# 1nc

## Off

### 1NC

#### The aff is not topical --- introducing armed forces only refers to human troops, not weapons systems such as nuclear weapons --- prefer our interpretation because it’s based on textual analysis, legislative history, and intent of the WPR

Lorber 13 – Eric Lorber, J.D. Candidate, University of Pennsylvania Law School, Ph.D Candidate, Duke University Department of Political Science. January 2013, "Executive Warmaking Authority and Offensive Cyber Operations: Can Existing Legislation Successfully Constrain Presidential Power?" University of Pennsylvania Journal of Contsitutional Law, 15 U. Pa. J. Const. L. 961, lexis nexis

As is **evident from a** textual analysis, n177 an examination of the legislative history, n178 and **the broad** policy purposes behind the creation of the Act, n179 [\*990] "armed forces" refers to U.S. soldiers and members of the armed forces, not weapon systems or capabilities such as offensive cyber weapons. Section 1547 does not specifically define "armed forces," but it states that "the term "introduction of United States Armed Forces' includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government." n180 While this definition pertains to the broader phrase "introduction of armed forces," the clear implication is that **only members of the armed forces count for the purposes of the definition under the WPR.** Though not dispositive, **the term "member" connotes a human individual who is part of an organization.** n181 Thus, it appears that the term "armed forces" means human members of the United States armed forces. However, there exist two potential complications with this reading. First, the language of the statute states that "the term "introduction of United States Armed Forces' includes the assignment of members of such armed forces." n182 By using inclusionary - as opposed to exclusionary - language, one might argue that the term "armed forces" could include more than members. This argument is unconvincing however, given that a core principle of statutory interpretation, expressio unius, suggests that **expression of one thing (i.e., members) implies the exclusion of others (**such as non-members **constituting armed forces)**. n183 Second, the term "member" does not explicitly reference "humans," and so could arguably refer to individual units and beings that are part of a larger whole (e.g., wolves can be members of a pack). As a result, though a textual analysis suggests that "armed forces" refers to human members of the armed forces, such a conclusion is not determinative.¶ **An examination of the legislative history also suggests that Congress clearly conceptualized "armed forces" as human members of the armed forces**. For example, disputes over the term "armed forces" revolved around who could be considered members of the armed forces, not what constituted a member. Senator Thomas Eagleton, one of the Resolution's architects, proposed an amendment during the process providing that the Resolution cover military officers on loan to a civilian agency (such as the Central [\*991] Intelligence Agency). n184 This amendment was dropped after encountering pushback, n185 but the debate revolved around whether those military individuals on loan to the civilian agency were still members of the armed forces for the purposes of the WPR, suggesting that Congress considered the term to apply only to soldiers in the armed forces. Further, during the congressional hearings, the question of deployment of "armed forces" centered primarily on past U.S. deployment of troops to combat zones, n186 suggesting that **Congress conceptualized "armed forces" to mean U.S. combat troops.**¶ **The broad purpose of the Resolution aimed to prevent the large-scale but unauthorized deployments of U.S. troops into hostilities**. n187 While examining the broad purpose of a legislative act is increasingly relied upon only after examining the text and legislative history, here it provides further support for those two alternate interpretive sources. n188 As one scholar has noted, "the War Powers Resolution, for example, is concerned with sending U.S. troops into harm's way." n189 The historical context of the War Powers Resolution is also important in determining its broad purpose; as the resolutions submitted during the Vietnam War and in the lead-up to the passage of the WPR suggest, Congress was concerned about its ability to effectively regulate the President's deployments of large numbers of U.S. troops to Southeast Asia, n190 as well as prevent the President from authorizing troop incursions into countries in that region. n191 The WPR was a reaction to the President's continued deployments of these troops into combat zones, and as such suggests that Congress's broad purpose was to prevent the unconstrained deployment of U.S. personnel, not weapons, into hostilities.¶ This analysis suggests that, when defining the term "armed forces," Congress meant members of the armed forces who would be placed in [\*992] harm's way (i.e., into hostilities or imminent hostilities). **Applied to offensive cyber operations, such a definition leads to the conclusion that the** W**ar** P**owers** R**esolution likely does not cover such activities**. Worms, viruses, and kill switches are clearly not U.S. troops. Therefore, the key question regarding whether the WPR can govern cyber operations is not whether the operation is conducted independently or as part of a kinetic military operation. Rather, the key question is the delivery mechanism. For example, if military forces were deployed to launch the cyberattack, such an activity, if it were related to imminent hostilities with a foreign country, could trigger the WPR. This seems unlikely, however, for two reasons. First, it is unclear whether small-scale deployments where the soldiers are not participating or under threat of harm constitute the introduction of armed forces into hostilities under the War Powers Resolution. n192 Thus, **individual operators deployed to plant viruses in particular enemy systems may not constitute armed forces introduced into hostilities or imminent hostilities.** Second, such a tactical approach seems unlikely. If the target system is remote access, the military can attack it without placing personnel in harm's way. n193 If it is close access, there exist many other effective ways to target such systems. n194 As a result, unless U.S. troops are introduced into hostilities or imminent hostilities while deploying offensive cyber capabilities - which is highly unlikely - such operations will not trigger the War Powers Resolution.

