# round 2 neg v. wake cv

1ac: indefinite detention Suspension Clause. Advantages: judicial abstention, Afghanistan.

2nr: politics.

## 1nc

### 1nc politics

#### Obama will win the debt ceiling fight despite Syria

**Garrett, 9/19/13 –** National Journal Correspondent-at-Large and Chief White House Correspondent for CBS News(Major, National Journal, “A September to Surrender: Syria and Summers Spell Second-Term Slump” <http://www.nationaljournal.com/all-powers/a-september-to-surrender-syria-and-summers-spell-second-term-slump-20130917>)

There are no “obstructionist” Republican fingerprints on the conspicuous and power-depleting defeats for Obama. He never sought a vote on Syria and therefore was not humiliated. The same is true for Summers. But Obama lost ground on both fronts and ultimately surrendered to political realities that, for the first time in his presidency, were determined by his own obdurate party.

This does not mean Obama will lose coming fights over the sequester, shutdown, or debt ceiling. But he is visibly weaker, and even his sense of victory in Syria is so unidimensional, it has no lasting sway in either Democratic cloakroom. More important, Democrats are no longer afraid to defy him or to disregard the will of their constituents—broadly defined in the case of Syria; activist and money-driving in the case of Summers. This, of course, indirectly announces the beginning of the 2016 presidential campaign and an intra-party struggle over the post-Obama Democratic matrix.

This shift—a tectonic one—will give Republicans new opportunities on the fiscal issues and in coming debates over immigration and implementation of Obamacare. Republicans have never known a world where Democratic defections were so unyielding and damaging.

This does not mean Republicans will find a way to exploit these fissures. The GOP’s current agony over delaying or defunding Obamacare and the related shambling incoherence around the sequester/shutdown/debt ceiling suggest not.

#### Restrictions on authority are a loss that spills over to the debt ceiling

**Parsons, 9/12/13** (Christi, Los Angeles Times, “Obama's team calls a timeout”

<http://www.latimes.com/nation/la-na-obama-congress-20130913,0,2959396.story>)

After a week in which President Obama narrowly averted a bruising defeat on Capitol Hill over a military strike on Syria, the decision had the feeling of a much-needed timeout. The messy debate over a resolution to authorize military force put a harsh light on the president's already rocky relationship with Congress. Despite a charm offensive earlier this year, complete with intimate dinners and phone calls, Obama faced contrary lawmakers in both parties, a climate that is certain to persist through the next round of legislative fights, if not to the end of his second term. In deciding to seek approval for military action, Obama banked on the long-standing deference to the commander in chief on matters of national defense. But by the time he pressed "pause" on the intense White House lobbying effort, he was finding as much defiance as deference. Although the White House cast the issue as a matter of national security and a crucial test of U.S. power, dozens of lawmakers from both parties were set to deliver a rare rebuke to a president on foreign policy. Even Democratic loyalists seemed unswayed by appeals to preserve the prestige of the presidency — and this president. Hawkish Republicans offering to reach across the aisle to support the president said they found the White House distant and uninterested. The canceled picnic punctuated a week of aggravated feelings. "We obviously have divided government. We have sometimes contentious, sometimes very effective relations with Congress. But we keep at it," said White House spokesman Jay Carney, who denied the picnic cancellation had anything to do with the state of relations between the two branches of government. On Capitol Hill, the week's episode strained Obama's traditional alliance with his fellow Democrats, many of whom were wary of another military involvement, unclear about the president's plans for a missile strike and surprised by his decision to ask them to vote on it. "Not only was it a hard ask, but it was not a well-prepared ask," said Sen. Sheldon Whitehouse (D-R.I.). "His willingness to back away from the ultimatum and pursue the disarmament proposal was extremely welcome, and I think that helped all of us in our relationship with him." Obama's relationship with his Republican critics was not helped. As lawmakers look ahead to the rest of the fall agenda, including the coming budget battles, the administration's performance this week will not be easy to forget, some said. "It's just more lack of confidence that they know what they're doing," said Sen. Tom Coburn (R-Okla.). "There's only so much political capital," said Sen. Rob Portman (R-Ohio). Democrats defended the president, blaming Republicans for a "knee-jerk" opposition to any initiative tied to this White House, a phenomenon that Obama aides regularly cite but that the president appears to have disregarded in his decision to put a use-of-force resolution before Congress. "Historically, when it comes to military force, Republicans and conservatives have led that. Now they're opposed to it," said Sen. Richard J. Durbin (D-Ill.). In a private meeting this week, Durbin said, Obama himself joked that "a lot of Republicans on Capitol Hill are discovering their inner doves on Syria." The next set of negotiations will be far more predictable and on familiar territory. By the end of the month, the president and Congress must agree on a plan to continue funding the government, or it will shut down. And by mid-October, they will have to agree to raise the debt limit, or risk a default. The White House has said it won't negotiate on the debt limit, as it did twice before, counting on the public and business groups to pressure Republicans. Democrats were hopeful the budget issues would put the White House back on more solid political footing. "I think the public has a heck of a lot more confidence in the president on economics and budget than [in] the House Republicans," said Sen. Carl Levin (D-Mich.). That may be wishful thinking, said Ross Baker, a political science professor at Rutgers University, who studies the Senate. "These things carry over. There's no firewall between issues," he said. "Failure in one area leads to problems in other areas." The debate over the war in Syria may be on an extended pause, although prospects of Obama returning to Congress to ask for a use-of-force authorization seem slim. A bipartisan group of senators is drafting an amended authorization, but the group is not expected to fully air its proposal until diplomatic talks conclude. There were some signs that the debate may have won the president some empathy, if not support. At a private lunch with Republican senators this week, Obama asked them not to undermine him on the world stage. Sen. Ron Johnson of Wisconsin, who is part of a group of GOP senators working with the White House on fiscal issues, said the appeal resonated.

#### Capital is finite and spending it elsewhere prevents a deal

**Moore, 9/10/13 -** Guardian's US finance and economics editor.(Heidi, “Syria: the great distraction” The Guardian, <http://www.theguardian.com/commentisfree/2013/sep/10/obama-syria-what-about-sequester>)

The country will crash into the debt ceiling in mid-October, which would be an economic disaster, especially with a government shutdown looming at the same time. These are deadlines that Congress already learned two years ago not to toy with, but memories appear to be preciously short.

The Federal Reserve needs a new chief in three months, someone who will help the country confront its raging unemployment crisis that has left 12 million people without jobs. The president has promised to choose a warm body within the next three weeks, despite the fact that his top pick, Larry Summers, would likely spark an ugly confirmation battle – the "fight of the century," according to some – with a Congress already unwilling to do the President's bidding.

Congress was supposed to pass a farm bill this summer, but declined to do so even though the task is already two years late. As a result, the country has no farm bill, leaving agricultural subsidies up in the air, farmers uncertain about what their financial picture looks like, and a potential food crisis on the horizon.

The two main housing agencies, Fannie Mae and Freddie Mac, have been in limbo for four years and are desperately in need of reform that should start this fall, but there is scant attention to the problem.

These are the problems going unattended by the Obama administration while his aides and cabinet members have been wasting the nation's time making the rounds on television and Capitol Hill stumping for a profoundly unpopular war. The fact that all this chest-beating was for naught, and an easy solution seems on the horizon, belies the single-minded intensity that the Obama White House brought to its insistence on bombing Syria.

More than one wag has suggested, with the utmost reason, that if Obama had brought this kind of passion to domestic initiatives, the country would be in better condition right now. As it is, public policy is embarrassingly in shambles at home while the administration throws all of its resources and political capital behind a widely hated plan to get involved in a civil war overseas.

The upshot for the president may be that it's easier to wage war with a foreign power than go head-to-head with the US Congress, even as America suffers from neglect.

This is the paradox that President Obama is facing this fall, as he appears to turn his back on a number of crucial and urgent domestic initiatives in order to spend all of his meager political capital on striking Syria.

Syria does present a significant humanitarian crisis, which has been true for the past two years that the Obama administration has completely ignored the atrocities of Bashar al-Assad.

Two years is also roughly the same amount of time that key domestic initiatives have also gone ignored as Obama and Congress engage in petty battles for dominance and leave the country to run itself on a starvation diet imposed by sequestration cuts. Leon Panetta tells the story of how he tried to lobby against sequestration only to be told:

Leon, you don't understand. The Congress is resigned to failure.

Similarly, those on Wall Street, the Federal Reserve, those working at government agencies, and voters themselves have become all too practiced at ignoring the determined incompetence of those in Washington.

Political capital – the ability to horse-trade and win political favors from a receptive audience – is a finite resource in Washington. Pursuing misguided policies takes up time, but it also eats up credibility in asking for the next favor. It's fair to say that congressional Republicans, particularly in the House, have no love for Obama and are likely to oppose anything he supports. That's exactly the reason the White House should stop proposing policies as if it is scattering buckshot and focus with intensity on the domestic tasks it wants to accomplish, one at a time.

#### The impact is the global economy

**Davidson, 9/10/13** – co-founder of NPR’s Planet Money (Adam, “Our Debt to Society” New York Times, <http://www.nytimes.com/2013/09/15/magazine/our-debt-to-society.html?pagewanted=all>)

If the debt ceiling isn’t lifted again this fall, some serious financial decisions will have to be made. Perhaps the government can skimp on its foreign aid or furlough all of NASA, but eventually the big-ticket items, like Social Security and Medicare, will have to be cut. At some point, the government won’t be able to pay interest on its bonds and will enter what’s known as sovereign default, the ultimate national financial disaster achieved by countries like Zimbabwe, Ecuador and Argentina (and now Greece). In the case of the United States, though, it won’t be an isolated national crisis. If the American government can’t stand behind the dollar, the world’s benchmark currency, then the global financial system will very likely enter a new era in which there is much less trade and much less economic growth. It would be, by most accounts, the largest self-imposed financial disaster in history.

Nearly everyone involved predicts that someone will blink before this disaster occurs. Yet a small number of House Republicans (one political analyst told me it’s no more than 20) appear willing to see what happens if the debt ceiling isn’t raised — at least for a bit. This could be used as leverage to force Democrats to drastically cut government spending and eliminate President Obama’s signature health-care-reform plan. In fact, Representative Tom Price, a Georgia Republican, told me that the whole problem could be avoided if the president agreed to drastically cut spending and lower taxes. Still, it is hard to put this act of game theory into historic context. Plenty of countries — and some cities, like Detroit — have defaulted on their financial obligations, but only because their governments ran out of money to pay their bills. No wealthy country has ever voluntarily decided — in the middle of an economic recovery, no less — to default. And there’s certainly no record of that happening to the country that controls the global reserve currency.

Like many, I assumed a self-imposed U.S. debt crisis might unfold like most involuntary ones. If the debt ceiling isn’t raised by X-Day, I figured, the world’s investors would begin to see America as an unstable investment and rush to sell their Treasury bonds. The U.S. government, desperate to hold on to investment, would then raise interest rates far higher, hurtling up rates on credit cards, student loans, mortgages and corporate borrowing — which would effectively put a clamp on all trade and spending. The U.S. economy would collapse far worse than anything we’ve seen in the past several years.

#### Nuclear war

**Friedberg and Schoenfeld 8**

[Aaron, Prof. Politics. And IR @ Princeton’s Woodrow Wilson School and Visiting Scholar @ Witherspoon Institute, and Gabriel, Senior Editor of Commentary and Wall Street Journal, “The Dangers of a Diminished America”, 10-28, <http://online.wsj.com/article/SB122455074012352571.html>]

Then there are the dolorous consequences of a potential collapse of the world's financial architecture. For decades now, Americans have enjoyed the advantages of being at the center of that system. The worldwide use of the dollar, and the stability of our economy, among other things, made it easier for us to run huge budget deficits, as we counted on foreigners to pick up the tab by buying dollar-denominated assets as a safe haven. Will this be possible in the future? Meanwhile, traditional foreign-policy challenges are multiplying. The threat from al Qaeda and Islamic terrorist affiliates has not been extinguished. Iran and North Korea are continuing on their bellicose paths, while Pakistan and Afghanistan are progressing smartly down the road to chaos. Russia's new militancy and China's seemingly relentless rise also give cause for concern. If America now tries to pull back from the world stage, it will leave a dangerous power vacuum. The stabilizing effects of our presence in Asia, our continuing commitment to Europe, and our position as defender of last resort for Middle East energy sources and supply lines could all be placed at risk. In such a scenario there are shades of the 1930s, when global trade and finance ground nearly to a halt, the peaceful democracies failed to cooperate, and aggressive powers led by the remorseless fanatics who rose up on the crest of economic disaster exploited their divisions. Today we run the risk that rogue states may choose to become ever more reckless with their nuclear toys, just at our moment of maximum vulnerability. The aftershocks of the financial crisis will almost certainly rock our principal strategic competitors even harder than they will rock us. The dramatic free fall of the Russian stock market has demonstrated the fragility of a state whose economic performance hinges on high oil prices, now driven down by the global slowdown. China is perhaps even more fragile, its economic growth depending heavily on foreign investment and access to foreign markets. Both will now be constricted, inflicting economic pain and perhaps even sparking unrest in a country where political legitimacy rests on progress in the long march to prosperity. None of this is good news if the authoritarian leaders of these countries seek to divert attention from internal travails with external adventures.

### 1nc court politics

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

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

Bond v. U.S.

Argument date: Nov. 5

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

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

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

#### The aff is controversial, causes political retaliation, and trades off with other cases

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

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

#### Court capital is finite

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

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

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

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

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

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

#### Even a narrow ruling for Bond collapses global arms control

Trapp et al 13

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

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

#### Extinction

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

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

### 1nc doj cp

#### COUNTERPLAN: The President of the United States should issue an Executive Order committing the executive branch to Solicitor General representation and advance consultation with the Office of Legal Counsel over decisions regarding indefinite detention. The Department of Justice officials involved should state that the President of the United States lacks authority to indefinitely detail individuals arrested by the U.S. government on the grounds of the Suspension Clause. The Executive Order should also require written publication of Office of Legal Counsel opinions. The United States Federal Government should legally prohibit arm sales reference in the 1ac Klare evidence.

#### The counterplan solves through DOJ adjudication—pre-commitment gives it precedent

**Pillard 2005** – JD from Harvard, Faculty Director of Supreme Court Institute at Georgetown University Law Center, former Deputy Assistant Attorney General in the DOJ (February, Cornelia T., Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758, http://scholarship.law.georgetown.edu/facpub/189/)

V. ENABLING EXECUTIVE CONSTITUTIONALISM

The courts indisputably do not and cannot fully assure our enjoyment of our constitutional rights, and it is equally clear that the federal executive has an independent constitutional duty to fulfill the Constitution's promise. Executive constitutionalism seems ripe with promise. Yet, it is striking how limited and court-centered the executive's normative and institutional approaches to constitutional questions remain.

One conceivable way to avoid the pitfalls of court-centric executive lawyering on one hand and constitutional decisions warped by political expedience on the other would be to make the Solicitor General and Office of Legal Counsel - or perhaps the entire Department of Justice - as structurally independent as an independent counsel or independent agency.207 Making the SG and OLC independent in order to insulate them from politics presumably would alleviate the "majoritarian difficulty" resulting from their service to elected clients. Promoting fuller independence in that sense does not, however, appear to be clearly normatively attractive, constitutionally permissible, nor particularly feasible. In all the criticism of our current constitutionalism, there is little call for an SG or OLC that would act, in effect, as a fully insulated and jurisprudentially autonomous constitutional court within the executive branch, operating with even less transparency and accountability than the Supreme Court. Moreover, as a practical matter it would be complex and problematic to increase the independence of the SG and OLC. The federal government faces Article II obstacles to formally insulating executive lawyers from politics and institutional pressures, and the president and his administration likely would be less amenable to guidance from such unaccountable lawyers.208

The challenge, rather, is to draw forth from the executive a constitutional consciousness and practice that helps the government actively to seek to fulfill the commitments of the Constitution and its Bill of Rights, interpreted by the executive as guiding principles for government. Adjustments to executive branch constitutional process and culture should be favored if they encourage the executive to use its experience and capacities to fulfill its distinctive role in effectuating constitutional guarantees. There is transformative potential in measures that break ingrained executive branch habits of looking to the Constitution only as it is mediated through the courts, and of reflexively seeking, where there is no clear doctrinal answer, to minimize constitutional constraint. It is difficult fully to imagine what kinds of changes would best prompt executive lawyers and officials to pick up constitutional analysis where the courts leave off, and to rely on the Constitution as an affirmative, guiding mandate for government action; what follows are not worked-out proposals, but are meant to be merely suggestive.

A. Correcting the Bias Against Constitutional Constraint

As we have seen, the SG's and OLC's default interpretive approach to individual rights and other forms of constitutional constraints on government is to follow what clear judicial precedents there are and, where precedents are not squarely to the contrary, to favor interpretations that minimize constitutional rights or other constitutional obligations on federal actors. Those court-centered and narrowly self-serving executive traditions produce a systematic skew against individual rights.

