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## Off-Case

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#### Detention is not a space of exception but of hyper-legality—reforms result in the naturalization of power

Fleur Johns 05, Co-Director of the Sydney Centre for International Law (with Associate Professor Tim Stephens) and an Associate Professor in the Faculty of Law, “Guantánamo Bay and the Annihilation of the Exception,” The European Journal of International Law Vol. 16 no.4, http://ejil.oxfordjournals.org/content/16/4/613.full.pdf+html

For detention decisions taken at Guantánamo Bay to correspond to Schmitt’s understanding of the exception, however, ‘[t]he precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited’. ‘From the liberal constitutional point if view’, Schmitt wrote, ‘there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.’100 Yet in respect of Guantánamo Bay, both the content and competence of the US executive is repeatedly cast as pre-codified in presidential and governmental statements. At times, the ‘code’ is said to be that of ‘freedom’, ‘democracy’ or ‘justice’.101 At other times, it is that of God.102 On still further occasions, constitutional norms are invoked to frame a decision.103 The acts of the would-be sovereign, in each case, are characterized by repeated references to some higher source of competence and direction, overt deference to a pre-determined programme in the course of implementation, and insistence upon the conduit or vessel-like status of executive authority.¶ A little lower down the hierarchy, Secretary of the Navy Gordon England, speaking about the annual administrative review process at a press briefing on 23 June 2004, conceded: ‘[T]here’s no question there’s judgment involved. I doubt if many of these are black and white cases. I would expect most are going to be gray’. When pressed to define his role in the process, he confirmed that he was the one to make the final decision regarding release, transfer or continued detention in respect of each detainee, in the wake of an Administrative Review Board assessment. ‘I operate and oversee, organise the process, and I also make the ultimate decision’, he stated.10¶ Secretary England went on, however, to convey an impression of this judgment as one cabined by broad policy directives, notions of reasonableness, and the institutional demand for standardization: ‘[W]e do have some guidelines; . . . the boards do have some guidelines’, he assured the audience, ‘[e]very board doesn’t have a different standard’. He continued: ‘[I]t will be a judgment based on facts, data available . . . the best decision a reasonable person can make in this situation’. ‘[I]t’s what is the situation today and going forward in terms of a threat to America. And that is what we will decide, and that’s what the decision will be based on’.105¶ From expressing the decision he would be taking in personal, case-specific terms, Secretary England thus moved rapidly into the mode of generalization, depersonalization and necessity. ‘His’ decision became ‘the’ decision of the reasonable person, made not to assess the individual detainee’s responsibility, but rather to assess his or her proximity to a generalized ‘threat to America’.¶ Such an approach is also discernible in the Military Order issued by President Bush in 2001, pursuant to which the Military Commissions were convened before which Guantánamo Bay detainees were, until their suspension in November 2004, in the process of being tried. The ‘findings’ upon which the jurisdiction created by that order is predicated cast the steps taken thereby as inexorable reactions to a state of affairs of immeasurable proportions and persistent duration. Attacks by international terrorists are said to have ‘created a state of armed conflict that requires the use of the United States Armed Forces’.106 Likewise, it is said to be ‘necessary for individuals subject to [the] order . . . to be detained’, just as the issuance of the order itself is stated to be ‘necessary to meet the emergency’.107 Although expressed in terms of ‘an extraordinary emergency’, this order frames the Presidential decisions embodied in its text as matters of exigency – in other words, as non-decisions – dictated by a ‘state of armed conflict’. The only acknowledgement of discretion is buried in the final paragraph of the order’s ‘findings’, where the President is said to have ‘determined that an extraordinary emergency exists for national defense purposes’. The exercise of sovereign discretion is, accordingly, cast as a derivative matter: a question of classification after the fact. **¶** One could, of course, read these claims as exercises in public relations, designed to cloak the deployment of unfettered sovereign power in the guise of liberal proceduralism. Yet regardless of how one might characterize the ‘real’ intent behind the military mandates governing Guantánamo Bay, the experience of decision-making reported by figures such as Secretary England seems, to a significant degree, to be one of deferral and disavowal – as though his job were more a matter of implementation than decision. Speaking of the determination, by the Combatant Status Review Tribunal, that one of the first 30 detainees to be heard by the Tribunal was not, in fact, an ‘enemy combatant’, Secretary England explained: ‘[I]n this case we – we set up a process, we’re following that process, we’re looking at all the data . . . Determinations were made he was an enemy combatant. We now have set up another process; more data is available. Time has gone by . . . I believe the process is doing what we asked the process to do, which is to look at the data as unbiased as you can, from a reasonable person point of view . . . and I believe the process is working . . . ’108 This is not the language of Schmittian exceptionalism. Rather, it is suggestive of efforts to construct a series of normatively airtight spaces in which the prospect of agonizing over an impossible decision may be delimited and, wherever possible, avoided. As such, the jurisdiction created at Guantánamo Bay is constituted, in Schmittian terms, in the liberal register of the norm (indeed, an overdetermined version thereof).109

#### The sovereign gets its power from law—thus appeals to return to legal norms legitimize it and prevent broader resistance

Mark Neocleous 06, Professor of Government at Brunel University, Alternatives, Vol. 31, p. 206-208

To criticize the use of emergency powers in terms of a suspension of the law, then, is to make the mistake of counterpoising normality and emergency, law and violence. In separating “normal” from “emergency,” with the latter deemed “exceptional,” this approach parrots the conventional wisdom that posits normalcy and emergency as two discrete and separable phenomena. This essentially liberal paradigm assumes that there is such a thing as “normal” order governed by rules, and that the emergency constitutes an “exception” to this normality. “Normal” here equates with the separation of powers, entrenched civil liberties, an ongoing debate about public policy and law, and the rule of law, while “emergencies” are thought to require strong executive rule, little time for discussion, and are premised on the supposedly necessary suspension of the law and thus the discretion to suspend key liberties and rights. But this rests on two deeply ideological assumptions: first, the assumption that emergency rule is aberrational; and, second, an equation of the emergency/nonemergency dichotomy with a distinction between constitutional and nonconstitutional action. Thus liberalism seeks to separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its pristine form while providing the executive with the power to act in an emergency.47 But the historical evidence suggests that emergency powers are far from exceptional; rather, they are an ongoing aspect of normal political rule. Emergency, in this sense, is what emerges from the rule of law when violence needs to be exercised and the limits of the rule of law overcome. The genealogy of “emergency” is instructive here. “Emergency” has its roots in the idea of “emerge.” The Oxford English Dictionary suggests that “emerge” connotes “the rising of a submerged body out of the water” and “the process of coming forth, issuing from concealment, obscurity, or confinement.” Both these meanings of “emerge” were once part of the meaning of “emergency,” but the first is now rare and the second obsolete. Instead, the modern meaning of “emergency” has come to the fore, namely a sudden or unexpected occurrence demanding urgent action and, politically speaking, the term used to describe a condition close to war in which the normal constitution might be suspended. But what this tells us is that in “emergency” lies the idea of something coming out of concealment or issuing from confinement by certain events. This is why “emergency” is a better category than exception: Where “emergency” has this sense of “emergent,” exception instead implies a sense of ex capere, that is, of being taken outside. Far from being outside the rule of law, emergency powers emerge from within it. They are thus as important as the rule of law to the political management of the modern state. There is, however, an even wider argument to be made. The idea that the permanent emergency involves a suspension of the law encourages the idea that resistance must involve a return to legality, a return to the normal mode of governing through the rule of law. But this involves a serious misjudgment in which it is simply assumed that legal procedures, both international and domestic, are designed to protect human rights from state violence. Law itself comes to appear largely unproblematic. What this amounts to is what I have elsewhere called a form of legal fetishism, in which law becomes a universal answer to the problems posed by power. Law is treated as an independent or autonomous reality, explained according to its own dynamics. This produces the illusion that law has a life of its own, abstracting the rule of law from its origins in class domination and oppression and obscuring the ideological mystification of these processes in the liberal trumpeting of the rule of law.48 To demand the return to the “rule of law” is to seriously misread the history of the relation between the rule of law and emergency powers and, consequently, to get sucked into a less-than-radical politics in dealing with state violence. Part of what I am suggesting is that emergency measures, as state violence, are part of the everyday exercise of powers, working alongside and from within rather than against the rule of law, as part of a unified political strategy in the fabrication of social order.

#### The alternative is to reject the 1AC—refusing the legitimacy of any current governance is crucial to remove the sovereign’s power

Mark Neocleous 06, Professor of Government at Brunel University, Alternatives, Vol. 31, p. 206-208

The question to ask, then, is less about how we can bring law to bear on violence than about what it is that the law permits emergency measures to accomplish.49 This rejects any supposed juxtaposition between legality and emergency and allows us to recognize instead the extent to which the concept of emergency is deeply inscribed within the law and the “normal” legal condition of the modern state. Emergency powers are permanent because they are part and parcel of the normal mode of governing. Once this is recognized then the supposed problematic of violence disappears completely. Emergency powers do not involve some kind of suspension of law while violence takes place, but are united with law for the exercise of a violence necessary for the permanent refashioning of order. Far from being a self-evident and peaceful good that might protect us from violence, the bloody and violent world around us is the product of the rule of law.50 In this context it is appropriate to turn briefly to Benjamin’s comment on the state of emergency as the rule rather than the exception. The tradition of the oppressed teaches us that the “state of emergency” in which we live is not the exception but the rule. We must attain to a conception of history that accords with this insight. Then we will clearly see that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against fascism.51 As I noted earlier, this comment has been cited time and again by those seeking to describe the current conjuncture as one of permanent emergency. But what tends to be omitted is Benjamin’s point that we learn about the permanent emergency not from the current conjuncture, either then or now, but from the tradition of the oppressed. If you want to know what emergency power looks like, read the history of the oppressed, for it is this history that reveals the permanent nature of the emergency. In other words, we should understand the state of emergency through a historical understanding of state power as class rule, not a contemporary reading of international relations. And this argument has political implications. If emergency powers are part and parcel of the exercise of law and violence (that is, law as violence), and if historically they have been aimed at the oppressed (in advanced capitalist states against the proletariat and its various struggles, in reactionary regimes against genuine politicization of the people, in colonial systems against popular mobilization), then they need to be fought not by demanding a return to the “normal” rule of law, but in what Benjamin calls a real state of emergency. As Slavoj Zizek puts it, “When a state institution proclaims a state of emergency, it does so by definition as part of a desperate strategy to avoid the true state of emergency and return to the ‘normal course of things.’”52 The permanent state of emergency carried out by the ruling class, then, is part and parcel of the struggle against the real state of emergency carried out by those seeking a real (global, local, political) alternative. Rather than being affronted by the permanent emergency and demanding a return to legality, then, we should be aiming to bring about a real state of emergency. And this is a task that requires violence, not the rule of law. As Benjamin saw, the law’s claim to a monopoly of violence is explained not by the intention of preserving some mythical “legal end” such as peace or normality but, rather, for “the intention of preserving the law itself.” But violence not in the hands of the law threatens it by its mere existence outside the law. A violence exercised not by the state, but used for very different political ends. For “if the existence of violence outside the law, as pure immediate violence, is assured, this furnishes proof that revolutionary violence, the highest manifestation of unalloyed violence by man, is possible.”53

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#### Text: The United States Congress should pass a constitutional amendment that restricts the indefinite detention war powers authority of the president of the United States by imposing a clean hands doctrine on that authority. The amendment should specify that the state ratification process must begin immediately. The appropriate number of the 50 states of the United States should ratify the amendment.

#### Constitutional amendments solve the case, including perception and modeling

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

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

#### Amendments are a predictable alternative --- the CP is fast

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

B. The Checking Function

Perhaps the most important function that the Article V amending process potentially plays is that it offers a check on the Supreme Court's decisions, short of outright defiance. In fact, of our twenty-seven amendments, at least four were ratified to overturn, or in reaction to, a specific Supreme Court decision. n122 Strauss's argument that many of these Court opinions were aberrant and would not have survived for very long anyway is beside the point. By resort to the amendment process, "We the People" are not dependent upon the Court seeing the errors of its ways and correcting them. The standard amending process does require the cooperation of Congress, but, even here, the Founders provided an alternative in case this institution proved to be unreliable. Although the Article V convention mechanism has not been used, it appears to have prompted Congress to propose amendments on a number of occasions, most notably in the case of the Seventeenth Amendment, providing for direct election of the Senate. That process can be hastened without the interference of, or dependence upon, intermediating institutions. Strauss may be correct that, absent Article V, the Court or Congress would eventually arrive at the same place as a formal amendment, but, to paraphrase Keynes, eventually we will all be dead. [\*277] Issues of ultimate efficacy aside, it would seem to be psychologically important to have open a process for amendment, lest a polity be unable to loosen the dead hand of the past other than by severing its connections with the past completely through revolution (with all the uncertainty that accompanies such radical surgery), or be unable to escape the occasional ill-starred decision of a branch, like the Supreme Court, which is insulated from the application of ordinary political pressure.

#### Avoids the disad

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

Decision costs and benefits

We must account for the costs of decision making as well as the quality of decisions. A simple view would be that the formal amendment process is too costly to serve as the principal means, or even as an important means, of constitutional updating, just as periodic constitutional conventions are too costly to be practical. Dennis Mueller denies this view. He suggests instead that the decision costs of the formal amendment process are decision benefits: The U.S. Constitution contains broad definitions of rights, and the task of amending their definitions to reflect changes in the country’s economic, social and political characteristics has been largely carried out by the Supreme Court. While this method of updating the Constitution’s definition of rights has helped to prevent them from becoming hopelessly out of date, it has failed to build the kind of support for the new definitions of rights that would exist if they had arisen from a wider consensual agreement in the society. The bitter debates and clashes among citizens over civil rights, criminal rights and abortion illustrate this point. . . . Although [alternative procedures for constitutional amendment] may appear to involve greater decision-making costs, they have the potential for building consensus over the newly formulated definitions of rights.82 On this view, it is an illusion that constitutional common law incurs lower decision costs in the long run, even if a given change may be more easily implemented through adjudication in the short run. Although at any given time it is less costly to persuade five Justices to adopt a proposed constitutional change than to obtain a formal amendment to the same effect, the former mode of change incurs higher decision costs over time, because common-law constitutionalism allows greater conflict in subsequent periods. A benefit of formal amendments, then, is to more effectively discourage subsequent efforts by constitutional losers to overturn adverse constitutional change. Precisely because the formal amendment process is more costly to invoke, formal amendments are more enduring than are judicial decisions that update constitutional rules;83 so losers in the amendment process will less frequently attempt to overturn or destabilize the new rules, in subsequent periods, than will losers in the process of common-law constitutionalism. This point does not necessarily suppose that dissenters from a given amendment come to agree with the enacting supermajority’s judgment, only that they accept the new equilibrium faute de mieux. Obviously more work might be done to specify these intuitions, but it is at least plausible to think that the simplest view, on which formal amendments incur decisionmaking costs that exceed their other benefits, is untenably crude. The overall picture, rather, is a tradeoff along the following lines. Relative to common-law constitutionalism, the Article V process requires a higher initial investment to secure constitutional change. If Mueller is right, however, constitutional settlements produced by the Article V process will tend to be more enduring over time than is judicial updating, which can be unsettled and refought at lower cost in subsequent periods.

