**\*\*1ac was same as @fullerton**

**Drone Shift DA: 2AC**

**Drone shift now, but plan still solves legitimacy**

David **Ignatius 10**, Washington Post, "Our default is killing terrorists by drone attack. Do you care?", December 2, www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120104458.html

Every war brings its own deformations, but consider this disturbing fact about America's war against al-Qaeda: **It has become easier, politically and legally, for the United States to kill suspected terrorists than to capture** and interrogate **them**.¶ **Predator and Reaper drones**, armed with Hellfire missiles, **have become the weapons of choice against al-Qaeda** operatives in the tribal areas of Pakistan. They have also been used in Yemen, and the demand for these efficient tools of war, which target enemies from 10,000 feet, is likely to grow.¶ **The pace of drone attacks on the tribal areas has increased sharply** during the Obama presidency, with more assaults in September and October of this year than in all of 2008. **At the same time, efforts to capture al-Qaeda suspects have virtually stopped.** Indeed, if CIA operatives were to snatch a terrorist tomorrow, the agency wouldn't be sure where it could detain him for interrogation.¶ Michael **Hayden, a former director of the CIA, frames the puzzle** this way: "Have **we made detention** and interrogation **so legally difficult and politically risky that our default option is to kill our adversaries rather than capture** and interrogate **them**?"¶ It's curious why the American public seems so comfortable with a tactic that arguably is a form of long-range assassination, after the furor about the CIA's use of nonlethal methods known as "enhanced interrogation." When Israel adopted an approach of "targeted killing" against Hamas and other terrorist adversaries, it provoked an extensive debate there and abroad.¶ "**For reasons that defy logic, people are more comfortable with drone attacks"** than with killings at close range, says Robert Grenier, a former top CIA counterterrorism officer who now is a consultant with ERG Partners. "**It's something that seems so clean and antiseptic, but the moral issues are the same."**

**There’s no tradeoff**

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

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

**Heg DA: A2 “Info Gap”**

**Courts can gain access to military or executive information**

**Kovacs 11** (Kathryn, Assistant Professor, Rutgers School of Law-Camden, 2011, "Leveling the Deference Playing Field" Oregon Law Review, Lexis)

The military's **expertise is commonly invoked as a justification for affording the military super-deference.** Colonel Peck urged the courts to consider the nature of the military action at issue and the extent to which military expertise is involved. n271 He cautioned courts to avoid the danger that they will not understand the ramifications of judicial interference, including the impact of increasing the administrative burden on the military. n272 Professor Luban found it "self-evident that legislators and judges lack institutional competence to kibitz commanders about military matters" and posited that "their meddling would invite disaster." n273 Judge Wilkinson, in the Fourth Circuit's decision upholding the "Don't Ask, Don't Tell" policy, said, "While Congress and the members of the Executive Branch have developed a practiced expertise by virtue of their day-to-day supervision of the military, the federal judiciary has not." n274 Eskridge and Baer do not endorse the practice of giving the military super-deference, n275 but they posit that the Justices perceive the Court as having "an institutional disadvantage" in national-security-related cases, "where interpretations are often based upon sensitive political calculations." n276 Along a related line, some commentators suggest that the military is entitled to super-deference because it has better access to relevant information. Professor Sunstein advises that courts should be deferential when national security is implicated because "courts lack information about the potentially serious consequences of their judgments, and the elected branches are in the best position to balance the competing considerations." n277 The Fourth Circuit, in upholding "Don't Ask, Don't Tell," deferred to the military in part because courts lack "access to intelligence and testimony on military readiness." n278 And Professor Vermeule proposes that "judges defer [\*626] because they think the executive has better information than they do." n279 The military's expertise, however, does not justify departing from the APA's rule that all agencies are subject to the same standard of review under § 706. Many agencies' actions require expertise and deserve deference - deference that they should receive under the arbitrary or capricious standard. Moreover, most military actions in wartime are insulated from judicial review under the "military authority" exception. n280 Captain McDaniel advocates varying the degree of deference "proportionally with the inherently "military' nature of the challenged discretionary action" and giving greater deference in cases concerning "military readiness." n281 He also acknowledges, though, that the "military authority" exception insulates many such actions from judicial review. n282 In the remainder of cases, the executive branch may have no greater institutional competence than any other branch of government. n283 Indeed, affording the military super-deference in cases that do not fall within the scope of the "military authority" exception may encourage the military to "cloak policy decisions" that do not actually require any special knowledge "in a shroud" of expertise. n284 Likewise, **the military's access to information should not hinder the courts from reviewing military action** under the arbitrary or capricious standard. In the administrative setting, **the military likely has records documenting its action, and "requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal [imposition]."** n285 As Professor Chesney points out, **if the military shares its information with the court - which it is more likely to do in an adversarial setting - the court will be at no disadvantage "in terms of the quantity and quality of data available to it."** n286 **Just as super- [\*627] deferential review may incentivize agency obfuscation, so too may meaningful judicial review incentivize the military to be forthcoming with the information underlying its decision.** n287

**Heg DA: A2 “Speed”**

**No decision requires literally split-second decision-making—their claims are hype**

**Holmes 9** -- Walter E. Meyer Professor of Law, New York University School of Law (Stephen, 4/30/2009, "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1140&context=californialawreview)

Thus, it also illustrates the truism, profoundly relevant to the war on terror, that limiting options available during emergencies can be good or bad, depending on what emergency responders, who may be tempted by sheer exhaustion to take hazardous shortcuts, will do with the latitudes they seize or receive. **Campaigners for executive discretion routinely invoke the imperative need for "flexibility"** to explain why counterterrorism cannot be successfully conducted within the Constitution and the rule of law. But **general rules and situation-specific improvisation**, far from being mutually exclusive, **are perfectly compatible**. 1 8 There is no reason why mechanically following protocols designed to prevent harried nurses from negligently administering the wrong blood type should preclude the same nurses from improvising unique solutions to the unique problems of a particular trauma patient. **Drilled-in emergency protocols provide a psychologically stabilizing floor**, shared by co- workers, **on the basis of which untried solutions can then be improvised**. 9 In other words, **there is no reason to assert**, at least not as a matter of general validity, that **the importance of flexibility excludes reliance on rules during emergencies**, including national-security emergencies. The emergency-room example can also deepen our understanding of national-security crises by bringing into focus an important but sometimes neglected distinction between threats that are novel and threats that are urgent. **Dangers may be unprecedented without demanding a split-second response**. Contrariwise, **urgent threats that have appeared repeatedly in the past can be managed according to protocols** that have become automatic and routine. Emergency-room emergencies are urgent even when they are perfectly familiar. **Terrorists with access to** weapons of mass destruction ("**WMD**"), by contrast, **present a novel threat** that is destined to endure for decades, if not longer. **Such a threat is not an "emergency" in the sense of a sudden event, such as a house on fire, requiring genuinely split-second decision making, with no opportunity for serious consultation or debate**. **Managing the risks of nuclear terrorism requires sustained policies, not short-term measures**. This is feasible precisely because, in such an enduring crisis, **national-security personnel have ample time to think and rethink, to plan ahead and revise their plans**. In depicting today's terrorist threat as "an emergency," executive-discretion advocates almost always blur together urgency and novelty. This is a consequential intellectual fallacy. But it also provides an opportunity for critics of executive discretion in times of crisis. If classical emergencies, in the house- on-fire or emergency-room sense, turn out to invite and require rule-governed responses, then the justification for dispensing with rules in the war on terror seems that much more tenuous and open to question. **In crises where "time is of the essence"** 2 1 and serious consultation is difficult or impossible, **it is imperative for emergency responders to follow previously crafted** first-order **rules** (or behavioral commands) **to enable prompt** remedial **action and coordination**. In crises that are not sudden and transient but, instead, **endure over time and** that therefore **allow for extensive consultation with knowledgeable parties, it is essential to rely on** previously crafted second-order rules (or **decision-making procedures) designed to encourage decision makers to consider the costs and benefits of, and feasible alternatives to, proposed action plans**. In medicine, a typical first-order rule is "always wash your hands before inserting a stent," and a typical second-order rule is "always get a second opinion before undertaking major surgery."