1. Encourage Express Presidential Articulation of Commitment to Constitutional Rights

To the extent that a president articulates his own rights-protective constitutional vision with any specificity, he ameliorates the tension his constitutional lawyers otherwise face between advancing individual rights and serving their boss's presumed interest in maximum governing flexibility. Case or controversy requirements and restrictions against courts issuing advisory opinions do not, of course, apply to the executive's internal constitutional decisionmaking, and presidents can better serve individual rights to the extent that they expressly stake out their constitutional commitments in general and in advance of any concrete controversy."° When the president takes a stand for advancing abortion rights, property rights, disability rights, "charitable choice," a right to bear arms, or full remediation of race and sex discrimination, he signals to his lawyers that they should, in those areas, set aside their default bias in favor of preserving executive prerogative, even if it requires extra executive effort or restraint to do so.

If presented in a concrete setting with a choice between interpreting and applying the Constitution in fully rights-protective ways or sparing themselves the effort where Supreme Court precedent can be read not to require it, government officials typically default to the latter course without considering whether they might thereby be giving short shrift to a constitutional duty. A president's stated commitment to protection of particular rights, however, flips the default position with respect to those rights, acting as a spur to executive-branch lawyers and other personnel to work to give effect to constitutional rights even where, for a range of institutional reasons, the courts would not. A president is thus uniquely situated to facilitate full executive-branch constitutional compliance by precommitting himself to a rights-protective constitutional vision, and thereby making clear that respect for constitutional rights is part of the executive's interest, not counter to it.

#### Presumptively binding opinions maintain OLC cred without hurting flexibility

**Morrison 2011** – Professor of Law, Columbia University (Trevor W., Harvard Law Review, ““Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation”, 124 HARV. L. REV.F. 62, http://web.law.columbia.edu/sites/default/files/microsites/constitutional-governance/files/Libya-Hostilities-Office-of-Legal-Counsel.pdf)

Once OLC arrived at its conclusion, it should have been clearly conveyed to the relevant parties, ideally in writing. Reducing an opinion to writing is not always possible when time is short, but where it is feasible it helps clarify the precise terms and bounds of OLC’s position. The recipients of OLC’s opinion (whether written or oral) should have regarded it as the presumptively final word on the “hostilities” question. The President certainly retains the authority to overrule OLC, but the traditions of executive branch legal interpretation do not contemplate routine relitigation before the President. Still, on matters of grave consequence where affected agencies strongly disagree with OLC’s analysis, there is nothing categorically inappropriate in their seeking presidential review. Importantly, any such presidential review should proceed on the understanding that OLC’s analysis should be adhered to in all but the most extreme circumstances. Presidential overruling should be rare because it can carry serious costs. To start, it can undermine OLC’s ability to produce legal opinions consistent with its best view of the law. Agency general counsels and the White House Counsel’s Office may approach legal questions not with the goal of seeking the best view of the law, but with the aim of finding the best, professionally responsible legal defense of their client’s preferred policy position. There is nothing wrong with that. But if the President routinely favors legal views of that sort over OLC’s conclusions, the traditional rationale for having an OLC at all will be undermined. OLC’s work product is significant today in large part because of the time-honored understanding that its conclusions are presumptively binding within the executive branch. Routine presidential overruling would weaken the presumption, which in turn would diminish the significance of OLC’s work and reduce its clients’ incentive to seek its views. To remain relevant, OLC would likely start intentionally tilting its analysis in favor of its clients’ (here, the President’s) preferred policies. Put another way, the strong presumption in favor of the authoritativeness of OLC’s analysis provides OLC with the institutional space and cover to provide answers based on its best view of the law. If the former is weakened, the latter is jeopardized.

### 1nc pres da

#### Deference is inevitable – the best they can achieve is inconsistent application of precedent.

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

THE COURTS

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

The Timing of Review

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

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

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

Intensity of Review

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

Legality and Legitimacy

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

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

#### They can’t solve but the interference still undermines executive decision-making

**Posner and Vermeule, 7** – \*Kirkland and Ellis Professor of Law at the University of Chicago Law School AND \*\*professor at Harvard Law School (Eric and Adrian,Terror in the Balance: Security, Liberty, and the Courts p. 30-31)

As a matter of fact, this baseline picture is almost certainly incorrect. Government does not always act rationally; sometimes government officials enjoy agency slack and use it to engage in self-dealing, opportunism, or other welfare-reducing actions; sometimes government officials act as tightly constrained agents for the majority and enact policies that oppress minorities. But the baseline picture helps us to clarify the position we will defend: government is not more likely to do these things during emergencies than during normal times, whereas courts are less able to police such behavior during emergencies than during normal times. This is an empirical and institutional claim, which we shall support in every succeeding chapter, not a conceptual claim. If courts were perfectly informed and well motivated, then they might weed out bad emergency policies chosen by irrational or ill-motivated governments. But we just do not have courts of that sort. In particular cases, judges may do better than government at assessing the relative likelihood of threats to security and liberty or the overall costs of particular policies. But this will be wholly fortuitous, and judges who think they have guessed better than government may guess worse instead. Judges are generalists, and the political insulation that protects them from current politics also deprives them of information,33 especially information about novel security threats and necessary responses to those threats. If government can make mistakes and adopt unjustified security measures, then judges can make mistakes as well, sometimes invalidating justified security measures.

On this comparative institutional view, there is no general reason to think that judges can do better than government at balancing security and liberty during emergencies. Constitutional rules do no good, and some harm, if they block government’s attempts to adjust the balance as threats wax and wane. When judges or academic commentators say that government has wrongly assessed the net benefits or costs of some security policy or other, they are amateurs playing at security policy, and there is no reason to expect that courts can improve upon government’s emergency policies in any systematic way.

#### This undermines strategic agility – collapses heg

**Blomquist, 10 -** Professor of Law, Valparaiso University School of Law (Robert, “THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE “ Valparaiso University Law Review, Vol. 44, No. 3 [2010], Art. 6, google scholar)

Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the “challengers, competitors, and threats to America’s future.”23 Not that the Justices need to become experts in national security affairs,24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations.

(1) “National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment’s notice.”25 While “[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers”26, the twenty-first century reality is that “[t]hreats are also more likely to be intertwined—proliferators use the same networks as narcotraffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers.”27

(2) “Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat—the Soviet Union—was brittle, most of the potential adversaries and challengers America now faces are resilient.”28

(3) “The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events.”29 Importantly, “[w]hen you hold the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not.”30

(4) While “keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony,”31 maintaining the American “strategic advantage is critical, because it is essential for just about everything else America hopes to achieve— promoting freedom, protecting the homeland, defending its values, preserving peace, and so on.”32

(5) The United States requires national security “agility.”33 It not only needs “to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources.”34

As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago,35 the average American can be understood as a Jacksonian pragmatist on national security issues.36 “Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms.”37 Thus, recent social science survey data paints “a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time.”38 Indeed, since the American people “do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian.”39

Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel,40 and the unprecedented dangers to the United States national security after 9/11,41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security.42 Second, Justices should be aware that different presidents institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation.43 Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. “During emergencies, the institutional advantages of the executive are enhanced”;44 moreover, “[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times.”45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check—even during times of claimed national emergency; but, how much deference to be accorded by the Court is “always a hard question” and should be a function of “the scale and type of the emergency.”46 Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule,47 “the United States should comply with the laws of war in its battle against Al Qaeda”—and I would argue, other lawless terrorist groups like the Taliban—“only to the extent these laws are beneficial to the United States, taking into account the likely response of other states and of al Qaeda and other terrorist organizations,”48 as determined by the POTUS and his national security executive subordinates.

#### Extinction

Barnett 11 (Thomas, Former Senior Strategic Researcher and Professor in the Warfare Analysis & Research Department, worked as the Assistant for Strategic Futures in the Office of Force Transformation in the Department of Defense, “The New Rules: Leadership Fatigue Puts U.S., and Globalization, at Crossroads,” The World Politics Review, March 7, 2011, <http://www.worldpoliticsreview.com/articles/8099/the-new-rules-leadership-fatigue-puts-u-s-and-globalization-at-crossroads>)

Events in Libya are a further reminder for Americans that we stand at a crossroads in our continuing evolution as the world's sole full-service superpower. Unfortunately, we are increasingly seeking change without cost, and shirking from risk because we are tired of the responsibility. We don't know who we are anymore, and our president is a big part of that problem. Instead of leading us, he explains to us. Barack Obama would have us believe that he is practicing strategic patience. But many experts and ordinary citizens alike have concluded that he is actually beset by strategic incoherence -- in effect, a man overmatched by the job. It is worth first examining the larger picture: We live in a time of arguably the greatest structural change in the global order yet endured, with this historical moment's most amazing feature being its relative and absolute lack of mass violence. That is something to consider when Americans contemplate military intervention in Libya, because if we do take the step to prevent larger-scale killing by engaging in some killing of our own, we will not be adding to some fantastically imagined global death count stemming from the ongoing "megalomania" and "evil" of American "empire." We'll be engaging in the same sort of system-administering activity that has marked our stunningly successful stewardship of global order since World War II. Let me be more blunt: As the guardian of globalization, the U.S. military has been the greatest force for peace the world has ever known. Had America been removed from the global dynamics that governed the 20th century, the mass murder never would have ended. Indeed, it's entirely conceivable there would now be no identifiable human civilization left, once nuclear weapons entered the killing equation. But the world did not keep sliding down that path of perpetual war. Instead, America stepped up and changed everything by ushering in our now-perpetual great-power peace. We introduced the international liberal trade order known as globalization and played loyal Leviathan over its spread. What resulted was the collapse of empires, an explosion of democracy, the persistent spread of human rights, the liberation of women, the doubling of life expectancy, and a roughly 10-fold increase in adjusted global GDP and a profound and persistent reduction in battle deaths from state-based conflicts. That is what American "hubris" actually delivered. Please remember that the next time some TV pundit sells you the image of "unbridled" American military power as the cause of global disorder instead of its cure. With self-deprecation bordering on self-loathing, we now imagine a post-American world that is anything but. Just watch who scatters and who steps up as the Facebook revolutions erupt across the Arab world. While we might imagine ourselves the status quo power, we remain the world's most vigorously revisionist force. As for the sheer "evil" that is our military-industrial complex, again, let's examine what the world looked like before that establishment reared its ugly head. The last great period of global structural change was the first half of the 20th century, a period that saw a death toll of about 100 million across two world wars. That comes to an average of 2 million deaths a year in a world of approximately 2 billion souls. Today, with far more comprehensive worldwide reporting, researchers report an average of less than 100,000 battle deaths annually in a world fast approaching 7 billion people. Though admittedly crude, these calculations suggest a 90 percent absolute drop and a 99 percent relative drop in deaths due to war. We are clearly headed for a world order characterized by multipolarity, something the American-birthed system was designed to both encourage and accommodate. But given how things turned out the last time we collectively faced such a fluid structure, we would do well to keep U.S. power, in all of its forms, deeply embedded in the geometry to come. To continue the historical survey, after salvaging Western Europe from its half-century of civil war, the U.S. emerged as the progenitor of a new, far more just form of globalization -- one based on actual free trade rather than colonialism. America then successfully replicated globalization further in East Asia over the second half of the 20th century, setting the stage for the Pacific Century now unfolding. As a result, the vector of structure-building connectivity shifted from trans-Atlantic to trans-Pacific. But if the connectivity push of the past several decades has been from West to East, with little connectivity extended to the South outside of the narrow trade of energy and raw materials, the current connectivity dynamic is dramatically different. Now, the dominant trends are: first, the East cross-connecting back to the West via financial and investment flows as well as Asian companies "going global"; and second, the East creating vast new connectivity networks with the South through South-South trade and investment. The challenge here is how to adjust great-power politics to these profound forces of structural change. Because of the West's connectivity to the East, we are by extension becoming more deeply connected to the unstable South, with China as the primary conduit. Meanwhile, America's self-exhausting post-Sept. 11 unilateralist bender triggered the illusion -- all the rage these days -- of a G-Zero, post-American world. The result, predictably enough for manic-depressive America, is that we've sworn off any overall responsibility for the South, even as we retain the right to go anywhere and kill any individuals -- preferably with flying robots -- that we deem immediately threatening to our narrowly defined national security interests. The problem with this approach is that China has neither the intention nor the ability to step up and play anything resembling a responsible Leviathan over the restive South, where globalization's advance -- again, with a Chinese face -- produces a lot of near-term instability even as it builds the basis for longer-term stability. Libya is a perfect example of where the world is now stuck: America is very reticent to get involved militarily, while China, for the first time in its history, engages in long-range military operations to evacuate its workforce there. Meanwhile, the expanding civil war rages on, to everyone's moral and economic distress. The point is not that America must invade Libya pronto to keep the world as we know it from coming to an end. But if the United States and the West sit by while the Rest, risers that they are, manage nothing more than pious warnings about needlessly butting in, then we all run the risk of collectively making the post-American, G-Zero, do-nothing storyline a self-fulfilling prophecy. While that alone won't stop the world from spinning, if it persists as a pattern, globalization will slide down another path: one of regionalism, spheres of influence and neocolonial burdens that are intuitively hoarded by great powers grown increasingly suspicious of one another. And if you know your history, that should make you nervous.

### 1nc detention pic

#### The federal judiciary of the United States should apply a clear statement principle that restricts the President of the United States authority to indefinitely imprison individuals arrested by the U.S. government on the grounds of the Suspension Clause

#### Using the word “detain” is unethical and turns solvency—“imprisonment” is more accurate—hold the 1ac accountable

**Sullivan, 4/12** editor of The New York Times (Margaret Sullivan, 12 April 2013, “‘Targeted Killing,’ ‘Detainee’ and ‘Torture’: Why Language Choice Matters,” http://publiceditor.blogs.nytimes.com/2013/04/12/targeted-killing-detainee-and-torture-why-language-choice-matters/?\_r=0)//CC

If it’s torture, why call it a “harsh interrogation technique”? If it’s premeditated assassination, why call it a “targeted killing”? And if a suspected terrorist has been locked up at Guantánamo Bay for more than a decade, why call him a “detainee”? Many of the complaints I get in the public editor’s in-box are about phrases that The Times uses. These writers complain that **language** choices make a **huge difference in perception**, **especially** when they accept and adopt government-speak. One reader, Donald Mintz, a professor emeritus at Montclair State University, objects to the unquestioning use of “defense” as in “defense budget,” and prefers “military.” He wrote: “Outside of direct or indirect quotation the term ‘defense’ should be used sparingly and with the greatest caution. Who, after all, could be against ‘defense’? But at least some of us are against excessive militarism.” Another reader, Roscoe Gort, commented on an article this week, “Targeted Killing Comes to Define War on Terror.” “Since 9/11 The New York Times has shown a great willingness to adopt the Newspeak (‘War Is Peace’) terminology from successive administrations in Washington,” he wrote. “War on terror” was just one example, he said, and wanted to know how The Times decides what terms to use. And, he wondered, “Do reporters like Scott Shane really write this way, or does some editor automatically change all the occurrences of “murder” or “assassination” in the stories they file into “targeted killing”? And Gene Krzyzynski, a veteran copy editor at The Buffalo News and a longtime New York Times reader, objected to the continued use of the term “detainee” to describe suspected terrorists who are being held indefinitely at the United States naval base at Guantánamo Bay, calling it “**accepting political spin** at face value.” Mr. Krzyzynski wrote: **To “detain” connotes brevity**, as in, say, a traveler detained at a border or an airport for further Immigration, Customs, T.S.A. or similar questioning-searching-processing. I’d go as far as to call it **language abuse** in the context of Gitmo, especially for anyone who has a healthy respect for plain, clear English or who remembers “detention” in high school. “**Prisoner**” and its variants **would be accurate**, of course, given the unusually long time behind bars or in cages (historically unprecedented, actually, for any P.O.W.’s, if one accepts that we’re in a “war,” albeit undeclared by Congress). Seven years ago, the Pulitzer Prize-winning cartoonist Steve Breen of The San Diego Union-Tribune came up with what’s probably the most precise term of all: “infinitee.” I asked Mr. Shane, a national security reporter in the Washington bureau, and Philip B. Corbett, the associate managing editor for standards, to respond to some of these issues. Mr. Shane addressed Mr. Gort’s question on “targeted killings,” noting that editors and reporters have discussed it repeatedly. He wrote: “Assassination” is banned by executive order, but for decades that has been interpreted by successive administrations as prohibiting the killing of political figures, not suspected terrorists. Certainly most of those killed are not political figures, though arguably some might be. Were we to use “assassination” routinely about drone shots, it would suggest that the administration is deliberately violating the executive order, which is not the case. This administration, like others, just doesn’t think the executive order applies. (The same issue arose when Ronald Reagan bombed Libya, and Bill Clinton fired cruise missiles at Sudan and Afghanistan.) “Murder,” of course, is a specific crime described in United States law with a bunch of elements, including illegality, so it would certainly not be straight news reporting to say President Obama was “murdering” people. This leaves “targeted killing,” which I think is far from a euphemism. It denotes exactly what’s happening: American drone operators aim at people on the ground and fire missiles at them. I think it’s a pretty good term for what’s happening, if a bit clinical. Mr. Shane added that he had only one serious qualm about the term. That, he said, was expressed by an administration official: “It’s not the targeted killings I object to — it’s the untargeted killings.” The official “was talking about so-called ‘signature strikes’ that target suspected militants based on their appearance, location, weapons and so on, not their identities, which are unknown; and also about mistaken strikes that kill civilians.” On the matter of “detainee,” Mr. Corbett called it “a legitimate concern” and agreed that the term might not be ideal. He said that it, not prisoner, was used because those being held “are in such an unusual situation – they are not serving a prison term, they are in an unusual status of limbo.” The debate over the word “torture,” he said, has similar implications to the one Mr. Shane described with assassination. “The word torture, aside from its common sense meaning, has specific legal meaning and ramifications,” Mr. Corbett said. “Part of the debate is on that very point.” The Times wants to “avoid making a legal judgment in the middle of a debate,” he added. Mr. Corbett also said that readers might have the wrong idea about The Times’s practices on word use. “People have this image that we set out a list of terms that must be used and those that must not be used — that there is a committee or cabal that sends out an edict,” he said. That’s far from true, he said. “In a vast majority of cases, we rely on our reporters to use their judgment,” he said. “Only rarely do we make a firm style rule.” Although individual words and phrases may not amount to very much in the great flow produced each day, **language matters**. When news organizations accept the government’s way of speaking, they seem to **accept the government’s way of thinking**. In The Times, these decisions carry even more weight. Word choices like these **deserve thoughtful consideration** – and, at times, some institutional **soul-searching**.

