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The executive branch of the United States federal government should issue and enforce an executive order to establish an executive branch court system to review drone strikes before authorizing the drone strikes. The executive branch should establish transparent standards for review of its targeted killing operations.

Counterplan solves the case better—plan crushes drone effectiveness.

Katyal 13 (Neal, a former acting solicitor general, is a professor of national security law at Georgetown and a partner at the law firm Hogan Lovells, “Who Will Mind the Drones?”, February 20, 2013, http://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html?\_r=0#h[], ZBurdette)

IN the wake of revelations about the Obama administration’s drone program, politicians from both parties have taken up the idea of creating a “drone court” within the federal judiciary, which would review executive decisions to target and kill individuals.

But the drone court idea is a mistake. It is hard to think of something less suitable for a federal judge to rule on than the fast-moving and protean nature of targeting decisions.

Fortunately, a better solution exists: a “national security court” housed within the executive branch itself. Experts, not generalists, would rule; pressing concerns about classified information would be minimized; and speedy decisions would be easier to reach.

There is, of course, a role for federal courts in national security. In 2006, I argued and won Hamdan v. Rumsfeld, a Supreme Court case that struck down President George W. Bush’s use of military tribunals at Guantánamo Bay. But military trials are a far cry from wartime targeting decisions.

And the Foreign Intelligence Surveillance Court, which reviews administration requests to collect intelligence involving foreign agents inside the country and which some have advocated as a model for the drone court, is likewise appropriately housed within the judicial system — it rules on surveillance operations that raise questions much like those in Fourth Amendment “search and seizure” cases, a subject federal judges know well.

But there is no true precedent for interposing courts into military decisions about who, what and when to strike militarily. Putting aside the serious constitutional implications of such a proposal, courts are simply not institutionally equipped to play such a role.

There are many reasons a drone court composed of generalist federal judges will not work. **They lack national security expertise, they are not accustomed to ruling on** lightning-fast timetables, they are used to being in absolute control, their primary work is on domestic matters and they usually rule on matters after the fact, not beforehand.

Even the questions placed before the FISA Court aren’t comparable to what a drone court would face; they involve more traditional constitutional issues — not rapidly developing questions about whether to target an individual for assassination by a drone strike.

Imagine instead that the president had an internal court, staffed by expert lawyers to represent both sides. Those lawyers, like the Judge Advocate General’s Corps in the military, would switch sides every few years, to develop both expertise as repeat players and the ability to understand the other point of view.

The adjudicator would be a panel of the president’s most senior national security advisers, who would issue decisions in writing if at all possible. Those decisions would later be given to the Congressional intelligence committees for review. **Crucially, the president would be able to overrule this court, and take whatever action he thought appropriate, but would have to explain himself afterward to Congress.**

Such a court would embed accountability and expertise into the drone program. With a federal drone court, it would simply be too easy for a president or other executive-branch official to point his finger at a federal judge for the failure to act. With an internal court, it would be impossible to avoid blame.

It’s true that a court housed within the executive branch might sound nefarious in today’s “Homeland” culture — if Alexander Hamilton celebrated the executive, in Federalist No. 70, for its “decision, activity, secrecy and dispatch,” some now look at those same qualities with skepticism, if not fear.

In contrast, advocates of a drone court say it would bring independent, constitutional values of reasoned decision making to a process that is inherently murky.

But simply placing a drone court in the judicial branch is not a guaranteed check. The FISA Court’s record is instructive: between 1979 and 2011 it rejected only 11 out of more than 32,000 requests — making the odds of getting a request rejected, around 1 in 3,000, approximately the same as those of being struck by lightning in one’s lifetime. What reason does the FISA Court give us to think that judges are better than specialists at keeping executive power in check?

The written decisions of an internal national security court, in contrast, would be products of an adversarial system (unlike the FISA Court), and later reviewed by Congressional intelligence committees. If members of Congress saw troublesome trends developing, it could push legislation to constrain the executive. That is something a federal judge cannot do.

One of our Constitution’s greatest virtues is that it looks to judges as a source of reasoned, practical, rights-minded decision making. But judges should be left to what they know. A national security court inside the executive branch **may not be a perfect solution, but it is a better way** to balance the demands of secrecy and speed with those of liberty and justice.

Solves the aff.

Jennifer Daskal, Fellow and Adjunct Professor, Georgetown Center on National Security and the Law, Georgetown University Law Center, April 2013, ARTICLE: THE GEOGRAPHY OF THE BATTLEFIELD: A FRAMEWORK FOR DETENTION AND TARGETING OUTSIDE THE "HOT" CONFLICT ZONE, 161 U. Pa. L. Rev. 1165

4. Procedural Requirements

Currently, officials in the executive branch carry out all such ex ante review of out-of-battlefield targeting and detention decisions, reportedly with the involvement of the President, but without any binding and publicly articulated standards governing the exercise of these authorities. n163 All ex post review of targeting is also done internally within the executive branch. There is no public accounting, or even acknowledgment, of most strikes, their success and error rates, or the extent of any collateral damage. Whereas the Department of Defense provides solatia or condolence payments to Afghan civilians who are killed or injured as a result of military actions in Afghanistan (and formerly did so in Iraq), there is no equivalent effort in areas outside the active conflict zone. n164 Meanwhile, the degree of ex post review of detention decisions depends on the location of detention as opposed to the location of capture. Thus, [\*1219] Guantanamo detainees are entitled to habeas review, but detainees held in Afghanistan are not, even if they were captured far away and brought to Afghanistan to be detained. n165 Enhanced ex ante and ex post procedural protections for both detention and targeting, coupled with transparency as to the standards and processes employed, serve several important functions: they can minimize error and abuse by creating time for advance reflection, correct erroneous deprivations of liberty, create endogenous incentives to avoid mistake or abuse, and increase the legitimacy of state action. a. Ex Ante Procedures Three key considerations should guide the development of ex ante procedures. First, any procedural requirements must reasonably respond to the need for secrecy in certain operations. Secrecy concerns cannot, for example, justify the lack of transparency as to the substantive targeting standards being employed. There is, however, a legitimate need for the state to protect its sources and methods and to maintain an element of surprise in an attack or capture operation. Second, contrary to oft-repeated rhetoric about the ticking time bomb, few, if any, capture or kill operations outside a zone of active conflict occur in situations of true exigency. n166 Rather, there is often the time and need for advance planning. In fact, advance planning is often necessary to minimize damage to one's own troops and nearby civilians. n167 Third, the procedures and standards employed must be transparent and sufficiently credible to achieve the desired legitimacy gains. These considerations suggest the value of an independent, formalized, ex ante review system. Possible models include the Foreign Intelligence [\*1220] Surveillance Court (FISC), n168 or a FISC-like entity composed of military and intelligence officials and military lawyers, in the mode of an executive branch review board. n169 Created by the Foreign Intelligence Surveillance Act (FISA) in 1978, n170 the FISC grants ex parte orders for electronic surveillance and physical searches, among other actions, based on a finding that a "significant purpose" of the surveillance is to collect "foreign intelligence information." n171 The Attorney General can grant emergency authorizations without court approval, subject to a requirement that he notify the court of the emergency authorization and seek subsequent judicial authorization within seven days. n172 The FISC also approves procedures related to the use and dissemination of collected information. By statute, heightened restrictions apply to the use and dissemination of information concerning U.S. persons. n173 Notably, the process has been extraordinarily successful in protecting extremely sensitive sources and methods. To date, there has never been an unauthorized disclosure of an application to or order from the FISC court. An ex parte review system for targeting and detention outside zones of active hostility could operate in a similar way. Judges or the review board would approve selected targets and general procedures and standards, while still giving operators wide rein to implement the orders according to the approved standards. Specifically, the court or review board would determine whether the targets meet the substantive requirements and would [\*1221] evaluate the overarching procedures for making least harmful means-determinations, but would leave target identification and time-sensitive decisionmaking to the operators. n174 Moreover, there should be a mechanism for emergency authorizations at the behest of the Secretary of Defense or the Director of National Intelligence. Such a mechanism already exists for electronic surveillance conducted pursuant to FISA. n175 These authorizations would respond to situations in which there is reason to believe that the targeted individual poses an imminent, specific threat, and in which there is insufficient time to seek and obtain approval by a court or review panel as will likely be the case in instances of true imminence justifying the targeting of persons who do not meet the standards applicable to operational leaders. As required under FISA, the reviewing court or executive branch review board should be notified that such an emergency authorization has been issued; it should be time-limited; and the operational decisionmakers should have to seek court or review board approval (or review, if the strike has already taken place) as soon as practicable but at most within seven days. n176 Finally, and critically, given the stakes in any application namely, the deprivation of life someone should be appointed to represent the potential target's interests and put together the most compelling case that the individual is not who he is assumed to be or does not meet the targeting criteria. The objections to such a proposal are many. In the context of proposed courts to review the targeting of U.S. citizens, for example, some have argued that such review would serve merely to institutionalize, legitimize, and expand the use of targeted drone strikes. n177 But this ignores the reality of their continued use and expansion and imagines a world in which targeted [\*1222] killings of operational leaders of an enemy organization outside a zone of active conflict is categorically prohibited (an approach I reject n178). If states are going to use this extraordinary power (and they will), there ought to be a clear and transparent set of applicable standards and mechanisms in place to ensure thorough and careful review of targeted-killing decisions. The formalization of review procedures along with clear, binding standards will help to avoid ad hoc decisionmaking and will ensure consistency across administrations and time. Some also condemn the ex parte nature of such reviews. n179 But again, this critique fails to consider the likely alternative: an equally secret process in which targeting decisions are made without any formalized or institutionalized review process and no clarity as to the standards being employed. Institutionalizing a court or review board will not solve the secrecy issue, but it will lead to enhanced scrutiny of decisionmaking, particularly if a quasi-adversarial model is adopted, in which an official is obligated to act as advocate for the potential target. That said, there is a reasonable fear that any such court or review board will simply defer. In this vein, FISC's high approval rate is cited as evidence that reviewing courts or review boards will do little more than rubber-stamp the Executive's targeting decisions. n180 But the high approval rates only tell part of the story. In many cases, the mere requirement of justifying an application before a court or other independent review board can serve as an internal check, creating endogenous incentives to comply with the statutory requirements and limit the breadth of executive action. n181 Even if this system does little more than increase the attention paid to the stated requirements and expand the circle of persons reviewing the factual basis for the application, those features in and of themselves can lead to increased reflection and restraint. Additional accountability mechanisms, such as civil or criminal sanctions in the event of material misrepresentations or omissions, the granting of far-reaching authority to the relevant Inspectors General, and meaningful ex post review by Article III courts, n182 are also needed to help further minimize abuse. Conversely, some object to the use of courts or court-like review as stymying executive power in wartime, and interfering with the President's Article II powers. n183 According to this view, it is dangerous and potentially unconstitutional to require the President's wartime targeting decisions to be subject to additional reviews. These concerns, however, can be dealt with through emergency authorization mechanisms, the possibility of a presidential override, and design details that protect against ex ante review of operational decisionmaking. The adoption of an Article II review board, rather than an Article III-FISC model, further addresses some of the constitutional concerns. Some also have warned that there may be no "case or controversy" for an Article III, FISC-like court to review, further suggesting a preference for an Article II review board. n184 That said, similar concerns have been raised with respect to FISA and rejected. n185 Drawing heavily on an analogy to courts' roles in issuing ordinary warrants, the Justice Department's Office of Legal Counsel concluded at the time of enactment that a case and controversy existed, even though the FISA applications are made ex parte. n186 [\*1224] Here, the judges would be issuing a warrant to kill rather than surveil. While this is significant, it should not fundamentally alter the legal analysis. n187 As the Supreme Court has ruled, killing is a type of seizure. n188 The judges would be issuing a warrant for the most extreme type of seizure. n189 It is also important to emphasize that a reviewing court or review board would not be "selecting" targets, but determining whether the targets chosen by executive branch officials met substantive requirements much as courts do all the time when applying the law to the facts. Press accounts indicate that the United States maintains lists of persons subject to capture or kill operations lists created in advance of specific targeting operations and reportedly subject to significant internal deliberation, including by the President himself. n190 A court or review board could be incorporated into the existing ex ante decisionmaking process in a manner that would avoid interference with the conduct of specific operations reviewing the target lists but leaving the operational details to the operators. As suggested above, emergency approval mechanisms could and should be available to deal with exceptional cases where ex ante approval is not possible. Additional details will need to be addressed, including the temporal limits of the court's or review board's authorizations. For some high-level operatives, inclusion on a target list would presumably be valid for some set period of [\*1225] time, subject to specific renewal requirements. Authorizations based on a specific, imminent threat, by comparison, would need to be strictly time-limited, and tailored to the specifics of the threat, consistent with what courts regularly do when they issue warrants. In the absence of such a system, the President ought to, at a minimum, issue an executive order establishing a transparent set of standards and procedures for identifying targets of lethal killing and detention operations outside a zone of active hostilities. n192 To enhance legitimacy, the procedures should include target list reviews and disposition plans by the top official in each of the agencies with a stake in the outcome the Secretary of Defense, the Director of the CIA, the Secretary of State, the Director of Homeland Security, and the Director of National Intelligence, with either the Secretary of Defense, Director of National Intelligence, or President himself, responsible for final sign-off. n193 In all cases, decisions should be unanimous, or, in the absence of consensus, elevated to the President of the United States. n194 Additional details will need to be worked out, including critical questions about the standard of proof that applies. Given the stakes, a clear and convincing evidentiary standard is warranted. n195 While this proposal is obviously geared toward the United States, the same principles should apply for all states engaged in targeting operations. n196 States would ideally subject such determinations to independent review or, alternatively, clearly articulate the standards and procedures for their decisionmaking, thus enhancing accountability. b. Ex Post Review For targeted-killing operations, ex post reviews serve only limited purposes. They obviously cannot restore the target's life. But retrospective review either by a FISC-like court or review board can serve to identify errors or overreaching and thereby help avoid future mistakes. This can, and ideally would, be supplemented by the adoption of an additional Article III damages mechanism. n197 At a minimum, the relevant Inspectors General should engage in regular and extensive reviews of targeted-killing operations. Such post hoc analysis helps to set standards and controls that then get incorporated into ex ante decisionmaking. In fact, post hoc review can often serve as a more meaningful and often more searching inquiry into the legitimacy of targeting decisions. Even the mere knowledge that an ex post review will occur can help to protect against rash ex ante decisionmaking, thereby providing a self-correcting mechanism. Ex post review should also be accompanied by the establishment of a solatia and condolence payment system for activities that occur outside the active zone of hostilities. Extension of such a system beyond Afghanistan and Iraq would help mitigate resentment caused by civilian deaths or injuries and would promote better accounting of the civilian costs of targeting operations. n198

## 2

Executive war power primacy now—the plan flips that

Eric Posner, 9/3/13, 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.

Plan shifts the balance of war powers to the Courts—kills war fighting.

Epps 13 (Garrett, law prof at the University of Baltimore, The Atlantic, “Why a Secret Court Won't Solve the Drone-Strike Problem”, Feb 16, http://www.theatlantic.com/politics/archive/2013/02/why-a-secret-court-wont-solve-the-drone-strike-problem/273246/, ZBurdette)

Look up: that buzz you hear overhead is the "drone court."

Washington's idea of the week is a secret court, based on the Foreign Intelligence Surveillance Court, which issues secret wiretap warrants in certain espionage cases. Executive officials would go before the drone court and present their evidence that an individual abroad, perhaps a U.S. citizen, is an Al Qaeda affiliate and an imminent danger. Judges on the panel would issue, in effect, a secret death warrant--a certification that lethal force can be used against the "enemy combatant."

Sen. Dianne Feinstein spoke favorably about the idea at confirmation hearings for C.I.A. Director-designate John Brennan. So did former Defense Secretary Robert Gates. Thursday, the New York Times joined in the chorus.

Americans love courts and judges. But they trust them because, in our system, they are independent of elected officials--not part of the political machine. They are also what lawyers call "courts of limited jurisdiction." In carefully chosen language, Article III of the Constitution extends "the judicial power" of the United States to a specific and limited set of "cases and controversies." Federal courts decide cases; they do not fight wars, collect the garbage, or set health-care policy. And most particularly, they may not become an advisory agency of the executive branch.

The idea of a "drone court" would send federal courts into areas they have never gone before, and indeed from which, I think, the text of the Constitution bars them. It could also put the integrity of our court system at risk.

Let's frame the issue properly. The present administration does not claim that the president has "inherent authority" to attack anyone anywhere. Instead, from the documents and speeches we've seen, the administration says it can order drone attacks only as provided by the Authorization for the Use of Military Force passed by Congress after the September 11 attacks--that is, against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

Unlike the fictional President Bennett in Tom Clancy's Clear and Present Danger, then, President Obama can't suddenly send the drone fleet down to take out, say, Colombian drug lords or the Lord's Resistance Army in Uganda. That's a marked change from the overall position of the last administration, and it's an important limitation on the president's claimed authority.

But because of that limitation, a court would be supervising the president's command decisions in a time of authorized military action--after, that is, the legal equivalent of a "declaration of war." As commander in chief, the president has been given a mission by Congress. By passing the AUMF, Congress has delegated to him its full war power to use in that mission. Nothing in the AUMF is directed to the courts; in fact, I have trouble finding authority for target selection anywhere in Article III. And whatever the technological changes, constitutionally I see no difference between targeting an enemy with a drone and doing the same thing with a Cruise missile or a SEAL Team. Courts simply aren't equipped to decide military tactics.

The FISA Court, on the other hand, doesn't really reach beyond Article III--judges since ancient times have issued warrants for searches and arrests, and the individuals being spied on are suspected of crimes against the United States. But I don't know of a deep-rooted tradition of common-law courts telling the shire reeve he can hunt someone down and kill him without trial.

There's yet another problem: what criteria would a "drone court" apply? In the "white paper" obtained by NBC News earlier this month, the Department of Justice says that a decision to order a strike involves three requirements: (1) the target represents "an imminent threat of violent attack"; (2) capturing the target would be "infeasible"; and (3) a lethal attack can be carried out "in a manner consistent with law of war principles." A court might be able to apply the first criterion, though just barely; but there is simply no precedent for an Article III judge balancing the prospective risks of a capture operation vs. that of a missile, or assessing the probability of "collateral damage" if the strike goes forward. We have left "the judicial power" behind altogether, and created a panel of poorly trained generals in sloppy black uniforms.

Finally, in time of war, there will be occasions when a target emerges and decisions must be made too quickly for even a secret court proceeding. And thus the "drone court" would not be able to rule on some cases; an ambitious president could find many exceptions.

Spills over and guts broader executive war powers.

Green ‘9

Craig, Associate Professor, Temple Law School; University Fellowship, Princeton History Department; J.D., Yale Law School, “Ending the Korematsu Era: A Modern Approach ,” http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=roger\_craig\_green

Another lesson from sixty years of wartime cases concerns the role of precedent itself in guiding presidential action. Two viewpoints merit special notice, with each having roots in opinions by Justice Jackson. On one hand is his explanation in Korematsu that courts must not approve illegal executive action: A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion . . . show[s] that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.270 This “loaded weapon” idea is orthodox in analysis of Korematsu as a racist morality play. The passage is cited as evidence that Supreme Court precedents really matter, and that tragically racist errors retain their menacing power throughout the decades.271 Students are reminded that Korematsu has never been directly overruled, thereby inviting imagination that Korematsu itself is a loaded weapon just waiting for a President to grasp and fire.272 This conventional approach is incomplete. As we have seen, the first and decisive precedent supporting World War II’s racist policies was not Korematsu but Hirabayashi; thus, Jackson himself helped to “load” the doctrinal “weapon” over which he worried just a year later.273 Jackson’s willingness to eviscerate Hirabayashi in Korematsu only exemplifies (as if anyone could doubt it) that no Supreme Court decision can fiat a legal principle “for all time.”274 Past cases can be overruled, disfavored, ignored, or reinterpreted if the Court finds reason to do so, and this is effectively what has happened to Korematsu and Hirabayashi themselves in the wake of Brown, the civil rights era, and other modern history.275 Korematsu was a direct “repetition” of Hirabayshi’s racism for “expand[ed]” purposes, yet it only launched these two cases farther toward their current pariah status.276 A second perspective on war-power precedents is Jackson’s Youngstown concurrence, which rejected President Truman’s effort to seize steel mills and maintain output for the Korean War.277 Jackson’s opinion ends with selfreferential pessimism about judicial authority itself: I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.278 This “no illusion” realism about presidential authority views judicial limitations on the President as contingent on Congress’s political wisdom and responsiveness — without any bold talk about precedents as “loaded weapons” or stalwart shields. On the contrary, if taken seriously, Jackson’s opinion almost suggests that judicial decisions about presidential wartime activities are epiphenomenal: When Congress asserts its institutional prerogatives and uses them wisely, the executive might be restrained, but the Court cannot do much to swing that political balance of power. Jackson’s hardnosed analysis may seem intellectually bracing, but it understates the real-world power **of judicial precedent to shape what is politically possible**.279 Although Presidents occasionally assert their willingness to disobey Supreme Court rulings, actual disobedience of this sort is vanishingly rare and would carry grave political consequences.280 Even President Bush’s repeated losses in the GWOT did not spur serious consideration of noncompliance, despite strong and obvious support from a Republican Congress.281 Likewise, from the perspective of strengthening presidential power, Korematsu-era precedents clearly emboldened President Bush in his twenty-first-century choices about Guantanamo and military commissions.282 The modern historical record thus shows that judicial precedent can both expand and limit the operative sphere of presidential action. Indeed, the influence of judicial precedent is stronger than a court-focused record might suggest. The past sixty years have witnessed a massive bureaucratization and legalization of all levels of executive government.283 From the White House Counsel, to the Pentagon, to other entities addressing intelligence and national security issues, lawyers have risen to such high levels of governmental administration that almost no significant policy is determined without multiple layers of internal legal review.284 And these executive lawyers are predominantly trained to think — whatever else they may believe — that Supreme Court precedent is authoritative and binding.285 Some middle ground seems therefore necessary between the “loaded weapon” and “no illusion” theories of precedent. Although Supreme Court decisions almost certainly influence the scope of presidential war powers, such practical influence is neither inexorable nor timeless. A more accurate theory of war-power precedents will help explain why it matters that American case law includes a reservoir of Korematsu-era decisions supporting excessive executive war power, and will also suggest how lawyers, judges, and scholars might eviscerate such rulings’ force. Korematsu is the kind of iconic negative precedent that few modern lawyers would cite for its legal holding. Yet even as Korematsu’s negative valence is beyond cavil, the breadth and scope of that negativity are not clear. Everyone knows that Korematsu is wrong, yet like other legal icons — Marbury, Dred Scott, Lochner, Erie, and Brown — its operative meaning is debatable. Just as Korematsu was once an authoritative precedent and is now discredited, this Article has sought to revise Korematsu’s cultural meaning even further, transforming it from an isolated and irrelevant precedent about racial oppression to a broadly illuminating case about how courts supervise presidential war powers.

The impact is the loss of fourth-gen warfighting capabilities that escalate to nuclear use.

Li ‘9

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

A. The Emergence of Non-State Actors

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

## 3

Obama pushing immigration—it’ll get through

Reid Epstein, Politico, 11/13/13, Obama: Don't let ACA problems stop immigration, dyn.politico.com/printstory.cfm?uuid=D92FF3A4-19D5-41D2-A8F1-C56D6BC23E08

President Barack Obama gave immigration reform advocates a simple message Wednesday: Don’t let Obamacare get you down. In an Oval Office meeting with eight Christian faith leaders, the president said he remains engaged on immigration legislation and hopes the reform effort can get a fair hearing despite his other political problems, several faith leaders told POLITICO. “He said he doesn’t want other debates that are going on to hurt this,” said Jim Wallis, the president and CEO of the Christian social justice agency Sojourners. “He doesn’t want all the other debates going on to prevent this from passing. It’s caught up in all the other debates and he wants this to be looked at on his own merits.” Obama’s exhortation came during a meeting just hours before his administration released the first batch of Affordable Care Act enrollment numbers – a figure the White House had for weeks telegraphed as far lower than expected. Much of Obama’s Oval Office conversation with the faith leaders, Biden and top aides Valerie Jarrett, Cecilia Munoz and Melissa Rogers centered around the idea that contemporary Washington politics is blocking reform efforts, the faith leaders said. Obama, they said, didn’t make a direct ask for them to press Congress to back the reform effort, as Vice President Joe Biden implored Catholic leaders to do during a call Tuesday night. Instead he asked for their input on how the current immigration system is harming their communities and echoed the urgency to pass reform legislation by the end of the year. But with House Speaker John Boehner (R-Ohio) announcing earlier in the day that he has “no intention of ever going to conference on the Senate bill,” it was clear to all in the room that immigration reform has lost momentum it had after the Senate immigration bill passed. “This can be a companion issue that also deserves some attention because we’ve come so far on this issue and we can’t let it get lost in the battle du jour,” said Joel Hunter, the senior pastor at Northland Church in suburban Orlando. “I think all of us are hoping that the headlines of the daily accusations don’t bury what is a very important and urgent issue in our time.” And still, Obama told the faith leaders he remains optimistic there will be progress by the end of December. “I did get the sense that he was wanting to reassure us that this is a priority for him,” said Russell Moore, the president of the Southern Baptist Ethics and Religious Liberty Commission. “He actually does want to work with Congress to get a bill, not to just to have an issue.” White House officials declined to comment on specifics of the meeting. In an official readout, the White House said Obama once again blamed House Republicans for blocking a vote. “The president and the leaders discussed their shared commitment to raise the moral imperative for immigration reform and said they will continue keeping the pressure on Congress so they can swiftly pass commonsense reform,” the statement said. “The president commended the faith leaders for their tireless efforts in sharing their stories with Congress. He noted there is no reason for House Republicans to continue to delay action on this issue that has garnered bipartisan support. Moore, a conservative evangelical leader, said he warned Obama not to make immigration a partisan political issue. “I did say to the president that I think he needs to take seriously that the Republicans in Congress are operating out of what I believe to be good motives and that there needs to be a sense of cooperation and not divisiveness on this issue,” Moore said. “I think that was well received. I think the president seemed to indicate that that’s what he wants to do.” Wallis said there was a discussion during the meeting that the upcoming holiday season could give a boost to the reform efforts as families and churches gather. “The holiday season now happens to be coming in the end game. Here are the holidays, religious holidays, maybe there is something there,” Wallis said. “We are hearing a president say, ‘I don’t want politics to prevent this. How can we transcend and reach people to make this not just political. What can you do to help us get this beyond the politics?’” Biden on Tuesday night told Catholic officials to make their opinions known forcefully to House Republicans. He said they can’t repeat the mistakes of the gun control fight, when opponents of expanding background checks on gun purchases outnumbered White House allies in calls and e-mails to senators debating the legislation. “Thank the representatives when you call who are already in favor of reform, especially the 32 Republicans who have expressed for a path to citizenship,” Biden said. “Give them a little bit of love and appeal to their better angels, the better angels of those who are still on the fence to take a politically courageous decision.” Hunter said the push will require some help from the public to spur House Republican leadership to call a vote. “We think that the votes are there and we think it is tricky for folks to vote the way they want to,” Hunter said. “They just need some momentum from the public in order to have the justification for voting the way they already want to.”

