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### 1

#### Passage of immigration reform is likely, both sides agree it is a top priority and congress is willing to cooperate

Clifford, 12/30 (Mike, 12/30/2013, “Immigration Reform Supporters: “Positive Signs” Headed into 2014,” <http://www.publicnewsservice.org/2013-12-30/immigrant-issues/immigration-reform-supporters-positive-signs-headed-into-2014/a36538-1)>)

NEW YORK - Supporters of comprehensive immigration reform fell short of their goal in 2013, but several things happened in December to swing momentum in their direction, they say. The first positive sign, according to Jim Wallis, Sojourners president and founder, was the House and Senate working together to pass a budget bill. And, while Speaker Boehner has said immigration reform would have to wait until next year, Wallis said there are signs Republicans are ready to act. "I hear Republican leaders - Goodlatte from Judiciary - saying this will be a top priority in 2014," Wallis said. "John Boehner has hired a really talented aide to help with immigration - she knows the topic well, and she's for reform." At his final 2013 news conference, President Obama called on House members to pass the immigration reform measure approved by the Senate, but Speaker Boehner has said he won't bring that version up for a vote.

#### New era of cooperation will lead to deals on immigration --- controversial issues will spoil the détente

WSJ, 12/30 (“Obama Seeks Way to Right His Ship; Exiting 2013 in His Weakest Political Position, the President Faces a Basic Strategic Choice,” 12/30/2013, <http://online.wsj.com/news/articles/SB10001424052702304361604579290264084633016>))

By almost any measure, 2013 was, as Democratic pollster Peter Hart put it, "a terribly ragged year" for the president, who saw his approval ratings plunge and his agenda stall. One glimmer of light emerged at year's end, when the two parties agreed on a deal to settle long-festering budget disputes through the new year. That now leaves it unclear whether Washington is entering a new phase in which the president seeks more compromises with Republicans to move at least part of his agenda through Congress, or whether he instead strikes out on his own by using executive action as a way to advance his program while underscoring his philosophical differences with the GOP on issues such as a higher minimum wage and extended unemployment benefits. For most of 2013, Mr. Obama has been unable to move key proposals such as new controls on gun sales. Meantime, his indecision on whether to actively engage in Syria's civil war has hurt his image as a leader as that conflict festers and Syrian President Bashar al-Assad remains in power. Worst of all for the White House, of course, was the disastrous rollout of the Affordable Care Act, and the deep blow to the president's personal credibility from the public's realization that his declaration that Americans could keep their health-insurance plans when the new law kicks in wasn't turning out to be entirely true. Now, "the Affordable Care Act hovers over everything," says Mike McCurry, former White House press secretary under Bill Clinton. The toll can be seen in the arc of public opinion in Wall Street Journal/NBC news polling through 2013. Mr. Obama's job approval has fallen to 43% from 52% at the start of the year. The percentage of those polled who give him good marks for being honest and straightforward has dropped 10 points to 37%. Mr. Obama's main consolation is that Republicans continue to fare even worse in public estimation. Indeed, his political high point in 2013 came when congressional Republicans shot themselves in the foot by allowing the government to shut down in October in a dispute over funding the president's health law. Republican leaders were so singed by the experience that they moved swiftly this month to strike the compromise budget plan that will keep the government funded through next year. Then, House Speaker John Boehner (R., Ohio) forcefully quashed complaints by the party's tea-party wing that the new deal didn't cut spending sufficiently The emergence of a large bloc of House Republicans who voted in favor of that compromise has created the possibility that Mr. Obama may be able to work out at least a few deals on other issues. "The jury's still out on whether or not the budget agreement was a one-off or a sign of things to come," says Rep. Chris Van Hollen of Maryland, the top Democrat on the House Budget Committee. Mr. Van Hollen says an early test will come when the parties try to reach an understanding to raise the debt ceiling, due to be hit around the beginning of March. If there is a new phase of cooperation, he says, that might open the door to deals on more infrastructure spending, corporate tax reform and, crucially, an overhaul of immigration laws. Rep. Kevin McCarthy, the third-ranking Republican in the House, says the budget deal "does allow us to get more done," but adds that compromises are more likely between House and Senate leaders than with the White House. He predicts much of Mr. Obama's effort in the new year will be on keeping Democratic supporters from abandoning him as he tries to get his new health program working better. That brings Mr. Obama to his key strategic choice: Does he focus on trying to craft compromises with Republicans to show skeptical voters he is making Washington work? Or does he work around Congress, striking out on his own with executive actions, while attacking the GOP for failing to cooperate? The question of whether more deals with congressional Republicans are possible is "perhaps the question when it comes to predicting how 2014 will play out," says a senior White House official. "Our approach will be to test as much as possible for principled compromise where Republicans are willing, but also to push ahead with nonlegislative solutions where Congress stonewalls."

#### The plan costs substantial capital

Brecher, 12 --- J.D. Candidate, May 2013, University of Michigan Law School (December, Aaron P., Michigan Law Review, “Cyberattacks and the Covert Action Statute: Toward a Domestic Legal Framework for Offensive Cyberoperations,” 111 Mich. L. Rev. 423))

[\*451] Finally, while urging Congress to clarify the law governing cyberattacks may be advisable, one should consider the reality that such legislation is very difficult to pass. Congress is notoriously slow to act and legislation is difficult to push through the arduous process to enactment. There are numerous stages in the process at which a bill, even on an issue of significant importance, can be stalled or killed. n170 For example, a bill may not be considered by its corresponding committee in either House, may be bogged down with amendments that cause it to lose support, or be subject to the Senate filibuster, among other "vetogates." n171 In the case of clarifying the appropriate procedures for conducting a cyberattack, there may be concern that such legislation, either by imposing substantive constraints or reporting requirements, will improperly burden the president on a national security issue of increasing importance. Congress as an institution tends to acquiesce to presidential prerogative in national security matters. n172 Further, given that Congress has recently addressed cyberattacks in legislation, albeit in an unhelpfully vague provision, n173 the possibility of expansive legislative clarification in the near future seems even more remote.

#### Reform key to the economy – immigrants are key to several critical sectors

West, ‘09 – Director of Governance Studies at the Brookings Institution (7/22/09, Darrell M., “The Path to a New Immigration Reform,” http://www.brookings.edu/opinions/2009/0721\_immigration\_reform\_west.aspx)

Skeptics need to understand how important a new immigration policy is to American competitiveness and long-term economic development. High-skill businesses require a sufficient number of scientists and engineers. Many industries such as construction, landscaping, health care and hospitality services are reliant on immigrant labor. Farmers need seasonal workers for agricultural productivity. Critics who worry about resource drains must understand that immigrants spend money on goods and services, pay taxes and perform jobs and start businesses vital to our economy. Beyond the economy, immigration reform prospects improve considerably across a fresh political landscape that features a popular Democratic president armed with substantial Democratic majorities in the House and Senate, many who appear receptive to comprehensive reform. Obama has called repeatedly for big ideas and bold policy actions. The country needs new policies that emphasize the importance of immigrant workers \_ across the skills spectrum \_ to our country's long-term financial future. Our universities invest millions in training foreign students but then send them home without any U.S. job opportunities that would take advantage of their new skills. And investing in the children of middle- and lower-skilled immigrants is wise as we recognize their majority role in our workforce as the next generation rises.

#### Extinction

Harris and Burrows, ‘09 [Mathew, PhD European History at Cambridge, counselor in the National Intelligence Council (NIC) and Jennifer, member of the NIC’s Long Range Analysis Unit “Revisiting the Future: Geopolitical Effects of the Financial Crisis” <http://www.ciaonet.org/journals/twq/v32i2/f_0016178_13952.pdf>]

Increased Potential for Global Conflict Of course, the report encompasses more than economics and indeed believes the future is likely to be the result of a number of intersecting and interlocking forces. With so many possible permutations of outcomes, each with ample Revisiting the Future opportunity for unintended consequences, there is a growing sense of insecurity. Even so, history may be more instructive than ever. While we continue to believe that the Great Depression is not likely to be repeated, the lessons to be drawn from that period include the harmful effects on fledgling democracies and multiethnic societies (think Central Europe in 1920s and 1930s) and on the sustainability of multilateral institutions (think League of Nations in the same period). There is no reason to think that this would not be true in the twenty-first as much as in the twentieth century. For that reason, the ways in which the potential for greater conflict could grow would seem to be even more apt in a constantly volatile economic environment as they would be if change would be steadier. In surveying those risks, the report stressed the likelihood that terrorism and nonproliferation will remain priorities even as resource issues move up on the international agenda. Terrorism’s appeal will decline if economic growth continues in the Middle East and youth unemployment is reduced. For those terrorist groups that remain active in 2025, however, the diffusion of technologies and scientific knowledge will place some of the world’s most dangerous capabilities within their reach. Terrorist groups in 2025 will likely be a combination of descendants of long established groups\_inheriting organizational structures, command and control processes, and training procedures necessary to conduct sophisticated attacks\_and newly emergent collections of the angry and disenfranchised that become self-radicalized, particularly in the absence of economic outlets that would become narrower in an economic downturn. The most dangerous casualty of any economically-induced drawdown of U.S. military presence would almost certainly be the Middle East. Although Iran’s acquisition of nuclear weapons is not inevitable, worries about a nuclear-armed Iran could lead states in the region to develop new security arrangements with external powers, acquire additional weapons, and consider pursuing their own nuclear ambitions. It is not clear that the type of stable deterrent relationship that existed between the great powers for most of the Cold War would emerge naturally in the Middle East with a nuclear Iran. Episodes of low intensity conflict and terrorism taking place under a nuclear umbrella could lead to an unintended escalation and broader conflict if clear red lines between those states involved are not well established. The close proximity of potential nuclear rivals combined with underdeveloped surveillance capabilities and mobile dual-capable Iranian missile systems also will produce inherent difficulties in achieving reliable indications and warning of an impending nuclear attack. The lack of strategic depth in neighboring states like Israel, short warning and missile flight times, and uncertainty of Iranian intentions may place more focus on preemption rather than defense, potentially leading to escalating crises. 36 Types of conflict that the world continues to experience, such as over resources, could reemerge, particularly if protectionism grows and there is a resort to neo-mercantilist practices. Perceptions of renewed energy scarcity will drive countries to take actions to assure their future access to energy supplies. In the worst case, this could result in interstate conflicts if government leaders deem assured access to energy resources, for example, to be essential for maintaining domestic stability and the survival of their regime. Even actions short of war, however, will have important geopolitical implications. Maritime security concerns are providing a rationale for naval buildups and modernization efforts, such as China’s and India’s development of blue water naval capabilities. If the fiscal stimulus focus for these countries indeed turns inward, one of the most obvious funding targets may be military. Buildup of regional naval capabilities could lead to increased tensions, rivalries, and counterbalancing moves, but it also will create opportunities for multinational cooperation in protecting critical sea lanes. With water also becoming scarcer in Asia and the Middle East, cooperation to manage changing water resources is likely to be increasingly difficult both within and between states in a more dog-eat-dog world.

### 2

#### Interpretation – A restriction limits allowable action

Oxford Advanced Learner’s Dictionary – 2013, <http://oald8.oxfordlearnersdictionaries.com/dictionary/restriction>

restriction NOUN

1 [countable]

a rule or law that limits what you can do or what can happen

import/speed/travel, etc. restrictions

restriction on something to impose/place a restriction on something

The government has agreed to lift restrictions on press freedom.

There are no restrictions on the amount of money you can withdraw.

2 [uncountable]

the act of limiting or controlling somebody/something

sports clothes that prevent any restriction of movement

A diet to lose weight relies on calorie restriction in order to obtain results.

3 [countable]

a thing that limits the amount of freedom you have

the restrictions of a prison

#### War power is the power to conduct war successfully

HIRABAYASHI v. UNITED STATES - SUPREME COURT - June 21, 1943, Decided, 320 U.S. 81; 63 S. Ct. 1375; 87 L. Ed. 1774; 1943 U.S. LEXIS 1109

The war power of the national government is "the power to wage war successfully." See Charles Evans Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238.It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. Prize Cases, supra; Miller v. United States, 11 Wall. 268, 303-14; Stewart v. Kahn, 11 Wall. 493, 506-07; Selective Draft Law Cases, 245 U.S. 366; McKinley v. United States, 249 U.S. 397; United States v. Macintosh, 283 U.S. 605, 622-23. HN4Go to this Headnote in the case.Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Ex parte Quirin, supra, 28-29; cf. Prize Cases, supra, 670; Martin v. Mott, 12 Wheat. 19, 29. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

#### Authority is the power to act

COURT OF APPEALS OF TENNESSEE, EASTERN SECTION - October 31, 1925, Decided, RACY CREAM COMPANY v. MARY BELLE WALDEN., 1 Tenn. App. 653; 1925 Tenn. App. LEXIS 85

While the circumstances in and of themselves do not necessarily show that the driver was the agent, employee or servant of the owner at the time of the accident, and if so that he was engaged in the master's business when the injury was effected, yet good reasons are shown justifying the purposes of the Legislature, if such justification was necessary, as to why these two essential facts should be presumed. The driver fled immediately after the accident, so that his name or identity was not known, and the difficulty of proving the same is therefore manifest, together with the necessity of indulging some such presumption, or else justice will be defeated in an ever increasing number of similar incidents. On the other hand, if in any case the presumption should be ill founded, it would be an easy matter to furnish facts to controvert [\*\*33] it, which are, or would be, more easily within the knowledge of the defendants, or at least much less difficult for them to establish, and thus the ends of justice be subserved. Besides, as it appears from the facts of this case, the proposition has attractions of original merit. When evidence has been furnished as to the negligent injury by one driving the defendants' truck, presumably from the name Racy Cream Company on the truck, engaged in the sale, distribution or transportation of cream or its products, and at a time of day, nine o'clock in the forenoon, in a city where such business might reasonably be pursued, and where just such an outfit so manned might reasonably have been employed, with a woman almost dead in the street from having been wantonly mowed down by its rapid and illegal operation, it furnishes a combination of facts and circumstances from which, it could be more reasonably inferred that the driver was the owner's servant rather than a thief, and that he was engaged in the owners business rather than his own, or that of someone else in which the truck was borrowed or hired. At least these first conceptions are less involved and more direct than the latter, and [\*\*34] are the most natural and legitimate to which the mind first gravitates, and why not indulge them? These first-hand legitimate inferences call for explanation rather than to be combatted by other circumstances neither ordinary nor proximate. It is not a case of draft without reason, but a case of the accusing finger pointing naturally sought to a conclusion which the Legislature in the act just mentioned sought to mature as a prima-facie case. Has the body of the act in the use of the terms employed sufficiently effectuated the purposes expressed in the title? Considered without reference to the amendment, we think it has. It is conceded that while under our constitution [\*669] the body of an act cannot be broader than the restrictions of the title, it may be less pretentious, and thus fall short of the purpose expressed; and in this case authority for the prima-facie case claimed to justify any personal judgment against the defendants must be found in the use of the word "authority," as the other words ("knowledge and consent") used express nothing more than the permissive authority necessary to effect a lien against the machine, if the negligence consists in willful violation [\*\*35] of the statute. It is true that in a certain sense the word "authority" has a meaning synonimous with the other terms, "knowledge and consent," but used as it is in the act, and in connection with the other terms mentioned, it may have another meaning implying direction or supervision, signifying control of subordinate agency. As expressed in 6th. Volume of C. J., page 864, with reference to the term "authority," in defining same it is said: "In another sense power delegated by a principal to his agent or attorney. . . . Power to act, whether originally or delegated. Control over. Jurisdiction. The word is generally used to express a derivative power."