### 1nc k

#### The 1ac’s use of the law as a starting point causes endless intervention and structural violence – turns the case

Ugo Mattei 9, Professor at Hastings College of the Law & University of Turin; and Marco de Morpurgo, M.Sc. Candidate, International University College of Turin, LL.M. Candidate, Harvard Law School, 2009, “GLOBAL LAW & PLUNDER: THE DARK SIDE OF THE RULE OF LAW,” online: <http://works.bepress.com/cgi/viewcontent.cgi?article=1014&context=bocconi_legal_papers>

Within this framework, Western law has constantly enjoyed a dominant position during the past centuries and today, thus being in the position to shape and bend the evolution of other legal systems worldwide. During the colonial era, continental-European powers have systematically exported their own legal systems to the colonized lands. During the past decades and today, the United States have been dominating the international arena as the most powerful economic power, exporting their own legal system to the ‘periphery’, both by itself and through a set of international institutions, behaving as a neo-colonialist within the ideology known as neoliberalism. Western countries identify themselves as law-abiding and civilized no matter what their actual history reveals. Such identification is acquired by false knowledge and false comparison with other peoples, those who were said to ‘lack’ the rule of law, such as China, Japan, India, and the Islamic world more generally. In a similar fashion today, according to some leading economists, Third World developing countries ‘lack’ the minimal institutional systems necessary for the unfolding of a market economy. The theory of ‘lack’ and the rhetoric of the rule of law have justified aggressive interventions from Western countries into non-Western ones. The policy of corporatization and open markets, supported today globally by the so-called Washington consensus3, was used by Western bankers and the business community in Latin America as the main vehicle to ‘open the veins’ of the continent—to borrow Eduardo Galeano’s metaphor4—with no solution of continuity between colonial and post-colonial times. Similar policy was used in Africa to facilitate the forced transfer of slaves to America, and today to facilitate the extraction of agricultural products, oil, minerals, ideas and cultural artefacts in the same countries. The policy of opening markets for free trade, used today in Afghanistan and Iraq, was used in China during the nineteenth century Opium War, in which free trade was interpreted as an obligation to buy drugs from British dealers. The policy of forcing local industries to compete on open markets was used by the British empire in Bengal, as it is today by the WTO in Asia, Africa, and Latin America. Foreign-imposed privatization laws that facilitate unconscionable bargains at the expense of the people have been vehicles of plunder, not of legality. In all these settings the tragic human suffering produced by such plunder is simply ignored. In this context law played a major role in legalizing such practices of powerful actors against the powerless.5 Yet, this use of power is scarcely explored in the study of Western law. The exportation of Western legal institutions from the West to the ‘rest’ has systematically been justified through the ideological use of the extremely politically strong and technically weak concept of ‘rule of law’. The notion of ‘rule of law’ is an extremely ambiguous one. Notwithstanding, within any public discussion its positive connotations have always been taken for granted. The dominant image of the rule of law is false both historically and in the present, because it does not fully acknowledge its dark side. The false representation starts from the idea that good law (which others ‘lack’) is autonomous, separate from society and its institutions, technical, non-political, non-distributive and reactive rather than proactive: more succinctly, a technological framework for an ‘efficient’ market. The rule of law has a bright and a dark side, with the latter progressively conquering new ground whenever the former is not empowered by a political soul. In the absence of such political life, the rule of law becomes a cold technology. Moreover, when large corporate actors dominate states (affected by a declining regulatory role), law becomes a product of the economy, and economy governs the law rather than being governed by it.

#### No offense – their internal links are devoid of merit – voting AFF is counterproductive

Schlag ’13 Pierre Schlag, “Facts (The),” his blog, 1/28/2013, http://brazenandtenured.com/2013/01/28/facts-the/

But let me explain about the facts. First, notice, that the most factish of facts (apologies to Latour) are actually factoids—trivial data bits shorn of any actual narrative. CNN had it down cold: “America has had five presidents who ate fish for breakfast.” What, I ask you, could you possibly do with that qua fact? Still, Americans like facts. It was Joe Friday on Dragnet who first said, “all we want are the facts, ma’am.” Really? That’s all? I don’t think so. He was on a mission. He wanted facts on a mission. And we, the viewers, did too. So I have to say, as a preliminary matter, things already don’t look too good for the facts. Indeed, the possibility that in their most prototypical factishisness, facts are nearly useless while in their most desirable state they are on a mission—well, that’s not an auspicious start. Things get worse. In law and social science (that’s my domain limit here—I feel really cramped) facts generally function as poseurs. The facts, are nearly always posing as the truth about “what-is-actually-going-on.” Facts are frequently presented as “the-real-story” or “the bottom line.” One is no doubt supposed to conclude from this that “facts are facts”—that they are the veritable bedrock of truth. But notice that this doesn’t make any sense. Notice that the “bottom line” is an accounting metaphor. Consider that, “the real story” is an oxymoron deliberately composed of both truth and fiction. Note that “what-is-actually-going-on” is a problematic state hanging precariously on the ungrounded and notoriously unreliable reality/appearance pair. All of this is to say, that the appeal of “getting down to the facts,” (or some such thing) often rests on situating the facts in some initially alluring rhetorical space (e.g. “the real story” “the bottom line”) that turns out, upon further inspection, to be constructed of images, metaphors or fictions of questionable philosophical countenance. (See, Nietzsche, On Lies and Truth in a Non-Moral Sense) Now, it’s not that these metaphors, images or fictions turn facts into non-facts. But still, I ask you: what could be more humbling to a fact then to learn that its appeal rests upon a fiction? Not only do facts frequently function as poseurs, but, when they are at their most factish, they’re often not all that interesting. Factish facts don’t really tell you much of anything you want to know. Imagine a party. Here are some exemplary factish facts: There were 19 people at the party. 9 were women. 10 were men. While the party was happening, gravity exercised a constant force of 32 feet per second/per second. Everyone standing stayed connected to the ground. Not the greatest narrative is it? And notice here that if you stick strictly to the facts (if you admit only of truly factish facts) adding more of these little items will not markedly improve your story line. (For you editors of university press books and law review articles, please pay special attention here.) The only time facts are really interesting (remember law and social science is the domain limit) is when they’re something more than just the facts. Go back to the party. Here’s another fact: Jill left the party with Tom. This fact is more interesting. Well, mildly so. With this sort of fact, you can start imagining possible implications (amorous, murderous, whathaveyou). But note that now we’re no longer talking about “just the facts.” We’re talking about facts with implications, facts with attitude. Why then are facts ever interesting? Well, ironically it’s because they’re not functioning as “just facts,” but something more.

#### Voting neg is the only choice – rejection alone solves – the 1ac can’t be validated because it is dedicated to effacing their own subject positions within the system of power

Salter 85. M.G. Salter, lecturer in criminal law at the University of Birmingham, “The Rule of Power in the Language of Law,” The Liverpool Law Review Vol.VII(1) [1985] pg. 36

Through such codes of discipline language itself lays down the forms of discourse which are judged appropriate and inappropriate. For their continued vigour, these codes actually depend upon the multiplicity of points of resistance by those - including the staff - who are subject to them. Resistances actively serve as footholds, targets, supports and adversaries for power. Power relations here are not then attributable to, or owned by a single group or class, but arise in an apparently anonymous manner from interactions within the local situations in which they first appear.

Now if this is true, it has real consequences for the common sense of legal culture. It suggests that its truth- claims concerning the power/truth relation are themselves possible and comprehensible only because power operates within their own discourse, productively excluding some interpretations, attitudes and actions as "inappropriate" and therefore creating a possible common ground for their intelligibility as such. (4) This productivity of power appears in the mutual implication of positive and negative determinations of all legal meaning over time and through productive disowning. For example, during a contract law tutorial the tedious determination of what an "offer" is for Contract law, involves the progressive unfolding of all that it does not mean, i.e. invitation to treat, continuing negotiations etc. Thus the limiting process of disowning - the self-exercise of the power of exclusion in meaning- determination - presents itself to be ultimately productive of truth.

Further we can see that all claims to a truthful critique - including those of this text - are "positive" and productive of truth only through their power of disowning the overall position that is successfully criticised. The experience of a continually disowned/re-owned world of law is then the pre-condition for the production of insight and truth-claims about its workings - including common sense views about the unproductivity of power. Thus at both the level of particular explication of meanings and that of the overall development within the "discipline" of law, the juxta-position of truth and power now appears no longer to be sustainable. Our discursive knowledge of the power/truth connection is, by virtue of its discursive character, implicated in that which it examines. This appears when we consider the derivation of much of the "knowledge" imparted by "criminology" courses from languages of punishment. Here not only does such "academic knowledge" emanate from the exercise of this form of state power, but by largely treating crime as about the explanation of criminal behaviour, this "knowledge" returns to support and legitimate the institutional exercise of criminalising powe**r**. It does this partly by reducing intellectual and theoretical problems to social policy ones. This leaves the whole exercise quite untroubled by critical thought. Therefore the implication of power, knowledge and legal discourse goes far deeper than simple encouragement or application. Instead legal discourse and power relations mutually imply one another to the extent that they cannot be conceived of without each other. For example, the power relations at work in the court room between the judge, jury, public, media, court officers, advocates, witnesses and accused give rise to a distinctive "knowledge" available for "Legal Methods" courses. It becomes available through a hierarchy of relations between and among law- reporters, publishers, lecturers, students, college traditions and government administrators. Here power demarcates what is sayable, to whom, in what manner, about what and when; yet the consequences of this demarcation is to open up and temporalise a common historical world of law and "legal education". We shall examine later how it produces a domain of legal subjects, objects and rituals for determining their truth through an ever-proliferating discourse on law.

### 1nc Afghanistan

#### NO modeling – Afghanistan won’t follow norms

John O. **McGinnis 7**, Professor of Law, Northwestern University School of Law. \*\* Ilya Somin \*\* Assistant Professor of Law, George Mason University School of Law. GLOBAL CONSTITUTIONALISM: GLOBAL INFLUENCE ON U.S. JURISPRUDENCE: Should International Law Be Part of Our Law? 59 Stan. L. Rev. 1175

The second benefit to foreigners of distinctive U.S. legal norms is information. The costs and benefits of our norms will be visible for all to see. n268 Particularly in an era of increased empirical social science testing, over time we will be able to analyze and identify the effects of differences in norms between the United States and other nations. n269 Such diversity benefits foreigners as foreign nations can decide to **adopt our good norms and avoid our bad ones**.

The only noteworthy counterargument is the claim that U.S. norms will have more harmful effects than those of raw international law, yet other nations will still copy them. But both parts of this proposition seem doubtful. First, U.S. law emerges from a democratic process that creates a likelihood that it will cause less harm than rules that emerge from the nondemocratic processes [\*1235] that create international law. Second, other democratic nations can use their own political processes to screen out American norms that might cause harm if copied.

Of course, many nations remain authoritarian. n270 But our norms are not likely to have much influence on their choice of norms. Authoritarian states are likely to select norms that serve the interests of those in power, regardless of the norms we adopt. It is true that **sometimes they might cite our norms as cover for their decisions. But the crucial word here is "cover."** **They would have adopted the same rules, anyway.** The cover may bamboozle some and thus be counted a cost. But this would seem marginal compared to the harm of allowing raw international law to trump domestic law.

#### Specific decisions aren’t modeled – Just the foundations of our system

**Klug**, Law Professor at the University of Wisconsin, **2K** (Heinz, “MODEL AND ANTI-MODEL: THE UNITED STATES CONSTITUTION AND THE ‘RISE OF WORLD CONSTITUTIONALISM,’” Wisconsin Law Review, 2000 Wis. L. Rev. 597)

Before discussing the various ways in which the American experience has served as a constitutional model, it is important to specify what serves as the model. The model is not merely the constitutional document and its amendments; it is also, more importantly, the ideas and institutions of American constitutionalism - popular sovereignty, federalism, the separation of powers, and judicial review - as well as the over two hundred years of constitutional jurisprudence that has flowed from the Constitution. It is this vision of the United States Constitution, as an elaborated text with a history of structural, institutional, and jurisprudential changes, that allows us to understand the place of the United States Constitution as the backdrop or wallpaper before which subsequent constitutional stories, from constitution-making to constitutional adjudication, have evolved. I must also clarify my use of the idea of a model. By model I mean a general source of ideas, concepts, examples, and even specific constitutional arguments rather than a mere reproduction or copy of what has occurred or is contained in the United States Constitution or constitutional jurisprudence. Caution at the notion of a constitutional model is also important. The pure adoption of any particular model or example **does not guarantee any particular outcome**. This problem is clearly evident in the experience of the United States in the Philippines, despite the aim of the United States to establish a different form of colonial relationship. After obtaining formal control from Spain through the Treaty of Paris in 1898 and after over fifty years of "tutelage" designed to establish an American form of government, the efforts of the United States seem to have achieved little more than a system of institutional charades, cast aside as soon as they no longer served those in power. From the passage of the 1934 Philippine Commonwealth and Independence Act, which provided that the Constitution should "include a [\*600] bill of rights and establish a "republican form of government'"; to the subsequent adoption of the 1935 Constitution by a Philippine constitutional convention and the **wholesale adoption of American case law**, which seems to have been used as binding precedent; the experience produced no more than a **symbolic manifestation** of United States constitutionalism. As Andrzej Rapaczynski argues, "politically speaking, the cloning of America did not effectively protect the Philippines from a dictatorship, and even the best commentators could not see why the result was not what the Americans had intended." 5 Despite this failure to clone, the United States constitutional experience has served as a model, in my more general sense of the concept. As a general model it has served a number of distinct functions. On the one hand, the American constitutional experience offers examples of a range of structural features, whose evolution and impact may be observed over two centuries. These structural features include the transformation of the political idea of the separation of powers into a working constitutional principle; the creation of a federal system providing for the division of powers between a central government and its constituent regions; and finally, the creation of a range of institutional mechanisms for checking and balancing the exercise of governmental power, which provided political adversaries multiple sites for raising and contesting issues. On the other hand, the American experiment has raised the banner of individual rights and through a long and wavering jurisprudence demonstrated how vast areas of political conflict may become judicialized. Although often criticized as a legalization of politics, the creation of a popular rights consciousness among citizens of the United States has indeed inspired advocates of human rights and is reflected most clearly in the adoption of international human rights instruments and the post-1945 emergence of an international human rights culture. Although less common, the specific doctrines of United States rights jurisprudence have at times served as a direct model abroad. A significant example of this is the influence of free speech doctrines flowing from the First Amendment of the United States Constitution on the common law based freedom of speech jurisprudence in Israel [n6](http://www.lexisnexis.com.floyd.lib.umn.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1270823866181&returnToKey=20_T9038689172&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.128042.01106417134#n6) and Australia. [n7](http://www.lexisnexis.com.floyd.lib.umn.edu/us/lnacademic/frame.do?reloadEntirePage=true&rand=1270823866181&returnToKey=20_T9038689172&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.128042.01106417134#n7) However, instead of specific constitutional doctrines, particular institutional forms, or even specific constitutional rights, it has been the ideas and broad structural innovations of American constitutionalism that have found the greatest resonance among constitution-makers and interpreters.  [\*601]  From the development of a single fundamental law, incorporated within one written document, to the distribution of public power among different geographic and institutional levels of government, the experience of American constitutionalism has provided a vast experiment to which constitution-builders abroad could turn. With subsequent waves of constitution-making these constitutional forms have evolved - both in the United States and abroad - to provide further elucidations of the original American model that could be relied upon by subsequent waves of constitution-makers.

