### 1

#### TPA will pass-strong bipartisan support

The White House Bulletin 1/15/14

HEADLINE: Business Roundtable Leaders See Strong Support For Trade Promotion Authority

Randall Stephenson, chairman and CEO of AT&T and chairman of the Business Roundtable, said that there is "general, broad, bipartisan support" for giving President Obama Trade Promotion Authority. "I've been surprised over the last couple of days at how much support there is for TPA on both sides of the aisle. So of the issues that I will walk away from being here this week concerned about, support for TPA is not really high on my concern list," he said. Business Roundtable President John Engler added that while Obama may be encountering some opposition from his own party, "I think he will get support. ... I think there's little risk in giving their president the authority, or his negotiator, [US Trade Representative Michael] Froman who's a splendid trade ambassador, giving him the authority to go into these negotiations and trying to get the best deal for America." Stephenson identified trade as one of the Roundtable's keys for economic growth. "As it relates to concerns about trade and the implication of investment moving from the US to other countries and employment moving I think the evidence is against it," he said. "We're 20 years into NAFTA, I think empirically virtually any metrics you look at" show that that agreement helped both employment and investment. He said similar deals with Europe and Asia would have similar effects. - Bulletin exclusive from US News

#### Obama is pushing and his push Is key

The Hill 1/21 < Obama: Give me fast track trade, http://thehill.com/homenews/administration/195858-white-house-works-to-convince-dems-to-give-obama-fast-track-on-trade>#SPS

The White House is making a major push to convince Congress to give the president trade promotion authority (TPA), which would make it easier for President Obama to negotiate pacts with other countries. ¶ A flurry of meetings has taken place in recent days since legislation was introduced to give the president the authority, with U.S. Trade Representative Mike Froman meeting with approximately 70 lawmakers on both sides of the aisle in the House and Senate.¶ White House chief of staff Denis McDonough has also been placing calls and meeting with top Democratic lawmakers in recent days to discuss trade and other issues.¶ Republicans have noticed a change in the administration’s interest in the issue, which is expected to be a part of Obama’s State of the Union address in one week.¶ While there was “a lack of engagement,” as one senior Republican aide put it, there is now a new energy from the White House since the bill dropped. ¶ The effort to get Congress to grant Obama trade promotion authority comes as the White House seeks to complete trade deals with the European Union, and a group of Asian and Latin American countries as part of the Trans-Pacific Partnership, or TPP.¶ The authority would put time limits on congressional consideration of those deals and prevent the deals from being amended by Congress. That would give the administration more leverage with trading partners in its negotiations.¶ The trade push dovetails with the administration’s efforts to raise the issue of income inequality ahead of the 2014 midterm elections. The White House is pressing Republicans to raise the minimum wage and extend federal unemployment benefits.¶ The difference is, on the minimum wage hike and unemployment issue, Obama has willing partners in congressional Democrats and unions, who are more skeptical of free trade. Republicans are more the willing partner on backing trade promotion authority.¶ Legislation introduced last week to give Obama trade promotion authority was sponsored by House Ways and Means Committee Chairman Dave Camp (R-Mich.) and Senate Finance Committee Chairman Max Baucus (D-Mont.), as well as Sen. Orrin Hatch (R-Utah), the ranking member on Finance.¶ No House Democrats are co-sponsoring the bill, however, and Rep. Sandy Levin (D-Mich.), the Ways and Means Committee ranking member, and Rep. Charles Rangel (D-N.Y.), the panel’s former chairman, have both criticized it. They said the legislation doesn’t give enough leverage and power to Congress during trade negotiations.¶ Getting TPA passed would be a major victory for the administration, and one that would please business groups, but the White House will first have to convince Democrats to go along with it.¶ One senior administration official said the White House has been in dialogue with lawmakers on both sides of the aisle “with a real focus on Democrats” to explain TPA and take into account their concerns. ¶ “Any trade matter presents challenges,” the senior administration official said, adding that White House officials are “devoted” to working with members on the issue. ¶ The Democratic opposition makes it highly unlikely the trade promotion authority bill, in its current form at least, will go anywhere.¶ One big problem is that it was negotiated by Baucus, who is about to leave the Senate to become ambassador to China.¶ Baucus will be replaced by Sen. Ron Wyden (Ore.), who is said to disagree with the approach taken by his predecessor. Democratic aides predict the legislation, which Majority Leader Harry Reid (D-Nev.) called “controversial” last week, would have to be completely redone to gain traction among lawmakers in their party.¶ Some Democrats might see a disconnect between the White House’s push for trade and it’s separate push on income inequality, which has been embraced by the party.¶ But that doesn’t mean the White House won’t ramp up their focus on trade in the coming weeks and months.¶ Senior congressional aides expect trade to be a part of Obama’s upcoming State of the Union address, since the White House has made clear that the trade bill is a priority and the TPP trade pact is a core part of the administration’s overall jobs agenda, in terms of increasing exports and opening markets.¶ “This is a priority of the president's,” White House press secretary Jay Carney told reporters last week. “It's part of a broad approach to expanding exports and, you know, creating more opportunities for our businesses to grow. And we're going to continue to push for it.”¶ In the same vein, House Republicans will continue to increase pressure on the administration to get Democrats on board.¶ “The White House carries the weight on this,” one senior House aide said.

#### The plan causes an inter-branch fight – saps PC and derails his agenda

Kriner 10

Douglas Kriner, Assistant Profess of Political Science at Boston University, 2010, After the Rubicon: Congress, Presidents, and the Politics of Waging War, p. 67-69

Raising or Lowering Political Costs by Affecting Presidential Political Capital Shaping both real and anticipated public opinion are two important ways in which Congress can raise or lower the political costs of a military action for the president. However, focusing exclusively on opinion dynamics threatens to obscure the much broader political consequences of domestic reaction—particularly congressional opposition—to presidential foreign policies. At least since Richard Neustadt's seminal work Presidential Power, presidency scholars have warned that costly political battles in one policy arena frequently have significant ramifications for presidential power in other realms. Indeed, two of Neustadt's three "cases of command"—Truman's seizure of the steel mills and firing of General Douglas MacArthur—explicitly discussed the broader political consequences of stiff domestic resistance to presidential assertions of commander-in-chief powers. In both cases, Truman emerged victorious in the case at hand—yet, Neustadt argues, each victory cost Truman dearly in terms of his future power prospects and leeway in other policy areas, many of which were more important to the president than achieving unconditional victory over North Korea." While congressional support leaves the president's reserve of political capital intact, congressional criticism saps energy from other initiatives on the home front by forcing the president to expend energy and effort defending his international agenda. Political capital spent shoring up support for a president's foreign policies is capital that is unavailable for his future policy initiatives. Moreover, any weakening in the president's political clout may have immediate ramifications for his reelection prospects, as well as indirect consequences for congressional races." Indeed, Democratic efforts to tie congressional Republican incumbents to President George W. Bush and his war policies paid immediate political dividends in the 2006 midterms, particularly in states, districts, and counties that had suffered the highest casualty rates in the Iraq War.6° In addition to boding ill for the president's perceived political capital and reputation, such partisan losses in Congress only further imperil his programmatic agenda, both international and domestic. Scholars have long noted that President Lyndon Johnson's dream of a Great Society also perished in the rice paddies of Vietnam. Lacking both the requisite funds in a war-depleted treasury and the political capital needed to sustain his legislative vision, Johnson gradually let his domestic goals slip away as he hunkered down in an effort first to win and then to end the Vietnam War. In the same way, many of President Bush's highest second-term domestic priorities, such as Social Security and immigration reform, failedperhaps in large part because the administration had to expend so much energy and effort waging a rear-guard action against congressional critics of the war in Iraq. When making their cost-benefit calculations, presidents surely consider these wider political costs of congressional opposition to their military policies. If congressional opposition in the military arena stands to derail other elements of his agenda, all else being equal, the president will be more likely to judge the benefits of military action insufficient to its costs than if Congress stood behind him in the international arena.

#### Bill Key to Trade

Watson 1/15 <William, trade policy analyst with Cato’s Herbert A Stiefel Center for Trade Policy Studies. His research focuses on U.S. trade remedy policies, disguised protectionism, and the institutional aspects of global trade liberalization, What to Look for in the Upcoming Trade Policy Debate, http://www.cato.org/blog/what-look-upcoming-trade-policy-debate>#SPS

The most important piece of trade legislation Congress has dealt with in years was introduced in the House and Senate last week. The “Bipartisan Congressional Trade Priorities Act of 2014” sets out the parameters for renewing trade promotion authority (TPA), originally known as “fast track,” in order to ease eventual passage of the Trans-Pacific Partnership and other agreements through Congress. There will be a lot of debate in the coming months about what U.S. trade policy should look like, and this TPA bill will do a lot to establish the agenda. The [new bill](http://www.finance.senate.gov/imo/media/doc/TPA%20bill%20text.pdf) largely mirrors the last TPA grant in 2002. The basic idea of fast track is that Congress agrees to hold an up-or-down vote on any trade agreement submitted by the president, while the president agrees to adopt a series of negotiating objectives laid out by Congress. ¶I’ve explained before why I think TPA is [not necessary right now](http://www.cato.org/publications/free-trade-bulletin/stay-fast-track-why-trade-promotion-authority-wrong-trans-pacific) to get agreements through Congress and why it could even [make the TPP negotiations more difficult](http://www.cato.org/multimedia/daily-podcast/fast-track-authoritys-dubious-record). However, that argument is temporarily moot since this TPA bill is on the table and will apply not only to the TPP but to the U.S.-EU trade agreement and any World Trade Organzation negotiations for the next four years. ¶ Defeat of this bill could quite possibly [kill any chance the president has](http://online.wsj.com/news/articles/SB10001424052702304617404579306221047716030) to conclude trade agreements before the end of his term. Also, the negotiating objectives included in the new bill are not as bad as I had feared.

#### Free trade prevents multiple scenarios for world war and WMD Terrorism

Panzner 2008

Michael, faculty at the New York Institute of Finance, 25-year veteran of the global stock, bond, and currency markets who has worked in New York and London for HSBC, Soros Funds, ABN Amro, Dresdner Bank, and JPMorgan Chase “Financial Armageddon: Protect Your Future from Economic Collapse,” pg. 136-138

Continuing calls for curbs on the flow of finance and trade will inspire the United States and other nations to spew forth protectionist legislation like the notorious Smoot-Hawley bill. Introduced at the start of the Great Depression, it triggered a series of tit-for-tat economic responses, which many commentators believe helped turn a serious economic downturn into a prolonged and devastating global disaster. But if history is any guide, those lessons will have been long forgotten during the next collapse. Eventually, fed by a mood of desperation and growing public anger, restrictions on trade, finance, investment, and immigration will almost certainly intensify. Authorities and ordinary citizens will likely scrutinize the cross-border movement of Americans and outsiders alike, and lawmakers may even call for a general crackdown on nonessential travel. Meanwhile, many nations will make transporting or sending funds to other countries exceedingly difficult. As desperate officials try to limit the fallout from decades of ill-conceived, corrupt, and reckless policies, they will introduce controls on foreign exchange. Foreign individuals and companies seeking to acquire certain American infrastructure assets, or trying to buy property and other assets on the cheap thanks to a rapidly depreciating dollar, will be stymied by limits on investment by noncitizens. Those efforts will cause spasms to ripple across economies and markets, disrupting global payment, settlement, and clearing mechanisms. All of this will, of course, continue to undermine business confidence and consumer spending. In a world of lockouts and lockdowns, any link that transmits systemic financial pressures across markets through arbitrage or portfolio-based risk management, or that allows diseases to be easily spread from one country to the next by tourists and wildlife, or that otherwise facilitates unwelcome exchanges of any kind will be viewed with suspicion and dealt with accordingly. The rise in isolationism and protectionism will bring about ever more heated arguments and dangerous confrontations over shared sources of oil, gas, and other key commodities as well as factors of production that must, out of necessity, be acquired from less-than-friendly nations. Whether involving raw materials used in strategic industries or basic necessities such as food, water, and energy, efforts to secure adequate supplies will take increasing precedence in a world where demand seems constantly out of kilter with supply. Disputes over the misuse, overuse, and pollution of the environment and natural resources will become more commonplace. Around the world, such tensions will give rise to full-scale military encounters, often with minimal provocation. In some instances, economic conditions will serve as a convenient pretext for conflicts that stem from cultural and religious differences. Alternatively, nations may look to divert attention away from domestic problems by channeling frustration and populist sentiment toward other countries and cultures. Enabled by cheap technology and the waning threat of American retribution, terrorist groups will likely boost the frequency and scale of their horrifying attacks, bringing the threat of random violence to a whole new level. Turbulent conditions will encourage aggressive saber rattling and interdictions by rogue nations running amok. Age-old clashes will also take on a new, more heated sense of urgency. China will likely assume an increasingly belligerent posture toward Taiwan, while Iran may embark on overt colonization of its neighbors in the Mideast. Israel, for its part, may look to draw a dwindling list of allies from around the world into a growing number of conflicts. Some observers, like John Mearsheimer, a political scientist at the University of Chicago, have even speculated that an “intense confrontation” between the United States and China is “inevitable” at some point. More than a few disputes will turn out to be almost wholly ideological. Growing cultural and religious differences will be transformed from wars of words to battles soaked in blood. Long-simmering resentments could also degenerate quickly, spurring the basest of human instincts and triggering genocidal acts. Terrorists employing biological or nuclear weapons will vie with conventional forces using jets, cruise missiles, and bunker-busting bombs to cause widespread destruction. Many will interpret stepped-up conflicts between Muslims and Western societies as the beginnings of a new world war.