#### Vote negative for predictable limits --- nuclear weapons is a whole topic on its own --- requires research into a whole separate literature base --- undermines preparedness for all debates.

### 1NC

#### Judicial deference is stable now but the plan’s precedent collapses it

John O’Connor 7, Former officer in the Marine Corp and Judge Advocate; JD, U Maryland Law School. Statistics and the Military Deference Doctrine: a Response to Professor Lichtman, 66 Md. L. Rev. 668, Lexis

As I have written elsewhere, one of the most important aspects of the military deference doctrine, and one that many commentators misunderstand,176 is that the military deference doctrine is not a venerable doctrine that has existed since the early days of the Republic. 177 Indeed, a review of the Court’s military deference jurisprudence could lead one to the conclusion that the doctrine was more or less the brainchild of Chief Justice Rehnquist, who wrote virtually every important military deference decision that the Court has issued.178 While notions of stare decisis may militate against a retreat from the military deference doctrine by the Court, the fact remains that the doctrine is one of fairly recent vintage, which was developed and perpetuated mainly through judicial opinions written by a Justice who is no longer on the Court. Moreover, while stare decisis is a nice concept in the abstract, that doctrine did not prevent the Court from radically changing its approach to constitutional challenges to military practices twice before. Therefore, **it is not out of the realm of possibility that the military deference doctrine could recede in importance** with personnel changes on the Court. This could occur through an express overruling of the doctrine, through decisions narrowing the doctrine’s application, or through a moresubtle process whereby the Court continues to pay lip service to its need to defer to political branch judgments but nevertheless **accords little or no actual deference to the policy determinations of Congress and the President.**

But early indications from the Roberts Court, with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O’Connor, respectively, provide reason to believe that the military deference doctrine will continue to be a robust feature of the Court’s military jurisprudence, at least in the near term. In FAIR, the first “military” case decided by the Roberts Court, the Court upheld the Solomon Amendment against a constitutional challenge and, in so doing, began its constitutional analysis by extolling the virtues of the military deference doctrine when Congress legislates pursuant to its constitutional power to raise and support armies:

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Congress’ power in this area “is broad and sweeping,” and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in Rostker, “judicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies.179

While it is always dangerous to draw conclusions from a single case, all participating members of the Court—Justice Alito did not participate—joined Chief Justice Roberts’s opinion, which invoked the military deference doctrine as its first step in constitutional analysis once the Court resolved what the statute in fact provided.180 Moreover, this is a case that could have been decided on a number of grounds, such as a pure Spending Clause or First Amendment basis, 181 without invoking the military deference doctrine, and the Court’s prominent reliance on the military deference doctrine to support its decision suggests that there is no move afoot to eradicate the doctrine, explicitly or through subtle narrowing. For his part, Justice Alito noted prominently in his confirmation hearing that he had joined a conservative Princeton alumni group because, as an alumnus who attended Princeton on an ROTC scholarship, he was unhappy that the school had decided to abolish the campus ROTC program.182 While, again, predicting judicial attitudes based on personal history is always a risky proposition, Justice Alito’s background makes him seem like an unlikely candidate to take up the sword against the military deference doctrine, particularly when every other member of the Court joined an opinion applying it in FAIR.