#### Violation – Requiring notification does not limit the President’s ability to successfully conduct the progress of war operations – it only adds a procedural step – that’s a regulation, not a restriction

Schackleford, justice – Supreme Court of Florida, 3/12/1917

(J., “ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, *et al., Plaintiff in Error,* v. THE STATE OF FLORIDA, *Defendant in Error,”* 73 Fla. 609; 74 So. 595; 1917 Fla. LEXIS 487)

There would seem to be no occasion to discuss whether or not the Railroad Commissioners had the power and authority to make the order, requiring the three specified railroads running into the City of Tampa to erect a union passenger station in such city, which is set out in the declaration in the instant case and which we have copied above. [\*\*\*29] It is sufficient to say that under the reasoning and the authorities cited in State v. Atlantic Coast Line R. Co., 67 Fla. 441, 458, 63 South. Rep. 729, 65 South. Rep. 654, and State v. Jacksonville Terminal [\*631] Co., supra, it would seem that HN14the Commissioners had power and authority. The point which we are required to determine is whether or not the Commissioners were given the authority to impose the fine or penalty upon the three railroads for the recovery of which this action is brought. In order to decide this question we must examine Section 2908 of the General Statutes of 1906, which we have copied above, in the light of the authorities which we have cited and from some of which we have quoted. It will be observed that the declaration alleges that the penalty imposed upon the three railroads was for the violation of what is designated as "Order No. 282," which is set out and which required such railroads to erect and complete a union depot at Tampa within a certain specified time. If the Commissioners had the authority to make such order, it necessarily follows that they could enforce a compliance with the same by appropriate proceedings in the courts, but [\*\*\*30] it does not necessarily follow that they had the power and authority to penalize the roads for a failure to comply therewith. That is a different matter. HN15Section 2908 of the General Statutes of 1906, which originally formed Section 12 of Chapter 4700 of the Laws of Florida, (Acts of 1899, p. 86), expressly authorizes the imposition of a penalty by the Commissioners upon "any railroad, railroad company or other common carrier doing business in this State," for "a violation or disregard of any rate, schedule, rule or regulation, provided or prescribed by said commission," or for failure "to make any report required to be made under the provisions of this Chapter," or for the violation of "any provision of this Chapter." It will be observed that the word "Order" is not mentioned in such section. Are the other words used therein sufficiently comprehensive to embrace an order made by the Commissioners, such as the one now under consideration? [\*632] It could not successfully be contended, nor is such contention attempted, that this order is covered by or embraced within the words "rate," "schedule" or "any report,' therefore we may dismiss these terms from our consideration and [\*\*\*31] direct our attention to the words "rule or regulation." As is frankly stated in the brief filed by the defendant in error: "It is admitted that an order for the erection of a depot is not a 'rate' or 'schedule' and if it is not a 'rule' or 'regulation' then there is no power in the Commissioners to enforce it by the imposition of a penalty." It is earnestly insisted that the words "rule or regulation" are sufficiently comprehensive to embrace such an order and to authorize the penalty imposed, and in support of this contention the following authorities are cited: Black's Law Dictionary, defining regulation and order; Rapalje & Lawrence's Law Dictionary, defining rule; Abbott's Law Dictionary, defining rule; Bouvier's Law Dictionary, defining order and rule [\*\*602] of court; Webster's New International Dictionary, defining regulation; Curry v. Marvin, 2 Fla. 411, text 515; In re Leasing of State Lands, 18 Colo. 359, 32 Pac. Rep. 986; Betts v. Commissioners of the Land Office, 27 Okl. 64, 110 Pac. Rep. 766; Carter V. Louisiana Purchase Exposition Co., 124 Mo. App. 530, 102 S.W. Rep. 6, text 9; 34 Cyc. 1031. We have examined all of these authorities, as well as those cited by the [\*\*\*32] plaintiffs in error and a number of others, but shall not undertake an analysis and discussion of all of them. While it is undoubtedly true that the words, rule, regulation and order are frequently used as synonyms, as the dictionaries, both English and law, and the dictionaries of synonyms, such as Soule's show, it does not follow that these words always mean the same thing or are interchangeable at will. It is well known that the same word used in different contexts may mean a different thing by virtue of the coloring which the word [\*633] takes on both from what precedes it in the context and what follows after. Thus in discussing the proper constructions to be placed upon the words "restrictions and regulations" as used in the Constitution of this State, then in force, Chap. 4, Sec. 2, No. 1, of Thompson's Digest, page 50, this court in Curry v. Marvin, 2 Fla. 411, text 415, which case is cited to us and relied upon by both the parties litigant, makes the following statement: "The word restriction is defined by the best lexicographers to mean limitation, confinement within bounds, and would seem, as used in the constitution, to apply to the amount and to the time [\*\*\*33] within which an appeal might to be taken, or a writ of error sued out. The word regulation has a different signification -- it means method, and is defined by Webster in his Dictionary, folio 31, page 929, to be 'a rule or order prescribed by a superior for the management of some business, or for the government of a company or society.' This more properly perhaps applies to the mode and form of proceeding in taking and prosecuting appeals and writs of error. By the use of both of those terms, we think that something more was intended than merely regulating the mode and form of proceedings in such cases." Thus, in Carter v. Louisiana Purchase Exposition Co., 124 Mo. App. 530, text 538, 102 S.W. Rep. 6, text 9, it is said, "The definition of a rule or order, which are synonymous terms, include commands to lower courts or court officials to do ministerial acts." In support of this proposition is cited 24 Amer. & Eng. Ency. of Law 1016, which is evidently an erroneous citation, whether the first or second edition is meant. See the definition of regulate and rule, 24 amer. & Eng. Ency. of Law (2nd Ed.) pages 243 to 246 and 1010, and it will be seen that the two words are not always [\*\*\*34] synonymous, much necessarily depending upon the context and the sense in which the words are used. Also see the discussion [\*634] of the word regulation in 34 Cyc. 1031. We would call especial attention to Morris v. Board of Pilot Commissioners, 7 Del. chan. 136, 30 Atl. Rep. 667, text 669, wherein the following statement is made by the court: "These words 'rule' and the 'order,' when used in a statute, have a definite signification. They are different in their nature and extent. A rule, to be valid, must be general in its scope, and undiscriminating in its application; an order is specific and not limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made." Also see 7 Words & Phrases 6271 and 6272, and 4 Words & Phrases (2nd Ser.) 419, 420. As we held in City of Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. Rep. 17, "The meaning of the word 'rules' is of wide and varied significance, depending upon the context; in a legal sense it is synonymous with 'laws.'" If Section 2908 had contained the word order, or had authorized the Commissioners to impose a penalty for the violation of any order [\*\*\*35] made by them, there would be no room for construction. The Georgia statute, Acts of 1905, p. 120, generally known as the "Steed Bill," entitled "An act to further extend the powers of the Railroad Commission of this State, and to confer upon the commission the power to regulate the time and manner within which the several railroads in this State shall receive, receipt for, forward and deliver to its destination all freight of every character, which may be tendered or received by them for transportation; to provide a penalty for non-compliance with any and all reasonable rules, regulations and orders prescribed by the said commission in the execution of these powers, and for other purposes," expressly authorized the Railroad Commissioners "to provide a penalty for non-compliance with any and all reasonable rules, regulations and orders prescribed by the said Commision." [\*635] See Pennington v. Douglas, A. & G. Ry. Co., 3 Ga. App. 665, 60 S.E. Rep. 485, which we cited with approval in State v. Atlantic Coast Line R. Co., 56 fla. 617, text 651, 47 South. Rep. 969, 32 L.R.A. (N.S.) 639. Under the reasoning in the cited authorities, especially State v. Atlantic Coast Line R. Co., [\*\*\*36] supra, and Morris v. Board of Pilot Commissioners, we are constrained to hold that the fourth and eighth grounds of the demurrer are well founded and that HN16the Railroad Commissioners were not empowered or authorized to impose a penalty upon the three railroads for failure to comply with the order for the erection of a union depot.

#### Specific to war powers – consulting requirements in the WPR don’t “restrict”

PATRICK D. ROBBINS - FALL, 1988, American University, Washington College of Law JD candidate, COMMENT: THE WAR POWERS RESOLUTION AFTER FIFTEEN YEARS: A REASSESSMENT., The American University, 38 Am. U.L. Rev. 141,

The War Powers Resolution states that its purpose is to fulfill the congressional conception of the Framers' intent, n85 and to ensure that Congress plays a substantive role in the use of United States armed forces abroad. n86 The statute requires that the President consult with Congress "in every possible instance," before placing troops into hostile or potentially hostile situations, and at regular [\*156] intervals thereafter. n87 It prescribes the circumstances under which the President must submit a detailed n88 report describing the situation. n89 The Resolution provides that where the President introduces armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," n90 section 5(b) of the Resolution activates a sixty-day clock, at the end of which the President must withdraw the troops. n91 The Resolution further states that the armed forces may remain deployed pursuant only to a declaration of war, or legislation specifically authorizing their use, or when an attack upon the United States prevents Congress from meeting. n92 To avoid a presidential veto of congressional decisions to force a withdrawal prior to the end of sixty days, section 5(c) provides that a concurrent resolution n93 by both Houses of Congress may mandate a withdrawal at any time. n94 Sections 6 and 7 of the Resolution set out certain procedures whereby the House and Senate can consider, on an accelerated basis, legislation authorizing continued military action. n95 Section 8 estalishes [\*157] the construction, intent and effect Congress intended for the Resolution's provisions. n96 Most notably, in section 8 the Resolution claims to have left the constitutional balance of power and the war powers untouched, neither augmenting nor diminishing the President's authority. n97

FOOTNOTE 97: n97. See id. § 1547(d). Section 8(d) states:

Nothing in this joint resolution --

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

Id.

Despite this provision, some members of Congress viewed the War Powers Resolution as an expansion of presidential power. Indeed, the statute places no restriction whatsoever on the President's use of force for sixty days. One Representative argued that the Resolution "does not prevent the commencement of an illegal war, but allows one to continue for from 60 to 90 days." 119 CONG. REC. 33872 (1973) (statement of Rep. Holtzman); see id. at 33556 (statement of Sen. Eagleton) (arguing that sixty day provision gave President "blank check" to wage brief wars).

### 3

#### Obama’s Syria maneuver has maximized presidential war powers because it’s on his terms

Posner 9/3, Law Prof at University of Chicago

(Eric, Obama Is Only Making His War Powers Mightier, www.slate.com/articles/news\_and\_politics/view\_from\_chicago/2013/09/obama\_going\_to\_congress\_on\_syria\_he\_s\_actually\_strengthening\_the\_war\_powers.html)

President Obama’s surprise announcement that he will ask Congress for approval of a military attack on Syria is being hailed as a vindication of the rule of law and a revival of the central role of Congress in war-making, even by critics. But all of this is wrong. Far from breaking new legal ground, President Obama has reaffirmed the primacy of the executive in matters of war and peace. The war powers of the presidency remain as mighty as ever. It would have been different if the president had announced that only Congress can authorize the use of military force, as dictated by the Constitution, which gives Congress alone the power to declare war. That would have been worthy of notice, a reversal of the ascendance of executive power over Congress. But the president said no such thing. He said: “I believe I have the authority to carry out this military action without specific congressional authorization.” Secretary of State John Kerry confirmed that the president “has the right to do that”—launch a military strike—“no matter what Congress does.” Thus, the president believes that the law gives him the option to seek a congressional yes or to act on his own. He does not believe that he is bound to do the first. He has merely stated the law as countless other presidents and their lawyers have described it before him. The president’s announcement should be understood as a political move, not a legal one. His motive is both self-serving and easy to understand, and it has been all but acknowledged by the administration. If Congress now approves the war, it must share blame with the president if what happens next in Syria goes badly. If Congress rejects the war, it must share blame with the president if Bashar al-Assad gases more Syrian children. The big problem for Obama arises if Congress says no and he decides he must go ahead anyway, and then the war goes badly. He won’t have broken the law as he understands it, but he will look bad. He would be the first president ever to ask Congress for the power to make war and then to go to war after Congress said no. (In the past, presidents who expected dissent did not ask Congress for permission.) People who celebrate the president for humbly begging Congress for approval also apparently don’t realize that his understanding of the law—that it gives him the option to go to Congress—maximizes executive power vis-à-vis Congress. If the president were required to act alone, without Congress, then he would have to take the blame for failing to use force when he should and using force when he shouldn’t. If he were required to obtain congressional authorization, then Congress would be able to block him. But if he can have it either way, he can force Congress to share responsibility when he wants to and avoid it when he knows that it will stand in his way.

