Index

Index 1

1NC 2

Solvency – Legislate 3

Solvency- Military 4

Solvency – Military 5

Solvency – War on Terror 6

Solvency – War on Terror 7

Solvency – International Law 8

Solvency – PMCs 9

\*\*\* International Law \*\*\* 10

Iraq Link 10

Iraq Link 11

Iraq Link 12

Iraq Link 13

Iraq Link 14

Iraq Link 15

Afghanistan Link 16

Afghanistan Link 17

Japan Link 18

Military Bases Link 19

CP key to I-Law 20

AT: Can’t Solve 21

Courts cite international law now 22

Now is the key time 23

I.Law Citation Good – Conflict 25

CIL Good – War 26

CIL Good – Bioweapons 27

CIL Good – Bio/Chem Weapons 28

AT: Saddam Used’m 29

CIL Good – ASATs 30

Satellites Good – Econ 31

Satellites Good – Readiness/NW/Terrorism 32

Satellites – ONE attack snowballs 33

AT: Other treaties solve ASATs 34

CIL Good – Civilian Casualties 35

CIL Good – Human Rights 36

HR key to Hegemony 37

CIL Good – Environment 38

CIL Solves 39

Courts don’t link to Politics 40

Courts don’t link to Politics 41

Courts don’t link to Politics 42

AT: Lower Courts won’t enforce 43

AT: Legitimacy DA 44

AT: Legitimacy DA 45

AT: Activism Turn – Inevitable 46

Activist/Controversial Now 47

Activist/Controversial Now 48

Activist/Controversial Now 49

Activist/Controversial Now 50

Activism Good – Rule of Law 51

Activism Good – Democracy 52

AT: Judicial Capital DA 53

Courts Defers Now 54

Court Defers Now 55

Deference Bad – Extinction 56

Deference Bad – Separation of Powers 57

Deference Bad – Democracy 58

Deference Bad – Rights 59

Deference Bad – Torture 60

Deference Bad – AT: Readiness 61

Deference bad – AT: Readiness 62

Deference Bad – AT: Readiness 63

Deference Bad – AT: Terrorism 64

Deference Bad - CMR 65

Deference Bad – CMR 66

\*\*\* AFF \*\*\* 67

Courts don’t solve – lower courts 67

Courts don’t solve foreign policy 68

Courts link to politics 69

Only Congress/Prez Solve Foreign Policy 71

Only Congress/Prez Solve Foreign Policy 72

Prez Solves Foreign Policy 73

Prez Solves Foreign Policy 74

Prez Solves Foreign Policy 75

Prez Solves Foreign Policy 76

Prez Solves - Middle East 77

Prez Solves – Military 78

Prez Solves – Arms Sales 79

Deference Good – Threat Response 80

Deference Good – Readiness 81

Deference Good – Readiness 82

Deference Good – Readiness 83

Deference Good – Readiness 84

Deference Good – Terrorism 85

Deference Good – Separation of Powers 86

Deference Good – Pres Powers 87

Deference Good – AT: CMR 88

Separation of Powers Turn 89

Separation of Powers ext. 90

Activism/Legitimacy Turn 91

Activism/Legitimacy Links 92

CIL Can’t Solve – Vague 93

CIL Can’t solve – Vague 94

CIL Can’t Solve – No enforcement 95

CIL Can’t Solve – No Spillover 96

CIL Bad – AT: Environment 97

CIL Bad – AT: Satellites (Koplow) 98

CIL Bad - Undemocratic 99

CIL Bad - Undemocratic 100

1NC

Text: The United States Supreme Court should

Observation 1: Competes through net benefits

Observation 2: Solvency

The Court can rule on issues of military policy in the context of international law – Hamdan proves

Totenberg 6 (Nina 6.29.6 NPR

http://www.npr.org/templates/story/story.php?storyId=5520809)

In a major rebuke to the Bush administration, the U.S. Supreme Court ruled Thursday that the president overstepped his power in ordering war-crimes trials for Guantanamo detainees without specific authority from Congress. By a 5-to-3 vote, the court said that the procedures set up by the president violate both the Uniform Code of Military Justice and the laws of war set out in the Geneva Conventions. In the immediate aftermath of the Sept. 11 attacks, President Bush set up procedures for war-crimes tribunals that were opposed internally by military lawyers and externally by civil libertarians.Stevens said nothing in the court's precedents, nor in the post-Sept. 11 actions of Congress, is a sweeping authorization for the president to establish special military commissions whenever he deems necessary. The president, Stevens wrote, is required both by the Uniform Code of Military Justice and the Geneva Conventions to use regularly constituted military courts, not special courts with special rules, to try accused war criminals. The court said that military commissions have historically been conducted within the confines of the rules laid down under the Uniform Code of Military Justice — the UCMJ. The glaring exception to this rule, the court noted, was the trial of Japanese General Tomoyuki Yamashita after World War II for failing to control his rampaging troops. Partly because of the subsequent criticism of that trial, the court said, the UCMJ was expanded to cover those who, like Yamashita, are accused of war crimes. Thus, war crimes trials must be conducted under the same rules as courts martial, with some flexibility permitted to meet exigent circumstances. In this case, said the court, nothing in the record demonstrates that it would be impracticable to apply court martial rules. That lack of necessity showing is particularly disturbing here, the court said, in light of the Bush rules allowing a prisoner to be convicted on the basis of evidence he has neither seen nor heard — evidence that may be the result of torture. For the Bush administration, Thursday's ruling was a stunning setback. "The decision is extraordinary in not deferring during wartime to the president's interpretation of a treaty," said Jack Goldsmith, who served as an assistant attorney general in the Bush administration before becoming a professor at Harvard Law school. "There's never been a decision like this in our history." Andrew McBride, who filed a brief in the Supreme Court on behalf of former Bush and Reagan attorneys general, says the decision takes the wind out of President Bush's broad assertion of executive power and limits his flexibility. "I think we will see less people tried in the military tribunals," McBride says, "and more people sent to their countries of origin or dealt with in other ways, as the president attempts to empty Gitmo over the next two years." Professor Goldsmith notes that under the court's decision, detainees can still be held indefinitely, without any trial. "The perverse result of the decision is that the administration can continue to detain people on Guantanamo Bay merely by showing that they may be a member of al-Qaida," Goldsmith said. "And [it can] detain them until the end of the hostilities, which could go on for a very long time, if not forever." But as retired Col. Scott Silliman observes, the ruling will give an additional boost to those detainees who have gone to federal court claiming that they are innocents being wrongly held. Silliman is the executive director of the Center on Law, Ethics and National Security at Duke University. Silliman said: "This ruling today tells the president, 'If you are going to fight the war on terrorism and prosecute those you capture, you’ve got to comply not only with the law of the land, as Congress establishes it, but also international law — the law of war — which includes the Geneva Conventions." Many in the military applauded the Hamdan ruling — among them, Brig. Gen. James Cullen, who formerly served as chief judge of the U.S. Army Court of Criminal Appeals. He said the tribunal procedures set up by the Bush administration "smack of a kangaroo court." "A kangaroo court will not meet the standards to which we are bound under the Geneva Conventions," Cullen said. "If our soldiers are captured under those circumstances, we don’t want them subjected to kangaroo courts." As for President Bush, he was circumspect in his reaction to the ruling, saying the administration would comply. "We will conform to the Supreme Court," the president said. "We'll analyze the decision. To the extent that the Congress has given any latitude to develop a way forward using military tribunals, we will work with them."

Solvency – Legislate

Counterplan solves as well as the aff-court can mandate public policy changes.

**Casper 76** (Jonathon, Associate Professor of Political Science at Stanford University, “The Supreme Court and National Policy Making”, The American Political Science Review, March 1976, Vol. 71 No. 1, JSTOR)

The Court is frequently called upon to interpret the meaning of federal statutes, and in the course of doing so, important policy choices must be made. If we adopt for the moment the notion that influence in policy making is most accurately judged in situations in which various participants conflict with one another, it is clear that the interpretations that are made by the Court even when they are based on "legislative intent" are often quite different from those that members of Congress and the President had in mind when the legislation was passed. The Court's doctrine that it will, if at all possible, interpret a statute in such a way as to "save" it from being de- clared unconstitutional means that the Court will often significantly twist and change the ostensible provisions of a statute. Thus, in interpreting statutes the Court often makes important policy choices, and these choices are at least arguably quite contrary to the preferences of the law-mak- ing majority that passed the legislation. The more influence the Court exercises by virtue of statutory construction, the less influence it will appear to have in terms of Dahl's coding rules. When the Court "saves" a law by interpreting it rather than declaring it unconstitutional, its contribution to the course of public policy is excluded from con- sideration under Dahl's rules.

Solvency- Military

Courts can rule on military policy-DADT proves

Mears 2009, CNN Supreme Court Producer, 6/8

(Bill, “High court rejects lawsuit over gays in military law”, CNN, <http://www.cnn.com/2009/POLITICS/06/08/scotus.gays.military/>, 7/3/09, DKL)

A former Army captain who was dismissed under a federal law dealing with gays and lesbians in the military lost his appeal Monday at the U.S. Supreme Court. The U.S. Supreme Court refused to intervene in the challenge to the "don't ask/don't tell" law. James Pietrangelo and 11 other veterans had sued the government over the "don't ask/ don't tell" law passed in 1993. Pietrangelo was the only one who appealed to the high court, but the justices without comment refused to intervene. The provision forbids those in the military from openly acknowledging or revealing their homosexuality, and prevents the government from asking individual soldiers and sailors about their sexual orientation. The Obama administration had asked the high court not to take the case, and White House officials had said they would not object to homosexuals being kicked out of the armed services.

The Supreme Court has the power to halt and affect military policies, GITMO proves

Welsh 6(Steven, Legal Scholar, July 2006, Center for defense information, [http://www.cdi.org/program/document.cfm?DocumentID= 3579&from\_page=../index.cfm](http://www.cdi.org/program/document.cfm?DocumentID=%203579&from_page=../index.cfm))JRG

The U.S. Supreme Court in a 5-3 decision in Hamdan v. Rumsfeld has halted the proceedings of U.S. military commissions formed to prosecute Guantanamo Bay (GTMO) detainees for alleged violations of the laws of war. President George W. Bush had authorized the secretary of defense to create military commissions in a Nov. 13, 2001, military order relating to post-Sept. 11, 2001, counterterrorism detentions. Hamdan was filed as a habeas corpus action to require the government to justify GTMO detentions, while also challenging the nature of the military commissions. The lead plaintiff had been Osama bin Laden’s driver and bodyguard, captured by third parties during hostilities in Afghanistan and turned over to American forces. After lengthy delays, military commission charges had been brought against bin Laden’s driver for conspiracy.

Supreme Court rules that president cannot oppose the international law of the Geneva Convention

Amadi 9 (1.26.9 Lawyer, consultant, Africa News)

The bone of contention on Guantanamo Bay is the insistence of Bush administration that prisoners in the detention center are not combatant soldiers so they are not deserving of the protection of article 4 of the Geneva Convention. The administration categorises the prisoners are illegal combatants; terrorists who can be prosecuted in military commissions and without the rights to a fair trial. One of the detainees, Salim Ahmed Hamdan from Yemen, has challenged the legality of trial of Guantanamo inmates. In his case, Justice James Robertson of the US District Court of DC held that the Military Commission is not a competent tribunal to make the finding whether the detainees were prisoners of war under Article 5 of the Geneva Convention. The Court of Appeal overruled the District Court and held that the Military Commission is competent to determine whether the detainees are prisoners of war. On further appeal, the US Supreme Court held that Bush had no powers under the US Constitution and the Geneva Convention to set up the Military Commission. The court side-stepped the issue whether Gitmo detainees are prisoners of war.

Solvency – Military

In the realm of military law, the courts can and do override the military’s and executive branch’s decisions, such was the case with Guantanamo

Welsh 04 (Steven, Jun 30, Research Analyst at Center for Defense Inst., http://www.cdi.org/news/law/gtmo-sct-decision.cfm)

With a decision notably brief for the mountain of argument leading up to it, the U.S. Supreme Court in Rasul v. Bush held on June 28, 2004, that foreign nationals imprisoned without charge at the Guantanamo Bay interrogation camps were entitled to bring legal action challenging their captivity in U.S. federal civilian courts.

Justice John Paul Stephens' majority opinion was joined by Justices Sandra Day O'Conner, David Souter, Ruth Bader-Ginsburg, and Stephen Breyer.  Justice Anthony Kennedy joined in the decision but disagreed sufficiently with the majority's analysis to issue a separate concurring opinion.  Justice Antonin Scalia authored a dissenting opinion, joined by Chief Justice William Rehnquist and Justice Clarence Thomas.

The decision addressed the question of "whether United States courts lacked jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." *Rasul v. Bush*, No. 03-334, *al Odah v. United States*, 542 U.S. \_\_ (2004)(slip. op., at 1)

The court reversed the U.S. District Court for the District of Columbia and the Court of Appeals for the D.C. Circuit, which had held that the Supreme Court's 1950 decision in Johnson v. Eisentrager barred Guantanamo detainees from bringing actions challenging their detentions in U.S. courts because they were foreign nationals outside U.S. sovereign territory. *Eisentrager* involved German nationals who, in the closing days of World War II, violated the terms of Germany's surrender by continuing to wage war against the allies in the Pacific theater.  The *Eisentrager* plaintiffs had been tried and convicted by a military commission (with some of their alleged confederates acquitted), and imprisoned at a U.S. military base in Germany. *Eisentrager* was an arguably tangled opinion in which the Supreme Court purportedly declined to recognize petitioners' right for habeas corpus review, only in fact to review the facts of their case. It set out elements detailing why the *Eisentrager* petitioners were not entitled to further threshold procedural steps such as habeas corpus, finding among other things that they were enemy aliens duly charged and convicted for violating the laws of war by a lawfully constituted tribunal.

The U.S. Supreme Court gets to rule on military policies

Greenhouse 5( Linda, Policy Analyst and NY Times Staff Writer, November 2005, NY TIMES, http://www.nytimes .com/2005/11/07/politics/07cnd-scotus.html)JRG

WASHINGTON, Nov. 7 - The Supreme Court announced today that it would decide the validity of the military commissions that President Bush wants to use to bring detainees charged with terrorist offenses to trial. The case, to be argued in March, places the court back at the center of the national debate over the limits of presidential authority in conducting the war on terror. Last year, the Supreme Court rejected the administration's position that the federal courts have no jurisdiction over people held as enemy combatants at the United States naval base at Guantánamo Bay, Cuba.

Solvency – War on Terror

The Supreme Court can affect the war on terror significantly

Bradley 8(Curtis, War On Terror Expert, July-August 2008, Foreign Affairs, <http://www.foreignaffairs.com/articles/64470/curtis-a-bradley/terror-and-the-law>)

The Supreme Court has already issued three significant decisions concerning the war on terror, and by the time this review is published, it is expected to have issued a fourth. Yet many fundamental legal questions remain unanswered. Who qualifies as an "enemy combatant" in this conflict? How must this classification be made? How long can such combatants be detained by the U.S. military without trial? These issues remain unresolved partly because the war on terror has been regulated not by Congress but by interactions between the executive branch and the courts, and the courts have tended to decide issues in an ad hoc and case-specific manner

The Supreme Court can interfere with the war on terror by ruling on policies

Mahler 8(Jonathan, NY Times Policy Analyst ,June 2008, NY Times, [http://www.nytimes.com/2 008/06/15/weekinreview/15mahler.html](http://www.nytimes.com/2%20008/06/15/weekinreview/15mahler.html))JRG

And yet, long before the Bush administration’s recent string of defeats, at least one justice warned of the dangers of endorsing war policies that might, in retrospect, look draconian. A military order, however unconstitutional, is not likely to outlive a military emergency, but a Supreme Court decision will stand for generations to come. Justice Robert Jackson, who would later be chief prosecutor at the Nuremberg trials of Nazi war criminals, spoke to this danger in a dissent in the 1944 Korematsu case, the Supreme Court ruling upholding the detention of Japanese-Americans in internment camps during World War II. Justice Jackson wrote that validating such an action was like leaving behind a “loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” In keeping with the court’s general reluctance to interfere with the president’s war-making powers, its rulings in the war on terror began relatively modestly. Hamdi v. Rumsfeld, in 2004, pertained only to United States citizens detained as enemy combatants on American soil; the court held that they must get a “meaningful opportunity” to challenge the factual basis for their detention.

Supreme court can rule to uphold international law even in times of war

Buncome 6 (Andrew 6.30.6 Washington Correspondent, The Independent Pg. 22)

The future of the notorious prison camp at Guantanamo Bay was in genuine doubt last night after the US Supreme Court delivered a striking blow to the administration of George Bush. and undermined his way of dealing with prisoners from the so-called war on terror. In a powerful rejection of the administration's efforts to place its actions outside the normal judicial process and the reach of international law, the court declared that the President's use of military tribunals to try prisoners was unconstitutional because they did not satisfy the requirements of the Geneva Conventions. Of equal importance, the court also opened the way for each of the 450 prisoners held at the prison-and presumably at other US bases - to have their day in court and to challenge America's basis for holding them. "This is a great victory," said Clive Stafford Smith, a British lawyer who represents 36 of the prisoners. "It means the end of Guantanamo, effectively. It means that anyone held around the world has the right to justice. It's a great day for the rule of law in the US." Three Britons held at Guantanamo for two years before being released without charge, Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, said in a statement: "We are ecstatic at today's outcome. This is another step in our collective efforts to see that those we left behind are treated fairly under international law." Last night the immediate impact of the ruling on Guantanamo itself was unclear. Mr Bush said he would examine whether the military commissions could be reconstituted, adding: "The American people need to know that the ruling, as I understand it, won't cause killers to be put out on the street. I'm not going to jeopardise the safety of the American people' I will protect the people and at the same time conform with the findings of the Supreme Court." But legal experts said both the court's views on the commissions and the implications for prisoners were clear. Joe Margulies, a lecturer at the University of Chicago law school, said the Government would have to defend in court its holding of detainees. He said: "The Government has never done that - if it does not do that it means it will have to let them go." Others said that by maintaining that the president's actions are subject to limits, even at a time of war, the court also challenged the government's justification for such actions as secret wiretapping. Michael Ratner of the Centre for Constitutional Rights, said: "What this says to the administration is that you can no longer decide arbitrarily what you want to do with people."

Solvency – War on Terror

Supreme Court is key to stop the government from abusing military tribunals

ACLU 6 (Jun 26, American Civil Liberties Union, http://www.aclu.org/human-rights\_national-security/supreme-court-says-guantanamo-bay-military-commissions-are-unconstitu)

In a sharp rebuke to the Bush administration, the United States Supreme Court today ruled 5-3 that the military commissions system established by President Bush to try detainees at Guantánamo Bay is unfair and illegal. The American Civil Liberties Union, which filed a friend-of-the-court brief in the case, applauded the decision.

“Today’s decision is a victory for the rule of law in the United States,” said ACLU Executive Director Anthony D. Romero. “The Supreme Court has made clear that the executive branch does not have a blank check in the war on terror and may not run roughshod over the nation’s legal system. This decision moves us one step closer to stopping the abuse of power that has become the hallmark of this White House. Now that the Supreme Court has issued its decision, the president should make good on his promise and close Guantánamo.”   The military commission rules do not guarantee an independent trial court, do not provide for impartial appellate review, and do not prohibit the use of coerced testimony despite extensive evidence that coercive interrogation techniques have been used at Guantánamo Bay and elsewhere.

“The government’s misuse of military tribunals is consistent with a larger pattern of abuse of power,” said Steven R. Shapiro, the ACLU’s national legal director.  “This is an Administration that prefers to act outside the law and without judicial scrutiny.  The Court properly rejected that anti-democratic view. Our own soldiers benefit as much as the Guantánamo detainees by the Court’s insistence that the administration comply with the Geneva Conventions and the rule of law."

The Supreme Court ruled on military commissions

Elsea, Garcia, and Nicola 8(Jennifer, Michael, and Thomas, Legislative Attorneys, February 2008, FAS, <http://www.fas.org/sgp/crs/natsec/RL33837.pdf>) JRG

In 2004, the Supreme Court avoided deciding whether Congress could pass a statute to prohibit or regulate the detention and interrogation of captured suspects, which the Administration had asserted would unconstitutionally interfere with core commander-in-chief powers, by finding that Congress had implicitly authorized the detention of enemy combatants when it authorized the use of force in the aftermath of the September 11, 2001, terrorist attacks.69 However, the Supreme Court in 2006 invalidated President Bush’s military order authorizing trials of aliens accused of terrorist offenses by military commission, finding that the regulations promulgated to implement the order did not comply with relevant statutes.70 The Court did not expressly pass on the constitutionality of any statute or discuss possible congressional incursion into areas of exclusive presidential authority, which was seen by many as implicitly confirming Congress’s authority to legislate in such a way as to limit the power of the Commander in Chief.

Solvency – International Law

The Supreme Court can force the President to follow International Laws

Totenberg 6 (Nina 6.29.6 NPR

http://www.npr.org/templates/story/story.php?storyId=5520809)

In a major rebuke to the Bush administration, the U.S. Supreme Court ruled Thursday that the president overstepped his power in ordering war-crimes trials for Guantanamo detainees without specific authority from Congress. By a 5-to-3 vote, the court said that the procedures set up by the president violate both the Uniform Code of Military Justice and the laws of war set out in the Geneva Conventions. In the immediate aftermath of the Sept. 11 attacks, President Bush set up procedures for war-crimes tribunals that were opposed internally by military lawyers and externally by civil libertarians.Stevens said nothing in the court's precedents, nor in the post-Sept. 11 actions of Congress, is a sweeping authorization for the president to establish special military commissions whenever he deems necessary. The president, Stevens wrote, is required both by the Uniform Code of Military Justice and the Geneva Conventions to use regularly constituted military courts, not special courts with special rules, to try accused war criminals. The court said that military commissions have historically been conducted within the confines of the rules laid down under the Uniform Code of Military Justice — the UCMJ. The glaring exception to this rule, the court noted, was the trial of Japanese General Tomoyuki Yamashita after World War II for failing to control his rampaging troops. Partly because of the subsequent criticism of that trial, the court said, the UCMJ was expanded to cover those who, like Yamashita, are accused of war crimes. Thus, war crimes trials must be conducted under the same rules as courts martial, with some flexibility permitted to meet exigent circumstances. In this case, said the court, nothing in the record demonstrates that it would be impracticable to apply court martial rules. That lack of necessity showing is particularly disturbing here, the court said, in light of the Bush rules allowing a prisoner to be convicted on the basis of evidence he has neither seen nor heard — evidence that may be the result of torture. For the Bush administration, Thursday's ruling was a stunning setback. "The decision is extraordinary in not deferring during wartime to the president's interpretation of a treaty," said Jack Goldsmith, who served as an assistant attorney general in the Bush administration before becoming a professor at Harvard Law school. "There's never been a decision like this in our history." Andrew McBride, who filed a brief in the Supreme Court on behalf of former Bush and Reagan attorneys general, says the decision takes the wind out of President Bush's broad assertion of executive power and limits his flexibility. "I think we will see less people tried in the military tribunals," McBride says, "and more people sent to their countries of origin or dealt with in other ways, as the president attempts to empty Gitmo over the next two years." Professor Goldsmith notes that under the court's decision, detainees can still be held indefinitely, without any trial. "The perverse result of the decision is that the administration can continue to detain people on Guantanamo Bay merely by showing that they may be a member of al-Qaida," Goldsmith said. "And [it can] detain them until the end of the hostilities, which could go on for a very long time, if not forever." But as retired Col. Scott Silliman observes, the ruling will give an additional boost to those detainees who have gone to federal court claiming that they are innocents being wrongly held. Silliman is the executive director of the Center on Law, Ethics and National Security at Duke University. Silliman said: "This ruling today tells the president, 'If you are going to fight the war on terrorism and prosecute those you capture, you’ve got to comply not only with the law of the land, as Congress establishes it, but also international law — the law of war — which includes the Geneva Conventions." Many in the military applauded the Hamdan ruling — among them, Brig. Gen. James Cullen, who formerly served as chief judge of the U.S. Army Court of Criminal Appeals. He said the tribunal procedures set up by the Bush administration "smack of a kangaroo court." "A kangaroo court will not meet the standards to which we are bound under the Geneva Conventions," Cullen said. "If our soldiers are captured under those circumstances, we don’t want them subjected to kangaroo courts." As for President Bush, he was circumspect in his reaction to the ruling, saying the administration would comply. "We will conform to the Supreme Court," the president said. "We'll analyze the decision. To the extent that the Congress has given any latitude to develop a way forward using military tribunals, we will work with them." Some contend, however, that there is no need for new laws. Georgetown law professor represented Hamdan in the Supreme Court. "Before embarking on some other five-year reckless experiment — which is going to fail — we should try our court-martial system," Katyal said. "It's already on the books and ready to go." Just what the congressional appetite is for writing a new law is undetermined. Until now, the Congress has studiously avoided writing any sort of a new code for war-crimes trials. Senate Republican Leader Bill Frist said Thursday that he would introduce legislation authorizing President Bush to create military commissions such as the ones that were struck down. And as Berkeley Law Professor John Yoo, who served in the Bush administration, observes, the issue has political potential. "It seems clear the administration is going to make being aggressive on the war on terrorism a campaign issue for this fall," Yoo said. "I wouldn't be surprised if they were to float a bill reversing this decision right before the elections." Today's Supreme Court decision was written by the court's only military veteran, Justice John Paul Stevens. It was joined by Justices Ruth Bader Ginsburg, David Souter, Stephen Breyer and Anthony Kennedy. Dissenting were Justices Antonin Scalia, Clarence Thomas and Samuel Alito. Scalia and Thomas each delivered impassioned dissents from the bench, castigating the court majority for substituting its judgment for the president's. Chief Justice John Roberts did not participate in the decision because, as a lower court judge, he joined a decision upholding the military commission trials. That decision was reversed by Thursday's ruling.

**Solvency – PMCs**

Supreme court is key to protecting human rights from private contractors

Soder 10 (Brenda, May 28, Media Relations Dir of Human Rights First, http://www.humanrightsfirst.org/media/usls/2010/alert/617/index.htm)

Human Rights First today urged the Supreme Court to hear the case against CACI International and L-3 Services (formerly Titan Corporation), companies whose employees are alleged to have tortured detainees at Abu Ghraib. The group notes that the Supreme Court should grant cert in the case to ensure that private military contractors are held accountable for crimes and cannot sidestep domestic and international laws designed to prevent such abuses.

"The torture and abuse visited on detainees at Abu Ghraib was a violation of fundamental human rights and humanitarian law principles," noted the group in its Amici brief. "The decision by the D.C. Circuit to immunize the tortious conduct of private military contractors on the ground that such contractors were 'integrated into combatant activities over which the military retains command authority' is incompatible with principles of international law to which the United States has subscribed."

The group notes that the decision is incompatible with international law in two ways. First, it leaves the detainees without a civil remedy for the violations of their human rights. Second, it ignores that individuals taken and detained in the course of combat are owed a duty of care under the Geneva Conventions and that civil liability arises from the violation of that duty. Human Rights First notes that the D.C. Circuit ruling in this case cannot be reconciled with those fundamental principles.

The brief filed today notes that, unlike some military personnel involved in the Abu Ghraib abuses, the private military contractors who participated in torturing detainees have not been criminally prosecuted. The organization notes, "Immunizing government contractors for the acts alleged would create the appearance that the United States condones torture by proxy or is even willing to invite abuses by outsourcing certain military functions to private actors for whose conduct the government need not answer. The problem is not a small one, as there are more contractors than soldiers in Iraq and Afghanistan."