The plan sparks an inter-branch fight derailing the agenda

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

Raising or Lowering Political Costs by Affecting Presidential Political Capital

Shaping both real and anticipated public opinion are two important ways in which Congress can raise or lower the political costs of a military action for the president. However, focusing exclusively on opinion dynamics threatens to obscure the much broader political consequences of domestic reaction—particularly congressional opposition—to presidential foreign policies. At least since Richard Neustadt's seminal work Presidential Power, presidency scholars have warned that costly political battles in one policy arena frequently have significant ramifications for presidential power in other realms. Indeed, two of Neustadt's three "cases of command"—Truman's seizure of the steel mills and firing of General Douglas MacArthur—explicitly discussed the broader political consequences of stiff domestic resistance to presidential assertions of commander-in-chief powers. In both cases, Truman emerged victorious in the case at hand—yet, Neustadt argues, each victory cost Truman dearly in terms of his future power prospects and leeway in other policy areas, many of which were more important to the president than achieving unconditional victory over North Korea."

While congressional support leaves the president's reserve of political capital intact, congressional criticism saps energy from other initiatives on the home front by forcing the president to expend energy and effort defending his international agenda. Political capital spent shoring up support for a president's foreign policies is capital that is unavailable for his future policy initiatives. Moreover, any weakening in the president's political clout may have immediate ramifications for his reelection prospects, as well as indirect consequences for congressional races." Indeed, Democratic efforts to tie congressional Republican incumbents to President George W. Bush and his war policies paid immediate political dividends in the 2006 midterms, particularly in states, districts, and counties that had suffered the highest casualty rates in the Iraq War.6°

In addition to boding ill for the president's perceived political capital and reputation, such partisan losses in Congress only further imperil his programmatic agenda, both international and domestic. Scholars have long noted that President Lyndon Johnson's dream of a Great Society also perished in the rice paddies of Vietnam. Lacking both the requisite funds in a war-depleted treasury and the political capital needed to sustain his legislative vision, Johnson gradually let his domestic goals slip away as he hunkered down in an effort first to win and then to end the Vietnam War. In the same way, many of President Bush's highest second-term domestic priorities, such as Social Security and immigration reform, failedperhaps in large part because the administration had to expend so much energy and effort waging a rear-guard action against congressional critics of the war in Iraq.

When making their cost-benefit calculations, presidents surely consider these wider political costs of congressional opposition to their military policies. If congressional opposition in the military arena stands to derail other elements of his agenda, all else being equal, the president will be more likely to judge the benefits of military action insufficient to its costs than if Congress stood behind him in the international arena

That destroys Obama’s push—it’s critical to lock-up a House vote

Bill Scher, The Week, 10/18/13, How to make John Boehner cave on immigration, theweek.com/article/index/251361/how-to-make-john-boehner-cave-on-immigration

Speaker John Boehner (R-Ohio) generally adheres to the unwritten Republican rule that bars him from allowing votes on bills opposed by a majority of Republicans, even if they would win a majority of the full House.

But he's caved four times this year, allowing big bills to pass with mainly Democratic support. They include repealing the Bush tax cuts for the wealthiest Americans; providing Hurricane Sandy relief; expanding the Violence Against Women act to better cover immigrants, Native Americans, and LGBT survivors of abuse; and this week's bill raising the debt limit and reopening the federal government.

Many presume the Republican House is a black hole sucking President Obama's second-term agenda into oblivion. But the list of Boehner's past retreats offers a glimmer of hope, especially to advocates of immigration reform. Though it has languished in the House, an immigration overhaul passed with bipartisan support in the Senate, and was given a fresh push by Obama in the aftermath of the debt limit deal.

The big mystery that immigration advocates need to figure out: What makes Boehner cave? Is there a common thread? Is there a sequence of buttons you can push that forces Boehner to relent?

Two of this year's caves happened when Boehner was backed up against hard deadlines: The Jan. 1 fiscal cliff and the Oct. 17 debt limit. Failure to concede meant immediate disaster. Reject the bipartisan compromise on rolling back the Bush tax cuts, get blamed for jacking up taxes on every taxpayer. Reject the Senate's three-month suspension of the debt limit, get blamed for sparking a global depression. Boehner held out until the absolute last minute both times, but he was not willing to risk blowing the deadline.

A third involved the response to an emergency: Hurricane Sandy. Conservative groups were determined to block disaster relief because — as with other federal disaster responses — the $51 billion legislative aid package did not include offsetting spending cuts. Lacking Republican votes, Boehner briefly withdrew the bill from consideration, unleashing fury from New York and New Jersey Republicans, including Gov. Chris Christie. While there wasn't a hard deadline to meet, disaster relief was a time-sensitive matter, and the pressure from Christie and his allies was unrelenting. Two weeks after pulling the bill, Boehner put it on the floor, allowing it to pass over the objections of 179 Republicans.

The fourth cave occurred in order to further reform and expand a government program: The Violence Against Women Act. The prior version of the law had been expired for over a year, as conservatives in the House resisted the Senate bill in the run-up to the 2012 election. But after Mitt Romney suffered an 18-point gender gap in his loss to Obama, and after the new Senate passed its version again with a strong bipartisan vote, Boehner was unwilling to resist any longer. Two weeks later, the House passed the Senate bill with 138 Republicans opposed.

Unfortunately for immigration advocates, there is no prospect of widespread pain if reform isn't passed. There is no immediate emergency, nor threat of economic collapse.

But there is a deadline of sorts: The 2014 midterm elections.

If we've learned anything about Boehner this month, it's that he's a party man to the bone. He dragged out the shutdown and debt limit drama for weeks, without gaining a single concession, simply so his most unruly and revolutionary-minded members would believe he fought the good fight and stay in the Republican family. What he won is party unity, at least for the time being.

What Boehner lost for his Republicans is national respectability. Republican Party approval hit a record low in both the most recent NBC/Wall Street Journal poll and Gallup poll.

Here's where immigration advocates have a window of opportunity to appeal to Boehner's party pragmatism. Their pitch: The best way to put this disaster behind them is for Republicans to score a big political victory. You need this.

A year after the Republican brand was so bloodied that the Republican National Committee had to commission a formal "autopsy," party approval is the worst it has ever been. You've wasted a year. Now is the time to do something that some voters will actually like.

There's reason to hope he could be swayed. In each of the four cases in which he allowed Democrats to carry the day, he put the short-term political needs of the Republican Party over the ideological demands of right-wing activists.

Boehner will have to do another round of kabuki. He can't simply swallow the Senate bill in a day. There will have to be a House version that falls short of activists' expectations, followed by tense House-Senate negotiations. Probably like in the most formulaic of movies, and like the fiscal cliff and debt limit deals, there will have to be an "all-is-lost moment" right before we get to the glorious ending. Boehner will need to given the room to do all this again.

But he won't do it without a push. A real good push.

## 4

The affirmative re-inscribes the primacy of liberal legalism as a method of restraint—that paradoxically collapses resistance to Executive excesses.

Margulies ‘11

Joseph, Joseph Margulies is a Clinical Professor, Northwestern University School of Law. He was counsel of record for the petitioners in Rasul v. Bush and Munaf v. Geren. He now is counsel of record for Abu Zubaydah, for whose torture (termed harsh interrogation by some) Bush Administration officials John Yoo and Jay Bybee wrote authorizing legal opinions. Earlier versions of this paper were presented at workshops at the American Bar Foundation and the 2010 Law and Society Association Conference in Chicago., Hope Metcalf is a Lecturer, Yale Law School. Metcalf is co-counsel for the plaintiffs/petitioners in Padilla v. Rumsfeld, Padilla v. Yoo, Jeppesen v. Mohammed, and Maqaleh v. Obama. She has written numerous amicus briefs in support of petitioners in suits against the government arising out of counterterrorism policies, including in Munaf v. Geren and Boumediene v. Bush., “Terrorizing Academia,” http://www.swlaw.edu/pdfs/jle/jle603jmarguilies.pdf

In an observation more often repeated than defended, we are told that the attacks of September 11 “changed everything.” Whatever merit there is in this notion, it is certainly true that 9/11—and in particular the legal response set in motion by the administration of President George W. Bush—left its mark on the academy. Nine years after 9/11, it is time to step back and assess these developments and to offer thoughts on their meaning. In Part II of this essay, we analyze the post-9/11 scholarship produced by this “emergency” framing. We argue that legal scholars writing in the aftermath of 9/11 generally fell into one of three groups: unilateralists, interventionists, and proceduralists. Unilateralists argued in favor of tilting the allocation of government power toward the executive because the state’s interest in survival is superior to any individual liberty interest, and because the executive is best able to understand and address threats to the state. Interventionists, by contrast, argued in favor of restraining the executive (principally through the judiciary) precisely to prevent the erosion of civil liberties. Proceduralists took a middle road, informed by what they perceived as a central lesson of American history.1 Because at least some overreaction by the state is an inevitable feature of a national crisis, the most one can reasonably hope for is to build in structural and procedural protections to preserve the essential U.S. constitutional framework, and, perhaps, to minimize the damage done to American legal and moral traditions. Despite profound differences between and within these groups, legal scholars in all three camps (as well as litigants and clinicians, including the authors) shared a common perspective—viz., that repressive legal policies adopted by wartime governments are temporary departures from hypothesized peacetime norms. In this narrative, metaphors of bewilderment, wandering, and confusion predominate. The country “loses its bearings” and “goes astray.” Bad things happen until at last the nation “finds itself” or “comes to its senses,” recovers its “values,” and fixes the problem. Internment ends, habeas is restored, prisoners are pardoned, repression passes. In a show of regret, we change direction, “get back on course,” and vow it will never happen again. Until the next time, when it does. This view, popularized in treatments like All the Laws but One, by the late Chief Justice Rehnquist,2 or the more thoughtful and thorough discussion in Perilous Times by Chicago’s Geoffrey Stone,3 quickly became the dominant narrative in American society and the legal academy. **This narrative also figured heavily in the many challenges to Bush-era policies,** including by the authors. The narrative permitted litigators and legal scholars to draw upon what elsewhere has been referred to as America’s “civic religion”4 and to cast the courts in the role of hero-judges5 **whom we hoped would restore legal order.**6 But by framing the Bush Administration’s response as the latest in a series of regrettable but temporary deviations from a hypothesized liberal norm, the legal academy ignored the more persistent, and decidedly illiberal, authoritarian tendency in American thought to demonize communal “others” during moments of perceived threat. Viewed in this light, what the dominant narrative identified as a brief departure caused by a military crisis is more accurately seen as part of a recurring process of intense stigmatization tied to periods of social upheaval, of which war and its accompanying repressions are simply representative (and particularly acute) illustrations. It is worth recalling, for instance, that the heyday of the Ku Klux Klan in this country, when the organization could claim upwards of 3 million members, was the early-1920s, and that the period of greatest Klan expansion began in the summer of 1920, almost immediately after the nation had “recovered” from the Red Scare of 1919–20.7 Klan activity during this period, unlike its earlier and later iterations, focused mainly on the scourge of the immigrant Jew and Catholic, and flowed effortlessly from the anti-alien, anti-radical hysteria of the Red Scare. Yet this period is almost entirely unaccounted for in the dominant post-9/11 narrative of deviation and redemption, which in most versions glides seamlessly from the madness of the Red Scare to the internment of the Japanese during World War II.8 And because we were studying the elephant with the wrong end of the telescope, we came to a flawed understanding of the beast. In Part IV, we argue that the interventionists and unilateralists came to an incomplete understanding by focusing almost exclusively on what Stuart Scheingold called “the myth of rights”—the belief that if we can identify, elaborate, and secure judicial recognition of the legal “right,” **political structures and policies will adapt their behavior to the requirements of the law** and change will follow more or less automatically.9 Scholars struggled to define the relationship between law and security primarily through exploration of structural10 and procedural questions, and, to a lesser extent, to substantive rights. And they examined the almost limitless number of subsidiary questions clustered within these issues. Questions about the right to habeas review, for instance, generated a great deal of scholarship about the handful of World War II-era cases that the Bush Administration relied upon, including most prominently Johnson v. Eisentrager and Ex Parte Quirin. 11 Regardless of political viewpoint, a common notion among most unilateralist and interventionist scholars was that when law legitimized or delegitimized a particular policy, **this would have a direct and observable effect on actual behavior**. The premise of this scholarship, in other words, was that policies “struck down” by the courts, or credibly condemned as lawless by the academy, would inevitably be changed—and that this should be the focus of reform efforts. Even when disagreement existed about the substance of rights or even which branch should decide their parameters, it reflected shared acceptance of the primacy of law, often to the exclusion of underlying social or political dynamics. Eric Posner and Adrian Vermeule, for instance, may have thought, unlike the great majority of their colleagues, that the torture memo was “standard fare.”12 But their position nonetheless accepted the notion that if the prisoners had a legal right to be treated otherwise, then the torture memo authorized illegal behavior and must be given no effect.13 Recent developments, however, cast doubt on two grounding ideas of interventionist and unilateralist scholarship—viz., that post-9/11 policies were best explained as responses to a national crisis (and therefore limited in time and scope), and that the problem was essentially legal (and therefore responsive to condemnation by the judiciary and legal academy). One might have reasonably predicted that in the wake of a string of Supreme Court decisions limiting executive power, apparently widespread and bipartisan support for the closure of Guantánamo during the 2008 presidential campaign, and the election of President Barack Obama, which itself heralded a series of executive orders that attempted to dismantle many Bush-era policies, the nation would be “returning” to a period of respect for individual rights and the rule of law. Yet the period following Obama’s election has been marked by an increasingly retributive and venomous narrative surrounding Islam and national security. **Precisely when the dominant narrative would have predicted change** and redemption, we have seen retreat and retrenchment. This conundrum is not adequately addressed by dominant strands of post-9/11 legal scholarship. In retrospect, it is surprising that much post-9/11 scholarship appears to have set aside critical lessons from previous decades as to the relationship among law, society and politics.14 Many scholars have long argued in other contexts that rights—or at least the experience of rights—are subject to political and social constraints, particularly for groups subject to historic marginalization. Rather than self-executing, rights are better viewed as contingent political resources, capable of mobilizing public sentiment and generating social expectations.15 From that view, a victory in Rasul or Boumediene no more guaranteed that prisoners at Guantánamo would enjoy the right to habeas corpus than a victory in Brown v. Board16 guaranteed that schools in the South would be desegregated.17 Rasul and Boumediene, therefore, should be seen as part (and probably only a small part) of a varied and complex collection of events, including the fiasco in Iraq, the scandal at the Abu Ghraib prison, and the use of warrantless wiretaps, as well as seemingly unrelated episodes like the official response to Hurricane Katrina. These and other events during the Bush years merged to give rise to a powerful social narrative critiquing an administration committed to lawlessness, content with incompetence, and engaged in behavior that was contrary to perceived “American values.”18 Yet the very success of this narrative, culminating in the election of Barack Obama in 2008, produced quiescence on the Left, even as it stimulated massive opposition on the Right. The result has been the emergence of a counter-narrative about national security that has produced a vigorous social backlash such that most of the Bush-era policies will continue largely unchanged, at least for the foreseeable future.19 Just as we see a widening gap between judicial recognition of rights in the abstract and the observation of those rights as a matter of fact, there appears to be an emerging dominance of proceduralist approaches, which take as a given that rights dissolve under political pressure, and, thus, are best protected by basic procedural measures. But that stance falls short in its seeming readiness to trade away rights in the face of political tension. First, it accepts the tropes du jour surrounding radical Islam—namely, that it is a unique, and uniquely apocalyptic, threat to U.S. security. In this, proceduralists do not pay adequate heed to the lessons of American history and sociology. And second, it endorses too easily the idea that procedural and structural protections will protect against substantive injustice in the face of popular and/or political demands for an outcome-determinative system that cannot tolerate acquittals. Procedures only provide protection, however, if there is sufficient political support for the underlying right. Since the premise of the proceduralist scholarship is that such support does not exist, it is folly to expect the political branches to create meaningful and robust protections. In short, a witch hunt does not become less a mockery of justice when the accused is given the right to confront witnesses. And a separate system (especially when designed for demonized “others,” such as Muslims) cannot, by definition, be equal. In the end, we urge a fuller embrace of what Scheingold called “the politics of rights,” which recognizes the contingent character of rights in American society. We agree with Mari Matsuda, who observed more than two decades ago that rights are a necessary but not sufficient resource for marginalized people with little political capital.20 To be effective, therefore, we must look beyond the courts and grapple with the hard work of long-term change with, through and, perhaps, in spite of law. These are by no means new dilemmas, but the post-9/11 context raises difficult and perplexing questions that deserve study and careful thought as our nation settles into what appears to be a permanent emergency.

Legalism underpins the violence of empire and creates the conditions of possibility for liberal violence.

Dossa ‘99

Shiraz, Department of Political Science, St. Francis Xavier University, Antigonish, Nova Scotia, “Liberal Legalism: Law, Culture and Identity,” The European Legacy, Vol. 4, No. 3, pp. 73-87,1

No discipline in the rationalized arsenal of modernity is as rational, impartial, objective as the province of law and jurisprudence, in the eyes of its liberal enthusiasts. Law is the exemplary countenance of the conscious and calculated rationality of modern life, **it is the** emblematic face of liberal civilization. Law and legal rules symbolize the spirit of science, the march of human progress. As Max Weber, the reluctant liberal theorist of the ethic of rationalization, asserted: judicial formalism enables the legal system to operate like a technically **rational machine**. Thus it guarantees to individuals and groups within the system a relative of maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their action. In this reading, law encapsulates the western capacity to bring order to nature and human beings, to turn the ebb and flow of life into a "rational machine" under the tutelage of "judicial formalism".19 Subjugation of the Other races in the colonial empires was motivated by power and rapacity, but it was justified and indeed rationalized, by an appeal to the civilizing influence of religion and law: western Christianity and liberal law. To the imperialist mind, "the civilizing mission of law" was fundamental, though Christianity had a part to play in this program.20 Liberal colonialists visualized law, civilization and progress as deeply connected and basic, they saw western law as neutral, universally relevant and desirable. The first claim was right in the liberal context, the second thoroughly false. In the liberal version, the mythic and irrational, emblems of thoughtlessness and fear, had ruled all life-forms in the past and still ruled the lives of the vast majority of humanity in the third world; in thrall to the majesty of the natural and the transcendent, primitive life flourished in the environment of traditionalism and lawlessness, hallmarks of the epoch of ignorance. By contrast, liberal ideology and modernity were abrasively unmythic, rational and controlled. Liberal order was informed by knowledge, science, a sense of historical progress, a continuously improving future. But this canonical, secular, bracing self-image, is tendentious and substantively illusory: it blithely scants the bloody genealogy and the extant historical record of liberal modernity, liberal politics, and particularly liberal law and its impact on the "lower races" (Hobson). In his Mythology of Modern Law, Fitzpatrick has shown that the enabling claims of liberalism, specifically of liberal law, are not only untenable but implicated in canvassing a racist justification of its colonial past and in eliding the racist basis of the structure of liberal jurisprudence.21 Liberal law is mythic in its presumption of its neutral, objective status. Specifically, the liberal legal story of its immaculate, analytically pure origin obscures and veils not just law's own ruthless, violent, even savage and disorderly trajectory, but also its constitutive association with imperialism and racism.22 In lieu of the transcendent, divine God of the "lower races", modern secular law postulated the gods of History, Science, Freedom. Liberal law was to be the instrument for realizing the promise of progress that the profane gods had decreed. Fitzpatrick's invasive surgical analysis lays bare the underlying logic of law's self-articulation in opposition to the values of cultural-racial Others, and its strategic, continuous reassertion of liberalism's superiority and the civilizational indispensability of liberal legalism. Liberal law's self-presentation presupposes a corrosive, debilitating, anarchic state of nature inhabited by the racial Others and lying in wait at the borders of the enlightened modern West. This mythological, savage Other, creature of raw, natural, unregulated fecundity and sexuality, justified the liberal conquest and control of the racially Other regions.23 Law's violence and resonant savagery on behalf of the West in its imperial razing of cultures and lands of the others, has been and still is, justified in terms of the necessary, beneficial spread of liberal civilization. Fitzpatrick's analysis parallels the impassioned deconstruction of this discourse of domination initiated by Edward Said's Orientalism, itself made possible by the pioneering analyses of writers like Aime Cesaire and Frantz Fanon. Fitzpatrick's argument is nevertheless instructive: his focus on law and its machinations unravels the one concrete province of imperial ideology that is centrally modern and critical in literally transforming and refashioning the human nature of racial Others. For liberal law carries on its back the payload of "progressive", pragmatic, **instrumental modernity**, its ideals of order and rule of law, its articulation of human rights and freedom, its ethic of procedural justice, its hostility to the sacred, to transcendence or spiritual complexity, its recasting of politics as the handmaiden of the nomos, its valorization of scientism and rationalization in all spheres of modern life. Liberal law is not synonymous with modernity tout court, but it is the exemplary voice of its rational spirit, **the custodian of its civilizational ambitions.** For the colonized Others, no non-liberal alternative is available: a non-western route to economic progress is inconceivable in liberal-legal discourse. For even the truly tenacious in the third world will never cease to be, in one sense or another, the outriders of modernity: their human condition condemns them to **playing perpetual catch-up**, eternally subservient to Western economic and technological superiority in a epoch of self-surpassing modernity.24 If the racially Other nations suffer exclusion globally, the racially other minorities inside the liberal loop enjoy the ambiguous benefits of inclusion. As legal immigrants or refugees, they are entitled to the full array of rights and privileges, as citizens (in Canada, France, U.K., U.S—Germany is the exception) they acquire civic and political rights as a matter of law. Formally, they are equal and equally deserving. In theory liberal law is inclusive, but concretely it is routinely **partial and invidious**. Inclusion is conditional: it depends on how robustly the new citizens wear and deploy their cultural difference. Two historical facts account for this phenomenon: liberal law's role in western imperialism and the Western claim of civilizational superiority that pervades the culture that sustains liberal legalism. Liberal law, as the other of the racially Other within its legal jurisdiction, differentiates and locates this other in the enemy camp of the culturally raw, irreducibly foreign, making him an unreliable ally or citizen. Law's suspicion of the others socialized in "lawless" cultures is instinctive and undeniable. Liberal law's constitutive bias is in a sense incidental: the real problem is racism or the racist basis of liberal ideology and culture.25 The internal racial other is not the juridical equal in the mind of liberal law but the juridically and humanly inferior Other, the perpetual foreigner.

The alternative is to vote negative to endorse political, rather than legal restrictions on Presidential war powers authority.

Goldsmith ‘12

Jack, Harvard Law School Professor, focus on national security law, presidential power, cybersecurity, and conflict of laws, Former Assistant Attorney General, Office of Legal Counsel, and Special Counsel to the Department of Defense, Hoover Institution Task Force on National Security and Law, March 2012, Power and Constraint, p. 205-209

DAVID BRIN is a science-fiction writer who in 1998 turned his imagination to a nonfiction book about privacy called The Transparent Society. Brin argued that individual privacy was on a path to extinction because government surveillance tools—tinier and tinier cameras and recorders, more robust electronic snooping, and bigger and bigger databases—were growing irreversibly more powerful. His solution to this attack on personal space was not to erect privacy walls, which he thought were futile, but rather to induce responsible government action by turning the surveillance devices on the government itself. A government that citizens can watch, Brin argued, is one subject to criticism and reprisals for its errors and abuses, and one that is more careful and responsible in the first place for fear of this backlash. A transparent government, in short, is an accountable one. "If neo-western civilization has one great trick in its repertoire, a technique more responsible than any other for its success, that trick is accountability," Brin argues, "[e]specially the knack—which no other culture ever mastered—of making accountability apply to the mighty."' Brin's notion of reciprocal transparency is in some ways the inverse of the penological design known as a "panopticon," made famous by the eighteenth-century English utilitarian philosopher Jeremy Bentham. Bentham's brother Samuel had designed a prison in Paris that allowed an "inspector" to monitor all of the inmates from a central location without the prisoners knowing whether or when they were being watched (and thus when they might be sanctioned for bad behavior). Bentham described the panopticon prison as a "new mode of obtaining power of mind over mind" because it allowed a single guard to control many prisoners merely by conveying that he might be watching.' The idea that a "watcher" could gain enormous social control over the "watched" through constant surveillance backed with threats of punishment has proved influential. Michel Foucault invoked Bentham's panopticon as a model for how modern societies and governments watch people in order to control them.' George Orwell invoked a similar idea three decades earlier with the panoptical telescreen in his novel 1984. More recently, Yale Law School professor Jack Balkin used the panopticon as a metaphor for what he calls the "National Surveillance State," in which governments "use surveillance, data collection, and data mining technologies not only to keep Americans safe from terrorist attacks but also to prevent ordinary crime and deliver social services." The direction of the panopticon can be reversed, however, creating a "synopticon" in which many can watch one, including the government.' The television is a synopticon that enables millions to watch the same governmental speech or hearing, though it is not a terribly robust one because the government can control the broadcast. Digital technology and the Internet combine to make a more powerful synopticon that allows many individuals to record and watch an official event or document in sometimes surprising ways. Video recorders placed in police stations and police cars, cell-phone video cameras, and similar tools increase citizens' ability to watch and record government activity. This new media content can be broadcast on the Internet and through other channels to give citizens synoptical power over the government—a power that some describe as "sousveillance" (watching from below)! These and related forms of watching can have a disciplining effect on government akin to Brin's reciprocal transparency. The various forms of watching and checking the presidency described in this book constitute a vibrant presidential synopticon. Empowered by legal reform and technological change, the "many"—in the form of courts, members of Congress and their staff, human rights activists, journalists and their collaborators, and lawyers and watchdogs inside and outside the executive branch—constantly gaze on the "one," the presidency. Acting alone and in mutually reinforcing networks that crossed organizational boundaries, these institutions extracted and revealed information about the executive branch's conduct in war—sometimes to adversarial actors inside the government, and sometimes to the public. The revelations, in turn, forced the executive branch to account for its actions and enabled many institutions to influence its operations. The presidential synopticonalso promoted responsible executive action merely through its broadening gaze. One consequence of a panopticon, in Foucault's words, is "to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."' The same thing has happened in reverse but to similar effect within the executive branch, where officials are much more careful merely by virtue of being watched. The presidential synopticon is in some respects not new. Victor Davis Hanson has argued that "war amid audit, scrutiny, and self-critique" has been a defining feature of the Western tradition for 2,500 years.' From the founding of the nation, American war presidents have been subject to intense scrutiny and criticism in the unusually open society that has characterized the United States. And many of the accountability mechanisms described in this book have been growing since the 1970s in step with the modern presidency. What is new, however, is the scope and depth of these modern mechanisms, their intense legalization, and their robust operation during wartime. In previous major wars the President determined when, how, and where to surveil, target, detain, transfer, and interrogate enemy soldiers, often without public knowledge, and almost entirely without unwanted legal interference from within the executive branch itself or from the other branches of government.' Today these decisions are known inside and outside the government to an unprecedented degree and are heavily regulated by laws and judicial decisions that are enforced daily by lawyers and critics inside and outside the presidency. Never before have Congress, the courts, and lawyers had such a say in day-to-day military activities; never before has the Commander in Chief been so influenced, and constrained, by law. This regime has many historical antecedents, but it came together and hit the Commander in Chief hard for the first time in the last decade. It did so because of extensive concerns about excessive presidential power in an indefinite and unusually secretive war fought among civilians, not just abroad but at home as well. These concerns were exacerbated and given credibility by the rhetoric and reality of the Bush administration's executive unilateralism—a strategy that was designed to free it from the web of military and intelligence laws but that instead galvanized forces of reaction to presidential power and deepened the laws' impact. Added to this mix were enormous changes in communication and collaboration technologies that grew to maturity in the decade after 9/11. These changes helped render executive branch secrets harder to keep, and had a flattening effect on the executive branch just as it had on other hierarchical institutions, making connections between (and thus accountability to) actors inside and outside the presidency much more extensive.