### 2

#### Text: The United States Supreme Court should extend the legal reasoning of Hamdi v. Rumsfeld concerning enemy combatants by limiting the war power authority of the president for self-defense targeted killings to outside an armed conflict.

#### Hamdi v. Rumsfeld proves the Supreme court can do the aff : Court can rule on AUMF applicability outside of combat zones

Rushforth ’12 (JD candidate U of Arizona)

Elinor June 29 Ariz. J. Int'l & Comp. Law 623

E. The Detainee Cases: Judicial Restraint on Executive Power and the Rights of Enemy Combatants, with Implications on Drone Warfare.¶ Though there is scant case law on the subject of the legality of targeted killings via armed drones, the U.S. Supreme Court and some federal district courts have discussed several legal issues that weigh on the legitimacy of these attacks. n114 The due process rights of those involved in the ongoing Overseas Contingency Operations, secured through the Guantanamo detainee decisions, **[\*643]** should weigh on the Executive's decision to use lethal targeting. Below is a discussion of some of the key detainee cases, which create the legal framework for individual due process in the Overseas Contingency Operations.¶ 1. *Hamdi v. Rumsfeld*¶ *Hamdi v. Rumsfeld* stands for the principle that an American citizen, detained in the War on Terror, retains the due process right to contest the factual basis of his detention. n115 The habeas corpus petition was brought by Hamdi's father as his next friend (personal representative) after Hamdi was turned over to U.S. military forces in Afghanistan. n116 Hamdi was detained and interrogated in Afghanistan and ultimately transferred to Guantanamo Bay. n117 Several months later, after determining he was an American citizen, the military transferred him to a naval brig. n118 The government's evidence against Hamdi, derived from his post-detention interviews and his association with the Taliban, was presented in an affidavit by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy. n119¶ The Supreme Court was faced with the question of "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'" n120 The government asserted that no congressional authorization was necessary to legitimize such a detention, but the Court did not reach that question because the Court agreed with the alternative argument that the AUMF authorized Hamdi's detention. n121 Because the **AUMF** authorizes "all necessary and appropriate force" against those associated with the 9/11 attacks, the detention of members of al-Qaeda falls squarely within the government's authority, due to the organization's involvement in the attacks and its continued hostility against the United States. n122 The Court found that Congress had authorized detention in the circumstances presented in Hamdi's case, but Hamdi objected that the AUMF had not authorized indefinite or perpetual detention," n123 and that he was due a meaningful and timely hearing. n124 The government countered by stating that since it is undisputed that Hamdi was detained in a **combat zone** no hearing for further factfinding was needed, and that national security interests far outweighed Hamdi's interest in a hearing. n125¶ **[\*644]** The Court recognized that "[s]triking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat" and highlighted serious concerns on both sides. n126 Applying the *Mathews v. Eldridge* balancing test, the Court considered whether Hamdi's interest in not being deprived of "life, liberty or property, without the due process of law" n127 outweighed the government's "weighty and sensitive" interest in not allowing enemy combatants to return to battle. n128 The government and court below suggested certain processes intended to satisfy Hamdi's interest in due process, but the Court found the "risk of erroneous deprivation of a detainee's liberty" very real. n129 Instead, the Court tried to strike a fair balance between citizen-detainee liberty interests and the government's national security interests. n130 The Court found that in a hearing in which there was a rebuttable presumption in favor of the government, the flexibility required for contingencies in ongoing military would be respected, that it is "unlikely that this basic process [would] have the dire impact on the central functions of warmaking that the government forecasts. n131¶ This analysis sheds light on the U.S. policy towards targeted killing. Though Hamdi's scope is limited, n132 it is not an impossible logical leap to extend these kinds of due process rights to those who are faced with, or are victims of, drone attacks. Nevertheless, there is a practical difference between an enemy combatant or terrorist detained on the battlefield and one who is subject to a targeted killing operation. The detainee has already been subjected to interrogation, and the government has likely culled any intelligence it can get. The detainee has been neutralized and separated from the battlefield and his or her unit. In contrast, the target of a drone strike will not be in the hands of military personnel and his fate will be determined from miles away.¶ However, now that the U.S. Supreme Court has determined that one of these classes has due process rights, granting some sort of process for targets of a drone strike does not seem far outside the realm of possibility. Though the target has yet to be deprived of any liberty interest, once killed he has been deprived of life at the hands of a government decision maker. Once an enemy combatant is in the government's custody he suddenly, through loss of liberty, has constitutional protections and due process rights, it could be argued that some sort of process or judicial review of government action is required for the target--at least a citizen-target--of a drone strike.

#### CP solves – empirically courts can restrict

Fisher 2005

(Louis Fisher, senior specialist in separation of Powers with the Congressional Research Service, September 2005, “Judicial Review of the War Power,” Presidential Studies Quarterly, Vol 35, No 3, http://www.constitutionproject.org/pdf/422.pdf)

The terrorist attacks of 9/11, followed by the creation of a military tribunal, treatment of detainees, and passage of the USA Patriot Act, brought to the fore again the ¶ question of what role federal courts should play in policing the war power. Contempo­¶ rary legal studies often argue that foreign affairs-and particularly issues of war and ¶ peace-lie beyond the scope of judicial jurisdiction and competence. However, the record ¶ over the past two centuries demonstrates that not only have courts decided war power ¶ issues many times, they have curbed presidential military actions in time of war.

#### Courts don’t link to politics- avoids political fallout

Whittington ‘05

(Keith E., Professor of Politics - Princeton University, "Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, [The American Political Science Review](http://proquest.umi.com.proxy.lib.umich.edu/pqdweb?RQT=318&pmid=28600&TS=1245862067&clientId=17822&VInst=PROD&VName=PQD&VType=PQD), Nov., (99)4, p. 583)

There are **some issues** that **politicians cannot easily handle**. For individual legislators, their **constituents may be sharply divided on a given issue** or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including **presidents and legislative leaders**, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials **may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves**. As Mark Graber (1993) has detailed **in cases such as** slavery and **abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action,** especially when the courts are believed to be sympathetic to the politician's own substantive preferences but **even when the attitude of the courts is uncertain** or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured **politicians** and coalition leaders, **shifting blame for controversial decisions to the Court** **and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening** active **judicial review** (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

### 3

#### Restrictions on executive war powers DO NOTHING for the state of political legal exception we live in and only gives further justification for violent intervention on the basis of legality

Dyzenhaus 05 (David, is a professor of Law and Philosophy at the University of Toronto, and a Fellow of the Royal Society of Canada, “Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?” Cardozo Law Review 27)

Rossiter had in mind Lincoln's actions during the Civil War, including the proclamation by which Lincoln, without the prior authority of Congress, suspended habeas corpus. n35 Lincoln, he said, subscribed to a theory that in a time of emergency, the President could assume whatever legislative, executive, and judicial powers he thought necessary to preserve the nation, and could in the process break the "fundamental laws of the nation, if such a step were unavoidable." n36 This power included one ratified by the Supreme Court: "an almost unrestrained power to act toward insurrectionary citizens as if they were enemies of the United States, and thus place them outside the protection of the Constitution." Rossiter's difficulties here illustrate rather than solve the tensions inherent in the idea of constitutional dictatorship. On the one hand, he wants to assert that emergency rule in a liberal democracy can be constitutional in nature. "Constitutional" implies restraints and limits in accordance not only with law, but with fundamental laws. These laws are not the constitution that is in place for ordinary times; rather, they are the laws that govern the management of exceptional times - the eleven criteria that he developed for constitutional dictatorship. The criteria are either put within the discretion of the dictator - they are judgments about necessity - or are couched as limits that should be enshrined either in the constitution or in legislation. However, Rossiter does not properly address the fact that judgments about necessity are for the dictator to make, which means that these criteria are not limits or constraints but merely factors about which the dictator will have to decide. Other criteria look more like genuine limits. Moreover, they are limits that could be constitutionally enshrined - for example, the second criterion, which requires that the person who makes the decision that there is an emergency should not be the person who assumes dictatorial powers. Yet, as we have seen, Rossiter's foremost example of the modern constitutional dictator, Lincoln, not only gave himself dictatorial powers but, Rossiter supposes, had no choice but to do this. Moreover, if these criteria are constitutionally enshrined, so that part of the constitution is devoted to the rules that govern the time when the rest of the constitution might be suspended, they still form part of the constitution. So, no less than the ordinary constitution, what we can think of as the exceptional or emergency constitution - the constitution that governs the state of emergency - is subject to suspension should the dictator deem this necessary. This explains why, on the other hand, Rossiter equated emergency rule with potentially unlimited dictatorship, with Locke's idea of prerogative. And Rossiter said, "whatever the theory, in moments of extreme national emergency the facts have always been with ... John Locke." So Rossiter at one and the same time sees constitutional dictatorship as unconstrained in nature and as constrainable by principles - his eleven criteria. The upshot is that "constitutional" turns out not to mean what we usually take it to mean; rather, it is a misleading name for the hope that the person who assumes dictatorial powers does so because of a good faith evaluation that this is really necessary and with the honest and steadfast intention to return to the ordinary way of doing things as soon as possible. Giorgio Agamben is thus right to remark that the bid by modern theorists of constitutional dictatorship to rely on the tradition of Roman dictatorship is misleading. n39 They rely on that tradition in an effort to show that dictatorship is constitutional or law-governed. But in fact they show that dictatorship is in principle absolute - the dictator is subject to whatever limits he deems necessary, which means to no limits at all. As H.L.A. Hart described the sovereign within the tradition of legal positivism, the dictator is an uncommanded commander. n40 He [\*2015] operates within a black hole, in Agamben's words, "an emptiness of law." n41 Agamben thus suggests that the real analogue to the contemporary state of emergency is not the Roman dictatorship but the institution of iustitium, in which the law is used to produce a "juridical void" - a total suspension of law. n42 And in coming to this conclusion, Agamben sides with Carl Schmitt, his principal interlocutor in his book. However, it is important to see that Schmitt's understanding of the state of exception is not quite a legal black hole, a juridically produced void. Rather, it is a space beyond law, a space which is revealed when law recedes, leaving the state, represented by the sovereign, to act. In substance, there might seem to be little difference between a legal black hole and space beyond law since neither is controlled by the rule of law. But there is a difference in that nearly all liberal legal theorists find the idea of a space beyond law antithetical, even if they suppose that law can be used to produce a legal void. This is so especially if such theorists want to claim for the sake of legitimacy that law is playing a role, even if it is the case that the role law plays is to suspend the rule of law. Schmitt would have regarded such claims as an attempt to cling to the wreckage of liberal conceptions of the rule of law brought about by any attempt to respond to emergencies through the law. They represent a vain effort to banish the exception from legal order. Because liberals cannot countenance the idea of politics uncontrolled by law, they place a veneer of legality on the political, which allows the executive to do what it wants while claiming the legitimacy of the rule of law. We have seen that Rossiter presents a prominent example which supports Schmitt's view, and as I will now show, it is a depressing fact that much recent post 9/11 work on emergencies is also supportive of Schmitt's view. II. Responding to 9/11 For example, Bruce Ackerman in his essay, The Emergency Constitution, n43 starts by claiming that we need "new constitutional concepts" in order to avoid the downward spiral in protection of civil liberties that occurs when politicians enact laws that become increasingly repressive with each new terrorist attack. n44 We need, he says, to rescue the concept of "emergency powers ... from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal [\*2016] democracy." n45 Because Ackerman does not think that judges are likely to do, or can do, better than they have in the past at containing the executive during an emergency, he proposes mainly the creative design of constitutional checks and balances to ensure, as did the Roman dictatorship, against the normalization of the state of emergency. Judges should not be regarded as "miraculous saviors of our threatened heritage of freedom." n46 Hence, it is better to rely on a system of political incentives and disincentives, a "political economy" that will prevent abuse of emergency powers. He calls his first device the "supramajoritarian escalator" n48 - basically the requirement that a declaration of a state of emergency requires legislative endorsement within a very short time, and thereafter has to be renewed at short intervals, with each renewal requiring the approval of a larger majority of legislators. The idea is that it will become increasingly easy with time for even a small minority of legislators to bring the emergency to an end, thus decreasing the opportunities for executive abuse of power. n49 The second device requires the executive to share security intelligence with legislative committees and that a majority of the seats on these committees belong to the opposition party. Ackerman does see some role for courts. They will have a macro role should the executive flout the constitutional devices. While he recognizes both that the executive might simply assert the necessity to suspend the emergency constitution and that this assertion might enjoy popular support, he supposes that if the courts declare that the executive is violating the constitution, this will give the public pause and thus will decrease incentives on the executive to evade the constitution. n51 In addition, the courts will have a micro role in supervising what he regards as the inevitable process of detaining suspects without trial for the period of the emergency. Suspects should be brought to court and some explanation should be given of the grounds of their detention, not so that they can contest it - a matter which Ackerman does not regard as practicable - but in order both to give the suspects a public identity so that they do not disappear and to provide a basis for compensation once the emergency is over in case the executive turns out to have fabricated [\*2017] its reasons. He also wishes to maintain a constitutional prohibition on torture, which he thinks can be enforced by requiring regular visits by lawyers. Not only is the judicial role limited, but it is clear that Ackerman does not see the courts as having much to do with preventing a period of "sheer lawlessness." n53 Even within the section on the judiciary, he says that the real restraint on the executive will be the knowledge that the supramajoritarian escalator might bring the emergency to an end, whereupon the detainees will be released if there is no hard evidence to justify detaining them. In sum, according to Ackerman, judges have at best a minimal role to play during a state of emergency. We cannot really escape from the fact that a state of emergency is a legally created black hole, a lawless void. It is subject to external constraints, controls on the executive located at the constitutional level and policed by the legislature. But internally, the rule of law does next to no work; all that we can reasonably hope for is decency. But once one has conceded that internally a state of emergency is more or less a legal black hole because the rule of law, as policed by judges, has no or little purchase, it becomes difficult to understand how external legal constraints, the constitutionally entrenched devices, can play the role Ackerman sets out. Recall that Ackerman accepts that the reason we should not give judges more than a minimal role is the history of judicial failure to uphold the rule of law during emergencies in the face of executive assertions of a necessity to operate outside of law's rule. For that reason, he constructs a political economy to constrain emergency powers. But that political economy still has to be located in law in order to be enforceable, which means that Ackerman cannot help but rely on judges. But why should we accept his claim that we can rely on judges when the executive asserts the necessity of suspending the exceptional constitution, the constitution for the state of emergency, when one of his premises is that we cannot so rely? Far from rescuing the concept of emergency powers from Schmitt, Ackerman's devices for an emergency constitution, an attempt to update Rossiter's model of constitutional dictatorship, fails for the same reasons that Rossiter's model fails. Even as they attempt to respond to Schmitt's challenge, they seem to prove the claim that Schmitt made in late Weimar that law cannot effectively enshrine a distinction between constitutional dictatorship and dictatorship. They appear to be vain attempts to find a role for law while at the same time conceding that law has no role. Of course, this last claim trades on an ambiguity in the idea of the rule of law between, on the one hand, the rule of law, understood as the rule of substantive principles, and, on the other, rule by law, where as long as there is a legal warrant for what government does, government will be considered to be in compliance with the rule of law. Only if one holds to a fairly substantive or thick conception of the rule of law will one think that there is a point on a continuum of legality where rule by law ceases to be in accordance with the rule of law. Ackerman's argument for rule by law, by the law of the emergency constitution, might not answer Schmitt's challenge. But at least it attempts to avoid dignifying the legal void with the title of rule of law, even as it tries to use law to govern what it deems ungovernable by law. The same cannot be said of those responses to 9/11 that seem to suggest that legal black holes are not in tension with the rule of law, as long as they are properly created. While it is relatively rare to find a position that articulates so stark a view, it is quite common to find positions that are comfortable with grey holes, as long as these are properly created. A grey hole is a legal space in which there are some legal constraints on executive action - it is not a lawless void - but the constraints are so insubstantial that they pretty well permit government to do as it pleases. And since such grey holes permit government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes.