The case at hand stems from a federal lawsuit filed by more than 250 former Iraqi detainees held in various Iraqi detention facilities, including Abu Ghraib. The prisoners allege that private contractors from CACI and L-3 Services tortured and seriously abused them during interrogations. In 2007, U.S. District Court Judge James Robertson denied CACI's motion for summary judgment, but ordered a jury trial in the case. CACI appealed that ruling to the Court of Appeals for the District of Columbia. In a separate ruling, Robertson granted L-3 Services' motion for summary judgment and dismissed the case against the company. Two years later, the Court of Appeals for the District of Columbia ruled 2-1 to uphold the dismissal of all claims against L-3 Services and, reversing the lower court's decision, dismissed all charges against CACI. The defendants are now seeking relief from the Supreme Court.

Human Rights First's brief notes that failure to hold private military contractors accountable for crimes is out of step with the federal government's interest in compliance with international norms of civilized behavior, whether expressed in statutes, treaties or in customary international law. The organization warns that such blatant disregard for these standards could place Americans captured overseas at risk.

In urging the Justices to take the case and conclude that the private military contractors should be held accountable for their crimes, the brief concludes, "The appearance that the government's contractors are being given a free pass for serious acts of brutality can only deprive the United States of any moral suasion in its ongoing struggle to achieve greater worldwide observance of these norms. It will also place into peril American citizens who may become captives of a foreign power and for whom the United States will demand treatment no worse than it affords to others."

\*\*\* International Law \*\*\*

Iraq Link

Iraq war violated international law

**Jayne and Kramer 04** (Edward, Education Ph.D., buffalo, published in College English, Genre, Style, Literature and Psychology, Minnesota Review, The Centennial Review, Change, American Studies, Ronald director of criminal justice, PhD law Yale, peace and collaborative network http://www.internationalpeaceandconflict.org/us-attack-on-iraq-in-2004

**The invasion of a single nation by another nation or group of nations is only legal under the UN Charter if such an invasion has been sanctioned by the vote of the UN Security Council. This did not happen in the case of the recent Iraq invasion**, since the United States and Great Britain, led by the U.S. Secretary of State Colin Powell, withdrew their resolution to stage such an invasion from consideration by the UN Security Council on March 17, 2002, when they realized that the majority of its members would vote against it. Instead, **Powell and others insisted that this approval was unnecessary, since UN Resolutions 687 and 1441 (**the latter of 8 November 2002) had already granted this right. **However, this is simply not true. As demonstrated by a close examination of the UN Charter and these particular resolutions, there is no possible interpretation that preempts the need for a final decision by the Security Council. Because the U.S. and UK withdrew their resolution, there could be no decision permitting an invasion. As a result, the invasion of Iraq was illegal, and those who brought it about can be held responsible for war crimes** by an impartial international tribunal, for example the International Criminal Court (ICC). Significantly, the Preamble to the UN Charter begins by declaring that the primary purpose of the UN is "to prevent the scourge of war," and **Article I repeats** this prerogative by stating the UN's role is to "maintain international peace and security." **As a peremptory norm of international law, Article 2(4) more explicitly prohibits the use of military force in international affairs except in accord with the guiding principles of the UN: "All members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the Purposes of the United Nations**." In retrospect this emphasis may be appreciated as a consequence of the UN Charter having been drafted and adopted at the end of World War II, when the avoidance of warfare seemed of the utmost importance. Today, in light of the Iraq invasion, it seems no less important. If and when warfare seems unavoidable, Articles 41 and 42 of Chapter VII of the UN Charter specify under what circumstances military conflict can be sanctioned. Article 41 declares that effective means short of conflict must first be employed to resolve differences, and Article 42 makes it plain that only with the failure of these preliminary measures may the Security Council vote to permit military action. This decision is supposed to be obtained by vote as specified by Article 27(e) earlier in the Charter.

The security council cannot approve the war since it violates article 51

**Zunes 02,** (Stephen, PhD, Professor of Politics at the University of San Francisco, The Nation, sep 30, http://usiraq.procon.org/view.answers.php?questionID=000876)

**International law is quite clear about when military force is allowed. In addition to the aforementioned case of UN Security Council authorization, the only other time that a member state is allowed to use armed force is described in Article 51, which states that it is permissible for 'individual or collective self-defense' against 'armed attack...until the Security Council has taken measures necessary to maintain international peace and security.' If Iraq's neighbors were attacked, any of these countries could call on the United States to help, pending a Security Council decision authorizing the use of force. Based on evidence that the Bush Administration has made public, there doesn't appear to be anything close to sufficient legal grounds for the United States to convince the Security Council to approve the use of military force against Iraq in US self-defense.**

Iraq Link

The Iraq war is both unconstitutional and a violation of international law

**Jayne and Kramer 04** (Edward, Education Ph.D., buffalo, published in College English, Genre, Style, Literature and Psychology, Minnesota Review, The Centennial Review, Change, American Studies, Ronald director of criminal justice, PhD law Yale, peace and collaborative network http://www.internationalpeaceandconflict.org/us-attack-on-iraq-in-2004

 **The U.S. Constitution also compels the need for a Security Council vote, since our nation is a signatory of the UN Charter, thus giving the Charter the status of a treaty guaranteed by the Constitution itself. The Supremacy Clause of the Constitution in Article VI, Section 2, specifically grants international treaties the same status as the Constitution itself and all state and federal laws enacted in accord with the Constitution. Moreover, as specified by Article 103 of the UN Charter, the Charter itself is the highest treaty in the world and supersedes any other international agreement. Accordingly, the Constitution's Supremacy Clause extends the application of Articles 41 and 42 to all warfare conducted by our own particular government** except under emergencies dictated by Article 51. President Bush and Secretary Powell might have had a better case in justifying an invasion if they had totally bypassed the involvement of the UN in the first place. They could have applied the precedent that the United States already went to war against Vietnam, Cambodia, Panama, Grenada, the Dominican Republic, and, most recently, Kosovo, without the approval of the Security Council. In the latter instance, President Clinton invoked the NATO connection, and the potential illegality of this decision was ignored in view of the need to terminate genocidal killings as soon as possible. The obvious demand for quick measures was satisfied, but at the cost of reinforcing a dangerous precedent in international relations. Regarding Iraq, however, the U.S. and U.K. presented their case to the UN Security Council in order to obtain Resolution 1441 that met the demands of Article 41, and then, as required by Article 42, presented a second resolution permitting an invasion of Iraq because of its failure to meet the terms of Resolution 1441. All of this was obviously intended to meet the guidelines of the UN Charter, obliging the U.S. to abide by its final authority in determining the legitimacy of military action in Iraq. However, as already indicated, Powell withdrew this second resolution once it became plain the Security Council would reject U.S. arguments that sufficient evidence had been disclosed to justify an invasion and that every alternative short of military conflict had been exhausted. **Bush thereupon bypassed the Security Council's vote by launching the March 20 unilateral preemptive strike on entirely illegal grounds.**

The invasion of Iraq violates basis of international law.

Happold 03 (Matthew, LLM, MSc, MA, Lecturer in Law at the University of Nottingham, Guardian Unlimited, Mar 13, http://usiraq.procon.org/view.answers.php?questionID=000876)

"The prohibition of the use of force is a foundational rule of international law. Only two exceptions are permitted: the use of force in self-defence, or with the express authorisation of the UN security council exercising its powers under chapter VII of the UN charter. Iraq has not attacked the US, the UK or their allies, nor is there any evidence that it is about to do so. Force may only be used in self-defence in response to an actual or (according to some commentators) an imminent armed attack. Therefore any arguments based on self-defence fail. What the US national security strategy has advocated are pre-emptive attacks on countries which may threaten the US. The use of armed force in such circumstances is contrary to international law."

Iraq Link

The invasion of Iraq was a violation of customary international law.

O’Connell 3 (Mary, William B. Saxbe Designated Professor of Law, Mortiz College of Law & Mershon Center, at the Ohio State University, *Jurist*, April 17th, 2003, <http://jurist.law.pitt.edu/forum/forumnew107.php>) NK

International lawyers around the world advised their governments on March 19 that the US-led invasion of Iraq was in violation of fundamental international law.[1] Following similar law violations by the US in the past, governments typically registered their condemnation by votes in the UN General Assembly. But Iraq is different and governments will face more, and more complicated, decisions in its aftermath. Two features distinguish this invasion: Iraq has considerably more assets outside US control than has been the case in the past, and the US policy behind the invasion, the doctrine of preemptive force, challenges the international legal system in a way the US has never before attempted.

Iraq war declared a violation of Customary International Law by panel of international lawyers

Carrell 3 (Severin, May 25, correspondent for the Guardian, http://www.robincmiller.com/art-iraq/b58.htm)

The war on Iraq will be condemned as illegal by a panel of eminent international lawyers at a conference being organised by the actor Corin Redgrave.

The symposium, to be held next Sunday at the Young Vic theatre in London, will also hear senior legal experts allege that the conflict has seriously weakened the authority of the United Nations and potentially threatened global security.

The panellists include Professor Philippe Sands QC, a member of Cherie Booth's Matrix chambers, Professor Christine Chinkin, professor of international law at the London School of Economics, and Jan Kavan, the president of the UN General Assembly and former Czech foreign minister.

Another prominent speaker, Professor Burns Weston, a human rights lawyer at the University of Iowa in the US, fears that other countries might use the American decision to wage war illegally to justify their own unlawful wars. He is most concerned about India and Pakistan - two nuclear powers in dispute over Kashmir. "It is a very bad precedent for other countries that might seek, in their own lack of wisdom, to emulate the United States," he said.

The event, called "Liberation or War Crime" will be chaired by the former Radio 4 Today programme presenter Sue MacGregor and is expected to attract other prominent figures, including the playwright David Hare, the Booker Prize-winning Indian writer Arundhati Roy and the former foreign secretary Robin Cook.

Prof Sands, one of 16 prominent international lawyers who earlier this year publicly warned Tony Blair that the war was illegal, said the conflict raised two major issues.

"First, did the Security Council authorise the use of force, and the answer to that is no. And [second] were we misled about the presence of weapons of mass destruction? Apparently, yes. These things are going to come back to haunt us," Prof Sands said.

Mr Redgrave, whose film roles include parts in Four Weddings and A Funeral, Enigma and In the Name of the Father, said one objective in staging and paying for the event was to investigate the damage caused by the war to international peace.

"Very early on, before the war began, it seemed that one of the main casualties of war was the whole fabric of international law and convention," he said. "It seemed to me there was a willingness, indeed a desire, on the part of America at least, to rend that fabric in a way that would almost make it irreparable."

Iraq Link

The Iraq war is a blatant violation of Customary International Law; undermining the U.S.’s credibility

Krebsback 5 (Tom, Jul 15, Editor, Seattle Post-Intelligncer, http://www.commondreams.org/views05/0715-07.htm)

The United States/United Kingdom invasion of Iraq in 2003 was a war of aggression, a crime against the peace as defined by the Nuremberg Principles.

Various legal experts employed by the coalition governments will dispute this. But their arguments are incredibly weak and are not taken seriously by an overwhelming majority of scholars of international law in the world. These independent legal scholars, such people as Sean Murphy of George Washington University, Mary Ellen O'Connell of Ohio State University and Philippe Sands of University College London, all hold that the invasion was a blatant violation of international law.

There are only two cases in which a nation or group of nations can legally undertake armed intervention against another nation: in self-defense against an armed attack or if the United Nations Security Council authorizes a coalition of nations to intervene militarily to maintain peace and security in the world.

Contrary to what the Bush administration would like the world to believe, the invasion of Iraq can be justified neither on the basis of self-defense nor because it was sanctioned by the Security Council.

These are the facts that outline the legal status of the war:

The primary grievance against Iraq was the claim that it had weapons of mass destruction and ongoing illicit weapons programs.

The U.N. weapons inspection team was invasively and thoroughly determining whether such weapons or weapons programs existed in Iraq.

The U.N. Security Council was not willing to grant authority to invade Iraq while the U.N. inspection team was handling the illicit weapons problem peacefully.

President Bush launched the invasion of Iraq anyway, in contravention of the U.N. Security Council and the U.N. Charter. Without Security Council authorization, the invasion was illegal and must be classified as a war of aggression.

Should Americans be concerned about international law? It is quite clear that Bush has little regard for it. Yet, the United States was founded on the basis of the rule of law. Article VI of the Constitution states that treaties, which this country has signed and ratified, are the "supreme law of the land."

The U.N. Charter is such a treaty, and it was created in large part because of the efforts of this country following World War II. For this country to so egregiously transgress the charter's prohibition on the use of force is not only a violation of international law, it is a violation of our Constitution and a repudiation of much of what this country stands for.

A thoughtful person does not require the U.S. Constitution or the U.N. Charter to understand the monstrosity of this invasion. Common sense and decency should tell us that launching an unprovoked invasion of another country, even one ruled by a man as nefarious as Saddam Hussein, is simply mass murder. What of the tens of thousands of innocent Iraqis who have died as a result of this military incursion? Did anyone ask them if they were willing to sacrifice their lives in a risky attempt to install democracy in their land?

Whether Americans realize it or not, the integrity of the United States has been dealt a serious blow. This country can no longer be regarded as a nation that stands upon the legal and moral high ground. There is little doubt people of most countries now regard us as hypocrites.

Iraq Link

The invasion of Iraq is a fundamental breach of international law

Lobe 3 (Jim, Mar 21, Bureau Chief of Inter Press Services, http://www.commondreams.org/headlines03/0321-10.htm)

The U.S.-led invasion of Iraq violates the basic rules of the United Nations Charter requiring countries to exhaust all peaceful means of maintaining global security before taking military action, and permitting the use of force in self-defense only in response to actual or imminent attack, two U.S. legal groups said Thursday.

The U.N. Security Council's refusal to approve a resolution proposed by the United States, Britain and Spain clarified that the weapons inspection process initiated by Security Council Resolution 1441 last November should have been permitted to continue before military action could be authorized, added The [Lawyers' Committee on Nuclear Policy](http://www.lcnp.org/) (LCNP) and the [Western States Legal Foundation](http://www.wslfweb.org/) (WSLF).

The two groups, the U.S. affiliates of the [International Association of Lawyers Against Nuclear Arms](http://www.ialana.org/home.htm) (IALANA), supported an open letter signed by 31 Canadian international law professors released Wednesday that called a U.S. attack against Iraq "a fundamental breach of international law (that) would seriously threaten the integrity of the international legal order that has been in place since the end of the Second World War."

Such an action "would simply return us to an international order based on imperial ambition and coercive force," they added.

The legalities of the U.S. attack on Iraq have sparked considerable debate since Washington, Britain, and Spain decided to pull their proposed resolution from consideration by the Security Council in the face of almost-certain defeat by a majority of members, including the threat of vetoes cast by permanent Council members France and Russia.

By withdrawing the resolution and issuing an ultimatum to Iraqi President Saddam Hussein to leave the country or face attack--demands that have not been included in any Security Council resolution--Washington asserted its sovereign right to self-defense and its intention to enforce previous resolutions, including 1441, which called for Iraqi disarmament.

Some international lawyers, such as Yale University's Ruth Wedgwood, have claimed that the previous resolutions gave Washington adequate legal cover to unilaterally enforce disarmament, and that precedent for circumventing the Security Council was established when Washington and its NATO allies launched their air campaign against Serbia in 1999 without Council authorization.

Another prominent expert, Anne-Marie Slaughter, argued that while technically "illegal," Washington's decision to take military action without Council backing might still be "legitimate."

Also citing the Serbia precedent, Slaughter, dean of the Woodrow Wilson School of Public and International Affairs at Princeton University, argued that Washington could still gain U.N. approval if its forces found "irrefutable evidence" that the Iraqi regime possessed weapons of mass destruction.

"Even without such evidence, the United States and its allies can justify their intervention if the Iraqi people welcome their coming and if they turn immediately back to the United Nations to help rebuild the country," she wrote in the *New York Times*.

"Even for international lawyers, insisting on formal legality in this case may be counterproductive," she said, arguing that supporters of international law should accept that the United Nations is a "political institution as well as a legal one."

But LCNP President Peter Weiss strongly denounced that reasoning, calling it "shocking beyond belief, coming from the current president of the American Society of International Law."

LCNP and WSLF argued that Washington could not use the right of self-defense to start military action unless it was actually attacked or was threatened by an immediate and unavoidable attack. In the absence of those circumstances, according to WSLF Program Director Andrew Lichterman, only the Security Council may approve such a U.S. attack.

"Because Iraq has not attacked any state, nor is there any showing whatever of an imminent attack by Iraq, self-defense cannot justify U.S. war on Iraq," he said.

The U.S. administration's attempt to expand the concept of self-defense to authorize preventive attacks against states based on potential future threats "would destabilize the present system of U.N. Charter restraints on use of force," Lichterman added.

Iraq Link

Even those associated with the Bush administration have conceded the Iraq invasion broke international law

Burkeman 3 (Oliver, Nov 20, Guardian writer, http://www.guardian.co.uk/uk/2003/nov/20/usa.iraq)

International lawyers and anti-war campaigners reacted with astonishment yesterday after the influential Pentagon hawk Richard Perle conceded that the invasion of Iraq had been illegal.

In a startling break with the official White House and Downing Street lines, Mr Perle told an audience in London: "I think in this case international law stood in the way of doing the right thing."

President George Bush has consistently argued that the war was legal either because of existing UN security council resolutions on Iraq - also the British government's publicly stated view - or as an act of self-defence permitted by international law.

But Mr Perle, a key member of the defence policy board, which advises the US defence secretary, Donald Rumsfeld, said that "international law ... would have required us to leave Saddam Hussein alone", and this would have been morally unacceptable.

French intransigence, he added, meant there had been "no practical mechanism consistent with the rules of the UN for dealing with Saddam Hussein".

Mr Perle, who was speaking at an event organised by the Institute of Contemporary Arts in London, had argued loudly for the toppling of the Iraqi dictator since the end of the 1991 Gulf war.

"They're just not interested in international law, are they?" said Linda Hugl, a spokeswoman for the Campaign for Nuclear Disarmament, which launched a high court challenge to the war's legality last year. "It's only when the law suits them that they want to use it."

Mr Perle's remarks bear little resemblance to official justifications for war, according to Rabinder Singh QC, who represented CND and also participated in Tuesday's event.

Certainly the British government, he said, "has never advanced the suggestion that it is entitled to act, or right to act, contrary to international law in relation to Iraq".

Afghanistan Link

The 2001 invasion of Afghanistan violates both domestic and international law

Cohn 09 (Marjorie, Marjorie Cohn is a professor at Thomas Jefferson School of Law, president of the National Lawyers Guild, and the US representative to the executive committee of the American Association of Jurists, silo breaker, <http://www.silobreaker.com/obamas-afpak-war-is-illegal-5_2262824286416797696>)

President Obama accepted the Nobel Peace Prize nine days after he announced he would send 30,000 more troops to Afghanistan. His escalation of that war is not what the Nobel committee envisioned when it sought to encourage him to make peace, not war. In 1945, in the wake of two wars that claimed millions of lives, the nations of the world created the United Nations system to “save succeeding generations from the scourge of war.” The UN Charter is based on the principles of international peace and security as well as the protection of human rights. But the United States, one of the founding members of the UN, has often flouted the commands of the charter, which is part of US law under the Supremacy Clause of the Constitution. Although the U.S. invasion of Afghanistan was as illegal as the invasion of Iraq, many Americans saw it as a justifiable response to the attacks of September 11, 2001. The cover of Time magazine called it "The Right War." Obama campaigned on ending the Iraq war but escalating the war in Afghanistan. But a majority of Americans now oppose that war as well. The UN Charter provides that all member states must settle their international disputes by peaceful means, and no nation can use military force except in self-defense or when authorized by the Security Council. After the 9/11 attacks, the council passed two resolutions, neither of which authorized the use of military force in Afghanistan. “Operation Enduring Freedom” was not legitimate self-defense under the charter because the 9/11 attacks were crimes against humanity, not “armed attacks” by another country. Afghanistan did not attack the United States. In fact, 15 of the 19 hijackers hailed from Saudi Arabia. Furthermore, there was not an imminent threat of an armed attack on the United States after 9/11, or President Bush would not have waited three weeks before initiating his October 2001 bombing campaign. The necessity for self-defense must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.” This classic principle of self-defense in international law has been affirmed by the Nuremberg Tribunal and the UN General Assembly. Bush's justification for attacking Afghanistan was that it was harboring Osama bin Laden and training terrorists, even though bin Laden did not claim responsibility for the 9/11 attacks until 2004. After Bush demanded that the Taliban turn over bin Laden to the United States, the Taliban’s ambassador to Pakistan said his government wanted proof that bin Laden was involved in the 9/11 attacks before deciding whether to extradite him, according to the Washington Post. That proof was not forthcoming, the Taliban did not deliver bin Laden, and Bush began bombing Afghanistan. Bush’s rationale for attacking Afghanistan was spurious. Iranians could have made the same argument to attack the United States after they overthrew the vicious Shah Reza Pahlavi in 1979 and the U.S. gave him safe haven. If the new Iranian government had demanded that the U.S. turn over the Shah and we refused, would it have been lawful for Iran to invade the United States? Of course not. When he announced his troop “surge” in Afghanistan, Obama invoked the 9/11 attacks. By continuing and escalating Bush’s war in Afghanistan, Obama, too, is violating the UN Charter. In his speech accepting the Nobel Peace Prize, Obama declared that he has the "right" to wage wars "unilaterally.” The unilateral use of military force, however, is illegal unless undertaken in self-defense. Those who conspired to hijack airplanes and kill thousands of people on 9/11 are guilty of crimes against humanity. They must be identified and brought to justice in accordance with the law. But retaliation by invading Afghanistan was not the answer. It has lead to growing U.S. and Afghan casualties, and has incurred even more hatred against the United States. Conspicuously absent from the national discourse is a political analysis of why the tragedy of 9/11 occurred. We need to have that debate and construct a comprehensive strategy to overhaul U.S. foreign policy to inoculate us from the wrath of those who despise American imperialism. The "global war on terror" has been uncritically accepted by most in this country. But terrorism is a tactic, not an enemy. One cannot declare war on a tactic. The way to combat terrorism is by identifying and targeting its root causes, including poverty, lack of education, and foreign occupation. In his declaration that he would send 30,000 additional U.S. troops to Afghanistan, Obama made scant reference to Pakistan. But his CIA has used more unmanned Predator drones against Pakistan than Bush. There are estimates that these robots have killed several hundred civilians.

Afghanistan Link

Afghan war is illegal under international law

Cohn 09 (Marjorie, Marjorie Cohn is a professor at Thomas Jefferson School of Law, president of the National Lawyers Guild, and the US representative to the executive committee of the American Association of Jurists, alter net, http://www.alternet.org/story/93473/afghanistan%3A\_the\_other\_illegal\_war/)

So far, President Bush's plan to maintain a permanent U.S. military presence in Iraq has been stymied by resistance from the Iraqi government. Barack Obama's timetable for withdrawal of American troops evidently has the backing of Iraqi Prime Minister Nuri al-Maliki, Bush has mentioned a "time horizon," and John McCain has waffled. Yet Obama favors leaving between 35,000 and 80,000 U.S. occupation troops there indefinitely to train Iraqi security forces and carry out "counterinsurgency operations." That would not end the occupation. We must call for bringing home -- not redeploying -- all U.S. troops and mercenaries, closing all U.S. military bases and relinquishing all efforts to control Iraqi oil. In light of stepped-up violence in Afghanistan, and for political reasons -- following Obama's lead -- Bush will be moving troops from Iraq to Afghanistan. Although the U.S. invasion of Afghanistan was as illegal as the invasion of Iraq, many Americans see it as a justifiable response to the attacks of Sept. 11, 2001, and the casualties in that war have been lower than those in Iraq -- so far. Practically no one in the United States is currently questioning the legality or propriety of U.S. military involvement in Afghanistan. The cover of Time magazine calls it "The Right War." The U.N. Charter provides that all member states must settle their international disputes by peaceful means, and no nation can use military force except in self-defense or when authorized by the Security Council. After the 9/11 attacks, the council passed two resolutions, neither of which authorized the use of military force in Afghanistan. Resolutions 1368 and 1373 condemned the Sept. 11 attacks and ordered the freezing of assets; the criminalizing of terrorist activity; the prevention of the commission of and support for terrorist attacks; and the taking of necessary steps to prevent the commission of terrorist activity, including the sharing of information. In addition, it urged ratification and enforcement of the international conventions against terrorism. The invasion of Afghanistan was not legitimate self-defense under article 51 of the charter because the attacks on Sept. 11 were criminal attacks, not "armed attacks" by another country. Afghanistan did not attack the United States. In fact, 15 of the 19 hijackers came from Saudi Arabia. Furthermore, there was not an imminent threat of an armed attack on the United States after Sept. 11, or Bush would not have waited three weeks before initiating his October 2001 bombing campaign. The necessity for self-defense must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation." This classic principle of self-defense in international law has been affirmed by the Nuremberg Tribunal and the U.N. General Assembly. Bush's justification for attacking Afghanistan was that it was harboring Osama bin Laden and training terrorists. Iranians could have made the same argument to attack the United States after they overthrew the vicious Shah Reza Pahlavi in 1979 and he was given safe haven in the United States. The people in Latin American countries whose dictators were trained in torture techniques at the School of the Americas could likewise have attacked the torture training facility in Fort Benning, Ga., under that specious rationale. Those who conspired to hijack airplanes and kill thousands of people on 9/11 are guilty of crimes against humanity. They must be identified and brought to justice in accordance with the law. But retaliation by invading Afghanistan is not the answer and will only lead to the deaths of more of our troops and Afghans.

Japan Link

The U.S. military bases in Japan are in violation of multiple international laws

Japanese Peace Committee 00 (Toward Freedom, September 2000, http://www.towardfreedom.com/asia/208-demilitarizing-okinawa-900)

In July, the G8 Summit Meeting was held in Okinawa, a group of islands in Japan that serves as a US stronghold with huge military bases. In response, the Japanese Peace Committee called for international support end to this occupation. Here is the group's statement: Like a colony, Okinawa is burdened with US military bases, a situation with no parallel in other sovereign states in the world. Huge bases occupy more than 10 percent of the whole territory (20 percent of the main island). They were built in violation of international law. Occupying Okinawa in the Second World War, US Military forces built their bases by force, sending surviving citizens to concentration camps and taking their land without payment. It was a clear violation of The Hague Convention that prohibits the confiscation of private property even during war, and that obliges to pay for their property requisitioned even in the case of military necessity. Since 1953, bulldozing houses and burning them, the US Forces has outrageously promoted the large scale of requisition of land for huge military bases. Today, these bases are the root cause of the violation of human rights and security of Okinawan people. According to the statistics of Japanese Government as well as of Okinawa prefecture, a number of crimes committed by US soldiers for these 30 years has reached around 5,000, and more than 10 percent of them are violent crimes such as murder, burglaries, and rapes. However, neither Japan's domestic laws nor US laws are applied to the US Forces in Japan, and in fact U.S. soldiers committing crimes are protected by prerogatives. Meanwhile, noise pollution by US bases reaches 37 percent of Okinawa's population. Crashes and the burning of military airplanes are common. This situation violates the spirit, if not the letter of the Universal Declaration of Human Rights: "Everyone has the right to life, liberty and security of person" (Article 3). The bases also constitute a threat to peace in Asia and around the world. Okinawa is the only place in the world where the US deploys Marine Corps outside its territory, looming over the Korean Peninsula and China. Moreover, the US is reinforcing its military bases in Okinawa. Based on the military strategy of preemptive attack, it plans to build a modern base on the beautiful seashore of Nago City, site of the recent G8 Summit. Clearly, such a situation infringes on UN principles such as peaceful solution of conflicts, respect for sovereignty, and non-interference in internal affairs. The nations of G8 declare that they share common values: democracy, human rights, and peace. But in Okinawa these values are trampled. We urge the governments of Japan and the US to immediately initiate the reduction and removal of US bases in order to normalize the situation in Okinawa. It is high time, as the 21st century begins, to honor the wishes of the Okinawan people.