## adv 2

Existing norms solve and precedent isn’t key

Anderson, professor of international law – American University, ‘13

(Kenneth, "The Case for Drones", https://www.commentarymagazine.com/articles/the-case-for-drones/)

The objection to civilian deaths draws out a related criticism: Why should the United States be able to conduct these drone strikes in Pakistan or in Yemen, countries that are not at war with America? What gives the United States the moral right to take its troubles to other places and inflict damage by waging war? Why should innocent Pakistanis suffer because the United States has trouble with terrorists? The answer is simply that like it or not, the terrorists are in these parts of Pakistan, and it is the terrorists that have brought trouble to the country. The U.S. has adopted a moral and legal standard with regard to where it will conduct drone strikes against terrorist groups. It will seek consent of the government, as it has long done with Pakistan, even if that is contested and much less certain than it once was. But there will be no safe havens. If al-Qaeda or its affiliated groups take haven somewhere and the government is unwilling or unable to address that threat, America’s very long-standing view of international law permits it to take forcible action against the threat, sovereignty and territorial integrity notwithstanding. This is not to say that the United States could or would use drones anywhere it wished. Places that have the rule of law and the ability to respond to terrorists on their territory are different from weakly governed or ungoverned places. There won’t be drones over Paris or London—this canard is popular among campaigners and the media but ought to be put to rest. But the vast, weakly governed spaces, where states are often threatened by Islamist insurgency, such as Mali or Yemen, are a different case altogether. This critique often leads, however, to the further objection that the American use of drones is essentially laying the groundwork for others to do the same. Steve Coll wrote in the New Yorker: “America’s drone campaign is also creating an ominous global precedent. Ten years or less from now, China will likely be able to field armed drones. How might its Politburo apply Obama’s doctrines to Tibetan activists holding meetings in Nepal?” The United States, it is claimed, is arrogantly exerting its momentary technological advantage to do what it likes. It will be sorry when other states follow suit. But the United States does not use drones in this fashion and has claimed no special status for drones. The U.S. government uses drone warfare in a far more limited way, legally and morally, and entirely within the bounds of international law. The problem with China (or Russia) using drones is that they might not use them in the same way as the United States. The drone itself is a tool. How it is used and against whom—these are moral questions. If China behaves malignantly, drones will not be responsible. Its leaders will be.

Global drone norms are impossible

McGinnis, senior professor – Northwestern Law, ‘10

(John O. 104 Nw. U. L. Rev. Colloquy 366)

It is hard to overstate the extent to which advances in robotics, which are driven by AI, are transforming the United States military. During the Afghanistan and Iraq wars, more and more Unmanned Aerial Vehicles (UAVs) of different kinds were used. For example, in 2001, there were ten unmanned "Predators" in use, and at the end of 2007, there were 180. n42 Unmanned aircraft, which depend on substantial computational capacity, are an increasingly important part of our military and may prove to be the [\*374] majority of aircraft by 2020. n43 Even below the skies, robots perform im-portant tasks such as mine removal. n44 Already in development are robots that would wield lasers as a kind of special infantryman focused on killing snipers. n45 Others will act as paramedics. n46 It is not an exaggeration to predict that war twenty or twenty-five years from now may be fought predominantly by robots. The AI-driven battlefield gives rise to a different set of fears than those raised by the potential autonomy of AI. Here, the concern is that human malevolence will lead to these ever more capable machines wreaking ever more havoc and destruction. III. THE FUTILITY OF THE RELINQUISHMENT OF AI AND THE PROHIBITION OF BATTLEFIELD RO-BOTS Joy argues for "relinquishment"--i.e., the abandonment of technologies that can lead to strong AI. Those who are concerned about the use of AI technology on the battlefield would focus more specifically on weapons powered by AI. But whether the objective is relinquishment or the constraint of new weaponry, any such program must be translated into a specific set of legal prohibitions. These prohibitions, at least under current technology and current geopolitics, are certain to be ineffective. Thus, nations are unlikely to unilaterally relinquish the technology behind accelerating compu-tational power or the research to further accelerate that technology. Indeed, were the United States to relinquish such technology, the whole world would be the loser. The United States is both a flourishing commercial republic that benefits from global peace and prosperity, and the world's hegemon, capable of supplying the public goods of global peace and security. Because it gains a greater share of the prosperity that is afforded by peace than do other nations, it has incentives to shoulder the burdens to maintain a global peace that benefits not only the United States but the rest of the world. n47 By relinquishing the power of AI, the United States would in fact be giving greater incentives to rogue nations to develop it. Thus, the only realistic alternative to unilateral relinquishment would be a global agreement for relinquishment or regulation of AI-driven weaponry. But such an agreement would face the same insuperable obstacles nuclear disarma-ment has faced. As recent events with Iran and North Korea demonstrate, n48 it seems difficult if not impossible to per-suade rogue nations [\*375] to relinquish nuclear arms. Not only are these weapons a source of geopolitical strength and prestige for such nations, but verifying any prohibition on the preparation and production of these weapons is a task beyond the capability of international institutions. The verification problems are far greater with respect to the technologies relating to artificial intelligence. Relative-ly few technologies are involved in building a nuclear bomb, but arriving at strong artificial intelligence has many routes and still more that are likely to be discovered. Moreover, building a nuclear bomb requires substantial infrastruc-ture. n49 Artificial intelligence research can be done in a garage. Constructing a nuclear bomb requires very substantial resources beyond that of most groups other than nation-states. n50 Researching artificial intelligence is done by institu-tions no richer than colleges and perhaps would require even less substantial resources.

No impact—drones make wars less intense

McGinnis, senior professor – Northwestern Law, ‘10

(John O., 104 Nw. U. L. Rev. Colloquy 366)

It is not as if in the absence of AI wars or weapons will cease to exist. The way to think about the effects of AI on war is to think of the consequences of substituting technologically advanced robots for humans on the battlefield. In at least three ways, that substitution is likely to be beneficial to humans. First, robots make conventional forces more effective and less vulnerable to certain weapons of mass destruction, like chemical and biological weapons. Rebalancing the world to make such weapons less effective, even if marginally so, must be counted as a benefit. Second, one of the reasons that conventional armies deploy lethal force is to protect the human soldiers against death or serious injury. If only robots are at stake in a battle, a nation is more likely to use non-lethal force, such as stun guns and the like. The United States is in fact considering outfitting some of its robotic forces with non-lethal weapon-ry. Third, AI-driven weaponry gives an advantage to the developed world and particularly to the United States, be-cause of its advanced capability in technological innovation. Robotic weapons have been among the most successful in the fight against Al-Qaeda and other groups waging asymmetrical warfare against the United States. The Predator, a robotic airplane, has been successfully targeting terrorists throughout Afghanistan and Pakistan, and more technologi-cally advanced versions are being rapidly developed. Moreover, it does so in a targeted manner without the need to launch large-scale wars to hold territory--a process that would almost certainly result in more collateral damage. n61 If one believes that the United States is on the whole the best enforcer of rules of conduct that make for a peaceful and prosperous world, this development must also be counted as a benefit.

Drones empirically don’t cause arms races

Joshi and Stein ’13 [Shashank Joshi, Research Fellow at the Royal United Services Institute and a PhD candidate at the Department of Government, Harvard University, & Aaron Stein, Associate Fellow at the Royal United Services Institute, a researcher at the Istanbul-based Centre for Economics and Foreign Policy Studies and a PhD candidate at King’s College London, 2013, Survival: Global Politics and Strategy, Volume 55, Issue 5, “Emerging Drone Nations,” Taylor and Francis, accessed 10/12/13]

Just weeks after Nazi Germany began to use the V-1 missile to attack the United Kingdom in 1944, the United States began work on a pilotless bomber to attack targets deep inside German-held territory. The programme was beset with problems, and converted B-17 and B-24 bombers were only able to fly 13 unsuccessful test missions.1 Nevertheless, the emergence of long-range missile technology, as well as these early tests in pilotless and remotely piloted aircraft, paved the way for the introduction of modern unmanned aerial vehicles and remotely piloted air systems, collectively and more commonly referred to as drones.2

Beginning in the 1950s, the US Air Force began to experiment with drones for high-altitude reconnaissance of Soviet missile, nuclear and mil- itary facilities. As the programme matured, the air force tested an SR-71 Blackbird-type drone for high-speed flights over China, developed a drone for use in Vietnam and, eventually, created a larger platform that served as a test bed for many of the systems comprising the current Global Hawk, Predator and Reaper drones.3

Drones do not, therefore, represent a radically new technology. They are but one strand in the remarkable trajectory of airpower development since the Second World War. The idea of using self-guiding or, more commonly, remotely guided aircraft to minimise the risk to pilots, to collect intelligence and to destroy targets has been at the centre of every drone programme for the past six decades.

Drones do not have, and have never had, a monopoly on these roles: manned aircraft, cruise missiles and special forces continue to be used in striking valuable targets in contested areas. Cruise missiles were used to target al-Qaeda in Yemen in 2009, and special forces to kill Osama bin Laden in Pakistan in 2011. Moreover, the great majority of drones around the world are neither armed, nor as large and capable as manned aircraft.4

TK restraints decimate timeliness, crushing drone effectiveness—external oversight doesn’t solve backlash—only justifying the current program makes it sustainable

Groves, senior research fellow – Institute for International Studies @ Heritage, 4/10/’13

(Steven, “Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad,” http://www.heritage.org/research/reports/2013/04/drone-strikes-the-legality-of-us-targeting-terrorists-abroad)

A Drone Court? Certain former Obama Administration officials, the editorial board of The New York Times, and at least one U.S. Senator have called for the establishment of a special oversight panel or court to review the Administration’s targeting determinations, particularly in instances in which a U.S. citizen is targeted.[49] Essentially, such a court would scrutinize the Administration’s targeting decisions, presumably including its decisions to place individuals on the “disposition matrix.” The court would apparently have the authority to overrule and nullify targeting decisions. The creation of such a court is ill advised and of doubtful constitutionality. The proponents of a drone court apparently do not appreciate the potential unintended consequences of establishing such an authority. The idea is wrongheaded and raises more questions than it answers. For instance, could the drone court decide as a matter of law that a targeted strike is not justified because the United States is not engaged in an armed conflict with al-Qaeda? Could the drone court rule that members of a force associated with al-Qaeda (e.g., AQAP) may not be targeted because AQAP was not directly involved in the September 11 attacks and therefore the strike is not authorized under the AUMF? The proposed drone court cannot avoid these fundamental questions since the justification for the targeted strikes is dependent on the answers to these questions. Even if the proposed drone court attempts to eschew intervention into foundational questions such as the existence of an armed conflict, it still would not be in a position to rule on the “easy” questions involved in each and every drone strike. Does the target constitute an “imminent threat” to the United States? When civilian casualties may occur as a result of the strike, does the drone court have the authority to overrule the targeting decision as a violation of the principle of proportionality? Is the target an innocent civilian or a civilian “directly participating in hostilities”? Should U.S. forces attempt to capture the target before resorting to a drone strike? Is capture feasible? Any drone court, even if constituted with former military and intelligence officials, is ill suited to weigh all of the competing factors that go into a decision to target an al-Qaeda operative and make a timely decision, particularly when there is often only a short window of time to order a strike. Regardless, creating a judicial or quasi-judicial review process will not ameliorate, much less resolve, objections to U.S. targeted killing practices. Critics will continue to demand more judicial process, including appeals from the proposed drone court, and additional transparency no matter what kind of forum is established to oversee targeting decisions. What the U.S. Should Do The U.S. drone program and its practices regarding targeted strikes against al-Qaeda and its associated forces are lawful. They are lawful because the United States is currently engaged in an armed conflict with those terrorist entities and because the United States has an inherent right to defend itself against imminent threats to its security. Moreover, the available evidence indicates that U.S. military and intelligence forces conduct targeted strikes in a manner consistent with international law. Military and intelligence officials go to great lengths to identify al-Qaeda operatives that pose an imminent threat and continually reassess the level of that threat. Decisions on each potential target are debated among U.S. officials before the target is placed in the “disposition matrix.” In conducting targeted strikes U.S. forces strive to minimize civilian casualties, although such casualties cannot always be prevented. The United States will continue to face asymmetric threats from non-state actors operating from the territory of nations that are either unwilling or unable to suppress the threats. To confront these threats, the United States must retain its most effective operational capabilities, including targeted strikes by armed drones, even if U.S. forces degrade al-Qaeda and its associated forces to such an extent that the United States no longer considers itself to be in a non-international armed conflict. Moreover, the United States must continue to affirm its inherent right to self-defense to eliminate threats to its national security, regardless of the presence or absence of an armed conflict recognized by international law. To that end, the United States should: Continue to affirm existing use-of-force authorities. During the past three years, senior officials of the Obama Administration have publicly set out in significant detail U.S. policies and practices regarding drone strikes. The Administration should continue to do so, emphasizing that U.S. policies adhere to widely recognized international law. Critics of the United States will continue to claim that a lack of transparency surrounds U.S. policy and actions. Such critics will likely never be satisfied, not even with full disclosure of the relevant classified legal memoranda, and their criticism will not cease until the United States abandons its practice of targeting terrorist threats in Pakistan, Yemen, and elsewhere. However, consistent repetition of the U.S. legal position on targeted drone strikes may blunt such criticism. Not derogate from the AUMF. At the 2012 NATO summit in Chicago, NATO agreed that the vast majority of U.S. and other NATO forces would be withdrawn from Afghanistan by the end of 2014, a time frame that President Obama confirmed during this year’s State of the Union address. Some critics of U.S. drone policy will inevitably argue that due to the drawdown the United States may no longer credibly claim that it remains in a state of armed conflict with the Taliban, al-Qaeda, and its associated forces, whether they are located in Afghanistan, the FATA, or elsewhere. Congress should pass no legislation that could be interpreted as a derogation from the AUMF or an erosion of the inherent right of the United States to defend itself against imminent threats posed by transnational terrorist organizations. Not create a drone court. The concept of a drone court is fraught with danger and may be an unconstitutional interference with the executive branch’s authority to wage war. U.S. armed forces have been lawfully targeting enemy combatants in armed conflicts for more than 200 years without being second-guessed by Congress or a secret “national security court.” Targeting decisions, including those made in connection with drone strikes, are carefully deliberated by military officers and intelligence officials based on facts and evidence gathered from a variety of human, signals, and imagery intelligence sources. During an armed conflict, all al-Qaeda operatives are subject to targeting; therefore, a drone court scrutinizing targeting decisions would serve no legitimate purpose. Conclusion The debate within the international legal, academic, and human rights communities on the legality and propriety of drone strikes will likely continue unabated. To surrender to the demands of such critics would be equivalent to forgetting the lessons of September 11, when a small, non-state terrorist organization operating from a nation with which the United States was not at war planned and launched an attack that killed almost 3,000 Americans. The United States should preserve its ability to use all of the tools in its arsenal to ensure that the plots hatched by terrorist organizations do not become successful attacks on the U.S. homeland. Armed drones have proved to be one of the most effective and discriminating tools available to U.S. forces, and their lawful use should continue until such time as non-state, transnational terrorist organizations no longer present an imminent threat to the United States.

## adv 1

No Pakistan collapse and it doesn't escalate

Dasgupta 13

Sunil Dasgupta is Director of the University of Maryland Baltimore County Political Science Program at the Universities at Shady Grove and non-resident Senior Fellow at the Brookings Institution, East Asia Forum, February 25, 2013, "How will India respond to civil war in Pakistan?", http://www.eastasiaforum.org/2013/02/25/how-will-india-respond-to-civil-war-in-pakistan/

As it is, India and Pakistan have gone down to the nuclear edge four times — in 1986, 1990, 1999 and 2001–02. In each case, India responded in a manner that did not escalate the conflict. Any incursion into Pakistan was extremely limited. An Indian intervention in a civil war in Pakistan would be subject to the same limitations — at least so long as the Pakistani army maintains its integrity.

Given the new US–India ties, the most important factor in determining the possibility and nature of Indian intervention in a possible Pakistani civil war is Washington. If the United States is able to get Kabul and Islamabad to work together against the Taliban, as it is trying to do now, then India is likely to continue its current policy or try to preserve some influence in Afghanistan, especially working with elements of the Northern Alliance.

India and Afghanistan already have a strategic partnership agreement in place that creates the framework for their bilateral relationship to grow, but the degree of actual cooperation will depend on how Pakistan and the Taliban react. If Indian interests in Afghanistan come under attack, New Delhi might have to pull back. The Indian government has been quite clear about not sending troops to Afghanistan.

If the United States shifts its policy to where it has to choose Kabul over Islamabad, in effect reviving the demand for an independent Pashtunistan, India is likely to be much more supportive of US and Afghan goals. The policy shift, however, carries the risk of a full-fledged proxy war with Pakistan in Afghanistan, but should not involve the prospect of a direct Indian intervention in Pakistan itself.

India is not likely to initiate an intervention that causes the Pakistani state to fail. Bill Keller of the New York Times has described Pakistani president Asif Ail Zardari as overseeing ‘a ruinous kleptocracy that is spiraling deeper into economic crisis’. But in contrast to predictions of an unravelling nation, British journalist-scholar Anatol Lieven argues that the Pakistani state is likely to continue muddling through its many problems, unable to resolve them but equally predisposed against civil war and consequent state collapse. Lieven finds that the strong bonds of family, clan, tribe and the nature of South Asian Islam prevent modernist movements — propounded by the government or by the radicals — from taking control of the entire country.

Lieven’s analysis is more persuasive than the widespread view that Pakistan is about to fail as a state. The formal institutions of the Pakistani state are surprisingly robust given the structural conditions in which they operate. Indian political leaders recognise Pakistan’s resilience. Given the bad choices in Pakistan, they would rather not have anything to do with it. If there is going to be a civil war, why not wait for the two sides to exhaust themselves before thinking about intervening? The 1971 war demonstrated India’s willingness to exploit conditions inside Pakistan, but to break from tradition requires strong, countervailing logic, and those elements do not yet exist. Given the current conditions and those in the foreseeable future, India is likely to sit out a Pakistani civil war while covertly coordinating policy with the United States.

No loose nukes

Cohen & Zenko 12 (Michael and Micah, Fellow at the Century Foundation AND Fellow in the Center for Preventive Action at the Council on Foreign Relations, “Clear and Present Safety,” Foreign Affairs, Vol. 91, Iss. 2, EBSCO)

Pakistan represents another potential source of loose nukes. The United States' military strategy in Afghanistan, with its reliance on drone strikes and cross-border raids, has actually contributed to instability in Pakistan, worsened U.S. relations with Islamabad, and potentially increased the possibility of a weapon falling into the wrong hands. Indeed, Pakistani fears of a U.S. raid on its nuclear arsenal have reportedly led Islamabad to disperse its weapons to multiple sites, transporting them in unsecured civilian vehicles. But even in Pakistan, the chances of a terrorist organization procuring a nuclear weapon are infinitesimally small. The U.S. Department of Energy has provided assistance to improve the security of Pakistan's nuclear arsenal, and successive senior U.S. government officials have repeated what former Secretary of Defense Robert Gates said in January 2010: that the United States is "very comfortable with the security of Pakistan's nuclear weapons."

No risk of nuclear terror

**Mueller 10** (John, professor of political science at Ohio State, Calming Our Nuclear Jitters, Issues in Science and Technology, Winter, <http://www.issues.org/26.2/mueller.html>)