#### **Statutory restriction of Presidential War Powers makes warfighting impossible**

Yoo 12 – prof of law @ UC Berkeley

(John, War Powers Belong to the President, ABA Journal February 2012 Issue, http://www.abajournal.com/magazine/article/war\_powers\_belong\_to\_the\_president) <we do not endorse the ableist language used in this card, but have left it in to preserve the author’s intent. we apologize for the author’s inappropriate use of the word “paralyze”>

The framers realized the obvious. Foreign affairs are unpredictable and involve the highest of stakes, making them unsuitable to regulation by pre-existing legislation. Instead, they can demand swift, decisive action—sometimes under pressured or even emergency circumstances—that is best carried out by a branch of government that does not suffer from multiple vetoes or is delayed by disagreements. Congress is too large and unwieldy to take the swift and decisive action required in wartime. Our framers replaced the Articles of Confederation, which had failed in the management of foreign relations because they had no single executive, with the Constitution’s single president for precisely this reason. Even when it has access to the same intelligence as the executive branch, Congress’ loose, decentralized structure would paralyze American policy while foreign threats grow. Congress has no political incentive to mount and see through its own wartime policy. Members of Congress, who are interested in keeping their seats at the next election, do not want to take stands on controversial issues where the future is uncertain. They will avoid like the plague any vote that will anger large segments of the electorate. They prefer that the president take the political risks and be held accountable for failure. Congress’ track record when it has opposed presidential leadership has not been a happy one. Perhaps the most telling example was the Senate’s rejection of the Treaty of Versailles at the end of World War I. Congress’ isolationist urge kept the United States out of Europe at a time when democracies fell and fascism grew in their place. Even as Europe and Asia plunged into war, Congress passed the Neutrality Acts designed to keep the United States out of the conflict. President Franklin Roosevelt violated those laws to help the Allies and draw the nation into war against the Axis. While pro-Congress critics worry about a president’s foreign adventurism, the real threat to our national security may come from inaction and isolationism. Many point to the Vietnam War as an example of the faults of the “imperial presidency.” Vietnam, however, could not have continued without the consistent support of Congress in raising a large military and paying for hostilities. And Vietnam ushered in a period of congressional dominance that witnessed American setbacks in the Cold War and the passage of the ineffectual War Powers Resolution. Congress passed the resolution in 1973 over President Richard Nixon’s veto, and no president, Republican or Democrat, George W. Bush or Obama, has ever accepted the constitutionality of its 60-day limit on the use of troops abroad. No federal court has ever upheld the resolution. Even Congress has never enforced it. Despite the record of practice and the Constitution’s institutional design, critics nevertheless argue for a radical remaking of the American way of war. They typically base their claim on Article I, Section 8, of the Constitution, which gives Congress the power to “declare war.” But these observers read the 18th century constitutional text through a modern lens by interpreting “declare war” to mean “start war.” When the Constitution was written, however, a declaration of war served diplomatic notice about a change in legal relations between nations. It had little to do with launching hostilities. In the century before the Constitution, for example, Great Britain—where the framers got the idea of the declare-war power—fought numerous major conflicts but declared war only once beforehand. Our Constitution sets out specific procedures for passing laws, appointing officers and making treaties. There are none for waging war because the framers expected the president and Congress to struggle over war through the national political process. In fact, other parts of the Constitution, properly read, support this reading. Article I, Section 10, for example, declares that the states shall not “engage” in war “without the consent of Congress” unless “actually invaded, or in such imminent danger as will not admit of delay.” This provision creates exactly the limits desired by anti-war critics, complete with an exception for self-defense. If the framers had wanted to require congressional permission before the president could wage war, they simply could have repeated this provision and applied it to the executive. Presidents, of course, do not have complete freedom to take the nation to war. Congress has ample powers to control presidential policy, if it wants to. Only Congress can raise the military, which gives it the power to block, delay or modify war plans. Before 1945, for example, the United States had such a small peacetime military that presidents who started a war would have to go hat in hand to Congress to build an army to fight it. Since World War II, it has been Congress that has authorized and funded our large standing military, one primarily designed to conduct offensive, not defensive, operations (as we learned all too tragically on 9/11) and to swiftly project power worldwide. If Congress wanted to discourage presidential initiative in war, it could build a smaller, less offensive-minded military. Congress’ check on the presidency lies not just in the long-term raising of the military. It can also block any immediate armed conflict through the power of the purse. If Congress feels it has been misled in authorizing war, or it disagrees with the president’s decisions, all it need do is cut off funds, either all at once or gradually. It can reduce the size of the military, shrink or eliminate units, or freeze supplies. Using the power of the purse does not even require affirmative congressional action. Congress can just sit on its hands and refuse to pass a law funding the latest presidential adventure, and the war will end quickly. Even the Kosovo war, which lasted little more than two months and involved no ground troops, required special funding legislation. The framers expected Congress’ power of the purse to serve as the primary check on presidential war. During the 1788 Virginia ratifying convention, Patrick Henry attacked the Constitution for failing to limit executive militarism. James Madison responded: “The sword is in the hands of the British king; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist.” Congress ended America’s involvement in Vietnam by cutting off all funds for the war. Our Constitution has succeeded because it favors swift presidential action in war, later checked by Congress’ funding power. If a president continues to wage war without congressional authorization, as in Libya, Kosovo or Korea, it is only because Congress has chosen not to exercise its easy check. We should not confuse a desire to escape political responsibility for a defect in the Constitution. A radical change in the system for making war might appease critics of presidential power. But it could also seriously threaten American national security. In order to forestall another 9/11 attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility. It is not hard to think of situations where congressional consent cannot be obtained in time to act. Time for congressional deliberation, which leads only to passivity and isolation and not smarter decisions, will come at the price of speed and secrecy. The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security. Presidents can take the initiative and Congress can use its funding power to check them. Instead of demanding a legalistic process to begin war, the framers left war to politics. As we confront the new challenges of terrorism, rogue nations and WMD proliferation, now is not the time to introduce sweeping, untested changes in the way we make war.

#### The plan spills over to broader Congressional decisionmaking

Paul 2008 - Senior Social Scientist; Professor, Pardee RAND Graduate School Pittsburgh Office Education Ph.D., M.A., and B.A. in sociology, University of California, Los Angeles (September, Christopher, “US Presidential War Powers: Legacy Chains in Military Intervention Decisionmaking\* ,” Journal of Peace Research, Vol. 45, No. 5 (Sep., 2008), pp. 665-679)

Legacy Chains

Finegold & Skocpol (1995: 222) describe policy legacies: Past and present policies are connected in at least three different ways. First, past policies give rise to analogies that affect how public officials think about contemporary policy issues. Second, past policies suggest lessons that help us to understand the processes by which contemporary policies are formulated and implemented and by which the conse quences of contemporary policies will be determined. Third, past policies impose limi tations that reduce the range of policy choices available as responses to contemporary problems. All three of the ways in which they connect past policy to present policy can be viewed as changes in the institutional context in which policy is made. These legacies are institutionalized in two different ways: first, through changes in formal rules or procedures, and second, in the 'taken for granteds', 'schemas', and accepted wisdom of policy makers and ordinary citizens alike (Sewell, 1992: 1-29). While a policy or event can leave multiple legacies, it often leaves a single major legacy. For example, the War Powers Resolution for mally changed the relationship between the president and the congress with regard to war-making and the deployment of troops. Subsequent military interventions were influenced by this change and have, in turn, left their own legacy (legal scholars might call it precedent) as a link in that chain. Legacy chains can be modified, trans formed, or reinforced as they step through each 'link' in the chain. As another example, US involvement in Vietnam left a legacy in the sphere of press/military relations which affected the intervention in Grenada in 1983 (the press was completely excluded for the first 48 hours of the operation). The press legacy chain begun in Vietnam also affected the Panama invasion of 1989 (a press pool was activated, in country, but excluded from the action), but the legacy had been trans formed slightly by the Grenada invasion (the press pool system itself grew out of complaint regarding press exclusion in Grenada) (Paul & Kim, 2004). Because of the different ways in which policy legacies are institutionalized, some legacies have unintended institutional conse quences. The War Powers Resolution was intended to curtail presidential war-making powers and return some authority to the con gress. In practice, the joint resolution failed to force presidents to include congressional participation in their intervention decision making, but it had the unintended conse quence of forcing them to change the way they planned interventions to comply with the letter of the law (see the extended ex ample presented later in the article).1

#### Executive control of warmaking is key to avoiding nuclear war and terrorism

Li 2009 - J.D. candidate, Georgetown University Law Center, 2009; B.A., political science and history, Yale University (Zheyao, “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 modern 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.

### 4

#### The Executive branch of the United States federal government should issue an executive order to make the covert action regime the presumptive framework for offensive cyber operations. The executive branch should be held accountable and share information with legislators.

#### The counterplan solves the case, ensure presidential flexibility and avoids politics

Brecher, 12 --- J.D. Candidate, May 2013, University of Michigan Law School (December, Aaron P., Michigan Law Review, “Cyberattacks and the Covert Action Statute: Toward a Domestic Legal Framework for Offensive Cyberoperations,” 111 Mich. L. Rev. 423))

III. Enacting the Covert Action Regime as Presumptive via Executive Order

Cyberattacks present a challenge for U.S. policymakers: they are difficult to locate within a clear legal category and there is a significant risk of uncontrollable consequences associated with their use. As a result, policymakers must choose a paradigm to govern their use that will ensure that the executive branch is held accountable and shares information with legislators.

This Part argues that the federal government should adopt the presumption that cyberattacks will be carried out under the covert action statute, and that the best way forward is for the president to issue an executive order making the covert action regime the presumptive framework for cyberattacks. It includes a brief discussion of why a president might willingly constrain her discretion by issuing the proposed executive order. It also shows that while the internal executive processes associated with both military and intelligence legal frameworks help mitigate the risk of cyberattacks' misuse by the executive, only the covert action regime provides an adequate role for Congress. Finally, this Part argues that the executive order option is preferable to one alternative proposed by scholars - enacting legislation - because of the practical difficulties of passing new legislation.

The covert action regime is the best approach for committing cyberattacks under the current law, as it would facilitate cooperation among executive agencies. The debate over which agency and set of legal authorities govern cyberattacks has caused no small amount of confusion. n145 Apparently, an Office of Legal Counsel ("OLC") memorandum declined to decide which legal regime should govern the use of cyberattacks, and the uncertainty has led to interagency squabbles, as well as confusion over how cyberattacks are to be regulated. n146 Establishing a presumptive answer would go far toward resolving this dispute.

Most importantly, adopting the covert action framework as the presumptive legal regime would be a principled way to help ensure constitutional legitimacy when the president orders a cyberattack. n147 There is also reason to believe that presidential power is intimately bound up in credibility, which in turn is largely dependent on the perception of presidential compliance with applicable domestic law. n148 A practice of complying with the covert action [\*448] regime for cyberattacks, both when they do not constitute a use of force and when it is unclear whether they do, is most likely to be in compliance with the law. Compliance with the covert action regime would also encourage covert action procedures in close cases without unduly restricting the executive's choice to use military authorities in appropriate circumstances.

## Case

### Solvency

#### Executive will circumvent the plan --- has institutional incentives and public support to expand its powers

Barron & Lederman, 8 --- \*Professor of Law at Harvard, AND \*\* Visiting Professor of Law at Georgetown

(February 2008, David J. Barron and Martin S. Lederman, Harvard Law Review, “THE COMMANDER IN CHIEF AT THE LOWEST EBB -- A CONSTITUTIONAL HISTORY,” 121 Harv. L. Rev. 941)

VII. Conclusion

Powers once claimed by the Executive are not easily relinquished. One sees from our narrative how, in a very real sense, the constitutional law of presidential power is often made through accretion. A current administration eagerly seizes upon the loose claims of its predecessors, and applies them in ways perhaps never intended or at least not foreseen or contemplated at the time they were first uttered. The unreflective notion that the "conduct of campaigns" is for the President alone to determine has slowly insinuated itself into the consciousness of the political departments (and, at times, into public debate), and has gradually been invoked in order to question all manner [\*1112] of regulations, from requirements to purchase airplanes, to limitations on deployments in advance of the outbreak of hostilities, to criminal prohibitions against the use of torture and cruel treatment. In this regard, the claims of the current Administration represent as clear an example of living constitutionalism in practice as one is likely to encounter. There is a radical disjuncture between the approach to constitutional war powers the current President has asserted and the one that prevailed at the moment of ratification and for much of our history that followed.

But that dramatic deviation did not come from nowhere. Rarely does our constitutional framework admit of such sudden creations. Instead, the new claims have drawn upon those elements in prior presidential practice most favorable to them. That does not mean our constitutional tradition is foreordained to develop so as to embrace unchecked executive authority over the conduct of military campaigns. At the same time, it would be wrong to assume, as some have suggested, that the emergence of such claims will be necessarily self-defeating, inevitably inspiring a popular and legislative reaction that will leave the presidency especially weakened. In light of the unique public fears that terrorism engenders, the more substantial concern is an opposite one. It is entirely possible that the emergence of these claims of preclusive power will subtly but increasingly influence future Executives to eschew the harder work of accepting legislative constraints as legitimate and actively working to make them tolerable by building public support for modifications. The temptation to argue that the President has an obligation to protect the prerogatives of the office asserted by his or her predecessors will be great. Congress's capacity to effectively check such defiance will be comparatively weak. After all, the President can veto any effort to legislatively respond to defiant actions, and impeachment is neither an easy nor an attractive remedy.

The prior practice we describe, therefore, could over time become a faint memory, recalled only for the proposition that it is anachronistic, unsuited for what are thought to be the unique perils of the contemporary world. Were this to happen it would represent an unfortunate development in the constitutional law of war powers. Thus, it is incumbent upon legislators to challenge efforts to bring about such a change. Moreover, executive branch actors, particularly those attorneys helping to assure that the President takes care the law is faithfully executed, should not abandon two hundred years of historical practice too hastily. At the very least, they should resist the urge to continue to press the new and troubling claim that the President is entitled to unfettered discretion in the conduct of war.

#### The president can draw from many areas to circumvent OCO restrictions

Chesney 11

Robert, Charles I. Francis Professor in Law at the University of Texas School of Law, Non-resident Senior Fellow of the Brookings Institution, “Offensive Cyberspace Operations, the NDAA, and the Title 10-Title 50 Debate,” Dec 14, <http://www.lawfareblog.com/2011/12/cyberoperations/>

First, section 954 makes clear that DOD can conduct offensive cyberspace operations (OCOs) under certain conditions, defined very, very loosely as the defense of the nation, of allies, and of our “interests.” That’s not much of a limitation, of course; the reference to interests would seem to encompass just about any scenario in which one might like to be able to conduct an offensive operation. And I suppose some might look at this language and draw the conclusion that section 954 is some kind of free-standing cyber-AUMF, usable at presidential discretion. But I really do not think this is what the “affirmation” language means to signify. On the contrary, with respect to separation of war powers I think the whole section is premised on the notion that there already is some separate underlying legal foundation for the action, such as the 9/18/01 AUMF in the case of an OCO directed at an al Qaeda website or Article II national self-defense for fact patterns that might fall under that heading. Put another way, I don’t think the purpose of section 954 is to grant new authority, but rather to clarify a variety of procedural and substantive questions OCOs raise. So on to the first such issue, which concerns the decision-making process.