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#### The Supreme Court will vote against the EPA’s climate regs on a 5-4 now---but that requires overcoming deference to an executive agency’s interpretation of statute

Richard Frank 2-24, Professor of Environmental Practice and Director of the U. C. Davis School of Law’s California Environmental Law & Policy Center, 2/24/14, “Deconstructing Today’s U.S. Supreme Court Arguments in Utility Air Regulatory Group,” <http://legal-planet.org/2014/02/24/deconstructing-todays-u-s-supreme-court-arguments-in-utility-air-regulatory-group/>

The Supreme Court heard oral arguments today in the most important environmental law case of the current Term: Utility Air Regulatory Group v. Environmental Protection Agency. Based on those arguments–and, more importantly, the justices’ questions and comments–it appears that EPA’s efforts to regulate greenhouse gas (GHG) emissions from stationary sources under the Clean Air Act’s Prevention of Significant Deterioration (PSD) program are in serious trouble.

It’s always rather hazardous to predict the outcome in U.S. Supreme Court cases based simply on oral arguments. So readers should take the observations that follow with a grain of salt. But here goes…

It seemed early in the arguments that there were four solid votes–Ginsburg, Breyer, Sotomayor and Kagan–for EPA’s position that its tailored efforts to regulate GHG emissions under the PSD program pass muster under the CAA. Indeed, Justice Sotomayor mused from the bench that this case presents “the apex of Chevron deference” and is the “quintessential area where we give deference to agency discretion” under established principles of administrative law.

But experienced legal advocates counsel that in the Supreme Court, one has to be able to count to five. And there doesn’t appear to be a critical fifth vote on the Court to uphold the EPA position.

From their questioning, Chief Justice Roberts, Justice Alito and Justice Scalia appeared generally supportive of the industry and red state challengers to EPA’s regulatory efforts. Justice Thomas maintained his customary silence at oral argument, but his past votes in related cases suggest he’ll also vote against EPA.

That leaves, as many of us predicted, Justice Anthony Kennedy as the key, deciding vote. So it was a dramatic moment indeed when Kennedy told Solicitor General Donald Verrilli, EPA’s advocate, that “I have to say, I couldn’t find a single precedent that supports your position.” It didn’t help that the only response Verrilli could muster was to cite a shipping case that he conceded the government had not bothered to cite in its written arguments.

Things got worse when Justice Kagan asked Verrilli what she termed “the question that every lawyer hates”–i.e., if the government is to lose the case, on what ground(s) should the adverse decision be based? Verrilli did a better job of responding this time around, suggesting a theory that would not do major violence to EPA’s still-evolving program of regulating GHG emissions–the proverbial “soft landing”.

The good news is that the justices (with the possible exception of Justice Scalia) showed no appetite for revisiting their 2007 ruling that GHGs are “air pollutants” subject to regulation under the CAA. Nor do they appear inclined to abandon the view–at least intimated in the Court’s 2012 American Electric Power v. Connecticut decision–that EPA has the authority to regulate stationary, as well as vehicular, sources of GHGs under the CAA.

So the key questions are likely reduced to two: how will the nine justices vote in Utility Air, and how broad or narrow a decision will it be? The answers to those questions are actually related: if the justices adhere to the positions they espoused at oral argument, a 5-4 decision in favor of petitioners seems most likely, with Justice Kennedy providing the crucial, deciding vote. But the four justices who seemingly support EPA’s position could conceivably trade their votes for a unanimous or near-unanimous opinion that rules against EPA quite narrowly, thereby doing minimal violence to EPA’s long-term climate change and CAA objectives. In recent years, Justice Ginsburg in particular has played this Henry Clay/”Great Compromiser” role most effectively in environmental cases.

#### The Court perceives that both overcoming deference to agency interpretation, and ruling against the government on war powers cases, require institutional capital---there’s a direct tradeoff

Neomi Rao 9, Assistant Professor of Law, George Mason University School of Law, 2009, “The President’s Sphere of Action,” Wilmette Law Review, Vol. 45, No. 3, p. 527-555

The Court extends similar deference to the executive branch. Many cases reviewing executive branch interpretation deal with administrative law. If a statute delegates lawmaking authority to an agency and is ambiguous, the Court will give some level of deference to a reasonable agency interpretation.60 The Court has at times accorded significant deference to the executive in foreign affairs matters;61 although in recent years the Court has overturned the judgments of both Congress and the President even with regard to the war powers.62

The limitations of the judicial power also serve to curb overreaching. The Court renders each decision with the knowledge that it cannot enforce its judgments. The inability to enforce its edicts must work as a strong tempering force for the Court, which must seek to conserve its institutional capital. It must be independent in its judgments, yet stay within boundaries that the political branches will accept. A web of constitutional and prudential limits constrains the Court in the process of constitutional interpretation.

#### Ruling for EPA destroys the economy

Paul Driessen 3-1, senior policy adviser for the Committee For A Constructive Tomorrow, 3/1/14, “Will the Supreme Court Permit EPA Fraud?,” <http://townhall.com/columnists/pauldriessen/2014/03/01/will-the-supreme-court-permit-epa-fraud-n1802465/print>

The U.S. Supreme Court recently heard oral arguments in Utility Air Regulatory Group v. Environmental Protection Agency. The case will determine how far EPA can extend its regulatory overreach, to control “climate changing” carbon dioxide from power plants and other facilities – by ignoring the Constitution’s “separation of powers” provisions, rewriting clear language in the Clean Air Act, and disregarding laws that require the agency to consider both the costs and benefits of its regulations and what it is regulating.

Put more bluntly, the Court will decide whether EPA may deceive and defraud the American people, by implementing regulations that have no basis in honest science and will be ruinous to our economy. It is the most important energy, economic and environmental case to come before the Court it in decades.

Suppose a used car dealership routinely rolled back speedometer mileage, deleted customer complaints from its website, posted fabricated compliments, and lied about defects and accidents, to sell more cars. Or a manufacturer misstated its sales and bottom line, failed to mention major safety violations and fines, and made false claims about new product lines, to attract investors and inflate stock prices?

Both would be indicted for fraud. Now apply the same standards to EPA, whose actions and regulations will affect far more people: virtually every family, facility, company and community in the United States. Jurors would likely rule that the agency is engaged in systematic deceit, dishonesty and fraud.

EPA Administrator Gina McCarthy insists there is “no more urgent threat to public health than climate change.” She is determined to impose President Obama’s anti-hydrocarbon agenda. “I just look at what the climate scientists tell me,” McCarthy told Senator Jeff Sessions (R-AL). Translated, she means she talks only to those who advocate climate alarmism, and ignores all contrary scientists and evidence.

In fact, thousands of scientists and studies argue that there is no empirical, observational evidence to support any of her claims. Recent NOAA and NASA temperature data confirm that global warming ended in 1997 and continues today, even as atmospheric carbon dioxide levels increase steadily, improving plant growth worldwide. Seas are rising at barely seven inches per century, and there is no evidence that recent weather events are any more frequent, intense or “dangerous” than what mankind has dealt with forever.

There is no convincing evidence that carbon dioxide emissions have replaced the powerful, complex, interrelated natural forces that have always driven climate and weather changes. No evidence supports the notion that slashing CO2 emissions and trashing our economy will “stabilize” global temperatures and climate variations, or that developing countries will stop pouring carbon dioxide into the atmosphere.

EPA brushes all this aside, just as crooked car dealers and manufacturers obfuscate the truth to sell their shoddy products. The agency just assumes and asserts human causes and disastrous results, disregards any and all experts and evidence to the contrary, and ignores any and all costs imposed by its regulations.

It has also violated the Constitution, by rewriting specific Clean Air Act provisions that specify 250-ton-per-year emission limits, in sections that EPA is relying on for its climate rulemakings. To shut down coal-fired power plants, the agency illegally and arbitrarily raised the threshold to 100,000 tons of carbon dioxide per year, and ignored the fact that in 692 bills Congress never contemplated applying these sections to greenhouse gases. Unless the Supreme Court intervenes, EPA will continue rewriting the law, gradually tightening its standards to control millions of natural gas generators, refineries, factories, paper mills, shopping malls, apartment and office buildings, hospitals, schools and even large homes.

EPA and other agencies have paid out billions in taxpayer dollars to finance and hype “research” making ludicrous claims that manmade global warming is hidden in really deep ocean waters or obscured by pine tree vapors; tens of thousands of offshore wind turbines could weaken hurricanes; and climate change will cause more rapes and murders. They have used “climate disruption” claims to justify giving eco-activist groups billions of taxpayer dollars to promote alarmist climate propaganda … spending tens of billions on crony-corporatist “green energy” and “climate resilience” programs … and forcing the United States and other nations to spend hundreds of billions on worthless climate change prevention capers.

EPA’s so-called “science” is intolerable “secret science.” The agency refuses to share it with outside experts or even members of Congress and businesses impacted by its regulations. The agency claims this taxpayer-funded information is somehow “proprietary,” even though it is being used to justify onerous regulations that dictate and impair our lives, livelihoods, liberties, living standards and life spans. EPA refuses to be transparent because it wants to prevent any examination of its internal machinations.

Just as bad, EPA routinely ignores its own scientific standards, and many climate reports it relies on come straight from the UN’s Intergovernmental Panel on Climate Change. However, as the Committee For A Constructive Tomorrow observed in its amicus curiae brief to the Supreme Court in this case, the IPCC has been caught red-handed presenting student papers, activist press releases and emailed conjecture as “peer-reviewed expert reports.” It has been caught deleting graphs that clearly show its computer models were worthless, and employing junk models like the one that generated Michael Mann’s infamous “hockey stick” to support assertions that it is 95% certain that humans are causing climate change chaos.

These computer models are built on unproven alarmist assumptions, have never been “validated” and are not merely “unverifiable.” They are flat-out contradicted by real-world evidence right outside the EPA windows, making their results worthless for sound, legitimate public policy. Any yet they drive policy.

In violation of federal laws and executive orders, EPA hypothesizes, concocts or exaggerates almost every conceivable carbon “cost” – to agriculture, forestry, water resources, coastal cities, human health and disease, ecosystems and wildlife. But it completely ignores even the most obvious and enormous benefits of using fossil fuels and emitting plant-fertilizing carbon dioxide: affordable heat and electricity, jobs, transportation, better crop growth and nutrition, and improved living standards, health and welfare.

In reality, hydrocarbon and carbon dioxide benefits outweigh their alleged costs by as much as 500 to 1! That means EPA’s “climate change mitigation” rules impose costs on society that exceed even EPA’s exaggerated regulatory benefits by as much as 500 to 1. The EPA “cure” is far worse than the “disease.”

And let’s not forget that one of Ms. McCarthy’s senior advisors devising the agency’s climate change policies and regulations was none other than John Beale – the guy who bilked us taxpayers out of $1 million in salary and travel expenses for his mythical second job as a CIA agent. To suppose his fraudulent actions did not extend to his official EPA duties defies belief. And yet EPA has apparently taken no steps to reexamine Beale’s analyses or conclusions.

EPA has done all of this knowingly, deliberately, with full knowledge of the grossly deficient foundations of its pseudo-science and policies – to drive an anti-hydrocarbon agenda, without regard for the consequences that agenda will inflict on millions of Americans and billions of people worldwide.

This goes beyond mere sloppiness or incompetence. It is dishonest. It violates the law. According to standards applicable to every citizen and business in the land, it is fraudulent. And while ObamaCare affects one-sixth of economy, by controlling the energy that powers our homes, cars, businesses and nation, EPA’s carbon and carbon dioxide policies will control and impair 100% of our economy, wipe out tens of millions of jobs, and kill thousands of people – for no health or environmental benefits.

#### U.S. key to the global economy

David Caploe 9, CEO of the Singapore-incorporated American Centre for Applied Liberal Arts and Humanities in Asia, 4/7/9, “Focus still on America to lead global recovery”, The Strait Times

IN THE aftermath of the G-20 summit, most observers seem to have missed perhaps the most crucial statement of the entire event, made by United States President Barack Obama at his pre-conference meeting with British Prime Minister Gordon Brown: 'The world has become accustomed to the US being a voracious consumer market, the engine that drives a lot of economic growth worldwide,' he said. 'If there is going to be renewed growth, it just can't be the US as the engine.' While superficially sensible, this view is deeply problematic. To begin with, it ignores the fact that the global economy has in fact been 'America-centred' for more than 60 years. Countries - China, Japan, Canada, Brazil, Korea, Mexico and so on - either sell to the US or they sell to countries that sell to the US. This system has generally been advantageous for all concerned. America gained certain historically unprecedented benefits, but the system also enabled participating countries - first in Western Europe and Japan, and later, many in the Third World - to achieve undreamt-of prosperity. At the same time, this deep inter-connection between the US and the rest of the world also explains how the collapse of a relatively small sector of the US economy - 'sub-prime' housing, logarithmically exponentialised by Wall Street's ingenious chicanery - has cascaded into the worst global economic crisis since the Great Depression. To put it simply, Mr Obama doesn't seem to understand that there is no other engine for the world economy - and hasn't been for the last six decades. If the US does not drive global economic growth, growth is not going to happen. Thus, US policies to deal with the current crisis are critical not just domestically, but also to the entire world. Consequently, it is a matter of global concern that the Obama administration seems to be following Japan's 'model' from the 1990s: allowing major banks to avoid declaring massive losses openly and transparently, and so perpetuating 'zombie' banks - technically alive but in reality dead. As analysts like Nobel laureates Joseph Stiglitz and Paul Krugman have pointed out, the administration's unwillingness to confront US banks is the main reason why they are continuing their increasingly inexplicable credit freeze, thus ravaging the American and global economies. Team Obama seems reluctant to acknowledge the extent to which its policies at home are failing not just there but around the world as well. Which raises the question: If the US can't or won't or doesn't want to be the global economic engine, which country will? The obvious answer is China. But that is unrealistic for three reasons. First, China's economic health is more tied to America's than practically any other country in the world. Indeed, the reason China has so many dollars to invest everywhere - whether in US Treasury bonds or in Africa - is precisely that it has structured its own economy to complement America's. The only way China can serve as the engine of the global economy is if the US starts pulling it first. Second, the US-centred system began at a time when its domestic demand far outstripped that of the rest of the world. The fundamental source of its economic power is its ability to act as the global consumer of last resort. China, however, is a poor country, with low per capita income, even though it will soon pass Japan as the world's second largest economy. There are real possibilities for growth in China's domestic demand. But given its structure as an export-oriented economy, it is doubtful if even a successful Chinese stimulus plan can pull the rest of the world along unless and until China can start selling again to the US on a massive scale. Finally, the key 'system' issue for China - or for the European Union - in thinking about becoming the engine of the world economy - is monetary: What are the implications of having your domestic currency become the global reserve currency? This is an extremely complex issue that the US has struggled with, not always successfully, from 1959 to the present. Without going into detail, it can safely be said that though having the US dollar as the world's medium of exchange has given the US some tremendous advantages, it has also created huge problems, both for America and the global economic system. The Chinese leadership is certainly familiar with this history. It will try to avoid the yuan becoming an international medium of exchange until it feels much more confident in its ability to handle the manifold currency problems that the US has grappled with for decades. Given all this, the US will remain the engine of global economic recovery for the foreseeable future, even though other countries must certainly help. This crisis began in the US - and it is going to have to be solved there too.

