# 1nc

### K

#### Using the law to restrain its own war power authority only re-centralizes power --- Voting neg to reject the 1AC’s institutional war power narrative is the most productive political act

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Despite such democratic concerns, a large part of what makes today’s dominant security concept so compelling are two purportedly objective sociological claims about the nature of modern threat. As these claims undergird the current security concept, by way of a conclusion I would like to assess them more directly and, in the process, indicate what they suggest about the prospects for any future reform. The first claim is that global interdependence means that the U.S. faces near continuous threats from abroad. Just as Pearl Harbor presented a physical attack on the homeland justifying a revised framework, the American position in the world since has been one of permanent insecurity in the face of new, equally objective dangers. Although today these threats no longer come from menacing totalitarian regimes like Nazi Germany or the Soviet Union, they nonetheless create of world of chaos and instability in which American domestic peace is imperiled by decentralized terrorists and aggressive rogue states.187 Second, and relatedly, the objective complexity of modern threats makes it impossible for ordinary citizens to comprehend fully the causes and likely consequences of existing dangers. **Thus, the best response is** the **further entrenchment** of Herring’s national security state, with the U.S. **permanently mobilized militarily** to gather intelligence and to combat enemies wherever they strike – at home or abroad. Accordingly, modern legal and political institutions that privilege executive authority and insulated decisionmaking are simply the necessary consequence of these externally generated crises. Regardless of these trade-offs, the security benefits of an empowered presidency (one armed with countless secret and public agencies as well as with a truly global military footprint)188 greatly outweigh the costs. Yet, although these sociological views have become commonplace, the conclusions that Americans should draw about security requirements are not nearly as clear cut as the conventional wisdom assumes. In particular, a closer examination of contemporary arguments about endemic danger suggests that such claims are **not objective empirical judgments** but rather are socially complex and **politically infused interpretations**. Indeed, the openness of existing circumstances to multiple interpretations of threat implies that the presumptive need for secrecy and centralization is not self-evident. And as underscored by high profile failures in expert assessment, claims to security expertise are themselves **riddled with ideological presuppositions and subjective biases**. All this indicates that the gulf between elite knowledge and lay incomprehension in matters of security may be far less extensive than is ordinarily thought. It also means that **the question of who decides** – and with it the issue of how democratic or insular our institutions should be – remains open as well. Clearly technological changes, from airpower to biological and chemical weapons, have shifted the nature of America’s position in the world and its potential vulnerability. As has been widely remarked for nearly a century, the oceans alone cannot guarantee our permanent safety. Yet, in truth they never fully ensured domestic tranquility. The nineteenth century was one of near continuous violence, especially with indigenous communities fighting to protect their territory from expansionist settlers. 189 But even if technological shifts make doomsday scenarios more chilling than those faced by Hamilton, Jefferson, or Taney, the mere existence of these scenarios tells us little about their likelihood or how best to address them. Indeed, these latter security judgments are inevitably permeated with subjective political assessments, assessments that carry with them preexisting ideological points of view – such as regarding how much risk constitutional societies should accept or how interventionist states should be in foreign policy. In fact, from its emergence in the 1930s and 1940s, supporters of the modern security concept have – at times unwittingly – reaffirmed the political rather than purely objective nature of interpreting external threats. In particular, commentators have repeatedly noted the link between the idea of insecurity and America’s post-World War II position of global primacy, one which today has only expanded following the Cold War. In 1961, none other than Senator James William Fulbright declared, in terms reminiscent of Herring and Frankfurter, that security imperatives meant that “our basic constitutional machinery, admirably suited to the needs of a remote agrarian republic in the 18th century,” was no longer “adequate” for the “20th- century nation.”190 For Fulbright, the driving impetus behind the need to jettison antiquated constitutional practices was the importance of sustaining the country’s “preeminen[ce] in political and military power.”191 Fulbright held that greater executive action and war-making capacities were essential precisely because the United States found itself “burdened with all the enormous responsibilities that accompany such power.”192 According to Fulbright, the United States had both a right and a duty to suppress those forms of chaos and disorder that existed at the edges of American authority. Thus, rather than being purely objective, **the American condition of permanent danger was itself deeply tied to political calculations about** the importance of global **primacy**. What generated the condition of continual crisis was not only technological change, but also the belief that the United States’ own ‘national security’ rested on the successful projection of power into the internal affairs of foreign states. The key point is that regardless of whether one agrees with such an underlying project, the **value** **of this project** is ultimately **a**n open **political question**. This suggests that whether distant crises should be viewed as generating insecurity at home is similarly as much an interpretative judgment as an empirically verifiable conclusion.193 To appreciate the open nature of security determinations, one need only look at the presentation of terrorism as a principal and overriding danger facing the country. According to the State Department’s Annual Country Reports on Terrorism, in 2009 “[t]here were just 25 U.S. noncombatant fatalities from terrorism worldwide” (sixteen abroad and nine at home).194 While the fear of a terrorist attack is a legitimate concern, these numbers – which have been consistent in recent years – place the gravity of the threat in perspective. Rather than a condition of endemic danger – requiring ever increasing secrecy and centralization – such facts are perfectly consistent with a reading that Americans do not face an existential crisis (one presumably comparable to Pearl Harbor) and actually enjoy relative security. Indeed, the disconnect between numbers and resources expended, especially in a time of profound economic insecurity, highlights the political choice of policymakers and citizens to persist in interpreting foreign events through a World War II and early Cold War lens of permanent threat. In fact, the continuous alteration of basic constitutional values to fit ‘national security’ aims highlights just how entrenched Herring’s old vision of security as pre-political and foundational has become, regardless of whether other interpretations of the present moment may be equally compelling. It also underscores a telling and often ignored point about the nature of modern security expertise, particularly as reproduced by the United States’ massive intelligence infrastructure. To the extent that political assumptions – like the centrality of global primacy or the view that instability abroad necessarily implicates security at home – shape the interpretative approach of executive officials, what passes as objective security expertise is itself intertwined with contested claims about how to view external actors and their motivations. This means that while modern conditions may well be complex, the conclusions of the presumed experts may not be systematically less liable to subjective bias than judgments made by ordinary citizens based on publicly available information. It further underscores that the question of who decides cannot be foreclosed in advance by simply asserting deference to elite knowledge. If anything, one can argue that the presumptive gulf between elite awareness and suspect mass opinion has generated its own very dramatic political and legal pathologies. In recent years, the country has witnessed a variety of security crises built on the basic failure of ‘expertise.’195 At present, part of what obscures this fact is the very culture of secret information sustained by the modern security concept. Today, it is commonplace for government officials to leak security material about terrorism or external threat to newspapers as a method of shaping the public debate.196 These ‘open’ secrets allow greater public access to elite information and embody a central and routine instrument for incorporating mass voice into state decision-making. But this mode of popular involvement comes at a key cost. Secret information is generally treated as worthy of a higher status than information already present in the public realm – the shared collective information through which ordinary citizens reach conclusions about emergency and defense. Yet, oftentimes, as with the lead up to the Iraq War in 2003, although the actual content of this secret information is flawed,197 its status as secret masks these problems and allows policymakers to cloak their positions in added authority. This reality highlights the importance of approaching security information with far greater collective skepticism; it also means that security judgments may be more ‘Hobbesian’ – marked fundamentally by epistemological uncertainty as opposed to verifiable fact – than policymakers admit. If both objective sociological claims at the center of the modern security concept are themselves profoundly contested, what does this mean for reform efforts that seek to recalibrate the relationship between liberty and security? Above all, it indicates that **the central problem** with the **procedural solutions** offered by constitutional scholars – emphasizing new statutory frameworks or greater judicial assertiveness – is that they **mistake a question of politics for one of law**. In other words, such scholars ignore the extent to which governing practices are the product of background political judgments about threat, democratic knowledge, professional expertise, and the necessity for insulated decision-making. To the extent that Americans are convinced that they face continuous danger from hidden and potentially limitless assailants – danger too complex for the average citizen to comprehend independently – it is inevitable that institutions (regardless of legal reform initiatives) will operate to centralize power in those hands presumed to enjoy military and security expertise. Thus, any systematic effort to **challenge the current framing** of the relationship between security and liberty **must begin by challenging the underlying assumptions** about knowledge and security upon which legal and political arrangements rest. Without a sustained and public debate about the validity of security expertise, its supporting institutions, and the broader legitimacy of secret information, there can be no substantive shift in our constitutional politics. The problem at present, however, is that no popular base exists to raise these questions. Unless such a base emerges, we can expect our prevailing security arrangements to become ever more entrenched.

#### Centralized institutionalizion causes genocide and extinction

HINDMARSH 2005 - Professor at the Australian School of Environmental Studies—Griffith University (Richard Hindmarsh, April 2005, Green Biopolitics & the Molecular Reordering of Nature, <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/granada/ws16/Hindmarsh.pdf>)

The first usage of the term ‘biopolitics’ that Braun and Gottweis (2004) refer to aligns to my longstanding analysis of the genetic engineering context. Unconnected to the traditional Foucauldian concept of **‘biopolitics’**, it ‘refers to the new public policy area of biotechnology policy which has co-evolved with the development of the life sciences’ to refer to transformations in medicine and health, or in food, agriculture and the environment. Here, biopolitical analysis is predominantly on biotechnology regulation and bioscientific-technological development. In turn, the second usage refers to the historical tradition of Foucauldian inquiry, which describes and analyses two forms of control and administration (the ‘art of government’) that emerged from the sixteenth century onwards. The first form concerns the disciplining, especially through institutionalisation, of individuals, or collections of individuals, for their usefulness (or performance) for integration into systems of **‘efficient and economic controls’** (Foucault 1990 [French version 1976]: 139). The second form is concerned with administering the biological processes and resources (or subjugation and control) of the species body or populations in general: namely their bodies, and reproduction. This is achieved through their productive engagement with the then emerging scientific methods such as, for example, statistics, in what Foucault calls the investment of the body of the population and its valorization. Typically, this area tackles the urban space, the habitat, the natural resources and their distribution, and within this, public health. Scientists and engineers, deemed holders of ‘**expert knowledges’**, carry out this **disciplining and administration** on behalf of the government (Foucault 1977, Rutherford 1999). This aims to ‘**normalize’ the knowledge** of the experts vis-à-vis other knowledges, although this is not a given but is achieved in a relational way. As such, systems of knowledge-power instead **negotiate and mediate society** and its directions. Forms of knowledge-power to ‘administer life’ (govern) and normalize governmentality, Foucault (1990: 143) refers to as ‘bio-power’, applied as a regime of power within the social body, rather from above it. This is carried out through the application of tactical elements (‘discourses’) or ‘discursive practices’: ‘practices of talk, text, writing, cognition, argumentation, and representation generally’ (Clegg 1989: 151). The exercise of power is thus not understood as a ‘single, all-encompassing strategy’ (Foucault 1990: 103), but, as Clegg (1989: 154) recognises, as ‘a more or less stable or shifting network of alliances extended over a shifting terrain of practice and discursively constituted interests. Points of resistance will open up at many points in the network. Their effect will be to fracture alliances, constitute regroupings and reposit strategies’. Such practices applied to the **administration of resources in managing human populations also introduces the notion of the environment and its control**, and thus the Cartesian body-mind or nature-culture dichotomy — which has been described as ‘the drawing apart of the human subject, or “experiencer”, and the world experienced’ (Pratt et al. 2000: 7). Much environmental thought has since ascribed this divide as the main cause of today’s environmental problems (as discussed below). The Cartesian divide paralleled the emergence of bio-power, during the Enlightenment, with logical links extended to the control of human populations through it partitioning and regulation, the focus of Foucault’s inquiry. Yet, in introducing the broader environmental context, my attention is almost immediately drawn to the point in Foucault’s conceptualisation of bio-power of his recognition that the techniques of the administration of life cannot effect total control, that ‘it [life] constantly escapes them’. Thus, even though Foucault’s focus is on human life and its regulation, where ‘escape’ equates to resistance, ‘escape’, in reference to the management of natural resources where the Foucauldian gaze is also upon the health of the people, institutional and/or technological failure of administration **can instead cause environmental breakdown** that instead exposes human health to undue risk and hazard, the opposite of health**.** This, I would posit, is posed by Foucault, although rather opaquely, in The Will To Knowledge (1990: 137), Wars are no longer waged in the name of a sovereign who must be defended; they are waged on behalf of the existence of everyone … the decision that initiates them and the one that **terminates them** are in fact increasingly informed by the naked question of survival … **The atomic situation is now at the end point** of this process: **the power to guarantee an individual’s existence.** The principle underlying the tactics of battle — **that one has to be capable of killing in order to go on living** — **has become the principle that defines the strategy of states**. But the existence in question is no longer the juridical existence of sovereignity; **at stake is the biological existence** of a population. **If genocide is indeed the dream of modern powers**, this is not because of a recent return of the ancient right to kill**; it is because power is situated and exercised at the level of life,** the species, the race, and the large-scale phenomena of population.

### T – prohibition

#### **the affirmative does not prohibit the ability of the President to make a military decision in one of the following areas mentioned in the topic – it merely requires a process or disclosure for the President to go through before exercising his commander and chief power**

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---Only prohibitions on authority guarantee neg ground---their interpretation lets affs no link the best neg offense like deference

### Exec cp/da

#### The President of the United States should request his Counsel and the Office of Legal Counsel for coordination over his war powers authority over indefinite detention. The President should affirm that treaties ratified by the United States are a restriction on the area of indefinite detention.

#### The plan would uniquely decimate Obama and the military’s ability to calm alliances and deter enemies ---- makes terrorism and global nuclear war more likely --- INDEPENDENTLY prevents ability to negotiate Iranian miscalc

WAXMAN 2013 - law professor at Columbia Law School, co-chairs the Roger Hertog Program on Law and National Security (Matthew Waxman, “The Constitutional Power to Threaten War,” August 27, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2316777)

As a prescriptive matter, Part II also shows that examination of threatened force and the credibility requirements for its effectiveness calls into question many orthodoxies of the policy advantages and risks attendant to various allocations of legal war powers, including the existing one and proposed reforms.23 Most functional arguments about war powers focus on fighting wars or hostile engagements, but that is not all – or even predominantly – what the United States does with its military power. Much of the time it seeks to avert such clashes while achieving its foreign policy objectives: to bargain, coerce, deter.24 The President’s flexibility to use force in turn affects decision-making about threatening it, with major implications for securing peace or dragging the United States into conflicts. Moreover, constitutional war power allocations affect potential conflicts not only because they **may constrain U.S. actions** but because **they** maysend **signal**s **and shape** other states’ (including adversaries’) expectations of U.S. actions.25 That is, most analysis of war-powers law is inward-looking, focused on audiences internal to the U.S. government and polity, but thinking about threatened force prompts us to look outward, at how war-powers law affects external perceptions among adversaries and allies. Here, extant political science and strategic studies offer few clear conclusions, but they point the way toward more sophisticated and realistic policy assessment of legal doctrine and proposed reform. More generally, as explained in Part III, analysis of threatened force and war powers exposes an under-appreciated relationship between constitutional doctrine and grand strategy. Instead of proposing a functionally optimal allocation of legal powers, as legal scholars are often tempted to do, this Article in the end denies the tenability of any such claim. Having identified new spaces of war and peace powers that legal scholars need to take account of in understanding how those powers are really exercised, this Article also highlights the extent to which any normative account of the proper distribution of authority over this area depends on many matters that cannot be predicted in advance or expected to remain constant.26 Instead of proposing a policy-optimal solution, this Article concludes that the allocation of constitutional war powers is – and should be –geopolitically and strategically contingent; the actual and effective balance between presidential and congressional powers over war and peace in practice necessarily depends on fundamental assumptions and shifting policy choices about how best to secure U.S. interests against potential threats.27 I. Constitutional War Powers and Threats of Force Decisions to go to war or to send military forces into hostilities are immensely consequential, so it is no surprise that debates about constitutional war powers occupy so much space. But one of the most common and important ways that the United States uses its military power is by threatening war or force – and the constitutional dimensions of that activity receive almost no scrutiny or even theoretical investigation. A. War Powers Doctrine and Debates The Constitution grants Congress the powers to create military forces and to “declare war,”28 which the Supreme Court early on made clear includes the power to authorize limited uses of force short of full-blown war.29 The Constitution then vests the President with executive power and designates him commander in chief of the armed forces,30 and it has been well-accepted since the Founding that these powers include unilateral authority to repel invasions if the United States is attacked.31 Although there is nearly universal acceptance of these basic starting points, there is little legal agreement about how the Constitution allocates responsibility for the vast bulk of cases in which the United States has actually resorted to force. The United States has declared war or been invaded only a handful of times in its history, but it has used force – sometimes large-scale force – hundreds of other times.32 Views split over questions like when, if ever, the President may use force to deal with aggression against third parties and how much unilateral discretion the President has to use limited force short of full-blown war. For many lawyers and legal scholars, at least one important methodological tool for resolving such questions is to look at historical practice, and especially the extent to which the political branches acquiesced in common practices.33 Interpretation of that historical practice for constitutional purposes again divides legal scholars, but most would agree at least descriptively on some basic parts of that history. In particular, most scholars assess that from the Founding era through World War II, Presidents and Congresses alike recognized through their behavior and statements that except in certain narrow types of contingencies, congressional authorization was required for large-scale military operations against other states and international actors, even as many Presidents pushed and sometimes crossed those boundaries.34 Whatever constitutional constraints on presidential use of force existed prior to World War II, however, most scholars also note that the President asserted much more extensive unilateral powers to use force during and after the Cold War, and many trace the turning point to the 1950 Korean War.35 Congress did not declare war in that instance, nor did it expressly authorize U.S. participation.36 From that point forward, presidents have asserted broad unilateral authority to use force to address threats to U.S. interests, including threats to U.S. allies, and that neither Congress nor courts pushed back much against this expanding power.37 Concerns about expansive presidential war-making authority spiked during the Vietnam War. In the wind-down of that conflict, Congress passed – over President Nixon’s veto – the War Powers Resolution,38 which stated its purpose as to ensure the constitutional Founders’ original vision that the “collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”39 Since then, presidentialists have argued that the President still retains expansive authority to use force abroad to protect American interests,40 and congressionalists argue that this authority is tightly circumscribed.41 These constitutional debates have continued through the first decade of the 21st century. Constitutional scholars split, for example, over President Obama’s power to participate in coalition operations against Libya without congressional authorization in 2011, especially after the War Powers Resolution’s 60-day clock expired.42 Some argue that President Obama’s use of military force without specific congressional authorization in that case **reflects the broad constitutional discretion presidents** now **have** to protect American interests, at least short of full-blown “war”, while others argue that it is the latest in a long record of presidential violations of the Constitution and the War Powers Resolution.43 B. Threats of Force and Constitutional Powers These days it is usually taken for granted that – whether or not he can make war unilaterally – the President is constitutionally empowered to threaten the use of force, implicitly or explicitly, through diplomatic means or shows of force. It is never seriously contested whether the President may declare that United States is contemplating military options in response to a crisis, or whether the President may move substantial U.S. military forces to a crisis region or engage in military exercises there. To take the Libya example just mentioned, is there any constitutional limitation on the President’s authority to move U.S. military forces to the Mediterranean region and prepare them very visibly to strike?44 Or his authority to issue an ultimatum to Libyan leaders that they cease their brutal conduct or else face military action? Would it matter whether such threats were explicit versus implicit, whether they were open and public versus secret, or whether they were just a bluff? If not a constitutional obstacle, could it be argued that the War Powers Resolution’s reporting requirements and limits on operations were triggered by a President’s mere ultimatum or threatening military demonstration, insofar as those moves might constitute a “situation where imminent involvement in hostilities is clearly indicated by the circumstances”? These questions simply are not asked (at least not anymore).45 If anything, most lawyers would probably conclude that the President’s constitutional powers to threaten war **are not just expansive but largely beyond Congress’s authority** to regulate directly. From a constitutional standpoint, to the extent it is considered at all, the President’s power to threaten force is probably regarded to be at least as broad as his power to use it. One way to look at it is that the power to threaten force is a lesser included element of presidential war powers; the power to threaten to use force is simply a secondary question, the answer to which is bounded by the primary issue of the scope of presidential power to actually use it. If one interprets the President’s defensive war powers very broadly, to include dealing with aggression not only directed against U.S. territories but also against third parties,46 then it might seem easy to conclude that the President can also therefore take steps that stop short of actual armed intervention to deter or prevent such aggression. If, however, one interprets the President’s powers narrowly, for example, to include only limited unilateral authority to repel attacks against U.S. territory,47 then one might expect objections to arguably excessive presidential power to include his unilateral threats of armed intervention. Another way of looking at it is that in many cases, threats of war or force might fall within even quite narrow interpretations of the President’s inherent foreign relations powers to conduct diplomacy or his express commander in chief power to control U.S. military forces – or some combination of the two – depending on how a particular threat is communicated. A President’s verbal warning, ultimatum, or declared intention to use military force, for instance, could be seen as merely exercising his role as the “sole organ” of U.S. foreign diplomacy, conveying externally information about U.S. capabilities and intentions.48 A president’s movement of U.S. troops or warships to a crisis region or elevation of their alert level could be seen as merely exercising his dayto- day tactical control over forces under his command.49 Generally it is not seriously contested whether the exercise of these powers alone could so affect the likelihood of hostilities or war as to intrude on Congress’s powers over war and peace.50 We know from historical examples that such unilateral military moves, even those that are ostensibly pure defensive ones, can provoke wars – take, for example, President Polk’s movement of U.S. forces to the contested border with Mexico in 1846, and the resulting skirmishes that led Congress to declare war.51 Coming at the issue from Congress’s Article I powers rather than the President’s Article II powers, the very phrasing of the power “To declare War” puts most naturally all the emphasis on the present tense of U.S. military action, rather than its potentiality. Even as congressionalists advance interpretations of the clause to include not merely declarative authority but primary decision-making authority as to whether or not to wage war or use force abroad, their modern-day interpretations do not include a power to threaten war (except perhaps through the specific act of declaring it). None seriously argues – at least not any more – that the Declare War Clause precludes presidential threats of war. This was not always the case. During the early period of the Republic, there was a powerful view that beyond outright initiation of armed hostilities or declaration of war, more broadly the President also could not unilaterally take actions (putting aside actual military attacks) that would likely or directly risk war,52 provoke a war with another state,53 or change the condition of affairs or relations with another state along the continuum from peace to war.54 To do so, it was often argued, would usurp Congress’s prerogative to control the nation’s state of peace or war.55 During the Quasi-War with France at the end of the 18th century, for example, some members of Congress questioned whether the President, absent congressional authorization, could take actions that visibly signaled an intention to retaliate against French maritime harassment,56 and even some members of President Adams’ cabinet shared doubts.57 Some questions over the President’s power to threaten force arose (eventually) in relation to the Monroe Doctrine, announced in an 1823 presidential address to Congress and which in effect declared to European powers that the United States would oppose any efforts to colonize or reassert control in the Western Hemisphere.58 “Virtually no one questioned [Monroe’s proclamation] at the time. Yet it posed a constitutional difficulty of the first importance.”59 Of course, Monroe did not actually initiate any military hostilities, but his implied threat – without congressional action – risked provoking rather than deterring European aggression and by putting U.S. prestige and credibility on the line it limited Congress’s practical freedom of action if European powers chose to intervene.60 The United States would have had at the time to rely on British naval power to make good on that tacit threat, though a more assertive role for the President in wielding the potential for war or intervention during this period went hand in hand with a more sustained projection of U.S. power beyond its borders, especially in dealing with dangers emanating from Spanish-held Florida territory.61 Monroe’s successor, John Quincy Adams, faced complaints from opposition members of Congress that Monroe’s proclamation had exceeded his constitutional authority and had usurped Congress’s by committing the United States – even in a non-binding way – to resisting European meddling in the hemisphere.62 The question whether the President could unilaterally send militarily-threatening signals was in some respects a mirror image of the issues raised soon after the Constitution was ratified during the 1793 Neutrality Controversy: could President Washington unilaterally declare the United States to be neutral as to the war among European powers. Washington’s politically controversial proclamation declaring the nation “friendly and impartial” in the conflict between France and Great Britain (along with other European states) famously prompted a back-and-forth contest of public letters by Alexander Hamilton and James Madison, writing pseudonymously as “Pacificus” and “Helvidius”, about whether the President had such unilateral power or whether it belonged to Congress.63 Legal historian David Currie points out the irony that the neutrality proclamation was met with stronger and more immediate constitutional scrutiny and criticism than was Monroe’s threat. After all, Washington’s action accorded with the principle that only Congress, representing popular will, should be able to take the country from the baseline state of peace to war, whereas Monroe’s action seemed (at least superficially) to commit it to a war that Congress had not approved.64 Curiously (though for reasons offered below, perhaps not surprisingly) this issue – whether there are constitutional limits on the President’s power to threaten war – has almost vanished completely from legal discussion, and that evaporation occurred even before the dramatic post-war expansion in asserted presidential power to make war. Just prior to World War II, political scientist and presidential powers theorist Edward Corwin remarked that “[o]f course, it may be argued, and has in fact been argued many times, that the President is under constitutional obligation not to incur the risk of war in the prosecution of a diplomatic policy without first consulting Congress and getting its consent.”65 “Nevertheless,” he continued,66 “the supposed principle is clearly a maxim of policy rather than a generalization from consistent practice.” In his 1945 study World Policing and the Constitution, James Grafton Rogers noted: [E]xamples of demonstrations on land and sea made for a variety of purposes and under Presidents of varied temper and in different political climates will suffice to make the point. The Commander-in-Chief under the Constitution can display our military resources and threaten their use whenever he thinks best. The weakness in the **diplomatic weapon** is the possibility of **dissidence at home** which may cast doubt on our serious intent. The danger of the weapon is war.67 At least since then, however, the importance to U.S. foreign policy of threatened force has increased dramatically, while legal questions about it have receded further from discussion. In recent decades a few prominent legal scholars have addressed the President’s power to threaten force, though in only brief terms.

