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## Off-Case

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#### Security is a psychological construct—the aff’s scenarios for conflict are products of paranoia that project our violent impulses onto the other

**Mack 91** – Doctor of Psychiatry and a professor at Harvard University (John, “The Enemy System” http://www.johnemackinstitute.org/eJournal/article.asp?id=23 \*Gender modified)

The threat of nuclear annihilation has stimulated us to try to understand what it is about (hu)mankind that has led to such self-destroying behavior. Central to this inquiry is an exploration of the adversarial relationships between ethnic or national groups. It is out of such enmities that war, including nuclear war should it occur, has always arisen. Enmity between groups of people stems from the interaction of psychological, economic, and cultural elements. These include fear and hostility (which are often closely related), competition over perceived scarce resources,[3] the need for individuals to identify with a large group or cause,[4] a tendency to disclaim and assign elsewhere responsibility for unwelcome impulses and intentions, and a peculiar susceptibility to emotional manipulation by leaders who play upon our more savage inclinations in the name of national security or the national interest. A full understanding of the "enemy system"[3] requires insights from many specialities, including psychology, anthropology, history, political science, and the humanities. In their statement on violence[5] twenty social and behavioral scientists, who met in Seville, Spain, to examine the roots of war, declared that there was no scientific basis for regarding (hu)man(s) as an innately aggressive animal, inevitably committed to war. The Seville statement implies that we have real choices. It also points to a hopeful paradox of the nuclear age: threat of nuclear war may have provoked our capacity for fear-driven polarization but at the same time it has inspired unprecedented efforts towards cooperation and settlement of differences without violence. The Real and the Created Enemy Attempts to explore the psychological roots of enmity are frequently met with responses on the following lines: "I can accept psychological explanations of things, but my enemy is real. The Russians [or Germans, Arabs, Israelis, Americans] are armed, threaten us, and intend us harm. Furthermore, there are real differences between us and our national interests, such as competition over oil, land, or other scarce resources, and genuine conflicts of values between our two nations. It is essential that we be strong and maintain a balance or superiority of military and political power, lest the other side take advantage of our weakness". This argument does not address the distinction between the enemy threat and one's own contribution to that threat-**by distortions of perception**, provocative words, and actions. In short, the enemy is real, but we have not learned to understand how we have created that enemy, or how the threatening image we hold of the enemy relates to its actual intentions. "We never see our enemy's motives and we never labor to assess his will, with anything approaching objectivity".[6] Individuals may have little to do with the choice of national enemies. Most Americans, for example, know only what has been reported in the mass media about the Soviet Union. We are largely unaware of the forces that operate within our institutions, affecting the thinking of our leaders and ourselves, and which determine how the Soviet Union will be represented to us. Ill-will and a desire for revenge are transmitted from one generation to another, and we are not taught to think critically about how our assigned enemies are selected for us. In the relations between potential adversarial nations there will have been, inevitably, real grievances that are grounds for enmity. But the attitude of one people towards another is usually determined by leaders who manipulate the minds of citizens for domestic political reasons which are generally unknown to the public. As Israeli sociologist Alouph Haveran has said, in times of conflict between nations historical accuracy is the first victim.[8] The Image of the Enemy and How We Sustain It Vietnam veteran William Broyles wrote: "War begins in the mind, with the idea of the enemy."[9] But to sustain that idea in war and peacetime a nation's leaders must maintain public support for the massive expenditures that are required. Studies of enmity have revealed susceptibilities, though not necessarily recognized as such by the governing elites that provide raw material upon which the leaders may draw to sustain the image of an enemy.[7,10] Freud[11] in his examination of mass psychology identified the proclivity of individuals to surrender personal responsibility to the leaders of large groups. This surrender takes place in both totalitarian and democratic societies, and without coercion. Leaders can therefore designate outside enemies and take actions against them with little opposition. Much further research is needed to understand the psychological mechanisms that impel individuals to kill or allow killing in their name, often with little questioning of the morality or consequences of such actions. Philosopher and psychologist Sam Keen asks why it is that in virtually every war "The enemy is seen as less than human? He's faceless. He's an animal"." Keen tries to answer his question: "The image of the enemy is not only the soldier's most powerful weapon; it is society's most powerful weapon. It enables people en masse to participate in acts of violence they would never consider doing as individuals".[12] National leaders become skilled in presenting the adversary in dehumanized images. The mass media, taking their cues from the leadership, contribute powerfully to the process.

#### Our response is to interrogate the epistemological failures of the 1ac---this is the only way to solve inevitable extinction

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While recommendations to shift our frame of orientation away from conventional state-centrism toward a 'human security' approach are valid, this cannot be achieved without confronting the deeper theoretical assumptions underlying conventional approaches to 'non-traditional' security issues.106 By occluding the structural origin and systemic dynamic of global ecological, energy and economic crises, orthodox approaches are incapable of transforming them. Coupled with their excessive state-centrism, this means they operate largely at the level of 'surface' impacts of global crises in terms of how they will affect quite traditional security issues relative to sustaining state integrity, such as international terrorism, violent conflict and population movements. Global crises end up fuelling the projection of risk onto social networks, groups and countries that cross the geopolitical fault-lines of these 'surface' impacts - which happen to intersect largely with Muslim communities. Hence, regions particularly vulnerable to climate change impacts, containing large repositories of hydrocarbon energy resources, or subject to demographic transformations in the context of rising population pressures, have become the focus of state security planning in the context of counter-terrorism operations abroad.

The intensifying problematisation and externalisation of Muslim-majority regions and populations by Western security agencies - as a discourse - is therefore not only interwoven with growing state perceptions of global crisis acceleration, but driven ultimately by an epistemological failure to interrogate the systemic causes of this acceleration in collective state policies (which themselves occur in the context of particular social, political and economic structures). This expansion of militarisation is thus coeval with the subliminal normative presumption that the social relations of the perpetrators, in this case Western states, must be protected and perpetuated at any cost - precisely because the efficacy of the prevailing geopolitical and economic order is ideologically beyond question.

As much as this analysis highlights a direct link between global systemic crises, social polarisation and state militarisation, it fundamentally undermines the idea of a symbiotic link between natural resources and conflict per se. Neither 'resource shortages' nor 'resource abundance' (in ecological, energy, food and monetary terms) necessitate conflict by themselves.

There are two key operative factors that determine whether either condition could lead to conflict. The first is the extent to which either condition can generate socio-political crises that challenge or undermine the prevailing order. The second is the way in which stakeholder actors choose to actually respond to the latter crises. To understand these factors accurately requires close attention to the political, economic and ideological strictures of resource exploitation, consumption and distribution between different social groups and classes. Overlooking the systematic causes of social crisis leads to a heightened tendency to problematise its symptoms, in the forms of challenges from particular social groups. This can lead to externalisation of those groups, and the legitimisation of violence towards them.

Ultimately, this systems approach to global crises strongly suggests that conventional policy 'reform' is woefully inadequate. Global warming and energy depletion are manifestations of a civilisation which is in overshoot. The current scale and organisation of human activities is breaching the limits of the wider environmental and natural resource systems in which industrial civilisation is embedded. This breach is now increasingly visible in the form of two interlinked crises in global food production and the global financial system. In short, industrial civilisation in its current form is unsustainable. This calls for a process of wholesale civilisational transition to adapt to the inevitable arrival of the post-carbon era through social, political and economic transformation.

Yet conventional theoretical and policy approaches fail to (1) fully engage with the gravity of research in the natural sciences and (2) translate the social science implications of this research in terms of the embeddedness of human social systems in natural systems. Hence, lacking capacity for epistemological self-reflection and inhibiting the transformative responses urgently required, they reify and normalise mass violence against diverse 'Others', newly constructed as traditional security threats enormously amplified by global crises - a process that guarantees the intensification and globalisation of insecurity on the road to ecological, energy and economic catastrophe. Such an outcome, of course, is not inevitable, but extensive new transdisciplinary research in IR and the wider social sciences - drawing on and integrating human and critical security studies, political ecology, historical sociology and historical materialism, while engaging directly with developments in the natural sciences - is urgently required to develop coherent conceptual frameworks which could inform more sober, effective, and joined-up policy-making on these issues.

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#### Restrictions are prohibitions --- the aff is distinct

Jean Schiedler-Brown 12, Attorney, Jean Schiedler-Brown & Associates, Appellant Brief of Randall Kinchloe v. States Dept of Health, Washington, The Court of Appeals of the State of Washington, Division 1, http://www.courts.wa.gov/content/Briefs/A01/686429%20Appellant%20Randall%20Kincheloe%27s.pdf

3. The ordinary definition of the term "restrictions" also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation.

Black's Law Dictionary, 'fifth edition,(1979) defines "restriction" as;

A limitation often imposed in a deed or lease respecting the use to which the property may be put. The term "restrict' is also cross referenced with the term "restrain." Restrain is defined as; To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb.

In contrast, the terms "supervise" and "supervisor" are defined as; To have general oversight over, to superintend or to inspect. See Supervisor. A surveyor or overseer. . . In a broad sense, one having authority over others, to superintend and direct. The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but required the use of independent judgment.

Comparing the above definitions, it is clear that the definition of "restriction" is very different from the definition of "supervision"-very few of the same words are used to explain or define the different terms. In his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision conditions, but he did not agree to restrict his license.

#### Restrictions on authority are distinct from conditions

William Conner 78, former federal judge for the United States District Court for the Southern District of New York United States District Court, S. D. New York, CORPORACION VENEZOLANA de FOMENTO v. VINTERO SALES, http://www.leagle.com/decision/19781560452FSupp1108\_11379

Plaintiff next contends that Merban was charged with notice of the restrictions on the authority of plaintiff's officers to execute the guarantees. Properly interpreted, the "conditions" that had been imposed by plaintiff's Board of Directors and by the Venezuelan Cabinet were not "restrictions" or "limitations" upon the authority of plaintiff's agents but rather conditions precedent to the granting of authority. Essentially, then, plaintiff's argument is that Merban should have known that plaintiff's officers were not authorized to act except upon the fulfillment of the specified conditions.

#### Authority is power delegated to an agent by a principle

Kelly 3 Judge for the State of Michigan, JOSEPH ELEZOVIC, Plaintiff, and LULA ELEZOVIC, Plaintiff-Appellant/Cross-Appellee, v. FORD MOTOR COMPANY and DANIEL P. BENNETT, Defendants-Appellees/Cross-Appellants., No. 236749, COURT OF APPEALS OF MICHIGAN, 259 Mich. App. 187; 673 N.W.2d 776; 2003 Mich. App. LEXIS 2649; 93 Fair Empl. Prac. Cas. (BNA) 244; 92 Fair Empl. Prac. Cas. (BNA) 1557, lexis

Applying agency principles, a principal is responsible for the acts of its agents done within the scope of the agent's authority, "even though acting contrary to instructions." [Dick Loehr's, Inc v Secretary of State, 180 Mich. App. 165, 168; 446 N.W.2d 624 (1989)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=115&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b180%20Mich.%20App.%20165%2cat%20168%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=708331d40466e4347936b73e103c82fb). This is because, in part, an agency relationship arises where the principal [\*\*\*36]  has the right to control the conduct of the agent. [St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n, 458 Mich. 540, 558 n 18; 581 N.W.2d 707 (1998)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=116&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b458%20Mich.%20540%2cat%20558%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=c0a63a81a484a6ce53be229bc2290a07) (citations omitted). The employer is also liable for the torts of his employee if "'the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation,'" [McCann v Michigan, 398 Mich. 65, 71; 247 N.W.2d 521 (1976)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=117&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b398%20Mich.%2065%2cat%2071%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=5219d53b6a7119254f8041c911d87fd2), quoting [Restatement of Agency, 2d § 219(2)(d)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_origin=TOASHLX&_butNum=118&_butInline=1&_butinfo=AGENCY%20SECOND%20219&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=71c1bf8c001fe5ae1153be4268b8e9e9), p 481; see also [Champion v Nation Wide Security, Inc, 450 Mich. 702, 704, 712; 545 N.W.2d 596 (1996)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=119&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b450%20Mich.%20702%2cat%20704%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=3d1841dc7f4fb90804d8adb6349a6fae), citing [Restatement of Agency, 2d § 219(2)(d)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_origin=TOASHLX&_butNum=120&_butInline=1&_butinfo=AGENCY%20SECOND%20219&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=c1927abf5bf3954a85d211c044ada141), p 481 ("the master is liable for the tort of his servant if the servant 'was aided in accomplishing the tort by the existence of the agency relation'"). In [Backus v  [\*213]  Kauffman (On Rehearing), 238 Mich. App. 402, 409; 605 N.W.2d 690 (1999)](https://www.lexis.com/research/buttonTFLink?_m=6cbcd97524abff5644c0987b135f7517&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b259%20Mich.%20App.%20187%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_origin=TOASHLX&_butNum=121&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b238%20Mich.%20App.%20402%2cat%20409%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=136&_startdoc=101&wchp=dGLbVtb-zSkAk&_md5=d9947545fee151274d489cbc14123160), this Court stated: The term "authority" is defined by Black's Law Dictionary to include "the power delegated by a principal to an agent." Black's Law Dictionary (7th ed), p [\*\*\*37]  127. "Scope of authority" is defined in the following manner: "The reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." Id. at 1348.

#### Vote neg---

#### Neg ground---only prohibitions on particular authorities guarantee links to every core argument like flexibility and deference

#### Precision---only our interpretation defines “restrictions on authority”---that’s key to adequate preparation and policy analysis

#### Limits---there are an infinite number of small hoops they could require the president to jump through---overstretches our research burden

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#### The United States Congress should substantially increase environmental restrictions on the introduction of non-nuclear armed forces into hostilities.