Politicians of all stripes preach to an anxious, appreciative, and very numerous choir when they, like President Obama, proclaim atomic terrorism to be “the most immediate and extreme threat to global security.” It is the problem that, according to Defense Secretary Robert Gates, currently keeps every senior leader awake at night. This is hardly a new anxiety. In 1946, atomic bomb maker J. Robert Oppenheimer ominously warned that if three or four men could smuggle in units for an atomic bomb, they could blow up New York. This was an early expression of a pattern of dramatic risk inflation that has persisted throughout the nuclear age. In fact, although expanding fires and fallout might increase the effective destructive radius, the blast of a Hiroshima-size device would “blow up” about 1% of the city’s area—a tragedy, of course, but not the same as one 100 times greater. In the early 1970s, nuclear physicist Theodore Taylor proclaimed the atomic terrorist problem to be “immediate,” explaining at length “how comparatively easy it would be to steal nuclear material and step by step make it into a bomb.” At the time he thought it was already too late to “prevent the making of a few bombs, here and there, now and then,” or “in another ten or fifteen years, it will be too late.” Three decades after Taylor, we continue to wait for terrorists to carry out their “easy” task. In contrast to these predictions, terrorist groups seem to have exhibited only limited desire and even less progress in going atomic. This may be because, after brief exploration of the possible routes, they, unlike generations of alarmists, have discovered that the tremendous effort required is scarcely likely to be successful. The most plausible route for terrorists, according to most experts, would be to manufacture an atomic device themselves from purloined fissile material (plutonium or, more likely, highly enriched uranium). This task, however, remains a daunting one, requiring that a considerable series of difficult hurdles be conquered and in sequence. Outright armed theft of fissile material is exceedingly unlikely not only because of the resistance of guards, but because chase would be immediate. A more promising approach would be to corrupt insiders to smuggle out the required substances. However, this requires the terrorists to pay off a host of greedy confederates, including brokers and money-transmitters, any one of whom could turn on them or, either out of guile or incompetence, furnish them with stuff that is useless. Insiders might also consider the possibility that once the heist was accomplished, the terrorists would, as analyst Brian Jenkins none too delicately puts it, “have every incentive to cover their trail, beginning with eliminating their confederates.” If terrorists were somehow successful at obtaining a sufficient mass of relevant material, they would then probably have to transport it a long distance over unfamiliar terrain and probably while being pursued by security forces. Crossing international borders would be facilitated by following established smuggling routes, but these are not as chaotic as they appear and are often under the watch of suspicious and careful criminal regulators. If border personnel became suspicious of the commodity being smuggled, some of them might find it in their interest to disrupt passage, perhaps to collect the bounteous reward money that would probably be offered by alarmed governments once the uranium theft had been discovered. Once outside the country with their precious booty, terrorists would need to set up a large and well-equipped machine shop to manufacture a bomb and then to populate it with a very select team of highly skilled scientists, technicians, machinists, and administrators. The group would have to be assembled and retained for the monumental task while no consequential suspicions were generated among friends, family, and police about their curious and sudden absence from normal pursuits back home. Members of the bomb-building team would also have to be utterly devoted to the cause, of course, and they would have to be willing to put their lives and certainly their careers at high risk, because after their bomb was discovered or exploded they would probably become the targets of an intense worldwide dragnet operation. Some observers have insisted that it would be easy for terrorists to assemble a crude bomb if they could get enough fissile material. But Christoph Wirz and Emmanuel Egger, two senior physicists in charge of nuclear issues at Switzerland‘s Spiez Laboratory, bluntly conclude that the task “could hardly be accomplished by a subnational group.” They point out that precise blueprints are required, not just sketches and general ideas, and that even with a good blueprint the terrorist group would most certainly be forced to redesign. They also stress that the work is difficult, dangerous, and extremely exacting, and that the technical requirements in several fields verge on the unfeasible. Stephen Younger, former director of nuclear weapons research at Los Alamos Laboratories, has made a similar argument, pointing out that uranium is “exceptionally difficult to machine” whereas “plutonium is one of the most complex metals ever discovered, a material whose basic properties are sensitive to exactly how it is processed.“ Stressing the “daunting problems associated with material purity, machining, and a host of other issues,” Younger concludes, “to think that a terrorist group, working in isolation with an unreliable supply of electricity and little access to tools and supplies” could fabricate a bomb “is farfetched at best.” Under the best circumstances, the process of making a bomb could take months or even a year or more, which would, of course, have to be carried out in utter secrecy. In addition, people in the area, including criminals, may observe with increasing curiosity and puzzlement the constant coming and going of technicians unlikely to be locals. If the effort to build a bomb was successful, the finished product, weighing a ton or more, would then have to be transported to and smuggled into the relevant target country where it would have to be received by collaborators who are at once totally dedicated and technically proficient at handling, maintaining, detonating, and perhaps assembling the weapon after it arrives. The financial costs of this extensive and extended operation could easily become monumental. There would be expensive equipment to buy, smuggle, and set up and people to pay or pay off. Some operatives might work for free out of utter dedication to the cause, but the vast conspiracy also requires the subversion of a considerable array of criminals and opportunists, each of whom has every incentive to push the price for cooperation as high as possible. Any criminals competent and capable enough to be effective allies are also likely to be both smart enough to see boundless opportunities for extortion and psychologically equipped by their profession to be willing to exploit them. Those who warn about the likelihood of a terrorist bomb contend that a terrorist group could, if with great difficulty, overcome each obstacle and that doing so in each case is “not impossible.” But although it may not be impossible to surmount each individual step, the likelihood that a group could surmount a series of them quickly becomes vanishingly small. Table 1 attempts to catalogue the barriers that must be overcome under the scenario considered most likely to be successful. In contemplating the task before them, would-be atomic terrorists would effectively be required to go though an exercise that looks much like this. If and when they do, they will undoubtedly conclude that their prospects are daunting and accordingly uninspiring or even terminally dispiriting. It is possible to calculate the chances for success. Adopting probability estimates that purposely and heavily bias the case in the terrorists’ favor—for example, assuming the terrorists have a 50% chance of overcoming each of the 20 obstacles—the chances that a concerted effort would be successful comes out to be less than one in a million. If one assumes, somewhat more realistically, that their chances at each barrier are one in three, the cumulative odds that they will be able to pull off the deed drop to one in well over three billion. Other routes would-be terrorists might take to acquire a bomb are even more problematic. They are unlikely to be given or sold a bomb by a generous like-minded nuclear state for delivery abroad because the risk would be high, even for a country led by extremists, that the bomb (and its source) would be discovered even before delivery or that it would be exploded in a manner and on a target the donor would not approve, including on the donor itself. Another concern would be that the terrorist group might be infiltrated by foreign intelligence. The terrorist group might also seek to steal or illicitly purchase a “loose nuke“ somewhere. However, it seems probable that none exist. All governments have an intense interest in controlling any weapons on their territory because of fears that they might become the primary target. Moreover, as technology has developed, finished bombs have been out-fitted with devices that trigger a non-nuclear explosion that destroys the bomb if it is tampered with. And there are other security techniques: Bombs can be kept disassembled with the component parts stored in separate high-security vaults, and a process can be set up in which two people and multiple codes are required not only to use the bomb but to store, maintain, and deploy it. As Younger points out, “only a few people in the world have the knowledge to cause an unauthorized detonation of a nuclear weapon.” There could be dangers in the chaos that would emerge if a nuclear state were to utterly collapse; Pakistan is frequently cited in this context and sometimes North Korea as well. However, even under such conditions, nuclear weapons would probably remain under heavy guard by people who know that a purloined bomb might be used in their own territory. They would still have locks and, in the case of Pakistan, the weapons would be disassembled. The al Qaeda factor The degree to which al Qaeda, the only terrorist group that seems to want to target the United States, has pursued or even has much interest in a nuclear weapon may have been exaggerated. The 9/11 Commission stated that “al Qaeda has tried to acquire or make nuclear weapons for at least ten years,” but the only substantial evidence it supplies comes from an episode that is supposed to have taken place about 1993 in Sudan, when al Qaeda members may have sought to purchase some uranium that turned out to be bogus. Information about this supposed venture apparently comes entirely from Jamal al Fadl, who defected from al Qaeda in 1996 after being caught stealing $110,000 from the organization. Others, including the man who allegedly purchased the uranium, assert that although there were various other scams taking place at the time that may have served as grist for Fadl, the uranium episode never happened. As a key indication of al Qaeda’s desire to obtain atomic weapons, many have focused on a set of conversations in Afghanistan in August 2001 that two Pakistani nuclear scientists reportedly had with Osama bin Laden and three other al Qaeda officials. Pakistani intelligence officers characterize the discussions as “academic” in nature. It seems that the discussion was wide-ranging and rudimentary and that the scientists provided no material or specific plans. Moreover, the scientists probably were incapable of providing truly helpful information because their expertise was not in bomb design but in the processing of fissile material, which is almost certainly beyond the capacities of a nonstate group. Kalid Sheikh Mohammed, the apparent planner of the 9/11 attacks, reportedly says that al Qaeda’s bomb efforts never went beyond searching the Internet. After the fall of the Taliban in 2001, technical experts from the CIA and the Department of Energy examined documents and other information that were uncovered by intelligence agencies and the media in Afghanistan. They uncovered no credible information that al Qaeda had obtained fissile material or acquired a nuclear weapon. Moreover, they found no evidence of any radioactive material suitable for weapons. They did uncover, however, a “nuclear-related” document discussing “openly available concepts about the nuclear fuel cycle and some weapons-related issues.” Just a day or two before al Qaeda was to flee from Afghanistan in 2001, bin Laden supposedly told a Pakistani journalist, “If the United States uses chemical or nuclear weapons against us, we might respond with chemical and nuclear weapons. We possess these weapons as a deterrent.” Given the military pressure that they were then under and taking into account the evidence of the primitive or more probably nonexistent nature of al Qaeda’s nuclear program, the reported assertions, although unsettling, appear at best to be a desperate bluff. Bin Laden has made statements about nuclear weapons a few other times. Some of these pronouncements can be seen to be threatening, but they are rather coy and indirect, indicating perhaps something of an interest, but not acknowledging a capability. And as terrorism specialist Louise Richardson observes, “Statements claiming a right to possess nuclear weapons have been misinterpreted as expressing a determination to use them. This in turn has fed the exaggeration of the threat we face.” Norwegian researcher Anne Stenersen concluded after an exhaustive study of available materials that, although “it is likely that al Qaeda central has considered the option of using non-conventional weapons,” there is “little evidence that such ideas ever developed into actual plans, or that they were given any kind of priority at the expense of more traditional types of terrorist attacks.” She also notes that information on an al Qaeda computer left behind in Afghanistan in 2001 indicates that only $2,000 to $4,000 was earmarked for weapons of mass destruction research and that the money was mainly for very crude work on chemical weapons. Today, the key portions of al Qaeda central may well total only a few hundred people, apparently assisting the Taliban’s distinctly separate, far larger, and very troublesome insurgency in Afghanistan. Beyond this tiny band, there are thousands of sympathizers and would-be jihadists spread around the globe. They mainly connect in Internet chat rooms, engage in radicalizing conversations, and variously dare each other to actually do something. Any “threat,” particularly to the West, appears, then, principally to derive from self-selected people, often isolated from each other, who fantasize about performing dire deeds. From time to time some of these people, or ones closer to al Qaeda central, actually manage to do some harm. And occasionally, they may even be able to pull off something large, such as 9/11. But in most cases, their capacities and schemes, or alleged schemes, seem to be far less dangerous than initial press reports vividly, even hysterically, suggest. Most important for present purposes, however, is that any notion that al Qaeda has the capacity to acquire nuclear weapons, even if it wanted to, looks farfetched in the extreme. It is also noteworthy that, although there have been plenty of terrorist attacks in the world since 2001, all have relied on conventional destructive methods. For the most part, terrorists seem to be heeding the advice found in a memo on an al Qaeda laptop seized in Pakistan in 2004: “Make use of that which is available … rather than waste valuable time becoming despondent over that which is not within your reach.” In fact, history consistently demonstrates that terrorists prefer weapons that they know and understand, not new, exotic ones. Glenn Carle, a 23-year CIA veteran and once its deputy intelligence officer for transnational threats, warns, “We must not take fright at the specter our leaders have exaggerated. In fact, we must see jihadists for the small, lethal, disjointed, and miserable opponents that they are.” al Qaeda, he says, has only a handful of individuals capable of planning, organizing, and leading a terrorist organization, and although the group has threatened attacks with nuclear weapons, “its capabilities are far inferior to its desires.” Policy alternatives The purpose here has not been to argue that policies designed to inconvenience the atomic terrorist are necessarily unneeded or unwise. Rather, in contrast with the many who insist that atomic terrorism under current conditions is rather likely— indeed, exceedingly likely—to come about, I have contended that it is hugely unlikely. However, it is important to consider not only the likelihood that an event will take place, but also its consequences. Therefore, one must be concerned about catastrophic events even if their probability is small, and efforts to reduce that likelihood even further may well be justified. At some point, however, probabilities become so low that, even for catastrophic events, it may make sense to ignore them or at least put them on the back burner; in short, the risk becomes acceptable. For example, the British could at any time attack the United States with their submarine-launched missiles and kill millions of Americans, far more than even the most monumentally gifted and lucky terrorist group. Yet the risk that this potential calamity might take place evokes little concern; essentially it is an acceptable risk. Meanwhile, Russia, with whom the United States has a rather strained relationship, could at any time do vastly more damage with its nuclear weapons, a fully imaginable calamity that is substantially ignored. In constructing what he calls “a case for fear,” Cass Sunstein, a scholar and current Obama administration official, has pointed out that if there is a yearly probability of 1 in 100,000 that terrorists could launch a nuclear or massive biological attack, the risk would cumulate to 1 in 10,000 over 10 years and to 1 in 5,000 over 20. These odds, he suggests, are “not the most comforting.” Comfort, of course, lies in the viscera of those to be comforted, and, as he suggests, many would probably have difficulty settling down with odds like that. But there must be some point at which the concerns even of these people would ease. Just perhaps it is at one of the levels suggested above: one in a million or one in three billion per attempt.

## solvency

Targeted killing regulation is impossible

Alston, professor – NYU Law, ‘11

(Philip, 2 Harv. Nat'l Sec. J. 283)

Despite the existence of a multiplicity of techniques by which the CIA might be held to account at the domestic level, the foregoing survey demonstrates that there is no evidence to conclude that any of them has functioned effective-ly in relation to the expanding practices involving targeted killings. The CIA Inspector General's Office has been unable to exact accountability and proposals to expand or strengthen his role run counter to almost all official actions taken in relation to his work. The President's Intelligence Oversight Board and the President's Foreign Intelligence Advisory Board are lauded by some for their potential, but there is no indication that they scrutinize activities such as targeted killings policy or practice, and many indications that they view their role as being to support rather than monitor the intelligence community. The Privacy and Civil Liberties Oversight Board remains dormant. Congressional oversight has been seriously deficient and far from manifesting an appetite to scrutinize the CIA's targeted killings policies, a range of senior members of congress are on record as favoring a hands-off policy. And a combination of the political question doctrine, the state secrets privilege, and a reluctance to prosecute, ensure that the courts have indeed allowed the CIA to fall into a convenient legal **gre**y hole.

Finally, civil society has been largely stymied by the executive and the courts in their efforts to make effective use of freedom of information laws. All that remains is the media, and most of what they obtain through leaks come from government sources that are deliberately "spinning" the story in their own favor. Simi-lar conclusions have been reached in closely related contexts. Thus, for example, Kitrosser's survey of official responses to the warrantless wiretapping initiated after 9/11 led her to conclude that it was a shell [\*406] game, involving "an indefinite bi-partisan, cross-administration, cross-institutional pattern of accountability-avoidance." n450 In brief, at least in relation to targeted killings, the CIA enjoys almost complete impunity and is not subject to any form of meaningful internal or external accountability. Whether from the perspective of democratic theory or of interna-tional accountability for violations of the right to life, this is deeply problematic. One solution to this that has been sug-gested by some commentators is to follow the precedent set by Israel in its efforts to ensure legal oversight of its target killings programs. We turn now to examine the feasibility and desirability of pursuing such an option.

Drone court fails—empirics prove rubber stamping and circumvention.

Greenwald 13 (Glenn, The Gaurdian, 3 May 2013, “The bad joke called 'the FISA court' shows how a 'drone court' would work”, http://www.theguardian.com/commentisfree/2013/may/03/fisa-court-rubber-stamp-drones, ZBurdette)

From the start, the Fisa court was a radical perversion of the judicial process. It convened in total secrecy and its rulings were classified. The standard the government had to meet was not the traditional "probable cause" burden imposed by the Fourth Amendment but a significantly diluted standard. There was nothing adversarial about the proceeding: only the Justice Department (DOJ) was permitted to be present, but not any lawyers for the targets of the eavesdropping request, who were not notified. Reflecting its utter lack of real independence, the court itself was housed in the DOJ.

And, and was totally predictable, the court barely ever rejected a government request for eavesdropping. From its inception, it was the ultimate rubber-stamp court, having rejected a total of zero government applications - zero - in its first 24 years of existence, while approving many thousands. In its total 34 year history - from 1978 through 2012 - the Fisa court has rejected a grand total of 11 government applications, while approving more than 20,000.

Despite how obedient and compliant this court always was, the Bush administration decided in late 2001 that it would have its National Security Agency (NSA) intercept the calls and emails of Americans without bothering to obtain the Fisa court approval required by the criminal law, claiming - with a straight face - that complying with the law was "too cumbersome" in the age of Terrorism. Once this lawbreaking was revealed by the New York Times in late 2005, the response from the DC political class was not to punish the responsible government officials for their lawbreaking, but rather to enact a new law (called the Fisa Amendments Act of 2008) that, in essence, simply legalized the warrantless eavesdropping scheme of the Bush administration.

That new Fisa law vested vast new surveillance powers in the US government to spy on the communications of Americans without the annoyance of obtaining permission from the Fisa court. It requires warrants from the Fisa court only in the narrowest of circumstances: the ones most susceptible to abuse. Although candidate Obama pretended to have serious concerns about the law (when he voted for it) and vowed to rein in its excesses, his administration last year demanded the renewal of this law with no reforms, and Congress, on a fully bipartisan basis, complied.

One of the provisions of the new Fisa law requires the DOJ annually to disclose to Congress the number of eavesdropping applications it files and the number approved and rejected by the Fisa court. Earlier this week, that disclosure was provided to Senate Majority Leader Harry Reid for the year 2012, and this is what it reported:

Let's repeat that: "of 1,789 applications, the FISA court did not deny any applications in whole or in part." What fantastic oversight (1789 is, ironically, the year the Constitution was ratified). The court did "modify" 40 of those applications - less than 3% - but it approved every single one. The same was true of 2011, when the DOJ submitted 1,676 applications and the Fisa court, while modifying 30, "did not deny any applications in whole, or in part".

What makes all of this worse is just how extreme the US government is "interpreting" - i.e. distorting - its eavesdropping powers under the law. Two Democratic Senators, Ron Wyden and Mark Udall, have been warning for years that the Obama administration is exploiting these laws in ways far beyond what the public knows or what a reasonable reading of the laws would permit. One of the nation's most knowledgeable surveillance experts, Julian Sanchez, has documented - citing the writing of a former Obama lawyer - documented that the law is used to target even "an American citizen located within the United States, and no court or judge is required to approve or review the choice of which individuals to tap": exactly the type of warrantless surveillance we were all told this law would prohibit. And yet, the Fisa court - even for those narrow set of cases where a warrant is required - continues as it always has: rubber-stamping virtually anything and everything the government wants to do.

There are many reasons that explain this judicial obeisance. Part of it is fear and abdication of duty: no federal judge wants to be the one who rejects a surveillance request from the government only to have the target perpetrate an attack, **even though federal judges are immunized with life tenure from such political pressures** so that they can apply the law and provide a real check on government conduct. Part of it is nationalistic delirium: federal courts in general have been disgracefully subservient to the Executive Branch every time they utter the word "Terrorism" since 9/11. And part of it is just the nature of persuasion: even the most mediocre lawyers can convince someone of almost anything if they have no opposition and can unilaterally select and depict all facts without challenge. The entire process, though depicted as some kind of check on Executive Branch behavior, is virtually designed to do the opposite: ensure the Government's surveillance desires are unimpeded. These shockingly lopsided statistics attest to the success of this design.

This is significant not only because it means there is no real check on the government's surveillance power, even as they exercise those powers in much broader ways than most people suspect. It's also significant in light of recent calls that a "drone court" be created that would provide for a similar process for the president's desire to target for execution people who have been charged with no crime. The New York Times Editorial Page has been advocating this for years.

The rationale offered is the same as what was used to justify the Fisa court: the President needs some check on who he targets, but requiring that he charge the person he wants to kill with a crime and convict them in a real court is too cumbersome. Therefore, this reasoning goes, a "drone court" modeled on the Fisa court is the happy medium: he'll have some constraints on his power to kill whomever he wants, but its secretive, one-sided process and lowered levels of required proof will ensure the necessary agility and flexibility he needs as Commander-in-Chief. As the NYT Editors put it: the drone court "would be an analogue" to the Fisa court whereby: "If the administration has evidence that a suspect is a terrorist threat to the United States, it would have to present that evidence in secret to a court before the suspect is placed on a kill list."

But does anyone believe that a "drone court" would be any less of a mindless rubber-stamp than the Fisa court already is? Except for a handful of brave judges who take seriously their constitutionally assigned role of independence, the vast majority of federal judges are far too craven to tell the president that he has not submitted sufficient proof that would allow him to kill someone he claims is a Terrorist. The fact that it would all take place in secret, with only the DOJ present, further ensures that the results would mirror the embarrassing subservience of the Fisa court. As former Pentagon chief counsel Jeh Johnson put it in a speech last month discussing this proposal:

"Its proceedings would necessarily be ex parte and in secret, and, like a FISA court, I suspect almost all of the government's applications would be granted, because, like a FISA application, the government would be sure to present a compelling case. So, at the same time the New York Times editorial page promotes a FISA-like court for targeted lethal force, it derides the FISA court as a 'rubber stamp' because it almost never rejects an application. How long before a 'drone court' operating in secret is criticized in the same way?"

Drone court institutionalizes the legality of drone strikes, which increases their use—turns backlash

Beauchamp, reporter/blogger – ThinkProgress, M.Sc IR – LSE, 2/8/’13

(Zack, “What To Be Concerned About As Congress Mulls Targeted Killing Courts,” http://thinkprogress.org/security/2013/02/08/1562861/targeted-killing-courts-concerns/)

This permissiveness could potentially expand the targeted killing power well beyond Congress’ original intent — a point made clear by comparison to the Bush torture regime. David Luban, a lawyer and philosopher at Georgetown University, argued against legally enshrined torture on the ground that the practice would necessarily spread throughout the United States government. Abu Ghraib, for Luban, was a direct consequence of Guantanamo Bay and the Bush legal memos authorizing it: legal torture is never a one-off, containable thing. The more torture is built into the legal system, the more a “torture culture” becomes the norm. Arguing against Alan Dershowitz, who defended special “torture courts” to authorize it in extreme cases, Luban pointed to the way torture already had shaped the legal system: Alan Dershowitz has argued that judges, not torturers, should oversee the permission to torture, which in his view must be regulated by warrants. The irony is that Jay S. Bybee, who signed the Justice Department’s highly permissive torture memo, is now a federal judge. Politicians pick judges, and if the politicians accept torture, the judges will as well. Once we create a torture culture, only the naive would suppose that judges will provide a safeguard. Judges do not fight their culture—they reflect it. The applicability to any new targeted killing courts idea is obvious. Once the targeted killing of Americans becomes an accepted, institutionalized part of the legal system, it could be seen as increasingly legitimate — and hence increasingly more likely to be used in a wider number of cases than we’d want. While there’s no guarantee this would happen, it’s certainly a risk, and one that needs to be considered as the Senate debate on this topic moves forward.

Drone court is unworkable—doesn’t solve legitimacy

Vladeck, professor of law – American University Washington College of Law, 2/27/’13

(Stephen I., “Statement of Stephen I. Vladeck Professor of Law and Associate Dean for Scholarship American University Washington College of Law,” TARGETING AMERICAN TERRORISTS OVERSEAS; HOUSE JUDICIARY COMMITTEE, CQ)

This ties together with the related point of just how difficult it would be to actually have meaningful ex ante review in a context in which time is so often of the essence. If, as I have to think is true, many of the opportunities for these kinds of operations are fleeting and often open and close within a short window then a requirement of judicial review in all cases might actually prevent the government from otherwise carrying out authority that, in at least some cases, most would agree it has. This possibility is exactly why FISA itself was enacted with a pair of emergency provisions (one for specific emergencies;18 one for the beginning of a declared war19), and comparable emergency exceptions in this context would almost necessarily swallow the rule. Indeed, the narrower a definition of imminence that we accept, the more this becomes a problem, since the time frame in which the government could simultaneously demonstrate that a target (1) poses such a threat to the United States; and (2) cannot be captured through less lethal measures will necessarily be a vanishing one. Even if judicial review were possible in that context, it's hard to imagine that it would produce wise, just, or remotely reliable decisions. That brings me to perhaps the biggest problem we should all have with a "drone court"-the extent to which, even if one could design a legally and practically workable regime in which such a tribunals could operate, its existence would put irresistible pressure on federal judges to sign off even on those cases in which they have doubts. As a purely practical matter, it would be next to impossible meaningfully to assess imminence, the existence of less lethal alternatives, or the true nature of a threat that an individual suspect poses in advance of a targeted killing operation. Indeed, it would be akin to asking law enforcement officers to obtain judicial review before they use lethal force in defense of themselves or third persons when the entire legal question turns on what was actually true in the moment, as opposed to what might have been predicted to be true ex ante. At its core, this is why the analogy to search warrants utterly breaks down and why it would hardly be surprising if judges in those circumstances approved a far greater percentage of applications than they might have on a complete after-the-fact record. Judges, after all, are humans. In the process, the result would be that such ex ante review would do little other than to add the vestiges of legitimacy to operations the legality of which might have otherwise been questioned ex post. Put another way, ex ante review in this context would most likely lead to a more expansive legal framework within which the targeted killing program could operate, one sanctioned by judges asked to decide these cases behind closed doors; without the benefit of adversary parties, briefing, or presentation of the facts; and with the very real possibility that the wrong decision could directly lead to the deaths of countless Americans. Thus, even if it were legally and practically possible, a drone court would be a very dangerous idea.

Doesn’t boost accountability or transparency—the status quo is sufficient.

Mulrine 13 (Anna, CSM, “Would a US 'drone court' to authorize drone strikes be a good idea? (+video)”, http://www.csmonitor.com/USA/DC-Decoder/2013/0524/Would-a-US-drone-court-to-authorize-drone-strikes-be-a-good-idea-video, ZBurdette)

Critics of the drone program, however, are generally not reassured by the notion of oversight from a special drone court. They note that the FISA courts, on which the drone courts would be modeled, operate largely in secret, doing little to improve accountability to the public.

What’s more, they say, national and international laws are already in place governing when drone strikes are legal. Those laws, they add, offer greater transparency than would a secret court.

“I’m not big on this,” Sarah Holewinski, executive director of the Center for Civilians in Conflict, says of the drone courts. “The fact is, we have international laws. We have domestic laws. I would focus on those and say, ‘Look, here’s the due diligence you need to do in targeting a combatant. Here’s what you need to do in order to avoid civilians. Here’s what proportionality looks like.’ ”

Zeke Johnson, director of Amnesty International’s Security and Human Rights Campaign, argues that drone courts would do little to change critics' fundamental concerns about drone strikes.

“What’s needed on drones is not a ‘kill court,’ but a rejection of the radical redefinition of ‘imminence’ used to expand who can be killed – as well as independent investigations of alleged extrajudicial executions and remedy for victims,” he says.

# 2NC

## 2nc do cp

It’s severance—

Authority is power vested in an agent by a principal

Oxford Dictionary of Law 2009

(“Authority,” Oxford University Press via Oxford Reference, Georgetown University Library)

authority

n.

1 Power delegated to a person or body to act in a particular way. The person in whom authority is vested is usually called an agent and the person conferring the authority is the principal.

Changing authority requires the principal–the agent only operates within the powers it has been given

Hohfeld, Yale Law, 1919

(Wesley, http://www.hku.hk/philodep/courses/law/HohfeldRights.htm)

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

There’s no world the CP is the plan

Fisher, Scholar in Residence at The Constitution Project, 2012

(Louis, served for four decades at the Library of Congress, as Senior Specialist, Congressional Research Service, “Basic Principles of the War Power,” 2012 Journal of National Security Law & Policy 5 J. Nat'l Security L. & Pol'y 319)

The second value that the Founders embraced in the Commander-in-Chief Clause is accountability. Hamilton in Federalist No. 74 wrote that the direction of war "most peculiarly demands those qualities which distinguish the exercise of power by a single hand." The power of directing war and emphasizing the common strength "forms a usual and essential part in the definition of the executive authority." n29 Presidential leadership is essential but it cannot operate outside legislative control. **The President is subject to the rule of law**, **including statutory and judicial restrictions**.

## 2nc at congress key to signal

Congress doesn’t solve signal – Presidential leadership is key

Tobin, Senior Online Editor of *Commentary* magazine, 9/3/2013

(Jonathan, Congress Can’t Fill Obama’s Leadership Void, http://www.commentarymagazine.com/2013/09/03/congress-cant-fill-obamas-leadership-void-syria/)

The implications of the congressional debate that will ensue on the future of American foreign policy are clear. Given the growth of isolationism on the right and the left, Obama’s decision to punt on Syria has opened the gates for those who have advocated for an American retreat from global responsibilities to gain more influence. Even if, as it is to be hoped, a majority of both houses of Congress vote to back American action in Syria, it’s not likely that the result of what will follow in the coming days will convince the world that America is still prepared to lead. Although there are good reasons to worry about any intervention in Syria, the arguments for inaction are unpersuasive. Given the stakes involved in letting Assad survive in terms of increasing the power of his Iranian and Hezbollah allies and the precedent set in terms of allowing the use of chemical weapons, the case for action in Syria is powerful. Boehner deserves credit for speaking up after meeting with the president and making it clear the leadership of the House of Representatives is not prepared to bow to the growing chorus of politicians who are more concerned with placing limits on the executive or opposing Obama at every turn than the need to stand up against genocidal dictators. Given the refusal of many Republicans to stand up to the Rand Paul wing of their party, it is refreshing for the normally cautious House speaker to show his willingness to put the national interest above partisan concerns. But no matter what Boehner or people like John McCain or Peter King say this week, there is no substitute for presidential leadership. As I wrote last week, it is axiomatic that liberal Democrats are far better placed to convince a majority of Americans that military action is needed in any circumstance than a conservative Republican. Though the left is just as uncomfortable with the assertion of American power as many on the right, there is little doubt that the president is far better placed than his predecessor was or any Republican might be to rally the country behind a policy that would draw a line in the sand about weapons of mass destruction. But with Obama faltering, no one should labor under the illusion that a divided Congress can either stiffen his spin or step into the leadership vacuum he has left.