#### Extinction

Geoffrey Kemp 10, Director of Regional Strategic Programs at The Nixon Center, served in the White House under Ronald Reagan, special assistant to the president for national security affairs and senior director for Near East and South Asian affairs on the National Security Council Staff, Former Director, Middle East Arms Control Project at the Carnegie Endowment for International Peace, 2010, The East Moves West: India, China, and Asia’s Growing Presence in the Middle East, p. 233-4

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

### \*Off

#### Restrictions are prohibitions on action --- the aff is oversight

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.

#### 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

### \*Off

#### The United States Federal Government should offer Israel consultation over whether or not to increase judicial restrictions on the indefinite detention war powers authority of the president of the United States by imposing a clean hands doctrine on that authority. The United States Federal Government should tell Israel that the consultation is binding. The United States Federal Government should not increase judicial restrictions on the indefinite detention war powers authority of the president of the United States by imposing a clean hands doctrine on that authority.

#### US-Israel relations are at a new low

Chris Good, 1-14-2014, "US-Israeli Relations Strained by 'Messianic Fervor'," ABC News Blogs, http://abcnews.go.com/blogs/politics/2014/01/us-israeli-relations-strained-by-messianic-fervor/

U.S.-Israeli relations have at times been rocky since early in President Obama’s first term, but the relationship may have hit a new low today – publicly, at least – with two spats brewing in the Israeli press. Two conservative, high-ranking Israeli officials criticized Secretary of State John Kerry today, one of them – Israel’s defense minister – accusing Kerry of “messianic fervor.” Kerry has made Jerusalem and Ramallah his second homes this fall and winter, pushing (myopically, some have said) for an elusive, long-sought peace deal that would create a Palestinian state and end decades of off-and-on conflict. The secretary of state has visited Israel five times since September, shuttling back and forth between meetings with Israeli Prime Minister Benjamin Netanyahu and Palestinian President Mahmoud Abbas. On a nine-month timetable agreed to on July 30, Kerry is pushing for a framework agreement on a final peace deal by the end of April, an ambitious goal, by any standards. But a top Israeli official just wants Kerry to leave Israel alone, according to comments published in Israeli newspaper Yedioth Ahronoth, which reported today that Defense Minister Moshe Ya’alon called Kerry “obsess[ed]” with Israeli/Palestinian peace: “Abu Mazen (Palestinian President Mahmoud Abbas) is alive and well thanks to us,” Ya’alon said. “The moment we leave Judea and Samaria (the West Bank) he is finished. In reality, there have been no negotiations between us and the Palestinians for all these months – but rather between us and the Americans. The only thing that can ‘save us’ is for John Kerry to win a Nobel Prize and leave us in peace.” … “The American security plan presented to us is not worth the paper it’s written on,” Ya’alon said. “It contains no peace and no security. Only our continued presence in Judea and Samaria and the River Jordan will endure that Ben-Gurion Airport and Netanya don’t become targets for rockets from every direction. American Secretary of State John Kerry, who turned up here determined and acting out of misplaced obsession and messianic fervor, cannot teach me anything about the conflict with the Palestinians.” In early December, Kerry brought Gen. John Allen, the U.S. security envoy for peace negotiations, and presented some proposals on Israeli security under an agreement, the proposal Ya’alon referred to as worthless. The State Department has called the comments “inappropriate” and “offensive.” Spokeswoman Jen Psaki told reporters: “The remarks of the Defense Minister if accurate are offensive and inappropriate especially given all that the United States is doing to support Israel’s security needs. Secretary Kerry and his team including General Allen have been working day and night to try to promote a secure peace for Israel because of the Secretary’s deep concern for Israel’s future. To question his motives and distort his proposals is not something we would expect from the Defense Minister of a close ally.” Ya’alon is a member of the Likud Party, from which Netanyahu hails, and which has opposed a two-state solution along 1967 borders, the starting point the United States has outlined in working towards a peace agreement. But that’s not Kerry’s only dispute playing out in the Israeli media today. Israeli housing minister Uri Ariel, a member of the conservative-nationalist Jewish Home party, contradicted the State Department’s public claims about new Israeli settlements, reportedly telling a radio station that Kerry has approved of the announcements of new housing units and that Israel will continue to build them regardless of what the United States says. From Israeli media network Arutz Sheva: Speaking to Kol Yisrael radio, Ariel said that the publication of the latest tenders for new homes were coordinated with U.S. Secretary of State John Kerry and that he approved of them. “Even if the United States does not approve of the construction, it will continue,” he added. “The United States is our greatest ally, but they also sometimes take actions we do not approve of.” Settlement plans have nearly derailed talks. After Israel announced plans to build 3,500 new settler homes in parts of the West Bank, the Palestinian negotiating team resigned in November. Ariel’s reported remarks contradict what the State Dept. has said: that the U.S. does not coordinate or condone Israeli announcements of new settlement plans. The State Dept. has called new settlements “illegitimate”; when asked for details of Kerry’s conversations with Netanyahu about them, the State Dept. has pointed back to public comments and reiterated U.S. opposition. A senior U.S. official disputed Ariel’s assertion, telling reporters: “Our position on settlements has not changed, and we have consistently communicated our objection both publicly and directly to the Israelis on settlement announcements. We have also not coordinated or agreed to any settlement announcements. In addition, Secretary Kerry has never met or spoken to Uri Ariel, so nothing has been coordinated or agreed with him, and he is not in a position to describe the Secretary’s conversations with Prime Minister Netanyahu.” In such a high-stakes negotiation, ranklings can be expected on both sides, and the Israelis’ comments follow what one might expect – conservatives in Israel opposing the proposals Kerry is working toward–but it is rare, in the caste of Ya’alom especially, that such aggressive criticism is publicly aired.

#### Consultation with Israel would repair relations

Daniel Drezner, 11-5-2013, "The Unconstant Gardener," Foreign Policy, http://www.foreignpolicy.com/articles/2013/11/04/the\_unconstant\_gardener\_obama\_us\_foreign\_policy

Newcomers to international relations may be forgiven for believing that allied resentment at the United States is a constant in American foreign policy. Believe it or not, there was a time when Washington managed to keep its allies pretty happy -- even in the wake of major foreign policy shifts. In retrospect, the 20-odd years between George Shultz becoming Ronald Reagan's secretary of state and George W. Bush becoming president were they heyday of "gardening." Shultz coined this term in his memoirs to refer to the need to consult and listen to allies on a regular basis. That way, even if the United States decided on policies at variance with their allies, at least those countries would feel in the loop. George W. Bush was not a very good gardener, outside of his constant watering of Tony Blair. Indeed, he was so historically bad at it that, in 2008, for the first time ever, more Americans thought that restoring America's standing in the world was a higher priority than protecting jobs at home. When Barack Obama ran for president, he stressed the need to restore America's standing -- and less than a year into office, declared that mission accomplished. For the past month, however, we've learned something important about President Obama: based on the global pique spawned by Edward Snowden's NSA revelations, among other things, he's just as bad a gardener as George W. Bush. Pick a region of the globe and in all likelihood America's allies located there have a valid case for being cheesed off at Washington. In the Pacific Rim, the fury is directed at the terrifically stupid government shutdown/debt-ceiling fight from last month. Countries there who hold massive sums of U.S. government debt were not keen on Congress's flirtation with defaulting on U.S. debt. Tea Party bloody-mindedness is not exactly Obama's fault, but his decision to cancel his trip to the region to deal with the crisis is on him. The contrast between Obama's no-show and Chinese premier Xi Jinping's heralded tour of Southeast Asian capitals did not go unnoticed by foreign affairs observers. In the Middle East, longstanding U.S. allies are furious with Washington for what they see as its volte-face on longstanding adversaries. First, the Obama administration backs down from a military confrontation with Syria's Bashar al-Assad. Then Secretary of State John Kerry went so far as to praise the Assad regime for complying with their chemical weapons agreement in "record time." Meanwhile, the administration started to reciprocate Iranian President Hasan Rouhani's outreach efforts -- rattling both Israeli and Saudi foreign policy circles. There's little new with Israeli Prime Minister Benjamin Netanyahu's irritation with the Obama administration. And the Saudi pique has been long-simmering -- but now it's gone public, however, which is surprising. Finally, there is Europe, home to America's longest and strongest allies. Oddly, they might be the most upset with President Obama. Yes, these countries are also annoyed with Washington's debt ceiling shenanigans and felt out of the loop on the dramatic reversal of course on Syria. But revelations that the NSA had bugged German Chancellor Angela Merkel's cell phone have kicked tensions up a notch. As Merkel's former defense minister explained recently, "we are at the level that European leaders don't only lose faith in a partner, but also their face." This lack of warmth between Obama and allied leaders is nothing new. Indeed, five months ago the New York Times was reporting that, "For all of his effort to cultivate personal ties with foreign counterparts over the last four and a half years.... Mr. Obama has complicated relationships with some, and has bet on others who came to disappoint him." Rather, what's striking is the way in which a little bit of gardening might have smoothed some of these issues. Sure, Saudi Arabia was never going to like any warming of U.S. relations with Iran, and no one was jumping for joy over the debt ceiling deadlock. That said, keeping the Saudis firmly in the loop on the evolution of U.S. policy towards Iran, Syria, and Egypt might have assuaged some anxieties in Riyadh. And the moment that Snowden fled the country, the White House should have crafted a damage control strategy with affected allies -- just as it did when Wikileaks released a trove of U.S. diplomatic cables in 2010. But at least at the public level, it seems like there's been almost no pruning and tending.

#### US-Israel relations are key to stop terrorism and prolif

Michael Eisenstadt, senior fellow @ Washington Inst., and David Pollock, ditto, 11-7-2012, "Friends with Benefits: Why the U.S.-Israeli Alliance Is Good for America," Foreign Affairs, http://www.washingtoninstitute.org/policy-analysis/view/friends-with-benefits-why-the-u.s.-israeli-alliance-is-good-for-america

U.S.-Israeli security cooperation dates back to heights of the Cold War, when the Jewish state came to be seen in Washington as a bulwark against Soviet influence in the Middle East and a counter to Arab nationalism. Although the world has changed since then, the strategic logic for the U.S.-Israeli alliance has not. Israel remains a counterweight against radical forces in the Middle East, including political Islam and violent extremism. It has also prevented the further proliferation of weapons of mass destruction in the region by thwarting Iraq and Syria's nuclear programs. Israel continues to help the United States deal with traditional security threats. The two countries share intelligence on terrorism, nuclear proliferation, and Middle Eastern politics. Israel's military experiences have shaped the United States' approach to counterterrorism and homeland security. The two governments work together to develop sophisticated military technology, such as the David's Sling counter-rocket and Arrow missile defense systems, which may soon be ready for export to other U.S. allies. Israel has also emerged as an important niche defense supplier to the U.S. military, with sales growing from $300 million per year before September 11 to $1.1 billion in 2006, due to the wars in Afghanistan and Iraq. Israel's military research and development complex has pioneered many cutting-edge technologies that are transforming the face of modern war, including cyberweapons, unmanned vehicles (such as land robots and aerial drones), sensors and electronic warfare systems, and advanced defenses for military vehicles.

#### Terror causes extinction

Hellman 8(Martin E, emeritus prof of engineering @ Stanford, “Risk Analysis of Nuclear Deterrence” SPRING, THE BENT OF TAU BETA PI, http://www.nuclearrisk.org/paper.pdf)

