## 1AC Kentucky

### 1AC Terrorism

**Contention one is terrorism –**

#### The United States is losing the war on terrorism now – it needs to change its strategy

**Walt 7/29** ([Stephen M. Walt](http://www.foreignpolicy.com/author/Stephen%20M.%20Walt), Robert and Renée Belfer professor of international relations at Harvard University. “['They're Baaack…': The Rebirth of al Qaeda?](http://walt.foreignpolicy.com/posts/2013/07/29/theyre_baaackthe_rebirth_of_al_qaeda),” July 29, 2013, <http://walt.foreignpolicy.com/posts/2013/07/29/theyre_baaackthe_rebirth_of_al_qaeda>)

Last Friday I posted an entry on America's ["one-sided" war on terrorism](http://walt.foreignpolicy.com/posts/2013/07/26/our_one_sided_war_on_terror), arguing that the country has focused enormous efforts on deterring, thwarting, or killing suspected terrorists and hardly any effort on removing the incentives or grievances that might make someone join a terrorist organization. The very same day, Bruce Riedel of the Brookings Institution posted [an article](http://www.thedailybeast.com/articles/2013/07/26/al-qaeda-is-back.html) on the Daily Beast, arguing that various al Qaeda affiliates are making a significant comeback in places like Iraq and Syria. Precisely my point. Undoubtedly, some pundits will interpret Riedel's article as evidence that the United States should have been even more aggressive and should have stayed in Iraq or Afghanistan or Yemen or wherever for as long as it took. This argument overlooks the tremendous costs of these operations -- including their degrading effects on Army performance and morale -- as well as their inherently self-defeating character. Given that opposition to foreign occupation and interference is one of the prime motivations behind terrorist activity -- especially [suicide bombings](http://www.amazon.com/gp/product/0812973380/ref=as_li_ss_tl?ie=UTF8&camp=1789&creative=390957&creativeASIN=0812973380&linkCode=as2&tag=fopo-20) -- maintaining an extensive military footprint in the Arab and Islamic world is a recipe for endless war. Even more limited operations like drone strikes have been tactically effective but are strategically questionable, precisely because they give jihadi recruiters a constant pool of angry locals from which to draw and vindicate their claims that the United States is unalterably addicted to violent interference in their societies. Indeed, the real lesson of Riedel's article is that much of the so-called "war on terror" has been misguided to the point of foolishness. It was both smart and necessary to go after al Qaeda in Afghanistan, but letting Osama bin Laden slip away at Tora Bora was a [massive command failure](http://www.gpo.gov/fdsys/pkg/CPRT-111SPRT53709/html/CPRT-111SPRT53709.htm). It was dumb to take on the task of nation-building in Afghanistan, and even dumber to invade Iraq in 2003. It was both immoral and counterproductive to torture captured terrorists (it tarnished America's image and didn't yield better intelligence) and obtuse not to rethink other aspects of the United States' Middle East policy. The post-9/11 TSA regime has been a colossal waste of resources that has added little to Americans' overall level of security. And vacuuming up gazillions of bytes of email and phone records merely proved that government agencies operating in secret will invariably grow like Topsy, without making Americans significantly safer. As Riedel suggests, none of these activities has prevented al Qaeda and its copycats from making a comeback. What is needed is a much more fundamental rethinking of the entire anti-terrorism campaign. As I suggested last week, part of that rethink means asking whether the United States needs to do a lot more to discredit jihadi narratives, instead of persisting with policies that make the extremists' charges sound plausible to their audiences. A second part is to keep the jihadi threat in better perspective: They are a challenge, but not a mortal threat to Americans' way of life unless the country reacts to them in ways that cause more damage to its well-being and its values than they do. Sadly, a rational ranking of costs, benefits, and threats seems to be something that the U.S. foreign-policy establishment is largely incapable of these days.

#### Scenario 1 is Yemen –

#### Obama has shifted most drone strikes to Yemen

**Hudson et al 13**

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An extensive CT drone campaign requires coordination with the central government of the territories in question. Evidently, Ali Abdallah Saleh's Yemeni government knew of the program and participated in it. Wikileaks revealed the particulars of a 2010 meeting with General David Petraeus, in which former President Saleh said (speaking of air strikes in general), "We'll continue saying the bombs are ours, not yours." Moreover, Saleh lamented mistakes due to the inaccuracy of cruise-missile strikes and preferred that the United States use fixed-wing aircraft (i.e., drones) in the future. Since then, the administration has increased its drone strikes and expanded the targeting parameters within Yemen and the Horn of Africa. Among the many ironies of drone strikes, Saleh's candor showed that old-style authoritarians are not above happily claiming credit for borrowed military power to enhance their "legitimacy."¶ Over the last decade, FATA has been subject to the largest drone campaign to date. The program started off slowly in 2004 under the Bush administration and has been expanded greatly. During Bush's tenure, there were approximately 50 strikes in FATA from 2004 to 2009. In Obama's first two years in office, from 2009 to 2010, the number of strikes in FATA tripled in half as much time. After 2010, the busiest year, drone strikes in FATA have decreased from 70 in 2011 to less than 25 in the first half of 2012. Notwithstanding the decrease in drone usage in FATA, this new and largely preferred program for "disrupting" or "decapitating" U.S. foes is not in decline; it has simply shifted location.¶ In our previous article, we posited that the increasing number of drone strikes in FATA and the decreasing ratio of deaths of so-called "high-value targets" (HVTs) to total deaths was a result of the larger payloads on UAVs and increasingly lax targeting requirements. And, as with the case of Pakistan, new technologies and the recent White House authorization that gave the Central Intelligence Agency (CIA) and the Joint Special Operations Command (JSOC) more options to conduct strikes in Yemen, will likely produce a similar outcome.1 New technology with larger payload capacity and wider targeting parameters through the use of "signature strikes," designed to eliminate groups of people who appear (conveniently and posthumously) to be militants, will likely produce an increase in the lethality and frequency of drone strikes in Yemen.

**Yemen drone strikes will cause wide spread blowback and strengthen the capacity of AQAP – that undermines Yemen stability**

**Hudson et al 13**

Dr. Leila Hudson, Colin Owens, and Matt Callen, is associate director of the School of Middle Eastern & North African Studies at the University of Arizona and director of SISMEC, graduate of the School of Middle Eastern & North African Studies and the School of Government and Public Policy, and PhD candidate at the School of Middle Eastern & North African Studies. “Drone Warfare in Yemen: Fostering Emirates through Counterterrorism?,” Middle East Policy Council, 2013. http://mepc.org/journal/middle-east-policy-archives/drone-warfare-yemen-fostering-emirates-through-counterterrorism

Just as likely, as the case of FATA has clearly shown, increased strikes in Yemen will produce distinct forms of blowback. This will manifest itself in terms of increased recruitment for al-Qaeda or affiliated groups and a reduction of the Yemeni leadership's ability to govern, increasing competition from alternative groups.¶ In the case of drone use in FATA, we identified five distinct forms of blowback, all of which are directly applicable to the use of drones in Yemen. The first, purposeful retaliation is typified by the events of the 2009 Khost bombing of CIA Camp Chapman and, more recently, an al-Qaeda attack earlier in 2012 on a liquid-natural-gas pipeline running through Yemen's Shabwa province.2 The motivation behind both of these attacks has been cited as the unremitting presence of, and specific attacks from, U.S.-operated drones. The second form of blowback deals with the increased ability of AQAP to recruit new members, especially those who have had friends or family killed in the attacks. Third, an overreliance on drones creates strategic confusion. While the United States is not waging a counterinsurgency (COIN) campaign next to Yemen — as it is in Afghanistan, Pakistan's western neighbor — the control of the drone program has oscillated between the CIA and JSOC, reducing U.S. accountability and blurring the lines between military and intelligence operations. Taken together, these three factors foster two additional forms of blowback: the continued destabilization of Yemen and an increasingly precarious alliance between the American and Yemeni governments. All told, these distinct forms of blowback combine to heighten Yemen's ungovernability.

#### Strengthened AQAP undermines the Saudi regime

**Abosaq 12** (Colonel Hassan Abosaq 12, US Army War College, master of strategic studies degree candidate, 2012, "The Implications of Unstable on Saudi Arabia," Strategy Research Project, www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA560581

AQAP has been vociferous in its opposition to the Saudi regime, and is likely to continue targeting the Kingdom, particularly its oil installations and members of the royal family. In August 2009, an AQAP member attempted to assassinate Prince Mohammed bin Naif, the Saudi Assistant Interior Minister for security affairs. The prince’s attacker was trained in and launched his attack from Yemen, confirming to the Saudis that instability in Yemen poses a security threat to Saudi Arabia. A strengthened AQAP in Yemen is certain to try to put pressure on Saudi Arabia and to strike Saudi targets. AQAP’s military chief, Qasin al-Raymi, warned the Saudi Leadership in July 2011 that they are still regarded as apostates. And he specifically placed King Abdullah, the late Crown Prince Sultan, Interior Minister Prince Naif, and his son Mohammed Bin Naif on the target list.21 In March 2010, Saudi Arabia foiled several planned attacks on oil installation with the arrest of more than 100 suspected al-Qaeda militants. The arrests included 47 Saudis, 51 Yemenis, a Somali, a Bangladeshi, and an Eritrean.22 The wider domestic strife in Yemen has provided AQAP with some breathing space. More worrisome for Saudi Arabia is the increased lawlessness within Yemen. Not only does this provide the space that al-Qaeda needs to regroup, train, recruit, but it also deflects the state resources away from counterterrorism operations. Saudi Arabia has for years been working to infiltrate al-Qaeda in its unstable neighbor to south, Yemen. Saudi Arabia has also been giving Yemen a great deal of assistance to counterterrorism and it is worrying to the Saudis to see all of that assistance diverted from the purposes for which it was intended. In June 2011, AQAP leaped into the security vacuum created by Yemen’s political volatility, and 63 al-Qaeda in the Arabian Peninsula fighters escaped from a Yemeni prison.23 This exemplifies how Yemeni instability emboldens this lethal al-Qaeda affiliate. As the Yemeni military consolidates its strength in an attempt to maintain state control and fight two insurgencies and oppress the protesters, AQAP has further expanded its safe haven in the country’s interior, further increasing their operational capacity. This organization has not only attacked police, foreigners, and diplomatic missions within the country, but also served as a logistic base for acts of terrorism abroad. Yemen also has become the haven for jihad militants not just from Yemen and Saudi Arabia, but from all over the world which includes some Arabs, Americans, Europeans, Africans and others. Al-Qaeda camps, where terrorists from all over the world train are also situated in Yemen. The growing anarchy and al-Qaeda presence could spill over into Saudi Arabia.

#### That destabilizes the Middle East

**Cordesman 11** (Anthony Cordesman 11, Arleigh A. Burke Chair in Strategy at CSIS, former director of intelligence assessment in the Office of the Secretary of Defense, former adjunct prof of national security studies at Georgetown, PhD from London University, Feb 26 2011, “Understanding Saudi Stability and Instability: A Very Different Nation,” http://csis.org/publication/understanding-saudi-stability-and-instability-very-different-nation

History scarcely means we can take Saudi stability for granted. Saudi Arabia is simply too critical to US strategic interests and the world. Saudi petroleum exports play a critical role in the stability and growth of a steadily more global economy, and the latest projections by the Department of Energy do not project any major reductions in the direct level of US dependence on oil imports through 2025.¶ Saudi Arabia is as important to the region’s security and stability as it is to the world’s economy. It is the key to the efforts of the Gulf Cooperation Council to create local defenses, and for US strategic cooperation with the Southern Gulf states. It plays a critical role as a counterbalance to a radical and more aggressive Iran, it is the source of the Arab League plan for a peace with Israel, and it has become a key partner in the war on terrorism. The US strategic posture in the Middle East depends on Saudi Arabia having a friendly and moderate regime.

#### Middle East war causes World War 3

**Stirling 11** (The Earl of Stirling 11, hereditary Governor & Lord Lieutenant of Canada, Lord High Admiral of Nova Scotia, & B.Sc. in Pol. Sc. & History; M.A. in European Studies, “General Middle East War Nears - Syrian events more dangerous than even nuclear nightmare in Japan”, http://europebusines.blogspot.com/2011/03/general-middle-east-war-nears-syrian.html)

Any Third Lebanon War/General Middle East War is apt to involve WMD on both side quickly as both sides know the stakes and that the Israelis are determined to end, once and for all, any Iranian opposition to a 'Greater Israel' domination of the entire Middle East. It will be a case of 'use your WMD or lose them' to enemy strikes. Any massive WMD usage against Israel will result in the usage of Israeli thermonuclear warheads against Arab and Persian populations centers in large parts of the Middle East, with the resulting spread of radioactive fallout over large parts of the Northern Hemisphere. However, the first use of nukes is apt to be lower yield warheads directed against Iranian underground facilities including both nuclear sites and governmental command and control and leadership bunkers, with some limited strikes also likely early-on in Syrian territory.¶ The Iranians are well prepared to launch a global Advanced Biological Warfare terrorism based strike against not only Israel and American and allied forces in the Middle East but also against the American, Canadian, British, French, German, Italian, etc., homelands. This will utilize DNA recombination based genetically engineered 'super killer viruses' that are designed to spread themselves throughout the world using humans as vectors. There are very few defenses against such warfare, other than total quarantine of the population until all of the different man-made viruses (and there could be dozens or even over a hundred different viruses released at the same time) have 'burned themselves out'. This could kill a third of the world's total population.¶ Such a result from an Israeli triggered war would almost certainly cause a Russian-Chinese response that would eventually finish off what is left of Israel and begin a truly global war/WWIII with multiple war theaters around the world. It is highly unlikely that a Third World War, fought with 21st Century weaponry will be anything but the Biblical Armageddon.

#### Scenario 2 is Blowback –

**Squo expansion of drone warfare undermines U.S. moral standing, breeds Anti-Americanism, and undermines our credibility**

**Brooks 13** (Rosa Brooks, Prof of Law @ Georgetown University Law Center and Bernard Schwartz Senior Fellow at the New America Foundation, Statement for the Record Submitted the Senate Committee on Armed Services, May 16, 2013.)

Former vice-chair of the Joint Chiefs of Staff General James Cartwright recently ¶ expressed concern that as a result of U.S. drone strikes, the U.S. may have “ceded some of our ¶ moral high ground.”35 Retired General Stanley McChrystal has expressed similar concerns:¶ “The resentment created by American use of unmanned strikes… is much greater than the ¶ average American appreciates. They are hated on a visceral level, even by people who’ve never ¶ seen one or seen the effects of one,” and fuel “a perception of American arrogance.” 36 Former ¶ Director of National Intelligence Dennis Blair agrees: the U.S. needs to “pull back on unilateral ¶ actions… except in extraordinary circumstances,” Blair told CBS news in January. U.S. drone ¶ strikes are “alienating the countries concerned [and] …threatening the prospects for long-term ¶ reform raised by the Arab Spring…. [U.S. drone strategy has us] walking out on a thinner and ¶ thinner ledge and if even we get to the far extent of it, we are not going to lower the fundamental ¶ threat to the U.S. any lower than we have it now.”37¶ Mr. Chairman, Senator Inhofe, I believe it is past time for a serious overhaul of U.S.¶ counterterrorism strategy. This needs to include a rigorous cost-benefit analysis of U.S. drone ¶ strikes, one that takes into account issues both of domestic legality and international legitimacy, ¶ and evaluates the impact of targeted killings on regional stability, terrorist recruiting, extremist ¶ sentiment, and the future behavior or powerful states such as Russia and China. If we undertake ¶ such a rigorous cost-benefit analysis, I suspect we may come to see scaling back on kinetic ¶ counterterrorism activities less as an inconvenience than as a strategic necessity—and we may¶ come to a new appreciation of counterterrorism measures that don’t involve missiles raining ¶ from the sky.¶ This doesn’t mean we should never use military force against terrorists. In some ¶ circumstances, military force will be justifiable and useful. But it does mean we should ¶ rediscover a long-standing American tradition: reserving the use of exceptional legal authorities ¶ for rare and exceptional circumstances. ¶ Thank you for the opportunity to testify today.

#### Ending drones key to host country cooperation

**Streeter ’13** (Devin C. Streeter, Helms School Of Government, Liberty University “Boko Haram, Drone Policy, And Port Security: Issues For Congress”, [http://www.academia.edu/3523639/U.S.\_Drone\_Policy\_Tactical\_Success\_and\_Strategic\_Failure](http://www.academia.edu/3523639/U.S._Drone_Policy_Tactical_Success_and_Strategic_Failure)shaw), April 19, 2013)

A new set of drone operating procedures would help to repair international relations and decrease civilian casualties. Furthermore, nations like Yemen, Somalia, and others, will not feel threatened and will readily accept U.S. assistance in counterterrorism efforts.¶ 78¶ Cooperation with affected nations will ensure that their sovereignty is not violated¶ 79¶ and the use of human intelligence programs will reduce civilian casualties, thus resulting in a sanitary, more effective drone operation.¶ 80¶ While the U.S. drone program has many noteworthy tactical successes, it simultaneously has suffered various strategic failures. Collateral damage has directly strained our relations with Pakistan, and indirectly stressed our relations with Europe, Asia, and South America. However, by increasing joint cooperation and decreasing civilian casualties, the harms inflicted on international relations can be reconciled. If this new system is implemented, not only will United States policy makers see the radical decrease of innocent deaths, but they will also see a decrease in terrorism and the terrorist recruiting pool.¶ 81¶ Confronting this issue and establishing a new set of standard operating procedures should be on the forefront of every elected official’s agenda, for the purpose of improving foreign policy and repairing international relations.

#### Host country cooperation key

**Cordesman ’13** (Anthony Cordesman, Arleigh A. Burke Chair in Strategy at CSIS, “The Common Lessons of Benghazi, Algeria, Mali, Tunisia, Egypt, Syria, Iraq, Yemen, Afghanistan, Pakistan, and the Arab Spring”, <http://csis.org/publication/common-lessons-benghazi-algeria-mali-tunisia-egypt-syria-iraq-yemen-afghanistan-pakistan>, January 28, 2013)

Working with Regional and Host Country Partners The third lesson is that in most cases the United States will find that the key partner will not be a European ally but either a regional partner or the host country itself. The internal dynamics of the host country that will determine what real world opportunities exist at what mix of costs and benefits. If the host country lacks the willingness and absorption capability to use U.S. and allied aid, the default setting should be containment not intervention. It is a grim reality that regardless of the humanitarian cost, there is little point in trying to help countries that cannot help themselves and creating a culture of dependence that shifts that responsibility to the United States or some outside power. More broadly, the United States should learn that it needs to work through local governments on their terms and rely on local allies that share a common religion and value system with the host or target country. This is particularly true because much of the reason for the rebirth of religious values throughout the Islamic world has come from the failure of secular governance. U.S. strengths consist of helping nations and nonstate actors deal with secular problems and needs, but the United States will always face major obstacles when it comes to dealing with Islam and different cultural values. This is why allies like the southern Gulf states, Arab states, Turkey and other states with largely Islamic populations will be key partners at both the regional and national level. They can act in ways the United States and other outside powers cannot. They do not bring the burden of western secularism, ties to Israel, or the history of European colonialism to a given problem. They also do not bring the baggage of intervention in Iraq and Afghanistan or the war on terrorism. Moreover, such partnerships are necessary because the United States must also work with its regional allies to help them to maintain or achieve their own internal stability and to limit the risk of the political upheavals that are underway in so many states. Patient diplomatic and advisory efforts to help allied and friendly countries make their own reforms in areas like economics and governance will be key sources of stability and evolutionary change. So will assistance in creating effective counterterrorism forces and internal security efforts, as will support to regional security structures like the Gulf Cooperation Council.

#### Drones only spread terrorist organizations out and creates affiliates associated with former al-Qaeda members

**Boyle, 13** (Michael J. Boyle, Assistant Professor of Political Science at La Salle University in Philadelphia. He was previously a Lecturer in International Relations and Research Fellow at the Centre for the Study of Terrorism and Political Violence (CSTPV) at the University of St. Andrews. He is also an alumnus of the Political Science Department at La Salle. “The costs and consequences of drone warfare” International Affairs 89: 1 (2013) 1–29)

Yet the evidence that drones inhibit the operational latitude of terrorist groups and push them towards collapse is more ambiguous than these accounts suggest.57 In Pakistan, the ranks of Al-Qaeda have been weakened significantly by drone strikes, but its members have hardly given up the fight. Hundreds of Al-Qaeda members have fled to battlefields in Yemen, Somalia, Iraq, Syria and elsewhere.58 These operatives bring with them the skills, experience and weapons needed to turn these wars into fiercer, and perhaps longer-lasting, conflicts.59 In other words, pressure from drone strikes may have scattered Al-Qaeda militants, but it does not neutralize them. Many Al-Qaeda members have joined forces with local insurgent groups in Syria, Mali and elsewhere, thus deepening the conflicts in these states.60 In other cases, drones have fuelled militant movements and reordered the alliances and positions of local combatants. Following the escalation of drone strikes in Yemen, the desire for revenge drove hundreds, if not thousands, of Yemeni tribesmen to join Al-Qaeda in the Arabian Peninsula (AQAP), as well as smaller, indigenous militant networks.61 Even in Pakistan, where the drone strikes have weakened Al-Qaeda and some of its affiliated movements, they have not cleared the battlefield. In Pakistan, other Islamist groups have moved into the vacuum left by the absence of Al-Qaeda, and some of these groups, particularly the cluster of groups arrayed under the name Tehrik-i-Taliban Pakistan (TTP), now pose a greater threat to the Pakistani government than Al-Qaeda ever did.62 Drone strikes have distinct political effects on the ecology of militant networks in these countries, leaving some armed groups in a better position while crippling others. It is this dynamic that has accounted for the US decision gradually to expand the list of groups targeted by drone strikes, often at the behest of Pakistan. Far from concentrating exclusively on Al-Qaeda, the US has begun to use drone strikes against Pakistan’s enemies, including the TTP, the Mullah Nazir group, the Haqqani network and other smaller Islamist groups.63 The result is that the US has weakened its principal enemy, Al-Qaeda, but only at the cost of earning a new set of enemies, some of whom may find a way to strike back.64 The cost of this expansion of targets came into view when the TTP inspired and trained Faisal Shahzad to launch his attack on Times Square.65 Similarly, the TTP claimed to be involved, possibly with Al-Qaeda, in attacking a CIA outpost at Camp Chapman in the Khost region of Afghanistan on 30 December 2009.66

#### Turning that tide is critical – al-Qaeda affiliates pose a high risk of nuclear and biological terrorism

**Allison**, IR Director @ Harvard, **12** [Graham, Director, Belfer Center for Science and International Affairs; Douglas Dillon Professor of Government, Harvard Kennedy School, "Living in the Era of Megaterror", Sept 7, <http://belfercenter.ksg.harvard.edu/publication/22302/living_in_the_era_of_megaterror.html>. BJM]

Forty years ago this week at the Munich Olympics of 1972, Palestinian terrorists conducted one of the most dramatic terrorist attacks of the 20th century. The kidnapping and massacre of 11 Israeli athletes attracted days of around-the-clock global news coverage of Black September’s anti-Israel message. Three decades later, on 9/11, Al Qaeda killed nearly 3,000 individuals at the World Trade Center and the Pentagon, announcing a new era of megaterror. In an act that killed more people than Japan’s attack on Pearl Harbor, a band of terrorists headquartered in ungoverned Afghanistan demonstrated that individuals and small groups can kill on a scale previously the exclusive preserve of states. Today, how many people can a small group of terrorists kill in a single blow? Had Bruce Ivins, the U.S. government microbiologist responsible for the 2001 anthrax attacks, distributed his deadly agent with sprayers he could have purchased off the shelf, tens of thousands of Americans would have died. Had the 2001 “Dragonfire” report that Al Qaeda had a small nuclear weapon (from the former Soviet arsenal) in New York City proved correct, and not a false alarm, detonation of that bomb in Times Square could have incinerated a half million Americans. In this electoral season, President Obama is claiming credit, rightly, for actions he and U.S. Special Forces took in killing Osama bin Laden. Similarly, at last week’s Republican convention in Tampa, Jeb Bush praised his brother for making the United States safer after 9/11. There can be no doubt that the thousands of actions taken at federal, state and local levels have made people safer from terrorist attacks. Many are therefore attracted to the chorus of officials and experts claiming that the “strategic defeat” of Al Qaeda means the end of this chapter of history. But we should remember a deeper and more profound truth. While applauding actions that have made us safer from future terrorist attacks, we must recognize that they **have not reversed an inescapable reality**: The relentless advance of science and technology is making it possible for smaller and **smaller groups to kill** **larger** and larger **numbers of people**. If a Qaeda affiliate, or some terrorist group in Pakistan whose name readers have never heard, acquires highly enriched uranium or plutonium made by a state, they can construct an elementary nuclear bomb capable of killing hundreds of thousands of people. At biotech labs across the United States and around the world, research scientists making medicines that advance human well-being are also capable of making pathogens, like anthrax, that can produce massive casualties. What to do? Sherlock Holmes examined crime scenes using a method he called M.M.O.: motive, means and opportunity. In a society where citizens gather in unprotected movie theaters, churches, shopping centers and stadiums, opportunities for attack abound. Free societies are inherently “target rich.” Motive to commit such atrocities poses a more difficult challenge. In all societies, a percentage of the population will be homicidal. No one can examine the mounting number of cases of mass murder in schools, movie theaters and elsewhere without worrying about a society’s mental health. Additionally, actions we take abroad unquestionably impact others’ motivation to attack us. As Faisal Shahzad, the 2010 would-be “Times Square bomber,” testified at his trial: “Until the hour the U.S. ... stops the occupation of Muslim lands, and stops killing the Muslims ... we will be attacking U.S., and I plead guilty to that.” Fortunately, it is more difficult for a terrorist to acquire the “means” to cause mass casualties. Producing highly enriched uranium or plutonium requires expensive industrial-scale investments that only states will make. If all fissile material can be secured to a gold standard beyond the reach of thieves or terrorists, aspirations to become the world’s first nuclear terrorist can be thwarted. Capabilities for producing bioterrorist agents are not so easily secured or policed. While more has been done, and much more could be done to further raise the technological barrier, as knowledge advances and technological capabilities to make pathogens become more accessible, the means for bioterrorism will come within the reach of terrorists. One of the hardest truths about modern life is that the same advances in science and technology that enrich our lives also empower potential killers to achieve their deadliest ambitions. To imagine that we can escape this reality and return to a world in which we are invulnerable to future 9/11s or worse is an illusion. For as far as the eye can see, we will live in an era of megaterror.