#### The United States federal judiciary should substantially increase its global judicial-exchanges, including but not limited to with the Chinese Judiciary and including but not limited to the subject of environmental destruction within the Chinese military, and undertake all possible research about environmental issues necessary to conduct those exchanges with the aim of reducing environmental destruction in China including but not limited to within its military.

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#### Plan wrecks warfighting and naval training

Major Charles Gartland 12, J.D., United States Air Force judge advocate currently serving as the Environmental Liaison Officer for the Air Force Materiel Command, “AT WAR AND PEACE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT: WHEN POLITICAL QUESTIONS AND THE ENVIRONMENT COLLIDE,” 68 A.F. L. Rev. 27

The preceding cases illustrate, at best, inconsistent application of injunction analyses and the political question doctrine. n375 At worst they illustrate no injunction analysis and total disregard of the political question doctrine. n376 A lasting solution to this problem calls for more than merely advocating that the policy preference [\*67] that happened to be imposed by five Justices in Winter be universally applied. Over forty years of NEPA case law shows that when it collides with national defense, not all judges will agree with how the scales tipped in Winter; indeed, many judges will not agree that the factual scenario in Winter presents a Constitutional issue at all. n377 Consequently, the most manageable solution is one that removes the grounds for a disagreement over all the foregoing issues: amending NEPA to create a national defense exception. The remainder of this article will further expound on the necessity of this solution, the form this solution might take, and finally show that it is consistent with both the Constitutionally prescribed role for national defense and the statutorily prescribed role for NEPA.¶ A. The Basis for a National Defense Exemption¶ Entertaining political questions in the courtroom has consequences, both legal and practical. The argument for a national defense exemption to NEPA can be reduced to three bases: (1) the impracticality of hearing national defense political questions in the courtroom; (2) the real-world impact that results; and (3) that the very nature of injunction law causes the first two bases to blend in a manner that is particularly virulent to national defense.¶ 1. Policy and Politics in the Courtroom¶ Trident, Weinberger v. Wisconsin, and Callaway amply illustrate the issues that trial courts are unequipped to resolve, as tactical, strategic, and foreign policy elements figure into national defense undertakings. n378 One District Court judge hearing a NEPA case with foreign policy implications remarked on the oddity of the testimony given in his courtroom, more akin to a "legislative hearing" than a trial. n379 As noted in McQueary v. Laird, national security does not blend well with evidentiary hearings. n380¶ 2. Real-World Adverse Impact to the National Defense¶ The consequences of judicial intervention in national defense can be more than academic: Army units n381 and naval fleets not training adequately or at all, n382 [\*68] nuclear tests jeopardized, n383 and diplomatic missions put at risk. n384 Winter is but the most recent and highest profile example of unwieldy judicial process outcomes: uniformed personnel devoted to being lookouts with binoculars and adjusting sonar decibel levels as whales approach and disperse--in the middle of a warfighting exercise. n385¶ 3. The Nature of Injunction Law Forces Judicial Policy-Making¶ The law surrounding injunctions guarantees unsatisfactory results because the third and fourth prongs of the injunction test in essence require the courts to make a policy choice that, in the national defense context at least, involves the constitutional separation of powers. Some courts have simply avoided the dilemma by ignoring the portion of the injunction test corresponding to the agency's equity and the public interest in national defense, n386 while others have plainly considered the former to be more important. n387 Either way, the NEPA injunction often decides a question that the Constitution and statute intended to be handled differently.

#### Naval training key to global sea-lanes---key to the economy

John Kirby 12, Rear Adm., U.S. Navy, Chief of Information, 11/14/12, “Keeping the Sea Lanes Open: Mine Countermeasures,” http://navylive.dodlive.mil/2012/11/14/keeping-the-sea-lanes-open-mine-countermeasures-2/

At the most basic level, the mission of our Navy is to defend our homeland while keeping global sea lanes open and free. In fact, the latter actually helps us do the former, since so much of our nation’s prosperity and security comes for the free flow of maritime commerce.

Naval strategist Rear Adm. Bradley Fiske said it best, way back in 1916: “As long as a maritime country carried on trade within its own borders exclusively, as long as it lived within itself, so long as its people did not go to countries oversea, a navy was not necessary. But when a maritime country is not contented to live within its own borders, then a navy becomes essential to guard its people and their possessions on the highways of the sea; to enforce, not municipal or national law, as an army does, but international law.”

To enforce that law and to defend those highways, the Navy must expend the appropriate effort, training and resources on the threats and obstacles which hinder this flow of commerce. One such threat — cheap and deadly — is the naval mine.

Mines are indiscriminate, easily procured and laid. And they have a potent psychological effect on commercial shippers. Not only can they sink vessels, they can grind the gears of international business to a halt. By limiting our access, naval mines can also put at jeopardy our ability to defend national interests in a given area or chokepoint.

And there are vital chokepoints all over the world.

Consistent with the new Defense Strategy, we will place a renewed emphasis on those chokepoints in the Asia-Pacific region while continuing to focus on the same in the Middle East. We need the capability to find and clear mines in both these critical regions — and we’ve got it.

The Navy has four MCM ships forward deployed to Japan to meet these requirements in the Pacific. And in the CENTCOM region, we counter the mine threat with eight MCM ships. Four of these are based in Bahrain; the other four are deployed there from San Diego.

#### Economic collapse causes global nuclear war

Cesare Merlini 11, nonresident senior fellow at the Center on the United States and Europe and chairman of the Board of Trustees of the Italian Institute for International Affairs, May 2011, “A Post-Secular World?”, Survival, Vol. 53, No. 2

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

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#### Judicial deference is stable now but the plan’s precedent collapses it

John O’Connor 7, Former officer in the Marine Corp and Judge Advocate; JD, U Maryland Law School. Statistics and the Military Deference Doctrine: a Response to Professor Lichtman, 66 Md. L. Rev. 668, Lexis

As I have written elsewhere, one of the most important aspects of the military deference doctrine, and one that many commentators misunderstand,176 is that the military deference doctrine is not a venerable doctrine that has existed since the early days of the Republic. 177 Indeed, a review of the Court’s military deference jurisprudence could lead one to the conclusion that the doctrine was more or less the brainchild of Chief Justice Rehnquist, who wrote virtually every important military deference decision that the Court has issued.178 While notions of stare decisis may militate against a retreat from the military deference doctrine by the Court, the fact remains that the doctrine is one of fairly recent vintage, which was developed and perpetuated mainly through judicial opinions written by a Justice who is no longer on the Court. Moreover, while stare decisis is a nice concept in the abstract, that doctrine did not prevent the Court from radically changing its approach to constitutional challenges to military practices twice before. Therefore, **it is not out of the realm of possibility that the military deference doctrine could recede in importance** with personnel changes on the Court. This could occur through an express overruling of the doctrine, through decisions narrowing the doctrine’s application, or through a moresubtle process whereby the Court continues to pay lip service to its need to defer to political branch judgments but nevertheless **accords little or no actual deference to the policy determinations of Congress and the President.**

But early indications from the Roberts Court, with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O’Connor, respectively, provide reason to believe that the military deference doctrine will continue to be a robust feature of the Court’s military jurisprudence, at least in the near term. In FAIR, the first “military” case decided by the Roberts Court, the Court upheld the Solomon Amendment against a constitutional challenge and, in so doing, began its constitutional analysis by extolling the virtues of the military deference doctrine when Congress legislates pursuant to its constitutional power to raise and support armies:

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Congress’ power in this area “is broad and sweeping,” and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in Rostker, “judicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies.179

While it is always dangerous to draw conclusions from a single case, all participating members of the Court—Justice Alito did not participate—joined Chief Justice Roberts’s opinion, which invoked the military deference doctrine as its first step in constitutional analysis once the Court resolved what the statute in fact provided.180 Moreover, this is a case that could have been decided on a number of grounds, such as a pure Spending Clause or First Amendment basis, 181 without invoking the military deference doctrine, and the Court’s prominent reliance on the military deference doctrine to support its decision suggests that there is no move afoot to eradicate the doctrine, explicitly or through subtle narrowing. For his part, Justice Alito noted prominently in his confirmation hearing that he had joined a conservative Princeton alumni group because, as an alumnus who attended Princeton on an ROTC scholarship, he was unhappy that the school had decided to abolish the campus ROTC program.182 While, again, predicting judicial attitudes based on personal history is always a risky proposition, Justice Alito’s background makes him seem like an unlikely candidate to take up the sword against the military deference doctrine, particularly when every other member of the Court joined an opinion applying it in FAIR.

V. Conclusion

This Article is by no means an attempt to catalogue every military deference case decided by the Court, or to discuss every nuance in its application. n183 It is important, however, that the doctrine be understood, both in terms of the facts surrounding its development and the limited scope of the doctrine as evidenced by the framework in which it is applied. Professor Lichtman's article on the military deference doctrine is thought provoking in that it challenges the orthodoxy by which the military deference doctrine is viewed - through the lens of time rather than through the lens of subject matter irrespective of time. n184 Ultimately, however, I have come to the conclusion that Professor Lichtman's analysis of the military deference doctrine is flawed in several important respects, all of which result in a fundamental misunderstanding [\*706] of the doctrine. In my estimation, the principal flaws in Professor Lichtman's analysis include: focusing on "win-loss" records rather than on the analytical framework in which those wins and losses occurred; failing to perceive that the military deference doctrine should - and does - apply only to a narrow category of "military" cases; incorrectly casting the military deference doctrine as a longstanding and relatively stable doctrine that has only subtly evolved since the early twentieth century; determining that subject matter, rather than timing, is the proper variable around which to organize an analysis of military deference decisions; and concluding that the military deference doctrine does not - and should not - apply to statutes and regulations burdening civilians instead of military personnel.

The military deference doctrine is, at once, both historically immature and limited, yet potent when applicable. After the disruption that occurred in the course of the Court's prior rejection of the doctrine of noninterference, the Court ultimately landed on the military deference doctrine as an appropriate analytical framework, where applicable, in the mid-1970s, and the Court has largely remained in the same place with its military jurisprudence ever since. The Court's rejection of its noninterference policy beginning in the mid-1950s likely came about as a result of what the Court perceived as overreaching by the political branches in subjecting persons - military and civilian - to courts-martial in a willy-nilly fashion. If the military deference doctrine were to recede in importance in the future, it would be a good bet that it happens because some collection of Supreme Court Justices perceives that Congress and the President are overreaching in the exercise of their constitutional powers to raise armies and regulate the armed forces. At present, though, there is no sign that such an upheaval is anywhere on the horizon.

#### Deference is vital to effective executive crisis response --- solves terror, rogue states, and prolif

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the unique [\*883] constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats. n16

The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22

[\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation

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." n23 Not that the Justices need to become experts in national security affairs, n24 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." n25 While "[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27

(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." n28

(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." n29 Importantly, "[w]hen you hold [\*887] 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." n30

(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," n31 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." n32

(5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34

[\*888] 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, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "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." n37 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." n38 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." n39

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, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 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", n44 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." n45 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." n46 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, n47 "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 [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

### 1NC

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

Neavl Devins 10, Goodrich Professor of Law and Professor of Government, College of William & Mary., Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, 12 U. Pa. J. Const. L. 491

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

#### Congress will backlash against the plan and cut judicial pay

Philip A. Talmadge 99, Justice, Washington State Supreme Court, Winter, Seattle University Law Review, 22 Seattle Univ. L. R. 695, p. 701-704

The doctrine of judicial restraint has been encrusted in recent years with considerable ideological cant of both the left and the right. 17 The ideological discussion highlights particular political issues of the day. Many conservatives decry judicial activism with respect to the courts' role in racial desegregation in America or [\*702] reproductive rights issues. 18 Liberals complain today of judicial activism in property and economic issues. 19 But this doctrine need not be the captive of the left or the right. The doctrine itself has become "political" largely because it is not susceptible to rigorous and predictable definition. That the courts are not entirely trusted by the partisan branches of government to announce constitutional principles is illustrated by recent Washington legislation. In 1997, a bill was introduced in the Washington State House of Representatives with thirty-three sponsors. The bill challenged the doctrine of judicial review: "The doctrine of judicial review that the courts have the sole and final say in interpreting the Constitution on behalf of all three branches of government has been subject to serious analysis and criticism by scholars, jurists, and others for almost two hundred years." 20 The legislation's apparent intent was to undercut the finality and authority of judicial review of constitutional questions by permitting the legislature to disagree with a judicial interpretation of the Washington Constitution and to submit the issue to the voters in a statewide referendum. 21 [\*703] The sense that the courts are too powerful sometimes conflicts with direction to judges from the partisan branches to state their views more publicly. In 1997, twenty-two sponsors introduced in the Washington State House of Representatives a measure urging the Supreme Court to amend Canon 7 of the Code of Judicial Conduct to afford judges and judicial candidates the right to "speak freely and without fear of governmental retaliation, on issues that are not then before the court." 22 The United States Congress has also raised serious questions about judicial performance through a different methodology. The United States Senate's recent glacial pace in confirming nominees to judicial vacancies increases judicial workloads and instills trepidation in the minds of the nominees. 23 In recent legislation, 24 Congress [\*704] sought to restrain "judicial activism" by denying judges cost-of-living salary adjustments and limiting federal court jurisdiction. Various versions of the legislation would deny federal courts the power to release federal prisoners because of bad prison conditions and establish special procedures to hear challenges to state initiative measures. In summary, these issues illustrate the need for the courts continually to revisit and review the core constitutional functions of the judiciary. 25 Within the constitutional sphere, however, the courts should be active and the other branches of government constrained not to act unconstitutionally. The judiciary cannot "restrain" itself from declaring the enactments of legislative bodies violative of constitutional norms. The courts must vigorously protect individuals, particularly minorities, from majoritarian tyranny. But this protective role does not allow the courts to "constitutionalize" every controversy. Judicial self-restraint lends support to the legitimacy of judicial independence. In our system of separation of powers, achievement of the necessary balance between a judiciary vigorous within its constitutional sphere and independent of the partisan branches of government, and a judiciary restrained in its inclination to right every wrong, is no easy task. That necessary balance is, however, the essence of ordered liberty in the American constitutional system. Likewise, the other branches of government must regard the authority and independence of the judiciary by respecting judicial review, properly funding the courts, and avoiding the imposition of nonjudicial duties or ever-escalating caseloads. The fulfillment of separation of powers is found in the principles of restraint employed in the federal and state court systems.