#### Our alternative is to recognize the necessity of the opposition. Sovereignty necessarily functions in exception to the law. This exception is necessary to avoid the universal violence of the Law and the affirmative.

Rasch 2000 (William. "Conflict as a Vocation: Carl Schmitt and the Possibility of Politics." Theory Culture Society 17.1)

It is not difficult to see that the polemical elevation of sovereignty over the rule of law replicates a lively historical opposition, one that can be perhaps best evoked by that happy pair, Hobbes and Locke. Within the liberal tradition, the rule of law invokes reason and calculability in its battles against the arbitrary and potentially despotic whim of an unrestrained sovereign. The legitimacy of the sovereign is thus replaced by a legality that claims to provide its own immanent and unforced legitimacy. Predictable and universally accessible reason - the normative validity of an "uncorked consensus", to use the words of a prominent modern exponent - gently usurps, so it is claimed, the place that would otherwise be occupied by a cynical, pragmatic utilitarianism and the tyranny of a dark, incalculable will. The rule of law brings all the comforts of an uncontroversial, rule-based, normative security as if legality preceded by way of simple logical derivation, abolishing above all the necessity of decisions. Schmitt clearly will have none of this and in various writings attempts to expose what he considers to be the two-fold fallacy of the liberal position. As we have seen, if taken at its word, legality, or the rule of law, is seen by Schmitt to be impotent; it can neither legitimize nor effectively defend itself against determined enemies in times of crisis. Were law truly the opposite of force, it would cease to exist. But this self-description is deceptive, for if judged by its deeds, the same liberal regime that enunciates the self-evidence validity of universal norms strives to enact a universal consensus that is, indeed, far from uncorked. The rule of law inevitably reveals itself, precisely during moments of crisis, as the force of law, perhaps, not every bit as violent and "irrational" as the arbitrary tyrant, but nonetheless compelling and irresistible - indeed, necessarily so. Thus, Schmitt would argue the distinction between "decision", "force" and sovereignty", on the one hand, and the "rule of law", on the other, is based on a blithe and simple illusion. What agitates Schmitt is not the force, but the deception. More precisely, what agitates Schmitt is what he perceives to be the elimination of politics in the name of a higher legal or moral order. In its claim to a universal, normative, rule-bound validity, the liberal sleight-of-hand reveals itself to be not the opposite of force, but a force that outlaws opposition. In resurrecting the notion of sovereignty, therefore, Schmitt sees himself as one who rescues a legitimate notion of politics. Of course, this rescue attempt is itself political, a battle over the correct definition of politics. That is, we are not merely dealing with a logical problem, and not merely dealing with a desire to provide constitutional mechanisms that would prevent the self-dissolution of the constitution. Rather, we are dealing with a contest between a particularist notion of politics, in which individual conflicts can be resolved, but in which antagonism as a structure and reservoir of possible future conflicts is never destroyed, versus politics as the historical unfolding and pacific expansion of the universal morality. To evoke the long shadows of an ongoing contemporary debate, we are dealing with the difference between a politics of dissensus and a politics of consensus. Whereas the latter ideology entails an explicit or implicit belief in the "highest good" that can be rationally discerned and achieved, a "right regime", to use Leo Strauss's term, or the "just society" that hopes to actualize aspects of the City of God here on earth, the former stresses the necessity of determining a workable order where no single order bears the mantle of necessity, in fact, where all order is contingent, hence imperfect, and thus seeks to make the best of an inherently contradictory world by erecting structures that minimize self-inflicted damage. In Schmitt's eyes, the elements of such a structure must be the manifold of sovereign states. The liberal says there can only be one world-wide sovereign, the sovereignty of a universal moral and legal order. Schmitt counters with a plurality of equal sovereigns, for only in this way, he believes, can the economic and moral extinction of politics be prevented. Politics, on this view, is not the means by which the universally acknowledged good is actualized, but the mechanism that negotiates and limits disputes in the absence of any universally acknowledged good. Politics exists, in other words, because the just society does not.

#### This requires the unchecked authority of the executive to respond to the exception.

Nagan and Haddad 12

(Winston and Aitza, "Sovereignty in Theory and Practice." San Diego International Law Journal 13)

Although Schmitt was German, his ideas about sovereignty, and the political exception have had influence on the American theory and practice of sovereignty. Carl Schmitt was a philosophic theorist of sovereignty during the Third Reich. n375 His ideas about sovereignty and its above the law placement in the political culture of the State have important parallels in the developing discourse in the United States about the scope of presidential authority and power. His views have attracted the attention of American theorists. Schmitt developed his view of sovereignty on the concept described as "the exception". n376 This idea suggests that the sovereign or executive may invoke the idea of exceptional powers which are distinct from the general theory of the State. In Schmitt's view, the normal condition of the functions of the theory of a State, rides with the existence of the idea of the "exception." The exception is in effect intrinsic to the idea of a normal State. In his view, [\*487] the normal legal order of a State depends on the existence of an exception. n377 The exception is based on the continuing existence of an existential threat to the State and it is the sovereign that must decide on the exception. n378 In short, the political life of a State comprises allies and enemies. For the purpose of Statecraft, "an enemy exists only when at least potentially, one fighting collectivity of people confronts another similar collectivity." n379 In this sense, the political reality of the State always confronts the issue of the survival of the group. This reality is explained as follows. The political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping. \*\*\* As an ever present possibility [war] is the leading presupposition which determines in a characteristic way human action and thinking and hereby creates a specifically political behavior.\*\*\* A world in which the possibility of war is utterly eliminated, a completely pacified globe, would be a world without the distinction between friend and enemy and hence a world without politics. n380 Schmitt's view bases the supremacy of the exception on the supremacy of politics and power. n381 Thus, the exception, as rooted in the competence of the executive, is not dependent on law for its authority but on the conditions of power and conflict, which are implicitly pre-legal. n382 The central idea is that in an emergency, the power to decide based on the exception accepts its normal superiority over law on the basis that the suspension of the law is justified by the pre-legal right to self-preservation. n383 Schmitt's view is a powerful justification for the exercise of extraordinary powers, which he regards as ordinary, by executive authority. This is a tempting view for executive officers but it may not be an adequate explanation of the interplay of power, legitimacy, and the constitutional foundations of a rule of law State. In a later section, we draw on insights from the New Haven School, which deals empirically with the problem of power and the problem of constituting authority using the methods of contextual mapping. Nonetheless, Schmitt's view provides support for theorists who seek to enlarge executive power on the unitary presidency theory.

### 4

#### Congressional restraints spill over to destabilize all presidential war powers

Heder ’10

(Adam, J.D., magna cum laude , J. Reuben Clark Law School, Brigham Young University, “THE POWER TO END WAR: THE EXTENT AND LIMITS OF CONGRESSIONAL POWER,” St. Mary’s Law Journal Vol

. 41 No. 3, <http://www.stmaryslawjournal.org/pdfs/Hederreadytogo.pdf>)

This constitutional silence invokes Justice Rehnquist’s oftquoted language from the landmark “political question” case, Goldwater v. Carter . 121 In Goldwater , a group of senators challenged President Carter’s termination, without Senate approval, of the United States ’ Mutual Defense Treaty with Taiwan. 122 A plurality of the Court held, 123 in an opinion authored by Justice Rehnquist, that this was a nonjusticiable political question. 124 He wrote: “In light of the absence of any constitutional provision governing the termination of a treaty, . . . the instant case in my view also ‘must surely be controlled by political standards.’” 125 Notably, Justice Rehnquist relied on the fact that there was no constitutional provision on point. Likewise, there is **no constitutional provision** on whether Congress has the legislative power to **limit, end, or otherwise redefine the scope of a war**. Though Justice Powell argues in Goldwater that the Treaty Clause and Article VI of the Constitution “add support to the view that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone,” 126 **the same cannot be said about Congress’s legislative authority** to terminate or limit a war in a way that goes beyond its explicitly enumerated powers. There are no such similar provisions that would suggest Congress may decline to exercise its appropriation power but nonetheless legally order the President to cease all military operations. Thus, the case for deference to the political branches on this issue is even greater than it was in the Goldwater context. Finally, the Constitution does not imply any additional powers for Congress to end, limit, or redefine a war. The textual and historical evidence suggests the Framers purposefully **declined to grant Congress such powers**. And as this Article argues, granting Congress this power would be **inconsistent with the general war powers structure of the Constitution.** Such a reading of the Constitution would **unnecessarily empower Congress** and **tilt the scales heavily in its favor**. More over, it would strip the President of his Commander in Chief authority to direct the movement of troops at a time **when the Executive’s expertise is needed.** 127 And fears that the President will grow too powerful are unfounded, given the reasons noted above. 128 In short, the Constitution does not impliedly afford Congress any authority to prematurely terminate a war above what it explicitly grants. 129 Declaring these issues nonjusticiable political questions would be the most practical means of balancing the textual and historical demands, the structural demands, and the practical demands that complex modern warfare brings . Adjudicating these matters would only lead the courts to engage in impermissible line drawing — lines that would both confus e the issue and add layers to the text of the Constitution in an area where the Framers themselves declined to give such guidance.

#### That goes nuclear

Li ‘9

Zheyao, J.D. candidate, Georgetown University Law Center, 2009; B.A., political science and history, Yale University, 2006. This paper is the culmination of work begun in the "Constitutional Interpretation in the Legislative and Executive Branches" seminar, led by Judge Brett Kavanaugh, “War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare,” 7 Geo. J.L. & Pub. Pol'y 373 2009 WAR POWERS IN THE FOURTH GENERATION OF WARFARE