Military Bases Link

Bases not only are in violation of international laws but create situations of which violate international law

Richter 07 (Hans-Peter, German delegate to world peace council, world peace council, peace progress, volume 1, issue 2, http://www.canadianpeacecongress.ca/random.asp?ID=39)

The bases are de facto extraterritorial areas. The US-expert Chalmers Johnson wrote: Americas 703 officially acknowledged foreign military enclaves (as of September 30, 2002), although structurally, legally, and conceptually different from colonies, are themselves something like microcolonies in that they are completely beyond the jurisdiction of the occupied nation which is in violation of international laws1. The United States virtually always negotiates a status of forces agreement (SOFA) with the ostensibly independent host nation, including countries whose legal systems are every bit (and perhaps more) sophisticated than our own. . . . Rachel Cornwell and Andrew Wells, two authorities on status of forces agreements, conclude, Most SOFAs are written so that national courts cannot exercise legal jurisdiction over US military personnel who commit crimes against local people, except in special cases where the US military authorities agree to transfer jurisdiction.2 You can find the legal frame for Germany in the NATO Status of Forces Agreement (SOFA) from June 19, 1951. There are Ad-ditional Agreements to SOFA (ZA-NTS) between Germany, Canada, Great Britain, Netherlands, Belgium and France, which have been modified since 1993. There are special agreements for admission and co-ordination of manoeuvers from March 18, 1994. Also for three US-German training shooting and bombing ranges there are administration agreements, which adapt regulations to the practice of the Bundeswehr. The same happened with three shared UK-German ranges, and one shared range with Belgium, France, and Netherlands. The question is if the allied forces will obey this regulation, and if not what happens. I recall the incident in 1998 in Cavalese (Italy) where a US warplane killed 20 people of in alpine carriage lift while flying at a dangerously low (and not permit--ted) level. A US military tribunal found the pilots not guilty. This reflects the experience elsewhere in the world with US bases violators and criminals will not be punished. They act in this awareness and make the military bases an outlaw area. Even worse is that using the military bases means breaking international law. In a verdict on June 21, 2005, (BVerwG 2 WD 12.04) the highest administration court in Germany stated that the war against Iraq violated international law. It was a violation of the ban against violence of the Charter of the United Nations. There was neither a UN mandate nor could the US use the excuse of self defence, which would only have been possible in the case of a direct attack against the US and only as long the UN took no measures. Neither was the case. The (alleged) enemy’s possession of weapons of mass destruction is no reason for war anyway.

All foreign bases violate international laws and the Charter of the United Nations

Richter 07 (Hans-Peter, German delegate to world peace council, world peace council, peace progress, volume 1, issue 2, http://www.canadianpeacecongress.ca/random.asp?ID=39)

In every SOFA the uncontrolled entering of US soldiers into the host nations is guaranteed. So the military bases are de facto extraterritorial areas. So the 93 states which have agreed on SOFAs have abandoned a part of their sovereignty and given a carte blanche to the US. The US can commit all types of crimes, violations of international law, and the Geneva conventions. In every SOFA there is a paragraph that no US soldier may be sent to the new International Criminal Court. So we see an erosion of the Charter of the United Nations and other international law. Every year there are new wars and new pretexts are invented.

CP key to I-Law

Citing international law in the area of territorial integrity is key to its effectiveness

Herz 98 (John Hurz, 5/23/98, New York Times,)PG

 The issue of closing the Palestine Liberation Organization observer mission to the United Nations raises a fundamental legal and political problem: the relation between international law and the domestic law of states. Prof. Michael J. Glennon (letter, April 6) is right in referring to a Supreme Court jurisdiction that, in case of a conflict between a treaty and a subsequent statute, lets the statute prevail. The question is whether this jurisdiction allows for binding international law.

It's the ancient problem of ''primacy'': In case of conflict, shall international law or domestic law prevail? This has been debated since Hugo Grotius (1583-1645) and the rise of a modern state system. When our Constitution, putting treaties and statutes on the same level, was adopted, there were only few rules of international law. We have since seen a tremendous increase in such law and the rise of international organizations based on international law. Consequently, most countries now recognize the primacy of international law. Article 25 of the Bonn Constitution, for instance, gives international law precedence over West German law. Shall we let the West Germans put us to shame? Must we ignore the law-mindedness we expect from others? Lately, alas, we have even been led to disregard such fundamental rules as that forbidding, in time of peace, the forceful violation of the territorial integrity of another country (and then to disregard the judgment of the Internationa Court of Justice condemning us for it). If international law is to have any force, we must stop negating it unilaterally, whether by covert action or later statute, however duly enacted. Now that national interests are merging with a common interest of all nations in global peace and prosperity, we should observe and enforce the international system of rules without which these objectives cannot be obtained.

AT: Can’t Solve

Hamdan proves each instance of domestic enforcement of international law is key

Hathaway 7 (Oona Hathaway, Yale Law School, 2007, “Hamdan v. Rumsfeld: Domestic Enforcement of International Law”, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1009621) PG

International law has long been subjected to the charge that it isn't really law - at least not in the sense that we usually imagine law. There is no international police force standing ready to enforce the laws of the international community against states that violate them. There is no court system that can adjudicate violations and assess penalties. And, with a few exceptions, there is no mechanism for penalizing states found to have fallen short of the law's rules. This has led some to conclude that most of international law is little more than cheap talk - words not backed up deeds and, hence, without any real force. And yet this view of international law misses much of what makes international law relevant and powerful: International law is not only enforced by states against one another, but it is also enforced by states against themselves. That is to say, it is enforced by domestic courts and political institutions that pressure their own government to live up to the promises it has made; it is enforced by individuals and interest groups that pressure the political branches of government to live up to international legal commitments they have made, whether they can be enforced in the courts or not; and it enforced by individuals or groups that use a state's own court system to enforce international law through litigation. It is this missing part of the picture - the enforcement of international law at home - that this essay brings to light. This essay explores these issues through the lens of one of the most important international law cases in the United States in at least the last decade: Hamdan v. Rumsfeld. The case powerfully illustrates both the promise and limits of domestic enforcement of international law. The circumstances that gave rise to it demonstrate the hurdles that domestic enforcement of international law faces in even the most robust democracies. It stands as a stark reminder that the domestic enforcement of international law relies not only on the existence of robust rule of law institutions, but also on the ability of those institutions to reach the cases in which international legal rules are at stake. And yet Hamdan also offers a more hopeful message: Domestic enforcement of international law can succeed even where there is stringent resistance by even the most powerful of political actors. The story of Hamdan is thus the story of both the fragility and the power of domestic enforcement of international law, and in this story lies broader lessons for the promise and limits of international law as a whole.

Courts cite international law now

International law is recognized by courts

Spiro 6 (Peter Spiro, Professor at Harvard Law School, 9/29/10, http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/international-law/wishing-international-law-away/) PG

As for courts, they are more evidently recognizing international law’s consequence. Though not subject to direct leveraging by international actors, the courts have long been sensitive to international norms, even to the end of [diluting constitutional rights.](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=419901) In recent years, federal judges have been more directly socialized to the reality of international law with the emergence of an [international community of courts.](http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/international-law/wishing-international-law-away/) International human rights practice was decisive in the Supreme Court’s invalidation of the death penalty against juvenile offenders in [Roper v. Simmons.](http://supreme.justia.com/us/543/03-633/case.html) It was also an important atmospheric in the detainee cases. In none of those decisions did international law supply the primary analytical hook. Once again, however, that fact does little to defeat the broader idea that judges are increasingly sensitive to international law. As with Congress and the Law of Nations Clause, Paulsen enables the courts as players in matters relating to international law and foreign relations by dismissing the political question doctrine. That position makes sense as interstate relations [become more stable,](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=307979) but it also removes an important barrier to the assimilation of international norms. Deprived of a jurisdictional shield, the anti-internationalists will inevitably suffer greater losses as courts add international law to their decisional armory.

Now is the key time

Now is key - US courts should rule on international law

Lauterpacht Center for International Law 8 (Lauterpacht Center for International Law, 2008, “International law in National Courts”, http://www.lcil.cam.ac.uk/Media/25\_anniversary/Int\_Law\_in\_National\_Courts\_paper.pdf)

However, from time to time and with increasing frequency causes raising issues of international law do come before national courts for decision. This has always been so (for example, cases involving piracy, prize and immunities). Now other questions of international law were being raised with increasing frequency. His own experience was limited to one national system but a few examples from his own jurisdiction could be cited. He referred to Buttes Gas, Pinochet, Iraqi Airways, and a series of more recent cases: Jones (Margaret), which involved the question whether waging an aggressive war was a crime under English law; Jones v Saudi Arabia, which raised the issue of whether agents of a foreign state were immune from civil proceedings arising out of torture committed abroad; Al-Skeini, which dealt with the extra-territorial reach of the European Convention on Human Rights and the Human Rights Act; and Al-Jedda, which concerned the responsibility of the UK and the effect of the United Nations Charter in relation to the conduct

of British troops in Iraq. Those arguing in favour could suggest that national courts work on the same principles as international tribunals: they find out governing principles, then look for precedents and analogies. There is, for example, very little difference between the approach of national courts to interpretation and that laid down in the Vienna Convention on the Law of Treaties. In most cases national courts find that the truth lies somewhere in between the contentions of warring parties. There is little doubt that the areas of activity into which courts will refuse to enter is shrinking.

I.Law Citation Good – Conflict

US courts should rule on international law – prevents conflict

Cleveland 5 (Sarah Cleveland, Professor of Constitutional Law, 3/30/05, The Washington Post, “Is There Room for the World in Our Courts?”) PG

Over a century ago, the court observed that "The Constitution of the United States was . . . . made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown." Those who seek to differentiate the American system from the international community fail to recognize that the United States is a participant in the making of international law, from international trade rules to international humanitarian law and human rights. The use of international law does not mean we should follow it blindly. But willfully ignoring those rules both brings the United States into conflict with other nations, as with the juvenile death penalty, and hampers our ability to invoke international rules from which we wish to benefit. International law has been a part of our law from the beginning, and its use in constitutional analysis is fully part of the American tradition.

International Law is Key to Peace

Schlafly 4 (Phyllis Schlafly, Author, 11/13/04, The Washington Post, “Global Benchmarks”) PG

"International law is a help in our search for a more peaceful world," Justice O'Connor declared. Besides, the U.S. Constitution gives Congress, not the Supreme Court or any international body, authority to declare war. The effort to import international law into the United States has nothing to do with preventing war. It aims to change our Constitution without approval from the American people via the amendment process.The Supreme Court recently accepted amicus briefs from Mikhail Gorbachev and from 48 foreign countries in a case considered this fall involving the death penalty for juveniles, Roper vs. Simmons. You read that right: The high court will listen to Mr. Gorbachev's opinion about what U.S. criminal law should be. The justices have increasingly cited foreign law to weaken our death penalty, though the U.S. Constitution in several places expressly recognizes its legality. However, the justices are very selective about which countries they cite, since executions are common in many countries. Nor do the judges cite stricter abortion laws around the world as they strike down state and congressional bans on partial-birth abortion.

CIL Good – War

CIL of armed conflict stops cruel and costly war

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

V. The Customary International Law of Armed Conflict and ASATs Some skeptics may doubt the continued viability or even the sheer existence of a body of law purporting to regulate international armed conflict - no less an authority than former Attorney General Alberto Gonzales dismissively referred to some of its central precepts as "quaint" and "obsolete." n180 Nonetheless, the Law of Armed Conflict (LOAC) assuredly exists; it imposes important restraints on what might otherwise be an excessively cruel and costly conduct of warfare, and States in general endeavor to comply with its terms. n181 LOAC [\*1243] seamlessly embraces both treaty law and customary law; for present purposes, we are concerned principally with the CIL measures, as these would be fully binding (as discussed above) even on countries that had resolutely refused to adhere to the relevant treaties. Within the specialized realm of LOAC customary law, three crucial centuries-old precepts of interest to the ASAT saga stand out: .Discrimination (or distinction): a military force may legitimately target only military objectives, and must not deliberately attack civilians or neutrals; .Proportionality: a military force may not undertake an attack that would inflict excessive damage on non-combatants, when compared to the direct, concrete military advantage gained from the action; and .Necessity: a military force is authorized to undertake only those attacks that are indispensable in securing the prompt submission of the enemy

CIL Good – Bioweapons

CIL stops the use of biological weapons

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

A. Discrimination The first fundamental precept is that a military force must target only military persons, materiel, and locations; civilians and other non-belligerents cannot lawfully be made the direct and intentional focus of an attack, and neutral States n184 and their property n185 are similarly off-limits. LOAC does not prohibit all "collateral damage" harm to civilians - that would probably be an impossible goal in any realistic military engagement - but it is axiomatic that force may lawfully be directed only at military objectives. A weapon system that is inherently incapable of that degree of finesse (or one that is sufficiently directional, but is in fact wielded in an indiscriminate fashion) is illegal. n186 This principle underpins much of the law's hostility to chemical and biological weapons, among others. Typically, those armaments would be employed in a scattershot fashion, unleashed as a cloud that may drift uncontrollably with the wind, rather than being precisely confined to an enemy's military apparatus. n187 If the user cannot control - or even reliably predict - where the effects of the weapon may be felt, it fails the LOAC standard. [\*1245] An ASAT weapon might appear, in contrast, to be quite discriminating - it is aimed with exquisite precision at a specific enemy satellite, and even a whole fleet of ASATs would be steered by the most sophisticated guidance systems to pick off particular hostile spacecraft one by one.

Bioweapons use causes extinction

John D. Steinbrenner, Brookings Senior Fellow, 1997 [Foreign Policy, "Biological weapons: a plague upon all houses," Winter, InfoTrac]

Although human pathogens are often lumped with nuclear explosives and lethal chemicals as potential weapons of mass destruction, there is an obvious, fundamentally important difference: Pathogens are alive, weapons are not. Nuclear and chemical weapons do not reproduce themselves and do not independently engage in adaptive behavior; pathogens do both of these things. That deceptively simple observation has immense implications. The use of a manufactured weapon is a singular event. Most of the damage occurs immediately. The aftereffects, whatever they may be, decay rapidly over time and distance in a reasonably predictable manner. Even before a nuclear warhead is detonated, for instance, it is possible to estimate the extent of the subsequent damage and the likely level of radioactive fallout. Such predictability is an essential component for tactical military planning. The use of a pathogen, by contrast, is an extended process whose scope and timing cannot be precisely controlled. For most potential biological agents, the predominant drawback is that they would not act swiftly or decisively enough to be an effective weapon. But for a few pathogens - ones most likely to have a decisive effect and therefore the ones most likely to be contemplated for deliberately hostile use - the risk runs in the other direction. A lethal pathogen that could efficiently spread from one victim to another would be capable of initiating an intensifying cascade of disease that might ultimately threaten the entire world population. The 1918 influenza epidemic demonstrated the potential for a global contagion of this sort but not necessarily its outer limit. Nobody really knows how serious a possibility this might be, since there is no way to measure it reliably.

CIL Good – Bio/Chem Weapons

CIL Stops the use of chemical weapons for all countries

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

An equally remarkable development during the twentieth century (at some point after the 1925 Geneva Protocol and before the 1993 CWC) was the formation of a customary international law rule that outlawed chemical weapons, or at least first use of CW, for all countries, even those that refrained from affiliating with any of the relevant treaties. It is not easy to ascertain exactly when this rule emerged, nor can we be [\*1260] completely confident about its exact content. It did not outlaw possession of chemical agents, and it might have tolerated a defensive or retaliatory application of lethal chemicals in response to an aggressor's prior CW attack. But leading authorities concur: CIL, arising from the considered opinion of mankind, and reflecting the world community's collective rejection of this form of combat, banned chemical warfare globally. That ban was independent of the written instruments and was fully binding on the entire world, including the United States, which signed the Geneva Protocol in 1925, but did not ratify it until 1975. No country acted to position itself effectively as a "persistent objector." n235 There is no authoritative determination by the ICJ that details the origins and content of this CIL rule, but there is plenty of consensus for its establishment. The UNGA in 1969, addressing "the question of chemical and bacteriological (biological) weapons," n236 noted that these forms of warfare have "always been viewed with horror and been justly condemned by the international community," n237 and that they are "inherently reprehensible" because their effects "are often uncontrollable and unpredictable and may be injurious without distinction to combatants and non-combatants." n238 The UNGA therefore recognized that "the Geneva Protocol embodies the generally recognized rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare" n239 and it declared "as contrary to the generally recognized rules of international law," as embodied in the Geneva Protocol, any such use. n240 Then Secretary-General of the United [\*1261] Nations U Thant concurred in this judgment in 1969, asserting that the Geneva Protocol "established a custom and hence a standard of international law." n241

AT: Saddam Used’m

The Use of chemical weapons is still prohibited in international conflicts because of CIL

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

To a similar effect is a statement in dicta from the International Criminal Tribunal for the Former Yugoslavia in 1995, asserting in the Tadic case that use of CW by Iraq against its own Kurdish minority population would be a violation of CIL: It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion - there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts. n242 Likewise, the ICRC analysis of CIL, noted above, states flatly that "the use of chemical weapons is prohibited," and "state practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts." n243

CIL Good – ASATs

CIL can stop weaponization against satellites

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

The Article then turns to my main thesis: that in the absence of a new outer space disarmament treaty, the world can productively turn to customary international law (CIL) as a viable alternative pathway toward enhancing space security and impeding the development and use of ASATs. To advance this novel argument, Part IV introduces "general customary international law," defining it as a recognized, important, and dynamic source of jurisprudence and explaining where it comes from, how it operates, and, in particular, how it may impede the erstwhile freedom of sovereign States to proceed untrammeled toward the weaponization of space through the testing and use of ASATs.

Satellites Good – Econ

Satellites are a crucial part of the US and global economy

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

Satellite services have become integral to all aspects of modern life, underpinning both the civilian economy and military operations around the globe. Secure, instantaneous communications links enable the quotidian range of television coverage, telephonic voice and fax links, Internet searches and email messages, and online shopping and ATM banking that we now take for granted. Satellite sensors provide the requisite data for daily global weather forecasting, as well as for monitoring earth resources such as seasonal crop harvests, encroachments on the rain forests, and the effects of global warming. Global Positioning System satellites enable inexpensive, accurate navigation by aircraft, ships, and an increasing fleet of private automobiles. n2 Satellites now function as essential links in U.S. "critical infrastructure," and the robust technological advantages have diffused to numerous other countries around the world, too. By one estimate, some 1100 corporations [\*1191] now exploit space in one way or another, n3 and Kazakhstan recently became the forty-seventh nation to undertake its own civilian space activities n4 - and there is no indication that this proliferation will soon abate. Global commercial space revenues now exceed $ 140 billion per year, and some estimate that the value of direct U.S. investment in outer space will soon reach half a trillion dollars, rivaling the size of U.S. capital investment in Europe. n5 Some 850 operational satellites now jockey for position, and outer space traffic has become congested, especially in the most favorable orbital sites; competition has also intensified for the allocation of scarce radio frequency slots for communicating with those spacecraft. n6

Satellites Good – Readiness/NW/Terrorism

Satellites ensure US readiness, stop terrorism and stop a nuclear miss-launch crisis

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

In the military sector, photoreconnaissance satellites enable the United States and Russia reliably to monitor each other's long-range missiles and other strategic nuclear assets, while different exoatmospheric sensors capture electromagnetic pulses and radar images of minute earth movements that would evince clandestine nuclear weapons test explosions. Likewise, early warning satellites would provide the first alert in the case of a surprise missile attack and the fabled Washington, D.C. to Moscow "hotline" link for resolving superpower crises is satellite-enabled. A diverse array of spy satellites surreptitiously intercepts communications and other electronic emissions, enabling intrusive  [\*1192]  monitoring of terrorists and potential global trouble spots. During times of conflict, satellites are essential to the reconnaissance and surveillance functions and to the "command, control, and communications" operations, enabling senior officials to penetrate the "fog of war" via secure, real-time links to fielded forces. Satellite-guided "smart bombs" and remotely piloted "unmanned aerial vehicle" drones provide critical arrows in the warfighter's quiver. In short, it is now almost impossible to imagine the U.S. military fighting a war without its satellite assets - the incessant demand for more orbiters, more communications bandwidth, and more reconnaissance demonstrates the accelerating exploitation of space as "the new high ground." [n7](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622#n7) As Army Lt. Gen. Larry J. Dodgen put it: "Today, space enables virtually everything we do." [n8](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622#n8)

Satellites – ONE attack snowballs

One attack on a satellite can destroy many – Large amount of debris

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

A. The Hazards of Debris One special feature that differentiates between the kinetic and directed energy ASATs is the creation of space debris. When the interceptor rams into or detonates against its target, both spacecraft fragment into thousands of pieces; in contrast, a laser or particle beam weapon would usually not compromise the gross physical integrity of its target, but would leave it intact, if dysfunctional. This distinction is critical, both legally and factually. Space debris is now increasingly recognized as a profound problem for current and future safe and successful operations in space. n40 Traveling at enormous orbital velocities (30,000 km/hr in low orbit), a chunk of random debris could obliterate an unlucky satellite; even small fragments could cause catastrophic damage. An orbiting particle a mere one centimeter in diameter (about the size of a child's marble) carries the impact of a one-ton safe falling from the top of a five-story building, and is capable of inflicting serious, perhaps fatal, harm. n41 To cite another vivid illustration: the windows of the Space Shuttle, designed to withstand the enormous pressures of re-entry into the earth's atmosphere, have repeatedly been pockmarked by collisions with tiny flecks of dried paint and other minor objects, traveling at ten times the speed of a high-powered bullet. n42 [\*1203] Debris from an ASAT test or attack would generate thousands of these random fragments, dispersing into a lethal orbiting cloud. China's January 2007 ASAT experiment, for example (described below), erupted into a miasma of 2600 pieces of trackable debris, and perhaps 150,000 smaller (but nonetheless hazardous) fragments careening in all directions. It created a swarm, moving through space like a high-speed lethal amoeba, stretching from 200 to 2350 kilometers in altitude, through which over 100 essential earth observation satellites must repeatedly pass in the years to come. Already, two U.S. satellites have been compelled to alter their normal orbital courses to avoid this danger zone. n43 Moreover, the location, density, and direction of the debris cloud are difficult to discern with sufficient specificity to guide evasive maneuvers. The U.S. Air Force Space Command, located at Cheyenne Mountain in Colorado, maintains the most advanced mechanism for cataloguing this space detritus. This Space Surveillance Network utilizes thirty advanced sensors worldwide to track 17,300 orbiting items larger than ten centimeters, including all manner of junk cast off by earlier space missions. Experts estimate that there may be 300,000 additional orbiting fragments between one and ten centimeters in size, and perhaps 35 million bits of scrap in total - a careening inventory of three to five million kilograms of unwanted human-created space trash. n44 Worse yet, much of the space debris is remarkably persistent. Altitude is the key variable here: debris generated at relatively low altitudes will usually degrade quite quickly, falling out of orbit and ordinarily burning up when re-entering the earth's atmosphere. But debris at higher altitudes can remain aloft for years, decades, or even centuries - the exoatmospheric environment has very little ability to cleanse itself, and [\*1204] human beings cannot yet play the janitorial role effectively. In the highest orbits, we have to think of each piece of debris as essentially a permanent problem. n45 For much of this debris, especially the smaller bits, identification of the source is impossible; neither the satellite itself nor its ground controllers will be reliably able to identify the nature and origin of the particle that hit and crippled it. Lacking better situational awareness, satellite owners and operators may be ignorant about the cause of a particular malfunction - was it an internal snafu, a collision with a micrometeorite, an accidental impact with random debris, or a deliberate ASAT attack - and attribution of liability for any damage could not be readily assigned. n46

AT: Other treaties solve ASATs

Only CIL can solve for satellites – other treaties don’t cover enough countries

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

Remarkably, the CIL version of the law of outer space would achieve even more comprehensive geographic coverage than the treaty version. Half of the countries in the world have not yet gotten around to ratifying the OST; even larger cohorts have not acted to affiliate themselves with the other important space-related instruments. In contrast, all countries would be bound by the CIL of outer space; it is hard to imagine any "persistent objectors" who have exempted themselves from any aspect of the now-entrenched custom, and any new States that emerge onto the world scene would automatically be covered by the body of space-related CIL, even if they do not affirmatively join the treaties.

CIL Good – Civilian Casualties

CIL ensures that civilians are not targeted in war

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

B. Proportionality   A similar conclusion is driven by evaluation of the second fundamental LOAC touchstone, proportionality. When a military force anticipates (as it virtually always must) that a proposed attack would generate both positive, direct military value (in damaging or destroying enemy military assets or personnel) and undesired harm on civilians (and on neutrals and other non-belligerents) or their effects, then the attacker must pause to assess the comparative value of those two factors. Admittedly, this calculation is inherently opaque and inexact, as it requires weighing starkly incommensurable variables, but LOAC requires the attacker to consider whether, with all things considered, the strike is "worth it." [n190](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622" \l "n190) Long-term, as well as immediate, effects must be considered, and the attacker is obligated to attempt to gather the data necessary for making an informed, mature judgment, including assessing the possible harms inflicted on nationals of neutral countries, and even on the natural environment. [n191](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622" \l "n191) If the anticipated collateral damage is excessive - if the reasonably expected hardship to protected sites is greater than the benefits that the operation can accomplish - then the attack must be modified or aborted. [n192](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622" \l "n192) Again, an ASAT operation - especially one that might spawn a persistent debris hazard - is vulnerable under this analysis. The proportionality calculus could be exceptionally complicated because the military value of a particular ASAT operation could be high. If the enemy force is heavily reliant on its satellites for reconnaissance, communications, targeting, etc., and if it possesses few alternative "fall  [\*1247]  back" substitutes, then destruction of one (or a few) orbiters could carry a significant premium. [n193](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622" \l "n193) On the other hand, the "collateral damage" side of the proportionality balance could be weighty, too. If the would-be target satellite is ensconced in a popular orbit (exploited by many other satellites from other countries), especially if it is relatively high in space, then the foreseeable debris field could be disruptive to the peaceful space activities of many users over an extended period. Depending on how many and what size debris fragments the attack might generate, how far they would be likely to spread, and how reliably they could be tracked (and possibly avoided) by subsequent space travelers, the costs of the ASAT operation could be substantial. Those costs would be borne by civilians, by space programs of other countries, and even by the subsequent satellites of the attacker itself, for many years after the conflict had terminated. [n194](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622" \l "n194) Even a non-debris-generating ASAT, such as one employing a laser or other directed energy system, could impose significant costs on civilians and neutrals. If the target was a dual-use satellite - and it is increasingly common for orbiters to serve military and non-military clients interchangeably [n195](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622" \l "n195) - then any interruption in its availability would negatively impact non-belligerents. With all those variables, it may not be possible to assert confidently that no ASAT activity could ever be justified as acceptably proportionate under the traditional LOAC analysis. But it seems clear that many possible ASAT operations would be ruled out, and even that most contemplated kinetic ASAT strikes would be of dubious legality. In any event, the attacker is required to evaluate proportionality: to gather the relevant available data about long-term costs and benefits necessary to making an intelligent decision.