### Nuclear Meltdownzzz

#### Nuclear power is safe now – post-Fukushima regulations

Holt, Specialist in Energy Policy, CRS, 2012

[6/20/12, Mark, Specialist in Energy Policy at the Congressional Research Service, “Nuclear Energy Policy,” RL33558, <http://www.fas.org/sgp/crs/misc/RL33558.pdf>]

The Fukushima accident has raised particular policy questions for the United States because, unlike Chernobyl, the Fukushima reactors are similar to common U.S. designs. Although the Fukushima accident resulted from a huge tsunami that incapacitated the power plant’s emergency diesel generators, the accident dramatically illustrated the potential consequences of any natural catastrophe or other situation that could cause an extended “station blackout” – the loss of alternating current (AC) power. Safety issues related to station blackout include standards for backup batteries, which now are required to provide power for 4-8 hours, and additional measures that may be required to assure backup power. The Institute of Nuclear Power Operations (INPO) released a detailed description of the Fukushima accident in November 2011.30 Safety concerns at U.S. reactors were also raised by hydrogen explosions at four of the Fukushima reactors—resulting from a high-temperature reaction between steam and nuclear fuel cladding—and the loss of cooling at the Japanese plant’s spent fuel storage pools. Other safety issues that have been raised in the wake of Fukushima include the vulnerability of U.S. nuclear plants to earthquakes, floods, and other natural disasters, the availability of iodine pills to prevent absorption of radioactive iodine released during nuclear accidents, and the adequacy of nuclear accident emergency planning. In response to such concerns, NRC on March 23, 2011, established a task force “made up of current senior managers and former NRC experts” to “conduct both short- and long-term analysis of the lessons that can be learned from the situation in Japan.”31 The Near-Term Task Force issued its report July 12, 2011, making recommendations ranging from specific safety improvements to broad changes in NRC’s overall regulatory approach.32 NRC staff subsequently identified several of those actions that “can and should be initiated without delay.”33 The NRC Commissioners largely agreed with the recommendations on October 18, 2011, and instructed the agency’s staff to “strive to complete and implement the lessons learned from the Fukushima accident within five years—by 2016.”34 Tier 1 regulatory actions, which are to get underway immediately, include: • Seismic and flood hazard reevaluations and walkdowns. Nuclear plant operators will be required to evaluate the implications of updated seismic and flooding models, including all potential flooding sources. Plant operators will be required to identify and verify the adequacy of flood and seismic protection features at their sites. • Station blackout regulatory actions. NRC will issue an advance notice of proposed rulemaking (ANPR) with the goal of requiring that nuclear power plants be able to cope with the total loss of AC power (station blackout) for at least eight hours. The eight hour period is intended to give plant personnel enough time to restore AC power or, if that is not possible, to take actions to extend the plant’s ability to cope with the loss of AC power to at least 72 hours. The eight-hour coping time would rely only on permanently installed equipment, while the 72-hour coping time could rely on off-site, portable equipment. Enough equipment and personnel would be required to protect all affected reactors at a multi-unit plant. While new regulations are being prepared, NRC is to order plant operators to protect emergency equipment from damage from external events and ensure that enough equipment is available to protect all reactors at a plant site. • Reliable hardened vents for Mark I containments. NRC will order nuclear plants to install vents for the containments in Mark I reactors (the type at Fukushima). The vents would be designed to reduce containment pressure while preventing hydrogen in the containment from leaking into the reactor building, as occurred at Fukushima. • Spent fuel pool instrumentation. NRC will order nuclear plants to install safety instrumentation to monitor spent fuel pool conditions, such as water level, temperature, and radiation levels, from the plant control room. • Strengthening and integrating accident procedures and guidelines. NRC will order nuclear plants to modify emergency operating procedures to integrate severe accident management guidelines and extensive damage mitigation guidelines. The modifications would have to specify clear command-and-control strategies and establish training qualifications for emergency decisionmakers. • Emergency preparedness regulatory actions. Pending a rulemaking, NRC will order nuclear plants to ensure adequate emergency preparedness training for multi-reactor station blackouts and other emergencies. The NRC staff slightly modified its proposals for top priority actions and divided the remaining Task Force proposals into two lower tiers, which were determined to require further assessment and potentially long-term study. Included in the lower-tier actions were requirements for emergency water supply systems for spent fuel pools, secure power for emergency communications and data systems, confirmation of seismic and flooding hazards, and modifications to NRC’s regulatory process.35 On March 12, 2012, NRC issued its first nuclear plant safety requirements based on the lessons learned from Fukushima. NRC ordered U.S. nuclear plant operators to begin implementing safety enhancements related to the loss of power caused by natural disasters, reactor containment venting, and monitoring the water levels of reactor spent fuel pools. Nuclear plant operators were required to begin implementing the requirements immediately and come into full compliance no later than the end of 2016.36 NRC also issued an advance notice of proposed rulemaking for new regulatory actions on station blackout March 20, 2012.37 Legislation introduced after the Fukushima accident includes the Nuclear Power Plant Safety Act of 2011 (H.R. 1242), introduced by Representative Markey on March 29, 2011. It would require NRC to revise its regulations within 18 months to ensure that nuclear plants could handle major disruptive events, a loss of off-site power for 14 days, and the loss of diesel generators for 72 hours. Spent fuel would have to be moved from pool to dry-cask storage within a year after it had cooled sufficiently, and emergency planning would have to include multiple concurrent disasters. NRC could not issue new licenses or permits until the revised regulations were in place.

#### No way to credibly assess meltdown risk – their advantage is flawed

Makhijani, president of IEER, 2011

[7/21/11, Arjun, president of the Institute for Energy and Environmental Research, electrical and nuclear engineer with 37 years of experience, Bulletin of the Atomic Scientists round table discussion, “Is nuclear energy different than other energy sources?,” “The Fukushima tragedy demonstrates that nuclear energy doesn’t make sense,” http://www.thebulletin.org/web-edition/roundtables/nuclear-energy-different-other-energy-sources]

Meltdown rates and bureaucracy. Those who promote nuclear power have hidden behind two related assumptions: first, that severe accidents will be extremely rare -- once every several hundred years if several hundred reactors are operational; and, second, that we are prescient enough to know the accident mechanisms and calculate their probabilities. The current tally: one in every 100 commercial light water power reactors, the most common design in the world (including all operating US commercial reactors), has now had a partial or full meltdown before its first 40-year license period has expired -- three at Fukushima Daiichi and one at Three Mile Island. The Fukushima meltdowns have had serious containment failures. In addition, there have been four hydrogen explosions and heating up or boiling of one or more spent fuel pools, which often have larger stores of long-lived radioactivity than the reactors. This severe accident rate -- one every five to 10 years for which a few hundred reactors have been operational -- is far greater than regulators and proponents imagine. So, we simply do not know how to reliably calculate the probabilities of such events, which remain rare in theory, but evidently not so rare in practice. And each accident sequence has been unique. There even appear to be differences among the meltdowns at the Fukushima reactors. Still, the US regulatory process moves ahead, relying on the perilous notion that these terribly dangerous events can be calculated -- though the official numbers are now in the realm of statistical fiction.

#### No impact to meltdowns

Strupczewski, Institute of Atomic Energy, 03

[1/28/03, A., Institute of Atomic Energy, Swierk, Poland, Applied Energy, “Accident risks in nuclear-power plants,” vol. 75, ScienceDirect]

\*\*\*NPP = nuclear-power plant

\*\*\*TMI = Three Mile Island

\*\*\*OECD = Organisation for Economic Co-operation and Development

1. Safety goals for nuclear power The general safety objective for nuclear-power plants (NPPs) is to protect the individual, society and the environment by establishing and maintaining in NPPs effective measures against radiological hazards. To reach this objective, safety goals for nuclear power were established from the very beginning of its development, and made more demanding as the technology matured. The initial qualitative targets were that no individual should bear a significant additional risk due to nuclear-power plant operation and the societal risks from power-plant operation should not be a significant addition to other societal risks [1]. They were followed by quantitative requirements, which according to US rules set the design targets so that the calculated plant core-damage frequency (CDF) should be less than 10-4 events per reactor year (R–Y) [2], and the calculated large release frequency (LRF) less than 10-6/R–Y for sequences resulting in a greater than 0.25 Sv whole-body dose over 24 h at one-half mile from the reactor. These requirements for NPP design corresponded to the cancer risk to the people in the critical population group equal to 10-10/R–Y [3]. Presently the safety objectives developed by the US and European utilities for the new generation of NPPs include a maximum permissible CDF equal to 10-5/R–Y [4]. It must also be demonstrated that early containment failure is avoided for all risk-significant scenarios. The cumulative LRF must be less than 10-6/R–Y. In parallel with the development of these targets, the nuclear industry and regulators in the countries leading in nuclear safety have developed the contemporary nuclear safety philosophy, which resulted in reducing risks in NPPs far below those risks typical for other power-industry branches. It places the principle ‘safety first’ as its cornerstone and includes several principles that are today the basis of NPP design and operation in all western countries. 2. Nuclear-power plant safety indicators The progress in the safety level of NPPs is reflected in the probabilistic safety analyses (PSAs), initiated in the US in 1975 by the Rasmussen Study and systematically developed to become standard tools used for safety analysis of every NPP. The importance of PSA in the evaluation of NPP safety is due to the fact that there has been only one severe core damage accident in water-moderated reactors, namely the Three Mile Island accident in the USA in 1978, so there are no historical statistical data as for coal-mine accidents, oil-transport accidents, gas explosions or dam breaks. Minor incidents that do happen in NPPs, although they are eagerly publicized by the media, usually are far below the level at which any hazard to the plant or the public would be involved. Moreover, in view of fast improvements of NPP technology, the analysis of the safety of the plants to be built cannot be based on historical experience with the plants put into operation 20 or even 10 years ago, but must reflect the actual safety features of the upgraded new designs. PSA makes it possible to study the new design features and evaluate which of the safety improvements will bring the required safety upgrading. The main condition for preventing massive releases of radioactivity is to maintain the reactor containment integrity, first of all in the early stage of the accident, then in the later stages when the releases of radioactivity would be less but still significant. In the middle of the 1990s, several mechanisms were considered as possible contributors to an early containment failure. Over the last decade, the intensive research and development of the technical means of coping with severe accidents have resulted in our being able to treat these issues as resolved. The results of several reactor-safety studies performed in Western countries show that the safety of the modern NPPs is very high. For example the German risk-study phase B [5] indicated that the frequency of core melt in Biblis B NPP was 10-4/(R– Y) and that of large radioactive releases 2.6x10-5/(R–Y). After taking into account operator actions preventing the reactor’s pressure-vessel melt-through under high pressure, the frequency of the core melt frequency was reduced to 2.6x10-6/(R–Y). Subsequent analyses performed for KONVOI plants [6] gave similar results, with absolute numbers lower due to improvements in the KONVOI type plants as compared to the Biblis B. Core-damage frequency without bleed and feed in KONVOI plants was 1.4x10-6/R–Y, and after considering the effects of operator actions in those plants, the CDF was reduced to 3.5x10-7/R–Y. These results can be considered as typical for modern PWRs. The project for the European Pressurized-Water Reactor (EPR) assumes that the design will limit the maximum possible releases so that the following safety objectives will be reached: 1. No need for short-term (about 24 h) off-site countermeasures 2. No need for population evacuation beyond 2–3 km 3. For long-term countermeasures, limited restriction of the consumption of agricultural products for a limited period (about 1 year) in a limited area is acceptable [7]. This is the level of safety of NPPs expected as a reference base in the future. Specific designs, which have been already licensed for construction, include reactors with passive safety-features AP 600 or Advanced BWR [8], for which the CDF is below 2x10-7/R–Y. The releases of radioactivity are at least ten times smaller and the health risks are negligible. 3. Radiological effects of nuclear-power plant accidents The level of safety of modern NPPs is surprisingly far from the mass-media picture of consequences of a nuclear accident. Actually, the only accidents with radioactive releases in NPPs were those in TMI and in Chernobyl. In TMI there was a reactor-core melt, but the integrity of the remaining barriers (reactor pressure vessel and containment) was maintained and the releases were so limited that the average effective dose to the public was 0.015 mSv [9]. The corresponding cancer risk was below 10-6 per lifetime, less than the risk due to NORMAL yearly emissions from a coal-fired power plant at that time [10], and no health effects have ever been identified. In Chernobyl, the quantities of released fission products were significant, from 100% of noble gases down to about 4% of solid fission-products. The doses in the early phase after the accident were high. In the rescue team, 28 men died in consequence of exposure to radiation and several more of those who were treated for radiation sickness died from illnesses that may have been associated with their exposure. However, as confirmed in the UNSCEAR report of 2000, there has been no statistically significant increase in the incidence of leukaemia or any other form of cancer among workers or the public (except for child thyroid cancer), nor of deformities of babies born to members of the public [11]. An increase in the incidence of occult thyroid cancer was predicted to occur after 10 years, but actually it was found already in the first year after the accident [11]. This shows that the screening effect can be largely responsible for this observed increase. Generally the occult thyroid cancer is not fatal and can be successfully treated. Although some 2000 cases of thyroid cancer are attributed to the accident, less than 10 fatal cases have been observed. Much greater damage to health has been caused by well meaning but misguided attempts to protect and help people living near Chernobyl at the time of the accident. The evacuation of hundreds of thousands of them is now seen as an over reaction, which in many cases did more harm than good. The first reaction was to move people out. Only later, was it realized that many of them had not needed to be moved. The relocation of people destroyed communities, broke up families, and led to unemployment, depression, hypochondria and stress-related illnesses. Among the relocated populations, there has been a massive increase in stress-related illnesses, such as heart disease and obesity, unrelated to radiation. A major factor causing distress has been uncertainty about risks and in particular belief that all radiation doses can lead to cancer, as stated in the Linear No Threshold hypothesis presently used for the purpose of radiological protection. The recent report of UNPD and UNICEF [12] confirms the above statements and acknowledges that the people living in the contaminated areas receive low doses of radiation, being less than those occurring naturally in many other parts of the world. This is illustrated in Fig. 1 taken from [13] comparing lifetime doses to people around Chernobyl with the doses in European countries including Finland and Sweden, in which the population enjoys very good health and low cancer rates in spite of the high radiation background. According to Russian sources, medical monitoring of the clean-up staff has shown no increase of cancer rate and no relationship between the dose and the mortality. The overall mortality rate among the clean-up staff was statistically lower than the mortality rate of the control group from the public [14]. The UNSCEAR report also confirms that no radiation illnesses (with the exception of child thyroid diseases) have been found in the exposed population [11]. Thus, although it should be acknowledged that the effects of the Chernobyl accident are important, it should be also stressed that most of them are due to excessive fear motivated and politically expedient decisions, not to the radiation doses themselves. The NPPs planned to be built are completely different from RBMKs. The negative temperature reactivity coefficient ensures that, in accident conditions, their power will decrease, not increase as in Chernobyl, the containment (which did not exist in Chernobyl) would remain intact even after severe accidents and the accidentmanagement procedures and safety-upgrading measures implemented in the NPPs would prevent such large releases of radioactivity as was the case in Chernobyl. Thus, the radiological results of Chernobyl cannot be treated as representative of nuclear accidents in NPPs. The estimates of probable releases are made for each NPP separately within PSA studies and generally show that the hazards are much smaller than for other energy sources. 4. Comparison of nuclear-power risks with accident risks due to other energy sources The risks of electricity generation should be evaluated considering the whole cycle, from fuel mining to plant construction, to waste management and site recultivation. While in the case of the nuclear-fuel cycle, the accident risks are mostly connected with the power plant, in other fuel cycles the dominant contribution can be made by other fuel stages. For example, in the case of coal mining, the fatality ratio in the US is about 0.1 death/million tons or 3.5 death/GW(e).a [15]. In very large regions of the world, the situation can be much worse. In China, the average value for the country was about 4.6 deaths per MT in 1997 [16] and the number of mining fatalities per unit of energy produced from coal was 17 deaths/GW(e).a. In addition to that, the accident death rate in coal-fired power plants was about 2 deaths/GW(e).a [17] and in coal transport sector 8.5 deaths/GW(e).a [17]. These numbers add up to the accidental mortality in China coal power system being equal 27.5 deaths/GW(e).a. The number of fatalities due to severe accidents (involving more than 5 fatalities each) for the coal chain in OECD countries is 0.13 per GW(e) [19]. In non-OECD Fig countries, it is much higher. The everyday occupational hazards for the coal chain will be taken as 1.27 fatalities/GW(e).a according to [18], that is for European countries. It is seen, that the small accidents involve more fatalities than the large ones, so both numbers must be taken into account. The differences of the safety of hydropower in OECD and non-OECD countries are most pronounced. While the fatality ratio for OECD countries is only 0.004, it is 2.187 for non-OECD countries [15]. The data on dam safety show that differences in technology and safety practices influence very much the risk of power generation from a given facility. These differences are taken into account while discussing risks of the conventional power industry and nobody discussing the safety of a dam to be erected in the twenty-first century would base its safety indicators on accidents of dams built in say 1920. In a recent ExternE report on hydropower, the authors do not include any risk due to damfailures in the overall health risks due to hydropower [18], because they maintain that the dams built in Norway provide ‘‘negligibly small risk’’. Similarly, the progress in coal-mining safety is taken into account while estimating the number of fatalities per GW(e).a. Of course this is a correct approach. However, if we take into account the progress in dam construction before and after 1930, then the differences in NPP technology existing between RBMK reactors and LWR NPPs should be also considered. Similarly, if introducing strict regulations requiring qualified engineering supervision had a strong effect on dam safety, it is evident that the whole concept of safety culture implemented in Western NPPs has also a significant influence on nuclear-reactor safety. As the differences in design between modern PWRs and the Chernobyl RBMK are much more significant that any differences in dams erected in Norway versus those built in the USA, Italy, France etc., then following the logic accepted by EC ExternE study, the hazards due to Chernobyl should not be considered as the basis for evaluating the safety of future NPPs.