The threat of nuclear terrorism looms much larger in the public’s mind than the threat of a full-scale nuclear war, yet this article focuses primarily on the latter. An explanation is therefore in order before proceeding. A terrorist attack involving a nuclear weapon would be a catastrophe of immense proportions: “A 10-kiloton bomb detonated at Grand Central Station on a typical work day would likely kill some half a million people, and inflict over a trillion dollars in direct economic damage. America and its way of life would be changed forever.” [Bunn 2003, pages viii-ix]. The likelihood of such an attack is also significant. Former Secretary of Defense William Perry has estimated the chance of a nuclear terrorist incident within the next decade to be roughly 50 percent [Bunn 2007, page 15]. David Albright, a former weapons inspector in Iraq, estimates those odds at less than one percent, but notes, “We would never accept a situation where the chance of a major nuclear accident like Chernobyl would be anywhere near 1% .... A nuclear terrorism attack is a low-probability event, but we can’t live in a world where it’s anything but extremely low-probability.” [Hegland 2005]. In a survey of 85 national security experts, Senator Richard Lugar found a median estimate of 20 percent for the “probability of an attack involving a nuclear explosion occurring somewhere in the world in the next 10 years,” with 79 percent of the respondents believing “it more likely to be carried out by terrorists” than by a government [Lugar 2005, pp. 14-15]. I support increased efforts to reduce the threat of nuclear terrorism, but that is not inconsistent with the approach of this article. Because terrorism is one of the potential trigger mechanisms for a full-scale nuclear war, the risk analyses proposed herein will include estimating the risk of nuclear terrorism as one component of the overall risk. If that risk, the overall risk, or both are found to be unacceptable, then the proposed remedies would be directed to reduce which- ever risk(s) warrant attention. Similar remarks apply to a number of other threats (e.g., nuclear war between the U.S. and China over Taiwan). his article would be incomplete if it only dealt with the threat of nuclear terrorism and neglected the threat of full- scale nuclear war. If both risks are unacceptable, an effort to reduce only the terrorist component would leave humanity in great peril. In fact, society’s almost total neglect of the threat of full-scale nuclear war makes studying that risk all the more important. The cosT of World War iii The danger associated with nuclear deterrence depends on both the cost of a failure and the failure rate.3 This section explores the cost of a failure of nuclear deterrence, and the next section is concerned with the failure rate. While other definitions are possible, this article defines a failure of deterrence to mean a full-scale exchange of all nuclear weapons available to the U.S. and Russia, an event that will be termed World War III. Approximately 20 million people died as a result of the first World War. World War II’s fatalities were double or triple that number—chaos prevented a more precise deter- mination. In both cases humanity recovered, and the world today bears few scars that attest to the horror of those two wars. Many people therefore implicitly believe that a third World War would be horrible but survivable, an extrapola- tion of the effects of the first two global wars. In that view, World War III, while horrible, is something that humanity may just have to face and from which it will then have to recover. In contrast, some of those most qualified to assess the situation hold a very different view. In a 1961 speech to a joint session of the Philippine Con- gress, General Douglas MacArthur, stated, “Global war has become a Frankenstein to destroy both sides. … If you lose, you are annihilated. If you win, you stand only to lose. No longer does it possess even the chance of the winner of a duel. It contains now only the germs of double suicide.” Former Secretary of Defense Robert McNamara ex- pressed a similar view: “If deterrence fails and conflict develops, the present U.S. and NATO strategy carries with it a high risk that Western civilization will be destroyed” [McNamara 1986, page 6]. More recently, George Shultz, William Perry, Henry Kissinger, and Sam Nunn4 echoed those concerns when they quoted President Reagan’s belief that nuclear weapons were “totally irrational, totally inhu- mane, good for nothing but killing, possibly destructive of life on earth and civilization.” [Shultz 2007] Official studies, while couched in less emotional terms, still convey the horrendous toll that World War III would exact: “The resulting deaths would be far beyond any precedent. Executive branch calculations show a range of U.S. deaths from 35 to 77 percent (i.e., 79-160 million dead) … a change in targeting could kill somewhere between 20 million and 30 million additional people on each side .... These calculations reflect only deaths during the first 30 days. Additional millions would be injured, and many would eventually die from lack of adequate medical care … millions of people might starve or freeze during the follow- ing winter, but it is not possible to estimate how many. … further millions … might eventually die of latent radiation effects.” [OTA 1979, page 8] This OTA report also noted the possibility of serious ecological damage [OTA 1979, page 9], a concern that as- sumed a new potentiality when the TTAPS report [TTAPS 1983] proposed that the ash and dust from so many nearly simultaneous nuclear explosions and their resultant fire- storms could usher in a nuclear winter that might erase homo sapiens from the face of the earth, much as many scientists now believe the K-T Extinction that wiped out the dinosaurs resulted from an impact winter caused by ash and dust from a large asteroid or comet striking Earth. The TTAPS report produced a heated debate, and there is still no scientific consensus on whether a nuclear winter would follow a full-scale nuclear war. Recent work [Robock 2007, Toon 2007] suggests that even a limited nuclear exchange or one between newer nuclear-weapon states, such as India and Pakistan, could have devastating long-lasting climatic consequences due to the large volumes of smoke that would be generated by fires in modern megacities. While it is uncertain how destructive World War III would be, prudence dictates that we apply the same engi- neering conservatism that saved the Golden Gate Bridge from collapsing on its 50th anniversary and assume that preventing World War III is a necessity—not an option.

#### prolif causes nuclear war

Shmuel Bar 13, director of studies at the Institute of Policy and Strategy in Herzliya, Israel, February 2013, “The Dangers of a Poly-Nuclear Mideast,” Hoover Policy Review, <http://www.hoover.org/publications/policy-review/article/139416>

Even ideologically, or religiously, highly charged leaderships may be aware of the dangers inherent in nuclear war and behave rationally. However, such awareness and rational decision-making processes are a necessary but not a sufficient condition. Nuclear confrontation may not be the result of some irrational but premeditated decision by leaders to initiate a nuclear strike, but of faulty intelligence, command, and control in escalatory situations. In such situations, it appears that the command and control structures that may develop in new nuclear states in the Middle East are likely to exacerbate the dangers inherent in escalation and brinkmanship, and to result ultimately in perennial nuclear instability or even nuclear war.

### \*Off

#### Expanding habeas kills warfighting and intel necessary to WOT

Jay Carafano 7, Vice President, Foreign and Defense Policy Studies, E. W. Richardson Fellow, and Director, Heritage, The War on Terrorism: Habeas Corpus On and Off the Battlefield, www.heritage.org/research/reports/2007/07/the-war-on-terrorism-habeas-corpus-on-and-off-the-battlefield

Impeding the Effectiveness of Military Operations

Soldiers have a number of equally compelling responsibilities in war: accomplishing the mission, safeguarding innocents, and protecting their fellow soldiers. These tasks are difficult enough. Soldiers should not be required to provide to unlawful combatants, in the same manner and to the same extent as would be expected of a civil court, the full array of civil protections afforded to U.S. citizens by the Constitution and created by judges since the 1960s. For example, it is highly unrealistic to expect soldiers during active operations to collect evidence and insure the integrity of the chain of custody for that evidence. American soldiers would effectively face a Hobson's choice: on one hand, win the war, bring fellow soldiers home, and safeguard innocents; or, on the other hand, meet novel legal standards that might result in prematurely releasing war criminals who will go back to the battlefield. ¶ Crippling Intelligence Gathering ¶ **Gaining timely, actionable information is the most powerful weapon in uncovering and thwarting terrorist plots. Requiring the armed forces to place detainees under a civilian legal process will severely restrict their access to detainees and, in turn, cripple their capacity to obtain intelligence through legitimate, lawful interrogation**. ¶ Military authorities are giving Gitmo detainees treatment that is as good as or better than that typically afforded to U.S.-held POWs. The only real difference is that Gitmo detainees may be interrogated for more than name, rank, and serial number. ¶ Unnecessary Burdens Changing the legal framework governing unlawful combatants is simply unnecessary. The military is already meeting its obligations to deal justly with individuals in its custody. ¶ Since the inception of the Geneva Conventions, no country has ever given automatic habeas corpus rights to POWs. Furthermore, such action is not required by the U.S. Constitution. The Supreme Court ruled in 2004 that, at most, some detainees were covered by a statutory privilege to habeas corpus. The Court concluded, in other words, that Congress had implicitly conferred habeas corpus rights to certain individuals. However, the Military Commissions Act of 2006 repealed that privilege and, so far, Congress has not acted to restore it. ¶ The Department of Defense already operates two tribunals that safeguard the legal rights of detainees. The Combatant Status Review Tribunal (CSRT) uses a formal process to determine whether detainees meet the criteria to be designated as enemy combatants. Tribunals known as Administrative Review Boards (ARB) ensure that enemy combatants are not held any longer than necessary. Both processes operate within the confines of traditional law-of-war tribunals and are also subject to the appeals process and judicial review. In addition, Congress has established a process under the Military Commissions Act to allow the military to try any non-U.S. detainees for war crimes they are alleged to have committed. ¶ Conclusion Imposing U.S. civil procedures over the conduct of armed conflict **will damage national security and make combat more dangerous for soldiers and civilians alike.** The drive to do so is based on erroneous views about the Constitution, the United States' image abroad, and the realities of war. ¶ U.S. military legal processes are on par with or exceed the best legal practices in the world. While meeting the needs of national security, the system respects individuals' rights and offers unlawful enemy combatants a fundamentally fair process that is based on that afforded to America's own military men and women. Having proven itself in past conflicts, **the current legal framework can continue to do so in a prolonged war against terrorism.**

**Terrorism causes extinction---hard-line responses are key**

Nathan **Myhrvold '13**, Phd in theoretical and mathematical physics from Princeton, and founded Intellectual Ventures after retiring as chief strategist and chief technology officer of Microsoft Corporation , July 2013, "Stratgic Terrorism: A Call to Action," The Lawfare Research Paper Series No.2, <http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf>

Several powerful trends have aligned to profoundly change the way that the world works. Technology ¶ now allows stateless groups to organize, recruit, and fund ¶ themselves in an unprecedented fashion. That, coupled ¶ with the extreme difficulty of finding and punishing a stateless group, means that stateless groups are positioned to be ¶ lead players on the world stage. They may act on their own, ¶ or they may act as proxies for nation-states that wish to ¶ duck responsibility. Either way, stateless groups are forces ¶ to be reckoned with.¶ At the same time, a different set of technology trends ¶ means that small numbers of people can obtain incredibly ¶ lethal power. Now, for the first time in human history, a ¶ small group can be as lethal as the largest superpower. Such ¶ a group could execute an attack that could kill millions of ¶ people. It is technically feasible for such a group to kill billions of people, to end modern civilization—perhaps even ¶ to drive the human race to extinction. Our defense establishment was shaped over decades to ¶ address what was, for a long time, the only strategic threat ¶ our nation faced: Soviet or Chinese missiles. More recently, ¶ it has started retooling to address tactical terror attacks like ¶ those launched on the morning of 9/11, but the reform ¶ process is incomplete and inconsistent. A real defense will ¶ require rebuilding our **military and intelligence capabilities** from the ground up. Yet, so far, strategic terrorism has ¶ received relatively little attention in defense agencies, and ¶ the efforts that have been launched to combat this existential threat seem fragmented.¶ History suggests what will happen. The only thing that shakes America out of complacency is a direct threat from a determined adversary that confronts us with our shortcomings by **repeatedly attacking** us or hectoring **us for decades**.

## Case

### Solvency vs. Courts

#### Courts can’t check circumvention --- 4 reasons

* Too slow (takes years)
* Rulings are narrow, allowing circumvention
* Implementation isn’t guaranteed and can be scuttled by the president
* Won’t take the cases --- deference

Wheeler 9 associate professor of political science at Ball State University (Darren A., “Checking Presidential Detention Power in the War on Terror: What Should We Expect from the Judiciary?” Presidential Studies Quarterly 39.4 (Dec 2009): 677-700, ebsco)

This article argues that there are four specific reasons why those expecting the Supreme Court to be a significant check on presidential detention power in the war on terror are likely to be disappointed. The first reason is that the judiciary makes decisions in what can be referred to as "judicial time." In short, the courts are slow. The judicial decision-making process is often one that takes years to complete (Rehnquist 1998). Few political actors conceptualize the decision-making process in such an extended manner. If the president can respond more quickly to matters of policy than the courts, it might be difficult for the judiciary to act as a check on the president. The second factor that limits the judiciary's ability to check presidential detention power is the fact that courts usually answer specific narrow legal questions as opposed to larger, "big picture" policy questions (Baum 2007; Rehnquist 1998; Rosenberg 1991). As a result, even when the Court makes a decision on a matter, it is often a narrow one that addresses only a small part of the overall policy picture. This can limit the impact that the courts have on the policymaking process, as other policy makers often find different means to accomplish their desired goals regardless of the roadblocks presented by the courts on particular details. The third factor that potentially limits judicial impact on the president's desired detention policies is the fact that the judicial implementation process is fraught with uncertainty (Baum 2007; Canon and Johnson 1999; Carp, Stidham, and Manning 2004; Stumpf 1998). Even when the courts make a decision, it is possible for other political actors (including the president) to shape the implementation process in such a way as to minimize the impact that the particular decision might have on the president's preferred policies. Finally, the judiciary, especially since the second half of the twentieth century, has adopted a general posture of deference to the executive in matters of war powers and foreign affairs (Fisher 2005; Howell 2003; Rossiter and Longaker 1976). This deference might lead the Court to refuse to even hear challenges to presidential detention power. Even when the Court does hear cases, it may dispose of them in ways that illustrate this historical pattern of deference. Any combination of these factors **may limit the ability of the judiciary to check presidential initiatives**, **especially in** a policy area - **the war on terror** - in which the Bush administration clearly demonstrated an intense willingness and desire to exert unilateral control over matters (Fisher 2004; Goldsmith 2007; Kassop 2007; Savage 2007; Wheeler 2008).

### Solvency

#### US engagement and reintervention are inevitable---it’s only a question of making it effective---the plan prevents failed engagement that triggers their turns

Robert Kagan 11 is a contributing editor to The Weekly Standard and a senior fellow in foreign policy at the Brookings Institution. "The Price of Power" Jan 24 Vol 16 No18 www.weeklystandard.com/articles/price-power\_533696.html?page=3

**In theory**, the United States could refrain from intervening abroad. But, **in practice**, will it? Many assume today that the American public has had it with interventions, and Alice Rivlin certainly reflects a strong current of opinion when she says that “much of the public does not believe that we need to go in and take over other people’s countries.” That sentiment has often been heard after interventions, especially those with mixed or dubious results. It was heard after the four-year-long war in the Philippines, which cost 4,000 American lives and untold Filipino casualties. It was heard after Korea and after Vietnam. It was heard after Somalia. Yet the reality has been that after each intervention, the sentiment against foreign involvement has faded, and the United States has **intervened again**.

Depending on how one chooses to count, the United States has undertaken roughly **25 overseas interventions since 1898:** Cuba, 1898 The Philippines, 1898-1902 China, 1900 Cuba, 1906 Nicaragua, 1910 & 1912 Mexico, 1914 Haiti, 1915 Dominican Republic, 1916 Mexico, 1917 World War I, 1917-1918 Nicaragua, 1927 World War II, 1941-1945 Korea, 1950-1953 Lebanon, 1958 Vietnam, 1963-1973 Dominican Republic, 1965 Grenada, 1983 Panama, 1989 First Persian Gulf war, 1991 Somalia, 1992 Haiti, 1994 Bosnia, 1995 Kosovo, 1999 Afghanistan, 2001-present Iraq, 2003-present

That is one intervention every 4.5 years on average. Overall, the United States has intervened or been engaged in combat somewhere in 52 out of the last 112 years, or roughly 47 percent of the time. Since the end of the Cold War, it is true, the rate of U.S. interventions has increased, with an intervention roughly once every 2.5 years and American troops intervening or engaged in combat in 16 out of 22 years, or over 70 percent of the time, since the fall of the Berlin Wall.

The argument for returning to “normal” begs the question: **What is normal for the United States? The** historical record of the last century **suggests that it is** not a policy of nonintervention. This record ought to raise doubts about the theory that American behavior these past two decades is the product of certain unique ideological or doctrinal movements, whether “liberal imperialism” or “neoconservatism.” Allegedly “realist” presidents in this era have been just as likely to order interventions as their more idealistic colleagues. George H.W. Bush was as profligate an intervener as Bill Clinton. He invaded Panama in 1989, intervened in Somalia in 1992—both on primarily idealistic and humanitarian grounds—which along with the first Persian Gulf war in 1991 made for three interventions in a single four-year term. Since 1898 the list of presidents who ordered armed interventions abroad has included William McKinley, Theodore Roose-velt, William Howard Taft, Woodrow Wilson, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John F. Kennedy, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush. One would be hard-pressed to find a common ideological or doctrinal thread among them—unless it is the doctrine and ideology of a mainstream American foreign policy that leans more toward intervention than many imagine or would care to admit.