CIL Good – Human Rights

CIL is key to worldwide human rights

Byers 95 (Michael, Supervisor in International Law, Queens' College, Michigan Journal of International Law, Fall, 1995 17 Mich. J. Int'l L. 109, Lexis) ELJ

The role of power in the process of customary international law is also an important, albeit not explicit, element of the debate about the extent to which international human rights law can pierce the territorial jurisdictions of non-consenting states. n28 It is generally accepted that the rules and procedures articulated in human rights treaties apply, as treaty obligations, only to states which have ratified those treaties. Yet many scholars have insisted that even those states which have refused to ratify human rights treaties have international human rights obligations. They have based this insistence on two main grounds. First, by ratifying the U.N. Charter, all member states accepted the general human rights obligations set out in Articles 55(c) and 56. n29 This argument asserts that the subsequent human rights treaties have simply elaborated the Charter- [\*120] based obligations, not created new obligations in themselves. n30 Second, scholars have asserted that rules of customary international law have developed with respect to the content of specific human rights and the jurisdiction of the international community to monitor, encourage respect for and even enforce the implementation of those rights within the territory of non-consenting states. n31

HR key to Hegemony

Human rights is key to hegemony

Byers 95 (Michael, Supervisor in International Law, Queens' College, Michigan Journal of International Law, Fall, 1995 17 Mich. J. Int'l L. 109, Lexis) ELJ

It is clear from the preceding discussion that power is derived from a number of different sources. First, power derived from military capabilities provides states with the option of using force to impose their will, or resist the efforts of others to do so. Second, power derived from wealth provides states with the capability to impose and withstand trade sanctions, to grant Most Favored Nation status or not to care whether it is granted. Power derived from wealth also enables states to support an effective diplomatic corps which can monitor international developments and apply pressure, based on all the various sources of power, in political organizations such as the United Nations. Third, power is derived from moral authority: the ability to appeal to general principles of justice. In the human rights field, for instance, the existence of a high [\*122] degree of moral authority in support of some customary rules has discouraged states which might otherwise have opposed those rules from doing so, from openly violating those rules, or from admitting to concealed violations of them. n36 These different sources of power are important in terms of the process of customary international law because their cumulative effect determines whether and to what degree different states are able to engage in behavior which contributes to the maintenance, development, and change of customary rules.

CIL Good – Environment

CIL is key to global environmental regulations

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

We turn next to a much younger n198 area of specialized CIL, one that may also extend restrictions on ASAT operations in surprising ways. International environmental law attempts to rein in national behaviors that pollute, damage, or jeopardize the natural environment in significant measure, even when no particular State is individually aggrieved. As with LOAC, skeptics may doubt the efficacy or even the existence of international environmental law, but, again as with LOAC, the reality is now abundantly clear: hundreds of treaties, UNGA resolutions, and declarations of other noteworthy international bodies attest to the ambition, competence, and accomplishment of the international environmental movement. n199 [\*1250] A prominent early example of this emergent international environmental law is the pathbreaking 1972 Stockholm Declaration, crafted at the U.N. Conference on the Human Environment, through which all leading States confirmed that protection of the environment is a major issue affecting everyone's well-being and "is the urgent desire of the peoples of the whole world and the duty of all Governments." n200 Principle 21 of the Declaration affirms that States have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." n201 Identical language was featured two decades later in the 1992 Rio Declaration on Environment and Development, in its Principle 2. n202 The UNGA has repeatedly confirmed and elaborated those assertions, urging all governments to pursue and effectuate the Stockholm and [\*1251] Rio pronouncements, n203 emphasizing the special responsibility to protect the environment in times of armed conflict, n204 and stressing that all States should "ensure that activities within their jurisdiction or control do not cause damage to the natural systems located within other States or in the areas beyond the limits of national jurisdiction." n205 The UNGA has also flatly asserted that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law." n206

CIL Solves

ALL countries are bound to CIL

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

Although treaties and customary international law norms are of equivalent legal weight, there is one sense in which CIL is even more  [\*1229]  assertive and far-reaching than the written instruments. That is, once a CIL norm is established (through the above-described arcane objective and subjective criteria), it becomes automatically binding on all States - even those that did not participate in the emerging pattern, that may not have been fully cognizant that a trend was developing, and that may not be fully supportive of the rule, if they took the occasion to think about it seriously. In fact, new countries (e.g., former colonies) that were not even in existence at the time a prior CIL norm had emerged are nonetheless bound by it - a new State may have some ability to pick and choose which treaty obligations of its former regime should continue to apply to the new entity, but it is generally deemed to have consented automatically to the entire corpus of CIL that exists on the date of its independence. [n138](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622" \l "n138)

Courts don’t link to Politics

Courts shield the electoral parts of the government

Whittington 3 (Keith, Princeton University, Department of Politics, November 17, 2003, http://www.law.northwestern.edu/colloquium/legalhistory/Keith%20Whittington.pdf) ELJ

An active and independent Court can assume the blame for advancing constitutional commitments that might have electoral costs. The relatively obscure traceability chain between elected officials and judicial action allows coalition members to simultaneously achieve certain substantive goals while publicly distancing themselves from electoral responsibility for the Court and denouncing it for its actions. Elected officials have an incentive to bolster the authority of the courts precisely in order to distance themselves from responsibility for any of its actions. As long as the Court is acting in concert with basic regime commitments, and thus is not imposing serious electoral or policy costs on other affiliated political actors, it may enjoy substantial autonomy in interpreting those commitments.

Court decisions avoid congressional political battles-comparatively save political capital

Ward in 2k9

(Artemus, Professor of Poli Sci @ NIU “*Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court*”, Congress & the Presidency, Jan-Apr, (36)1; p. 119)

After the old order has collapse the once- united, new-regime coalition begins to fracture as original commitments are extended to new issues. In chapter 3 Whittington combines Skowronek's articulation and disjunctive categories into the overarching "affiliated" presidencies as both seek to elaborate the regime begun under reconstructive leaders. By this point in the ascendant regime, Bourts are staffed by justices from the dominant ruling coalition via the appointment process - and Whittington spends time on appointment politics here and more fully in chapter 4. Perhaps counter-intuitively, affiliated political actors - including presidents - encourage Courts to exercise vetoes and operate in issue areas of relatively low political salience. Of course, this "activism" is never used against the affiliated president per se. Instead, affiliated Courts correct for the overreaching of those who operate outside the preferred constitutional vision, which are often state and local governments who need to be brought into line with nationally dominant constitutional commitments. Whittington explains why it is easier for affilitated judges, rather than affiliated presidents, to rein in outliers and conduct constitutional maintenance. The latter are saddled with controlling opposition political figures, satisfying short-term political demands, and navigating intraregime gridlock and political thickets. Furthermore, because of their electoral accountability, politicians engage in position-taking, credit-claiming, and blame-avoidance behavior. By contrast, their judicial counterparts are relatively sheltered from political pressures and have more straightforward decisional processes. Activist Courts can take the blame for advancing and legitimizing constitutional commitments that might have electoral costs. In short, a division of labor exists between politicians and judges affiliated with the dominant regime.

Courts don’t link to Politics

Even in today’s no restraint society, the court has remained immune from the public

Burton, graduate of Georgetown University Law Center, 2004

(Adam Burton, PAY NO ATTENTION TO THE MEN BEHIND THE CURTAIN: THE SUPREME COURT, POPULAR CULTURE, AND THE COUNTERMAJORITARIAN PROBLEM, UMKC Law Review, 73:53, Fall 2004 JWS)

At any rate, by the 1990s, restraint in popular culture had all but evaporated. In the most obvious example, the salivating media devoured and propagated the most lascivious details of the allegations put forth in the Starr Report, and President Clinton's sexual practices became a staple of popular culture, inspiring countless Saturday Night Live sketches, Monica Lewinsky Halloween costumes (complete with stained blue dress), n92 and Monica internet fan pages, n93 to name only a few indicators of popular culture's obsession with the story. That the most intimate details of the President's encounters, and not merely the simple fact of the encounters, could be revealed in the government's official reports is a testament to the lack of regard that our popular culture holds for the privacy of public figures. While the degree of detail might have been thought of as excessive and in poor taste in earlier times, and may have inspired sympathy for the President's situation and repulsion for his attackers, the architects of the Starr Report calculated that exposing the salacious minutiae of the President's sex acts would fascinate the American public in the age of Jerry Springer. n94 And the new tools of information technology were quickly utilized to allow the public to satisfy its desire to know. In addition to garnering widespread [\*66] television coverage, the Starr Report was available on the Internet within minutes of its official publication. n95 The Clinton-Lewinsky scandal is the most obvious example of the exposure of the private life of a political figure, but by no means the only one. Exposure is not limited to circumstances of scandal, sexual or otherwise. Even before the Lewinsky scandal, the private lives of the Clintons were subject to scrutiny; an audience member at a 1992 campaign speech famously asked the future President what style of underwear he preferred. n96 The inspection of the Clintons was not limited to the family's patriarch. Chelsea's braces garnered unwanted attention, even inspiring a scene in the film Beavis and Butt-Head Do America. n97 In the same vein, the arrest of President Bush's daughter, Jenna, for underage drinking also generated headlines n98 and is manifest in expressions of popular culture. n99 How has the Supreme Court fared in an age of no restraint? If the Court's power is, as in Oz, equivalent to mystery, n100 what are the implications of this culture of exposition to the Court's ability to maintain its distance from the public, and therefore its institutional clout? Or, if, as in Frankfurter's estimation, the Court's authority rests on its "moral sanction," can the Court retain its aura of moral righteousness when purveyors of popular culture pander to public tastes, coveting scandal, eager to expose and exaggerate the deficiencies of any public figure? The Court has, even in our age, remained largely immune from attack in the avenues of mass visual popular culture. Novelists and journalists have, at times, closely scrutinized, if not excoriated, the Justices and the Court as a whole. n101 Bob Woodward and Scott Armstrong examined the inner workings of the Berger Court in their best-selling non-fiction book The Brethren, n102 in which the Justices [\*67] were depicted as a body of men who engaged in petty politics not only to advance their policy preferences, but also to gratify their personal jealousies. n103 Edward Lazarus published a similar tell-all expos6 of the Rehnquist Court in Closed Chambers. n104 However, the Court as an institution has generally remained below the radar of representational popular culture and the more general audience it attracts, except in extraordinary circumstances, after which it again fades into relative obscurity. As I will show below, the Court's decisions sometimes frame the background of fictional productions exploring controversial social issues, such as abortion or capital punishment, and the Court has as such been portrayed as a tangential "character," sometimes without ever actually "appearing" on-screen. n105 The Court itself, however, rarely is depicted as a subject worthy of exploration: The real Justices rarely appear on television, in the national media, or in fictitious representation. The lack of publicity can be explained in part by the Court's protection of its anonymity. Thus, "no American institution has so . . . controlled the way it is viewed by the public," n106 although that control is neither absolute nor complete.

Courts don’t link to Politics

Supreme Court decisions avoid congressional political battles

Curry, Pacelle, and Marshall 8

(Brett, Richard, Bryan, Professors of Political Science @ Georgia Southern University, "*An informal and limited alliance*", Presidential Studies Quarterly, 6/1, http://www.accessmylibrary.com/coms2/summary\_0286-34845337\_ITM)

Presidents have an incentive to use their time in the White House to cement their place in history. Presidents must work closely with Congress to ensure that their legislative agendas survive and flourish. But, as most presidents soon learn, that is not enough. An important consideration depends on the context the president faces (Barber 1992; Lewis and Strine 1996; Skowronek 1997). Over the bulk of the past 50 years, a number of presidents have served during periods of divided government, which, of course, complicates their attempts to exert influence and establish their legacies (Fiorina 1996; Quirk 1991). This has prodded presidents to seek influence and advance their policy goals in other ways, such as relying on executive orders to circumvent Congress (Deering and Maltzman 1999; Howell 2005; Krause and Cohen 1997; Krause and Cohen 2000; Marshall and Pacelle 2005; Mayer 2001) and using executive agreements instead of treaties to bypass the Senate (Howell 2003; Johnson 1984). Presidents have also turned to the Supreme Court in attempting to advance and protect their goals and initiatives. The institutional relationship between the president and the Court seems almost natural. Indeed, according to Robert Scigliano, that was the intent of the framers. Scigliano argues that the framers designed the judicial and executive branches as "an informal and limited alliance against Congress" (1971, vii). The rise of presidential and judicial power has largely come at the expense of Congress. The Court has generally been reluctant to challenge the exercise of executive power, particularly in wartime (Fisher 1997, 1998; Pritchett 1984, 281-338; Silverstein 1997). The Court has also helped the expansion of presidential power by silent assent (Barilleaux 2006). This study provides an empirical investigation of part of Scigliano's proposition: Does the Supreme Court appear responsive to the president in its decisions? Thus, this study is not concerned with those occasional cases involving executive power but with whether the Court systematically responds to the president in its overall decision making. Presidents can try to impress their philosophy on the courts through their appointments to all levels of the federal judiciary (Abraham 1999; Epstein and Segal 2005). This is particularly true of presidential influence over the Supreme Court, although opportunities to change the Court's composition are more intermittent (Krehbiel 2007). But presidents are equipped with additional tools to influence the Court as well. The president can rely on the Office of the Solicitor General to advance his agenda before the Court (Bailey, Kamoie, and Maltzman 2005; Pacelle 2003; Salokar 1992). The president can bring negative sanctions to bear if the Court issues unfavorable decisions. He can use the bully pulpit to initiate legislation or push for a constitutional amendment overturning a judicial decision. Finally, as the nation's chief executive, the president often determines the extent to which the Court's decisions will be implemented and respected (Canon and Johnson 1999).

AT: Lower Courts won’t enforce

The Lower Courts Will Follow Supreme Court

Kim 2007, Professor of Law, Washington University School of Law, St. Louis., 2007

(Pauline, *P*Copyright © by Pauline T. Kim. Copyright (c) 2007 New York University Law Review

*/LexisNexis*, “Lower Court Discretion,” May, 2007, http://www.lexisnexis.com:80/us/lnacademic/mungo/lexseestat.do?bct=A&risb=21\_T6892370664&homeCsi=7361&A=0.8169646952960026&urlEnc=ISO88591&&citeString=82%20N.Y.U.L.%20Rev.%20383,at%20388&countryCode=USA, July 2, 2009,E.B.S.).

If the fear of reversal is insufficient to explain judicial behavior, then the principal-agent model presents a puzzle. In the absence of any effective sanction, why would lower court judges - assumed to be motivated by their policy preferences - choose to follow legal authority rather than pursuing their own \preferred outcomes? The simplest explanation for lower court compliance is that judges have legal preferences independent of their political preferences. More precisely, even if judges care about whether the outcome in a given case advances their preferred policy, they likely care about whether it conforms to legal norms as well. Judges may have a variety of legal preferences regarding matters such as the appropriate mode of interpreting statutes, or the relevance of foreign legal materials, and these preferences may vary from judge to judge. But their decisions are also guided by a set of widely shared norms - some of which are formulated as legal rules - regarding their role in the judicial hierarchy. One fundamental and widely accepted norm requires that lower federal court judges follow precedent established by a court directly in line above them in the judicial hierarchy. Adherence to this norm offers a straightforward explanation of why lower courts comply with superior court precedent, even that with which they disagree. n8

AT: Legitimacy DA

Overturning bad precedent is crucial to legitimacy

Rosenfeld Professor of Constitutional Law 04

(Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast International Journal of Constitutional Law Volume 2, Number 2, October 650-1 TC)

In theory at least, common law adjudication need not involve repudiation of precedents, only their refinement and adjustment through further elaborations. Accordingly, gaps in predictability may be merely the result of indeterminacies; the recourse to notions of fairness are meant primarily to reassure the citizenry that the inevitably unpredictable will never be unjust. Constitutional adjudication, on the other hand, while relying on precedents as part of its common law methodology, must ultimately be faithful to the constitutional provision involved rather than to the precedents. As a result, when precedents appear patently unfair or circumstances have changed significantly, the U.S. Supreme Court is empowered—perhaps obligated pursuant to its constitutional function—to overrule precedent, thus putting fairness above predictability.60 For example, in its recent decision in Lawrence v. Texas,61 the Supreme Court overruled its 1986 decision in Bowers v. Hardwick,62 which held that the due process clause did not extend constitutional protection to homosexual sex among consenting adults, thus upholding a law that criminalized such conduct. More generally, whenever a constitutional challenge raises a significant question that could entail overruling a constitutional precedent, the Supreme Court faces a choice between predictability and fairness. American rule of law, like the Verfassungsstaat, involves constitutional rule through law, but unlike the Rechtsstaat it produces a rule through law where predictability is but one among several, often antagonistic, elements. American rule of law ultimately amounts to a complex, dynamic interplay between competing elements and tendencies. Moreover, it appears, at least initially, that more than the Rechtsstaat or the État de droit, American rule of law depends for its viability on a broad based consensus regarding extralegal norms, such as fairness and substantive notions of justice and equity. Indeed, if there is a consensus on what constitutes fairness or justice, then the tensions between predictability and fairness, and between procedural and substantive safeguards, seem entirely manageable, and the work of the constitutional adjudicator more legal than political. If, on the contrary, there are profound disagreements over what is fair or just, then the work of the constitutional adjudicator is bound to seem unduly political. Accordingly, at least prima facie, the task of the American constitutional adjudicator seems more delicate and precarious than that of her continental counterpart.

Enforcing controversial decisions builds legitimacy

**Law in 2k9** (David S., Professor of Law and Political Science – Washington University, “A Theory of Judicial Power and Judicial Review”, Georgetown Law Journal, March, 97 Geo. L.J. 723, Lexis)

Part IV of this Article discusses a counterintuitive implication of a coordination-based account of judicial power. Conventional wisdom suggests that courts secure compliance with their decisions by drawing upon their store of legitimacy, which is undermined by decisions that are unpopular, controversial, or lack intellectual integrity. [**25**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n25) Part IV argues that precisely the opposite is true: an unpopular or unpersuasive decision can, in fact, enhance a court's power in future cases, as long as it is obeyed. Widespread compliance with a decision that is controversial, unpopular, or unpersuasive serves only to strengthen the widely held expectation that others comply with judicial decisions. This expectation, in turn, is self-fulfilling: those who expect others to comply with a court's decisions will find it strategically prudent to comply themselves, and the aggregate result will, in fact, be widespread compliance. Part IV illustrates these strategic insights--and the Supreme Court's apparent grasp of them--by contrasting  [\*734]  *Bush v. Gore* [**26**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n26) with *Brown v. Board of Education* [**27**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n27) and *Cooper v. Aaron*. [**28**](http://www.lexis.com/research/retrieve?y=&dom1=&dom2=&dom3=&dom4=&dom5=&crnPrh=&crnSah=&crnSch=&crnLgh=&crnSumm=&crnCt=&cc=&crnCh=&crnGc=&shepSummary=&crnFmt=&shepStateKey=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&fpSetup=0&_m=8c88d133c25a3b4f5051a1f6e7d59e22&docnum=10&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAA&_md5=f69097397b5940fd4142eea50a91eed7&focBudTerms=supreme+court+w%2F35+controvers%21+or+unpopular+w%2F20+decision%21+or+ruling%21+w%2F35+legitimacy&focBudSel=all#n28)

AT: Legitimacy DA

The Court’s legitimacy is not effected by its decisions and it has power to change political environment separate its popularity.

McDonnell, Stanford U econ pH.D, 97

(Brett, California Law Review, “Dynamic Statutory Interpretations and Sluggish Social Movements”, Vol. 85, No. 4, p. 923, July, JSTOR)

Part VI applies this model to the Civil Rights Act of 1991 and to civil rights politics today. Eskridge thinks the congressional override of many decisions shows the Rehnquist Court has not played the Court/Congress/President game well. The dynamic theory suggests several alternative stories. One possibility is that the Court's recalcitrance has forced advocates to go back to more grassroots Congressional lobbying, strengthening their long-run political position and leading to stronger laws than they would have achieved under a more sympathetic Court. This would not have been the Court's intent, but rather an unanticipated effect of the judicial decisions. An alternative interpretation is that the Court's actions contributed to a changed political environment on racial issues, leading in the long run to national policies closer to its conservative preferences. Either way, with today's conservative Court, a judicial strategy might actually make the law more conservative than the status quo in the short run, and might threaten to make future preferences even more conservative. Even a legislative strategy might be futile in the short run. Thus, today a mass action strategy aimed primarily at shaping future preferences makes the most sense.

AT: Activism Turn – Inevitable

Because of a lack of checks on Judicial power, judges inevitably practice activism

Lipkin, Distinguished Professor of Law, Widener University School of Law (Delaware), J.D., UCLA School of Law, 1984, Ph.D., Princeton University, 1974, 2008

(Robert Justin Lipkin, WE ARE ALL JUDICIAL ACTIVISTS NOW, University of Cincinnati Law Review, 77:181, Fall 2008, JWS)

While there must be checks on the elected branches, no significant [\*193] institutional device exists to protect the other branches of government and the people from judicial excess. n48 Of course, defenders of judicial supremacy invariably argue that the appointments process is a sufficient check on the judiciary, but this a limited check at best. For one thing, it overlooks the fact that consent requires accountability and that once the elected branches nominate and confirm a federal judge, that judge is virtually free from any further serious accountability. n49 It is the combination of judicial supremacy and the absence of judicial accountability that created the fertile conditions under which the seed of judicial activism first began to germinate. Once the seed has been planted, justices - even some who warn against the dangers and illegitimacy of judicial activism - will be unable to prevent themselves or their colleagues from ultra vires judicial decision-making. When judges do transgress, there is enough judicial rhetoric available to hide their transgressions even from themselves. We must remember that federal judges are unelected, life-tenured officials, who cannot be removed from office except by impeachment. Yet, in a republican democracy, consent and accountability are the chief criteria for guaranteeing the government's legitimacy. n50 This raises one of the most suppressed questions buried deep in the recesses of the entrenched understanding, namely, the question of judicial accountability. Which constitutional actor checks the judiciary's excess? Although judicial decisions can be reversed through constitutional amendment or transformative judicial appointments, these practices are extraordinarily difficult to execute, especially as a reliable means of reversing more-than-ordinary but less-than-seminal judicial decisions. n51 Consequently, this defective institutional design guarantees that the ill effects of constitutionally erroneous judicial decisions may last for [\*194] decades.

Activist/Controversial Now

The Supreme Court judges are activists right now.

Hirshman 10 (Linda, retired professor of philosophy, Salon, July 8th, 2010, <http://www.salon.com/news/opinion/feature/2010/07/08/activist_judges_left_right>) NK

On May 10, President Obama named Solicitor General Elena Kagan as his nominee to replace the retiring Justice John Paul Stevens on the bench. A former law professor, Associate White House Counsel, and Dean of Harvard Law School, Kagan will, if confirmed, be the first justice since William Rehnquist in 1972 to join the court with no prior judicial experience. Senate Judiciary Committee hearings will begin June 28. The committee will question Kagan, as well as supporting and opposing witnesses, before voting and sending its recommendation to the full Senate. Although confirmation only requires a simple majority, Republican senators could block a final vote if all 41 of them unite for a filibuster. Liberals and conservatives agree on one thing: They were each wrong before. Now that the conservative-dominated Supreme Court has struck down state and municipal gun laws, and as it faces the prospect of a challenge to healthcare reform, conservatives are embracing the very judicial activism they used to decry. At the same time, liberals are decrying the practice of overturning legislative judgments for constitutional reasons, a practice they once defended. Lions of judicial restraint like Learned Hand and Oliver Wendell Holmes, long missing from the columns of liberal commentators, are enjoying a resurgence, while the heroes of the civil rights left are notably missing from the exemplars of judicial excellence.

The Supreme Court judges are activists right now.

Hirshman 10 (Linda, retired professor of philosophy, Salon, July 8th, 2010, <http://www.salon.com/news/opinion/feature/2010/07/08/activist_judges_left_right>) NK

 Hardcore conservatives learned to live with the "switch in time" deal, but they never really reconciled themselves to giving economic regulation a pass. As conservatives have come to dominate the federal courts, their disaffection has become increasingly clear. Recently, conservative judicial activism has taken a turn toward invalidating unambiguous exercises of the federal commerce power unrelated to civil rights. In the most notorious case, Louisiana District Judge Marvin Feldman, a Reagan appointee, stopped the Obama administration's suspension of new and exploratory deep-water drilling. Noting that the ban would cost jobs, he ruled that the federal government couldn't justify such a harmful impact simply by connecting the unexplained failure of one rig to the possibility that other rigs might fail. Without better reasoning, the judge ruled, the law would violate the due process clause. Feldman is a lowly district judge, but the logic behind his ruling does not bode well for the regulatory state -- especially when you consider that conservatives contend that healthcare reform also threatens jobs and rests on an irrational misreading of what is wrong with the current healthcare system.

The court is showing too much activism and not enough deference now.

Feller 10 (Ben, writer for *The Huffington Post*, *The Huffington Post*, April 28th, 2010, <http://www.huffingtonpost.com/2010/04/28/obama-supreme-court-warni_n_556317.html>) NK

President Barack Obama, preparing to make his second nominee to the Supreme Court, warned Wednesday of a "conservative" brand of judicial activism in which the courts are often not showing appropriate deference to the decision of lawmakers. Obama made clear that his views on judicial restraint are not the only basis he will use in choosing his next nominee for the high court, a decision expected over the next few weeks. But his comments underscore just how much he thinks courts are being vested with too much power and are overruling legislative will, a factor that will influence his nominee choice. Obama already has openly criticized the Supreme Court for a January ruling – one led by the court's conservative members – that allowed corporations and unions to spend freely to influence elections. Obama has vowed to replace retiring Justice John Paul Stevens with a like-minded justice who will not let powerful interests crowd out voices of ordinary people. On Wednesday, when asked about judicial activism as he spoke with reporters aboard Air Force One, Obama spoke of judges who ignore the will of Congress and the democratic process, imposing judicial solutions instead of letting the political process solve problems.

Activist/Controversial Now

Kagan is a judicial activist.

Hogan 10 (Hogan, writer for *Red State*, *Red State*, June 29th, 2010, <http://www.redstate.com/hogan/2010/06/29/elena-kagan-admits-she-is-an-activist/>) NK

Elena Kagan admitted today that she will be a judicial activist. And she didn’t bat an eye. Now, this should not surprise anyone. After all, Ms. Kagan has called Israeli Judge Aharon Barak, a man who believes that the role of the judge is to “help bridge the gap between needs of society and law,” her “hero.” She is a woman who learned at the feet of both Judge Abner Mikva, a known liberal, judicial activist and Obama supporter straight out of the Chicago machine - and Justice Thurgood Marshall, who said, “[y]ou do what you think is right and let the law catch up.” She worked for the Clinton administration where she advocated against guns and for partial birth abortion, and she now works for the Obama administration as Solicitor General where she found time to file briefs against Arizona immigration laws. She kicked the military off campus, has been dubbed a legal progressive by more than one of her friends and colleagues, and she wrote an ode to socialism for her Masters Thesis. And these are but just a few of the very loud signals that have been sent about who she is.

The activist court just voted for a controversial law.

Foster 10 (Chase, writer for *The Progressive Pulse*, *The Progressive Pulse*, January 21st, 2010, <http://pulse.ncpolicywatch.org/2010/01/21/activist-court-overturns-century-old-campaign-finance-law/>) NK

In a 5-4 decision issued this morning, the U.S. Supreme Court radically altered campaign finance law, obliterating the long-held distinction between spending by individuals and spending by corporations. The case, Citizens United v. FEC, dealt with a challenge to an FEC ruling barring the airing of an anti-Hillary Clinton documentary during the 2008 primary elections. The lower court had said t Here’s how the Campaign Legal Center describes it: Today’s decision from the Supreme Court is an extreme example of judicial overreach that arbitrarily overturns decades of precedent and undercuts the powers of the legislative branch. What the Supreme Court majority did today was empower corporations to use their enormous wealth and urge the election or defeat of federal candidates, and in doing so, buy even more power over the legislative process and government decision making. As a result of this decision, for profit corporations and industries will be able to threaten members of Congress with negative ads if they vote against corporate interests, and to spend tens of millions on campaign ads to “punish” those who do not knuckle under to their lobbying threats.he McCain-Feingold law of 2002 prohibited the planned broadcasts because they would be aired during the 30 day period before a presidential primary and were paid for with corporate money. The Supreme Court was faced with determining whether the lower court’s ruling was Constitutional. They were originally expected to rule narrowly on the particular merits and circumstances of this unusual case, but instead, the Court issued a sweeping and expansive ruling that undermines 100 years of precedent and law.

Even the Supreme Court’s conservatives are being considered activists now.