#### Developing countries, lax regulation, and profit maximization means warming is inevitable

Porter 2013 - writes the Economic Scene column for the Wednesday Business section (March 19, Eduardo, “A Model for Reducing Emissions” <http://www.nytimes.com/2013/03/20/business/us-example-offers-hope-for-cutting-carbon-emissions.html?_r=1&>)

Even if every American coal-fired power plant were to close, that would not make up for the coal-based generators being built in developing countries like India and China. “Since 2000, the growth in coal has been 10 times that of renewables,” said Daniel Yergin, chairman of IHS Cambridge Energy Research Associates.¶ Fatih Birol, chief economist of the International Energy Agency in Paris, points out that if civilization is to avoid catastrophic climate change, only about one third of the 3,000 gigatons of CO2 contained in the world’s known reserves of oil, gas and coal can be released into the atmosphere.¶ But the world economy does not work as if this were the case — not governments, nor businesses, nor consumers.¶ “In all my experience as an oil company manager, not a single oil company took into the picture the problem of CO2,” said Leonardo Maugeri, an energy expert at Harvard who until 2010 was head of strategy and development for Italy’s state-owned oil company, Eni. “They are all totally devoted to replacing the reserves they consume every year.”

#### No impact to warming – empirics

Willis et. al, ’10 [Kathy J. Willis, Keith D. Bennett, Shonil A. Bhagwat & H. John B. Birks (2010): 4 °C and beyond: what did this mean for biodiversity in the past?, Systematics and Biodiversity, 8:1, 3-9, <http://www.tandfonline.com/doi/pdf/10.1080/14772000903495833>, ]

The most recent climate models and fossil evidence for the early Eocene Climatic Optimum (53–51 million years ago) indicate that during this time interval atmospheric CO2 would have exceeded 1200 ppmv and tropical temperatures were between 5–10 ◦ C warmer than modern values (Zachos et al., 2008). There is also evidence for relatively rapid intervals of extreme global warmth and massive carbon addition when global temperatures increased by 5 ◦ C in less than 10 000 years (Zachos et al., 2001). So what was the response of biota to these ‘climate extremes’ and do we see the large-scale extinctions (especially in the Neotropics) predicted by some of the most recent models associated with future climate changes (Huntingford et al., 2008)? In fact the fossil record for the early Eocene Climatic Optimum demonstrates the very opposite. All the evidence from low-latitude records indicates that, at least in the plant fossil record, this was one of the most biodiverse intervals of time in the Neotropics (Jaramillo et al., 2006). It was also a time when the tropical forest biome was the most extensive in Earth’s history, extending to mid-latitudes in both the northern and southern hemispheres – and there was also no ice at the Poles and Antarctica was covered by needle-leaved forest (Morley, 2007). There were certainly novel ecosystems, and an increase in community turnover with a mixture of tropical and temperate species in mid latitudes and plants persisting in areas that are currently polar deserts. [It should be noted; however, that at the earlier Palaeocene–Eocene Thermal Maximum (PETM) at 55.8 million years ago in the US Gulf Coast, there was a rapid vegetation response to climate change. There was major compositional turnover, palynological richness decreased, and regional extinctions occurred (Harrington & Jaramillo, 2007). Reasons for these changes are unclear, but they may have resulted from continental drying, negative feedbacks on vegetation to changing CO2 (assuming that CO2 changed during the PETM), rapid cooling immediately after the PETM, or subtle changes in plant–animal interactions (Harrington & Jaramillo, 2007).]

#### Growing emissions in developing countries make CO2 reduction impossible – modeling is irrelevant

Koetzle, 08 – Ph.D. and Senior Vice President of Public Policy at the Institute for Energy Research (William, “IER Rebuttal to Boucher White Paper”, 4/13/2008, http://www.instituteforenergyresearch.org/2008/04/13/ier-rebuttal-to-boucher-white-paper/)

For example, if the United States were to unilaterally reduced emissions by 30% or 40% below 2004 levels[8] by 2030; net global CO2 emissions would still increase by more than 40%. The reason is straightforward: either of these reduction levels is offset by the increases in CO2 emissions in developing countries. For example, a 30% cut below 2004 levels by 2030 by the United States offsets less than 60% of China’s increase in emissions during the same period. In fact, even if the United States were to eliminate all CO2 emissions by 2030, without any corresponding actions by other countries, world-wide emissions would still increase by 30%. If the United States were joined by the other OECD countries in a CO2 reduction effort, net emissions would still significantly increase. In the event of an OCED-wide reduction of 30%, global emissions increase by 33%; a reduction of 40% still leads to a net increase of just under 30%. Simply put, in order to hold CO2 emissions at 2004 levels, absent any reductions by developing nations like China and India, all OECD emissions would have to cease.[9] The lack of participation by all significant sources of GHGs not only means it is unlikely that net reductions will occur; it also means that the cost of meaningful reductions is increased dramatically. Nordhous (2007) for example, argues that for the “importance of near-universal participation to reduce greenhouse gases.”[10] His analysis shows that GHG emission reduction plans that include, for example, 50% of world-wide emissions impose additional costs of 250 percent. Thus, he find’s GHG abatement plans like Kyoto (which does not include significant emitters like the United States, China, and India) to be “seriously flawed” and “likely to be ineffective.” [11] Even if the United States had participated, he argues that Kyoto would make “but a small contribution to slowing global warming, and it would continue to be highly inefficient.”[12]The data on emissions and economic analysis of reduction programs make it clear that GHG emissions are a global issue. Actions by localities, sectors, states, regions or even nations are unlikely to effectively reduce net global emissions unless these reductions are to a large extent mirrored by all significant emitting nations.

### Nanotech

#### Commercialization strong- new innovation and government funding guarantee growth for decades

LOUIS J. ROSS- CEO of Virtus Advanced Sensors, dir of the Global Emerging Technology Institute- JUNE 2010, Nanotech Commercialization in the United States, IEEE Nanotechnology Magazine, http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=05472872

The growth and adoption of nanotechnology- enabled products will continue for the next several decades, as the list of companies attempting to commercialize it grows. Over the past decade, the technology’s commercial potential has become more clear, and a never-ending stream of new uses continue to be identified, with its concentration primarily in three areas. The first includes the use of its low-grade form (nanotubes) for additives to enhance materials used for making a broad variety of items such as tennis racquets, fabrics, and cosmetics. The second includes health care and life-science applications in pharma, biomedical implants, diagnostics and imaging, and drug discovery. Third, in the area of electronics, including the semiconductor, memory, flat-panel display, and cell phone industries. The first wave of products developed over the past few years has been mostly those related to personal care, cosmetics, household care, packaging, leisure wear, and various types of sports equipment. But the promise of much more advanced uses continue to fascinate the research community and the private sector. For example, it is expected that a variety of life-science products— from drug-delivery systems to new biochemical compounds are giving rise to new applications. Even the packaging of these products are expected to be a considerable market for nanotech. The total market for nano-enabled packaging was US$3.8 billion in 2009, growing at a 16.5% compound annual growth rate through 2014 to US$8.1 billion (Innovative Research and Products Inc.) In energy, there are new efforts under the clean technology movement to enlist nanotech as a primary enabler. Developing and commercializing nanoprojects that focus on alternative domestic energy sources include unprecendented alliances. For example, members of the defense, clean energy, and environmental sectors identified nanotech as a common cause to support and champion. The relationship between clean energy and national security is evident. The sustainment of these efforts will hopefully be much more effective than stalled efforts initiated in the 1970s during the oil shock period. Already, major semiconductor foundries are slowly adopting microelectromechanical systems (MEMS) technology as a first step, with some companies like Italian chip maker ST Micro completely reengineering their business plans to diversify their operations. The company expertly timed a major investment in MEMS R&D meant to develop foundry capabilities to produce devices meant for the consumer electronics industry, including MEMS-based inertial sensors, several years before amajor market adoption of the technology, leading the company to earn more than US$200 million in extra revenue a year. It is envisioned that the semiconductor industry will emerge from the current climate of restructuring and planned consolidation to increase its R&D focus and investments inmicro- and nanotechnology. Because of the broad variety of applications, the engineering field is high on nanotechnology, as it comes out near the top of the list in tech sighted with the best potential for the future, with MEMS not far behind. (Nanotechnology was ranked second, with MEMS coming in at 11th out of the 20 technologies listed. 2009 EE Times global salary and opinion survey.) It should be noted that the push toward the nanoscale was started with the government funding of MEMS (also known as Big Nano) projects through the Defense Advanced Research Project Agency (DARPA) in the 1980s. This eventually led to great commercial success stories, including the aforementioned note on ST Micro and Texas Instrument’s Digital Light Processing (DLP) technology, which is a key component in overhead projectors and the now new miniature, portable pico projectors. Expect to see the field of nanoelectromechanical systems (NEMS) (a combination of micro/MEMS and nanotechnology) soon, as it will be a key step toward developing real-complete nanotechnology devices or ‘‘systems.’’ A growing number of experts feel that promising areas such as Bio- MEMS, which utilize all of the above, is set to experience significant growth over the next decade (IEEE Nanotechnology Conference Proceedings, Xiamen, China, February 2010). Considering the recent promising commercial results in the MEMS field, after many decades of public support, and the dire need for key industries to restructure, it is plausible to think that the U.S. government will consider putting more of its debt dollars into parts of the economy that have the best potential to produce a future return, namely, innovation. What became very apparent is that breakthroughs in micro- and nanotechnology would be critical before things such as green revolutions, energy independence, and proliferation of robots could take place. The depth and breadth of industries in which nanotech may potentially become a disruptive technology is impressive, and the United States is planning to make more direct investments that, arguably for the first time since before World War II, exemplify a (somewhat) coordinated attempt on the federal level at industrial policy. U.S. INDUSTRIAL POLICY FINALLY COMES OF AGE In a new interesting development in the United States, it appears that commercial industrial policy has finally been introduced into status quo policy making. This could have a significant impact on the promise of nanotechnology, since it helps to better focus on targets in several key areas in which micro- and nanotechnology could be the critical enabler. The Obama administration is providing an initial US$400 million in government seed money to invest in the commercialization of new technology, including alternative energy and new materials. This investment is being made through the newly established Advanced Research Project Agency-Energy (ARPA-E), an offshoot of DARPA. The goal of ARPA-E is to help greatly expedite the market introduction of new technology platforms much faster than what DARPA usually focuses on. Prior to the president’s announcement and the DARPA plans, the DoE was already operating five new nanoscale science research centers to support the synthesis, processing, fabrication, and analysis of substances at a nanoscale. Over the past five years, a large percentage of papers were published on nanotechnology related to energy topics. (Nanofrontiers, no. 3, Fall 2008, Woodrow Wilson Center for International Scholars.) DARPA, its focus on defenseoriented and applicable innovation, has been charged with investing in cuttingedge technologies that are often decades from commercialization and has been quite successful. DARPA investments have led to the development of the Internet and a variety of other commercial technologies and products. Advancements in microtechnology development, including MEMS and nanotech, help to reduce the size, weight, cost, and carbon footprint of various military and aerospace electronics in land, sea, air, and space applications. For example, saving space, weight, and mass while allowing for more digital signal paths in applications ranging from unmanned aerial vehicles (UAVs) to handheld devices deployed in the military, homeland security, and for law enforcement are considered as crucial. This is a true watershed in U.S. policy, since for the first time, the federal government is conducting commercial industrial policy in the name of industrial competitiveness without the main focus being solely on defense needs. Surely, these technologies will have dual-use applications, as many have in the past that were first targeted by defense spending, including the development of the Internet itself. ARPA-E will be similar to DARPA in its organizational structure but will be more competitive and market oriented in terms of being able to compete with the existing market, with the goal of ensuring costs that can be scaled and that manufacturing is done domestically. (Government tries old strategy for creating new green technology. 4 March 2010, Washington Tribune.)