#### Nuclear terrorism cause a nuclear war

**Ayson 10**

(Robert Ayson, Professor of Strategic Studies and Director of the Centre for Strategic Studies: New Zealand at the Victoria University of Wellington, 2010 (“After a Terrorist Nuclear Attack: Envisaging Catalytic Effects,” Studies in Conflict & Terrorism, Volume 33, Issue 7, July, Available Online to Subscribing Institutions via InformaWorld)

A terrorist nuclear attack, and even the use of nuclear weapons in response by the country attacked in the first place, would not necessarily represent the worst of the nuclear worlds imaginable. Indeed, there are reasons to wonder whether nuclear terrorism should ever be regarded as belonging in the category of truly existential threats. A contrast can be drawn here with the global catastrophe that would come from a massive nuclear exchange between two or more of the sovereign states that possess these weapons in significant numbers. Even the worst terrorism that the twenty-first century might bring would fade into insignificance alongside considerations of what a general nuclear war would have wrought in the Cold War period. And it must be admitted that as long as the major nuclear weapons states have hundreds and even thousands of nuclear weapons at their disposal, there is always the possibility of a truly awful nuclear exchange taking place precipitated entirely by state possessors themselves. But these two nuclear worlds—a non-state actor nuclear attack and a catastrophic interstate nuclear exchange—are not necessarily separable. It is just possible that some sort of terrorist attack, and especially an act of nuclear terrorism, could precipitate a chain of events leading to a massive exchange of nuclear weapons between two or more of the states that possess them. In this context, today’s and tomorrow’s terrorist groups might assume the place allotted during the early Cold War years to new state possessors of small nuclear arsenals who were seen as raising the risks of a catalytic nuclear war between the superpowers started by third parties. These risks were considered in the late 1950s and early 1960s as concerns grew about nuclear proliferation, the so-called n+1 problem. t may require a considerable amount of imagination to depict an especially plausible situation where an act of nuclear terrorism could lead to such a massive inter-state nuclear war. For example, in the event of a terrorist nuclear attack on the United States, it might well be wondered just how Russia and/or China could plausibly be brought into the picture, not least because they seem unlikely to be fingered as the most obvious state sponsors or encouragers of terrorist groups. They would seem far too responsible to be involved in supporting that sort of terrorist behavior that could just as easily threaten them as well. Some possibilities, however remote, do suggest themselves. For example, how might the United States react if it was thought or discovered that the fissile material used in the act of nuclear terrorism had come from Russian stocks,40 and if for some reason Moscow denied any responsibility for nuclear laxity? The correct attribution of that nuclear material to a particular country might not be a case of science fiction given the observation by Michael May et al. that while the debris resulting from a nuclear explosion would be “spread over a wide area in tiny fragments, its radioactivity makes it detectable, identifiable and collectable, and a wealth of information can be obtained from its analysis: the efficiency of the explosion, the materials used and, most important … some indication of where the nuclear material came from.”41 Alternatively, if the act of nuclear terrorism came as a complete surprise, and American officials refused to believe that a terrorist group was fully responsible (or responsible at all) suspicion would shift immediately to state possessors. Ruling out Western ally countries like the United Kingdom and France, and probably Israel and India as well, authorities in Washington would be left with a very short list consisting of North Korea, perhaps Iran if its program continues, and possibly Pakistan. But at what stage would Russia and China be definitely ruled out in this high stakes game of nuclear Cluedo? In particular, if the act of nuclear terrorism occurred against a backdrop of existing tension in Washington’s relations with Russia and/or China, and at a time when threats had already been traded between these major powers, would officials and political leaders not be tempted to assume the worst? Of course, the chances of this occurring would only seem to increase if the United States was already involved in some sort of limited armed conflict with Russia and/or China, or if they were confronting each other from a distance in a proxy war, as unlikely as these developments may seem at the present time. The reverse might well apply too: should a nuclear terrorist attack occur in Russia or China during a period of heightened tension or even limited conflict with the United States, could Moscow and Beijing resist the pressures that might rise domestically to consider the United States as a possible perpetrator or encourager of the attack? Washington’s early response to a terrorist nuclear attack on its own soil might also raise the possibility of an unwanted (and nuclear aided) confrontation with Russia and/or China. For example, in the noise and confusion during the immediate aftermath of the terrorist nuclear attack, the U.S. president might be expected to place the country’s armed forces, including its nuclear arsenal, on a higher stage of alert. In such a tense environment, when careful planning runs up against the friction of reality, it is just possible that Moscow and/or China might mistakenly read this as a sign of U.S. intentions to use force (and possibly nuclear force) against them. In that situation, the temptations to preempt such actions might grow, although it must be admitted that any preemption would probably still meet with a devastating response.

#### **Bioweapons are imminent and cause extinction**

**Myhrvold, July 2013** [Nathan, formerly Chief Technology Officer at Microsoft, is co-founder of Intellectual Ventures—one of the largest patent holding companies in the world, “Strategic Terrorism: A Call to Action”, The Lawfare Research Paper Series Research paper NO . 2, <http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf>, BJM]

Biotechnology is advancing so rapidly that it is hard to keep track of all the new potential threats. Nor is it clear that anyone is even trying. In addition to lethality and drug resistance, many other parameters can be played with, given that the infectious power of an epidemic depends on many properties, including the length of the latency period during which a person is contagious but asymptomatic. Delaying the onset of serious symptoms allows each new case to spread to more people and thus makes the virus harder to stop. This dynamic is perhaps best illustrated by HIV , which is very difficult to transmit compared with smallpox and many other viruses. Intimate contact is needed, and even then, the infection rate is low. The balancing factor is that HIV can take years to progress to AIDS , which can then take many more years to kill the victim. What makes HIV so dangerous is that infected people have lots of opportunities to infect others. This property has allowed HIV to claim more than 30 million lives so far, and approximately 34 million people are now living with this virus and facing a highly uncertain future.15 A virus genetically engineered to infect its host quickly, to generate symptoms slowly—say, only after weeks or months—and to spread easily through the air or by casual contact would be vastly more devastating than HIV . It could silently penetrate the population to unleash its deadly effects suddenly. This type of epidemic would be almost impossible to combat because most of the infections would occur before the epidemic became obvious. A technologically sophisticated terrorist group could develop such a virus and **kill a large part of humanity with it**. Indeed, terrorists may not have to develop it themselves: some scientist may do so first and publish the details. Given the rate at which biologists are making discoveries about viruses and the immune system, at some point in the near future, someone may create artificial pathogens that could drive the human race to extinction. Indeed, a detailed species-elimination plan of this nature was openly proposed in a scientific journal. The ostensible purpose of that particular research was to suggest a way to extirpate the malaria mosquito, but similar techniques could be directed toward humans.16 When I’ve talked to molecular biologists about this method, they are quick to point out that it is slow and easily detectable and could be fought with biotech remedies. If you challenge them to come up with improvements to the suggested attack plan, however, they have plenty of ideas. Modern biotechnology will soon be capable, if it is not already, of bringing about the demise of the human race— or at least of killing a sufficient number of people to end high-tech civilization and set humanity back 1,000 years or more. That terrorist groups could achieve this level of technological sophistication may seem far-fetched, but keep in mind that it takes **only a handful of individuals** to accomplish these tasks. Never has lethal power of this potency been accessible to so few, so easily. Even more dramatically than nuclear proliferation, modern biological **science has frighteningly undermined the correlation between the lethality of a weapon and its cost**, a fundamentally stabilizing mechanism throughout history. Access to extremely lethal agents—lethal enough to exterminate Homo sapiens—will be available to anybody with a solid background in biology, terrorists included. The 9/11 attacks involved at least four pilots, each of whom had sufficient education to enroll in flight schools and complete several years of training. Bin Laden had a degree in civil engineering. Mohammed Atta attended a German university, where he earned a master’s degree in urban planning—not a field he likely chose for its relevance to terrorism. A future set of terrorists could just as easily be students of molecular biology who enter their studies innocently enough but later put their skills to homicidal use. Hundreds of universities in Europe and Asia have curricula sufficient to train people in the skills necessary to make a sophisticated biological weapon, and hundreds more in the United States accept students from all over the world. Thus it seems **likely** that sometime in the near future a small band of terrorists, or even a single misanthropic individual, will **overcome our best defenses** and do something truly terrible, such as fashion a bioweapon that **could kill millions or even billions** **of people**. Indeed, **the creation of such weapons within the next 20 years seems to be a virtual certainty**. The repercussions of their use are hard to estimate. One approach is to look at how the scale of destruction they may cause compares with that of other calamities that the human race has faced.

**Scenario 3 is Pakistan stability**

#### drones undermine Pakistani government stability

**Boyle, 13** (Michael J. Boyle, Assistant Professor of Political Science at La Salle University in Philadelphia. He was previously a Lecturer in International Relations and Research Fellow at the Centre for the Study of Terrorism and Political Violence (CSTPV) at the University of St. Andrews. He is also an alumnus of the Political Science Department at La Salle. “The costs and consequences of drone warfare” International Affairs 89: 1 (2013) 1–29)

The escalation of drone strikes in Pakistan to its current tempo—one every few days—directly contradicts the long-term American strategic goal of boosting the capacity and legitimacy of the government in Islamabad. Drone attacks are more than just temporary incidents that erase all traces of an enemy. They have lasting political effects that can weaken existing governments, undermine their legitimacy and add to the ranks of their enemies. These political effects come about because drones provide a powerful signal to the population of a targeted state that the perpetrator considers the sovereignty of their government to be negligible. The popular perception that a government is powerless to stop drone attacks on its territory can be crippling to the incumbent regime, and can embolden its domestic rivals to challenge it through violence. Such continual violations of the territorial integrity of a state also have direct consequences for the legitimacy of its government. Following a meeting with General David Petraeus, Pakistani President Asif Ali Zardari described the political costs of drones succinctly, saying that ‘continuing drone attacks on our country, which result in loss of precious lives or property, are counterproductive and difficult to explain by a democratically elected government. It is creating a credibility gap.’75 Similarly, the Pakistani High Commissioner to London Wajid Shamsul Hasan said in August 2012 that what has been the whole outcome of these drone attacks is that you have directly or indirectly contributed to destabilizing or undermining the democratic government. Because people really make fun of the democratic government—when you pass a resolution against drone attacks in the parliament and nothing happens. The Americans don’t listen to you, and they continue to violate your territory.76 The appearance of powerlessness in the face of drones is corrosive to the appearance of competence and legitimacy of the Pakistani government. The growing perception that the Pakistani civilian government is unable to stop drone attacks is particularly dangerous in a context where 87 per cent of all Pakistanis are dissatisfied with the direction of the country and where the military, which has launched coups before, remains a popular force.77 The political effects of this signal are powerful and lasting even when the reality of the relationship between the perpetrator and the targeted state is more complex. For example, the government of Pakistan has been ambivalent about drone strikes, condemning them in some cases but applauding their results in others.78 Much has been made of the extent to which the Pakistani government has offered its ‘tacit consent’ for the US drone strikes on its territory.79 The US has been willing to provide details on drone strikes after the fact, but has refrained from providing advance warning of an attack to the Pakistani government for fear that the information might leak. Pakistan has been operationally compliant with drone strikes and has not ordered its air force to shoot down drones in Pakistani airspace. Despite official denials, it has been revealed that the Pakistani government has permitted the US to launch drones from at least one of its own airbases.80 Whatever the complexity of its position and the source of its ambivalence over drone strikes, the political effects of allowing them to escalate to current levels are increasingly clear. The vast expansion of drone warfare under the Obama administration has placed enormous pressure on Pakistan for its complicity with the US, multiplied the enemies that its government faces and undermined parts of the social fabric of the country. By most measures, Pakistan is more divided and unstable after the Obama administration’s decision to ramp up the tempo and scale of drone attacks than it was during the Bush administration.81

#### Pakistan instability leads to extinction

**Pitt ‘9**- a New York Times and internationally bestselling author of two books: "War on Iraq: What Team Bush Doesn't Want You to Know" and "The Greatest Sedition Is Silence." (5/8/09, William, “Unstable Pakistan Threatens the World,” http://www.arabamericannews.com/news/index.php?mod=article&cat=commentary&article=2183)

But a suicide bomber in Pakistan rammed a car packed with explosives into a jeep filled with troops today, killing five and wounding as many as 21, including several children who were waiting for a ride to school. Residents of the region where the attack took place are fleeing in terror as gunfire rings out around them, and government forces have been unable to quell the violence. Two regional government officials were beheaded by militants in retaliation for the killing of other militants by government forces. As familiar as this sounds, it did not take place where we have come to expect such terrible events. This, unfortunately, is a whole new ballgame. It is part of another conflict that is brewing, one which puts what is happening in Iraq and Afghanistan in deep shade, and which represents a grave and growing threat to us all.Pakistan is now trembling on the edge of violent chaos, and is doing so with nuclear weaponsin its hip pocket,right in the middle ofone ofthe most dangerous neighborhoods in the world.The situation in brief: Pakistan for years has been a nation in turmoil, run by a shaky government supported by a corrupted system, dominated by a blatantly criminal security service, and threatened by a large fundamentalist Islamic population with deep ties to the Taliban in Afghanistan. All this is piled atop an ongoing standoff with neighboring India that has been the center of political gravity in the region for more than half a century. The fact thatPakistan, andIndia, and Russia, and China all possess nuclear weaponsand share the same space means any ongoing or escalating violence over there hasthe realpotential to crack open the very gates of Hellitself. Recently, the Taliban made a military push into the northwest Pakistani region around the Swat Valley. According to a recent Reuters report: The (Pakistani) army deployed troops in Swat in October 2007 and used artillery and gunship helicopters to reassert control. But insecurity mounted after a civilian government came to power last year and tried to reach a negotiated settlement. A peace accord fell apart in May 2008. After that, hundreds — including soldiers, militants and civilians — died in battles. Militants unleashed a reign of terror, killing and beheading politicians, singers, soldiers and opponents. They banned female education and destroyed nearly 200 girls' schools.About 1,200 people were killed since late 2007 and 250,000 to 500,000 fled, leaving the militants in virtual control. Pakistan offered on February 16 to introduce Islamic law in the Swat valley and neighboring areas in a bid to take the steam out of the insurgency. The militants announced an indefinite cease-fire after the army said it was halting operations in the region. President Asif Ali Zardari signed a regulation imposing sharia in the area last month. But the Taliban refused to give up their guns and pushed into Buner and another district adjacent to Swat, intent on spreading their rule. The United States, already embroiled in a war against Taliban forces in Afghanistan, must now face the possibility that Pakistan could collapse under the mounting threat of Taliban forces there. Military and diplomatic advisers to President Obama, uncertain how best to proceed, now face one of the great nightmare scenarios of our time. "Recent militant gains in Pakistan," reported The New York Times on Monday, "have so alarmed the White House that the national security adviser, Gen. James L. Jones, described the situation as 'one of the very most serious problems we face.'" "Security was deteriorating rapidly," reported The Washington Post on Monday, "particularly in the mountains along the Afghan border that harbor al-Qaeda and the Taliban, intelligence chiefs reported, and there were signs that those groups were working with indigenous extremists in Pakistan's populous Punjabi heartland. The Pakistani government was mired in political bickering. The army, still fixated on its historical adversary India, remained ill-equipped and unwilling to throw its full weight into the counterinsurgency fight. But despite the threat the intelligence conveyed, Obama has only limited options for dealing with it. Anti-American feeling in Pakistan is high, and a U.S. combat presence is prohibited. The United States is fighting Pakistan-based extremists by proxy, through an army over which it has little control, in alliance with a government in which it has little confidence." It is believedPakistan is currently in possession of between 60 and 100 nuclear weapons. Because Pakistan's stability is threatened by the wide swath of its population that shares ethnic, cultural and religious connections to the fundamentalist Islamic populace of Afghanistan, fears over what could happen to those nuclear weapons if the Pakistani government collapses are very real. "As the insurgency of the Taliban and Al Qaeda spreads in Pakistan," reported the Times last week, "senior American officials say they are increasingly concerned about new vulnerabilities for Pakistan's nuclear arsenal, including the potential for militants to snatch a weapon in transport or to insert sympathizers into laboratories or fuel-production facilities. In public, the administration has only hinted at those concerns, repeating the formulation that the Bush administration used: that it has faith in the Pakistani Army. But that cooperation, according to officials who would not speak for attribution because of the sensitivity surrounding the exchanges between Washington and Islamabad, has been sharply limited when the subject has turned to the vulnerabilities in the Pakistani nuclear infrastructure." "The prospect of turmoil in Pakistan sends shivers up the spinesof those U.S. officials charged with keeping tabs on foreign nuclear weapons," reported Time Magazine last month. "Pakistan is thought to possess about 100 — the U.S. isn't sure of the total, and may not know where all of them are. Still, if Pakistan collapses, the U.S. military is primed to enter the country and secure as many of those weapons as it can, according to U.S. officials. Pakistani officials insist their personnel safeguards are stringent, but a sleeper cell could cause big trouble, U.S. officials say." In other words, a shaky Pakistan spells trouble for everyone, especially if America loses the footrace to secure those weapons in the event of the worst-case scenario. If Pakistani militants ever succeed in toppling the government, several very dangerous events could happen at once. Nuclear-armedIndia couldbe galvanized into military actionof some kind,as couldnuclear-armedChina ornuclear-armedRussia. If the Pakistani government does fall, and all those Pakistani nukes are not immediately accounted for and secured,the specter (or reality) ofloose nukes falling into the hands of terrorist organizations could place the entire world on a collision course with unimaginable disaster.We have all been paying a great deal of attention to Iraq and Afghanistan, and rightly so. The developing situation in Pakistan, however, needs to be placed immediately on the front burner. The Obama administration appears to be gravely serious about addressing the situation. So should we all.

#### Effective drones key- need to change our strats to avoid blowback

**Masood 13** (Hassan, Monmouth College, “Death from the Heavens: The Politics of the United States’ Drone Campaign in Pakistan’s Tribal Areas,” 2013) /wyo-mm

Those who support the use of drones as an important counter-insurgency tactic nonetheless point out that the current campaign is not always conducted in the most effective manner. The authors of “Sudden Justice” for example, argue that the campaign should be focused on ‘high value targets’ and not be used frequently to take down the lower level operatives. The more you can destroy and disrupt the activities of personnel in the Taliban and al-Qaeda from the top-down instead of the bottom-up, the more of an impact it will have. The leadership qualities, organizational skills, and strategic awareness of various high-level commanders in both the Taliban and al-Qaeda cannot be easily replaced after their deaths at the hands of U.S. drones. Fricker and Plaw use the example of Baitullah Mehsud, a Tehrik-i-Taliban (TTP) leader who was killed by a drone strike on the roof of his uncle’s house on August 5, 2009. His death provoked an internal struggle in his organization that ultimately led to enough confusion and tension within the TTP that the Pakistan Army was able to launch the South Waziristan Offensive, putting the TTP on the defensive. But the lower level Taliban and al-Qaeda members have skills and abilities that are more common and more easily replaced. The amount of time and energy, the article asserts, that the U.S. is spending killing lower-level members (and increasing civilian casualties in the process, as the majority of the time these strikes happen during funeral processions or wedding parties) could instead be used to seriously disrupt the activities of the entire organization by targeting its leaders, much like the death of Osama bin Laden did to al-Qaeda in South/Central Asia in 2011. David Rohde agrees that the drones should be used, as they are an effective and efficient way of disrupting and destroying the extremist power base there, but their usage should be both selective and surgical. There is no consensus among scholars when it comes to evaluating the effectiveness of the use of drones as a counter-insurgency tactic. As Hassan Abbas points out “the truth is we don’t know whether U.S. drone strikes have killed more terrorists or produced more terrorists.”

### 1AC Norms

#### Drones are proliferating now- only the United States setting a precedent can limit use – the impact is global war

**Dowd, 13** [Drone Wars: Risks and Warnings Alan W. Dowd, Alan W. Dowd writes on national defense, foreign policy, and international security. His writing has appeared in multiple publications including Parameters, Policy Review, The Journal of Diplomacy and International Relations, World Politics Review, American Outlook, The Baltimore Sun, The Washington Times, The National Post, The Wall Street Journal Europe, The Jerusalem Post, and The Financial Times Deutschland, Parameters 42(4)/43(1) Winter-Spring 2013]

In short, it seems Washington has been seduced by the Jupiter Complex. Being seen in such a light—as detached and remote in every sense of the word, especially in waging war—should give Americans pause. “Reliance on drone strikes allows our opponents to cast our country as a distant, high-tech, amoral purveyor of death,” argues Kurt Volker, former US ambassador to NATO. “It builds resentment, facilitates terrorist recruitment and alienates those we should seek to inspire.”40 Indeed, what appears a successful counterterrorism campaign to Americans may look very different to international observers. “In 17 of 20 countries,” a recent Pew survey found, “more than half disapprove of U.S. drone attacks targeting extremist leaders and groups in nations such as Pakistan, Yemen and Somalia.”41 Moreover, a UN official recently announced plans to create “an investigation unit” within the Human Rights Council to “inquire into individual drone attacks . . . in which it has been alleged that civilian casualties have been inflicted.”42 This is not to suggest that either side of the drone debate has a monopoly on the moral high ground; both have honorable motives. UCAV advocates want to employ drone technologies to limit US casualties, while UCAV opponents are concerned that these same technologies could make war too easy to wage. This underscores there exists no simple solution to the drone dilemma. Converting to a fully unmanned air force would be dangerous. Putting the UCAV genie back in the bottle, on the other hand, would be difficult, perhaps impossible. There are those who argue that it is a false dichotomy to say that policymakers must choose between UCAVs and manned aircraft. To be sure, UCAVs could serve as a complement to manned aircraft rather than a replacement, with pilots in the battlespace wielding UCAVs to augment their capabilities. That does not, however, appear to be where we are headed. Consider Admiral Mullen’s comments about the sunset of manned combat aircraft, the manned-versus-unmanned acquisition trajectories, the remote-control wars in Pakistan and Yemen and Somalia, and President Obama’s reliance on UCAVs. Earlier this year, for instance, when France asked for help in its counterassault against jihadists in Mali, Washington initially offered drones.43 The next president will likely follow and build upon the UCAV precedents set during the Obama administration, just as the Obama administration has with the UCAV precedents set during the Bush administration. Recall that the first shot in the drone war was fired approximately 11 years ago, in Yemen, when a CIA Predator drone retrofitted with Hellfire missiles targeted and killed one of the planners of the USS Cole attack. Given their record and growing capabilities, it seems unlikely that UCAVs will ever be renounced entirely; however, perhaps the use of drones for lethal purposes can be curtailed or at least contained. It is important to recall that the United States has circumscribed its own military power in the past by drawing the line at certain technologies. The United States halted development of the neutron bomb in the 1970s and dismantled its neutron arsenal in the 2000s; agreed to forswear chemical weapons; and renounced biological warfare “for the sake of all mankind.”44 That brings us back to The New York Times’ portrait of the drone war. Washington must be mindful that the world is watching. This is not an argument in defense of international watchdogs tying America down. The UN secretariat may refuse to recognize America’s special role, but by turning to Washington whenever civil war breaks out, or nuclear weapons sprout up, or sea lanes are threatened, or natural disasters wreak havoc, or genocide is let loose, it is tacitly conceding that the United States is, well, special. Washington has every right to kill those who are trying to kill Americans. However, the brewing international backlash against the drone war reminds us that means and methods matter as much as ends. Error War If these geo-political consequences of remote-control war do not get our attention, then the looming geo-strategic consequences should. If we make the argument that UCAV pilots are in the battlespace, then we are effectively saying that the battlespace is the entire earth. If that is the case, the unintended consequences could be dramatic. First, if the battlespace is the entire earth, the enemy would seem to have the right to wage war on those places where UCAV operators are based. That’s a sobering thought, one few policymakers have contemplated. Second, power-projecting nations are following America’s lead and developing their own drones to target their distant enemies by remote. An estimated 75 countries have drone programs underway.45 Many of these nations are less discriminating in employing military force than the United States—and less skillful. Indeed, drones may usher in a new age of accidental wars. If the best drones deployed by the best military crash more than any other aircraft in America’s fleet, imagine the accident rate for mediocre drones deployed by mediocre militaries. And then imagine the international incidents this could trigger between, say, India and Pakistan; North and South Korea; Russia and the Baltics or Poland or Georgia; China and any number of its wary neighbors. China has at least one dozen drones on the drawing board or in production, and has announced plans to dot its coastline with 11 drone bases in the next two years.46 The Pentagon’s recent reports on Chinese military power detail “acquisition and development of longer-range UAVs and UCAVs . . . for long-range reconnaissance and strike”; development of UCAVs to enable “a greater capacity for military preemption”; and interest in “converting retired fighter aircraft into unmanned combat aerial vehicles.”47 At a 2011 air show, Beijing showcased one of its newest drones by playing a video demonstrating a pilotless plane tracking a US aircraft carrier near Taiwan and relaying targeting information.48 Equally worrisome, the proliferation of drones could enable nonpower-projecting nations—and nonnations, for that matter—to join the ranks of power-projecting nations. Drones are a cheap alternative to long-range, long-endurance warplanes. Yet despite their low cost, drones can pack a punch. And owing to their size and range, they can conceal their home address far more effectively than the typical, nonstealthy manned warplane. Recall that the possibility of surprise attack by drones was cited to justify the war against Saddam Hussein’s Iraq.49 Of course, cutting-edge UCAVs have not fallen into undeterrable hands. But if history is any guide, they will. Such is the nature of proliferation. Even if the spread of UCAV technology does not harm the United States in a direct way, it is unlikely that opposing swarms of semiautonomous, pilotless warplanes roaming about the earth, striking at will, veering off course, crashing here and there, and sometimes simply failing to respond to their remote-control pilots will do much to promote a liberal global order. It would be ironic if the promise of risk-free war presented by drones spawned a new era of danger for the United States and its allies.