O’Malley 10 (Deborah, Research Associate in the Center for Legal and Judicial Studies at The Heritage Foundation, Ashbrook Center, May 12th, 2010, <http://nlt.ashbrook.org/2010/05/defining-judicial-activism-down.php>) NK

As pundits debate the merits of Obama's Supreme Court nominee Elena Kagan, discussion of "judicial activism" takes center stage. But the accusations of activism are not all being tossed in Kagan's direction. What has typically been a nomenclature used by conservatives is now frequently being touted by the Left to attack the "conservative" justices on the Supreme Court. These criticisms are based on all-too-common distortions of the term's meaning. (I will leave it up to the reader to determine whether some distort it intentionally in order to mislead the American public, who overwhelmingly oppose judicial activism according to its actual definition...) Among the erroneous definitions of activism is the idea that it occurs whenever the Court strikes down a law. For example, MediaMatters attempts to debunk the "myth" that "liberal" judges engage in activism more than "conservative" judges by citing studies showing that conservative judges strike down legislation and regulation more than liberal judges do. But do we really want judges to uphold all laws, even unconstitutional ones? Would the Court be "activist" if it struck down a statute that, on its face, invidiously discriminated on the basis of race?

Activist/Controversial Now

The current Supreme Court is very activist.

Gewirtz 10 (Paul, Potter Stewart Professor of Constitutional Law at Yale Law School, *New York Times*, July 5th, 2010, <http://www.nytimes.com/2010/07/06/opinion/06gewirtz.html?_r=3&ref=opinion>) NK

It is no secret that the current Supreme Court is an activist one in striking down congressional legislation — just look at the prominent cases from the court’s just-completed term, most notably Citizens United v. Federal Election Commission, in which a 5-4 majority of the court’s more conservative justices struck down key provisions of Congress’s bipartisan campaign finance laws.

The current Supreme Court is very activist and has made many controversial decisions lately.

Gewirtz 10 (Paul, Potter Stewart Professor of Constitutional Law at Yale Law School, *New York Times*, July 5th, 2010, <http://www.nytimes.com/2010/07/06/opinion/06gewirtz.html?_r=3&ref=opinion>) NK

But “activism” can be measured in ways other than striking down legislation. Indeed, this term’s leading cases highlight another type of Supreme Court activism that hasn’t received much attention: vigorously policing and overturning district court judges who ordinarily would have much more leeway — particularly when those judges had used that leeway in a liberal direction. District courts are the front-line federal courts. Their judges hear evidence, manage trials, make factual findings, provide appropriate remedies and interpret and apply the law. In their interpretation of legal questions, district court judgments are always open to review on appeal. But in the judges’ other roles they usually have wide discretion, both because they have on-the-ground knowledge of a case and because our judicial system would be overloaded if appellate courts routinely second-guessed trial-court judgments. Yet with little public attention, the Supreme Court, led by the more conservative justices, has been intervening in these district court roles. In January, for example, the court took the unusual step of granting an emergency stay to stop a district court in California from televising a civil trial over the constitutionality of that state’s Proposition 8, which prohibits same-sex marriage. The district court had allowed the trial to be televised as part of a pilot program. But a 5-4 Supreme Court majority held that the district court hadn’t allowed enough public comment before making its decision — despite the dissenters’ argument that they could not find a single prior “instance in which this court has pre-emptively sought to micromanage district court proceedings as it does today.”

The Supreme Court has been activist for the last five years and the court just made a controversial decision.

Zotter 10 (Frank, senior associate general counsel for SCLSC, *Ukiah Daily Journal*, July 7th, 2010, <http://www.ukiahdailyjournal.com/ci_15458177>) NK

But the Supreme Court's decisions over the past five years, since Roberts and Alito joined the court, have increasingly demonstrated that "activism" isn't just something in the liberal days when Earl Warren was chief justice. One such decision was handed down earlier in this term, the Citizens United case that overturned a 20-year old precedent to rule that the government cannot limit independent corporate expenditures for or against political candidates. And then, on the same day the Kagan was being told over and over how bad judicial activism was, the Supreme Court handed down its decision in McDonald v. Chicago, completing a process it began in 2008 with the Heller decision that recognized a citizen's individual right to possess handguns. Heller, however, only involved only a federal enclave, the District of Columbia. In McDonald, by the same 5-4 split that had decided Heller, the Supreme Court extended Heller to a handgun ban in the City of Chicago. To do this, it effectively overruled a case going back to 1886, Presser v. Illinois, in which the Supreme Court had ruled that the Second Amendment didn't apply to the states or local governments.

Activist/Controversial Now

The current Supreme Court is has made many decisions which are controversial.

Gewirtz 10 (Paul, Potter Stewart Professor of Constitutional Law at Yale Law School, *New York Times*, July 5th, 2010, <http://www.nytimes.com/2010/07/06/opinion/06gewirtz.html?_r=3&ref=opinion>) NK

In April, an identical 5-4 majority overturned a district court’s award of fees to a group of civil rights lawyers who had won a case that transformed Georgia’s foster care system, even though the Supreme Court acknowledged that district courts usually have the power to grant such enhanced fees, and that the award turned on the district court’s fact-intensive and on-site judgment. Also in April, the same 5-4 majority yet again reversed a district court, this time over the enforcement of the court’s own injunction against a constitutional violation, something traditionally left to the district court’s discretion. The underlying issue, which involved the display of a cross on federal land, was an ideologically charged church-state question — but that aspect of the case had been settled by an earlier decision barring the display of the cross. The only legal issue before the Supreme Court was the district court’s enforcement of that previously ordered remedy — a matter traditionally within a district court’s discretion. Labels like “conservative” and “liberal” are simplistic, of course, but in each of these cases a conservative court majority reined in a district court decision that, within an area of traditional discretion, leaned in a direction usually favored by liberals — greater judicial transparency, incentives for lawyers who litigate civil rights cases and insistence on the strong enforcement of church-state separation. By wading into realms where the district courts traditionally have leeway, the Supreme Court majority undoubtedly believes it is correcting lower-court mistakes. But appellate courts usually give district courts flexibility and review trial court decisions only for significant legal errors. Whether they would have made the same decision as the trial court is usually irrelevant. I, for one, personally oppose the televising of district court trials, but also believe that the district court in California had the prerogative to decide differently.

The courts are extremely activist right now.

Corn 10 (David, Mother Jones' Washington bureau chief, *Mother Jones*, January 21st, 2010, <http://motherjones.com/mojo/2010/01/stevens-accuses-supreme-court-conservatives-judicial-activism>) NK

So where are all the cries of judicial activism from the right? By ruling today that corporations and unions can independently spend as much money as they want to back or trash congressional and presidential candidates, the conservative Supreme Court justices are throwing out over a century of jurisprudence that backed the regulation of corporate involvement in elections. Yet will the right denounce the five-to-four decision as an act of judicial overreach? That's not likely. But Justice John Paul Stevens, in a stinging dissent written for the minority, argues that the right wing of the court has engaged in a brazen act of activism--and has done so to award corporations more legal rights than they have previously been afforded.

The court just voted narrowly for a controversial decision.

Schneider 10 (Brian, writer for *The Daily* Caller, *The Daily Caller*, July 7th, 2010, <http://dailycaller.com/2010/07/07/experts-debate-activism-vs-judicial-restraint-on-the-supreme-court/>) NK

What started out Wednesday as a discussion among experts about the Supreme Court’s recent rulings quickly turned into a debate about whether the current justices on the high court displayed activist tendencies or practiced judicial restraint. In McDonald v. Chicago, the high court ruled 5-4 last month to overturn Chicago’s handgun ban. This decision followed a similar ruling in 2008 in Heller v. District of Columbia, where the Supreme Court, on another 5-4 vote, struck down a handgun ban in the nation’s capital.

Activism Good – Rule of Law

A- Judicial Activism is key to protect liberty and the rule of law

**Bolick, CATO Institute Writer, 07**

(Clint, A Cheer for Judicial Activism, CATO Institute, <http://www.cato.org/pub_display.php?pub_id=8168>, 6/30/09, DKL)

Judicial activism has become a universal pejorative, a rare point of agreement between red and blue America. Conservatives and liberals alike condemn courts for overturning policy decisions they support. Both sides would reduce the judiciary's constitutional scrutiny of the actions of other branches of government -- a role it exercises not too much but far too little. To be sure, courts deserve criticism when they exercise legislative or executive powers -- ordering taxes to be raised, assuming control over school systems or prisons, or as the Supreme Court did yesterday, giving regulatory agencies broad lawmaking authority. But better to call this behavior what it really is, which is not "activism" but lawlessness. By contrast, judicial activism -- defined as courts holding the president, Congress, and state and local governments to their constitutional boundaries -- is essential to protecting individual liberty and the rule of law. Judicial review, the power to invalidate unconstitutional laws, was essential to the scheme of republican government established by our Constitution. The courts, declared James Madison, would provide "an impenetrable bulwark against every assumption of power in the executive and legislative" branches, and "will naturally be led to resist every encroachment of rights expressly stipulated for in the constitution by the declaration of rights."

B- Rule of Law key to prevent global nuclear war

Rhyne 58

(Charles, fmr president @ American Bar Association, "Law Day Speech for Voice of America," 5/1/1958, http://www.abanet.org/publiced/lawday/rhyne58.html)

The tremendous yearning of all peoples for peace can only be answered by the use of law to replace weapons in resolving international disputes . We in our country sincerely believe that ~~man~~kind's best hope for preventing the tragic consequences of nuclear-satellite-missile warfare is to persuade the nations of the entire world to submit all disputes to tribunals of justice for all adjudication under the rule of law. We lawyers of America would like to join lawyers from every nation in the world in fashioning an international code of law so appealing that sentiment will compel its general acceptance. Man's relation to man is the most neglected field of study, exploration and development in the world community. It is also the most critical. The most important basic fact of our generation is that the rapid advance of knowledge in science and technology has forced increased international relationships in a shrunken and indivisible world. Men must either live together in peace or in modern war we will surely die together. History teaches that the rule of law has enabled ~~man~~kind to live together peacefully within nations and it is clear that this same rule of law offers our best hope as a mechanism to achieve and maintain peace between nations.

--card has been gender-edited

Activism Good – Democracy

A- Judicial Activism Is A Model for Constitutional Democracy

Horowitz, Journal of Democracy Writer, 06

(Donald L., “Constitutional Courts: A Primer For Decision Makers”, <http://muse.jhu.edu.floyd.lib.umn.edu/journals/journal_of_democracy/v017/17.4horowitz.html>, 7/1/09, DKL)

Judicial review is a growing institution. Originating in the United States two centuries ago, the power to declare governmental action, whether legislative or executive, unconstitutional has spread around the world in the last half century. As of 2005, more than three-quarters of the world's states had some form of judicial review for constitutionality enshrined in their constitutions.1 This figure includes a good many countries with undemocratic regimes, in which the effectiveness of judicial review might be subject to question, but the prevalence of the institution nonetheless testifies to the current fashion for judicial review. The popularity of judicial review is a recent phenomenon. As we shall see, judicial review is a function performed either by a specialized constitutional court or by a court with more general jurisdiction, typically a supreme court. While a growing number of new constitutions provide for judicial review in a supreme court, the stronger trend in new democracies has been to create separate constitutional courts.2 In 1978, only 26 percent of constitutions provided for a constitutional court,3 while approximately 44 percent did by 2005. There are regional variations in the relative popularity of the two types. For example, supreme-court review is more common than constitutional-court review in Latin America.4 Worldwide, however, only about 32 percent of constitutions locate judicial review in a supreme court or other ordinary court. It has become more and more difficult for constitution-makers to avoid judicial review. In the post-1989 period, constitution-making has become an international and comparative exercise in ways it was not previously. Increasingly, there are norms of constitutional process [End Page 125] and constitutional provisions propagated as desirable. Some part of the fashion for judicial review derived initially from a few conspicuous adoptions, as in Germany, Japan, and India. Some part derived, too, from the adjudication of new rights by new supranational institutions, particularly in Europe.5 Once optional for new democracies, constitutional courts are now generally regarded as standard equipment. To be sure, it is possible for constitutional drafters to defy the counsel of international advisors and monitors of democratic progress by choosing, as Afghanistan and Iraq did, not to create constitutional courts. It is, however, exceedingly unusual to fail to provide for judicial review altogether, and the more common choice, exemplified by Indonesia (2002), Côte d'Ivoire (2000), Latvia (2003), Chile (2001), and Spain (1992), is the constitutional-court model.

B- Democracy prevents nuclear warfare, ecosystem collapse, and extinction

**Diamond 95** (Larry, a professor, lecturer, adviser, and author on foreign policy, foreign aid, and democracy,

 “Promoting Democracy in the 1990s: Actors and instruments, issues and imperatives : a report to the Carnegie Commission on Preventing Deadly Conflict”, December 1995, http://wwics.si.edu/subsites/ccpdc/pubs/di/di.htm)

This hardly exhausts the lists of threats to our security and well-being in the coming years and decades. In the former Yugoslavia nationalist aggression tears at the stability of Europe and could easily spread. The flow of illegal drugs intensifies through increasingly powerful international crime syndicates that have made common cause with authoritarian regimes and have utterly corrupted the institutions of tenuous, democratic ones. Nuclear, chemical, and biological weapons continue to proliferate. The very source of life on Earth, the global ecosystem, appears increasingly endangered. Most of these new and unconventional threats to security are associated with or aggravated by the weakness or absence of democracy, with its provisions for legality, accountability, popular sovereignty, and openness.

AT: Judicial Capital DA

**No link – empirical studies prove justices don’t vote based on public or congressional responses**

Brace et al 1999, Hall, Langer, Clarence Carter Professor, Department of Political Science, Rice University, Professor, Department of Political Science, Michigan State University. Assistant Professor, Department of Political Science, University of Arizona, 1999

(Paul, Melinda, Laura, Judicial choice and the politics of abortion: institutions, context, and the autonomy of courts, Albany Law Review, 62 Alb. L. Rev. 1265, Accessed By SA)

While these two alternative perspectives on the status of the United States Supreme Court will continue to be debated as new evidence is brought to bear on the issue, some very recent research raises serious doubts about the utility of models derived from positive theory for explaining the Supreme Court's interaction with Congress. n12 In a highly thought-provoking paper, Jeffrey Segal presents a convincing case that assumptions about the insularity of courts are theoretically sound and empirically correct for the Supreme Court, even in matters of statutory interpretation. n13 As Segal demonstrates, very much in accordance with the voluminous literature on attitudinal theory, individual justices cast votes on the basis of their personal preferences, displaying little evidence of deference to Congress. n14 In other words, the Supreme Court's decisions are not constrained by anticipated reactions from Congress. As mentioned, Segal attributes the failure to find empirical support for separation-of-powers models to the institutional arrangements that define the Court and free its members from the need to engage in strategic voting. n15

Courts Defers Now

The Supreme Court recently upheld a controversial terrorism law.

Koppel 10 (Nathan, writer for the *Wall Street Journal*, *Wall Street Journal*, June 21st, 2010, <http://blogs.wsj.com/law/2010/06/21/supreme-court-upholds-controversial-terror-law/>) NK

The Supreme Court today upheld a law banning “material support” for foreign terrorist organizations, handing a win to the Obama administration and prosecutors. Critics say the law is too broad and impinges on U.S. citizens’ First Amendment rights of free speech and association. By making it a crime to provide “training,” “personnel” and “expert advice” to terrorist organizations—even for, say, peaceful ends such as disaster relief—the law sweeps too far into the rights of U.S. citizens to speak and associate freely. Here’s an article from WSJ’s Jess Bravin about the ruling in Holder v. Humanitarian Law Project and here’s a link to the opinion. Finally, click here to see a Scotusblog roundup of today’s three other holdings, including one that looks at whether district judges or arbitrators have jurisdiction to consider challenges to arbitration agreements.

Supreme court defers now

Markon and Eilperin 8 (Jerry and Juliet 11.13.8 Staff Writers, Washington Post, <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/12/AR2008111201058.html>)

In issuing a deliberately narrow ruling yesterday in a controversial case involving whales and the U.S. Navy, the Supreme Court strongly indicated that it intends to defer to the military in future disputes pitting national security against environmental concerns. The justices voted 6 to 3 to lift restrictions on the Navy's use of sonar off the Southern California coast, backing the military in a longstanding battle over whether anti-submarine training harms marine mammals. Environmentalists say the exercises disrupt habitats and leave the mammals with permanent hearing loss and decompression sickness. But the Navy argued that the training missions are essential to detecting a new generation of "quiet" submarines deployed by China, North Korea and other potential adversaries. "We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals," Chief Justice John G. Roberts Jr. wrote in the first decision of the court's current term. "Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines." Although the majority tailored its decision on narrow legal grounds and indicated that future environmental disputes will be decided on a case-by-case basis, the court made sweeping statements of deference to military judgments. Roberts unquestioningly accepted the assertion of top Navy officers that the exercises "are of utmost importance to the Navy and the Nation," writing that "the proper determination of where the public interest lies does not strike us as a close question."

The Supreme Court has deferred the Executive Branch’s authority before

Carter 3(Phillip, FindLaw Columniston Legal Policies, July 2003, CNN, [http://www.glapn.org/sodomylaws /usa/military/milnews22.htm](http://www.glapn.org/sodomylaws%20/usa/military/milnews22.htm))JRG

Deference by the courts to military-related judgments by Congress and the Executive is deeply recurrent in Supreme Court caselaw and repeatedly has been the basis for rejections to a variety of challenges to Congressional and Executive decisions in the military domain. For example, the Supreme Court has upheld Congress's delegation of authority to the President to define factors for the death penalty in military capital cases, Congress's authority to order members of the National Guard into active federal duty for training outside the United States, the President's authority as Commander in Chief to "control access to information bearing on national security," Congress's decision to authorize registration only of males for the draft, Congress's regulation of the conduct of military personnel under the Uniform Code of Military Justice, and the President's discretion as Commander in Chief to commission all Army officers.

Court Defers Now

Supreme courts will defer if military readiness is at stake

NY Times 8 (9.17.8 New York Times p. A20)

The Supreme Court showed extreme and troubling deference to the views of the military, deciding to lift two restrictions on the Navy's use of sonar in training exercises off the California coast. The sonar is used to detect extremely quiet diesel-electric submarines that might threaten a fleet. But the noise is earsplitting -- as loud as 2,000 jet engines, according to environmental groups -- to acoustically sensitive whales and other marine mammals. Most disturbing was the majority's strong statements of deference to the professional judgments of military officers. A district court and appeals court in California had shown much more willingness to probe behind the military's claims. They had concluded that the Navy could effectively train its strike groups even under the two restrictions it most vigorously opposed: that sonar be shut down if marine mammals were spotted within 2,200 yards and powered down during certain rare sea conditions. Chief Justice John Roberts, who wrote the majority opinion, chastised the lower courts for failing to defer to the judgment of senior Navy officers who claimed that the restrictions would impair realistic training that is of the ''utmost importance to the Navy and the nation.'' Chief Justice Roberts downplayed the likely harm to marine life and said the public interest in military readiness tipped the scales ''strongly in favor of the Navy.

Supreme court has history of deferring to the military because courts cannot try commanders

Kraw 2 (George 9.6.2 Partner at law firm Kraw & Kraw, Courts Must Respect President’s Authority in Time of War 12(23) p. 1)

The Supreme Court has consistently deferred to the political branches of government in cases relating to military decisions. In the Hamdi matter, the Fourth Circuit notes that this deference extends to "military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." Permitting judicial proceedings to review military judgments can pose special hazards, because "allowing alleged combatants to call American commanders to account in federal courtrooms would stand the war-making powers of Articles I and II on their heads."

Deference Bad – Extinction

The judicial branch can check back dangerous military action that can cumulate in extinction

Kellman 89 (Barry, Professor at DePaul University College of Law, Duke Law Journal, 1989 Duke L.J. 1597 December, Lexis)

In this era of thermonuclear weapons, America must uphold its historical commitment to be a nation of law. Our strength grows from the resolve to subject military force to constitutional authority. Especially in these times when weapons proliferation can lead to nuclear winter, when weapons production can cause cancer, when soldiers die unnecessarily in the name of readiness: those who control military force must be held accountable under law. As the Supreme Court recognized a generation ago, the Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders. . . .. . . We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military. We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. [1](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da" \l "n1#n1" \t "_self) Our fears may be rooted in more recent history. During the decade of history's largest peacetime military expansion (1979-1989), more than 17,000 service personnel were killed in training accidents. [2](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da#n2#n2) In the same period, virtually every facility in the nuclear bomb complex has been revealed  [\*1598]  to be contaminated with radioactive and poisonous materials; the clean-up costs are projected to exceed $ 100 billion. [3](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da#n3#n3) Headlines of fatal B-1B bomber crashes, [4](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da#n4#n4) the downing of an Iranian passenger plane, [5](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da#n5#n5) the Navy's frequent accidents [6](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da#n6#n6) including the fatal crash of a fighter plane into a Georgia apartment complex, [7](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da" \l "n7#n7" \t "_self) remind Americans that a tragic price is paid to support the military establishment. Other commentaries may distinguish between the specific losses that might have been preventable and those which were the random consequence of what is undeniably a dangerous military program. This Article can only repeat the questions of the parents of those who have died: "Is the military accountable to anyone? Why is it allowed to keep making the same mistakes? How many more lives must be lost to senseless accidents?" [8](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da" \l "n8#n8" \t "_self) This Article describes a judicial concession of the law's domain, ironically impelled by concerns for "national security." In three recent controversies involving weapons testing, the judiciary has disallowed tort accountability for serious and unwarranted injuries. In United States v. Stanley, [9](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da" \l "n9#n9" \t "_self) the Supreme Court ruled that an Army sergeant, unknowingly drugged with LSD by the Central Intelligence Agency, could not pursue a claim for deprivation of his constitutional rights. In Allen v. United States, [10](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da" \l "n10#n10" \t "_self) civilian victims of atmospheric atomic testing were denied a right of tort recovery against the government officials who managed and performed the tests. Finally, in Boyle v. United Technologies, [11](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da" \l "n11#n11" \t "_self) the Supreme Court ruled that private weapons manufacturers enjoy immunity from product liability actions alleging design defects. A critical analysis of these decisions reveals that the judiciary, notably the Rehnquist Court, has abdicated its responsibility to review civil matters involving the military security establishment. [12](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da" \l "n12#n12" \t "_self)  [\*1599]  Standing at the vanguard of "national security" law, [13](http://www.lexis.com/research/retrieve?_m=2b45c7ca3bbaa91d903abecdca20be6b&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVlz-zSkAW&_md5=45a87d13298099bd9f6df456a59191da" \l "n13#n13" \t "_self) these three decisions elevate the task of preparing for war to a level beyond legal  [\*1600]  accountability. They suggest that determinations of both the ends and the means of national security are inherently above the law and hence unreviewable regardless of the legal rights transgressed by these determinations. This conclusion signals a dangerous abdication of judicial responsibility. The very underpinnings of constitutional governance are threatened by those who contend that the rule of law weakens the execution of military policy. Their argument -- that because our adversaries are not restricted by our Constitution, we should become more like our adversaries to secure ourselves -- cannot be sustained if our tradition of adherence to the rule of law is to be maintained. To the contrary, the judiciary must be willing to demand adherence to legal principles by assessing responsibility for weapons decisions. This Article posits that judicial abdication in this field is not compelled and certainly is not desirable. The legal system can provide a useful check against dangerous military action, more so than these three opinions would suggest. The judiciary must rigorously scrutinize military decisions if our 18th century dream of a nation founded in musket smoke is to remain recognizable in a millennium ushered in under the mushroom cloud of thermonuclear holocaust.

Deference Bad – Separation of Powers

Deference Undermines Separation of powers

Jaeger 97 (Nicole, Journal of Criminal Law & Criminology, Spring, <http://www.questia.com/googleScholar.qst;jsessionid=M1zNLmyGHGD4GG1MMwgnmRpJrZh32PzT2yn02TwbyZTQcyq20711!1330981764!1896127874?docId=5000552309>) ELJ

1. Separation of Powers Rationale Among the traditional justifications for the Judiciary's deference to the Military, the Supreme Court has stated that some form of deference is constitutionally mandated by the doctrine of separation of powers. n299 The Judiciary occupies a sensitive position when it reviews military cases. Explicit constitutional powers have been granted to both the executive and the legislative branches of government, n300 but the Judiciary is without a specific constitutional grant. The Court has invoked this constitutional scheme to explain its deference to the  [\*926]  other branches of government in military matters. n301 Although the Supreme Court has refused to abandon completely its power of review, n302 the Court has considered the Constitution a plenary grant of power, which should not be subjected to any unjustified second guessing by the Judiciary. n303 Although the Judiciary is without an explicit constitutional grant to review military cases, the Judiciary is nonetheless always obliged to decide "cases ... arising under [the] Constitution, [and] the laws of the United States ...." n304 Since Marbury v. Madison, n305 it has been the function of the Judiciary and not the political branches to delimit the bounds of permissible governmental conduct and the scope of constitutionally protected rights. n306 When a military regulation conflicts with a constitutionally guaranteed individual right, it is the Judiciary's duty to safeguard the Bill of Rights. n307 The principal of deference, however, is diametrically opposed to this tradition; n308 it represents a complete abdication of the traditional judicial function. n309 When the Judiciary defers to military decision-makers, it dangerously aggrandizes the military's power to influence not only military personnel, but the nation as a whole. n310

Deference Destroys separation of power – judicial scrutiny is key

Robbins 99 (Kalyani, J.D., Stanford Law School, 1999, Oregon Law Review Fall, 78 Or. L. Rev. 767, Lexis) ELJ

The Greater Separation of Powers Problem Suggests Less Deference to Military Decisions The separation of powers doctrine, as discussed earlier, has as its primary purpose and function the prevention of power concentration. It is not enough to prevent one branch from usurping the power of another; it is also important to forbid delegation of the power and duty invested in any branch. While all three branches are bound by an oath to support the Constitution, the judicial duty to interpret the Constitution is vested in the judiciary, and it may not shirk that duty or allow others to share it. The military is not a part of the judicial branch, and has no authority to engage in constitutional judicial review. When the Supreme Court asserts as its primary justification for holding a military act constitutional that the military itself has already calculated its action to be sufficiently necessary to survive constitutional inquiry, it delegates its most basic constitutional duty to the military. This is especially egregious when the military act challenged would, absent narrow tailoring to a compelling government interest in the civilian context, be deemed an unconstitutional infringement on someone's liberty. Justice Brennan persuasively described this problem in his dissent in Goldman v. Weinberger: Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a subrational-basis standard - absolute, uncritical "deference to the professional judgment of military authorities." If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be. n91 The source of Brennan's frustration with the majority was not his disagreement with the result, but the fact that the process which [\*795] led to that result was not constitutionally proper. There is more than mere deference in play here. This case in particular is an example of one that, due to the years that Dr. Goldman wore his yarmulke without incident, and to the over-inclusiveness of the regulation, would probably have failed even an intermediate level of constitutional scrutiny. This is not to suggest that every case in which the Court has explicitly deferred to the military's judgment as to the constitutionality of its actions would have failed standard constitutional analysis. There will certainly be circumstances, perhaps with even greater frequency than in the civilian government, when the military's needs are so great, and alternative options so lacking, that it must violate an individual's rights and the Court must allow it to do so. The problem lies in the frequent, if not consistent, lack of any constitutional analysis at all. By stating that the relevant analysis has been done at the military level, the Court is not only shirking its constitutional duty to police the other branches, it is delegating its interpretive function to them.

Deference Bad – Democracy

Judicial review is key to Democracy

Molot 0 (Jonathan T ., George Washington Law Professor, Stanford Law Review , 53 Stan. L. Rev. 1 Lexis) ELJ

To the contrary, for our representative democracy to flourish, the exercise of interpretive authority must be sufficiently predictable and controllable that legislators can hope to achieve real-world outcomes through carefully tailored legislation. Democratic legitimacy thus depends in part upon Congress' expectations regarding, and influence over, the exercise of interpretive authority: Congress must understand the abilities and priorities of the entity that ultimately will decide how to apply its laws and be able to influence, but not overwhelm, that entity. The discussion below suggests that the Founders' political vision of an independent judiciary both serving and constraining democracy is tied to the Founders' background understanding of legal meaning and interpretive leeway.