#### Adequate funding for the judiciary is key to the rule of law – it’s watched internationally

Testimony of Associate Justice Anthony M. Kennedy 7 before the United States Senate Committee on the Judiciary Judicial Security and Independence February 14, http://judiciary.senate.gov/testimony.cfm?id=2526&wit\_id=6070

The provision of judicial resources by Congress over the years is admirable in most respects. Your expeditious consideration of the pending court-security bill is just one example of your understanding of our needs. Our facilities have been, and are, the envy of the judiciaries of the several States and, indeed, of judges throughout the world. Our staff, our libraries, our electronic data systems, and our courthouses are excellent. These resources have been the special concern of Congress. Your interest, your oversight, and your understanding of our needs set a standard for our own States and for nations around the world. Just one example is the Federal Judicial Center. When visitors come to Washington, we recommend they observe it to learn how a successful judicial-education center functions. Those visitors are awed by what they see. As you know, the Center produces an elaborate series of programs for judicial education, under a small budget emphasizing turn-key projects. Around the world, the allocation of scarce resources to judiciaries is, to be candid, a tough sell. There are urgent demands for funds for defense; for roads and schools; for hospitals, doctors, and health care; and for basic utilities and necessities such as clean water. Even rich countries like our own find it hard to marshal the necessary resources for all these endeavors. What, then, is the reception an elected representative receives when he or she tells constituents the legislature has increased funding for judicial resources? The report, to be frank, is not likely to generate much excitement. Perhaps this is an educational failure on our part, for there is a proper response to this predictable public reaction. It is this: An efficient, highly qualified judiciary is part of the infrastructure necessary in any society that seeks to safeguard its freedom. A judiciary committed to excellence secures the Rule of Law; and the Rule of Law is a building block no less important to the advance of freedom and prosperity than infrastructure systems such as roads and utilities. Without a functioning, highly qualified, efficient judiciary, no nation can hope to guarantee its prosperity and secure the liberties of its people. The Committee knows that judges throughout the United States are increasingly concerned about the persisting low salary levels Congress authorizes for judicial service. Members of the federal judiciary consider the problem so acute that it has become a threat to judicial independence. This subject is a most delicate one and, indeed, is difficult for me to address. It is, however, an urgent matter requiring frank and open exchange of views. Please permit me to make some remarks on the subject.

#### That causes nuclear war

[gender paraphrased].

Charles S. Rhyne 58, Founder and Senior Partner of Rhyne & Rhyne law firm. “Law Day Speech for Voice of America.” May 1. American Bar Association. http://www.abanet.org/publiced/lawday/rhyne58.html

In these days of soul-searching and re-evaluation and inventorying of basic concepts and principles brought on by the expansion of man’s vision to the new frontiers and horizons of outer space, we want the people of the world to know that we in America have an unshakable belief in the most essential ingredient of our way of life—the rule of law. The law we honor is the basis and foundation of our nation’s freedom and the freedom for the individual which exists here. And to Americans our freedom is more important than our very lives. The rule of law has been the bulwark of our democracy. It has afforded protection to the weak, the oppressed, the minorities, the unpopular; it has made it possible to achieve responsiveness of the government to the will of people. It stands as the very antithesis of Communism and dictatorship. When we talk about “justice” under our rule of law, the absence of such justice behind the Iron Curtain is apparent to all. When we talk about “freedom” for the individual, Hungary is recalled to the minds of all men. And when we talk about peace under law—peace without the bloodbath of war—we are appealing to the foremost desire of all peoples everywhere. The tremendous yearning of all peoples for peace can only be answered by the use of law to replace weapons in resolving international disputes. We in our country sincerely believe that [hu]mankind’s best hope for preventing the tragic consequences of nuclear-satellite-missile warfare is to persuade the nations of the entire world to submit all disputes to tribunals of justice for all adjudication under the rule of law. We lawyers of America would like to join lawyers from every nation in the world in fashioning an international code of law so appealing that sentiment will compel its general acceptance. Man’s relation to man is the most neglected field of study, exploration and development in the world community. It is also the most critical. The most important basic fact of our generation is that the rapid advance of knowledge in science and technology has forced increased international relationships in a shrunken and indivisible world. Men must either live together in peace or in modern war we will surely die together. History teachers that the rule of law has enabled [hu]mankind to live together peacefully within nations and it is clear that this same rule of law offers our best hope as a mechanism to achieve and maintain peace between nations. The lawyer is the technician in man’s relationship to man. There exists a worldwide challenge to our profession to develop law to replace weapons before the dreadful holocaust of nuclear war overtake our people.

## Case

## Solvency

### 1NC No Spillover

#### There’s no chance the plan spills over---all federal courts are either siding with the executive’s terror policies through narrow rulings or declining to even hear the cases---the plan will just be distinguished away

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

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

#### The plan can’t set a precedent---Roberts is a sly dog

William D. Araiza, Law Prof @ Brooklyn, Summer 2012, “PLAYING WELL WITH OTHERS-BUT STILL WINNING,” 46 Ga. L. Rev. 1059, ln

How can a judge undermine precedent while still following it? This Essay considers the methods by which Supreme Court Justices may weaken precedent without explicitly overruling cases by strategically adopting an approach to stare decisis that is less explicitly aggressive than their colleagues'. Adding to the literature of "stealth overruling," this Essay considers examples of such methods from Chief Justice Roberts's first five years on the Supreme Court. These examples indicate that Chief Justice Roberts knows how to engage in stealth overruling and, more broadly, how to use his colleagues' preferences to maintain a formal commitment to judicial humility while achieving jurisprudential change. As such, they reveal important insights about how Justices can operate strategically to achieve their preferences within both the opportunities and the confines inherent in a multi-judge court. After five years, many have accused the Roberts Court of aggressively attacking precedent. No less a figure than Justice O'Connor, whose retirement marked the effective start of that Court, has expressed concern about the Roberts Court's willingness to overrule prior decisions. n1 Then-Judge Roberts's famous confirmation hearing analogy of judging to umpiring n2 and his professed respect for stare decisis n3 make for a dramatic narrative in which a nominee piously describes a humble role for judges but then, once safely confirmed, sets out with a wrecking ball. The charge may have merit, but a short essay is not the vehicle to make that determination. Simply pointing to a few high-profile [\*1061] overrulings, as critics sometimes do, proves little. n4 Rather, an in-depth examination of the issue requires considering the situations where the overruling dog did not bark-that is, where the Court could have overruled a prior case but declined to do so. n5 Such an investigation also calls for both historical perspective and nuance. n6 Reaching interesting conclusions about the Roberts Court's treatment of stare decisis requires that we identify a baseline of how previous Courts have treated that principle. If impressionistic conclusions based on a few dramatic examples are enough to consider the charge proven, then the Rehnquist n7 and Warren n8 Courts are presumably guilty also. Moreover, not all overrulings are created equal. Determining the extent of the Roberts Court's alleged disregard of precedent also requires considering the importance of the precedents the Court has in fact rejected. Consider Justice White's dissent in INS v. Chadha. n9 White characterized the majority's rejection of the legislative veto as effectively striking down hundreds of statutes and eliminating a then-major feature of the modern administrative state. n10 Chadha was not a case where the Court overruled precedent. Justice White's complaint about the far-reaching nature of the Court's decision, however, reminds us that identifying judicial aggressiveness, whatever its form, requires [\*1062] more than simply adding up the number of cases where the Court has acted aggressively. n11 This Essay considers the Roberts Court and stare decisis from a different angle. It examines several methods by which Chief Justice Roberts arguably has used the multi-judge nature of the Supreme Court to his advantage in undermining precedent without explicitly calling for its overruling. n12 These examples do not prove that the Court as a whole, or the Chief Justice in particular, is bent on undoing the work of prior Courts. Instead, they illustrate the ways in which a Justice can work within the formal confines of precedent to achieve fundamentally different results, either in the short or long term. n13 The methods described below depend in part on the distinction between the result a court reaches in a case and the reasoning it employs. The nature of the Supreme Court as a multi-judge court makes this distinction possible: often times, the Court may agree on a result but split sharply on its reasoning. n14 This opens up room for a creative Justice to undermine precedent, even as the Justice expresses reasons that appear moderate-in particular, more moderate than those who are more inclined to overrule explicitly. In so doing, the Justice may create the conditions for the ultimate rejection of that precedent, even while publicly counseling restraint-indeed, even while voting to uphold that [\*1063] precedent. n15 In short, this Essay considers methods by which Justices can play well with others-both those that came before (via respect for stare decisis) and current colleagues (by strategically positioning themselves among them)-and still achieve their ultimate goal. n16 This Essay situates itself at the intersection of two ongoing debates about judicial behavior. The first examines the concept of stealth overruling-the practice of limiting or even eviscerating a precedent while ostensibly remaining faithful to it. n17 This phenomenon has become a major topic of scholarly discussion during the last five years, n18 as scholars have identified and analyzed examples of the Roberts Court engaging in such conduct-conduct generally thought to have resulted from the replacement of a sometimes centrist Justice O'Connor with a more reliably conservative Justice Alito. n19 The examples in this Essay illustrate instances where the Court or a plurality thereof arguably has engaged in such conduct. n20 The lessons one can draw from these examples will help shape an understanding of the stealth overruling phenomenon, and the extent to which the Roberts Court performs it. Second, this Essay engages the debate about the implications of the Supreme Court's character as a collegial body. Scholars long have acknowledged that critiques of the Court must account for its collegial nature rather than simply treating it as a purposive [\*1064] individual. n21 This Essay contributes to that debate by considering how Chief Justice Roberts may in certain cases strategically use his colleagues' calls for more explicit overruling of precedent as a tool in maintaining his and the Court's reputation as faithful to stare decisis while nevertheless pushing the law away from precedents.

## Environment

### AT: Military I/L

#### They don’t solve other countries military emissions which makes their impacts inevitable

#### No internal link-environmentalists using the legal system and the military changed its policy

Russell McLendon 8/13/13, Science editor at Mother Nature Network, 8/13/13, "American military, wildlife learning to coexist," http://www.mnn.com/earth-matters/animals/blogs/american-military-wildlife-learning-to-coexist

This coexistence isn't necessarily selfless, as the AP points out: If endangered species decline too much, military bases could face tougher rules or even be forced to relocate. Conger acknowledges this, telling the AP "our conservation efforts are first and foremost focused on protecting readiness and eliminating the need for restrictions on training."¶ ¶ Regardless of the military's motivation, though, it's in a unique position to influence the fate of American wildlife. According to a report by nonprofit conservation group NatureServe, DOD territory harbors a greater density of endangered species than any other federal land-management agency. It has nearly seven times more threatened and endangered species per acre than the Forest Service, for example, with especially dense concentrations in Hawaii, California and Florida.¶ ¶ The Pentagon still struggles to share land with some endangered wildlife, such as desert tortoises the Army has relocated from Fort Irwin in California. But one of its most persistent ecological problems is now at sea, where Navy sonar exercises have raised widespread concerns about noise-sensitive whales and other marine mammals.¶ ¶ "As part of these exercises, the Navy will repeatedly broadcast high-intensity sound waves into a vast stretch of ocean, containing some of the most biologically productive marine habitat in the United States," environmentalists argued in a 2012 lawsuit against the use of naval sonar off the U.S. West Coast, one of several such cases in recent years.¶ ¶ But as the AP reports, the DOD has already learned what can happen if it's too cavalier about the wildlife whose habitats it shares. San Clemente Island is currently the U.S. Navy's only ship-to-shore bombing range, but it used to have two: A former range on Vieques, Puero Rico, was closed in 2003 after years of protests over the environmental and health effects of naval exercises. Much of Vieques is now a national wildlife refuge.¶ ¶ "If we were to abuse the island," a naval commander tells the AP, "we would lose it."¶ ¶ Many environmentalists and scientists are still worried about the effect of sonar on whales, and while the Navy has at times reacted defensively to such concerns, it's not ignoring them. As part of a "ground-breaking" behavioral response study on cetaceans and sonar, two Navy ships recently joined independent researchers off the California coast to tag several whales and dolphins. The Navy is currently seeking renewal of federal permits for testing and training exercises in the Atlantic and Pacific, and data from such studies are used in yearly "adaptive management discussions" with the National Marine Fisheries Service. A second phase of the research is slated to begin in September.¶ ¶ "USS Dewey was honored to be a part of this vital study," Cmdr. Jake Douglas, commanding officer of USS Dewey, says in a statement. "We take environmental stewardship seriously in our role as operators, and want nothing more than to be able to do our mission while protecting our environment."