### Prolif (Short)

#### Proliferation is slow, doesn’t cascade, and doesn’t cause conflict – 60 years of empirics prove

DeGarmo 2011

Denise, professor of international relations at Southern Illinois University, “Proliferation Leads to Peace”

Unfortunately, while the fear of proliferation is pervasive, it is unfounded and lacks an understanding of the evidence. Nuclear proliferation has been slow. From [1945 to 1970](http://en.wikipedia.org/wiki/List_of_states_with_nuclear_weapons), only six countries acquired nuclear weapons: United States, Russia, United Kingdom, France, China, and Israel. Since the Nuclear Non-Proliferation Treaty came into effect in 1970, only three countries have joined the nuclear club: India, Pakistan, and North Korea. In total, only .05% of the world’s states have nuclear weapons in their possession. Supporters of non-proliferation seem to overlook the fact that there are states currently capable of making nuclear weapons and have chosen not to construct them, which illustrates the seriousness with which states consider their entrance into the nuclear club. Included on this list are such actors as: [Japan, Argentina, Brazil, Egypt, Iran, South Korea, Taiwan, and South Africa](http://www.fas.org/irp/threat/svr_nuke.htm). The attraction of nuclear weapons is multifold. Nuclear weapons enhance the international status of states that possess them and help insecure states feel more secure. States also seek nuclear capabilities for offensive purposes. It is important to point out that while nuclear weapons have spread very slowly, conventional weapons have proliferated exponentially across the globe. The wars of the 21st century are being fought in the peripheral regions of the globe that are undergoing conventional weapons proliferation. What the pundits of non-proliferation forget to mention are the many lessons that are learned from the nuclear world. Nuclear weapons provide stability just as they did during the Cold War era. The fear of[Mutual Assured Destruction (MAD)](http://atomicarchive.com/History/coldwar/page15.shtml) loomed heavily on the minds of nuclear powers through out the Cold War and continues to be an important consideration for nuclear states today. States do not strike first unless they are assured of a military victory, and the probability of a military victory is diminished by fear that their actions would prompt a swift retaliation by other states. In other words, states with nuclear weapons are deterred by another state’s second-strike capabilities. During the Cold War, the United States and Soviet Union could not destroy enough of the other’s massive arsenal of nuclear weapons to make a retaliatory strike bearable. Even the prospect of a small number of nuclear weapons being placed in Cuba by the Soviets had a great deterrent effect on the United States. Nothing can be done with nuclear weapons other than to use them for deterrent purposes. If deterrence works reliably, as it has done over the past 60 plus years, then there is less to be feared from nuclear proliferation than there is from convention warfare.

### Defer Add-On: Chemical Soldiers 2AC

#### Military is developing chemical soldiers

Parasidis 12 (Efthimios, Assistant Professor of Law, Center for Health Law Studies, Saint Louis University School of Law, 2012, "Justice and Beneficence in Military Medicine and Research" Ohio State Law School, Lexis)

The United States military has a long and checkered history of experimental research involving human subjects. It has sponsored clandestine projects that examined if race influences one's susceptibility to mustard gas, n1 the extent to which radiation affects combat effectiveness, n2 and whether psychotropic drugs could be used to facilitate interrogations or develop chemical weapons. n3 In each of these experiments, the government deliberately violated legal requirements and ethical norms that govern human-subjects research and failed to provide adequate follow-up medical care or compensation for those who suffered adverse health effects. In defending its decisions, the government argued that the studies and research methods were necessary to further the strategic advantage of the United States. n4 The military's contemporary research program is motivated by the same rationale. As the U.S. Defense Advanced Research Projects Agency (DARPA) explains, its goal is to "create strategic surprise for U.S. adversaries by maintaining the technological superiority of the U.S. military." n5 Current research sponsored by DARPA and the U.S. Department of Defense (DoD) [\*725] aims to ensure that soldiers have "no physical, physiological, or cognitive limitations." n6 The research includes drugs that keep soldiers awake for seventy-two hours or more, a nutraceutical that fulfills a soldier's dietary needs for up to five days, a vaccine that eliminates intense pain within seconds, and sophisticated brain-to-computer interfaces. n7 The military's emphasis on neuroscience is particularly noteworthy, with recent annual appropriations of over $ 350 million for cognitive science research. n8 Projects include novel methods of scanning a soldier's brain to ascertain physical, intellectual, and emotional states, as well as the creation of electrodes that can be implanted into a soldier's brain for purposes of neuroanalysis and neurostimulation. n9 One of the goals of the research is to create a means by which a soldier's subjective experience can be relayed to a central command center, and, in turn, the command center can respond to the soldier's experience by stimulating brain function for both therapeutic and enhancement purposes. n10 For example, the electrodes can be used to activate brain function that can help heal an injury or keep a soldier alert during difficult moments. n11 Another goal is to create a "connected consciousness" whereby a soldier can interact with machines, access information from the Internet, or communicate with other humans via thought alone. n12

#### Chemical soldiers cause extinction and destroy value to life

Deubel 13 (Paula, Professor Gabriel has held positions at the Brookings Institution, the Army Intelligence School, the Center for the Study of Intelligence at the CIA, and at the Walter Reed Army Institute of Research, Department of Combat Psychiatry, in Washington. 3-25-13, "The Psychopath Wars: Soldiers of the Future?" Suite 101) suite101.com/article/the-psychopath-wars-soldiers-of-the-future-a366977 \*\*evidence is gender modified\*\*

According to Dr. Richard A. Gabriel in his fascinating book, No More Heroes, the sociopathic personality can keep his or her psyche intact even under extremely pathological conditions, while the sane will eventually break down under guilt, fear, or normal human repulsion. Chemical Soldiers Richard A. Gabriel (military historian, retired U.S. army officer and former professor at the U.S. Army War College) describes socio/psychopaths as people without conscience, intellectually aware of what harm they might do to another living being, but unable to experience corresponding emotions. This realization, Gabriel claims, has led the military establishments of the world to discover a drug banishing fear and emotion in the soldier by controlling ~~his~~ [their] brain chemistry. In order for soldiers to ideally function in modern war ~~he~~ [they] should first be reconstructed to become what could be defined as mentally ill. “We may be rushing headlong into a long, dark chemical night from which there will be no return,” warns Gabriel. If these efforts succeed (as it appears they can) a chemically induced zombie would be born, a psychopathic-type being who would function (at least temporarily) without any human compassion and whose moral conscience would not exist to take responsibility for his actions. “Man’s [Humankind’s] nature would be altered forever,” he adds, “and it would cost him his [us our] soul.” As incredible and futuristic as that sounds, the creation of such a drug is apparently already well underway in the world’s military research labs; Gabriel reports such research centers already exist in the United States, Russia, and Israel. Since all emotions are based in anxiety, it appears the eradication of it (perhaps through a variant of the anti-anxiety medication Busbirone) may create soldiers who become more efficient killing machines. Futuristic Warfare Gabriel writes further about the possible nightmarish future of modern warfare: “The standards of normal sane men will be eroded, and soldiers will no longer die for anything understandable or meaningful in human terms. They will simply die, and even their own comrades will be incapable of mourning their deaths […] The battlefields of the future will witness a clash of truly ignorant armies, armies ignorant of their own emotions and even of the reasons for which they fight.” (Operation Enduring Valor, Richard A. Gabriel) This would strip a person of his core identity and all of his humanity. Whether or not the soldier would knowingly take part in this experience is unknown, but during the 1991 Persian Gulf War, one could almost easily imagine that this conscience-killing pill had already been swallowed. Psychopathic Behavior During War During the 1991 Iraq war a pilot interviewed on European television callously remarked ambushing Iraqis was “like waiting for the cockroaches to come out so we could kill them." Other U.S. pilots compared killing human beings to “shooting turkey” or like “attacking a farm after someone had opened a sheep stall.” This same lack of empathy can be seen in Iraq’s Abu Graib prison scandal (2004) where U.S. soldiers were shown seemingly to enjoy torture, as well as more recent photos of military men posing with dead Afghans (first published in Germany's Der Spiegel magazine); more gruesome photos were later published in Rolling Stone before the U.S. Army censored all the remaining damning material from public view. No More Heroes warns that modern warfare will become increasingly difficult for sane men to endure. The combat punch of man’s weapons has increased over 600% since World War II. These weapons are highly technical. High Explosive Plastic Tracers (HEP-T) send fragments of metal through enemy tanks and into humans at speeds faster than the speed of sound. The Starlight Scope is able to differentiate between males and females by computing differences in body heat given off by pelvic areas. The Beehive artillery ammunition (filled with three-inch long nail-like steel needles) is capable of pinning victims to trees. The world has a nightmare arsenal of terrible weapons advanced beyond the evolution of our morality.