#### Already commercialized- startups have quickly emerged

Evan S. Michelson- Research Associate, Project on Emerging Nanotechnologies @ Woodrow Wilson International Center for Scholars- October 2006, Nanotechnology Policy: An Analysis of Transnational Governance Issues Facing the United States and China, http://www.law.gmu.edu/nctl/stpp/pubs/Michelson.pdf

The fact that this first wave of consumer products is already available on store shelves may be surprising, especially since only a few years ago, there were a mere handful of nanotechnology companies and virtually no nanotechnology-based products being made and marketed to consumers. However, it has been estimated that over the past few years, 1,200 nanotechnology-related start-up companies have emerged, many of which are based in the United States.38 In China, Liu and Zhang have estimated that “the number of registered companies with a nanotechnology focus reached 800 by [the] end of 2003, resulting in a total of 10 billion RMB ($1.2 billion) in registered capital.”39 Along these lines, Lux Research has estimated that more than $32 billion in products incorporating nanotechnology were sold worldwide in 2005, a number that is only expected to grow as more research is funded, more patent applications are filed, and more companies are formed.40 A search of the Nanotechnology Consumer Products Inventory can provide numerous examples of products already on the market, ranging from cosmetics and personal care items to dietary supplements and cooking supplies and from automotive and home improvement products to advanced coatings for glass surfaces and stain-resistant clothing. In many cases, these products are available for purchase in local stores or over the Internet. However, in the event of a mishap or accident, it is not clear whether product safety laws in the United States, China, or elsewhere are sufficiently robust to protect the public’s health or safety. While such a situation may sound far-fetched, there has already been the case of Magic Nano, a bath and tile treatment product sold in Germany that was recalled after causing significant health problems, with over 100 people affected with respiratory problems and six hospitalized with pulmonary edema.41 Although the Federal Institute for Risk Assessment (BfR) in Berlin concluded that the product did not actually contain nanomaterials and that nanotechnology was not the cause of the reported health problems,42 the Magic Nano incident illuminated other concerns—such as a lack of transparency in terms of timely disclosure of information and misuse of a third-party verification seal purporting to ensure that the product was independently tested—that could affect regulatory agencies in the United States or China if a similar situation were to occur in either country.

# 2NC

## Wf

### 2NC OV

DA turns the case

#### a) Deterrence – effective warfighting is necessary for deterrence – restrictions wreck the ability to respond rapidly in time of crises which is THE THESIS OF WHY THEY SAY THE AFF DETERS FUTURE CYBERATTACKS

#### Maintaining agility is critical

Berkowitz, 8 - research fellow at the Hoover Institution at Stanford University and a senior analyst at RAND. He is currently a consultant to the Defense Department and the intelligence community (Bruce, STRATEGIC ADVANTAGE: CHALLENGERS, COMPETITORS, AND THREATS TO AMERICA’S FUTURE, p. 1-4)

THIS BOOK is intended to help readers better understand the national security issues facing the United States today and offer the general outline of a strategy for dealing with them. National security policy—both making it and debating it — is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice. Yesterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers. Threats are also more likely to be intertwined—proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers. Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat — the Soviet Union — was brittle, most of the potential adversaries and challengers America now faces are resilient. In at least one dimension where the Soviets were weak (economic efficiency, public morale, or leadership), the new threats are strong. They are going to be with us for a long time. As a result, we need to reconsider how we think about national security. The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events.1 When you hold the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not. As national goals go, “keeping the strategic advantage” may not have the idealistic ring of “making the world safe for democracy” and does not sound as decisively macho as “maintaining American hegemony.” But keeping the strategic advantage is critical, because it is essential for just about everything else America hopes to achieve — promoting freedom, protecting the homeland, defending its values, preserving peace, and so on. The Changing Threat If one needs proof of this new, dynamic environment, consider the recent record. A search of the media during the past fifteen years suggests that there were at least a dozen or so events that were considered at one time or another the most pressing national security problem facing the United States — and thus the organizing concept for U.S. national security. What is most interesting is how varied and different the issues were, and how many different sets of players they involved — and how each was replaced in turn by a different issue and a cast of characters that seemed, at least for the moment, even more pressing. They included, roughly in chronological order, • regional conflicts — like Desert Storm — involving the threat of war between conventional armies; • stabilizing “failed states” like Somalia, where government broke down in toto; • staying economically competitive with Japan; • integrating Russia into the international community after the fall of communism and controlling the nuclear weapons it inherited from the Soviet Union; • dealing with “rogue states,” unruly nations like North Korea that engage in trafficking and proliferation as a matter of national policy; • combating international crime, like the scandal involving the Bank of Credit and Commerce International, or imports of illegal drugs; • strengthening international institutions for trade as countries in Asia, Eastern Europe, and Latin America adopted market economies; • responding to ethnic conflicts and civil wars triggered by the reemergence of culture as a political force in the “clash of civilizations”; • providing relief to millions of people affected by natural catastrophes like earthquakes, tsunamis, typhoons, droughts, and the spread of HIV/AIDS and malaria; • combating terrorism driven by sectarian or religious extremism; • grassroots activism on a global scale, ranging from the campaign to ban land mines to antiglobalization hoodlums and environmentalist crazies; • border security and illegal immigration; • the worldwide ripple effects of currency fluctuations and the collapse of confidence in complex financial securities; and • for at least one fleeting moment, the safety of toys imported from China. There is some overlap in this list, and one might want to group some of the events differently or add others. The important point, however, is that when you look at these problems and how they evolved during the past fifteen years, you do not see a single lesson or organizing principle on which to base U.S. strategy. Another way to see the dynamic nature of today's national security challenges is to consider the annual threat briefing the U.S. intelligence community has given Congress during the past decade. These briefings are essentially a snapshot of what U.S. officials worry most about. If one briefing is a snapshot, then several put together back to back provide a movie, showing how views have evolved.2 Figure 1 summarizes these assessments for every other year between 1996 and 2006. It shows when a particular threat first appeared, its rise and fall in the rankings, and in some cases how it fell off the chart completely. So, in 1995, when the public briefing first became a regular affair, the threat at the very top of the list was North Korea. This likely reflected the crisis that had occurred the preceding year, when Pyongyang seemed determined to develop nuclear weapons, Bill Clinton's administration seemed ready to use military action to prevent this, and the affair was defused by an agreement brokered by Jimmy Carter. Russia and China ranked high as threats in the early years, but by the end of the decade they sometimes did not even make the list. Proliferation has always been high in the listings, although the particular countries of greatest concern have varied. Terrorism made its first appearance in 1998, rose to first place after the September 11, 2001, terrorist attacks, and remains there today. The Balkans appeared and disappeared in the middle to late 1990s. A few of the entries today seem quaint and overstated. Catastrophic threats to information systems like an “electronic Pearl Harbor” and the “Y2K problem” entered the list in 1998 but disappeared after 2001. (Apparently, after people saw an airliner crash into a Manhattan skyscraper, the possible loss of their Quicken files seemed a lot less urgent.) Iraq first appeared in the briefing as a regional threat in 1997 and was still high on the list a decade later—though, of course, the Iraqi problem in the early years (suspected weapons of mass destruction) was very different from the later one (an insurgency and internationalized civil war). All this is why the United States needs agility. It not only must be able to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources.

**Maintaining primacy k2 economic stability – subsumes manufacturing**

**Walt, 2** - Robert and Renée Belfer Professor of International Affairs at Harvard; Faculty Chair, International Security Program (Spring 2002, Stephen M. Walt, “American Primacy: Its prospects and pitfalls,” <http://belfercenter.ksg.harvard.edu/publication/330/american_primacy.html>, CJC)

By facilitating the development of a more open and liberal world economy, American primacy also fosters global prosperity. Economic interdependence is often said to be a cause of world peace, but it is more accurate to say that peace encourages interdependence—by making it easier for states to accept the potential vulnerabilities of extensive international intercourse.10 Investors are more willing to send money abroad when the danger of war is remote, and **states worry less about being dependent on others when they are not concerned that these connections might be severed**. When states are relatively secure, they will also be less fixated on how the gains from cooperation are distributed. In particular, they are less likely to worry that extensive cooperation will benefit others more and thereby place them at a relative disadvantage over time.

#### War leads to enormous amounts of environmental degradation

Wall 03 (Allyson Migani Wall, Spring of 2003, International Politics and Environmental Science Major, The Ecological **Footprints of War, The Bard Journal of Global Affairs,** [**http://www.bad.edu**](http://www.bad.edu)**)**

In 3,000 years of recorded history, there have been less than 300 years that have been free of armed conflict. Unfortunately, “for centuries, war has involved not only human conflict but also environmental destruction in the forms of both ‘collateral damage’ and deliberate destruction of environments." The Romans, for example, consistently destroyed their enemies’ crops to guarantee their future dependence on Rome. In the rush to settle western North America, settlers nearly hunted the buffalo to extinction – with the main purpose of eliminating the food base of the Native American tribes. In 1812,Napoleon’s troops attempted to invade and take Russia. They failed, in part because of the scorch and burn policy that retreating Russians employed – burning, and therefore depriving Napoleon’s troops of all means of food, shelter, and warmth. Russians responded to Hitler’s attempted invasion in 1941 with the same policy. In both cases, the environment was damaged – first by the fires that burned forests, crops, and animal life; again by the displaced Russian population, who put pressures on the environments in which they sought refuge and to the environments to which they returned - having to build new houses, consequently destroying more forests, and displacing more animal life; and lastly, by the huge troops of Napoleon and Hitler, which damaged the ecosystems through which they marched, trampling undergrowth, hunting and decimating the wildlife, and leaving a wake of excrement and food waste. World War I introduced revolutionary weapons that increased the potential of military maneuvers to damage the environment. The German submarines were successful, not only in challenging British sea power, but also in damaging marine life. The British tank allowed troops protection and mobility, helping them to break down German resistance – their huge weight helping them to break down trees, crops, and grasses. Trench warfare was well utilized during this time as well – requiring soldiers to dig up plants and destroy soil and, after the war, leaving huge scars in the earth. Landmines were also liberally used, especially in farmlands throughout France and Belgium. Consequently, hundreds of animals – wild and domesticated – and humans lost their limbs and/or lives in the following decades. World War II damaged ecosystems throughout Europe, Northern Africa, Asia and the Pacific. In August 1945 the first atomic bombs used in warfare were dropped on Hiroshima and Nagasaki. The bombs obliterated all life near the drop areas; the bomb in Hiroshima alone killed an estimated 70,000 to 100,000 people ,destroying all structures and life within five square miles. Hundreds of thousands of citizens were effected – suffering injuries from the blast; developing burns, tumors, and other such health problems from the radiation; and years later, experiencing miscarriages and giving birth to malformed children due to radiation exposure. Unfortunately, future wars produced equally horrifying results. During the Vietnam War, the US military liberally sprayed Agent Orange and other defoliants over vast expanses of southern Vietnam to deny cover to communist forces. Soldiers on both sides, and local residents, were exposed to the chemical. More than thirty years later,40% ofthe country’s forests still show damage from the defoliant. Agent Orange exposure has since been indirectly linked with cancer, birth defects and miscarriages. High levels of dioxin from the chemical continue to be found in the bloodstreams of many of southern Vietnamese and US veterans – children born more than thirty years after the war ended are showing signs of contamination. Vietnam continues to be riddled with landmines and bomb craters showing that again, damage initiated between 1962-1971 continues to have long-term effects on the country.

#### t/ nanotechnology – if we can’t effectively deploy nanoweapons due to a lack of warfighting capability means we wouldn’t be able to respond

#### Accesses external impact of effective warmaking to stop war and terrorism – Li evidence indicates executive flexibility must catch up to the modern era – SOP the way the founders intended is insufficient with new non-state threats we need to respond to rapidly, absent that war will escalate because the US is hamstrung

#### Maintaining effective warfighting capabilities key to sustain global peace – prevents extinction

Barnett 11, Former Senior Strategic Researcher and Professor in the Warfare Analysis & Research Department, Center for Naval Warfare Studies, U.S. Naval War College

(Thomas P.M., The New Rules: Leadership Fatigue Puts U.S., and Globalization, at Crossroads, [www.worldpoliticsreview.com/articles/8099/the-new-rules-leadership-fatigue-puts-u-s-and-globalization-at-crossroads](http://www.worldpoliticsreview.com/articles/8099/the-new-rules-leadership-fatigue-puts-u-s-and-globalization-at-crossroads))

Events in Libya are a further reminder for Americans that we stand at a crossroads in our continuing evolution as the world's sole full-service superpower. Unfortunately, we are increasingly seeking change without cost, and shirking from risk because we are tired of the responsibility. We don't know who we are anymore, and our president is a big part of that problem. Instead of leading us, he explains to us. Barack Obama would have us believe that he is practicing strategic patience. But many experts and ordinary citizens alike have concluded that he is actually beset by strategic incoherence -- in effect, a man overmatched by the job. It is worth first examining the larger picture: We live in a time of arguably the greatest structural change in the global order yet endured, with this historical moment's most amazing feature being its relative and absolute lack of mass violence. That is something to consider when Americans contemplate military intervention in Libya, because if we do take the step to prevent larger-scale killing by engaging in some killing of our own, we will not be adding to some fantastically imagined global death count stemming from the ongoing "megalomania" and "evil" of American "empire." We'll be engaging in the same sort of system-administering activity that has marked our stunningly successful stewardship of global order since World War II. Let me be more blunt: As the guardian of globalization, the U.S. military has been the greatest force for peace the world has ever known. Had America been removed from the global dynamics that governed the 20th century, the mass murder never would have ended. Indeed, it's entirely conceivable there would now be no identifiable human civilization left, once nuclear weapons entered the killing equation. But the world did not keep sliding down that path of perpetual war. Instead, America stepped up and changed everything by ushering in our now-perpetual great-power peace. We introduced the international liberal trade order known as globalization and played loyal Leviathan over its spread. What resulted was the collapse of empires, an explosion of democracy, the persistent spread of human rights, the liberation of women, the doubling of life expectancy, a roughly 10-fold increase in adjusted global GDP and a profound and persistent reduction in battle deaths from state-based conflicts. That is what American "hubris" actually delivered. Please remember that the next time some TV pundit sells you the image of "unbridled" American military power as the cause of global disorder instead of its cure. With self-deprecation bordering on self-loathing, we now imagine a post-American world that is anything but. Just watch who scatters and who steps up as the Facebook revolutions erupt across the Arab world. While we might imagine ourselves the status quo power, we remain the world's most vigorously revisionist force. As for the sheer "evil" that is our military-industrial complex, again, let's examine what the world looked like before that establishment reared its ugly head. The last great period of global structural change was the first half of the 20th century, a period that saw a death toll of about 100 million across two world wars. That comes to an average of 2 million deaths a year in a world of approximately 2 billion souls. Today, with far more comprehensive worldwide reporting, researchers report an average of less than 100,000 battle deaths annually in a world fast approaching 7 billion people. Though admittedly crude, these calculations suggest a 90 percent absolute drop and a 99 percent relative drop in deaths due to war. We are clearly headed for a world order characterized by multipolarity, something the American-birthed system was designed to both encourage and accommodate. But given how things turned out the last time we collectively faced such a fluid structure, we would do well to keep U.S. power, in all of its forms, deeply embedded in the geometry to come. To continue the historical survey, after salvaging Western Europe from its half-century of civil war, the U.S. emerged as the progenitor of a new, far more just form of globalization -- one based on actual free trade rather than colonialism. America then successfully replicated globalization further in East Asia over the second half of the 20th century, setting the stage for the Pacific Century now unfolding.