#### Regional cooperation prevents the impact

**Innocent and Carpenter, 9 –** \*foreign policy analyst at Cato who focuses on Afghanistan and Pakistan AND \*\*vice president for defense and foreign policy studies at Cato (Malou and Ted, “Escaping the Graveyard of Empires: A Strategy to Exit Afghanistan,” http://www.cato.org/pubs/wtpapers/escaping-graveyard-empires-strategy-exit-afghanistan.pdf)

Additionally, regional stakeholders, especially Russia and Iran, have an interest in a stable Afghanistan. Both countries possess the capacity to facilitate development in the country and may even be willing to assist Western forces. In July, leaders in Moscow allowed the United States to use Russian airspace to transport troops and lethal military equipment into Afghanistan. Yet another relevant regional player is the Collective Security Treaty Organization, made up of Russia, Kazakhstan, Tajikistan, Kyrgyzstan, Uzbekistan, Armenia, and Belarus. At the moment, CSTO appears amenable to forging a security partnership with NATO. CSTO secretary general Nikolai Bordyuzha told journalists in March 2009 of his bloc’s intention to cooperate. “The united position of the CSTO is that we should give every kind of aid to the anti-terror coalition operating in Afghanistan. . . . The interests of NATO and the CSTO countries regarding Afghanistan conform unequivocally.”83

Mutual interests between Western forces and Afghanistan’s surrounding neighbors can converge on issues of transnational terrorism, the Caspian and Central Asia region’s abundant energy resources, cross-border organized crime, and weapons smuggling. Enhanced cooperation alone will not stabilize Afghanistan, but engaging stakeholders may lead to tighter regional security.

#### No solvency—judicial independence is a pipe dream for Afghanistan, only a risk of our offense because reform would be crude and ineffective

**Thier 2004** – Fellow at Stanford’s Center on Democracy, Development, and the Rule of Law and a National Fellow at Stanford’s Hoover Institute, legal advisor to Afghanistan's Constitutional and Judicial Reform Commissions in Kabul and was a consultant to the International Crisis Group (9/1, J Alexander, Liechtenstein Institute on Self-Determination at Princeton University, “State- and Security-Building Lessons from Afghanistan”, http://iisdb.stanford.edu/pubs/20714/Reestablishing\_the\_Judiciary\_in\_Afghanistan.pdf, WEA)

Judicial Independence and Judicial Responsibility

In Afghan history, there is neither practical experience with judicial independence in the state system, nor a political ethos to support it. The judiciary has been structurally independent, on paper, for a total of 11 years. In reality, it has never been independent in an institutional sense. Judicial independence is most clearly defined when the judiciary is needed to serve as a check against another government power. However, the judiciary has been seen as an extension of executive authority, not as an entity to challenge the authority. Thus far, the King or executive has held a trump in most cases, especially the important ones. There has been an ongoing struggle between the clergy-dominated judiciary and the executive over the application and codification of sharia. In the brief period between 1964 and 1973, the court system was only beginning to form as an independent entity, and never exercised challenges to executive or legislative authority, such as judicial review of a law. In the one case in the early seventies that might have tested this power - a dispute between the legislature and the executive concerning budgetary authority - the King intervened and the dispute was resolved.

The barriers to judicial independence seem to have political and religious rationales as well. The head of an Islamic state has the duty to administer the sharia, and is therefore the highest judicial authority under Islam. The head of state delegates judicial jurisdiction, wilaya, to the qazi, who then administers justice. This jurisdiction can be also removed. Therefore, “a consequence of the doctrine of wilaya in Islam is total lack of separation between the judicial and executive powers.”15

Judicial responsibility is an equally critical element of a functioning judiciary. Judges must also be the faithful and neutral arbiters of the law. They must know the law, respect it despite personal misgivings, and apply it fairly. At present, Afghanistan’s judiciary enjoys a degree of independence at the central level due to the weakness of the executive authority – but judicial responsibility is gravely lacking. The judiciary has had a free hand with appointments, and has challenged executive policy through use of extra-judicial pronouncements on the legality of activities it deems un-Islamic. This judicial activism is in line with the long-term struggle by the clergy to dominate the judiciary and the application and interpretation of law. The lack of religious credentials among President Karzai and many in his transitional administration has left the government open to potentially damming charges that they are not sufficiently Islamic. The fundamentalist groups jockeying for power in the post-Taliban political landscape have seized upon the judiciary as an institution they could control and use as a pulpit. However, in the countryside judges complain of constant pressure from local power-holders to conform to their will, regardless of the law. For example, the chief judges of the provincial courts of Herat and Nangrahar both complained of convicted criminals being released at the whim of local and regional power-brokers in 2002.16 As discussed above, the Chief Judge of Herat has been the target of violence.

### 1nc Abstention

#### Their Symonds impact is horribly unqualified – writing for the world socialist website de facto constraints are easily sufficient

**Posner and Vermeule, 9** - \* University of Chicago – Law School AND \*\*Harvard University – Harvard Law School (Eric and Adrian, “Tyrannophobia” 9/15, SSRN)

Demography and the Administrative State. The best explanation for the lack of dictatorship in America – at least in America today, as opposed to the 19th century – is neither psychological nor institutional, but demographic. Part III examined the strong comparative evidence that wealth is the best safeguard for democracy. Equality, homogeneity, and education matter as well. How does the United States, circa 2009, fare on these dimensions? Ethnic, religious and linguistic homogeneity have declined, but because of its high performance on other margins, there is little cause for concern about American democracy. The United States has an enormously rich, relatively well-educated population and multiple overlapping cleavages of class, race, religion and geography. Simply by virtue of its high per capita income, the likelihood of dictatorship in the United States is almost nil, at least if the historical pattern reflects causation. The highwater mark of the modern presidency’s approach to domestic dictatorship – Nixon’s “third-rate burglary” of the offices of his political opponents – was pathetic stuff in historical and comparative perspective, and immediately put Nixon on a slippery slope to disgrace. Likewise, comparisons between Weimar Germany and the United States of the Bush administration87 were worse than irresponsible; they were ignorant.

We add a less obvious point. Legal scholars, especially those of a libertarian or civil-libertarian bent, often express concern that the formal separation of powers has atrophied over the course of the 20th century. On this account, economic and security crises, the rise of the administrative state, the death of the nondelegation doctrine, the imperial presidency, the ineffectual character of the War Powers Resolution and the other framework statutes of the 1970s, all mean that in many domains presidents operate without substantial legal checks, although they have political incentives to cooperate with Congress and to seek statutory authorization for their actions. Among the framer’s miscalculations was their failure to understand the “presidential power of unilateral action”88 – the president’s power to take action in the real world, with debatable legal authority or none at all, creating a new status quo that then constrains the response of other institutions. In the most overheated version of this view, such developments are taken to pose a real risk of executive tyranny in the United States.89

We suggest, however, that the same large-scale economic and political developments that have caused a relaxation of the legal checks on the executive have simultaneously strengthened the nonlegal checks. Legal checks on the presidency have been relaxed largely because of the need for centralized, relatively efficient government under the complex conditions of a modern dynamic economy and a highly interrelated international order. Yet those economic and political conditions have themselves helped to create de facto constraints on presidential power that make democracy in the United States extremely stable.

The modern economy, whose complexity creates the demand for administrative governance, also creates wealth, leisure, education and broad political information, all of which strengthen democracy and make a collapse into authoritarian rule nearly impossible. Modern presidents are substantially constrained, not by old statutes or even by Congress and the courts, but by the tyranny of public and (especially) elite opinion. Every action is scrutinized, leaks from executive officials come in a torrent, journalists are professionally hostile, and potential abuses are quickly brought to light. The modern presidency is a fishbowl, in large part because the costs of acquiring political information have fallen steadily in the modern economy, and because a wealthy, educated and leisured population has the time to monitor presidential action and takes an interest in doing so. This picture implies that modern presidents are both more accountable than their predecessors and more responsive to gusts of elite sentiment and mass opinion, but they are not dictators in any conventional sense.

More tentatively, we also suggest that the relaxation of legal checks may itself have contributed to the growth of the political checks, rather than both factors simply being the common result of a complex modern economy. On this hypothesis, the administrative and presidential state of the New Deal and later has, despite all its inefficiencies, plausibly supplied efficiency-enhancing regulation, political stability, and a measure of redistribution, and these policies have both added to national economic and cultural capital and dampened political conflict. The administrative state has thus helped to create a wealthy, educated population and a super-educated elite whose members have the leisure and affluence to care about matters such as civil liberties, who are politically engaged to a fault, and who help to check executive abuses. While the direct effects of wealth, education and other factors on the stability of democracy are clear in comparative perspective, there is more dispute about the overall economic effects of regulation and the administrative state,90 so we offer this as a hypothesis for further research.

#### No nuclear escalation

**Gelb, 10** – President Emeritus of the Council on Foreign Relations. He was a senior official in the U.S. Defense Department from 1967 to 1969 and in the State Department from 1977 to 1979 (Leslie, Foreign Affairs, “GDP Now Matters More Than Force: A U.S. Foreign Policy for the Age of Economic Power,” November/December, proquest)

Also reducing the likelihood of conflict today is that there is no arena in which the vital interests of great powers seriously clash. Indeed, the most worrisome security threats today-rogue states with nuclear weapons and terrorists with weapons of mass destruction-actually tend to unite the great powers more than divide them. In the past, and specifically during the first era of globalization, major powers would war over practically nothing. Back then, they fought over the Balkans, a region devoid of resources and geographic importance, a strategic zero. Today, they are unlikely to shoulder their arms over almost anything, even the highly strategic Middle East. All have much more to lose than to gain from turmoil in that region. To be sure, great powers such as China and Russia will tussle with one another for advantages, but they will stop well short of direct confrontation.

#### No China war

Robert J. **Art**, Fall **2010** Christian A. Herter Professor of International Relations at Brandeis University and Director of MIT's Seminar XXI Program The United States and the rise of China: implications for the long haul Political Science Quarterly 125.3 (Fall 2010): p359(33)

The workings of these three factors should make us cautiously optimistic about keeping Sino-American relations on the peaceful rather than the warlike track. The peaceful track does not, by any means, imply the absence of political and economic conflicts in Sino-American relations, nor does it foreclose coercive diplomatic gambits by each against the other. What it does mean is that the conditions are in place for war to be a low-probability event, if policymakers are smart in both states (see below), and that an all-out war is nearly impossible to imagine. By the historical standards of recent dominant-rising state dyads, this is no mean feat. In sum, there will be some security dilemma dynamics at work in the U.S.-China relationship, both over Taiwan and over maritime supremacy in East Asia, should China decide eventually to contest America's maritime hegemony, and there will certainly be political and military conflicts, but nuclear weapons should work to mute their severity because the security of each state's homeland will never be in doubt as long as each maintains a second-strike capability vis-a-vis the other. If two states cannot conquer one another, then the character of their relation and their competition changes dramatically. These three benchmarks--China's ambitions will grow as its power grows; the United States cannot successfully wage economic warfare against a China that pursues a smart reassurance (peaceful rise) strategy; and Sino-American relations are not doomed to follow recent past rising-dominant power dyads--are the starting points from which to analyze America's interests in East Asia. I now turn to these interests.

#### No Russia war

**Graham 7** (senior advisor on Russia in the US National Security Council staff 2002-2007, Thomas, Russia in Global Affairs, July - September 2007, “The Dialectics of Strength and Weakness,” http://eng.globalaffairs.ru/numbers/20/1129.html)

An astute historian of Russia, Martin Malia, wrote several years ago that “Russia has at different times been demonized or divinized by Western opinion less because of her real role in Europe than because of the fears and frustrations, or hopes and aspirations, generated within European society by its own domestic problems.” Such is the case today. To be sure, mounting Western concerns about Russia are a consequence of Russian policies that appear to undermine Western interests, but they are also a reflection of declining confidence in our own abilities and the efficacy of our own policies. Ironically, this growing fear and distrust of Russia come at a time when Russia is arguably less threatening to the West, and the United States in particular, than it has been at any time since the end of the Second World War. Russia does not champion a totalitarian ideology intent on our destruction, its military poses no threat to sweep across Europe, its economic growth depends on constructive commercial relations with Europe, and its strategic arsenal – while still capable of annihilating the United States – is under more reliable control than it has been in the past fifteen years and the threat of a strategic strike **approaches zero probability**. Political gridlock in key Western countries, however, precludes the creativity, risk-taking, and subtlety needed to advance our interests on issues over which we are at odds with Russia while laying the basis for more constructive long-term relations with Russia.

## 2nc

### 2nc economy impact

#### Global growth solves war

**Royal 10** – Jedediah Royal, Director of Cooperative Threat Reduction at the U.S. Department of Defense, 2010, “Economic Integration, Economic Signaling and the Problem of Economic Crises,” in Economics of War and Peace: Economic, Legal and Political Perspectives, ed. Goldsmith and Brauer, p. 213-215

Less intuitive is how periods of economic decline may increase the likelihood of external conflict. Political science literature has contributed a moderate degree of attention to the impact of economic decline and the security and defence behaviour of interdependent states. Research in this vein has been considered at systemic, dyadic and national levels. Several notable contributions follow.

First, on the systemic level, Pollins (2008) advances Modclski and Thompson's (1996) work on leadership cycle theory, finding that rhythms in the global economy are associated with the rise and fall of a pre-eminent power and the often bloody transition from one pre-eminent leader to the next. As such, exogenous shocks such as economic crises could usher in a redistribution of relative power (see also Gilpin, 1981) that leads to uncertainty about power balances, increasing the risk of miscalculation (Fearon. 1995). Alternatively, even a relatively certain redistribution of power could lead to a permissive environment for conflict as a rising power may seek to challenge a declining power (Werner, 1999). Separately, Pollins (1996) also shows that global economic cycles combined with parallel leadership cycles impact the likelihood of conflict among major, medium and small powers, although he suggests that the causes and connections between global economic conditions and security conditions remain unknown.

Second, on a dyadic level, Copeland's (1996. 2000) theory of trade expectations suggests that 'future expectation of trade' is a significant variable in understanding economic conditions and security behaviour of states. He argues that interdependent states are likely to gain pacific benefits from trade so long as they have an optimistic view of future trade relations. However, if the expectations of future trade decline, particularly for difficult  to replace items such as energy resources, the likelihood for conflict increases, as states will be inclined to use force to gain access to those resources. Crises could potentially be the trigger for decreased trade expectations either on its own or because it triggers protectionist moves by interdependent states.4

Third, others have considered the link between economic decline and external armed conflict at a national level. Blomberg and Hess (2002) find a strong correlation between internal conflict and external conflict, particularly during periods of economic downturn. They write:

The linkages between internal and external conflict and prosperity are strong and mutually reinforcing. Economic conflict tends to spawn internal conflict, which in turn returns the favour. Moreover, the presence of a recession tends to amplify the extent to which international and external conflicts self-reinforce each other. (Blomberg & Hess, 2002. p. 89)

Economic decline has also been linked with an increase in the likelihood of terrorism (Blomberg. Hess. & Weerapana. 2004). which has the capacity to spill across borders and lead to external tensions.

Furthermore, crises generally reduce the popularity of a sitting government. 'Diversionary theory' suggests that, when facing unpopularity arising from economic decline, sitting governments have increased incentives to fabricate external military conflicts to create a 'rally around the flag' effect. Wang (1990, DeRouen (1995). and Blomberg, Hess, and Thacker (2006) find supporting evidence showing that economic decline and use of force are at least indirectly correlated. Gelpi (1997), Miller (1999), and Kisangani and Pickering (2009) suggest that the tendency towards diversionary tactics are greater for democratic states than autocratic states, due to the fact that democratic leaders are generally more susceptible to being removed from office due to lack of domestic support. DeRouen (2000) has provided evidence showing that periods of weak economic performance in the United States, and thus weak Presidential popularity, are statistically linked to an increase in the use of force.

In summary, recent economic scholarship positively correlates economic integration with an increase in the frequency of economic crises, whereas political science scholarship links economic decline with external conflict at systemic, dyadic and national levels.' This implied connection between integration, crises and armed conflict has not featured prominently in the economic-security debate and deserves more attention.