**Military Court Martial PIC: 2AC**

**Military courts martial and military commissions are distinct**

**Benson and Lewis 10** (Daniel, Paul Whitfield Horn Professor of Law Emeritus, Texas Tech University School of Law, and Calvin, Associate Professor of Law, Associate Dean for Student Affairs and Diversity, Texas Tech University School of LawSpring 2010, "REPEAL OF THE MILITARY COMMISSIONS ACT" Southern California Review of Law and Social Justice, Lexis)

A. Courts-Martial and Military Commission Differ on Key Provisions **Unlike** some aspects of **trial by military commission, trial by court-martial is both lawful and constitutional.** In the almost sixty-year history of the court-martial system, **the Court of Military Appeals** (now the United States Court of Appeals for the Armed Services) **and the armed services' Courts of Criminal Appeals** n69 **have developed considerable expertise regarding military-court procedures and rules of evidence. Utilizing courts-martial under the UCMJ to try the Guantanamo cases would bring into play a well-established, well-understood, and well-respected system of military justice.** As previously noted, although the language of the Military Commissions Act of 2009 appears to track the UCMJ on many provisions, the two statutes and their resulting trial systems differ in several important aspects. In particular, **military commissions differ from courts-martial in which individuals have the authority to convene trials, the required pretrial procedures, the rules for admitting evidence, and the appellate processes available to the accused**. By comparing the two systems and noting their differences, this Part demonstrates that **courts-martial provide for swift trials without sacrificing defendants' due process rights, and therefore, courts-martial are the superior choice** for trying the remaining detainees at Guantanamo.

**LOAC DA: 2AC**

**LOAC is destroyed now**

**A. PMCs**

Daniel P. **Ridlon**, A.F. Captain, JD Harvard, **2008**, “CONTRACTORS OR ILLEGAL COMBATANTS? THE STATUS OF ARMED CONTRACTORS IN IRAQ,” 62 A.F. L. Rev. 199, ln

In addition to legal liability, the United States' **employment of PMF personnel in future conflicts has potential negative policy ramifications**. Employing **PMF personnel** who are potentially viewed as illegal combatants **may undermine the public image that the United States conducts its military operations in accordance with the laws of war**. **This** **would** not only **serve as a p**ublic **r**elations **problem** for the United States, **but it could also be used as justification for other nations** or non-state actors **to violate the l**aws **o**f **w**ar, especially if those states or groups are engaged in a conflict against the United States. In the end, the employment of illegal combatants could reduce prisoner of war [\*253] protections afforded to United States military personnel if they are captured.

**No impact—LOAC is redundant**

**Glazier 09** (David, Professor of Law, Loyola Law School Los Angeles, Dec. 2009, "PLAYING BY THE RULES: COMBATING AL QAEDA WITHIN THE LAW OF WAR" William and Mary Law Review, Lexis)

But even the most cursory study of the law of war quickly reveals the fallacy of this view. Virtually every society that has left a written record has documented legal constraints on the conduct of hostilities. n133 **The law of war constitutes a major portion of eighteenth- and nineteenth-century international law treatises.** n134 **The explosive growth of international law in the twentieth century, including the proliferation of multinational organizations and international courts, as well as the development of such new fields as international environmental and human rights law, relegated the law of war to relative obscurity. Today, it typically occupies just a single chapter in an international law text.** n135 This is ironic given the equally expansive development of the law of war during this same era n136 but may explain why expertise on this subject seems so limited among policymakers.

**Amend CP: 2AC**

**Perm do both—solves the link**

**Denning 2** (Brannon P, Assistant Professor of Law – Southern Illinois University School of Law; John R. Vile, Chair of Political Science – Middle Tennessee State University; November, 77 Tul. L. Rev. 247, Lexis)

The Article V process is, as the Framers intended, rigorous. **The supermajority provisions for both proposal and ratification almost always guarantee that additions will not be made to the Constitution without both deep and broad support. Though some have criticized the necessity of such supermajorities, 127 holding additions to the Constitution in abeyance until it is clear that support is broad generally prevents populous regions from dominating less populous ones. This, in turn, allows the amendment to become part of the Constitution with a near-conclusive presumption of legitimacy. This legitimacy, then, helps free the other branches (courts, for example) to enforce it vigorously; indeed, such enforcement would likely be expected after an amendment makes it through Article V's arduous process.** And if, after popular expectations were raised through the debates over proposal and ratification, the amendment is not enforced, institutions responsible for the foot-dragging may again face costs for evasion. This legitimization element is so crucial that the examples Strauss cites of amendments that, he argues, did not do anything immediately (the Reconstruction Amendments) or are not likely to have a significant effect despite their eventual ratification (the Twenty-Seventh Amendment), 128 could be cited as proof of what [\*279] happens when attempts are made to short-circuit (or play games with) Article V's procedural requirements. 129

**Judicial review is key to solve**

Christopher P. **Manfredi**, Professor of Political Science, McGill University, “Why Do Formal Amendments Fail?: An Institutional Design Analysis” World Politics, v. 50, April 19**98**, p. 377-400.

Perhaps because of the rigidity of its amending process**, the U.S. Constitution is** also **characterized by interpretive fluidity. This characteristic stems** not only from the broad, indeterminate language in which most constitutional provisions are written but also **from the willingness of courts to exercise the power of judicial review in order to derive more policy-specific rules from those provisions.** Although the U.S. Supreme Court established the constitutionality of judicial review in 1803, the interpretive fluidity of the U.S. Constitution has been most evident since 1954. Indeed, between 1889 and 1953 the Court overturned on average about one act of Congress and seven state laws every year. By contrast, since 1954 the judicial nullification rate has approximately doubled to almost two acts of Congress and twelve state laws per year. Especially throughout the 1960s, litigants took advantage of judicial openness toward the Constitution's interpretive fluidity to persuade U.S. courts to participate actively in shaping and administering policy in areas such as zoning and land-use planning, housing, social welfare, transportation, education, and the operation of complex institutions like prisons and mental health facilities. While this may make the document's rigid amending process less burdensome on the constitutional order, **the ability and willingness of courts to extend formal rules in unexpected directions heightens redistributive indeterminacy.** Finally, both the rigid amending process and the interpretive fluidity of the U.S. Constitution generate a high degree of institutional inclusiveness. On the one hand, interpretive fluidity provides society-based actors with a wide range of opportunities to institutionalize specific policy preferences by manipulating and transforming formal constitutional rules through litigation. Interpretive fluidity promotes institutional inclusiveness by allowing society-based actors to alter the policy impact of constitutional rules without the constraints imposed by the formal amending process. On the other hand, the requirement that ratification succeed in eighty-seven legislative chambers unconstrained by strict party discipline provides numerous points of influence for social actors wary of the policy consequences of proposed amendments. **The institutional inclusiveness of U.S. constitutional politics** thus **provides** both incentives to oppose constitutional change and**the means of carrying out that opposition successfully.**

**Courts will ignore the amendment**

**Segal & Spaeth ‘02** [The Supreme Court and the Attitudinal Model Revisted, p. 5-6]

If action by the Congress to undo the Court’s interpetation of one of its laws does not subert judicial authority, a fortiori neither does the passage of a constitutional amendment, for example, the Twenty-Sixth Amendment reducing the voting age to eighteen and thereby undoing the decision in Oregon v. Mitchell, which held that Congress could not constitutionally lower the voting age in state elections. Furthermore, not only does a constitutional amendment not subvert judicial authority, courts themselves—ultimately, **the Supreme Court—have the last word when determining the** sanctioning **amendment’s meaning**. Thus, **the Court is free to construe any amendment**—whether or not it overturns one of its decisions—**as it sees fit, even though its construction deviates** appreciably **from the language or purpose of the amendment.** Consider, for example, the fourteenth and Sixteenth Amendments. The former clearly overturned the Court’s decision in Scott v. Sandford and was meant to give blacks legal equality with whites. Scholars disagree about other objectives the amendment may have had, but it does appear that the prohibition of sex discimination was not among them. Nonetheless, in 1871 the Court held that the equal protection clause of the Fourteenth Amendment encompassed women. As for the Sixteenth Amendment, it substantially, but not completely, reversed the Court’s decisions in Pollock v. Farmers’ Loan and Trust Co., which declared unconstitutional the income tax that Congress had enacted in 1894. In 1913, the requisite number of states ratified an amendment that authorized Congress to levy a tax on income “from whatever source derived.” The language is unequivocal. Yet for the next twenty-six years the [6] Supreme Court ruled that this language excluded the salaries of federal judges. Why the exclusion? Because Article III, section I, of the original Constitution orders that judges’ salaries “not be diminished during their continuance in office.” Though it is an elementary legal principle that later language erases incompatible earlier language, the justices ruled that any taxation of their salaries, and those of their lower court colleagues, would obviously diminish them. Finally, in 1939 the justices overruled their predecessors and magnaminously and unselfishly allowed themselves to be taxed.