### 2nc L

#### 1nc yoo evidence indicates that statutory restrictions make warfighting impossible by allowing the decentralized, slow moving congress to hold up action in wartime, devastating effective response capabilities – prefer our evidence it speaks to the nature of congressional deliberation and the risk of delay which NONE of their evidence talks about

#### More ev

#### Excluding OCO’s from congressional restriction is key to Presidential flexibility and warfighting

Lorber 13 JD candidate at UPenn and PhD candidate at Duke

(Eric, EXECUTIVE WARMAKING AUTHORITY AND OFFENSIVE CYBER OPERATIONS: CAN EXISTING LEGISLATION SUCCESSFULLY CONSTRAIN PRESIDENTIAL POWER?, www.law.upenn.edu/live/files/1773-lorber15upajconstl9612013)

This analysis suggests that, given inherent weaknesses in the underlying statutory schemes, excluding offensive cyber operations from their scope does not substantially shift the balance of war-making authority between the President and Congress. This exclusion does, however, provide the President additional, powerful means by which to conduct military action without congressional oversight. Based on analysis of the War Powers Resolution, the lack of oversight for OCOs does not radically shift the balance between the legislative and executive branches’ war-making authority. Most notably, because the War Powers Resolution itself has proven ineffective in providing Congress with a powerful tool to govern presidential use of force, bringing OCOs under the War Powers Resolution’s statutory umbrella likely would not provide the possibility of such oversight. However, insofar as the President has increasingly turned to covert action since the passage of the War Powers Resolution to avoid its reporting requirements, offensive cyber operations provide the President another means by which to continue this trend. OCOs therefore may give the President substantially more flexibility than he already has under the War Powers Resolution by adding what will become an increasingly frequent tool of warfare to his option-set. The lack of congressional oversight of offensive cyber operations under the Intelligence Authorization Act also likely does not seriously shift the balance between congressional and executive war-making powers. The reason is inherent in the limitations of the legislation itself: the Intelligence Authorization Act specifies reporting requirements, but does not require the non-use or withdrawal of forces.234 Further, these reports must be made in a “timely” fashion (the definition of which is undefined) and only to a small number of Congressmen (at most eight).235 Thus even if the President had to report offensive cyber operations to Congress, it is unclear he would have to do so in a way that gave Congress an effective check, as these reports would be made only to a small group of Congressmen (who would not be able to share the information, because of its classified nature, with other members of the legislature) and could be done well after the employment of these capabilities. The resulting picture is one of increased presidential flexibility; the War Powers Resolution and the Intelligence Authorization Act—while arguably ineffective in many circumstances—provide increased congressional oversight of presidential war-making actions such as troop deployments and covert actions. Yet these statutes do not cover offensive cyber operations, giving the President an increasingly powerful foreign policy tool outside congressional reach.

#### The plan spills over to all other warfighting capabilities –

#### 1.) Institutional memory – the plan embeds normative categories

Paul 2008 - Senior Social Scientist; Professor, Pardee RAND Graduate School Pittsburgh Office Education Ph.D., M.A., and B.A. in sociology, University of California, Los Angeles (September, Christopher, “US Presidential War Powers: Legacy Chains in Military Intervention Decisionmaking\* ,” Journal of Peace Research, Vol. 45, No. 5 (Sep., 2008), pp. 665-679)

The Institutional Context 'Institution' is used quite inclusively in this article. Following Nee & Ingram (1998: 19), 'An institution is a web of interrelated norms ? formal and informal ? governing social relationships' (emphasis in original).For military intervention decisions, these institutions include not only the formal organizations and departments of the gov ernment, but also the basic building blocks of the policy formation process: the laws gov erning who participates in the policy process and the procedures that must be followed. More subtle factors in policy formation are also institutionalized: the relationships between different policy participants (for ex ample, the congress and the White House, or the press and the military), taken for granted normative categories such as isolationism vs. interventionism, and the range of policies that are considered 'legitimate' by the elec torate and by other nations. The preferences, capabilities, and basic self-identities of indi viduals are conditioned by these institutional structures; if these individuals are part of the policymaking process, they can affect policy (Haney, 1997: 17). All actors are constrained by existing political institutions (Mann, 1993: 52). These institutions create and constitute the context (writ large) in which policy is made. The changes in the institutional contexts that constitute policy legacies tend to be of two different types. The first type of institutional legacy is a formal change in rules, structure, organization, or procedure. The second type is an informal institutional change, perhaps a change in the broad taken-for-granted logics that inform decision making. This could include changes in institu tionalized preferences, perceptions, informal rules, and 'schemas' (Sewell, 1992: 1-29). The most important difference between the two has to do with how the legacy comes about. Changes in taken-for-granted logics and schemas involve subtle shifts in perceptions based on demonstrated challenges to previously held assumptions or beliefs. These changes may or may not be undertaken consciously and reflexively, but they are certainly not something that is discussed and decided on; rather, they are a product of collective logic, sense, and unspoken consensus. For example, prior to President Truman's commitment of US forces to combat in Korea without congressional permission or a declaration of war, the division of powers laid down in the Constitution was assumed to be a sufficient protection of the various branches of the government s prerogatives with regarding to war-making. After Korea, such protections were less taken for granted and more contested, ultimately resulting in a formal institutional change: the War Powers Resolution of 1973. Such formal organizational institutional legacies, on the other hand, are the product of active decisionmaking and are codified in rule or law. As the product of a decision making process, these are 'intended' changes, and, if the language formalizing the change is not precisely aligned with its intentions, unintended institutional consequences can result. A case in point: the War Powers Re solution has not so much retilted the balance of power over war-making toward congress as placed artificial institutional constraints (time limits, reporting requirements) on how presidents plan and launch military interventions.

#### 2.) Precedential effect – the plan requires reframing constitutional separations of power

Heder 2010 - magna cum laude , J. Reuben Clark Law School, Brigham Young University (Adam, J.D., “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.

#### 3.) Perception of divided government – causes enemies to be emboldened

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. 60)

In this way, measures urged by the executive to cope with a crisis of unclear magnitude acquired a kind of self-created momentum. Rejection of those measures would themselves create a political crisis that might, in turn, reduce confidence and thus trigger or exacerbate the underlying financial crisis. A similar process occurred in the debates over the AUMF and the Patriot Act, where proponents of the bills urged that their rejection would send terrorist groups a devastating signal about American political willpower and unity, thereby encouraging more attacks. These political dynamics, in short, create a self-fulfilling crisis of authority that puts legislative institutions under tremendous pressure to accede to executive demands, at least where a crisis is even plausibly alleged. Critics of executive power contend that the executive exploits its focal role during crises in order to bully and manipulate Congress, defeating Madisonian deliberation when it is most needed. On an alternative account, the legislature rationally submits to executive leadership because a crisis can be addressed only by a leader. Enemies are emboldened by institutional conflict or a divided government; financial markets are spooked by it. A government riven by internal conflict will produce policy that varies as political coalitions rise and fall. Inconsistent policies can be exploited by enemies, and they generate uncertainty at a time that financial markets are especially sensitive to agents’ predictions of future government action. It is a peculiar feature of the 2008 financial crises that a damaged president could not fulfill the necessary leadership role, but that role quickly devolved to the Treasury secretary and Fed chair who, acting in tandem, did not once express disagreement publicly.

#### That independently collapses hegemony

Bolton 2009 - Senior fellow at the American Enterprise Institute & Former U.S. ambassador to the United Nations (October 18, John R., “The danger of Obama's dithering,” Los Angeles Times, <http://articles.latimes.com/2009/oct/18/opinion/oe-bolton18>)

Weakness in American foreign policy in one region often invites challenges elsewhere, because our adversaries carefully follow diminished American resolve. Similarly, presidential indecisiveness, whether because of uncertainty or internal political struggles, signals that the United States may not respond to international challenges in clear and coherent ways. Taken together, weakness and indecisiveness have proved historically to be a toxic combination for America's global interests. That is exactly the combination we now see under President Obama. If anything, his receiving the Nobel Peace Prize only underlines the problem. All of Obama's campaign and inaugural talk about "extending an open hand" and "engagement," especially the multilateral variety, isn't exactly unfolding according to plan. Entirely predictably, we see more clearly every day that diplomacy is not a policy but only a technique. Absent presidential leadership, which at a minimum means clear policy direction and persistence in the face of criticism and adversity, engagement simply embodies weakness and indecision.

### 2nc Solvency

#### The counterplan constrains future administrations and provides basis for more effective congressional action if it is needed in the future

**[--- covert action regime is adequate on its own]**

Brecher, 12 --- J.D. Candidate, May 2013, University of Michigan Law School (December, Aaron P., Michigan Law Review, “Cyberattacks and the Covert Action Statute: Toward a Domestic Legal Framework for Offensive Cyberoperations,” 111 Mich. L. Rev. 423))

The executive might also issue the proposed order, even though it would limit her freedom in some ways, because of the possible benefits of constraining future administrations or preempting legislative intervention. n149 For example, in this context, an administration may choose to follow the finding and reporting requirements in order to convince Congress that legislative intervention is unnecessary for proper oversight. This is acceptable if the covert action regime is in fact adequate on its own. Moreover, if greater statutory control over cyberattacks is needed, the information shared with Congress may give Congress the tools and knowledge of the issue necessary to craft related legislation. n150 Additionally, while executive orders are hardly binding, the inertia following adoption of an order may help constrain future administrations, which may be more or less trustworthy than the current one. Creating a presumption through an executive order also establishes a stable legal framework for cyberattacks that allows law to follow policy in this new field, and permits decisionmakers to learn more about the nature of cyberoperations before passing detailed statutes that may result in unintended consequences.

### At stat key

Brecher concludes neg -

#### The counterplans leads more effective future legislation – it’s a question of what we start with, the presumptive fw is best

Brecher, 12 --- J.D. Candidate, May 2013, University of Michigan Law School (December, Aaron P., Michigan Law Review, “Cyberattacks and the Covert Action Statute: Toward a Domestic Legal Framework for Offensive Cyberoperations,” 111 Mich. L. Rev. 423))

An executive order making the covert action regime presumptive for cyberattacks gives the executive branch considerable flexibility while also ensuring notification to Congress. A presumptive regime helps remove current confusion within the executive branch, as well as allows cyberattack policy to develop with members of Congress gaining access to information that may be helpful in crafting later statutory controls on the use of cyberattacks. Moreover, some proposals for immediate legislative intervention overestimate congressional will to legislate in this field and underestimate the protections for interbranch collaboration offered by the covert action regime.

Conclusion

The covert action framework is a flexible one that can be applied by any appropriate agency, whether intelligence or military. The legal regimes governing military action, by contrast, lack this flexibility. Moreover, the wide array of cyberattacks that are not of a warlike nature, along with potential confusion between cyberattacks and cyberexploitations, counsels in favor of the covert action framework. In limited circumstances, the covert action [\*452] statute might serve as an alternative legal basis for certain uses of force, and adherence to the covert action procedures could move cyberattacks into a sphere of presidential authority entitled to a strong presumption of validity. Finally, an executive order making the covert action framework presumptive for cyberattacks is a more attainable goal than detailed legislation. Indeed, the reporting requirements of the covert action regime may both preserve accountability to Congress and enable legislative reform.

### AT: notification key

#### The counterplan maintains executive flexibility and ensures notification to congress

Brecher, 12 --- J.D. Candidate, May 2013, University of Michigan Law School (December, Aaron P., Michigan Law Review, “Cyberattacks and the Covert Action Statute: Toward a Domestic Legal Framework for Offensive Cyberoperations,” 111 Mich. L. Rev. 423))

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### AT: Perm “Do Both”

#### Executive action preserves flexibility and prevents overbroad congressional and judicial restrictions

Michaels, 11 --- Acting Professor, UCLA School of Law (June 2011, Jon D., Virginia Law Review, “THE (WILLINGLY) FETTERED EXECUTIVE: PRESIDENTIAL SPINOFFS IN NATIONAL SECURITY DOMAINS AND BEYOND,” 97 Va. L. Rev. 801))

Third, the anti-aggrandizing effects might have been necessary to preempt more stringent congressional regulations. That is to say, the Executive likely will not be alone in noticing that the traditional legal and political constraints are absent or dysfunctional. Congress and the courts will no doubt realize that the President has unfettered discretion. The Executive, aware that Congress or the courts might try to address the accountability deficits, thus has reason to move first, and possibly lessen the need for legislative or judicial intervention. By doing so, the Executive welcomes constraints. But it does so on its terms. The President’s constraints likely will not be as stringent as Congress’s would be. But the President’s constraints might nevertheless be adequate— sufficiently so that the coordinate branches’ concerns are allayed, and they can focus their attention elsewhere.37

### At courts s def

#### Court won’t overturn executive orders

Covington, 12 --- School of Engineering, Vanderbilt University

(Spring 2012, Megan, Vanderbilt Undergraduate Research Journal, “Executive Legislation and the Expansion of Presidential Power,” http://ejournals.library.vanderbuilt.edu))

The Supreme Court constitutes the other major check on presidential power. Executive legislation – specifically executive orders and signing statements - is considered law, so the Supreme Court has the jurisdiction to deem an executive order unconstitutional using judicial review.49 If a case challenging a president’s legislation comes before the court, the judges can choose to hear the case and overturn the legislation if they think it represents a severe violation of the Constitution.50 Unfortunately, the Supreme Court is generally unwilling to intervene in the president’s use of executive legislation, even when the directives used are “of – at best dubious constitutional authority [or] issued without specific statutory authority.”51 In addition, the wide and vague grounds the president can use in his defense can make challenging the president problematic.52 Of the executive orders passed in our nation’s history, only 14 have actually been challenged by federal courts and only 2 were completely overturned, showing how very rare it is for the Supreme Court to challenge executive legislation.53

#### Grid is resilent – Katrina proves

James Andrew Lewis – senior fellow and director of the Technology and Public Policy Program @ CSIS - March 2010, The Electrical Grid as a Target for Cyber Attack, http://csis.org/files/publication/100322\_ElectricalGridAsATargetforCyberAttack.pdf

This conclusion is different from the strategic consequences on a cyber attack on the power grid. The United States routinely suffers blackouts. The nation does not collapse. In the short term, military power and economic strength are not noticeably affected - a good example for opponents to consider is Hurricane Katrina, which caused massive damage but did not degrade U.S. military power in or even long-term economic performance. Is there any cyber attack that could match the hurricane?