#### Turns our entire democratic model

**Tilford 2008** – PhD in history from George Washington University, served for 32 years as a military officer and analyst with the Air Force and Army (Earl, “Critical mass: economic leadership or dictatorship”, Cedartown Standard, lexis)

Could it happen again? Bourgeois democracy requires a vibrant capitalist system. Without it, the role of the individual shrinks as government expands. At the very least, the dimensions of the U.S. government economic intervention will foster a growth in bureaucracy to administer the multi-faceted programs necessary for implementation. Bureaucracies, once established, inevitably become self-serving and self-perpetuating. Will this lead to “socialism” as some conservative economic prognosticators suggest? Perhaps. But so is the possibility of dictatorship. If the American economy collapses, especially in wartime, there remains that possibility. And if that happens the American democratic era may be over. If the world economies collapse, totalitarianism will almost certainly return to Russia, which already is well along that path in any event. Fragile democracies in South America and Eastern Europe could crumble. A global economic collapse will also increase the chance of global conflict. As economic systems shut down, so will the distribution systems for resources like petroleum and food. It is certainly within the realm of possibility that nations perceiving themselves in peril will, if they have the military capability, use force, just as Japan and Nazi Germany did in the mid-to-late 1930s. Every nation in the world needs access to food and water. Industrial nations—the world powers of North America, Europe, and Asia—need access to energy. When the world economy runs smoothly, reciprocal trade meets these needs. If the world economy collapses, the use of military force becomes a more likely alternative. And given the increasingly rapid rate at which world affairs move; the world could devolve to that point very quickly.

#### Turns every country that would be affected by arms sales

**Kemp 10**

Geoffrey Kemp, Director of Regional Strategic Programs at The Nixon Center, served in the White House under Ronald Reagan, special assistant to the president for national security affairs and senior director for Near East and South Asian affairs on the National Security Council Staff, Former Director, Middle East Arms Control Project at the Carnegie Endowment for International Peace, 2010, The East Moves West: India, China, and Asia’s Growing Presence in the Middle East, p. 233-4

The second scenario, called Mayhem and Chaos, is the opposite of the first scenario; everything that can go wrong does go wrong. The world economic situation weakens rather than strengthens, and India, China, and Japan suffer a major reduction in their growth rates, further weakening the global economy. As a result, energy demand falls and the price of fossil fuels plummets, leading to a financial crisis for the energy-producing states, which are forced to cut back dramatically on expansion programs and social welfare. That in turn leads to political unrest: and nurtures different radical groups, including, but not limited to, Islamic extremists. The internal stability of some countries is challenged, and there are more “failed states.” Most serious is the collapse of the democratic government in Pakistan and its takeover by Muslim extremists, who then take possession of a large number of nuclear weapons. The danger of war between India and Pakistan increases significantly. Iran, always worried about an extremist Pakistan, expands and weaponizes its nuclear program. That further enhances nuclear proliferation in the Middle East, with Saudi Arabia, Turkey, and Egypt joining Israel and Iran as nuclear states. Under these circumstances, the potential for nuclear terrorism increases, and the possibility of a nuclear terrorist attack in either the Western world or in the oil-producing states may lead to a further devastating collapse of the world economic market, with a tsunami-like impact on stability. In this scenario, major disruptions can be expected, with dire consequences for two-thirds of the planet’s population.

### 2nc at: uniqueness overwhelms

#### Their argument assumes the GOP has the policy expertise to recognize the economic implications of the debt ceiling – actions by the leadership suggest otherwise – #StayClassyGOP

**Krugman, 9/10/13** – Nobel Prize winning economist (Paul, “The Wonk Gap and the Debt Ceiling” New York Times, <http://webcache.googleusercontent.com/search?q=cache:Ja2H2jvat3AJ:krugman.blogs.nytimes.com/2013/09/10/the-wonk-gap-and-the-debt-ceiling/+&cd=1&hl=en&ct=clnk&gl=us&gwh=051AF725CBBBCEBC7F7A55732E9676E4>)

So, are we going to have a crisis over the debt ceiling again? Everyone seems to assume that we won’t, that Republicans have learned their lesson, and that they’ll huff and puff before slinking away into the shadows. But there’s a problem: the GOP leadership has been telling the base to chill on the idea of shutting down the government to defund Obamacare, that they’ll use the debt limit instead. And so far nobody seems to have been willing to admit that this won’t work either.

And part of the problem may be, once again, the complete lack of actual policy analysis on the right. Apparently Eric Cantor is floating the idea of demanding a one-year delay in Obamacare in return for not forcing America into bankruptcy; Greg Sargent emails a Republican aide for clarification, and get this reponse:

It’s absolutely one of the possible outcomes of a debt limit negotiation, and likely given the President’s proclivity for delaying sections of this law. Whether it’s a mandate delay, or delaying the law entirely, it depends on a great deal of other factors.

OK, this represents a complete failure to understand how the health reform works. As I’ve tried to explain, three things are essential: nondiscrimination, the individual mandate, and subsidies. Other things, like the employer mandate, can be delayed without undermining the basic working of the plan. But Republicans don’t know any of that; they haven’t tried to understand Obamacare, they’ve just denounced it. And so they mistake Obama’s flexibility on side issues for a willingness to retreat on the essentials, which he won’t do.

In other words, the wonk gap might cause the GOP to stumble into disaster.

#### Even if a deal is eventually reached to prevent hitting the ceiling a protracted fight is economic sabotage – collapse growth, markets and confidence.

Johnson, 9/4/13 - Campaign for America's Future (Dave, “Fresh Hell When Congress Returns”, <http://truth-out.org/opinion/item/18597-fresh-hell-when-congress-returns>

There are two different levels of economic damage from a debt-ceiling fight. First there is the cost of the fight itself, as the world worries over whether Republicans would actually pull the trigger. The fact that they would talk about this at all causes considerable damage to growth and confidence. But the other level of damage – far more serious – comes if they actually do it. If the U.S. defaulted, the consequences to the country’s and world’s economic system are literally unimaginable. In January, The Washington Post looked at reports of the economic damage caused by the last debt-ceiling fight – the one that led to the economic damage of the “sequester.” The Post report summarized: The protracted, unsettling nature of the negotiations between the White House and Republicans dramatically slowed the recovery, economists conclude, looking back at the episode. Consumer confidence collapsed, reaching its worst level since the depths of the financial crisis. Hiring stalled, with the private sector creating jobs at its slowest pace since the economy exited the recession. The stock market plunged, sending the Standard & Poor’s 500-stock index down more than 10 percent. In the last debt-ceiling hostage battle, the government spent an extra $1.3 billion to borrow because of lender uncertainty over whether they would be paid back, according to the Government Accounting Office (GAO). Following the battle the Standard & Poor’s credit agency “downgraded” the U.S. credit rating, saying that any country that would even discuss default does not deserve the top rating. On top of that, the 10-year cost of higher interest rates from that fight is $18.9 billion. The unemployment rate increased as job growth was cut in half by the fight. Consumer confidence plunged “more than it did following the collapse of Lehman Brothers Holdings Inc. in 2008.” The consequences of actually letting the country default would begin with a panic in the stock market. And there would likely be a “run” on money markets, because the safety of the U.S. dollar is the foundation of the entire financial system. Next, many of the things the U.S. government must pay for would not be paid for. Because raising the debt ceiling is about allowing the government to get the money to pay for the things Congress has already spent money on, existing invoices would not be paid. So the government would default on paying for contracts, hospitals and doctors who had already performed services, fuel purchases, everything right up to payments to Social Security recipients and people trying to redeem their government bonds. The government would have to prioritize who to pay based on what is coming in from tax receipts, fees and market transactions, which would all drop dramatically as the world’s economy exploded. In any event, the government doesn’t have the computer systems in place to prioritize payments, and wouldn’t have the time or funds to get those running. There would be a dramatic rise in interest rates for borrowing. The United States would no longer be a “safe” borrower, so the price of loans – the interest rate – would go up. That would ripple out to the price of a loan to a business, a mortgage, a car loan and everything else that Americans finance. No matter how fast a default of the country was resolved, the shock to the confidence of the entire economic system would not go away. If the United States was no longer a “safe haven,” then a restructuring of the world’s core understanding of debt and repayment would follow. With the effect of the last fight now understood, any new fight has to be seen for what it is: “economic sabotage.”

#### Delay risks economic collapse

**Puzzanghera, 9/18/13** (Jim, “Delay in raising debt limit risky, Lew says” Los Angeles Times, lexis)

As the nation fast approaches its debt limit, Treasury Secretary Jacob J. Lew issued his strongest warning yet to Congress about the economic consequences of waiting until just before the deadline to pass an increase.

"Trying to time a debt-limit increase to the last minute could be very dangerous," Lew told the Economic Club of Washington on Tuesday. "We cannot afford for Congress to gamble with the full faith and credit of the United States of America."

Republicans are balking at raising the $16.7-trillion debt limit, which Congress must do by as early as mid-October, unless the Obama administration agrees to major concessions including deep spending cuts and a delay in implementing the healthcare reform law.

During a meeting last week, House Speaker John A. Boehner (R-Ohio) gave Lew a list of times in the past when the White House and Congress used the need to raise the debt limit as a way to find bipartisan solutions on fiscal issues, Boehner's office said.

Boehner has said that any increase in the debt limit must be offset by budget cuts or spending reforms at least as large as the increase.

But Lew reiterated Tuesday that President Obama would not negotiate over raising the debt limit because it involves paying for bills already authorized by Congress and because the notion of a federal government default should not be a bargaining chip.

Lew specifically ruled out a delay in the healthcare law, the Affordable Care Act, a move being pushed by some House conservatives.

"That's just not reality, and they're going to have to start dealing in reality," he said.

But as the Treasury runs out of the accounting maneuvers it has used since the spring to continue borrowing to pay the nation's bills, Lew said lawmakers needed to act.

Since the U.S. technically reached its debt limit in the spring, the Treasury has been using so-called extraordinary measures, such as suspending investments in some federal pension funds, to juggle the nation's finances to pay bills. Those measures will be exhausted by the middle of October.

Lew noted that Washington politicians like to wait until they are up against a deadline to act, as they often do with spending bills and did last year with the so-called fiscal cliff, the combination of automatic tax increases and government spending cuts.

But the debt limit is different, Lew said, because of the complexity of identifying an exact date when the nation would run out of borrowing authority -- and because of the consequences of a first-ever federal government default.

Lew said a default would be "a self-inflicted wound that can do harm to our economy right at a moment when the recovery is strengthening."

A bitter battle over the debt limit in 2011, resolved at the last minute, raised fears of a first-ever U.S. government default. The lengthy standoff led Standard & Poor's to downgrade the nation's credit rating for the first time and triggered financial market turmoil along with a deep drop in consumer confidence.

"Some in Congress seem to think they can keep us from failing to pay our nation's bills by simply raising the debt ceiling right before the moment our cash balance is depleted," Lew said. Such a view is misguided, he said.

The Treasury Department doesn't know with precision the exact day that it won't have enough incoming cash to make all the required outgoing payments once it runs out of borrowing authority.

Lew formally told Congress last month that the Treasury would run out of borrowing authority in mid-October. At that point, the government would be able to pay bills only with cash on hand of about $50 billion on any given day.

An analysis released last week by the Bipartisan Policy Center, which also cited the difficulty of pegging an exact date, estimated that the U.S. would run out of borrowing authority between Oct. 18 and Nov. 5.

The vagaries of the debt-limit issue mean that Congress must act sooner rather than later, Lew said.

"I'm nervous about the desire to drive this to the last minute when the last minute is inherently unknowable and the risk of making a mistake could be catastrophic," he said.

#### PC key to quick debt ceiling resolution

PACE, 9/12/13 — AP White House Correspondent (Julie, “Syria debate on hold, Obama refocuses on agenda” <http://www.myrtlebeachonline.com/2013/09/12/3704721/obama-seeks-to-focus-on-domestic.html#storylink=cpy>)

WASHINGTON — With a military strike against Syria on hold, President Barack Obama tried Thursday to reignite momentum for his second-term domestic agenda. But his progress could hinge on the strength of his standing on Capitol Hill after what even allies acknowledge were missteps in the latest foreign crisis. "It is still important to recognize that we have a lot of things left to do here in this government," Obama told his Cabinet, starting a sustained White House push to refocus the nation on matters at home as key benchmarks on the budget and health care rapidly approach. "The American people are still interested in making sure that our kids are getting the kind of education they deserve, that we are putting people back to work," Obama said. The White House plans to use next week's five-year anniversary of the 2008 financial collapse to warn Republicans that shutting down the government or failing to raise the debt limit could drag down the still-fragile economy. With Hispanic Heritage Month to begin Monday, Obama is also expected to press for a stalled immigration overhaul and urge minorities to sign up for health care exchanges beginning Oct. 1. Among the events planned for next week is a White House ceremony highlighting Americans working on immigrant and citizenship issues. Administration officials will also promote overhaul efforts at naturalization ceremonies across the country. On Sept. 21, Obama will speak at the Congressional Black Caucus Gala, where he'll trumpet what the administration says are benefits of the president's health care law for African-Americans and other minorities. Two major factors are driving Obama's push to get back on track with domestic issues after three weeks of Syria dominating the political debate. Polls show the economy, jobs and health care remain Americans' top concerns. And Obama has a limited window to make progress on those matters in a second term, when lame-duck status can quickly creep up on presidents, particularly if they start losing public support. Obama already is grappling with some of the lowest approval ratings of his presidency. A Pew Research Center/USA Today poll out this week put his approval at 44 percent. That's down from 55 percent at the end of 2012. Potential military intervention in Syria also is deeply unpopular with many Americans, with a Pew survey finding that 63 percent opposing the idea. And the president's publicly shifting positions on how to respond to a deadly chemical weapons attack in Syria also have confused many Americans and congressional lawmakers. "In times of crisis, the more clarity the better," said Sen. Lindsey Graham, R-S.C., a strong supporter of U.S. intervention in Syria. "This has been confusing. For those who are inclined to support the president, it's been pretty hard to nail down what the purpose of a military strike is." For a time, the Obama administration appeared to be barreling toward an imminent strike in retaliation for the Aug. 21 chemical weapons attack. But Obama made a sudden reversal and instead decided to seek congressional approval for military action. Even after administration officials briefed hundreds of lawmakers on classified intelligence, there appeared to be limited backing for a use-of-force resolution on Capitol Hill. Rather than face defeat, Obama asked lawmakers this week to postpone any votes while the U.S. explores the viability of a deal to secure Syria's chemical weapons stockpiles. That pause comes as a relief to Obama and many Democrats eager to return to issues more in line with the public's concerns. The most pressing matters are a Sept. 30 deadline to approve funding to keep the government open — the new fiscal year begins Oct. 1 — and the start of sign-ups for health care exchanges, a crucial element of the health care overhaul. On Wednesday, a revolt by tea party conservatives forced House Republican leaders to delay a vote on a temporary spending bill written to head off a government shutdown. Several dozen staunch conservatives are seeking to couple the spending bill with a provision to derail implementation of the health care law. The White House also may face a fight with Republicans over raising the nation's debt ceiling this fall. While Obama has insisted he won't negotiate over the debt limit, House Speaker John Boehner on Thursday said the GOP will insist on curbing spending. "You can't talk about increasing the debt limit unless you're willing to make changes and reforms that begin to solve the spending problem that Washington has," the Ohio Republican said.