V. Conclusion

This Article is by no means an attempt to catalogue every military deference case decided by the Court, or to discuss every nuance in its application. n183 It is important, however, that the doctrine be understood, both in terms of the facts surrounding its development and the limited scope of the doctrine as evidenced by the framework in which it is applied. Professor Lichtman's article on the military deference doctrine is thought provoking in that it challenges the orthodoxy by which the military deference doctrine is viewed - through the lens of time rather than through the lens of subject matter irrespective of time. n184 Ultimately, however, I have come to the conclusion that Professor Lichtman's analysis of the military deference doctrine is flawed in several important respects, all of which result in a fundamental misunderstanding [\*706] of the doctrine. In my estimation, the principal flaws in Professor Lichtman's analysis include: focusing on "win-loss" records rather than on the analytical framework in which those wins and losses occurred; failing to perceive that the military deference doctrine should - and does - apply only to a narrow category of "military" cases; incorrectly casting the military deference doctrine as a longstanding and relatively stable doctrine that has only subtly evolved since the early twentieth century; determining that subject matter, rather than timing, is the proper variable around which to organize an analysis of military deference decisions; and concluding that the military deference doctrine does not - and should not - apply to statutes and regulations burdening civilians instead of military personnel.

The military deference doctrine is, at once, both historically immature and limited, yet potent when applicable. After the disruption that occurred in the course of the Court's prior rejection of the doctrine of noninterference, the Court ultimately landed on the military deference doctrine as an appropriate analytical framework, where applicable, in the mid-1970s, and the Court has largely remained in the same place with its military jurisprudence ever since. The Court's rejection of its noninterference policy beginning in the mid-1950s likely came about as a result of what the Court perceived as overreaching by the political branches in subjecting persons - military and civilian - to courts-martial in a willy-nilly fashion. If the military deference doctrine were to recede in importance in the future, it would be a good bet that it happens because some collection of Supreme Court Justices perceives that Congress and the President are overreaching in the exercise of their constitutional powers to raise armies and regulate the armed forces. At present, though, there is no sign that such an upheaval is anywhere on the horizon.

#### Deference is vital to effective executive crisis response --- solves terror, rogue states, and prolif

Robert Blomquist 10, Professor of Law, Valparaiso University School of Law, THE JURISPRUDENCE OF AMERICAN NATIONAL SECURITY PRESIPRUDENCE, 44 Val. U.L. Rev. 881

Supreme Court Justices--along with legal advocates--need to conceptualize and prioritize big theoretical matters of institutional design and form and function in the American national security tripartite constitutional system. By way of an excellent introduction to these vital issues of legal theory, the Justices should pull down from the library shelf of the sumptuous Supreme Court Library in Washington, D.C. (or more likely have a clerk do this chore) the old chestnut, The Legal Process: Basic Problems in the Making and Application of Law by the late Harvard University law professors Henry M. Hart and Albert M. Sacks. n7 Among the rich insights on institutional design coupled with form and function in the American legal system that are germane to the Court's interpretation of national security law-making and decision-making by the President are several pertinent points. First, "Hart and Sacks' intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together." n8 By implication, therefore, the Court should be mindful of the unique [\*883] constitutional role played by the POTUS in preserving peace and should prevent imprudent judicial actions that would undermine American national security. Second, Hart and Sacks, continuing their broad insights of social theory, noted that legal communities establish "institutionalized[] procedures for the settlement of questions of group concern" n9 and regularize "different procedures and personnel of different qualifications . . . appropriate for deciding different kinds of questions" n10 because "every modern society differentiates among social questions, accepting one mode of decision for one kind and other modes for others-e.g., courts for 'judicial' decisions and legislatures for 'legislative' decisions" n11 and, extending their conceptualization, an executive for "executive" decisions. n12 Third, Professors Hart and Sacks made seminal theoretical distinctions between rules, standards, principles, and policies. n13 While all four are part of "legal arrangements [\*884] in an organized society," n14 and all four of these arrangements are potentially relevant in judicial review of presidential national security decisions, principles and policies n15 are of special concern because of the sprawling, inchoate, and rapidly changing nature of national security threats and the imperative of hyper-energy in the Executive branch in responding to these threats. n16