**They don’t solve – amendments only apply moving forward, don’t solve current cases**

Jill E. **Fisch**, Professor and Director, Center for Corporate, Securities, and Financial Law, Fordham Law School, “The Implications of Transition Theory for Stare Decisis,” JOURNAL OF CONTEMPORARY LEGALISSUES v. 13, 200**3**, p. 97-98.

The second alternative when stare decisis does not permit a court to change the law by overruling is for another lawmaker to effect the change. Congress can enact new legislation to overrule decisions involving statutory interpretation or common law rulemaking. The **Amendment process** provided by Article V **provides a mechanism to overrule constitutional decisions**. Some constitutional decisions can also be effectively overruled by other means; for example, states can overturn the Supreme Court's decision to limit federal constitutional rights by interpreting their own constitutions to provide such rights. **There is an important distinction, however, between overruling and these lawmaking alternatives. When a court overrules a precedent, the new legal rule is applied retroactively to all pending and future cases. Parties that relied upon the old rule are not accorded transition relief. In contrast, statutory changes and constitutional amendments generally apply prospectively.**

### SSD: U—2AC

#### Courts don’t leak but the executive does

D.A. Jeremy Telman, Professor, Law, Valparaiso University, “Intolerable Abuses: Rendition for torture and the State Secrets Privilege,” ALABAMA LAW REVIEW v. 63 n. 3, 2012, www.law.ua.edu/pubs/lrarticles/Volume%2063/Issue%203/Telman.pdf

Moreover, in Tilden, neither the court, nor any other sources that I have been able to locate cite to a single example of a court being the source of a national security leak. Such leaks are much more likely to come from the Executive or Legislative Branch, as Wikileaks has now demonstrated.417 An argument can be made that courts are far better guardians of national security information than are either the Legislative418 or the Executive Branches.419¶ \*\*\*TO FOOTNOTES\*\*\* 419. In the aftermath of the outing of Valerie Plame Wilson as a CIA agent, there was some discussion of the extent of leaks of such sensitive information by the Executive Branch. The consensus quickly emerged that there was no workable mechanism for controlling such leaks because they were often authorized by the persons responsible for the original classification of the information. See William E. Lee, Deep Background: Journalists, Sources, and the Perils of Leaking, 57 AM. U. L.REV. 1453, 1470 (2008) (observing that previous investigations into leaks of classified information by the Executive Branch often resulted in the discovery that the leaks were authorized by a White House or cabinet official).

#### Secrecy compromise inevitable

Andrea Peterson, “How Technology Makes More Leaks Inevitable,” THINKPROGRESS, 6—25—13, <http://thinkprogress.org/justice/2013/06/25/2199391/tech-leaks-inevitable/>

This week’s massive game of “Where In The World Is Edward Snowden?” may soon be a common occurrence, thanks to new technologies that make more leaks and more leak prosecutions virtually inevitable. Snowden is the eighth person the Obama administration has pursued for leaking information under the Espionage Act of 1917 — more than double the number charged by all previous administrations combined — and it is likely that America is on an unstoppable trajectory towards more and more leak prosecutions in future presidencies. Certainly, the sheer increase in the amount of potentially leakable data is a part of this conversation: According to IBM, the world creates 2.5 quintillion bytes of data everyday and that pace means that ninety percent of the data that has ever existed was created within the last two years. And governments are adapting to this new reality. Thanks to Snowden’s leaks, we now know that the National Security Agency (NSA) has been siphoning up call records and sniffing through internet data. And according to one 2007 Department of Defense report, the Pentagon is trying to expand its worldwide communications network to handle yottabytes of data with the Utah NSA data center being key to achieving that goal. A yottabyte is equal to about 500,000,000,000,000,000,000 pages of text. Yes, that is the correct number of zeros. As a result of the expansion of the national security apparatus in general and the amount of intelligence that apparatus must sift through, there are now more than 4.9 million people with security clearance. That includes roughly 483,000 contractors with top secret clearance, like Snowden. Indirectly, this means that the expansion of government surveillance operations and the technological innovations driving that expansion have led to more and more people having access to the kind of documents that could result in a major intelligence leak. Similarly, with digital storage it’s no longer a matter of sneaking out folders or filing cabinets worth of documents to expose a full extent of a program with national security and civil liberty implications. Now you just need a flash drive — or in the alleged case of Bradley Manning, a disc that appears to be a burnt Lady Gaga CD. And services like Wikileaks, the group allegedly used by Bradley Manning to release a vast treasure trove of sensitive content would not exist or have the same impact without the communications capabilities of the internet. Plus, being able to upload documents to an anonymous tool like the New Yorker’s strongbox, while onerous, is certainly different beast than meeting in a dark parking garage. But, as the NSA leaks themselves ironically show, surveillance tech also means it’s easier than ever to track down and prosecute those initiating the leaks. Access to digital documents are often tracked via auditing system that can be quickly searched to narrow down suspects — and if that doesn’t pinpoint the person, the government can use wiretapping laws to snoop on the communications of the reporters who broke the story. Indeed, one of the reasons Snowden supposedly outed himself was that he considered exposure inevitable. Sure, technology also enables a number of ways to avoid that detection, but many require a lot of extra effort and a fair amount of technological know-how. Regardless of your opinion on the value of the information released via leaks over the past several years or by Snowden in particular, the current trajectory of the U.S.’s dependency on technology for national security purposes is more likely to make this kind of information sharing — and the persecution of those engaging in it — the rule rather than the exception.

#### Other rulings pound

Zach Miners, “US Court Rejects State-Secrets Defense in NSA Surveillance Case,” PCWORLD, 7—8—13, <http://www.pcworld.com/article/2043879/us-court-rejects-statesecrets-defense-in-nsa-surveillance-case.html>

The U.S. government can no longer refuse to litigate wiretapping cases on the grounds that they would expose state secrets and undermine national security, a federal court has ruled.

The ruling concerns two cases in a series of many tied to claims that the federal government has been working with telecommunications companies such as AT&T to collect massive amounts of data about U.S. residents without a search warrant. Plaintiffs have said such searches were instituted following the Sept. 11, 2001, terror attacks in violation of privacy rights.

Similar privacy concerns have entered into the national discussion following recent leaks involving a government surveillance program known as Prism and a separate telecom metadata collection program.

Last year, the U.S. Supreme Court refused to overturn legal immunity for telecom carriers that allegedly participated in a National Security Agency surveillance program over the past decade.

Monday’s decision, handed down by the U.S. District Court for the Northern District of California, considered the defendants’ argument that plaintiffs’ claims should be dismissed on the grounds of the state secrets privilege, which permits the government to bar the disclosure of information if it presents a “reasonable danger” of exposing military matters that should not be divulged. The defendants in the case include the NSA as well as Obama and Bush administration officials. The plaintiffs are represented by the Electronic Frontier Foundation.

The ruling rejected the state-secrets argument. “Given the multiple public disclosures of information regarding the surveillance program, the court does not find that the very subject matter of the suits constitutes a state secret,” Judge Jeffrey White wrote in the ruling.

### SSD: L—2AC

#### Overbroad doctrine unsustainable—narrowing key to saving it

Amanda Frost, Professor, Law, American University, and Justin Florence, attorney and nonresidential fellow, Georgetown Center on National Security and the Law, “Reforming the State Secrets Privilege,” 2009, [www.acslaw.org/files/Frost%20FINAL.pdf](http://www.acslaw.org/files/Frost%20FINAL.pdf)

As scholars, lawyers, and policymakers have recognized, the executive branch can place its programs on firmer ground, and better protect both the nation’s security and liberty, through working with and not against the coordinate branches of government. Jack Goldsmith, a former senior official in the Bush Pentagon and Justice Department, testified before the Senate Judiciary Committee last year that “[t]he administration’s failure to engage Congress deprived the country of national debates about the nature of the threat and its proper response that would have served an educative and legitimating function regardless of what emerged from the process.”79 As Professor Goldsmith explained, “[w]hen the Executive branch forces Congress to deliberate, argue, and take a stand, it spreads accountability and minimizes the recriminations and other bad effects of the risk taking that the President’s job demands.”80 Just as an extreme unilateralist approach with respect to Congress ultimately undermines authority and support for administration programs, so too will an administration’s efforts to limit the role of the courts through excessive use of the state secrets privilege eventually backfire. When the executive branch deprives courts of the ability to perform their constitutional job of interpreting the law and administering justice, it calls into question the legal basis for its programs, and cause judges and the public at large to question whether the executive branch is operating in good faith. This may, over time, lead to a “boy who cried wolf” scenario where the executive cannot rely on the privilege in a situation in which it is truly necessary. Indeed, Maher Arar’s case illustrates the growing skepticism regarding the Bush Administration’s assertion of the privilege. Even as the government was claiming that Arar’s case could not proceed because it might damage U.S. relations with Canada, the Canadian government was holding public hearings on the matter, and ultimately issued an apology to Arar and awarded him approximately $10 million.81 Distrust of the Administration’s claimed need for secrecy may have been the basis for the Second Circuit’s highly unusual decision to sua sponte grant rehearing en banc of an appellate panel’s dismissal of Arar’s case. If the new administration wishes to avoid judicial and legislative second-guessing of its claims of privilege, it should better police its assertions of the privilege.