#### Status quo solves- new military programs help the environment

Russell McLendon 8/13/13, Science editor at Mother Nature Network, 8/13/13, "American military, wildlife learning to coexist," http://www.mnn.com/earth-matters/animals/blogs/american-military-wildlife-learning-to-coexist

¶ War is hell for everyone involved, including wildlife. But beyond the heat of the battle — where large tracts of land are often set aside for training, storage or other purposes — human conflict can actually be a boon for wild plants and animals.¶ ¶ One well-known example is the Korean Demilitarized Zone, a forested border between North and South Korea where the danger to people has created an inadvertent nature preserve. But smaller military menageries exist in many parts of the world, including North America, and some are less accidental than others. The U.S. military is increasingly embracing this role, for example, protecting national ecology as well as security.¶ ¶ "The Defense Department has a dedication to the environment that is wider in scope than a lot of people are familiar with," said John Conger, acting deputy undersecretary of defense for installations and environment, at a panel discussion on the issue last month. "We spend $4 billion a year on our environmental programs."¶ ¶ The U.S. military manages nearly 30 million acres of land nationwide, Conger added, on which it hosts 420 federally listed endangered or threatened species and 523 at-risk species. About 2 percent of the former and 14 percent of the latter exist only on Department of Defense property. And according to a recent report by the Associated Press, DOD spending on endangered and threatened species grew by nearly 45 percent over the past decade, from about $50 million in 2003 to about $73 million in 2012.¶ ¶ The Pentagon doesn't have a stellar reputation as an ecological steward. Military leaders have long sought exemptions from environmental laws, and the Navy still frequently clashes with animal advocates who say its sonar harms whales. At the same time, though, U.S. armed forces have been quietly setting aside swaths of habitat for hundreds of vulnerable plants and animals, often partnering with environmental advocacy groups.¶ ¶ The military's ecological efforts vary widely in scale. The Army's Joint Base Lewis-McChord, for example, has installed bridges over streams to prevent military vehicles from damaging the waterways and disrupting salmon spawning grounds. In July, the base also received $12.6 million from governments and nonprofit groups to preserve prairie habitat for Mazama pocket gophers, Taylor's checkerspot butterflies and other native species.

### AT: Biodiversity

#### No impact to biodiversity

Sagoff 97  Mark, Senior Research Scholar – Institute for Philosophy and Public policy in School of Public Affairs – U. Maryland, William and Mary Law Review, “INSTITUTE OF BILL OF RIGHTS LAW SYMPOSIUM DEFINING TAKINGS: PRIVATE PROPERTY AND THE FUTURE OF GOVERNMENT REGULATION: MUDDLE OR MUDDLE THROUGH? TAKINGS JURISPRUDENCE MEETS THE ENDANGERED SPECIES ACT”, 38 Wm and Mary L. Rev. 825, March, L/N

Note – Colin Tudge - Research Fellow at the Centre for Philosophy at the London School of Economics. Frmr Zoological Society of London: Scientific Fellow and tons of other positions. PhD. Read zoology at Cambridge.

Simon Levin = Moffet Professor of Biology, Princeton. 2007 American Institute of Biological Sciences Distinguished Scientist Award 2008 Istituto Veneto di Scienze Lettere ed Arti 2009 Honorary Doctorate of Science, Michigan State University 2010 Eminent Ecologist Award, Ecological Society of America 2010 Margalef Prize in Ecology, etc… PhD

Although one may agree with ecologists such as Ehrlich and Raven that the earth stands on **the brink of** an episode of **massive extinction, it may not follow** from this grim fact **that human** being**s will suffer** as a result. On the contrary, skeptics such as science writer Colin Tudge have challenged biologists to explain **why we need more than a tenth of the 10 to 100 million species that grace the earth**. Noting that "cultivated systems often out-produce wild systems by 100-fold or more," Tudge declared that "the argument that humans need the variety of other species is, when you think about it, a theological one." n343 Tudge observed that "the elimination of all but a tiny minority **of our fellow creatures does not affect the material well-being of humans** one iota."n344 This skeptic challenged ecologists to list more than 10,000 species (other than unthreatened microbes) that are essential to ecosystem productivity or functioning. n345 "**The human species could survive just as well** if 99.9% of our fellow creatures went extinct, provided only that we retained the appropriate 0.1% that we need." n346   [\*906]   The monumental Global Biodiversity Assessment ("the Assessment") identified two positions with respect to redundancy of species. "At one extreme is the idea that each species is unique and important, such that its removal or loss will have demonstrable consequences to the functioning of the community or ecosystem." n347 The authors of the Assessment, a panel of eminent ecologists, endorsed this position, saying it is "unlikely that there is much, if any, ecological redundancy in communities over time scales of decades to centuries, the time period over which environmental policy should operate." n348 These eminent ecologists rejected the opposing view, "the notion that species overlap in function to a sufficient degree that removal or loss of a species will be compensated by others, with negligible overall consequences to the community or ecosystem." n349  Other biologists believe, however, that species are so fabulously redundant in the ecological functions they perform that the life-support systems and processes of the planet and ecological processes in general will function perfectly well with fewer of them, certainly fewer than the millions and millions we can expect to remain **even if** **every threatened organism becomes extinct**. n350 Even the kind of sparse and miserable world depicted in the movie Blade Runner could provide a "sustainable" context for the human economy as long as people forgot their aesthetic and moral commitment to the glory and beauty of the natural world. n351 The Assessment makes this point. "Although any ecosystem contains hundreds to thousands of species interacting among themselves and their physical environment, the emerging consensus is that the system is driven by a small number of . . . biotic variables on whose interactions the balance of species are, in a sense, carried along." n352   [\*907]   To make up your mind on the question of the functional redundancy of species, consider an endangered species of bird, plant, or insect and ask how the ecosystem would fare in its absence. The fact that the creature is endangered suggests an answer: it is already in limbo as far as ecosystem processes are concerned. What crucial ecological services does the black-capped vireo, for example, serve? Are any of the species threatened with extinction necessary to the provision of any ecosystem service on which humans depend? If so, which ones are they?  Ecosystems and the species that compose them have changed, dramatically, continually, and totally in virtually every part of the United States. There is little ecological similarity, for example, between New England today and the land where the Pilgrims died. n353 In view of the constant reconfiguration of the biota, **one may wonder why Americans have not suffered more as a result of ecological catastrophes**. The cast of species in nearly every environment changes constantly-local extinction is commonplace in nature-but the crops still grow. Somehow, it seems, property values keep going up on Martha's Vineyard in spite of the tragic disappearance of the heath hen.  One might argue that the sheer number and variety of creatures available to any ecosystem buffers that system against stress. Accordingly, we should be concerned if the "library" of creatures ready, willing, and able to colonize ecosystems gets too small. (Advances in genetic engineering may well permit us to write a large number of additions to that "library.") In the United States as in many other parts of the world, however, the number of species has been increasing dramatically, not decreasing, as a result of human activity. This is because the hordes of exotic species coming into ecosystems in the United States far exceed the number of species that are becoming extinct. Indeed, introductions may outnumber extinctions by more than ten to one, so that the United States is becoming more and more species-rich all the time largely as a result of human action. n354 [\*908] Peter Vitousek and colleagues estimate that over 1000 non-native plants grow in California alone; in Hawaii there are 861; in Florida, 1210. n355 In Florida more than 1000 non-native insects, 23 species of mammals, and about 11 exotic birds have established themselves. n356 Anyone who waters a lawn or hoes a garden knows how many weeds desire to grow there, how many birds and bugs visit the yard, and how many fungi, creepy-crawlies, and other odd life forms show forth when it rains. All belong to nature, from wherever they might hail, but not many homeowners would claim that there are too few of them. Now, not all exotic species provide ecosystem services; indeed, some may be disruptive or have no instrumental value. n357 This also may be true, of course, of native species as well, especially because all exotics are native somewhere. Certain exotic species, however, such as Kentucky blue grass, establish an area's sense of identity and place; others, such as the green crabs showing up around Martha's Vineyard, are nuisances. n358 Consider an analogy [\*909] with human migration. Everyone knows that after a generation or two, immigrants to this country are hard to distinguish from everyone else. The vast majority of Americans did not evolve here, as it were, from hominids; most of us "came over" at one time or another. This is true of many of our fellow species as well, and they may fit in here just as well as we do. It is possible to distinguish exotic species from native ones for a period of time, just as we can distinguish immigrants from native-born Americans, but as the centuries roll by, species, like people, fit into the landscape or the society, changing and often enriching it. Shall we have a rule that a species had to come over on the Mayflower, as so many did, to count as "truly" American? Plainly not. When, then, is the cutoff date? Insofar as we are concerned with the absolute numbers of "rivets" holding ecosystems together, extinction seems not to pose a general problem because a far greater number of kinds of mammals, insects, fish, plants, and other creatures thrive on land and in water in America today than in prelapsarian times. n359 The Ecological Society of America has urged managers to maintain biological diversity as a critical component in strengthening ecosystems against disturbance. n360 Yet as Simon Levin observed, "much of the detail about species composition will be irrelevant in terms of influences on ecosystem properties." n361 [\*910] He added: "For net primary productivity, as is likely to be the case for any system property, **biodiversity matters only up to a point**; above a certain level, increasing biodiversity is likely to make **little difference**." n362 What about the use of plants and animals in agriculture? There is no scarcity foreseeable. "Of an estimated 80,000 types of plants [we] know to be edible," a U.S. Department of the Interior document says, "only about 150 are extensively cultivated." n363 About twenty species, not one of which is endangered, provide ninety percent of the food the world takes from plants. n364 Any new food has to take "shelf space" or "market share" from one that is now produced. Corporations also find it difficult to create demand for a new product; for example, people are not inclined to eat paw-paws, even though they are delicious. It is hard enough to get people to eat their broccoli and lima beans. It is harder still to develop consumer demand for new foods. This may be the reason the Kraft Corporation does not prospect in remote places for rare and unusual plants and animals to add to the world's diet. Of the roughly 235,000 flowering plants and 325,000 nonflowering plants (including mosses, lichens, and seaweeds) available, farmers ignore virtually all of them in favor of a very few that are profitable. n365 To be sure, any of the more than 600,000 species of plants could have an application in agriculture, but would they be preferable to the species that are now dominant? Has anyone found any consumer demand for any of these half-million or more plants to replace rice or wheat in the human diet? There are reasons that farmers cultivate rice, wheat, and corn rather than, say, Furbish's lousewort. There are many kinds of louseworts, so named because these weeds were thought to cause lice in sheep. How many does agriculture really require? [\*911] The species on which agriculture relies are domesticated, not naturally occurring; they are developed by artificial not natural selection; they might not be able to survive in the wild. n366 This argument is not intended to deny the religious, aesthetic, cultural, and moral reasons that command us to respect and protect the natural world. These spiritual and ethical values should evoke action, of course, but we should also recognize that they are spiritual and ethical values. We should recognize that ecosystems and all that dwell therein compel our moral respect, our aesthetic appreciation, and our spiritual veneration; we should clearly seek to achieve the goals of the ESA. There is no reason to assume, however, that these goals have anything to do with human well-being or welfare as economists understand that term. These are ethical goals, in other words, not economic ones. Protecting the marsh may be the right thing to do for moral, cultural, and spiritual reasons. We should do it-but someone will have to pay the costs. In the narrow sense of promoting human welfare, protecting nature often represents a net "cost," not a net "benefit." It is largely for moral, not economic, reasons-ethical, not prudential, reasons- that we care about all our fellow creatures. They are valuable as objects of love not as objects of use. What is good for   [\*912]  the marsh may be good in itself even if it is not, in the economic sense, good for mankind. The most valuable things are quite useless.

### AT: Environment Collapse

#### No impact to the environment and no solvency

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

Reluctant to concede such losses, tellers of the ecological horror story highlight how close a catastrophe might be, and how little we know about what actions might trigger one. But the apocalyptic vision is **less credible today than it seemed in the 1970s.** Although it is clear that the earth is experiencing a mass wave of extinctions, n213 the **complete elimination of life on earth seems unlikely.** n214 **Life is remarkably robust**. **Nor is human extinction probable** any time soon. Homo sapiens is **adaptable to nearly any environment**. Even if the world of the future includes far fewer species, it likely will hold people. n215 One response to this credibility problem tones the story down a bit, arguing not that humans will go extinct but that ecological disruption will bring economies, and consequently civilizations, to their knees. n216 But this too may be **overstating the case**. Most ecosystem functions are **performed by multiple species**. This **functional redundancy** means that **a high proportion of species can be lost without precipitating a collapse**. n217 Another response drops the horrific ending and returns to a more measured discourse of the many material benefits nature provides humanity. Even these more plausible tales, though, suffer from an important limitation. They call for nature protection only at a high level of generality. For example, human-induced increases in atmospheric carbon dioxide levels may cause rapid changes in global temperatures in the near future, with drastic consequences for sea levels, weather patterns, and ecosystem services. n218 Similarly, the loss of large numbers of species undoubtedly reduces the genetic library from which we might in the future draw useful resources. n219 But it is difficult to translate these insights into convincing arguments against any one of the small local decisions that contribute to the problems of global warming or biodiversity loss. n220 It is easy to argue that **the** material **impact of any individual decision to increase** carbon **emissions slightly or to destroy a small amount of habitat will be small.** It is difficult to identify the specific straw that will break the camel's back. Furthermore, **no unilateral action at the local or even national level can solve these global problems**. Local decisionmakers may feel paralyzed by the scope of the problems, or may conclude that any sacrifices they might make will go unrewarded if others do not restrain their actions. In sum, at the local level at which most decisions affecting nature are made, the material discourse provides little reason to save nature. Short of the ultimate catastrophe, the material benefits of destructive decisions frequently will exceed their identifiable material costs. n221

### AT: Heg

#### Environment not key to leadership

Brooks 5—Prof Government, Dartmouth. BA in economics and politics, UC Santa Cruz. MA, MPhil, PhD in pol sci, Yale. (Stephen and William Wohlforth, Perspectives on Politics 3:509-524)

Drawing on rational choice theory, Downs and Jones show that a far more compelling theoretical case can be made that states have multiple reputations—each particular to a specific agreement or issue area. For this reason, they find that "the reputational, consequences of defection are usually more bounded" than institutionalist scholarship currently presumes." 67 If America has, for example, one reputation associated with the UN and another regarding the WTO, then lack of compliance with the former organization will in no way directly undercut its ability to gain cooperation in the latter. As Downs and Jones note, viewing states as having multiple reputations "helps to explain why, despite the prevalence of the unitary reputation assumption, examples of a state's defection from an agreement in one area (for example, environment) jeopardizing its reputation in every other area (for example, trade and security) are virtually nonexistent in the literature." 68 This conclusion is consistent with the two most detailed studies of reputation in IR, which decisively undercut the notion that states have a general reputation that will strongly influence how other states relate across different issue areas. 69