### 2nc key to economy

**Destroys the global economy.**

**Milstead 9-12** [David, Writer for the Globe and Mail, “The under-the-radar threat to U.S. stocks” Factiva]

Conventional wisdom holds that the chief risk to the high-flying U.S. stock market is “tapering,” the potential cutback of the Federal Reserve's bond-buying program. It's an understandable view, given how the Fed's monetary policy has propped up the country's economy for years by helping to keep long-term interest rates at ultra-low levels. But it's also wrong. The greatest immediate hazard to stocks isn't the direction the six governors of the Federal Reserve will take. It's what the 535 members of Congress will do in the coming weeks when faced with two budgetary issues that ought to be routine – but will likely be anything but. The first issue is approving a federal budget for the fiscal year that begins Oct. 1, or at least a resolution that will keep the government open in its absence. The second is authorizing a new, higher number for the U.S. government's borrowing before Washington hits its debt ceiling, once again, possibly by mid-October. In the absence of such a vote, the U.S. must simply stop spending – and, in essence, default on its debt. If this sounds familiar, it's because we went through a similar showdown two years ago, in the summer of 2011. Yet it's easy to forget now how that fiscal gridlock roiled the markets. In the first day of trading after Standard & Poor's downgraded U.S. debt in early August, the S&P 500 fell nearly 7 per cent. The day after, the index was nearly 19 per cent below the level of early July. The rhetoric suggests this fiscal showdown could inflict similar damage. Eighty House Republicans recently signed a letter urging their leadership to use any new government-funding bill to cut all necessary money for President Barack Obama's signature accomplishment, the Affordable Care Act, more popularly known as Obamacare. The Republican House leadership, it is said, does not support such a move. That's apparently because they prefer to make it part of the showdown over the debt ceiling. (The National Review, one of the U.S.'s leading conservative publications, reported Tuesday that Eric Cantor, the House Majority Leader, told Republicans they will be demanding a one-year delay of Obamacare in exchange for an increase in the debt ceiling.) Failing to raise the debt ceiling doesn't mean default, its opponents argue. The Treasury can just do a better job of “prioritizing,” paying the creditors while axing other expenses. In the absence of a higher debt ceiling, the U.S. could pay the interest on Treasury securities, and keep on footing the tab for Medicare and Medicaid, Social Security, national defence and a handful of aid programs, according to the Bipartisan Policy Centre. But, starting Oct. 15, it won't be able to afford the salaries of other federal workers, or perform functions like road construction and air traffic control, or run the federal court system. Ted Yoho, the improbably named Republican representative from Florida, said this about a failure to raise the debt ceiling, according to a recording of one of his summertime town hall meetings leaked to the Huffington Post: “So they say that would rock the market, capital would leave, the stock market would crash … I think our credit rating would do better.” Better, I think, to take the U.S. Treasury's position that the markets will view the U.S. picking and choosing which bills to pay as an admission it simply can't pay them all. Deputy secretary Neil Wolin said during the last debt-ceiling showdown, in 2011, that it “would merely be default by another name.” That, however, is the view from the reality-based community, rather than the deeply irrational, anti-intellectual element that has hijacked the Republican Party and turned ordinary budgetary procedure into a partisan brawl. The liberal economic writer Jonathan Chait recently wrote “the chaos and dysfunction have set in so deeply that Washington now lurches from crisis to crisis, and once-dull, keep-the-lights-on rituals of government procedure are transformed into white-knuckle dramas that threaten national or even global catastrophe.” And yet stocks seem to be priced as if Democrats, Republicans and President Obama will come together to work something out. There is great faith that the United States will overcome its challenges and take the right path in the end. Investors could suffer double-digit losses in the coming weeks if that faith is misplaced.

### Court detention rulings

**Empirically – Court detention cases caused a Congressional backlash**

**Abramowitz and Weisman 6** – Washington Post Staff Writers (6/1/06, Michael and Jonathan, The Washington Post, “GOP Seeks Advantage In Ruling On Trials”, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/30/AR2006063001737.html>) AC

**Republicans** yesterday **looked to wrest a political victory from a legal defeat in the Supreme Court, serving notice to Democrats that they must back President Bush on how to try suspects at Guantanamo Bay or risk being branded as weak on terrorism.**

**In striking down the military commissions** Bush sought for trials of suspected members of al-Qaeda and other terrorist groups, **the high court Thursday invited Congress to establish new rules and put the issue prominently before the public** four months before the midterm elections. As the White House and lawmakers weighed next steps, **House GOP leaders signaled they are ready to use this week's turn of events as a political weapon**.

House Majority Leader John A. **Boehner** (R-Ohio) **criticized** House Minority Leader Nancy **Pelosi's comment Thursday that the court decision "affirms the American ideal that all are entitled to the basic guarantees of our justice system**." Th**at statement, Boehner said, amounted to** Pelosi's **advocating "special privileges for terrorists**."

Similar views ricocheted around conservative talk radio -- Rush Limbaugh called Pelosi's comments "deranged" on his show Thursday -- and **Republican strategists said they believed that the decision presented Bush a chance to put Democrats on the spot while uniting a Republican coalition** that lately has been splintered on immigration, spending and other issues.

"**It would be good politics to have a debate about this if Democrats are going to argue for additional rights for terrorists,"** said Terry Nelson, a prominent GOP political strategist who was political director for Bush's reelection campaign in 2004.

#### Reducing war powers will end Obama’s credibility with Congress – it causes stronger GOP pushback on the debt ceiling – and the fight alone will wreck markets

**Seeking Alpha, 9/10/13** (“Syria Could Upend Debt Ceiling Fight”, <http://seekingalpha.com/article/1684082-syria-could-upend-debt-ceiling-fight>)

Unless President Obama can totally change a reluctant public's perception of another Middle-Eastern conflict, it seems unlikely that he can get 218 votes in the House, though he can probably still squeak out 60 votes in the Senate. This defeat would be totally unprecedented as a President has never lost a military authorization vote in American history. To forbid the Commander-in-Chief of his primary power renders him all but impotent. At this point, a rebuff from the House is a 67%-75% probability.

I reach this probability by looking within the whip count. I assume the 164 declared "no" votes will stay in the "no" column. To get to 218, Obama needs to win over 193 of the 244 undecided, a gargantuan task. Within the "no" column, there are 137 Republicans. Under a best case scenario, Boehner could corral 50 "yes" votes, which would require Obama to pick up 168 of the 200 Democrats, 84%. Many of these Democrats rode to power because of their opposition to Iraq, which makes it difficult for them to support military conflict. The only way to generate near unanimity among the undecided Democrats is if they choose to support the President (recognizing the political ramifications of a defeat) despite personal misgivings. The idea that all undecided Democrats can be convinced of this argument is relatively slim, especially as there are few votes to lose. In the best case scenario, the House could reach 223-225 votes, barely enough to get it through. Under the worst case, there are only 150 votes. Given the lopsided nature of the breakdown, the chance of House passage is about one in four.

While a failure in the House would put action against Syria in limbo, I have felt that the market has overstated the impact of a strike there, which would be limited in nature. Rather, investors should focus on the profound ripple through the power structure in Washington, which would greatly impact impending battles over spending and the debt ceiling.

Currently, the government loses spending authority on September 30 while it hits the debt ceiling by the middle of October. Markets have generally felt that Washington will once again strike a last-minute deal and avert total catastrophe. Failure in the Syrian vote could change this. For the Republicans to beat Obama on a President's strength (foreign military action), they will likely be emboldened that they can beat him on domestic spending issues.

Until now, consensus has been that the two sides would compromise to fund the government at sequester levels while passing a $1 trillion stand-alone debt ceiling increase. However, the right wing of Boehner's caucus has been pushing for more, including another $1 trillion in spending cuts, defunding of Obamacare, and a one year delay of the individual mandate. Already, Conservative PACs have begun airing advertisements, urging a debt ceiling fight over Obamacare. With the President rendered hapless on Syria, they will become even more vocal about their hardline resolution, setting us up for a showdown that will rival 2011's debt ceiling fight.

I currently believe the two sides will pass a short-term continuing resolution to keep the government open, and then the GOP will wage a massive fight over the debt ceiling. While Obama will be weakened, he will be unwilling to undermine his major achievement, his healthcare law. In all likelihood, both sides will dig in their respective trenches, unwilling to strike a deal, essentially in a game of chicken. If the House blocks Syrian action, it will take America as close to a default as it did in 2011. Based on the market action then, we can expect massive volatility in the final days of the showdown with the Dow falling 500 points in one session in 2011.

As markets panicked over the potential for a U.S. default, we saw a massive risk-off trade, moving from equities into Treasuries. I think there is a significant chance we see something similar this late September into October. The Syrian vote has major implications on the power of Obama and the far-right when it comes to their willingness to fight over the debt ceiling. If the Syrian resolution fails, the debt ceiling fight will be even worse, which will send equities lower by upwards of 10%. Investors must be prepared for this "black swan" event.

Looking back to August 2011, stocks that performed the best were dividend paying, less-cyclical companies like Verizon (VZ), Wal-Mart (WMT), Coca-Cola (KO) and McDonald's (MCD) while high beta names like Netflix (NFLX) and Boeing (BA) were crushed. Investors also flocked into treasuries despite default risk while dumping lower quality bonds as spreads widened. The flight to safety helped treasuries despite U.S. government issues. I think we are likely to see a similar move this time.

Assuming there is a Syrian "no" vote, I would begin to roll back my long exposure in the stock market and reallocate funds into treasuries as I believe yields could drop back towards 2.50%. Within the stock market, I think the less-cyclical names should outperform, making utilities and consumer staples more attractive. For more tactical traders, I would consider buying puts against the S&P 500 and look toward shorting higher-beta and defense stocks like Boeing and Lockheed Martin (LMT). I also think lower quality bonds would suffer as spreads widen, making funds like JNK vulnerable. Conversely, gold (GLD) should benefit from the fear trade.

I would also like to address the potential that Congress does not vote down the Syrian resolution. First, news has broken that Russia has proposed Syria turn over its chemical stockpile. If Syria were to agree (Syria said it was willing to consider), the U.S. would not have to strike, canceling the congressional vote. The proposal can be found here. I strongly believe this is a delaying tactic rather than a serious effort. In 2005, Libya began to turn over chemical weapons; it has yet to complete the hand-off. Removing and destroying chemical weapons is an exceptionally challenging and dangerous task that would take years, not weeks, making this deal seem unrealistic, especially because a cease-fire would be required around all chemical facilities. The idea that a cease-fire could be maintained for months, essentially allowing Assad to stay in office, is hard to take seriously. I believe this is a delaying tactic, and Congress will have to vote within the next two weeks.

The final possibility is that Democrats back their President and barely ram the Syria resolution through. I think the extreme risk of a full-blown debt stand-off to dissipate. However, Boehner has promised a strong fight over the debt limit that the market has largely ignored. I do believe the fight would still be worse than the market anticipates but not outright disastrous. As such, I would not initiate short positions, but I would trim some longs and move into less cyclical stocks as the risk would still be the debt ceiling fight leading to some drama not no drama.

Remember, in politics everything is connected. Syria is not a stand-alone issue. Its resolution will impact the power structure in Washington. A failed vote in Congress is likely to make the debt ceiling fight even worse, spooking markets, and threatening default on U.S. obligations unless another last minute deal can be struck.

### 2nc uniqueness wall

#### He’s winning because he’s using capital to unify Democrats and exploit GOP divisions

**Allen, 9/19/13** (Jonathan, Politico, “GOP battles boost Obama” <http://www.politico.com/story/2013/09/republicans-budget-obama-97093.html>)

There’s a simple reason President Barack Obama is using his bully pulpit to focus the nation’s attention on the battle over the budget: In this fight, he’s watching Republicans take swings at each other.

And that GOP fight is a lifeline for an administration that had been scrambling to gain control its message after battling congressional Democrats on the potential use of military force in Syria and the possible nomination of Larry Summers to run the Federal Reserve.

If House Republicans and Obama can’t cut even a short-term deal for a continuing resolution, the government’s authority to spend money will run out on Oct. 1. Within weeks, the nation will default on its debt if an agreement isn’t reached to raise the federal debt limit.

For some Republicans, those deadlines represent a leverage point that can be used to force Obama to slash his health care law. For others, they’re a zero hour at which the party will implode if it doesn’t cut a deal.

Meanwhile, “on the looming fiscal issues, Democrats — both liberal and conservative, executive and congressional — are virtually 100 percent united,” said Sen. Charles Schumer (D-N.Y.).

Just a few days ago, all that Obama and his aides could talk about were Syria and Summers. Now, they’re bringing their party together and shining a white hot light on Republican disunity over whether to shut down the government and plunge the nation into default in a vain effort to stop Obamacare from going into effect.

The squabbling among Republicans has gotten so vicious that a Twitter hashtag — #GOPvsGOPugliness — has become a thick virtual data file for tracking the intraparty insults. Moderates, and even some conservatives, are slamming Texas Sen. Ted Cruz, a tea party favorite, for ramping up grassroots expectations that the GOP will shut down the government if it can’t win concessions from the president to “defund” his signature health care law.

“I didn’t go to Harvard or Princeton, but I can count,” Sen. Bob Corker (R-Tenn.) tweeted, subtly mocking Cruz’s Ivy League education. “The defunding box canyon is a tactic that will fail and weaken our position.”

While it is well-timed for the White House to interrupt a bad slide, Obama’s singular focus on the budget battle is hardly a last-minute shift. Instead, it is a return to the narrative arc that the White House was working to build before the Syria crisis intervened.

#### He just needs to stay the course

**Robinson, 9/20**/13 – Washington Post columnist (Eugene, “Obama Needs to Stand His Ground” <http://www.realclearpolitics.com/articles/2013/09/20/obama_needs_to_stand_his_ground_120003.html>)

Obama is by nature a reasonable and flexible man, but this time he must not yield. Even if you leave aside what delaying or defunding Obamacare would mean for his legacy -- erasing his most significant domestic accomplishment -- it would be irresponsible for him to bow to the GOP zealots' demands.

The practical impact of acquiescing would be huge. Individuals who have been uninsured are anticipating access to adequate care. State governments, insurance companies and health care providers have spent vast amounts of time and money preparing for the law to take effect. To suddenly say "never mind" would be unbelievably reckless.

The political implication of compromising with blackmailers would be an unthinkable surrender of presidential authority. The next time he said "I will do this" or "I will not do that," why should Congress or the American people take him seriously? How could that possibly enhance Obama's image on the world stage?

Obama has said he will not accept a budget deal that cripples Obamacare and will never negotiate on the debt ceiling. Even if the Republicans carry through with their threats -- and this may happen -- the president has no option but to stand his ground.

You don't deal with bullies by making a deal to keep the peace. That only rewards and encourages them. You have to push back.

The thing is, this showdown is a sure political loser for the GOP -- and smart Republicans know it. Boehner doesn't want this fight, and in fact should be grateful if Obama hangs tough and shows the crazies the limits of their power. Republicans in the Senate don't want this fight. It's doubtful that even a majority of House Republicans really, truly want this fight, no matter what they say publicly.

But irresponsible demagogues -- I mean you, Sen. Ted Cruz, R-Texas -- have whipped the GOP base into a frenzy of unrealistic expectations. House members who balk at jumping off the cliff risk being labeled "moderate," which is the very worst thing you can call a Republican -- and the most likely thing to shorten his or her political career.

The way to end this madness is by firmly saying no. If Boehner won't do it, Obama must.

### rol add on

#### The separation of powers is obsolete and is utterly incapable of regulating the executive – the executive is simply too large to effectively monitor

**Posner and Vermeule, 10** - \*professor of law at the University of Chicago AND \*\*professor of law at Harvard (Eric and Adrian, The Executive Unbound, p. 17-18)

We begin with the constitutional framework, and with the official constitutional theory of liberal legalism. In this theory lawmaking powers are separated among three different branches-legislature, executive, and judiciary-in order to promote an institutional division of labor and to protect liberty The liberty-protecting function of the separation of powers, Madison suggested, is that the combination of powers in one institution would be "the very definition of tyranny". Mutual checking and monitoring by the branches of government would prevent concentration of power suppress the evils of factionalism, and conduce to better policymaking overall.

This theory has collapsed. Its fit with reality is no longer merely imperfect, in the way that all regulative ideals are imperfect; rather it does not even approximate the political terrain it purports to cover. We will proceed to explain this conclusion in three steps. First, we examine the checking function of the separation of powers. Here Madison made two crucial mistakes: first in assuming that the individual ambitions of government officials would cause them to support the power of the institutions they occupy and second in assuming that some invisible-hand mechanism would cause the mutual contest among institutions to produce a socially beneficial system of mutual checks. Nothing in the actual separation-of-powers system, however, guarantees or even generally tends to produce socially beneficial results. In particular, we show that the system will predictably lead to suboptimal checking-to a political regime in which some institutions (such as legislature and judiciary) do too little to check the swelling power of others (such as the executive).

Second, we examine the monitoring function of the separation of powers, focusing particularly on legislative and judicial monitoring of the executive. The vastly increased complexity and scale of the executive, since Madison's day ensures that the monitoring function is largely obsolete. In the administrative state, the scope of the executive's responsibility is vast, and legislative and judicial institutions lack the capacity to monitor any important fraction of what the executive does, even where opposing political parties occupy the executive and other branches, and even with the help of "fire alarms"-alerts from interest groups with stakes in particular issues.2 In many of the most important domains, and those most difficult to monitor-those involving intelligence, foreign affairs and national security or highly complex questions of economic policy-legislators and the courts are overmatched, for enduring structural reasons that prevail no matter what the contingent political constellation. We thus reject any strong version of the "congressional dominance" thesis-the idea that Congress, sometimes enlisting the aid of interest groups and the courts, exerts implicit but effective control over executive and administrative behavior.

### 2nc doj cp overview

#### Their answers don’t assume a united front of OLC and Solicitor General

**Pillard 2005** – JD from Harvard, Faculty Director of Supreme Court Institute at Georgetown University Law Center, former Deputy Assistant Attorney General in the DOJ (February, Cornelia T., Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758, http://scholarship.law.georgetown.edu/facpub/189/)

\*NOTE: OLC = Office of Legal Counsel; SG = Solicitor General. Both in Justice Department.