Taylor Reveley noted in his volume on war powers the importance of allocating constitutional responsibility not only for the actual use of force but also “[v]erbal or written threats or assurances about the circumstances in which the United States will take military action …, whether delivered by declarations of American policy, through formal agreements with foreign entities, by the demeanor or words of American officials, or by some other sign of national intent.”68 Beyond recognizing the critical importance of threats and other non-military actions in affecting war and peace, however, Reveley made little effort to address the issue in any detail. Among the few legal scholars attempting to define the limiting doctrinal contours of presidentially threatened force, Louis Henkin wrote in his monumental Foreign Affairs and the Constitution that: Unfortunately, the line between war and lesser uses of force is often elusive, sometimes illusory, and the use of force for foreign policy purposes can almost imperceptibly become a national commitment to war. Even when he does not use military force, the President can incite other nations or otherwise plunge or stumble this country into war, or force the hand of Congress to declare or to acquiesce and cooperate in war. As a matter of constitutional doctrine, however, one can declare with confidence that a President begins to exceed his authority if he willfully or recklessly moves the nation towards war…69 The implication seems to be that the President may not unilaterally threaten force in ways that are dramatically escalatory and could likely lead to war, or perhaps that the President may not unilaterally threaten the use of force that he does not have the authority to initiate unilaterally.70 Jefferson Powell, who generally takes a more expansive view than Henkin of the President’s war powers, argues by contrast that “[t]he ability to warn of, or threaten, the use of military force is an ordinary and essential element in the toolbox of that branch of government empowered to formulate and implement foreign policy.”71 For Powell, the President is constantly taking actions as part of everyday international relations that carry a risk of military escalation, and these are well-accepted as part of the President’s broader authority to manage, if not set, foreign policy. Such brief mentions are in recent times among the rare exceptions to otherwise barren constitutional discussion of presidential powers to threaten force. That the President’s authority to threaten force is so well-accepted these days as to seem self-evident is not just an academic phenomenon. It is also reflected in the legal debates among and inside all three branches of government. In 1989, Michael Reisman observed: Military maneuvers designed to convey commitment to allies or contingent threats to adversaries … **are matters of presidential competence**. Congress does not appear to view as within its bailiwick many low-profile contemporaneous expressions of gunboat diplomacy, i.e., the physical interposition of some U.S. war-making capacity as communication to an adversary of United States’ intentions and capacities to oppose it.72 This was and remains a correct description but understates the pattern of practice, insofar as even major and high-profile expressions of coercive diplomacy are regarded among all three branches of government as within presidential competence. In Dellums v. Bush – perhaps the most assertive judicial scrutiny of presidential power to use large-scale force abroad since the end of the Cold War – the district court dismissed on ripeness grounds congressmembers’ suit challenging President George H. W. Bush’s intended military operations against Iraq in 1991 and seeking to prevent him from initiating an offensive attack against Iraq without first securing explicit congressional authorization for such action.73 That at the time of the suit the President had openly threatened war – through ultimatums and deployment of several hundred thousand U.S. troops – but had not yet “committed to a definitive course of action” to carry out the threat meant there was no justiciable legal issue, held the court.74 The President’s threat of war did not seem to give the district court legal pause at all; quite the contrary, the mere threat of war was treated by the court as a non-issue entirely.75 There are several reasons why constitutional questions about threatened force have dropped out of legal discussions. First, the more politically salient debate about the President’s unilateral power to use force has probably swallowed up this seemingly secondary issue. As explained below, it is a mistake to view threats as secondary in importance to uses of force, but they do not command the same political attention and their impacts are harder to measure.76 Second, the expansion of American power after World War II, combined with the growth of peacetime military forces and a set of defense alliance commitments (developments that are elaborated below) make at least some threat of force much more common – in the case of defensive alliances and some deterrent policies, virtually constant – and difficult to distinguish from other forms of everyday diplomacy and security policy.77 Besides, for political and diplomatic reasons, presidents rarely threaten war or intervention without at least a little deliberate ambiguity. As historian Marc Trachtenberg puts it: “It often makes sense … to muddy the waters a bit and avoid direct threats.”78 Any legal lines one might try to draw (recall early attempts to restrict the President’s unilateral authority to alter the state of affairs along the peacetime-wartime continuum) have become blurrier and blurrier. In sum, if the constitutional power to threaten war ever posed a serious legal controversy, it does so no more. As the following section explains, however, threats of war and armed force have during most of our history become a greater and greater part of American grand strategy, defined here as long-term policies for using the country’s military and non-military power to achieve national goals. The prominent role of threatened force in U.S. strategy has become the focus of political scientists and other students of security strategy, crises, and responses – but constitutional study has not adjusted accordingly.79 C. Threats of Force and U.S. Grand Strategy While the Korean and Vietnam Wars were generating intense study among lawyers and legal scholars about constitutional authority to wage military actions abroad, during that same period many political scientists and strategists – economists, historians, statesmen, and others who studied international conflict – turned their focus to the role of threatened force as an instrument of foreign policy. The United States was building and sustaining a massive war-fighting apparatus, but its security policy was not oriented primarily around waging or winning wars but around deterring them and using the threat of war – including demonstrative military actions – to advance U.S. security interests. It was the potential of U.S. military might, not its direct application or engagement with the enemy, that would do much of the heavy lifting. U.S. military power would be used to deter the Soviet Union and other hostile states from taking aggressive action. It would be unsheathed to prompt them to back down over disputes. It would reassure allies that they could depend on U.S. help in defending themselves. All this required that U.S. willingness to go to war be credible in the eyes of adversaries and allies alike. Much of the early Cold War study of threatened force concerned nuclear strategy, and especially deterrence or escalation of nuclear war. Works by Albert Wohlstetter, Herman Kahn, and others not only studied but shaped the strategy of nuclear threats, as well as how to use limited applications of force or threats of force to pursue strategic interests in remote parts of the globe without sparking massive conflagrations.80 As the strategic analyst Bernard Brodie wrote in 1946, “Thus far the chief purpose of our military establishment has been to win wars. From now on its chief purpose must be to avert them.”81 Toward that end, U.S. government security and defense planners during this time focused heavily on preserving and improving the credibility of U.S. military threats – while the Soviet Union was doing likewise.82 The Truman administration developed a militarized version of containment strategy against the Soviet empire, emphasizing that stronger military capabilities were necessary to prevent the Soviets from seizing the initiative and to resist its aggressive probes: “it is clear,” according to NSC-68, the government document which encapsulated that strategy, “that a substantial and rapid building up of strength in the free world is necessary to support a firm policy intended to check and to roll back the Kremlin's drive for world domination.”83 The Eisenhower administration’s “New Look” policy and doctrine of “massive retaliation” emphasized making Western collective security both more effective and less costly by placing greater reliance on deterrent threats – including threatened escalation to general or nuclear war. As his Secretary of State John Foster Dulles explained, “[t]here is no local defense which alone will contain the mighty landpower of the Communist world. Local defenses must be reinforced by the further deterrent of massive retaliatory power.”84 As described in Evan Thomas’s recent book, Ike’s Bluff, Eisenhower managed to convince Soviet leaders that he was ready to use nuclear weapons to check their advance in Europe and elsewhere. In part due to concerns that threats of massive retaliation might be insufficiently credible in Soviet eyes (especially with respect to U.S. interests perceived as peripheral), the Kennedy administration in 1961 shifted toward a strategy of “flexible response,” which relied on the development of a wider spectrum of military options that could quickly and efficiently deliver varying degrees of force in response to foreign aggression.85 Throughout these periods, the President often resorted to discrete, limited uses of force to demonstrate U.S. willingness to escalate. For example, in 1961 the Kennedy administration (mostly successfully in the short-run) deployed intervention-ready military force immediately off the coast of the Dominican Republic to compel its government's ouster,86 and that same year it used military exercises and shows of force in ending the Berlin crisis;87 in 1964, the Johnson administration unsuccessfully used air strikes on North Vietnamese targets following the Tonkin Gulf incidents, failing to deter what it viewed as further North Vietnamese aggression.88 The point here is not the shifting details of U.S. strategy after World War II – during this era of dramatic expansion in asserted presidential war powers – but the central role of credible threats of war in it, as well as the interrelationship of plans for using force and credible threats to do so. Also during this period, the United States abandoned its long-standing aversion to “entangling alliances,”89 and committed to a network of mutual defense treaties with dependent allies. Besides the global collective security arrangement enshrined in the UN Charter, the United States committed soon after World War II to mutual defense pacts with, for example, groups of states in Western Europe (the North Atlantic Treaty Organization)90 and Asia (the Southeast Asia Treaty Organization,91 as well as a bilateral defense agreement with the Republic of Korea,92 Japan,93 and the Republic of China,94 among others). These alliance commitments were part of a U.S. effort to “extend” deterrence of Communist bloc aggression far beyond its own borders.95 “Extended deterrence” was also critical to reassuring these U.S. allies that their security needs would be met, in some instances to head off their own dangerous rearmament.96 Among the leading academic works on strategy of the 1960s and 70s were those of Thomas Schelling, who developed the theoretical structure of coercion theory, arguing that rational states routinely use the threat of military force – the manipulation of an adversary’s perceptions of future risks and costs with military threats – as a significant component of their diplomacy.97 Schelling distinguished between deterrence (the use of threats to dissuade an adversary from taking undesired action) and compellence (the use of threats to persuade an adversary to behave a certain way), and he distinguished both forms of coercion from brute force: “[B]rute force succeeds when it is used, whereas the power to hurt is most successful when held in reserve. It is the threat of damage to come that can make someone yield of comply. It is latent violence that can influence someone’s choice.”98 Alexander George, David Hall, and William Simons then led the way in taking a more empirical approach, reviewing case studies to draw insights about the success and failure of U.S. coercive threats, analyzing contextual variables and their effects on parties’ reactions to threats during crises. Among their goals was to generate lessons informed by history for successful strategies that combine diplomatic efforts with threats or demonstrations of force, recognizing that the United States was relying heavily on threatened force in addressing security crises. Coercive diplomacy – if successful – offered ways to do so with minimal actual application of military force.99 One of the most influential studies that followed was Force Without War: U.S. Armed Forces as a Political Instrument, a Brookings Institution study led by Barry Blechman and Stephen Kaplan and published in 1977.100 They studied “political uses of force”, defined as actions by U.S. military forces “as part of a deliberate attempt by the national authorities to influence, or to be prepared to influence, specific behavior of individuals in another nation without engaging in a continued contest of violence.”101 Blechman and Kaplan’s work, including their large data set and collected case studies, was important for showing the many ways that threatened force could support U.S. security policy. Besides deterrence and compellence, threats of force were used to assure allies (thereby, for example, avoiding their own drive toward militarization of policies or crises) and to induce third parties to behave certain ways (such as contributing to diplomatic resolution of crises). The record of success in relying on threatened force has been quite mixed, they showed. Blechman and Kaplan’s work, and that of others who built upon it through the end of the Cold War and the period that has followed,102 helped understand the factors that correlated with successful threats or demonstrations of force without resort or escalation to war, especially the importance of credible signals.103 After the Cold War, the United States continued to rely on coercive force – threatened force to deter or compel behavior by other actors – as a central pillar of its grand strategy. During the 1990s, the United States wielded coercive power with varied results against rogue actors in many cases that, without the overlay of superpower enmities, were considered secondary or peripheral, not vital, interests: Iraq, Somalia, Haiti, Bosnia, and elsewhere. For analysts of U.S. national security policy, a major puzzle was reconciling the fact that the United States possessed overwhelming military superiority in raw terms over any rivals with its difficult time during this era in compelling changes in their behavior.104 As Daniel Byman and I wrote about that decade in our study of threats of force and American foreign policy: U.S. conventional and nuclear forces dwarf those of any adversaries, and the U.S. economy remains the largest and most robust in the world. Because of these overwhelming advantages, the United States can threaten any conceivable adversary with little danger of a major defeat or even significant retaliation. Yet coercion remains difficult. Despite the United States’ lopsided edge in raw strength, regional foes persist in defying the threats and ultimatums brought by the United States and its allies. In confrontations with Somali militants, Serb nationalists, and an Iraqi dictator, the U.S. and allied record or coercion has been mixed over recent years…. Despite its mixed record of success, however, coercion will remain a critical element of U.S. foreign policy.105 One important factor that seemed to undermine the effectiveness of U.S. coercive threats during this period was that many adversaries perceived the United States as still afflicted with “Vietnam Syndrome,” unwilling to make good on its military threats and see military operations through.106 Since the turn of the 21st Century, major U.S. security challenges have included non-state terrorist threats, the proliferation of nuclear and other weapons of mass destruction (WMD), and rapidly changing power balances in East Asia, and the United States has accordingly been reorienting but retaining its strategic reliance on threatened force. The Bush Administration’s “preemption doctrine” was premised on the idea that some dangerous actors – including terrorist organizations and some states seeking WMD arsenals – are undeterrable, so the United States might have to strike them first rather than waiting to be struck.107 On one hand, this was a move away from reliance on threatened force: “[t]he inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit” a reactive posture.108 Yet the very enunciation of such a policy – that “[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively”109 – was intended to persuade those adversaries to alter their policies that the United States regarded as destabilizing and threatening. Although the Obama administration pulled back from this rhetoric and placed greater emphasis on international institutions, it has continued to rely on threatened force as a key pillar of its strategy with regard to deterring threats (such as aggressive Iranian moves), intervening in humanitarian crises (as in Libya), and reassuring allies.110 With regard to East Asia, for example, the credible threat of U.S. military force is a significant element of U.S. strategy for deterring Chinese and North Korean aggression as well as reassuring other Asian powers of U.S. protection, to avert a destabilizing arms race.111 D. The Disconnect Between Constitutional Discourse and Strategy There is a major disconnect between the decades of work by strategists and many political scientists on American security policy and practice since the Second World War and legal analysis and scholarship of constitutional war powers during that period. Lawyers and strategists have been relying on not only distinct languages but distinct logics of military force – in short, when it comes to using U.S. military power, lawyers think in terms of “going to war” while strategists focus on potential war and processes leading to it. These framings manifest in differing theoretical starting points for considering how exercises of U.S. military might affect war and peace, and they skew the empirical insights and normative prescriptions about Presidential power often drawn from their analyses. 1. Lawyers’ Misframing Lawyers’ focus on actual uses of force – especially engagements with enemy military forces – as constitutionally salient, rather than including threats of force in their understanding of modern presidential powers tilts analysis toward a one-dimensional strategic logic, rather than a more complex and multi-dimensional and dynamic logic in which the credible will to use force is as important as the capacity to do so. As discussed above, early American constitutional thinkers and practitioners generally wanted to slow down with institutional checks decisions to go to war, because they thought that would make war less likely. “To invoke a more contemporary image,” wrote John Hart Ely of their vision, “it takes more than one key to launch a missile: It should take quite a number to start a war.”112 They also viewed the exercise of military power as generally a ratchet of hostilities, whereby as the intensity of authorized or deployed force increased, so generally did the state of hostilities between the United States and other parties move along a continuum from peace to war.113 Echoes of this logic still reverberate in modern congressionalist legal scholarship: the more flexibly the President can use military force, the more likely it is that the United States will find itself in wars; better, therefore, to clog decisions to make war with legislative checks.114 Modern presidentialist legal scholars usually respond that rapid action is a virtue, not a vice, in exercising military force.115 Especially as a superpower with global interests and facing global threats, presidential discretion to take rapid military **action** – endowed with what Alexander Hamilton called “[**d]ecision, activity, secrecy, and dispatch**”116 – **best protects American interests**. In either case the emphasis tends overwhelmingly to be placed on actual military engagements with adversaries. Strategists and many political scientists, by contrast, view some of the most significant use of military power as starting well before armed forces clash – and including important cases in which they never actually do. Coercive diplomacy and strategies of threatened force, they recognize, often involve a set of moves and countermoves by opposing sides and third parties before or even without the violent engagement of opposing forces. It is often the parties’ perceptions of anticipated actions and costs, not the actual carrying through of violence, that have the greatest impact on the course of events and resolution or escalation of crises. Instead of a ratchet of escalating hostilities, the flexing of military muscle can increase as well as decrease actual hostilities, inflame as well as stabilize relations with rivals or enemies. Moreover, those effects are determined not just by U.S. moves but by the responses of other parties to them – or even to anticipated U.S. moves and countermoves.117 Indeed, as Schelling observed, strategies of brinkmanship sometimes operate by “the deliberate creation of a recognizable risk of war, a risk that one does not completely control.”118 This insight – that effective strategies of threatened force involve not only great uncertainty about the adversary’s responses but also sometimes involve intentionally creating risk of inadvertent escalation119 – poses a difficult challenge for any effort to cabin legally the President’s power to threaten force in terms of likelihood of war or some due standard of care.120 2. Lawyers’ Selection Problems Methodologically, a lawyerly focus on actual uses of force – a list of which would then commonly be used to consider which ones were or were not authorized by Congress – vastly undercounts the instances in which presidents wield U.S. military might. It is already recognized by some legal scholars that studying actual uses of force risks ignoring instances in which President contemplated force but refrained from using it, whether because of political, congressional, or other constraints.121 The point here is a different one: that some of the most significant (and, in many instances, successful) presidential decisions to threaten force do not show up in legal studies of presidential war powers that consider actual deployment or engagement of U.S. military forces as the relevant data set. Moreover, some actual uses of force, whether authorized by Congress or not, were preceded by threats of force; in some cases these threats may have failed on their own to resolve the crisis, and in other cases they may have precipitated escalation. To the extent that lawyers are interested in understanding from historical practice what war powers the political branches thought they had and how well that understanding worked, they are excluding important cases. Consider, as an illustration of this difference in methodological starting point, that for the period of 1946-1975 (during which the exercise of unilateral Presidential war powers had its most rapid expansion), the Congressional Research Service compilation of instances in which the United States has utilized military forces abroad in situations of military conflict or potential conflict to protect U.S. citizens or promote U.S. interests – which is often relied upon by legal scholars studying war powers – lists only about two dozen incidents.122 For the same time period, the Blechman and Kaplan study of political uses of force (usually threats) – which is often relied upon by political scientists studying U.S. security strategy – includes dozens more data-point incidents, because they divide up many military crises into several discrete policy decisions, because many crises were resolved with threat-backed diplomacy, and because many uses of force were preceded by overt or implicit threats of force.123 Among the most significant incidents studied by Blechman and Kaplan but not included in the Congressional Research Service compilation at all are the 1958-59 and 1961 crises over Berlin and the 1973 Middle East War, during which U.S. Presidents signaled threats of superpower war, and in the latter case signaled particularly a willingness to resort to nuclear weapons.124 Because the presidents did not in the end carry out these threats, these cases lack the sort of authoritative legal justifications or reactions that accompany actual uses of force. It is therefore difficult to assess how the executive branch and congress understood the scope of the President’s war powers in these cases, but historical inquiry would probably show the executive branch’s interpretation to be very broad, even to include full-scale war and even where the main U.S. interest at stake was the very credibility of U.S. defense commitments undergirding its grand strategy, not simply the interests specific to divided Germany and the Middle East region.