#### No impact to hegemony

Friedman 10 Ben, research fellow in defense and homeland security, Cato. PhD candidate in pol sci, MIT, Military Restraint and Defense Savings, 20 July, http://www.cato.org/testimony/ct-bf-07202010.html

Another argument for high military spending is that U.S. military hegemony underlies global stability. Our forces and alliance commitments dampen conflict between potential rivals like China and Japan, we are told, preventing them from fighting wars that would disrupt trade and cost us more than the military spending that would have prevented war. The theoretical and empirical foundation for this claim is weak. It overestimates both the American military's contribution to international stability and the danger that instability abroad poses to Americans. In Western Europe, U.S. forces now contribute little to peace, at best making the tiny odds of war among states there slightly more so.7 Even in Asia, where there is more tension, the history of international relations suggests that without U.S. military deployments potential rivals, especially those separated by sea like Japan and China, will generally achieve a stable balance of power rather than fight. In other cases, as with our bases in Saudi Arabia between the Iraq wars, U.S. forces probably create more unrestthan they prevent. Our force deployments can also generate instability by prompting states to develop nuclear weapons. Even when wars occur, their economic impact is likely to be limited here.8 By linking markets, globalization provides supply alternatives for the goods we consume, including oil. If political upheaval disrupts supply in one location, suppliers elsewhere will take our orders. Prices may increase, but markets adjust. That makes American consumers less dependent on any particular supply source, undermining the claim that we need to use force to prevent unrest in supplier nations or secure trade routes.9 Part of the confusion about the value of hegemony comes from misunderstanding the Cold War. People tend to assume, falsely, that our activist foreign policy, with troops forward supporting allies, not only caused the Soviet Union's collapse but is obviously a good thing even without such a rival. Forgotten is the sensible notion that alliances are a necessary evil occasionally tolerated to balance a particularly threatening enemy. The main justification for creating our Cold War alliances was the fear that Communist nations could conquer or capture by insurrection the industrial centers in Western Europe and Japan and then harness enough of that wealth to threaten us — either directly or by forcing us to become a garrison state at ruinous cost. We kept troops in South Korea after 1953 for fear that the North would otherwise overrun it. But these alliances outlasted the conditions that caused them. During the Cold War, Japan, Western Europe and South Korea grew wealthy enough to defend themselves. We should let them. These alliances heighten our force requirements and threaten to drag us into wars, while providing no obvious benefit.

### AT: SoPo

#### Soft power resilient — overcomes their legitimacy internals

Brooks and Wohlforth 9 (Stephen Brooks and William Wohlforth, both are professors of Government at Dartmouth, “Reshaping the world order: how Washington should reform international institutions,” Foreign Affairs, March-April)

FOR ANALYSTS such as Zbigniew Brzezinski and Henry Kissinger, the key reason for skepticism about the United States' ability to spearhead global institutional change is not a lack of power but a lack of legitimacy. Other states may simply refuse to follow a leader whose legitimacy has been squandered under the Bush administration; in this view, the legitimacy to lead is a fixed resource that can be obtained only under special circumstances. The political scientist G.John Ikenberry argues in After Victory that states have been well positioned to reshape the institutional order only after emerging victorious from some titanic struggle, such as the French Revolution, the Napoleonic Wars, or World War I or II. For the neoconservative Robert Kagan, the legitimacy to lead came naturally to the United States during the Cold War, when it was providing the signal service of balancing the Soviet Union. The implication is that today, in the absence of such salient sources of legitimacy, the wellsprings of support for U.S. leadership have dried up for good. But this view is mistaken. For one thing, it overstates how accepted U.S. leadership was during the Cold War: anyone who recalls the Euromissile crisis of the 1980s, for example, will recognize that mass opposition to U.S. policy (in that case, over stationing intermediaterange nuclear missiles in Europe) is not a recent phenomenon. For another, it understates how dynamic and malleable legitimacy is. Legitimacy is based on the belief that an action, an actor, or a political order is proper, acceptable, or natural. An action - such as the Vietnam War or the invasion of Iraq - may come to be seen as illegitimate without sparking an irreversible crisis of legitimacy for the actor or the order. When the actor concerned has disproportionately more material resources than other states, the sources of its legitimacy can be refreshed repeatedly. After all, this is hardly the first time Americans have worried about a crisis of legitimacy. Tides of skepticism concerning U.S. leadership arguably rose as high or higher after the fall of Saigon in 1975 and during Ronald Reagan's first term, when he called the Soviet Union an "evil empire." Even George W. Bush, a globally unpopular U.S. president with deeply controversial policies,oversaw a marked improvement in relations with France, Germany, and India in recent years - even before the elections of Chancellor Angela Merkel in Germany and President Nicolas Sarkozy in France. Of course, the ability of the United States to weather such crises of legitimacy in the past hardly guarantees that it can lead the system in the future. But there are reasons for optimism. Some of the apparent damage to U.S. legitimacy might merely be the result of the Bush administration's approach to diplomacy and international institutions. Key underlying conditions remain particularly favorable for sustaining and even enhancing U.S. legitimacy in the years ahead. The United States continues to have a far larger share of the human and material resources for shaping global perceptions than any other state, as well as the unrivaled wherewithal to produce public goods that reinforce the benefits of its global role. No other state has any claim to leadership commensurate with Washington's. And largely because of the power position the United States still occupies, there is no prospect of a counterbalancing coalition emerging anytime soon to challenge it. In the end, the legitimacy of a system's leader hinges on whether the system's members see the leader as acceptable or at least preferable to realistic alternatives. Legitimacy is not necessarily about normative approval: one may dislike the United States but think its leadership is natural under the circumstances or the best that can be expected. Moreover, history provides abundant evidence that past leading states - such as Spain, France, and the United Kingdom - were able to revise the international institutions of their day without the special circumstances Ikenberry and Kagan cite. Spainfashioned both normative and positive laws to legitimize its conquest of indigenous Americans in the early seventeenth century; France instituted modern concepts of state borders to meet its needs as Europe's preeminent land power in the eighteenth century; and the United Kingdom fostered rules on piracy, neutral shipping, and colonialism to suit its interests as a developing maritime empire in the nineteenth century. As Wilhelm Grewe documents in his magisterial The Epochs of International Law, these states accomplished such feats partly through the unsubtle use of power: bribes, coercion, and the allure oflucrative long-term cooperation. Less obvious but often more important, the bargaining hands of the leading states were often strengthened by the general perception that they could pursue their interests in even less palatable ways - notably, through the naked use of force. Invariably, too, leading states have had the power to set the international agenda, indirectly affecting the development of new rules by defining the problems they were developed to address. Given its naval primacy and global trading interests, the United Kingdom was able to propel the slave trade to the forefront of the world's agenda for several decades after it had itself abolished slavery at home, in 1833. The bottom line is that the UnitedStates today has the necessary legitimacy to shepherd reform of the international system.

### AT: Warming

#### No impact---mitigation and adaptation will solve---no tipping point or “1% risk” args

Robert O. Mendelsohn 9, the Edwin Weyerhaeuser Davis Professor, Yale School of Forestry and Environmental Studies, Yale University, June 2009, “Climate Change and Economic Growth,” online: http://www.growthcommission.org/storage/cgdev/documents/gcwp060web.pdf

The heart of the debate about climate change comes from a number of warnings from scientists and others that give the impression that human-induced climate change is an immediate threat to society (IPCC 2007a,b; Stern 2006). Millions of people might be vulnerable to health effects (IPCC 2007b), crop production might fall in the low latitudes (IPCC 2007b), water supplies might dwindle (IPCC 2007b), precipitation might fall in arid regions (IPCC 2007b), extreme events will grow exponentially (Stern 2006), and between 20–30 percent of species will risk extinction (IPCC 2007b). Even worse, there may be catastrophic events such as the melting of Greenland or Antarctic ice sheets causing severe sea level rise, which would inundate hundreds of millions of people (Dasgupta et al. 2009). Proponents argue there is no time to waste. Unless greenhouse gases are cut dramatically today, economic growth and well‐being may be at risk (Stern 2006).

These statements are largely alarmist and misleading. Although climate change is a serious problem that deserves attention, society’s immediate behavior has an extremely low probability of leading to catastrophic consequences. The science and economics of climate change is quite clear that emissions over the next few decades will lead to only mild consequences. The severe impacts predicted by alarmists require a century (or two in the case of Stern 2006) of no mitigation. Many of the predicted impacts assume there will be no or little adaptation. The net economic impacts from climate change over the next 50 years will be small regardless. Most of the more severe impacts will take more than a century or even a millennium to unfold and many of these “potential” impacts will never occur because people will adapt. It is not at all apparent that immediate and dramatic policies need to be developed to thwart long‐range climate risks. What is needed are long‐run balanced responses.

## New Adv

### China Won’t Model

#### Chinese judiciary won’t listen on the environment

#### China won’t model – even if they do, can’t solve

Yvonne Chan 9 in Hong Kong, BusinessGreen, 9/17/09, China's rapid growth imperils global climate change goal, says study, http://www.businessgreen.com/business-green/news/2249644/china-rapid-growth-imperils

China's booming economic growth imperils a global target to limit global warming to two degrees, according to a major new report from an influential government think-tank.

Released yesterday by the Energy Research Institute, China's Low Carbon Development Pathways by 2050 says that even if the nation were to embark on an aggressive strategy to cut greenhouse gas emissions, halting CO2 growth would be difficult given the country's current stage of rapid economic development.

"There is a huge number of cities to be built," study co-author He Jiankun told reporters. "They will consume a large amount of steel and cement. This means that **emissions will not be reduced for some time."**

The problem with the global target, according to the report, was that the two-degree limit – which was formally adopted by G8 nations in July – does not make adequate concessions for the industrialisation of developing countries.

The report said that in order to even get close to the target, it was up to wealthy nations to make carbon emission cuts of at least 90 per cent on 1990 levels by 2050. Otherwise, global temperatures will rise between 2.8 and 3.2 degrees above the pre-industrial average, estimated the report, which was conducted over a two-year period and had involved 10 independent institutes, including WWF and the US-based Energy Foundation.

### AT: CCP Collapse

#### No lashout – CCP knows it would be suicide and PLA wouldn’t support it

Gilley 4 [Bruce, former contributing editor at the Far Eastern Economic Review, M.A. Oxford, 2004, China’s Democratic Future, p. 114]

Yet the risks, even to a dying regime, may be too high. An unprovoked attack on Taiwan would almost certainly bring the U.S. and its allies to the island's rescue. Those forces would not stop at Taiwan but might march on Beijing and oust the CCP, or attempt to do so through stiff sanctions, calling it a threat to regional and world peace. Such an attack might also face the opposition of the peoples of Fujian, who would be expected to provide logis¬tical support and possibly bear the worst burdens of war. They, like much of coastal China, look to Taiwan for investment and culture and have a close affinity with the island. As a result, there are doubts about whether such a plan could be put into action. A failed war would prompt a Taiwan declaration of independence and a further backlash against the CCP at home, just as the May Fourth students of 1919 berated the Republican government for weakness in the face of foreign powers. Failed wars brought down authoritarian regimes in Greece and Portugal in 1974 and in Argentina in 1983. Even if CCP leaders wanted war, it is unlikely that the PLA would oblige. Top officers would see the disastrous implications of attacking Taiwan. Military caution would also guard against the even wilder scenario of the use of nuclear weapons against Japan or the U.S.47 At the height of the Tiananmen protests it appears there was consideration given to the use of nuclear weapons in case the battle to suppress the protestors drew in outside countries.48 But even then, the threats did not appear to gain even minimal support. In an atmosphere in which the military is thinking about its future, the resort to nuclear confrontation would not make sense.