Congress has zero credibility–ruins the signal

Cook, Editor of *The Cook Political Report*, Columnist for the *National Journal*, 2011

(Charlie, “Congress Becomes a Laughingstock,” http://cookpolitical.com/story/3210)

My wife told me recently about a Facebook post by an acquaintance that held Congress up to ridicule. Apparently, the sentiment was enthusiastically endorsed by people who spanned her entire network of friends—from the most liberal to the most conservative. My wife couldn’t recall anything else that had been so universally embraced by such a politically diverse group of people. If this debt-ceiling debate is producing any political winners or beneficiaries, they have no connection to Congress or the White House. The unfavorable ratings for both parties are climbing, and President Obama’s job-approval rating in the Gallup Poll fell to 43 percent in one recent week, tied for the lowest of his presidency. (At this writing, it is at 46 percent approval/46 percent disapproval, hardly what a president seeking reelection wants to see.) The debt-ceiling debacle has become like a bomb that keeps exploding in Washington, hurting both sides and each end of Pennsylvania Avenue, effectively damaging everyone in sight. Sadly, my view is that it will probably take a significant stock-market plunge of 500 or 1,000 points in the Dow Jones industrial average, perhaps triggered by a bond-ratings downgrade, to focus minds and cut through the political posturing. The stock and bond markets, neurotic and skittish under the best of circumstances, have been remarkably patient, looking the other way and quietly assuming that everything will work out. They may reach the end of their patience any day. Even a modest deal on deficit reduction and a short-term increase in the debt ceiling may not bring enough confidence to the markets. A significant market plunge would cause great pain to 401(k) retirement plans, other personal savings, and the economy in general. The negative wealth effect would be great, but another type of loss would be just as bad—just not as obvious. Washington is now sullying America’s long-deserved reputation as the leading country in the world to such an extent that we are becoming a laughingstock. The renowned, late journalist A.J. Liebling, a fixture for many years in The New Yorker and a chronicler of then-Louisiana Gov. Earl Long, once wrote that the home state I share with Long was “the northernmost of the banana republics.” If Liebling were alive today, he might expand his “northernmost” banana republic to include the whole United States, with Washington as its sorry capital. My guess is that most members of Congress and their aides are too close to the process and don’t fully appreciate what they are doing to themselves, the institution, and the nation’s political process. The Pictorial Directory test will determine if I’m right.

## 2nc follow on

Creates a precedent for future administrations and leads to Congressional follow-on

Duncan, Associate Professor of Law at Florida A&M, Winter 2010

(John C., “A Critical Consideration of Executive Orders,” 35 Vt. L. Rev. 333, Lexis)

**Executive orders** can serve the purpose of allowing the President to generate favorable publicity, such as when President Clinton signed an executive order on ethics, n493 and when President George W. Bush signed the first of a series of executive orders to launch his Faith-Based and Community Initiatives. n494 While these orders pay off political debts and thus may seem trivial, they nevertheless **create both infrastructural and regulatory precedents for future administrations**. Hence, they create an avenue for key constituencies of each administration to influence the executive structure as a whole without necessarily permitting that influence to extend to arenas of reserved for Congress. That is, while the President can act more swiftly and precisely to satisfy political commitments, the impact of his action will fall considerably short of analogous congressional action. This in turn serves to satisfy selected constituencies without giving them undue power via the presidency. Executive orders have even served to create presidential commissions to investigate and research problems, and have been instrumental in solving remedial issues. n495 **Commission reports** that result from such orders can in [\*398] turn **put pressure on Congress to** enact legislation to respond to those problems. President Franklin Roosevelt pursued this process when he issued a report of the Committee on Economic Security studying financial insecurity due to "unemployment, old age, disability, and health." n496 This report led to the Social Security Act. n497

Self-restraint solves the case without altering executive legal authority

Nathan Alexander Sales, Assistant Professor of Law, George Mason University School of Law, 8/29/2012, Self-Restraint and National Security, http://jnslp.com/2012/08/29/self-restraint-and-national-security/

As we’ve seen, certain officials within military and intelligence agencies – general counsels, legal advisors, and other watchdogs – are responsible for ensuring that national security operations comply with the relevant domestic and international legal requirements. These players intervene to rule out missions they believe would cross a legal line. But sometimes they go beyond that basic function – ensure compliance with the law, full stop – and reject operations that, while lawful, are thought to be undesirable on policy grounds. That is, they impose self-restraints that are stricter than the applicable laws. Why? One way to answer that question is to consider the individual and institutional incentives that color the behavior of military and intelligence officials. Looking at the government’s national security apparatus through the lens of public choice theory (especially the idea that bureaucrats are rationally self interested actors who seek to maximize their utility152) and basic agency relationships (e.g., the relationships between senior policymakers and the subordinates who act on their behalf153) reveals a complex system in which power is distributed among a number of different nodes. The executive branch “is a ‘they,’ not an ‘it.’”154 The national security community in particular is subdivided into various semiautonomous entities, each of which promotes its own parochial interests within the system and, in so doing, checks the like ambitions of rival entities;155 the government thus is subject to what Neal Katyal has called the “internal separation of powers.”156 These basic insights into how military and intelligence agencies operate suggest several possible explanations for why self-restraint occurs. As elaborated in this Part, such constraints might result from systematic asymmetries in the expected value calculations of senior policymakers and their lawyers. In addition, as explained in Part IV, self-restraint might occur due to bureaucratic empire building by officials who review operations for compliance with domestic and international law. A. A Simple Framework One possible explanation for why the government stays its own hand is expected value asymmetry. This reluctance to push the envelope is a rational and predictable response to powerful bureaucratic incentives. Officials tend to be cautious because the costs they expect to incur as a result of forward-leaning and aggressive action usually are greater than the expected benefits. Similarly, government employment rules and other mechanisms make it easier to internalize onto individual bureaucrats the costs of a failed operation than the benefits of a successful one.157 National security players typically have more to lose from boldness than to gain, and that asymmetry inclines them to avoid risky behavior.158 While all members of the national security community experience some cost-benefit asymmetry, senior policymakers and their lawyers seem especially cautious. Attorneys who review proposed operations for legality therefore look askance at risky missions. They tend to veto proposals that, while legal, could inspire propaganda campaigns by adversaries, expose officials to ruinous investigations, or worse. The result is self-restraint – officials rule out operations that they regard as lawful because of fears they will prove too costly.

## 2nc at external checks key

Risk of Congressional restrictions underlies the CP

Nathan Alexander Sales, Assistant Professor of Law, George Mason University School of Law, 8/29/2012, Self-Restraint and National Security, http://jnslp.com/2012/08/29/self-restraint-and-national-security/

Bureaucrats will have an incentive not to push the boundaries of their powers for another reason – **the risk that aggressive conduct will provoke Congress to restrict their** delegated **authorities** or otherwise subject them to stricter limits. One account of Congress’s decision to delegate legislative power to administrative agencies emphasizes expertise and information asymmetries. Bureaucrats, the theory goes, have more information than their legislator principals about the conditions that prevail in the regulated field and the outcomes that are likely to result from various policy choices. Knowing this, Congress establishes a “discretionary window” in which the agency is given authority to act. Stephenson, supra note 18, at 288. The scope of delegated power thus ordinarily will be broader than the scope of exercised power. But if bureaucrats push to the limit, they run the risk of alienating their legislator principals. **Bureaucrats therefore will tend to stay their own hands to dissuade Congress from narrowing the range of options available to them**. Posner & Vermeule, supra note 3, at 901; Stephenson, supra note 18, at 301.

## 2nc at rollback

And executive orders have the force of law:

Oxford Dictionary of English 2010

(Oxford Reference, Georgetown Library)

executive order

▶ noun US (Law) a rule or order issued by the President to an executive branch of the government and having the force of law.

Executive orders are permanent

Duncan, Associate Professor of Law at Florida A&M, Winter 2010

(John C., “A Critical Consideration of Executive Orders,” 35 Vt. L. Rev. 333, Lexis)

The trajectory of the evolution of the executive power in the United States, as seen through the prism of the growing edifice of executive orders have become increasingly formal and permanent. The evolution of executive power in the United States has shifted executive orders from mere legislative interpretation to ancillary legislation. **Executive orders continue to influence subsequent presidents**. The elaboration of executive order promulgation, as an autopoietic process was necessary to the very existence of presidential power. That is, the mechanisms for formalizing executive orders have always existed in the executive power in a government whose legitimacy lives in written pronouncements treated as delicate, sacred, and worth protecting at all cost. **Part of this formalization is** a consequence of **the reverence for precedent**. Thus, **prior presidents influence future presidents**, less because future presidents wish to mimic their predecessors, but more **because future presidents act within an edifice their predecessors have already erected**. Thus, the growth and elaboration of an ever more robust structure of executive orders resembles an autopoietic process. n561

Creates a stable legal framework that constrains future presidents

Brecher, JD University of Michigan, December 2012

(Aaron, Cyberattacks and the Covert Action Statute, 111 Mich. L. Rev. 423, Lexis)

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.

## 2NC Tyranny

A practical deontological approach is utopian – consequential thinking is inevitable.

**Spragens**, professor of Political science at Duke, 2000 (Thomas, Political Theory and Partisan Politics, 2000, p. 81-2, PDNSS1796)//CS

My thesis that all three layers/forms of political association areimportant in a well-ordered liberal democracy also implies the untenabilityof Rawls's argument that agreement regarding norms of social justice is apossible and sufficient way to overcome the deficiencies of the modusvivendi approach. In the first place, as I have argued in more detailelsewhere, the fundamental unfairness of life and the presence of gratuitous elements in the moral universe make it impossible to settle rationally upon a single set of distributive principles as demonstrably fair (See also, Spragens 1993). Simply put, the problem is that the contingencies of the world ineluctably allocate assets and sufferings quite unfairly. We can cope with and try to compensate for these "natural injustices," but only at the price of introducing other elements of unfairness or compromising other moral values. The other major problem inthis context is that real world human beings are not deontologists: their moral intuitions about distributive justice are permeated and influenced by their moral intuitions about the good. The empirical consequence of thesetwo difficulties is the falsification of Rawls's hermeneutic claims aboutan overlapping consensus. Rational people of good will with a liberal democratic persuasion will be able to agree that some possible distributive criteria are morally unacceptable. But, as both experience and theliterature attest, hopes for a convergence of opinion on definitiveprinciples of distributive justice are chimerical.

## 2NC PDB

It’s impossible and links to the net benefit because the aff restricts the president’s authority—

The perm is the worst of all worlds—aff or CP are individually better

Metzger ‘9

Gillian, Professor of Law, Columbia Law School, “THE INTERDEPENDENT RELATIONSHIP BETWEEN INTERNAL AND EXTERNAL SEPARATION OF POWERS,” 59 Emory L.J. 423

Equally important, the relationship between internal and external separation of powers is reciprocal: Internal and external checks reinforce and operate in conjunction with one another. Congress needs information to conduct meaningful oversight of the Executive Branch. n94 Internal agency experts and watchdogs are important sources of that information, whether in the guise of [\*445] formal reports, studies, and testimony or informal conversations and leaks. n95 Procedural constraints within agencies can serve a similar function, alerting Congress to agency activities. n96 Internal mechanisms also reinforce congressional mandates by creating bodies of personnel within the Executive Branch who are committed to enforcing the governing statutory regime that sets out the parameters of their authority and regulatory responsibilities - and on whose expertise the functioning of these regulatory regimes often depends. n97 Courts equally depend on information and evidence compiled by agency personnel to review agency actions, and they have invoked this dependence to justify the requirement that agencies disclose underlying information and offer detailed explanations of their decisions. n98 Moreover, despite courts regularly intoning that "it [is] not the function of the court to probe the mental processes of Secretaries in reaching [their] conclusions," n99 judicial review of agency actions often appears to turn on judges' perceptions of the role politics played in decisionmaking by agency officials. n100 Evidence that decisions were made over the objections of career staff and agency professionals often triggers more rigorous review. n101 A particularly striking [\*446] suggestion of how internal checks can effect judicial review came in the recent Boumediene litigation. Just a few months after refusing to grant certiorari in order to allow the Combatant Status Review Tribunal process to proceed, the Court reversed course and granted review, apparently influenced by the concerns of military lawyers about how the tribunals were functioning. n102

## 2nc ov

Restrictions cause global Al Qaeda spread—destabilizes multiple hotspots

James Carafano, Ph.D., Heritage VP for Foreign and Defense Policy Studies, 2/27/13, Drone of Battle, www.heritage.org/research/commentary/2013/2/drone-of-battle

**Drone strikes** and other covert operations **clearly serve a military purpose: defending the U.S. against real, legitimate threats of armed violence.** Yet, the president's drone wars raise some serious concerns. They have become this administration's primary means for battling transnational terrorism and they are inadequate. Al Qaeda is not simply about attacking the U.S. That is just a means to an end. The terrorist organization is part of a global Islamist insurgency, dedicated to seizing power and territory and ruling in a manner that is contrary to the vital national interests of this nation. It will rule without humanity or prudence, **bringing war** and crushing freedom wherever its shadow can spread. So even though we are preventing them from attacking our homeland, it doesn't mean we are winning. A**l** Q**aeda and its affiliates are making progress on other fronts in the Caucuses, the Middle East, North Africa and South Asia.** Further, **just killing its leadership won't stop** a**l** Q**aeda**. This organization is a human web. Killing a few nodes in the web just like cutting a few strands in a real web won't take it down. Worrying about the legality of drone wars is distracting concern from what Washington really ought to be worried about: the very real possibility that it may be losing the larger war against radical Islamism.

Caucuses escalates

Merry, senior fellow for Europe and Eurasia – American Foreign Policy Council, 1/31/’13

(E. Wayne, “Another Regional War in the Wings,” The National Interest)

Two decades ago the newly independent states of Armenia and Azerbaijan fought a bitter war over this remote area of mountains and valleys. Armenia won the war, but nobody has achieved peace. A fragile ceasefire signed in 1994 remains the only tangible achievement of diplomacy. Since then, a mediation effort led by Washington, Moscow and Paris has sought a solution. Despite the best efforts of the three governments—including presidential initiatives by all three—**the parties** to the conflict do not and **will not negotiate.** This impasse has contributed to a dangerous evolution of the dispute in recent years from post-war to pre-war. A major arms race is underway, fueled by Azerbaijan’s oil and gas wealth and by Armenia’s support from Russia. Azerbaijan is acquiring a distinct advantage in military technology and firepower, but Armenia retains major advantages of terrain and operational skill. Azerbaijan has a patron in Turkey, which feels a fraternal commitment, but Armenia has a treaty-based security alliance and historical partnership with Russia. A new war would likely be pyrrhic for both sides, but also dwarf the first war in scale and destruction. The initial conflict was limited to Karabakh and its surroundings, and was largely an infantry fight. The next war will engage Armenia and Azerbaijan against each other directly, with greatly expanded arsenals. Both sides plan on this basis and both threaten to target civilian infrastructure, such as pipelines. Serious ceasefire violations have recently occurred on their joint border, not just around Karabakh. The international mediation effort, though complex, envisions a final settlement involving an exchange of land for peace. In earlier years, diplomats and politicians in Baku and Yerevan privately acknowledged that a settlement would involve Armenian withdrawal from lowland territories to the east and south of Karabakh, as well as Azerbaijani acceptance of an Armenian identity for Karabakh and a link with Armenia to the west. Today, the land-for-peace concept is essentially dead on both sides. Armenia demands “comprehensive security” in the captured lands around Karabakh, while Azerbaijan believes its new weaponry and support from Turkey can restore its full Soviet-era territorial control. Political rhetoric on both sides dehumanizes the other. Each side exploits its refugees and wallows in a cult of victimization. Each side outrages the other: last year Baku lionized an officer who committed a vicious axe murder of an Armenian in Hungary; Yerevan publishes maps of “Armenia” which include large swaths of inherently Azerbaijani territory. Each believes war will bring military triumph and historical fulfillment. Both cannot be correct in their expectations, but both certainly can be wrong. The broader danger lies in the patron-client relationships of the regional great powers, Russia with Armenia and Turkey with Azerbaijan. **Ankara and Moscow** would not actually come to blows in a new Karabakh war, but both **can be dragged into dangerous circumstances by their clients.** The Azerbaijani tail has already wagged the Turkish dog to prevent normalizing relations between Ankara and Yerevan. (For the time being, **Iran** plays a marginal political role, but **provides vital energy and trade links to Armenia.** However, Tehran’s relations with Baku are poisonous and, in a new Karabakh war, Iran might seek to settle accounts.)

Afghanistan goes nuclear

Morgan 7

(Stephen John, former National Executive Officer of the British Labour Party, his responsibilities included international relations, ethnic minority work, women’s issues, finance, local government and organization, he specialised particularly in international crisis situations spending long periods working in Belfast, in efforts to overcome sectarian strife and terrorism, former Director of WIC, a research and publishing company based in London, he went to live in Budapest during the Gorbachov period from where he helped build opposition groups in the underground in Hungary, Yugoslavia, Bulgaria and East Germany, Stephen left active politics in the early 1990 and came to live in Brussels, where he established and managed his own publishing company, has lived and worked in more than 27 different countries, including underground political work during the troubles in in Northern Ireland and war in Yugoslavia, http://www.electricarticles.com/display.aspx?id=639)

Although disliked and despised in many quarters, the Taliban could not advance without the support or acquiescence of parts of the population, especially in the south. In particular, the Taliban is drawing on backing from the Pashtun tribes from whom they originate. The southern and eastern areas have been totally out of government control since 2001. Moreover, not only have they not benefited at all from the Allied occupation, but it is increasingly clear that with a few small centres of exception, all of the country outside Kabul has seen little improvement in its circumstances. The conditions for unrest are ripe and the Taliban is filling the vacuum. The Break-Up of Afghanistan? However, the Taliban is unlikely to win much support outside of the powerful Pashtun tribes. Although they make up a majority of the nation, they are concentrated in the south and east. Among the other key minorities, such as Tajiks and Uzbeks, who control the north they have no chance of making new inroads. They will fight the Taliban and fight hard, but their loyalty to the NATO and US forces is tenuous to say the least. The Northern Alliance originally liberated Kabul from the Taliban without Allied ground support. The Northern Alliance are fierce fighters, veterans of the war of liberation against the Soviets and the Afghanistan civil war. Mobilized they count for a much stronger adversary than the NATO and US forces. It is possible that, while they won’t fight for the current government or coalition forces, they will certainly resist any new Taliban rule. They may decide to withdraw to their areas in the north and west of the country. This would leave the Allied forces with few social reserves, excepting a frightened and unstable urban population in Kabul, much like what happened to the Soviets. Squeezed by facing fierce fighting in Helmund and other provinces, and, at the same time, harried by a complementary tactic of Al Qaeda-style urban terrorism in Kabul, sooner or later, a “Saigon-style” evacuation of US and Allied forces could be in the cards. The net result could be the break-up and partition of Afghanistan into a northern and western area and a southern and eastern area, which would include the two key cities of Kandahar and, the capital Kabul. « Pastunistan?» The Taliban themselves, however may decide not to take on the Northern Alliance and fighting may concentrate on creating a border between the two areas, about which the two sides may reach an agreement regardless of US and Allied plans or preferences. The Taliban may claim the name Afghanistan or might opt for “Pashtunistan” – a long-standing, though intermittent demand of the Pashtuns, within Afghanistan and especially along the ungovernable border regions inside Pakistan. It could not be ruled out that the Taliban could be aiming to lead a break away of the Pakistani Pashtuns to form a 30 million strong greater Pashtun state, encompassing some 18 million Pakistani Pashtuns and 12 Afghan Pashtuns. Although the Pashtuns are more closely linked to tribal and clan loyalty, there exists a strong latent embryo of a Pashtun national consciousness and the idea of an independent Pashtunistan state has been raised regularly in the past with regard to the disputed territories common to Afghanistan and Pakistan. The area was cut in two by the “Durand Line”, a totally artificial border between created by British Imperialism in the 19th century. It has been a question bedevilling relations between the Afghanistan and Pakistan throughout their history, and with India before Partition. It has been an untreated, festering wound which has lead to sporadic wars and border clashes between the two countries and occasional upsurges in movements for Pashtun independence. In fact, is this what lies behind the current policy of appeasement President Musharraf of Pakistan towards the Pashtun tribes in along the Frontiers and his armistice with North Waziristan last year? Is he attempting to avoid further alienating Pashtun tribes there and head–off a potential separatist movement in Pakistan, which could develop from the Taliban’s offensive across the border in Afghanistan? Trying to subdue the frontier lands has proven costly and unpopular for Musharraf. In effect, he faces exactly the same problems as the US and Allies in Afghanistan or Iraq. Indeed, fighting Pashtun tribes has cost him double the number of troops as the US has lost in Iraq. Evidently, he could not win and has settled instead for an attempted political solution. When he agreed the policy of appeasement and virtual self-rule for North Waziristan last year, President Musharraf stated clearly that he is acting first and foremost to protect the interests of Pakistan. While there was outrageous in Kabul, his deal with the Pashtuns is essentially an effort to firewall his country against civil war and disintegration. In his own words, what he fears most is, the « Talibanistation » of the whole Pashtun people, which he warns could inflame the already fierce fundamentalist and other separatist movement across his entire country. He does not want to open the door for any backdraft from the Afghan war to engulf Pakistan. Musharraf faces the nationalist struggle in Kashmir, an insurgency in Balochistan, unrest in the Sindh, and growing terrorist bombings in the main cities. There is also a large Shiite population and clashes between Sunnis and Shias are regular. Moreover, fundamentalist support in his own Armed Forces and Intelligence Services is extremely strong. So much so that analyst consider it likely that the Army and Secret Service is protecting, not only top Taliban leaders, but Bin Laden and the Al Qaeda central leadership thought to be entrenched in the same Pakistani borderlands. For the same reasons, he has not captured or killed Bin Laden and the Al Qaeda leadership. Returning from the frontier provinces with Bin Laden’s severed head would be a trophy that would cost him his own head in Pakistan. At best he takes the occasional risk of giving a nod and a wink to a US incursion, but even then at the peril of the chagrin of the people and his own military and secret service. The Break-Up of Pakistan? Musharraf probably hopes that by giving de facto autonomy to the Taliban and Pashtun leaders now with a virtual free hand for cross border operations into Afghanistan, he will undercut any future upsurge in support for a break-away independent Pashtunistan state or a “Peoples’ War” of the Pashtun populace as a whole, as he himself described it. However events may prove him sorely wrong. Indeed, his policy could completely backfire upon him. As the war intensifies, he has no guarantees that the current autonomy may yet burgeon into a separatist movement. Appetite comes with eating, as they say. Moreover, should the Taliban fail to re-conquer al of Afghanistan, as looks likely, but captures at least half of the country, then a Taliban Pashtun caliphate could be established which would act as a magnet to separatist Pashtuns in Pakistan. Then, the likely break up of Afghanistan along ethnic lines, could, indeed, lead the way to the break up of Pakistan, as well. Strong centrifugal forces have always bedevilled the stability and unity of Pakistan, and, in the context of the new world situation, the country could be faced with civil wars and popular fundamentalist uprisings, probably including a military-fundamentalist coup d’état. Fundamentalism is deeply rooted in Pakistan society. The fact that in the year following 9/11, the most popular name given to male children born that year was “Osama” (not a Pakistani name) is a small indication of the mood. Given the weakening base of the traditional, secular opposition parties, conditions would be ripe for a coup d’état by the fundamentalist wing of the Army and ISI, leaning on the radicalised masses to take power. Some form of radical, military Islamic regime, where legal powers would shift to Islamic courts and forms of shira law would be likely. Although, even then, this might not take place outside of a protracted crisis of upheaval and civil war conditions, mixing fundamentalist movements with nationalist uprisings and sectarian violence between the Sunni and minority Shia populations. The nightmare that is now Iraq would take on gothic proportions across the continent. The prophesy of an arc of civil war over Lebanon, Palestine and Iraq would spread to south Asia, stretching from Pakistan to Palestine, through Afghanistan into Iraq and up to the Mediterranean coast. Undoubtedly, this would also spill over into India both with regards to the Muslim community and Kashmir. Border clashes, terrorist attacks, sectarian pogroms and insurgency would break out. A new war, and possibly nuclear war, between Pakistan and India could not be ruled out. Atomic Al Qaeda Should Pakistan break down completely, a Taliban-style government with strong Al Qaeda influence is a real possibility. Such deep chaos would, of course, open a "Pandora's box" for the region and the world. With the possibility of unstable clerical and military fundamentalist elements being in control of the Pakistan nuclear arsenal, not only their use against India, but Israel becomes a possibility, as well as the acquisition of nuclear and other deadly weapons secrets by Al Qaeda. Invading Pakistan would not be an option for America. Therefore a nuclear war would now again become a real strategic possibility. This would bring a shift in the tectonic plates of global relations. It could usher in a new Cold War with China and Russia pitted against the US. What is at stake in "the half-forgotten war" in Afghanistan is far greater than that in Iraq. But America's capacities for controlling the situation are extremely restricted. Might it be, in the end, they are also forced to accept President Musharraf's unspoken slogan of «Better another Taliban Afghanistan, than a Taliban NUCLEAR Pakistan!

Africa causes global wars

Glick 7

Caroline Glick 7, deputy managing editor of The Jerusalem Post, Senior Fellow for Middle East Affairs of the Center for Security Policy, “Condi's African holiday”, December 11, http://www.rightsidenews.com/20071211309/editorial/us-opinion-and-editorial/our-world-condis-african-holiday.html

The Horn of Africa is a dangerous and strategically vital place. Small wars, which rage continuously, can easily escalate into big wars. Local conflicts have regional and global aspects. All of the conflicts in this tinderbox, which controls shipping lanes from the Indian Ocean into the Red Sea, can potentially give rise to regional, and indeed global conflagrations between competing regional actors and global powers.

## drone court LX

Drone court destroys warfighting

Vladeck, professor of law – American University Washington College of Law, 2/27/’13

(Stephen I., “Statement of Stephen I. Vladeck Professor of Law and Associate Dean for Scholarship American University Washington College of Law,” TARGETING AMERICAN TERRORISTS OVERSEAS; HOUSE JUDICIARY COMMITTEE, CQ)

In my view, the adversity issue is the deepest legal flaw in "drone court" proposals. But the idea of an ex ante judicial process for signing off on targeted killing operations may also raise some serious practical concerns insofar as such review could directly interfere with the Executive's ability to carry out ongoing military operations. First, and most significantly, even though I am not a particularly strong defender of unilateral (and indefeasible) presidential war powers, I do think that, if the Constitution protects any such authority on the part of the President, it includes at least some discretion when it comes to the "defensive" war power, i.e., the President's power to use military force to defend U.S. persons and territory, whether as part of an ongoing international or non-international armed conflict or not.17 And although the Constitution certainly constrains how the President may use that power, it's a different issue altogether to suggest that the Constitution might forbid him for acting at all without prior judicial approval especially in cases where the President otherwise would have the power to use lethal force.