Of course, one might argue that because the threatened military actions were never carried out in these cases, it is impossible to know if the President would have sought congressional authorization or how Congress would have reacted to the use of force; nonetheless, it is easy to see that in crises like these a threat by the President to use force, having put U.S. credibility on the line in addition to whatever other foreign policy stakes were at issues, would have put Congress in a bind. 3. Lawyers’ Mis-Assessment Empirically, analysis of and insights gleaned from any particular incident – which might then be used to evaluate the functional merits of presidential powers – looks very different if one focuses predominantly on the actual use of force instead of considering also the role of threatened force. Take for example, the Cuban Missile Crisis – perhaps the Cold War’s most dangerous event. To the rare extent that they consider domestic legal issues of this crisis at all, lawyers interested in the constitutionality of President Kennedy’s actions generally ask only whether he was empowered to initiate the naval quarantine of Cuba, because that is the concrete military action Kennedy took that was readily observable and that resulted in actual engagement with Soviet forces or vessels – as it happens, very minimal engagement.125 To strategists who study the crisis, however, the naval quarantine is not in itself the key presidential action; after all, as Kennedy and his advisers realized, a quarantine alone could not remove the missiles that were already in Cuba. The most consequential presidential actions were threats of military or even nuclear escalation, signaled through various means including putting U.S. strategic bombers on highest alert.126 The quarantine itself was significant not for its direct military effects but because of its communicative impact in showing U.S. resolve. If one is focused, as lawyers often are, on presidential military action that actually engaged the enemy in combat or nearly did, it is easy to dismiss this case as not very constitutionally significant. If one focuses on it, as strategists and political scientists often do, on nuclear brinkmanship, it is arguably the most significant historical exercise of unilateral presidential powers to affect war and peace.127 Considering again the 1991 Gulf War, most legal scholars would dismiss this instance as constitutionally a pretty uninteresting military conflict: the President claimed unilateral authority to use force, but he eventually sought and obtained congressional authorization for what was ultimately – at least in the short-run – a quite successful war. For the most part this case is therefore neither celebrated nor decried much by either side of legal war powers debates,128 though some congressionalist scholars highlight the correlation of congressional authorization for this war and a successful outcome.129 Political scientists look at the case differently, though. They often study this event not as a successful war but as failed coercive diplomacy, in that the United States first threatened war through a set of dramatically escalating steps that ultimately failed to persuade Saddam Hussein to withdraw from Kuwait.130 Some political scientists even see U.S. legal debate about military actions as an important part of this story, assessing that adversaries pay attention to congressional arguments and moves in evaluating U.S. resolve (an issue taken up in greater detail below) and that congressional opposition to Bush’s initial unilateralism in this case undermined the credibility of U.S. threats.131 Whether one sees the Gulf War as a case of (successful) war, as lawyers usually do, or (unsuccessful) threatened war, as political scientists usually do, colors how one evaluates the outcome and the credit one might attach to some factors such as vocal congressional opposition to initially-unilateral presidential moves. Notice also that legal analysis of Presidential authority to use force is sometimes thought to turn partly on the U.S. security interests at stake, as though those interests are purely contextual and exogenous to U.S. decision-making and grand strategy. In justifying President Obama’s 2011 use of force against the Libyan government, for example, the Justice Department’s Office of Legal Counsel concluded that the President had such legal authority “because he could reasonably determine that such use of force was in the national interest,” and it then went on to detail the U.S. security and foreign policy interests.132 The interests at stake in crises like these, however, are altered dramatically if the President threatens force: doing so puts the credibility of U.S. threats at stake, which is important not only with respect to resolving the crisis at hand but with respect to other potential adversaries watching U.S. actions.133 The President’s power to threaten force means that he may unilaterally alter the costs and benefits of actually using force through his prior actions.134 The U.S. security interests in carrying through on threats are partly endogenous to the strategy embarked upon to address crises (consider, for example, that once President George H.W. Bush placed hundred of thousands of U.S. troops in the Persian Gulf region and issued an ultimatum to Saddam Hussein in 1990, the credibility of U.S. threats and assurances to regional allies were put on the line).135 Moreover, interests at stake in any one crisis cannot simply be disaggregated from broader U.S. grand strategy: if the United States generally relies heavily on threats of force to shape the behavior of other actors, then its demonstrated willingness or unwillingness to carry out a threat and the outcomes of that action affect its credibility in the eyes of other adversaries and allies, too.136 It is remarkable, though in the end not surprising, that the executive branch does not generally cite these credibility interests in justifying its unilateral uses of force. It does cite when relevant the U.S. interest in sustaining the credibility of its formal alliance commitments or U.N. Security Council resolutions, as reasons supporting the President’s constitutional authority to use force.137 The executive branch generally refrains from citing the similar interests in sustaining the credibility of the President’s own threats of force, however, probably in part because doing so would so nakedly expose the degree to which the President’s prior unilateral strategic decisions would tie Congress’s hands on the matter. \* \* \* In sum, lawyers’ focus on actual uses of force – usually in terms of armed clashes with an enemy or the placement of troops into hostile environments – does not account for much vaster ways that President’s wield U.S. military power and it skews the claims legal scholars make about the allocation of war powers between the political branches. A more complete account of constitutional war powers should recognize the significant role of threatened force in American foreign policy. II. Democratic Checks on Threatened Force The previous Parts of this Article showed that, especially since the end of World War II, the United States has relied heavily on strategies of threatened force in wielding its military might – for which credible signals are a necessary element – and that the President is not very constrained legally in any formal sense in threatening war. Drawing on recent political science scholarship, this Part takes some of the major questions often asked by students of constitutional war powers with respect to the actual use of force and reframes them in terms of threatened force. First, as a descriptive matter, in the absence of formal legal checks on the President’s power to threaten war, is the President nevertheless informally but significantly constrained by democratic institutions and processes, and what role does Congress play in that constraint? Second, as a normative matter, what are the strategic merits and drawbacks of this arrangement of democratic institutions and constraints with regard to strategies of threatened force? Third, as a prescriptive matter, although it is not really plausible that Congress or courts would ever erect direct legal barriers to the President’s power to threaten war, how might legal reform proposals to more strongly and formally constrain the President’s power to use force indirectly impact his power to threaten it effectively? For reasons discussed below, I do not consider whether Congress could legislatively restrict directly the President’s power to threaten force or war; in short, I set that issue aside because assuming that were constitutionally permissible, even ardent congressionalists have exhibited no interest in doing so, and instead have focused on legally controlling the actual use of force. Political science insights that bear on these questions emerge from several directions. One is from studies of Congress’ influence on use of force decisions, which usually assume that Congress’s formal legislative powers play only a limited role in this area, and the effects of this influence on presidential decision-making about threatened force. Another is international relations literature on international bargaining138 as well as literature on the theory of democratic peace, the notion that democracies rarely, if ever, go to war with one another.139 In attempting to explain the near-absence of military conflicts between democracies, political scientists have examined how particular features of democratic governments – electoral accountability, the institutionalized mobilization of political opponents, and the diffusion of decision-making authority regarding the use of force among executive and legislative branches – affect decision-making about war.140 These and other studies, in turn, have led some political scientists (especially those with a rational choice theory orientation) to focus on how those features affect the credibility of signals about force that governments send to adversaries in crises.141 My purpose in addressing these questions is to begin painting a more complete and detailed picture of the way war powers operate, or could operate, than one sees when looking only at actual wars and use of force. This is not intended to be a comprehensive account but an effort to synthesize some strands of scholarship from other fields regarding threatened force to inform legal discourse about how war powers function in practice and the strategic implications of reform. The answers to these questions also bear on raging debates among legal scholars on the nature of American executive power and its constraint by law. Initially they seem to support the views of those legal scholars who have long believed that in practice law no longer seriously binds the President with respect to war-making.142 That view has been taken even further recently by Eric Posner and Adrian Vermeule, who argue that “[l]aw does little constraint the modern executive” at all, but also observe that “politics and public opinion” operate effectively to cabin executive powers.143 The arguments offered here, however, do more to support the position of those legal scholars who describe a more complex relationship between law and politics, including that law is constitutive of the processes of political struggle.144 That law helps constitute the processes of political struggles is true of any area of public policy, though, and what is special here is the added importance of foreign audiences – including adversaries and allies, alike – observing and reacting to those politics, too. Democratic Constraints on the Power to the Threaten Force Whereas most lawyers usually begin their analysis of the President’s and Congress’s war powers by focusing on their formal legal authorities, political scientists usually take for granted these days that the President is – in practice – the dominant branch with respect to military crises and that Congress wields its formal legislative powers in this area rarely or in only very limited ways. A major school of thought, however, is that congressional members nevertheless wield significant influence over decisions about force, and that this influence extends to threatened force, so that Presidents generally refrain from threats that would provoke strong congressional opposition. Even without any serious prospect for legislatively blocking the President’s threatened actions, Congress under certain conditions can loom large enough to force Presidents to adjust their policies; even when it cannot, congressional members can oblige the President expend lots of political capital. As Jon Pevehouse and William Howell explain: When members of Congress vocally **oppose a use of force, they undermine the president’s ability to convince** foreign states that he will see a fight through to the end. Sensing hesitation on the part of the United States, **allies may be reluctant to contribute** to a military campaign, **and adversaries are likely to fight harder and longer** when conflict erupts— thereby raising the costs of the military campaign, decreasing the president’s ability to negotiate a satisfactory resolution, and increasing the probability that American lives are lost along the way. Facing a limited band of allies willing to participate in a military venture and an enemy emboldened by domestic critics, presidents may choose to curtail, and even abandon, those military operations that do not involve vital strategic interests. 145 This statement also highlights the important point, alluded to earlier, that force and threatened force are not neatly separable categories. Often limited uses of force are intended as signals of resolve to escalate, and most conflicts involve bargaining in which the threat of future violence – rather than what Schelling calls “brute force”146 – is used to try to extract concessions. The formal participation of political opponents in legislative bodies provides them with a forum for registering dissent to presidential policies of force through such mechanisms floor statements, committee oversight hearings, resolution votes, and funding decisions.147 These official actions prevent the President “from monopolizing the nation’s political discourse” on decisions regarding military actions can thereby make it difficult for the President to depart too far from congressional preferences.148 Members of the political opposition in Congress also have access to resources for gathering policy relevant information from the government that informs their policy preferences. Their active participation in specialized legislative committees similarly gives opponent party members access to fact-finding resources and forums for registering informed dissent from decisions within the committee’s purview.149 As a result, legislative institutions within democracies can enable political opponents to have a more **immediate** and informed **impact** on executive’s decisions regarding force than can opponents among the general public. Moreover, studies suggest that Congress can actively shape media coverage and public support for a president’s foreign policy engagements.150 In short, these findings among political scientists suggest that, even without having to pass legislation or formally approve of actions, Congress often operates as an important check on threatened force by providing the president’s political opponents with a forum for registering dissent from the executive’s decisions regarding force in ways that attach domestic political costs to contemplated military actions or even the threats to use force. Under this logic, Presidents, anticipating dissent, will be more selective in issuing¶ threats in the first place, making only those commitments that would not incite¶ widespread political opposition should the threat be carried through.151 Political¶ opponents within a legislature also have few electoral incentives to collude in an¶ executive’s bluff, and they are capable of expressing opposition to a threatened use of¶ force in ways that could expose the bluff to a threatened adversary.152 This again narrows¶ the President’s range of viable policy options for brandishing military force. Counter-intuitively, given the President’s seemingly unlimited and unchallenged¶ constitutional power to threaten war, it may in some cases be easier for members of¶ Congress to influence presidential decisions to threaten military action than presidential¶ war decisions once U.S. forces are already engaged in hostilities. It is widely believed¶ that once U.S. armed forces are fighting, congress members’ hands are often tied: policy¶ opposition at that stage risks being portrayed as undermining our troops in the field.153¶ Perhaps, it could be argued, the President takes this phenomenon into account and¶ therefore discounts political opposition to threatened force; he can assume that such¶ opposition will dissipate if he carries it through. Even if that is true, before that point¶ occurs, however, members of Congress may have communicated messages domestically¶ and communicated signals abroad that the President will find difficult to counter.154 The bottom line is that a body of recent political science, while confirming the¶ President’s dominant position in setting policy in this area, also reveals that policymaking¶ with respect to threats of force is significantly shaped by domestic politics and¶ that Congress is institutionally positioned to play a powerful role in influencing those¶ politics, even without exercising its formal legislative powers. Given the centrality of¶ threatened force to U.S. foreign policy strategy and security crises, this suggests that the¶ practical war powers situation is not so imbalanced toward the President as many assume. B. Democratic Institutions and the Credibility of Threats A central question among constitutional war powers scholars is whether robust¶ checks – especially congressional ones – on presidential use of force lead to “sound”¶ policy decision-making. Congressionalists typically argue that legislative control over¶ war decisions promotes more thorough deliberation, including more accurate weighing of¶ consequences and gauging of political support of military action.155 Presidentialists¶ usually counter that the executive branch has better information and therefore better¶ ability to discern the dangers of action or inaction, and that quick and decisive military¶ moves are often required to deal with security crises.156 If we are interested in these sorts of functional arguments, then reframing the¶ inquiry to include threatened force prompts critical questions whether such checks also¶ contribute to or detract from effective deterrence and coercive diplomacy and therefore¶ positively or negatively affect the likelihood of achieving aims without resort to war.¶ Here, recent political science provides some reason for optimism, though the scholarship¶ in this area is neither yet well developed nor conclusive. To be sure, “soundness” of policy with respect to force is heavily laden with¶ normative assumptions about war and the appropriate role for the United States in the¶ broader international security system, so it is difficult to assess the merits and¶ disadvantages of constitutional allocations in the abstract. That said, whatever their¶ specific assumptions about appropriate uses of force in mind, constitutional war powers¶ scholars usually evaluate the policy advantages and dangers of decision-making¶ allocations narrowly in terms of the costs and outcomes of actual military engagements¶ with adversaries. The importance of credibility to strategies of threatened force adds important new¶ dimensions to this debate. On the one hand, one might intuitively expect that robust democratic checks would generally be ill-suited for coercive threats and negotiations –¶ that institutional centralization and secrecy of decision-making might better equip nondemocracies¶ to wield threats of force. As Quincy Wright speculated in 1944, autocracies¶ “can use war efficiently and threats of war even more efficiently” than democracies,157¶ especially the American democracy in which vocal public and congressional opposition¶ may undermine threats.158 Moreover, proponents of democratic checks on war powers¶ usually assume that careful deliberation is a virtue in preventing unnecessary wars, but¶ strategists of deterrence and coercion observe that perceived irrationality is sometimes¶ important in conveying threats: “don’t test me, because I might just be crazy enough to¶ do it!”159 On the other hand, some political scientists have recently called into question this¶ view and concluded that the institutionalization of political contestation and some¶ diffusion of decision-making power in democracies of the kind described in the previous¶ section make threats to use force rare but especially credible and effective in resolving¶ international crises without actual resort to armed conflict. In other words, recent¶ arguments in effect turn some old claims about the strategic disabilities of democracies¶ on their heads: whereas it used to be generally thought that democracies were ineffective¶ in wielding threats because they are poor at keeping secrets and their decision-making is¶ constrained by internal political pressures, a current wave of political science accepts this¶ basic description but argues that these democratic features are really strategic virtues.160 Rationalist models of crisis bargaining between states assume that because war is¶ risky and costly, states will be better off if they can resolve their disputes through¶ bargaining rather than by enduring the costs and uncertainties of armed conflict.161¶ Effective bargaining during such disputes – that which resolves the crisis without a resort¶ to force – depends largely on states’ perceptions of their adversary’s capacity to wage an¶ effective military campaign and its willingness to resort to force to obtain a favorable¶ outcome. A state targeted with a threat of force, for example, will be less willing to resist¶ the adversary’s demands if it believes that the adversary intends to wage and is capable of¶ waging an effective military campaign to achieve its ends. In other words, if a state¶ perceives that the threat from the adversary is credible, that state has less incentive to¶ resist such demands if doing so will escalate into armed conflict. The accuracy of such perceptions, however, is often compromised by¶ informational asymmetries that arise from private information about an adversary’s¶ relative military capabilities and resolve that prevents other states from correctly¶ assessing another states’ intentions, as well as by the incentives states have to¶ misrepresent their willingness to fight – that is, to bluff.162 Informational asymmetries¶ increase the potential for misperception and thereby make war more likely; war,¶ consequentially, can be thought of in these cases as a “bargaining failure.”163 Some political scientists have argued in recent decades – contrary to previously common wisdom – that features and constraints of democracies make them better suited than non-democracies to credibly signal their resolve when they threaten force. To bolster their bargaining position, states will seek to generate credible signals of their resolve by taking actions that can enhance the credibility of such threats, such as mobilizing military forces or making “hand-tying” commitments from which leaders cannot back down without suffering considerable political costs domestically.164 These domestic audience costs, according to some political scientists, are especially high for leaders in democratic states, where they may bear these costs at the polls.165 Given the potentially high domestic political and electoral repercussions democratic leaders face from backing down from a public threat, they have considerable incentives to refrain from bluffing. An adversary that understands these political vulnerabilities is thereby more likely to perceive the threats a democratic leader does issue as highly credible, in turn making it more likely that the adversary will yield.166 Other scholars have recently pointed to the special role of legislative bodies in signaling with regard to threatened force. This is especially interesting from the perspective of constitutional powers debates, because it posits a distinct role for Congress – and, again, one that does not necessarily rely on Congress’s ability to pass binding legislation that formally confines the President. Kenneth Schultz, for instance, argues that the open nature of competition within democratic societies ensures that the interplay of opposing parties in legislative bodies over the use of force is observable not just to their domestic publics but to foreign actors; this inherent transparency within democracies – magnified by legislative processes – **provides more information to adversaries** regarding the unity of domestic opponents around a government’s military and foreign policy decisions.167 Political opposition parties can undermine the credibility of some threats by the President to use force if they publicly voice their opposition in committee hearings, public statements, or through other institutional mechanisms. Furthermore, legislative processes – such as debates and hearings – make it difficult to conceal or misrepresent preferences about war and peace. Faced with such institutional constraints, Presidents will incline to be more selective about making such threats and avoid being undermined in that way.168 This restraining effect on the ability of governments to issue threats simultaneously makes those threats that the government issues more credible, if an observer assumes that the President would not be issuing it if he anticipated strong political opposition. Especially when members of the opposition party publicly support an executive’s threat to use force during a crisis, their visible support lends additional credibility to the government’s threat by demonstrating that political conditions domestically favor the use of force should it be necessary.169 In some cases, Congress may communicate greater willingness than the president to use force, for instance through non-binding resolutions.170 Such powerful signals of resolve should in theory make adversaries more likely to back down. The credibility-enhancing effects of legislative constraints on threats are subject to dispute. Some studies question the assumptions underpinning theories of audience costs – specifically the idea that democratic leaders suffer domestic political costs to failing to make good on their threats, and therefore that their threats are especially credible171 – and others question whether the empirical data supports claims that democracies have credibility advantages in making threats.172 Other scholars dispute the likelihood that leaders will really be punished politically for backing down, especially if the threat was not explicit and unambiguous or if they have good policy reasons for doing so.173 Additionally, even if transparency in democratic institutions allows domestic dissent from threats of force to be visible to foreign audiences, it is not clear that adversaries would interpret these mechanisms as political scientists expect in their models of strategic interaction, in light of various common problems of misperception in international relations.174 These disputes are not just between competing theoretical models but also over the links between any of the models and real-world political behavior by states. At this point there remains a dearth of good historical evidence as to how foreign leaders interpret political maneuvers within Congress regarding threatened force. Nevertheless, at the very least, strands of recent political science scholarship cast significant doubt on the intuition that democratic checks are inherently disadvantageous to strategies of threatened force. Quite the contrary, they suggest that legislative checks – or, indeed, even the signaling functions that Congress is institutionally situated to play with respect to foreign audiences interpreting U.S. government moves – can be harnessed in some circumstances to support such strategies. C. Legal Reform and Strategies of Threatened Force Among legal scholars of war powers, the ultimate prescriptive question is whether the President should be constrained more formally and strongly than he currently is by legislative checks, especially a more robust and effective mandatory requirement of congressional authorization to use force. Calls for reform usually take the form of narrowing and better enforcement (by all three branches of government) of purported constitutional requirements for congressional authorization of presidential uses of force or revising and enforcing the War Powers Resolutions or other framework legislation requiring express congressional authorization for such actions.175

As applied to strategies of threatened force, generally **under these proposals the President would lack authority to make good on them** unilaterally (except in whatever narrow circumstances for which he retains his own unilateral authority, such as deterring imminent attacks on the United States). Whereas legal scholars are consumed with the internal effects of war powers law, such as whether and when it constrains U.S. government decision-making, the analysis contained in the previous section shifts attention externally to whether and when U.S. law might influence decision-making by adversaries, allies, and other international actors. In prescriptive terms, if the President’s power to use force is linked to his ability to threaten it effectively, then any consideration of war powers reform on policy outcomes and longterm interests should include the important secondary effects on deterrent and coercive strategies – and how U.S. legal doctrine is perceived and understood abroad.176 Would stronger requirements for congressional authorization to use force reduce a president’s opportunities for bluffing, and if so would this improve U.S. coercive diplomacy by making ensuing threats more credible? Or would it undermine diplomacy by taking some threats off the table as viable policy options? Would stronger formal legislative powers with respect to force have significant marginal effects on the signaling effects of dissent within Congress, beyond those effects already resulting from open political discourse? These are difficult questions, but the analysis and evidence above helps generate some initial hypotheses and avenues for further research and analysis. One might ask at this point why, though, having exposed as a hole in war powers legal discourse the tendency to overlook threatened force, this Article does not take up whether Congress should assert some direct legislative control of threats – perhaps statutorily limiting the President’s authority to make them or establishing procedural conditions like presidential reporting requirements to Congress. This Article puts such a notion aside for several reasons. First, for reasons alluded to briefly above, such limits would be very constitutionally suspect and difficult to enforce.177 Second, even the most ardent war-power congressionalists do not contemplate such direct limits on the President’s power to threaten; they are not a realistic option for reform. Instead, this Article focuses on the more plausible – and much more discussed – possibility of strengthening Congress’s power over the ultimate decision whether to use force, but augments the usual debate over that question with appreciation for the importance of credible threats. A claim previously advanced from a presidentialist perspective is that stronger legislative checks on war powers is harmful to coercive and deterrent strategies, because it establishes easily-visible impediments to the President’s authority to follow through on threats. This was a common policy argument during the War Powers Resolution debates in the early 1970s. Eugene Rostow, an advocate inside and outside the government for executive primacy, remarked during consideration of legislative drafts that any serious restrictions on presidential use of force would mean in practice that “no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations.”178 He continued: In the tense and cautious diplomacy of our present relations with the Soviet Union, as they have developed over the last twenty-five years, the authority of the President to set clear and silent limits in advance is perhaps **the *most* important** of all the powers in our constitutional armory to prevent confrontations that could **carry nuclear implications**. … [I]t is the **diplomatic power the President needs** most under the circumstance of modern life—the power to make a credible threat to use force in order to prevent a confrontation which might escalate.179 In his veto statement on the War Powers Resolution, President Nixon echoed these concerns, arguing that **the law would undermine the credibility of U.S. deterrent** and coercive threats in the eyes of both adversaries and allies – they would know that presidential authority to use force would expire after 60 days, so absent strong congressional support they could assume U.S. withdrawal at that point.180 In short, those who oppose tying the president’s hands with mandatory congressional authorization requirements to use force sometimes argue that doing so incidentally and dangerously ties his hands in threatening it. A critical assumption here is that presidential flexibility, preserved in legal doctrine, enhances the credibility of presidential threats to escalate.

#### Iran miscalc would spark nuclear war

Ben-Meir, 2/6/2007 (Alon – professor of international relations at the Center for Global Affairs, Ending iranian defiance, United Press International, p. lexis)

That Iran stands today able to challenge or even defy the United States in every sphere of American influence in the Middle East attests to the dismal failure of the Bush administration's policy toward it during the last six years. **Feeling emboldened and unrestrained**, Tehran may, however, miscalculate the consequences of its own actions, which could **precipitate a catastrophic regional war**. The Bush administration has less than a year to rein in Iran's reckless behavior if it hopes to prevent such an ominous outcome and achieve, at least, a modicum of regional stability. By all assessments, Iran has reaped the greatest benefits from the Iraq war. The war's consequences and the American preoccupation with it have provided Iran with an historic opportunity to establish Shiite dominance in the region while aggressively pursuing a nuclear weapon program to deter any challenge to its strategy. Tehran is fully cognizant that the successful pursuit of its regional hegemony has now become intertwined with the clout that a nuclear program bestows. Therefore, it is most unlikely that Iran will give up its nuclear ambitions at this juncture, unless it concludes that the price will be too high to bear. That is, whereas before the Iraq war Washington could deal with Iran's nuclear program by itself, now the Bush administration must also disabuse Iran of the belief that it can achieve its regional objectives with impunity. Thus, while the administration attempts to stem the Sunni-Shiite violence in Iraq to prevent it from engulfing other states in the region, Washington must also take a clear stand in Lebanon. Under no circumstances should Iranian-backed Hezbollah be allowed to topple the secular Lebanese government. If this were to occur, it would trigger not only a devastating civil war in Lebanon but a wider Sunni-Shiite bloody conflict. The Arab Sunni states, especially, Saudi Arabia, Egypt and Jordan, are terrified of this possible outcome. For them Lebanon may well provide the litmus test of the administration's resolve to inhibit Tehran's adventurism but they must be prepared to directly support U.S. efforts. In this regard, the Bush administration must wean Syria from Iran. This move is of paramount importance because not only could Syria end its political and logistical support for Hezbollah, but it could return Syria, which is predominantly Sunni, to the Arab-Sunni fold. President Bush must realize that Damascus' strategic interests are not compatible with Tehran's and the Assad regime knows only too well its future political stability and economic prosperity depends on peace with Israel and normal relations with the United States. President Bashar Assad may talk tough and embrace militancy as a policy tool; he is, however, the same president who called, more than once, for unconditional resumption of peace negotiation with Israel and was rebuffed. The stakes for the United States and its allies in the region are too high to preclude testing Syria's real intentions which can be ascertained only through direct talks. It is high time for the administration to reassess its policy toward Syria and begin by abandoning its schemes of regime change in Damascus. Syria simply matters; the administration must end its efforts to marginalize a country that can play such a pivotal role in changing the political dynamic for the better throughout the region. Although ideally direct negotiations between the United States and Iran should be the first resort to resolve the nuclear issue, as long as Tehran does not feel seriously threatened, it seems unlikely that the clergy will at this stage end the nuclear program. In possession of nuclear weapons Iran will intimidate the larger Sunni Arab states in the region, bully smaller states into submission, threaten Israel's very existence, use oil as a political weapon to blackmail the West and instigate regional proliferation of nuclear weapons' programs. In short, if unchecked, Iran could **plunge the Middle East into** a deliberate or inadvertent **nuclear conflagration**. If we take the administration at its word that it would not tolerate a nuclear Iran and considering these regional implications, Washington is left with no choice but to warn Iran of the severe consequences of not halting its nuclear program.