### SSD: M—2AC

#### No secrecy impact

Stephen Holmes, Professor, Law, NYU, “In Case of Emergency: Misunderstanding Tradeoffs in the war on terror,” CALIFORNIA LAW REVIEW, 4—30—09, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1140&context=californialawreview>

The question is: who should decide which information to reveal or conceal? Or, formulating the question with an eye to institutional design: how should the decision-making process be organized to increase the chances that choices about concealment will be relatively reasonable, rather than whimsical and capricious? Secrecy is a serious problem during national emergencies because disclosure and concealment are both risky, for different reasons and--depending on context-to a different extent. It is also an empirical question, since we are talking about predicting the real-world effects, whether harmful or beneficial, of revealing closely held intelligence. Without delving deeply into this issue, we can say one thing with confidence: a well-designed national-security constitution would not assign the right and responsibility to make the conceal/reveal decision to parties with a reputational stake in the choice. Covert operatives themselves consistently over-value the secrets that inflate their personal feelings of self-importance. 4 8 They also exaggerate the damage to national security that the release of such secret information would cause. No system for deciding what to conceal and what to reveal, if crafted to supply the defects of human nature, would place unmonitored discretion in the hands of executive-branch officials whose self- image as custodians of precious secrets might interfere with an objective assessment of the actual consequences of classification and declassification in any particular case.

### EU-US Relations 1NC

#### Cooperation inevitable--shared values, economic ties, and issue specific coop

**McCormick 6** The War on Terror and Contemporary U.S.-European Relations James M. McCormick 1 1 Iowa State University ABSTRACT AU: James M. McCormick TI: The War on Terror and Contemporary U.S.-European Relations SO: Politics & Policy VL: 34 NO: 2 PG: 426-450 YR: 2006

Even if the conceptual gap were to narrow only slightly over U.S. foreign policy generally and terrorism particularly, powerful international and domestic constraints remain, which may motivate both the United States and Europe to close the action gap. In other words, certain existing constraints may actually serve as incentives to close the action gap between these two global actors in the near term. Some of these constraints result from the common ties that already exist, but others are unique to the United States and Europe.First, of course, the United States and Europe are still bound together by a set of underlying common values and beliefs that brought them together during the Cold War after World War II, albeit no longer with the Soviet Union acting as a lone star guiding policy formulation. Those common values and beliefs are hardly empty notions to the vast majority of Europeans and Americans, particularly not to the new European states that have escaped communist rule since the fall of the Berlin Wall. How those values should be advanced will surely remain as a source of disagreement both within and between Europe and America, but those values will undoubtedly continue to serve as incentives for all parties to seek some policy accommodations. Second, Europe and America are fundamentally tied by the significant economic links that serve as the "sticky power" (Mead 2004, 46-53; Mead 2005, 29-36) between them. Indeed, economic ties remain very strong, despite recent political differences and lingering disputes over access to both participants' markets (Drozdiak 2005). Third, the often unspoken levels of cooperation on terrorism—for example, in the areas of law enforcement, intelligence matters, or the tracking of financial matters—remain in place, even in the face of more visible political differences over Iraq and the wider war on terrorism. Moreover, the events of 3/11/04 in Madrid and 7/7/05 in London continue to provide very powerful incentives for this kind of transatlantic cooperation. In this sense, these different kinds of "ties that bind"—and continue to bind—should not be forgotten as important sources of momentum to seek common ground between America and Europe.

### U Ans: Baked in the Cake

#### Ruling will be issued any day now

Eliza Newlin Carlin, “Will McCutcheon Replay Citizens United?” ROLL CALL, 1—28—14, <http://blogs.rollcall.com/beltway-insiders/will-mccutcheon-replay-citizens-united-rules-of-the-game/>

Four years after the Supreme Court deregulated independent campaign spending in Citizens United v. Federal Election Commission, the high court is poised to yet again turn American elections upside down.

The court is expected to rule any day now on McCutcheon v. FEC, another potentially landmark constitutional challenge that could shake up campaign financing as dramatically as Citizens United did in 2010. While no one can predict how the court will rule, oral arguments in October suggest that conservatives in the majority remain as eager as ever to dismantle money limits.

At issue in McCutcheon is the constitutionality of existing overall limits on how much a contributor may give to candidates and political parties in a single election cycle. Alabama businessman Shaun McCutcheon, who brought the challenge, argues that the $123,200 cap on total contributions per cycle violates his First Amendment rights.

The limit’s defenders say that tossing it out will bring back the “soft money” days when donors freely wrote large, unrestricted checks to the political parties. That soft money, banned by the 2002 law known as McCain-Feingold, was raised by the elected officials who ran the parties — and wrote the bills that the big donors lobbied for and against. It was an invitation to abuse, a parade of lawmakers and donors told the court when it took up McConnell v. FEC, the constitutional challenge that upheld the soft money ban in 2003.

But the Supreme Court has partially changed hands since then, and today’s right-leaning justices appear to have forgotten that unrestricted, multimillion-dollar contributions to the political parties ever drew fire. In Citizens United, the high court concluded that unlimited campaign spending by unions and corporations (including incorporated nonprofits) can’t corrupt anybody when the spending is independent — not coordinated with candidates or parties.

Now some on the court argue that big money should be legal for political parties as well. As Justice Antonin Scalia told Solicitor General Donald B. Verrilli Jr., during the McCutcheon oral arguments: “It seems to me fanciful to think that the sense of gratitude that an individual Senator or Congressman is going to feel because of a substantial contribution to the Republican National Committee or Democratic National Committee is any greater than the sense of gratitude that that Senator or Congressman will feel to a PAC which is spending enormous amounts of money in his district or in his state for his election.”

Never mind that this argument undercuts the court’s own conclusion in Citizens United: that independent spending poses no corruption risk because politicians are not involved. A ruling in McCutcheon’s favor might well free up elected officials to collect unrestricted soft money for the political parties once again. That’s because without the aggregate limits, politicians in charge of joint fundraising committees could ask donors to write checks of as much as $2.5 million or more at a pop, advocates of campaign restrictions argue.

A ruling for McCutcheon would also weaken the “base” contribution limit, a cornerstone of the remaining campaign finance rules. That limit bars an individual, for example, from giving a candidate more than $2,600 per election. Historically, the court has held that limits on contributions are less of a First Amendment burden than restrictions on spending. The McCutcheon challenge argues, in part, that contribution and spending limits should be treated as equally onerous. If the court agrees, a successful challenge to the base limits could be next.

“This case not only threatens to have a broad impact on laws limiting aggregate contributions, but could also, depending on the scope of the ruling, jeopardize even the longstanding ‘base’ limits on contributions to candidates and political parties at every level of government — municipal, state and federal,” warns a background memo circulated by the Campaign Legal Center.

The center is one of several watchdog groups bracing for a McCutcheon ruling that may well deal another blow to campaign finance restrictions. Public Citizen has also released a two-part “prebuttal” to the pending McCutcheon ruling titled: “Beware of a Naïve Perspective.”

When Justice Anthony M. Kennedy wrote the majority opinion in Citizens United four years ago, he asserted blithely that the Internet age would ensure enough “prompt disclosure” to hold corporations and politicians accountable. Nonprofits exempt from the disclosure rules, such as social welfare and trade groups, went on to spend more than $300 million on the 2012 elections, all without disclosing a single donor.

The question now is whether the high court, having freed outside groups to spend record sums of unrestricted soft money in campaigns, will also extend that invitation to political parties — and the politicians who run them.