## Turns Terror

Flexible drone policy is key to decapitation, confusion, and minimizing casualties—the plan’s restriction undermines legitimacy by causing a shift to more destructive tactics

Yoo, law professor – UC Berkeley, ‘12

(John, “Assassination or Targeted Killings After 9/11,” New York Law School Law Review, Volume 56)

When the United States considered terrorism to be a matter for the criminal justice system, it waited until after attacks on the United States had occurred before attempting to capture al-Qaeda leaders. Now that the United States is at war with al-Qaeda, it is entitled to kill the enemy’s commanders. This is done in an effort to demoralize the enemy, throw their troops into confusion and disarray, undermine their planning, and remove their most able leaders. Such is a well-documented wartime strategy. World War II and the Korean War witnessed numerous attacks on enemy military leaders.35 In the 1980s, President Ronald Reagan ordered U.S. jets to bomb Libyan locations where Colonel Muammar Qadhafi might be living and working.36 Launching a missile to kill al-Qaeda commanders like Derwish, even though he was an American citizen, is legal. They are members of the enemy forces, the equivalent of officers—Derwish amounted to a captain or major in command of al-Qaeda cells, the equivalent of enemy military units. The U.S. military and intelligence services are legally and morally free to target them for attack whether they were on the front lines or behind them. Killing an enemy commander will better promote the principles behind the rules of civilized war than other means. Over the centuries, the laws and customs of war have developed to reduce the harm to noncombatants and limit the use of force to that which is proportional to military objectives. By specifically targeting enemy leaders, the United States can render enemy **forces leaderless and frustrate their operations, § Marked 09:07 § prevent the enemy from mounting effective plots and campaigns, and reduce both civilian and military casualties.** Using targeted killing as a primary tactic also takes better account of the new kind of war facing the United States. The United States has prevailed in conventional wars by invading the territory of an enemy nation, destroying its armed forces on the battlefield, and capturing key cities and population centers. It has won by outproducing its opponents. During the lead-up to World War II, President Franklin D. Roosevelt aptly declared the United States to be the great “arsenal of democracy.”37 Historically, the United States has deployed its large productive capacity and population in war, and its large, well-equipped and well-supplied armies and navies have, generally speaking, overwhelmed the soldiers of the other side. The United States cannot win the war on terrorism by producing more tanks, fielding more army divisions, or setting more carrier battle groups and submarines to sail than this enemy. This did not work in Vietnam and it will not work against the even more diffuse enemy of today. Military plans based on traditional deterrence and the threat of retaliation will not be effective against this terrorist network because it has no territory or armed forces to crush, and its members welcome death. The amount of actual force needed to frustrate or cripple al-Qaeda is quite small, and well within the capabilities of a single division of U.S. troops. Indeed, the problem is not with the strength of America’s power, but how and where to aim it. Al-Qaeda does not mass its operatives into units onto a battlefield, or at least it has not after its setbacks in Afghanistan in the fall and winter of 2001. Instead, al-Qaeda will continue to disguise its members as civilians, hide its bases in remote mountains and deserts or among unsuspecting city populations, and avoid military confrontation. The only way for the United States to defeat al-Qaeda is to destroy its ability to function—by selectively killing or capturing its key members. In fact, the unique circumstances of the war on terrorism make a compelling case for taking out individual al-Qaeda leaders. Al-Qaeda is a social network of friends, acquaintances, or companies interlocked through various cross-ownerships and relationships; it is not unlike the Internet, which gives it remarkable resiliency. A killed or captured leader seems to be quickly replaced by the promotion of a more junior member and, as in Iraq, other arms of the network spring to the fore. Most nation-states would have collapsed after the kinds of losses inflicted by the armed forces and the CIA over the last decade: thousands of operatives killed, two thirds of al-Qaeda’s leadership killed or captured, and its open bases and infrastructure destroyed in Afghanistan.38 But al-Qaeda operatives continue to attempt to infiltrate the United States, and they have succeeded in carrying out new terrorist attacks in London, Madrid, and Bali.39 Al-Qaeda exhibits the typical characteristics of what is known as a free-scale network.40 A free-scale network is not created at random. It is made up of nodes— connected to each other for some purpose—around hubs, which are nodes with multiple connections to other nodes. They are not command-and-control hierarchies like the Defense Department. In terms of the Internet, hubs are highly trafficked websites with connections to many other sites, such as Google.com, Yahoo.com, and MSN.com. Users visit them often in order to connect to other sites, and a great many other sites connect to them as well. In a social or professional network, hubs are people that are widely known, who set trends or whose work influences a great many others. Decentralization is another attribute. Because of decentralization, a network can quickly collect and process information from a myriad of sources located in different places and connected only by a common interest or affinity. If a node disappears, others simply move their connections. Networks can remain remarkably immune to attack. Randomly destroying its nodes will not cause it to collapse, and the loss of a single hub will not bring down the whole network. Therefore, because it has no real single leader, it can function even after suffering severe losses. Al-Qaeda is just such a network. Each node is a terrorist seeking to connect with another through a desire to promote Islamic fundamentalism in the Middle East by any means necessary, including violence. Its hubs are leaders, such as bin Laden and Zawahiri, and facilitators, such as Khalid Sheikh Mohammed and Ramzi Binalshibh.41 Capturing or killing an al-Qaeda member is important for the discovery of other cells and plots to which he is connected. However, taking out single operatives is not crippling; other parts of the network can continue to function. The United States must target al-Qaeda hubs. Random, individual attacks on a free-scale network will not work. Turning off random websites will have almost no effect on the Internet, but closing down a Google.com or Yahoo.com might have a serious effect on Internet usage and traffic. Similarly, killing or capturing an ordinary al-Qaeda operative will cripple one cell, but al-Qaeda will only replace that cell with others. Even significant al-Qaeda facilitators eliminated one at a time will permit replacements to be trained or communications and contacts shifted to other leaders. To cripple al-Qaeda, the United States must gather timely and accurate information and attack its most important planners and leaders simultaneously. Otherwise, targeted killing at best will prevent an imminent attack, but it will not stop them all. This raises an important difference between law and capability on the one hand, and good policy on the other. Simply because the United States can kill a member of al-Qaeda does not mean it always should. It can interrogate captured leaders to learn not just about tomorrow’s bombing, but about other plans for the future, and the identities and locations of other al-Qaeda facilitators and commanders. It was far more advantageous for American intelligence that al-Qaeda leaders Abu Zubaydah, Khalid Sheik Mohammed, and Ramzi Binalshibh were captured in Pakistan rather than killed by missiles.42 According to former CIA director Porter Goss and senator Pat Roberts, chair of the Senate Intelligence Committee, information gained from their interrogation likely produced “actionable intelligence” that has prevented future terrorist attacks.43 Other policy considerations must be taken into account when deciding whether to launch a deadly attack. The United States should rely on its own police or military forces, or those of its allies, to capture and detain hostiles. Strong cooperative relationships with other nations are invaluable in the war on terrorism. Other nations can provide more intelligence, cultural expertise, and capabilities in waging covert warfare against al-Qaeda. This is one reason why effective diplomacy and strong alliances are a crucial factor in wartime success. The United States also needs to reduce harm to civilians found near terrorists. Strikes that kill innocent men, women, and children, either by mistake or because of proximity to the target, could undermine the support of the populations of allied and uncommitted nations. None of these factors is or should be an absolute, however. Some friendly nations may be unable or unwilling to take the necessary action to stop al-Qaeda activity inside their borders.44 They might quietly allow targeted strikes, but popular anger will also require them to launch formal political protests. Knowing that American leaders do not want to harm civilians, terrorist leaders would intentionally surround themselves with their family members whenever they travel. During the Afghanistan invasion, a Central Command JAG lawyer apparently advised against a missile strike on a caravan of SUVs reinforcing Kandahar. Even though intelligence reported a high probability that it was an al-Qaeda and Taliban unit, the attack was put off because imagery showed women and children in the convoy.45 Taliban and al-Qaeda fighters in Afghanistan apparently brought their families onto the battlefield.46 Decisions on whether to attack such targets cannot be proscribed by simple rules. Instead, the importance of the target must be balanced against the collateral damage to innocents nearby. The most important factor to consider is uncertainty. When deciding whether to target someone, American intelligence officials cannot be one hundred percent sure the person is in fact an al-Qaeda leader or that the information about his location and timing is correct beyond any doubt. Even if it has collected all information possible—and information has a cost, just like any other good or service—the United States is still dealing with the probability that something will happen in the future. Terrorists’ plans can change **at the last minute**. American intelligence may have identified the wrong man, or it may have made a simple mistake (as with the erroneous bombing of the Chinese embassy in Belgrade during the Kosovo war).47 Using force to prevent future harms can never be done perfectly. No military can choose the right target every time, nor can any military hit its target every time. Soldiers might shoot someone who turns out to be a noncombatant, but was lurking around a known enemy location, or they might fire their cannons at the wrong building. In domestic law enforcement, which is governed by tougher standards, a police officer who fires his weapon on the reasonable belief that his attacker holds a gun is not punished by law, even if it turns out that his belief was in error. We ask that our soldiers make reasonable decisions when they choose their targets and decide how much force to use. Similarly, our policymakers consider all of these factors when they decide whether to use deadly force against a suspected al-Qaeda member. They must balance matters like the effect of an attack on allied governments, local populations, and nearby civilians against the benefit of eliminating an al-Qaeda leader and frustrating the plans he might have been organizing, while also keeping in mind the probability of success in the attack.

# 1NR

## Impact OV

Judicial enforcement of ex-ante congressional review turns both advantages – turns their signal arguments, makes escalating warfare inevitable, and cripples warfighting effectiveness

Nzelibe & Yoo 6 [Jide Nzelibe (Asst. Profesor of Law @ Northwestern) and John Yoo (Emanuel S. Heller Professor of Law @ UC-Berkeley Law); “Rational War and Constitutional Design”; Yale Law Journal, Vol. 115; 2006]

The Dangers of Judicial Intervention

Faced with the prospect that congressional participation can sometimes play a salutary role in avoiding unnecessary wars, an antecedent question naturally arises. **Should the courts decide if such a congressional role would be appropriate?** Indeed, **a recurring theme running through much of the Congress-first literature is that judicial intervention is necessary to vindicate the congressional role in initiating conflicts**. n66 **But if one accepts the signaling model developed here, there are** significant reasons **why one ought to be wary of a judicial role in resolving war powers controversies.**

[\*2537] First, under our model of international crisis bargaining, **judicial review would** likely undermine the value of signals **sent by the President when he seeks legislative authorization** to go to war. In other words, **it is the fact that the signal is both costly and discretionary that often makes it valuable.** Once one understands that regime characteristics can influence the informational value of signaling, n67 it makes sense that **the President should have the maximum** flexibility **to choose** less costly signals when dealing with rogue states or terrorist organizations**.** The alternative - **a judicial rule that mandates costly signals in all circumstances, even when such signals have little or no** informational **value** to the foreign adversary - **would dilute the overall value of such signals.**

Second, **judicial review would** preclude the possibility of beneficial bargaining between the President and Congress by **forc**ing **warmaking into a** procedural straitjacket. In this picture, **judicial review would constrain the political branches to adopt only the tying hands type of signal regardless of the nature or stage of an international crisis**. n68 But the supposed restraining effect attributed to the tying hands signal can vary considerably depending on whether the democracy is deciding to initiate an international crisis or is already in the midst of an escalating crisis. Requiring **legislative authorization may** make it less likely that the democracy will be willing to back out **of a conflict once it starts. n69 Thus, tying hand signals and judicial insistence that the President seek legislative authorization will contribute to** greater international instability **once a conflict has already started.**

Thus far, our argument presupposes that there are only two institutional models of judicial review from which to choose: a judicial approach that mandates legislative authorization for all conflicts and a hands-off judicial approach that gives the President wide latitude to decide if such costly signaling would be beneficial. But there is a third possibility. The courts could make the initial determination as to whether a foreign adversary is the type that would benefit from costly signaling. n70

At first blush, such a judicial choice of an interpretive approach might appear to resolve the problem of over-inclusive signaling identified above. But [\*2538] here the objection to judicial review would be on institutional competence grounds. Simply put, **it would take a leap of faith to believe that courts would be able to discern correctly the regime type of a foreign adversary and decide whether legislative participation would prove to be valuable in any specific war.** Of course, courts sometimes make case-by-case judgments about factual predicates in other contexts, but **decisions about the signaling value of legislative authorization would not only require access to possibly classified information about foreign threats but also the resources to analyze such threats - information and resources that courts** clearly lack. **Nor can one assume that all democratic regimes will behave alike in their proclivity to initiate or reciprocate hostility**. For instance, the President might conclude that although a foreign adversary is nominally a democratic regime, it would not be responsive to costly tying hands signals because it is facing domestic political turmoil. n71 In any event, **the judiciary's insulation from the political process makes it** particularly ill suited **to decide whether the President's decision about the value of signaling in a particular conflict is wrong or not.**

## UQ DEBATE

Executive has primacy now – that’s Posner

Judiciary is deferring now

Denniston 13 (Lyle, SCOTUSblog, National Constitution Center’s adviser on constitutional literacy, “Constitution Check: Will drone policy be tested in court?”, <http://blog.constitutioncenter.org/2013/05/constitution-check-will-drone-policy-be-tested-in-court/>, ZBurdette)

One of the most delicate and challenging tasks of U.S. federal courts is to decide when they may judge, by legal norms, the conduct of a highly secret government program that causes harm to someone. In the years of the government’s “war on terrorism,” judges have shown a continuing reluctance to weigh the constitutionality of such programs, and they have used a variety of legal arguments for that reluctance.

The Obama administration, however, may have made it somewhat easier for the challengers to the legality of its ongoing drone strikes policy, by adopting a policy that the president and his aides have said was aimed at making that program more “transparent.” It just might get them into legal trouble in the district court of Judge Rosemary M. Collyer.

Even as the president and his associates have publicly talked of a fuller airing of drone policy, lawyers from the Justice Department for months have been attempting to persuade Judge Collyer to shut down—without a decision—the case of Al-Aulaqi v. Panetta, and others.

The families of three of the four U.S. citizens whose deaths Attorney General Holder acknowledged were the result of drone strikes filed that lawsuit against present and former government officials, seeking to hold them personally responsible for the deaths.

The three were Anwar Al-Aulaqi, his son Abdulrahman Al-Aulaqi, and Samir Khan. Anwar Al-Aulaqi was killed, along with Khan, in a drone strike in Yemen on September 30, 2011. Two weeks later, Al-Aulaqi’s 16-year-old son was killed by a strike in southern Yemen. Parents of the two men killed in September (one is also the grandfather of the youth killed in October of that year) filed the lawsuit last July, and it was assigned to Judge Collyer.

Up to now, the two sides have been battling through lengthy legal briefs. The judge has scheduled a hearing for July 19, focusing directly on the government’s motion to dismiss the case altogether.

“This case,” the challengers argued in one of their court filings, “concerns the most fundamental right the Constitution guarantees to citizens: the right not to be deprived of life without due process of law. … The three individuals were killed without ever being charged with or convicted of a crime. Their families have never received any explanation of why they were killed. … [The government’s] argument that the judiciary should turn a blind eye to the executive’s extrajudicial killing of American citizens misunderstands both the individual rights guaranteed by the Constitution and the courts’ constitutional duty to safeguard those rights from encroachment.”

Justice Department lawyers, however, have made a variety of arguments why the case should not go forward. The most technical argument is that neither of those who sued has a legal right to speak for the estates of the three dead persons, because no court has appointed them to manage those estates.

If that argument does not end the case, the department’s lawyers have argued more sweepingly that the case should be stopped (1) because it involves a “political question” that is beyond the reach of the courts, (2) because the courts should hesitate long before they fashion a new remedy of money damages that would make the courts supervisors of executive action, and (3) because the government officials sued in the case for damages they would personally have to pay have immunity to constitutional claims never before recognized by the courts.

## ---inter-branch fighting

Court precedent spills over to destabilize all presidential war powers—shapes possible presidential actions and lawyers are trained to think precedents are binding so it locks in restraints—empirics prove—that’s Greene

Legacy chains cause further restraint

Paul ‘8

Christopher, 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, “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

Legitimacy concerns lock in a culture of restrictions on Executive war power

Paul ‘8

Christopher, 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, “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 in stitutional 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 'sch?mas' (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.

Destroys the precedent of deference

Bradley ‘13

Curtis A. Bradley Duke Law School and Trevor W. Morrison Columbia Law School, “PRESIDENTIAL POWER, HISTORICAL PRACTICE, AND LEGAL CONSTRAINT,” Columbia Law School Public Law & Legal Theory Working Paper Group Paper Number WP 31-327

Reliance on historical practice is a mainstay of decisionmaking and debates concerning the scope of presidential power. n17 In part this is a function of the limited guidance provided by the constitutional text. Unlike Article I of the Constitution, which contains a long list of congressional powers, Article II sets forth relatively few specific presidential powers. The President is made the Commander in Chief of the armed forces, but the constitutional text does not explain what this authority entails. n18 The President has the power to make treaties and to appoint various officials, but those powers are shared with the Senate. n19 Other clauses in Article II, such as the provisions about receiving ambassadors and taking care that the laws are faithfully executed, arguably [\*1104] sound more like obligations than powers. n20 Some scholars contend that the first sentence of Article II, which states that "the executive Power shall be vested in a President of the United States of America," n21 implicitly grants the President a broad range of powers, but this claim is controversial, and, in any event, it highlights the text's lack of specificity. n22 Responding in part to the limited textual guidance in Article II, Justice Frankfurter's concurring opinion in the Youngstown steel seizure case famously emphasized the importance of historical practice to the interpretation of presidential power. As he put it: [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II. n23 In other decisions, the full Supreme Court has endorsed the significance of such practice-based "gloss." Consider, for example, Dames & Moore v. Regan. n24 The issue there was whether Presidents Carter and Reagan had the authority, as part of their resolution of the Iranian hostage crisis, to transfer billions of dollars in claims by U.S. citizens against Iran to a new arbitral body being established in The Hague. In concluding that the Presidents had this authority, the Court noted that "the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries" and that "there has ... been a longstanding practice of settling such claims by executive agreement without the [\*1105] advice and consent of the Senate." n25 The Court further emphasized that "the practice of settling claims continues today" and that Congress had acquiesced in this practice, both by enacting supporting framework legislation and by "consistently failing to object ... even when it has had an opportunity to do so." n26 Historical practice is also an important component of the canonical three-tiered framework for assessing presidential power that Justice Jackson articulated in his Youngstown concurrence. Under that framework, the President's power is at its highest when supported by express or implied congressional authorization, in an intermediate "zone of twilight" when Congress has said nothing, and at its lowest when Congress has expressly or implicitly prohibited the action in question. n27 Historical practice is potentially relevant in each of these categories. It can help an interpreter determine whether there is implicit congressional support or opposition for purposes of the first and third categories. n28 It is also potentially relevant to whether a presidential power is exclusive and thus valid even under the third category. n29 Perhaps most obviously, it can play a large role in the intermediate zone, in which the President and Congress "may have concurrent authority, or in which its distribution is uncertain." n30 Indeed, as Justice Jackson noted, congressional inaction in the face of presidential activity "may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." n31

Path dependency means no net link turns

Paul ‘8

Christopher, 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, “US Presidential War Powers: Legacy Chains in Military Intervention Decisionmaking\* ,” Journal of Peace Research, Vol. 45, No. 5 (Sep., 2008), pp. 665-679

Another relevant form of institutional inertia is 'the legitimacy imperative' (DiMag gio and Powell, 1991; Rogers-Dillon & Skrentny, 1999:13-29). Skrentny (1998:284) notes that: 'Formal organizations, including state bureaucracies, take for granted a "legiti macy imperative.'" In the organizational case of the highest level of US decisionmakers, particularly in the office of the president, legitimacy weighs considerably in decision maker calculations (Neustadt & May, 1986). Tago (2005) argues that legitimacy-seeking has frequently driven US decisionmakers to seek multilateral rather than unilateral force deployments. The operation of the legitimacy imperative is straightforward. Previously legi timate or successful policy approaches are easily proposed and repeated, while previ ously failed or delegitimated approaches are difficult to even get on the decisional table. The war powers legacy chain contains several examples of the legitimation or delegitima tion of a new policy tack. Consider President Reagan's success at initiating and concluding operations in Grenada, without congressional approval but within the War Powers Resolu tion's 60-day time limit in establishing 'in and out' operations as a legitimate presidential war-making strategy; or, recall congressional exclusion from further decisionmaking regarding Vietnam as a direct result of the Gulf of Tonkin Resolution and the role that played in decreasing the likelihood of future 'blank check' resolutions. Path dependence in military interventions is about what is formally and informally pos sible and what is likely, preferred, and legiti mate based on relevant cultural precepts. Change, then, presupposes either change in institutions or change in the 'relevant cultural precepts'. Since culture provides the 'tool box' out of which institutions are constructed, institutional change can be connected with cultural change (Swidler, 1986: 273-286; Sewell, 1992: 1-29; DiMaggio & Powell, 1991). This parallels work in organizational learning that suggests two organizational learning mechanisms: structural (very similar to my 'formal institutional change') and cul tural (very similar to my 'informal institu tional change') (Popper & Lipshitz, 1998). If culture is what people know', cultural change can result from nothing more than new information. One of the main mechani sms of institutional change and legacy trans mission is the information resulting from the experiences of a major event or military inter vention. As the success, failure, or other con sequences of an intervention become clear and enter general cultural understanding, institu tions and sch?mas built on those understand ings can and do change. It is difficult to predict exactly what cultural and institutional lessons will stem from a military intervention. Sewell (1992: 19) notes that such things can be very varied; for example: The new prestige, wealth, and territory gained from the brilliant success of a cavalry charge may be attributed to the superior discipline and ?lan of the cavalry officers and thereby enhance the power of an aristocratic officer corps, or it may be attributed to the com manding general and thereby result in the increasing subordination of officers to a cha rismatic leader ... Any array of resources is capable of being interpreted in varying ways and, therefore, of empowering different actors and teaching different sch?mas. Once these new sch?mas are in place, they have entered the institutional context and apply path-dependent weight to subsequent policy choices. New information that con tains a critical shift' is most likely to leave a discernable legacy. 'Critical shifts' produce information that is either surprising by virtue of introducing something previously incon ceivable or demonstrating that a prior cul tural 'fact' is incorrect, or highly salient in some other way, such as being associated with either a brilliant success or horrific failure. Busenberg (2001) argues that 'focus ing events - incidents that focus public and political attention on a policy issue' can shape institutional arrangements and policy change. The US loss in Vietnam constituted a critical shift in numerous policy spheres, including war powers and press?military relations. The more dramatic these critical shifts are, the longer the cultural information they produce is likely to be included in the construction of institutions. As cultural information becomes old or 'stale', institu tions built in part based on that knowledge will be more vulnerable to change. The impact of this decay relationship for military interventions is clear. As the cultural infor mation informing a legacy ages and loses salience, the institutions constituting the legacy become more vulnerable to change through new or more salient-seeming infor mation. Legacies, then, are 'increasing returns' path dependent until a critical shift (or simple attenuation due to the passage of time) changes the returns.

## ---warfighting

Cross-apply Katyal from the CP flow – this card is excellent – judicial involvement CRUSHES warfighting – two reasons:

1. It cripples speed of targeting decisions

AND

1. Puts inexperienced courts in charge

They concede in cross-ex that this puts non-experts in control. Well impact that out –

[insert card]

Plan kills war powers and drone effectiveness.

Vladeck 13 (Steve, professor of law and the associate dean for scholarship at American University Washington College of Law, Lawfare, “Why a “Drone Court” Won’t Work–But (Nominal) Damages Might…”, <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/>, February 10, ZBurdette)

II. Drone Courts and the Separation of Powers

In my view, the adversity issue is the deepest legal flaw in “drone court” proposals. But the idea of an ex ante judicial process for signing off on targeted killing operations may also raise some serious separation of powers concerns insofar as such review could directly interfere with the Executive’s ability to carry out ongoing military operations…

First, and most significantly, even though I am not a particularly strong defender of unilateral (and indefeasible) presidential war powers, I do think that, if the Constitution protects any such authority on the part of the President (another big “if”), it includes at least some discretion when it comes to the “defensive” war power, i.e., the President’s power to use military force to defend U.S. persons and territory, whether as part of an ongoing international or non-international armed conflict or not. And although the Constitution certainly constrains how the President may use that power, it’s a different issue altogether to suggest that the Constitution might forbid him for acting at all without prior judicial approval–especially in cases where the President otherwise would have the power to use lethal force.

This ties together with the related point of just how difficult it would be to actually have meaningful ex ante review in a context in which time is so often of the essence. If, as I have to think is true, **many of the opportunities for these kinds of operations are fleeting**–and often open and close within a short window–then a requirement of judicial review in all cases might actually **prevent the government from otherwise carrying out authority that most would agree it has** (at least in the appropriate circumstances). This possibility is exactly why FISA itself was enacted with a pair of emergency provisions (one for specific emergencies; one for the beginning of a declared war), and comparable emergency exceptions in this context would almost necessarily swallow the rule. Indeed, the narrower a definition of imminence that we accept, the more this becomes a problem, since the time frame in which the government could simultaneously demonstrate that a target (1) poses such a threat to the United States; and (2) cannot be captured through less lethal measures will necessarily be a vanishing one. Even if judicial review were possible in that context, it’s hard to imagine that it would produce wise, just, or remotely reliable decisions.

## AT: Same Process

Plan causes delays—undermines security.

HRF 13 (Human Rights First, non-profit organization, “How to Ensure that the U.S. Drone Program does not Undermine Human Rights”, Updated April 2013, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF_Targeted_Killing_blueprint.pdf>, ZBurdette)

Aside from the constitutional problems, the drone court would undermine national security. In an armed conflict, lethal force is appropriate under the laws of armed conflict, and no court should be asked to second-guess a commander’s decision. Outside an armed conflict, the Constitution authorizes the President to defend Americans with lethal force only in the face of an imminent threat when no other feasible means to disrupt the threat is available. When the threat is imminent, there is by definition insufficient time to seek judicial review. Adding a requirement of judicial process is impractical and would likely encourage the use of lethal force in situations where the threat is not actually imminent.

## 2NC OV

Turns the entire aff

Howell ‘7

William, professor of political science at U-Chicago, and Jon C. Pevehouse, professor of Political Science UW-Madison, “While Dangers Gather : Congressional Checks on Presidential War Powers,” 2007 ed.