### AT: Bioweapons

#### No impact

O’Neill 4O’Neill 8/19/2004 [Brendan, “Weapons of Minimum Destruction” http://www.spiked-online.com/Articles/0000000CA694.htm]

David C Rapoport, professor of political science at University of California, Los Angeles and editor of the Journal of Terrorism and Political Violence, has examined what he calls 'easily available evidence' relating to the historic use of chemical and biological weapons. He found something surprising - such weapons do not cause mass destruction. Indeed, whether used by states, terror groups or dispersed in industrial accidents, they tend to be far less destructive than conventional weapons. 'If we stopped speculating

about things that might happen in the future and looked instead at what has happened in the past, we'd see that our fears about WMD are misplaced', he says. Yet such fears remain widespread. Post-9/11, American and British leaders have issued dire warnings about terrorists getting hold of WMD and causing mass murder and mayhem. President George W Bush has spoken of terrorists who, 'if they ever gained weapons of mass destruction', would 'kill hundreds of thousands, without hesitation and without mercy' (1). The British government has spent £28million on stockpiling millions of smallpox vaccines, even though there's no evidence that terrorists have got access to smallpox, which was eradicated as a natural disease in the 1970s and now exists only in two high-security labs in America and Russia (2). In 2002, British nurses became the first in the world to get training in how to deal with the victims of bioterrorism (3). The UK Home Office's 22-page pamphlet on how to survive a terror attack, published last month, included tips on what to do in the event of a 'chemical, biological or radiological attack' ('Move away from the immediate source of danger', it usefully advised). Spine-chilling books such as Plague Wars: A True Story of Biological Warfare, The New Face of Terrorism: Threats From Weapons of Mass Destruction and The Survival Guide: What to Do in a Biological, Chemical or Nuclear Emergency speculate over what kind of horrors WMD might wreak. TV docudramas, meanwhile, explore how Britain might cope with a smallpox assault and what would happen if London were 'dirty nuked' (4). The term 'weapons of mass destruction' refers to three types of weapons: nuclear, chemical and biological. A chemical weapon is any weapon that uses a manufactured chemical, such as sarin, mustard gas or hydrogen cyanide, to kill or injure. A biological weapon uses bacteria or viruses, such as smallpox or anthrax, to cause destruction - inducing sickness and disease as a means of undermining enemy forces or inflicting civilian casualties. We find such weapons repulsive, because of the horrible way in which the victims convulse and die - but they appear to be less 'destructive' than conventional weapons. 'We know that nukes are massively destructive, there is a lot of evidence for that', says Rapoport. But when it comes to chemical and biological weapons, 'the evidence suggests that we should call them "weapons of minimum destruction", not mass destruction', he says. Chemical weapons have most commonly been used by states, in military warfare. Rapoport explored various state uses of chemicals over the past hundred years: both sides used them in the First World War; Italy deployed chemicals against the Ethiopians in the 1930s; the Japanese used chemicals against the Chinese in the 1930s and again in the Second World War; Egypt and Libya used them in the Yemen and Chad in the postwar period; most recently, Saddam Hussein's Iraq used chemical weapons, first in the war against Iran (1980-1988) and then against its own Kurdish population at the tail-end of the Iran-Iraq war. In each instance, says Rapoport, chemical weapons were used more in desperation than from a position of strength or a desire to cause mass destruction. 'The evidence is that states rarely use them even when they have them', he has written. 'Only when a military stalemate has developed, which belligerents who have become desperate want to break, are they used.' (5) As to whether such use of chemicals was effective, Rapoport says that at best it blunted an offensive - but this very rarely, if ever, translated into a decisive strategic shift in the war, because the original stalemate continued after the chemical weapons had been deployed. He points to the example of Iraq. The Baathists used chemicals against Iran when that nasty trench-fought war had reached yet another stalemate. As Efraim Karsh argues in his paper 'The Iran-Iraq War: A Military Analysis': 'Iraq employed [chemical weapons] only in vital segments of the front and only when it saw no other way to check Iranian offensives. Chemical weapons had a negligible impact on the war, limited to tactical rather than strategic [effects].' (6) According to Rapoport, this 'negligible' impact of chemical weapons on the direction of a war is reflected in the disparity between the numbers of casualties caused by chemicals and the numbers caused by conventional weapons. It is estimated that the use of gas in the Iran-Iraq war killed 5,000 - but the Iranian side suffered around 600,000 dead in total, meaning that gas killed less than one per cent. The deadliest use of gas occurred in the First World War but, as Rapoport points out, it still only accounted for five per cent of casualties. Studying the amount of gas used by both sides from1914-1918 relative to the number of fatalities gas caused, Rapoport has written: 'It took a ton of gas in that war to achieve a single enemy fatality. Wind and sun regularly dissipated the lethality of the gases. Furthermore, those gassed were 10 to 12 times as likely to recover than those casualties produced by traditional weapons.' (7) Indeed, Rapoport discovered that some earlier documenters of the First World War had a vastly different assessment of chemical weapons than we have today - they considered the use of such weapons to be preferable to bombs and guns, because chemicals caused fewer fatalities. One wrote: 'Instead of being the most horrible form of warfare, it is the most humane, because it disables far more than it kills, ie, it has a low fatality ratio.' (8) 'Imagine that', says Rapoport, 'WMD being referred to as more humane'. He says that the contrast between such assessments and today's fears shows that actually looking at the evidence has benefits, allowing 'you to see things more rationally'. According to Rapoport, even Saddam's use of gas against the Kurds of Halabja in 1988 - the most recent use by a state of chemical weapons and the most commonly cited as evidence of the dangers of 'rogue states' getting their hands on WMD - does not show that unconventional weapons are more destructive than conventional ones. Of course the attack on Halabja was horrific, but he points out that the circumstances surrounding the assault remain unclear. 'The estimates of how many were killed vary greatly', he tells me. 'Some say 400, others say 5,000, others say more than 5,000. The fighter planes that attacked the civilians used conventional as well as unconventional weapons; I have seen no study which explores how many were killed by chemicals and how many were killed by firepower. We all find these attacks repulsive, but the death toll may actually have been greater if conventional bombs only were used. We know that conventional weapons can be more destructive.' Rapoport says that terrorist use of chemical and biological weapons is similar to state use - in that it is rare and, in terms of causing mass destruction, not very effective. He cites the work of journalist and author John Parachini, who says that over the past 25 years only four significant attempts by terrorists to use WMD have been recorded. The most effective WMD-attack by a non-state group, from a military perspective, was carried out by the Tamil Tigers of Sri Lanka in 1990. They used chlorine gas against Sri Lankan soldiers guarding a fort, injuring over 60 soldiers but killing none. The Tamil Tigers' use of chemicals angered their support base, when some of the chlorine drifted back into Tamil territory - confirming Rapoport's view that one problem with using unpredictable and unwieldy chemical and biological weapons over conventional weapons is that the cost can be as great 'to the attacker as to the attacked'. The Tigers have not used WMD since.

# Block

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### Deference Now---Legal Clarification Key

#### SQ rulings haven’t clarified the legal debate---the plan does

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

To be sure, the Supreme Court has decided some well-known national security cases. Among them are the Steel Seizure case, Youngstown Sheet & Tube Co. v. Sawyer; n2 the Pentagon Papers case, New York Times Co. v. United States; n3 the Iranian hostage case, Dames & Moore v. Regan; n4 and some notable First Amendment cases arising out of World War I, such as Schenck v. United States n5 and Abrams v. United States. n6 Then there are the Japanese internment decisions during World War II, notably Korematsu v. United States, n7 as well as Ex parte Quirin, n8 which upheld the use of military commissions to try German agents who landed in the United States as part of a sabotage mission. Most recently, the Supreme Court has addressed questions arising from the government's response to the attacks of September 11, 2001, in such cases as Hamdi v. Rumsfeld, n9 Hamdan v. Rumsfeld, n10 and Boumediene v. Bush. n11 These cases do matter, but they have not clearly resolved the constitutional and other legal issues that pervade the debate about presidential power and foreign affairs.

Beyond the limitations of the Supreme Court rulings, the judiciary probably will not contribute very much to the debate. Various procedural and jurisdictional obstacles make it difficult for courts to address the merits of disputes about war powers and foreign affairs. Even if those obstacles can be surmounted, those who decry what they view as presidential excess should note that the judiciary typically has taken a deferential role in reviewing challenges to executive action.

### Deference Now---Broad Trends

#### Prefer our uniqueness---only our authors analyze the relative importance of rulings on deference while theirs assumes they’re all the same

John O’Connor 7, Former officer in the Marine Corp and Judge Advocate; JD, U Maryland Law School. Statistics and the Military Deference Doctrine: a Response to Professor Lichtman, 66 Md. L. Rev. 668, Lexis

[\*670] Professor Lichtman's article is a useful contribution to the existing literature on the military deference doctrine because it challenges a number of orthodoxies concerning the doctrine, such as the best way to group cases for analysis, as well as the origins and scope of the doctrine itself. Nevertheless, as someone who has studied and written about the military deference doctrine in some detail, n8 I have given considerable thought to Professor Lichtman's arguments and, upon deliberation, remain unconvinced as to several of the central theses of Professor Lichtman's analysis. Most of my criticisms of Professor Lichtman's analysis stem from his overly generalized approach to the military deference doctrine, one that tries to draw conclusions about the doctrine from statistics, instead of by reading and analyzing what the cases actually say. Indeed, by conducting his analysis solely by keeping track of "wins" and "losses," without delving into the analytical underpinnings of the Court's military deference jurisprudence, Professor Lichtman conducts his analysis from the wrong pool of cases and, consequently, arrives at substantive conclusions that are not justified by the existing case law.

As Part II of this Article explains, Professor Lichtman's analysis is flawed in that he begins with the faulty assumption that the military deference doctrine is best analyzed by taking into account the Supreme Court's decisions in the entire universe of "military" decisions, that is, every decision before the Court in which the military was a litigant. A review of the cases actually applying the military deference framework, however, makes clear that the rationale behind the doctrine will only support its application in a narrow category of "military" cases - cases where a challenge to statutes or regulations relating to the military require the Court, as part of its analysis, to weigh the government interest in the challenged statute or regulation. By beginning with a pool of cases that is over-inclusive in the extreme, Professor Lichtman is essentially attempting to draw conclusions about the military deference doctrine from the results in a universe of cases, the vast majority of which would never trigger deferential review.

### Salaries Key Judicial Independence

#### Cutting judicial salaries wrecks court legitimacy and independence – prevents life tenure

Stephen L. Carter, law prof @ Yale, 2-21-2013, “The Other Crisis Facing the Federal Judiciary,” Bloomberg, http://www.bloomberg.com/news/2013-02-21/the-other-crisis-facing-the-federal-judiciary.html

The problem isn’t going away. A recent survey asked retired federal judges why they stepped down. Although judges leave for complex reasons, the most common explanation was a desire to earn additional income. “Grossly inadequate salary is demeaning and necessitated my retirement,” one judge wrote. “Had judges been fairly compensated I never would have retired.” Another was even more blunt: “Had Congress kept its promise of $125,000 in constant 1989 dollars, I would still be on the bench.” Some context: $125,000 in 1989 dollars would be about $228,000 in 2012 dollars. A federal district judge currently receives an annual salary of $174,000. To most Americans, that probably sounds like a lot of money. But there are literally hundreds of executive-branch employees who earn more. So do first-year associates at many large law firms. By effectively cutting judicial compensation -- and make no mistake, that is what has happened -- Congress is reducing the incentives to remain on the bench for life. The framers would have been appalled. Article III of the Constitution reads that judges “shall hold their offices during good behavior.” As a non-Catholic, it is not for me to say whether life tenure for the pope is an indispensable feature of the faith. But the framers of the Constitution certainly believed it to be an indispensable feature of an independent judiciary. Alexander Hamilton, in Federalist No. 78, suggested a relationship between life tenure and the quality of those who would be willing to serve: “Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.” Why does this matter? Because “a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.” Life tenure, then, was seen as the price of persuading talented lawyers to give up the lucrative work of practicing law. At the time of the framing, judicial compensation was set in part with the idea that the judges should find a lifetime of federal service lucrative, too. Jarring Interests John Adams, in his “Thoughts on Government,” expressed a similar view of the ideal judges: “Their minds should not be distracted with complicated jarring interests -- they should not be dependent on any man, or body of men; they should lean to none, be subservient to none, nor more complaisant to one than another. To this end they should hold Estates for Life in their Offices.” But it isn’t enough to give judges the opportunity to remain at their posts. We should also supply a proper incentive. At the moment, the incentives are perverse. There is at least modest evidence to support the notion that wealthier judges are less likely to retire and seek outside income -- a proposition in accord with common sense. If this theory is correct, there are important distributional reasons for Congress to act, unless we want a federal bench in which the judges with the greatest experience are also those who are rich. To be sure, salary isn’t everything. Federal judges receive plenty of non-monetary compensation. Their posts carry enormous prestige, and they exercise considerable power. Their salaries, at least in nominal dollars, cannot be reduced. Judges cannot be easily dismissed. They have enormous autonomy. Moreover, judges are part of what at least strives to be a high-commitment culture (such as the military), meaning that the drive to fulfill the common mission is in a sense also part of the compensation. On the other hand, just because salary isn’t everything doesn’t mean that salary isn’t anything. At the margins, money income will continue to influence the behavior of judges, as it does the behavior of other workers. And as salaries continue to lag, and other costs continue to rise, judges will continue to leave, and in higher numbers. Chief Justice John Roberts put the problem this way six years ago: “Inadequate compensation directly threatens the viability of life tenure, and if tenure in office is made uncertain, the strength and independence judges need to uphold the rule of law -- even when it is unpopular to do so -- will be seriously eroded.” Paying Bills Once upon a time, resignations from the federal bench were scandalous. In 1961, a federal judge who had recently dismissed a price-fixing complaint against several oil companies stepped down to become general counsel to an oil company, an act that occasioned thunderous denunciations from politicians and the press. Today’s departures, by contrast, raise no serious ethical concerns. Most judges who depart for financial reasons simply have bills to pay -- kids in college, a mortgage -- the same challenges as the rest of us. Judges typically are appointed to the federal bench in their 50s or late 40s, the top earning years for professionals. We invite them to sacrifice in order to serve the nation. We ask the same sacrifice of others, of course. The difference is that when other federal employees leave to seek additional income, it doesn’t necessarily threaten the constitutional system. When judges do it, the independence of the third branch totters. This may not be the best time to urge that the federal government spend more money. If we do not, however, the courts will eventually face a crisis of legitimacy.