Many don’t want to admit it, and the only thing as consistent as this pattern of American behavior has been the claim by contemporary critics that it is abnormal and a departure from American traditions. The anti-imperialists of the late 1890s, the isolationists of the 1920s and 1930s, the critics of Korea and Vietnam, and the critics of the first Persian Gulf war, the interventions in the Balkans, and the more recent wars of the Bush years have all insisted that the nation had in those instances behaved unusually or irrationally. And yet the behavior has continued.

To note this consistency is not the same as justifying it. The United States may have been wrong for much of the past 112 years. Some critics would endorse the sentiment expressed by the historian Howard K. Beale in the 1950s, that “the men of 1900” had steered the United States onto a disastrous course of world power which for the subsequent half-century had done the United States and the world no end of harm. But whether one lauds or condemns this past century of American foreign policy—and one can find reasons to do both—the fact of this consistency remains. It would require not just a modest reshaping of American foreign policy priorities but a sharp departure from this tradition to bring about the kinds of changes that would allow the United States to make do with a substantially smaller force structure.

Is such a sharp departure in the offing? It is no doubt true that many Americans are unhappy with the on-going warfare in Afghanistan and to a lesser extent in Iraq, and that, if asked, a majority would say the United States should intervene less frequently in foreign nations, or perhaps not at all. It may also be true that the effect of long military involvements in Iraq and Afghanistan may cause Americans and their leaders to shun further interventions at least for a few years—as they did for nine years after World War I, five years after World War II, and a decade after Vietnam. This may be further reinforced by the difficult economic times in which Americans are currently suffering. The longest period of nonintervention in the past century was during the 1930s, when unhappy memories of World War I combined with the economic catastrophe of the Great Depression to constrain American interventionism to an unusual degree and produce the first and perhaps only genuinely isolationist period in American history.

So are we back to the mentality of the 1930s? It wouldn’t appear so. There is no great wave of isolationism sweeping the country. There is not even the equivalent of a Patrick Buchanan, who received 3 million votes in the 1992 Republican primaries. Any isolationist tendencies that might exist are severely tempered by continuing fears of terrorist attacks that might be launched from overseas. Nor are the vast majority of Americans suffering from economic calamity to nearly the degree that they did in the Great Depression.

Even if we were to repeat the policies of the 1930s, however, it is worth recalling that the unusual restraint of those years was not sufficient to keep the United States out of war. On the contrary, the United States took actions which ultimately led to the greatest and most costly foreign intervention in its history. Even the most determined and in those years powerful isolationists could not prevent it.

Today there are a number of **obvious possible contingencies** that might **lead the United States to substantial interventions** overseas, notwithstanding the preference of the public and its political leaders to avoid them. Few Americans want a war with Iran, for instance. But it is not implausible that a president—indeed, this president—might find himself in a situation where military conflict at some level is hard to avoid. The continued success of the international sanctions regime that the Obama administration has so skillfully put into place, for instance, might eventually cause the Iranian government to lash out in some way—perhaps by attempting to close the Strait of Hormuz. Recall that Japan launched its attack on Pearl Harbor in no small part as a response to oil sanctions imposed by a Roosevelt administration that had not the slightest interest or intention of fighting a war against Japan but was merely expressing moral outrage at Japanese behavior on the Chinese mainland. Perhaps in an Iranian contingency, the military actions would stay limited. But perhaps, too, they would escalate. One could well imagine an American public, now so eager to avoid intervention, suddenly demanding that their president retaliate. Then there is the possibility that a military exchange between Israel and Iran, initiated by Israel, could drag the United States into conflict with Iran. Are such scenarios so farfetched that they can be ruled out by Pentagon planners?

Other possible contingencies include a war on the Korean Peninsula, where the United States is bound by treaty to come to the aid of its South Korean ally; and possible interventions in Yemen or Somalia, should those states fail even more than they already have and become even more fertile ground for al Qaeda and other terrorist groups. And what about those “humanitarian” interventions that are first on everyone’s list to be avoided? Should another earthquake or some other natural or man-made catastrophe strike, say, Haiti and present the looming prospect of mass starvation and disease and political anarchy just a few hundred miles off U.S. shores, with the possibility of thousands if not hundreds of thousands of refugees, can anyone be confident that an American president will not feel compelled to send an intervention force to help?

**Some may hope that a smaller U.S. military, compelled by the necessity of budget constraints, would prevent a president from intervening. More likely, however,** it would simply prevent a president from intervening effectively. This, after all, was the experience of the Bush administration in Iraq and Afghanistan. Both because of constraints and as a conscious strategic choice, the Bush administration sent too few troops to both countries. The results were lengthy, unsuccessful conflicts, burgeoning counterinsurgencies, and **loss of confidence** in American will and capacity, as well as large annual expenditures. Would it not have been better, and also cheaper, to have sent larger numbers of forces initially to both places and brought about a more rapid conclusion to the fighting? The point is, it may prove cheaper in the long run to have larger forces that can fight wars quickly and conclusively, as Colin Powell long ago suggested, than to have smaller forces that can’t. Would a defense planner trying to anticipate future American actions be wise to base planned force structure on the assumption that the United States is out of the intervention business? Or would that be the kind of penny-wise, pound-foolish calculation that, in matters of national security, can prove so unfortunate?

The debates over whether and how the United States should respond to the world’s strategic challenges will and should continue. Armed interventions overseas should be weighed carefully, as always, with an eye to whether the risk of inaction is greater than the risks of action. And as always, these judgments will be merely that: judgments, made with inadequate information and intelligence and no certainty about the outcomes. No foreign policy doctrine can avoid errors of omission and commission. But history has provided some lessons, and for the United States the lesson has been fairly clear: The world is better off, and the United States is better off, in the kind of international system that American power has built and defended.

#### The Courts have willingly developed institutional checks that lock them into deference

Daniel Abebe & Eric A. Posner 11, Assistant Professor and Kirkland & Ellis Professor, University of Chicago Law School, The Flaws of Foreign Affairs Legalism, 51 Va. J. Int'l L. 507

Executive primacy means that courts give greater deference to executive interpretations of international law and foreign relations law than they do to executive interpretations of other areas of the law. This stance goes back to the founding generation, when proponents of executive primacy, such as Alexander Hamilton, argued that the executive needs freedom of action in foreign affairs because of the fluidity of relations among states and the ever-present danger of war. n3 Secrecy, speed, and decisiveness are at a premium, and these are characteristics of the executive, n4 not of the courts, which are slow and decentralized.

Courts have largely, though not always, accepted this argument. They have provided a substantial level of deference to executive determinations on a number of foreign affairs questions and on issues related to international law, including treaty interpretation n5 and treaty termination. n6 [\*510] Courts also consider the executive's views on the meaning of customary international law (CIL) n7 and generally defer to the executive on the application of head of state immunity. n8 Further, they have permitted the executive to evade the onerous supermajority requirements in the Article II treaty process by entering congressional-executive and executive agreements, n9 and they have developed avoidance doctrines - including the political question doctrine, the act of state doctrine, international comity rules, and state secrecy rules - to limit their own capacity to adjudicate foreign affairs cases. n10

#### Deference inevitable---it’s institutionally locked in, the judiciary wants it, \* and the aff doesn’t clarify multiple constitutional issues

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.

#### 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.

#### The aff can’t solve the broader power grabs of the state

Nasser Hussain 07, an assistant professor in the Department of Law, Jurisprudence, and Social Thought at Amherst College, Summer 07, “Beyond Norm and Exception: Guantánamo,” Critical Inquiry, Vol. 33, No. 4

Finally, what are some of the implications of the argument that norm and exception have blurred severely and perhaps irrevocably? Let me stress that my efforts to draw attention to the ways in which an administrative legality has made the concept of a state of exception superfluous is not just theoretical disagreement or just an effort to discredit one particular paradigm. One may agree or disagree about the continuing validity of a concept, but my more immediate concern here is that the concept not overshadow or distort efforts to fashion a newer, fairer, and more just response.¶ Consider then one such effort to fashion a new response: Bruce Ackerman’s proposals in “The Emergency Constitution.”50 Ackerman’s essay begins with the recognition that attacks on the U.S. similar to 9/11 are almost a virtual certainty and that without creative new constitutional concepts each attack will only prompt harsher political measures in a “downward cycle” (“A,” p. 1044). Dismissing the models currently provided for by war and crime, Ackerman settles on the concept of emergency and sets out to find a way to grant and yet control the use of extraordinary powers in the case of a genuine emergency. For Ackerman, it is time to try to rescue the concept of a state of exception from fascist thinkers like Schmitt, who used it as a battering ram against liberal democracy. Ackerman would confine a genuine emergency to a bounded state (tellingly, the “triggering event” in Ackerman’s proposals is left entirely uncharted, left to the hope of political wisdom). But because Ackerman neglects the more dispersed condition of emergency in contemporary conditions, his proposals hinge on the use of legislative oversight largely in the form of a “supermajoritarian escalator”: “majority support should serve to sustain emergency for a short time—two or three months. Continuation should require an escalating cascade of supermajorities: sixty percent for the next two months; seventy for the next; eighty thereafter” (“A,” p. 1047). While such a sensible and even workable proposal would go some of the way towards removing some of the current excesses of executive policy, my effort at highlighting the role of administrative agencies and regulations suggests that the effectiveness of Ackerman’s proposals would remain extremely limited. That is to say, only if we presume that a bounded state of exception rather than a more dispersed emergency regulation is currently being used would efforts to bind it further be effective. But proposals such as the supermajoritarian escalator would do very little to change the “spitting on the sidewalk” strategy endorsed by Ashcroft or the use of petty visa violations to enable large‐scale roundups and prolonged detention—as I noted earlier, what enables the indefinite detention of hundreds of people without charge is not the use of an exceptional measure but the multiple use of an everyday measure. Moreover, as I earlier noted with reference to Nonet’s work, the internal structure of a rule of law and its relation to administrative regimes, far from negating such an outcome, actually facilitates it. The current emergency response whose operations we witness daily emerges from a broader field of governmentality, and until such a modular and legalistic character is addressed any effort to design a more liberal emergency constitution will invariably miss a great many of its intended targets.

#### The POINT of the state of exception is that rights the plan provides will be suspended

Andrew Neal 05, PhD candidate and part-time Research Associate in the School of Politics, Philosophy, and International Relations and Keele University, 4/12/05, http://www.libertysecurity.org/article199.html

The apparent popular, national legitimacy accorded to Guantanamo marks a further and central element of this complex relationship between norm and exception that Foucault has so far not been able to touch upon. This is where «Society Must Be Defended»can help us. In this series of lectures Foucault makes some radical departures from traditional political theory. He begins by rejecting the classic seventeenth century discourse on sovereignty, which sought to establish the proper limits or rights of sovereign power. This is because, «That model in effect presupposes that the individual is a subject with natural rights or primitive powers; it sets itself the task of accounting for the ideal genesis of the State; and finally, it makes the law the basic manifestation of power.» [[61](http://www.libertysecurity.org/#nb61)] As I have relayed above, Foucault argued that we should instead account for power at its apparatuses, external points of exercise, circulation, reproduction and infinitesimal mechanisms. Foucault’s comments have been highly appropriate for our case, that of contemporary sovereign exceptionalism. The old liberal discourse of rights, limits and oppression is a flawed means of critique if, first, exceptional sovereign power is able to declare itself to be above those limits; second, this does not trigger a constitutional crisis; third, this receives popular legitimacy; and fourth, the language of liberty and rights becomes the handmaiden of the very suspension of those liberties and rights. Sovereign exceptionalism undermines individual rights, the exemplar of the ‘ideal’ genesis of the state in the constitution, and the law itself. In fact sovereign exceptionalism does not simply undermine rights, constitutions and law, but somehow exists in a dialectical relationship with them. The classic liberal discourse on sovereignty is dualistic and as such cannot account for its own negativity.

### Impact D

#### Numerous cultural and historical factors have gone into Guantanamo—that means the aff can’t solve broader violence and there is no broader impact

Halit Tagma 09, Professor of Political Science, Arizona State , “Homo Sacer vs. Homo Soccer Mom: Reading Agamben and Foucault in the War on Terror,” Alternatives: Global, Local, Political, Vol. 34, No. 4 (Oct.-Dec. 2009), pp. 407-435

Sovereign decisions are always already informed by historical and cultural understandings as to who counts as a member of the "good species." The "good species," "the inside," and the body politic have been constructed by colonial discourse. As Roxanne Doty has pointed out, colonial discourse has had a vital role in the construction of Western nations. She further points out that race, religion, and other marks of difference have played an important role in national classification.94 The treatment of faraway people as inferior and exotic has played an important role in nation building in its classic sense. Therefore, who counts as a citizen, a "legitimate" member of a "legitimate" nation, is the product and effect of centuries of interaction of the West with its others. Understood in this sense, sovereign decisions (whether made at the top or bottom level) are informed and shaped by a cultural and colonial history. This is neglected in Agamben's grand analysis of Western politics. Therefore, sovereign power needs the classification, hierarchization, and othering provided by a regime of truth in order to conduct its violent power. Only certain types of people could be rendered as bare life and thrown into a zone of indistinction. Understood this way, it is easier to comprehend the "smooth" production of homines sacri out of Middle Eastern subjects.¶ In the early stages of the war in Afghanistan, as Michael Ratner and Ellen Ray point out, tens of thousands of people were collected by the Northern Alliance.95 Among the collected were ordinary foreign aid workers, refugees, and probable fighters of the Taliban regime. They were sold from $50 to $5,000 per head to Coalition Forces.96 Even though there was no real investigation based on tangible and concrete evidence, some these captives were flown to Guantánamo. As Fox points out, if the prisoners were wearing a Casio brand watch, this meant an higher prize in the eyes of the interrogators, as it signaled that the prisoner was a probable AI Qaeda bombmaker.97 The small difference between wearing a Casio watch in some parts of the world, as opposed to others, is at the ground level what makes it possible for a body to be become a homo sacer. They can then be flown off to an unknown place to face an unknown future that get read and interpreted by petty sovereigns. Such differences in- form the decisions that render bodies as homo sacer, which are thrown into a zone of indistinction. In the modern age, no doubt, Agamben would argue that even the body of a soccer mom - an obedient national flag-waving subject - has entered into political and strategic calculations. However, the soccer mom is not exposed to the violence of homo sacer. Regimes of truth and disciplines produce hierarchically ordered subject positions, and this is an aspect of biopower. The theoretical priority that Agamben gives to sovereign power is reversed when it is shown that biopower makes it possible for the petty agents of the state to conduct sovereign violence. Sovereign power is informed and shaped by biopower.