The Justices should also consult Professor Robert S. Summers's masterful elaboration and amplification of the Hart and Sacks project on enhancing a flourishing legal system: the 2006 opus, Form and Function in a Legal System: A General Study. n17 The most important points that [\*885] Summers makes that are relevant to judicial review of American national security presiprudence are three key considerations. First, a "conception of the overall form of the whole of a functional [legal] unit is needed to serve the founding purpose of defining, specifying, and organizing the makeup of such a unit so that it can be brought into being and can fulfill its own distinctive role" n18 in synergy with other legal units to serve overarching sovereign purposes for a polity. The American constitutional system of national security law and policy should be appreciated for its genius in making the POTUS the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats. Second, "a conception of the overall form of the whole is needed for the purpose of organizing the internal unity of relations between various formal features of a functional [legal] unit and between each formal feature and the complementary components of the whole unit." n19 Thus, Supreme Court Justices should have a thick understanding of the form of national security decision-making conceived by the Founders to center in the POTUS; the ways the POTUS and Congress historically organized the processing of national security through institutions like the National Security Council and the House and Senate intelligence committees; and the ways the POTUS has structured national security process through such specific legal forms as Presidential Directives, National Security Decision Directives, National Security Presidential Decision Directives, Presidential Decision Directives, and National Security Policy Directives in classified, secret documents along with typically public Executive Orders. n20 Third, according to Summers, "a conception of the overall form of the whole functional [legal] unit is needed to organize further the mode of operation and the instrumental capacity of the [legal] unit." n21 So, the Supreme Court should be aware that tinkering with national security decisions of the POTUS--unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution--may lead to unforeseen negative second-order consequences in the ability of the POTUS (with or without the help of Congress) to preserve, protect, and defend the Nation. n22

[\*886] B. Geopolitical Strategic Considerations Bearing on Judicial Interpretation

Before the United States Supreme Court Justices form an opinion on the legality of national security decisions by the POTUS, they should immerse themselves in judicially-noticeable facts concerning what national security expert, Bruce Berkowitz, in the subtitle of his recent book, calls the "challengers, competitors, and threats to America's future." n23 Not that the Justices need to become experts in national security affairs, n24 but every Supreme Court Justice should be aware of the following five basic national security facts and conceptions before sitting in judgment on presiprudential national security determinations.

(1) "National security policy . . . is harder today because the issues that are involved are more numerous and varied. The problem of the day can change at a moment's notice." n25 While "[y]esterday, it might have been proliferation; today, terrorism; tomorrow, hostile regional powers" n26, the twenty-first century reality is that "[t]hreats are also more likely to be intertwined--proliferators use the same networks as narco-traffickers, narco-traffickers support terrorists, and terrorists align themselves with regional powers." n27

(2) "Yet, as worrisome as these immediate concerns may be, the long-term challenges are even harder to deal with, and the stakes are higher. Whereas the main Cold War threat--the Soviet Union--was brittle, most of the potential adversaries and challengers America now faces are resilient." n28

(3) "The most important task for U.S. national security today is simply to retain the strategic advantage. This term, from the world of military doctrine, refers to the overall ability of a nation to control, or at least influence, the course of events." n29 Importantly, "[w]hen you hold [\*887] the strategic advantage, situations unfold in your favor, and each round ends so that you are in an advantageous position for the next. When you do not hold the strategic advantage, they do not." n30

(4) While "keeping the strategic advantage may not have the idealistic ring of making the world safe for democracy and does not sound as decisively macho as maintaining American hegemony," n31 maintaining the American "strategic advantage is critical, because it is essential for just about everything else America hopes to achieve--promoting freedom, protecting the homeland, defending its values, preserving peace, and so on." n32

(5) The United States requires national security "agility." n33 It not only needs "to refocus its resources repeatedly; it needs to do this faster than an adversary can focus its own resources." n34

[\*888] As further serious preparation for engaging in the jurisprudence of American national security presiprudence in hotly contested cases and controversies that may end up on their docket, our Supreme Court Justices should understand that, as Walter Russell Mead pointed out in an important essay a few years ago, n35 the average American can be understood as a Jacksonian pragmatist on national security issues. n36 "Americans are determined to keep the world at a distance, while not isolating ourselves from it completely. If we need to take action abroad, we want to do it on our terms." n37 Thus, recent social science survey data paints "a picture of a country whose practical people take a practical approach to knowledge about national security. Americans do not bother with the details most of the time because, for most Americans, the details do not matter most the time." n38 Indeed, since the American people "do know the outlines of the big picture and what we need to worry about [in national security affairs] so we know when we need to pay greater attention and what is at stake. This is the kind of knowledge suited to a Jacksonian." n39