A. The Emergence of Non-State Actors

Even as the quantity of nation-states in the world has increased dramatically since the end of World War II, the institution of the nation-state has been in decline over the past few decades. Much of this decline is the direct result of the waning of major interstate war, which primarily resulted from the introduction of nuclear weapons.122 The proliferation of nuclear weapons, and their immense capacity for absolute destruction, has ensured that conventional wars remain limited in scope and duration. Hence, "both the size of the armed forces and the quantity of weapons at their disposal has declined quite sharply" since 1945.123 At the same time, concurrent with the decline of the nation-state in the second half of the twentieth century, non-state actors have increasingly been willing and able to use force to advance their causes. In contrast to nation-states, who adhere to the Clausewitzian distinction between the ends of policy and the means of war to achieve those ends, non-state actors do not necessarily fight as a mere means of advancing any coherent policy. Rather, they see their fight as a life-and-death struggle, wherein the ordinary terminology of war as an instrument of policy breaks down because of this blending of means and ends.124 It is the existential nature of this struggle and the disappearance of the Clausewitzian distinction between war and policy that has given rise to a new generation of warfare. The concept of fourth-generational warfare was first articulated in an influential article in the Marine Corps Gazette in 1989, which has proven highly prescient. In describing what they saw as the modem trend toward a new phase of warfighting, the authors argued that: In broad terms, fourth generation warfare seems likely to be widely dispersed and largely undefined; the distinction between war and peace will be blurred to the vanishing point. It will be nonlinear, possibly to the point of having no definable battlefields or fronts. The distinction between "civilian" and "military" may disappear. Actions will occur concurrently throughout all participants' depth, including their society as a cultural, not just a physical, entity. Major military facilities, such as airfields, fixed communications sites, and large headquarters will become rarities because of their vulnerability; the same may be true of civilian equivalents, such as seats of government, power plants, and industrial sites (including knowledge as well as manufacturing industries). 125 It is precisely this blurring of peace and war and the demise of traditionally definable battlefields that provides the impetus for the formulation of a new theory of war powers. As evidenced by Part M, supra, the constitutional allocation of war powers, and the Framers' commitment of the war power to two co-equal branches, was not designed to cope with the current international system, one that is characterized by the persistent machinations of international terrorist organizations, the rise of multilateral alliances, the emergence of rogue states, and the potentially wide proliferation of easily deployable weapons of mass destruction, nuclear and otherwise. B. The Framers' World vs. Today's World The Framers crafted the Constitution, and the people ratified it, in a time when everyone understood that the state controlled both the raising of armies and their use. Today, however, the threat of terrorism is bringing an end to the era of the nation-state's legal monopoly on violence, and the kind of war that existed before-based on a clear division between government, armed forces, and the people-is on the decline. 126 As states are caught between their decreasing ability to fight each other due to the existence of nuclear weapons and the increasing threat from non-state actors, it is clear that the Westphalian system of nation-states that informed the Framers' allocation of war powers is no longer the order of the day. 127 As seen in Part III, supra, the rise of the modem nation-state occurred as a result of its military effectiveness and ability to defend its citizens. If nation-states such as the United States are unable to adapt to the changing circumstances of fourth-generational warfare-that is, if they are unable to adequately defend against low-intensity conflict conducted by non-state actors-"then clearly [the modem state] does not have a future in front of it.' 128 The challenge in formulating a new theory of war powers for fourthgenerational warfare that remains legally justifiable lies in the difficulty of adapting to changed circumstances while remaining faithful to the constitutional text and the original meaning. 29 To that end, it is crucial to remember that the Framers crafted the Constitution in the context of the Westphalian system of nation-states. The three centuries following the Peace of Westphalia of 1648 witnessed an international system characterized by wars, which, "through the efforts of governments, assumed a more regular, interconnected character."' 130 That period saw the rise of an independent military class and the stabilization of military institutions. Consequently, "warfare became more regular, better organized, and more attuned to the purpose of war-that is, to its political objective."' 1 3' That era is now over. Today, the stability of the long-existing Westphalian international order has been greatly eroded in recent years with the advent of international terrorist organizations, which care nothing for the traditional norms of the laws of war. This new global environment exposes the limitations inherent in the interpretational methods of originalism and textualism and necessitates the adoption of a new method of constitutional interpretation. While one must always be aware of the text of the Constitution and the original understanding of that text, that very awareness identifies the extent to which fourth-generational warfare epitomizes a phenomenon unforeseen by the Framers, a problem the constitutional resolution of which must rely on the good judgment of the present generation. 13 Now, to adapt the constitutional warmarking scheme to the new international order characterized by fourth-generational warfare, one must understand the threat it is being adapted to confront. C. The Jihadist Threat The erosion of the Westphalian and Clausewitzian model of warfare and the blurring of the distinction between the means of warfare and the ends of policy, which is one characteristic of fourth-generational warfare, apply to al-Qaeda and other adherents of jihadist ideology who view the United States as an enemy. An excellent analysis of jihadist ideology and its implications for the rest of the world are presented by Professor Mary Habeck. 133 Professor Habeck identifies the centrality of the Qur'an, specifically a particular reading of the Qur'an and hadith (traditions about the life of Muhammad), to the jihadist terrorists. 134 The jihadis believe that the scope of the Qur'an is universal, and "that their interpretation of Islam is also intended for the entire world, which must be brought to recognize this fact peacefully if possible and through violence if not."' 135 Along these lines, the jihadis view the United States and her allies as among the greatest enemies of Islam: they believe "that every element of modern Western liberalism is flawed, wrong, and evil" because the basis of liberalism is secularism. 136 The jihadis emphasize the superiority of Islam to all other religions, and they believe that "God does not want differing belief systems to coexist."' 37 For this reason, jihadist groups such as al-Qaeda "recognize that the West will not submit without a fight and believe in fact that the Christians, Jews, and liberals have united against Islam in a war that will end in the complete destruction of the unbelievers.' 138 Thus, the adherents of this jihadist ideology, be it al-Qaeda or other groups, will continue to target the United States until she is destroyed. Their ideology demands it. 139 To effectively combat terrorist groups such as al-Qaeda, it is necessary to understand not only how they think, but also how they operate. Al-Qaeda is a transnational organization capable of simultaneously managing multiple operations all over the world."14 It is both centralized and decentralized: al-Qaeda is centralized in the sense that Osama bin Laden is the unquestioned leader, but it is decentralized in that its operations are carried out locally, by distinct cells."4 AI-Qaeda benefits immensely from this arrangement because it can exercise direct control over high-probability operations, while maintaining a distance from low-probability attacks, only taking the credit for those that succeed. The local terrorist cells benefit by gaining access to al-Qaeda's "worldwide network of assets, people, and expertise."' 42 Post-September 11 events have highlighted al-Qaeda's resilience. Even as the United States and her allies fought back, inflicting heavy casualties on al-Qaeda in Afghanistan and destroying dozens of cells worldwide, "al-Qaeda's networked nature allowed it to absorb the damage and remain a threat." 14 3 This is a far cry from earlier generations of warfare, where the decimation of the enemy's military forces would generally bring an end to the conflict. D. The Need for Rapid Reaction and Expanded Presidential War Power By now it should be clear just how different this conflict against the extremist terrorists is from the type of warfare that occupied the minds of the Framers at the time of the Founding. Rather than maintaining the geographical and political isolation desired by the Framers for the new country, today's United States is an international power targeted by individuals and groups that will not rest until seeing her demise. The Global War on Terrorism is not truly a war within the Framers' eighteenth-century conception of the term, and the normal constitutional provisions regulating the division of war powers between Congress and the President do not apply. Instead, this "war" is a struggle for survival and dominance against forces that threaten to destroy the United States and her allies, and the fourth-generational nature of the conflict, highlighted by an indiscernible distinction between wartime and peacetime, necessitates an evolution of America's traditional constitutional warmaking scheme. As first illustrated by the military strategist Colonel John Boyd, constitutional decision-making in the realm of war powers in the fourth generation should consider the implications of the OODA Loop: Observe, Orient, Decide, and Act. 44 In the era of fourth-generational warfare, quick reactions, proceeding through the OODA Loop rapidly, and disrupting the enemy's OODA loop are the keys to victory. "In order to win," Colonel Boyd suggested, "we should operate at a faster tempo or rhythm than our adversaries." 145 In the words of Professor Creveld, "[b]oth organizationally and in terms of the equipment at their disposal, the armed forces of the world will have to adjust themselves to this situation by changing their doctrine, doing away with much of their heavy equipment and becoming more like police."1 46 Unfortunately, the existing constitutional understanding, which diffuses war power between two branches of government, necessarily (by the Framers' design) slows down decision- making. In circumstances where war is undesirable (which is, admittedly, most of the time, especially against other nation-states), the deliberativeness of the existing decision-making process is a positive attribute. In America's current situation, however, in the midst of the conflict with al-Qaeda and other international terrorist organizations, the existing process of constitutional decision-making in warfare may prove a fatal hindrance to achieving the initiative necessary for victory. As a slow-acting, deliberative body, Congress does not have the ability to adequately deal with fast-emerging situations in fourth-generational warfare. Thus, in order to combat transnational threats such as al-Qaeda, the executive branch must have the ability to operate by taking offensive military action even without congressional authorization, because only the executive branch is capable of the swift decision-making and action necessary to prevail in fourth-generational conflicts against fourthgenerational opponents.

### Adv

#### Only compliance with Self-defense norm – not other international norms

Ohlin ‘11

(Jens David Ohlin “THE FUTURE OF LEGAL THEORY: ESSAY AND COMMENT: NASH EQUILIBRIUM AND INTERNATIONAL LAW” Cornell Law Review¶ May, 2011¶ Cornell Law Review¶ 96 Cornell L. Rev. 869 Lexis, TSW)

The same analysis would apply in a multilateral context. Consider, for example, the most important area of international legal regulation: the use of force. n44 This is also the most contentious area of international legal regulation, one that the new realists often use as a poster child for their contention that legal norms will give way to self-interest when the cost of compliance becomes inconvenient. n45 However, [\*879] the Nash Equilibrium here is clear. The norm in question is the legal prohibition on the use of force, in both the UN Charter and customary law, unless such use of force is authorized by the Security Council - the central clearing house for decisions regarding international peace and security. n46 Some scholars trace the norm back to the Kellogg-Briand Pact, before which aggressive war was simply recognized as inevitable (and therefore not presumptively illegal). n47 This is too simplistic, since it was at the very least implicit in the notion of Westphalian sovereignty that states were free not just from outside interference in the widest sense, but also from outside attack in the narrowest sense. n48 In the current scheme, the prohibition against the use of force is now coupled with the Security Council's authority to authorize use of force to restore international peace and security. n49¶ Unfortunately, Security Council authorizations for the use of force are rare, and, since the threat of a veto is always present, states cannot predict with any reasonable certainly when the Security Council will authorize such use of force. n50 Thus, State A complies with the norm and eschews the use of force. This strategy of compliance is made with the hope that the other players in the game will also favor compliance. However, no state can assume that competitors will adopt the same strategy; the competitors might choose violation as their strategy and in so doing reserve the right to use force at their discretion. Why would the second state choose this strategy? Perhaps because the costs associated with noncompliance are relatively mild. Although they might be sued before the International Court of Justice (ICJ) and lose international standing (e.g., reputation), these costs pale in comparison to foregoing the use of force when your competitors refuse to do the same. This is why the international legal community has not navigated toward a Nash Equilibrium that grants the Security Council the exclusive authority to authorize military force. The stakes are too high and the legal prohibitions insufficient to incentivize reciprocal compliance. Simply put, each participant has an incentive to change its strategy away from compliance regardless of the strategy chosen by its competitors.¶ [\*880] It is precisely for this reason that, at its earliest incarnation, international law gravitated toward a norm regarding the use of force that allowed unilateral exceptions to the prohibition against the use of force in cases of self-defense. Nineteenth-century treatises regarding public international law, in discussing the use of force, made clear that military force was legal in cases of self-defense or self-preservation. n51 This exception to the norm prohibiting the use of force is as old as the prohibition itself. Although states were unwilling to adopt a strategy of compliance with a blanket prohibition on military force, states have been willing to adopt a strategy of compliance with a more nuanced legal norm that always allows military force in self-defense. n52 A state can comply with this norm because even if a competitor in the game changes strategy, defects from the norm, and engages in aggressive warfare, the first state can still use force in self-defense to protect itself, consistent with the legal norm. In other words, the cost of compliance with the norm does not require that a state risk its national security. n53¶ Consequently, states have a reason to stick with the strategy of compliance even given the uncertainty regarding the strategy of their competitors in the game. That is why a Nash Equilibrium has developed around a prohibition regarding the use of force unless authorized by the Security Council or in self-defense. Each state benefits from the legal norm - a stable world order without aggressive force and constant warfare - and therefore complies with the legal norm because compliance with the norm is also consistent with purely defensive force when competitors in the game change their strategy. n54 So, no state has reason to unilaterally change its strategy in the game.

**No brink- Overlapping occurring for a decade their author**

**Blank 12**

(Director, International Humanitarian Law Clinic, Emory University School of Law

Laurie, 2012, "TARGETED STRIKES: THE CONSEQUENCES OF BLURRING THE ARMED CONFLICT AND SELF-DEFENSE JUSTIFICATIONS" William Mitchell Law Review, Vol. 38 http://www.wmitchell.edu/lawreview/Volume38/documents/11.BlankFINAL.pdf

For the past several years, ~…~ invitation to unregulated warfare.11)

In November 2002, a U.S. drone strike killed Abu Ali al-Harethi, an al Qaeda operative suspected of masterminding the October 2000 attack on the USS Cole. The exchange of viewpoints between the United States and the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions set the stage early on for the dichotomy in approaches to target killing. After the attack, the U.N. Special Rapporteur asked the U.S. government to provide justification for the killing of al-Harethi. In particular, the Special Rapporteur referred to the drone strike as an “extrajudicial execution” and framed the event within the paradigm of the International Covenant on Civil and Political Rights, human rights law overall, and law enforcement principles for the use of force. The U.S. response clearly showed an entirely different perspective, stating that “inquiries related to allegations stemming from any military operations conducted during the course of an armed conflict with [al Qaeda] do not fall within the mandate of the Special Rapporteur.”¶ 13 For the United States, the Special Rapporteur simply did not have jurisdiction to address the event at all because it took place within an armed conflict between the United States, al Qaeda, and associated terrorist groups. This discourse highlights the divergent approaches to the appropriate framework for targeted strikes.14 Now, almost ten years later, the paradigms are no longer so clearly delineated but have become blurred through consistent parallel use. In March 2010, State Department Legal Advisor Harold Koh stated, in a much-discussed speech before the American Society of International Law, that the United States uses force, through targeted strikes for example, either because it “is engaged in an armed conflict or in legitimate self-defense.”15 Similarly, in a brief before the District Court of the District of Columbia, the government asserted that it had legal authority to target Anwar al-Awlaki either in the context of the armed conflict with al Qaeda and associated forces as authorized in the 2001 Authorization to Use Military Force (AUMF) or under “the inherent right to national self-defense recognized in international law.”16 The following subsections offer a brief background on targeting within these two legal regimes: armed conflict and self-defense.