### Aumf da

#### AUMF strong now- Congress supports a broad interpretation

Brooks, 13 -- Georgetown University law professor

[Rosa, New America Foundation Schwartz senior fellow, served as a counselor to the U.S. defense undersecretary for policy from 2009 to 2011 and previously served as a senior advisor at the U.S. State Department, "Mission Creep in the War on Terror," Foreign Policy, 3-14-13, www.foreignpolicy.com/articles/2013/03/14/mission\_creep\_in\_the\_war\_on\_terror, accessed 8-24-13, mss]

"When you're not near the girl you love, love the girl you're near," sang Frank Sinatra. The U.S. government seems to have its own variant: When you're not near the terrorist you're supposed to target, target the terrorist you're near. To accommodate this desire, both the Bush and Obama administrations have had to gradually stretch the AUMF's language to accommodate an ever-widening range of potential targets, ever more attenuated from the 9/11 perpetrators. The shift has been subtle, and for the most part **Congress** has **aided and abetted it**. In the 2006 and 2009 Military Commissions Acts, for instance, Congress gave military commissions jurisdiction over individuals who are "part of forces associated with al Qaeda or the Taliban," along with "those who purposefully and materially support such forces in hostilities against U.S. Coalition partners." This allowed the Bush and then the Obama administration to argue that in the original 2001 AUMF, Congress must have implicitly authorized the use of force against al Qaeda and Taliban "associated forces." That is, if Congress considers it appropriate for U.S. military commissions to have jurisdiction over al Qaeda and Taliban associates, Congress must believe the executive branch has the authority to detain such associates, and the authority to detain must stem from the authority to use force. This suggests that Congress must believe the AUMF should be read in the context of traditional law-of-war authorities, which include the implied authority to use force against (or detain) both the declared enemy and the enemy's "co-belligerents" or "associated forces." By 2009, the Obama administration was arguing in court that, at least when it comes to detention, the AUMF implicitly authorizes the president "to detain persons who were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners" (my emphasis). Note how far this has shifted from the original language of the AUMF: The focus is no longer merely on those who were directly complicit in the 9/11 attacks, but on a far broader category of individuals. This broadened understanding of executive detention authority was later given the congressional nod in the 2012 National Defense Authorization Act, which used virtually identical language.

#### DETENTION - Detention authority comes from the AUMF

**Kelley ’12** [Michael, MA in journalism from Medill, writer for Business Insider, “Why Losing Indefinite Detention Powers Would Be A Disaster For Obama,” Oct. 24, http://www.businessinsider.com/why-losing-indefinite-detention-powers-would-be-a-disaster-for-obama-2012-10]

There's a big story by Greg Miller in the Washington Post on how the Obama administration has expanded its powers in the War on Terror.¶ Miller notes that the legal foundation for U.S. counterterrorism strategy is partially based on "the Congressional authorization to use military force" (AUMF) that was passed after 9/11.¶ Specifically it seems to be based on an interpretation of the AUMF that was "reaffirmed" by the indefinite detention clause of the National Defense Authorization Act (NDAA). ¶ This explains why Obama is fighting so hard to keep the indefinite detention clause in effect.¶ **In court** **the government argued** that the **indefinite detention** clause **is simply a "reaffirmation" of the** Authorization Use Of Military Force (**AUMF**), which gives the president authority "to use all necessary and appropriate force against those ... [who] aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons." In the NDAA lawsuit, the government argued that the NDAA §1021 is simply an "affirmation" or "reaffirmation" of the AUMF.

#### Decreasing AUMF authorizations snowballs- causes judicial rollback of the AUMF

Barnes, 12 -- J.D. Candidate, Boston University School of Law

[Beau, “Reauthorizing the ‘War on Terror’: The Legal and Policy Implications of the AUMF’s Coming Obsolescence,” Military Law Review, Vol 211, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2150874, accessed 8-21-13, mss]

**The scope of** the **AUMF is** also **important for** any **future judicial opinion** that might rely in part on Justice Jackson’s Steel Seizure concurrence.23 Support from Congress places the President’s actions in Jackson’s first zone, where executive power is at its zenith, because it “includes all that [the president]~~he~~ possesses in [their]~~his~~ own right plus all that Congress can delegate.”24 Express or **implied congressional disapproval, discernible by identifying the outer limits of** the **AUMF’s authorization, would place the President’s “power . . . at its lowest ebb**.”25 In this third zone, executive claims “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”26 Indeed, Jackson specifically rejected an overly powerful executive, observing that the Framers did not intend to fashion the President into an American monarch.27 Jackson’s concurrence has become the **most significant guidepost** in debates over the constitutionality of executive action in the realm of national security and foreign relations.28 Indeed, some have argued that it was given “the status of law”29 by then-Associate Justice William Rehnquist in Dames & Moore v. Regan.30 Speaking for the Court, Rehnquist applied Jackson’s tripartite framework to an executive order settling pending U.S. claims against Iran, noting that “[t]he parties and the lower courts . . . have all agreed that much relevant analysis is contained in [Youngstown].”31 More recently, Chief Justice John Roberts declared that “Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in [the area of foreign relations law].”32 Should a future court adjudicate the nature or extent of the President’s authority to engage in military actions against terrorists, an applicable statute would confer upon such executive action “the strongest of presumptions and the widest latitude of judicial interpretation.”33 The AUMF therefore exercises a profound legal influence on the future of the United States’ struggle against terrorism, and its precise scope, authorization, and continuing vitality matter a great deal.

#### That shifts US doctrine to international self-defense- expanded *jus ad bellum* collapses global firebreak on use-of-force --- causes global hotspots that go to war

Barnes, 12 -- J.D. Candidate, Boston University School of Law

[Beau, “Reauthorizing the ‘War on Terror’: The Legal and Policy Implications of the AUMF’s Coming Obsolescence,” Military Law Review, Vol 211, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2150874, accessed 9-19-13, mss]

In a world without a valid AUMF, the United States could base its continued worldwide counterterrorism operations on various alternative domestic legal authorities. All of these alternative bases, however, carry with them significant costs—detrimental to U.S. security and democracy. The foreign and national security policy of the United States should rest on “a comprehensive legal regime to support its actions, one that [has] the blessings of Congress and to which a court would defer as the collective judgment of the American political system about a novel set of problems.”141 Only then can the President’s efforts be sustained and legitimate. 2. Effect on the International Law of Self-Defense A failure to reauthorize military force would lead to significant negative consequences on the international level as well. Denying the Executive Branch the authority to carry out military operations in the armed conflict against Al Qaeda would force the President to find authorization elsewhere, most likely in the international law of selfdefense— the jus ad bellum.142 Finding sufficient legal authority for the United States’s ongoing counterterrorism operations in the international law of self-defense, however, is problematic for several reasons. As a preliminary matter, relying on this rationale usurps Congress’s role in regulating the contours of U.S. foreign and national security policy. If the Executive Branch can assert “self-defense against a continuing threat” to target and detain terrorists worldwide, it will almost always be able to find such a threat.143 Indeed, the Obama Administration’s broad understanding of the concept of “imminence” illustrates the danger of allowing the executive to rely on a self-defense authorization alone.144 This approach also would inevitably lead to dangerous “slippery slopes.” Once the President authorizes a targeted killing of an individual who does not pose an imminent threat in the strict law enforcement sense of “imminence,”145 there are few potential targets that would be off-limits to the Executive Branch. Overly malleable concepts are not the proper bases for the consistent use of military force in a democracy. Although the **Obama** Administration has **disclaimed** this manner of **broad authority because the AUMF “does not authorize** military **force** **against anyone** the Executive labels a ‘terrorist,’”146 **relying solely on** the **international** law of **self** **defense would** likely **lead to precisely such a result**. The slippery slope problem, however, is not just limited to the United States’s military actions and the issue of domestic control. The creation of international norms is an iterative process, one to which the United States makes significant contributions. Because of this outsized influence, the United States should not claim international legal rights that it is not prepared to see proliferate around the globe. Scholars have observed that the Obama Administration’s “expansive and open-ended interpretation of the right to self-defence threatens to destroy the prohibition on the use of armed force . . . .”147 Indeed, “[i]f other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, **the result would be chaos**.”148

### Ptx da

#### Short shutdown now- extension causes quick market collapse

**Reinhart et al 10-1**-13 [Vincent Reinhart, chief US economist, Morgan Stanley, Harm Bandholz, chief US economist, UniCredit, Aroop Chatterjee, FX strategist, Barclays, Vincent Chaigneau, rates strategist, Société Générale, Daniel Tenengauzer, US economist, Standard Chartered, Allan von Mehren, chief analyst at Danske, Trevor Greetham, director of asset allocation, Fidelity, “US shutdown reaction: ‘Odds favour a short event’,” <http://www.ft.com/cms/s/0/5bda1eb2-2a67-11e3-ade3-00144feab7de.html#axzz2gYttdnTn>]

The US government began shutting down a range of services on Tuesday after the Republican-controlled House of Representatives and the Democratic Senate failed to agree a short-term budget extension. The lack of an agreement by US politicians will lead to about 800,000 federal employees being placed on unpaid leave, a process known as furloughing. The following is a round-up of strategist and economist reaction:¶ Vincent Reinhart, chief US economist, Morgan Stanley:¶ The heat will build on politicians from constituents who were furloughed, inconvenienced, or fearful of market consequences. That is why we believe the odds favour a short event – over in one week.¶ Harm Bandholz, chief US economist, UniCredit:¶ I think it is only a matter of days, maybe hours, until the majority of Republicans will eventually free themselves from the pressure of the Tea Party minority and vote along with Congressional Democrats to reopen the government. But don’t forget, the government shutdown is merely the prelude to a much bigger issue, namely the forthcoming debt limit fight.¶ Aroop Chatterjee, FX strategist, Barclays:¶ In and of itself, the government shutdown appears to be a limited market event. The indirect effect, however, is on the other main risk scenario for markets – the deal on the debt ceiling. For example, a government shutdown could lead to a sharp increase in the public disapproval of Congress’s handling of fiscal matters and allow for a smoother agreement on the debt ceiling issue. Or on the flip side, it could embolden both sides to become more entrenched in their positions.¶ Vincent Chaigneau, rates strategist, Société Générale:¶ Keep calm and carry on. So it seems that is the message from the markets just now. The US government is going into partial shutdown for the first time in 17 years. This will hurt the economy, though not much if it’s short. Negotiations may keep us on tenterhooks for a couple more weeks, as we approach the debt ceiling. But there has been no sign of financial stress overnight.¶ Daniel Tenengauzer, US economist, Standard Chartered:¶ A shutdown lasting a few days would shave only a few decimal points off fourth-quarter economic growth. The hit to growth would come mainly from the impact of the furloughs on consumption – a similar event to the summer and the sequester-related furloughs of federal employees – and a potential hit to business confidence. The main risk to this expectation is that the shutdown continues for longer, potentially until or beyond the October 17 debt ceiling deadline.¶ Allan von Mehren, chief analyst at Danske:¶ The next FOMC [the monetary policy-setting Federal Open Market Committee] meeting is on 29-30 October. It is now more unlikely that tapering will start at this meeting as the Fed will probably wait to see the consequences of the increased uncertainty and effects of the shutdown. This strengthens our call that Fed tapering won’t start until December. If the shutdown drags out and has more negative effects on the economy the risk is tapering could start even later.¶ Given the increased uncertainty it also raises the odds of a further correction in stock markets. The reaction so far has been fairly muted. But given that markets have been technically overbought we think it’s likely we will see further declines in coming weeks. This should also add to downside pressure on bond yields. In the short term the risk is also that the dollar could weaken further.¶ Trevor Greetham, director of asset allocation, Fidelity:¶ We do not expect the fiscal stand-off in Washington to have a lasting impact and stock market weakness presents a buying opportunity.¶ The dispute has the power to depress economic activity temporarily and it will play havoc with the economic release calendar. But the US is four years into a steady, self-sustaining recovery and the Federal Reserve stands ready to offset any marginal fiscal tightening that may come out of the negotiations.

#### Capital is key to get a deal

CNN 10/1/13 (Interview with Rick Lazio, Former US Congressman, Transcript: Anderson Cooper 360 Degrees, "Government Shutdown; Views of Obamacare Shaped by Misinformation; Is Losing Good for Kids?"

LAZIO: Getting back to the earlier point about entitlements and out- year spending, here's -- Democrats will criticize Republicans on obsessing on Obamacare. Republicans will say why doesn't the president lead on the most pressing fiscal issue that faces the country over the next 20 or 30 years?  You have got an explosion of seniors, 10,000 seniors retiring every single day in America. The program Social Security was created, signed by FDR into law, average life expectancy was 64 years old, eligibility 65, pretty good deal. But now...  BLOW: But, Rick, you're pretending that they never tried to do that.   Last time we got close to the debt ceiling, they got very close to a global deal, and it fell apart at the last minute. It's not as if the president has never gone to Boehner and tried to figure out how to do this.   LAZIO: But the president has to provide cover for moderate Democrats who want to get a deal done. And that's what he's failed to do. He's got to engage.   He's got to lead. And he's got to address some of these big picture issues. That's when you get a win-win out of this thing. If you could get both sides to come together and say we're going to really try and solve at least part of this entitlement picture, we will create some momentum, some trust, and that's a way forward.   (CROSSTALK)  BROWN: ... what exactly Obama right now is supposed to really do? When we talk about him engaging and him doing -- what actually is he supposed to do? Who's he supposed to call? How does it work at this moment in this particular situation?   LAZIO: I think you start to go and you speak to individual senators. He's done this with Bob Corker and other people where he's tried to court them and bring them in.  I think you have got to have some agenda, you have got to be somewhat flexible. You have got to say, OK, what do you think is doable? This is an area where obviously I have got limited flexibility, but let's get something significant done and I will help provide some air cover.

#### DETENTION - Reforming indefinite detention makes Obama seem soft on terror – crushes capital for the rest of the agenda

Klaidman 5/15/13 (Daniel, Author for Newsweek Magazine and the Daily BEast, "How Gitmo Imprisoned Obama" The Daily Beast)

But one of his very first tactical moves on Guantánamo backfired spectacularly. Obama’s plan to bring to the United States a handful of detainees—Chinese Uighurs who were cleared by the courts—caused a political furor. Obama pulled the plug on the plan, and Congress soon began passing measures to restrict transfers out of Gitmo. For Obama’s political advisers, the episode demonstrated that the toxic politics of terrorism could overwhelm the administration’s domestic agenda; for civil libertarians, it was an ominous sign that Obama lacked the political will to aggressively engage Congress on one of their core concerns. Even some of Obama’s top national-security aides were frustrated with the White House’s timid approach toward Congress. John Brennan—then Obama’s counterterrorism czar, now his CIA chief—believed the administration needed to show more backbone in its dealings with Congress, according to a source who spoke with him at the time. Brennan’s outrage was fueled by the knowledge that many detainees, who were still at Guantánamo after years of detention, had no record of terrorism.¶ Christoph Bangert/Laif/Redux¶ Former Gitmo detainee Abdul Salam Zaeef.¶ A few weeks after the Uighur debacle, Obama made his first attempt to save his faltering Guantánamo policy: in a sweeping address at the National Archives, he laid out a detailed plan for closing the prison. But in the end, however eloquent, it was only a speech. It did not, in any measurable way, push the policy forward.¶ Things only got worse from there. On Christmas Day 2009, the so-called underwear bomber attempted to bring down a plane over Detroit—a plot that was directed by al Qaeda’s Yemen affiliate. The frightening near miss took a powerful psychic toll on the White House, which was still dogged by the perception that Democrats were weak on national security. Obama became convinced that he could not send any of the nearly 100 Yemeni detainees at Gitmo back to their home country, for fear they would link up with extremists and begin plotting attacks against America. Suddenly, the fate of the Yemenis was another giant obstacle to closing the prison.¶ Ed Alcock/eyevine/Redux¶ Former Gitmo detainee Lakhdar Boumediene.¶ Then came the unraveling of Attorney General Eric Holder’s plans to try some Gitmo detainees, including 9/11 mastermind Khalid Sheikh Mohammed, in New York. Obama had initially backed Holder’s decision. But when it blew up in Congress, he seemed to equivocate. His own chief of staff, Rahm Emanuel, actually worked behind the scenes with Republican senators to undermine Holder’s initiative, according to multiple sources with knowledge of the episode. Once the plan cratered, lawmakers smelled blood. They began passing ever more restrictive legislation tying the administration’s hands on Guantánamo.¶ For much of the past few years, without any signal that Obama was going to fight on Gitmo, the policy drifted. Daniel Fried, the veteran State Department official in charge of resettling detainees, was transferred to a different position. Even the steps Obama took to move things forward were of a highly limited nature. One of those steps came in March 2011, when Obama issued an executive order designed to solve a thorny problem. Forty-eight of the detainees could not be prosecuted, either for lack of evidence or because they had been tortured—yet they were nonetheless considered too dangerous to release. This meant they had to be held in indefinite detention, a prospect that troubled Obama. His compromise, issued via executive order, was to set up Periodic Review Boards—administrative bodies that would allow such prisoners to challenge their incarceration, including by presenting new evidence.

#### Economic collapse causes nuclear war

Merlini 11

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

### 1NC

#### The United States federal judiciary should rule that the Guantanamo habeas corpus cases should be construed narrowly and be limited to their facts under post-Boumediene jurisprudence.

#### Presumption flips neg – the CP is less change than the plan because it’s a matter of interpretation, not explicit overrule.

#### This solves the case

Sophia Brill (J.D., Yale Law School) 2009 “The National Security Court We Already Have” Yale Law & Policy Review, http://yalelawandpolicy.org/sites/default/files/Brill\_28.pdf

It may indeed be wise as a matter of policy to detain al-Qaeda and Taliban members indefinitely without charges. Congress, however, has failed to act (ei- ther by codifying preventive detention or ending it), and the Supreme Court has been unwilling to articulate the sc ope of the AUMF’s detention authority in Hamdi or any of its subsequent rulings. Th e President’s stated position, mean- while, has been articulated not as a matte r of open policy, but rather as a legal opinion adopted by the Justice Department in a somewhat obscure court fil- ing. 49 Thus, the D.C. district court judges have been facing, case by case, petition- ers who have been detained for several years and have been tasked with deter- mining whether they are still detainable. They arguably have come up with rea- sonable answers to many difficult questions. But the most important question—whether we ought to (or cons titutionally can) maintain preventive detention of persons who, unlike Mr. Hamdi, never were engaged in any battle- field hostilities—is no longer asked. It seemingly has been answered, not by leg- islation or even by a higher court rul ing, but as a matter of common law juris- prudence in the months and years following Boumediene . 50 Moreover, absolutely nothing in any of the D.C. habeas opinions suggests that the government must or should refrain from capturing additional detainees, who never will stand trial in criminal court, and transferring them to long- term preventive detention facilities. While the rulings at hand all deal with detainees captured abroad several years ago under President Bush and brought to a facility that President Obama intends to close, their scope has not been con- fined to the current Guantá namo population. To the contrary, the rulings may suggest that the government is free to capture and preventively detain any addi- tional individuals who are part of (or who substantially support) Taliban or al- Qaeda forces, or any group that associates with them. It is no surprise, then, that many have called for Umar Faro uk Abdulmutallab, the man who at- tempted to detonate an explosive on a commercial plane on December 25 , 2009 , to be afforded the same treatment as the Guantánamo detainees. Despite the Obama Administration’s principled intention to try him in a criminal court, it simultaneously has been engaged in crafting a common law that might well permit his indefinite detention under the AUMF—and almost certainly would if the plane had landed anywhere outside the United States. 51 In other words, the D.C. decisions, while perhaps reason able as applied to a dwindling popula- tion of those already detained, have created and continue to create a “loaded weapon” 52 by laying the foundation for an entire preventive detention regime. Unfortunately, the D.C. Circuit made this weapon somewhat stronger in its recent Al-Bihani ruling. Because Al-Bihani had conceded so many key facts, the court simply could have decided whether detaining someone who served as a cook for a military unit supporting the Taliban constituted the use of “necessary and appropriate force against those nations, organizations, or persons” that “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11 , 2001 , or harbored such organizations or persons.” 53 Since Al- Bihani actually admitted to carrying a Ta liban-issued weapon in the zone of conflict, his case could have been closely analogized to Hamdi , without the court having to evaluate the government ’s broader detention claims. Instead, the D.C. Circuit issued an opinion that: ( 1 ) broadly dismissed international law regarding detention authority; ( 2 ) endorsed the Obama Administration’s gen- eral position on detention; ( 3 ) went further by importing language from the Military Commissions Act to cover all unlawful belligerents; and ( 4 ) sketched a broad framework of deference to truncated procedural rules. 54 Conclusion Even if Al-Bihani remains good law, future panels of the D.C. Circuit (and potentially Supreme Court Justices) ought to take as minimalist an approach toward these habeas cases as possible. They should cabin them to include only the current Guantánamo population, or only persons captured abroad, or only persons captured by military as opposed to civilian forces. Whatever lines are drawn, a ruling that emphasizes the spec ific facts before the court and avoids sweeping declarations will head off a judicial endorsement of a more lasting “national security court.” The courts need not reverse earlier interpretations of the AUMF, but they should avoid ratifying them. Instead, they ought to take the Supreme Court’s cue in Hamdi and rule narrowly on the cases at hand—all of which are likely to involve people who we re captured in Afghanistan or border- ing conflict zones in Pakistan and who have been detained in Guantánamo for several years. This would, of course, pr olong any firm resolution of the issue. But it likely would force the hand of th e political branches to erect a democrati- cally generated solution, while avoiding the creation of an unprecedented legal regime that may last long after Guantánamo has shut its doors.

### Solvency – 1nc

#### Your aff is a joke – Al-Bihani’s international law holdings had ZERO precedential effect – DC court rulings prove

Marty Lederman (Deputy Assistant Attorney General in the Department of Justice’s Office of Legal Counsel, appointed by President Obama in January 2009) and Steve Vladeck (Professor of Law and the Associate Dean for Scholarship at American University Washington College of Law) December 31, 2011 “The NDAA: The Good, the Bad, and the Laws of War–Part II” http://opiniojuris.org/2011/12/31/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-ii/

Al-Bihani petitioned for en banc review. In response, the United States argued that although al-Bihani was detainable as part of an enemy force, the court of appeals had been mistaken on the international law question: Al-Bihani cites to the panel’s more general statements that the laws of war do not limit the President’s authority under the AUMF. See 590 F.3d at 871 (the “premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war \* \* \* is mistaken”). The Government agrees that this broad statement does not properly reflect the state of the law. As it announced on March 13, 2009, the Government interprets its detention authority under the AUMF to be informed by the laws of war. That interpretation is consistent with longstanding Supreme Court precedent that, generally, statutes should be construed, if possible, as consistent with international law. See, e.g., Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804) (“an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains”); see also MacLeod v. United States, 229 U.S. 416, 434 (1913) (“The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law”); . . . . Notably, in Hamdi, the plurality applied this approach specifically to the AUMF. The plurality discussed the Third Geneva Convention and other law-of-war sources when addressing detention authority under the AUMF and explained: “we understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ [in the AUMF] to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.” 542 U.S. at 520-521 (emphasis added). Consistent with Hamdi, the United States interprets the detention authority granted by the AUMF, as informed by the laws of war. The full court denied review, but the other seven active judges on the court took the remarkable step of writing collectively to strip the panel’s holding on international law of any precedential force: “We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel’s discussion of that question is not necessary to the disposition of the merits.” Judges Brown and Kavanaugh wrote opinions totaling over 100 pages in which they criticized the rest of the court’s treatment of the law-of-war question, and reasserted in even stronger terms their views that the AUMF should not be construed as informed by the laws of war—indeed, that in construing the AUMF courts should not even apply the Charming Betsy canon, which counsels courts, where fairly possible, to construe ambiguous statutes so as not to conflict with international law. Judge Kavanaugh argued, in particular, that the laws of war should be used as a one-way ratchet when it comes to presidential authority to use “necessary and appropriate” force: “I do not agree . . . with the inference drawn by Professors Bradley and Goldsmith—and adopted by Judge Williams—that if ‘the international laws of war can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers.’” 619 F.3d at 44 n.23 (quoting Bradley & Goldsmith, 118 Harv. L. Rev. at 2094); see also id. at 43 (arguing that the traditional, “fundamental incident[s] of waging war” to which Justice O’Connor referred in Hamdi established only the “minimum” tools and methods the AUMF authorizes the President to use). Judge Kavanaugh singled out use-of-force authorizations such as the AUMF as singularly inappropriate candidates for application of the Charming Betsy canon. Id. at 38-41. Developments After al-Bihani Because Judge Brown’s resort to the MCA “purposeful and material support” standard for detention in al-Bihani was untethered to any notion of which civilian supporters can be detained in a traditional armed conflict, consistent with the laws of war, it was not clear what would become of that “purposeful and material support” standard—and the proposed abandonment of the laws of war as an interpretive guide—after the full court had signaled that the international-law analysis of her panel opinion was dicta. The court of appeals’ subsequent, minimal treatment of the issue has sent mixed signals. In one case decided on February 15th of this year, Hatim v. Gates, a panel of the court of appeals remanded the case to the district court to consider, inter alia, application of the “purposeful and material support” standard articulated in al-Bihani—without any mention of the laws of war. Exactly one week later, however, a different panel remanded a case with instructions for the district court to consider whether the detainee was “permanently and exclusively engaged as a medic,” a status that would be relevant in determining detainability under Article 24 of the First Geneva Convention. Warafi v. Obama, 409 Fed. Appx. 360. Compare al-Bihani, 619 F.3d at 20-21 (Kavanaugh, J., concurring in denial of rehearing en banc) (arguing that the Geneva Conventions should not bear upon construing the AUMF’s detention authority). Within the past month, the United States has filed two petition-stage briefs in the Supreme Court taking issue with the al-Bihani panel’s view of the relevance of the laws of war in construing the AUMF’s detention authority. In al-Bihani itself, No. 10-1383 (following remand), the U.S. told the Court that it “disagrees” with the “inapposite and inadvisable” statements in Judge Brown’s opinion, and that “[l]aw-of-war principles do properly inform the construction of the AUMF, see Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion), and thus the understanding of what actions are ‘necessary and appropriate’ for the President to undertake in waging war against al-Qaida.” The government added that “[s]ince al-Bihani, the court of appeals and the district court have consistently applied the detention standard articulated by the government, which is informed by and consistent with the laws of war,” citing Warafi as an example. The government filed a brief with a similar explanation of its views on the law of war and the AUMF just two weeks ago, in Uthman v. Obama, No. 11-413.