Extinction

Larry Diamond, professor at Stanford and Senior Fellow at the Hoover Institution, October 1995 “Promoting Democracy in the 1990’s,” [http://www.carnegie.org//sub/pubs/deadly/dia95\_01.html](http://www.carnegie.org/sub/pubs/deadly/dia95_01.html)

OTHER THREATS This hardly exhausts the lists of threats to our security and well-being in the coming years and decades. In the former Yugoslavia nationalist aggression tears at the stability of Europe and could easily spread. The flow of illegal drugs intensifies through increasingly powerful international crime syndicates that have made common cause with authoritarian regimes and have utterly corrupted the institutions of tenuous, democratic ones. Nuclear, chemical, and biological weapons continue to proliferate. The very source of life on Earth, the global ecosystem, appears increasingly endangered. Most of these new and unconventional threats to security are associated with or aggravated by the weakness or absence of democracy, with its provisions for legality, accountability, popular sovereignty, and openness. LESSONS OF THE TWENTIETH CENTURY The experience of this century offers important lessons. Countries that govern themselves in a truly democratic fashion do not go to war with one another. They do not aggress against their neighbors to aggrandize themselves or glorify their leaders. Democratic governments do not ethnically "cleanse" their own populations, and they are much less likely to face ethnic insurgency. Democracies do not sponsor terrorism against one another. They do not build weapons of mass destruction to use on or to threaten one another. Democratic countries form more reliable, open, and enduring trading partnerships. In the long run they offer better and more stable climates for investment. They are more environmentally responsible because they must answer to their own citizens, who organize to protest the destruction of their environments. They are better bets to honor international treaties since they value legal obligations and because their openness makes it much more difficult to breach agreements in secret. Precisely because, within their own borders, they respect competition, civil liberties, property rights, and the rule of law, democracies are the only reliable foundation on which a new world order of international security and prosperity can be built.

Deference Bad – Rights

Deference allows the military to violate constitutional rights – Korematsu decision Proves

Carter 3 (Phillip, writer, CNN, July 15, <http://www.cnn.com/2003/LAW/07/15/findlaw.analysis.carter.security/>) ELJ

In this instance the court was willing to say that Congress, not the president, possessed the relevant power. However, in military matters, the Supreme Court has typically supported -- rather than curtailing -- the exercise of presidential power. To take the most notorious -- and shameful -- example, during World War II, the Supreme Court invoked the doctrine of deference to the military in Korematsu v. United States, to uphold the decision to intern 120,000 Japanese-Americans with scant regard for their constitutional rights. In so doing, the court emphasized the "real military dangers" the detention was intended to address. It also stressed the fact that the decision had been made by "the properly constituted military authorities . . . because they decided that the military urgency of the situation demanded" it. Plainly, the Korematsu Court -- though it purported to apply "strict scrutiny" to a policy based on national origin discrimination -- was actually deferring broadly to the judgment of military decision makers, and of President Roosevelt in particular. In addition, it did so even though the case was decided in 1944, when the war had turned in America's favor.

Deference Bad – Torture

Deferring could open up room for human right infringements

Koh 8 (Harold 3.31.8 Dean of Yale Law, The Washington Post Pg. A19)

But why defer blindly when doing so would expose American citizens to torture without judicial review? And the amicus brief presented by human rights organizations shows that as Sunni Muslims, Omar and Munaf face a real and substantial risk of torture upon surrender to Iraqi authorities. Our government has a duty under both international and U.S. law not to surrender any person to a foreign sovereign where there is a substantial risk of torture. Our Constitution mandates that our government not threaten any person's liberty without due process of law. U.S. foreign policy interests are ill served when our government claims that our country's military personnel should answer to no law and that U.N. authorization constitutes valid ground for denying Americans their day in court and potentially exposing them to torture. In nearly identical circumstances, Britain's High Court recently held that a British court could inquire into the legality of the detention of a British citizen by British forces in Iraq because those troops, operating alongside American troops in the multinational force, are under their own country's effective command and control. If British courts are responsible for protecting the rights and well being of British citizens held by Britain's military in Iraq, why shouldn't American courts do the same?

Deference Bad – AT: Readiness

Deference not key to readiness – Courts can rule without being incompetent

Turley 2 (Jonathan, Professor of Law at George Washington, George Washington Law Review, , 70 Geo. Wash. L. Rev. 649, Lexis) ELJ

The judicial incompetence rationale is hardly compelling in an age of regulation in which courts routinely deal with the most complex and comprehensive issues involving federal agencies. Courts often review actions taken by agencies like the DOE and NASA despite their classified functions and specialized communities. More importantly, there is objectively little reason for courts to be so self-critical and self-doubting when dealing with military matters. There is a mystique of a warrior class that obscures the fact that the legal issues dealt with in military courts are largely conventional criminal matters. If, as suggested in this article, military jurisdiction were reduced to core military functions and violations, the excluded cases where the status of the defendant is merely incidental. Once again, there was an element of truth in the danger of supplanting martial traditions and values with judicial edicts and analysis. This danger, however, was primarily limited to those core areas of discipline and obedience, such as orders violations. This rationale breaks down rapidly as the subjects of individual cases move further from the center of military concerns and into more conventional violations. As will be argued below, a significant reduction in the military justice system can be made without touching on these core areas. [n296](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278558943818&returnToKey=20_T9701558674&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.573807.0664322117" \l "n296)

The Judicial branch Can deal with the military effectively

Myers 8 (Erika, J.D. Stanford University 2008, American Journal of Criminal Law, 35 Am. J. Crim. L. 201, Spring, Lexis) ELJ

Finally, unlike the Mexican War tribunal system, designed by the military, the War on Terror commission system was designed by civilian government lawyers, not the military. Many of the military's lawyers argued against the establishment of military commissions, on the ground that courts-martial were adequate to try detainees. n315 After the commissions were established, the top-ranking lawyers of both the Army and the Marines argued in Congressional hearings that commission procedures should be more protective of defendants, taking positions that "directly conflicted with the position of the civilians in the Bush Administration." n316 Sulmasy and Yoo argue that military lawyers have had too much influence over modern military commissions - harming civilian control over the military - and that "claims of deference to military expertise" are not as compelling "when the rules of warfare are being adapted to a new situation." n317 However, the Mexican War experience suggests otherwise, showing that the ability of military lawyers to combine knowledge of international law with knowledge of the military situation and strategy can be extremely helpful in adapting the rules of warfare to new situations.

No Judicial review will decrease military recruitment

Gilbert 98 (Michael H., Lieutenant Colonel in the US Air Force, USAFA Journal of Legal Studies, 1997 / 1998, 8 USAFA J. Leg. Stud. 197, Lexis) ELJ

During drastic post-Cold War downsizing and greater operational commitments in a larger number of foreign nations than ever, the military must have the most qualified members possible. Quality is derived from obtaining highly educated individuals, providing specialized training and promoting and retaining the very best. If the public perceives the military policy-makers as an all-powerful force that can ignore normal legal precepts, they may avoid joining the all-volunteer armed forces unless they are in the most dire circumstances [\*202] or without reasonable alternative. Those who volunteer and then discover the substantial limitations on their freedoms may leave the service for this reason. In this way, the military may lose some of its best troops. In turn, this could further isolate those that remain in the military from their parent society and foster within the military a belief that they are different than society because they are treated differently by a judiciary that characterizes them as a separate and distinct community. Most importantly, however, military members deserve the protection of the judiciary, which is part of the checks and balances of our government. n14 Without the check of the judiciary, the executive and legislative branches can be out of balance with the Constitution and contravene the basic intent of our system of government.

Deference bad – AT: Readiness

Third party needed in military affairs – military too biased

Robbins 99 (Kalyani, J.D., Stanford Law School, 1999, Oregon Law Review Fall, 78 Or. L. Rev. 767, Lexis) ELJ

Because necessity is one of the justifications for the judicial behavior criticized, it is fair to ask what alternative approaches would make it possible to strike a proper balance between individual rights and military imperatives. Not only does the Court often complain of its inability to determine the military's needs without simply accepting the military's own assertions, but even when it offers other justifications for its deference, at the core the problem is nearly always the Court's lack of expertise. This is a difficult problem, but that does not excuse the legal community from its problem-solving responsibility. Rather than attempting creative arrangements to aid in the proper constitutional analysis of military cases, the Court has thrown up its hands and handed over its jurisdiction. When criticizing the "'special expertise' argument [which] is often employed by the defenders of the military court system," n92 Justice Douglas pointed out that "civilian courts must deal with equally arcane matters in such areas as patent, admiralty, tax, antitrust, [\*796] and bankruptcy law, on a daily basis." n93 It is worthwhile, then, to take a moment to consider how this is achieved. In cases such as Justice Douglas describes, the parties generally call disinterested third-party experts to testify to relevant understandings of the field, as well as to the reasonability, within that field, of a particular act. The attorneys will take the time to locate such witnesses for cases dealing with areas in which precedent has taught them that this is important to do. This better enables the courts to fulfill their responsibility to engage in the legal analysis that those field experts cannot do on their own. The judicial holdings of such cases are thus a result of the combined wisdom of the experts and the judges. For this reason alone, the importance of ensuring that the experts are disinterested should be evident. Not only is the military like its own specialized field, but it is also somewhat more removed from society than are other specialized fields. For this reason, the need for such disinterested experts in the military field is both exceptionally great and more difficult to fulfill. Most experts on the military are either in the military, so clearly not disinterested, or were formerly in the military, which increases the likelihood of bias. This is not to say that all people in the military, or even all those who are or were officers in the military, are the same, or are hostile to upholding constitutional rights. The argument against using experts with direct ties to the military leaves plenty of room for diversity of thought, politics, and opinion among military personnel. When the courts allow expert testimony in other fields, they do not select those that either work or have worked at a company that is one of the litigants in the case. This is the most basic of precautions we take in the selection of disinterested experts. n94

The Judicial deference doctrine is outdated

Carter 3 (Phillip 7.15.3 Pres. of Truman National Security Project and Founder IAVA, CNN <http://www.cnn.com/2003/LAW/07/15/findlaw.analysis.carter.security/#carter>)

Does the judicial deference doctrine still make sense today? For a number of reasons, it may not be as well-justified as it once was. Recall that one early justification for the doctrine was the Executive Branch’s superior national security knowledge and expertise. In the modern era, however, judges are more knowledgeable about foreign policy than they may once have been. The information asymmetry which used to exist between the Executive and Judicial branches has been wiped away, thanks to CNN and the rise of the modern media establishment. Moreover, to the extent that there are gaps in judges’ knowledge, the executive branch can provide them with sensitive national security information through various means spelled out in the Classified Information Procedures Act. Judges can review this information “in camera”—outside the presence or access of the parties—if necessary to preserve secrecy and security.

Deference Bad – AT: Readiness

Turn – deference can hurt morale and recruiting

Carter 3 (Phillip 7.15.3 Pres. of Truman National Security Project and Founder IAVA, CNN <http://www.cnn.com/2003/LAW/07/15/findlaw.analysis.carter.security/#carter>)

For this reason, deference to military policies that infringe individual liberties on this, and other issues, can create tremendous dissonance between the values of the military and civil society—leading service persons to question and doubt the military’s institutional values. The dissonance and doubt add other variables with which commanders have to contend as they train, assimilate, socialize, and lead soldiers. Thus, the very policies intended to bolster morale and unit cohesion, good order, and discipline, may end up detracting from all these values if many service members consider the policies intolerably unjust.

Deference Bad – AT: Terrorism

Judicial review allows for flexibility on the war on terror

Margulies 4 (Peter, Professor of Law, Roger Williams University School of Law, Boston University Law Review, 84 B.U.L. Rev. 383, April, Lexis) ELJ

Institutional equity's "latitude of interpretation for changing times" n36 may be disconcerting for both champions and critics of executive authority. Champions of executive power may blanch at institutional equity's cabining of exigent procedures. n37 Critics of executive power may object to institutional [\*390] equity's willingness to find implied legislative authority for enemy combatant detention and military tribunals. Moreover, as the district court's sanctions in United States v. Moussaoui demonstrate, attempts to chart a course of institutional equity may result in a facile compromise that discounts defendants' rights. n38 When applied with appropriate care, however, institutional equity can offer a framework for assessing judicial review of procedure in antiterrorism efforts that incorporates both the flexibility that government requires and respect for lasting values. Part I of this article analyzes the values of exigency, equality, and integrity in the law and terrorism context, focusing on the risk to the rule of law that exigency presents in times of crisis. Part II depicts deference as the dominant narrative in both normative and descriptive accounts and uses a post-September 11 decision on access to information to illustrate how deference compounds the risk of executive assertions of exigency. Part III outlines the alternative account represented by institutional equity, which applies the tailoring methodology of equitable remedies jurisprudence and habeas review to resolve the separation of powers problems of law in times of crisis identified by Justice Jackson in the Steel Seizure Case. Part IV applies institutional equity to important procedural issues on the law and terrorism front, considering the indefinite detention of alleged enemy combatants, access of a criminal defendant such as Zacarias Moussaoui to exculpatory information within the government's control, and access to exculpatory information in the military tribunal context.

Deference Bad - CMR

Ending Deference is key to Civil-Military relations

Gilbert 98 (Michael H., Lieutenant Colonel in the US Air Force, USAFA Journal of Legal Studies, , 8 USAFA J. Leg. Stud. 197, 1997 / 1998 Lexis) ELJ

Without an actual, meaningful presence of the judiciary as a leg of the civil-military triangle, the triangle is incomplete and collapses. In its current structure, the judiciary has adopted a non-role by deferring its responsibility to oversee the lawfulness of the other two branches to those branches themselves. This dereliction, which arguably is created by the malfeasance of the United States Supreme Court, has resulted in inherent inequities to the nation, in general, and to service members, in particular, as the federal courts are reluctant to protect even basic civil rights of military members. Judicial oversight is one form of civilian control over the military; abrogating this responsibility is to return power to the military hierarchy that is not meant to be theirs. [\*198]  Under the United States Constitution, Congress has plenary authority over the maintenance and regulation of the armed forces, and the President is expressly made the Commander-in-Chief of the armed forces. The unwillingness of the Court to provide a check and balance on these two equal branches of the federal government creates an area virtually unchallengeable by the public. As a result, a large group of people, members of the military services, lack recourse to address wrongs perpetrated against them by their military and civilian superiors. Ironically, the very men and women dedicating their lives to protect the U.S. Constitution lack many of the basic protections the Constitution affords everyone else in this nation. The weakness in the present system is that the Supreme Court has taken a detour from the Constitution with regard to reviewing military issues under the normally recognized requirements of the Constitution. The federal judiciary, following the lead of the Supreme Court, has created de facto immunity from judicial interference by those who seek to challenge policy or procedure established by the other two branches and the military itself. When the "Thou Shalt Nots" of the Amendments to the Constitution compete with the necessities of the military, the conflict is resolved in favor of the military because it is seen as a separate society based upon the constitutionally granted authority of Congress to maintain and regulate the armed forces. n1 Essentially, the Court permits a separate world to be created for the military because of this regulation, distinguishing and separating the military from society. n2 The Court needs to reexamine their almost complete deference on military matters, which is tantamount to an exception to the Bill of Rights for matters concerning members of the military. Unless the Court begins to provide the oversight that is normally dedicated to many other areas of law fraught with complexity and national importance, judicial review of the military will continue to be relegated to a footnote in the annals of law. Combined with the downsizing and further consequent decline of interaction between the military and general society, n3 this exile from the protection of the Constitution could breed great injustices within the military. Perhaps even more importantly, the military might actually begin to believe that they are indeed second-class citizens, separate from the general  [\*199]  population, which could create dire problems with civil-military relations that are already the subject of concern by many observers. n4

Civil-military relations suffer without oversight by the judicial branch

Gilbert 98 (Michael H., Lieutenant Colonel in the US Air Force, USAFA Journal of Legal Studies, , 8 USAFA J. Leg. Stud. 197, 1997 / 1998 Lexis) ELJ

The proper role of the judiciary in civil-military relations is to ensure that neither the legislative branch, the executive branch, nor the military violate their responsibility to care for and treat fairly the sons and daughters of our nation who volunteer for military service. When federal prisoners can file lawsuits for often frivolous reasons, but military members cannot enter a courtroom after being subjected to secret experimentation with dangerous, illegal drugs, something is wrong. When military members cannot seek redress even for discrimination or injury caused by gross negligence, civil-military relations suffer because the judiciary is not ensuring that the balance of power is not being abused.

Deference Bad – CMR

Deference is key to Civil military Relations

Zillman 97 (Donald N., Professor at University of Maine School of Law, Maine Law Review, 49 Me. L. Rev. 85, Lexis) ELJ

Scholars of American civil-military relations have emphasized that the subject is far more sophisticated than the simple inquiry: "Has the military avoided seizing power from the civilian authorities?" n68 Healthy civil-military relations and a sensible "civilian control of the military" require mutual respect and understanding between the civilian leadership and the military. The military must be respectful of ultimate civilian authority and the non-military factors that drive national security decisions. The civilian authorities must be respectful of the military's professionalism and its need for non-partisanship. The civilian leadership must also give considerable deference to military expertise in military matters. The micro-managing president or Congress may be a less visible threat than the overreaching general or admiral. But they both harm the goal of an effective and professional military under civilian authority. The United States Supreme Court has maintained that balance in its military decisions in the half-century since World War II. In broad outline, two themes have guided the decisions. The first has been caution over the intrusion of the military (whether acting on its own or acting under the orders of civilian leadership) into the civilian world. One memorable illustration was the Court's rejection of President Truman's seizure of the steel industry in order to maintain Korean wartime production in Youngstown Sheet & Tube v. Sawyer. n69 To affirm the President's action - which three justices were [\*107] ready to do n70 - would have assuredly given a broad scope to presidential powers as commander in chief in non-military contexts.

 \*\*\* AFF \*\*\*

Courts don’t solve – lower courts

Lower Courts Don’t Follow Supreme Court

**Borochoff 2008,** J.D. Candidate, 2010, Harvard Law School; M.A. Political Science, 2007, Emory University; B.A. Political Science, 2007, Emory University, 2008

(Elise, *Copyright (c) 2008 Touro College Jacob D. Fuchsberg Law Center Touro Law Review/LexisNexis*, “Lower Court Compliance With Supreme Court Remands,” 2008, ]

The traditional model of the United States legal system envisions the relationship between federal district courts, appeals courts, and the Supreme Court as strictly hierarchical. n13 The district courts constitute the base of the judicial pyramid, the appeals court the middle, and the Supreme Court its peak. n14 This model implies the Supreme Court issues the final edict in any area of law, and the lower levels of the judicial hierarchy simply implement Supreme Court policy. Consequently, early legal scholars focused their research solely on Supreme Court decision making, and assumed that both federal and state lower courts strictly obeyed the Supreme Court's rulings. n15 Supreme Court decisions were viewed as the reigning law of the land  [\*856]  and compliance was a foregone conclusion.

Under the hierarchal view of the federal judiciary, Supreme Court remands would not be an issue. Lower courts are faithful implementers of Supreme Court decisions and their decisions are an extension of the Supreme Court's legal views. Thus, all lower court decisions would comply with the Supreme Court, whether heard on remand or for the first time. B. Recognition of Noncompliance with the Supreme Court

Beginning in the 1950s, legal scholars began to doubt the hierarchical model's validity. n16 First, some articles noted that state courts would often rely on state law, effectively ignoring the Supreme Court's reasoning. n17 Others soon noted that even federal courts, while relying on federal law, also ignored Supreme Court decisions. n18 While authors did not openly criticize the hierarchical model, the increasing profile of noncompliance shed doubt on its accuracy. Implicit critiques of the hierarchical model became more explicit after the Warren Court's decisions in Brown v. Board of Education n19 and other controversial civil rights cases. n20 Noncompliance  [\*857]  with the Supreme Court's decisions undermined the model of the Supreme Court as an apolitical institution ruling over the entirety of the judicial branch.

Courts don’t solve foreign policy

Judicial decisions in foreign policy issues are not enforced – executive branch will ignore the plan

Jide Nzelibe 2004 [Bigelow Fellow and Lecturer in Law, University of Chicago Law School, March 2004 89 Iowa L. Rev. 941, “The Uniqueness of Foreign Affairs”]

Unlike in domestic constitutional controversies, it is also doubtful that the judiciary can draw on the popular underpinnings of its legitimacy should the political branches ignore its foreign affairs determinations. As one commentator has explained, the public appetite for judicial involvement in international issues is not particularly strong. 217 The judiciary's lack of popular legitimacy in foreign affairs is particularly understandable when the relevant controversy touches on matters of national security. As demonstrated above, in matters involving the domestic operations of the government, the court plays an important role in legitimizing the activities of the other branches, as well as providing a reliable mechanism for the resolution of disputes between private individuals. When matters touch on the very existence of the state, however, such as when the state faces an external threat, the justifications for judicial involvement correspondingly diminish. 218 Thus, far from getting popular support in the event of a confrontation with the political branches, it is more likely that the courts will face public criticism for intervening improperly in foreign affairs or jeopardizing national security.

Courts link to politics

Congress perceives and reacts to Supreme Court decisions-the counterplan links to politics

Brickman in 2k7 (Danette. "Congressional Reaction to U.S. Supreme Court Decisions: Understanding the Introduction of Legislation to Override" Paper presented at the annual meeting of the Southern Political Science Association, Hotel InterContinental, New Orleans, LA, Jan 03, 2007 <Not Available>. 2009-05-24 <http://www.allacademic.com/meta/p143265\_index.html>

The United States Constitution sets forth a government that prescribes specific roles for each of its branches. While, constitutionally, Congress is the policy-making branch, the U.S. Supreme Court enters the policy-making arena through statutory interpretation and judicial review decisions. The preferred policies of these two branches of government do not always coincide, causing conflict between the Court and Congress. At such times this conflict can lead to a battle over control of national policy. This paper explains congressional reaction to Supreme Court decisions by relaxing two of the assumptions of the separation of powers game and incorporating changing congressional preferences and context. U.S. Supreme Court decisions tend to be viewed “not as a mere interpretation of law, but a determinative statement of national policy that is, for all practical purposes, irrevocable” (Paschel 1991:144). While the majority of Supreme Court decisions remain untouched by Congress, a number of statutory interpretation and judicial review decisions have been successfully overridden by the legislative branch, making it apparent that Supreme Court decisions are not necessarily final. In certain circumstances Congress is willing to do battle with the Court to achieve their preferred policy. Although successful congressional overrides of Supreme Court decisions are infrequent, their occurrence has generated a body of research that has contributed to our understanding of the interaction between these two branches of government. What is missing from the discourse is an examination that focuses on the introduction of legislation to override Supreme Court decisions 1 . This paper fills that gap, examining the circumstances under which Congress introduces legislation attempting to override a Supreme Court decision. Using an approach which incorporates changing congressional preferences and context this research contributes to our understanding of Court-Congress interaction.

Court’s decisions affect politics – relationship with the executive branch

Smith 7 (Joseph L. , Assistant Professor, The University of Alabama , Department of Political Science, Journal of Law, Economics, and Organization May 9, http://jleo.oxfordjournals.org/cgi/content/full/23/2/346) ELJ

The consequences of the institutional choice are more complex and potentially far-reaching. A decision endorsing the disputed agency action not only allows the agency decision to stand (with whatever policy consequences that entails) but also signals to the lower courts that agencies should be given latitude to take the disputed action. Every decision upholding a disputed agency action expands, ever so slightly perhaps, the ability of agencies to implement their agendas. Because lower courts are supposed to implement the legal doctrines articulated by the Supreme Court, the effects of this institutional choice, whether or not to defer to the agency decision, will ripple throughout the lower courts and should affect the decisions in many disputes. This article continues a line of research begun by Linda Cohen and Matt Spitzer in the 1990s. Cohen and Spitzer began with the insight that Supreme Court decisions evaluating agency actions do more than merely uphold or overturn the action being litigated. These decisions also communicate legal doctrine to the lower courts, sending signals regarding the level of deference they should show to agency decisions. Given the small number of administrative law cases the Supreme Court hears each term, they assert that the signal-sending or doctrinal element of these decisions will have a larger impact on policy than the direct effects on the litigants. Cohen and Spitzer argue that Supreme Court Justices can best achieve their policy-related goals if they consider their ideological relationship with the executive branch and then factor this relationship into their decisions evaluating administrative actions. Their model generally suggests that as the median member of the Court gets ideologically closer to the president, the Court should become more deferential to the administrative action.

Only Congress/Prez Solve Foreign Policy

**Congress and the President are essential for determining foreign policy.**

Murphy 7 (Bill, BA in political science, Associated Content, November 23rd, 2007, <http://www.associatedcontent.com/article/449188/the_president_and_congress_role_in.html>) NK

Congress and the president play important roles in the foreign policy of the United States. The Constitution grants both branches of the government specific powers and also has areas where they need to work together. Both the legislative and executive branches have informal powers that each can use and exploit for political gain. Congress and president share the foreign policy role by the Principle of Codetermination.

**The President and Congress have vital roles in determining the country’s foreign policy.**

Grimmett 99 (Richard, Specialist in National Defense for the US Department of State, US Department of State, June 1st, 1999, <http://fpc.state.gov/6172.htm>) NK

The United States Constitution divides foreign policy powers between the President and the Congress so that both share in the making of foreign policy. The executive and legislative branches each play important roles that are different but that often overlap. Both branches have continuing opportunities to initiate and change foreign policy, and the interaction between them continues indefinitely throughout the life of a policy. This report reviews and illustrates 12 basic ways that the United States can make foreign policy. The practices illustrated in this report indicate that making foreign policy is a complex process, and that the support of both branches is required for a strong and effective U.S. foreign policy. For a detailed discussion of how war-making powers are shared, see War Powers Resolution: Presidential Compliance.

The President and Congress are the integral creators of US foreign policy.

ThisNation.com No Date Given (ThisNation.com, repository of basic information, resources and historical documents related to American Government and Politics, ThisNation.com, No Date Given, <http://www.thisnation.com/foreign.html>) NK

The Constitution of the United States gives the President the clear upper-hand in the conduct of foreign policy. The President is the Commander-in-Chief of the nation's armed forces. As the single officer of the United States charged with receiving the leaders of other nations and with negotiating treaties, the President is also the nation's Chief Diplomat. The President, however, does not have the authority to make foreign policy independently. The Constitution gives the Congress the power to check the President's foreign policy powers in important ways. While the President can order the United States military into action to respond to emergencies and threats to the security of the nation, only the Congress has the authority to officially "declare war." Ultimately, it is the Congress' power of the purse that allows it to cut off funding to presidentially ordered military ventures of which it does not approve.

Only Congress/Prez Solve Foreign Policy

**The executive and legislative branches are necessary to determine the country’s foreign policy.**

Grimmett 99 (Richard, Specialist in National Defense for the US Department of State, US Department of State, June 1st, 1999, <http://fpc.state.gov/6172.htm>) NK

The United States Constitution divides the foreign policy powers between the President and Congress so that both share in the making of foreign policy. The executive and legislative branches each play important roles that are different but that often overlap. Both branches have continuing opportunities to initiate and change foreign policy, and the interaction between them continues indefinitely throughout the life of a policy. This report identifies and illustrates 12 basic ways to make U.S. foreign policy. The President or the executive branch can make foreign policy through: 1) -- responses to foreign events 2) -- proposals for legislation 3) -- negotiation of international agreements 4) -- policy statements 5) -- policy implementation 6) -- independent action. In nearly all of these circumstances, Congress can either support the President's approach or seek to change it. In the case of independent Presidential action, it may be very difficult to change policy in the short term; in the case of a legislative proposal by the executive branch or treaties and international agreements submitted to the Senate or Congress for approval, Congress has a decisive voice. In most cases Congress supports the President, but it often makes significant modifications in his initiatives in the process of approving them. Congress can make foreign policy through: 1) -- resolutions and policy statements 2) -- legislative directives 3) -- legislative pressure 4) -- legislative restrictions/funding denials 5) -- informal advice 6) -- congressional oversight. In these circumstances, the executive branch can either support or seek to change congressional policies as it interprets and carries out legislative directives and restrictions, and decides when and whether to adopt proposals and advice. The practices illustrated in this report indicate that making U.S. foreign policy is a complex process, and the support of both branches is required for a strong and effective U.S. foreign policy.