#### Low risk of a successful bioterror attack – wind patterns, logistics and weaponization

Keller ‘13

(Rebecca Keller of Stratfor which is a geopolitical intelligence firm that provides strategic analysis and forecasting to individuals and organizations around the world. By placing global events in a geopolitical framework, we help customers anticipate opportunities and better understand international developments. “Bioterrorism and the Pandemic Potential” THURSDAY, MARCH 7, 2013 - 04:01 <http://www.stratfor.com/weekly/bioterrorism-and-pandemic-potential>, TSW)

The Risk-Reward Equation¶ The risk of an accidental release of H5N1 is similar to that of other infectious pathogens currently being studied. Proper safety standards are key, of course, and experts in the field have had a year to determine the best way to proceed, balancing safety and research benefits. Previous work with the virus was conducted at biosafety level three out of four, which requires researchers wearing respirators and disposable gowns to work in pairs in a negative pressure environment. While many of these labs are part of universities, access is controlled either through keyed entry or even palm scanners. There are roughly 40 labs that submitted to the voluntary ban. Those wishing to resume work after the ban was lifted must comply with guidelines requiring strict national oversight and close communication and collaboration with national authorities. The risk of release either through accident or theft cannot be completely eliminated, but given the established parameters the risk is minimal.¶ The use of the pathogen as a biological weapon requires an assessment of whether a non-state actor would have the capabilities to isolate the virulent strain, then weaponize and distribute it. Stratfor has long held the position that while terrorist organizations may have rudimentary capabilities regarding biological weapons, the likelihood of a successful attack is very low. ¶ Given that the laboratory version of H5N1 -- or any influenza virus, for that matter -- is a contagious pathogen, there would be two possible modes that a non-state actor would have to instigate an attack. The virus could be refined and then aerosolized and released into a populated area, or an individual could be infected with the virus and sent to freely circulate within a population.¶ There are severe constraints that make success using either of these methods unlikely. The technology needed to refine and aerosolize a pathogen for a biological attack is beyond the capability of most non-state actors. Even if they were able to develop a weapon, other factors such as wind patterns and humidity can render an attack ineffective. Using a human carrier is a less expensive method, but it requires that the biological agent be a contagion. Additionally, in order to infect the large number of people necessary to start an outbreak, the infected carrier must be mobile while contagious, something that is doubtful with a serious disease like small pox. The carrier also cannot be visibly ill because that would limit the necessary human contact.¶ As far as continued research is concerned, there is a risk-reward equation to consider. The threat of a terrorist attack using biological weapons is very low. And while it is impossible to predict viral outbreaks, it is important to be able to recognize a new strain of virus that could result in an epidemic or even a pandemic, enabling countries to respond more effectively. All of this hinges on the level of preparedness of developed nations and their ability to rapidly exchange information, conduct research and promote individual awareness of the threat.

#### No Senkaku or Asian conflict- empirically denied, economic interdependence checks, and China avoids nationalism.

Carlson ’13

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At times in the past few months, China and Japan have appeared almost ready to do battle over the **Senkaku** (Diaoyu) Islands --which are administered by Tokyo but claimed by both countries -- and to ignite a war that could be bigger than any since World War II. Although Tokyo and Beijing have been shadowboxing over the territory for years, the standoff reached a new low in the fall, when the Japanese government nationalized some of the islands by purchasing them from a private owner. The decision set off a wave of violent anti-Japanese demonstrations across China. In the wake of these events, the conflict quickly reached what political scientists call a state of equivalent retaliation -- a situation in which both countries believe that it is imperative to respond in kind to any and all perceived slights. As a result, it may have seemed that armed engagement was imminent. **Yet,** months later,nothing has happened. And **despite** their **aggressive posturing** in the disputed territory, **both** sides **now show** glimmers of willingness to dial down hostilities and to reestablish stability**.** Some analysts have cited North Korea's recent nuclear test as a factor in the countries' reluctance to engage in military conflict. They argue that the detonation, and Kim Jong Un's belligerence, brought China and Japan together, unsettling them and placing their differences in a scarier context. Rory Medcalf, a senior fellow at the Brookings Institution, explained that "the nuclear test gives the leadership in both Beijing and Tokyo a chance to focus on a foreign and security policy challenge where their interests are not diametrically at odds." The nuclear test, though, is a red herring in terms of the conflict over the disputed islands. In truth, the roots of the conflict -- and the reasons it has not yet exploded -- are much deeper. Put simply, **China** cannot afford military conflict **with** any of its **Asian neighbors.** It is not that China believes it would lose such a spat; the country increasingly enjoys strategic superiority over the entire region, and it is difficult to imagine that its forces would be beaten in a direct engagement over the islands, in the South China Sea or in the disputed regions along the Sino-Indian border. However**, Chinese officials see** thateven the most pronounced victory would be outweighed by the collateral damagethat such a use of force would cause **to Beijing's** two most fundamental national interests **--** economic **growth and preventing the escalation of** radical **nationalist sentiment at home.** These constraints, rather than any external deterrent**, will keep** Xi Jinping, **China's new leader, from** authorizing the use of deadly **force** in the Diaoyu Islands theater. For over three decades, **Beijing has promoted** peace and stability **in Asia** to facilitate conditions amenable to **China's** **economic** **development**. The origins of the policy can be traced back to the late 1970s, when Deng Xiaoping repeatedly contended that to move beyond the economically debilitating Maoist period, China would have to seek a common ground with its neighbors. Promoting cooperation in the region would allow China to spend less on military preparedness, focus on making the country a more welcoming destination for foreign investment, and foster better trade relations. All of this would strengthen the Chinese economy. Deng was right. Today, China's economy is second only to that of the United States. The fundamentals of Deng's grand economic strategy are still revered in Beijing. But any war in the region would erode the hard-won, and precariously held, political capital that China has gained in the last several decades. It would also disrupt trade relations, complicate efforts to promote the yuan as an international currency, and send shock waves through the country's economic system at a time when it can ill afford them. There is thus little reason to think that China is readying for war with Japan. At the same time, the specter of rising Chinese nationalism, **although** often seen as **a promoter of conflict**, further limits the prospects for armed engagement. This is because Beijing will try to discourage nationalism if it fears it may lose control or be forced by popular sentiment to take an action it deems unwise. **Ever since** the **Tiananmen Square** massacre put questions about the Chinese Communist Party's right to govern before the population, **successive generations of Chinese leaders have carefully negotiated a balance** between promoting nationalist sentiment and preventing it from boiling over. In the process, they cemented the legitimacy of their rule. A war with Japan could easily upset that balance by inflaming nationalism that could blow back against China's leaders. Consider a hypothetical scenario in which a uniformed Chinese military member is killed during a firefight with Japanese soldiers. Regardless of the specific circumstances, the casualty would create a new martyr in China and, almost as quickly, catalyze popular protests against Japan. Demonstrators would call for blood, and if the government (fearing economic instability) did not extract enough, citizens would agitate against Beijing itself. Those in Zhongnanhai, the Chinese leadership compound in Beijing, would find themselves between a rock and a hard place. It is possible that Xi lost track of these basic facts during the fanfare of his rise to power and in the face of renewed Japanese assertiveness. It is also possible that the Chinese state is more rotten at the core than is understood. That is, party elites believe that a diversionary war is the only way to hold on to power -- damn the economic and social consequences. But Xi does not seem blind to the principles that have served Beijing so well over the last few decades. Indeed, although he recently warned unnamed others about infringing upon China's "national core interests" during a foreign policy speech to members of the Politburo, he also underscored China's commitment to "never pursue development at the cost of sacrificing other country's interests" and to never "benefit ourselves at others' expense or do harm to any neighbor." Of course, wars do happen -- and still could in the East China Sea. Should either side draw first blood through accident or an unexpected move, Sino-Japanese relations would be pushed into terrain that has not been charted since the middle of the last century. However, understanding that war would be a no-win situation, China has avoided rushing over the brink. This relative restraint seems to have surprised everyone. But it shouldn't. Beijing will continue to disagree with Tokyo over the sovereign status of the islands, and will not budge in its negotiating position over disputed territory. However, it cannot take the risk of going to war over a few rocks in the sea. On the contrary, in the **coming months it will quietly** seek a way to **shelve the dispute in return for** securing **regional stability**, facilitating economic development, and keeping a lid on the Pandora's box of rising nationalist sentiment. The ensuing peace, while unlikely to be deep, or especially conducive to improving Sino-Japanese relations, will be enduring.

### Solvency

#### The executive will redefine the law to get around the plan

Pollack 13

Norman Pollack 13, Prof of History @ MSU and PhD in History from Harvard, “Drones, Israel, and the Eclipse of Democracy, Counterpunch, 2/5, [www.counterpunch.org/2013/02/05/drones-israel-and-the-eclipse-of-democracy/](http://www.counterpunch.org/2013/02/05/drones-israel-and-the-eclipse-of-democracy/)

Bisharat first addresses the transmogrification of international law by Israel’s military lawyers. We might call this damage control, were it not more serious. When the Palestinians first sought to join the I.C.C., and then, to receive the UN’s conferral of nonmember status on them, Israel raised fierce opposition. Why? He writes: “Israel’s frantic opposition to the elevation of Palestine’s status at the United Nations was motivated precisely by the fear that it would soon lead to I.C.C. jurisdiction over Palestinian claims of war crimes. Israeli leaders are unnerved for good reason. The I.C.C. could prosecute major international crimes committed on Palestinian soil anytime after the court’s founding on July 1, 2002.” In response to the threat, we see the deliberate reshaping of the law: Since 2000, “the Israel Defense Forces, guided by its military lawyers, have attempted to **remake the laws** of war by consciously violating them and then **creating** new legal concepts to provide juridical cover for their misdeeds.” (Italics, mine) In other words, habituate the law to the existence of atrocities; in the US‘s case, targeted assassination, repeated often enough, seems permissible, indeed clever and wise, as pressure is steadily applied to the laws of war. Even then, “collateral damage” is seen as unintentional, regrettable, but hardly prosecutable, and in the current atmosphere of complicity and desensitization, never a war crime. (**Obama is** hardly a novice **at** this game of **stretching the law to suit the convenience of**, shall we say, the **national interest**? In order to ensure the distortion in counting civilian casualties, which would bring the number down, as Brennan with a straight face claimed, was “zero,” the Big Lie if ever there was one, placing him in distinguished European company, Obama **redefined the meaning** of “combatant” status to be any male of military age throughout the area (which we) declared a combat zone, which noticeably led to a higher incidence of sadism, because it allowed for “second strikes” on funerals—the assumption that anyone attending must be a terrorist—and first responders, those who went to the aid of the wounded and dying, themselves also certainly terrorists because of their rescue attempts.) These guys play hardball, perhaps no more than in using—by report—the proverbial baseball cards to designate who would be next on the kill list. But funerals and first responders—verified by accredited witnesses–seems overly much, and not a murmur from an adoring public.

#### The plan isn’t valid under self defense – they are preventative strikes, in the same way as their iran add on is – the 1ac is a recognition of self-defense tareted killing, which is more expansive than the status quo and makes the 1ac indistinct from the bush doctrine - That’s Martin, writing a legal response to the 1ac’s authors -

#### Not a single US drone strike meets the definition of ‘self-defense targeted killing’ – the only effect of the plan is the stance it takes towards legal regimes – means the case is meaningless and if anything wrecks those regimes

**Martin, 11 -** Associate Professor of Law at Washburn University School of Law (Craig, “GOING MEDIEVAL: TARGETED KILLING, SELFDEFENSE AND THE JUS AD BELLUM REGIME” SSRN) **NSA = Non State Actors**

Without going through the analysis for each of these scenarios in detail, we can nonetheless conclude that while it may be possible to justify the use of force against these states on the basis of self-defense, the crucial point is that the justificatory analysis is case-dependent. When the United States engages in strikes that constitute the use of force against each of these states, the claim of the right of self-defense must make specific reference to the armed attacks that justify it, how the group that is the object of the use of force is responsible for the attacks, and how the state in which the group is being targeted can itself be held legally responsible for the operations of that group so as to justify the use of force against the state. The problem with the current U.S. claim of self-defense is that it does none of this, but rather asserts a general right to use force against Al Qaeda, the Taliban, and any other groups associated with them; and against any country in which the members of such groups are located, not based on the state’s actual involvement in the group’s attacks, but merely on it being insufficiently willing or able to suppress the group’s operations.96 It almost goes without saying that the principles of necessity and proportionality cannot be satisfied under such sweeping and general claims of self-defense. It is not possible to demonstrate that the use of force was strictly necessary when there has been no identification of the armed attacks in question, or explanation of how the specific groups being targeted pose the threat of imminent armed attacks, that can only be stopped through the use of force. Similarly, there can be no proportionality analysis without the identification of the harm that would be caused by specific attacks, against which one can compare the harm being inflicted by the defensive use of force.97 Thus, in order to satisfy the necessity and proportionality principles that are at the core of the doctrine, the United States must provide the information required for such analysis. In sum, the U.S. government’s reliance upon self-defense as a justification for the targeted killing policy in countries such as Yemen, Somalia, and Pakistan, at least in the very general terms with which it has been asserted, is not consistent with the principles of self-defense under the jus ad bellum regime. This finding would suggest that, unless and until the administration offers more particularized support for this justification, the ongoing use of missile strikes for the purposes of killing suspected “terrorists,” “militants” and “insurgents” in countries like Somalia, Yemen, and Pakistan, is a violation of the prohibition on the use of armed force. Such a conclusion is troubling enough. But even more important in the long run is the potential harm this continued practice could cause to the jus ad bellum regime, and to the relationship between the jus ad bellum and IHL regimes, to which we turn next.