#### The global signal of the non-precedent of Al-Bihani in international law has already been sent – the entire DC circuit rejects these extremist views

Andy Worthington (policy advisor to the Future of Freedom Foundation) September 2010 “Restricting Presidential Wartime Powers” http://fff.org/explore-freedom/article/restricting-presidential-wartime-powers/

The D.C Circuit Court backs down on presidential power Last Tuesday, the Court of Appeals finally issued an opinion on al-Bihani’s appeal (PDF). Predictably, all nine judges turned down the appeal, but in an unusual move, seven of the judges — Chief Judge David B. Sentelle and Judges Douglas H. Ginsburg, Karen LeCraft Henderson, Judith Ann Wilson Rogers, David S. Tatel, Merrick B. Garland, and Thomas B. Griffith — issued the following joint statement: We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel’s discussion of that question is not necessary to the disposition of the merits. Although the decision does nothing to challenge the fundamental problem with detaining al- Bihani under the AUMF, rather than as a prisoner of war, it is enormously significant, as was pointed out by Stephen Vladeck, professor of law at American University Washington College of Law, who filed an amicus brief in support of the en banc appeal. Vladeck told the New York Times that the note by the seven judges “amounted to a nullification of the more sweeping parts of the January ruling without the court bothering to rehear it.” He added, as the Times described it, that the paragraph “tells the world that the section of the January ruling about international law should be treated like what lawyers call ‘dicta’ — editorializing about issues that are not necessary to decide the matter at hand, which has little controlling authority for other cases.” As Vladeck explained, They’ve basically removed the single biggest complaint people had with that opinion. They said, “We don’t think we need to rehear the whole case just to limit the opinion — we can just say it, and going forward this is how we understand it.” That matters a lot. Confirmation of Vladeck’s opinion can be found in the responses of Judge Brown and Kavanaugh. In a desperate attempt to salvage their defense of sweeping war powers, unrestrained by the international laws of war, Judge Brown issued a 15-page opinion, attacking her colleagues for “appending ‘a cryptic statement’ that she said would ‘muddy the clear holding’ that international law does not limit the war powers Congress authorized,” and Judge Kavanaugh issued an 87-page opinion, arguing that “only rules explicitly enacted by Congress, not international laws of armed conflict, can constrain what an American president can do in wartime,” and stating, “International law is not a judicially enforceable limit on a president’s wartime authority unless Congress expressly says it is” (emphasis in original). On Balkinization, Stephen Vladick summed up the significance of the seven judges’ note by stating, “Whatever the merits of the decision in al-Bihani's case, specifically, its significance in other cases has been unquestionably lessened (along with any chance that the Supreme Court would feel the need to step in).” This is to be welcomed, but although it is reassuring that seven judges (two nominated by Reagan, one by Bush Sr., three by Clinton and one by Bush Jr.) refused to endorse their colleagues’ extreme opinions, it is still apparent that the courts’ jurisdiction regarding the Guant´namo habeas cases leaves the fundamental problems with the AUMF untouched.

#### The aff is a facial ruling that doesn’t require tangible policy changes

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In this Article, I will show that American courts have often approached the extreme policies of the anti-terrorism campaign by splitting the difference between the two sides - the government and suspected terrorists. One side typically got the ringing rhetoric (the suspected terrorists), and the other side got the facts on the ground (the government). In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge. The government continued to treat suspected terrorists almost as badly as it did before the suspected terrorists "won" their cases. And any change in terrorism suspects' conditions that did result from these victorious decisions was slow and often not directly attributable to the judicial victories they won. Does this gap between suspected terrorists' legal gains and their unchanged fates exist because administration officials were flouting the decisions of the courts? The Bush Administration often responded with sound and fury and attempted to override the Supreme Court's decisions or to comply minimally with them when they had to. n6 But, as this Article will show, these decisions did not actually require the government to change its practices very quickly. The decisions usually required the government to change only its general practices in the medium term. Judges had a different framework for analyzing the petitioners' situation than the petitioners themselves did; judges generally couched their decisions in favor of the suspected terrorists as critiques of systems instead of as solutions for individuals. In doing so, however, courts allowed a disjuncture between rights and remedies for those who stood before them seeking a vindication of their claims. Suspected terrorists may have won [\*92] in these cases - and they prevailed overwhelmingly in their claims, especially at the Supreme Court - but courts looked metaphorically over the suspects' heads to address the policies that got these suspects into the situation where the Court found them. Whether those who brought the cases actually got to benefit from the judgments, either immediately or eventually, was another question. Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference. n7 Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, inter arma silent leges: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still "hot," courts jumped right in, dealing governments one loss after another. n8 After 9/11, it appears that deference is dead. [\*93] But, I will argue, deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice. n9 Suspected terrorists have received [\*94] from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives. Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference. This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted - often bold, ambitious, and brave solutions - nonetheless fail to address the plights of the specific individuals who brought the cases. This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something - an appearance not entirely false in the long run - while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

### Advantage 1 – charming bets

#### Status quo solves- recent cases reaffirmed Charming Betsy

**Bradley ’13** [Curtis Bradley is the William Van Alstyne Professor of Law, Professor of Public Policy Studies, and Senior Associate Dean for Academic Affairs, “Terrorists, Pirates, and Drug Traffickers: Customary International Law and U.S. Criminal Prosecutions,” Jan. 11, <http://www.lawfareblog.com/2013/01/terrorists-pirates-and-drug-traffickers-customary-international-law-and-u-s-criminal-prosecutions/>]

Hamdan involved a statutory scheme that was found by the court to be centered around the law of nations. But customary international law can also play a role in limiting criminal prosecutions through the more general Charming Betsy canon of construction, pursuant to which courts will attempt to construe statutes to avoid violations of international law. Consider, for example, the decision by the federal district court in D.C. last July in United States v. Ali. The issue there was whether a Somali citizen could be prosecuted after acting as an intermediary between Somali pirates and the Dutch owner of a Bahamian vessel that had been apprehended by the pirates in international waters. Applying the Charming Betsy canon, the court concluded (among other things) that the defendant could not be prosecuted either for acts of aiding and abetting piracy that did not occur on the high seas or for an alleged conspiracy to commit piracy. The court found that, unlike acts of piracy, these other offenses did not constitute universal jurisdiction offenses under customary international law and thus could legitimately be punished only if the prosecuting state had either a territorial connection to the conduct or a nationality connection to the perpetrators or victims, and it found no indication that Congress had intended to override that international law requirement. This case is currently on appeal to the D.C. Circuit.¶ In addition to affecting the interpretation of federal statutes, the content of customary international law can affect Congress’s constitutional authority to define and punish offenses against the law of nations. This was evident in a decision in November by the Eleventh Circuit in United States v. Bellaizac-Hurtado. In that case, the court held that Congress lacked the power, under the Maritime Drug Law Enforcement Act, to authorize a drug trafficking prosecution for non-U.S. citizens apprehended in the territorial waters of Panama. The only constitutional basis invoked by the government for applying the Act in this situation was Congress’s authority to define and punish offenses against the law of nations, and the court concluded that Congress was limited under this authority to punishing conduct recognized as an offense under customary international law. The court reasoned that it did not need to determine whether the conduct had to be an offense under customary international law at the time the Constitution was adopted, because it concluded that even today drug trafficking is not an offense under customary international law. (In a concurrence, Judge Barkett also reasoned that Congress’s power to define and punish offenses against the law of nations was limited by customary international law requirements of prescriptive jurisdiction, which she argued were not met in this case.)¶ In each of these decisions, the courts examined a variety of materials in an effort to discern the customary practices and understandings of the international community, and the courts applied their interpretation in a way that limited the bounds of U.S. criminal prosecutions. One question implicated by this sort of judicial reliance on customary international law—although not a question that was specifically addressed in these cases—is how much deference the courts should give to the judgment of the Executive Branch about the content of customary international law. The question was not at issue in Hamdan, since the Executive Branch did not argue on appeal that material support for terrorism violated the international laws of war, but it was potentially relevant to the other two cases. The court in Bellaizac-Hurtado denied (correctly, in my view) that the political branches have unlimited authority to label something a violation of customary international law, but that should not necessarily rule out deference to reasonable political branch interpretations.

#### Charming Betsy is inherently uncertain- poor signal and circumvention

**Dore ’11** [Philip, JD from Louisiana Law, Law Clerk at United States District Court for the Eastern District of Louisiana, “Greenlighting American Citizens: Proceed with Caution,” <http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=3055&context=lalrev>]

In support of its position that the AUMF incorporates the laws¶ of war, the Government also argued that "generally, statutes should¶ be construed, if possible, as consistent with international law."l 86¶ This argument refers to what has become known as the Charming¶ Betsy canon of statutory interpretation. This canon should not be¶ used to interpret the AUMF for multiple reasons.¶ Advocates of the canon generally argue that it gains support¶ from the early Supreme Court decision of Murray v. Schooner¶ Charming Betsy,1s where Chief Justice Marshall famously held¶ that "[a]n act of Congress ought never be construed to violate the¶ law of nations if any other possible construction remains."¶ Though the canon has become an important part of the U.S.¶ interpretive tradition,189 the validity of the canon is a matter of¶ controversy. 90¶ There are at least four different versions of the canon. The first¶ tracks the language of Charming Betsy and holds that domestic¶ statutes should never be interpreted to violate international law if¶ any other possible construction remains. 9 The second version of¶ the canon is expressed in the Restatement (Second): "If a domestic¶ law of the United States may be interpreted either in a manner¶ consistent with international law or in a manner that is in conflict¶ with international law, a court in the United States will interpret it¶ in a manner that is consistent with international law."' 9 The¶ Restatement (Third) has a different formulation: "Where fairly¶ possible, a United States statute is to be construed so as not to¶ conflict with international law or with an international agreement¶ of the United States."' 93 **The fourth** version **dictates that the canon¶ should not apply to governmental actors, because its purpose is to¶ assure that only the political branches may decide to violate international law**. 194 The Government perhaps advocates a fifth¶ interpretation according to which statutes should "general" be¶ construed "if possible" as consistent with international law.19¶ These inconsistent phrasings demonstrate a lack of agreement¶ as to how ambiguous a statute must be before the Charming Betsy¶ canon may be used as an interpretative aid.196 Thus, the canon's¶ availability as a viable method of interpretation is intimately tied to¶ which formulation the interpreter adopts.¶ When applied to the AUMF, the first version favors¶ interpreting the statute as consistent with international law,¶ because this interpretation is one of many "possible constructions."¶ In contrast, interpreting the AUMF using the canon as formulated¶ in the Restatement (Third) yields a different result. Construing¶ domestic law as consistent with international law "where fairly¶ possible" is a much narrower standard than doing so "if any other¶ possible construction remains." Given that Congress intended to¶ emphasize the breadth of its authorization in the AUMF through¶ the phrase "necessary and appropriate," and that the ratification¶ history of the AUMF tends to support this interpretation, it may not¶ be "fairly possible" to construe the AUMF consistently with¶ international law.¶ In sum, there are many interpretations of the Charming Betsy¶ canon. Whether the canon may be properly invoked depends on¶ which interpretation is employed. Such uncertainty suggests that¶ courts should be cautious in relying on the canon to interpret¶ domestic legislation.¶ A second argument that militates against using the Charming¶ Betsy canon to interpret the AUMF focuses on the status of the¶ international law being invoked vis-i-vis domestic law. In order to¶ justify killing al-Awlaki, the Obama Administration needs to argue¶ that the AUMF must be interpreted consistently with the laws of¶ war, particularly Article 4 of the 1949 Geneva Convention 111.197 As¶ demonstrated above, this Article is non-self-executing.198 With¶ respect to non-self-executing treaties, there is a strong presumption¶ that the United States did not intend to incorporate such treaties into domestic law. 199 This presumption finds support in the Senate's¶ ratification of the Geneva Conventions and in the fact that no¶ separate statute has incorporated Article 4.200 Therefore, "[t. . .¶ makes sense to conclude that Congress would not want courts to¶ smuggle [non-incorporated international law norms] into domestic¶ U.S. law through the back door bp using them as a basis to alter. . .¶ interpretation of a federal statute." o1¶ Another reason why the Charming Betsy canon should not be¶ used to interpret the AUMF is that the canon is most often invoked¶ as a justification for limiting extraterritorial application of¶ domestic law in ways that may violate international law norms of¶ prescriptive jurisdiction.202 It is debatable whether the canon¶ should apply in the very different context of a congressional¶ authorization of force, especially considering that the authorization¶ overlaps with the President's independent constitutional powers.203

#### International law solves nothing

Acharya 13 – Associate Professor of Law, Gonzaga University School of Law (Upendra D., May, “GLOBALIZATION, DEREGULATION, POWER, AND AGENCY: GLOBALIZATION AND HEGEMONY SHIFT: ARE STATES MERELY AGENTS OF CORPORATE CAPITALISM?” 36 B.C. Int'l & Comp. L. Rev. 937, Lexis)

I. PROCESS OF HEGEMONY: INTERNATIONAL LAW, POWER, AND DETERRITORIALIZATION¶ ¶ Discussions of hegemonic international law posit that international law is relatively weak, that it is nothing more than epiphenomenal, [\*940] merely a production of normative standards that mirror the interests of powerful states. n14 The hegemonic international law theory also posits that hegemons (powerful nations among the many sovereign states) define the course of states' behavior by creating and influencing international law to give effect to the hegemons' interests and condone actions that support those interests. n15 This Part critically observes hegemons' techniques and methods of consolidating power, n16 leading to the next Part's discussion addressing an emerging corporate-centric hegemonic international law, a new form of international law contrasted to Vagts's state-centric hegemonic international law. n17¶ ¶ Because international law is based on the mutual consent of sovereign states, each participating state must have common values and interests for international law to be effective. n18 Political, cultural, religious, [\*941] and economic traditions were naturally varied among states before the implementation of international law. n19 Because of this variation, the powerful Western states superimposed self-styled Western values such as democracy, a definitive structure of rule of law, industrial development, perception of peace, and eventually capitalism on less-influential or less-powerful states. n20 Western hegemons present these values as though they are prerequisites for stability. n21 In reality, however, formal consent to these values allows (in the creation of international law) the hegemon to disrupt existing value structures--an inherently destabilizing action--and take advantage of the less-powerful states' resources. n22 This process of obtaining consent is so sophisticated that it frequently requires engaging lawyers and legal scholars to guide less-powerful states. n23 These scholars typically represent Western education and ideologies within the scope of the broader interests of hegemons, imposing Western legal traditions on non-Western states. n24¶ ¶ Despite maintaining consent to superimposed Western norms, international law lacks a formal enforcement and compliance authority. n25 Nevertheless, fragmented informal or non-legal authority has been institutionalized through means controlled by hegemons that can make others comply with the norms. n26 In this scattered and pseudo-legal compliance mechanism, hegemons may comply with international law when faced with worldwide pressure and opposition from competing [\*942] hegemons. n27 For non-hegemons, a hint of pressure, economic or otherwise, is sometimes sufficient to force compliance with the regime. n28¶ ¶ According to Antonio Gramsci:¶ ¶ [H]egemony presupposes that account be taken of the interests and the tendencies of the groups over which hegemony is to be exercised, and that a certain compromise equilibrium should be formed--in other words, that the leading group [hegemons] should make sacrifices of an economic-corporate kind. But . . . such sacrifices and such a compromise cannot touch the essential . . . [they] must necessarily be based on the decisive function exercised by the leading group in the decisive nucleus of economic activity. n29¶ ¶ ¶ ¶ B.S. Chimni also noted the current influence of what he terms the "transnational capitalist class," that produces a culture in which "the third world counterparts essentially act as 'transmission belts and filtering devices for the imposition of the transnational agenda.'" n30¶ ¶ [\*943] International law, in its creation and application, has been a victim of the hegemonic power consolidation process. n31 Rather than recognizing and respecting the common goals and values of a pluralistic world, international law deems hegemons' values those of "true" civilization, held in esteem and aspired to by all others at the expense of unique and insightful non-Western thought. n32 Now in the era of globalization, evolving hegemonic international law theory warrants questioning whether states are really the hegemons in today's world. In order to address this question, it is important to analyze the processes of hegemony in the development of international law and to identify when the course of the hegemonic process departed from state-centric to corporate-centric hegemony.

#### Empirics disprove successful i-law integration, and globalization solves the impact

Berger 13 – J.D. /M.B.A. Candidate, 2015, Maurice A. Deane School of Law/ Frank G. Zarb School of Business at Hofstra University (Matthew J., “BITING THE HAND THAT FEEDS: THE TAKINGS CLAUSE AND AIG,” 12 J. Int'l Bus. & L. 341, Lexis)

A. United States Acceptance of International Law¶ There is no consensus on whether United States justices should take foreign law into consideration when making decisions on a novel or controversial issue. While it has been held that foreign law is not binding in United States' courts, several justices have displayed a willingness to take international law and actions into consideration. n199¶ The Court's willingness to examine international law when deciding cases in the United States has been displayed numerous times over the course of the last century. In the Paquete Habana, the Court stated that [i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of [c]ivilized nations. n200¶ More recently in Roper v. Simmons, the Court expressed its intent to look at the international community for guidance when dealing with a controversial decision in the United States. n201 In that case, the Supreme Court discussed the constitutionality of the juvenile death penalty in relation to the Eighth Amendment's Cruel and Unusual Punishment clause. n202 Based on the near universal outlaw of the juvenile death penalty, the Court decided to declare the juvenile [\*367] death penalty unconstitutional. n203 However, the Court was quick to declare that international law was not binding on its decision. n204¶ Even though international law is not dispositive, the Supreme Court has taken international views into consideration because of common themes among nations and the growing trend of globalization. The United States shares many traits with countries around the world, including its origins. Based on these common origins, it is often helpful to see how other countries handle similar issues. n205 Additionally, over the last several decades the world has become more interconnected than ever and the international community has played a larger role in decision making. As a result, it is important to consider what other nations are doing with respect to problems all nations face. n206

#### Judge biases hurt cross-fertilization

**Chechi ’12** [Allessandro, PhD from the European University Institute (EUI); LLM from the University College London, J.D. (2001), University of Siena, Post-doctoral researcher at the Art-Law Centre, University of Geneva, lecturer in public international law at the Université Catholique of Lille and at the University for Foreigners of Siena, reporter for Italy of the International Law in Domestic Courts – Oxford University Press project since 2007, “The Role of Domestic Courts in Resolving Restitution Cases: Unveiling Judicial Strategies for Culture-Sensitive Settlements,” <http://www.academia.edu/3685860/The_Role_of_Domestic_Courts_in_Resolving_Restitution_Cases_Unveiling_Judicial_Strategies_for_Culture-Sensitive_Settlements>]

The preceding paragraphs emphasise that cross-fertilization entails a certain degree of uncertainty that derives principally from the human component of adjudication. Moreover, it appears that there are not clear parameters as to the circumstances under which it is necessary to seek guidance from foreign jurisprudence, about which areas of law should (or should not) be excluded, or how the selection process should work. With regard to the latter point, it seems that the selection of external sources is guided by a number of variable factors: (i) the extent to which the lending system and the borrowing system share similar values and common ideological bases; (ii) the degree of similarity between the issues faced by the two systems; and (iii) whether foreign legal materials are available in a language that judges are able to work with. Nevertheless, it is submitted that these problems do not decisively rule out resort to cross-fertilization. The fact is that the risks associated with this process are not dissimilar from those normally related to court cases that contain no recourse to foreign material. Either way the settlement procedure may be affected by the whims of judges. In effect, decisions of national courts are sometimes followed by suspicions of political motivations. Decisions of international courts are not exempted from similar criticisms¶ 71¶ .Hence, it seems fair to assert that judges are justified in engaging in cross-fertilization, even if there is no obligation to do so, because it entails advantages that outnumber and offset its inherent deficiencies.

#### International law doesn’t prevent conflict

Cassese 2001—Antonio Cassese, Professor at the University of Florence and member of I'Institut de droit international, 2001 (International Law) pg. 348

Over the years the 'authorization regime' has evolved along three main lines. First with regard to the purpose of the use of force authorized by the SC, this body has increasingly defined in a clearer manner the objectives States were to pursue when using force. It is necessary only to think, in contrast, of the broad purpose of the use of force set out in resolution 678 (1990) concerning Iraq. The SC decided that States had to use all the means necessary 'to uphold and implement resolution 660 (1990) and al subsequent resolutions and to restore international peace and security in the area'. This sweeping mandate enabled some States (in particular the USA and the UK) to argue that the air raids against Iraq designed to ensure respect for the subsequent SC resolutions were authorized by resolution 678 (1990). Clearer and more specific objectives were set fourth in resolution 1511 (2003) and, even more, in resolution 1546 (2004) (see for instance 9-14), both on Iraq.

#### There are no cred silver bullets- takes years to escape legacies

**Gray ’11** [Colin S, Professor of International Politics and Strategic Studies at the University of Reading, England, and Founder of the National Institute for Public Policy, “Hard Power And Soft Power: The Utility Of Military Force as An Instrument Of Policy In The 21st Century,” April, <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1059>]

It bears repeating because it passes unnoticed that culture, and indeed civilization itself, are dynamic, not static phenomena. They are what they are for good and sufficient local geographical and historical reasons, and cannot easily be adapted to fit changing political and strategic needs. For an obvious example, the dominant American strategic culture, though allowing exceptions, still retains its principal features, the exploitation of technology and mass.45 These features can be pathological when circumstances are not narrowly conducive to their exploitation. Much as it was feared only a very few years ago that, in reaction to the neglect of culture for decades previously, the cultural turn in strategic studies was too sharp, so today there is a danger that the critique of strategic culturalism is proceeding too far.46 The error lies in the search for, and inevitable finding of, “golden keys” and “silver bullets” to resolve current versions of enduring problems. Soft-power salesmen have a potent product-mix to sell, but they fail to appreciate the reality that American soft power is a product essentially unalterable over a short span of years. As a country with a cultural or civilizational brand that is unique and mainly rooted in deep historical, geographical, and ideational roots, America is not at liberty to emulate a major car manufacturer and advertise an extensive and varied model range of persuasive soft-power profiles. Of course, some elements of soft power can be emphasized purposefully in tailored word and deed. However, foreign perceptions of the United States are no more developed from a blank page than the American past can be retooled and fine-tuned for contemporary advantage. Frustrating though it may be, a country cannot easily escape legacies from its past.