Turning to how the Supreme Court should view and interpret American presidential measures to oversee national security law and policy, our Justices should consider a number of important points. First, given the robust text, tradition, intellectual history, and evolution of the institution of the POTUS as the American national security sentinel, n40 and the unprecedented dangers to the United States national security after 9/11, n41 national security presiprudence should be accorded wide latitude by the Court in the adjustment (and tradeoffs) of trading liberty and security. n42 Second, Justices should be aware that different presidents [\*889] institute changes in national security presiprudence given their unique perspective and knowledge of threats to the Nation. n43 Third, Justices should be restrained in second-guessing the POTUS and his subordinate national security experts concerning both the existence and duration of national security emergencies and necessary measures to rectify them. "During emergencies, the institutional advantages of the executive are enhanced", n44 moreover, "[b]ecause of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times." n45 Fourth, Supreme Court Justices, of course, should not give the POTUS a blank check--even during times of claimed national emergency; but, how much deference to be accorded by the Court is "always a hard question" and should be a function of "the scale and type of the emergency." n46 Fifth, the Court should be extraordinarily deferential to the POTUS and his executive subordinates regarding questions of executive determinations of the international laws of war and military tactics. As cogently explained by Professors Eric Posner and Adrian Vermeule, n47 "the United States should comply with the laws of war in its battle against Al Qaeda"--and I would argue, other lawless terrorist groups like the Taliban--"only to the extent these laws are beneficial to the United States, taking into account the likely response of [\*890] other states and of al Qaeda and other terrorist organizations," n48 as determined by the POTUS and his national security executive subordinates.

### 1NC

#### The President of the United States should not authorize the introduction of nuclear armed forces into hostilities against a government for inadvertently releasing nuclear material used in an attack against the United States or its allies. The United States Federal Government should require Congressional authorization prior to initiating offensive use of military force.

#### Solves group think

Annette Dickerson 9, Director of Education & Outreach for the Center for Constitutional Rights, Restore. Protect. Expand. Amend the War Powers Resolution, http://ccrjustice.org/files/CCR\_White\_WarPowers.pdf

Reform the War Powers Resolution

The War Powers Resolution has failed. Every president since the enactment of the Act has considered it to be unconstitutional. Presidents have generally not filed a report that would start the 60-day clock running, despite repeated executive introduction of armed forces into places like Indochina, Iran, Lebanon, Central America, Grenada, Libya, Bosnia, Haiti, Kosovo and Somalia, among others. Congress has usually not challenged this non-compliance. And, the judiciary has persistently refused to adjudicate claims challenging executive action as violating the War Powers Resolution, holding that members of Congress have no standing to seek relief, or that the claim presents non-justifiable political questions.

The War Powers Resolution, as written, was flawed in several key respects. The first flaw was that the Resolution imposed no operative, substantive limitations on the executive’s power to initiate warfare, but rather created a time limit of 60 days on the president’s use of troops in hostile situations without explicit congressional authorization. This approach was a mistake, because as a practical matter it recognized that the President could engage in unilateral war-making for up to 60 days, or 90 days with an extension. But the Constitution requires that Congress provide authorization prior to initiating non-defensive war, not within a period of months after warfare is initiated. As history has demonstrated time and again, it is difficult to terminate warfare once hostilities have begun. The key time for Congress to weigh in is before hostilities are commenced, not 60 or 90 days afterward.

Secondly, the War Powers Resolution correctly recognized that even congressional silence, inaction or even implicit approval does not allow the president to engage in warfare – but it failed to provide an adequate enforcement mechanism if the president did so. Under the resolution, wars launched by the executive were supposed to be automatically terminated after 60 or 90 days if not affirmatively authorized by Congress – but this provision proved unenforceable. Presidents simply ignored it, Congress had an insufficient interest in enforcing it and the courts responded by effectually saying: if Congress did nothing, why should we?

Reforming the War Powers Resolution is a project that will require leadership from the President and the political will of Congress, working together in the service and preservation of the Constitution. In light of the abuses that have taken place under the Bush administration, it is the responsibility of a new administration to insist on transparency in the drafting of new legislation.

There is a long history of attempts to revise the War Powers Resolution. As new legislation is drafted, though, it will be important to focus on the central constitutional issues. Much time has been spent in debating how to address contingencies. It will be impossible to write into law any comprehensive formula for every conceivable situation, though; much more important will be establishing the fundamental principles of reform:

The War Powers Resolution should explicitly prohibit executive acts of war without previous Congressional authorization. The only exception should be the executive’s power in an emergency to use short-term force to repel sudden attacks on US territories, troops or citizens.

It is true that many potential conflict situations will be murky, complicated or divisive, and that quick congressional action may not always be forthcoming. Yet, history shows the folly of launching wars that are not supported by the American people. The United States should not use military force until a substantial consensus develops in Congress and the public that military force is necessary, appropriate and wise.