# Block

### 2NC Self Defense = Norm

#### Self-defense is the norm versus non-state actors means lines aren’t blurred

D'aspremont ‘10

(JEAN D'ASPREMONT Associate Professor of International Law, Amsterdam Centre for International Law, University of Amsterdam, “MAPPING THE CONCEPTS BEHIND THE CONTEMPORARY LIBERALIZATION OF THE USE OF FORCE IN INTERNATIONAL LAW” University of Pennsylvania Journal of International Law¶ Summer, 2010¶ University of Pennsylvania Journal of International Law¶ 31 U. Pa. J. Int'l L. 1089 Lexis, TSW)

3.2.2.2. Armed Attacks by Non-State Actors¶ It is probably the threats posed by non-State actors--those that are seen as belonging to terrorist organizations or secessionist movements--at the global, regional, or local level that have prodded States to incrementally feel less constrained by the legal requirements of the self-defense exception. This is not entirely surprising. In the absence of an authorization by the Security Council, the current collective security system does not provide an [\*1120] explicit right to use force in the case of an armed attack by non-State actors, n107 unless it can be attributed to a State--for instance, because it has been committed under the effective control of another State n108--or simply because it follows "[t]he sending by or on behalf of [another] State of armed hands, groups, irregulars or mercenaries, which carry out acts of armed force . . . of such gravity as to amount to [an act of aggression]." n109 As a result, States, confronted with the rising threats from non-State actors, have tried to justify the use of armed force on the basis of self-defense even if the armed attack cannot be attributed to a State but only to a terrorist organization. It is particularly noteworthy that, while unilateral uses of force against non-state actors in the 1980s were systematically condemned, n110 this is no longer the case. Attention now focuses not on the question of whether the use of force is permitted, but instead on whether the use of force is proportionate. n111 This is well-illustrated by the war in Afghanistan in 2001 n112 and the war in Lebanon in 2006. n113 Overall, claims that [\*1121] force can be used as a measure of self-defense are no longer the exception and are closer to becoming the rule. n114¶ If the concept of armed attack is understood as being necessarily committed by a State, one can liken the rule of self-defense to a rule that only yields its legal effects if the behavior that it regulates can be ascribed to a person endowed with an official status. n115 This means that self-defense is a rule whereby the impugned conduct, n116 or the fact which triggers the legal effects defined by the rule, must be the act of an actor or an entity which has the official status of a State. It cannot be ascertained whether this was the original meaning of the concept of armed attack when it was first set out in the U.N. Charter. Indeed, the question of what constitutes an armed attack was not really deemed important during the negotiations of the Charter, as Article 51 was originally devised to ensure compatibility between regional self-defense pacts and the U.N. collective security system. n117 At that time, violence in the international arena was still mostly construed in a classical inter-State format. Even if we believe that the concept of self-defense was originally restricted to situations of armed attacks by States, it is still conceivable that the rule has evolved to waive the requirement pertaining to the official status of the original attacker and now encapsulates situations of attack by non-State actors.

#### No international convergence on norms – no check and I-lawyer disagreements

Murphy ‘05

(Sean D. Murphy Professor, George Washington University Law School. B.A., Catholic University; J.D., Columbia University; LL.M., Cambridge University; S.J.D., University of Virginia. “BRAVE NEW WORLD: U.S. RESPONSES TO THE RISE IN INTERNATIONAL CRIME: ARTICLE: THE DOCTRINE OF PREEMPTIVE SELF-DEFENSE” Villanova Law Review¶ October, 2005¶ 50 Vill. L. Rev. 699 Lexis, TSW)

The strikingly divergent views on the legality of preemptive self-defense no doubt have several causal explanations. International law as a whole suffers from the lack of authoritative decision-makers, such as a supreme court with plenary power to decide controversial questions of either legal process or substance, thus making a convergence of views harder. Further, international law on the use of force presents particular difficulties in promoting state fidelity to a normative structure given that adherence to norms is under the greatest stress when issues of national security are at stake. Finally, the norms may not be static in nature. Whether September 11 can be viewed as a "constitutional moment" for [\*720] international law - meaning a moment in which seismic shifts in international law occurred without any formal amendment - is unclear, but the rise of global terrorism represented by those attacks challenges many of the conventional assumptions upon which international law has been based.¶ Despite these many factors, a central reason for these divergences of view may well be that: (1) international lawyers are not explaining the methodology that they are employing in determining the state of the law; (2) are not recognizing that their disagreement with other international lawyers arises largely from the use of different methodologies; and (3) are not articulating why one methodology is superior to another. In particular, to the extent that state practice is deemed significant for purposes of interpreting the U.N. Charter or determining the emergence of a new customary rule of law, international lawyers rarely explain their view as to the circumstances that merit using state practice to establish an evolution in the state of the law and too often provide only a cursory analysis of such practice to see if those circumstances are met. Unfortunately, in reading the literature one cannot help but feel that international lawyers are often coming to this issue with firm predispositions as to whether anticipatory self-defense or preemptive self-defense should or should not be legal and then molding their interpretation of state practice to fit their predispositions.¶ Ideally, international lawyers would agree upon a narrative explanatory protocol that would set forth a coherent structure for analyzing and configuring state practice, as has been done in the field of international relations theory. n69 Among other things, developing such a protocol may allow international lawyers to move away from a binary discussion of whether preemptive self-defense is lawful or unlawful, to one that explores the subtleties and nuances of how states react to varying levels of such force being used in different kinds of factual scenarios. The purpose of this section is to identify some of the key issues that arise in assessing methodology and state practice on this topic in the hope that it may promote the pursuit of an explanatory protocol, and in turn, more rigorous analyses by international lawyers and more convergence in the positions taken by them regarding the legality of preemptive self-defense. n70 Through greater convergence in the views taken by international lawyers, the normative [\*721] standards set by international law may become clearer and more helpful for states in ordering their relations.

## K

### 2NC AT Legal Restraints Effective

#### Their ev assumes Congress will pass very specific authorizations – no chance of that happening - they are going to pass ambiguous statutes that let the President do whatever he wants

Mitchell 9

Mitchell, GMU law professor, 2009¶ (Jonathan, “Legislating Clear-Statement Regimes in National-Security Law”, January, <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jonathan_mitchell>, ldg)

The executive branch’s interpretive theories were far-reaching, and its approach to constitutional avoidance and implied repeal were irreconcilable with the Supreme Court’s precedents. But they provided some political cover for the President by giving his actions a veneer of legality, and may even have protected executive-branch employees from the fear of criminal liability or political reprisals.22 To prevent the executive from continuing to evade Congress’s codified clear-statement requirements in this manner, many proposals have sought to provide more narrow and explicit clear statement requirements in Congress’s framework legislation as well as provisions that withhold funding from activities that Congress has not specifically authorized. For example, Senator Arlen Specter proposed new provisions to FISA stating that no provision of law may repeal or modify FISA unless it “expressly amends or otherwise specifically cites this title,” and that “no funds appropriated or 23 otherwise made available by any Act” may be expended for electronic surveillance conducted outside of FISA. Congress failed 24 to enact Senator Specter’s proposal, but it did enact an amendment to FISA that made the clear-statement regime more explicit, specifying that “[o]nly an express statutory authorization for electronic surveillance” may authorize electronic surveillance outside of FISA’s procedures. And numerous commentators have 25 argued for new provisions in the War Powers Resolution that would withhold funds from military ventures that Congress has not specifically authorized. Yet such proposals are unable to counter 26 the executive branch’s aggressive interpretive doctrines. Executive branch lawyers will remain able to concoct congressional “authorization” from vague statutory language by repeating their assertions that codified clear-statement requirements “bind future Congresses” or that ambiguous language in later-enacted statutes implicitly repeals restrictions in Congress’s framework legislation. Future legislators will continue to acquiesce to the President’s unilateralism when it is politically convenient to do so. And the 27 federal courts’ willingness to enforce clear-statement regimes against the President in national-security law bears no relationship to the codified clear-statement requirements in framework legislation or treaties.28 Congress could produce more effective clear-statement regimes if it precommitted itself against enacting vague or ambiguous legislation from which executive-branch lawyers might claim implicit congressional “authorization” for certain actions. Rather than merely enacting statutes that instruct the executive not to construe ambiguous statutory language as authorizing military hostilities or warrantless electronic surveillance, Congress could establish point-of-order mechanisms that impose roadblocks to enacting such vague legislation in the first place. A point-of-order 29 mechanism would empower a single legislator to object to legislation that authorizes military force, or that funds the military or intelligence agencies. But the point of order would be valid only if the legislation fails to explicitly prohibit or withhold funding for military hostilities beyond sixty days, or warrantless electronic surveillance, unless the bill includes the specific authorizing language that Congress’s framework legislation requires. This device would reduce the likelihood of Congress ever enacting vague or ambiguous legislation that the executive might use to claim “authorization” for extended military hostilities or warrantless electronic surveillance. It would also induce legislators to confront presidents who act without specific congressional authorization by empowering a single legislator to object to legislation necessary to fund the President’s unauthorized endeavors. Yet the political branches have never established such an enforcement mechanism for the clear-statement requirements in national-security legislation, even though they have established such point-of-order devices to enforce precommitments in framework legislation governing the federal budget process. The result is a regime of 30 faint-hearted clear-statement regimes in national-security law—framework legislation that codifies strongly worded clearstatement rules but that lacks any mechanism to induce compliance by future political actors. This may be a calculated choice of members of Congress, or it may reflect the President’s influence in the legislative process. But no one should think that simply legislating more narrow or explicit clear-statement requirements, or adding funding restrictions to Congress’s framework legislation, will prevent the executive from continuing to infer congressional authorization from vague or ambiguous statutory language.

### AT Perm

#### Perm either severs or links – it severs the legal restriction on war powers which is a voting issue because it makes the aff a moving target and destroys neg ground

#### OR it still links – LEGAL restrictions guarantee a creation of a gray hole – that was in the overview

#### Magnifies the link - any blurring of the capacity for the president to take action is what shifts black representations of the political to transition into grey sections of legality - that’s 1NC Dyzenhaus evidence

### Link

#### Trying to make a distinction between jus ad bellum and jus in bello creates a checklist approach to war where any humanitarian conflict can be justified as long as it receives all the proper “checks”

Sharma 8, Serena Sharma, Professor at London School of Economics and Political, Department of International Relations, “Reconsidering the jus ad bellum/jus in bello distinction,” TMC Asser Press, 2008, <http://www.elac.ox.ac.uk/downloads/Rodin%20-%20Two%20Emerging%20Issues%20of%20Jus%20Post%20Bellum.pdf>, FM

Apart from the tendency of elevating certain just war criteria at the expense of ¶ others, the ad bellum/in bello distinction has also manifested in another troubling ¶ tendency: the checklist approach. On account of the sharp distinction, which has ¶ been drawn between the jus ad bellum and jus in bello, the moral appraisal of war is ¶ typically regarded as encompassing two independent judgments. Accordingly, when ¶ just war principles are operationalized within the context of a distinction, the ad ¶ bellum and in bello are treated as subcategories, with all relevant just war criteria ¶ listed below each. Such a formulation lends itself to the impression that a check ¶ need be placed next to each criterion in order for a war to be deemed ’just’. Typically the jus ad bellum list will be as follows: just cause, proper authority, right ¶ intention, reasonable prospects, last resort, proportionality: the jus in bello will ¶ normally include the principles of discrimination and proportionality. While there ¶ are virtually uncountable ways to present the lists,60 the central idea is the same in ¶ terms of the requirement that all criteria be satisfied. Hence, whereas the ad bellum ¶ versus in bello tendency elevates one criterion at the expense of all others, the ¶ checklist approach insists on the fulfillment of all criteria. ¶ The espousal of the checklist approach in contemporary just war thought ¶ tends to corroborate Stephen Toulmin’s observation regarding the decline of casu- istic reasoning in modem moral philosophy.’ This abandonment of casuistry in ¶ favor of what Toulmin refers to as ’timeless and universalistic principles’ tends to ¶ misconstrue the fundamental purpose of the just war tradition. The rationale for ¶ employing specific just war criteria is not to conclusively decide whether any given ¶ war is ‘just’ or ‘unjust’. Indeed, it is not the answers it provides which makes just ¶ war reasoning an invaluable tool for moral reflection, but rather, the questions such ¶ moral deliberation raises. Oliver O’Donovan makes precisely this point in The Just War Revisited:‘It is often supposed that just war theory undertakes to validate or invalidate¶ particular wars. That would be an impossible undertaking. History knows of no¶ just wars, as it knows of no just peoples ... wars as such, like most large scale¶ historical phenomena, present only a question mark, a continual invitation to reflect further.’6¶ In recent times, the most vivid illustration of the checklist approach in action was¶ the efforts to establish objective criteria for cases of humanitarian intervention. Somehow it was thought that if a universal set of criteria could be decided on in¶ advance it would aid decision-making capacity in cases of humanitarian emergency.¶ Instead, the outcome was a rather fruitless debate over the interpretation of specific¶ principles, and incessant discussions over whether or not a particular case met certain threshold conditions. Ultimately, this search for objective criteria deflected¶ serious attention away from the most pertinent questions surrounding humanitarian¶ intervention, which happen to arise out of the relationship between the jus ad bellum¶ and jus in bello — the crucial issue of course being how to use force in a manner¶ consistent with the humanitarian aims of an intervention. In this regard, humanitarian operations necessitate a harmony between ends and means not sufficiently captured by the checklist approach. A genuinely balanced assessment of war must take¶ both the ad bellum and in bello criteria into account concurrently.

### 2NC Impact Wall – Short

#### Zero risk of the aff resolving war - the 1AC’s Universalist rhetoric prevents the ending of hostilities in any form because we cannot negotiate with the devil – Afghanistan and Vietnam proves

#### The K qualitatively outweighs – we control the biggest internal link to macro-level violence - only our evidence is comparative about the scope and quality of violence in what our authors describe as “war”.