#### Judicial salaries are the biggest internal link to judicial independence

Karissa M. Schwartz, Ed. Cardozo L.R. and JD Candidate Cardozo, 2012, “SOUND THE ALARM: THE CONSTITUTIONAL CRISIS OF JUDICIAL COMPENSATION,” 2012 Cardozo L. Rev. De Novo 101, ln

When legal scholars refer to a "constitutional crisis," they speak about a substantive legal showdown between branches of the government, such as President Roosevelt's "court packing" plan, n1 the presidential subpoena issued by Congress during the Watergate era, n2 or the election recount in Bush v. Gore. n3 Chief Justice Roberts has recently sounded the alarm about an ongoing constitutional crisis that threatens the viability of the judicial branch of government. n4 This constitutional crisis undermining the strength and independence of the federal judiciary is the failure to raise judicial pay. n5 Over the years, federal judicial salaries have stagnated, while [\*102] inflation has risen. n6 Since 1993, judicial pay has fallen 10.8% behind inflation while the pay of most other federal workers has increased by 18.5%. n7 Consequently, judicial pay has declined substantially and, in doing so, has impacted the makeup of the judiciary. n8 The inadequate levels of judicial pay not only threaten the judiciary's composition but also the quality of justice in the United States. n9 Critics argue that there is no need to increase judicial salaries, since judicial salaries are already higher than those of other occupations. n10 Former Chief Justice Rehnquist answered this critique by identifying the disparity in judicial compensation as compared to the [\*103] rest of the legal profession. n11 In addition, Chief Justice Roberts has noted that a federal judge is aware he is making financial sacrifices to serve the nation; however, there comes a point when those sacrifices become an undue financial burden. n12 The national cost to minimize the financial burden on judges is minimal compared to the intangible cost of minimizing American justice. n13 Thus, in order to maintain a judicial system made up of diverse and competent individuals, we must adequately compensate our judiciary lest we lose the most qualified individuals to higher paying occupations. n14

### BACKLASH

#### Court involvement in national security causes massive blowback that crushes judicial legitimacy

Robert M. Chesney 9, Professor, University of Texas School of Law, NATIONAL SECURITY FACT DEFERENCE, 95 Va. L. Rev. 1361

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

#### Court stripping destroys judicial legitimacy and separation of powers---even unsuccessful backlash can put the entire edifice of judicial review in question

Andrew D. Martin 1, Prof of Political Science at Washington University 2001. Statuatory Battles and Constitutional Wars: Congress and the Supreme Court

But the large policy payoff in the constitutional cases. What does the ability of the President and Congress to attack through overrides or other means constitutional court decisions imply in terms of the cost of the justices bear? If an attack succeeds and the court does not back down, it effectively removes the court from the policy game and may seriously or, even irrevocably harm its reputation, credibility, and legitimacy. Indeed, such an attack would effectively remove the court from policy making, thus incurring an infinite cost. With no constitutional prescription for judicial review, this power is vulnerable, and would be severely damaged if congress and the president were effective in attack on the Court. But even if the attack is unsuccessful, the integrity of the court may be damaged, for the assault may compromise its ability to make future constitutional decisions and, thus, more long-lasting policy. One does not have to peer as far back as scott v. sandford to find examples; Bush v. Gore (2000, U.S.) may provide one. To be sure, the new President and Congress did not attack the decision, but other members of government did of course, unsuccessfully at least in terms of the ruling’s impact. Yet, there seems little doubt that the critics (not to mention the decision itself) caused some major damage to the reputation of the court, the effects of which the justices may feel in the not-so-distant future.

### 2NC Link / UQ

#### The SQ is goldilocks---it carves out enough room for judicial review of War Powers to solve Court influence, but doesn’t impose any meaningful checks on the Executive so it allows for flexibility---the plan sends a signal of judicial over-reach that causes political blowback

Neavl Devins 10, Goodrich Professor of Law and Professor of Government, College of William & Mary., Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, 12 U. Pa. J. Const. L. 491

In Part III of this Essay, I will argue that the Court's actions in the first year of the Obama administration are cut from the same cloth as its decision to intervene in Bush-era disputes. As this section has suggested, the Court has never risked national security or executive branch non-acquiescence in its enemy combatant decision making. Moreover, as I argued in Part I, Court decision making in this area has largely tracked social and political forces. For reasons I will now detail, the Court's decisions both to steer clear of this issue in the spring and summer of 2009 and its fall 2009 decision to hear the Uighur petition match past Court practices. Throughout the enemy combatant dispute, the Court has found ways to expand its authority without risking an institutionally costly backlash.¶ III. Conclusion: The Past Is Prologue¶ Supreme Court interventions in the enemy combatant disputes never pushed the limits of what was acceptable to the political [\*523] branches of government. The Court, instead, maximized its authority by moving incrementally and expanding judicial power in ways generally acceptable to the political branches. This was true of Bush-era decision making and there is no reason to think that the Court will depart from past practices during the Obama administration.¶ Consider, for example, the Court's March 2009 decision to back away from a case involving Bush administration efforts to detain a legal resident without charges. After agreeing - in December 2008 - to hear a challenge to the Bush administration's detention of Ali Saleh Kahlah al-Marri at a South Carolina Navy brig, the Court sided with the Obama administration and removed the case from its docket. n170 The administration had claimed the case was moot because - in February 2009 - it formally filed federal criminal charges against al-Marri (so that he would be tried in federal court and not held indefinitely at a military base). n171 Mr. Marri's lawyers objected, arguing (unsuccessfully) that the administration could subsequently relocate him to a military base and, consequently, the Court should still resolve his legal challenge. n172¶ The Court's decisions to hear and then moot al-Marri are readily understandable. The Fourth Circuit had upheld the Bush administration in al-Marri and - when agreeing to hear the case - the Justices had good reason to slap down the Bush administration for their continuing efforts to sidestep federal court review over enemy combatant policy-making. Not only had the Court taken a strong stand in favor of judicial review in Boumediene and other decisions, but the November 2008 election of Barack Obama and the Democratic Congress further solidified the Court's position with elected officials and the American people. And, with none of the eighteen amicus briefs in the case supporting the Bush administration, n173 a Court ruling against [\*524] Bush administration actions would have further buoyed the Court's status with academics and other interest groups. By March 2009, however, there was no good reason to ask the new administration to sort out its views on the al-Marri detention. Candidate Obama had campaigned against the Bush administration efforts to fence out federal courts from war-on-terror litigation. Indeed, when asking the Court to moot the case, the Obama administration told the Justices that it was willing to have the Fourth Circuit ruling vacated (showing "that the government is not attempting to preserve its victory while evading review"). n174 Against this backdrop, there was simply no reason for the Justices to force the Obama administration to formally disavow or embrace Bush administration legal arguments. An Obama administration decision disavowing Bush administration arguments would not strengthen the Court's position vis-a-vis the executive (as the Obama Justice Department had already conceded the Court's authority to vacate the lower court ruling); an administration decision supporting Bush administration arguments would set the stage for a costly battle between the Court and the new administration. A decision on the merits, moreover, would have opened the Court up to charges of judicial over-reaching. In its brief seeking to moot al-Marri, the government argued that keeping the case alive "would lead only to an advisory opinion with no real-world impact on any individual" and that the Court should not reach out to decide "in a hypothetical posture" "complex constitutional questions" about the line where "national security policy and the Constitution intersect." n175¶ The Court's participation in Kiyemba likewise displays the Court's sensitivity to its status vis-a-vis the other branches and to the risks of unnecessarily interjecting itself in national security policy. This was true of both the June 2009 decision to hold over the appeal of the Uighur petitioners and the October 2009 decision to hear the case (but to schedule oral arguments so as to delay any decision until the summer of 2010). n176¶ June 2009 was too early for the Court to enter this dispute. Even though petitioners cast the case as an opportunity for the Court to defend its turf (suggesting that Boumediene had become an empty shell and it was up to the Court to give meaning to the decision), n177 [\*525] the Court well understood the costs of entering this dispute. At that time, the Obama administration and Democratic Congress were sorting out their policy priorities on Guantanamo, Bagram detainees, and much more. Correspondingly, the Court had reason to think that a ruling demanding the relocation of Uighur detainees to the United States would not sit well with either the administration or Congress. Not only did the Obama administration oppose the relocation of the Uighurs to the United States, n178 Congress enacted legislation in June 2009 that severely limited the President's power to move Guantanamo detainees to the United States or resettle them in another country. n179¶ By holding the issue over, however, the Court gave the Obama administration time both to sort out its policy priorities and to relocate the Uighur detainees (and, in so doing, to try to moot the case). n180 In its brief opposing certiorari, the Obama administration made clear that it was trying both to close Guantanamo and to relocate the Uighur petitioners and asked the Court to respect the "efforts of the political Branches to resolve issues relating to petitioners and other individuals located at Guantanamo Bay." n181 Furthermore, the decision to hold the case over bought the Court time to see how the enemy combatant issue would play out among politicians, interest groups, the media, and the American people. As Part I reveals, Court enemy combatant decisions track social and political forces. As Part II reveals, the Court has moved incrementally - advancing its authority to say "what the law is" without risking backlash or national security.¶ The Court's October 2009 decision to hear Kiyemba does not break from this pattern. By scheduling oral arguments for spring 2009, the Court both provided elected government with additional time to settle this issue and provided itself with an opportunity to calibrate its decision making against the backdrop of elected government action and other subsequent developments. n182 More than that, [\*526] since Boumediene only decided the threshold issue that enemy combatants were entitled to habeas corpus relief, Kiyemba is a good vehicle for the Court to provide some details on how habeas proceedings should be conducted. In particular, there is little prospect that the decision will impact the rights on many Guantanamo detainees. By the summer of 2010, Guantanamo may be closed; if not, most detainees who prevail in habeas proceedings are likely to have been relocated to another country. Moreover, Kiyemba raises a quite narrow issue, namely, whether federal courts can mandate that Guantanamo detainees be relocated to the United States if no foreign nation will take them. n183 In other words, there is next to no prospect that Kiyemba will result in the type of scrutinizing judicial review that might raise national security risks (assuming, of course, that the Court will rule against the administration). Instead, Kiyemba seems likely to further tighten judicial control over the executive - but only in a very modest way.¶ Throughout the course of its enemy combatant decision making, the Court has moved incrementally. In so doing, the Court has expanded its authority vis-a-vis the President. Obama administration efforts to moot al-Marri and to relocate Uighur detainees (thereby mooting that litigation) speak to the administration's desire to avoid Supreme Court rulings that might limit the scope of presidential power. Unlike the Bush administration (whose politically tone deaf arguments paved the way for anti-administration rulings), n184 the Obama administration understands that the Court has become a player in the enemy combatant issue.¶ What is striking here, is that the Court never took more than it could get - it carved out space for itself without risking the nation's security or political backlash. Its 2004 and 2006 rulings provided ample opportunity for the President to pursue his enemy combatant initiative. Its 2008 ruling in Boumediene, while clearly constraining the political branches, reflected the views of the new Democratic majority in Congress and (to a lesser extent) the views of presidential candidates Obama and McCain. n185 Its decision to steer clear of early Obama-era [\*527] disputes likewise avoids the risks of a costly backlash while creating incentives for the Obama administration to take judicial authority into account (by settling these cases outside of court). n186 Put another way, by taking prevailing social and political forces into account, the Court was able to flex its muscles without meaningfully undermining the policy preferences of the President and Congress.¶ I, of course, recognize that the Court's willingness to engage the executive and, in so doing, to nullify a signature campaign of the Bush administration, is a significant break from the judiciary's recent practice of steering clear of disputes tied to unilateral presidential war making. n187 At the same time, I see the Court's willingness to challenge, and not defer, as not at all surprising. The Bush administration made arguments that backed the Court into a corner. The Court could either bow at the altar of presidential power, or it could find a way to slap the President down. It is to be expected that the Court chose to find a way to preserve its authority to "say what the law is." n188 The Justices, after all, have incentives to preserve the Court's role in our system of checks and balances - especially when their decisions enhance their reputations with media and academic elites. n189 This is true of the Supreme Court in general, and arguably more true of the current Court - given its penchant to claim judicial supremacy and given the importance of these institutional concerns to the Court's so-called swing Justices. n190 It is also noteworthy that the enemy combatant cases were at the very core of the judicial function. At oral arguments in Hamdan, Justice Kennedy emphasized the importance of habeas corpus relief, n191 suggesting that limitations on habeas relief would "threaten[] the status of the judiciary as a co-equal partner of the legislature and the executive." n192¶ [\*528] One final comment on the nature of the dialogue that took and is taking place between the three branches on the enemy combatant issue: Throughout the Bush-era, these cases were anything but a constitutional dialogue. The executive persisted in making the same argument, and, as its political fortunes diminished, the Court carved over more and more issue space for itself. For its part, the Bush-era Congress played no meaningful role - it simultaneously backed the executive while signaling to the Court that it would support judicial invalidation of executive initiatives. With a new administration in place, there is reason to think that the inter-branch dynamic will change. The Obama administration has advanced its policies while pursuing a less confrontational course; avoiding absolutist arguments and trying to steer clear of an adverse Supreme Court ruling. In so doing, the administration has yet to launch the type of broadsides that challenge the foundations of judicial authority. Up until now, the Court has responded in kind, leaving the administration breathing room to pursue its policies without a Supreme Court pronouncement on the scope of presidential power. It is a matter of pure speculation whether this pattern will continue. At the same time, there is good reason to think that the Court will follow the path it has laid down in Bush-era cases, taking social and political forces into account so as to protect its turf without risking national security or elected government backlash.

## CASE

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### Overview

#### There's a clear brightline---restrictions require a floor and a ceiling---plan is a floor but doesn't set a cap on the President's potential actions

USCA 77, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 564 F.2d 292, 1977 U.S. App. LEXIS 10899,. 1978 Fire & Casualty Cases (CCH) P317

Continental argues that even if the Aetna and Continental policies provide coverage for the Cattuzzo accident, that coverage should [\*\*8] be limited to a total of $300,000 because Atlas agreed to procure "not less than" $300,000 coverage. The District Court properly found that the subcontract language does not support a restriction on the terms of Continental's policy because the subcontract only sets a floor, not a ceiling, for coverage.

### AT: We Meet

#### Contextual definitions bad – intent to define outweighs

Eric Kupferbreg 87, University of Kentucky, Senior Assistant Dean, Academic & Faculty Affairs at Northeastern University, College of Professional Studies Associate Director, Trust Initiative at Harvard School of Public Health 1987 “Limits - The Essence of Topicality” http://groups.wfu.edu/debate/MiscSites/DRGArticles/Kupferberg1987LatAmer.htm

Often, field contextual definitions are too broad or too narrow for debate purposes. Definitions derived from the agricultural sector necessarily incorporated financial and bureaucratic factors which are less relevant in considering a 'should' proposition. Often subject experts' definitions reflected administrative or political motives to expand or limit the relevant jurisdiction of certain actors. Moreover, field context is an insufficient criteria for choosing between competing definitions. A particularly broad field might have several subsets that invite restrictive and even exclusive definitions. (e.g., What is considered 'long-term' for the swine farmer might be significantly different than for the grain farmer.) Why would debaters accept definitions that are inappropriate for debate? If we admit that debate is a unique context, then additional considerations enter into our definitional analysis.