**These conflicts go nuclear.**

Jürgen **Altmann 10,** Researcher and lecturer at the University of Dortmund, is one of the founding members of the International Committee for Robot Arms Control, http://www.irf.ac.at/index.php?option=com\_content&task=view&id=314&Itemid=1

**Where do you see the main challenges for the international community regarding the use of armed un~~man~~ned systems by the military**. What are the specific challenges of autonomous systems as compared to current telerobotic systems? **The main challenge is in deciding whether the present trend should continue and expand to many more countries and to many more types of armed uninhabited vehicles** (in the air, on and under water, on the ground, also in outer space**), or whether efforts should be taken to constrain this arms race and limit the dangers connected to it**. Here not only governments, but non-governmental organisations and the general public should become active. **Autonomous systems obviously would open many new possibilities for war by accident** (possibly **escalating up to nuclear war) and for violations of the international laws of warfare**. A human decision in each single weapon use should be the minimum requirement.

#### Aggressive Chinese drone deployment creates multiple scenarios for Asian war – draws in the US

Gertz, **13** (Bill senior editor of the Washington Free Beacon, national security reporter, 3-26-2013, “Game of Drones,” Washington Free Beacon, http://freebeacon.com/game-of-drones/)

China’s military is expanding its unmanned aerial vehicle forces with a new Predator-like armed drone and a new unmanned combat aircraft amid growing tensions with neighbors in Asia, according to U.S. intelligence officials. New unarmed drone deployments include the recent stationing of reconnaissance and ocean surveillance drones in Northeast Asia near Japan and the Senkaku islands and along China’s southern coast. Drones also are planned for the South China Sea where China has been encroaching on international waters and bullying nations of that region in asserting control over international waters, said officials familiar with intelligence reports. “Unmanned aerial vehicles are emerging as critical enablers for PLA long range precision strike operations,” said Mark Stokes, a former military intelligence official now with the Project 2049 Institute. “A general operational PLA requirement appears to be persistent surveillance of fixed and moving targets out to 3,000 kilometers of Chinese shores.” Japan, meanwhile, is developing and purchasing military drone capabilities to counter what it regards as Chinese aggression and Beijing’s growing military capabilities as Tokyo’s dispute with China over the Senkaku islands intensifies, the officials said. After Chinese aircraft intruded into Japanese airspace over the Senkakus undetected late last year, Tokyo stepped up efforts to seek drone capabilities. The efforts include building an indigenous missile-tracking drone and high-altitude U.S. drones. So far, unlike Beijing, Tokyo asserts its drone will be unarmed, the officials said. “China has started deploying UAVs for reconnaissance and oceanic surveillance purposes in the vicinity of disputed maritime territories, such as the Senkaku Islands,” said one military source. Of particular concern to U.S. intelligence agencies are two new missile-equipped drones known as the CH-4 and Yi Long. The aircraft were shown off along with six other military drones at a major Chinese arms show last November in Zhuhai. Photos of the drones reveal the designs appear to be copied from the U.S. Predator armed drone that has been leading the Obama administration’s war on al Qaeda in Pakistan and elsewhere. Photos of the CH-4 show it armed with Blue Arrow-7 anti-tank missiles that appear similar in size to the U.S. Hellfire fired from Predators. Even more of a concern, according to the officials, are intelligence reports from Asia indicating that China is well along in building a large stealth unmanned combat aerial vehicle (UCAV)—an upiloted jet—that was revealed recently in an online Chinese military video. The drone combat jet is nearly identical in shape to the experimental batwing-shaped U.S. Air Force X-47B currently under development. The X-47B was tested on an aircraft carrier in December. The Chinese UCAV is expected to have enough range to reach the U.S. island of Guam, some 1,800 miles from the Chinese coast and the hub of the Pentagon’s shift to Asia, officials said. Video and photos of the Chinese UCAV were posted on Chinese military enthusiast Internet sites recently. Also, a model of the drone combat jet was on display at Zhuhai. The aircraft is being built by the China Shenyang Aerospace Institute and could be deployed on China’s new aircraft carrier, officials said. Richard Fisher, a China military analyst with the International Assessment and Strategy Center, said the first prototype flying wing UCAV was completed at China’s Hongdu Aircraft Corp in mid-December. The drone weighs 10 to 14 tons and could be carrier based. “This means that the U.S. attempt to ‘outrange’ an emergent PLA anti-access systems, like the DF-21D anti-ship ballistic missile, could soon be outflanked by a new PLA carrier-based UCAV,” Fisher said. Japan, alarmed at fierce Chinese reaction to its efforts to solve the Senkakus dispute by nationalizing several of the uninhabited but oil-rich islands last year, is bolstering its military forces with both missile-detecting and maritime surveillance with drones. Japanese Defense Ministry officials, quoted in press reports, have called the purchase of several long-range U.S. Global Hawk surveillance drones an urgent priority. Tokyo is seeking up to three Global Hawks by 2015 but could speed up purchases in response to what it regards as growing Chinese aggressiveness toward Japan over the Senkakus. The U.S. military currently has Global Hawks deployed at Guam. The Japanese do not plan to develop armed drones and plan to limit initial purchases to the Global Hawk, which fly nearly 60,000 feet for extended missions. It is able to track vessels using sensors and radar. Japan also is developing an unmanned drone aircraft that will be used to detect North Korean nuclear missile attacks and to counter the Chinese military buildup, the officials said. The anti-missile drone program is being developed over the next four years with the first drone deployed by 2020. It will use infrared sensors designed to detect missiles shortly after launch. China’s drone program is believed to have benefitted from its aggressive economic and cyber espionage operations against the United States. Those efforts have included breaking into both government and defense industry networks and stealing valuable drone technology. Officials also said China’s drone program is receiving a boost from an unlikely source: Taiwan. The largest Chinese drone production center is being built at Wuhan in Hubei province, site of a joint construction project by China’s Wuhan Visiontek Inc. and Taiwan’s Carbon-Based Technology, Inc. Officials said China launched a crash program to develop military drones beginning around 2007. Beijing is planning a range of unmanned aircraft capabilities, including high-altitude, long-endurance drones, integrated air and sea warfare drones, sea-based drones and UCAVs. More than 60 drones were on display in Beijing last June, including a drone helicopter, and a drone with simulated birds’ wings. Additionally, officials have said drone bases are being set up in the South China Sea to monitor Scarborough reef, which is claimed by Philippines and China; Macclesfield Bank; the Paracel Islands; and the Spratly Islands. China also is using drone to monitor the Socotra Reef claimed by South Korea. A report made public March 11 by the Project 2049 Institute on Chinese drones estimated that China has more than 280 military drones. “The PLA has developed one of the largest and most organizationally complex UAV programs in the world,” the report stated. For the immediate future, the Chinese drones are monitoring disputed maritime and land boundaries that are likely to “increase tensions” since other states in the region lack the same capabilities. “Like any new capability, UAVs may encourage the inexperienced to overreach and engage in risk taking,” the report said. “There could be a sense that because human pilot lives are not at stake, operators can push farther than they otherwise might.” An isolated UAV attack during a crisis also could lead to a major conflict. “In the future, PRC decision-makers might feel compelled to order ‘plausibly deniable’ UAV attacks as a means of sending a political signal only to inadvertently wind up escalating tensions,” the report said. Over the long term, Chinese drones will support the expansion of Chinese military operational areas by pushing the ability to hit targets further into the western Pacific. The report said China likely will use its UAV force for targeting and guidance of the DF-21D anti-ship ballistic missile designed to strike U.S. aircraft carriers more than a thousand miles from China’s coast. “While the potential for a large scale conflict in the region currently appears low, the lack of adequate preparation for worst case scenarios could encourage and invite adventurous adversary behavior, ultimately increasing risks to peace and stability,” the report stated. U.S. intelligence agencies reported earlier this month that China plans to build 11 drone bases along its coastline by 2015, with each base deploying at least one unmanned aircraft. The People’s Liberation Army currently has two drone bases in northeast Liaoning province. A third base was disclosed further south at Lianyungang, Jiangsu Province, also on the Bohai Sea. The bases were announced in August by the State Oceanic Administration, which has been used as a proxy by the Chinese military to lay claim to international waters and islands as part of a strategy of pushing Chinese maritime control hundreds and eventually thousands of miles from the coast through what Beijing calls its two Asian island chain strategy. The island chains stretch from Northeast Asia through Southeast Asia. The two bases in the Bohai Sea are located at Yingkou and Dalian to provide surveillance of the Bohai and Yellow Seas. China called U.S. aircraft carrier exercises held in the Yellow Sea three years ago “a threat to China” even though the carrier maneuvers were carried out in international waters. The maritime surveillance drones provide high-definition remote imagery and will be used by China to respond to emergencies in the region and also to identify what China claims are illegal resource extraction from undersea gas and oil deposits. U.S. officials regard recent highlighting of attack drones as a sign that Beijing remains intent on taking control of the Senkakus. The increased use of drones by both China and Japan is expected to increase tensions over the Senkakus, the officials said. According to Fisher, China is also exporting two of its armed drones, the Yi Long and CH-3, to the United Arab Emirates and Pakistan. The UAE government purchased the Yi Long, and a smaller CH-3 was sold to Pakistan and repackaged by Islamabad as the Shahpar. Fisher said he is concerned China will sell the new and larger CH-4 to Iran. “Because it is not connected to the Aviation Industries Corporation (AVIC) which wants to do business in the United States, the CH-4 stands a better chance of being sold to Iran,” he told the Free Beacon. “China’s willingness to sell UCAV technology to terrorist-linked states means that terrorists may soon have another deadly tool with which to attack the United States.”

#### Causes US-China nuclear war

**Fisher 11** (Max Fisher 11, foreign affairs writer and editor for the Atlantic, MA in security studies from Johns Hopkins, Oct 31 2011, “5 Most Likely Ways the U.S. and China Could Spark Accidental Nuclear War,” http://www.theatlantic.com/international/archive/2011/10/5-most-likely-ways-the-us-and-china-could-spark-accidental-nuclear-war/247616

Neither the U.S. nor China has any interest in any kind of war with one other, nuclear or non-nuclear. The greater risk is an accident. Here's how it would happen. First, an unforeseen event that sparks a small conflict or threat of conflict. Second, a rapid escalation that moves too fast for either side to defuse. And, third, a mutual misunderstanding of one another's intentions.¶ This three-part process can move so quickly that the best way to avert a nuclear war is for both sides to have absolute confidence that they understand when the other will and will not use a nuclear weapon. Without this, U.S. and Chinese policy-makers would have to guess -- perhaps with only a few minutes -- if and when the other side would go nuclear. This is especially scary because both sides have good reason to err on the side of assuming nuclear war. If you think there's a 50-50 chance that someone is about to lob a nuclear bomb at you, your incentive is to launch a preventative strike, just to be safe. This is especially true because you know the other side is thinking the exact same thing. In fact, even if you think the other side probably won't launch an ICBM your way, they actually might if they fear that you're misreading their intentions or if they fear that you might over-react; this means they have a greater incentive to launch a preemptive strike, which means that you have a greater incentive to launch a preemptive strike, in turn raising their incentives, and on and on until one tiny kernel of doubt can lead to a full-fledged war that nobody wants.¶ The U.S. and the Soviet Union faced similar problems, with one important difference: speed. During the first decades of the Cold War, nuclear bombs had to be delivered by sluggish bombers that could take hours to reach their targets and be recalled at any time. Escalation was much slower and the risks of it spiraling out of control were much lower. By the time that both countries developed the ICBMs that made global annihilation something that could happen within a matter of minutes, they'd also had a generation to sort out an extremely clear understanding of one another's nuclear policies. But the U.S. and China have no such luxury -- we inherited a world where total mutual destruction can happen as quickly as the time it takes to turn a key and push a button.¶ The U.S. has the world's second-largest nuclear arsenal with around 5,000 warheads (first-ranked Russia has more warheads but less capability for flinging them around the globe); China has only about 200, so the danger of accidental war would seem to disproportionately threaten China. But the greatest risk is probably to the states on China's periphery. The borders of East Asia are still not entirely settled; there are a number of small, disputed territories, many of them bordering China. But the biggest potential conflict points are on water: disputed naval borders, disputed islands, disputed shipping lanes, and disputed underwater energy reserves. These regional disputes have already led to a handful of small-scale naval skirmishes and diplomatic stand-offs. It's not difficult to foresee one of them spiraling out of control. But what if the country squaring off with China happens to have a defense treaty with the U.S.?¶ There's a near-infinite number of small-scale conflicts that could come up between the U.S. and China, and though none of them should escalate any higher than a few tough words between diplomats, it's the unpredictable events that are the most dangerous. In 1983 alone, the U.S. and Soviet Union almost went to war twice over bizarre and unforeseeable events. In September, the Soviet Union shot down a Korean airliner it mistook for a spy plane; first Soviet officials feared the U.S. had manufactured the incident as an excuse to start a war, then they refused to admit their error, nearly pushing the U.S. to actually start war. Two months later, Soviet spies misread an elaborate U.S. wargame (which the U.S. had unwisely kept secret) as preparations for an unannounced nuclear hit on Moscow, nearly leading them to launch a preemptive strike. In both cases, one of the things that ultimately diverted disaster was the fact that both sides clearly understood the others' red lines -- as long as they didn't cross them, they could remain confident there would be no nuclear war.¶ But the U.S. and China have not yet clarified their red lines for nuclear strikes. The kinds of bizarre, freak accidents that the U.S. and Soviet Union barely survived in 1983 might well bring today's two Pacific powers into conflict -- unless, of course, they can clarify their rules. Of the many ways that the U.S. and China could stumble into the nightmare scenario that neither wants, here are five of the most likely. Any one of these appears to be extremely unlikely in today's world. But that -- like the Soviet mishaps of the 1980s -- is exactly what makes them so dangerous.

#### Congress is key to setting an international signal to comply with norms

**Ellison ’13** (Keith Ellison, “Time for Congress to build a better drone policy”, <http://articles.washingtonpost.com/2013-01-13/opinions/36311903_1_drone-strikes-drone-program-drone-policy>, January 13, 2013)

An unmanned U.S. aerial vehicle — or drone — reportedly killed eight people in rural Pakistan last week, bringing the estimated death toll from drone strikes in Pakistan this year to 35. As the frequency of drone strikes spikes again, some questions must be asked: How many of those targeted were terrorists? Were any children harmed? And what is the standard of evidence to carry out these attacks? The United States has to provide answers, and Congress has a critical role to play. The heart of the problem is that our technological capability has far surpassed our policy. As things stand, the executive branch exercises unilateral authority over drone strikes against terrorists abroad. In some cases, President Obama approves each strike himself through “kill lists.” While the president should be commended for creating explicit rules for the use of drones, unilateral kill lists are unseemly and fraught with hazards. When asked about the drone program in October during an interview on the “The Daily Show,” the president said, “One of the things we’ve got to do is put a legal architecture in place, and we need congressional help in order to do that, to make sure that not only am I reined in, but any president’s reined in terms of some of the decisions that we’re making.” It’s time to put words into action. Weaponized drones have produced results. They have eliminated 22 of al-Qaeda’s top 30 leaders and just last week took out a Taliban leader. Critically, they lessen the need to send our troops into harm’s way, reducing the number of U.S. casualties. Yet the costs of drone strikes have been ignored or inadequately acknowledged. The number of innocent civilian casualties may be greater than people realize. A recent study by human rights experts at Stanford Law School and the New York University School of Law found that the number of innocent civilians killed by U.S. drone strikes is much higher than what the U.S. government has reported: approximately 700 since 2004, including almost 200 children. This is unacceptable. Another cost is how drone strikes are shaping views of the United States around the world. You might develop a negative attitude toward the United States if your only perception of it is a foreign aircraft buzzing over your house that occasionally fires missiles into your neighborhood. In Pakistan, where 95 percent of U.S. drone strikes have occurred, people familiar with them overwhelmingly express disapproval (97 percent, according to Pew polling from June) and believe they kill too many innocent people (94 percent). Drone strikes may well contribute to the extremism and terrorism the United States seeks to deter. U.S. drone use has also lowered the threshold for the use of lethal force in foreign countries. Would we fire so many missiles into Pakistan, Yemen and Somalia if doing so required sending U.S. troops into harm’s way? Our drone policy must be guided by more than capability. It must be guided by respect for noncombatants, necessity and urgency. It is Congress’s responsibility to exercise oversight and craft policies that govern the use of lethal force. But lawmakers have yet to hold a single hearing examining U.S. drone policy. Any rules must provide adequate transparency, respect the rule of law, conform with international standards and prudently advance U.S. national security over the long term. In codifying a legal framework to guide executive action on drone strikes, Congress should consider these steps: First, we must do more to avoid innocent civilian casualties. The Geneva Conventions, which have governed the rules of war since World War II, distinguish between combatants and noncombatants in the conduct of hostilities and state that civilian casualties are not acceptable except in cases of demonstrated military necessity. This is the standard we must follow. Second, Congress must require an independent judicial review of any executive-branch “kill list.” The U.S. legal system is based on the principle that one branch of government should not have absolute authority. Congress should object to that concentration of power, especially when it may be used against U.S. citizens. A process of judicial review would diffuse executive power and provide a mechanism for greater oversight. Third, the United States must collaborate with the international community to develop a widely accepted set of legal standards. No country — not even our allies — accepts the U.S. legal justification for targeted killings. Our justification must rest on the concept of self-defense, which would allow the United States to protect itself against any imminent threat. Any broader criteria would create the opportunity for abuse and set a dangerous standard for other countries to follow, which could harm long-term U.S. security interests. The United States will not always enjoy a monopoly on sophisticated drone technology. The Iranian-made drone that Hezbollah recently flew over Israel should compel us to think about the far-reaching implications of current policy. A just, internationally accepted protocol on the use of drones in warfare is needed. By creating and abiding by our own set of reasonable standards, the United States will demonstrate to the world that we believe in the rule of law.

### 1AC Plan

**Plan: The congress of the United States federal government should substantially increase statutory restrictions on the war powers authority of the President of the United States by establishing a federal court with jurisdiction over targeted killing orders.**

### 1AC Solvency

#### Drone courts limit the President’s ability to strike

**Rushforth 12** (Elinor June Rushforth, J.D. candidate, University of Arizona, 2012, Fall, 2012 Arizona Journal of International and Comparative Law 29 Ariz. J. Int'l & Comp. Law 623, Note: There's An App For That: Implications Of Armed Drone Attacks And Personality Strikes By The United States Against Non-Citizens, 2004-2012)

Because of staunch political and military support for the drone program, it is unlikely that these attacks will diminish in the near future. If that is indeed the case, it is more important than ever that the Executive, in conjunction with Congress and the judiciary, set out clear standards for these lethal operations. The nation has faced these difficult questions before and “[i]n keeping with the purpose and the pragmatism of Mathews v. Eldridge, this investigation should be as thorough, independent, and public as possible without damage to national security.”189 Specifically, a heightened and public standard of review is needed for the CIA drone program as the military operates within its own chain of command. There should be an open standard of selection that clearly delineates why an individual becomes a target, how long they may be targeted, and who reviews the information about the target. Though these standards are likely to remain classified based on national security concerns, there has been success in integrating national security cases into the judicial process; for example, in the Guantanamo detainee cases.190 A federal court or panel should also be created, similar to Foreign Intelligence Surveillance Courts that will aid in the targeting process and issue a warrant for a strike.191Because of the U.S. commitment to the rule of law, any lethal program not operated by a military branch should be subject to a more public and judicially overseen review. The CIA needs to define exactly who they are searching for; whether it is the “anyone who aids and abets” terrorism level of involvement or a mere scintilla of suspicion. By defining whom they are targeting, a level of credence will be lent to the program. Further, the United States should take a page out of Israel’s playbook and declare that there must be actionable intelligence against the proposed target that identifies “the target as a person actively involved in acts of terrorism.”192 There must be an actual plan of attack (time, place, means) in place by that individual that is known through the intelligence;193 this will lessen the likelihood of opportunistic targeting that risks error and miscalculation. Further, an assessment of the distinction and proportionality of the attack should be tied into the decision to attack,194 as well as a reflection on potential domestic political consequences195 and foreign political blowback from an attack.196 Then, supervisors should review a package of information about the proposed target and decide if the intelligence is good enough to continue up the chain of command. Due to the Executive’s reassurances, a review process similar to this is already in place, however, without sacrificing national security interests this standard of selection should be made more public. Though the decision to attack terrorist organizations, and those providing material support, has already been made,197 public support for the tactics used in the Overseas Contingency Operations should help guide the executive and legislative game plan. The next level of review should be a statutorily created court that is the last stop on the targeted killing process. Though there may be some grumbling among judges and politicians about overextended courts and full dockets, national security concerns and the risk of lethal mistakes should outweigh reluctance to introduce an important check on targeted killing. The President, and perhaps Congress, could also be reluctant to allow courts into what they deem a core executive function.198 Attorney General Eric Holder gave the public another piece of the Obama administration’s targeted killing model when he claimed that the Constitution “guarantees due process, not judicial process” and that “due process takes into account the realities of combat.”199 This signals to the public that the Obama administration will remain wary of any encroachment and that the imposition of judicial process on targeted killing would be fought. However, these reviewing courts could develop in several ways. As suggested by Murphy and Radsan, a court mirroring the Foreign Intelligence Surveillance Court (FISC) is not outside the realm of possibility.200 Another option is the expansion of the jurisdiction of the current FISCs. The judges and staff already have the necessary security mechanisms in place to handle sensitive matters, and there would be less financial and political blowback from expanding an existing framework. Perhaps the most complex suggestion is the creation of a new national security court to deal exclusively with cases having national security implications. Such a court could address not only drone strikes, but the whole plethora of emerging national security and terrorism related concerns. For example, Guantanamo detainee cases could be tried in the national security court rather than in a military commission, cases of trafficking, and materially supporting terrorist groups could be tried there instead of in Article III courts. A new national security court, though logistically far off, could be the judicial response to the legislative expansion of the homeland security field (e.g. the creation of the Department of Homeland Security). One of the most looming challenges to creating this kind of court, especially in the case of targeted killings and drone strikes, is the lack of judicial precedent on such matters.201 Arguably, some of the preceding suggestions face logistical, political, and practical difficulties, but judicial action in such critical matters to U.S. national security is paramount. Regardless of the type of judicial mechanism used to ensure the lawfulness of a targeted killing, the Chief Justice of the U.S. Supreme Court should designate district court judges from every region where CIA drone operators are stationed, with several in the District of Columbia. These judges will preside over courts with jurisdiction to "hear applications and grant orders," whose job would be approving or rejecting targeted killing warrants. n202 The hearings will be held expeditiously and records will be kept according to security measures "established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence." n203 The application for an order approving a targeted killing will be submitted by a designated CIA official, or DOJ official in conjunction with the CIA investigative team, "in writing upon oath or affirmation" after review and [\*654] approval by the supervisor of the drone program at a given outpost. n204 This application will include all necessary and pertinent information needed for the judge's decision. n205 This information shall include who the target is (if known), what action or information led to this targeting, any informant information, imminent threat analysis, known links to terrorists or terrorist organization, and a distinction and proportionality analysis (if available). These warrants could be made before locating a target. Once a suitable application has been assembled, the designated official may submit the application and receive a warrant that would be good for a specific period. If the target is not found within that period, a renewal request may be made by adding an addendum to the above described application with any new and pertinent information. n206 An expedited process would also apply to newly acquired targets by which the CIA official could make an emergency application. Further, an authorization made by the President, through the Attorney General, could bypass this application process in appropriate exigent circumstances. There would also be a semi-annual report to Congress from CIA officials on targeted killing application procedures. An act creating this court would also address sanctions and liabilities, likely monetary fines or professional sanctions, of CIA and DOJ officials who do not comply with the procedures. Although any judicial action that encroaches on the Executive's autonomy in the national security realm will likely face pushback, judicial review is an important check on the Executive's power. To assuage the separation of powers issues that could arise in the creation of this court on targeted killing and drone strike operations, the legislative and judicial branches will have to ensure they are not unconstitutionally restricting the President's authority. V. CONCLUSION Simply put, this paper has created more questions than it has answered given the subject's cloaked and secret nature. However, it has also demonstrated that for the targeted killing and drone program to continue unchecked without a more public standard of target selection and judicial involvement is not prudent. While perhaps not in violation of international law or the AUMF, given that "nothing in the language of Article 51 restricts the right to engage in self-defense actions to circumstances of armed attacks by a 'state,'" n207 the amorphous nature of terrorist networks will remain a problem for those who continue to rely on traditional war-fighting paradigms. Furthermore, a workable definition of "terrorism" is a necessity given the inter-state and inter-agency nature of this program and the United States' prohibition on the use of assassination. By [\*655] determining that terrorist leaders and their affiliates are not technically within E.O. 12,333's definition, the Administration is ignoring the possibility that eventually the United States may face the reality, however clichéd, that "one man's terrorist is another man's freedom fighter." n208 Again, asymmetric warfare requires thinking outside the box of traditional wartime and law enforcement paradigms. Most importantly, this paper sought to find ways in which the United States could identify legitimate targets and a role for the judicial system in that process. A standard of selection should include at the very least: (1) a workable definition of terrorist/terrorism and a determination that the target fits that definition; (2) a determination that the target is engaged in terrorist acts; (3) that the target has an actual plan of attack in place determined through known intelligence; (4) an analysis of the distinction and proportionality of the attack; (5) the inability to capture the target; and (6) and a blowback analysis. After this information has been compiled, it should be reviewed and sent up the chain of command. Without ignoring the realities of real-time, actionable intelligence, the information should then be reviewed by a statutorily created court. Though an undoubtedly complex solution, the creation of a court designed to deal with national security issues is the answer to pressing legal issues surrounding targeted killing. President Obama's confirmation that drones are used in the Federally Administered Tribal Areas to go "after al-Qaeda suspects who are up in very tough terrain along the border between Afghanistan and Pakistan" and that "for us to be able to get them in another way would involve probably a lot more intrusive military action than the one we are already engaging in" ignites foreign sovereignty questions that remain unanswered. n209 Does the United States require permission from a sovereign government before targeting a person in its territory? What if the United States fails to get that permission? What if the region in question does not have a functioning government? The United States faces an increasing number of threats worldwide and these international questions must be answered. An expert in the field, Peter Singer, analyzes the impact on the drone pilot, the autonomous weapons systems and their capacity, and the danger of going to war when it is too easy." n210 He discusses the morality of "good" wars and the fear that "without public debate and support and without risking troops, the decision to go to war becomes the act of a nation that doesn't give a damn." n211 With so much unknown about the consequences of robotic warfare, is it responsible to expand its use? And finally, determining the real risk and cost to the foreign civilian population should be a top priority whenever lives may be lost. The risks that civilian populations may turn against the counter-insurgency efforts of the United States are too great to ignore the human concerns of technological advancement. Despite the importance of reflection on the meaning of those [\*656] advances, we remain woefully unprepared to answer moral and legal questions surrounding our advancements. 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#### Judicial control increases accuracy of target selection and reduces mistaken destruction

**Murphy and Radsan, 9** (Richard Murphy is the AT&T Professor of Law, Texas Tech University School of Law. Afsheen John Radsan is a Professor, William Mitchell College of Law. He was assistant general counsel at the Central Intelligence Agency from 2002-2004. “Due Process and Targeted Killing of Terrorists” Cardozo Law Review, Vol. 31, p. 405, 2009 William Mitchell Legal Studies Research Paper No. 126 Texas Tech Law School Research Paper No. 2010-06. March 1, 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1349357)

Where the paradigm of war applies, the executive dominates in deciding who lives or dies. Justice O‘Connor nonetheless claimed in Hamdi that the war on terror does not give the executive a ―blank check‖ to do as it pleases in the name of security.189 If one accepts this premise, then the question becomes how to control the executive‘s war power without unduly hampering it. Under a Mathews-style approach, to determine whether due process demands a particular procedural control over targeted killing, one should: (a) identify the range of legitimate interests that the procedure might protect; (b) assess the degree to which adoption of the procedure actually would protect these interests; and (c) weigh these marginal benefits against the damage the procedure may cause other legitimate interests.190 Judicial control of targeted killing could increase the accuracy of target selection, reducing the danger of mistaken or illegal destruction of lives, limbs, and property. Independent judges who double-check targeting decisions could catch errors and cause executive officials to avoid making them in the first place. More broadly, judicial control of targeted killing could serve the interests of all people—targets and non-targets—in blocking the executive from exercising an unaccountable, secret power to kill.191 If possible, we should avoid a world in which the CIA or other executive officials have unreviewable power to decide who gets to live and who dies in the name of a shadow war that might never end. Everyone has a cognizable interest in stopping a slide into tyranny.