Prozorov 2K6

[Sergei, collegium fellow at the Helsinki Collegium for Advanced Studies, University of Helsinki, Professor of International Relations in the Department of International Relations, Faculty of Politics and Social Sciences, Petrozavodsk State University, Russia, 2006, “Liberal Enmity: The Figure of the Foe in the Political Ontology of Liberalism,” Millennium: Journal of International Studies, Vol. 35, No. 1, p. 75-99]

Schmitt makes a distinction between hostis and inimicus to stress the specificity of the relationship of a properly political enmity. The concept of inimicus belongs to the realm of the private and concerns various forms of moral, aesthetic or economic resentment, revulsion or hate that are connoted by the archaic English word ‘foe’, whose return into everyday circulation was taken by Schmitt as an example of the collapse of the political into the moral.31 In contrast, the concept of hostis is limited to the public realm and concerns the existential threat posed to the form of life of the community either from the inside or from the outside. In simple terms, the enemy (hostis) is what we confront, fight and seek to defeat in the public realm, to which it also belongs, while the foe (inimicus) is what we despise and seek either to transform into a more acceptable life-form or to annihilate. Contrary to Zizek’s attribution of the ‘ultra-politics of the foe’ to Schmitt, he persistently emphasised that the enemy conceptually need not and normatively should not be reduced to the foe: ‘The enemy in the political sense need not be hated personally.’32 In Schmitt’s argument, during the twentieth century such a reduction entailed the destruction of the symbolic framework of managing enmity on the basis of equality and the consequent absolutisation of enmity, i.e. the actualisation of the ‘most extreme possibility’: [Presently] the war is considered to constitute the absolute last war of humanity. Such a war is necessarily unusually intense and inhuman because, by transcending the limits of the political framework, it simultaneously degrades the enemy into moral and other categories and is forced to make of him a monster that must not only be defeated but also utterly destroyed. In other words, he is an enemy who no longer must be compelled to retreat into his borders only.33 Thus, it appears impossible to equate Schmitt’s notion of enmity with the friend–foe politics that was the object of his criticism. The very anti- essentialism, which Zizek’s reading recovers in Schmitt, brings into play a plurality of possible modalities of enmity. To argue, as Schmitt certainly does, that enmity is an ontological presupposition of any meaningful political relation, is certainly not to valorise any specific construction of the friend–enemy distinction. What is at stake is the need to distinguish clearly between what we have termed the transcendental function of the friend–enemy distinction (and in this aspect, Zizek’s own work on politics, particularly his recent ‘Leninist’ turn,34 remains resolutely Schmittian) and the empirical plurality of historical modalities of enmity. Schmitt’s philosophical achievement arguably consists in his affirmation of the irreducibility of the former function and the perils of its disavowal, an achievement that is not tarnished by a plausible criticism of his historical excursus on the Jus Publicum Europaeum as marked by a conservative nostalgia for a system that, after all, combined the sovereign equality of European powers with the manifestly asymmetric structure of colonial domination. At the same time, the objective of this article is not merely to correct manifold misreadings in the exegesis of a ‘properly Schmittian’ conception of enmity. Instead, we shall rely on Schmitt’s political realism and more contemporary philosophical orientations in deconstructing the present, actually existing ultra-politics of the foe, which has acquired a particular urgency in the current ascendancy of American neoconservative exceptionalism but is by no means reducible to it. Against the facile assumption of the unbridgeable gulf between the politics of the Bush administration and the remainder of the transatlantic community, we shall rather posit the ‘ultra-politics of the foe’ as the definitive feature of the transformation of the relation of enmity in Western politics in the twentieth century. Moreover, as our analysis below will demonstrate, the emergence of this ultra-politics is a direct effect of the universalisation of the liberal disposition rather than a resurgence of an ‘archaic’ form of political realism. What we observe presently is not a temporary ‘barbarian’ deviation from the progressive teleology of liberalism, but the fulfilment of Schmitt’s prophecy that liberalism produces its own form of barbarism.

### 2NC Alternative Debate

#### Only this resolves the violence the affirmative describes

Odysseos ‘07

Louiza Odysseos. “Crossing the Line? Carl Schmitt on the ‘Spaceless Universalism’ of Cosmopolitanism and the War on Terror.” The international political thought of Karl Schmitt. New York: Routledge, 2007. 136.

The first relationship arises from their joint location in a long line of thought and policy offering both a worldview and a political programme of modernity in which violence and war dissipate, in which war is gradually replaced by rules and principled behavior. One might say, in other words, that both the War on Terror and liberal cosmopolitanism are located within the modernist vision of the end of war. Hans Joas has eloquently called this ‘the dream of a modernity without violence’. That cosmopolitanism seeks ‘perpetual’ peace is often acknowledged through cosmopolitanism’s intellectual debt to Immanuel Kant. That the War on Terror is located in this understanding of modernity is less obvious, perhaps, but becomes increasingly apparent when one examines the rhetorical framing and understanding of the War on Terror as a fight that will not be abandoned until terrorism is rooted out. The terrorist acts of 11 September 2001 in the seat of this dream, the United States of America, were an unforgivable affront to this modernist and liberal cosmopolitan vision of perpetual peace. At the same time, modernity’s dream to end war has repeatedly had the opposite effect, signaling a much neglected paradox, that ‘[a] political project based concretely upon an ideal of “peace” has continually produced its nemesis, war’. It is not only that the search for peace has time and again led to war – it is the very intensification of war within the horizon of liberal modernity that is worth investigating. Schmitt’s own assessment in the *Nomos* of prior liberal attempts to abolish war, such as those undertaken by the League of Nations, suggests that ‘any abolition of war without true bracketing [has historically]

resulted only in new, perhaps even worse types of war, such as reversions to civil war and other types of wars of annihilation’. Reid, more recently, echoes this insight: Not only does the recurrence of war throughout modernity serve to underline its paradoxical character. But the very forms of war that recur are of such increasing violence and intensity as to threaten the very sustainability of the project of modernity understood in terms of the pursuit of perpetual peace.

## Polt

#### And we have the stronger internal link to international escalation – trade reduces conflict escalation

Morrow, Research Fellow at the Hoover Institution at Stanford University, ’99 (James, “How Could Trade Affect Conflict?” Journal of Peace Research, Vol 36 No 4, p 481-489, SagePub)

For war to occur, both i and j must be willing to escalate. The likelihood function then requires both conditions above, both of which require the bivariate distribution of unobservable resolve. A complete estimation of the conflict process, including both initiation and escalation, can and should be done with one likelihood function (Reed, 1998). In review, international conflict occurs because states cannot fully observe one another’s resolve for war. A state considering the initiation of a militarized dispute compares its own resolve to what it knows about the resolve of its target. It must also possess a credible threat in the sense that the target must believe that it is possible for the initiator to prefer war to the status quo. In a crisis, the sides signal their unobservable resolve through the exchange of threats. A side escalates to violence or concedes the stakes based on what it has learned about the other side’s resolve from the latter’s actions in the crisis. The greater its resolve relative to what it believes the other side’s resolve, the more likely a state is to escalate to violence. Escalation to war requires both sides to use violence. Trade, Conflict, and Resolve If trade prevents conflict, it does so by altering the terms of the argument above. Trade flows are observable ex ante and so are part of observable resolve in cases where we look at aggregate trade flows or a measure of interdependence based on trade and size of the economy. Precisely because trade flows are ex ante observable, we can use them as an independent variable in statistical models of dispute initiation and escalation. The common argument is that higher trade flows reduce a state’s resolve to fight due to the fear of losing the trade-war should break out. That is, the expectation is that resolve declines as trade increases, making war less attractive, with the understanding that the value of trade should be assessed by a measure of dependence. If higher levels of trade reduce a nation’s resolve for war against its trading partners, the argument above implies that the effect of trade on the initiation and escalation of disputes is indeterminate. Relative resolve determines the willingness of a state to initiate a crisis. A prospective initiator considers the likely response of the intended target of its threat; if the latter is likely to yield the stakes without a fight, then the former is more likely to use a threat to make a demand of the latter. If two states have a high level of trade, and higher levels of trade reduce resolve, the two could be more or less likely to have militarized disputes with each other, compared to a pair of states with a low level of trade. The threat of the loss of trade could either deter the prospective initiator or intimidate its target into making concessions, and so encourage the prospective initiator.

Free trade solves poverty, environmental destruction, working conditions and discrimination

Geddes, Executive vice president of the Foundation for research on Economics and the Environment, 2004

(Pete, “The Benefits of Globalization,” Bozeman daily Chronicle, January 7, http://free-eco.org/articleDisplay.php?id=378)

President Clinton understood that only those countries that have opened their economies to trade, to capital movements, and to competition have realized significant gains in per capita income and thus enjoyed social and economic progress. Here are some of the other benefits. - Over the past 20 years, 200 million people have left absolute poverty -- defined as living on the equivalent of less than $1 a day. - Advances in medicine, improved public health policies, and greater food supplies have lowered infant mortality and lengthened life expectancy. In developing countries in the 1950s, 178 children per every 1000 live births died before reaching their first birthday. By the late 1990s, the infant mortality rate in these countries had declined to 64 per 1000. Life expectancy increased from 44 years in 1960 to 59 years in 1999. - Child labor declines as a country’s income increases. As trade promotes economic growth, globalization results in less child labor over time. In 1960, children made up 32 percent of the labor force in low-income countries. Forty years later, following the massive expansion in international trade, child labor in the same countries had declined to 19 percent. - Though inequality remained more or less constant, or possibly increased, during the 1970s, it declined substantially in the 1980s and 1990s. As a result, the shape of the income distribution curve has changed, from a bimodal distribution with a peak of poor people and a peak of rich in 1970, to a smoother distribution in 1998, suggesting the emergence of a “world middle class.” Increased wealth is, of course, a key predictor of environmental quality. The environmental sustainability index (ESI), produced by Columbia and Yale Universities, allows cross-national comparisons of rates of nonrenewable resource use and other environmental policies in countries worldwide. The index scores range from 0 to 100, with 100 being optimal sustainability. - Countries such as Finland, Sweden, and Switzerland, with high ESI scores (73.9, 72.6, and 66.5, respectively), also rank among the countries with the highest annual per-capita income ($25,130, $27,140, and $38,140). The U.S. has an ESI of 53.2. (Our low score is due to the index’s heavy weighting of greenhouse gas emissions.) - Countries ranking in the middle range of ESI scores (around 50), such as Algeria, Russia, and Egypt, are poorer (per-capita incomes of $1,580, $1,690, and $1,490, respectively). - At the lower end of the scale are impoverished countries such as Haiti, Ukraine, and Turkmenistan (per capita incomes of $510, $690, and $750, respectively). The integration of rich and poor nations is not a zero-sum game where the gains of one come at the expense of the other. Driven by the rapid democratization of information, technology, and finance, globalization is turning out to be a remarkably progressive, liberating force. Opponents of globalization may be well intentioned, but they are ill informed. Globalization helps break the regressive taboos responsible for discriminating against people on the basis of gender, race, or religious beliefs. It is an antidote to the intolerant fundamentalism that oppresses millions of the world’s poorest.

### Uniqueness

#### Will pass – coalition

Depillis 1/9 <Lydia, Writer for Washington Post’s Wonkblog, “Congress is considering whether to allow Obama to finish two massive trade deals,” http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/09/congress-is-considering-whether-to-allow-obama-to-finish-two-massive-trade-deals/>#SPS

On the other side, however, lies all the force of American industry: An array of business lobby groups, from the [Farm Bureau](http://www.fb.org/issues/docs/trade-tpa13.pdf) to the [National Association of Manufacturers](http://thehill.com/blogs/on-the-money/1005-trade/311111-manufacturers-press-for-fast-track-authority), have been pushing for trade promotion authority all year. The Chamber of Commerce says it's the organization's top legislative priority; its officials have even started running ads on the issue, have already met with all the House freshmen, and are planning meetings with the sophomores.¶ "It's really urgent to get this done, because the U.S. is engaged in a lot of negotiations right now," says Chris Wenk, the Chamber's point person on trade issues. "I think it's safe to say that if there's not some clarity about trade promotion authority, some of our trade partners might not put their best feet forward."¶ Unlike the filibuster fight, this is a rare instance where top Republicans are actually willing to grant the Obama administration more authority, because modern trade deals typically involve less regulation, rather than more. And granting fast track authority is usually understood as a signal to trade partners that the U.S. is serious.