One such difference is that all of the OLC deputies are politically appointed, whereas in the SG's Office, three out of the four deputies are career employees. A more politically led office seems less likely to make impartial, arms-length constitutional decisions, but the political pedigree of OLC's leadership may give it credibility with the political leadership of client entities by helping them to trust that OLC will not use constitutional objections as a back-door way to stop or limit policies with which it simply disagrees. Only when clients are willing to abide by its advice can OLC play a client-checking role. Another difference between the two offices is that, whereas only one deputy reviews each matter in the SG's office, OLC customarily follows a "two-deputy rule," permitting advice on behalf of the office only after review and approval by two deputies. Without the immediate threat of an adverse court judgment against an agency that fails to follow its advice, OLC's clout depends more on support from other sources. Presenting a "united front," rather than lone authors more readily questioned as idiosyncratic, may enhance OLC's authority with its clients.125

#### Here’s ev in the context of war powers

**Pillard 2005** – JD from Harvard, Faculty Director of Supreme Court Institute at Georgetown University Law Center, former Deputy Assistant Attorney General in the DOJ (February, Cornelia T., Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758, http://scholarship.law.georgetown.edu/facpub/189/)

Just as the SG is the federal government's chief litigator, the head of the Office of Legal Counsel is the executive branch's chief legal advisor. The Attorney General has formally delegated the legal-advice-giving part of his statutory responsibility to OLC.104 OLC has no enforcement or litigation responsibilities, and is devoted exclusively to giving legal advice. OLC's role within the executive branch has evolved over the years, with tasks calling for legal and, especially, constitutional judgment migrating to OLC, while more politicized tasks, like OLC's short involvement in vetting potential judicial nominees, being reassigned elsewhere.105

OLC's core work is to provide written and oral legal opinions to others within the executive branch, including the president, the Attorney General, and heads of other departments. In practice, the White House and the Attorney General are by far the most frequent requesters, often asking complex, momentous questions, frequently on short notice. OLC clients may seek opinions on matters such as the sustainability of a claim of executive privilege, or the lawfulness in a particular circumstance of a quarantine, detention, or use of military force. OLC has been consulted when troops have been sent abroad and when international criminals were arrested overseas.106 Much of OLC's work is more quotidian, including topics such as the constitutionality under the Appointments Clause of various boards and commissions, or the scope of an agency's statutory authority to alter a regulation or settle a case in a particular way. Its opinions "involve domestic problems, international issues, pet plans of bureaucrats, the application of the Constitution and the laws to administrative policies and procedures, the powers and jurisdictions of departments and agencies, the advisability of contemplated actions, [and various mundane and] momentous matters." 107

OLC traditionally requires that requests for advice come from the head or general counsel of the requesting agency, that advice-seekers submit their own view of the question to OLC, and that independent agencies (not already presumptively bound) agree in advance to abide by the advice - even oral advice - that OLC delivers.108 The agreement to be bound forestalls opportunistic advice-shopping by entities willing to abide only by advice they like, and it preserves the resources and authority of OLC against being treated merely as an extra source of legal research on issues that other lawyers or officials will ultimately resolve for themselves.109

### 2nc solicitor general solves

#### Solicitor General positions are binding—constrains the executive, even if courts and Congress fail—our mechanism solves

**Pillard 2005** – JD from Harvard, Faculty Director of Supreme Court Institute at Georgetown University Law Center, former Deputy Assistant Attorney General in the DOJ (February, Cornelia T., Michigan Law Review, 103.4, “The Unfulfilled Promise of the Constitution in Executive Hands”, 103 Mich. L. Rev. 676-758, http://scholarship.law.georgetown.edu/facpub/189/)

\*NOTE: gendered language in this card is in reference to Paul D. Clement, who was SG in 2005

The SG is assisted by a small legal and administrative staff operating within a relatively flat office hierarchy. Only two of the office's lawyers - the SG and one of his four Deputies - are political appointees; all of the others, including the three other Deputies and all of the Assistants to the SG, who research and draft the office's briefs, are "career" employees with civil-service protection.95 The office's functional separation from policymaking is further shown by the pattern of hiring lawyers for their general skill at legal analysis and appellate advocacy, rather than for any particular area of substantive expertise. Consistent with that pattern, SGs routinely hire lawyers from the Justice Department's appellate divisions, but rarely hire from client agencies.

The work flow in the SG's Office typically follows a bottom-up path that reflects an assumption that skilled, dispassionate legal analysis by career lawyers will unearth constitutional issues relevant to the litigating position proposed by an agency or a component of the Justice Department. The SG and his Deputies assign each matter to an Assistant who completes the research and drafting. Sometimes the assigning Deputy will discuss the merits of a new assignment briefly with the Assistant, but more often the Deputy has no advance conversation with the Assistant. The Assistant typically learns of the assignment once it is deposited in his or her in-box by an office courier, and the Assistant independently develops a draft.96 Thus, the SG's Office's work is not a collaborative political-legal enterprise, promoting "all-things-considered" judgments,97 but is quite formally doctrinal. Only occasionally do executive agency officials - i.e. those who are responsible for executive branch policy decisions - even meet with the Solicitor General or his staff. Those patterns reflect the office's focus on legal, rather than policy-oriented or political, analysis.

3. Client-Checking

The SG is **not merely a mouthpiece** for his federal clients. Although he seeks to advocate (or authorize other government lawyers to advocate) the positions and interests of the client entities, lawyers in the SG's Office critically evaluate the input they get from the government's policymaking agencies. Departments and agencies seek the SG's approval for hundreds of petitions each year, but he typically authorizes less than ten to twenty percent of them.9 " He also turns down a sizeable fraction of requests for authorization to appeal, and the overwhelming majority of requests for authorization to seek rehearing en banc.

The SG often declines to make particular arguments in briefing and may even confess error, abandoning the government's victory in a lower court.99 If the SG's own analysis disagrees with the judgment of the lower court that sustained the government's position, he can choose not to defend the favorable decision against the opposing party's appeal or effort to obtain Supreme Court review. Giving up a victory already in hand is virtually unheard of in the private bar, but it is an established practice by the SG, occurring on average two to three times per year.100

Each of these ways through which the SG checks client initiatives - rejecting requests to appeal or petition, declining to make certain proposed arguments in briefs to the courts, and even confessing error - might be thought to illustrate the law's capacity to constrain politics within the executive branch. OLC, the other centralized source of executive constitutional interpretation, can also play a checking role.

### solves precedent

#### We solve precedent by invoking constitutional limits

**Atkinson 2013** – JD NYU, National Security Division, Department of Justice (L. Rush, Vanderbilt Law Review, forthcoming issue, “The Fourth Amendment’s National Security Exception”, http://ssrn.com/abstract=2226404)

When identifying constitutional parameters for the executive, it is particularly instructive to look at historical moments when the executive is restrained. When congressional prohibition draws executive power to its “ebb,” for example, one can identify the executive’s core inextinguishable powers.47 Constitutional boundaries are similarly discernible in some cases where the executive branch **limits its own** conduct. Specifically, the executive’s self-restraint is precedential when it stems from a sense of constitutional obligation.48 Such fealty towards the Constitution might be **unprompted by judicial command or legislative action**, and there may be no record as obvious as a judicial opinion or legislative bill. Nevertheless, where a discernible opinio juris has shaped executive action, such legal opinion should be considered both for its persuasive power and a historical understanding about what protections the Constitution establishes.49

#### Disclosure solves precedent

**Morrison 2010** – Professor of Law, Columbia University (Trevor, Columbia Law Review, “STARE DECISIS IN THE OFFICE OF LEGAL COUNSEL”, 110 Colum. L. Rev. 1448, Lexis)

Second, the special precedential force of prior opinions in this area also requires disclosure, especially to Congress. This is entailed in the Madisonian model of the separation of powers, which continues to dominate separation of powers doctrine today - both in OLC and elsewhere. n200 "The great security against a gradual concentration of the several powers in the same department," Madison explained, "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." n201 Assertions of executive power that are kept secret from [\*1500] Congress constitute evasions of this checking mechanism, and for that reason cannot claim special precedential weight on Madisonian terms. In contrast, assertions of executive power known to and acquiesced in by Congress are at the opposite end of the spectrum. To return to Justice Frankfurter's Steel Seizure concurrence, courts should treat historical patterns of executive practice "as a gloss on 'executive Power' vested in the President" when they are "long pursued to the knowledge of the Congress and never before questioned." n202 This theory of acquiescence obviously requires notice.

### 2nc at: future rollback

#### Executives rely on OLC too much to be flippant

**Morrison 2011** – Professor of Law, Columbia University (Trevor W., Harvard Law Review, ““Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation”, 124 HARV. L. REV.F. 62, http://web.law.columbia.edu/sites/default/files/microsites/constitutional-governance/files/Libya-Hostilities-Office-of-Legal-Counsel.pdf)

The White House is one of the main beneficiaries of that reputation. When OLC concludes that a government action is lawful, its conclusion carries a legitimacy that other executive offices cannot so readily provide. That legitimacy is a function of OLC’s deep traditions and unique place within the executive branch. Other executive offices — be they agency general counsels or the White House Counsel’s Office — do not have decades-long traditions of providing legal advice based on their best view of the law after fully considering the competing positions; they have not generated bodies of authoritative precedents to inform and constrain their work; and they do not issue legal opinions that, whether or not they favor the President, are treated as presumptively binding within the executive branch. (Nor should those other offices mimic OLC; that is not their job.) Because the value of a favorable legal opinion from OLC is tied inextricably to these aspects of its work, each successive presidential administration has a strong incentive to respect and preserve them.

#### The counterplan involves a unique agency commitment—it’s irreversible

**Magill 2009** – Horace W. Goldsmith Research Professor, University of Virginia School of Law (5/31, Elizabeth, The George Washington Law Review, Vol. 77, “Agency Self-Regulation”, http://law.bepress.com/cgi/viewcontent.cgi?article=1192&context=uvalwps&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fstart%3D30%26q%3Drelated%3A1PuVXzR0CFZ8hM%3Ascholar.google.com%2F%26hl%3Den%26as\_sdt%3D0%2C11#search=%22related%3A1PuVXzR0CFZ8hM%3Ascholar.google.com%2F%22)

A. Control of Delegated Authority

Perhaps the most obvious case is where self-regulatory measures are used to control the exercise of authority that is delegated within the agency. Just as the legislature delegates some decisions to agencies95 and delegates within its own institutions,96 so there is a great deal of delegation within agencies.97 Although the amount of decentralization of decisionmaking varies across agencies, those at the top of agencies simply cannot make all decisions. Some of this internal delegation is the result of statutory design98 and some is the result of agency decisions.99 In many agencies, frontline and midlevel decisionmakers make hundreds, if not thousands, of decisions each month that represent the on-the-ground implementation of the laws the agency administers.100 Administrative law judges determine who is eligible for social security disability benefits, FDA field inspectors determine whether a food product is misbranded or adulterated, customs and immigration officers make decisions at the border about the legal status of a product or an individual.

Where there is delegation, as night follows day, there will be strategies to control the exercise of that delegated authority.101 The agent does not have the same incentives as the principal and also can have superior information.102 Thus, the policy makers at the top of the agency will attempt to control the substance of the decisions made by those in the lower rungs of the hierarchy and to assure consistent application of those decisions across decisionmakers. Self-regulatory measures are a key mechanism by which top-level agency “principals” assert this control over agents exercising delegated authority.

Agencies can rely on self-regulatory measures to control the exercise of delegated authority. Most straightforwardly, an agency might instruct lower-level decisionmakers how to make their decisions.103 In a more subtle way, self-regulatory measures might structure the decisionmaking process to facilitate desired outcomes.104 A self-regulatory rule might allow field offices to make the decision whether to bring enforcement actions, or, conversely, it might allow (only) the central office to make such decisions; likewise, a self-regulatory rule might empower a large number of officials with sign-off authority before a major action is undertaken, or it might dictate a more streamlined process.105 Finally, the agency might adopt various monitoring mechanisms to assure compliance with instructions.106 Effectively controlling those who exercise delegated authority is a hard problem for any organization, and there are trade-offs associated with each mechanism of control.107 That complexity aside, the point for present purposes is that many self-regulatory measures will be best explained as efforts by the top-level agency decisionmakers to control authority delegated to others within the agency.

B. Self-Constraint

Agencies may also use self-regulatory measures to advance policy goals where there is little need to control delegation. That is, they may wish to constrain themselves. Consider enforcement strategy in an agency that makes only a few enforcement decisions a year. One option for the agency would be to pursue an enforcement strategy informally. As a matter of practice, for instance, the agency may choose not to bring enforcement actions against certain categories of violators.108 Or, the agency could transform that practice into a self-regulatory rule to advance the same policy objective.109

There are advantages to formalizing the agency policy in a self-regulatory measure. Some of those advantages are internal. The process of actually articulating the practice in writing may clarify the contours of the agency policy. Some ambiguities that do not arise as the policy is followed as a matter of practice may come to the surface and be resolved when the agency decision makers anticipate the widest range of possible circumstances. Articulating the policy formally may also satisfy an internal need of certain bureaucrats by providing them with an explanation for their decisions. The bureaucrats and bureaucracies described in the tradition that starts with Max Weber—neutral, impersonal, expert—would prefer to enforce rules written down to an amorphous set of informal practices.110

Formalizing the policy also provides external benefits. Although close observers of the agency will have known the earlier practice, a rule would publicize the policy in a broader way. More importantly, formalizing the policy evidences more commitment by the agency to the stability of the policy. If the agency, for instance, chooses to promulgate the selfregulatory measure in a legislative rule, it is opting into judicial enforcement of the rule against the agency in the future and such commitment may induce desired reliance by external actors.111

#### Internal agency rules are durable—it’s judicially enforceable across administrations

**Magill 2009** – Horace W. Goldsmith Research Professor, University of Virginia School of Law (5/31, Elizabeth, The George Washington Law Review, Vol. 77, “Agency Self-Regulation”, http://law.bepress.com/cgi/viewcontent.cgi?article=1192&context=uvalwps&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fstart%3D30%26q%3Drelated%3A1PuVXzR0CFZ8hM%3Ascholar.google.com%2F%26hl%3Den%26as\_sdt%3D0%2C11#search=%22related%3A1PuVXzR0CFZ8hM%3Ascholar.google.com%2F%22)

Whether self-regulation does constrain the agency, then, depends on whether and, if so, how these self-regulatory measures bind the agency going forward. In other words, the question whether self-regulation constrains the agency reduces to an interesting question that is familiar to us from other contexts: can an agency make a credible commitment to the stability of the position it takes in a self-regulatory measure?

1. Government and Precommitments

There is a rich theoretical literature across a range of fields about voluntarily imposed constraints on choices,32 but the literature that is most relevant here explores two questions.33 Why would government (as opposed to individuals or private firms) wish to make credible commitments about its future behavior? And what are the mechanisms by which government can do so? To understand why these questions are worthy of attention, consider a commonly invoked example. Because government has a monopoly on the exercise of coercive powers, it has the authority, and sometimes the short-term incentive, to take private assets for its own purposes, ignoring property and contract rights in the process.34 But without stable property and contract rights, those with resources will not want to engage in financial dealings with the government, and they will be leery of engaging in economic exchange more generally if they cannot be assured that their property and contract rights will be respected.35 A government that seeks to induce investment by private parties and foster economic growth thus has good reason to promise that it will respect property and contract rights in the future.

That there are good reasons for government to limit its options in the future does not mean that there are good mechanisms for doing so. Government may announce today that it will respect contract rights tomorrow, but as the saying goes, talk is cheap, and next year when government needs cash it may change its mind and use its coercive power in violation of those earlier promises. So how can government credibly commit today that it will respect private rights tomorrow? Lawyers think of constitutional constraints (the Takings Clause36 or the Contracts Clause37) as mechanisms by which government attempts to make a credible commitment of this sort;38 social scientists point to particular institutional arrangements like separation of powers or an independent judiciary (constitutionally protected or not) that make it difficult for the government to change course in the future because those arrangements tend to maintain the status quo and protect whatever policy the government commits to in the first instance.39

2. Agencies and Precommitment

Translating these insights to the narrow context of the agency, the most striking fact is that an agency has limited ability to make credible commitments.40 That is because an agency is (to invoke the embarrassingly obvious) an agent. It is formally controlled by other principals, like Congress, the courts, or the President.41 An agency does not even fully control its own destiny because those principals can force the agency to change its commitments. Congress can pass a new statute that displaces an agency’s approach, a court can reject the agency’s policy as an arbitrary choice or an unreasonable reading of a statute, or a (new) President can order his (newly-installed) subordinate to change the previous policy choice. This status substantially limits agencies’ ability to make credible commitments.

Accepting the important reality that agencies are subordinate to these principals, is there any room for an agency to constrain itself when it self-regulates? Some strategies that other government actors might adopt are not available to agencies. As just noted, an agency does not even ultimately control the choices delegated to it, and it has little authority over its formal relationships with other governmental actors. It thus cannot facilitate credible commitments by rearranging its institutional relationships with those actors. Consider one example. A design choice that would facilitate credible commitments would be an arrangement where the agency’s approach could only be changed if Congress consented to the change. But agencies have no such authority.