Prez Solves Foreign Policy

The executive is most effective at making foreign policy

Powell 99 (H. Jefferson, Law professor at Duke, George Washington Law Review, March 1999, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=821384>) NK

The executive branch's perspective on the constitutional law of foreign affairs is one approach for working out the implications of the text, structure, and history of the Constitution as it bears on foreign affairs. This perspective accords the President primary responsibility for the conduct of foreign policy and the preservation of national security, without denying the Congress very broad powers relating to foreign affairs and national security. The coherence of the executive primacy interpretation of Constitutional authority over foreign affairs, and the respect it embodies for the presidency, for Congress, and for the constitutional system of separated but interlocking powers, support the argument that the best reading of the Constitution regarding foreign affairs is the "executive primacy" position.

**The president has many indispensable roles in determining foreign policy.**

Murphy 7 (Bill, BA in political science, Associated Content, November 23rd, 2007, <http://www.associatedcontent.com/article/449188/the_president_and_congress_role_in.html>) NK

The Constitution grants the president three powers as to foreign policy. First of all, the President is the Commander in Chief of all the armed forces. He is also the head of the national security establishment. This power gives him the right to direct the military as well as the intelligence community and to appoint all high level officials. The President can also issue executive orders that affect both. The President is the head of State and the Government so when he goes on trips overseas he speaks for the country. The President has the power to make treaties with other nations and bring it to the Senate for ratification. They may choose to or not to pass the treaty just as the President has the authority to veto any bill the Congress passes.

As president, the President has extra power due to his position.

Murphy 7 (Bill, BA in political science, Associated Content, November 23rd, 2007, <http://www.associatedcontent.com/article/449188/the_president_and_congress_role_in.html>) NK

Along with the Constitutional powers the President has are the informal powers that automatically come with the position but varies between men. One source of power is the simple fact that he is the President of the United States, the greatest and most powerful nation on Earth. This alone comes with much prestige that he can speak to the world and be listened to. Being a domestically popular figure also helps enhance this. A President can tout his past experience when making policy that will also help further his power. During his tenure the political allies through the years will come into play and help raise support for particular policies. Being the President and having many allies gives you a larger bully-pulpit in which to speak your views. One of the most vital sources of power for the President is being able to speak your views as well as have other prominent officials echo your beliefs.

Prez Solves Foreign Policy

The Constitution gives the president power over foreign policy.

Morris 1787 (Gouverneur Morris, Writer of the US Constitution, US Constitution, September 17th, 1787, <http://www.senate.gov/civics/constitution_item/constitution.htm>) NK

 The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment. As Commander in Chief, the president controls the military forces. Presidents have also cited this power as extending to their control of national and foreign policy in war and peacetime. Congress may not restrain the president's power to pardon, except in impeachment cases. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. The Constitution gives the Senate a share in foreign policy by requiring Senate consent, by a two-thirds vote, to any treaty before it may go into effect. The president may enter into "executive agreements" with other nations without the Senate's consent, but if these involve more than minor matters they may prove controversial. The president must also submit judicial and major executive branch nominations to the Senate for its advice and consent. The Constitution makes no provision for the removal of executive officers, which has remained largely at the discretion of the president.

The constitution grants the president the majority of the power in determining foreign policy.

Porter No Date Given (Keith, About.com guide, About.com, No Date Given, <http://usforeignpolicy.about.com/od/backgroundhistory/a/whomakesforpol.htm>) NK

Article II of the Constitution says the president has the power to: •make treaties with other countries (with consent of the Senate), •appoint ambassadors to other countries (with consent of the Senate) •and receive ambassadors from other countries Article II also establishes the president as commander-in-chief of the military, which gives him or her a lot of control over how the United States interacts with the world. As Carl von Clausewitz said, "War is the continuation of diplomacy by other means." The president's authority in all things is exercised through various parts of his or her administration. Therefore, understanding the executive branch's international relations bureaucracy is one key to understanding how foreign policy is made.

Prez Solves Foreign Policy

The framers of the Constitution intended for the President to have complete power over foreign affairs.

Prakash and Ramsey 1 (Saikrishna and Michael, professor of law at UCSD, Yale Law Journal vol 30, no 1, 2001, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_Ramseyonline.pdf>) NK

What I want to present here is, if not an alternative to Justice Robert Jackson’s famous Youngstown framework,1 at least a complement to that framework for approaching the President’s foreign affairs power. My central proposition is that the eighteenth‐ century meaning of “executive” power included foreign affairs powers as well as the more familiar power to execute the law. Thus, Article II, Section 1 of the U.S. Constitution— which states that “the executive Power shall be vested in a President”—grants, in eighteenth‐century terms, the power to execute the law plus foreign affairs powers. This is sometimes called Hamilton’s vision of executive power, but its first reasoned exposition after the Constitution’s ratification was actually made by Thomas Jefferson, and that is why I have called it the “Jeffersonian” executive power in prior articles. There are four basic steps in this argument. First, the key writers of the eighteenth century on whom the Framers relied, particularly Montesquieu and Blackstone, defined “executive” power to include foreign affairs powers. For example, Montesquieu wrote: “In every government, there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.”4 In listing the “executive” powers “dependent on the law of nations,” he included things like war and peace, ambassadors, defense, and national security.5 Modern experts on Montesquieu’s philosophy conclude that Montesquieu “use[s] the term ‘executive power’ . . . to cover the function of the magistrates to make peace or war, send or receive embassies, establish the public security, and provide against invasions,” and that “Montesquieu, like most writers of his time, was inclined to think of the executive branch of government as being concerned nearly entirely with foreign affairs.”6 According to constitutional historian Francis Wormuth, “[t]he famous sixth chapter of Book XI of [Montesquieu’s] Spirit of the Laws . . . recognizes . . . the executive power in foreign relations . . . .”7 Similarly, Blackstone described the “executive” powers of the English monarch as encompassing the principal foreign af‐ fairs authorities, including ambassadors, treaties, war, and letters of marque and reprisal. These “foreign concerns,” Blackstone explained, are included within the powers “the exertion whereof consists the executive part of government.”8 This in itself does not prove how the Framers chose to organize their new government. It does suggest, though, that the vocabulary that they started with defined “executive” power to include foreign affairs powers. Montesquieu and Blackstone were by far the most widely read and influential political writers in America during the founding era, enjoying wide circulation and citation.9 Madison described Blackstone’s Commentaries as “a book which is in every man’s hand” and Montesquieu as “the oracle who is always consulted and cited” on separation of powers.10 Their use of words, especially words as central to the idea of separation of powers as “executive power,” was surely well‐known to educated Americans.

History proves that the president should have control over foreign affairs, beginning with Washington.

Prakash and Ramsey 1 (Saikrishna and Michael, professor of law at UCSD, Yale Law Journal, 2001, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_Ramseyonline.pdf>) NK

The third step of the argument is that when George Washington became President after the ratification of the Constitution, he immediately took over control of foreign affairs. Without statutory authority, he exercised the foreign affairs functions of the nation that were not specifically mentioned in the Constitution—things like control and removal of diplomats, foreign communications, and formation of foreign policy. These powers had all been exercised by the Continental Congress under the Articles, but both Washington and the new Congress acted as if something in the Constitution had shifted them to the new office of the President.

Prez Solves Foreign Policy

All of the evidence points to the president as the head of foreign affairs.

Prakash and Ramsey 1 (Saikrishna and Michael, professor of law at UCSD, Yale Law Journal, 2001, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_Ramseyonline.pdf>) NK

It is not the case that all the Framers made this association. In particular, although Madison initially seemed to acknowledge the relationship between executive power and foreign affairs power, he later famously denied it in disputing Hamilton’s Pacificus.22 But the weight of the evidence, both before and after ratification, seems clearly to favor including foreign affairs powers within the definition of “executive” powers. This seems particularly true when this reading is compared to alternative readings. Neither Madison, in his response to Hamilton, nor modern scholars have been able to offer a satisfactory alternative account of the text’s foreign affairs powers. The power to control and recall U.S. diplomats, to communicate with foreign nations, and to establish foreign policy is not included within any other grant of power in the Constitution.23 Yet surely the Framers—who were anxious to correct the Articles in the field of foreign affairs—did not simply forget to provide for such important foreign affairs powers in their new government. Once the Constitution was ratified, no one acted as if these powers were missing, or were allocated other than to the President. These mysteries are explained only if we give the Constitution its eighteenth century meaning, recognizing that “executive” power had two components: law execution and foreign affairs.

Prez Solves - Middle East

The executive branch is the driving branch in Middle East foreign policy.

Bzostek and Robinson 8 (Rachel and Samuel, Ph. D and M.A., Physorg.com, November 6th, 2008, <http://www.physorg.com/news145197719.html>) NK

A new study in the journal International Studies Perspectives examines U.S. foreign policy towards three Middle Eastern states and finds that the executive branch is often the driving force in foreign policy. Also, U.S. foreign policies tend to be reciprocal in nature. Rachel Bzostek, Ph.D., and Samuel B. Robison, M.A. conducted a quantitative and qualitative analysis of the influences on U.S. foreign policy toward Israel, Iraq, and Saudi Arabia from 1981 to 2004. Results show that the executive branch is the primary force driving policy towards those Middle Eastern states. Congress may seek to influence or mold policy and oftentimes does in significant ways. However, its ability to truly direct policy is limited. Also, the policies engaged in by the U.S. tend to be reciprocal in nature. More often than not, the United States tends to "reward" states that adopt policies the U.S. likes and "punish" states that engage in behaviors disapproved of by the U.S.

Prez Solves – Military

The president has broad constitutional power to take military action

Yoo 1 (John, Supreme Court Deputy Assistant Attorney General, MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT [Supreme Court Memorandum following September 11th], <http://www.justice.gov/olc/warpowers925.htm>) NK

The President has broad constitutional power to take military action in response to the terrorist attacks on the United States on September 11, 2001. Congress has acknowledged this inherent executive power in both the War Powers Resolution and the Joint Resolution passed by Congress on September 14, 2001. The President has constitutional power not only to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harboring or supporting such organizations. The President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.

Prez Solves – Arms Sales

The executive branch has the authority to determine our military policy.

Grimmett 99 (Richard, Specialist in National Defense for the US Department of State, US Department of State, June 1st, 1999, <http://fpc.state.gov/6172.htm>) NK

Even when Congress establishes foreign policy through legislation, the Administration continues to shape policy as it interprets and applies the various provisions of law. This is illustrated in arms sales policy. Congress has established the objectives and criteria for arms sales to foreign countries in the Arms Export Control Act, and it has required advance notification of major arms sales and provided procedures for halting a sale it disapproves. But the executive branch makes the daily decisions on whether or not to sell arms to specific countries and what weapons systems to provide. As an example, on September 14, 1992, President Bush notified Congress of his intention to sell 72 F-15 fighter aircraft to Saudi Arabia, and after the 30-day congressional review period expired, the sale proceeded

Deference Good – Threat Response

**Deference is key to rapid response in our military**

Carter 3 (Phillip, writer, CNN, July 15, <http://www.cnn.com/2003/LAW/07/15/findlaw.analysis.carter.security/>) ELJ

As the ratification debates reveal, the Framers assigned these powers to the President because they feared that judicial or congressional interference in these areas might render the new nation weak, or incapable of rapid response to threats from abroad. The Framers also felt that because, at the time, the majority of national security knowledge and expertise lay in the Executive Branch, decision making on such issues properly belonged to that branch. Accordingly, while Article II gives expansive military and foreign policy powers to the President, Article I gives Congress only limited military powers. It may "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations"; "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water"; "raise and support armies, but no appropriation of money to that use shall be for a longer term than two years"; "provide and maintain a navy"; "make rules for the government and regulation of the land and naval forces"; and provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions . . ." But that is all. Finally, Article III gives the judicial branch no power at all over the military. As a result, the courts, unlike the other two branches, have no constitutional mandate to make military policy. The tradition of judicial deference to the military grew out of this constitutional structure and history. As commander-in-chief, the argument goes, the President should have the utmost latitude in making decisions that affect the readiness of America's military. Similarly, Congress deserves free rein in exercising its Constitutional responsibilities to fund the military and make laws for its governance. In contrast, the courts have no such Constitutional mandate to make military policy; thus, they should yield to decisions by the President and Congress.

Deference Good – Readiness

A judicial branch rejection of Deference kills military readiness

Hudson 99 (Walter, Major, US Army, Military Law Review 159, March <http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C75~1.pdf>) ELJ

By granting the elected branches plenary and command power over the military, the Constitution links military control to the democratic will and the democratic process. Because the people will feel the burden of war, the elected branches can best respond to that will.223 Furthermore, in granting power to the elected branches to control the military, the Constitution acknowledges that the elected branches grant a degree of legitimacy to military policy that courts cannot. These elected branches can best reflect and respond to the societal consensus, a particularly relevant and important concern when dealing with national security.224 Of the three branches, the judiciary has the least competence to evaluate the military’s formation, training, or command. It has, as one court stated, “no Armed Services Committee, Foreign Relations Committee, Department of Defense, or Department of State” nor does it have the same access to intelligence and testimony on military readiness as does Congress or the President.225 The Supreme Court has thus repeatedly cited its own lack of competence to evaluate military affairs.226

Judicial rejection of deference creates friction in the military that jeopardizes national security

Hudson 99 (Walter, Major, US Army, Military Law Review 159, March <http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C75~1.pdf>) ELJ

It is not thus simply the lack of judicial competence in military affairs, but the effects that the lack of competence may have that is an additional "friction" in the military environment. The problem in applying a standard of review similar to the kind used for civilian society is not just that the court may err, but the ramifications of such an error given the uncertainty of conflict. n240 An error in military policy making could impede military effectiveness and thereby jeopardize national security. n241 These judicial decisions put the courts squarely into the political arena. Judges unwittingly become "strategists" -- unelected and ill-equipped officials deciding matters of potentially ultimate importance.

The Courts are too technical for effective military control

Hudson 99 (Walter, Major, US Army, Military Law Review 159, March <http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C75~1.pdf>) ELJ

There are several problems with adjudication as a means of rule making. Adjudication is more costly and more time consuming. Years and millions of dollars can be spent in litigating one issue that involves one individual. n228 Adjudication concerns itself with an individual remedy based upon "a small set of controverted facts" that are highly contextual and may or may not be applicable to a larger class of individuals. n229 Furthermore, adjudication sets up elaborate procedures according to its ultimate goal -- to determine whether a particular individual should prevail in a particular case. n230 [\*48] Dissenters, in particular Justice Brennan, have asserted that the Court decides issues that are far more technically complicated than adjudicating rather straightforward rules on discipline. n231 Yet that argument does not address rules formation in an administrative, as opposed to an adjudicative, system. Military policy-making is, by its nature, meant to do precisely what administrative policy-making does: allocate rights, benefits, and sanctions, among large groups using consistent standards. n232 What makes military policy making along administrative rule-making lines even more advantageous is that the military's primary concern is ensuring military discipline and combat effectiveness of units, rather than focusing primarily on individuals themselves. Applying consistent and predetermined norms among large groups is what administrative rule making is best equipped to do. n233

Deference Good – Readiness

Deference is key to maintain the power of our military

Yoo 3 (John C., Visiting Professor of Law, University of Chicago Law School, The George Washington Law Review 72 Geo. Wash. L. Rev. 427, December, Lexis) ELJ

The role of the courts in reviewing the detention of enemy combatants demonstrates the tension between judicial review and the usual judicial deference to political wartime decisions. In the first category, that of alien enemy combatants captured and held abroad, the courts historically have refused to exercise judicial review. n91 In Johnson v. Eisentrager, the Supreme Court refused to entertain a habeas petition brought by German World War II prisoners who challenged their trial and conviction by the military commission for war crimes. n92 Finding that Article III courts had no jurisdiction over their petition, the Court observed that "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." n93 Further, judicial deference to the decisions of the political branches was warranted because "trials would hamper the war effort and bring aid and [\*446] comfort to the enemy." n94 Judicial proceedings would engender a "conflict between judicial and military opinion," interfere with military operations by recalling personnel to testify, and "would diminish the prestige of" a field commander called "to account in his own civil courts" and would "divert his efforts and attention from the military offensive abroad to the legal defensive at home." n95 In such cases, just as with the initiation of hostilities, judicial review has no role, as such decisions have been vested in the political branches and any exercise of jurisdiction would interfere with the conduct of military operations.

Deference ensures our military can function correctly

Carr 98 (B.S., United States Air Force Academy, J.D., Harvard Law School, The Air Force Law review, 45 A.F. L. Rev. 303Lexis) ELJ

Both courts and commentators have justified the judicial deference to the military on the grounds that the Constitution vests the primary responsibility for respecting the rights of servicemembers with the Legislative and Executive branches. The Constitution gives Congress the power to "raise and support Armies," n23 "provide and maintain a Navy," n24 and "make Rules for the Government and Regulation of the land and naval Forces." n25 The President is designated as the "Commander in Chief of the Army and Navy of the United States." n26 Given this division of responsibility, it has been argued that the two branches have safeguarded the rights of service personnel while protecting the readiness of the military. Senator Nunn explains that: [A] system of military and criminal and administrative law that carefully balances the rights of individual service members and the changing needs of the armed forces . . . has demonstrated considerable flexibility to meet the needs of the armed forces without undermining the fundamental needs of morale, good order, and discipline. The principles of judicial review developed by the Supreme Court recognizes the fact that over the years Congress has acted responsibly in addressing the constitutional rights of military personnel. n27

Deference is key to military order

Carr 98 (B.S., United States Air Force Academy, J.D., Harvard Law School, The Air Force Law review, 45 A.F. L. Rev. 303Lexis) ELJ

The regulations serve two related purposes. The first is to avert clear and present dangers to military order and discipline as described in the preceding court opinions. The second purpose is to maintain a politically disinterested military that remains safely under the control of civilian superiors. The balance between the free speech rights of military personnel and the military's interest in good order and discipline and mission effectiveness can be a particularly challenging task.

Deference Good – Readiness

The courts are too incompetent to be involved in military affairs

Carr 98 (B.S., United States Air Force Academy, J.D., Harvard Law School, The Air Force Law review, 45 A.F. L. Rev. 303 Lexis) ELJ

Underlying the judiciary's cautious excursions into the realm of military command are fears that courts lack the competence to contradict the judgment of military experts. Chief Justice Earl Warren has explained that the Supreme Court's deference to military determinations is based upon the "strong historical" tradition supporting "the military establishment's broad power to deal with its own personnel." n30 According to Warren, the "most obvious reason" for this deference is that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." n31 The Supreme Court has alluded to the judiciary's lack of expertise to review prosecutions based upon military custom. In Parker v. Levy, it cited lower court opinions which held that the applications of military custom are best determined by military officers who are "more competent judges than the courts of common law." n32 Additionally, in the oft-quoted opinion of Orloff v. Willoughby, the Court expressly adopted a hands-off approach to the military, stating: But judges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. n33

Judicial interference in the military kills military readiness

Carr 98 (B.S., United States Air Force Academy, J.D., Harvard Law School, The Air Force Law review, 45 A.F. L. Rev. 303Lexis) ELJ

When deciding constitutional or statutory issues in the military context, the Supreme Court has emphasized the special characteristics of the military community as a separate society. For example, the Court reviewed the nature of and justifications for these characteristics in Parker v. Levy. n34 The Court stressed that it "has long recognized that the military is, by necessity, a specialized society separate from civilian society." n35 This specialization is necessitated by the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." n36 The Court noted that "the military has, again by necessity, developed laws and traditions of its own during its long history." n37 Quoting from previous opinions, it also reiterated that the army "is not a deliberate body" n38 and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." n39 Furthermore, in order to "maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'" n40

Deference Good – Readiness

The Court is ill-equipped to control the military

O’Connor 0 (John F., Former USMC officer, Georgia Law Review, Fall, 35 Ga. L. Rev. 161, Lexis) ELJ

This "hands off" attitude has strong historical support, of course. While I cannot here explore the matter completely, there is also no necessity to do so, since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal. n254

Congressional control of the military is key to national security

Aden 4 (Steven H., J.D. (cum laude) 1989, Georgetown Univ. Law Center, Western State University Law Review, 31 W. St. U. L. Rev. 185, Lexis) ELJ

In pertinent part, the former, said the Second Circuit, authorizes Congress to ""provide for the common Defence'" and ""to raise and support Armies.'" n42 Consequently, although the actions of the military remain subject to judicial review, the Supreme Court has historically granted great deference to the content and implementation of armed forces' policies calculated to [\*196] enhance military readiness and promote national safety. n43 In seeking to strike this balance of powers, the Second Circuit wrote: Caution dictates when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion. n44

Judicial limits will degrade our fighting force

Henriksen 96 (Kelly E., J.D. Candidate, 1996, Washington College of Law of The American University Administrative Law Journal Winter, 9 Admin. L.J. Am. U. 1273 Lexis) ELJ

B. The Military as a Separate Community As another justification in support of the principle of deference, the Supreme Court has regularly referred to the military as a "separate community" n27 in which the judiciary must approach restrictions on individual liberties with deference. n28 Based on the need to maintain an effective fighting force, n29 courts have recognized that limits on constitutional rights which may not have a rational basis in our civilian society may survive in the military "society" because the war-making purpose of the military [\*1279] makes those limits compelling. n30 Courts have noted that the military has developed its own practices, laws and traditions in preparation for its ultimate responsibility - war-making. n31 Courts have also framed this particular justification for its deference in terms of the difference in autonomy between being in the civilian community and the military's "separate society." n32 C. The Limited Competence of the Courts A third justification commonly forwarded in support of the doctrine of deference centers on the perceived limits of the courts' competence in dealing with the complex aspects of the military establishment. n33 The professional judgment and experience of those familiar with the military is the primary source for determining the climate of obedience and discipline necessary to sustain an effective fighting force. Traditionally, courts have deemed themselves unable to master these complexities. n34 [\*1280]

Deference Good – Terrorism

Second guessing by the courts kills any chances to fight terrorism

Sekulow 4 (Jay Allen, American Center for Law and Justice Chief Counsel, March 17, http://www.wiggin.com/db30/cgi-bin/pubs/American%20Center%20for%20Law%20%20Justice.pdf) ELJ

We are facing an enemy which willingly commits the most horrendous, suicidal acts against innocent civilians and which will do so again if it can. Because this situation is without historical precedent, no one can know for sure how much success emerging policies will have. As such, it would be inappropriate for the courts of the United States to enter the political fray and attempt to second-guess the policies adopted by the President to meet this threat. Any appearance of official opposition to decisions within the discretion of the President will surely bring aid and comfort to the enemy while demoralizing the men and women in the U.S. armed forces who are daily putting their lives at risk to track down and destroy the confederates of those who planned the 9-11 attacks and seek to repeat them.

Terrorism must be fought by the elected government

The Washington Times 3 (June 18, http://www.washtimes.com/national/20030618-013148-4079r.htm) ELJ

"The Constitution would indeed be a suicide pact if the only way to curtail enemies' access to assets were to reveal information that might cost lives," the majority said in an opinion written by Circuit Judge David B. Sentelle, who was nominated by President Reagan. In declaring that tactical decisions in the war on terror must be made by "the government's top counterterrorism officials," not judges, Judge Sentelle was joined by Circuit Judge Karen LeCraft Henderson, a nominee of President Bush in 1990.

Judicial intervention kills war-making authority that is key to fight terrorism

Yoo 3 (John C., Visiting Professor of Law, University of Chicago Law School, The George Washington Law Review 72 Geo. Wash. L. Rev. 427, December, Lexis) ELJ

Instead, the legality of the war with al Qaeda has arisen in actions challenging the detention of Americans captured fighting in league with the enemy. In these cases, the courts have refused to second-guess whether the nation is at war, but instead have deferred to the judgment of the political branches. In Hamdi v. Rumsfeld, n49 Yaser Esam Hamdi, who was born in Louisiana but grew up in Saudi Arabia, was captured in Afghanistan fighting on the side of the Taliban militia. Hamdi's father, acting as his next friend, filed a petition for a writ of habeas corpus seeking his release because he was not held on criminal charges. n50 In dismissing the writ, Judge Wilkinson, writing for a unanimous panel in the United States Court of Appeals for the Fourth Circuit, did not question whether the United States was in a state of armed conflict in Afghanistan, nor whether that war was properly authorized under the Constitution. n51 Indeed, the court emphasized that its role was limited to reviewing whether the executive branch had properly classified Hamdi as an enemy combatant, under the standards set out by Ex Parte Quirin, and hence could be detained under the laws of war until the end of the conflict. As Judge Wilkinson wrote, "the political branches are best positioned to comprehend this global war in its full context, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches[.]" n52 The Fourth Circuit limited the scope of its review not to whether the war was properly begun, which was a decision for the political branches, but to the legal ramifications of the decision to go to war. n53

Deference Good – Separation of Powers

Deference is key to separation of powers

Henriksen 96 (Kelly E., J.D. Candidate, 1996, Washington College of Law of The American University Administrative Law Journal Winter, 9 Admin. L.J. Am. U. 1273 Lexis) ELJ

A. Separation of Powers Among several traditional justifications for the judiciary's deference to the military, the Supreme Court has repeatedly stated that the Constitution mandates some form of deference by providing for a separation of powers. n22 The Constitution expressly vests power over military affairs in Congress n23 and the Executive. n24 While the Supreme Court has considered article I, section 8, clauses 12-16 a plenary grant of power not subject to [\*1278] unjustified second guessing by the judiciary, n25 it has not completely abandoned its power of review. n26

Judicial interference hurts separation of power

Gerschwer 93 (Lawrence, Columbia Law Review, May 93 Colum. L. Rev. 996, Lexis) ELJ

3. Separation of Powers and Procedural Statutes. -- Separation of powers concerns counsel judicial restraint when litigants attempt to transform constitutional provisions into judicially enforceable proscriptions on government action. n249 The argument for judicial restraint in such cases draws force from the antimajoritarian aspect of judicial review and the struggle to reconcile the role of the judiciary with the democratic underpinnings of our political system. n250 In a democracy, the exercise of judicial power to interfere with legislative outcomes is and should be rare. n251

Deference Good – Pres Powers

Deference is key to presidential power

Masur 5 (Jonathan, Law clerk to the Honorable Richard A. Posner , Hastings Law Journal, February, 56 Hastings L.J. 441, Lexis) ELJ

The perceived duty of courts and judges to defer to the factual assertions and judgments of executive branch actors in times of war represents the unifying principle of all modern wartime cases. "Deference" has become a shibboleth that courts believe they must invoke if their wartime rulings are to have any hope of withstanding appellate (and public) scrutiny. Even a court that eventually concludes that no deference is due the executive branch often appears compelled to recite a statement of judicial fealty to the deference principle for fear of signaling an inappropriate lack of respect for the authority of the coordinate branches in wartime. n14 Judicial deference to administrative decision-making in times of war remains inescapably and intuitively attractive. This Article should not be understood to suggest that courts should exercise anything approaching de novo review over executive decisions in military situations. Yet within wartime jurisprudence, the doctrine of judicial deference has overwhelmed the legal strictures established to constrain the operation of executive power. Courts sitting in judgment of the Executive's wartime actions have permitted the military to effectively define the constitutional scope of its own authority.