### Advantage 2 – Cred

#### Long says the grounds the aff rules on are distinct and do not emphasize broader international law incorporation on climate change

Andrew Long (Assistant Professor of Law, Florida Coastal School of Law) 2008 “International Consensus and U.S. Climate Change Litigation” 33 Wm. & Mary Envtl. L.

& Pol'y Rev. 177 (2008), <http://scholarship.law.wm.edu/wmelpr/vol33/iss1/4>

The question whether international norms should play a role in domestic climate change cases falls within a broader context of scholarship examining the proper role of international or foreign legal sources in domestic U.S. litigation more generally. Much of the hotly contested debate addresses human rights norms and constitutional protections because that is where incorporation of external sources is most prominent. Environmental issues, particularly those of global importance, present an equally appropriate and relatively unexplored forum for contributing to the dialogue. Indeed, on questions of climate change, the global community is inexorably linked, law is developing in multiple fora simultaneously, and many arguments raised against U.S. judicial use of foreign sources for constitutional interpretation have no force.

#### He clarifies that the ruling must EXPLICITELY be applied to climate change to increase leadership

Andrew Long (Assistant Professor of Law, Florida Coastal School of Law) 2008 “International Consensus and U.S. Climate Change Litigation” 33 Wm. & Mary Envtl. L.

& Pol'y Rev. 177 (2008), <http://scholarship.law.wm.edu/wmelpr/vol33/iss1/4>

In essence, I conclude that explicitly analyzing international climate change norms in domestic climate change cases would increase uniformity and clarity of the basis for judicial consideration of climate change issues and legal responses, enhance the international standing and influence of the United States, and foster the development of more effective international and foreign climate regimes. 3 Increased judicial use of the international regime should not replace domestic bases for decisions, but can inform them

#### Not rapid

McGrath ’13 (Matt McGrath, Environment correspondent, BBC News, “Climate slowdown means extreme rates of warming 'not as likely'”, http://www.bbc.co.uk/news/science-environment-22567023, May 19, 2013)

Scientists say the recent downturn in the rate of global warming will lead to lower temperature rises in the short-term. Since 1998, there has been an unexplained "standstill" in the heating of the Earth's atmosphere. Writing in Nature Geoscience, the researchers say this will reduce predicted warming in the coming decades. But long-term, the expected temperature rises will not alter significantly. “Start Quote The most extreme projections are looking less likely than before” Dr Alexander Otto University of Oxford The slowdown in the expected rate of global warming has been studied for several years now. Earlier this year, the UK Met Office lowered their five-year temperature forecast. But this new paper gives the clearest picture yet of how any slowdown is likely to affect temperatures in both the short-term and long-term. An international team of researchers looked at how the last decade would impact long-term, equilibrium climate sensitivity and the shorter term climate response. Transient nature Climate sensitivity looks to see what would happen if we doubled concentrations of CO2 in the atmosphere and let the Earth's oceans and ice sheets respond to it over several thousand years. Transient climate response is much shorter term calculation again based on a doubling of CO2. The Intergovernmental Panel on Climate Change reported in 2007 that the short-term temperature rise would most likely be 1-3C (1.8-5.4F). But in this new analysis, by only including the temperatures from the last decade, the projected range would be 0.9-2.0C. Ice The report suggests that warming in the near term will be less than forecast "The hottest of the models in the medium-term, they are actually looking less likely or inconsistent with the data from the last decade alone," said Dr Alexander Otto from the University of Oxford. "The most extreme projections are looking less likely than before."

#### We adapt

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

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

#### United States not key to solve warming and inevitable

Grose ‘13 (Thomas K., National Geographic News Writer, “As U.S. Cleans Its Energy Mix, It Ships Coal Problems Abroad”, March 15, 2013)

Ready for some good news about the environment? Emissions of carbon dioxide in the United States are declining. But don't celebrate just yet. A major side effect of that cleaner air in the U.S. has been the further darkening of skies over Europe and Asia. The United States essentially is exporting a share of its greenhouse gas emissions in the form of coal, data show. If the trend continues, the dramatic changes in energy use in the United States—in particular, the switch from coal to newly abundant natural gas for generating electricity—will have only a modest impact on global warming, observers warn. The Earth's atmosphere will continue to absorb heat-trapping CO2, with a similar contribution from U.S. coal. It will simply be burned overseas instead of at home. "Switching from coal to gas only saves carbon if the coal stays in the ground," said John Broderick, lead author of a study on the issue by the Tyndall Center for Climate Change Research at England's Manchester University. The U.S. Energy Information Administration (EIA) released data this week showing that United States coal exports hit a record 126 million short tons in 2012, a 17 percent increase over the previous year. Overseas shipments surpassed the previous high mark set in 1981 by 12 percent. The United States clearly is using less coal: Domestic consumption fell by about 114 million tons, or 11 percent, largely due to a decline in the use of coal for electricity. But U.S. coal production fell just 7 percent. The United States, with the world's largest coal reserves, continued to churn out the most carbon-intensive fuel, producing 1 billion tons of coal from its mines in 2012. Emissions Sink The EIA estimates that due largely to the drop in coal-fired electricity, U.S. carbon emissions from burning fossil fuel declined 3.4 percent in 2012. If the numbers hold up, it will extend the downward trend that the U.S. Environmental Protection Agency (EPA) outlined last month in its annual greenhouse gas inventory, which found greenhouse gas emissions in 2011 had fallen 8 percent from their 2007 peak to 6,703 million metric tons of CO2 equivalent (a number that includes sources other than energy, like methane emissions from agriculture). In fact, if you don't count the recession year of 2009, U.S. emissions in 2011 dropped to their lowest level since 1995. President Barack Obama counted the trend among his environmental accomplishments in his State of the Union address last month: "Over the last four years, our emissions of the dangerous carbon pollution that threatens our planet have actually fallen." The reason is clear: Coal, which in 2005 generated 50 percent of U.S. electricity, saw its share erode to 37.4 percent in 2012, according to EIA's new short-term energy outlook. An increase in U.S. renewable energy certainly played a role; renewables climbed in those seven years from 8.7 percent to 13 percent of the energy mix, about half of it hydropower. But the big gain came from natural gas, which climbed from 19 percent to 30.4 percent of U.S. electricity during that time frame, primarily because of abundant supply and low prices made possible by hydraulic fracturing, or fracking. The trend appears on track to continue, with U.S. coal-fired plants being retired at a record pace. But U.S. coal producers haven't been standing still as their domestic market has evaporated. They've been shipping their fuel to energy-hungry markets overseas, from the ports of Norfolk, Baltimore, and New Orleans. Although demand is growing rapidly in Asia—U.S. coal exports to China were on track to double last year—Europe was the biggest customer, importing more U.S. coal last year than all other countries combined. The Netherlands, with Europe's largest port, Rotterdam, accepted the most shipments, on pace for a 24 jump in U.S. coal imports in 2012. The United Kingdom, the second largest customer, saw its U.S. coal imports jump more than 70 percent. The hike in European coal consumption would appear to run counter to big government initiatives across the Continent to cut CO2 emissions. But in the European Union, where fracking has made only its initial forays and natural gas is still expensive, American coal is, well, dirt cheap. European utilities are now finding that generating power from coal is a profitable gambit. In the power industry, the profit margin for generating electricity from coal is called the "clean dark spread"; at the end of December in Great Britain, it was going for about $39 per megawatt-hour, according to Argus. By contrast, the profit margin for gas-fired plants—the "clean spark spread"—was about $3. Tomas Wyns, director of the Center for Clean Air Policy-Europe, a nonprofit organization in Brussels, Belgium, said those kinds of spreads are typical across Europe right now. The EU has a cap-and-trade carbon market, the $148 billion, eight-year-old Emissions Trading System (ETS). But it's in the doldrums because of a huge oversupply of permits. That's caused the price of carbon to fall to about 4 euros ($5.23). A plan called "backloading" that would temporarily extract allowances from the market to shore up the price has faltered so far in the European Parliament. "A better carbon price could make a difference" and even out the coal and gas spreads, Wyns said. He estimates a price of between 20 and 40 euros would do the trick. "But a structural change to the Emissions Trading System is not something that will happen very quickly. A solution is years off." The Tyndall Center study estimates that the burning of all that exported coal could erase fully half the gains the United States has made in reducing carbon emissions. For huge reserves of shale gas to help cut CO2 emissions, "displaced fuels must be reduced globally and remain suppressed indefinitely," the report said. Future Emissions It is not clear that the surge in U.S. coal exports will continue. One reason for the uptick in coal-fired generation in Europe has been the looming deadline for the EU's Large Combustion Plant Directive, which will require older coal plants to meet lower emission levels by the end of 2015 or be mothballed. Before that phaseout begins, Wyns says, "there is a bit of a binge going on." Also, economic factors are at work. Tyndall's Broderick said American coal companies have been essentially selling surplus fuel overseas at low profit margins, so there is a likelihood that U.S. coal production will decrease further. The U.S. government forecasters at EIA expect that U.S. coal exports will fall back to about 110 million tons per year over the next two years, due to economic weakness in Europe, falling international prices, and competition from other coal-exporting countries. The Paris-based International Energy Agency (IEA) calls Europe's "coal renaissance" a temporary phenomenon; it forecasts an increasing use of renewables, shuttering of coal plants, and a better balance between gas and coal prices in the coming years. But IEA does not expect that the global appetite for coal will slacken appreciably. The agency projects that, by 2017, coal will rival oil as the world's primary energy source, mainly because of skyrocketing demand in Asia. U.S. coal producers have made clear that they aim to tap into that growing market.

#### No modeling or momentum

Mead '10 (Walter Russell, senior fellow for U.S. foreign policy at the Council on Foreign Relations, The Death of Global Warming, http://blogs.the-american-interest.com/wrm/2010/02/01/the-death-of-global-warming/, February 1, 2010)

The global warming movement as we have known it is dead. Its health had been in steady decline during the last year as the once robust hopes for a strong and legally binding treaty to be agreed upon at the Copenhagen Summit faded away. By the time that summit opened, campaigners were reduced to hoping for a ‘politically binding’ agreement to be agreed that would set the stage for the rapid adoption of the legally binding treaty. After the failure of the summit to agree to even that much, the movement went into a rapid decline. The movement died from two causes: bad science and bad politics. After years in which global warming activists had lectured everyone about the overwhelming nature of the scientific evidence, it turned out that the most prestigious agencies in the global warming movement were breaking laws, hiding data, and making inflated, bogus claims resting on, in some cases, no scientific basis at all. This latest story in the London Times is yet another shocker; the IPCC’s claims that the rainforests were going to disappear as a result of global warming are as bogus and fraudulent as its claims that the Himalayan glaciers would melt by 2035. It seems as if a scare story could grab a headline, the IPCC simply didn’t care about whether it was reality-based. With this in mind, ‘climategate’ — the scandal over hacked emails by prominent climate scientists — looks sinister rather than just unsavory. The British government has concluded that University of East Anglia, home of the research institute that provides the global warming with much of its key data, had violated Britain’s Freedom of Information Act when scientists refused to hand over data so that critics could check their calculations and methods. Breaking the law to hide key pieces of data isn’t just ‘science as usual,’ as the global warming movement’s embattled defenders gamely tried to argue. A cover-up like that suggests that you indeed have something to conceal. The urge to make the data better than it was didn’t just come out of nowhere. The global warmists were trapped into the necessity of hyping the threat by their realization that the actual evidence they had — which, let me emphasize, all hype aside, is serious, troubling and establishes in my mind the need for intensive additional research and investigation, as well as some prudential steps that would reduce CO2 emissions by enhancing fuel use efficiency and promoting alternative energy sources — was not sufficient to get the world’s governments to do what they thought needed to be done. Hyping the threat increasingly doesn’t look like an accident: it looks like it was a conscious political strategy. Now it has failed. Not everything that has come out of the IPCC and the East Anglia Climate Unit is false, but enough of their product is sufficiently tainted that these institutions can best serve the cause of fighting climate change by stepping out of the picture. New leadership might help, but everything these two agencies have done will now have to be re-checked by independent and objective sources. The global warming campaigners got into this mess because they had a deeply flawed political strategy. They were never able to develop a pragmatic approach that could reach its goals in the context of the existing international system. The global warming movement proposed a complex set of international agreements involving vast transfers of funds, intrusive regulations in national economies, and substantial changes to the domestic political economies of most countries on the planet. As it happened, the movement never got to the first step — it never got the world’s countries to agree to the necessary set of treaties, transfers and policies that would constitute, at least on paper, a program for achieving its key goals. Even if that first step had been reached, the second and third would almost surely not have been. The United States Congress is unlikely to pass the kind of legislation these agreements would require before the midterm elections, much less ratify a treaty. (It takes 67 senate votes to ratify a treaty and only 60 to overcome a filibuster.) After the midterms, with the Democrats expected to lose seats in both houses, the chance of passage would be even more remote — especially as polls show that global warming ranks at or near the bottom of most voters’ priorities. American public opinion supports ‘doing something’ about global warming, but not very much; support for specific measures and sacrifices will erode rapidly as commentators from Fox News and other conservative outlets endlessly hammer away. Without a commitment from the United States to pay its share of the $100 billion plus per year that poor countries wanted as their price for compliance, and without US participation in other aspects of the proposed global approach, the intricate global deals fall apart. Since the United States was never very likely to accept these agreements and ratify these treaties, and is even less prepared to do so in a recession with the Democrats in retreat, even “success” in Copenhagen would not have brought the global warming movement the kind of victory it sought — although it would have created a very sticky and painful political problem for the United States. But even if somehow, miraculously, the United States and all the other countries involved not only accepted the agreements but ratified them and wrote domestic legislation to incorporate them into law, it is extremely unlikely that all this activity would achieve the desired result. Countries would cheat, either because they chose to do so or because their domestic systems are so weak, so corrupt or so both that they simply wouldn’t be able to comply. Governments in countries like China and India aren’t going to stop pushing for all the economic growth they can get by any means that will work — and even if central governments decided to move on global warming, state and local authorities have agendas of their own. The examples of blatant cheating would inevitably affect compliance in other countries; it would also very likely erode what would in any case be an extremely fragile consensus in rich countries to keep forking over hundreds of billions of dollars to poor countries — many of whom would not be in anything like full compliance with their commitments. For better or worse, the global political system isn’t capable of producing the kind of result the global warming activists want. It’s like asking a jellyfish to climb a flight of stairs; you can poke and prod all you want, you can cajole and you can threaten. But you are asking for something that you just can’t get — and at the end of the day, you won’t get it. The grieving friends and relatives aren’t ready to pull the plug; in a typical, whistling-past-the-graveyard comment, the BBC first acknowledges that even if the current promises are kept, temperatures will rise above the target level of two degrees Celsius — but let’s not despair! The BBC quotes one of its own reporters: “BBC environment reporter Matt McGrath says the accord lacks teeth and does not include any clear targets on cutting emissions. But if most countries at least signal what they intend to do to cut their emissions, it will mark the first time that the UN has a comprehensive written collection of promised actions, he says.”

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

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

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

#### Authority means “authorization” – topical affirmatives must remove the permission to act, not just regulate the President

Hohfeld,Yale Law,1919(Wesley, <http://www.hku.hk/philodep/courses/law/HohfeldRights.htm>)

Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property "in a tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and-simultaneously and correlatively-to create in other persons privileges and powers relating to the abandoned object,-e. g., the power to acquire title to the latter by appropriating it. Similarly, X has the power to transfer his interest to Y, that is to extinguish his own interest and concomitantly create in Y a new and corresponding interest. So also X has the power to create contractual obligations of various kinds. Agency cases are likewise instructive. By the use of some metaphorical expression such as the Latin, qui facit per alium, facit per se\* the true nature of agency relations is only too frequently obscured. The creation of an agency relation involves, inter alia, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal. That is to say, one party, P, has the power to create agency powers in another party, A,-for example, the power to convey P's property, the power to impose (so called) contractual obligations on P, the power to discharge a debt owing to P, the power to "receive" title to property so that it shall vest in P, and so forth. In passing, it may be well to observe that the term "authority," so frequently used in agency cases, is very ambiguous and slippery in its connotation. Properly employed in the present connection, the word seems to be an abstract or qualitative term corresponding to the concrete "authorization," the latter consisting of a particular group of operative facts taking place between the principal and the agent. All too often, however, the term in question is so used as to blend and confuse these operative facts with the powers and privileges thereby created in the agent. A careful discrimination in these particulars would, it is submitted, go far toward clearing up certain problems in the law of agency.

#### There's a clear brightline---restrictions sets a ceiling--- not just process

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

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

#### Restrictions on authority are distinct from conditions

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

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

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

Words & Phrases 64, 40 W&P 759

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

#### Increase means from a baseline

Rogers 5 Judge, STATE OF NEW YORK, ET AL., PETITIONERS v. U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT, NSR MANUFACTURERS ROUNDTABLE, ET AL., INTERVENORS, 2005 U.S. App. LEXIS 12378, \*\*; 60 ERC (BNA) 1791, 6/24, lexis

 [\*\*48]  Statutory Interpretation. [HN16](http://www.lexis.com/research/retrieve?_m=1fe428155fdfc9074f3623f0dae9d78a&docnum=14&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=0ebd338d6a7793de8561db53b915effd&focBudTerms=term%20increase&focBudSel=all#clscc16)While the CAA defines a "modification" as any physical or operational change that "increases" emissions, it is silent on how to calculate such "increases" in emissions. [42 U.S.C. § 7411(a)(4)](http://www.lexis.com/research/buttonTFLink?_m=8541fbf7a7f5554ca588059b132acd17&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b367%20U.S.%20App.%20D.C.%203%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=103&_butInline=1&_butinfo=42%20U.S.C.%207411&_fmtstr=FULL&docnum=14&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=1f89a0e47b1996a5400e8d865d8da08a). According to government petitioners, the lack of a statutory definition does not render the term "increases" ambiguous, but merely compels the court to give the term its "ordinary meaning." See [Engine Mfrs.Ass'nv.S.Coast AirQualityMgmt.Dist., 541 U.S. 246, 124 S. Ct. 1756, 1761, 158 L. Ed. 2d 529(2004)](http://www.lexis.com/research/buttonTFLink?_m=8541fbf7a7f5554ca588059b132acd17&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b367%20U.S.%20App.%20D.C.%203%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=104&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b541%20U.S.%20246%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=14&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=48f016ea3eabfdb898b67b348b11662c); [Bluewater Network, 370 F.3d at 13](http://www.lexis.com/research/buttonTFLink?_m=8541fbf7a7f5554ca588059b132acd17&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b367%20U.S.%20App.%20D.C.%203%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=105&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b370%20F.3d%201%2cat%2013%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=14&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=78fdfe9d48c7b91d7659b90c0198707e); [Am. Fed'n of Gov't Employees v. Glickman, 342 U.S. App. D.C. 7, 215 F.3d 7, 10 [\*23]  (D.C. Cir. 2000)](http://www.lexis.com/research/buttonTFLink?_m=8541fbf7a7f5554ca588059b132acd17&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b367%20U.S.%20App.%20D.C.%203%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=106&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b342%20U.S.%20App.%20D.C.%207%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=14&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=fb18ff0b92931ac00621d88dae997e67). Relying on two "real world" analogies, government petitioners contend that the ordinary meaning of "increases" requires the baseline to be calculated from a period immediately preceding the change. They maintain, for example, that in determining whether a high-pressure weather system "increases" the local temperature, the relevant baseline is the temperature immediately preceding the arrival of the weather system, not the temperature five or ten years ago. Similarly,  [\*\*49]  in determining whether a new engine "increases" the value of a car, the relevant baseline is the value of the car immediately preceding the replacement of the engine, not the value of the car five or ten years ago when the engine was in perfect condition.

## Solvo

### 2NC – Squo Solves

#### The DC court cases that have cited Al-Bihani have not ruled on the international law holding

Lyle Denniston (Reporter for SCOTUSblog) August 31, 2010 “Diminishing a precedent” http://www.scotusblog.com/2010/08/diminishing-a-precedent/

Although federal District judges in Washington have been applying the Al-Bihani decision to detainee cases that have arisen since that ruling came down some eight months ago, the international law issue has not been treated as it curbed their judicial power significantly. How they will react to Tuesday’s writings is unclear at this point. The reality for those judges is now that there is no controlling precedent in the Circuit on the role that international law plays in defining the president’s powers of detention. Judge Brown’s panel opinion and its discussion on that point now appears to have been undermined by the views of the seven other judges, essentially treating that discussion as mere dicta. And the opinions of Judges Kavanaugh and Williams speak only for themselves.

#### Even if confronted over international law, lower courts have plenty of room to maneuver around it with existing precedent

Steve Vladeck (professor of law and the associate dean for scholarship at American University Washington College of Law) June 12, 2012 “My Last Word (for Now) on the D.C. Circuit and Boumediene” http://www.lawfareblog.com/2012/06/my-last-word-for-now-on-the-d-c-circuit-and-boumediene/

I really have said too much already. Let me just close on this note: I do believe, at a fundamental level, that the D.C. Circuit’s hostility to the Supreme Court vis-a-vis Guantanamo has not been as pronounced as many (including the editorial page of the New York Times) have argued, largely because it has been the work of a small minority of its judges, and not the whole court. I also believe that Hamdi and Boumediene left a fair amount of maneuvering room to the lower courts, and we can criticize how they chose to exercise that discretion without suggesting that they thereby abused it. But I also believe that there have been at least some episodes of well-documented abuses of that discretion in the form of hostility to the Court’s prior work, and I’ve done my best to document them (in the Seton Hall piece more so than in this morning’s reply to Ben). To my mind, each example serves as a counterweight to the otherwise compelling views of those, like Ben, who would absolve the D.C. Circuit of its role in watering down Boumediene–placing more of the blame on the Justices for not doing enough to define the rules of the game in the first place…

#### Even if other DC circuit courts made ruling based on Al-Bihani – they would have ZERO facial credibility – no snowball effect

Steve Vladeck (professor of law and the associate dean for scholarship at American University Washington College of Law) February 19, 2011 “Judge Randolph Pulls Another Fast One--But Will Anyone Notice?” http://prawfsblawg.blogs.com/prawfsblawg/2011/week7/

Nor should it surprise anyone that Al-Bihani is full of inconvenient dicta. Judge Williams' concurrence in that case made exactly that point. And the D.C. Circuit all-but went en banc to overrule (or, at least, dicta-ize) one of the panel's other holdings--i.e., that the laws of war have no bearing on the scope of the government's detention authority under the AUMF. Thus, Hatim was not merely "following" Al-Bihani; it converted wholly unnecessary (and woefully incorrect) dicta into a holding, and without anything in the way of analysis. Moreover (and this is key), Judge Brown's reliance on the MCA in Al-Bihani came only after she rejected the Obama Administration's argument that the scope of the AUMF should be understood by reference to international law--that is, the conflation of the AUMF and the MCA necessarily followed upon her rejection of international law as the relevant constraint, a position that was itself dismissed by the rest of the D.C. Circuit in the non-en banc manuevering last August. So to reaffirm that logic (as the Hatim panel did) after its necessary predicate (Al-Bihani's holding vis-a-vis international law) had been vitiated is even less convincing than the original holding might have been on its face.

#### Either way, vote negative on presumption

Steve Vladeck (professor of law and the associate dean for scholarship at American University Washington College of Law) February 19, 2011 “Judge Randolph Pulls Another Fast One--But Will Anyone Notice?” http://prawfsblawg.blogs.com/prawfsblawg/2011/week7/

So this leads to my real question: As it becomes increasingly clear that a small but vocal minority of the D.C. Circuit (Judges Brown, Kavanaugh, and Randolph, in particular) will apparently find any way in any case to adopt holdings that (1) go beyond even what the government is asking for in these cases (see, e.g., Randolph's lament about the standard of review in Al-Adahi); and (2) are indefensible as a matter of law and logic, is anyone else on that court going to notice? Don't get me wrong--the answer in Hatim's case may end up being the same. And the other judges of the D.C. Circuit may well reach the same results in these cases as their more aggressive colleagues. But my gripe is not about the merits; it's about the indifferent attitude that the rest of the court seems to have toward the analysis being deployed by these three jurists, and the damage that is being done to the substantive and procedural law governing detention going forward. The more these decisions pile up, the more a pattern is developing in which panels that include one or more of Judges Brown, Kavanaugh, or Randolph find seemingly uncontroversial ways to reach sweeping new holdings that have dramatic effects on the shape of the law. And if the Supreme Court isn't in a position to say anything about it, that leaves the other seven active judges of the D.C. Circuit. Let's just hope they're paying attention...