### U Ans: Many Controversial Cases

#### Entire docket thumps

Robert Barnes, “Upcoming Supreme Court Cases Are Weighty, if not Numerous,” WASHINGTON POST, 1—12—14, [www.washingtonpost.com/politics/upcoming-supreme-court-cases-are-weighty-if-not-numerous/2014/01/12/0fa0ad0c-79f1-11e3-af7f-13bf0e9965f6\_story.html](http://www.washingtonpost.com/politics/upcoming-supreme-court-cases-are-weighty-if-not-numerous/2014/01/12/0fa0ad0c-79f1-11e3-af7f-13bf0e9965f6_story.html)

By the numbers, the Supreme Court is headed for a great fallow period.

Over the approximately next 100 days, it will hear oral argument in only 25 cases. Despite taking eight new pleas Friday, the court’s workload this term might reach a new low: In its March sitting, it will consider only half its usual number of cases.

And yet, as recent days have shown, the court is as central as ever to the national debate.

During their holiday break, justices stopped a federal judge’s order allowing same-sex marriages in Utah. They considered anew the Affordable Care Act and whether the Obama administration has made proper accommodations for religiously affiliated groups.

The court could decide any day whether to further loosen restrictions on political campaign contributions. Affirmative action is once again on the agenda, as is a separate look at Obamacare that has elements of Citizens United redux — this time about whether corporations are entitled to rights of religious expression.

And the justices return from their holiday break Monday to review restrictions on abortion protesters and to referee an unprecedented constitutional conflict between the president and the Congress about the appointment of high-level government officials.

“We’re in the middle of a quite remarkable period in the court’s history,” said Kannon Shanmugam, a Washington lawyer who argues before the court. “The court has had several cases implicating major issues of national debate each of the last few years. What that shows is that this is a court that’s not at all shy about tackling hot-button issues.”

Of course, the involvement is not always up to the court. For instance, justices might have thought they had done all they wanted to on the subject of same-sex marriage last June.

The court struck down the portion of the Defense of Marriage Act that prevented federal recognition of same-sex marriages performed in states where they are legal, and allowed such unions to resume in California without ruling on the basic question of whether states may ban gay marriage.

But gay rights advocates around the country went to work trying to convince federal judges that the reasoning of the court’s DOMA decision meant that state bans on same-sex marriage cannot stand, even where voters made them part of state constitutions.

That is what happened in Utah, where U.S. District Judge Robert J. Shelby declared that state’s ban unconstitutional. He and the appeals court refused to stay the ruling, so the Supreme Court stepped in to put the marriages on hold while appeals played out.

“In the context of same-sex marriage, it seems clear that many of the justices affirmatively wish to delay deciding the question for a number of years,” said Justin Driver, a law professor at the University of Texas.

“But it seems equally clear that the justices will in effect be unable to avoid this spotlight for very long.”

Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, agreed that the court is not always seeking a role.

“I don’t think that the court is necessarily looking to be ‘in the middle of everything,’ ” he said in an e-mail, repeating a reporter’s wording. “[Chief Justice] John Roberts especially would probably prefer not to be.” But as the court’s docket shrinks, “the high-profile cases stand out more in contrast.”

The court has great discretion over its docket in some ways, but when subjects such as same-sex marriage arise or parts of major legislation such as the Affordable Care Act are challenged as unconstitutional, “it sort of has to be” involved, Shapiro said.

The marquee case on the court’s agenda as it returns to work is a good example. For 200 years, the court has not had to rule on the meaning of the constitutional provision that allows the president to make “recess appointments” of high-level government officials when the Senate is not in session to provide consent.

The clause states that the president “shall have power to fill up all vacancies that may happen during the recess of the Senate.”

Nearly every president has used the power, and the executive and legislative branches, no matter which party was in control, have made grudging accommodations. But an extraordinary level of political gridlock between Senate Republicans and President Obama has forced the issue.

Republicans used the filibuster to block a vote on Obama appointments to the National Labor Relations Board to the extent that the board could not function. Then, borrowing a procedure pioneered by Senate Democrats when George W. Bush was president, they forced the Senate into pro forma sessions when most senators were out of town to keep Obama from making recess appointments.

Obama responded equally brazenly. Unlike Bush, Obama in January 2010 made the appointments anyway. He declared that despite the pro forma sessions, the Senate was not really available to conduct business by voting on his nominees.

Lawsuits followed, and a decision by a panel of the U.S. Court of Appeals for the D.C. Circuit ratcheted the dispute, bypassing the question of the pro forma sessions. Under the appellate court’s view, the president may make recess appointments only during the annual breaks between sessions of Congress — sometimes those last only minutes — and the vacancies must occur during those breaks in order for the president to fill them.

Such a scenario would virtually eliminate a president’s power to make recess appointments.

The Democratic majority in the Senate recently changed the filibuster rule to make it easier for the president to secure a vote for his nominees, diminishing the urgency of the case. But that would change if the Senate and the White House were not controlled by the same political party.

If the court had little choice on the recess appointments case, it still in recent years has taken on controversial subjects — affirmative action, the constitutionality of parts of the Voting Rights Act, punishment of juvenile offenders — where it might have declined.

“Notwithstanding the reduced docket, I agree that the court has not suddenly become shy about granting certiorari to resolve disputes involving high-visibility issues the public cares about,” said Irving L. Gornstein, director of the Supreme Court Institute at Georgetown Law Center.

“It is taking those cases just as much as it ever did, if not more.”

**Court Politics DA: 2AC**

**Empirics prove the Court doesn’t consider capital**

**Schauer 04** [Frederick, Law prof at Hravard, “Judicial Supremacy and the Modest Constitution”, California Law Review, July, 92 Cal. L. Rev. 1045, ln //uwyo-kn]

Examples of the effects of judicial supremacy hardly occupy the entirety of constitutional law. As the proponents of popular constitutionalism properly claim, it is simply not plausible to argue that all of the Supreme Court's decisions are counter-majoritarian, nor that the Court is unaware of the potential repercussions if a high percentage of its decisions diverges too dramatically from the popular or legislative will. Nevertheless, **there is no indication that the Court uses its vast repository of political capital only to accumulate more** political capital, and in many areas judicial supremacy has made not just a short-term difference, but a long-term difference as well. Perhaps most obvious is school prayer. For over forty years the Court has persisted in its view that organized prayer in public schools is impermissible under the Establishment Clause 59 despite the fact that public opinion is little more receptive to that view now than it was in 1962. 60 So too with flag burning, where the Court's decisions from the late 1960s 61 to the present have remained dramatically divergent from public and legislative opinion. 62 Or consider child pornography, where the Court's decision in Ashcroft v. Free Speech Coalition 63 flew in the face of an overwhelming congressional majority approving the extension of existing child pornography laws to virtual child pornography. Similarly, in the regulation of "indecency," **the Court has spent well over a decade repeatedly striking down acts of Congress that enjoyed overwhelming public and** [\*1059] **congressional support**. 64 Most dramatic of all, however, is criminal procedure, where the Supreme Court's decision in Dickerson v. United States, 65 invalidating a congressional attempt to overrule Miranda v. Arizona, 66 underscores the persistent gap in concern for defendants' rights between Congress and the public, on the one hand, and the Supreme Court, on the other.

**Winners win**

**Law 09** (David, Professor of Law and Professor of Political Science, Washington University in St. Louis, Georgetown Law Journal, March 2009, 97 Geo. L.J. 723; “A Theory of Judicial Power and Judicial Review,” Lexis, rwg)

Part IV of this Article discusses a counterintuitive implication of a coordination-based account of judicial power. **Conventional wisdom suggests that courts secure compliance with their decisions by drawing upon their store of legitimacy, which is undermined by decisions that are unpopular, controversial, or lack intellectual integrity. n25 Part IV argues that precisely the opposite is true: an unpopular or unpersuasive decision can, in fact, enhance a court's power in future cases, as long as it is obeyed. Widespread compliance with a decision that is controversial,** unpopular, or unpersuasive **serves only to strengthen the widely held expectation that others comply with judicial decisions. This expectation, in turn, is self-fulfilling**: those who expect others to comply with a court's decisions will find it strategically prudent to comply themselves, and the aggregate result will, in fact, be widespread compliance. Part IV illustrates these strategic insights--and the Supreme Court's apparent grasp of them--by contrasting [\*734] Bush v. Gore n26 with Brown v. Board of Education n27 and Cooper v. Aaron. n28