Deference is key for the president to declare war

Masur 5 (Jonathan, Law clerk to the Honorable Richard A. Posner , Hastings Law Journal, February, 56 Hastings L.J. 441, Lexis) ELJ

Within the legal lexicon, the phrase "judicial deference" captures a broad swath of court' attitudes and actions united by a single generalized principle: courts will require some heightened measure of proof or surety before overturning a conclusion reached or a judgment made by a different branch of government. n15 Much attention has been given to what one might describe as "legal deference" to the military, or juridical acceptance of the executive branch's extraordinarily broad construction of its own statutory and constitutional powers during wartime. n16 The President's extant power to declare war sua sponte (and [\*446] without an act of Congress) stands as a paradigmatic example of this phenomenon. n17

Deference key to presidential power

Masur 5 (Jonathan, Law clerk to the Honorable Richard A. Posner , Hastings Law Journal, February, 56 Hastings L.J. 441, Lexis) ELJ

For nearly one hundred and fifty years, the judiciary's conception of the reach of the Executive's war-making powers has known few bounds. Beginning with The Prize Cases n20 in 1862, the Supreme Court has read the President's commander-in-chief power broadly to encompass nearly any necessary war-related actions, even without a formal declaration of war. n21 The Court's maxim, gleaned from Hirabayashi v. United States, that "the war power of the Government is "the power to wage war successfully,'" n22 has given rise to an understanding of presidential power that encompasses activities that do not involve the deployment of troops in the field, n23 such as the Japanese-American internment, as well as [\*449] foreign policy making authority not directly tied to national security or the military. n24 In some cases, the Supreme Court has refused even to entertain cases that attempt to demarcate limitations on the President's constitutional military powers. n25 This expansive understanding of the President's wartime authority has led the Executive to argue that an entire range of military questions or executive measures are entirely beyond the court' reach as either non-justiciable or otherwise unsuitable for judicial review. Courts have accepted this argument most decisively in areas that hew closely to the actual mechanics of armed conflict, such as presidential decisions committing American forces to battle or selecting the means and mechanisms of waging war. n26 Yet the judiciary has hardly confined its [\*450] deferential posture to such intimately military questions. n27 Courts have concluded that even administrative decisions implicating traditional judicial authority and significant constitutional or statutory legal structures must command substantial judicial deference. Prominent among the actions receiving such deference are detentions of American citizens who have not been charged with crimes. n28

Deference Good – AT: CMR

Deference key to civil military relations

Sulmasy and Yoo 7 (Glen Sulmasy and John Yoo, UCLA Law Review, 7/22/07, “CHALLENGES TO CIVILIAN CONTROL OF THE MILITARY: A RATIONAL CHOICE APPROACH TO THE WAR ON TERROR”, http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=johnyoo)

Since the founding of the republic, the military justice system was considered distinct and separate from the civilian system. Warfare operations were clearly regarded as distinct from civilian enterprises and therefore demanded a separate judicial system with a reduced expectation of constitutional protections. The Supreme Court consistently deferred to this unique system designed to respect the unique demands of warfare and of the role of the military.

Separation of Powers Turn

CP violates separation of powers

Hudson 99 (Walter, Major, US Army, Military Law Review 159, March <http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C75~1.pdf>) ELJ

The Supreme Court cites the separation of powers doctrine as a basis for deferring to either Congress or the military to create military policy. n219 The idea of separation of powers comes from the text of the Constitution itself. The articles of the Constitution assign each branch distinct roles and functions. The Constitution gives the power to raise, to support, and to train the armed forces to the legislative branch n220 and the authority to command [\*46] them to the executive branch. n221 The Constitution assigns no such role to the judiciary. n222

Collapse of constitutional balance of power risks tyranny and reckless warmongering

Martin Redish, Professor of Law and Public Policy at Northwestern, and Elizabeth Cisar, Law Clerk at the Seventh Circuit Court of Appeals, 1991 41 Duke L.J. 449

In any event, the political history of which the Framers were aware tends to confirm that quite often concentration of political power ultimately leads to the loss of liberty. Indeed, if we have begun to take the value of separation of powers for granted, we need only look to modern American history to remind ourselves about both the general vulnerability of representative government, and the direct correlation between the concentration of political power and the threat to individual liberty. [127](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n127#n127" \t "_self) [\*473] The widespread violations of individual rights that took place when President Lincoln assumed an inordinate level of power, for example, are well documented. [128](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n128#n128" \t "_self) Arguably as egregious were the threats to basic freedoms that arose during the Nixon administration, when the power of the executive branch reached what are widely deemed to have been intolerable levels. [129](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n129#n129" \t "_self) Although in neither instance did the executive's usurpations of power ultimately degenerate into complete and irreversible tyranny, the reason for that may well have been the resilience of our political traditions, among the most important of which is separation of powers itself. In any event, it would be political folly to be overly smug about the security of either representative government or individual liberty. Although it would be all but impossible to create an empirical proof to demonstrate that our constitutional tradition of separation of powers has been an essential catalyst in the avoidance of tyranny, common sense should tell us that the simultaneous division of power and the creation of interbranch checking play important roles toward that end. To underscore the point, one need imagine only a limited modification of the actual scenario surrounding the recent Persian Gulf War. In actuality, the war was an extremely popular endeavor, thought by many to be a politically and morally justified exercise. But imagine a situation in which a President, concerned about his failure to resolve significant social and economic problems at home, has callously decided to engage [\*474] the nation in war, simply to defer public attention from his domestic failures. To be sure, the President was presumably elected by a majority of the electorate, and may have to stand for reelection in the future. However, at this particular point in time, but for the system established by separation of powers, his authority as Commander in Chief [130](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n130#n130" \t "_self) to engage the nation in war would be effectively dictatorial. Because the Constitution reserves to the arguably even more representative and accountable Congress the authority to declare war, [131](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n131#n131" \t "_self) the Constitution has attempted to prevent such misuses of power by the executive. [132](http://www.lexis.com/research/retrieve?_m=1294fa69dc670006b0722c9a5da42022&docnum=18&_fmtstr=FULL&_startdoc=11&wchp=dGLbVzb-zSkAV&_md5=31ba2d0ed3fa3e2ddd0a08e25ee6928b&focBudTerms=&focBudSel=all" \l "n132#n132" \t "_self) It remains unproven whether any governmental structure other than one based on a system of separation of powers could avoid such harmful results. In summary, no defender of separation of powers can prove with certitude that, but for the existence of separation of powers, tyranny would be the inevitable outcome. But the question is whether we wish to take that risk, given the obvious severity of the harm that might result. Given both the relatively limited cost imposed by use of separation of powers and the great severity of the harm sought to be avoided, **o**ne should not demand a great showing of the likelihood that the feared harm would result. For just as in the case of the threat of nuclear war**,** no one wants to be forced into the position of saying, "I told you so."

Separation of Powers ext.

Only Congress and the President can make foreign policy – CP violates separation of powers

Frazier 7 (Bart, program director at The Future of Freedom Foundation, Freedom Daily, July 2007, <http://www.fff.org/freedom/fd0707e.asp>) NK

So how were the Framers to protect this nation from unjust wars? They knew that too much power concentrated in the hands of any one man, or group of men, eventually leads to despotism. What provisions did the Constitution have that would attempt to limit the government to only the most necessary of wars? Like so many other functions of the Constitution, the powers that were needed to implement foreign policy were divided between the executive and legislative branches. The power to declare war was given to Congress, but the president was the one with the power to wage it. The president might wish to wage war, but he needed to get a declaration of war from Congress before he could do so. And even if a president was successful in getting a war started, Congress had the power to stop it by cutting off the money that funded it. The system of checks and balances so highly regarded by historians was supposed to prevent the ascension of a tyrannical government. Instead of enabling one man or one body of men to determine when the country was to go to war, the Constitution saw to it that different parts of the federal government would have to debate and ultimately agree among themselves that war was the proper route.

Activism/Legitimacy Turn

Activist decisions undermine court legitimacy

**Earle 93** (Caroline S., J.D. Candidate – Indiana University, Bloomington, “The American Judicial Review Quagmire: A Canadian Proposal”, Indiana Law Journal, Fall, 68 Ind. L.J. 1357, Lexis)

****n26 John Hart Ely notes that commentators have been ominously portending the "destruction" of the activist Supreme Court for years. He notes that the Court has thrived despite these predictions, and suggests that it will continue to do so. ELY, *supra* note 9, at 46-48. Ely's attention, however, is directed toward executive and/or legislative reaction to Supreme Court activism. In contrast, my point is that the Supreme Court is sowing the seeds of its own "destruction." Judicial activism has served to undermine the Supreme Court's legitimacy with the people. Minorities, who in the past have looked to the Court for protection of their rights, may feel that the Court is increasingly susceptible to majority impulse. Similarly, those in the majority may fear the influence of special interest groups on the Court and also may view the politicization of the Court as inconsistent with its unelected and effectively unchecked status.

Court legitimacy key to prevent terrorism

Shapiro 3 (Jeremy, Associate Director and Research Associate – Brookings Institute, March “French Lessons: The Importance of the Judicial System in Fighting Terrorism http://www.brookings.edu/fp/cusf/analysis/shapiro20030325.htm)

The unique nature of terrorism means that maintaining the appearance of justice and democratic legitimacy will be much more important than in past wars. The terrorist threat is in a perpetual state of mutation and adaptation in response to government efforts to oppose it. The war on terrorism more closely resembles the war on drugs than World War II; it is unlikely to have any discernable endpoint, only irregular periods of calm. The French experience shows that ad-hoc anti-terrorist measures that have little basis in societal values and shallow support in public opinion may wither away during the periods of calm. In the U.S., there is an enormous reservoir of legitimacy, established by over 200 years of history and tradition, in the judiciary. That reservoir represents an important asset that the U.S. government can profit from to maintain long-term vigilance in this type of war. Despite the unusual opportunity for innovation afforded by the crisis of September 11, the U.S. government has not tried to reform American judicial institutions to enable them to meet the threat of terrorism. To prevent the next wave of attacks, however far off they might be, and to avoid re-inventing a slightly different wheel each time will require giving life to institutions that can persist and evolve, even in times of low terrorist activity. Given the numerous differences between the two countries, the U.S. cannot and should not simply import the French system, but it can learn from their mistakes. Their experience suggests a few possible reforms: A specialized U.S. Attorney tasked solely with terrorism cases and entirely responsible for prosecuting such cases in the U.S. Direct and formal links between that U.S. Attorney’s office and the various intelligence agencies, allowing prosecutors to task the intelligences agencies during judicial investigations Special procedures for selecting and protecting juries in terrorism cases and special rules of evidence that allow for increased protection of classified information in terrorist cases Creating a normal, civilian judicial process that can prosecute terrorists and yet retain legitimacy is not merely morally satisfying. It may also help to prevent terrorist attacks in the long run. Not incidentally, it would demonstrate to the world a continuing faith in the ability of democratic societies to manage the threat of terrorism without sacrificing the very values they so desperately desire to protect.

The impact is extinction

Gordon 2 (Harvey, Visiting Lecturer in Forensic Psychiatry – Tel Aviv University, “The ‘Suicide’ Bomber: Is It a Psychiatric Phenomenon?” , Psychiatric Bulletin, 26, http://pb.rcpsych.org/cgi/content/full/26/8/285)

Although terrorism throughout human history has been tragic, until relatively recently it has been more of an irritant than any major hazard. However, the existence of weapons of mass destruction now renders terrorism a potential threat to the very existence of human life (Hoge & Rose, 2001). Such potential global destruction, or globicide as one might call it, supersedes even that of genocide in its lethality. Although religious factors are not the only determinant of ‘suicide’ bombers, the revival of religious fundamentalism towards the end of the 20th century renders the phenomenon a major global threat. Even though religion can be a force for good, it can equally be abused as a force for evil. Ultimately, the parallel traits in human nature of good and evil may perhaps be the most durable of all the characteristics of the human species. There is no need to apply a psychiatric analysis to the ‘suicide’ bomber because the phenomenon can be explained in political terms. Most participants in terrorism are not usually mentally disordered and their behaviour can be construed more in terms of group dynamics (Colvard, 2002). On the other hand, perhaps psychiatric terminology is as yet deficient in not having the depth to encompass the emotions and behaviour of groups of people whose levels of hate, low self-esteem, humiliation and alienation are such that it is felt that they can be remedied by the mass destruction of life, including their own.

Activism/Legitimacy Links

Controversial decisions undermine legitimacy

**Gibson and Caldiera 7** (James L., Professor of Government – Washington University and Fellow – Centre for Comparative and International Politics, and Gregory A., Distinguished University Professor in Political Communications and Policy Thinking – Ohio State University, “Supreme Court Nominations, Legitimacy Theory, and the American Public: A Dynamic Test of the Theory of Positivity Bias”, 7-4, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=998283)

Social scientists have taught us a great deal about the legitimacy of the U.S. Supreme Court. Unfortunately, however, most research fails to consider how the public’s views of political institutions like the Court change over time. But opinions can indeed change, with at least two types of “exogenous” sources — controversial Supreme Court decisions and politicized confirmation hearings — providing engines for attitude change. Events such as these may awaken attitudes from their hibernation, allowing for the possibility of updating. Two types of change seem possible: Attention to things judicial may be associated with exposure to highly legitimizing symbols of judicial power (e.g., robes), symbols that teach the lesson that the Court is different from ordinary political institutions and therefore is worthy of esteem. Gibson and Caldeira refer to this as “positivity bias.” Alternatively, events may teach that the Court is not different, that its role is largely “political,” and that the “myth of legality”really is a myth. Since so few studies have adopted a dynamic perspective on attitudes toward institutions, we know little about how these processes of attitude change take place.

Overturning a constitutional precedent or controversial decision subverts Court legitimacy

**Peters, 8** (Christopher J., Associate Professor of Law @ Wayne State University Law School and Visiting Professor of Law @ Loyola Law School Los Angeles, Symposium: The Roberts Court at Age Three: Under-The-Table Overruling, The Wayne Law Review, Fall, Lexis)

But the Court also went farther. In a remarkable passage-remarkable because it directly engaged the question of the Court's role in a constitutional democracy to a degree rarely seen in majority opinions  [\*1080]  of the Court n54 -it argued that overruling Roe would undermine the Court's own legitimacy. N55The Court's power, it asserted in Casey, "lies . . . in its legitimacy, a product of substance and perception." n56 In tying its legitimacy to "substance," the Court appeared to mean that part of its power depends on widespread public acceptance of the content of its decisions, on the impression that the Court is getting things right most (or at least an acceptably high percentage) of the time. n57 In citing "perception," however, the Court meant something different and perhaps more complex. Some segment of the public inevitably will disagree with the substance of any constitutional decision by the Court; as the Court put it, "not every conscientious claim of principled justification [for a Court decision] will be accepted as such." n58Thus "something more"-more than agreement with the substance of Court decisions-"is required" to support the Court's power. n59 That something more is a widespread perception that the Court is procedurally legitimate, that the way it makes constitutional decisions is generally acceptable, even to those who disagree with the substance of particular decisions. n60 And this procedural legitimacy "depends on making legally principled decisions," decisions that are "grounded truly in principle, not . . . compromises with social and political pressures." n61Frequent overrulings of the Court's own constitutional precedents-or overrulings of highly controversial decisions that have produced extraordinary "social and political pressures," like Roe-would foster the impression that the Court is giving in to those pressures rather than making decisions of principle. n62 This "would subvert the Court's legitimacy" and thus its power. n63

CIL Can’t Solve – Vague

Customary international law is not precise.

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

A central theme in many traditional critiques is the imprecise character of CIL. Karol Wolfke, for example, argues that the problem with custom “lies in the intangibility of custom, in the numerous factors which come into play, in the great number of various views, spread over centuries, and in the resulting ambiguity of the terms involved.”42 Vagueness about legal rules, however, need not be fatal. After all, common law adjudication is in significant part about the clarification or establishment of rules that are applied to disputes ex post. That said, the lack of precision in CIL rules does indeed undermine the force of the rules and generate skepticism about their importance.

Customary international law has many problems, including its inherent circularity.

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Beyond vagueness, there is a laundry list of problems with CIL that have long been understood. Anthony D’Amato made perhaps the best presentation of those concerns in his well-known book, The Concept of Custom in International Law.43 One of the most vexing problems discussed by D’Amato is the inherent circularity of CIL.44 It is said that CIL is only law if the opinio juris requirement is met. That is, it is only law if states believe it is law.45 But why would a state believe something to be law if it does not already have the requisite opinio juris? So it appears that opinio juris is necessary for there to be a rule of law, and a rule of law is necessary for there to be opinio juris.

CIL can’ solve – no internal consistency

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Other problems with the conventional definition of CIL are easy to find. Like the opinio juris requirement, the state practice norm is said to be unworkable. There is no agreement on the amount or consistency of practice that is required.46 It is clear that universal state practice is not necessary, but beyond that the opinions of commentators diverge.47 For example, it is unclear whether a single inconsistent act is sufficient to conclude that there has not been “continuous” state practice. Furthermore, if a single inconsistent act is not enough to undermine the consistency of the practice, how much inconsistency is required?48 Even if agreement could be reached on the consistency element, it is difficult to determine how widespread the practice must be. One might hope that the ICJ would provide guidance here, but when the court has addressed the issue it has failed to offer clarity. Judge Lachs, in his dissent in the North Sea Continental Shelf cases, for example, did little more than restate the problem when he commented that a “general practice of States,” which is something less than “universal acceptance,” is sufficient evidence that a practice is accepted as law.49

CIL Can’t solve – Vague

Customary international law lacks a consensus of practice and a definitive evidence base.

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Ultimately, the question is one of the overall importance of practice, and there is no consensus on that issue. In the Anglo-Norwegian Fisheries case, the ICJ stated that “the Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice.”50 Though this quote seems to indicate that practice is of modest consequence, the court then emphasized the importance of “constant and sufficiently long practice.”51 Furthermore, there is no agreement on the forms of evidence that may be used to demonstrate state practice. A liberal view of acceptable evidence of practice includes not only the actual actions of states, but also diplomatic correspondence, treaties, public statements by heads of state, domestic laws, and so on.52 Though there is support for this view, one can also find prominent commentators arguing for a much shorter list.53

Customary international law lacks a definitive evidence base.

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Even if one could resolve the above problems about what counts as practice and the degree of consistency required, there remains the practical problem that observing all relevant evidence from all relevant states will normally be impossible. At the most mundane level, few nations document their actions and statements in a way that allows for an investigation of their practices.60 Furthermore, it is fantastical to think that lawyers in a case, much less adjudicators deciding a case or policymakers selecting a course of action, can canvass the virtually infinite universe of potential evidence, let alone come to some understanding of the extent to which a practice has been followed.61 The challenge is even greater when one realizes that a proper investigation of state practice would consider instances in which states refrain from taking an action because it would be in violation of international law. This latter category of evidence would be the most relevant to an investigation of CIL. The fact that it is unobservable, how- ever, makes it virtually impossible to include in the evaluation of CIL.62 Even if one can identify instances in which states claim to be refraining from certain actions based on CIL, it is difficult to know if they are doing so out of a sincere concern for CIL or if expressions of concern are simply a convenient rhetorical justification for their decision. The interpretation of observable evidence of state action is also problematic. The most visible evidence consists of statements made by countries, including votes in international fora such as the UN General Assembly. Unfortunately, this evidence is also the least reliable, as states may have incentives to misrepresent their beliefs about CIL. In practice, such statements are at times used as evidence by international courts, including the ICJ.63

CIL Can’t Solve – No enforcement

Not enforceable – lacks consistency and coherence

Guzman 6 (Andrew, Professor of Law and Director of the Advanced Law degree Programs at Berkeley Law School, *Michigan Journal of International Law* 27(115), February 26th, 2006, <http://students.law.umich.edu/mjil/article-pdfs/v27n1-guzman.pdf>) NK

Finally, in addition to these problems of evidence, attempts to determine state practice inevitably face time and resource constraints, preventing a serious canvassing of all relevant information. The result is that judgments are based on cursory reviews of a few states, biased toward the practices of states with readily available statements about their behavior written in a language understood by the relevant judges,64 heavily influenced by the particular background of the judge, and often inconsistent with the behavior of many states.65 These problems, along with others that are omitted from this brief discussion, make it difficult to take traditional theories of CIL seriously if one approaches the subject with even mild skepticism.66 One illustration of this problem appears in an article by Kelly, who concludes that CIL is “a useless, incoherent source of law that is of little guidance in determining norms.” Even on its own terms, CIL is a problematic area. The basic definitions of CIL are at best difficult to understand and apply and certain to lead to inconsistent judgments about the content of the law; at worst they are incoherent and internally inconsistent.67

Can’t solve: CIL will not be enforced.

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

Third, many treaties and other international declarations are merely empty promises if nations do not actually enforce them. Many nations flout international norms imposed by treaty while others often fail to give them domestic effect. In contrast, Congress expects that the norms it codifies into domestic law will be enforced, providing evidence that those norms are sincerely embraced.

CIL Can’t Solve – No Spillover

No spillover –we’ve incorporated specific provisions before without complete incorporation

Harold Hongju Koh**,** Yale Law Professor**,** 1998,Harvard law Review, Vol. 111, No. 7, May, p. 1839-40

Take, for example, the federal doctrine of foreign sovereign immunity, which originated in the customary international law doctrine of absolute foreign sovereign immunity. Over time, the Supreme Court incorporated that decision into United States law and melded it with a federal common law doctrine of judicial deference to federal executive suggestions of immunity. Eventually, executive policy brought US practice into line with the emerging customary international law doctrine of restrictive sovereign immunity, and Congress codified the new doctrine in the Foreign Sovereign Immunities Act (FSIA), whose gaps federal courts have subsequently filled by declaring rules of federal common law. In short, rules that originate in customary international law are regularly determined by United States courts and incorporated into federal common law, then updated by executive policy as customary law evolves, and codified in federal statutes whose interstices are filled through federal common lawmaking.

CIL Bad – AT: Environment

Treaties solve – don’t need CIL

Daniel W. Drener, Political Science Professor University of Chicago, 2001**,** Chicago Journal of International Law, 2 Chi. J. Int'l L. 321, p. 326-7

Second, the law here is growing largely through treaty ratification, not through customary international law. One could argue that the declarations produced by UN conferences are an attempt to use customary law as a way of bypassing democratic institutions. However, this overlooks the constraints that domestic legal institutions place upon international environmental accords. Case studies of fallout from the 1992 Rio Summit suggest that countries implement environmental accords only to the extent permitted by their domestic political institutions. n24 In the case of the Kyoto Protocol, objections in the United States about the treaty's costs of implementation and the distribution of costs led the Bush administration to reject ratification of the treaty. These actions highlight the fact that when international environmental law has moved forward, it has only occurred with the backing of the great powers. While NGOs do play a role in persuading powerful states to alter their policies, so do other factors, such as the material costs and benefits of such treaties.

CIL Bad – AT: Satellites (Koplow)

Koplow Concedes – CIL is not enough for an ASAT ban

Koplow 9 (David A., Michigan Journal of International Law, Summer, 30 Mich. J. Int'l L. 1187, Lexis) ELJ

In sum, general CIL gets us only halfway toward an effective ASAT ban. There is, I submit, sufficient evidence of congruent behavior by the leading spacefaring States to satisfy the objective criterion; they have in general refrained from testing or using ASAT devices. The observed pattern of conformity is not perfect, but especially in the past two decades (and, specifically, until the U.S. and Chinese events in 2007 and 2008), the aberrations from a "no ASATs" rule have been few. If physical actions alone were sufficient to entrench a CIL rule, then we would have such a standard. On the other hand, the evidence to satisfy the subjective component of the usual definition of CIL is essentially lacking. States have not generally asserted the belief that ASAT testing or use is already a violation of the world community's expectations. The three States that have occasionally conducted ASAT events have certainly not conceded the illegality of their respective programs, and the many other States that observe and comment on those ASAT programs have criticized them with rhetoric that sounds in policy, not in law. To date, there has  [\*1242]  been little affirmative argumentation that an opinio juris already exists to outlaw ASATs under general CIL. [n179](http://www.lexisnexis.com:80/us/lnacademic/frame.do?reloadEntirePage=true&rand=1278706563414&returnToKey=20_T9715755939&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.944061.7857489622" \l "n179)

CIL Bad - Undemocratic

**Customary international law can’t solve because it has democratic deficits built into its definition.**

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

A glaring problem with customary international law, the most important category of raw international law, is that it has a democratic deficit built into its very definition. To be customary international law, a principle must result “from a general and consistent practice of states followed by them from a sense of legal obligation.”7 This definition mentions only the “general and consistent practice of” nation‐states without any reference to representative processes or to the welfare of citizens. Thus, by its very definition, customary international law neglects democratic decision making. In addition to this theoretical problem, customary international law has at least five different democratic deficits that arise in practice.

CIL is undemocratic, nonbinding, and meaningless

**Kelly 00** (J. Patrick, Winter, Law Professor Widener University, Virgina Journal of International Law)

I argue that CIL should be eliminated as a source of international legal norms and replaced by consensual processes. My goal is not to undermine international law, but to encourage the use of more democratic, deliberative processes in formulating this law. My argument has three components. First, the substantive CIL norms of the literature lack the authority of customary law and therefore are not binding on states. CIL lacks authority as law, because such norms are not, in fact, based on the implied consent or general acceptance of the international community that a norm is obligatory. Both implied consent and general acceptance are fictions used at different historical periods to justify the universalization of preferred norms. In a world of many cultures and values, general acceptance is neither ascertainable nor verifiable.

Second, CIL has evolved into a meaningless concept that furnishes neither a coherent nor objective means of determining the  [\*453]  norms of international law, how and when they come into existence, and which nations are bound. As an undefined and indeterminant source, it is unable to perform its assigned function as a relatively objective source of international norms based on social fact.

Third, the CIL process lacks procedural legitimacy. The process of norm formation, as actually practiced, violates the basic notion of democratic governance among states and is a particularly ineffective way to generate substantive norms that will command compliance. Few nations participate in the formation of norms said to be customary. The less powerful nations and voices are ignored. There is little consideration of alternatives and trade-offs in reconciling diverse values and interests. Consequently, CIL should be discarded as a source of law and replaced by consent-based processes that permit wide participation, the discussion of alternatives, and the commitment of nations to their norms.

Can’t solve: CIL has the democratic deficit of not having to assent affirmatively.

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

First, nations do not have to assent affirmatively to the creation of a principle of customary international law. Instead, nations are considered to have consented to a principle if they simply failed to object.8 This measure of assent compares unfavorably with the requirements of domestic democracy, which assure both deliberation and accountability. Domestic political actors cannot create norms by inaction but instead must affirmatively embrace a practice to make it law.

CIL Bad - Undemocratic

Can’t solve: CIL has been influenced by totalitarian countries.

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

Second, undemocratic, even totalitarian, nations wield influence on international law. This influence is most obvious in multilateral human rights treaties, like the U.N. Convention on the Rights of the Child,9 which are often asserted as a basis for customary international law even if not ratified by the United States.10 Totalitarian nations like the Soviet Union and communist China participated in the negotiations of these treaties. One can hardly be confident that the same provisions would have emerged absent the influence of those “evil empire[s].”11 Consider this analogy: Should the United States give domestic effect to provisions of treaties that it did not ratify, but that instead were approved by Nazi Germany and other Axis powers?

Can’t solve: CIL law doesn’t have the solvency that domestic law has.

McGinnis 6 (John, professor of law at Northwestern University's School of Law, Harvard Journal of Law and Public Policy, Fall 2006, <http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_McGinnisonline.pdf>) NK

Thus, international law has many democratic deficits. Domestic democracy is far from perfect, but elections, deliberation, and the scrutiny of public officials provide substantial assurance that norms beneficial for Americans will develop over time. Defenders of international law sometimes note that the American legal system makes use of undemocratic norms, like custom and the common law. But international law simply does not possess the virtues of domestic custom or the common law. For example, the notion behind efficient custom is that individuals interacting reciprocally and repeatedly will adopt norms that maximize their joint surpluses.15 Because nations rather than people create customary international law, it is not well designed to maximize the welfare of people.16