### A2 “But Our 1AC Ev is Good”

#### Your WALSH was published a month after the en banc review but the entire article never even mentions it AND also concedes that Supreme Court precedent will prevent broad Al-Bihani spill over

Cara Maureen Walsh (J.D. Vanderbilt University Law School) October 2010 “Al-Bihani, Not So Charming” 43 Vand. J. Transnat'l L. 1151, Lexis

Despite broad assertions in Al-Bihani, 15 courts have construed domestic legislation in accordance with international law for more than two hundred years. 16 Since at least 1801, the Supreme Court has consistently held that, where possible, courts should interpret U.S. law to conform to the international legal obligations of the United States. 17 Recent statutory amendments do preclude individuals from invoking the Geneva Conventions as a source of rights in certain civil actions, 18 but these provisions do not affect the use of international law as an interpretive canon.

### Circumv

#### Obama ignores restrictions- tons of loopholes

**Kumar 3-19**-13 [Anita, White House correspondent for McClatchy Newspapers, former writer for The Washington Post, covering Virginia politics and government, and spent a decade at the St. Petersburg Times, writing about local, state and federal government both in Florida and Washington, “Obama turning to executive power to get what he wants,” <http://www.mcclatchydc.com/2013/03/19/186309/obama-turning-to-executive-power.html#.Ue18CdK1FSE>]

President Barack Obama came into office four years ago skeptical of pushing the power of the White House to the limit, especially if it appeared to be circumventing Congress.¶ Now, as he launches his second term, Obama has grown more comfortable wielding power to try to move his own agenda forward, particularly when a deeply fractured, often-hostile Congress gets in his way.¶ He’s done it with a package of tools, some of which date to George Washington and some invented in the modern era of an increasingly powerful presidency. And he’s done it with a frequency that belies his original campaign criticisms of predecessor George W. Bush, invites criticisms that he’s bypassing the checks and balances of Congress and the courts, and whets the appetite of liberal activists who want him to do even more to advance their goals.¶ While his decision to send drones to kill U.S. citizens suspected of terrorism has garnered a torrent of criticism, his use of executive orders and other powers at home is deeper and wider.¶ He delayed the deportation of young illegal immigrants when Congress wouldn’t agree. He ordered the Centers for Disease Control and Prevention to research gun violence, which Congress halted nearly 15 years ago. He told the Justice Department to stop defending the Defense of Marriage Act, deciding that the 1996 law defining marriage as between a man and a woman was unconstitutional. He’s vowed to act on his own if Congress didn’t pass policies to prepare for climate change.¶ Arguably more than any other president in modern history, he’s using executive actions, primarily orders, to bypass or pressure a Congress where the opposition Republicans can block any proposal.¶ “It’s gridlocked and dysfunctional. The place is a mess,” said Rena Steinzor, a law professor at the University of Maryland. “I think (executive action) is an inevitable tool given what’s happened.”¶ Now that Obama has showed a willingness to use those tactics, advocacy groups, supporters and even members of Congress are lobbying him to do so more and more.¶ The Center for Progressive Reform, a liberal advocacy group composed of law professors, including Steinzor, has pressed Obama to sign seven executive orders on health, safety and the environment during his second term.¶ Seventy environmental groups wrote a letter urging the president to restrict emissions at existing power plants.¶ Sen. Barbara Mikulski, D-Md., the chairwoman of the Appropriations Committee, sent a letter to the White House asking Obama to ban federal contractors from retaliating against employees who share salary information.¶ Gay rights organizations recently demonstrated in front of the White House to encourage the president to sign an executive order to bar discrimination based on sexual orientation or gender identity by companies that have federal contracts, eager for Obama to act after nearly two decades of failed attempts to get Congress to pass a similar bill.¶ “It’s ridiculous that we’re having to push this hard for the president to simply pick up a pen,” said Heather Cronk, the managing director of the gay rights group GetEQUAL. “It’s reprehensible that, after signing orders on gun control, cybersecurity and all manner of other topics, the president is still laboring over this decision.”¶ The White House didn’t respond to repeated requests for comment.¶ In January, Obama said he continued to believe that legislation was “sturdier and more stable” than executive actions, but that sometimes they were necessary, such as his January directive for the federal government to research gun violence.¶ “There are certain issues where a judicious use of executive power can move the argument forward or solve problems that are of immediate-enough import that we can’t afford not to do it,” the former constitutional professor told The New Republic magazine.¶ Presidents since George Washington have signed executive orders, an oft-overlooked power not explicitly defined in the Constitution. More than half of all executive orders in the nation’s history – nearly 14,000 – have been issued since 1933.

## Charming betsy

### Treaties

#### We violate treaties all the time- fights will fizzle out

**Koplow ’13** [David A. Koplow is Professor of Law and Director of the Center for Applied Legal Studies ¶ at Georgetown University Law Center. He was Special Counsel for Arms Control to the ¶ General Counsel, U.S. Department of Defense, Washington, DC, from 2009 to 2011, “Indisputable Violations: ¶ What Happens When the ¶ United States Unambiguously ¶ Breaches a Treaty?” <http://www.fletcherforum.org/wp-content/uploads/2013/02/Koplow_37-1.pdf>]

This commitment to the law also extends to international agreements. Treaties are the coin of the international realm, and the United ¶ States leads the world both in making treaties and in publicly and pointedly holding others accountable when they fall short of full compliance.1¶ What happens, then, when the United States contravenes a binding international legal obligation in a manner so obvious and unarguable that it can ¶ offer no defense to the charge of breach?¶ It happens more often than one might think and to more important ¶ treaties than one would hope, including treaties for which the United States ¶ continues to depend upon fastidious performance by other countries. Here, ¶ I present three illustrative cases studies of blatant U.S. violations of binding ¶ international legal obligations: the 1993 Chemical Weapons Convention, ¶ the 1963 Vienna Convention on Consular Relations, and the obligation ¶ to pay annual dues under the Charter of the United Nations. I explain the ¶ causes of these breaches and examine their adverse consequences for the ¶ United States and for the international rule of law.¶ TWO STREAMS OF LAW¶ First, however, a bit of background about the two independent and ¶ somewhat-competing streams of legal authority governing treaties. On the ¶ one hand, under Article VI of the U.S. Constitution, a treaty, as a matter of ¶ domestic law, is the “supreme Law of the Land.” Only the Constitution is ¶ superior to a treaty and the latter has the equivalent legal dignity of a statute. ¶ Article II of the Constitution further states that the President of the United ¶ States has the obligation to “take Care that the Laws be faithfully executed.” ¶ Juxtaposing these texts, it is “black letter law” that a treaty must be enforced ¶ unless it runs afoul of a provision of the Constitution (noting that a treaty may ¶ be invalidated as “unconstitutional” in the same sense as a statute) or if it is ¶ superseded by a directly contrary stipulation in a subsequently enacted statute.¶ On the other hand, international law presents a somewhat different ¶ hierarchy of legal rules. From the perspective of international jurisprudence, the foundational prescription is pacta sunt servanda; treaties are to ¶ be respected and international obligations must be obeyed. Treaties and ¶ other forms of international law, therefore, occupy the apex of the legal ¶ pyramid and all domestic authorities of any particular country—whether ¶ denominated as rules of its national constitution, ordinary legislation, ¶ or in any other manner—are subsidiary. A country may not, under this ¶ system, interpose domestic law as a justification for its failure to meet treaty ¶ requirements. If it could, there would not be much point in concluding ¶ such agreements.¶ The President of the United States may therefore occasionally be ¶ handcuffed by this amalgamation of distinct legal authorities. If a valid ¶ treaty imposes an obligation, international law will demand adherence to ¶ it. However, if the same treaty violates the Constitution or if a subsequent ¶ domestic statute were to contain a contradictory obligation, the President’s ¶ ability to fulfill international obligations would be constrained. The United ¶ States must then adhere to domestic law and violate the treaty, or develop a ¶ creative mechanism to reconcile the contradictory requirements of the treaty ¶ and the statute. U.S. institutions have demonstrated great zeal in attempting ¶ to "nd or invent such harmonization, but it is not always possible. ¶ A MATTER OF INTERPRETATION¶ In practice, violations of international law are not usually formally ¶ adjudicated

. The world’s leading international judicial tribunal, the ¶ International Court of Justice (ICJ), typically resolves only two or three cases per year, and it does not possess automatic jurisdictional power over ¶ the United States, Russia, China, and other leading international actors ¶ who have not submitted themselves to the Court’s mandatory authority. ¶ Some other international courts, such as the European Court of Justice, are ¶ more active, but even the most successful do not exercise the same primacy ¶ in the global arena that U.S. courts enjoy domestically. Aside from judicial institutions, the United Nations Security Council holds the power to ¶ resolve disputes in a compulsory fashion. However, the veto power ensures ¶ that the "ve permanent members—and their allies—are protected against ¶ any adverse "ndings or orders. the “court of world public opinion” can be ¶ meaningful too, but its judgments are often murky.¶ Debates about putative treaty violations are also often inconclusive ¶ because international law, like domestic U.S. law, is frequently contestable. For example, the rules for demarcating a disputed land or maritime ¶ boundary or the interpretation of a World Trade Organization obligation ¶ about improper barriers to international trade can be obscure, ambiguous, ¶ and debatable. Often, the United States (or any other country) adopts a ¶ certain interpretation of the treaty. If the issue becomes a cause célèbre, the ¶ United States might “win” or “lose” the debate over its interpretation. But ¶ if the matter is truly one on which countries could reasonably disagree, ¶ there may not be much embarrassment for a country that has in good faith ¶ advanced what subsequently turns out to be only a minority position.

## Climate

### Long

#### He clarifies that the ruling must EXPLICITELY be applied to climate change to increase leadership

Andrew Long (Assistant Professor of Law, Florida Coastal School of Law) 2008 “International Consensus and U.S. Climate Change Litigation” 33 Wm. & Mary Envtl. L.

& Pol'y Rev. 177 (2008), <http://scholarship.law.wm.edu/wmelpr/vol33/iss1/4>

In essence, I conclude that explicitly analyzing international climate change norms in domestic climate change cases would increase uniformity and clarity of the basis for judicial consideration of climate change issues and legal responses, enhance the international standing and influence of the United States, and foster the development of more effective international and foreign climate regimes. 3 Increased judicial use of the international regime should not replace domestic bases for decisions, but can inform them

### A2oceans

#### Ocean acidification will be slow and stable, proven by 1000 studies- it improves ocean resiliency

Codling ‘11 [Jo, received a Bachelor of Science first class and won the FH Faulding and the Swan Brewery prizes at the University of Western Australia. Her major was microbiology, molecular biology. Nova received a Graduate Certificate in Scientific Communication from the Australian National University in 1989,[4] and she did honours research in 1990, prize-winning science graduate, Jo has has done over 200 radio interviews, many on the Australian ABC.  She was formerly an associate lecturer in Science Communication at the ANU and is based in Perth, Western Australia, , “Ocean Acidification — a little bit less alkalinity could be a good thing,” Sept. 11, <http://joannenova.com.au/2011/09/ocean-acidification-a-little-bit-less-alkalinity-could-be-a-good-thing/>]

Studies of how marine life copes with less alkaline conditions include many experiments with water at pH values in a range beyond anything that is likely on planet Earth — they go beyond the bounds of what’s possible. There are estimates that the pH of the ocean has shifted about 0.1 pH unit in the last 200 years, yet some studies consider the effects of water that is shifted by 2 or even 4 entire pH units. Four pH units means 10,000 fold change in the concentration of hydrogen ions). That’s a shift so large, it’s not going to occur in the next few thousand years, even under the worst of the worst case scenarios by the most sadistic models. Indeed, it’s virtually impossible for CO2 levels to rise high enough to effect that kind of change, even if we burned every last fossil, every tree, plant microbe, and vaporized life on earth. (Yet still someone thought it was worth studying what would happen if, hypothetically, that happened. Hmm.)¶ 1103 studies on acidification say there’s no need to panic¶ CO2 science has an extraordinary data base of 1103 studies of the effects of “acidification” on marine life. They reason that any change beyond 0.5 pH units is “far far beyond the realms of reality” even if you are concerned about coral reefs in the year 2300 (see Tans 2009). Even the IPCC’s highest end “scenario A2″ estimate predicts a peak change in the range of 0.6 units by 2300.¶ Many of the headlines forecasting “Death to Reefs” come from studies of ocean water at extreme pH’s that will never occur globally,

and that are beyond even what the IPCC is forecasting. Some headlines come from studies of hydrothermal vents where CO2 bubbles up from the ocean floor. Not surprisingly they find changes to marine life near the vents, but then, the pH of these areas ranges right down to 2.8. They are an extreme environment, nothing like what we might expect to convert the worlds oceans too.¶ Marine life, quite happy about a bit more CO2?¶ Studies of growth, calcification, metabolism, fertility and survival show that, actually, if things were a little less alkaline, on average, marine life would benefit. There will be winners and losers, but on the whole, using those five measures of health, the reefs are more likely to have more life on and around them, than they are to shrink.¶ Figure 12. Percent change in the five measured life characteristics (calcification, metabolism, growth, fertility and survival) vs. decline of seawater pH from its present (control treatment) value to ending values extending up to the beginning pH value of "the warped world of the IPCC" for all individual data points falling within this pH decline range.¶ How can this be?¶ First, marine life evolved under conditions where most of the time the world was warmer and had more CO2 in the atmosphere than it does today. Second, like life above the water, life-below-water is based on carbon, and putting more carbon into the water is not necessarily a bad thing. That said, the dots in the graph above represent study results, and the ones below zero tell us there will be some losers, even though there will be more winners (above zer0). Thirdly, watch out for some of the more devastating headlines which also come from studies where researchers changed the pH by tossing hydrochloric acid into the tank. Chlorine, as they say, is not the same as the gas nature breathes — CO2. (The strange thing about the studies with hydrochloric acid, is that it doesn’t seem to be bad as we might have expected– nonetheless, it seems like a dubious practice to use in studying the health of corals.)¶ The Ocean Acidification Database is housed at CO2 science.¶ The graph above is just one of many on their results and conclusions page.¶ The bottom line:¶ Yes, we should watch and monitor the oceans careful. No, there is no chance the Great Barrier Reef will be gone in the next 100 years: 1103 studies show that if the worlds oceans were slightly less basic then marine life as a whole will be slightly more likely to grow, survive, and be fertile.

### A2 warming wars

#### Warming won’t cause wars

Burns ‘9 (October 25, 2009 Study challenges the idea of global warming wars Former Vice President Al Gore John Burns

Al Gore got a Nobel peace prize, in part, for helping to prevent war by highlighting global warming and helping to slow it. In fact, climate change is not likely to cause conflict in the future, according to a study co-authored by Professor Richard Tol of the Economic and Social Research Institute (Esri) in Dublin. The conclusion challenges predictions made by the likes of Hillary Clinton, the American secretary of state, and John Reid, the former British defence secretary, who have forecast that future conflicts will be caused by rising temperatures. Earlier this year Clinton told her Senate confirmation hearing that climate change is a security threat. “At the extreme, it threatens our very existence,” she said. “But well before that point, it could well incite wars of an old kind over basic resources like food, water and arable land.” Tol’s study concludes that, if anything, it’s lower temperatures that cause conflicts, and even this link has weakened since the industrial revolution. “This implies that future global warming is not likely to lead to war between European countries,” says the study, published in the Climatic Change journal. The Esri research professor and a colleague, Sebastian Wagner, investigated the relationship between war in Europe and the continent’s climate between the years 1000 and 2000. They took information on conflicts from warscholar.com, and mapped them against temperature and rainfall records that have been kept throughout Europe since 1500. For earlier centuries, they used indirect information about climate derived from sources such as tree rings and the growth pattern of corals. The further back they went, the greater the correlation between war and weather. “This confirms the agricultural hypothesis,” the study says. “Agriculture became progressively less important over the period, because of economic development, and agriculture became less dependent on weather, because of improved cultivation methods and better fertilisers.” The closest link was found between 1300 and 1650, the most violent period of the millennium. “Europe gradually cooled and then warmed over the millennium, while conflict worsened and then waned,” they say. The finding that periods with lower temperatures in the pre-industrial era were accompanied by violent conflicts is similar to a conclusion reached about China by Professor David Zhang at the University of Hong Kong. He deduced that food scarcity was the reason why more wars were fought during colder periods. “We do not believe that people fight to keep warm,” Tol and Wagner say. “Rather, temperature and precipitation are proxy variables for agricultural production.” The authors note that while “scenarios of climate-changeinduced violence can be painted with abandon”, this is because there is “very little research to either support or refute such claims”. Previous studies suggest that resource scarcity is at most a contributory factor rather than a direct cause of war, the study says.. They admit it is possible to imagine a scenario in which climate change leads to battles. Reid predicted, in a speech in 2006, that rising temperatures would lead to declining natural resources, and inevitable clashes over arable land, clean water and energy. These apocalyptic warnings are based around prolonged droughts in areas such as the Horn of Africa, followed by mass migration in search of clean water. Tol and Wagner argue that this isn’t likely, however. “Drought is only a real problem for the poor; a scenario like this would happen only if warming and drying outpace development,” their study says. “If not, food imports or desalination may be the preferred options. Drought is also a slow-onset disaster. It may exhaust people before they move. Poor and exhausted people are unlikely to take up arms, and if they do, they are probably not very effective. The human suffering would be substantial nonetheless.” A more plausible scenario of climate change leading to war would be a rapid rise in sea level in a large delta in Asia or Africa. Such coastal plains are usually fertile, and well-populated. Rising sea levels could force people to move to higher ground, setting off conflicts inland. “In West Africa, for instance, the situation is already so tense that additional refugees are unlikely to do any good — the coasts of Cameroon, Gabon and Nigeria are particularly vulnerable to sea-level rise,” the study says. “However, these impacts will not be on today’s world. Sixty-six years ago, western Europe was at war. In 2075, south Asia and west Africa may be stable and prosperous.”

# 1nr

### Addon

#### AND Restraint high now- Syria proves Obama is acting within current legal limits

Corn, 13 -- Mother Jones' Washington Bureau chief

[David, "Obama, Syria, and Congress: Why Did He Go There?" Mother Jones, 9-6-13, www.motherjones.com/politics/2013/09/why-obama-sought-congressional-authorization-syria, accessed 9-21-13, mss]

Given all these swirling and complicated political dynamics, why did Obama grant Congress the right to hold him hostage? Some cynics have suggested that he might be seeking a way out of the corner he red-lined himself into. The polls show a strike would likely be highly unpopular among American voters, and experts of various ideological bents have raised serious questions about the efficacy and impact of a limited US military assault designed to deter Assad from the further use of chemical weapons. If Congress doesn't green light the endeavor, Obama can say he gave it a shot and retreat. Others have slammed Obama for not having the spine to go it alone, speculating he felt the need for political cover. But there's an alternative explanation: He's doing the right thing—or what he believes is the right thing. A former senior Obama adviser who still works with the White House says, "Look at this. Is there any other explanation, other than he thinks this is what he ought to do?" Meaning that Obama, the former law professor, is paying heed to the constitutional notion that the president shares war-making responsibility with Congress. Though this question has long been a source of unresolved conflict between presidents and legislators—and Obama did not seek congressional approval for the military action in Libya and has ordered drone strikes without official Capitol Hill backing—he does appear to be sympathetic to the idea that a president does not possess unhindered and unchecked war-making authority. During the 2008 campaign, he declared, "The president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."

### Kansas

#### The affirmative limits AUMF by constraining it with international limitations- the court ruling against Al-Bihani *increased* AUMF by saying AUMF power super-ceded international rules

Dehn 10

~Major John C. Dehn is an Assistant Professor in the Department of Law, US Military Academy, West Point, NY. He currently teaches International Law and Constitutional and Military Law. He is writing in his personal capacity and his views do not necessarily represent the views of the Department of Defense, the US Army, or the US Military Academy.~ The Relevance of International Law to (the Substantive and Procedural Rules of) Preventive Detention in Armed Conflict – A Rejoinder to Al-Bihanihttp://opiniojuris.org/2010/01/29/the-relevance-of-international-law-to-the-substantive-and-procedural-rules-of-preventive-detention-in-armed-conflict-E28093-a-rejoinder-to-al-bihani/