#### Statority restrictions are the best way to constrain the president

**Huq 12** (Aziz Z. Huq 12, Assistant Professor of Law, University of Chicago Law School, "Binding the Executive (by Law or by Politics)", May 25, www.law.uchicago.edu/files/file/400-ah-binding.pdf)

There is some merit to this story. But in my view it again understates the observed effect of positive legal constraints on executive discretion. Recent scholarship, for example, has documented congressional influence on the shape of military policy via framework statutes . This work suggests Congress influences executive actions during military engagements through hearings and legislative proposals. 75 Consistent with this account, two legal scholars have recently offered a revisionist history of constitutional war powers in which “ Congress has been an active participant in setting the terms of battle, ” in part because “ congressional willingness to enact [ ] laws has only increased ” over time. 76 In the last decade, Congress has often taken the initiative on national security, such as enacting new statutes on military commissions in 2006 and 2009. 77 Other recent landmark security reforms, such as a 2004 statute restr ucturing the intelligence community, 78 also had only lukewarm Oval Office support. 79 Measured against a baseline of threshold executive preferences then , Congress has achieved nontrivial successes in shaping national security policy and institutions through both legislated and nonlegislated actions even in the teeth of White House opposition. 80¶ The same point emerges more forcefully from a review of our “ fiscal constitution. ” 81 Article I, § 8 of the Constitution vests Congress with power to “ lay and collect Tax es ” and to “ borrow Money on the credit of the United States, ” while Article I, § 9 bars federal funds from being spent except “ in Consequence of Appropriations made by Law. ” 82 Congress has enacted several framework statutes to effectuate the “ powerful limitations ” implicit in these clauses. 83 The resulting law prevents the President from repudiating past policy commitments (as Skowronek suggests) as well as imposing barriers to novel executive initiatives that want for statutory authorization . 84¶ Three statutes merit attention here. First, the Miscellaneous Receipts Act of 1849 85 requires that all funds “ received from customs, from the sales of public lands, and from all miscellaneous sources, for the use of the United States, shall be paid . . . into the treasur y of the United States. ” 86 It ensures that the executive cannot establish off - balance - sheet revenue streams as a basis for independent policy making. Second, the Anti - Deficiency Act, 87 which was first enacted in 1870 and then amended in 190 6 , 88 had the effect of cementing the principle of congressional appropriations control. 89 With civil and criminal sanctions, it prohibits “ unfunded monetary liabilities beyond the amounts Congress has appropriated, ” and bars “ the borrowing of funds by federal a gencies . . . in anticipation of future appropriations. ” 90 Finally, the Congressional Budget and Impoundment Control Act of 1974 91 (Impoundment Act) channels presidential authority to decline to expend appropriated funds. 92 It responded to President Nixon ’ s e xpansive use of impoundment. 93 Congress had no trouble rejecting Nixon ’ s claims despite a long history of such impoundments. 94 While the Miscellaneous Receipts Act and the Anti - Deficiency Act appear to have succeeded, the Impoundment Act has a more mixed rec ord. While the Supreme Court endorsed legislative constraints on presidential impoundment, 95 President Gerald Ford increased impoundments through creative interpretations of the law. 96 But two decades later, Congress concluded the executive had too little di scretionary spending authority and expanded it by statute. 97 ¶ Moreover, statutory regulation of the purse furnishes a tool for judicial influence over the executive. Judicial action in turn magnifies congressional influence. A recent study of taxation litiga tion finds evidence that the federal courts interpret fiscal laws in a more pro - government fashion during military engagements supported by both Congress and the White House than in the course of unilateral executive military entanglements. 98 Although the r esulting effect is hard to quantify, the basic finding of the study suggests that fiscal statutes trench on executive discretion not only directly, but also indirectly via judicially created incentives to act only with legislative endorsement. 99¶ To be sure, a persistent difficulty in debates about congressional efficacy, and with some of the claims advanced in The Executive Unbound , is that it is unclear what baseline should be used to evaluate the outcomes of executive - congressional struggles. What counts, that is, as a “win” and for whom? What, for example, is an appropriate level of legislative control over expenditures? In the examples developed in this Part , I have underscored instances in which a law has been passed that a President disagrees with in substantial part, and where there are divergent legislative preferences reflected in the ultimate enactment. I do not mean to suggest, however, that there are not alternative ways of delineating a baseline for analysis. 100¶ In sum, there is strong evidence that law and lawmaking institutions have played a more robust role in delimiting the bounds of executive discretion over the federal sword and the federal purse than The Executive Unbound intimates. Congress in fact impedes presidential agendas. The White House in practice cannot use presidential administration as a perfect substitute. Legislation implementing congressional control of the purse is also a significant, if imperfect, tool of legislative influence on the ground. This is true even when Presidents influence the budgetary agenda 101 and agencies jawbone their legislative masters into new funding. 102 If Congress and statutory frameworks seem to have such nontrivial effects on the executive ’ s choice set , this at minimum i mplies that the conditions in which law matters are more extensive than The Executive Unbound suggests and that an account of executive discretion that omits law and legal institutions will be incomplete .

# 2AC

## Solvency

### 2AC A?T: Circumvention

#### All relevant officials will comply with the plan

**Goldsmith ’12** [Jack Goldsmith is a Harvard Law professor and a member of the Hoover Task Force on National Security and Law. He served in the Bush administration as assistant attorney general in charge of the Office of Legal Counsel, “Fire When Ready,” 3-19-12, <http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready?page=full>, March 19, 2012]

When the Obama administration made the decision to kill Awlaki, it did not rely on the president's constitutional authority as commander in chief. Rather, it relied on authority that Congress gave it, and on guidance from the courts. In September 2001, Congress authorized the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines" were responsible for 9/11. Whatever else the term "force" may mean, it clearly includes authorization from Congress to kill enemy soldiers who fall within the statute. Unlike some prior authorizations of force in American history, the 2001 authorization contains no geographical limitation. Moreover, the Supreme Court, in the detention context, has ruled that the "force" authorized by Congress in the 2001 law could be applied against a U.S. citizen. Lower courts have interpreted the same law to include within its scope co-belligerent enemy forces "associated" with al Qaeda who are "engaged in hostilities against the United States."¶ International law is also relevant to targeting decisions. Targeted killings are lawful under the international laws of war only if they comply with basic requirements like distinguishing enemy soldiers from civilians and avoiding excessive collateral damage. And they are consistent with the U.N. Charter's ban on using force "against the territorial integrity or political independence of any state" only if the targeted nation consents or the United States properly acts in self-defense. There are reports that Yemen consented to the strike on Awlaki. But even if it did not, the strike would still have been consistent with the Charter to the extent that Yemen was "unwilling or unable" to suppress the threat he posed. This standard is not settled in international law, but it is sufficiently grounded in law and practice that no American president charged with keeping the country safe could refuse to exercise international self-defense rights when presented with a concrete security threat in this situation. The "unwilling or unable" standard was almost certainly the one the United States relied on in the Osama bin Laden raid inside Pakistan.¶ These legal principles are backed by a system of internal and external checks and balances that, in this context, are without equal in American wartime history. Until a few decades ago, targeting decisions were not subject to meaningful legal scrutiny. Presidents or commanders typically ordered a strike based on effectiveness and, sometimes, moral or political considerations. President Harry Truman, for example, received a great deal of advice about whether and how to drop the atomic bomb on Hiroshima and Nagasaki, but it didn't come from lawyers advising him on the laws of war. Today, all major military targets are vetted by a bevy of executive branch lawyers who can and do rule out operations and targets on legal grounds, and by commanders who are more sensitive than ever to legal considerations and collateral damage. Decisions to kill high-level terrorists outside of Afghanistan (like Awlaki) are considered and approved by lawyers and policymakers at the highest levels of the government.¶ The lawyers and policymakers are guided in part by Supreme Court and lower court decisions that, in the context of reviewing military detentions, have interpreted the meaning, scope, and limits of the congressional authorization to use force. The executive branch also has tools at its disposal -- an elaborate intelligence bureaucracy, precision weapons, and computer targeting algorithms -- to minimize collateral damage in war like never before (indeed, these tools sometimes force an operation or target to be avoided or aborted). We do not know the full details of targeting decisions, but we do know -- from administration speeches and press coverage of internal deliberations -- that Obama administration policymakers and lawyers seriously grapple with the legal limits of their authorities, construe them narrowly to meet the case at hand, and are constrained in who they target.¶ Congress too is involved. The executive branch only targets enemy forces that fall within the parameters set by Congress in 2001. All major targeting operations conducted as "covert actions" must, under laws in place before 9/11, be conducted in conformity with presidential "findings" and reported to congressional intelligence committees. These committees lack a formal veto, but they have many ways to push back against covert actions they dislike. House Minority Leader Nancy Pelosi is said to have scaled back a covert operation in 2004 to influence the outcome of elections in Iraq by complaining to the White House, while the House Intelligence Committee reportedly persuaded the Obama administration not to arm the Libyan rebels in 2011. Operations by the U.S. military are also reported to and scrutinized by congressional armed services committees through less formal means.¶ More broadly, Congress as a whole is well aware of the president's targeted killing program, and many congressional committees have held public hearings on targeted killing in the last few years. And yet, in contrast to its actions to tighten the president's traditional military authorities in other contexts (like interrogation, military detention, and military commissions), Congress has not tightened the president's power to target. Instead, Congress chose to reaffirm the 2001 authorization on which the president has rested his targeting practices in December 2011, and to bless the judicial construction of the statute that extended the president's authorities to co-belligerents like Awlaki, all without a word about limitations on targeted killing. Congress did this against the backdrop of many public reports that the 2001 statute was relied on to kill Awlaki.¶ The targeted killing of Awlaki was also subject to a limited but important form of judicial scrutiny. In 2010, the ACLU and the Center for Constitutional Rights brought a novel lawsuit that sought to enjoin the president from killing Awlaki. Judge John Bates of the U.S. District Court for the District of Columbia dismissed the case, in part because of "the impropriety of judicial review." Bates explained that the Constitution places "responsibility for the military decisions at issue in this case 'in the hands of those who are best positioned and most politically accountable for making them'" -- Congress and the president. This ruling, based on extensive precedent, is almost certainly right. Commanders in chief have always had discretion over targeting decisions in wars authorized by Congress. No court has ever suggested that judicial approval for these decisions was appropriate or necessary. This is so even though the U.S. military killed U.S. citizens in the Civil War and most likely in World War II as well, when some fought in the Italian and German armies. The Supreme Court itself has ruled -- in the context of military commissions and military detention -- that U.S. citizenship does not by itself preclude the commander in chief from exercising traditional forms of military force.¶ This is the background against which to assess Attorney General Holder's claim that the Constitution "guarantees due process, not judicial process." Holder was referring to the Fifth Amendment's prohibition on taking life without due process, a further legal limitation on the targeted killing of U.S. citizens. Critics belittled Holder for distinguishing due process from judicial process, but Holder is right. The Supreme Court has ruled in many contexts that due process does not always demand judicial scrutiny. It has also ruled that the type and extent of process due depends on the nature and circumstances of the deprivation, including a balance between the interests of the individual and the government.¶ A U.S. citizen's interest is obviously at its height when he is targeted with lethal force. The government's interest is at its height when it seeks to incapacitate a threatening enemy in a congressionally sanctioned war. Holder only defended the wartime authority to kill a U.S. citizen who presents "an imminent threat of violent attack against the United States" and for whom "capture is not feasible," and only when operations are "conducted in a manner consistent with applicable law of war principles." In these circumstances, he claimed, high-level executive deliberation, guided by judicial precedent and subject to congressional oversight, is all the process that is due.¶ Is Holder right? It is hard to say for sure because the due process clause has never before been thought relevant to wartime presidential targeting decisions. The system described above goes far beyond any process given to any target in any war in American history. Awlaki was not given a formal notice and opportunity to defend himself in court, but war does not permit such formal practices. One predicate for the killing was that Awlaki was in hiding -- beyond legal process or the reasonable possibility of capture -- and plotting and directing attacks on the United States. The U.S. government made clear that if Awlaki "were to surrender or otherwise present himself to the proper authorities in a peaceful and appropriate manner, legal principles with which the United States has traditionally and uniformly complied would prohibit using lethal force or other violence against him in such circumstances." And as Judge Bates noted, while Awlaki's placement on a targeting list was publicly disclosed in January 2010, Awlaki publicly disclaimed any intention of challenging his status or turning himself in.¶ It is hard to see how the executive branch could have taken its constitutional responsibilities more seriously while honoring its obligation to keep the nation safe. In light of Judge Bates's ruling and the analysis on which it rests, and until Congress thinks the president's approach to targeting requires change, the current system -- executive deliberation guided by judicial precedent and subject to congressional oversight -- almost certainly satisfies any constitutional requirement. In any event, it belies the claim that the president is not subject to checks and balances.¶ This conclusion will not assuage critics like Andrew Rosenthal who insist that "the president must receive judicial input before ordering the death of an American citizen." What Rosenthal and other krytocrats have not explained is how the Constitution permits, much less demands, such ex ante judicial input. These critics have not grappled with Judge Bates's analysis. Nor have they explained how a presidential request for judicial approval to target and kill a terrorist suspect is consistent with the constitutional limitation of judicial power to cases and controversies between parties in court.¶ It is also unclear whether judges possess the competence to assess and quickly act upon military targets, or whether they would welcome the responsibility for targeting decisions. Perhaps Congress could devise a lawful and effective scheme of judicial or administrative review of the president's targeting decisions. But it has shown no inclination to do so, and it appears to support the current arrangement.

### T- restrict

#### We meet- we prohibit obamas ability to act without judicial review

#### Restriction is limitation, NOT prohibition

CAC 12,COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, COUNTY OF LOS ANGELES, Plaintiff and Respondent, v. ALTERNATIVE MEDICINAL CANNABIS COLLECTIVE et al., Defendants and Appellants, DIVISION ONE, 207 Cal. App. 4th 601; 143 Cal. Rptr. 3d 716; 2012 Cal. App. LEXIS 772

We disagree with County that in using the phrases “further restrict the location or establishment” and “regulate the location or establishment” in [\*615] section 11362.768, subdivisions (f) and (g), the Legislature intended to authorize local governments to ban all medical marijuana dispensaries that are otherwise “authorized by law to possess, cultivate, or distribute medical marijuana” (§ 11362.768, subd. (e) [stating scope of section's application]); the Legislature did not use the words “ban” or “prohibit.” Yet County cites dictionary definitions of “regulate” (to govern or direct according to rule or law); “regulation” (controlling by rule or restriction; a rule or order that has legal force); “restriction” (a limitation or qualification, including on the use of property); “establishment” (the act of establishing or state or condition of being established); “ban” (to prohibit); and “prohibit” (to forbid by law; to prevent or hinder) to attempt to support its interpretation. County then concludes that “the ordinary meaning [\*\*\*23] of the terms, ‘restriction,’ ‘regulate,’ and ‘regulation’ are consistent with a ban or prohibition against the opening or starting up or continued operation of [a medical marijuana dispensary] storefront business.” We disagree.¶CA(9)(9) The ordinary meanings of “restrict” and “regulate” suggest a degree of control or restriction falling short of “banning,” “prohibiting,” “forbidding,” or “preventing.” Had the Legislature intended to include an outright ban or prohibition among the local regulatory powers authorized in section 11362.768, subdivisions (f) and (g), it would have said so. Attributing the usual and ordinary meanings to the words used in section 11362.768, subdivisions (f) and (g), construing the words in context, attempting to harmonize subdivisions (f) and (g) with section 11362.775 and with the purpose of California's medical marijuana [\*\*727] statutory program, and bearing in mind the intent of the electorate and the Legislature in enacting the CUA and the MMP, we conclude that HN21Go to this Headnote in the case.the phrases “further restrict the location or establishment” and “regulate the location or establishment” in section 11362.768, subdivisions (f) and (g) do not authorize a per se ban at the local level. The Legislature [\*\*\*24] decided in section 11362.775 to insulate medical marijuana collectives and cooperatives from nuisance prosecution “solely on the basis” that they engage in a dispensary function. To interpret the phrases “further restrict the location or establishment” and “regulate the location or establishment” to mean that local governments may impose a blanket nuisance prohibition against dispensaries would frustrate both the Legislature's intent to “[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects” and “[p]romote uniform and consistent application of the [CUA] among the counties within the state” and the electorate's intent to “ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes” and “encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.”

#### Prefer our interpritaiton:

#### A. theres is overlimiting- there would only be 4 affs

#### B. substiantial and XO check all limits claims.

#### “In” means within a set of limits

Dictionary.Com – No specific Date Included

Updated in 2013 but no specific date given, http://dictionary.reference.com/browse/in

In [in] preposition, adverb, adjective, noun, verb, inned, in·ning.¶ preposition¶ 1.¶ (used to indicate inclusion within space, a place, or limits): walking in the park.¶ 2.¶ (used to indicate inclusion within something abstract or immaterial): in politics; in the autumn.¶ 3.¶ (used to indicate inclusion within or occurrence during a period or limit of time): in ancient times; a task done in ten minutes.¶ 4.¶ (used to indicate limitation or qualification, as of situation, condition, relation, manner, action, etc.): to speak in a whisper; to be similar in appearance.¶ 5.¶ (used to indicate means): sketched in ink; spoken in French.¶ 6.¶ (used to indicate motion or direction from outside to a point within) into: Let's go in the house.¶ 7.¶ (used to indicate transition from one state to another): to break in half.¶ 8.¶ (used to indicate object or purpose): speaking in honor of the event.

#### And, their interpretation is terrible and arbitrary Restrictions and regulations can both be prohibitions or limitations—no brightline to their interp

Supreme Court of Delaware 83 (THE MAYOR AND COUNCIL OF NEW CASTLE, a municipal corporation of the State of Delaware, Plaintiff Below, Appellant, v. ROLLINS OUTDOOR ADVERTISING, INC., Defendant Below, Appellee, No. 155, 1983, 475 A.2d 355; 1984 Del. LEXIS 324, November 21, 1983, Submitted, April 2, 1984, Decided)

The term "restrict" is defined as: To restrain within bounds; to limit; [\*\*9] to confine. Id. at 1182. The Supreme Court of the United States has recognized that HN5the term "regulate" necessarily entails a possible prohibition of some kind. That Court has stated: "It is an oft-repeated truism that every regulation necessarily speaks as a prohibition." Goldblatt v. Hempstead, 369 U.S. 590, 592, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962). The Supreme Court of Massachusetts in reviewing a statute containing language similar to that found in 22 Del.C. § 301 (which empowered municipalities to "regulate and restrict" outdoor advertising on public ways, in public places, and on private property within public view) held that the statute in question authorized a town to provide, through amortization, for the elimination of nonconforming off-site signs five years from the time the ordinance was enacted. The court held that the Massachusetts enabling act: Conferred on the Legislature plenary power to regulate and restrict outdoor advertising . . . . Although the word "prohibit" was omitted from [the enabling act], it was recognized that the unlimited and unqualified power to regulate and restrict can be, for practical purposes, the power to prohibit [\*\*10] "because under such power the thing may be so far restricted that there is nothing left of of it." (Citations omitted.) The court continued its discussions of the two terms by stating: The distinction between regulation and outright prohibition is often considered to be a narrow one: "that regulation may take the character of prohibition, in proper cases, is well established by the decisions of this court" . . . quoting from United States v. Hill, 248 U.S. 420, 425, 63 L. Ed. 337, 39 S. Ct. 143 (1919). John Donnelly and Sons, Inc. v. Outdoor Advertising Board, Mass. Supr., 369 Mass. 206, 339 N.E.2d 709 (1975). We hold that, through Article II, Section 25 of the Delaware Constitution and 22 Del.C. § 301, the General Assembly has authorized New Castle to terminate nonconforming off-site signs upon reasonable notice, that is, by what has come to be known as amortization. We hold that the power to "regulate and restrict" as such term applies to zoning matters includes the power, upon reasonable notice, to prohibit some of those uses already in existence.

#### Defult to resonabiliyty- competing interpretations only create a race to the bottom.

### Top shelf

#### CP is a rubber stamp

Ilya Somin 13, Professor of Law at George Mason University, “Hearing on ‘Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing’: Testimony before the United States Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights”, April 23, http://www.law.gmu.edu/assets/files/faculty/Somin\_DroneWarfare\_April2013.pdf

But any internal executive process has the flaw that it could always be overriden by the president, and possibly other high-ranking executive branch officials. Moreover, lower- level executive officials might be reluctant to veto drone strikes supported by their superiors, either out of careerist concerns, or because administration officials ar e naturally likely to share the ideological and policy priorities of the president. An external check on targeting reduces such risks. External review might also enhance the credibility of the target-selection process with informed opinion both in the United States and abroad.

#### Counter plan doesn’t solve and links to politics- the president will overreach his power

Eric A. Posner + and Adrian Vermeule ++, + Kirkland & Ellis Professor of Law, The University of Chicago Law School, ++ Professor of Law, Harvard Law School. Copyright (c) 2007 University of Chicago, University of Chicago Law Review Summer, 2007, 74 U. Chi. L. Rev. 865

With discretion comes distrust. n2 Voters and legislators grant the executive discretion, through action or inaction, and increase executive discretion during emergencies, because they believe that the benefits of doing so outweigh the risks of executive abuse. n3 By the same token, political actors will attempt to constrain the executive, or will simply fail to grant powers they otherwise would have preferred to grant, where they believe that the risks and harms of abuses outweigh any benefits in security or other goods. The fear of executive abuse arises from many sources, but the basic problem is uncertainty about the executive's motivations. The executive may, for example, be a power maximizer, intent on using legal or factual discretion to harm political opponents and cement his political position, or that of his political party; or he may be an empire builder, interested in expanding his turf at the expense of other institutions.