**Issues are compartmentalized**

**Redish and Cisar 91** prof law @ Northwestern and Law clerk to US Court of Appeals, 1991

(MARTIN H. REDISH, prof law and public policy @ Northwestern; ELIZABETH J. CISAR, Law Clerk to Chief Judge William Bauer, United States Court of Appeals, Seventh Circuit, Dec 1991, “CONSTITUTIONAL PERSPECTIVES: ARTICLE: "IF ANGELS WERE TO GOVERN" \*: THE NEED FOR PRAGMATIC FORMALISM IN SEPARATION OF POWERS THEORY.”41 Duke L.J. 449)

**Choper's assumption that the judiciary's institutional capital is transferable from structural cases to individual rights cases is no more credible**. Common sense should tell us that **the public's reaction to con- troversial individual rights cases**-for example, cases **concerning abor- tion**,240 school prayer,241 busing,242 **or criminal defendants' rights**243- **will be based largely, if not exclusively, on the basis of its feelings con- cerning those particular issues. It is unreasonable to assume that the public's acceptance or rejection of these individual rights rulings would somehow be affected by anything the Court says about wholly unrelated structural issues.**

### Defense

#### Aggregate limits don’t polarize politics—‘90s prove

Bob Biersack, “No, Overturning Campaign Contribution Limits Really Would Be a Problem,” WASHINGTON POST, 10—14—13, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/14/no-overturning-campaign-contribution-limits-really-would-be-a-problem/>

The soft money days are still fairly fresh in my memory, though, and I struggle to see the moderating influence of those parties or why we should think that greater institutional wealth could have hindered the insurrection Republicans have experienced in recent years. The advertising purchased by national parties in the ’90s or early 2000s would be hard to describe as moderate. In substance it felt no different to me than the most aggressive messages pursued by outside groups today. The specter of party and elected officials offering exclusive meetings or White House sleepovers to the highest bidder did not foster a feeling that the parties were in any common sense “responsible.” And would we want to argue that Texas Republican David Dewhurst would be working in Washington in place of Sen. Ted Cruz today if only the Republican Party had higher contribution limits? Even the outside spending totals were nearly equal in this and other 2012 primaries where insurgent candidates won. Parties have also consistently demonstrated their ability to adapt to changing environments, and the move to funding of “outside” groups is no exception. The list of largest outside spending groups in 2012 is dominated by organizations controlled and operated by individuals who would otherwise be expected to hold important positions in a Romney or Obama administration or in the two parties. Groups like American Crossroads, not to mention Majority PAC and House Majority, along with the groups created to support specific presidential candidates, were managed by mainstream party loyalists on both sides whose actions seemed indistinguishable from what the parties had done in the past and continued to do in the 2012 campaign. In the end I come back to something Ray points out that I find pretty important. There is simply no empirical evidence that these overall contribution limits are inhibiting people from being as active as they choose in offering financial support to candidates and others. The 646 individuals who approached the overall limit last year (or the 200 or so who did the same in 2008 before the rise of unlimited outside groups) do not suggest that these limits are pushing donors in other directions in order to fully and freely express themselves.

**No protectionism**

**Anderson 9 (Jonathan, Head of the Asia-Pacific Economics for UBS, “Economist: Reality Check for Prophets of Protectionism,” 8-17,** [**http://english.caijing.com.cn/2009-08-17/110225722.html**](http://english.caijing.com.cn/2009-08-17/110225722.html)**)**

Now, here we are again, at the beginning of what some commentators call the "Great Depression II." And according to the World Trade Organization, we are seeing a sharp uptick in protectionist measures around the world. **Are we risking another wave of trade destruction** that closes the world's doors? And could a new wave crush China and the rest of the emerging world**? The short answer is no.** We do not worry much about the **protectionism** issue. We think **these fears are vastly overstated for four reasons. First, conditions in the global economy are not that bad.** If we look back at the Great Depression in the 1930s, we find the United States economy contracted nearly 30 percent in real terms, and more than a quarter of the entire workforce was unemployed. Up to one-third of the economy simply disappeared. In many European economies, the impact was greater still. How do things look today? At last count, the United States, euro zone countries, and Japan had seen a cumulative GDP contraction of 6 percent or so, with average unemployment nearing 9 percent. And this is probably as bad as it will get; the world economy is now expected to stabilize and recover in the second half of 2009. Of course, the recovery may be extremely weak. But even if developed countries don't grow at all over the next 18 months, the situation still compares favorably with the events of 75 years ago. In other words, **there's just no reason to look for the same kind of protectionist reaction today**. We should add that we're not seeing it. The WTO has reported a sharp increase in various protectionist actions, claims and cases, but the overall economic impact of these measures is still small by any standard. **This is likely to be the worst it will get. Second, the effects of "plain vanilla" protectionism are highly exaggerated.**Although Smoot-Hawley passed in 1930, raising tariffs on thousands of products, most economists agree the real attack on global trade didn't come until the breakup of the international monetary and exchange rate arrangements in 1931, and a corresponding collapse of global finance. Of course, many pundits now worry about the fall of the U.S. dollar as a global invoicing and reserve currency, and that this could have a similarly negative impact on trade and financing. However, we should stress that as bad as the U.S. economy looks at present, it's still the best thing we have. The European Union is beset by crushing regional disparities and political pressures, with significant basket cases hiding inside its borders. Japan simply doesn't have the necessary dynamism or commitment to globalization. And as far as fiscal balance sheets are concerned, all three major regions have equally significant problems. The United States stands alone in terms of how fast the Federal Reserve has expanded its monetary balance sheet, raising specific concerns about U.S. inflation and its impact on the dollar. But as one can see by looking at U.S. economic data, we are still falling into a deflation cycle for the time being, with nary a hint of inflationary pressure yet. We fully expect the Fed to be able to rein in the monetary expansion quickly if these pressures arise. We should add that, **although it's fashionable to look at China and the yuan as a rising competitor to the dollar, this is simply not a realistic theme for the next 10 years – and perhaps for much longer**. China doesn't have an open capital account, which means there is little opportunity or interest in holding the yuan as a serious asset. If anything, the impact of the current global crisis is likely to convince mainland authorities to be slow in opening their borders. China also doesn't have the kind of deep, domestic financial markets required of a global reserve currency; the bond market in particular is still in its infancy. As a result, it will be a long time indeed before the yuan starts playing a real role on the global stage. **Third, even if we do see an unexpected wave of protectionism, emerging countries have less to lose than the developed world.** Let's start by asking this question: **When we talk about "protectionism,"** what exactly are we trying to protect? **The answer is,** of course, domestic workers and domestic jobs. In what areas do the labor forces of the United States, Europe and Japan work? **The vast majority are in services and construction, sectors that don't compete much directly on the international arena. Only 10 to 15 percent are manufacturing jobs**, and these are mostly in capital intensive, high-tech industries such as autos, precision machinery and high-end electronics. By contrast, manufactured goods that China and other emerging markets sell – toys, textiles, running shoes, sporting goods, light electronics, etc. – are barely made at all in the G3 countries. **Rich countries outsourced most of these low-end, labor-intensive jobs a long time ago.**A related point holds for commodities and raw materials, which make up much of the rest of the exports from the low-income world. **All three major, developed regions are heavily dependent on imported resources, and this is unlikely to change in the foreseeable future.** The bottom line here is that even if we do get a big wave of protectionism in developed countries, it unlikely to be aimed specifically at low-end goods from the developed world. Rather, it makes more sense to protect the auto industry along with high-end equipment and chemical manufacturers. Moreover, any tariffs and barriers placed on toys and textiles are much more likely to raise consumer prices than crush volumes, given the absence of competitive domestic industries that could take advantage of protection to grab local market shares. The final point concerns financial leverage. There has never been a time in recent global economic history when the developed world was so dependent on low-income countries for financial resources. For the first time, the emerging world is a net financial creditor. Given the rapid expansion of public debts, the major developed countries are extremely interested in seeing China and other low-income countries continue to buy U.S. Treasuries, Japanese Government Bonds and various European debt instruments. The impact of a big, potential pullout from global bond markets actually could be much more negative than positive in terms of protecting domestic industries. So emerging markets now are in a much better bargaining position than at any time in the past.