TPA will pass but political capital is key-failure collapses global trade momentum

Financial Times 1/20/14

http://www.ft.com/intl/cms/s/0/60506de0-7f9c-11e3-b6a7-00144feabdc0.html#axzz2qtDiKryq

US trade debate prompts fears of delay in talks

A heated debate over trade in the US Congress risks stalling two trade negotiations that cover 70 per cent of the global economy, senior international officials have warned. For President Barack Obama the key to sealing both the Trans-Pacific Partnership and a deal with the EU is securing so-called fast-track authority. It gives the White House power to negotiate trade deals and limits Congress’s ability to intervene in nitty-gritty details once talks are concluded. If Mr Obama fails, it would scupper his ambitious second-term trade agenda. He has already hit stumbling blocks as he missed his self-imposed aim to reach a preliminary agreement with TPP members by the end of 2013. It would also threaten US-led efforts in Geneva to update the rules for the $4tn annual trade in services around the world. After months of haggling, Congressional leaders this month introduced a bipartisan bill to grant Mr Obama what is formally known as Trade Promotion Authority (TPA). But it is already facing opposition from many Democrats and criticism from Republicans who want Mr Obama to do more to bring his own party into line. In an interview with the Financial Times, Ildefonso Guajardo Villarreal, Mexico’s economy minister, said governments in the TPP talks, in which it is a member, were unlikely to offer any significant concessions until they were sure Mr Obama had fast-track authority and any agreement could get through the US Congress. “We have to wait until we really get a better sense of how things evolve. From a negotiating point of view . . . things will go along slowly until that happens,” Mr Guajardo Villarreal said, adding he believed the Obama administration would eventually secure fast-track authority. “If they are able to send a strong signal of support from Congress that will make it easier for us to finish the deal.” The TPP negotiations are further along than the EU talks so the immediate impact is likely to be greater on those talks. But a senior European official said officials in Brussels were bracing for a TPA debate that could last through this year and would inevitably affect negotiations. “Without TPA we will always feel very reticent to show our real red lines,” the official said. Administration officials remain confident that they can get the bill through Congress and Michael Froman, the US trade representative, said there was no reason for the fast-track debate in Washington to affect the progress of any trade negotiations. “Every TPP partner has domestic politics, from elections to legislative battles over various policies that could impact the agreement,” he said. “We trust our partners to manage their own domestic processes, and we will be working with our Congress to pass broadly supported trade promotion authority here. In the meantime, there is no reason talks should slow.” The bill is raising concern among negotiating partners. It would require the administration to include mechanisms to address currency manipulation in agreements, a sore point for TPP partner Japan. It also would require any deal the US enters to have strict, environmental, labour and intellectual property rules. EU officials are concerned about a section of the bill which would give some members of Congress the right to attend negotiations. The concern in Brussels is that it could cause the European parliament to request the same access and thus add a political element to the complex negotiations. Deborah Elms, an American TPP expert at Singapore’s S. Rajaratnam School of International Studies, said the concerns of other TPP countries over the conditions in the bill, particularly on currency, should not be underestimated. But, above all, she said, President Obama needed to send a signal in this month’s State of the Union address that he was prepared to push for fast-track authority. “You have two big negotiations that are a bit stuck waiting for Congress to move,” she said. “This is the time [to spend political capital]. Your whole trade agenda is stuck unless you get [fast-track authority] very soon.”

They will say Boehner, the full Boehner quote is that Obama needs to push - also says PC effective

Obama focused on TPA-political capital key to passing it this year

Inside U.S. Trade 1/17/14

HEADLINE: Carney Defends White House Push For TAA; Boehner Urges Larger Effort

White House Press Secretary Jay Carney yesterday (Jan. 16) said that President Obama is personally engaged with members of Congress on the issue the need to renew Trade Promotion Authority (TPA), even as House and Senate lawmakers called on the administration to do more to secure congressional passage of the bill. "I don't have a schedule of [Obama's] engagement in it. He is engaged in it. He speaks with members about it. He has a team that is engaged in this effort," Carney told reporters, defending the administration's efforts to move forward a TPA bill. "And we're going to continue to push for as broad a bipartisan support as we can get." Carney's remarks were made in response to a question that related the comments by Senate Finance Committee Ranking Member Orrin Hatch (R-UT) at a Finance Committee on TPA earlier that day. Hatch warned that TPA will fail to pass unless the administration promotes it more actively (see related story). The press secretary was asked about the absence of U.S. Trade Representative Michael Froman from the hearing, but Carney deferred the question to USTR. Froman's absence was criticized by Republican senators at the hearing. Another reporter asked if Obama had pressed the importance of TPA when he met with Senate Democrats on Jan. 15. A readout of the meeting said the president and the senators present discussed their priorities for the year, and that Obama will use his executive authority formally and informally to "get things done," but did not mention TPA. Carney declined to comment, saying that he skipped the meeting. The Jan. 16 press briefing marks the latest volley between the administration and congressional Republicans over the executive branch's role in pushing for the renewal of TPA. House Speaker John Boehner (R-OH) urged Obama twice this week to make the case for renewing TPA, urging the president to "pull out all the stops" for the bill's passage. "Now after five years in office, we know how the president can be when he's serious about something," Boehner said at his weekly press briefing yesterday. "He hits the road, uses his bully pulpit, and he takes his case to the American people." Boehner said that Obama will do the same if he's serious about TPA, adding that he hopes to pass the bill this year. His remarks came one day after Boehner called on Obama to actively push for Congress to approve a bill to renew TPA as part of a larger plea for the president to take the lead on a slew of initiatives that Republicans argue would create jobs for Americans.

### L

#### Prefer Kriner - only comprehensive study

Fowler 10

Professor of Government, Chair in Policy Studies at Dartmouth [Linda L. Fowler, After the Rubicon, CONGRESS, PRESIDENTS, AND THE POLITICS OF WAGING WAR, http://press.uchicago.edu/ucp/books/book/chicago/A/bo10156999.html]

Studies of war and research on Congress typically stand in isolation from each other. Kriner’s new book demonstrates big payoffs from examining the two in concert. He shows how the balance of party power in the legislature trumps conventional strategic variables in explaining the duration of U.S. military conflicts. Kriner also reveals how informal legislative actions, such as hearings, investigations, and resolutions, limit the president’s use of force. The book draws on a wide range of statistical and qualitative evidence and should cause even diehard realists to look more seriously at domestic constraints on U.S. actions abroad. In sum, Kriner’s work suggests that reports of Congress’s death as a participant in international relations are greatly exaggerated.

#### That tanks PC and outweighs their link turns

Light, ’99

Director of Center for Public Service – Brookings, The President’s Agenda, pg. 214-5

Today, the most important party function may be to coordinate the legislative process, not to mobilize blocs of votes on key issues. Party is still the basis of presidential capital: It still **supplies the foundation of the White House influence in Congress**.Continues Party support is the chief ingredient in presidential capital: it is **the** “gold standard” **of congressional support**. Among the White House staffs, congressional parties are viewed as much more stable than public approval. Even if the president is slipping in the polls, [they] can count on support in Congress, particularly **from [their] own party**.

#### Obama would fight to retain authority, even if he supported the plan’s practice

Silverstein 9

Gordon Silverstein, UC Berkeley Assistant Professor, December 2009, Bush, Cheney, and the Separation of Powers: A Lasting Legal Legacy?, http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1161&context=schmooze\_papers

Less than six months into the new administration, many of Obama’s staunch supporters have been surprised—even appalled—that the new president not only had failed to fully repudiate many of the Bush-Cheney legal policies, but in some instances, actually seems to be embracing and extending those policy choices (Gerstein 2009; Goldsmith 2009a, 2009b; Greenwald 2009a, 2009b; Herbert 2009; Savage 2009a). In areas ranging from the assertion of the state secrets privilege in efforts to shut down lawsuits over warrantless wiretapping (Al-Haramain v. Obama; Jewel v. NSA) and extraordinary rendition (Mohamed v. Jeppesen Dataplan) to those concerning lawsuits over detention and treatment at Guantánamo (Bostan v. Obama) and the reach of habeas corpus to Bagram Air Force Base in Afghanistan (Al Maqaleh v. Gates), as well as the continuing use of signing statements, the new Obama administration’s policies in a number of areas that were of intense interest during the campaign certainly do appear less dramatically different than one might have expected. Does this suggest that Obama actually will salvage and enhance the Bush-Cheney legal legacy?¶ Early evidence suggests the answer is no. There is a critical difference between policy and the legal foundation on which that policy is constructed. The policies may be quite similar, at least in the first few months of the new administration, but the legal legacy will turn on the underlying legal arguments, the legal foundation on which these policies are built. Here we find a dramatic difference between Obama and Bush. Both are clearly interested in maintaining strong executive power, but whereas Bush built his claims on broad constitutional arguments, insisting that the executive could act largely unhampered by the other branches of government, the Obama administration has made clear that its claims to power are built on statutes passed by Congress, along with interpretations and applications of existing judicial doctrines. It may be the case, as one of the Bush administration’s leading Office of Legal Counsel attorneys argued, that far from reversing Bush-era policies, the new administration “has copied most of the Bush program, has expanded some of it, and has narrowed only a bit” (Goldsmith 2009a). But what is profoundly different are the constitutional and legal default foundations on which these policies, and the assertions of executive power to enforce them, are built.¶ Obama, like virtually every chief executive in American History, seems committed to building and holding executive power. But unlike Bush, Obama is developing a far more traditional approach to this task, building his claims not on constitutional assertions of inherent power, but rather interpreting and applying existing statutes and judicial doctrines or, where needed, seeking fresh and expansive legislative support for his claims.

#### Disagreements over authority trigger constitutional showdowns – even if the executive wants the plan – it’s about who decides, not the decision itself

Posner and Vermeule, 10

\*professor of law at the University of Chicago AND \*\*professor of law at Harvard (Eric and Adrian, The Executive Unbound, p. 75-77)

Showdowns occur when the location of constitutional authority for making an important policy decision is ambiguous, and multiple political agents (branches, parties, sections, governments) have a strong interest in establishing that the authority lies with them. Although agents often have an interest in negotiating a settlement, asymmetric information about the interests and bargaining power of opposing parties will sometimes prevent such a settlement from being achieved. That is when a showdown occurs. Ultimately, however, someone must yield; this yielding to or acquiescence in the claimed authority of another agent helps clarify constitutional lines of authority, so that next time the issue arises, a constitutional impasse can be avoided. From a normative standpoint, constitutional showdowns thus have an important benefit, but they are certainly not costless. As long as the showdown lasts, the government may be paralyzed, unable to make important policy decisions, at least with respect to the issue under dispute. We begin by examining a simplified version of our problem, one involving just two agents—Congress and the executive. We assume for now that each agent is a unitary actor with a specific set of interests and capacities. We also assume that each agent has a slightly different utility function, reflecting their distinct constituencies. If we take the median voter as a baseline, we might assume that Congress is a bit to the left (or right) of the median voter, while the president is a bit to the right (or left). We will assume that the two agents are at an equal distance from the median, and that the preferences of the population are symmetrically distributed, so that the median voter will be indifferent between whether the president or Congress makes a particular decision, assuming that they have equal information.39 But we also will assume that the president has better information about some types of problems, and Congress has better information about other types of problems, so that, from the median voter’s standpoint, it is best for the president to make decisions about the first type of problem and for Congress to make decisions about the second type ofproblem.40 Suppose, for example, that the nation is at war and the government must decide whether to terminate it soon or allow it to continue. Congress and the president may agree about what to do, of course. But if they disagree, their disagreement may arise from one or both of two sources. First, Congress and the president have different information. For example, the executive may have better information about the foreign policy ramifications of a premature withdrawal, while Congress has better information about home-front morale. These different sources of information lead the executive to believe that the war should continue, while Congress believes the war should be ended soon. Second, Congress and the president have different preferences because of electoral pressures of their different constituents. Suppose, for example, that the president depends heavily on the continued support of arms suppliers, while crucial members of Congress come from districts dominated by war protestors. Thus, although the median voter might want the war to continue for a moderate time, the president prefers an indefinite extension, while Congress prefers an immediate termination. So far, we have explained why the president and Congress might disagree about when to terminate the war, but mere policy disagreement does not result in a showdown. Showdowns arise only when there is a disagreement about authority. If Congress believes that the president has the sole authority to terminate the war, then his view will prevail. Congress may try to pressure him or influence him by offering support for other programs desired by the president, or by trying to rile up the public, but these activities are part of normal politics, and do not provoke a constitutional showdown. Similarly, if the president believes that Congress has the sole authority to terminate the war, then Congress’s view will prevail. This outcome is shown in cell 3 in table 2.1. Similarly, no showdown occurs when the two branches agree both about authority and policy—for example, that the president decides, and Congress agrees with his decision (cell 1). The first column represents the domain of normal politics. Showdowns can arise only when Congress and the president disagree about who decides. Here, there are two further possibilities. First, Congress and the president disagree about who decides but agree about the correct policy outcome (cell 2). In these situations, which arise with some frequency, the two branches are often tempted to paper over their differences because an immediate policy choice is not at stake. But sometimes a showdown will occur. We will discuss this special case later. Second, Congress and the president disagree about the policy outcome and about authority (cell 4). In this case, showdowns are likely, because a policy decision must be made, and if the parties cannot agree about what it should be, then they cannot avoid resolving the question of authority. We focus on this case for now.

#### Politics DA’s are intrinsic

Saideman 11

associate professor of political science - McGill University, 7/25 (Steve, “Key Constraint on Policy Relevance,” http://duckofminerva.blogspot.com/2011/07/key-constraint-on-policy-relevance.html)

Dan Drezner has a great post today about how the foreign policy smart set (his phrase) gets so frustrated by domestic politics that they tend to recommend domestic political changes that are never going to happen. I would go one step further and suggest that one of the key problems for scholars who want to be relevant for policy debates is that we tend to make recommendations that are "incentive incompatible." I love that phrase. What is best for policy may not be what is best for politics, and so we may think we have a good idea about what to recommend but get frustrated when our ideas do not get that far. Lots of folks talking about early warning about genocide, intervention into civil wars and the like blame "political will." That countries lack, for whatever reason, the compulsion to act. Well, that is another way of saying that domestic politics matters, but we don't want to think about it. Dan's piece contains an implication which is often false--that IR folks have little grasp of domestic politics. Many IR folks do tend to ignore or simplify the domestic side too much, but there is plenty of scholarship on the domestic determinants of foreign policy/grand strategy/war/trade/etc. Plenty of folks look at how domestic institutions and dynamics can cause countries to engage in sub-optimal foreign policies (hence the tradeoff implied in my second book--For Kin or Country). The challenge, then, is to figure out what would be a cool policy and how that cool policy could resonate with those who are relevant domestically. That is not easy, but it is what is necessary. To be policy relevant requires both parts--articulating a policy alternative that would improve things and some thought about how the alternative could be politically appealing. Otherwise, we can just dream about the right policy and gnash our teeth when it never happens.