SIGNALING RESOLVE To the extent that congressional discontent signals domestic irresolution to other nations, the job of resolving a foreign crisis is made all the more difficult. As Kenneth Schultz shows, an ''opposition party can undermine the credibility of some challenges by publicly opposing them. Since this strategy threatens to increase the probability of resistance from the rival state, it forces the government to be more selective about making threats "—and, concomitantly, more cautious about actually using military force.'4 When members of Congress openly object to a planned military operation, would-be **adversaries** of the United States may feel emboldened, believing that the president lacks the domestic support required to see a military venture through. Such nations, it stands to reason, will be more willing to enter conflict, and if convinced that the United States will back down once the costs of conflict are revealed, they may fight longer and make fewer concessions. Domestic political strife, as it were, weakens the ability of presidents to bargain effectively with foreign states, while increasing the chances that military entanglements abroad will become **protracted and unwieldy.** A large body of work within the field of international relations supports the contention that a nation's ability to achieve strategic military objectives in short order depends, in part**,** on the head of state's **credibility in conveying political resolve.** Indeed, a substantial game theoretic literature underscores the importance of domestic political institutions and public opinion as state leaders attempt to credibly commit to war,75 Confronting widespread and vocal domestic opposition, the president may have a difficult time signaling his willingness to see a military campaign to its end, While congressional opposition may embolden foreign enemies, the perception on the part of allies that the president lacks support may make them wary of **committing any troops at all.**

Also causes rollback/circumvention

Laura Young, Ph.D., Purdue University Associate Fellow, June 2013, Unilateral Presidential Policy Making and the Impact of Crises, Presidential Studies Quarterly, Volume 43, Issue 2

A president looks for chances to increase his power (Moe and Howell 1999). Windows of opportunity provide those occasions. These openings create an environment where the president faces little backlash from Congress, the judicial branch, or even the public. Though institutional and behavioral conditions matter, domestic and international crises play a pivotal role in aiding a president who wishes to increase his power (Howell and Kriner 2008, 475). These events overcome the obstacles faced by the institutional make-up of government. They also allow a president lacking in skill and will or popular support the opportunity to shape the policy formation process. In short, focusing events increase presidential unilateral power.

Outweighs their mechanism

Laura Young, Ph.D., Purdue University Associate Fellow, June 2013, Unilateral Presidential Policy Making and the Impact of Crises, Presidential Studies Quarterly, Volume 43, Issue 2

During periods of crisis, the time available to make decisions is limited. Because the decision-making process is often arduous and slow in the legislative branch, it is not uncommon for the executive branch to receive deference during a crisis because of its ability to make swift decisions. The White House centralizes policies during this time, and presidents seize these opportunities to expand their power to meet policy objectives. Importantly, presidents do so with limited opposition from the public or other branches of government (Howell and Kriner 2008). In fact, despite the opposition presidents often face when centralizing policies, research shows policies formulated via centralized processes during times of crisis receive more support from Congress and the American people (Rudalevige 2002, 148-49). For several reasons, a crisis allows a president to promote his agenda through unilateral action. First, a critical exogenous shock shifts attention and public opinion (Birkland 2004, 179). This shift is a phenomenon known as the “rally round the flag” effect (Mueller 1970). The rally effect occurs because of the public's increase in “its support of the president in times of crisis or during major international events” (Edwards and Swenson 1997, 201). Public support for the president rises because he is the leader and, therefore, the focal point of the country to whom the public can turn for solutions. Additionally, individuals are more willing to support the president unconditionally during such times, hoping a “united front” will increase the chance of success for the country (Edwards and Swenson 1997, 201). As a result, a crisis or focusing event induces an environment that shifts congressional focus, dispels gridlock and partisanship, and increases positive public opinion—each of which is an important determinant for successful expansion of presidential power (Canes-Wrone and Shotts 2004; Howell 2003). In other words, a crisis embodies key elements that the institutional literature deems important for presidential unilateral policy making. The president's ability to focus attention on a particular issue is also of extreme importance if he wishes to secure support for his agenda (Canes-Wrone and Shotts 2004; Edwards and Wood 1999; Howell 2003; Neustadt 1990). The role the media play is pivotal in assisting a president in achieving such a result because of its ability to increase the importance of issues influencing the attention of policy makers and the priorities of viewers. Although it is possible a president can focus media attention on the policies he wishes to pursue through his State of the Union addresses or by calling press conferences, his abilities in this regard are limited, and the media attention he receives is typically short lived (Edwards and Wood 1999, 328-29). High-profile events, on the other hand, are beneficial because they allow the president to gain focus on his agenda. This occurs because the event itself generates attention from the media without presidential intervention. Thus, the ability of crises to set the agenda and shift media and public attention provides another means for overcoming the constraints placed upon the president's ability to act unilaterally. Finally, Rudalevige finds support that a crisis increases the success of presidential unilateral power even if the policy process is centralized. A crisis allows little time to make decisions. As a result, “the president and other elected officials are under pressure to ‘do something’ about the problem at hand” (2002, 89, 148). Because swift action is necessary, presidents rely on in-house advice. As a result, the policy formation process is centralized, and the president receives deference to unilaterally establish policies to resolve the crisis. During a crisis, the president has greater opportunity to guide policy because the event helps him overcome the congressional and judicial obstacles that typically stand in his way.2 This affords the president greater discretion in acting unilaterally (Wildavsky 1966). It is possible the institutional make-up of the government will align so that the president will serve in an environment supportive of his policy decisions. It is also likely a president will have persuasive powers that enable him to gain a great deal of support for his policy agenda. An event with the right characteristics, however, enhances the president's ability to act unilaterally, regardless of the institutional make-up of government or his persuasive abilities.

## 4th gen key

4th gen key to defeating AQ—nuclear terror impact

Barno ‘6

David, retired Lieutenant General of the United States Army. He was head of Combined Forces Command-Afghanistan from 2003–2005, “Challenges in Fighting a

Global Insurgency,” http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/06summer/barno.pdf

Strategy in a global counterinsurgency requires a **new level of thinking**. A world of irregular threats and asymmetrical warfare demands that we broaden our thinking beyond the norms of traditional military action once sufficient to win our wars. The focus of this global insurgency of violent Islamist extremism exploits the concepts of Fourth Generation Warfare with a calculated assault on perceptions at home, on our decisionmakers and on the public. In a war of intelligence and a war of perceptions, we grapple to understand how to best devise a war-winning strategy given the predominantly conventional warfighting tools in our military toolbox—and our vulnerabilities outside the military sphere. Realities are that an unbroken series of tactical military victories in today’s war, the primary focus of our Army and Marine Corps, will not assure strategic success, yet our conventional military organizations and service cultures seem increasingly tactical. An effective strategy does not result from the aggregate of an unlimited number of tactical data points. Commanders assert, “We simply cannot be defeated militarily in this war.” That may be true, but this statement masks the fact that we can potentially be defeated by other than purely military means. How big is our concept of war? With our enemies committed to an unlimited war of unlimited means—a**l** Q**aeda will clearly use a nuclear weapon against the** U**nited** S**tates if it gains the means**—how can we continue to regard this fight as a limited war and keep our focus chiefly on accumulating an unbroken series of battlefield tactical successes which we somehow think will collectively deliver victory? How do we justify our military services’institutional fixation with accruing more and more tactical capability in the face of an enemy which places no value on tactical engagements except to achieve his strategic and political objectives? Where do we best invest our future defense dollars to gain leverage over this new “global insurgent,” an enemy with no tanks, no air force, no navy, and no satellites? What type of provocation will it take for Americans to fully commit to a “long war” against an enemy who is engaged in a war without limits against us? And what does an all-out “long war” mean for America within the ethical and moral values of our nation in the 21st century? Many of these questions are beyond the scope of this article, but they point to the complex dimensions of understanding the nature of the war we fight today—a Fourth Generation War—and the means required for us to win. As a military charged with fighting this new type of war, a global insurgency, we must better grasp ownership of the fight. In some sense, as society’s trustee in the conduct of our nation’s wars, we must accept the full range of war, tactical to strategic level. After all, winning wars—and preventing them—are the only reasons our military exists. If we as a nation or a member of a coalition are ultimately defeated by our enemies, the reasons for that defeat—whether military, political, or economic—will be far less important than the result. We must more fully leverage all the intellectual as well as physical capabilities inside our military to assure such a defeat remains unthinkable. We need to contribute more directly toward a comprehensive strategy leading to long-term victory. Battlefield victories result from good tactics, training, and leadership; strategic victories result from thinking through the right strategy and executing it aggressively. Our military should be the repository of the deepest reservoirs of strategic thinking on winning our wars—of any type. But for our military to deny that an asymmetric defeat at the strategic level is even possible in this unconventional war is the equivalent of burying our heads in the sand and increases our risk. While protecting against tactical or operational-level defeat on the battlefields of Iraq and Afghanistan, our military needs to also guard against the dangers of strategic-level defeat. This is not just “someone else’s problem.” We need to understand the nature of the war we are fighting, and we need to avoid the temptation to define our war as the tactical battle we would like to fight rather than the strategic fight we are in with a thinking enemy who strikes daily at our national political will here at home. The military’s role in addressing this asymmetrical “war of wills” is hyper-sensitive. This predicament is a very real problem inherent in 21stcentury warfare, and the military needs to understand and support the civilian leadership in defending this flank. Bipartisan recognition and defense of this Achilles’ heel is also necessary to deprive our enemies of its effect. America’s military contribution needs to evolve toward designing a war-winning series of campaigns and, perhaps even more important, helping our civilian leadership to craft the broad political-military grand strategy necessary to succeed against a dangerous and resourceful enemy in this “long war.” We as a military must fully understand, accept, and take ownership of “war-winning” as well as “war-fighting” if we are to fulfill our role in defending the society we are pledged to serve. If this conflict is truly a “long war” against violent global extremism, against an ideology of hate and destruction as dangerous as fascism in the 1930s and communism in the 1950s, then we as a military have to take on the institutional and intellectual challenges to fight and to win this very different war against a determined and dangerous enemy.

Key to deterring and de-escalating terror attacks

Murden ‘7

Simon, “Staying the Course in ‘Fourth-Generation Warfare’: Persuasion and Perseverance in the Era of the Asymmetric Bargaining War,” Contemporary Security Policy, Vol.28, No.1 (April 2007), pp.197–211

Bringing wars against diffusely organized insurgents to a successful conclusion has long been the Achilles’ heel of great states, and this especially seems to be the case in the era of late 20th century globalization. Today, just when US military power has chased most opponents **from the conventional battleﬁeld**, the new technologies and openness of globalization has empowered insurgents, especially ‘glocal’ ones. While the activities of some of these small actors might only be manifest on the territorial plane in rather diffuse and sporadic ways, they are able to operate across and draw upon a strategic space that is both regional and global in its extent. The advent of al-Qaeda demonstrated how signiﬁcant the empowerment of small actors could be and provided a case par excellence of a fourth-generation insurgency. Meeting the challenge of such opponents requires predicting where their activities might precipitate; deterring, pre-empting and destroying the manifestations of that precipitation; and drying up their presence across the globalized strategic space. The task is a difﬁcult one. Fourth-generation opponents are often so diffuse and well hidden that it is difﬁcult to ﬁnd and engage them. Indeed, it seems improbable that force alone is capable of achieving decisive outcomes against such adversaries. If only a proportion of the forces of fourth-generation opponents can be hunted down, many others will have to be persuaded to give up. The era of fourthgeneration warfare is the era of the asymmetric bargaining war.

## no interstate war

Comparatively turns and outweighs the Aff –

Rogue states/terrorists are the only scenarios for escalation

Gable ‘11

William, US Army War College, “An Era of Persistent Conflict?,” http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA560155

Exceptional individuals are key contributors to the turmoil the U.S. experienced in the last decade through the present, and their objectives could portend continued conflict. While the existence of these exceptional individuals alone does not necessarily assure conflict, the ideologies they espouse are underpinned by religion adding a nondeterrable dimension to their struggle. The actual or perceived preponderance of U.S. power will not diminish the likelihood of future attacks. In fact, such attacks will only serve to enhance these organizations‘ status and power, fueling every aspect of their operations from recruiting to financing operations. Consequently, threats from non-state actors will continue. Depending on the potential destruction inflicted by any terrorist attack, the attacker‘s sanctuary, and the threat posed to the aforementioned governments, the U.S. may be compelled to fight wars similar to the war in Afghanistan. Conflict with another state is possible, though less likely. Although the relative decline of U.S. economic power in relation to China appears to constitute a potential ―window‖ or threat to peace, **both governments are aware of the risks and are working to mitigate them.** Moreover, **the U.S., China, and Russia represent deterrable nuclear powers,** states dissuaded from conflict with each other due to the potential costs of a nuclear exchange. Conflict between these states appears unlikely. However, existing theory suggests problems with nondeterrable states that are not responsive to punishment or are willing to take risks that prompt conflict**. North Korea and Iran seem to fit this description.** Their efforts to develop, acquire, and possibly proliferate nuclear weapons, combined with the potential threat posed by a non-state actor acquiring such weapons, form conditions that indicate a strong possibility of war. In particular, Iran‘s nuclear program presents a potentially ominous window. Should diplomacy, sanctions, and cyber attacks fail to sidetrack Iran‘s nuclear program, **the U.S. will be presented with an ever-narrowing window to act with force** to deny Iran this capability. This could result in conflict with Iran. While false optimism is a potent and pervasive cause of war, recent experience with war and the nature of these and likely future conflicts will diminish leaders support for initiating war. Similarly, the current economic conditions and concern over the national debt will dampen leaders‘ enthusiasm for wars. But existing theories that discuss these factors fail to consider the impact of non-state actors. Thus, conflict is still possible despite them. Overall, the combination of factors seems to indicate continuing conflict with nonstate actors and potential conflict with states over development and proliferation of nuclear weapons. These factors identify specific circumstances where U.S. involvement in war is likely, and represent the primary drivers for concluding that the current era will be one of persistent conflict. The U.S. government should use all of the elements of power to focus on these factors to prevent what history and theory suggest the inevitability of war.

Deterrence solves all their impacts but not ours

Adams ‘11

Captain William, US Army war college, Achieving Nuclear Deterrence in the 21st Century, <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA543192>

Several general conclusions can be drawn

First, historical evidence that general deterrence prevents attacks is weak. Second, deterrence is a complex and ambiguous process similar to religious belief. It is not a science and does not obey scientific rules. Third, deterrence is relational and individual, resulting from one-to-one relationships between the deterrer and the deterred parties. What will deter one party may not deter another party, and what deters one party may change with time and circumstance. Successful deterrence requires profound knowledge about the opponent. Fourth, in all likelihood, any nation state can be deterred from using Weapons of Mass Destruction against the US without invoking nuclear weapons, since current US **conventional weapons** are capable of inflicting massive economic damage to any nation state. Fifth, in theory even a non-state group such as Al Qaeda could be deterred from launching a nuclear attack on the US. However, this requires the US to understand how the group thinks and what it holds dear. It also requires a relationship with the non-state actor to permit the deterrence conversation to occur. It is possible that only deterrence by denial can work against a non-state actor. Sixth, **nuclear weapons appear capable of deterring nuclear attack,** but probably only nuclear attack.

Interstate war is over—terrorism is the only impact

Gat ‘13

Azar, Department of Political Science, University of Tel Aviv, “Is war declining – and why?,” Journal of Peace Research March 2013 vol. 50 no. 2 149-157,

The decline of war and the three `Long Peaces' after 1815 We now move to the decline of war, which is our main concern here. Most people are surprised to learn that the occurrence of war and overall mortality in war sharply decreased after 1815, most notably in the developed world. The ‘Long Peace’ among the great powers after 1945 is more recognized and is widely attributed to the nuclear factor, a decisive factor to be sure, which concentrated the minds of all the protagonists wonderfully. The (inter-)democratic peace has been equally recognized. But in actuality, the decrease in war had been very marked before the nuclear era and encompassed both democracies and non-democracies. In the century after 1815, wars among economically advanced countries declined in their frequency to about one-third of what they had been in the previous centuries, an unprecedented change. Indeed, the Long Peace after 1945 was preceded by the second longest peace among the great powers, between 1871 and 1914, and by the third longest peace, between 1815 and 1854 (Gat, 2006: 536–537, 608). Thus, the three longest periods of peace by far in the modern great powers system all occurred after 1815. Clearly, one needs to explain the entire trend, while also accounting for the glaring divergence from it: the two World Wars. Is modern war more lethal and destructive than before? In his earlier works, Levy (1983) was among the first to document the much-reduced frequency of war after 1815. But what brought about this change? Levy & Thompson assume – this is perhaps the most natural hypothesis – that wars declined in frequency because they became too lethal, destructive, and expensive. Supposedly, a trade-off of sorts was created between the intensity and frequency of warfare: fewer, larger wars supplanting many smaller ones. This hypothesis barely holds, however, because, again, relative to population and wealth wars have not become more lethal and costly than earlier in history. Furthermore, as Levy & Thompson rightly document, the wars of the 19th century – the most peaceful century in European history – were particularly light, in comparative terms, so there is no trade-off here. True, the World Wars, especially World War II, were certainly on the upper scale of the range in terms of casualties. Yet, as already noted, they were far from being exceptional in history. Once more, we need to look at relative casualties, general human mortality in any number of wars that happen to rage around the world, rather than at the aggregate created by the fact that many states participated in the World Wars. I have already mentioned the Mongol invasions, but other examples abound. In the first three years of the Second Punic War, 218–16 BCE, Rome lost some 50,000 citizens of the ages of 17–46, out of a total of about 200,000 in that age demographic (Brunt, 1971). This was roughly 25% of the military-age cohorts in only three years, the same range as the Russian and higher than the German rates in World War II. This, and the devastation of Rome’s free peasantry during the Second Punic War, did not reduce Rome’s propensity for war thereafter. During the Thirty Years War (1618–48) population loss in Germany is estimated at between one-fifth and one-third – either way higher than the German casualties in World War I and World War II combined. People often assume that more developed military technology during modernity means greater lethality and destruction, but in fact it also means greater protective power, as with mechanized armor, mechanized speed and agility, and defensive electronic measures. **Offensive and defensive advances generally rise in tandem**. In addition, it is all too often forgotten that the vast majority of the many millions of non-combatants killed by Germany during World War II – Jews, Soviet prisoners of war, Soviet civilians – fell victim to intentional starvation, exposure to the elements, and mass executions rather than to any sophisticated military technology. Instances of genocide in general during the 20th century, much as earlier in history, were carried out with the simplest of technologies, as the Rwanda genocide horrifically reminded us. Nor have wars during the past two centuries been economically more costly than they were earlier in history, again relative to overall wealth. War has always involved massive economic exertion and has been the single most expensive item of state spending (e.g. massively documented, Bonney, 1999). Examples are countless, and it will suffice to mention that both 16th- and 17th-century Spain and 18th-century France were economically ruined by war and staggering war debts, which in the French case brought about the Revolution. Furthermore, death by starvation in premodern wars was widespread. Is it peace that has become more profitable? So if wars have not become more costly and destructive during the past two centuries then why have they receded, particularly in the developed world? The answer is the advent of the industrial–commercial revolution after 1815, the most profound transformation of human society since the Neolithic adoption of agriculture. The correlation between the decline of war in the developed world and the process of modernization, both unfolding since 1815, is surely not accidental, and the causation is not difficult to locate. In the first place, given explosive growth in per capita wealth, about 30- to 50-fold thus far, the Malthusian trap has been broken. Wealth no longer constitutes a fundamentally finite quantity, and wealth acquisition progressively shifted away from a zero-sum game. Secondly, economies are no longer overwhelmingly autarkic, instead having become increasingly interconnected by specialization, scale, and exchange. Consequently, foreign devastation potentially depressed the entire system and was thus detrimental to a state’s own wellbeing. This reality, already noted by Mill (1848/1961: 582), starkly manifested itself after World War I, as Keynes (1920) had anticipated in his criticism of the reparations imposed on Germany. Thirdly, greater economic openness has decreased the likelihood of war by disassociating economic access from the confines of political borders and sovereignty. It is no longer necessary to politically possess a territory in order benefit from it. Of the above three factors, the second one – commercial interdependence – has attracted most of the attention in the literature. But the other two factors have been no less significant. Thus, the greater the yield of competitive economic cooperation, **the more counterproductive and less attractive conflict becomes.** Rather than war becoming more costly, as is widely believed, it is in fact peace that has been growing more profitable. Referring to my argument in this regard, Levy & Thompson (2011: 72–75) excused themselves from deciding on the issue on the grounds of insufficient information regarding the cost of premodern war. But as already noted, the information on the subject is quite clear. In this limited framework I can only briefly mention the main reasons for the continued outbreak of war during the past two centuries. In the first place, ethnic and nationalist tensions often overrode the logic of the new economic realities, accounting for most wars in Europe until 1945. They continue to do so today, especially in the less developed parts of the globe, the world’s remaining ‘zone of war’. Additionally, the logic of the new economic realities receded during the late 19th and early 20th centuries, as the great powers resumed protectionist policies and expanded them to the undeveloped parts of the world with the New Imperialism. This development signaled that the emergent global economy might become partitioned rather than open, with each imperial domain becoming closed to everybody else, as, indeed, they eventually did in the 1930s. A snowball effect ensued, generating a runaway grab for imperial territories, Lebensraum, and ‘co-prosperity spheres’. Here lay the seeds of the two World Wars. Furthermore, the retreat from economic liberalism in the first decades of the 20th century spurred, and was in turn spurred by, the rise to power of anti-liberal and anti-democratic political ideologies and regimes incorporating a creed of violence: communism and fascism. Indeed, although non-liberal and non-democratic states also became much less belligerent during the industrial age, it is the liberal democracies that have been the most attuned to its pacifying aspects. This applies most strikingly to the democracies’ relations among themselves, but, as scholars have become increasingly aware, also to their conduct in general. Pinker examines in great detail and nuance the various aspects in the unfolding process over the past centuries, which he labels the humanitarian revolution, the rights revolution, and the democratic, liberal and capitalist peace. Some of the other books surveyed here are more problematic in this respect. Previous Section Next Section A successful UN? Joshua Goldstein, Winning the War on War (2011), is in many ways two books under one cover – the first is very ambitious, the other more limited. Both are very good, yet they do not always sit quite comfortably together. The beginning of the book (specifically chapter 2) is similar to Pinker’s in boldly and effectively advancing the wide-ranging thesis that war has decreased in stages throughout human history and in recent times. Goldstein, relying on pretty much the same studies and data as Pinker, albeit in lesser detail, arrives in his opening exposé at more or less the same conclusions regarding the long-term historical trend. As he suggests, the more we travel back into the past the more warlike it becomes (as predominantly measured by mortality rates): the past ten years compared with the previous ten; the post-Cold War era compared with the Cold War; the Cold War era compared with that of the World Wars; the past century compared with previous centuries (the peaceful 19th century is silently smoothed over here); the modern era (past 500 years) compared with premodern history; historical times compared with prehistory. The remaining 90% of the book is a different breed altogether. It is a history of UN and other peacekeeping operations from 1947 to the present, analyzing their effect in decreasing warfare in various regions of the developing world. In this portion of the book Goldstein has many achievements as well. The historical study and analysis are learned and sensible. More importantly, Goldstein succeeds in making a case for a claim that is generally met with much skepticism: that **peacekeeping forces** have actually had a not insignificant effect in quelling open violence, shortening wars and thereby reducing war mortality and, in some instances, even in contributing to a peaceful conflict resolution. It falls beyond the scope of this article to offer a critical review of the exact political conditions and specific circumstances in terms of the local and international players and interests under which lesser or greater success has been achieved in some cases. Side by side with the discerning political scientist, there appears to be in Goldstein a true believer and crusader in the cause of peace for whom peacekeeping missions and the activity of peace movements are a panacea and the main reason behind the writing of the book. Indeed, it is the connection between the two parts of the book, between the long-term and more recent decrease in war, on the one hand, and the role of peacekeeping in reducing warfare, on the other, that constitutes the book’s weakest link. The question of causality is where Goldstein stands on shaky ground. Had he been content with the modest argument that peacekeeping operations have contributed something to the decrease of warfare over the past 65, especially the last 20 years, and made an effort to weave this factor together with other factors so as to clarify their mutual connections and interactions and make sense of the overall picture, this would have been a very reasonable approach. Indeed, Goldstein cites (p. 15) with seeming approval the list of factors generally regarded as contributing to the decrease of war: from US hegemony, to the effect of liberalism, democracy, and global capitalism, to female participation in politics (all of them, incidentally, not mutually unrelated). Yet later (pp. 42–45) he summarily plays down any other explanation for the recent decrease of war as if it were competing with rather than complementary to peacekeeping. This is curious, unnecessary and, indeed, self-contradictory. After all, temporally, it is Goldstein himself who claims that the decrease in warfare had begun long before the UN and its peacekeeping operations. Moreover, spatially, the world’s remarkable zone of peace – the scene of the most dramatic change – is not the developing world but **the affluent, developed world, especially its liberal democratic parts**, where no peacekeeping forces and operations, by the UN or anybody else, have played a role. In response to the claim that he had little by way of theory, Goldstein replied in a 2012 International Studies Association panel1 that his was international liberalism. But is international liberalism unrelated to the growth of liberalism in general – both political and economic – with its broader, well-documented pacifying effects projected from the hegemonic liberal core to the less liberal periphery? Simply kicking a senseless habit? An untempered idealistic, almost salvationist, streak is the cause of considerable problems and confusion in John Horgan, The End of War (2012). The author is very familiar with the literature relating to the subject and has many correct things to say: like the others, he documents the great decline in warfare around the world; and rejecting the crude biological determinism often cited as the cause of war and of war’s inevitability, he points out that both war and peace are in our genes. And yet he fails to grasp the full significance of this point. In pursuit of their aims people may employ any of the following strategies: cooperation, peaceful competition, and violent conflict. We are very adept in using each of them because we are evolutionarily well-equipped with the heavy biological machinery necessary for carrying them out. The reason why we are so well equipped is that each of these strategies has been widely employed by humans throughout our long evolutionary history. Each of them is a well-designed tool interchangeably resorted to, depending on the particular circumstances and prospects of success. Violence is not a blind biological instinct, but nor does it lack a deep-rooted, evolution-shaped biological function. It is the hammer in our behavioral toolkit, which has always been readily disposable and handy; indeed, it often proved necessary and advantageous. The above-cited huge disparity between men and women among killers, which remains constant despite huge differences in killing rates among different societies, is a striking demonstration of both the innate element and great context-sensitivity of violent behavior. A failure to grasp this crucial point (which Pinker well emphasizes) is the cause of many fatuous ideas in Horgan’s book. He has been convinced by the recent literature on the subject that extensive warfare had existed before the state and agriculture. Yet despite the evidence to the contrary (e.g. Australia, Tasmania, the Arctic), he clings to the view that warfare had begun only with the denser human populations forming shortly before the agricultural revolution. He repeats Margaret Mead’s idea (1940) that war was an addictive invention, somehow – it is not clear why – picked up by human populations throughout the world (one wonders if the same applies also to homicide). Apparently, Horgan believes that the alleged ‘invention’ of war at some point in history strengthens the case that it is not pre-ordained and gives credence to the proposition that this arbitrary and senseless habit is, and should be, now kicked, ‘uninvented’, as suddenly and inexplicably as it was invented, by an act of sheer moral will. He states that he has always believed war to be crazy and absurd, devoid of any rationale. This is a growing sentiment in today’s modern and affluent world. But try this thesis on Chinggis Khan, whose descendants constitute, according to genetic studies (Zerjal et al., 2003), 8% of all males in Eastern and Central Asia, evidence of staggering sexual opportunities enjoyed by his sons and grandsons whose houses ruled over the area for centuries. Lest it be thought that only autocrats and other ‘rotten apples’ profited from war, it ought to be remembered that the two most successful war-making city-states of classical antiquity were democratic Athens and republican Rome. And they were so successful precisely because the populace in these polities benefited from war and imperial expansion, championed them, and enlisted in their cause. To account for the perceived decrease in warfare, Horgan resorts to a purely **voluntary explanation**. He adheres to John Mueller’s thesis (1989) that the decline of war is the product of a social ‘attitude change’. Why this attitude change occurred at this point in history rather than any time earlier remains a mystery with both Mueller and Horgan. Horgan posits people’s free will as moral agents, yet powerful moral doctrines such as Buddhism and Christianity decried war for millennia without this having any noticeable effect. To understand the gravitation of human choices, and norms, from violent conflict towards the nonviolent options of cooperation and peaceful competition, one needs to understand the changing circumstances and calculus of cost-effectiveness during the past two centuries and in recent decades, as mentioned above. Pinker well understands this logic, but some of the few major reservations I have about his book concern the causes of violence. Surprisingly, the evolutionary parts of the book are, in my opinion, inferior to the historical parts. ‘Angels’ versus ‘Demons’ in the human behavioral system is an allusion to Lincoln’s first inaugural address and is surely invoked metaphorically. And yet, not entirely, because to reduce central aspects of human behavior, including those Pinker labels predation, dominance, and ideology, to ‘demons’ is to flatten the major subject of human aims and motivations as well as the means for achieving them. Pinker cites studies showing that separate parts of the brain may trigger violent behavior, and this is of course true of nearly all behaviors. But this does not mean that all violent behaviors are not subject to, regulated, and shaped by a unified evolutionary calculus of survival and reproduction, the very definition of the evolutionary rationale, which Pinker as an evolutionist would surely be the first to accept. The wide category he calls predation violence and describes as a means to achieve an end in fact also covers most of the other motives for violence he cites. Thus, the quest for dominance among all social animals is an evolutionary means to achieve preferential access to resources and superior sexual opportunities. Furthermore, dominance can be pursued peacefully as well as violently (as it generally is in modern and liberal societies), which makes the ‘demon’ category all the more awkward. The same, of course, applies to ideology, which is another of Pinker’s ‘demons’. Revenge, yet another ‘demon’, is also, as Pinker recognizes, a means to an end: it is intended to foster deterrence by demonstrating that one is not a pushover. It is the main means for establishing fragile security in all unruly societies. Finally, Pinker on occasion gives the impression that the decline of war is a matter of escaping a Prisoner’s Dilemma. While there are all sorts of Prisoner’s Dilemmas in conflict situations, not all conflicts fall under this category. Throughout human history there have been many winners and losers in war. Future prospects and threats One more point: Pinker wisely argues that he is not prophesying the future but simply describing past trends and their historical explanations. He agrees that such trends, however deep-rooted – and they are – may reverse, as with the potential changes in the global balance of power with the weakening of US and Western hegemony, the rise of a non-democratic, non-liberal China (if it so remains) and the like. In discussing the prospect of unconventional terror, Pinker claims, like some others, that the threat is much overrated, emphasizing the difficulties surrounding the acquisition and successful use of nuclear weapons by terrorists. However, he ignores the more relevant threat, that of biological weapons, magnified and widely disseminated thanks to today’s biotechnological revolution. Biological weapons are potentially as lethal as nuclear weapons, and far easier to acquire and use even by non-state individuals or small groups. Not only might a successful attack result in casualties on a par with the USA’s greatest wars; it is likely to target its main centers of population and the economy. I would not underestimate this threat. More generally, we are clearly experiencing the most peaceful times in history by far, a strikingly blissful and deeply grounded trend. Yet the observation that at least since 1945 this is also the most dangerous world ever, with mankind for the first time possessing the ability to destroy itself completely, civilian populations held hostage to MAD (mutually assured destruction) deterrence, and even individuals and small groups gaining the ability to cause mass death, is far from a cliché.