The post-Boumediene habeas litigation has raised concerns regarding whether the courts are equipped to determine the substantive and procedural rules governing preventive detention pursuant to the Authorization for the Use of Military Force of 18 September 2001 (AUMF). Before the January 5th D.C. Circuit panel opinion in Al-Bihani v. Obama, no court had questioned the relevance of international laws governing war to the issue. I believe that the courts are certainly competent to determine these issues so long as they observe applicable international law in construing the AUMF. The panel opinion’s suggestion that international law is irrelevant to the preventive detention inquiry ignores over 200 years of precedent in this area. Contrary to the general approach taken by the district courts, the al-Bihani panel concluded: [A]ll of [al-Bihani’s claims] rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. This premise is mistaken. There is no indication in the AUMF, the Detainee Treatment Act of 2005…, or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President’s war powers under the AUMF. Mem. Op. at 7. Concurring with the panel opinion, Judge Brown said: The Supreme Court in Boumediene and Hamdi charged this court and others with the unprecedented task of developing rules to review the propriety of military actions during a time of war, relying on common law tools. We are fortunate this case does not require us to demarcate the law’s full substantive and procedural dimensions. But as other more difficult cases arise, it is important to ask whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation. Concur. Op. at 1. Another D.C. district court judge is reported to have expressed similar concerns from the bench regarding the conduct of the courts and the need for congressional action: “It is unfortunate that the legislative branch of our government and the executive branch have not moved more strongly to provide uniform, clear rules and laws for handling these cases.” He noted that his fellow judges hearing detainee cases essentially created “different rules and procedures … different rules of evidence … [and] substantive law. Interestingly, this “unprecedented task” is not unprecedented at all. Early in U.S. history, federal courts determined the rights of individuals against the U.S. government in prize cases and faced precisely these problems. Prize cases involved the capture and condemnation of the ships and commercial cargo of enemy nationals (and also of U.S. nationals engaging in commerce with them) in congressionally designated general or limited (a.k.a. “partial”, or “quasi”) wars. While prize captures are no longer permitted by international law, its case law is instructive to preventive detention questions. Similar to Boumediene but much earlier in our nation’s history, the Supreme Court somewhat (but less) controversially found that the constitutional and statutory grants of admiralty jurisdiction conferred jurisdiction over prize cases on the federal courts. In The Amiable Nancy, 16 U.S. 546, 557-58 (1818) the Court stated that “[t]he jurisdiction of the district court to entertain this suit, by virtue of its general admiralty and maritime jurisdiction, and independent of the special provisions of the prize act of the 26th of June 1812…has been so repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt.” With frequent conflict between our fledgling country and both England and France, the federal courts became deeply involved in this then-significant aspect of armed conflict. Identifying the ships or property of enemy nationals on the high seas was often difficult. Ships would cloak their affiliation and throw log books and other evidence overboard when approached. Crew members were frequently unavailable to the courts or lacked specific knowledge. The federal courts were uncertain what substantive and procedural rules to use in this unique legal environment. Writing for the Court in The Schooner Adeline, 13 U.S. 244, 284 (1815)(emphasis added), Justice Story attempted to assist them by clarifying that: “No proceedings can be more unlike than those in the Courts of common law and in the admiralty. In prize causes, in an especial manner, the allegations, the proofs and the proceedings are, in general, modelled [sic] upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose. The Court of prize is emphatically a Court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country.” Just two years later, the Supreme Court added an appendix to a very cursory opinion in The London Packet, 15 U.S. 371 (1817) (appendix), which began: I[n] the Appendix to the first volume of these Reports… a summary sketch was attempted of the practice in prize causes in some of its most important particulars. It has been suggested that a more enlarged view of the principles and practice of prize courts might be useful, and in case of a future war, save much embarrassment to captors and claimants. With this view the following additional sketch is submitted to the learned reader. The Court then provided, in what might be viewed as in part an advisory opinion on the law and in part a promulgation of rules of procedure, to deliver a heavily referenced mini-treatise (32 Lexis© download pages!) of the internationalrules governing prize practice, including substantive rules, evidentiary standards and modes of proof. The panel opinion in al-Bihani both embraces and ignores this tradition. The above discussed and related precedent lends support to the Supreme Court’s belief, expressed in both Hamdi and Boumediene, that the procedures to be used in preventive detention habeas cases related to armed conflict need not be the same as would govern domestic habeas litigation. This view was heartily embraced by the al-Bihani panel. Mem. Op. at 14-25. With that said, the panel also ignores this history by suggesting that international laws regulating war are irrelevant to its inquiry into which individuals are subject to indefinite detention. The Supreme Court has consistently stated precisely the opposite of this view. In Talbot v. Seeman, 5 U.S. 1, 28 (1801), Chief Justice Marshall stated that “Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.” (emphasis added) Just three years later in Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804), when finding – against the determination of a U.S. naval commander – that a certain vessel and its cargo were not subject to condemnation as prize, Justice Marshall again clarified that “that an act of Congress [in this case, the authority to engage in limited hostilities/armed conflict against France] ought never to be construed to violate the law of nations if any other possible construction remains….” Nearly 100 years later in the prize case of The Paquete Habana, 175 U.S. 677, 700 (1900), the Supreme Court reaffirmed the notion that “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations….” (emphasis added) And in United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 318 (1936) the Supreme Court noted that “operations of the nation in …[foreign] territory must be governed by treaties, international understandings and compacts, and the principles of international law.” As I note in a draft article, now posted on SSRN (comments on this still very rough-in-spots draft are welcome), the Supreme Court has consistently “implied from …[congressional authorization to engage in general or limited armed conflict] a scope of authority consistent with the congressional act and any relevant international law. Indeed, the application of Charming Betsy to a congressional declaration of war or other AUMF necessarily yields this result.” My research reveals that this same approach also permeates Supreme Court precedent and U.S. practice withregard to laws of war on land both extraterritorially and, to a less certain extent, territorially. What is clear in this long line of precedent is that the Court does not always “make” domestic federal common law from international law, it applies or observes existing international law in appropriate cases in the absence of an applicable domestic law or other controlling public act of the government. In other words, as Paquete Habana, 175 U.S. at 700, attempted to make clear, international law “must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” Additionally, customary international laws governing war were not applied “by analogy” in non-international armed conflict. The U.S. view was that they also governed the U.S. Civil War and other non-international armed conflicts, a view gradually taking hold in the international community after the ICTY appellate decision in Prosecutor v. Tadic. In Winthrop’s treatise, though, there is a clear implication that U.S. practice also established a domestic common law of war in purely internal armed conflicts. No doubt, the panel opinion’s authors align with those who believe that Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) requires state law to govern cases in federal courts “[e]xcept in matters governed by the Federal Constitution or by acts of Congress” – taking this to mean that international law may never provide a rule of decision in a federal court unless implemented by the states or federal political branches. After extensive research into this understanding of Erie, it is clear that both pre- and post-Erie Supreme Court precedent contradicts such claims with regard to international laws governing armed conflict. (I will present this and its theoretical basis in forthcoming scholarship.) It is equally clear from above-cited cases and related precedent (as the al-Bihani opinion noted) that Congress may establish national policy that violates international law. If that happens, this federal law must be applied by U.S. courts. However, Charming Betsy-related precedent also requires the courts to determine either that Congress’s intent to do so is expressly stated, or that such intent can be clearly implied from enacting a law irreconcilable with applicable international law. See e.g.Dehn, Why Article 5 Status Determinations are not ‘Required’ at Guantánamo, 6 J. INT’L CRIM. JUST. 371 (2008)(discussing related precedent and its effect on the Military Commissions Act of 2006 when compared to Articles 4 & 5 of the Geneva Convention Relative to the Treatment of Prisoners of War). The al-Bihani opinion completely reverses this longstanding approach. Effectively overturning the Charming Betsy as if it were the fictitious Poseidon cruise ship, it requires a finding of congressional intent to comply with international laws governing armed conflict before the court will look to them when interpreting the AUMF and related statutes. One hopes an en banc rehearing will right the ship, sparing the district courts from being forced to reorient to this topsy-turvy legal environment and claw their way to daylight. Whether one views Charming Betsy as a canon of statutory construction or as a conflict of laws decision, international law is clearly relevant to interpreting the scope of preventive detention authority granted by the AUMF. It is relevant both to the general nature of war powers exercised and to any particular limits on those powers. It is unlikely that the Supreme Court would issue another mini-treatise appendix to an opinion outlining the rules, though the precedent for doing so exists. Thus, the courts must continue their difficult but not insurmountable task by determining and observing the content of relevant international law in preventive detention habeas proceedings. Congressional action is of only limited value here. More precisely, a “preventive detention act” would not relieve the courts of their Charming Betsy requirement to look to relevant international law when interpreting both the AUMF and any new law(s) expressly outlining executive detention authority in this or any other armed conflict.

### 2NC Breakdown [2/2] – Core

#### AND- We control uniqueness- there’s court deference in counter-terror now- because of congressional signals

Schuck, 13 -- Yale Law School Simeon E. Baldwin law professor

[Peter, "The Courts and National Security: A False Hope," Huffington Post, 7-3-13, www.huffingtonpost.com/peter-h-schuck/national-security\_b\_3543312.html, accessed 9-21-13, mss]

Our federal courts have played a central role in safeguarding our precious constitutional values from encroachments by government and other power centers. But history teaches that where Congress and the president have invoked plausible national security interests, **the courts have almost always deferred** to them, for better and for worse. In the infamous Dred Scott case, the Supreme Court upheld a system of slavery that the Buchanan administration argued was necessary to hold the nation together. During and after World War I, the Court upheld government efforts to suppress criticism; recall that the great defenses of free speech in those cases were written by the losing side. In World War II, the Court upheld the execrable Japanese internment programs. This pattern of deference to national security claims continues to today -- **especially where the president's actions appear grounded in congressional action**, as with FISA and military court prosecution of suspected terrorists. Deference continues even in detention cases, which are closer to traditional judicial functions than the NSA and targeting decisions. The fact that courts have little or no role to play in these latter efforts is no cause for dismay. Placing them at the center of such decisions would tend to tarnish them, as is now occurring with the FISA court. If they could significantly improve that process, the risk might be worth taking, but they cannot.

#### Court is deferential now because of congressional signals- the plan unravels that

Lederman, 12 -- Department of Justice’s Office of Legal Counsel Deputy Assistant Attorney General

[Martin, "War, Terror and the Federal Courts, Ten Years After 9/11," American University Law Review, Vol 61, 2012, aulawreview.org/pdfs/61/61-5/Conference.website.pdf, accessed 9-21-13, mss]

Marty Lederman: Correct. So this is something to be on the watch for, both what the Executive Branch says and what the courts say in these two areas. You brought up that comment by Justice Kennedy at the end of Boumediene. It reminded me of Justice O’Connor’s similar comment in her plurality opinion in Hamdi. I think the theme of those cases—O’Connor’s and Kennedy’s lesson, as it were, was something like the following. “To the extent you, the Executive Branch and Congress, are acting more or less in accord with the way things have been done in the past and in pursuance of international law norms and practices that the United States has historically engaged in, we will sit to review it but we’re going to be pretty deferential. But to the extent you start deviating and doing things that are unprecedented or seem to be out of step with the international law, in Justice O’Connor’s words, ‘this conclusion may unravel.’” She doesn’t explain whether she means “unravel” as a matter of statutory interpretation, which is nominally what she was doing in Hamdi, or some sort of constitutional limit on the political branches.

### Impact Wall

#### Causes global hotspots to go nuclear

Obayemi, 6 -- East Bay Law School professor

[Olumide, admitted to the Bars of Federal Republic of Nigeria and the State of California, Golden Gate University School of Law, "Article: Legal Standards Governing Pre-Emptive Strikes and Forcible Measures of Anticipatory Self-Defense Under the U.N. Charter and General International Law," 12 Ann. Surv. Int'l & Comp. L. 19, l/n, accessed 9-19-13, mss]

The United States must abide by the rigorous standards set out above that are meant to govern the use of preemptive strikes, because today's international system is characterized by a relative infrequency of interstate war. It has been noted that developing doctrines that lower the threshold for preemptive action could put that accomplishment at risk, and exacerbate regional crises already on the brink of open conflict. n100 This is important as O'Hanlon, Rice, and Steinberg have rightly noted: ...countries already on the brink of war, and leaning strongly towards war, might use the doctrine to justify an action they already wished to take, and the effect of the U.S. posture may make it harder for the international community in general, and the U.S. in particular, to counsel delay and diplomacy. Potential **examples abound**, ranging from Ethiopia and Eritrea, to China and Taiwan, to the Middle East. But perhaps the clearest case is the India-Pakistan crisis. n101 The world must be a safe place to live in. We cannot be ruled by bandits and rogue states. There must be law and order not only in the books but in enforcement as well. No nation is better suited to enforce international law than the United States. The Bush Doctrine will stand the test [\*42] of time and survive. Again, we submit that nothing more would protect the world and its citizens from **nuclear weapons**, terrorists and rogue states than an able and willing nation like the United States, acting as a policeman of the world within all legal boundaries. This is the essence of the preamble to the United Nations Charter.

#### A. India-Pakistan

Starr ’11 (Consequences of a Single Failure of Nuclear Deterrence by Steven Starr February 07, 2011 \* Associate member of the Nuclear Age Peace Foundation \* Senior Scientist for PSR)

Only a single failure of nuclear deterrence is required to start a nuclear war, and the consequences of such a failure would be profound. **Peer-reviewed studies predict** that **less than 1% of** the **nuclear weapons** now deployed in the arsenals of the Nuclear Weapon States, if detonated in urban areas, would immediately kill tens of millions of people, and cause long-term, **catastrophic disruptions** of the global **climate and** massive destruction ofEarth’sprotective **ozone** layer. The result would be a global nuclear famine that could kill up to one billion people. A full-scale war, fought with the strategic nuclear arsenals of the United States and Russia, would so utterly devastate Earth’s environment that most humans and other complex forms of life would not survive. Yet no Nuclear Weapon State has ever evaluated the environmental, ecological or agricultural consequences of the detonation of its nuclear arsenals in conflict. Military and political leaders in these nations thus remain dangerously unaware of the existential danger which their weapons present to the entire human race. Consequently, nuclear weapons remain as the cornerstone of the military arsenals in the Nuclear Weapon States, where nuclear deterrence guides political and military strategy. Those who actively support nuclear deterrence are trained to believe that deterrence cannot fail, so long as their doctrines are observed, and their weapons systems are maintained and continuously modernized. They insist that their nuclear forces will remain forever under their complete control, immune from cyberwarfare, sabotage, terrorism, human or technical error. They deny that the short 12-to-30 minute flight times of nuclear missiles would not leave a President enough time to make rational decisions following a tactical, electronic warning of nuclear attack. The U.S. and Russia continue to keep a total of 2000 strategic nuclear weapons at launch-ready status – ready to launch with only a few minutes warning. Yet both nations are remarkably unable to acknowledge that this high-alert status in any way increases the probability that these weapons will someday be used in conflict. How can strategic nuclear arsenals truly be “safe” from accidental or unauthorized use, when they can be launched literally at a moment’s notice? A cocked and loaded weapon is infinitely easier to fire than one which is unloaded and stored in a locked safe. The mere existence of immense nuclear arsenals, in whatever status they are maintained, makes possible their eventual use in a nuclear war. Our **best scientists** now **tell us** that **such a war would mean the end of human history**. We need to ask our leaders: Exactly what political or national goals could possibly justify risking a nuclear war that would likely cause the extinction of the human race? However, in order to pose this question, we must first make the fact known that existing nuclear arsenals – through their capacity to utterly devastate the Earth’s environment and ecosystems – threaten continued **human existence**. Otherwise, military and political leaders will continue to cling to their nuclear arsenals and will remain both unwilling and unable to discuss the real consequences of failure of deterrence. We can and must end the silence, and awaken the peoples of all nations to the realization that “nuclear war” means “global nuclear suicide”. A Single Failure of Nuclear Deterrence could lead to: \* A nuclear war **between India and Pakistan**; \* 50 Hiroshima-size (15 kiloton) weapons detonated in the mega-cities of both India and Pakistan (there are now 130-190 operational nuclear weapons which exist in the combined arsenals of these nations); \* The deaths of 20 to 50 million people as a result of the prompt effects of these nuclear detonations (blast, fire and radioactive fallout); \* Massive firestorms covering many hundreds of square miles/kilometers (created by nuclear detonations that produce temperatures hotter than those believed to exist at the center of the sun), that would engulf these cities and produce 6 to 7 million tons of thick, black smoke; \* About 5 million tons of smoke that would quickly rise above cloud level into the stratosphere, where strong winds would carry it around the Earth in 10 days; \* A stratospheric smoke layer surrounding the Earth, which would remain in place for 10 years; \* The dense smoke would heat the upper atmosphere, destroy Earth’s protective ozone layer, and block 7-10% of warming sunlight from reaching Earth’s surface; \* 25% to 40% of the protective ozone layer would be destroyed at the mid-latitudes, and 50-70% would be destroyed at northern and southern high latitudes; \* Ozone destruction would cause the average UV Index to increase to 16-22 in the U.S, Europe, Eurasia and China, with even higher readings towards the poles (readings of 11 or higher are classified as “extreme” by the U.S. EPA). It would take 7-8 minutes for a fair skinned person to receive a painful sunburn at mid-day; \* Loss of warming sunlight would quickly produce average surface temperatures in the Northern Hemisphere colder than any experienced in the last 1000 years; \* Hemispheric drops in temperature would be about twice as large and last ten times longer then those which followed the largest volcanic eruption in the last 500 years, Mt. Tambora in 1816. The following year, 1817, was called “The Year Without Summer”, which saw famine in Europe from massive crop failures; \* Growing seasons in the Northern Hemisphere would be significantly shortened. It would be too cold to grow wheat in most of Canada for at least several years; \* World grain stocks, which already are at historically low levels, would be completely depleted; grain exporting nations would likely cease exports in order to meet their own food needs; \* The one billion already hungry people, who currently depend upon grain imports, would likely starve to death in the years following this nuclear war; \* The total explosive power in these 100 Hiroshima-size weapons is less than 1% of the total explosive power contained in the currently operational and deployed U.S. and Russian nuclear forces.

#### B. China-Taiwan

Straits Times 2k (6-25, Lexis, No one gains in war over Taiwan)

THE DOOMSDAY SCENARIO THE high-intensity scenario postulates a cross-strait war escalating into a full-scale war between the US and China. If Washington were to conclude that splitting China would better serve its national interests, then a full-scale war becomes unavoidable. Conflict on such a scale would embroil other countries far and near and -- horror of horrors -- raise the possibility of a nuclear war. Beijing has already told the US and Japan privately that it considers any country providing bases and logistics support to any US forces attacking China as belligerent parties open to its retaliation. In the region, this means South Korea, Japan, the Philippines and, to a lesser extent, Singapore. If China were to retaliate, east Asia will be set on **fire**. And the conflagration may not end there as opportunistic powers elsewhere may try to overturn the existing world order. With the US distracted, Russia may seek to redefine Europe's political landscape. The balance of power in the Middle East may be similarly upset by the likes of Iraq. In south Asia, hostilities between India and Pakistan, each armed with its own nuclear arsenal, could enter a new and dangerous phase. Will a full-scale Sino-US war lead to a nuclear war? According to General Matthew Ridgeway, commander of the US Eighth Army which fought against the Chinese in the Korean War, the US had at the time thought of using nuclear weapons against China to save the US from military defeat. In his book The Korean War, a personal account of the military and political aspects of the conflict and its implications on future US foreign policy, Gen Ridgeway said that US was confronted with two choices in Korea -- truce or a broadened war, which could have led to the use of nuclear weapons. If the US had to resort to nuclear weaponry to defeat China long before the latter acquired a similar capability, there is little hope of winning a war against China 50 years later, short of using nuclear weapons. The US estimates that China possesses about 20 nuclear warheads that can destroy major American cities. Beijing also seems prepared to go for the nuclear option. A Chinese military officer disclosed recently that Beijing was considering a review of its "non first use" principle regarding nuclear weapons. Major-General Pan Zhangqiang, president of the military-funded Institute for Strategic Studies, told a gathering at the Woodrow Wilson International Centre for Scholars in Washington that although the government still abided by that principle, there were strong pressures from the military to drop it. He said military leaders considered the use of nuclear weapons mandatory if the country risked dismemberment as a result of foreign intervention. Gen Ridgeway said that should that come to pass, we would see the **destruction of civilisation**. There would be no victors in such a war. While the prospect of a nuclear Armaggedon over Taiwan might seem inconceivable, it cannot be ruled out entirely, for China puts sovereignty above everything else.

### Turns Case (Cred/Leadership)

#### Shift from AUMF to *jus ad bellum* turns case- collapses cred and US leadership

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[Beau, “Reauthorizing the ‘War on Terror’: The Legal and Policy Implications of the AUMF’s Coming Obsolescence,” Military Law Review, Vol 211, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2150874, accessed 9-19-13, mss]

Encouraging the proliferation of an expansive law of international self-defense would not only be harmful to U.S. national security and global stability, but it would also directly contravene the Obama Administration’s national security policy, sapping U.S. credibility. The Administration’s National Security Strategy emphasizes U.S. “moral leadership,” basing its approach to U.S. security in large part on “pursu[ing] a rules-based international system that can advance our own interests by serving mutual interests.”149 Defense Department General Counsel Jeh Johnson has argued that “[a]gainst an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge.”150 Cognizant of the risk of establishing unwise international legal norms, Johnson argued that the United States “must not make [legal authority] up to suit the moment.”151 The Obama Administration’s global counterterrorism strategy is to “adher[e] to a stricter interpretation of the rule of law as an essential part of the wider strategy” of “turning the page on the past [and rooting] counterterrorism efforts within a more durable, legal foundation.”152 Widely accepted legal arguments also facilitate cooperation from U.S. allies, especially from the United States’ European allies, who have been wary of expansive U.S. legal interpretations.153 Moreover, U.S. strategy vis-à-vis China focuses on binding that nation to international norms as it gains power in East Asia.154 The United States is an international “standard-bearer” that “sets norms that are mimicked by others,”155 and the Obama Administration acknowledges that its drone strikes act in a quasi-precedential fashion.156 Risking the **obsolescence of the AUMF would force** **the U**nited **S**tates **into an “aggressive interpretation” of international legal authority**,157 **not just discrediting its** **own rationale, but facilitating that rationale’s destabilizing adoption by nations around the world**. 158 United States efforts to entrench stabilizing global norms and oppose destabilizing international legal interpretations—a core tenet of U.S. foreign and national security policy159—would undoubtedly be hampered by continued reliance on self defense under the jus ad bellum to authorize military operations against international terrorists. Given the presumption that the United States’s armed conflict with these terrorists will continue in its current form for at least the near term, ongoing authorization at the congressional level is a far better choice than continued reliance on the jus ad bellum. Congress should reauthorize the use of force in a manner tailored to the global conflict the United States is fighting today. Otherwise, the United States will be forced to continue to rely on a statute anchored only to the continued presence of those responsible for 9/11, a group that was small in 2001 and, due to the continued successful targeting of Al Qaeda members, is rapidly approaching zero.

### NW

**Even a regional nuke war would spark massive climate change – new computer models and expert consensus**

**Choi ‘11** (Charles, is a science reporter freelancing for Scientific American, The New York Times, Science, Nature, The San Diego Union, February 22, “Small Nuclear War Could Reverse Global Warming for Years”, http://news.nationalgeographic.com/news/2011/02/110223-nuclear-war-winter-global-warming-environment-science-climate-change/)

Even a regional nuclear war could spark "unprecedented" global cooling and reduce rainfall for years, according to U.S. government computer models. Widespread famine and disease would likely follow, experts speculate. During the Cold War a nuclear exchange between superpowers—such as the one feared for years between the United States and the former Soviet Union—was predicted to cause a "nuclear winter." In that scenario hundreds of nuclear explosions spark huge fires, whose smoke, dust, and ash blot out the sun for weeks amid a backdrop of dangerous radiation levels. Much of humanity eventually dies of starvation and disease. Today, with the United States the only standing superpower, nuclear winter is little more than a nightmare. But nuclear war remains a very real threat—for instance, between developing-world nuclear powers, such as India and Pakistan. To see what climate effects such a regional nuclear conflict might have, scientists from NASA and other institutions modeled a war involving a hundred Hiroshima-level bombs, each packing the equivalent of 15,000 tons of TNT—just 0.03 percent of the world's current nuclear arsenal. (See a National Geographic magazine feature on weapons of mass destruction.) The researchers predicted the resulting fires would kick up roughly five million metric tons of black carbon into the upper part of the troposphere, the lowest layer of the Earth's atmosphere. In NASA climate models, this carbon then absorbed solar heat and, like a hot-air balloon, quickly lofted even higher, where the soot would take much longer to clear from the sky. Reversing Global Warming? The global cooling caused by these high carbon clouds wouldn't be as catastrophic as a superpower-versus-superpower nuclear winter, but "the effects would still be regarded as leading to unprecedented climate change," research physical scientist Luke Oman said during a press briefing Friday at a meeting of the American Association for the Advancement of Science in Washington, D.C. Earth is currently in a long-term warming trend. After a regional nuclear war, though, average global temperatures would drop by 2.25 degrees F (1.25 degrees C) for two to three years afterward, the models suggest. At the extreme, the tropics, Europe, Asia, and Alaska would cool by 5.4 to 7.2 degrees F (3 to 4 degrees C), according to the models. Parts of the Arctic and Antarctic would actually warm a bit, due to shifted wind and ocean-circulation patterns, the researchers said. After ten years, average global temperatures would still be 0.9 degree F (0.5 degree C) lower than before the nuclear war, the models predict. Years Without Summer For a time Earth would likely be a colder, hungrier planet. "Our results suggest that agriculture could be severely impacted, especially in areas that are susceptible to late-spring and early-fall frosts," said Oman, of NASA's Goddard Space Flight Center in Greenbelt, Maryland. "Examples similar to the crop failures and famines experienced following the Mount Tambora eruption in 1815 could be widespread and last several years," he added. That Indonesian volcano ushered in "the year without summer," a time of famines and unrest. (See pictures of the Mount Tambora eruption.) All these changes would also alter circulation patterns in the tropical atmosphere, reducing precipitation by 10 percent globally for one to four years, the scientists said. Even after seven years, global average precipitation would be 5 percent lower than it was before the conflict, according to the model. In addition, researcher Michael Mills, of the National Center for Atmospheric Research in Colorado, found large decreases in the protective ozone layer, leading to much more ultraviolet radiation reaching Earth's surface and harming the environment and people. "The main message from our work," NASA's Oman said, "would be that even a regional nuclear conflict would have global consequences."

**Nuclear war causes extinction- new studies**

**Starr ‘9** (Catastrophic Climatic Consequences of Nuclear Conflict, October 2009, by Steven Starr Steven Starr is a Senior Scientist with Physicians for Social Responsibility, and the Director of the Clinical Laboratory Science Program at the University of Missouri. He has been published in the Bulletin of the Atomic Scientists and the STAR (Strategic Arms Reduction) website of the Moscow Institute of Physics and Technology.

Despite a two-thirds reduction in global nuclear arsenals since 1986, new scientific research makes it clear that the environmental consequences of nuclear war can still end human history. A series of peer-reviewed studies, performed at several U.S. universities, predict the detonation of even a tiny fraction of the global nuclear arsenal within large urban centers will cause catastrophic disruptions of the global climate and massive destruction of the protective stratospheric ozone layer.