3. The Accardi Principle and Precommitment

Accepting all of this, an agency does have some limited capacity to make credible commitments.42 There are no doubt a variety of interesting reasons for this, such as an agency’s ability to discern and rely on stable allocations of political, institutional, or economic power.43 Here this Article focuses on one formal, legal reason why agencies can commit to the stability of their policy over time. This is due to the operation of an administrative law doctrine that goes by different names but will be called here the Accardi principle.44 The complexities of that doctrine will be explored shortly, but consider now a simple statement of it: an agency has an obligation to follow its own rules.45 From the perspective of permitting an agency to credibly commit to future action, the most important feature of that doctrine is that its enforcement is not up to the agency, but is rather up to the courts.46 It is true that the courts only enforce the Accardi doctrine if a proper party comes along and brings a timely challenge to an agency’s failure to abide by its own rules, but if that occurs, a court can invalidate agency action that does not comply with existing rules.

And all relevant parties proceed in the shadow of that possibility. Thus, if an agency chooses to embed its self-regulatory measure in a rule, it can rely on the fact that a court will require it to adhere to that rule in the future. This doctrine gives the agency some capacity to make credible commitments.

The problem of a government agent promising adherence to a policy in the future is that the government agent (or her successor), absent some effective enforcement mechanism, can thereafter ignore the promise.47 Government can say today that it will respect contract rights, but tomorrow it can exercise its coercive powers in ways that ignore them. The availability of an effective third party enforcer of the original promise permits the agent to back it with some level of credibility and thus induces whatever behavior the original promise was intended to facilitate.48 And an effective third party enforcer of self-regulation is what the Accardi doctrine provides. An agency can say today that it will only bring certain cases and not others and, if the doctrine applies, parties can rely on the fact that a court will force the agency to follow it in the future.

The Accardi doctrine provides third party enforcement of a particular status quo baseline that the agency must follow—namely, the existing rules that limit the agency’s discretion. It is worth noting that it would be possible for the regime to be otherwise. It could be that every time a new administration begins its tenure, the prior administration’s self-regulatory measures would not bind the new administration, or at least not be judicially enforceable by the courts. The new administration would start from scratch, as it were. Such a regime would have obvious advantages in terms of electoral responsiveness, but at a cost to stability. Regardless, it is not the regime we have.

## 1nr

### afghanistan ji

#### Turn: judicial independence would collapse their government

**Rubin 2003**, PhD, Director Afghanistan studies @ NYU (Barnett R. Rubin, PHD @ UChicago, Director of afghan studies @ NYU, 6-5-2003. [Presentation to Constitutional Commission of Afghanistan” [www.cic.nyu.edu/archive/pdf/Presentationto.pdf](http://www.cic.nyu.edu/archive/pdf/Presentationto.pdf)

Finally, I understand that the commission is considering establishment of a constitutional court to review legislation and acts of the government for conformity to the constitution. Afghanistan never had such judicial review in the past. Instead, it was the responsibility of the king to assure that the government acted in accord with the constitution and the fundamental principles (asasat) of Islam. Many new democracies have established such courts to safeguard the rights of the people. **Unfortunately, if judicial review is established in too broad a manner, it can have negative effects on the functioning of government**. If a court reviews legislation before it is enacted, such review can delay necessary government decision-making. If a court has the power to decide if the government’s decisions conform to a general idea like the principles of Islam, it has a tremendous amount of discretion, it can misuse for political purposes. In Pakistan, for instance, a court overturned arbitrarily the commercial code and the banking laws; on the grounds that they contradicted Sharia with disastrous economic effects. We have seen such dangerous results in Pakistan. In the past the responsibility for conformity to the principles of Islam remained with riyasat-i taqnin and the executive, acting on the advice of experts. The commission might consider if this system might be sufficient for the country today as well. A number of the experts whom we consulted suggested that the jurisdiction of the constitutional court should be limited to disputes involving fundamental rights and relations among different parts of the government, as is done in Malaysia, where the laws also conform to Islamic principles.

#### Independent Afghan judiciary doesn’t solve – makes the problem worse

**Thier 2004** – Fellow at Stanford’s Center on Democracy, Development, and the Rule of Law and a National Fellow at Stanford’s Hoover Institute, legal advisor to Afghanistan's Constitutional and Judicial Reform Commissions in Kabul and was a consultant to the International Crisis Group (9/1, J Alexander, Liechtenstein Institute on Self-Determination at Princeton University, “State- and Security-Building Lessons from Afghanistan”, http://iisdb.stanford.edu/pubs/20714/Reestablishing\_the\_Judiciary\_in\_Afghanistan.pdf, WEA)

Two recent events illustrate the key challenges in establishing a competent, independent, and accountable judiciary in Afghanistan. Only 10 days after the close of Afghanistan’s Constitutional Convention, Afghanistan’s Supreme Court violated the word and spirit of Afghanistan’s new constitution. Without any case before the court, and based on no existing law, the court declared on January 14, 2004 that a performance by the Afghan pop singer Salma on Kabul television was un-Islamic and therefore illegal. The video featuring the modestly dressed Afghan woman singing about rural life was recorded in the 1970s. "We are opposed to women singing and dancing as a whole and it has to be stopped," said the deputy chief justice, Fazl Ahmad Manawi.2 This ruling is consistent with past behavior of the court and its chief justice, Mawlavi Fazl Hadi Shinwari, an Islamic fundamentalist and former head of a religious school in Peshawar. Last year he tried to ban cable television and coeducation. Although appointed by former President Burhanuddin Rabbani in the chaos that gripped Kabul in Fall 2001, Mr. Karzai has kept Justice Shinwari on the bench, giving him virtually unchecked appointment powers. He has put scores of unqualified mullahs on the bench at all levels, and has created a "fatwa council" in the Supreme Court to issue religious edicts – an entity with no legal basis. The court's intervention underscores one of the greatest threats to stability and democracy in Afghanistan: **a renegade judiciary bent on imposing its fundamentalist interpretations of the Koran rather than enforcing Afghan law.**

### 1nr circumvention

#### Prefer our evidence –

#### Court politics – it’s a question of institutional will - judges recognize political constraints to unpopular decisions in wartime – so the aff might fiat the plan and cost the court capital, but they can’t fiat adherence to precedent by subsequent courts who can find clear statutory authorization in anything– who have strong reasons not to conform – the history of court crisis politics proves

**Posner and Vermeule, 7** – \*Kirkland and Ellis Professor of Law at the University of Chicago Law School AND \*\*professor at Harvard Law School (Eric and Adrian,Terror in the Balance: Security, Liberty, and the Courts p. 48-49)

More simply, the massive number and scope of statutory delegations since the New Deal, especially in areas impinging upon national security and foreign policy, means that there is almost always a statute lurking somewhere in the picture. Judges have considerable discretion to read statutes more or less broadly, or at higher or lower levels of generality, so as to suggest that Congress has authorized the executive action. Consider the plurality opinion in Hamdi v. United States,58 which arguably stretched a general congressional authorization to use military force by reading it to authorize detention of U.S. citizens alleged to be enemy combatants, despite the presence of an earlier statute requiring that detention be specifically authorized.59 A similar example is Hamdi’s predecessor, Ex parte Quirin,60 in which the Court relied upon a general and nonexplicit statutory provision to find congressional authorization for the president to try by military commission U.S. citizens accused of being enemy combatants. Clearest of all is Dames & Moore v. Regan,61 which threw a set of largely inapposite statutes into a blender and mixed up an authorization for the president to suspend claims pending in the U.S. courts against a foreign nation. Many other cases touching on war, the military, or foreign affairs are similar.62 As political scientists Terry Moe and William Howell put it:

The Court can issue rulings favorable to presidents, but justify its decisions by appearing to give due deference to the legislature. . . . Congress’s collective action problems, combined with the zillions of statutes already on the books, make it entirely unclear what the institution’s “will” is—and this gives the Court tremendous scope for arguing that, almost whatever presidents are doing, it is consistent with the “will of Congress.” . . . [E]ven when presidents are quite vague (as they frequently are) about the constitutional and statutory provisions that supposedly justify their unilateral actions, the courts have actively sought out and creatively construed justifying provisions in the law, provisions that presidents did not even employ on their own behalf.63

If judges strain to find statutory authorization for executive action in times of emergency, why do they do so? As we explain in subsequent chapters, there is an institutional dilemma facing judges who must review the executive’s emergency policies; the problem is that the judges lack the competence to evaluate those policies. The judges know that the executive might be acting opportunistically or from bad motives, but they also know that the policy might be a vitally necessary security measure, or was not authorized because Congress moved too slowly. Worst of all, the judges know that they do not know which of these possibilities is actually the case; they cannot sort opportunism from executive vigor. In a situation of this sort, the judges will be powerfully tempted to defer, while also finding some relevant statute to suggest that Congress too has approved the policy. The finding of statutory authorization, however strained, is largely costless to the judges, reassures the public by denying that the executive is running around without a leash, and preserves the principle of statutory authorization for a future day on which the judges might rouse themselves to apply it seriously. The point is not that judges are acting out of disreputable motives: quite the opposite. On our view, judges tend to defer because there is usually little else that even the most public-spirited of judges can do. The stakes are too high and the judges’ information is too poor.

#### Decentralization of the judiciary – the Supreme Court can’t regulate lower courts and there will be strongly divergent decisions

**Posner and Vermeule, 10** - \*professor of law at the University of Chicago AND \*\*professor of law at Harvard (Eric and Adrian, The Executive Unbound, p. 29-30)

Information asymmetries

The gap between the executive and the judiciary, in information and expertise, is even wider than between the executive and Congress. Whereas many legislators have a narrowly defined field of policy expertise, particularly in the House of Representatives, federal judges are mostly generalists, barring a few specialized courts. Furthermore, the partial insulation from current politics that federal judges enjoy, by virtue of life tenure and salary protection, brings with it a kind of informational impoverishment.25 Legislators, who must please other people at least some of the time, interact with the outside world far more systematically than generalist judges, whose main sodurce of information is the briefs and arguments of litigants. When the executive says that resolving a plaintiff’s claim would require disclosure of “state secrets,” with dangerous consequences for national security, judges know that either an ill-motivated or a well-motivated executive might be making the claim and that they have no easy means to assess whether the claim is credible.

Collective action problems and decentralization

If congressional monitoring of executive discretion is hampered by collective action problems, judicial monitoring is hampered by a similar condition, the decentralized character of the federal judiciary. The judiciary too is a “they,” not an “it,” and is decentralized along mainly geographic lines. Different judges on different courts have different views of the costs and benefits of oversight and of the appropriate level of monitoring. The Supreme Court is incapable of fully resolving these structural conflicts. Because the Court presides over a large institutional system and lacks the capacity to review more than a fraction of cases submitted to it, its role is restricted by necessity to the declaration of general principles of law and episodic, ad hoc intervention in the system.

The legitimacy deficit

In the federal system, appointed judges are not overtly partisan, though they are sometimes covertly so. The very condition that enables this relative lack of overt politicization—that federal judges are, at least in one familiar conception, legal technocrats appointed for their expertise rather than elected on a partisan basis—also creates a serious legitimacy deficit for the judiciary, understanding legitimacy in a strictly sociological sense.26 Aroused publics concerned about issues such as national security may have little tolerance for robust judicial oversight of executive discretion, which can always be condemned as “activism” by “unelected judges.” This charge sometimes succeeds and sometimes fails, but for the judges it is always a concern that acts as a drag on attempts to monitor executive behavior.

#### will answer the claim that the court still independently enforces the plan

**They don’t’**

**Katyal 2006** – debate rockstar, JD from Yale, Saunders Professor of National Security Law at Georgetown (10/26, Neal, Yale Law Journal, “Toward Internal Separation of Powers”, http://yalelawjournal.org/the-yale-law-journal-pocket-part/executive-power/toward-internal-separation-of-powers/)

CONCLUSION America faces a choice. It can either take its chances with an extremely powerful executive branch and the attendant risks that the courts will underreact and overreact, or it can harken back to a tradition of divided government that has served our country well. September 11 did change everything, but it is up to us to figure out how to translate the ideas of divided government into a modern age in which Presidents must act quickly to avoid calamity.

Courts, of course, are not unaware that a trend toward greater executive power in this time of crisis exists. As a result, one can expect that as the executive becomes more monolithic, courts will function as a sort of check. But judicial checking is bound to fail. It will often occur too late, if at all. Courts lack expertise in many areas, and they may intervene when they should not and refrain from intervening when they should. For this reason, and others advanced in this Essay, a set of institutional design choices must be made that permits both sources of executive legitimacy—democratic will and expertise— to function simultaneously.

#### Nobody solves anything

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

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

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

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

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

[\*1112]

C. Skepticism About Legal Constraint

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

### ji bad

**The lack of judicial independence undermines Georgia’s integration into NATO**

**Anjaparidze 06** (Zaal, Executive Director of the Georgian NGO Democracy Resources Development Center, "CRITICS PRESS FOR IMPROVED JUDICIAL INDEPENDENCE IN GEORGIA," 4/26, Eurasia Daily Monitor, http://www.jamestown.org/publications\_details.php?volume\_id=414&issue\_id=3702&article\_id=2371020)

Georgia's court system has never been fully independent since the restoration of Georgian statehood in 1992. Moreover, it has always been a convenient tool for governing forces to suppress political opponents, and it appears that the Saakashvili-led National Movement succumbed to the temptation to make the courts docile. Meanwhile, Saakashvili's government seems to be fully aware that **a passive judiciary could damage Georgia's prospects for** economic revival, foreign investment, and **integration into the Euro-Atlantic structures.**

International organizations and Georgia's Western allies are increasingly demanding that Saakashvili's government bring the judiciary in line with democratic standards in general and ensure judicial independence in particular. In May 2005 the European Union's Rule of Law mission presented the Georgian government with a comprehensive strategy for judicial reform (Civil Georgia, May 20, 2005). But judging by Saakashvili's remarks, it seems that little has been done to improve the situation.

**The imperfect judiciary appears to be impeding Georgia's integration into NATO**. Even pro-government parliamentarian Nika Rurua, deputy chair of the parliamentary committee for defense and security, admitted that breaches in the Georgian judicial system were among the complaints raised when a Georgian delegation visited NATO headquarters on April 13 (24 Saati, April 18; Prime News, April 20; Interfax, April 22).

**Expanding NATO to include Georgia undermines US/Russia relations and emboldens Russia**

**Simes 07** (Dimitri, founding President of The Nixon Center, National Interest, Winter, lexis)

Much is said, and sometimes with considerable justification, about Russia's departure from democracy at home and its propensity toward applying heavy-handed pressure to its new neighbors. But publicizing Russia's misdeeds, real and imagined alike, is not a substitute for achieving what is needed. The United States must either be prepared to bargain with a resurgent Moscow who cannot be intimidated or bribed as was done with Yeltsin's Russia during the 1990s, or be prepared to pay the much higher costs for taking action without Russian cooperation.

This is why realists have a different perspective on the question of NATO's further expansion east. For the crusaders of moralpolitik, the alliance is a near-mystical union of "democracies", and must be broadened to bring in all states that desire membership, **even at the cost of ratcheting tensions up with other major powers**.

But common sense suggests one other major criterion: does expansion of the alliance enhance its capabilities and ultimately U.S. security? **Would,** for instance, **the number of troops potentially committed to NATO missions by** states like Ukraine and **Georgia compensate for turning Russia into America's adversary?**

**A strong and active judiciary undermines the balance of powers in India**

Venkatesan 00 (V, Staff @ Frontline, "Judiciary and social justice," Oct., http://www.flonnet.com/fl1721/17210960.htm)

What was glossed over in the Jethmalani debate was the changing contours of the relationship between the executive and the judiciary: the judiciary has, of late, tended to resist even the slightest intrusion into its domain by the executive or the legislature. There are several interactive elements between the two arms, particularly in matters of the appointment, tenure and removal of Judges. It is feared that **as the judiciary becomes over-protective of its domain, these interactive aspects, which often constitute a fine balance of powers, may get weakened**.

**--The weakening of the balance of powers destroys Indian internal stability**

Sripati 98 (Vijayashri, LL.M., American University Washington College of Law, May 1991; British Chevening Scholar (1995-96); M.A. (International Law & Politics) University of Hull, England, January 1997; Recipient of the Josephine Onoh Memorial Prize in Public International Law awarded by the University of Hull, England, January 1997, 14 Am. U. Int'l L. Rev. 413, lexis)

Other practical reasons also render this proposal an unsound one. First, after much deliberation, India's founding fathers opted for a parliamentary system since it proved successful prior to independence in some of the provinces under the Government of India Act, 1935. 369 Second, separation of powers between the executive and legislature is the hallmark of a presidential democracy. In India, however, given the deep divisions in the Lok Sabha - the house of the people - there is the potential for an utter breakdown of consultation and debate in Parliament, leading to legislative paralysis and paving the way for usurpation of all power by the Executive. **The consequences of such a scenario would affect the very life of the Republic, as well as the country's stability**.