Nuclear deterrence checks inter-state conflict

Forsyth ‘10

James, B. Chance Saltzman, Colonel, USAF Gary Schaub Jr., “Remembrance of Things Past The Enduring Value of Nuclear Weapons,” <http://www.au.af.mil/au/ssq/2010/spring/forsythsaltzmanschaub.pdf>

Deterrence evolved throughout the Cold War, moving from massive retaliation to the intricate targeting schemes of countervailing strategies. All the while the superpowers came to understand what Brodie aptly de­ scribed as “strategy in the missile age.” Despite the harsh rhetoric and big words from both sides, they came to appreciate what these **weapons meant and** behavedaccordingly. While both vied for attention and aggressively pursued international influence, neither side initiated or threatened to initiate a nuclear exchange. In short, **nuclear learning** occurred. Something similar is taking place in other parts of the world. China, India, Pakistan, North Korea, and presumably, Iran **understand that a small number of nuclear weapons is all that is needed for deterrence to take hold**. Others will learn too, which is why nuclear weapons ought to be the centerpiece of American strategy. That does not mean that they should be America’s only concern, just the most important one. Would the world be better of without nuclear weapons? Although it might be desirable to rid the world of nuclear weapons, it is not wise. “The web of social and political life is spun out of inclinations and incen­ tives, deterrent threats and punishments.” Take away the latter two and international society depends entirely on the former—a utopian thought impractical “this side of Eden.”47 Serious-minded men have wished it were not so. Gen Charles Horner, then head of US Space Command, explained in 1994, “I want to get rid of all [nuclear weapons]. I want to go to zero. I’ll tell you why. . . . think of the moral high-ground we secure by having none.”48 Two years later, addressing the National Press Club in December 1996, Gen Lee Butler, former commander of Strategic Air Command, wondered if “it is possible to forge a global consensus on the proposi­ tions that nuclear weapons have no definitive role; that the broader conse­ quences of their employment transcend any asserted military utility.”49 In both instances, what was overlooked is the role that force plays in interna­ tional life. In politics, force is said to be the ultima ratio. In international politics, it is the first and constant one.50 **Force casts a long shadow and serves as an incentive to temper statesmen, moderate demands, and settle disputes**. That the use of nuclear weapons is to be avoided does not render them useless. Quite the opposite—nuclear weapons might be the most politically useful weapons a state can possess, which helps explain why they are spreading

## at circumvention

PREFER THE SQUO AND THE COUNTERPLAN – Executive wont circumvent –

The aff is a focal point that guarantees compliance

Eric Posner, Professor of Law, The University of Chicago Law School, and Adrian Vermeule, Professor of Law, Harvard Law School, March 2011, The Executive Unbound, p. 72-3

Several mechanisms can cause the settlements that do occur in earlier episodes to have positive force in later times. The "civilizing force of hypocrisy"' makes it positively costly for decision makers to disavow a principle they relied on to their benefit at an earlier time, although in some cases the benefits of opportunistic disavowals of precedent are worth the cost. Political precedents may create focal points that coordinate behavior;" indeed, focal points can affect behavior even in interactions that mix cooperative and distributive motives29—circumstances where all branches involved want to coordinate, yet the branches have different preferences about which rule or practice to coordinate upon. Political precedents reduce the costs of decision making, so that in later periods decision makers may follow them even if they would have preferred a different rule if deciding on a blank slate. More nebulously, precedents set in an earlier showdown tend to ossify into **institutional** routines and individual habits, and may even become internalized by actors who develop a sense of legal obligation to follow the precedent. The precedent that is created by a showdown may, but need not, be a judicial precedent. Instead it will usually be an unwritten constitutional norm or convention30—a practice that is widely understood as a settlement of a constitutional question and that is regular or stable over time, although it need not be eternal. Constitutional conventions in this sense include the refusal of any president after Washington and before Franklin Roosevelt to stand for a third term, a convention that eventually collapsed, and the norm that the president need not submit treaties to the Senate during the negotiating phase, but need only obtain ex post Senate ratification; the latter practice was also established by Washington but has persisted to the present day.m We have called showdowns a species of legalized politics, and it is important to be clear that the precedents created in showdowns are as much political as conventionally legal. They are rarely judicial precedents, and even if as a jurisprudential matter there are nonjudicial precedents that might count as "legal" on some theory of law, such an account would be excessively spongy, even meaningless, if extended to cover all the consequences of showdowns. Showdowns usually produce settlements of political conflicts in which the participants cite more or less legal arguments, but which do not become conventionally legal for that reason. Note also that showdowns may produce no settlement at all. What starts off as a showdown might end as a compromise, with the disagreement papered over and neither side acquiescing in the other side's claim to authority. Or the underlying source of dispute might resolve itself before a true impasse is reached.

It still links

Barron ‘8

David, Professor of Law, Harvard Law School, and Martin Lederman, Visiting Professor of Law, Georgetown University Law Center, THE COMMANDER IN CHIEF AT THE LOWEST EBB -- A CONSTITUTIONAL HISTORY, 121 Harv. L. Rev. 941

Insofar as such a Commander in Chief nevertheless concludes that the existing constraints are harmful, and that significant changes are needed, an acknowledgment of statutory supremacy will still be important. A President respectful of such constraints will be compelled to provide public justifications for the legal changes he favors, **which will effectively subject his proposals to the crucible of public debate**. Such a requirement not only helps to ensure that the President's preferred means of exercising wartime authority enjoy substantial popular support, but also necessarily exposes the President's favored course of conduct to scrutiny and critique by an array of others with valuable knowledge and experience. In this way, respect for the lawful authority of statutory constraints on executive war powers permits the ordinary legislative process (over which the President obviously has extraordinary influence, especially in wartime n668) to temper and correct possible errors or misjudgments that the President might make if left to his own devices.

## solves the aff

Key to winning all future conflicts

Johson ‘6

Karlton, Army War College, “Temporal and Scalar Mechanics of Conflict Strategic Implications of Speed and Time on the American Way of War,” http://www.dtic.mil/dtic/tr/fulltext/u2/a449394.pdf

The U.S. Army War College uses the acronym “VUCA” to describe the volatile, uncertain, chaotic and ambiguous environment in which strategy is made.4 If the present is any indication of the future, then it is reasonable to assume that the world will become increasingly dangerous as long as that strategic environment exists. Many long-range assessments predict that global tensions will continue to rise as resources become even more constrained and as transnational threats endanger international security. 5 Future leaders and planners can expect to see weak and failed states persisting to dominate U.S. foreign policy agendas. Terrorism will remain a vital interest, and the use of American military strength will remain focused on the dissuasion, deterrence, and, where necessary, the preemption of strategic conflict. Enemies will work aggressively to offset U.S. military superiority by seeking out technologies that will offer some level of asymmetric advantage, and the challenging asymmetric nature of future conflicts will add deeper complexity to both war planning and the development of national security strategy. 6 The “National Defense Strategy of the United States,” published in March 2005, addressed the unconventional nature of the future. It argued that enemies are increasingly likely to pose asymmetric threats resulting in irregular, catastrophic and disruptive challenges.7 This means that, in some cases, non-state actors will choose to attack the United States using forms of irregular warfare that may include the use of weapons of mass destruction. These actors may also seek new and innovative ways to negate traditional U.S. strengths to their advantage.8 In fact, one author theorizes that “speed of light engagements” will be the norm by the year 2025, and America may lose its monopoly on technological advances as hostile nations close the gap between technological “haves” and “have nots.”9 This type of warfare lends itself to engagements of varying speed and temporal geometry. 10 Therefore, in conflicts of the future, time and speed will matter. Consequently, it is necessary to analyze these elements with rigor and discipline in order to understand their far-reaching implications.

Key to victory in every domain

Johson ‘6

Karlton, Army War College, “Temporal and Scalar Mechanics of Conflict Strategic Implications of Speed and Time on the American Way of War,” http://www.dtic.mil/dtic/tr/fulltext/u2/a449394.pdf

Military services appear to be increasingly dependent on speed, and these organizations continue to place a premium on its relative value. The Army’s “Field Manual 1: The Army,” embraces the idea that speed is critical to its operational concept, necessary for maneuver forces to keep the initiative in battle, and vital towards achieving shock and surprise.25 The United States Navy looks to speed as an essential component of maritime operations. In “Fleet Tactics and Costal Combat,” Wayne P. Hughes reasons that speed is necessary to win the sea battle **within the first few shots of an engagement**.26 The United States Air Force has plans to increase the speed and fidelity of command, control, communications and computers, intelligence, surveillance and reconnaissance (C4ISR) to create Predictive Battlespace Awareness over the combat area. The desired end state of these capabilities will be “getting a cursor over a target” upon demand.27 Even U.S. Air Force doctrine is replete with references to speed. The concept of speed clearly underlies the tenets and principles of airpower as an enabling factor.28

Solves prolif and regional crises

Bohnemann ‘2

Edward, Major, US Army, “Rapid, Decisive Operations: The Execution of Operational Art by a Standing Joint Task Force,” http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA403628%26Location=U2%26doc=GetTRDoc.pdf

Modern campaigns, such as OPERATION DESERT STORM conducted by the United States and its allies; nineteenth century campaigns conducted by Napoleon in Europe; or the ancient campaigns conducted by the Romans or the Mongols have all sought to apply an asymmetrical advantage to the battlefield. The great captains have continuously struggled to find an advantage possessed by their forces and developed ways in which to leverage that advantage against an opponent. Lightning campaigns such as OPERATION DESERT STORM, were the result of the application of asymmetrical advantages such as: superior mobility, speed, intelligence, synchronization, and training of friendly forces. These advantages and superior technology shocked opponents and often led to the rapid conclusion of the conflict.81 As the United States enters the twenty-first century as the lone superpower, it must develop ways in which to harness the tremendous capabilities the joint forces bring to a confrontation and apply those joint capabilities in a manner consistent with the characteristics of operational art. The asymmetrical advantages currently enjoyed by the United States over potential adversaries must focus on placing him in a reactionary mode, while creating too many dilemmas for him to deal with at a particular time and space. September 11, 2001 significantly changed the way America views the world. With the attacks on the World Trade Centers and the Pentagon, the post-Cold War era ended violently and was replaced by an era of uncertainty. The forces of terror that had previously operated on distant shores now brought their violence home to Americans with the killing of innocent civilians within the borders of the United States. This single act of violence, along with the emergence of other regional powers and the proliferation of weapons of mass destruction has set the stage for the future operational environment; with it comes the military requirement to possess the capability to respond rapidly and decisively. With the need to respond rapidly and decisively to worldwide contingencies, the United States can no longer afford a system within the military that is essentially unprepared for action at the onset of each crisis. The ad hoc JTFs previously examined lacked the inherent capabilities demanded in modern crises, with rapidly unfolding situations, taking place in obscure areas around the world. All three of the examined JTFs lacked critical personnel needed to plan courses of action during the initial phases of the operation, causing problems during the execution phases. The one-dimensional approach to the crisis in Kosovo was reminiscent of the singular focus LANTCOM had before OPERATION URGENT FURY. Humanitarian aid operations, as well as other stability and support operations also require a **command** and control **system** in place to enable a rapid and effective response.

Underpins all deterrence and power projection

Karren ‘12

Major Wade, USAF, “Long-Range Strike The Bedrock of Deterrence and America’s Strategic Advantage,” Air Force Research Institute\*LRS=long range strike

The basic concept behind LRS—using military power projection to influence the behavior of others—is as old as human conflict itself. Whether it took the form of naval expeditions by Athenian amphibious forays deep into Sparta, overwhelming ground attacks by Mongol light cavalry archers, or the massive aerial bombardment of the Combined Bomber Offensive of World War II, projecting power with speed across a wide span of the enemy’s territory and interests has made attacking or defending against such forces **increasingly difficult.** Napoleonic warfare, as described by Jomini and Clausewitz, led subsequent military planners to seek ways to identify and attack an enemy’s decisive points and centers of gravity.6 These concepts of power projection framed early ideas of how to break the bloody stalemate of World War I. Col Edgar S. Gorrell consolidated the innovative ideas of military theorists and aviators like William “Billy Mitchell, William Sherman, Sir Hugh Trenchard, and Giulio Douhet, leading to the development of a practice commonly called “strategical bombardment.” In his World War I publication The Final Report, Gorrell called for a strategy using the flexibility and reach of airpower to bypass the strength of the enemy’s military formations and defenses to attack vulnerable, war-supporting infrastructure.7 Though never implemented because hostilities ended in 1918, this idea served as the intellectual bedrock for the strategic bombing concepts developed in World War II. During the 1930s, students at the Air Corps Tactical School studied the writings of Gorrell and Lord Tiverton to formulate the industrial web theory, which held that one could disrupt or destroy certain bottlenecks of production and thereby incapacitate an enemy’s ability to make war.8 Unfortunately, the early theorists overestimated the destructive and moral effects of bombing and underestimated the effectiveness of ground- and air-based defenses, as well as the resilience and regenerative capabilities of modern societies and their industrial complexes. Early bombers did not have the range, precision, or payload to deliver a decisive blow to the enemy’s heartland. By the time air forces had sufficiently established air superiority, which would allow truly long-range platforms to deliver atomic weapons, the war had come to a close. Despite the continuing debate concerning strategic bombing as an independent war winner, World War II demonstrated that ultimate victory came to the side that could project forcible power at a longer distance, preserving its own war capability while denying the same to its opponent. The proposed German strategy leading up to World War II offers an example of how a lack of LRS can affect a conflict. Agreeing with the LRS premise, Germany’s first chief of the General Staff, Gen Walther Wever, advocated a strategy of long-range strategic bombing. He based his strategy on bombing enemy bases, aircraft factories, warsustaining industries, and logistical networks in order to paralyze the enemy’s war-making capabilities.9 Fortunately for the Allies, General Wever’s untimely death in 1936 prevented his strategy from coming to fruition. His immediate successors and, ultimately, Hermann Göring, commander in chief of the Luftwaffe, fatefully steered the latter away from the long-range bombing strategy. Göring’s decision to develop shorter-range bombers such as the He-177 Griffon and the Ju-87 Stuka, emphasizing tactical close air support of ground forces, allowed aircraft-production facilities in England to survive the Battle of Britain. Despite the fact that Germany enjoyed a formidable tactical fighter force, its lack of strategic focus on LRS eventually conceded the strategic advantage to the Allies by allowing British Avro 683 Lancasters and US B-17s and B-24s to project airpower from longer range without fear of long-range counterstrikes.10 The Allies were victorious in large part because they could continue war production unhindered, while the Axis powers found their war-fighting prowess constantly degraded by a combination of short- and long-range attacks. One may debate the effects of LRS in Europe, but after the use of atomic bombs on Hiroshima and Nagasaki and the end of World War II, the value of longrange power projection became readily apparent. The latent threat of further violence by LRS proved valuable to the United States and the allies because it contributed significantly to the end of the war. The value and capability of LRS had matured exponentially by the late 1950s with the introduction of intercontinental ballistic missiles (ICBM) armed with nuclear warheads. ICBMs enhanced the value of LRS by increasing standoff range and overcoming the lack of precision evident in World War II with nuclear yields. In the end, the ability of the United States and Union of Soviet Socialist Republics to project power through LRS developed to the point where, for all practical purposes, each country could hold the entire planet at risk of instantaneous annihilation. LRS subsequently became the backbone of each country’s comprehensive deterrent strategies. As the concepts of massive retaliation and mutually assured destruction emerged to deal with the reality of the new strategic standoff, theorists such as Schelling, Brodie, and Lawrence Freedman came to grips with the implications of using LRS for deterrence in the nuclear age. By definition, deterrence is “the prevention of action by the existence of a credible threat of unacceptable counteraction and/or belief that the cost of action outweighs the perceived benefits.”11 It depends solely on the adversary’s perception of what the opposition (United States) is willing and capable of doing. The first component of the equation—a country’s will—ebbs and flows with the political climate. Yet without a credible capability to strike, the will to act becomes a paper tiger because a lack of capability would nullify the ability to act. Thus, capability is a prerequisite to any successful deterrent strategy. Compared to other instruments of military power, LRS platforms historically provide the best requisite capability to hold any target at risk, at any time, and therefore enable successful deterrence strategies. Assuming a nation’s will to act, the strategic foresight to develop, modernize, and adequately fund LRS has paid invaluable dividends by lending credibility to that country’s deterrent threats. Consequently, the value and importance of LRS with respect to national defense and security remain evident today and into the foreseeable future. Nearly every conflict since World War II has demonstrated the United States’ willingness and ability to use conventional LRS assets for limited objectives while retaining sufficient nuclear capability as a plausible deterrent. Despite the demonstrated capacity to destroy targets from long range at will—in Serbia, Iraq, Libya, or Afghanistan—air strikes alone cannot bring about desired political outcomes. Diplomatic engagement, effective strategic communications, economic embargoes, governance aid, and financial incentives for commercial investment are all part of resolving and recovering from wars. Yet without LRS, these forms of soft power possess less coercive power over the enemy. Even in today’s complex world, **the power of LRS remains the essence of deterrence and a foundational element of America’s strategic advantage**. However, as Mark Gunzinger points out, for the United States, “that advantage is dissipating.”1

Solves all conflict

Kim ‘8

Jung Hyok, KDI School of Public Policy and Management, “A STUDY ON THE IMPACT OF U.S. “STRATEGIC FLEXIBILITY” ON THE KOREA-U.S. ALLIANCE

Military **flexibility is more important than ever** because nobody can expect complicated security environment and battlefield condition of today easily. The 21st century security environment faces various military and non-military threats; it becomes difficult to find the countermeasure against threatening. In this situation, military‘s mission and its scope of activity having been broadened from the conventional operation to the counter-terror and supporting national catastrophe as well as Military Operations Other Than War (MOOTW) such as peace keeping operations (PKO). Consequently, under the uncertain and complicated security environment, flexible thinking and countermeasures are necessarily needed for the military and leaders in order to successfully complete various duties. In the aspect of strategic theory and military doctrine, **flexibility functions as one of the War Principles.** For example, British military adopts flexibility as one of the ten Principles of War. 33 They emphasize that flexibility is an essential principle to cope with unpredictable and changeable conditions as well as in order not to indulge in dogma. On the other hand, the U.S. doctrine does not adopt ―Flexibility‖ as one of the nine Principles of War34 ; however, it functions same as the Principle of War. In order to achieve the military victory and strategic success simultaneously, the nine Principles of War should be adopted harmoniously; in addition, flexibility plays a role as binding material for these nine Principles of War, as if it functions like the tenth Principle of War.35 As discussed earlier, future forms of warfare can take many paths, and much uncertainty lies ahead. Flexible responses are often born of **flexible planning**. Further, in tomorrow‘s unfolding environment where asymmetric and other nontraditional threats will be more prevalent, open-minded, nonjudgmental and critical thinking skills—at all ranks and levels of war—will become the tools to eliminate dangerous blind spots and develop effective solutions. That is flexibility. As we go through the 21st century, the need for flexibility is an indispensable condition for conducting a victory for military operations in uncertain security conditions and ambiguous battlefield environments. 36

Rapid response solves all conflict

Kim ‘8

Jung Hyok, KDI School of Public Policy and Management, “A STUDY ON THE IMPACT OF U.S. “STRATEGIC FLEXIBILITY” ON THE KOREA-U.S. ALLIANCE”

The Joint Chief of Staff (JCF) has defined three major threats which the U.S. is facing today as; a **wider range of adversaries**, a more complex and distributed battlespace, **technology diffusion and access.** Firstly, a wider range of adversaries means adversaries‘ capability of threatening the United States, its allies, and its interests range from states to nonstate organizations to individuals. There are states with traditional military forces and advanced systems, including cruise and ballistic missiles, which could seize the control in key regions of the world. A few of these states are ‗rogues‘ that violate treaties, secretly pursue and proliferate WMD/E37, reject peaceful resolution of disputes and display callous disregard for their citizens. **Some of these states sponsor terrorists,** providing them financial support, sanctuary and access to dangerous capabilities. There are non-state actors, including terrorist networks, international criminal organizations and illegal armed groups that menace stability and security. Secondly, a more complex and distributed battlespace means that adversaries threaten the United States throughout a complex battlespace, extending from critical regions overseas to the homeland and spanning the global commons of international airspace, waters, space and cyberspace. There exists an ―arc of instability‖ stretching from the Western Hemisphere, through Africa and the Middle East and extending to Asia. There are areas in this arc that serve as breeding grounds for threats to our interests. Within these areas rogue states provide sanctuary to terrorists, protecting them from surveillance and attack. Other adversaries take advantage of ungoverned space and under-governed territories from which they prepare plans, train forces and launch attacks. These ungoverned areas often coincide with locations of illicit activities; such coincidence creates opportunities for hostile coalitions of criminal elements and ideological extremists. Thirdly, technology diffusion and access means that global proliferation of a wide range of technology and weaponry will affect the character of future conflict. Dual use civilian technologies, especially information technologies, high-resolution imagery and global positioning systems are widely available. These relatively low cost, commercially available technologies will improve the disruptive and destructive capabilities of a wide range of state and non-state actors. Advances in automation and information processing will allow some adversaries to locate and attack targets both overseas and in the United States. Software tools for network-attack, intrusion and disruption are globally available over the Internet, providing almost any interested adversary a basic computer network exploitation or attack capability. Access to advanced weapons systems and innovative delivery systems could fundamentally change warfighting and dramatically increase an adversary‘s ability to threaten the United States.38 The U.S faces a number of dangerous and pervasive threats. Traditional, irregular, catastrophic, and disruptive challenges will require the Armed Forces to adjust quickly and decisively to change and anticipate emerging threats. Three key aspects of the security environment have unique implications for executing this military strategy and will drive the development of concepts and capabilities that ensure success in future operations.

Key to inter-service integration

Boot ‘3

Max, Olin Senior Fellow in National Security Studies at the Council on Foreign Relations and the author of The Savage Wars ofPeace: Small Wars and the Rise ofAmerican Power, “The New American War of War”

Its time is now past, however. Spurred by dramatic advances in information technology, the U.S. military has adopted a new style of warfare that eschews the bloody slogging matches of old. **It seeks a** quick victory **with minimal casualties on both sides**. Its hallmarks are speed, maneuver, flexibility, and surprise. It is heavily reliant upon precision firepower, special forces, and psychological operations. And it strives to integrate naval, air, and land power into a seamless whole. This approach was put powerfully on display in the recent invasion of Iraq, and its implications for the future of American war fighting are profound.