Where the executive is indeed ill motivated in any of these ways, constraining his discretion (more than the voters would otherwise choose) may be sensible. But the executive may not be ill motivated at all. Where the executive is in fact a faithful agent, using his increased discretion to promote the public good according to whatever conception of the public good voters hold, then constraints on executive discretion are all cost and no benefit. Voters, legislators, and judges know that different executive officials have different motivations. Not all presidents are power maximizers or empire builders. n4 Of course, the executive need not be pure of heart; his devotion to the public interest may in turn be based on concern for the judgment of history. But so long as that motivation makes him a faithful agent of the principal(s), he counts as well motivated.¶ The problem, however, is that the public has no simple way to know which type of executive it is dealing with. An ill-motivated executive will just mimic the statements of a well-motivated one, saying [\*867] the right things and offering plausible rationales for policies that outsiders, lacking crucial information, find difficult to evaluate -- policies that turn out not to be in the public interest. The ability of the ill-motivated executive to mimic the public-spirited executive's statements gives rise to the executive's dilemma of credibility: the well-motivated executive has no simple way to identify himself as such. Distrust causes voters (and the legislators they elect) to withhold discretion that they would like to grant and that the well-motivated executive would like to receive. Of course, the ill-motivated executive might also want discretion. The problem is that voters who would want to give discretion (only) to the well-motivated executive may choose not to do so, because they are not sure what type he actually is. The risk that the public and legislators will fail to trust a well-motivated president is just as serious as the risk that they will trust an ill-motivated president, yet legal scholars have felled forests on the second topic while largely neglecting the first. n5¶ Our aim in this Article is to identify this dilemma of credibility that afflicts the well-motivated executive and to propose mechanisms for ameliorating it. We focus on emergencies and national security but cast the analysis within a broader framework. Our basic claim is that the credibility dilemma can be addressed by executive signaling. Without any new constitutional amendments, statutes, or legislative action, law and executive practice already contain resources to allow a well-motivated executive to send a credible signal of his motivations, committing to use increased discretion in public-spirited ways. By tying [\*868] policies to institutional mechanisms that impose heavier costs on ill-motivated actors than on well-motivated ones, the well-motivated executive can credibly signal his good intentions and thus persuade voters that his policies are those that voters would want if fully informed. We focus particularly on mechanisms of executive self-binding that send a signal of credibility by committing presidents to actions or policies that only a well-motivated president would adopt.¶ The discussion is structured as follows. Part I lays out examples of the credibility dilemma, both historical and recent. Part II analyzes the credibility dilemma through the lens of principal-agent theory. Part III examines the attempted Madisonian solution to the credibility dilemma and explains why it is a failure, for the most part. Part IV suggests a series of mechanisms for credibly demonstrating the executive's good intentions. These mechanisms include independent commissions within the executive branch; bipartisanship in appointments to the executive branch, or more broadly the creation of domestic coalitions of the willing; the related tactic of counterpartisanship, or choosing policies that run against the preferences of the president's own party; commitments to multilateral action in foreign policy; increasing the transparency of the executive's decisionmaking processes; and a regime of strict liability for executive abuses. Not all of these mechanisms succeed, and some of them succeed under some conditions but fail under others.¶ Credibility is but one good that trades off against other goods, even from the standpoint of the well-motivated executive. The main cost of credibility is that it diminishes the president's control over policymaking. In Part IV, we attempt to identify the conditions under which one or the other mechanism can produce credibility benefits greater than the resulting costs.¶ I. Examples¶ Presidents always have some credibility, at least at the start of their term. People do not vote for candidates whom they do not believe, and so the winning candidate brings to the office some amount of credibility, which he may further enhance over time by keeping his promises or making predictions that are proven correct by events. Having built up capital, some presidents find it useful to engage in deception, and some have gotten away with it, at least in the short term. Prominent examples include FDR's claim during the 1940 election that he was determined to keep the United States out of war; n6 Eisenhower's [\*869] denial that U-2 spy planes overflew the Soviet Union; n7 (probably) Johnson's description of the Gulf of Tonkin incident; n8 Nixon's statements about military action relating to Cambodia; n9 (probably) Reagan's claim that he was unaware of the arms-for-hostages scheme; n10 and Clinton's denial that he had had a sexual relationship with Monica Lewinsky. n11 But deception is potentially a costly strategy, because revelation of the deception damages the president's credibility, making it more difficult for him to achieve his next set of goals.¶ For this reason, we focus on historical cases where the president avoids deception, where in fact he makes a true or roughly true statement about circumstances that the public cannot directly evaluate, but has trouble persuading the public to believe him. In these cases, the president needs to use mechanisms that enhance his credibility or, if he cannot, finds himself unable to act. We offer examples to illustrate the credibility dilemma, to illustrate a range of solutions to the dilemma -- some successful, some otherwise -- and to show that the mechanisms we will propose in Part IV have historical analogues or precedents.¶ A. FDR: The Nazi Threat¶ Franklin Delano Roosevelt understood the threat posed by Nazi Germany to the United States' long-term interests long before the U.S. public did. The public was preoccupied with the Great Depression and had powerful isolationist representatives in Congress. Because of popular sentiment, FDR could not commit U.S. military assistance to Britain and France, even after Germany invaded France and began [\*870] bombing London. n12 Marginal economic and military assistance could take place only through complicated subterfuges and was in any event of minimal value.¶ Even after Japan bombed Pearl Harbor and Nazi Germany declared war on the U.S., FDR had to move cautiously. The public supported war, but sought war primarily with Japan, while FDR correctly believed that Germany posed a greater threat to the United States than Japan did. In FDR's view, Japan could be, and should be, dealt with after the Atlantic alliance against Germany was solidified. Thus, although FDR had popular support on one level, he needed to devise ways to ensure support for his particular war aims and strategies, whose particular justifications would always remain at least partially obscure to the public. One of FDR's tactics for generating support was to invite prominent Republicans into his cabinet. For example, Henry Stimson was given the post of Secretary of War, and Frank Knox was made the Secretary of the Navy. n13 Provided with inside information, they would be able to blow the whistle if U.S. war strategy departed too much from what they believed was the public interest. But, as internationalists, they would also support the war.¶ B. Truman: Scaring Hell out of the Country¶ The Soviet Union had been the United States' ally during World War II, and many people, including FDR, expected or hoped that it would cooperate with the United States after the war as well. That the Soviet Union would have aggressive rather than pacific designs only gradually dawned on U.S. elites. By 1946, skepticism about Soviet motives was widespread in the U.S. government, but the U.S. public still labored under more genial impressions fostered by wartime propaganda. To counter the growing Soviet threat, President Harry S. Truman resolved to expend U.S. treasure to rebuild the economies of France, West Germany, Britain, and other potential allies, and to bind them together in a military defense pact. The former would require a lot of money; the latter would require the stationing of U.S. troops abroad. The U.S. public, however, was traditionally isolationist, and wished to enjoy the victory and the peace. n14 How could Truman persuade [\*871] the public that further sacrifice and foreign entanglements would be necessary to defend U.S. interests against a former ally?¶ Truman apparently could not simply explain to the public that the Soviet threat justified the Marshall Plan and North Atlantic Treaty Organization, the United States' first permanent foreign military alliance. The problem was that the public had no way to evaluate the Soviet threat. The U.S.S.R. had not actually used military force against U.S. troops, as the Japanese had five years earlier at Pearl Harbor. The Soviet Union was instead supporting communist insurgencies in Greece and Turkey, interfering in politics in Italy, violating its promise to respect democratic processes in Poland, engaging in espionage, and so forth. Experienced and perceptive observers saw a threat, but, generally speaking, the public was in no position to do so.¶ To enhance the credibility of his claims about the Soviet threat, Truman did two things. First, he recast the threat as an ideological challenge. Truman gave the threat an ideological dimension, deliberately "scaring hell out of the country." n15 Second, he made an alliance with a powerful Republican senator, Arthur Vandenberg, who could assure Truman that the Republicans would not object to his policies as long as he consulted them and allowed them some influence. As a former isolationist, Vandenberg's endorsement of Truman's policy of engagement must have enhanced the credibility of Truman's claims about the Soviet threat. n16¶ Both of these strategies succeeded, but neither was costless. Truman's characterization of the Soviet threat as an ideological challenge may have led to the McCarthy era and suppressed public debate about foreign policy. Truman's alliance with the Republicans meant, of course, that he would have less freedom of action. n17 [\*872] ¶ C. Bush I versus Bush II: The Iraqi Threat¶ George H.W. Bush and George W. Bush both went to war with Iraq, but they faced different threats and chose different responses. George H.W. Bush sought to drive Iraqi military forces out of Kuwait. His problem was persuading the U.S. public that a U.S. military response was justified. In retrospect, it might seem that he was clearly right, but at the time most experts believed that that a great number of U.S. troops would be killed. n18 This was the expected cost of a military response. On the benefit side, Bush could appeal to the sanctity of sovereign borders, but public sympathy for the rich Kuwaitis was limited. The United States' real concern was that Iraq would, with Kuwait's oil fields, become wealthy and powerful enough to expand its control over the region, threaten Saudi Arabia, dominate the Persian Gulf's oil reserves, and pose a long-term threat to the Western economies and the United States' influence in the Middle East. But all of these concerns are rather abstract, and it was never obvious that the public would accept this case. Indeed, the congressional authorization to use military force was far from unanimous in the House of Representatives. n19¶ The credibility of Bush's claims, however, was greatly aided by international support. The public support of nations with divergent interests showed that Bush's claim about the internationally destabilizing effects of Saddam Hussein's invasion was real and not imagined. Thus any claim that a U.S. military invasion was solely in Bush's partisan political interests, or in the interests mainly of oil companies, was seriously weakened. Formal United Nations approval and the military assistance of foreign states -- which was of mainly political, not military significance -- further solidified Bush's credibility. n20¶ Surface similarities aside, George W. Bush faced a different kind of threat. He feared that Saddam Hussein had weapons of mass destruction (WMDs), which he would give or sell to terrorist groups like al Qaeda. It was more difficult for George W. Bush to prove that Saddam had WMDs than for his father to prove that Saddam was a threat to the region, because any WMDs were hidden on Saddam's territory [\*873] while the invasion of Kuwait could be observed by all. George W. Bush followed the same strategy that his father did, albeit somewhat less enthusiastically: to enlist international support in order to bolster the credibility of his claim that Saddam continued to pose a major threat to U.S. and Western interests. But George W. Bush failed to persuade foreign countries that Saddam posed a great enough threat to justify a military invasion (although they largely agreed that he either had or probably had WMDs), and he did not obtain significant international support. n21 Ironically, George W. Bush, unlike his father, had strong congressional support, in part because opposition to the first war turned out to be a political liability, and the costs of the first war (unlike the second war) turned out to be minimal.¶ D. Clinton: Wag the Dog¶ Long before the attacks of September 11, 2001, the U.S. government understood that al Qaeda posed a threat to U.S. interests. The CIA had established a bin Laden office in 1996, and the Clinton administration was trying to develop an effective counterterrorism strategy. n22 In 1998, al Qaeda blew up U.S. embassies in Kenya and Tanzania, whereupon Clinton ordered cruise missile strikes on targets in Afghanistan and Sudan. Just three days earlier, however, Clinton had announced on national television that he had had an affair with Monica Lewinsky. Opponents charged that he ordered the strikes in order to distract the public from his domestic problems. n23 This came to be known as the Wag the Dog strategy after a movie that featured a similar subterfuge. n24 [\*874] ¶ Clinton's credibility problem was more acute than that of earlier presidents. FDR, Truman, and George H.W. Bush (as well as, later, George W. Bush) might embark on foreign adventures in order to enhance their prestige or to pay off interest groups or to distract the public from domestic problems. George W. Bush, for example, has been repeatedly accused of manipulating terrorism warnings in order to improve poll results or electoral outcomes. n25 But only in Clinton's case was it necessary for him to make an important and visible decision about foreign policy in the midst of a personal scandal in which he admitted that he engaged in deceit, with the result that his ability to conduct an effective terrorism defense was hampered by doubts about his credibility. n26 A more aggressive response to al Qaeda would have to wait until after September 11, 2001.¶ II. Theory¶ A. The Problem¶ The examples we discussed have a common structure: a nation or group, like Nazi Germany, the Soviet Union, Iraq, or al Qaeda, poses a threat to U.S. interests. The threat is widely understood at a general level but the public does not understand important details: why the threat exists, its magnitude, what programs will best address it. The president believes that a particular program -- NSA surveillance, unlimited detention, military preparation -- is necessary and desirable for countering the threat, and let us assume that he is correct. At the same time, the program could be misused in various ways. It could be used to enhance the power of the president at the expense of legitimate political opponents; to pay off the president's supporters at the expense of the general public; or to spark an emotional but short-lived surge of patriotism that benefits the president during an important election but does not enhance security. The president can announce the [\*875] program and justify it in general terms, but he cannot design the program in such a way that its dangers to legitimate political opposition can be eliminated. n27 As a result, his claim that the program will be used only for national security, and not to enhance his power at the expense of political opponents, or to benefit allies, may not be believed.¶ Consider, for example, the policy of detaining suspected members of al Qaeda without charging them and without providing them with a trial. The public understands that al Qaeda poses a threat to national security but lacks the information necessary to evaluate the detention policy. The public does not know the magnitude of the continuing threat from al Qaeda: it might be the case that the group has focused its attention on foreign targets, that it no longer has the capacity to launch attacks on U.S. soil, that greater international cooperation and intelligence sharing has significantly reduced the threat, and so forth. The public also does not know whether the detainees are important members of al Qaeda, foot soldiers, or unconnected to al Qaeda; whether the dangerous detainees could be adequately incapacitated or deterred through regular criminal processes; whether the Bush administration obtains valuable intelligence from the detainees, as it claims, or not; whether the detainees are treated well or harshly; and numerous other relevant factors. Some of the relevant variables are public, but most are not; those that are public are nonetheless extremely difficult to evaluate. Consider the ambiguity over whether the suicides at Guantanamo Bay in June 2006 were driven by despair and harsh treatment, or were the result of a calculated effort by martyr-seeking Jihadists to score a propaganda coup. n28 As a general matter, the public does not even know whether the absence of major terrorist attacks on U.S. soil since September 11, 2001 resulted from the Bush administration's detention policy, at least partly resulted from this policy, occurred for reasons entirely independent of this policy such as (say) the military attack on Afghanistan, or occurred despite the detention policy, which, by alienating potential allies, perversely made a further attack more likely than it would otherwise have been.¶ Described in this manner, the president's credibility problem is the result of an agency relationship, where the president is the agent and the public is the principal. In agency models, the agent has the power to engage in an action that benefits or harms a principal. In a [\*876] typical version of these models, the principal first hires the agent and instructs the agent to engage in high effort rather than shirk. The agent then chooses whether to engage in high effort or shirk. High effort by the agent increases the probability that the principal will receive a high payoff, but some randomness is involved, so that the link between the agent's effort and the principal's payoff is stochastic rather than certain. If the agent's behavior can be observed and proven before a court, then the simple solution is for the two parties to enter a contract requiring the agent to engage in high effort. If the agent's behavior cannot be observed, then a contract requiring high effort is unenforceable, and instead the principal and agent might enter a contract that makes the agent's compensation a function of the principal's payoff. This gives the agent an incentive to use high effort, though depending on various conditions, this incentive might be weak. n29¶ Less important than the details of the agency model, and its various solutions, is the way that it clarifies the basic problem. The president is the agent and the public is the principal (sometimes we will think of the legislature as the principal, bracketing questions of agency slack between voters and legislators). The public cares about national security but also cares about civil liberties and the well-being of potential targets of the war on terror; its optimal policy trades off these factors. However, the public cannot directly choose the policy; instead, it delegates that power to the government and, in particular, the president. The president knows the range of options available, their likely effects, their expected costs and benefits -- thanks to the resources and expertise of the executive branch -- and so, if he is well motivated, he will choose the best measures available.¶ Thus a well-motivated executive, in our sense, is an executive who chooses the policies that voters would choose if they knew what the executive knows. n30 This definition does not require that the president's deeper motives be pure. For our purposes, a well-motivated president may be concerned with his historical reputation in the long run, as many presidents are. Because presidents know that in the long run most or all of their currently private information will be revealed, n31 a [\*877] concern with the judgment of history pushes presidents to make the decisions that future generations, knowing what the president knows now, will approve. To be sure, the concern with historical reputation is not perfectly congruent with doing what the current generation would approve of (with full information), because different generations have different values, as in the case of civil rights. The convergence is substantial, however, compared to far more harmful motivations a president might have, such as short-term empire-building or partisan advantage. Presidents with a concern for their long-run reputation may not be disinterested leaders, but they approach the ideal of faithful agency more closely than do presidents with no such concern.¶ We also assume that the voters' ultimate preferences are fixed, so we put aside the possibility of presidential leadership that changes bedrock public values. However, voters' derived preferences may change as their information changes, and this further blurs the significance of changing public values over time. On this view, there is still scope for leadership, in the sense that a well-motivated president might choose a policy inconsistent with voters' current ill-informed preferences, but consistent with the new preferences voters will form as their information changes, perhaps as a result of the policy itself. FDR's behavior just before World War II is the model for presidential leadership in this sense. n32¶ As this discussion suggests, the well-motivated executive may or may not keep campaign promises, or adopt popular policies. All depends on circumstances -- on what the public would approve, if it knew what the president knows. A public that would condemn the president's policy P might, if it knew more, approve of P. The well-motivated president will want to adopt P in such circumstances, and will then face the problem of credibly signaling to the public that he favors the policy for good reasons that he cannot directly convey. Furthermore, we assume that the well-motivated executive will collect an optimal amount of information -- up to the point where the marginal benefits of further information gathering equal the marginal costs. n33 This does not mean [\*878] that the well-motivated executive always gets the facts right; he may turn out to be wrong. But it does mean that greater accuracy would not have been cost justified.¶ Against this benchmark of faithful agency, the problem is that a given president's motivations may or may not be faithful, and the public knows this. The public fears that, for various reasons, the president might choose policies that diverge from the public's optimal policies. These include:¶ 1. The president cares more about national security (or more about civil liberties, but we will, for simplicity, assume the former) than the public does. His "preferences" are different from those of the public.¶ 2. The president cares very little about national security and civil liberties; he mainly cares about maximizing his political power and, more broadly, political success -- success for himself, his party, or his chosen successor. With a view to political power and success, the president might maximize the probability of electoral success by favoring particular interest groups, voting blocs, or institutions at the expense of the public, or by adopting policies that are popular in the short term, as far as the next election cycle, but that are harmful in the long term, along with rhetoric that confuses and misleads.¶ The public knows that the president might have these or other harmful motivations, so when the president claims, for example, that a detention policy is essential to the war on terror but at the same time is not excessively harsh given its benefits, the public simply does not know whether to believe him.¶ Crucially, the risk that the public will fail to trust a well-motivated president is just as serious as the risk that it will trust an ill-motivated one. Imagine that a well-motivated president chooses the optimal policies. No terrorist attack occurs before the next election, but the public does not know whether this is because the president chose the optimal policies, the president chose bad policies and was merely lucky (as the terrorists for internal reasons chose to focus on foreign targets), or the president chose effective but excessively harsh policies. In the election, the public therefore has no particular reason to vote for this president and could easily vote him out of office and replace him with a worse president. A president who cares about electoral [\*879] success might therefore not choose the optimal policies, and even a well-motivated president might be reluctant to choose the optimal policies because of the risk that the public will misinterpret them and replace him with an ill-motivated president. Presidents need public support even when they do not face reelection; they need the public to prod Congress to provide the president with funds for his programs and statutory authorization when necessary. A well-motivated president will abandon optimal policies if he cannot persuade the public that they are warranted.¶ As we noted earlier, legal scholars rarely note the problem of executive credibility, preferring to dwell on the problem of aggrandizement by ill-motivated presidents. Ironically, this assumption that presidents seek to maximize power has obscured one of the greatest constraints on aggrandizement, namely, the president's own interest in maintaining his credibility. Neither a well-motivated nor an ill-motivated president can accomplish his goals if the public does not trust him. n34 This concern with reputation may put a far greater check on the president's actions than do the reactions of the other branches of the government.¶ B. Solutions¶ The literature on agency models and optimal contracting provides clues for solving the problem of executive credibility. This literature gives two basic pieces of advice. n35 The first piece of advice is to align preferences. An employer will do better if her employees obtain utility from doing whatever actions benefit the employer. Suppose, for example, an employer seeks to hire someone to build furniture in a factory. The pay is good enough to attract job candidates who do not enjoy building furniture, but clearly the employer does better by hiring people who like working with their hands, and take pleasure in constructing a high-quality product, than by hiring people who do not like working with their hands. We say that the first type of person has a preference for building high-quality furniture; this person is less likely to shirk than the other type of person.¶ In order to align preferences, employers can use various types of screening mechanisms or selection mechanisms that separate the good [\*880] types and the bad types. n36 An old idea is that job candidates who completed a training program -- here, in carpentry -- are more likely good types than job candidates who did not complete such a program. The reason is not that the training program improves skills, though it might, but that a person who enjoys carpentry is more likely to enter and complete such a program than a person who does not -- the program, in terms of time and effort, is less burdensome for the former type of person. The employer could use other mechanisms as well, of course. She could ask for evidence that the job candidate pursues woodworking as a hobby in his free time, or, simply, that he has held other jobs in similar factories, or jobs that involve carpentry or furniture construction. Another important screening mechanism is to compensate employees partly through in-kind components or earmarked funds that are worth more to good types than to bad types. In university settings, academic compensation is partly composed of research budgets that cannot be spent on personal consumption and that are worth more to good types (researchers) than to bad types (shirkers). n37¶ The second piece of advice is to reward and sanction. This is not as simple as giving the employee a bonus if she constructs good furniture and firing her if she does not; recall that we assume that the employer does not directly observe the quality of the agent's action. Consider the following version of our example. The employees both design and construct furniture; "high-quality" furniture is both made well and pleasing to the public, so that it sells well. The employer cannot tell by looking at a piece of furniture whether it is high quality, because she does not know the tastes of the public. An employee who uses a high level of effort is more likely to produce furniture that sells well, but an employee can in good faith misjudge public taste and produce furniture that sells poorly. Similarly, an employee who uses a low level of effort is less likely to produce furniture that sells well but nonetheless may succeed at times. Since the employer cannot observe the quality of the furniture, she cannot make the wage a function of its quality; if she pays a flat wage, then the employee does not have an incentive to engage in a high level of effort, because that involves more personal cost without producing any reward.¶ The main solution is to make the employee's compensation a function, in part, of the quantity of the sales of the goods that the employee [\*881] produces. The quantity of sales, unlike the quality of the furniture, is observable. If the pay is properly determined, then the employee will engage in a high level of effort because the expected gains from high sales exceed the cost of high effort. How closely pay should be correlated with sales depends on how risk averse the employee is, and it may be necessary, for ordinary people who are generally risk averse, to pay them at least a little even if sales are low, and somewhat more if sales are high.¶ An enormous literature develops and qualifies these results, and we will refer to relevant parts of it later as necessary rather than try to summarize it here. n38 For now, we want to briefly point out the relevance of these solutions to our problem of executive credibility.¶ The preference-alignment solution has clear applicability to the problem of executive credibility. To be sure, elections and other democratic institutions help ensure that the president's preferences are not too distant from those of the public, but they are clearly not sufficient to solve the executive credibility problem. Elections will never create perfect preference alignment, for well-known reasons, and in any event the well-motivated executive will do what the public would want were it fully informed, not what maximizes the chances of electoral success in the short run. Furthermore, we do not consider credibility-generating mechanisms that would require new constitutional or statutory provisions; of course, the president has little or no power to redesign electoral rules in order to enhance his credibility. We will instead focus, in Part IV, on how the president might use the existing electoral system to enhance his credibility in indirect ways -- by appointing subordinates, advisors, and commission members, and by supporting certain types of candidacies for electoral office.¶ The reward-and-sanction solution also is applicable to the problem of executive credibility, but we think it is of less importance and we will not address it in any detail. The problem that most concerns us -- threats to national security -- typically does not produce a clear outcome while the president is still in office. As noted above, Bush's war-on-terror policies might be optimal, insufficient, or excessive; we will not know for many years. And the public cannot enter a contract with the president that provides that he will receive a bonus if national security is enhanced and will be sanctioned if it is not enhanced. Consequently, Bush cannot enter a contract with the public that rewards him if his policies are good and punishes him if they are bad. [\*882] ¶ However, some signaling mechanisms have a reward-or-sanction component. A good job applicant can distinguish herself from a bad job applicant by agreeing to a compensation scheme that good types value and bad types disvalue. For example, if a good type of employee discounts future payoffs less than bad types, then good types will accept deferred compensation (such as pension contributions) that bad types reject. n39 Similarly, a well-motivated president can distinguish himself from an ill-motivated president by binding himself to a policy position that an ill-motivated president would reject -- for example, deficit reduction programs or Social Security reform that would mainly benefit future generations, long after the president leaves office. However, a president, unlike an ordinary employee, cannot bind himself by a judicially enforceable contract; therefore, this mechanism can work only if the president can engage in self-binding through informal means, as we will discuss below. n40¶ Note that either a well-motivated actor or an ill-motivated actor might use strategic devices to enhance her credibility. A bad actor might, for example, take actions to enhance the credibility of his threats. In a standard illustration, the "chicken" game occurs when two drivers race toward each other and the loser is the one who swerves to avoid death. In that game, each driver is threatening to drive straight, and the winner will be the one who can make his threat credible, because the other driver will then know that the only choice is to swerve or die. Credibility is a valuable adjunct to many different motivations, not just to socially beneficial ones.¶ But this is a different type of credibility problem than the one we are interested in. In the class of problems we address, the problem that faces the well-motivated actor is that others cannot distinguish or sort him at a glance from ill-motivated actors. "Bad types" can mimic "good types" through low-cost imitation and by saying all the right things. The good type needs some device whereby he can credibly signal that he is a good type. The only effective device, in general, is for the good type to undertake an action that imposes greater costs on bad types than on good types. If third parties understand the cost structure of the action, then this separates the two types, because the bad type's strategy of costlessly imitating the good type no longer works. In employment screening, for example, both the lazy worker and the hard worker will claim to be a hard worker. The employer might prefer candidates with good references, or an advanced degree, [\*883] on the theory that obtaining those things will be easier for the good type than the bad type.¶ Let us provide a little more structure to our analysis before describing our preferred mechanisms. Suppose that the president must choose a policy that will affect national security and civil liberties; this might include asking Congress to authorize him to engage in conduct like wiretapping or the use of military force. He makes this choice at the start of his first term, and the actual effect of his choice -- on national security and civil liberties -- will not be revealed to the public until after the next election. Terrorist attacks during the first term do not necessarily prove that he chose the wrong policies; nor does the absence of terrorist attacks during the first term prove that he chose the right policies. Only later will it become clear whether the president chose the optimal policies, perhaps many decades later. Thus, the public must vote for or against the president on the basis of the policy choice itself, not on the basis of its effect on their well-being. For expository convenience, we will assume that the president actually does make the optimal policy choice and that his problem is one of convincing the public that he has done so. Presidents who, for whatever reason, knowingly choose policies that the public would reject (if fully informed) obviously do not want to convince the public that this is what they are doing.¶ Our focus, then, is how the president who chooses the optimal policy, given the information available to him and the relevant institutional constraints, might use some additional mechanism to enhance the credibility of his claim that he chose the best policy. In the next Part, we will address why our current Madisonian system does not already solve the problem of executive credibility. In Part IV, we will analyze some mechanisms by which presidents can bootstrap themselves into credibility.¶ III. Madisonian Monitoring¶ In the standard separation of powers theory attributed to Madison, the executive's credibility dilemma is ameliorated by the separation of powers and institutional competition, which produce monitoring or oversight of executive discretion. Although the Madisonian system is not usually justified as a means of enhancing the executive's credibility, that is a byproduct of the system: if checks and balances discourage ill-motivated persons from running for office, or force them to adopt public-spirited policies once in office, then the executive's claims about his policies will be credible. Congressional and judicial oversight of executive action, on this account, will ensure that the executive exercises discretion only as directed by voter-principals, [\*884] acting through legislators who are simultaneously agents (of the voters) and principals (of the executive).¶ This account is no longer adequate, if it ever was. Legislators and judges are, for the most part, unable to effectively oversee or monitor the executive, especially in the domains of foreign policy and national security. As a result, they are forced to make the difficult choice of granting discretion that an ill-motivated executive would abuse, or withholding discretion that a well-motivated executive would use for good.¶ We do not suggest that the Madisonian system has entirely failed, only that it has partly failed, and that to the extent it has failed the executive's credibility dilemma becomes more acute. We will examine some of the principal institutional problems, beginning with legislative oversight and then turning to the courts.¶ A. Congress¶ In the Madisonian vision, legislators are simultaneously principals of the president, who is supposed to execute the statutes that legislators enact, and are also institutional competitors of the president, who has freestanding constitutional powers beyond the execution of statutes. Voters elect legislators, who either transmit voters' exogenously determined policy preferences to the executive through statutes or (in a deliberative conception of Madisonianism) refine public preferences through reasoned discussion and then instruct the executive accordingly. n41 We are agnostic on the question of whether the preference-based or deliberative version of the Madisonian vision is more persuasive, or exegetically more faithful to the Madison of the Federalist Papers. In either case, what matters here is that the combination of principal-agent relationships with institutional rivalry is supposed to produce valuable byproducts for the polity as a whole. Legislators have an interest in monitoring the president, not only to ensure that he faithfully executes the statutes they enact, but also to ensure that executive power does not swell beyond its constitutionally prescribed bounds and destroy the separation of legislative and executive powers.¶ Whether or not this picture was ever realistic, it is no longer so today. Many institutional factors hamper effective legislative monitoring of executive discretion. Consider the following problems. [\*885] ¶ 1. Information asymmetries.¶ Monitoring the executive requires expertise in the area being monitored. In many cases, Congress lacks the information necessary to monitor discretionary policy choices by the executive. Although the committee system has the effect, among others, of generating legislative information and expertise, n42 and although Congress has a large internal staff, there are domains in which no amount of legislative expertise suffices for effective oversight. Prime among these are areas of foreign policy and national security. Here legislative expertise is beside the point, because the legislature lacks the raw information that experts need to make assessments.¶ The problem would disappear if legislators could cheaply acquire information from the president, but they cannot. One obstacle is a suite of legal doctrines protecting executive secrecy and creating deliberative privileges n43 -- doctrines which may or may not be justified from some higher-order systemic point of view as means for producing optimal deliberation within the executive branch. Although such privileges are waivable, the executive often fears to set a bad institutional precedent. Another obstacle is the standard executive claim that Congress leaks like a sieve, so that sharing secret information with legislators will result in public disclosure. The credibility dilemma becomes most acute when, as in the recent controversy over surveillance by the National Security Agency, the executive claims that the very scope or rationale of a program cannot be discussed with Congress, because to do so would vitiate the very secrecy that makes the program possible and beneficial. In any particular case the claim might be right or wrong; legislators have no real way to judge, and they know that the claim might be made either by a well-motivated executive or an ill-motivated executive, albeit for very different reasons.¶ 2. Collective action problems.¶ Executive officials worry that, with many legislators on select intelligence committees, someone is bound to leak and it will be difficult to pinpoint the source. Aware of the relative safety that the numbers give them, leakers are all the more bold. This is an example of a larger problem, arising from the fact that there are many more legislators than top-level executive officials. Compared to the executive branch, [\*886] Congress finds it more costly to coordinate and to undertake collective action (such as the detection and punishment of leakers). To be sure, the executive too is a "they," not an "it." Much of what presidents do is to arbitrate internal conflicts among executive departments and to try to aggregate competing views into coherent policy over time. As a comparative matter, however, the contrast is striking: the executive can act with much greater unity, force, and dispatch than can Congress, which is chronically hampered by the need for debate and consensus among large numbers. This comparative advantage is a principal reason why Congress enacts broad delegating statutes in the first place, especially in domains touching on foreign policy and national security. In these domains, and elsewhere, the very conditions that make delegation attractive also hamper congressional monitoring of executive discretion under the delegation.¶ There may or may not be offsetting advantages to Congress's large numbers; perhaps the very size and heterogeneity of Congress make it a superior deliberator, whereas the executive branch is prone to suffer from various forms of groupthink. n44 But there are clear disadvantages to large numbers, insofar as monitoring executive discretion is at issue. From the standpoint of individual legislators, monitoring is a collective good. If rational and self-interested, each legislator will attempt to free-ride on the production of this good, and monitoring will be inefficiently underproduced. n45 More broadly, the institutional prerogatives of Congress are also a collective good. n46 Individual legislators may or may not be interested in protecting the institution of Congress or the separation of legislative from executive power; much depends on legislators' time horizons or discount rate, the expected longevity of a legislative career, and so forth. But it is clear that protection of legislative prerogatives will be much less in an institution composed of hundreds of legislators coming and going than if Congress were a single person. [\*887] ¶ 3. "Separation of parties, not powers." n47¶ Congress is, among other things, a partisan institution. Political scientists debate whether it is principally a partisan institution, or even exclusively so. n48 But Madison arguably did not envision partisanship in anything like its modern sense. n49 Partisanship undermines the separation of powers during periods of unified government. n50 Where the same party controls both the executive branch and Congress, real monitoring of executive discretion rarely occurs, at any rate far less than in an ideal Madisonian system. Partisanship may enhance monitoring during periods of divided government, as one house of Congress, say, investigates a president of the other party. However, monitoring is arguably most necessary during periods of unified government, because Congress is most likely to enact broad delegations when the President holds similar views; n51 and in such periods monitoring is least likely to occur. n52 The Congress of one period may partially compensate by creating institutions to ensure bipartisan oversight in future periods -- consider the statute that gives a partisan minority of certain congressional committees power to subpoena documents from the executive, albeit only nonprivileged documents n53 -- but these are palliatives. Under unified government, congressional leaders of the [\*888] same party as the president have tremendous power to frustrate effective oversight by the minority party.¶ 4. The limits of congressional organization.¶ Congress as a collective body has attempted, in part, to overcome these problems through internal institutional arrangements. Committees and subcommittees specialize in a portion of the policy space, such as the armed forces or homeland security, thereby relieving members of the costs of acquiring and processing information (at least if the committee itself maintains a reputation for credibility). n54 Intelligence committees hold closed sessions and police their members to deter leaks (although the sanctions that members of Congress can apply to one another are not as strong as the sanctions a president can apply to a leaker in the executive branch). Large staffs, both for committees and members, add expertise and monitoring capacity. And interest groups can sometimes be counted upon to sound an alarm when the executive harms their interests. n55¶ Overall, however, these arrangements are not fully adequate, especially in domains of foreign policy and national security, where the scale of executive operations is orders of magnitude larger than the scale of congressional operations. Congress's whole staff, which must (with the help of interest groups) monitor all issues, runs to some 30,000 persons. n56 As of 2005, the executive branch had some 2.6 million civilian employees, n57 in addition to almost 1.4 million in the active armed forces. n58 The sheer mismatch between the scale of executive operations and the congressional capacity for oversight, even aided by interest groups or by leakers within the bureaucracy, is daunting. Probably Congress is already at or near the limits of its monitoring capacity at its current size and budget. [\*889] ¶ 5. Congressional motivation and credibility.¶ Like the executive, Congress has a credibility problem. Members of Congress may be well motivated or ill motivated; the public does not know. Thus, when Congress passes a resolution criticizing presidential action or refuses to delegate power that he seeks, observers do not know whether Congress or the president is right. Ill-motivated members of Congress will constrain public-spirited presidents; thus the Madisonian cure for the problem of executive credibility could be worse than the disease.¶ Even if members of Congress are generally well motivated, Congress has a problem of institutional credibility that the president lacks. Although a voter might trust the member of Congress for whom she voted because she knows about his efforts on his district's behalf, she will usually know nothing about other members of Congress, so when her representative is outvoted, she might well believe that the other members are ill motivated. And, with respect to her own representative, he will often lack credibility compared to the president because he has much less information. Further, the reputation of congressional leaders is only very loosely tied to the reputation of the institution, while there is a closer tie between the president's reputation and the presidency. As a result, Congress is likely to act less consistently than the president, further reducing its relative credibility. Congressional lack of credibility undermines its ability to constrain the president: Congress can monitor the president and tell the public that the president has acted properly or improperly, but if the public does not believe Congress, then Congress's power to check the president is limited.¶ We neither make, nor need to make, any general empirical claim that Congress has no control over executive discretion. That is surely not the case; there is a large debate, or set of related debates, about the extent of congressional dominance. n59 We have reviewed the institutional problems piecemeal; perhaps some of them are mutually offsetting, although we do not see any concrete examples. Our assertion is just that there is at least a real gap, and during emergencies and wars [\*890] an even larger gap, between the extent of executive discretion and legislative capacity for monitoring. It is hard to say how great that gap is, but we know of no one who thinks it is nonexistent. Within that gap, the dilemma of executive credibility arises. To the extent that legislators cannot monitor the executive's exercise of discretion, they must either withhold discretion from an executive who might be well motivated, or grant discretion to an executive who might be ill motivated.¶ B. Courts¶ Similar problems afflict judicial oversight of the executive.¶ 1. Information asymmetries.¶ The gap between the executive and the judiciary, in information and expertise, is even wider than between the executive and Congress. Whereas many legislators have a narrowly defined field of policy expertise, particularly in the House, federal judges are mostly generalists, barring a few specialized courts. Furthermore, the partial insulation from current politics that federal judges enjoy, by virtue of life tenure and salary protection, brings with it a kind of informational impoverishment. n60 Legislators, who must please other people at least some of the time, interact with the outside world far more systematically than generalist judges, whose main source of information is the briefs and arguments of litigants. The credibility dilemma thus appears quite acutely in judicial proceedings. When the executive says that resolving a plaintiff's claim would require disclosure of "state secrets," n61 with dangerous consequences for national security, judges know that either an ill-motivated or a well-motivated executive might be making the claim and that they have no easy means to assess whether the claim is credible.¶ 2. Collective action problems and decentralization.¶ If congressional monitoring of executive discretion is hampered by collective action problems, judicial monitoring is hampered by a [\*891] similar condition, the decentralized character of the federal judiciary. The judiciary really is a "they," not an "it," and is decentralized along mainly geographic lines. Different judges on different courts will have different prior estimates of the executive's credibility, and hence different views of the costs and benefits of oversight and of the appropriate level of monitoring. The Supreme Court is incapable of fully resolving these structural conflicts. Because the Court presides over a large institutional system and lacks the capacity to review more than a fraction of cases submitted to it, its role is restricted by necessity to the declaration of general principles of law and episodic, ad hoc intervention in the system. n62¶ 3. The legitimacy deficit.¶ In the federal system, appointed judges are not overtly partisan, though they are sometimes covertly so. n63 The very condition that enables this relative lack of overt politicization -- that federal judges are, at least in one familiar conception, legal technocrats appointed for their expertise rather than elected on a partisan basis -- also creates a serious legitimacy deficit for the judiciary, understanding legitimacy in a strictly sociological sense. n64 Aroused publics concerned about issues such as national security sometimes have little tolerance for robust judicial oversight of executive discretion, which can always be condemned as "activism" by "unelected judges." This charge sometimes succeeds and sometimes fails, but for the judges it is always a concern that acts as a drag on attempts to monitor executive behavior.¶ 4. Judicial credibility.¶ Judges rely on executive officials to carry out their orders and Congress to fund them, and thus ultimately rely on the public to impose sanctions on the political branches when the political branches do not obey a court order. But the public will support the judiciary [\*892] only if the public believes that the judiciary is well motivated rather than ill motivated. Such is often the case, but the credibility of judges is not infinite. n65 Lingering public suspicion of elite decisionmaking places a cap on judicial credibility, and indeed the evidence suggests that judges are often motivated by ideology, at least when it comes to opinion assignment. n66 Thus, in extreme cases, as between a presidential determination that an emergency requires a course of action and a judge's claim to the contrary, the public might well believe the president. n67¶ Here too, we do not claim that judicial oversight is a total failure. Doctrinal lawyers focus, sometimes to excess, on a handful of great cases in which judges have checked or constrained discretionary executive action, even in domains involving foreign policy or national security. Cases such as Youngstown, n68 the Pentagon Papers case, n69 and recently Hamdan n70 head this list. Undoubtedly, however, there is a [\*893] large gap between executive discretion and judicial capacities, or even between executive discretion and the sum of congressional and judicial capacities working in tandem. In times of emergency, especially, both Congress and the judiciary defer to the executive. n71 Legislators and judges understand that the executive's comparative institutional advantages in secrecy, force, and unitariness are all the more useful during emergencies, so that it is worthwhile transferring more discretion to the executive even if it results in an increased risk of executive abuse. The result is that cases such as the ones we have listed are the exception, not the rule, at least during the heat of the emergency.¶ C. The Madisonian System and the Well-Motivated Executive¶ The Madisonian system of oversight has not totally failed. Sometimes legislators overcome the temptation to free ride; sometimes they invest in protecting the separation of powers or legislative prerogatives. Sometimes judges review exercises of executive discretion, even during emergencies. But often enough, legislators and judges have no real alternative to letting executive officials exercise discretion unchecked. The Madisonian system is a partial failure; compensating mechanisms must be adopted to fill the area of slack, the institutional gap between executive discretion and the oversight capacities of other institutions. Again, the magnitude of this gap is unclear, but plausibly it is quite large; we will assume that it is.¶ It is often assumed that this partial failure of the Madisonian system unshackles and therefore benefits ill-motivated executives. This is grievously incomplete. The failure of the Madisonian system harms the well-motivated executive as much as it benefits the ill-motivated one. Where Madisonian oversight fails, the well-motivated executive is a victim of his own power. Voters, legislators, and judges will be wary of granting further discretion to an executive whose motivations are uncertain and possibly nefarious. The partial failure of Madisonian oversight thus threatens a form of inefficiency, a kind of contracting failure that makes potentially everyone, including the voters, worse off.¶ Our central question, then, is what the well-motivated executive can do to solve or at least ameliorate the problem. The solution is for the executive to complement his (well-motivated) first-order policy goals with second-order mechanisms for demonstrating credibility to other actors. We thus do not address the different question of what voters, legislators, judges, and other actors should do about an execu [\*894] tive who is ill motivated and known to be so. That project involves shoring up or replacing the Madisonian system to block executive dictatorship. Our project is the converse of this, and involves finding new mechanisms to help the well-motivated executive credibly distinguish himself as such.¶ IV. Executive Signaling: Law and Mechanisms¶ We suggest that the executive's credibility problem can be solved by second-order mechanisms of executive signaling. In the general case, well-motivated executives send credible signals by taking actions that are more costly for ill-motivated actors than for well-motivated ones, thus distinguishing themselves from their ill-motivated mimics. Among the specific mechanisms we discuss, an important subset involves executive self-binding, whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors. Commitments themselves have value as signals of benign motivations.¶ This departs from the usual approach in legal scholarship. Legal theory has often discussed self-binding by "government" or government officials. In constitutional theory, it is often suggested that constitutions represent an attempt by "the people" to bind "themselves" against their own future decisionmaking pathologies, or relatedly, that constitutional prohibitions represent mechanisms by which governments commit themselves not to expropriate investments or to exploit their populations. n72 Whether or not this picture is coherent, n73 it is not the question we examine here, although some of the relevant considerations are similar. n74 We are not concerned with binding the president so that he cannot abuse his powers, but with how he might bind himself or take other actions that enhance his credibility, so that he can generate support from the public and other members of the government. [\*895] ¶ Furthermore, our question is subconstitutional: it is whether a well-motivated executive, acting within an established set of constitutional and statutory rules, can use signaling mechanisms to generate public trust. Accordingly, we proceed by assuming that no constitutional amendments or new statutes will be enacted. Within these constraints, what can a well-motivated executive do to bootstrap himself to credibility? The problem for the well-motivated executive is to credibly signal his benign motivations. In general, the solution is to engage in actions that are less costly for good types than for bad types.¶ We begin with some relevant law, then examine a set of possible mechanisms -- emphasizing both the conditions under which they might succeed and the conditions under which they might not -- and conclude by examining the costs of credibility.¶ A. A Preliminary Note on Law and Self-Binding¶ Many of our mechanisms are unproblematic from a legal perspective, as they involve presidential actions that are clearly lawful. But a few raise legal questions; in particular, those that involve self-binding. n75 Can a president bind himself to respect particular first-order policies? With qualifications, the answer is yes, at least to the same extent that a legislature can. Formally, a duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated, thereby establishing a new legal status quo. n76 The legal authority to establish a new status quo allows a president to create inertia or political constraints that will affect his own future choices. In a practical sense, presidents, like legislatures, have great de facto power to adopt policies that shape the legal landscape for the future. A [\*896] president might commit himself to a long-term project of defense procurement or infrastructure or foreign policy, narrowing his own future choices and generating new political coalitions that will act to defend the new rules or policies.¶ More schematically, we may speak of formal and informal means of self-binding:¶ 1. The president might use formal means to bind himself. This is possible in the sense that an executive order, if otherwise valid, legally binds the president while it is in effect and may be enforced by the courts. It is not possible in the sense that the president can always repeal the executive order if he can bear the political and reputational costs of doing so.¶ 2. The president might use informal means to bind himself. This is not only possible but frequent and important. Issuing an executive rule providing for the appointment of special prosecutors, as Nixon did, is not a formal self-binding. n77 However, there may be large political costs to repealing the order. This effect does not depend on the courts' willingness to enforce the order, even against Nixon himself. Court enforcement makes the order legally binding while it is in place, but only political and reputational enforcement can protect it from repeal. Just as a dessert addict might announce to his friends that he is going on a no-dessert diet in order to raise the reputational costs of backsliding and thus commit himself, so, too, the executive's issuance of a self-binding order can trigger reputational costs. In such cases, repeal of an executive order may be seen as a breach of faith even if no other institution ever enforces it.¶ In what follows, we will invoke both formal and informal mechanisms. For our purposes, the distinction between the authority to engage in de jure self-binding (legally limited and well-defined) and the power to engage in de facto self-binding (broad and amorphous) is secondary. So long as policies are deliberately chosen with a view to generating credibility, and do so by constraining the president's own future choices in ways that impose greater costs on ill-motivated [\*897] presidents than on well-motivated ones, it does not matter whether the constraint is formal or informal.¶ B. Mechanisms¶ What signaling mechanisms might a well-motivated executive adopt to credibly assure voters, legislators, and judges that his policies rest on judgments about the public interest, rather than on power maximization, partisanship, or other nefarious motives?¶ 1. Intrabranch separation of powers.¶ In an interesting treatment of related problems, Neal Katyal suggests that the failure of the Madisonian system counsels "internal separation of powers" within the executive branch. n78 Abdication by Congress means that there are few effective checks on executive power; second-best substitutes are necessary. Katyal proposes some mechanisms that would be adopted by Congress, such as oversight hearings by the minority party, but his most creative proposals are for arrangements internal to the executive branch, such as redundancy and competition among agencies, stronger employment protections for civil servants, and internal adjudication of executive controversies by insulated "executive" decisionmakers who resemble judges in many ways. n79¶ Katyal's argument is relevant because the mechanisms he discusses might be understood as signaling devices, but his overall approach is conceptually flawed on two grounds. First, the assumption that second-best constraints on the executive should reproduce the Madisonian separation of powers within the executive branch is never defended. The idea seems to be that this is as close as we can get to the first-best, while holding constant everything else in our constitutional order. But the general theory of second-best states that approaching as closely as possible to the first-best will not necessarily be the preferred strategy; n80 the best approach may be to adjust matters on other margins as well, in potentially unpredictable ways. If the Madisonian system has failed in the ways Katyal suggests, the best compensating [\*898] adjustment might be, for all we know, to switch to a parliamentary system. (We assume that no large scale changes of this sort are possible, whereas Katyal seemingly assumes that they are, or at least does not make clear his assumptions in this regard.) Overall, Katyal's view has a kind of fractal quality; each branch should reproduce within itself the very same separation of powers structure that also describes the whole system, but it is not explained why the constitutional order should be fractal.¶ Second, Katyal's proposals for internal separation of powers are self-defeating: the motivations that Katyal ascribes to the executive are inconsistent with the executive adopting or respecting the prescriptions Katyal recommends. n81 Katyal never quite says so explicitly, but he clearly envisions the executive as a power-maximizing actor, in the sense that the president seeks to remove all constraints on his current choices. n82 Such an executive would not adopt or enforce the internal separation of powers to check himself. Executive signaling is not, even in principle, a solution to the lack of constraints on a power-maximizing executive in the sense Katyal implicitly intends. Although an ill-motivated executive might bind himself to enhance his strategic credibility, as explained above, he would not do so in order to restore the balance of powers. Nor is it possible, given Katyal's premise of legislative passivity or abdication, that Congress would force the internal separation of powers on the executive. In what follows, we limit ourselves to proposals that are consistent with the motivations, beliefs, and political opportunities that we ascribe to the well-motivated executive, to whom the proposals are addressed. This limitation ensures that the proposals are not self-defeating, whatever their other drawbacks.¶ The contrast here must not be drawn too simply. A well-motivated executive, in our sense, would attempt to increase his power if fully informed voters would want him to do so. The very point of demonstrating credibility is to allow voters and legislators to increase the discretionary authority of the executive, where all will be made better off by doing so. Scholars such as Katyal, who implicitly distrust the executive, however, do not subscribe to this picture of executive motivations. Rather, they see the executive as an unfaithful agent of the voters; the executive attempts to maximize his power even where fully informed [\*899] voters would prefer otherwise. An actor of that sort will have no incentive to adopt proposals intended to constrain that sort of actor.¶ 2. Independent commissions.¶ We now turn to some conceptually coherent mechanisms of executive signaling. Somewhat analogously to Katyal's idea of the internal separation of powers, a well-motivated executive might establish independent commissions to review policy decisions, either before or after the fact. Presidents do this routinely, especially after a policy has had disastrous outcomes, but sometimes beforehand as well. Independent commissions are typically blue-ribbon and bipartisan. n83¶ We add to this familiar process the idea that the President might gain credibility by publicly committing or binding himself to give the commission authority on some dimension. For example, the president might publicly promise to follow the recommendations of such a commission, or to allow the commission to exercise de facto veto power over a policy decision before it is made, or might promise before the policy is chosen that the commission will be given power to review its success after the fact. To be sure, there will always be some wiggle room in the terms of the promise, but that is true of almost all commitments, which raise the costs of wiggling out even if they do not completely prevent it.¶ Consider whether George W. Bush's credibility would have been enhanced had he appointed a blue-ribbon commission to examine the evidence for weapons of mass destruction in Iraq before the 2003 invasion, and publicly promised not to invade unless the commission found substantial evidence of their existence. Bush would have retained his preexisting legal authority to order the invasion even if the commission found the evidence inadequate, but the political costs of doing so would have been large. Knowing this, and knowing that Bush [\*900] shared that knowledge, the public could have inferred that Bush's professed motive -- elimination of weapons of mass destruction -- was also his real motive. Public promises that inflict reputational costs on badly motivated behavior help the well-motivated executive to credibly distinguish himself from the ill-motivated one.¶ The more common version of this tactic is to appoint commissions after the relevant event, as George W. Bush did to investigate the faulty reports by intelligence agencies that Iraq possessed weapons of mass destruction. n84 If the president appoints after-the-fact commissions, the commissions can enhance his credibility for the next event -- by showing that he will be willing, after that event, to subject his statements to scrutiny by public experts. Here, however, the demonstration of credibility is weaker, because there is no commitment to appoint any after-the-fact commissions in the future, but merely a plausible inference that the president's future behavior will track his past behavior.¶ 3. Bipartisan appointments.¶ In examples of the sort just mentioned, the signaling arises from public position-taking. The well-motivated executive might produce similar effects through appointments to office. n85 A number of statutes require partisan balance on multimember commissions; presidents might approve them because they allow the president to commit to a policy that legislators favor, thus encouraging legislators to increase the scope of the delegation in the first place. n86 For similar reasons, presidents may consent to restrictions on the removal of agency officials, [\*901] because the restriction enables the president to commit to giving the agency some autonomy from the president's preferences. n87¶ Similar mechanisms can work even where no statutes are in the picture. As previously mentioned, during World War II, FDR appointed Republicans to important cabinet positions, making Stimson his Secretary of War. n88 Clinton appointed William Cohen, a moderate Republican, as Secretary of Defense in order to shore up his credibility on security issues. Bipartisanship of this sort might improve the deliberation that precedes decisions, by impeding various forms of herding, cascades, and groupthink; n89 however, we focus on its credibility-generating effects. By (1) expanding the circle of those who share the president's privileged access to information, (2) ensuring that policy is partly controlled by officials whose preferences differ from the president's, and (3) inviting a potential whistleblower into the tent, bipartisanship helps to dispel the suspicion that policy decisions rest on partisan motives or extreme preferences, which in turn encourages broader delegations of discretion from the public and Congress.¶ A commitment to bipartisanship is only one way in which appointments can generate credibility. Presidents might simply appoint a person with a reputation for integrity, as when President Nixon appointed Archibald Cox as special prosecutor (although plausibly Nixon did so because he was forced to do so by political constraints, rather than as a tactic for generating credibility). A person with well-known preferences on a particular issue, even if not of the other party or widely respected for impartiality, can serve as a credible whistleblower on that issue. Thus presidents routinely award cabinet posts to leaders of subsets of the president's own party, leaders whose preferences are known to diverge from the president's on the subject. One point of this is to credibly assure the relevant interest groups that the president will not deviate (too far) from their preferences.¶ More generally, the decision by presidents to bring into their administrations members of other parties, or persons with a reputation for bipartisanship and integrity, illustrates the formation of domestic [\*902] coalitions of the willing. Presidents can informally bargain around the formal separation of powers n90 by employing subsets of Congress, or of the opposing party, to generate credibility while maintaining a measure of institutional control. FDR was willing to appoint Knox and Stimson, but not to give the Republicans in Congress a veto. Truman was willing to ally with Arthur Vandenberg but not with all the Republicans; Clinton was willing to appoint William Cohen but not Newt Gingrich. George W. Bush likewise made a gesture towards credibility by briefing members of the Senate Intelligence Committee -- including Democrats -- on the administration's secret surveillance program(s), which provided a useful talking point when the existence of the program(s) was revealed to the public.¶ 4. Counter-partisanship.¶ Related to bipartisanship is what might be called counter-partisanship: presidents have greater credibility when they choose policies that cut against the grain of their party's platform or their own presumed preferences. n91 Only Nixon could go to China, and only Clinton could engineer welfare reform. Voters and publics rationally employ a political heuristic: the relevant policy, which voters are incapable of directly assessing, must be highly beneficial if it is chosen by a president who is predisposed against it by convictions or partisan loyalty. n92 Accordingly, those who wish to move U.S. terrorism policy towards greater security and less liberty might do well to support the election of a Democrat. n93 By the same logic, George W. Bush is widely suspected [\*903] of nefarious motives when he rounds up alleged enemy combatants, but not when he creates a massive prescription drug benefit.¶ Counter-partisanship can powerfully enhance the president's credibility, but it depends heavily on a lucky alignment of political stars. A peace-loving president has credibility when he declares a military emergency but not when he appeases; a belligerent president has credibility when he offers peace but not when he advocates military solutions. A lucky nation has a well-motivated president with a belligerent reputation when international tensions diminish (Ronald Reagan) and a president with a pacific reputation when they grow (Abraham Lincoln, who opposed the Mexican War). But a nation is not always lucky.¶ 5. Transparency.¶ The well-motivated executive might commit to transparency as a way to reduce the costs to outsiders of monitoring his actions. n94 The FDR strategy of inviting potential whistleblowers from the opposite party into government is a special case of this; the implicit threat is that the whistleblower will make public any evidence of partisan motivations. The more ambitious case involves actually exposing the executive's decisionmaking processes to observation. To the extent that an ill-motivated executive cannot publicly acknowledge his motivations or publicly instruct subordinates to take them into account in decisionmaking, transparency will tend to exclude those motivations from the decisionmaking process. The public will know that only a well-motivated executive would promise transparency in the first place, and the public can therefore draw an inference to credibility.¶ Credibility is especially enhanced when transparency is effected through journalists with reputations for integrity or with political [\*904] preferences opposite to those of the president. Thus, George W. Bush gave Bob Woodward unprecedented access to White House decisionmaking and perhaps even to classified intelligence, n95 with the expectation that the material would be published. This sort of disclosure to journalists is not real-time transparency -- no one expects meetings of the National Security Council to appear on C-SPAN -- but the anticipation of future disclosure can have a disciplining effect in the present. By inviting this disciplining effect, the administration engages in signaling in the present through (the threat of) future transparency.¶ There are complex tradeoffs here, because transparency can have a range of harmful effects. As far as process is concerned, decisionmakers under public scrutiny may posture for the audience, may freeze their views or positions prematurely, and may hesitate to offer proposals or reasons for which they can later be blamed if things go wrong. n96 As for substance, transparency can frustrate the achievement of programmatic or policy goals themselves. Where security policy is at stake, secrecy is sometimes necessary to surprise enemies or to keep them guessing. Finally, one must take account of the incentives of the actors who expose the facts -- especially journalists who might reward sources who give them access by portraying their decisionmaking in a favorable light. n97¶ We will take up the costs of credibility shortly. n98 In general, however, the existence of costs does not mean that the credibility-generating mechanisms are useless. Quite the contrary: where the executive uses such mechanisms, voters and legislators can draw an inference that the executive is well motivated, precisely because the existence [\*905] of costs would have given an ill-motivated executive an excuse not to use those mechanisms.¶ 6. Multilateralism.¶ Another credibility-generating mechanism for the executive is to enter into alliances or international institutions that subject foreign policy decisions to multilateral oversight. Because the information gap between voters and legislators, on the one hand, and the executive on the other, is especially wide in foreign affairs, there is also wide scope for suspicion and conspiracy theories. If the president undertakes a unilateral foreign policy, some sectors of the domestic public will be suspicious of his motives. All recent presidents have faced this problem. In the case of George W. Bush, as we suggested, many have questioned whether the invasion of Iraq was undertaken to eliminate weapons of mass destruction, or to protect human rights, or instead to safeguard the oil supply, or because the president has (it is alleged) always wanted to invade Iraq because Saddam Hussein attempted to assassinate his father. n99 In the case of Bill Clinton, some said that the cruise missile attack on Osama bin Laden's training camp in Afghanistan was a "wag the dog" tactic intended to distract attention from Clinton's impeachment. n100¶ A public commitment to multilateralism can close or narrow the credibility gap. Suppose that a group of nations have common interests on one dimension -- say, security from terrorism or from proliferation of nuclear weapons -- but disparate interests on other dimensions -- say, conflicting commercial or political interests. Multilateralism can be understood as a policy that in effect requires a supermajority vote -- or even a unanimous vote -- of the group to license intervention. The supermajority requirement ensures that only interventions promoting the security interest common to the group will be approved, while interventions that promote some political agenda not shared by the requisite supermajority will be rejected. Knowing this, domestic audiences can infer that interventions that gain multilateral approval do not rest on disreputable motives.¶ It follows that multilateralism can be either formal or informal. Action by the United Nations Security Council can be taken only under formal voting rules that require unanimous agreement of the permanent members. n101 Informally, in the face of increasing tensions [\*906] with Iran, George W. Bush's policy has included extensive multilateral consultations and a quasicommitment not to intervene unilaterally. Knowing that his credibility is thin after Iraq, Bush has presumably adopted this course in part to reassure domestic audiences that there is no nefarious motive behind an intervention, should one occur.¶ It also follows that multilateralism and bipartisan congressional authorization may be substitutes, in terms of generating credibility. In both cases the public knows that the cooperators -- partisan opponents or other nations, as the case may be -- are unlikely to share any secret agenda the president may have. The substitution, however, is only partial; as we suggested in Part III, the Madisonian emphasis on bipartisan authorization has proven insufficient. The interests of parties within Congress diverge less than do the interests of different nations, which makes the credibility gain greater under multilateralism. In eras of unified government, the ability of the president's party to put a policy through Congress without the cooperation of the other party (ignoring the threat of a Senate filibuster, a weapon that the minority party often hesitates to wield) often undermines the policy's credibility even if members of the minority go along. After all, the minority members may be going along precisely because they anticipate that opposition is fruitless, in which case no inference about the policy's merits should be drawn from their approval. Moreover, even a well-motivated president may prefer, all else equal, to generate credibility through mechanisms that do not involve Congress, if concerned about delay, leaks, or obstruction by small legislative minorities. Thus Truman relied on a resolution of the United Nations Security Council n102 rather than congressional authorization to prosecute the Korean War.¶ The costs of multilateralism are straightforward. Multilateralism increases the costs of reaching decisions, because a larger group must coordinate its actions, and increases the risks of false negatives -- failure to undertake justified interventions. A president who declines to bind himself through multilateralism may thus be either ill motivated and desirous of pursuing an agenda not based on genuine security [\*907] goals, or well motivated and worried about the genuine costs of multilateralism. As usual, however, the credibility-generating inference holds asymmetrically: precisely because an ill-motivated president may use the costs of multilateralism as a plausible pretext, a president who does pursue multilateralism is more likely to be well motivated.¶ 7. Legal liability.¶ For completeness, we mention that the well-motivated executive might in principle subject himself to legal liability for actions or outcomes that only an ill-motivated executive would undertake. Consider the controversy surrounding George W. Bush's telecommunications surveillance program, which the president has claimed covers only communications in which one of the parties is overseas, not domestic-to-domestic calls. n103 There is widespread suspicion that this claim is false. n104 In a recent poll, 26 percent of respondents believed that the National Security Agency listens to their calls. n105 The credibility gap arises because it is difficult in the extreme to know what exactly the Agency is doing, and what the costs and benefits of the alternatives are.¶ Here the credibility gap might be narrowed by creating a cause of action, for damages, on behalf of anyone who can show that domestic-to-domestic calls were examined. n106 Liability would be strict, because a negligence rule -- whether the Agency exerted reasonable efforts to avoid examining the communication -- requires too much information for judges, jurors, and voters to evaluate, and would just reproduce the monitoring problems that gave rise to the credibility gap in the first place. Strict liability, by contrast, would require a much narrower factual inquiry. Crucially, a commitment to strict liability would only be made by an executive who intended to minimize the incidence of (even unintentional and nonnegligent) surveillance of purely domestic communications. [\*908] ¶ However, there are legal and practical problems here, perhaps insuperable ones. Legally, it is hardly clear that the president could, on his own authority, create a cause of action against himself or his agents to be brought in federal court. It is well within presidential authority to create executive commissions for hearing claims against the United States, for disbursing funds under benefit programs, and so on; but the problem here is that there might be no pot of money from which to fund damages. The so-called Judgment Fund, out of which damages against the executive are usually paid, is restricted to statutorily specified lawsuits. n107 Even so, statutory authorization for the president to create the strict liability cause of action would be necessary, n108 as we discuss shortly. n109 Practically, it is unclear whether government agents can be forced to "internalize costs" through money damages in the way that private parties can, at least if the treasury is paying those damages. n110 And if it is, voters may not perceive the connection between governmental action and subsequent payouts in any event.¶ 8. The news conference.¶ Presidents use news conferences to demonstrate their mastery of the details of policy. Many successful presidents, like FDR, conducted numerous such conferences. n111 Ill-motivated presidents will not care [\*909] about policy if their interest is just holding power for its own sake. Thus, they would regard news conferences as burdensome and risky chores. The problem is that a well-motivated president does not necessarily care about details of policy, as opposed to its broad direction, and journalists might benefit by tripping up a president in order to score points. Reagan, for example, did not care about policy details, but is generally regarded as a successful president. n112 To make Reagan look good, his handlers devoted considerable resources trying to prepare him for news conferences, resources that might have been better used in other ways. n113¶ 9. "Precommitment politics." n114¶ We have been surveying mechanisms that the well-motivated executive can employ once in office. However, in every case the analysis can be driven back one stage to the electoral campaign for executive office. During electoral campaigns, candidates for the presidency take public positions that partially commit them to subsequent policies, by raising the reputational costs of subsequent policy changes. Under current law, campaign promises are very difficult to enforce in the courts. n115 But even without legal enforcement, position-taking helps to separate the well-motivated from the ill-motivated candidate, because the costs to the former of making promises of this sort are higher. To be sure, many such promises are vacuous, meaning that voters will not sanction a president who violates them, but some turn out to have real [\*910] force, as George H.W. Bush discovered when he broke his clear pledge not to raise taxes. n116¶ 10. The possibility of statutory commitments.¶ So far, we have proceeded on the austere assumption that no constitutional or statutory changes are allowed. We have confined ourselves to credibility-generating mechanisms that arise by executive signaling -- commitments that the executive could initiate by legal order or by public position-taking, without the permission of other institutions.¶ However, this restriction may stack the deck too heavily against the solutions we suggest. A central example of the credibility problem, after all, arises when voters and legislators want to enact statutes transferring further discretion to a well-motivated executive, but are not sure that that is the sort of executive they are dealing with.

