Midwest, wiping out native species and assaulting unsuspecting fishermen. The creatures were introduced by well-meaning technocrats trying to cure a different problem, but the carp have grown so large and numerous that the government is now formulating expensive plans to curb them. Replace “carp” with “imports” and you have an accurate description of how a large number of Democrats, and a smaller number of Republicans, feel about free trade. This helps to explain why Congress is likely to block two big free-trade deals—one with Asia, the other with Europe—until after November’s mid-term elections, and possibly to scupper them altogether.

This would make both America and the world poorer. Peter Petri of the Peterson Institute, a think-tank, estimates the boost to global income from the Trans-Pacific Partnership (TPP) alone to be $295 billion a year, $78 billion of that accruing to the United States. The Transatlantic Trade and Investment Partnership (TTIP) is roughly as large. And the deals could generate big extra benefits by paving the way for more competition in services, the largest but least globally traded part of the economy.

For all its self-image as a place where doing business comes first, America has often found trade deals frightening. This is partly because its continent-spanning economy is more self-contained than many people realise: imports and exports of goods amount to 23% of GDP, compared with 26% for the EU or 46% for China, so the constituency for reducing tariffs and opening markets is relatively small. The last time Congress granted the president “fast-track” authority to negotiate trade deals was in 2002. This power, now known as Trade Promotion Authority, allows the president to thrash out a pact and then present it to Congress for an up-or-down vote, with no amendments allowed. It expired in 2007 and has not been renewed. Without it American negotiators will find it impossible to put together a good deal, because the people on the other side of the table will know that Congress is likely to unpick whatever is agreed.

The last time the White House was granted the authority to do trade deals, George W. Bush was popular and Republicans had a majority in the House. Even so, the law only just squeaked through, with 183 Democrats voting no in the House and only 25 voting yes. Moreover, the deal mooted in 2002, a free-trade pact with Andean nations, was small: the threat to American jobs from imported Peruvian knitwear seemed less menacing than an Asian pact that includes big economies like Japan and Australia (though not China).

Most of the lawmakers who voted in favour of that deal have now left Congress. Of the 279 members of both chambers who voted yes, only 86 remain. That makes any vote on granting the president the authority to do an Asian trade deal and, later, a European one, hard to predict. But there are good reasons for assuming that the chances are not good.

A total of 173 House members—151 Democrats and 22 Republicans—have already signed letters opposing the granting of deal-making authority to the White House. The wording of the letter signed by the Democrats gives them some wiggle room, but it reflects a powerful feeling on the left. “Our constituents,” said three House Democrats, George Miller of California, Louise Slaughter of New York and Rosa DeLauro of Connecticut, “did not send us to Washington to ship their jobs overseas”.

Within the Democratic caucus, there is “a level of scepticism on trade that we haven’t seen since the mid-1990s [when the North American Free-Trade Agreement, or NAFTA, was signed]—in fact it’s probably higher now than it was then,” says Matt Bennett of Third Way, a centre-left think-tank. The belief that NAFTA is partly to blame for rising income inequality and the disappearance of well-paying manufacturing jobs has become fixed on the left, so that even those who are in favour of the Asian deal talk about “learning the lessons of NAFTA”, as if it were a painful defeat.

Opponents of free trade have fixed on the idea that letting the White House negotiate behind closed doors is somehow undemocratic and that more transparency is required. The executive office responsible for trade negotiations has held more than 1,150 meetings on Capitol Hill on the Asia deal alone, but this is apparently insufficient.

A similar argument has developed to oppose the deal at the other end of the political spectrum. In addition to those few Republicans who oppose more free trade for protectionist reasons there is a larger group that likes trade deals in theory but not in practice, since negotiating them involves handing power to a president who cannot be trusted. The Republican letter opposing the granting of such authority regrets that “recent presidents have seized Congress’s constitutional trade authority” and asks for it to be returned.

It is hard to oppose greater transparency without sounding sinister, but too much will make it hard for America to do a good deal. “I don’t know anyone who, when buying a car or a house, walks in with their best price written on their forehead,” says someone involved in negotiating the Asian deal.

Both sides in Congress now seem to prefer inaction to moving ahead. The office of John Boehner, the House Speaker, has suggested he will need the support of 50 Democrats to ensure passage. That seems impossible for now, which probably suits him well: attending a signing ceremony with Mr Obama in the Rose Garden is not high on his list of priorities before the mid-terms. This suits Democrats, who would rather not pick a fight with the unions before the elections. Yet even when that hurdle is past, it is not clear that the political maths on which approval for free trade turns will have changed.

#### Obama’s not pushing

**Strassel, 2/10/14** – member of the WSJ editorial board (Kimberly, Wall Street Journal Asia, “How Politics May Sink Trade Deals” factiva)

Yet the iron rule of Washington is that TPA votes only succeed via ferocious and sustained White House lobbying. President George W. Bush spent two years speechifying, mobilizing, horse-trading, and unleashing his assembled business and administrative host on Congress to get TPA. "You couldn't walk down the hall to the bathroom without bumping into a Bush cabinet member or staffer demanding to talk about trade," reminisces one current GOP staffer. "And if you didn't, they'd follow you in." With all this, the House vote in July 2002 to pass TPA was 215-212.

Hurricane Obama has ambitions but not about trade. He is aiming to win the midterm election, and that means keeping the left flank happy. Union heavyweights have vowed a grass-roots assault on the trade deals, with enviros in tow. Mr. Obama only wants a trade victory if he doesn't have to commit political capital and upset his base. Since he'd have to do both to win TPA, he's doing little. Congressional pro-traders report no real trade push from the White House. They say Mr. Obama has so far limited himself to working this, ahem, behind the scenes. Not to worry, he keeps telling them. He's making a few calls.

One call that apparently hasn't gone out is to Typhoon Harry Reid, who has already announced that Mr. Obama's call for TPA is dead. The Senate Majority leader has a priority that far outranks job-creating trade deals, and it is called staying Majority Leader. He spends 99.999989% of his time protecting his vulnerable members from tough situations, and the thought of TPA makes his few nerve endings go numb.

#### Courts don’t link – institutional and persuasive power

**Pacelle 2** [Richard L. Pacelle, Associate Professor, Political Science, University of Missouri-St. Louis, THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS, 2002, p. 102]

The limitations on the Court are not as significant as they once seemed. They constrain the Court, but the boundaries of those constraints are very broad. Justiciability is self-imposed and seems to be a function of the composition of the Court rarther than a philosophical position. Checks and balances are seldom successfully invoked against the judiciary, in part because the Court has positive institutional resource to justify its decision. The Supreme Court has a relatively high level of diffuse support that comes, in part, from a general lack of knowledge by the public and that contributes to its legitimacy. The cloak of the Constitution and the symbolism attendant to the marble palace and the law contribute as well. As a result, presidents and the Congress should pause before striking at the Court or refusing to follow its directives. Indeed, presidents and members of Congress can often use unpopular Court decisions as political cover. They cite the need to enforce or support such decision even though they disagree with them. In the end, the institutional limitations do not mandate judicial restraint, but turn the focus to judicial capacity, the subject of the next chapter.