#### No risk of endless or imperial wars due to pre-emption

Gray 7—Director of the Centre for Strategic Studies and Professor of International Relations and Strategic Studies at the University of Reading, graduate of the Universities of Manchester and Oxford, Founder and Senior Associate to the National Institute for Public Policy, formerly with the International Institute for Strategic Studies and the Hudson Institute (Colin, July, “The Implications of Preemptive and Preventive War Doctrines: A Reconsideration”, [http://www.ciaonet.org/wps/ssi10561/ssi10561.pdf](http://www.ciaonet.org/wps/ssi10561/ssi10561.pdf" \t "_blank))

7. A policy that favors preventive warfare expresses a futile quest for absolute security. It could do so. Most controversial policies contain within them the possibility of misuse. In the hands of a paranoid or boundlessly ambitious political leader, prevention could be a policy for endless warfare. However, the American political system, with its checks and balances, was designed explicitly for the purpose of constraining the executive from excessive folly. Both the Vietnam and the contemporary Iraqi experiences reveal clearly that although the conduct of war is an executive prerogative, in practice that authority is disciplined by public attitudes. Clausewitz made this point superbly with his designation of the passion, the sentiments, of the people as a vital component of his trinitarian theory of war. 51 It is true to claim that power can be, and indeed is often, abused, both personally and nationally. It is possible that a state could acquire a taste for the apparent swift decisiveness of preventive warfare and overuse the option. One might argue that the easy success achieved against Taliban Afghanistan in 2001, provided fuel for the urge to seek a similarly rapid success against Saddam Hussein’s Iraq. In other words, the delights of military success can be habit forming. On balance, claim seven is not persuasive, though it certainly contains a germ of truth. A country with unmatched wealth and power, unused to physical insecurity at home—notwithstanding 42 years of nuclear danger, and a high level of gun crime—is vulnerable to demands for policies that supposedly can restore security. But we ought not to endorse the argument that the United States should eschew the preventive war option because it could lead to a futile, endless search for absolute security. One might as well argue that the United States should adopt a defense policy and develop capabilities shaped strictly for homeland security approached in a narrowly geographical sense. Since a president might misuse a military instrument that had a global reach, why not deny the White House even the possibility of such misuse? In other words, constrain policy ends by limiting policy’s military means. This argument has circulated for many decades and, it must be admitted, it does have a certain elementary logic. It is the opinion of this enquiry, however, that the claim that a policy which includes the preventive option might lead to a search for total security is **not at all convincing**. Of course, folly in high places is always possible, which is one of the many reasons why popular democracy is the superior form of government. It would be absurd to permit the fear of a futile and dangerous quest for absolute security to preclude prevention as a policy option. Despite its absurdity, this rhetorical charge against prevention is a stock favorite among prevention’s critics. It should be recognized and dismissed for what it is, a debating point with little pragmatic merit. And strategy, though not always policy, **must be nothing if not pragmatic**.

### Solvency

#### US engagement and reintervention are inevitable---it’s only a question of making it effective---the plan prevents failed engagement that triggers their turns

Robert Kagan 11 is a contributing editor to The Weekly Standard and a senior fellow in foreign policy at the Brookings Institution. "The Price of Power" Jan 24 Vol 16 No18 www.weeklystandard.com/articles/price-power\_533696.html?page=3

**In theory**, the United States could refrain from intervening abroad. But, **in practice**, will it? Many assume today that the American public has had it with interventions, and Alice Rivlin certainly reflects a strong current of opinion when she says that “much of the public does not believe that we need to go in and take over other people’s countries.” That sentiment has often been heard after interventions, especially those with mixed or dubious results. It was heard after the four-year-long war in the Philippines, which cost 4,000 American lives and untold Filipino casualties. It was heard after Korea and after Vietnam. It was heard after Somalia. Yet the reality has been that after each intervention, the sentiment against foreign involvement has faded, and the United States has **intervened again**.

Depending on how one chooses to count, the United States has undertaken roughly **25 overseas interventions since 1898:** Cuba, 1898 The Philippines, 1898-1902 China, 1900 Cuba, 1906 Nicaragua, 1910 & 1912 Mexico, 1914 Haiti, 1915 Dominican Republic, 1916 Mexico, 1917 World War I, 1917-1918 Nicaragua, 1927 World War II, 1941-1945 Korea, 1950-1953 Lebanon, 1958 Vietnam, 1963-1973 Dominican Republic, 1965 Grenada, 1983 Panama, 1989 First Persian Gulf war, 1991 Somalia, 1992 Haiti, 1994 Bosnia, 1995 Kosovo, 1999 Afghanistan, 2001-present Iraq, 2003-present

That is one intervention every 4.5 years on average. Overall, the United States has intervened or been engaged in combat somewhere in 52 out of the last 112 years, or roughly 47 percent of the time. Since the end of the Cold War, it is true, the rate of U.S. interventions has increased, with an intervention roughly once every 2.5 years and American troops intervening or engaged in combat in 16 out of 22 years, or over 70 percent of the time, since the fall of the Berlin Wall.

The argument for returning to “normal” begs the question: **What is normal for the United States? The** historical record of the last century **suggests that it is** not a policy of nonintervention. This record ought to raise doubts about the theory that American behavior these past two decades is the product of certain unique ideological or doctrinal movements, whether “liberal imperialism” or “neoconservatism.” Allegedly “realist” presidents in this era have been just as likely to order interventions as their more idealistic colleagues. George H.W. Bush was as profligate an intervener as Bill Clinton. He invaded Panama in 1989, intervened in Somalia in 1992—both on primarily idealistic and humanitarian grounds—which along with the first Persian Gulf war in 1991 made for three interventions in a single four-year term. Since 1898 the list of presidents who ordered armed interventions abroad has included William McKinley, Theodore Roose-velt, William Howard Taft, Woodrow Wilson, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John F. Kennedy, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush. One would be hard-pressed to find a common ideological or doctrinal thread among them—unless it is the doctrine and ideology of a mainstream American foreign policy that leans more toward intervention than many imagine or would care to admit.

Many don’t want to admit it, and the only thing as consistent as this pattern of American behavior has been the claim by contemporary critics that it is abnormal and a departure from American traditions. The anti-imperialists of the late 1890s, the isolationists of the 1920s and 1930s, the critics of Korea and Vietnam, and the critics of the first Persian Gulf war, the interventions in the Balkans, and the more recent wars of the Bush years have all insisted that the nation had in those instances behaved unusually or irrationally. And yet the behavior has continued.

To note this consistency is not the same as justifying it. The United States may have been wrong for much of the past 112 years. Some critics would endorse the sentiment expressed by the historian Howard K. Beale in the 1950s, that “the men of 1900” had steered the United States onto a disastrous course of world power which for the subsequent half-century had done the United States and the world no end of harm. But whether one lauds or condemns this past century of American foreign policy—and one can find reasons to do both—the fact of this consistency remains. It would require not just a modest reshaping of American foreign policy priorities but a sharp departure from this tradition to bring about the kinds of changes that would allow the United States to make do with a substantially smaller force structure.

Is such a sharp departure in the offing? It is no doubt true that many Americans are unhappy with the on-going warfare in Afghanistan and to a lesser extent in Iraq, and that, if asked, a majority would say the United States should intervene less frequently in foreign nations, or perhaps not at all. It may also be true that the effect of long military involvements in Iraq and Afghanistan may cause Americans and their leaders to shun further interventions at least for a few years—as they did for nine years after World War I, five years after World War II, and a decade after Vietnam. This may be further reinforced by the difficult economic times in which Americans are currently suffering. The longest period of nonintervention in the past century was during the 1930s, when unhappy memories of World War I combined with the economic catastrophe of the Great Depression to constrain American interventionism to an unusual degree and produce the first and perhaps only genuinely isolationist period in American history.

So are we back to the mentality of the 1930s? It wouldn’t appear so. There is no great wave of isolationism sweeping the country. There is not even the equivalent of a Patrick Buchanan, who received 3 million votes in the 1992 Republican primaries. Any isolationist tendencies that might exist are severely tempered by continuing fears of terrorist attacks that might be launched from overseas. Nor are the vast majority of Americans suffering from economic calamity to nearly the degree that they did in the Great Depression.

Even if we were to repeat the policies of the 1930s, however, it is worth recalling that the unusual restraint of those years was not sufficient to keep the United States out of war. On the contrary, the United States took actions which ultimately led to the greatest and most costly foreign intervention in its history. Even the most determined and in those years powerful isolationists could not prevent it.

Today there are a number of **obvious possible contingencies** that might **lead the United States to substantial interventions** overseas, notwithstanding the preference of the public and its political leaders to avoid them. Few Americans want a war with Iran, for instance. But it is not implausible that a president—indeed, this president—might find himself in a situation where military conflict at some level is hard to avoid. The continued success of the international sanctions regime that the Obama administration has so skillfully put into place, for instance, might eventually cause the Iranian government to lash out in some way—perhaps by attempting to close the Strait of Hormuz. Recall that Japan launched its attack on Pearl Harbor in no small part as a response to oil sanctions imposed by a Roosevelt administration that had not the slightest interest or intention of fighting a war against Japan but was merely expressing moral outrage at Japanese behavior on the Chinese mainland. Perhaps in an Iranian contingency, the military actions would stay limited. But perhaps, too, they would escalate. One could well imagine an American public, now so eager to avoid intervention, suddenly demanding that their president retaliate. Then there is the possibility that a military exchange between Israel and Iran, initiated by Israel, could drag the United States into conflict with Iran. Are such scenarios so farfetched that they can be ruled out by Pentagon planners?

Other possible contingencies include a war on the Korean Peninsula, where the United States is bound by treaty to come to the aid of its South Korean ally; and possible interventions in Yemen or Somalia, should those states fail even more than they already have and become even more fertile ground for al Qaeda and other terrorist groups. And what about those “humanitarian” interventions that are first on everyone’s list to be avoided? Should another earthquake or some other natural or man-made catastrophe strike, say, Haiti and present the looming prospect of mass starvation and disease and political anarchy just a few hundred miles off U.S. shores, with the possibility of thousands if not hundreds of thousands of refugees, can anyone be confident that an American president will not feel compelled to send an intervention force to help?

**Some may hope that a smaller U.S. military, compelled by the necessity of budget constraints, would prevent a president from intervening. More likely, however,** it would simply prevent a president from intervening effectively. This, after all, was the experience of the Bush administration in Iraq and Afghanistan. Both because of constraints and as a conscious strategic choice, the Bush administration sent too few troops to both countries. The results were lengthy, unsuccessful conflicts, burgeoning counterinsurgencies, and **loss of confidence** in American will and capacity, as well as large annual expenditures. Would it not have been better, and also cheaper, to have sent larger numbers of forces initially to both places and brought about a more rapid conclusion to the fighting? The point is, it may prove cheaper in the long run to have larger forces that can fight wars quickly and conclusively, as Colin Powell long ago suggested, than to have smaller forces that can’t. Would a defense planner trying to anticipate future American actions be wise to base planned force structure on the assumption that the United States is out of the intervention business? Or would that be the kind of penny-wise, pound-foolish calculation that, in matters of national security, can prove so unfortunate?

The debates over whether and how the United States should respond to the world’s strategic challenges will and should continue. Armed interventions overseas should be weighed carefully, as always, with an eye to whether the risk of inaction is greater than the risks of action. And as always, these judgments will be merely that: judgments, made with inadequate information and intelligence and no certainty about the outcomes. No foreign policy doctrine can avoid errors of omission and commission. But history has provided some lessons, and for the United States the lesson has been fairly clear: The world is better off, and the United States is better off, in the kind of international system that American power has built and defended.

#### The Courts have willingly developed institutional checks that lock them into deference

Daniel Abebe & Eric A. Posner 11, Assistant Professor and Kirkland & Ellis Professor, University of Chicago Law School, The Flaws of Foreign Affairs Legalism, 51 Va. J. Int'l L. 507

Executive primacy means that courts give greater deference to executive interpretations of international law and foreign relations law than they do to executive interpretations of other areas of the law. This stance goes back to the founding generation, when proponents of executive primacy, such as Alexander Hamilton, argued that the executive needs freedom of action in foreign affairs because of the fluidity of relations among states and the ever-present danger of war. n3 Secrecy, speed, and decisiveness are at a premium, and these are characteristics of the executive, n4 not of the courts, which are slow and decentralized.

Courts have largely, though not always, accepted this argument. They have provided a substantial level of deference to executive determinations on a number of foreign affairs questions and on issues related to international law, including treaty interpretation n5 and treaty termination. n6 [\*510] Courts also consider the executive's views on the meaning of customary international law (CIL) n7 and generally defer to the executive on the application of head of state immunity. n8 Further, they have permitted the executive to evade the onerous supermajority requirements in the Article II treaty process by entering congressional-executive and executive agreements, n9 and they have developed avoidance doctrines - including the political question doctrine, the act of state doctrine, international comity rules, and state secrecy rules - to limit their own capacity to adjudicate foreign affairs cases. n10

#### Deference inevitable---it’s institutionally locked in, the judiciary wants it, \* and the aff doesn’t clarify multiple constitutional issues

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.