In such cases, there is no reason to exclude the possibility that the executive might ask Congress to provide him with statutory signaling mechanisms that he would otherwise lack. In the surveillance example, Congress is currently considering amendments to relevant statutes. n117 It is easy to imagine a well-motivated executive proposing that Congress explicitly ratify his authority to examine overseas communications, while also proposing -- as a demonstration of credibility -- that the ratification be bundled with oversight mechanisms, review by an independent agency or special court, or a statutory cause of action imposing strict liability for prohibited forms of surveillance.¶ C. The Costs of Credibility¶ The mechanisms we have discussed generate credibility, which is a benefit for voters and legislators who would like to increase the discretion of the well-motivated executive. What of the cost side? In each case, there are costs to generating credibility, although the character and magnitude of the costs differ across mechanisms.¶ Signaling is by definition costly. The presence of a cost is what distinguishes ill-motivated mimics, who are unwilling to incur the cost, from genuine good types. In this context, the inherent costliness of signaling means that the president must use time or resources to establish credibility with the public when, if voters were perfectly informed, that time and those resources could be expended directly on [\*911] determining and implementing policy. But costs can be reflected in more subtle ways as well. Many of these mechanisms rely on the participation of agents who themselves may be ill motivated. Whistleblowers can leak information in order to damage the administration or cry wolf when there is no partisanship, merely substantive disagreement. Journalists might produce images distorted by their own biases and strategic agendas. Miscellaneous costs arise in other ways as well. Multilateralism raises decision costs, transparency can harm deliberation, and so on. n118¶ Often the basic tradeoff facing presidents is that credibility is gained at the expense of control. Mechanisms such as creating independent commissions and pursuing multilateralism illustrate that to gain credibility, presidents must surrender part of their control over policy choices, partially constraining executive discretion in the present in return for more trust, which will then translate into more discretion in the future. The loss of control is a cost, even to the well-motivated executive. To be sure, the well-motivated executive may be more willing than the ill-motivated one to trade some loss of present control for increased future discretion, if the ill-motivated executive tends to be myopic or to discount the future more heavily. However, it is not clear that is so -- many terrifying dictators have been quite far-sighted -- and in any event everything depends upon the particulars of the case.