# \*\*1AR\*\*

**no i/l to patrick trade war impact**

**Guoqiang 9**—director of foreign economic relations research for China's State Council (Long, “Is Protectionism a Threat to the World Economy?,” 6 March 2009, http://www.eeo.com.cn/ens/finance\_investment/2009/03/06/131493.shtml)

**I don't think we'll end up with a trade war**. **Countries** mostly **adopt protectionist measures within the WTO framework**. There are two reasons--the first is that **all the countries have something in common in prosting protectionism**, second, **countries have emphasized corporation at recent** top-level **meetings**. **If some countrydared** to really **put up** protectionist **barriers, it would open up a hornets' nest of criticism against them.** Second, trade **retaliation forces parties to weigh the pros and cons before taking protectionist measures**. **So while protectionism is sure to rise, it would not have a big impact. Periodic trade disputes will be unavoidable in the near future, but there would be little possibility of trade conflicts**. **I treat frictional trade rhetoric as a part of the bilateral negotiation process.** It just becomes more intense during times of crisis.

**NLRB - which is an authority question- more likely to t/o there- thumps**

**Forbes 1-12**-14 "The Supreme Court Is Set To Review Obama's Most Egregious Abuse Of Power" [www.forbes.com/sites/realspin/2014/01/12/the-supreme-court-is-set-to-review-obamas-most-egregious-abuse-of-power/](http://www.forbes.com/sites/realspin/2014/01/12/the-supreme-court-is-set-to-review-obamas-most-egregious-abuse-of-power/)

**On Monday, the Supreme Court reviews** President **Obama’s most egregious abuse of executive power to date: the assertion that he decides when the Senate is in session.** In case you missed the controversy two years ago, President **Obama made three “recess appointments” to the National Labor Relations Board (NLRB) without the constitutionally required advice and consent of the Senate. Unfortunately for him, the Senate was not in recess.**

**Court will rule on labor issues—they’re very controversial**

**McMorris 10-18** (Bill, staff writer, 10-18-13, "Dominating the Docket" Free Beacon) freebeacon.com/dominating-the-docket/

**The Supreme Court is expected to rule on a number of high-profile labor cases** over the next several months touching on issues **from recess appointments to forced union membership to shady alliances between unions and businesses. The legal community is paying special attention to the Noel Canning case**, which could have broad implications beyond the scope of labor and constitutional law. The case stems from President Obama’s 2012 decision to bypass Senate confirmation and push through three nominees to the National Labor Relations Board (NLRB) using his recess authority. The Washington, D.C., Appeals Court ruled that the appointments were unconstitutional because the Senate was in pro forma session at the time of the appointments. **“This is a very high-stakes case for the institution of the presidency and the institution of the Senate. This goes beyond the NLRB and into the separation of powers,” said** the Workforce Fairness Institute’s Fred **Wszolek.**

**Healthcare thumps**

**CNN 11-26**-13 "Supreme Court to take up Obamacare contraception case" www.cnn.com/2013/11/26/politics/obamacare-court/

**The high-stakes fight over** implementing parts of the troubled **health care reform** law **will move to the U.S. Supreme Court in coming months, in a dispute involving coverage for contraceptives and religious liberty. The justices agreed** on Tuesday **to review provisions in the Affordable Care Act requiring employers of a certain size to offer insurance coverage for birth control and other reproductive health services without a co-pay.** At issue is whether private companies can refuse to do so on the claim it violates their religious beliefs. Oral arguments will likely be held in March with a ruling by late June.

**Ideology predicts the vast majority of decisions**

**Friedman 05** [Barry, Prof. of Law at NYU, “The Politics of Judicial Review, Texas Law Review, December, 84 Texas Law Rev. 257, ln //uwyo-kn]

The central tenet of the attitudinal model is that **the primary determinant of much judicial decisionmaking is the judge's own values**. Judges come onto the bench with a set of ideological dispositions and apply them in resolving cases. As the most notable proponents of the attitudinal model, Jeffrey Segal and Harold Spaeth, explain: "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal." Although methodologies vary, attitudinalists typically use a measure of judicial ideology and then rely on it to predict judicial votes. Often, they also try to control for other factors that might influence the vote: everything from personal characteristics of the judge (such as race, gender, and prior occupation) to law itself. **Attitudinalists claim an enormous degree of success in their predictive endeavor, especially with regard to the Supreme Court. "There is now surpassing empirical evidence in support of [the attitudinal model]** of judicial decisionmaking." **Segal and Spaeth are able to predict over 70% of** Supreme Court **Justices' votes based on ideology**, and sometimes they do quite a bit better. "For Rehnquist, Blackmun, Brennan and Marshall, simply knowing that a case involves search and seizure would lead to correct predictions of votes between 78% and 90% of the time." Even in the lower courts, ideology turns out to be a significant determinant of judicial behavior.

**Life tenure of Court justices makes political pressures irrelevant**

**Yates 02** [Jeff, political science @ Georgia, “Popular Justice” p. 9 //uwyo-kn]

Under this theory, **external pressures from the public or other political actors do not sway justices’ voting behavior**; once on the Court they vote their sincere policy preferences. Thus, the judicial replacement theory is logically aligned with the attitudinal model of judicial behavior. **Attitudinal theorists discount the possibility of external influences of justices’ behavior**. They note that while state judicial officers are elected in some states and thus may be susceptible to external pressures (e.g. Brace and Hall 1990). **United States Supreme Court Justices are life tenured and typically seek no higher political office and therefore have no reason to be influenced by external factors** (Norpoth and Segal 1994).

**Institutional environment frees the Court from political calculations**

**Landau**, JD Harvard and clerk to US CoA judge, 20**05**

(David Landau, JD Harvard Law, clerk to Honorable Sandra L. Lynch, U.S. Court of Appeals for the First Circuit, 2005, “THE TWO DISCOURSES IN COLOMBIAN CONSTITUTIONAL JURISPRUDENCE: A NEW APPROACH TO MODELING JUDICIAL BEHAVIOR IN LATIN AMERICA” 37 Geo. Wash. Int'l L. Rev. 687)

Theoretically, **attitudinalists could argue that judges rule in accordance with their own ideological preferences** honestly, **rather than strategically**, because for some reason judges simply are not capable of, or prefer not to, act strategically. In practice, however, **this is not what they say. Attitudinalists instead say that the factual environment renders strategic action unnecessary**, at least **for U.S. Supreme Court justices, because,** for example, federal judges have life tenure, **U.S. Supreme Court justices have no real ambition for higher office, and congressional overrides are rarely a realistic danger. n25"The Supreme Court's rules** and structures, along with those of the American political system in general, **give** life-tenured **justices**  [\*696]  **enormous latitude to reach decisions based on their personal policy preferences**." n26 In other words, **both** strategic and attitudinal **models,** in practice, **assume that judges are willing and able to act strategically.** Where the two theories differ is in their factual assumptions: Strategic models support the belief that judges face various types of constraints that force them to support decisions that differ from their preferred policy points, while attitudinalists believe that **the institutional environment leaves** at least those judges that they study - generally **U.S. Supreme Court justices - free to make decisions that are exactly in accord with their preferred policies.** Similarly, followers of strategic theory could theoretically believe that judges act strategically to maximize achievement of some set of goals other than their ideological policy preferences. For example, perhaps judges could prefer "legalistic" goals like adherence to precedent, but would have to defect strategically from absolute adherence to those goals given the presence of other institutions with some clout, like the U.S. Congress. In practice, however, this is not what happens. Instead, strategic theorists virtually always model judges as strategically furthering sets of ideological policy goals, which are the exact same goals modeled by the attitudinal theorists. n27 What we have, then, **are two theories that in practice tend to collapse into one.** In both theories, actors are assumed: (1) to have preferences; and (2) to act strategically for the maximization of those preferences . n28 In addition, attitudinalists and strategic theorists both believe in a particular kind of rational choice theory: Specifically, the **actors' preferences are assumed to be solely ideological, policy-based goals** derived from the political realm. It is important to emphasize that both theories also believe that the  [\*697]  proper way to test judicial behavior is to look at what judges actually do, not at what they say: Thus, what matters is the outcome, not the reasoning of the case.

**Zero spillover between issues**

**Gibson 03**

[James L., Washington University in St. Louis, ‘Measuring Attitudes Toward the United States Supreme Court”, American Journal of Poltiical Science V. 47 I. 2 //uwyo-kn]

Perhaps more important is the rather limited relationship between performance evaluations and loyalty to the Supreme Court. These two types of attitudes are of course not entirely unrelated, but **commitments to the Supreme Court are not** largely **a function of whether one is pleased with how it is doing its job. Even less influential are perceptions of decisions in individual cases.** When people have developed a “running tally” about an institution—a sort of historical summary of the good and bad things an institution has done—it is difficult for any given decision to have much incremental influence on that tally. **Institutional loyalty is valuable to the Court precisely because it is so weakly related to actions the Court takes** at the moment.