#### 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.

#### The aff can’t solve the broader power grabs of the state

Nasser Hussain 07, an assistant professor in the Department of Law, Jurisprudence, and Social Thought at Amherst College, Summer 07, “Beyond Norm and Exception: Guantánamo,” Critical Inquiry, Vol. 33, No. 4

Finally, what are some of the implications of the argument that norm and exception have blurred severely and perhaps irrevocably? Let me stress that my efforts to draw attention to the ways in which an administrative legality has made the concept of a state of exception superfluous is not just theoretical disagreement or just an effort to discredit one particular paradigm. One may agree or disagree about the continuing validity of a concept, but my more immediate concern here is that the concept not overshadow or distort efforts to fashion a newer, fairer, and more just response.¶ Consider then one such effort to fashion a new response: Bruce Ackerman’s proposals in “The Emergency Constitution.”50 Ackerman’s essay begins with the recognition that attacks on the U.S. similar to 9/11 are almost a virtual certainty and that without creative new constitutional concepts each attack will only prompt harsher political measures in a “downward cycle” (“A,” p. 1044). Dismissing the models currently provided for by war and crime, Ackerman settles on the concept of emergency and sets out to find a way to grant and yet control the use of extraordinary powers in the case of a genuine emergency. For Ackerman, it is time to try to rescue the concept of a state of exception from fascist thinkers like Schmitt, who used it as a battering ram against liberal democracy. Ackerman would confine a genuine emergency to a bounded state (tellingly, the “triggering event” in Ackerman’s proposals is left entirely uncharted, left to the hope of political wisdom). But because Ackerman neglects the more dispersed condition of emergency in contemporary conditions, his proposals hinge on the use of legislative oversight largely in the form of a “supermajoritarian escalator”: “majority support should serve to sustain emergency for a short time—two or three months. Continuation should require an escalating cascade of supermajorities: sixty percent for the next two months; seventy for the next; eighty thereafter” (“A,” p. 1047). While such a sensible and even workable proposal would go some of the way towards removing some of the current excesses of executive policy, my effort at highlighting the role of administrative agencies and regulations suggests that the effectiveness of Ackerman’s proposals would remain extremely limited. That is to say, only if we presume that a bounded state of exception rather than a more dispersed emergency regulation is currently being used would efforts to bind it further be effective. But proposals such as the supermajoritarian escalator would do very little to change the “spitting on the sidewalk” strategy endorsed by Ashcroft or the use of petty visa violations to enable large‐scale roundups and prolonged detention—as I noted earlier, what enables the indefinite detention of hundreds of people without charge is not the use of an exceptional measure but the multiple use of an everyday measure. Moreover, as I earlier noted with reference to Nonet’s work, the internal structure of a rule of law and its relation to administrative regimes, far from negating such an outcome, actually facilitates it. The current emergency response whose operations we witness daily emerges from a broader field of governmentality, and until such a modular and legalistic character is addressed any effort to design a more liberal emergency constitution will invariably miss a great many of its intended targets.

#### The POINT of the state of exception is that rights the plan provides will be suspended

Andrew Neal 05, PhD candidate and part-time Research Associate in the School of Politics, Philosophy, and International Relations and Keele University, 4/12/05, http://www.libertysecurity.org/article199.html

The apparent popular, national legitimacy accorded to Guantanamo marks a further and central element of this complex relationship between norm and exception that Foucault has so far not been able to touch upon. This is where «Society Must Be Defended»can help us. In this series of lectures Foucault makes some radical departures from traditional political theory. He begins by rejecting the classic seventeenth century discourse on sovereignty, which sought to establish the proper limits or rights of sovereign power. This is because, «That model in effect presupposes that the individual is a subject with natural rights or primitive powers; it sets itself the task of accounting for the ideal genesis of the State; and finally, it makes the law the basic manifestation of power.» [[61](http://www.libertysecurity.org/#nb61)] As I have relayed above, Foucault argued that we should instead account for power at its apparatuses, external points of exercise, circulation, reproduction and infinitesimal mechanisms. Foucault’s comments have been highly appropriate for our case, that of contemporary sovereign exceptionalism. The old liberal discourse of rights, limits and oppression is a flawed means of critique if, first, exceptional sovereign power is able to declare itself to be above those limits; second, this does not trigger a constitutional crisis; third, this receives popular legitimacy; and fourth, the language of liberty and rights becomes the handmaiden of the very suspension of those liberties and rights. Sovereign exceptionalism undermines individual rights, the exemplar of the ‘ideal’ genesis of the state in the constitution, and the law itself. In fact sovereign exceptionalism does not simply undermine rights, constitutions and law, but somehow exists in a dialectical relationship with them. The classic liberal discourse on sovereignty is dualistic and as such cannot account for its own negativity.

### Impact D

#### Numerous cultural and historical factors have gone into Guantanamo—that means the aff can’t solve broader violence and there is no broader impact

Halit Tagma 09, Professor of Political Science, Arizona State , “Homo Sacer vs. Homo Soccer Mom: Reading Agamben and Foucault in the War on Terror,” Alternatives: Global, Local, Political, Vol. 34, No. 4 (Oct.-Dec. 2009), pp. 407-435

Sovereign decisions are always already informed by historical and cultural understandings as to who counts as a member of the "good species." The "good species," "the inside," and the body politic have been constructed by colonial discourse. As Roxanne Doty has pointed out, colonial discourse has had a vital role in the construction of Western nations. She further points out that race, religion, and other marks of difference have played an important role in national classification.94 The treatment of faraway people as inferior and exotic has played an important role in nation building in its classic sense. Therefore, who counts as a citizen, a "legitimate" member of a "legitimate" nation, is the product and effect of centuries of interaction of the West with its others. Understood in this sense, sovereign decisions (whether made at the top or bottom level) are informed and shaped by a cultural and colonial history. This is neglected in Agamben's grand analysis of Western politics. Therefore, sovereign power needs the classification, hierarchization, and othering provided by a regime of truth in order to conduct its violent power. Only certain types of people could be rendered as bare life and thrown into a zone of indistinction. Understood this way, it is easier to comprehend the "smooth" production of homines sacri out of Middle Eastern subjects.¶ In the early stages of the war in Afghanistan, as Michael Ratner and Ellen Ray point out, tens of thousands of people were collected by the Northern Alliance.95 Among the collected were ordinary foreign aid workers, refugees, and probable fighters of the Taliban regime. They were sold from $50 to $5,000 per head to Coalition Forces.96 Even though there was no real investigation based on tangible and concrete evidence, some these captives were flown to Guantánamo. As Fox points out, if the prisoners were wearing a Casio brand watch, this meant an higher prize in the eyes of the interrogators, as it signaled that the prisoner was a probable AI Qaeda bombmaker.97 The small difference between wearing a Casio watch in some parts of the world, as opposed to others, is at the ground level what makes it possible for a body to be become a homo sacer. They can then be flown off to an unknown place to face an unknown future that get read and interpreted by petty sovereigns. Such differences in- form the decisions that render bodies as homo sacer, which are thrown into a zone of indistinction. In the modern age, no doubt, Agamben would argue that even the body of a soccer mom - an obedient national flag-waving subject - has entered into political and strategic calculations. However, the soccer mom is not exposed to the violence of homo sacer. Regimes of truth and disciplines produce hierarchically ordered subject positions, and this is an aspect of biopower. The theoretical priority that Agamben gives to sovereign power is reversed when it is shown that biopower makes it possible for the petty agents of the state to conduct sovereign violence. Sovereign power is informed and shaped by biopower.

#### No risk of endless or imperial wars due to pre-emption

Gray 7—Director of the Centre for Strategic Studies and Professor of International Relations and Strategic Studies at the University of Reading, graduate of the Universities of Manchester and Oxford, Founder and Senior Associate to the National Institute for Public Policy, formerly with the International Institute for Strategic Studies and the Hudson Institute (Colin, July, “The Implications of Preemptive and Preventive War Doctrines: A Reconsideration”, [http://www.ciaonet.org/wps/ssi10561/ssi10561.pdf](http://www.ciaonet.org/wps/ssi10561/ssi10561.pdf" \t "_blank))

7. A policy that favors preventive warfare expresses a futile quest for absolute security. It could do so. Most controversial policies contain within them the possibility of misuse. In the hands of a paranoid or boundlessly ambitious political leader, prevention could be a policy for endless warfare. However, the American political system, with its checks and balances, was designed explicitly for the purpose of constraining the executive from excessive folly. Both the Vietnam and the contemporary Iraqi experiences reveal clearly that although the conduct of war is an executive prerogative, in practice that authority is disciplined by public attitudes. Clausewitz made this point superbly with his designation of the passion, the sentiments, of the people as a vital component of his trinitarian theory of war. 51 It is true to claim that power can be, and indeed is often, abused, both personally and nationally. It is possible that a state could acquire a taste for the apparent swift decisiveness of preventive warfare and overuse the option. One might argue that the easy success achieved against Taliban Afghanistan in 2001, provided fuel for the urge to seek a similarly rapid success against Saddam Hussein’s Iraq. In other words, the delights of military success can be habit forming. On balance, claim seven is not persuasive, though it certainly contains a germ of truth. A country with unmatched wealth and power, unused to physical insecurity at home—notwithstanding 42 years of nuclear danger, and a high level of gun crime—is vulnerable to demands for policies that supposedly can restore security. But we ought not to endorse the argument that the United States should eschew the preventive war option because it could lead to a futile, endless search for absolute security. One might as well argue that the United States should adopt a defense policy and develop capabilities shaped strictly for homeland security approached in a narrowly geographical sense. Since a president might misuse a military instrument that had a global reach, why not deny the White House even the possibility of such misuse? In other words, constrain policy ends by limiting policy’s military means. This argument has circulated for many decades and, it must be admitted, it does have a certain elementary logic. It is the opinion of this enquiry, however, that the claim that a policy which includes the preventive option might lead to a search for total security is **not at all convincing**. Of course, folly in high places is always possible, which is one of the many reasons why popular democracy is the superior form of government. It would be absurd to permit the fear of a futile and dangerous quest for absolute security to preclude prevention as a policy option. Despite its absurdity, this rhetorical charge against prevention is a stock favorite among prevention’s critics. It should be recognized and dismissed for what it is, a debating point with little pragmatic merit. And strategy, though not always policy, **must be nothing if not pragmatic**.

### Block

### V2l

#### Value to life is inevitable and subjective

Schwartz 2 (Lisa, professional metaphysician, Medical Ethics: A case based approach, “The Value of Life: Who Decides and How?”, p. 112)

The second assertion made by supporters of the quality of life as a criterion for decision making is closely related to the first, but with an added dimension. This assertion suggests that the determination of the value of the quality of a given life is a subjective determination to be made by the person experiencing that life. The important addition here is that the decision is a personal one that, ideally, ought not to be made externally by another person but internally by the individual involved. Katherine Lewis made this decision for herself based on a comparison between two stages of her life. So did James Brady. Without this element, decisions based on quality of life criteria lack salient information and the patients concerned cannot give informed consent. Patients must be given the opportunity to decide for themselves whether they think their lives are worth living or not. To ignore or overlook patients’ judgment in this matter is to violate their autonomy and their freedom to decide for themselves on the basis of relevant information about their future, and comparative consideration of their past. As the deontological position puts it so well, to do so is to violate the imperative that we must treat persons as rational and as ends in themselves.

### DA

#### Disad outweighs the case---economic collapse causes global war in the short term---escalates and implicates everyone they access through violence as well as the rest of the world---magnitude has to come first because it’s the only way to value every life equally

#### Turns the case---economic decline empirically empowers the government, promotes authoritiarianism as in Nazi Germany and encourages lashout means the shift they seek becomes impossible

Flow

### Epist/Ontol

#### No prior questions

Owen 2 [David Owen, Reader of Political Theory at the Univ. of Southampton, Millennium Vol 31 No 3 2002 p. 655-7]

Commenting on the ‘philosophical turn’ in IR, Wæver remarks that ‘[a] frenzy for words like “epistemology” and “ontology” often signals this philosophical turn’, although he goes on to comment that these terms are often used loosely.4 However, loosely deployed or not, it is clear that debates concerning ontology and epistemology play a central role in the contemporary IR theory wars. In one respect, this is unsurprising since it is a characteristic feature of the social sciences that periods of disciplinary disorientation involve recourse to reflection on the philosophical commitments of different theoretical approaches, and there is no doubt that such reflection can play a valuable role in making explicit the commitments that characterise (and help individuate) diverse theoretical positions. Yet, such a philosophical turn is not without its dangers and I will briefly mention three before turning to consider a confusion that has, I will suggest, helped to promote the IR theory wars by motivating this philosophical turn. The first danger with the philosophical turn is that it has an inbuilt tendency to prioritise issues of ontology and epistemology over explanatory and/or interpretive power as if the latter two were merely a simple function of the former. But while the explanatory and/or interpretive power of a theoretical account is not wholly independent of its ontological and/or epistemological commitments (otherwise criticism of these features would not be a criticism that had any value), it is by no means clear that it is, in contrast, wholly dependent on these philosophical commitments. Thus, for example, one need not be sympathetic to rational choice theory to recognise that it can provide powerful accounts of certain kinds of problems, such as the tragedy of the commons in which dilemmas of collective action are foregrounded. It may, of course, be the case that the advocates of rational choice theory cannot give a good account of why this type of theory is powerful in accounting for this class of problems (i.e., how it is that the relevant actors come to exhibit features in these circumstances that approximate the assumptions of rational choice theory) and, if this is the case, it is a philosophical weakness—but this does not undermine the point that, for a certain class of problems, rational choice theory may provide the best account available to us. In other words, while the critical judgement of theoretical accounts in terms of their ontological and/or epistemological sophistication is one kind of critical judgement, it is not the only or even necessarily the most important kind. The second danger run by the philosophical turn is that because prioritisation of ontology and epistemology promotes theory-construction from philosophical first principles, it cultivates a theory-driven rather than problem-driven approach to IR. Paraphrasing Ian Shapiro, the point can be put like this: since it is the case that there is always a plurality of possible true descriptions of a given action, event or phenomenon, the challenge is to decide which is the most apt in terms of getting a perspicuous grip on the action, event or phenomenon in question given the purposes of the inquiry; yet, from this standpoint, ‘theory-driven work is part of a reductionist program’ in that it ‘dictates always opting for the description that calls for the explanation that flows from the preferred model or theory’.5 The justification offered for this strategy rests on the mistaken belief that it is necessary for social science because general explanations are required to characterise the classes of phenomena studied in similar terms. However, as Shapiro points out, this is to misunderstand the enterprise of science since ‘whether there are general explanations for classes of phenomena is a question for social-scientific inquiry, not to be prejudged before conducting that inquiry’.6 Moreover, this strategy easily slips into the promotion of the pursuit of generality over that of empirical validity. The third danger is that the preceding two combine to encourage the formation of a particular image of disciplinary debate in IR—what might be called (only slightly tongue in cheek) ‘the Highlander view’—namely, an image of warring theoretical approaches with each, despite occasional temporary tactical alliances, dedicated to the strategic achievement of sovereignty over the disciplinary field. It encourages this view because the turn to, and prioritisation of, ontology and epistemology stimulates the idea that there can only be one theoretical approach which gets things right, namely, the theoretical approach that gets its ontology and epistemology right. This image feeds back into IR exacerbating the first and second dangers, and so a potentially vicious circle arises.

### Conseq

Consequences are relevant even if it’s a thought experiment

First fiat is inherentl;y a thought experiment---only predictable role of the neg is to disprove the desirability of that world means we should get the DA in a fair version of their framework

Second is if we prove that they make things worse or that their imagined scenario ends in disaster it means that it’s a shitty thought experiment b/c have to delude themselves---their thought experiment can’t be effective if there’s a clear massive cost and a clearly superior alternative

Third is no solvency deficit to the CP means any risk we win net offense means vote neg---deference args means it’s not as dramatic a change so presumption flips

### Intrins

#### The disad is intrinsic --- the judge is an analyst deciding which policies legislators/courts should channel their limited influence toward enacting --- policymakers have to pick and choose which issues they prioritize --- proves the disad is a real world opportunity cost.