The United States is a very large collection of targets with many different pieces making up its electrical infrastructure. While a single attack could interrupt service, the large size and complexity of the American economy make it more resilient. Even without a Federal response plan, the ability of electrical companies to work quickly together to restore service is impressive and we should not underestimate the ingenuity of targets to recover much more rapidly than expected. This is a routine occurrence in aerial bombing: impressive damage is quickly rectified by a determined opponent.

# 1NR

#### Contextual evidence proves – war power is the conduct of war and Congress restricts presidential war power by limiting the nature of the military orders he can give

Elsea, Garcia, and Nicola - Legislative Attorneys @ CRS – 2/19/13, Congressional Authority to Limit

Military Operations, Jennifer K. Elsea, Michael John Garcia, Thomas J. Nicola<http://fpc.state.gov/documents/organization/206121.pdf>

At least two arguments support the constitutionality of Congress’s authority to limit the President’s ability to continue military operations. First, Congress’s constitutional power over the nation’s Armed Forces arguably provides ample authority to legislate with respect to how they may be employed. Under Article I, Section 8, Congress has the power “To lay and collect Taxes ... to ... pay the Debts and provide for the common Defence,” “To raise and support Armies,” “To provide and maintain a Navy,” “To make Rules for the Government and Regulation of the land and naval Forces,” and “To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” as well as “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” and “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.” Further, Congress is empowered “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ...” as well as “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Secondly, Congress has virtually plenary constitutional power over appropriations, one that is not qualified with reference to its powers in Section 8. Article I, Section 9 provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” It is well established, as a consequence of these provisions, that “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress”4 and that Congress can specify the terms and conditions under which an appropriation may be used,5 so long as the restrictions do not impair power inherent solely in other branches or otherwise run afoul of constitutional restrictions on congressional prerogatives.6 On the executive side, the Constitution vests the President with the “executive Power,” Article II, Section 1, clause 1, and appoints him “Commander in Chief of the Army and Navy of the United States,” id., §2, clause 1. The President is empowered, “by and with the Advice and Consent of the Senate, to make Treaties,” authorized “from time to time [to] give to the Congress Information on the State of the Union, and [to] recommend to their Consideration such Measures as he shall judge necessary and expedient,” and bound to “take Care that the Laws be faithfully executed.” Id., §3. He is bound by oath to “faithfully execute the Office of President of the United States,” and, to the best of his “Ability, preserve, protect and defend the Constitution of the United States.” Id., §1, clause 8. It is clear that the Constitution allocates powers necessary to conduct war between the President and Congress. While the ratification record of the Constitution reveals little about the meaning of the specific war powers clauses, the importance of preventing all of those powers from accumulating in one branch appears to have been well understood,7 and vesting the powers of the sword and the purse in separate hands appears to have been part of a careful design.8 It is generally agreed that some aspects of the exercise of those powers are reserved to the Commander in Chief, and that Congress could conceivably legislate beyond its authority in such a way as to intrude impermissibly into presidential power. The precise boundaries separating legislative from executive functions, however, remain elusive.9 There can be little doubt that Congress would exceed its bounds if it were to confer exclusive power to direct military operations on an officer not subordinate to the President,10 or to purport to issue military orders directly to subordinate officers.11 At the same time, Congress’s power to make rules for the government and regulation of the Armed Forces provides it wide latitude for restricting the nature of orders the President may give**.** Congress’s power of appropriations gives it ample power to supply or withhold resources, even if the President deems them necessary to carry out planned military operations.12

#### Consultation/notification gives Congress zero influence over the successful conduct of war

Matthew Fleischman – 2010, J.D. Candidate, 2010, New York University School of Law; B.A., 2007, Washington University in St. Louis, NEW YORK UNIVERSITY JOURNAL OF LEGISLATION AND PUBLIC POLICY, 13 N.Y.U. J. Legis. & Pub. Pol'y 137

The War Powers Resolution of 1973 was passed in response to the Vietnam War over a Presidential veto. n156 Congress believed that "it had been dodging its constitutional duty to make the decision whether to commit American troops to combat" n157 and the WPR was supposed to prevent this pattern from continuing. Section 2(c) states that the President may only exercise his commander-in-chief powers pursuant to a declaration of war, specific statutory authorizations, or a national emergency. n158 Section 3 requires that the President consult with Congress before engaging troops whenever possible. n159 Section 4(a) requires the Executive to submit a report to Congress no more than forty-eight hours after introducing United States forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." n160 Subsequently, according to section 5(b), within sixty days of filing a report (or sixty days from when the report must be filed), the President shall terminate any use of United States Armed Forces ... unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. n161 However, section 5(c) allows for Congress to compel the removal of troops by concurrent resolution. n162 There have been numerous arguments against the framework of interactions between the branches of government delineated in the WPR. There is some debate whether or not Section 2(c) "too narrowly defines the President's war powers." n163 Presidents have sent troops into conflict without any of the section 2(c) preconditions. n164 The WPR also fails to detail which members of Congress should be consulted. A study by the Congressional Research Service concluded, [\*163] "there has been very little consultation with Congress under the Resolution when consultation is defined to mean seeking advice prior to a decision to introduce troops." n165 One of the most consistent complaints has been that "no President has ever filed a report 'pursuant to' Section 4(a)(1)." n166 Indeed, the sixty-day window has never been triggered. Furthermore, even if a section 4(a)(1) report was filed, many argue that section 5(c) is an unconstitutional legislative veto in light of the Supreme Court's ruling on this type of congressional action in Chadha. n167 This would mean Congress would have no mechanism of ending a conflict during the sixty-day window. The WPR fails to address the concerns discussed in the previous section, as it has not given Congress a voice in the decision to go to war. Instead, it forces Congress to take a stand after the fact, within sixty days of the commencement of hostilities. Some have said that the true problem is not in the framework itself but that "the President has refused to obey the law." n168 This interpretation is flawed, in that it ignores the fact that the policy options are more limited once troops have been deployed n169 and public pressure is greater. Therefore, it does not matter whether section 5(c) is unconstitutional, as political [\*164] theory suggests n170 that Congress will deem it too politically risky to avail itself of the powers the statute gives it, and end a war in such a way.

#### Congress has two choices: define conditions for the conduct of war OR enact procedural safeguards like consultation – Congress uses the consultation option to avoid restrictions on executive authority

Louis Fisher – 1995, *Presidential War Power*, p. 128-129, Scholar in Residence at the Constitution Project / fmr. Senior Specialist in Separation of Powers @ CRS, PhD in political science at the New School for Social Research

Action by the House of Representatives in 1970 on the War Powers Resolution conceded a measure of war power to the President. Passed by a vote of 289 to 39, the resolution recognized that the President “in certain extraordinary and emergency circumstances has the authority to defend the United States and its citizens without specific prior authorization by the Congress.” Instead of trying to define the precise conditions under which Presidents may act, the House opted for procedural safeguards. The President would be required, “whenever feasible,” to consult with Congress before sending American forces into armed conflict. He was also to report the circumstances necessitating the action; the constitutional, legislative, and treaty provisions authorizing the action, together with his reasons for not seeking specific prior congressional authorization; and the estimated scope of activities.72 The House passed the same resolution a year later,73 but the Senate did not act on either measure. Both Houses later passed the War Powers Resolution that went beyond mere reporting requirements. The House of Representatives, adhering to its earlier practices, did not try to define or codify presidential war powers. It directed the President “in every possible instance,” to consult with Congress before sending forces into hostilities or situations in which hostilities might be imminent. If unable to do so, he was to report to Congress within seventy-two hours, setting forth the circumstances and details of his action. Unless Congress declared war within 120 days or specifically authorized the use of force, the President had to terminate the commitment and remove the troops. Congress could also direct disengagement at any time during the 120-day period by passing a concurrent resolution.74 The Senate thought it could identify the precise conditions under which Presidents could act unilaterally. Armed force could be used in three situations: (1) to repel an armed attack upon the United States, its territories and possessions, retaliate in the event of such an attack, and forestall the direct and imminent threat of such an attack; (2) to repel an armed attack against U.S. armed forces located outside the United States, its territories and possessions, and forestall the direct and imminent threat of such an attack; and (3) to rescue endangered American citizens and nationals in foreign countries or at sea. The first situation (except for the final clause) agrees with the understanding reached at the Philadelphia convention. The other situations reflect the changes in presidential power that developed later, including the broad concept of defensive war and actions taken to protect American lives and property.

#### The President’s war power authority is his ability to conduct war

Gerald G. Howard - Spring, 2001, Senior Notes and Comments Editor for the Houston Law Review, COMMENT: COMBAT IN KOSOVO: IGNORING THE WAR POWERS RESOLUTION, 38 Hous. L. Rev. 261, LexisNexis

[\*270] The issue, then, becomes one of defining and monitoring the authority of the political leader in a democratic nation. Black's Law Dictionary defines "war power" as "the constitutional authority of Congress to declare war and maintain armed forces, and of the President to conduct war as commander-in-chief." n45 The power and authority of United States political leaders to conduct war stems from two documents: the United States Constitution and the War Powers Resolution. n46 One must understand each of these sources of authority to properly assess the legality of the combat operations in Kosovo.

Limits –

#### There are 100s of consultation affs alone – when to consult, how to consult, who to consult

Richard F. Grimmett – Specialist in International Security @ CRS – September 25, 2012, War Powers Resolution: Presidential Compliance, http://www.fas.org/sgp/crs/natsec/RL33532.pdf

Section 3 of the War Powers Resolution requires the President “in every possible instance” to consult with Congress before introducing U.S. Armed Forces into situations of hostilities and imminent hostilities, and to continue consultations as long as the Armed Forces remain. A review of instances involving the use of Armed Forces since passage of the Resolution, noted in this report, indicates there has been very little consultation with Congress under the Resolution when consultation is defined to mean seeking advice prior to a decision to introduce troops. Presidents have met with congressional leaders after the decision to deploy was made but before commencement of operations. One problem is the interpretation of when consultation is required. The War Powers Resolution established different criteria for consultation than for reporting. Consultation is required only before introducing Armed Forces into “hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,” the circumstances triggering the time limit. A second problem is the meaning of the term consultation. The executive branch has often taken the view that the consultation requirement has been fulfilled when from the viewpoint of some Members of Congress it has not. The House report on the War Powers Resolution said, “consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated.” A third problem is who represents Congress for consultation purposes. The House version specifically called for consultation between the President and the leadership and appropriate committees. This was changed to less specific wording in final House-Senate conference committee version, to provide some flexibility. Some critics of the existing statute have introduced proposals to specify a consultation group. But Congress has yet to act on such a proposal.

#### Notification produces no functional restriction

Philip Alston - John Norton Pomeroy Professor of Law, New York University School of Law – 2011, Harvard National Security Journal, ARTICLE: The CIA and Targeted Killings Beyond Borders, 2 Harv. Nat'l Sec. J. 283

The Gang of Eight procedure has been strongly criticized for being overused, providing too little information, generating no significant records, providing members with no real opportunity for input, and amounting to a formality. A member of the House Committee complained that such notifications are not conducive to effective oversight because members [\*389] "cannot take notes, seek the advice of their counsel, or even discuss the issues raised with their committee colleagues." n376 Indeed, the most extraordinary fact about the congressional notification procedures is how little is known, even by those very close to, but not actually engaged in the process. Thus in a 2011 report, the Congressional Research Service highlighted just how little is known about the extent to which the executive has complied with the relevant legal provisions. The questions they identified and to which they claim no answers are known include the criteria actually applied by the executive in determining whether and how to notify Congress, whether explanations have been furnished, as required by law, to congressional leaders in cases where a restrictive (Gang of Eight) notification approach has been adopted, whether the executive has ever briefed the intelligence committees after the event in relation to actions that were not notified to the Gang of Eight, whether the latter has ever determined that it should alert the intelligence committees to a matter of which it has been informed by the executive, and whether the committees have ever sought to develop procedures for dealing with the many issues that arise in this grey zone. n377

#### Notification allows the President to war powers single-handedly

Louis Fisher – 1995, *Presidential War Power*, p. 185, Scholar in Residence at the Constitution Project / fmr. Senior Specialist in Separation of Powers @ CRS, PhD in political science at the New School for Social Research

The drift of the war power from Congress to the President after World War II is unmistakable. The framers’ design, deliberately placing in Congress the decision to expend the nation’s blood and treasure, has been radically transformed. Presidents now regularly claim that the commander-in-chief clause empowers them to send American troops anywhere in the world, including into hostilities, without first seeking legislative approval. Congress has made repeated efforts since the 1970s to restore legislative prerogatives, with only moderate success. Presidents continue to wield military power single-handedly, agreeing only to consult with legislators and notify them of completed actions. That is not the framers’ model.

#### Consultation leaves the president exclusive control over war powers

Louis Fisher – 1995, *Presidential War Power*, p. xi, Scholar in Residence at the Constitution Project / fmr. Senior Specialist in Separation of Powers @ CRS, PhD in political science at the New School for Social Research

During October 1993, when Congress was considering restrictions on the President’s use of American forces in Somalia and Haiti, President Bill Clinton vigorously objected to any congressional interference: “I would strenuously oppose such attempts to encroach on the President’s foreign policy powers.”1 While promising to *consult* with members of Congress, he claimed that “the Constitution leaves the President, for good and sufficient reasons, the ultimate decisionmaking authority.”2 Acknowledging that the President has an obligation to define and justify the use of U.S. force, Clinton said that “the President must make the ultimate decision.”3 In February 1994, while contemplating air strikes in Bosnia, he looked for authority not to Congress but to the UN Security Council and to NATO.4 At a press conference on August 3, 1994, Clinton said he was not “constitutionally mandated” to receive approval from Congress before invading Haiti.5 This definition of executive power—to send troops anywhere in the world whenever the President likes—would have astonished the framers of the Constitution. Their structure of government very deliberately rejected the British models that gave the executive exclusive control over foreign affairs and the war power. Instead, the framers vested in Congress explicit control over the initiation and authorization of war, power over foreign commerce, approval of treaties, confirmation of ambassadors, power of the purse, and other authorities over external affairs. The trend of presidential war power since World War II—the last congressionally declared war—collides with the constitutional framework adopted by the founding fathers. The period after 1945 created a climate in which Presidents have regularly breached constitutional principles and democratic values. Under these pressures (and invitations), Presidents have routinely exercised war powers with little or no involvement by Congress.