#### Future presidents prevent solvency

Harvard Law Review 12, "Developments in the Law: Presidential Authority," Vol. 125:2057, www.harvardlawreview.org/media/pdf/vol125\_devo.pdf

The recent history of signing statements demonstrates how public opinion can effectively check presidential expansions of power by inducing executive self-binding. It remains to be seen, however, if this more restrained view of signing statements can remain intact, for **it relies on the promises of one branch — indeed of one person — to enforce and maintain the separation of powers**. To be sure, President Obama’s guidelines for the use of signing statements contain all the hallmarks of good executive branch policy: transparency, accountability, and fidelity to constitutional limitations. Yet, in practice, this apparent constraint (however well intentioned) may amount to little more than voluntary self-restraint. 146 Without a formal institutional check, it is unclear what mechanism will prevent the next President (or President Obama himself) from reverting to the allegedly abusive Bush-era practices. 147 Only time, and perhaps public opinion, will tell.

### Links to politics

#### CP links to politics more

Billy Hallowell 13, writer for The Blaze, B.A. in journalism and broadcasting from the College of Mount Saint Vincent in Riverdale, New York and an M.S. in social research from Hunter College in Manhattan, “HERE’S HOW OBAMA IS USING EXECUTIVE POWER TO BYPASS LEGISLATIVE PROCESS” Feb. 11, 2013, <http://www.theblaze.com/stories/2013/02/11/heres-how-obamas-using-executive-power-to-bylass-legislative-process-plus-a-brief-history-of-executive-orders/>

“In an era of polarized parties and a fragmented Congress, the opportunities to legislate are few and far between,” Howell said. “So presidents have powerful incentive to go it alone. And they do.”¶ And the political opposition howls.¶ Sen. Marco Rubio, R-Fla., a possible contender for the Republican presidential nomination in 2016, said that on the gun-control front in particular, Obama is “abusing his power by imposing his policies via executive fiat instead of allowing them to be debated in Congress.”¶ The Republican reaction is to be expected, said John Woolley, co-director of the American Presidency Project at the University of California in Santa Barbara.¶ “For years there has been a growing concern about unchecked executive power,” Woolley said. “It tends to have a partisan content, with contemporary complaints coming from the incumbent president’s opponents.”

### OLC Plank

#### Links to all the solvency arguments they make- uses they use the same legal councel the plan uses.

#### OLC can’t solve and links to politics

Eric Posner 11, the Kirkland & Ellis Professor, University of Chicago Law School. “DEFERENCE TO THE EXECUTIVE IN THE UNITED STATES AFTER 9/11 CONGRESS, THE COURTS AND THE OFFICE OF LEGAL COUNSEL” available at http://www.law.uchicago.edu/academics/publiclaw/index.html.

These two events neatly encapsulate the dilemma for OLC, and indeed all the president’s legal advisers. If OLC tries to block the president from acting in the way he sees fit, it takes the risk that he will disregard its advice and marginalize the institution. If OLC gives the president the advice that he wants to hear, it takes the risk that it will mislead him and fail to prepare him for adverse reactions from the courts, Congress, and the public. Can OLC constrain the executive? That is the position taken by many scholars, most notably Jack Goldsmith. 18 The underlying idea here is that even if Congress and the courts cannot constrain the executive, perhaps offices within the executive can. The opposite view, advanced by Bruce Ackerman, is that OLC is a rubber stamp. 19 I advocate a third view: OLC does not constrain the executive but enables him to accomplish goals that he would not otherwise be able to accomplish. It is more accurate to say that OLC enables than constrains. B. OLC as a Constraint on the Executive A number of scholars have argued that OLC can serve as an important constraint on executive power. I will argue that OLC cannot act as a constraint on executive power. Indeed, its only function is the opposite—as an “enabler” (as I will put it) or extender of executive power. A president must choose a course of action. He goes to OLC for advice. Ideally, OLC will provide him good advice as to the legality of the course of action. It will not provide him political advice and other relevant types of advice. The president wants to maximize his political advantage, 21 and so he will follow OLC’s advice only if the legal costs that OLC identifies are greater than the political benefits. On this theory, OLC will properly always give the president neutral advice, and the president will gratefully accept it although not necessarily follow it. If the story ended here, then it would be hard to see what the controversy over OLC could be about. As an adviser, it possesses no ability to constrain the executive. It merely provides doctrinal analysis, in this way, if it does its job properly, merely supplying predictions as to how other legal actors will react to the president’s proposed action. The executive can choose to ignore OLC’s advice, and so OLC cannot serve as a “constraint” on executive power in any meaningful sense. Instead, it merely conveys to the president information about the constraints on executive power that are imposed from outside the executive branch. However, there is an important twist that complicates the analysis. The president may choose to publicize OLC’s opinions. Naturally, the president will be tempted to publicize only favorable opinions. When Congress 22 claims that a policy is illegal, the president can respond that his lawyers advised him that the policy is legal. This response at least partially deflects blame from the president. There are two reasons for this. First, the Senate consented to the appointment of these lawyers; thus, if the lawyers gave bad advice, the Senate is partly to blame, and so the blame must be shared. Second, OLC lawyers likely care about their future prospects in the legal profession, which will turn in part on their ability to avoid scandals and to render plausible legal advice; they may also seek to maintain the office’s reputation. When OLC’s opinions are not merely private advice, but are used to justify actions, then OLC takes on a quasi-judicial function. Presidents are not obliged to publicize OLC’s opinions, but clearly they see an advantage to doing so, and they have in this way given OLC quasi-judicial status. But if the president publicizes OLC opinions, he takes a risk. The risk is that OLC will publicly advise him that an action is illegal. If OLC approval helps deflect blame from the president, then OLC disapproval will tend to concentrate blame on the president who ignores its advice. Congress and the public will note that after all the president is ignoring the advice of lawyers that he appointed and thus presumably he trusts, and this can only make the president look bad. To avoid such blame, the president may refrain from engaging in a politically advantageous action. In this way, OLC may be able to prevent the president from taking an action that he would otherwise prefer. At a minimum, OLC raises the political cost of the action. I have simplified greatly, but I believe that this basic logic has led some scholars to believe that OLC serves as a constraint on the president. But this is a mistake. OLC strengthens the president’s hand in some cases and weakens them in others; but overall it extends his power—it serves as enabler, not constraint. To see why, consider an example in which a president must choose an action that lies on a continuum. One might consider electronic surveillance. At one extreme, the president can engage in actions that are clearly lawful—for example, spying on criminal suspects after obtaining warrants from judges. At the other extreme, the president can engage in actions that are clearly unlawful—for example, spying on political opponents. OLC opinions will not affect Congress’s or the public’s reaction to either the obviously lawful or the obviously unlawful actions. But then there are middle cases. Consider a policy L, which is just barely legal, and a policy I, which is just barely illegal. The president would like to pursue policy L but fears that Congress and others will mistakenly believe that L is illegal. As a result, political opposition to L will be greater than it would be otherwise. In such a case, a favorable advisory opinion from a neutral legal body that has credibility with Congress will help the president. OLC’s approval of L would cause political opposition (to the extent that it is based on the mistaken belief that L is unlawful) to melt away. Thus, OLC enables the president to engage in policy L, when without OLC’s participation that might be impossible. True, OLC will not enable the president to engage in I, assuming OLC is neutral. And, indeed, OLC’s negative reaction to I may stiffen Congress’ resistance. However, the president will use OLC only because he believes that OLC will strengthen his hand on net. It might be useful to make this point using a little jargon. In order for OLC to serve its ex ante function of enabling the president to avoid confrontations with Congress in difficult cases, it must be able to say “no” to him ex post for barely illegal actions as well as “yes” to him for barely legal actions. It is wrong to consider an ex post no as a form of constraint because, ex ante, it enables the president to act in half of the difficult cases. OLC does not impose any independent constraint on the president, that is, any constraint that is separate from the constraint imposed by Congress. An analogy to contract law might be useful. People enter contracts because they enable them to do things ex ante by imposing constraints on them ex post. For example, a debtor can borrow money from a creditor only because a court will force the debtor to repay the money ex post. It would be strange to say that contract law imposes “constraints” on people because of ex post enforcement. In fact, contract law enables people to do things that they could not otherwise do—it extends their power. If it did not,people would not enter contracts. A question naturally arises about OLC’s incentives. I have assumed that OLC provides neutral advice—in the sense of trying to make accurate predictions as to how other agents like Congress and the courts would reaction to proposed actions. It is possible that OLC could be biased—either in favor of the president or against him. However, if OLC were biased against the president, he would stop asking it for advice (or would ask for its advice in private and then ignore it). This danger surely accounts for the fact that OLC jurisprudence is pro-executive. 23 But it would be just as dangerous for OLC to be excessively biased in favor of the president. If it were, it would mislead the president and lose its credibility with Congress, with the result that it could not help the president engage in L policies. So OLC must be neither excessively pro-president nor anti-president. If it can avoid these extremes, it will be an “enabler”; if it cannot, it will be ignored. In no circumstance could it be a “constraint.” If the OLC cannot constrain the president on net, why have people claimed that OLC can constrain the president? What is the source of this mistake? One possibility, which I have already noted, is that commentators might look only at one side of the problem. Scholars note that OLC may “prevent” the president from engaging in barely illegal actions without also acknowledging that it can do so only if at the same time it enables the president to engage in barely legal actions. This is simply a failure to look at the full picture. For example, in The Terror Presidency, Goldsmith argues that President Bush abandoned a scheme of warrantless wiretapping without authorization from the FISA court because OLC declared the scheme illegal, and top Justice Department officials threatened to resign unless Bush heeded OLC’s advice. 25 This seems like a clear example of constraint. But it is important to look at the whole picture. If OLC had approved the scheme, and subsequently executive branch agents in the NSA had been prosecuted and punished by the courts, then OLC’s credibility as a supplier of legal advice would have been destroyed. For the president, this would have been a bad outcome. As I have argued, a credible OLC helps the president accomplish his agenda in “barely legal” cases. Without taking into account those cases where OLC advice helps the president’s agenda ex post as well as the cases where OLC advice hurts the president’s agenda ex post, one cannot make an overall judgment about OLC’s ex ante effect on executive power. Another possible source of error is that scholars imagine that “neutral” advice will almost always prevent the president from engaging in preferred actions, while rarely enabling the president to engage in preferred actions. The implicit picture here is that a president will normally want to break the law, that under the proper interpretation of the Constitution and relevant standards the president can accomplish very little. So if OLC is infact neutral and the president does obey its advice, then it must constrain the president. But this theory cannot be right, either. If OLC constantly told the president that he cannot do what he wants to do, when infact Congress and other agents would not object to the preferred actions, then the president would stop asking OLC for advice. As noted above, for OLC to maintain its relevance, it cannot offer an abstract interpretation of the Constitution that is divorced from political realities; it has to be able to make realistic predictions as to how other legal agents will react to the president’s actions. This has led OLC to develop a pro-executive jurisprudence in line with the long-term evolution of executive power. If OLC tried to impose constraints other than those imposed by Congress and other institutions with political power, then the president would ignore it.

### 2ac top level

#### No debt ceiling deal – there is a stalemate in Congress

**WDTV 10/4** (“No Sign of a Deal as Debt Ceiling Draws Nearer,” October 04, 2013, <http://www.wdtv.com/wdtv.cfm?func=view&section=5-News&item=No-Sign-of-a-Deal-as-Debt-Ceiling-Draws-Nearer12141>

There was no progress Friday on a compromise to end the shutdown, and it doesn't look like that's going to change soon. Congress is still locked in a stalemate, but with each passing day the pressure mounts to end the shutdown and get back on track because we will hit the debt ceiling on October 17th. If congress can't come to a budget agreement by then, we're going to default on our loans, lose our credit rating, and hurt the global economy. Republicans say they will only agree to raise the debt limit if they see big cuts in government spending, but President Obama and other Democratic leaders aren't even willing to talk about budgets until after the government reopens. In the midst of this battle, two Republicans from Kentucky, Mitch McConnell and Rand Paul, were caught strategizing for their party in whispers on Wednesday. Paul approached McConnell to say they should reiterate that they are the ones ready to negotiate, implying that the Democrats are the ones keeping the government shut down. He also said they could "win this thing". The GOP said they would continue to vote for piece-meal funding during the shutdown, but Democrats are pushing to fund everything at once.

#### The GOP won’t blink – conservative media pressure, the base, and Obama hatred

**Tobin, 10/1/13** - Jonathan S. Tobin is Senior Online Editor of Commentary magazine with responsibility for managing the editorial content of the website as well as serving as chief politics blogger (“Must Republicans Blink on the Shutdown?” <http://www.commentarymagazine.com/2013/10/01/must-republicans-blink-on-the-shutdown/>)

There’s no question that Democrats are in a stronger position today, at least as far as public opinion is concerned. But the expectation that the GOP must give in and do so quickly may be mistaken. As I noted last night, after having gone this far in order to make a point about their unwillingness to go along with ObamaCare, for Boehner to cave in quickly would only worsen his party’s situation. Having taken a stand on points they believe are eminently defensible—applying ObamaCare to Congress and the staff of the White House and a demand to delay the penalties attached to the health-care bill’s personal mandate—and with the president declaring he won’t negotiate and with an even more important deadline looming in three weeks about raising the debt ceiling, the GOP may not have as much incentive to surrender as their opponents think. Let me specify that the decision to call the president’s bluff on the shutdown was unwise. There was never a chance the Democrats would agree to defund ObamaCare and no game plan that would give the Republicans a viable exit strategy from such a standoff, let alone a way to win it. But having gotten into this position, it must be conceded that the widespread belief that they will be forced to wave the white flag within days is based on a set of expectations that aren’t necessarily valid. As the Washington Examiner wisely noted this morning, the comparisons to the disastrous 1995 shutdown need to be re-examined. As much as Senator John McCain may be right when he said that he had seen this movie before, the circumstances are slightly different. Unlike in 1995, mainstream liberal media pressure on Republicans is now offset by not only Fox News but also conservative talk radio, a medium that is placing pressure on the GOP to stand firm, not to give in. The conservative base that helped goad the Republicans into this fix is equally unwilling to see them weasel their way out of it, at least not without a fight. Just as important is the nature of their antagonist. In 1995, Republicans were faced with a Democratic president who made a career out of successfully pretending to be a centrist. President Obama may have run in 2008 as a post-partisan candidate, but he dropped that act a long time ago and is a far more polarizing figure. When the president told NPR this morning that he “will not negotiate” with Republicans, that was what his liberal base wanted to hear. But it is not a stand that is likely to increase pressure on the GOP. To the contrary, the more Obama dares them to dig in their heels, the more likely it is that conservatives will do just that. All along, critics of the shutdown strategy have assumed that simply because there was no clear exit strategy the consequences of a shutdown would be enough to pressure Republicans to blink once the Democrats refused to budge. But the problem with that critique is that while Senator Ted Cruz and others were blowing smoke when they said Obama would cave, there may not be sufficient leverage on the other side that would cause Boehner to blink. Indeed, the longer this goes on, the more likely it may be that Republicans start to think time is on their side rather than against them. President Obama has been hoping for this shutdown for two years but only because he, like so many others, assumed it would not last long. As the days pass with Senate Democrats refusing to go into a conference with House Republicans and Obama drawing a line in the sand, pressure may start to build on him to give a little. The financial markets are not collapsing today because of the belief the shutdown will be brief. Once that changes, the economic impact will change with it.