#### “In the area” means all of the activities

United Nations 13

(United Nations Law of the Sea Treaty, http://www.un.org/depts/los/convention\_agreements/texts/unclos/part1.htm)

PART I¶ INTRODUCTION¶ Article 1

Use of terms and scope¶ 1. For the purposes of this Convention:¶ (1) "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction;¶ (2) "Authority" means the International Seabed Authority;¶ (3) "activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area;

### AT: C/I

#### Restriction narrower than regulation

Judge Thomas E. Johnson 9, District Court Judge, US District Court for the Southern District of West Virginia, "Stover v. Fingerhut Direct Marketing, Inc. - Document 33," 8/26/2009 http://law.justia.com/cases/federal/district-courts/west-virginia/wvsdce/5:2009cv00152/61171/33

9 The fourth prong of the Central Hudson test refers to "regulation" of speech. 447 U.S. at 567. "Regulation" could be construed broadly as applying [\*\*29] a system of laws, including penalties, affecting a particular manner of commercial speech. However, in subsequent cases, the Supreme Court has employed the narrower word, "restriction," in place of "regulation." See, e.g., Bd. of Trs. v. Fox, 492 U.S. 469, 476, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) ("[G]overnment restrictions upon commercial speech may be no more broad or no more expansive than 'necessary' to serve its substantial interests").

#### Their ev only defines "restrictions," not "restrictions on authority" - that kills predictability

J.A.D. Haneman 59, justice of the Superior Court of New Jersey, Appellate Division. “Russell S. Bertrand et al. v. Donald T. Jones et al.,” 58 NJ Super. 273; 156 A.2d 161; 1959 N.J. Super, Lexis

HN4 In ascertaining the meaning of the word "restrictions" as here employed, it must be considered in context with the entire clause in which it appears. It is to be noted that the exception concerns restrictions "which have been complied with." Plainly, this connotes a representation of compliance by the vendor with any restrictions upon the permitted uses of the subject property. The conclusion that "restrictions" refer solely to a limitation of the manner in which the vendor may [\*\*\*14] use his own lands is strengthened by the further provision found in said clause that the conveyance is "subject to the effect, [\*\*167] if any, of municipal zoning laws." Municipal zoning laws affect the use of property.¶ HN5 A familiar maxim to aid in the construction of contracts is noscitur a sociis. Simply stated, this means that a word is known from its associates. Words of general and specific import take color from each other when associated together, and thus the word of general significance is modified by its associates of restricted sense. 3 Corbin on Contracts, § 552, p. 110; cf. Ford Motor Co. v. New Jersey Department of Labor and Industry, 5 N.J. 494 (1950). The [\*284] word "restrictions," therefore, should be construed as being used in the same limited fashion as "zoning."

#### And, substantial requires an objective, absolute measurement--- there's no way to quantify the impact oversight has on War Powers which means that their interpretation has no coherent way to account for an entire word in the topic

Words & Phrases 64, 40 W&P 759

The words "outward, open, actual, risible, substantial, and exclusive," in connection with a change of possession, mean substantially the same thing. They mean not concealed; not bidden; exposed to view; free from concealment dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain; absolute; real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including, admitting, or pertaining to any others; undivided; sole; opposed to inclusive. Bass v. Pease, 79 111. App. 308, 31R

#### They conflate management and restrictions

BEREC 12, Guidelines for quality of service in the scope of net neutrality, Body of European Regulators for Electronic Communications

The concept of “traffic management” is sometimes used as a synonym of “restrictions”, but in these guidelines BEREC seeks to avoid misunderstanding by using the term “restrictions” to refer to all limitations, including those which are contractually binding and/or technically implemented limitations.

#### The affirmative sets conditions under which the President may use his authority; it doesn’t restrict the uses to which his authority may be put---that distinction matters

Morris Pashman 63, justice on the New Jersey Supreme Court. “ISIDORE FELDMAN, PLAINTIFF AND THIRD-PARTY PLAINTIFF, v. URBAN COMMERCIAL, INC., AND OTHERS, DEFENDANT,” 78 N.J. Super. 520; 189 A.2d 467; 1963 N.J. Super. Lexis

HN3A title insurance policy "is subject to the same rules of construction as are other insurance policies." Sandler v. N.J. Realty Title Ins. Co., supra, at [\*\*\*11] p. 479. It is within these rules of construction that this policy must be construed.¶ Defendant contends that plaintiff's loss was occasioned by restrictions excepted from coverage in Schedule B of the title policy. The question is whether the provision in the deed to Developers that redevelopment had to be completed [\*528] within 32 months is a "restriction." Judge HN4 Kilkenny held that this provision was a "condition" and "more than a mere covenant." 64 N.J. Super., at p. 378. The word "restriction" as used in the title policy cannot be said to be synonymous with a "condition." A "restriction" generally refers to "a limitation of the manner in which one may use his own lands, and may or may not involve a grant." Kutschinski v. Thompson, 101 N.J. Eq. 649, 656 (Ch. 1927). See also Bertrand v. Jones, 58 N.J. Super. 273 (App. Div. 1959), certification denied 31 N.J. 553 (1960); Freedman v. Lieberman, 2 N.J. Super. 537 (Ch. Div. 1949); Riverton Country Club v. Thomas, 141 N.J. Eq. 435 (Ch. 1948), affirmed per curiam, 1 N.J. 508 (1948). It would not be inappropriate to say that the word "restrictions," as used [\*\*\*12] by defendant insurers, is ambiguous. The rules of construction heretofore announced must guide us in an interpretation of this policy. I find that the word "restrictions" in Schedule B of defendant's title policy does not encompass the provision in the deed to Developers which refers to the completion [\*\*472] of redevelopment work within 32 months because (1) the word is used ambiguously and must be strictly construed against defendant insurer, and (2) the provision does not refer to the use to which the land may be put. As the court stated in Riverton Country Club v. Thomas, supra, at p. 440, "HN5equity will not aid one man to restrict another in the uses to which he may put his land unless the right to such aid is clear, and that restrictive provisions in a deed are to be construed most strictly against the person or persons seeking to enforce them." (Emphasis added)

### AT: Authority

#### Authority is the exercise of power over others

OED 13 (http://www.oed.com/viewdictionaryentry/Entry/13349)

authority, n.

I. Power to enforce obedience.

a. Power or right to enforce obedience; moral or legal supremacy; the right to command, or give an ultimate decision.

b. in authority: in a position of power; in possession of power over others.

## Adv 2

### AT: China-Russia War

#### Deterrence checks and no extinction

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Every so often there appear claims, not only in the Western press but the Russian one, that (rising but overpopulated) China is destined to fight an (ailing and creaking) Russia for possession of its resources in the Far East\*. For reasons that should be obvious, this is almost completely implausible for the next few decades. But let’s spell them out nonetheless. 1. China regards India, Japan, and above all the USA as its prime potential enemies. This is tied in to its three geopolitical goals: (1) keep the country together and under CCP hegemony – an enterprise most threatened by its adversaries stirring up ethnic nationalism (India – Tibetans, Turkey – Uyghurs) or buying the loyalties of the seaboard commercial elites (Japan, USA), (2) returning Taiwan into the fold and (3) acquiring hegemony over the South China Sea and ensuring the security of the sea routes supplying it with natural resources. The major obstacles to the latter two are the “dangerous democracies” of Japan and India, with the US hovering in the background. In contrast, the northern border is considered secure, and more generally, Russia and Central Asia are seen as sources of natural resource supplies that are more secure than the oceanic routes. 2. But let’s ignore all that. It’s true that in a purely conventional war, it is now very likely that Russia will not be able to defend its Far East possessions thanks to China’s (mostly complete) qualitative equalization, (very substantial) quantitative superiority, and (huge) positional advantage. Short of the US and Japan interfering – which is unlikely, if not impossible if Russia were to make big concessions (e.g. on Kuriles ownership, rights to the Siberian resource base) – defeat and occupation are assured. BUT… This ignores the all-important nuclear dimension. In the wake of post-Soviet demilitarization, it has become clear that any war with either NATO or China would likely end up going nuclear. The official military doctrine allows for the use of nuclear weapons against other nuclear powers in defense against conventional attack; post-Soviet military exercises explicitly model usage of tactical nukes to blunt enemy spearheads as Russian military formations beat a scorched-earth retreat. Though the quantity of Russia’s tactical nukes is now substantially smaller than their 16,000 peak, there are still probably thousands of them remaining (unlike strategic platforms these are not subject to inspection and verification procedures), and it’s difficult to see how a Chinese invasion could effectively counter them. (But why would the Russians use nukes on their own territory, one might ask? The Russian Far East is very lightly populated, and in any case air bursts – which is presumably what they’ll be using against the enemy divisions – produce little radioactive fallout). 3. Aleksandr Khramchikhin goes on to argue that: … Unfortunately, nuclear weapons don’t guarantee salvation either, since China also has them. Yes, at the time we have superiority in strategic forces, but it’s rapidly diminishing. Furthermore we don’t have medium range missiles, but China has them, which almost makes null their inferiority in ICBM’s… What concerns a strategic nuclear exchange, then the Chinese potential is more than enough to destroy the main cities of European Russia, which they don’t need anyway (it has a lot of people and few resources). There’s a strong argument to be made that, understanding this, the Kremlin will not use nuclear weapons.

Therefore nuclear deterrenece with respect to China is a complete myth. This is wrong on most points: (A) As far as is known, China maintains a position of limited deterrence, its nuclear forces being constantly modernized but remaining small in comparison with those of the US and Russia (this may or may not change in the future). The big post-Soviet decline in Russia’s arsenal has largely run itself out and on recent trends is unlikely to resume. This shouldn’t be surprising, since Russia no doubt realizes that it is precisely its nuclear forces that do most to guarantee its current day security. (B) Apart from the fact that China’s medium-range rocket forces still can’t reach deep into European Russia, even accounting for them it is still very much inferior to Russia: “In July 2010 the Russian strategic forces were estimated to have 605 strategic delivery platforms, which can carry up to 2667 nuclear warheads.” As of 2010, China is estimated to have (non-MIRVed) 90 intercontinental ballistic missiles (i.e. can reach European Russian cities) and a few hundreds of medium and short range ballistic missiles. The latter will comprehensively devastate the populated regions of the Russian Far East, and to a lesser extent east of the Urals, but these aren’t core Russian territories and have relatively small concentrations of population and industry. In any case, if anything these are likely to be used not against Siberian cities, but against Russian military and strategic objects. (C) One must also include ballistic missile defense, civil defense and geography into the equation. Though China has more S-300 type missile systems and has recently demonstrated an ability to shoot down ballistic missiles in controlled tests, there is little doubt that Russia is still ahead in this sphere. The S-400 now replacing the S-300 has intrinsic anti-ICBM capabilities, and the A-135 system around Moscow – with its nuclear-tipped interceptor missiles – makes it better than even odds that the capital would survive intact. Both China and Russia have substantial civil defense measures. The USSR in 1986 had shelter space for around 11.2% of its urban population, according to CIA estimates. As of 2001, it was estimated to be 50% in Moscow, and construction of bunkers continues. China too has a large-scale civil defense plan of building bunkers in its larger cities. At first glance, it would appear that geography-wise, China has an advantage in its huge population, large size, and greater rural population as a percentage of the whole. In contrast, Russia’s population is largely urban, and seemingly more vulnerable. This however is misleading. Most of China’s population, fertile land and industry is concentrated on its eastern seaboard and along its great river valleys. Agricultural productivity will plummet in the years following a large-scale exchange, resulting in famine, and as so often in Chinese history, perhaps anarchy and the end of political dynasties – in this case the CCP. Even if the Russian Far East is “won” in time, it is unlikely that it could alleviate the suddenly critical population pressures, for building up the infrastructure for mass human accommodation in that cold, barren and mountainous will take decades. Since Russian agriculture happens over a greater area, is less intensive / reliant on machinery and fertilizer inputs, and generates a substantial export surplus in most year, it isn’t as likely as China to dip into all out famine. (D) As things stand, the real result of a nuclear war between Russia and China would be (1) a crippled Russia with 20-30 million fewer people, with many tens of millions more at the edge of subsistence, shorn of its Far East territories, but with an intact state still endowed with a nuclear deterrent, and (2) a collapsed and c.90% deindustrialized China rapidly descending into mass famine and anarchy and knocked out of the Great Power game for the foreseeable future. Two tragic, but nonetheless distinguishable, postwar environments, as Herman Kahn would have said. 4. Obviously Chinese strategists comprehend these arguments, and as such cannot have any serious medium-term designs on Russian territory. This is not the case for Taiwan and the South China Sea, where Chinese interests are greater, and don’t fundamentally infringe on US security to the extent that it will contemplate using its far superior nuclear arsenal against China, as that would risk Los Angeles and San Francisco and a dozen other cities on the West Coast getting annihilated. This fulfills the main purpose of China’s long-range “minimal deterrence” strategy. 5. The strategic balance isn’t fixed in stone, and future developments may make the situation more precarious by 2030-50: (1) The development of truly effective ABM systems, (2) growing sustanance pressures in China due to climate change and the depletion of coal reserves, and (3) the opening of the Russian Far East and Siberian interiors to intensive settlement thanks to global warming. But this remains speculation, and the facts are that since both Chinese and Russians are more or less rational actors, the chances of large-scale war between them in the next few decades is very close to zero – no matter what the sensationalists claim.