### Conseq Last

Comp

### Predic

#### Our method for prediction is sound

Earl C. Ravenal 9, distinguished senior fellow in foreign policy studies @ Cato, is professor emeritus of the Georgetown University School of Foreign Service. He is an expert on NATO, defense strategy, and the defense budget. He is the author of *Designing Defense for a New World Order.*What's Empire Got to Do with It? The Derivation of America's Foreign Policy.” *Critical Review: An Interdisciplinary Journal of Politics and Society* 21.1 (2009) 21-75

The underlying notion of “the security bureaucracies . . . looking for new enemies” is a threadbare concept that has somehow taken hold across the political spectrum, from the radical left (viz. Michael Klare [1981], who refers to a “threat bank”), to the liberal center (viz. Robert H. Johnson [1997], who dismisses most alleged “threats” as “improbable dangers”), to libertarians (viz. Ted Galen Carpenter [1992], Vice President for Foreign and Defense Policy of the Cato Institute, who wrote a book entitled A Search for Enemies). What is missing from most analysts’ claims of “threat inflation,” however, is a convincing theory of why, say, the American government significantly(not merely in excusable rhetoric) might magnify and even invent threats (and, more seriously, act on such inflated threat estimates). In a few places, Eland (2004, 185) suggests that such behavior might stem from military or national security bureaucrats’ attempts to enhance their personal status and organizational budgets, or even from the influence and dominance of “the military-industrial complex”; viz.: “Maintaining the empire and retaliating for the blowback from that empire keeps what President Eisenhower called the military-industrial complex fat and happy.” Or, in the same section:¶ In the nation’s capital, vested interests, such as the law enforcement bureaucracies . . . routinely take advantage of “crises”to satisfy parochial desires. Similarly, many corporations use crises to get pet projects— a.k.a. pork—funded by the government. And national security crises, because of people’s fears, are especially ripe opportunities to grab largesse. (Ibid., 182)¶ Thus, “bureaucratic-politics” theory, which once made several reputa- tions (such as those of Richard Neustadt, Morton Halperin, and Graham Allison) in defense-intellectual circles, and spawned an entire sub-industry within the field of international relations,5 is put into the service of dismissing putative security threats as imaginary. So, too, can a surprisingly cognate theory, “public choice,”6 which can be considered the right-wing analog of the “bureaucratic-politics” model, and is a preferred interpretation of governmental decision- making among libertarian observers. As Eland (2004, 203) summarizes:¶ Public-choice theory argues [that] the government itself can develop sepa- rate interests from its citizens. The government reflects the interests of powerful pressure groups and the interests of the bureaucracies and the bureaucrats in them. Although this problem occurs in both foreign and domestic policy, it may be more severe in foreign policy because citizens pay less attention to policies that affect them less directly.¶ There is, in this statement of public-choice theory, a certain ambiguity, and a certain degree of contradiction: Bureaucrats are supposedly, at the same time, subservient to societal interest groups and autonomous from society in general.¶ This journal has pioneered the argument that state autonomy is a likely consequence of the public’s ignorance of most areas of state activity (e.g., Somin 1998; DeCanio 2000a, 2000b, 2006, 2007; Ravenal 2000a). But state autonomy does not necessarily mean that bureaucrats substitute their own interests for those of what could be called the “national society” that they ostensibly serve. I have argued (Ravenal 2000a) that, precisely because of the public-ignorance and elite-expertise factors, and especially because the opportunities—at least for bureaucrats (a few notable post-government lobbyist cases nonwithstanding)—for lucrative self-dealing are stringently fewer in the defense and diplomatic areas of government than they are in some of the contract-dispensing and more under-the-radar-screen agencies of government, the “public-choice” imputation of self-dealing, rather than working toward the national interest (which, however may not be synonymous with the interests, perceived or expressed, of citizens!) is less likely to hold. In short, state autonomy is likely to mean, in the derivation of foreign policy, that “state elites” are using rational judgment, in insulation from self-promoting interest groups—about what strategies, forces, and weapons are required for national defense.¶ Ironically, “public choice”—not even a species of economics, but rather a kind of political interpretation—is not even about “public” choice, since, like the bureaucratic-politics model, it repudiates the very notion that bureaucrats make truly “public” choices; rather, they are held, axiomatically, to exhibit “rent-seeking” behavior, wherein they abuse their public positions in order to amass private gains, or at least to build personal empires within their ostensibly official niches. Such sub- rational models actually explain very little of what they purport to observe. Of course, there is some truth in them, regarding the “behavior” of some people, at some times, in some circumstances, under some conditions of incentive and motivation. But the factors that they posit operate mostly as constraints on the otherwise rational optimization of objectives that, if for no other reason than the playing out of official roles, transcends merely personal or parochial imperatives.¶ My treatment of “role” differs from that of the bureaucratic-politics theorists, whose model of the derivation of foreign policy depends heavily, and acknowledgedly, on a narrow and specific identification of the role- playing of organizationally situated individuals in a partly conflictual “pulling and hauling” process that “results in” some policy outcome. Even here, bureaucratic-politics theorists Graham Allison and Philip Zelikow (1999, 311) allow that “some players are not able to articulate [sic] the governmental politics game because their conception of their job does not legitimate such activity.” This is a crucial admission, and one that points— empirically—to the need for a broader and generic treatment of role.¶ Roles (all theorists state) give rise to “expectations” of performance. My point is that virtually every governmental role, and especially national-security roles, and particularly the roles of the uniformed mili- tary, embody expectations of devotion to the “national interest”; rational- ity in the derivation of policy at every functional level; and objectivity in the treatment of parameters, especially external parameters such as “threats” and the power and capabilities of other nations.¶ Sub-rational models (such as “public choice”) fail to take into account even a partial dedication to the “national” interest (or even the possibility that the national interest may be honestly misconceived in more paro- chial terms). In contrast, an official’s role connects the individual to the (state-level) process, and moderates the (perhaps otherwise) self-seeking impulses of the individual. Role-derived behavior tends to be formalized and codified; relatively transparent and at least peer-reviewed, so as to be consistent with expectations; surviving the particular individual and trans- mitted to successors and ancillaries; measured against a standard and thus corrigible; defined in terms of the performed function and therefore derived from the state function; and uncorrrupt, because personal cheating and even egregious aggrandizement are conspicuously discouraged.¶ My own direct observation suggests that defense decision-makers attempt to “frame” the structure of the problems that they try to solve on the basis of the most accurate intelligence. They make it their business to know where the threats come from. Thus, threats are not “socially constructed” (even though, of course, some values are).¶ A major reason for the rationality, and the objectivity, of the process is that much security planning is done, not in vaguely undefined circum- stances that offer scope for idiosyncratic, subjective behavior, but rather in structured and reviewed organizational frameworks. Non-rationalities (which are bad for understanding and prediction) tend to get filtered out. People are fired for presenting skewed analysis and for making bad predictions. This is because something important is riding on the causal analysis and the contingent prediction. For these reasons, “public choice” does not have the “feel” of reality to many critics who have participated in the structure of defense decision-making. In that structure, obvious, and even not-so-obvious,“rent-seeking” would not only be shameful; it would present a severe risk of career termination. And, as mentioned, the defense bureaucracy is hardly a productive place for truly talented rent-seekers to operatecompared to opportunities for personal profit in the commercial world. A bureaucrat’s very self-placement in these reaches of government testi- fies either to a sincere commitment to the national interest or to a lack of sufficient imagination to exploit opportunities for personal profit.

#### Not linear---synthesizes multiple court motivations and economic factors and says that pushes toward collapse---predicts any number of scen’s bcm more confl prone

### Pounder

#### Their thumpers would be good if our disad were based on the usually terrible generic ‘controversy’ links people read to court politics---but that’s not our arg---the premise of our disad is that overcoming deference to the executive requires the court to spend institutional capital which they perceive as limited---it’s solely a question of inter-branch relations and the court’s hesitance to issue too many challenges the executive. Their uniqueness args about controversial decisions are irrelevant---every court decision is controversial insofar as there’s a winning and losing side---none of their ev rises to the level of speaking to the court’s institutional capital and none of it’s about deference issues on the court’s current docket.

### PC

#### flow

#### The Court perceives itself to be required to risk institutional capital when they reject an agency’s interpretation of statute

William N. Eskridge 8, the John A. Garver Professor of Jurisprudence, Yale Law School, April 2008, “ARTICLE: The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan,” Georgetown Law Journal, 96 Geo. L.J. 1083

Justice Stevens's opinion in Chevron posited that statutory gapfilling or policy elaboration by agencies is more legitimate than similar gapfilling or elaboration by federal judges because agencies are accountable to the President, our only nationally elected official. n288 Some judges and professors have invoked presidential accountability as a justification for strong deference. n289 A few have even suggested that the President is a more democratically accountable branch of government than Congress, not just the Court. n290 To be sure, other commentators object that presidential involvement in agency lawmaking and statutory gapfilling cuts against the rule-of-law and institutional-competence justifications for deference. n291 But the presidential-accountability justification can be best understood as a legitimacy point.

Emphasis on this justification would render the Chevron approach both over-and under-inclusive. It would be over-inclusive because relatively few interpretational issues presented to the courts by agency adjudication and notice-and-comment rulemaking reflect regime changes that purportedly come with presidential elections. n292 Our study of the Supreme Court's docket from 1983-2006 [\*1176] found very few cases like Chevron, where a new President and his appointees shifted statutory policy to reflect an ideological change endorsed in the prior election. And when those cases came to the Supreme Court, the Justices often overturned them, as they did in Hamdan, the Military Commissions Case. Additionally, most White House involvement in legislative rulemaking is hard to detect, usually for political reasons. n293 The presidential accountability justification for Chevron is also under-inclusive because there is often significant White House influence on interpretive rules and agency practices that receive only Skidmore deference. This could support Justice Scalia's view that Chevron should govern any interpretation adopted by the head of an agency--namely, the person or group appointed by the President and, in the case of executive agencies, removable by the President as well.

A serious normative problem with strong versions of the presidential-accountability justification is that they rest upon no systematic examination of presidential accountability and the extent to which his accountability actually drives agency lawmaking (Chevron) or interpretation (Skidmore). Scholars who tout the President as nationally accountable in contrast to a parochial Congress are on particularly weak ground. As Cynthia Farina and Jide Nzelibe argue, the President, chosen by an Electoral College that frequently graduates preference outliers, does not necessarily reflect majoritarian preferences better than Congress does. n294 Unlike members of Congress, the President can only be reelected once, a fact that diminishes his theoretical accountability advantage.

A weaker version of the argument is the one Justice Stevens originally penned, that agencies have accountability advantages over judges. n295 Our study contributes this point to the argument: agencies are more democratically accountable, not so much because of their link to the White House, but because of their links to Congress. Our reading of government briefs in Supreme Court cases suggests to us that agencies usually have institutionally superior access to the original expectations of the legislators. Add this further point: agencies also have better knowledge than courts about current congressional expectations, [\*1177] through formal congressional oversight and budgetary hearings and through the myriad informal processes of Congress-agency communication. n296

Our empirical study reveals the power of this last point. When the statutory materials are less than determinate and the issue is one of major public attention, the Court is usually at risk, because a badly justified decision that riles a portion of the body politick may undermine the Court's legitimacy. Indeed, that is what happened during the 1988 Term, when the Court handed down conservative readings of our major job discrimination statutes in six high-profile cases. n297 Even Republican politicians denounced the Court for "reneging" on Congress's commitment to the anti-discrimination norm in the workplace, and in 1991 Congress and the White House delivered a sweeping statutory rebuke for the Court's work product that Term. n298 In half of the controversial cases, George H. W. Bush Administration Solicitor General Charles Fried had submitted amicus briefs arguing for more liberal interpretations of civil rights statutes. n299 If the Court had gone along with the Administration, and the careful legal reasoning its briefs supplied, the "reneging" charges would surely have been less fierce. We hypothesize that the Court is much (by a wide margin) more likely to be overridden by Congress when it rejects agency statutory interpretations than when it accepts those interpretations. n300

### WW

#### The link only goes one way---Court decisions don’t build political capital

Schauer 4 [Frederick Schauer, Professor of the First Amendment, John F. Kennedy School of Government, Harvard University, 2004 (92 Calif. L. Rev. 1045)]

Examples of the effects of judicial supremacy hardly occupy the entirety of constitutional law. As the proponents of popular constitutionalism properly claim, it is simply not plausible to argue that all of the Supreme Court's decisions are counter-majoritarian, nor that the Court is unaware of the potential repercussions if a high percentage of its decisions diverges too dramatically from the popular or legislative will. Nevertheless, there is no indication that the Court uses its vast repository of political capital only to accumulate more political capital, and in many areas judicial supremacy has made not just a short-term difference, but a long-term difference as well. Perhaps most obvious is school prayer. For over forty years the Court has persisted in its view that organized prayer in public schools is impermissible under the Establishment Clause n59 despite the fact that public opinion is little more receptive to that view now than it was in 1962. n60 So too with flag burning, where the Court's decisions from the late 1960s n61 to the present have remained dramatically divergent from public and legislative opinion. n62 Or consider child pornography, where the Court's decision in Ashcroft v. Free Speech Coalition n63 flew in the face of an overwhelming congressional majority approving the extension of existing child pornography laws to virtual child pornography. Similarly, in the regulation of "indecency," the Court has spent well over a decade repeatedly striking down acts of Congress that enjoyed overwhelming public and [\*1059] congressional support. n64 Most dramatic of all, however, is criminal procedure, where the Supreme Court's decision in Dickerson v. United States, n65 invalidating a congressional attempt to overrule Miranda v. Arizona, n66 underscores the persistent gap in concern for defendants' rights between Congress and the public, on the one hand, and the Supreme Court, on the other.

### Theor

Theory was above

All destroys court ptx which is good---key to neg ground especially on a broad topic with 4 areas and tons of new affs --- also key to current events education that promotes political engagement

Fiat doesn’t solve the link---not about intra-court controversies

### Sdf

#### The EPA decision will be announced in June too

Warren Richey 2-24, “Did EPA overstep in tackling global warming? Supreme Court sharply split,” 2/24/14, http://news.yahoo.com/did-epa-overstep-tackling-global-warming-supreme-court-002000738.html

The case is Utility Air Regulatory Group v. Environmental Protection Agency (12-1146). It is among six cases consolidated for high court review.

A decision is expected by late June.

#### The question’s not when the decision’s announced---the justices write their decisions before then obviously, and adding the plan means they’ll change how they vote in the EPA case.

### Yes PC

#### They think aggressive rulings trade off---and they don’t think that issuing several decisions can build capital, so no risk of a turn

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

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

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