#### Boehner pushing for a deal now but unable to unite the GOP

Heidi Przybyla - Oct 3, 2013 “Frustrated Republicans Pressure Boehner to End Shutdown” Bloomberg, Online

According to two lawmakers who participated in the earlier gathering with Boehner, the speaker told them he wants to shift the focus to a long-term agreement to address the nation’s debt that would also avoid a clash over raising the U.S. debt limit later this month. The lawmakers requested anonymity when discussing the meeting. Representative Michael Fitzpatrick of Pennsylvania, also part of the group, said Boehner “very clearly wants a long-term resolution that puts the country on a more solid economic and financial footing.” Michael Steel, the speaker’s spokesman, didn’t comment on specific meetings with members, saying his boss “constantly listens to members from every part of our conference.” The anti-shutdown wing of the party is growing, including Virginia Representatives Frank Wolf and Scott Rigell. Their judgment is that the party is being hurt by pursuing a strategy first championed by Republican Senator Ted Cruz of Texas, a freshman lawmaker aligned with the small-government Tea Party movement who attacked Obamacare on Sept. 24 in a 21-hour speech on the Senate floor.

#### No risk of a shutdown – and it’s about Boehner’s capital, not Obama’s

Robert Costa is Washington editor of National Review and a political analyst for CNBC. 10-4-2013 “Five myths about House Republicans” WaPo, Online

Instead, Boehner is struggling to balance his right flank’s appetite for brinkmanship with his desire to cut a deal that’s palatable to conservatives. To do that, he frequently shies away from publicly conceding any ground. But he and the Republican leadership aren’t eager to be blamed for economic chaos and risk their party’s House majority in next year’s midterms. So don’t read too much into the fight-till-the-death posturing of the House’s debt-limit warriors. They have influence but not total say. Look for smaller clues — Boehner’s closed-door meetings, the chatter about a larger fiscal package — as evidence of how the impasse will probably end: with an eleventh-hour, smaller compromise that Boehner has been slowly but surely shepherding.

#### Boehner will have to balance Tea Party interests with other Republicans – political considerations play a huge role in this fight

Robert Costa is Washington editor of National Review and a political analyst for CNBC. 10-4-2013 “Five myths about House Republicans” WaPo, Online

The House speaker has endured an arduous post-election period, going back to late December, when his strategy for solving the “fiscal cliff,” the infamous “Plan B,” failed to gain traction in the House Republican conference. In a memorable moment, Boehner, nearly in tears, conceded defeat and pulled Plan B from the floor. A few weeks later, there was an embarrassing coup attempt in which about a dozen Republicans broke ranks. Ever since, Boehner’s grip on his conference has been threatened by 30 to 40 House conservatives who don’t trust his instincts and ignore his direction. But Boehner isn’t powerless. That group of 30 to 40 conservatives, while a dominant bloc, represents only about 10 percent of the House. Boehner goes along with them on many issues, but not because he doesn’t have other options; it’s because he wants to keep the conference united. If he wanted to break with them in the current fiscal drama, he could, and that power shouldn’t be dismissed. Should he decide to bring a compromise to the House floor, there’s nothing, other than political considerations, that would stop him.

#### Tea party loves challenges to drones – draws in other Republicans who need a conservative win back home – Paul filibuster proves

RICHARD W. STEVENSON and ASHLEY PARKER March 7, 2013 “A Senator’s Stand on Drones Scrambles Partisan Lines” NYT online

Mr. Paul won particular support from two other Tea Party-backed Republicans, Senators Ted Cruz of Texas and Mike Lee of Utah. The three spelled one another during the filibuster on Wednesday afternoon and evening, drawing in part from a huge positive response on Twitter to their efforts. But with Tea Party supporters having demonstrated the ability to mount primary challenges to incumbents they consider insufficiently conservative, an array of other Republican senators showed up on the Senate floor late Wednesday night to support Mr. Paul’s filibuster. They included Mr. McConnell, who has been moving vigorously to shut down chatter about a potential primary challenge to his re-election campaign next year, and Senator Marco Rubio, who has drawn some Tea Party criticism for his openness to an immigration overhaul that would give illegal immigrants a chance at gaining citizenship.

#### Political capital theory is wrong, winners win

**Hirsch ‘2-7-13** (“There’s No Such Thing as Political Capital”, Michael Hirsh February 7, 2013, former foreign editor and chief diplomatic correspondent for Newsweek. He is currently a senior editor in the magazine's Washington bureau. He is a lecturer and has appeared numerous times as a commentator on Fox News, CNN, MSNBC, National Public Radio,. Hirsh was co-winner of the Overseas Press Club award for best magazine reporting from abroad in 2001 for "prescience in identifying the al Qaeda threat half a year before September 11 and for Newsweek's coverage of the war on terror, which also won a National Magazine Award, http://www.nationaljournal.com/magazine/there-s-no-such-thing-as-political-capital-20130207)

There’s No Such Thing as Political Capital

The idea of political capital—or mandates, or momentum—is so poorly defined that presidents and pundits often get it wrong. On Tuesday, in his State of the Union address, President Obama will do what every president does this time of year. For about 60 minutes, he will lay out a sprawling and ambitious wish list highlighted by gun control and immigration reform, climate change and debt reduction. In response, the pundits will do what they always do this time of year: They will talk about how unrealistic most of the proposals are, discussions often informed by sagacious reckonings of how much “political capital” Obama possesses to push his program through. Most of this talk will have no bearing on what actually happens over the next four years. Consider this: Three months ago, just before the November election, if someone had talked seriously about Obama having enough political capital to oversee passage of both immigration reform and gun-control legislation at the beginning of his second term—even after winning the election by 4 percentage points and 5 million votes (the actual final tally)—this person would have been called crazy and stripped of his pundit’s license. (It doesn’t exist, but it ought to.) In his first term, in a starkly polarized country, the president had been so frustrated by GOP resistance that he finally issued a limited executive order last August permitting immigrants who entered the country illegally as children to work without fear of deportation for at least two years. Obama didn’t dare to even bring up gun control, a Democratic “third rail” that has cost the party elections and that actually might have been even less popular on the right than the president’s health care law. And yet, for reasons that have very little to do with Obama’s personal prestige or popularity—variously put in terms of a “mandate” or “political capital”—chances are fair that both will now happen. What changed? In the case of gun control, of course, it wasn’t the election. It was the horror of the 20 first-graders who were slaughtered in Newtown, Conn., in mid-December. The sickening reality of little girls and boys riddled with bullets from a high-capacity assault weapon seemed to precipitate a sudden tipping point in the national conscience. One thing changed after another. Wayne LaPierre of the National Rifle Association marginalized himself with poorly chosen comments soon after the massacre. The pro-gun lobby, once a phalanx of opposition, began to fissure into reasonables and crazies. Former Rep. Gabrielle Giffords, D-Ariz., who was shot in the head two years ago and is still struggling to speak and walk, started a PAC with her husband to appeal to the moderate middle of gun owners. Then she gave riveting and poignant testimony to the Senate, challenging lawmakers: “Be bold.” As a result, momentum has appeared to build around some kind of a plan to curtail sales of the most dangerous weapons and ammunition and the way people are permitted to buy them. It’s impossible to say now whether such a bill will pass and, if it does, whether it will make anything more than cosmetic changes to gun laws. But one thing is clear: The political tectonics have shifted dramatically in very little time. Whole new possibilities exist now that didn’t a few weeks ago. Meanwhile, the Republican members of the Senate’s so-called Gang of Eight are pushing hard for a new spirit of compromise on immigration reform, a sharp change after an election year in which the GOP standard-bearer declared he would make life so miserable for the 11 million illegal immigrants in the U.S. that they would “self-deport.” But this turnaround has very little to do with Obama’s personal influence—his political mandate, as it were. It has almost entirely to do with just two numbers: 71 and 27. That’s 71 percent for Obama, 27 percent for Mitt Romney, the breakdown of the Hispanic vote in the 2012 presidential election. Obama drove home his advantage by giving a speech on immigration reform on Jan. 29 at a Hispanic-dominated high school in Nevada, a swing state he won by a surprising 8 percentage points in November. But the movement on immigration has mainly come out of the Republican Party’s recent introspection, and the realization by its more thoughtful members, such as Sen. Marco Rubio of Florida and Gov. Bobby Jindal of Louisiana, that without such a shift the party may be facing demographic death in a country where the 2010 census showed, for the first time, that white births have fallen into the minority. It’s got nothing to do with Obama’s political capital or, indeed, Obama at all. The point is not that “political capital” is a meaningless term. Often it is a synonym for “mandate” or “momentum” in the aftermath of a decisive election—and just about every politician ever elected has tried to claim more of a mandate than he actually has. Certainly, Obama can say that because he was elected and Romney wasn’t, he has a better claim on the country’s mood and direction. Many pundits still defend political capital as a useful metaphor at least. “It’s an unquantifiable but meaningful concept,” says Norman Ornstein of the American Enterprise Institute. “You can’t really look at a president and say he’s got 37 ounces of political capital. But the fact is, it’s a concept that matters, if you have popularity and some momentum on your side.” The real problem is that the idea of political capital—or mandates, or momentum—is so poorly defined that presidents and pundits often get it wrong. “Presidents usually over-estimate it,” says George Edwards, a presidential scholar at Texas A&M University. “The best kind of political capital—some sense of an electoral mandate to do something—is very rare. It almost never happens. In 1964, maybe. And to some degree in 1980.” For that reason, political capital is a concept that misleads far more than it enlightens. It is distortionary. It conveys the idea that we know more than we really do about the ever-elusive concept of political power, and it discounts the way unforeseen events can suddenly change everything. Instead, it suggests, erroneously, that a political figure has a concrete amount of political capital to invest, just as someone might have real investment capital—that a particular leader can bank his gains, and the size of his account determines what he can do at any given moment in history. Naturally, any president has practical and electoral limits. Does he have a majority in both chambers of Congress and a cohesive coalition behind him? Obama has neither at present. And unless a surge in the economy—at the moment, still stuck—or some other great victory gives him more momentum, it is inevitable that the closer Obama gets to the 2014 election, the less he will be able to get done. Going into the midterms, Republicans will increasingly avoid any concessions that make him (and the Democrats) stronger. But the abrupt emergence of the immigration and gun-control issues illustrates how suddenly shifts in mood can occur and how political interests can align in new ways just as suddenly. Indeed, the **pseudo-concept** of political capital **masks a larger truth** about Washington that is kindergarten simple: You just don’t know what you can do until you try. Or as Ornstein himself once wrote years ago, “**Winning wins**.” In theory, and in practice, depending on Obama’s handling of any particular issue, even in a polarized time, he could still deliver on a lot of his second-term goals, depending on his skill and the breaks. Unforeseen catalysts can appear, like Newtown. Epiphanies can dawn, such as when many Republican Party leaders suddenly woke up in panic to the huge disparity in the Hispanic vote. Some political scientists who study the elusive calculus of how to pass legislation and run successful presidencies say that **political capital is**, at best, **an empty concept**, and that **almost nothing in** the **academic literature** successfully quantifies or even defines it. “It can refer to a very abstract thing, like a president’s popularity, but there’s no mechanism there. That makes it kind of useless,” says Richard Bensel, a government professor at Cornell University. Even Ornstein concedes that the calculus is far more complex than the term suggests. Winning on one issue often **changes the** **calculation** for the next issue; there is never any known amount of capital. “The idea here is, if an issue comes up where the conventional wisdom is that president is not going to get what he wants, and [they]he gets it, then each time that happens, it changes the calculus of the other actors” Ornstein says. “If they think he’s going to win, they may **change positions to get on the winning side**. **It’s a bandwagon effect**.” ALL THE WAY WITH LBJ Sometimes, a clever practitioner of power can get more done just because [they’re]he’s aggressive and knows the hallways of Congress well. Texas A&M’s Edwards is right to say that the outcome of the 1964 election, Lyndon Johnson’s landslide victory over Barry Goldwater, was one of the few that conveyed a mandate. But one of the main reasons for that mandate (in addition to Goldwater’s ineptitude as a candidate) was President Johnson’s masterful use of power leading up to that election, and his ability to get far more done than anyone thought possible, given his limited political capital. In the newest volume in his exhaustive study of LBJ, The Passage of Power, historian Robert Caro recalls Johnson getting cautionary advice after he assumed the presidency from the assassinated John F. Kennedy in late 1963. Don’t focus on a long-stalled civil-rights bill, advisers told him, because it might jeopardize Southern lawmakers’ support for a tax cut and appropriations bills the president needed. “One of the wise, practical people around the table [said that] the presidency has only a certain amount of coinage to expend, and you oughtn’t to expend it on this,” Caro writes. (Coinage, of course, was what political capital was called in those days.) Johnson replied, “Well, what the hell’s the presidency for?” Johnson didn’t worry about coinage, and he got the Civil Rights Act enacted, along with much else: Medicare, a tax cut, antipoverty programs. He appeared to understand not just the ways of Congress but also the way to maximize the momentum he possessed in the lingering mood of national grief and determination by picking the right issues, as Caro records. “Momentum is not a mysterious mistress,” LBJ said. “It is a controllable fact of political life.” Johnson had the skill and wherewithal to realize that, at that moment of history, he could have unlimited coinage if he handled the politics right. He did. (At least until Vietnam, that is.)

### AT econ

#### AQAP rise collapses the economy

Nathaniel Sheppard 11, correspondent for the Chicago Tribune and NYT, June 7 2011, “Why pint-sized Yemen has become a world player,” http://www.alarabiya.net/articles/2011/06/07/152204.html

That Yemen could fall into the abyss is of great geopolitical significance that has put the bean-size nation at center stage. About 11 percent of the world’s seaborne petroleum passes through the Gulf of Aden en route to the Suez Canal, regional refineries and points west. ¶ It is not the largest shipment by far but enough that disruptions in transit could spook world markets and set off a new spiral of inflation as the world tries to recover from four years of economic distress.¶ Yemen occupies the southwestern and southern end of the Arabian Peninsula. It is bordered by Saudi Arabia to the north, the Red Sea to the west and Oman to the east. ¶ West bound oil must transit the Gulf of Aden and Bab el Mandab, a narrow strait that passes between Yemen and Djibouti then past the pirates’ paradise, Somalia before reaching open water. It is one of seven strategic world oil shipping chokepoints. ¶ Moreover, the area may contain significant untapped oil reserves, more reason for US concern since Saudi reserves may be diminishing and America is doing little to wean itself from fossil fuel.¶ Should Yemen polity fall apart, the country would be up for grabs. One of the grabbing hands would be that of Al Qaeda in the Arabian Peninsula, one of the most notorious of Al Qaeda offshoots. Even before Osama Bin Laden was killed and his body dumped into the sea at the beginning of May, the Al Qaeda leader and best known symbol of world terror had lost control of Yemen’s Al Qaeda warriors. They marched to their own drum.¶ Able to operate freely in this poorest of poor, barely managed country with rugged, unforgiving terrain, Yemen’s Al Qaeda has been able to mount several attacks on the US from here. First there was the suicide bombing of the naval destroyer USS Cole while it refueled at the Yemeni port of Aden. Seventeen seamen were killed¶ Subsequent attacks launched from here included the failed Christmas Day bomb plot in 2009 and the parcel bomb plot of 2010, which also failed. ¶ In 2009, Nasir Al Wuhayshi, an Al Qaeda commander who trained under Bin Laden in Afghanistan and served as his secretary, announced the consolidation of Al Qaeda forces in the region as Al Qaeda in the Arabian Peninsula, under his command.¶ The US went after Al Qaeda elements in the region that same year but in lawless Somalia with disastrous consequences.¶ Commander Wuhayshi pledged to take jihad from the Arabian Peninsula to Israel, striking at Muslim leaders he decreed “criminal tyrants,” along the way, such as the Saudi royal, family, Yemen’s President Ali Abdullah Saleh and recently deposed Egyptian President Hosni Mubarak. ¶ Once in Israel he would “liberate” Gaza and Muslim holy sites such as Haram Ash-Sharif, known by Jews as Temple Mount, the holiest of sites in the Old City of Jerusalem. It was here that God chose the Divine Presence to rest; from which the world we know expanded; and that God gathered the dust to make man.¶ US Navy SEALs would love to meet Mr. Wuhayshi to discuss diabolical ambitions for any serious attempt to carry out his apocalyptic quest most certainly would plunge the world into war of world proportions. His agenda and the passion and persistence with which he and his followers pursue it are a reason for stepped up US engagement in Yemen.¶ Before the current uptick in violence as disparate forces seek to send President Saleh packing for good, the long reigning strongman had begun to cooperate with the US counter terrorism efforts in the region, obliging with a series of air strikes and ground assaults on suspected Al Qaeda targets in Yemen. That cooperation may now be in tatters and Mr. Wuhayshi stands to gain ground.¶ The US’ waltz with the strongman was not by choice. While Mr. Saleh’s cooperation was probably more to save his utterly corrupt regime, he was viewed by the US as the lesser of evils in Yemen. The attitude toward President Saleh was the same as toward Panamanian strongman Gen. Manuel Noriega, another US criminal client: “He may be an SOB but he’s our SOB.’’ ¶ With a bigger footprint and wider control in Yemen in the absence of a strong central authority, outright land grabs and possible alliances with Somalia warlords, it would be as if Al Qaeda had found its Holy Grail, a potential for disrupting the flow of oil to the west, and what it views as the devil incarnate, the US. ¶ Ships transiting the area already find the waters treacherous. Now it stands to get worse. They are frequently targeted by pirates from Somalia who kill or demand large ransoms if they are able to successfully board cargo-carrying vessels. Oil tankers are like crown jewels.¶ International forces, including the US, have treated the Somali pirates like flies at a picnic, swatting them away unscathed most of the time and sometimes killing them, but not enough times to make their confederates think about new careers. ¶ Hijacking or blowing up oil tankers and messing with the oil that powers the world is a different matter altogether. There is too much at stake to leave it to Yemen to handle its own affairs but overt meddling from the West would be unwelcome in the region.¶ No Western or Asian oil dependent nation would relish the idea of invading a Muslim nation at a time of such tensions with Muslims. The US is particularly reluctant, having already done so twice in Iraq and Afghanistan.¶ Oil is oil however. While it might not matter to Muslim fundamentalists who want to turn the hands of time back to the 17th century, oil dependent nations would not sit by idly while an already fractured world economy worsened. The situation would get ugly.¶ Thus the tail wags the dog, the pint-sized nation that offers so little has forced the powerful behemoths to consider so much, like their limited options for doing anything about frightening events unfolding before their eyes.

### Flex DA

#### Pres powers low now—Syria decision undermined Obama’s presidential powers

Nather and Palmer, 9-1-13

[David and Anna, Politico, Bushies fear Obama weakening presidency, http://www.politico.com/story/2013/09/bushies-fear-obama-weakening-presidency-96143.html]

President Barack Obama just turned decades of debate over presidential war powers on its head.¶ Until Saturday, when Obama went to Congress to ask for permission to strike Syria, the power to launch military action had been strongly in the hands of the commander in chief. Even the 1973 War Powers Resolution allows bombs to start falling before the president has to ask Congress for long-term approval.¶ For three decades after Watergate, conservatives like Dick Cheney and those of his ilk sought to increase executive branch power that they felt had been eroded by liberal congressional reformers. George W. Bush’s legal team crafted controversial opinions that emboldened the White House on a wide range of national security areas, from interrogation to surveillance.¶ That makes the move by Obama to hand a piece of the messy situation in Syria to Congress a clear step in the other direction — an abdication of power to Congress at a moment when he has no good solutions.¶ And even if Obama ultimately balks at Congress if they vote down his ask, prominent conservatives who fueled the expansion of presidential power — especially Bush administration alums — are beside themselves, arguing that Obama has weakened the presidency.

#### Current targeted killing policy under executive authority will collapse due process protections and allow indefinite detention to continue uncontrollable

Alford, 11 [Copyright (c) 2011 Utah Law Review Society Utah Law Review 2011 Utah Law Review 2011 Utah L. Rev. 1203 LENGTH: 41771 words ARTICLE: The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens NAME: Ryan Patrick Alford\* BIO: \* © 2011 Ryan Patrick Alford, Assistant Professor, Ave Maria School of Law, p. lexis]

From 2001 to 2004, the constitutional order of the United States was severely tested. In Hamdi v. Rumsfeld, n408 the Supreme Court held that the writ of habeas corpus extended to a United States citizen held at Guantanamo Bay. n409 Eight of the nine Justices agreed that the executive branch did not have the power to hold a citizen indefinitely, without access to basic due process protections enforceable in open court. n410 This case was properly seen as a watershed, a rejection of theories of executive detention that were incompatible with the basic tenets of our common law tradition. n411 However, the clear right to habeas corpus is only slightly over three hundred years old - the right not to be killed without due process of law is twice as old and considerably more fundamental. As Blackstone made clear, habeas corpus was originally necessary because it was a prophylactic protection for Magna Carta's right not to be killed. n412 To turn a blind eye to executive death warrants would be to trample upon numerous principles the Framers believed so important as to put into a document that outlines the parameters of the state itself. It would also trample upon principles that predate the Bill of Rights: the balance of powers, the constraints on arbitrary executive action, and the specific requirements of additional due process for those accused of crimes amounting to treason. It would also make a mockery of their [\*1271] comprehensive view of due process, which precluded the use of military justice against civilians. It would allow a return to the very features of royalist justice that they and their forbearers detested, such as allowing the executive the power of judgment and denying the courts the power to intervene - this was the hallmark of the detested Star Chamber, which was abolished on these grounds in 1641. n413 What is perhaps most perplexing about this current crossroads is that there seems to be very little discussion of the importance of this case within the legal profession in general, and in particular among the scholars and lawyers who had opposed the legal framework for the indefinite detention of the detainees at Guantanamo Bay. It is difficult to understand why so much determined opposition should emerge to the withholding of the rights of habeas corpus from American citizens (which led to the decision in Hamdi), n414 while the administration's decision to issue executive death warrants has led to so little. Apart from the decision of the ACLU and the CCR to litigate the case on behalf of Nasser Al-Aulaqi, there has been very little action taken within the legal community to publicize the Obama Administration's decision to use the targeted killing program to assassinate an American citizen. n415 As the discussion of the targeted killing program after Al-Awlaki's extrajudicial execution reveals, American militants like Anwar al-Awlaki are placed on a kill or capture list by a secretive panel of senior government officials, which then informs the president of its decisions ... . There is no public record of the operations or decisions of the panel, which is a subset of the White House's National Security Council ... . Neither is there any law establishing its existence or setting out the rules by which it is supposed to operate. n416 [\*1272] Not only is there no law addressing the due process rights of Americans with respect to targeted killing, but no law on this subject can be made. The executive branch has prevented the judiciary from addressing the killing of citizens by asserting that the courts do not have jurisdiction over these cases because they present political questions. Since the judiciary may not adjudicate the claims of those about to be killed, the prevailing law of the land now comes in the form of secret memoranda created by the executive's Office of Legal Counsel ("OLC"). n417 The executive branch now has the final say on the constitutionality of its decision to kill an American citizen, since it asserts that no court has jurisdiction to review its opinion. This is executive privilege beyond James I's wildest dreams. While the administration insists that the OLC memorandum did not formulate general criteria for deciding whether Americans accused (impliedly, but not formally) of treason may be tortured or killed, n418 its version of events is actually worse than the alternative. The administration advances the position that a citizen suspected of treason may be killed after a singular determination within the executive branch that this would not violate the citizen's due process rights. "If that's true, then the Obama Administration is playing legal Calvinball, making decisions based on individual cases, rather than consistent legal criteria." n419 Unfortunately, this has been confirmed to be true: the recommendations for targeted killings are reportedly made on a case-by-case basis by "a grim debating society" of "more than 100 members of the government's sprawling national security apparatus," who provide no indication of using legal principles when determining such issues as which sort of "facilitators" of terrorism should be marked for death. n420 This sort of Star Chamber is precisely what the rule of law was designed to protect us against. After months of silence, Attorney General of the United States Eric Holder traced out the rationale for the targeted killing of an American citizen. n421 Rebutting this article's thesis, he argued: Some have argued that the president is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of Al Qaeda or associated forces... . [\*1273] This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process. n422 Given the Obama Administration's decision not to release the OLC memorandum or even acknowledge that they did in fact kill Al-Awlaki, n423 this will likely be the most comprehensive description of the legal case for targeted killings the American people ever receive. Its arrogance is stunning. Attorney General Holder appears to rely implicitly on a Court decision holding that those having their social security benefits terminated are not entitled to a hearing in advance in support of another proposition. Namely, that some unspecified degree of procedural fairness apportioned in secret within the executive branch is all that is required before an American citizen can be killed. The Constitution, and a tradition of resistance to arbitrary executive power that it reaffirmed that extends back to the Magna Carta, is being held for naught - on the basis of a holding from an administrative law case wrenched forcibly out of context. With this flimsy justification, the administration rationalizes the creation of a new Star Chamber, newly empowered to administer capital punishment in secret and unchallengeable proceedings. Should this pass unchallenged, this may herald the end of the rule of law in America.