Today, as in 1787, the reality is that the interests of the people of the United States are best served if the Congress retains the power to declare war, and the President’s unilateral power to use American forces in combat should be reserved to repelling attacks on American troops or territories and evacuating citizens under actual attack. Repelling does not equate retaliation for an attack on an American city that occurred in the past, be it several days, weeks or months prior; it also does not mean launching a surprise invasion of a nation that has not attacked us. Repelling similarly does not permit the inflation of supposed threats against US citizens as justification to invade another country, as was the case in the Dominican Republic in 1965 and Grenada in 1983. The president can respond defensively to attacks that have been launched or are in the process of being launched, but not to rumors, reports, intuitions, or warnings of attacks. Preventive war, disguised as preemptive war, has no place in constitutional or international law.

### 1NC

The Court’s pursuing an incremental strategy in regards to War Powers now---the plan causes massive backlash and executive non-acquiescence

Neavl Devins 10, Goodrich Professor of Law and Professor of Government, College of William & Mary., Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, 12 U. Pa. J. Const. L. 491

Congress, the President, and the Court. Throughout the enemy combatant litigation, Congress signaled to the Court that it would go along with whatever ruling the Court made in these cases. In other words, contrary to the portrayal by academics and the news media of the Supreme Court's willingness to stand up to Congress and the executive branch, lawmakers repeatedly stood behind Court rulings limiting elected branch power. At the same time, as I will detail in the next Part, the Court pursued an incremental strategy - declining to test the boundaries of lawmaker acquiescence and, instead, issuing decisions that it knew would be acceptable to lawmakers. n85¶ The 2004 rulings in Hamdi and Rasul triggered anything but a backlash. In the days following the decisions, no lawmaker spoke on the House or Senate floor about the decision, and only a handful issued [\*508] press releases about the cases. n86 And while eight members of Congress signed onto amicus briefs backing administration policy, n87 Congress did not seriously pursue legislative reform on this issue until the Supreme Court had agreed to hear the Hamdan case. n88¶ When Congress enacted the Detainee Treatment Act (DTA) in December 2005, "lawmakers made clear that they did not see the DTA as an attack on either the Court or an independent judiciary." n89 Most significant, even though the DTA placed limits on federal court consideration of enemy combatant habeas petitions, lawmakers nevertheless anticipated that the Supreme Court would decide the fate of the President's military tribunal initiative. Lawmakers deleted language in the original bill precluding federal court review of Hamdan and other pending cases. n90 Lawmakers, moreover, depicted themselves as working collegially with the Court; several Senators, for example, contended that the "Supreme Court has been shouting to us in Congress: Get involved," n91 and thereby depicted Rasul as a challenge [\*509] to Congress, n92 "asking the Senate and the House, do you intend for ... enemy combatants ... to challenge their detention [in federal courts] as if they were American citizens?" n93 Lawmakers also spoke of detainee habeas petitions as an "abuse[]" n94 of the federal courts, and warned that such petitions might unduly clog the courts, n95 thus "swamping the system" n96 with frivolous complaints. n97 Under this view, the DTA's cabining of federal court jurisdiction "respects" the Court's independence and its role in the detainee process. n98¶ Following Hamdan, lawmakers likewise did not challenge the Court's conclusions that the DTA did not retrospectively bar the Hamdan litigation and that the President could not unilaterally pursue his military tribunal policy. n99 Even though the Military Commissions Act (MCA) eliminates federal court jurisdiction over enemy combatant habeas petitions, lawmakers depicted themselves as working in tandem with the Court. Representative Duncan Hunter (R. Cal.), who introduced the legislation on the House floor, said during the debates that the bill was a response to the "mandate of the Supreme Court that Congress involve itself in producing this new structure to prosecute terrorists." n100 And DTA sponsor Lindsey Graham stated: "The Supreme Court has set the rules of the road and the [\*510] Congress and the president can drive to the destination together." n101 Even lawmakers who expressed disappointment in the Court's ruling did not criticize the Court. Senator Sessions (R. Ala.), for example, blamed Hamdan's lawyers for misleading the Court about the legislative history of the DTA. n102¶ Debates over the MCA habeas provision, moreover, reveal that lawmakers thought that the Supreme Court was responsible for assessing the reach of habeas protections. Fifty-one Senators (fifty Republicans and one Democrat) voted against a proposed amendment to provide habeas protections to Guantanamo detainees. Arguing that enemy combatants possessed no constitutional habeas rights, n103 these lawmakers contended that they could eliminate habeas claims without undermining judicial authority. One of the principal architects of the MCA, Senator Lindsey Graham, put it this way: Enemy combatants have "a statutory right of habeas ... . And if [the Supreme Court finds] there is a constitutional right of habeas corpus given to enemy combatants, that is ... totally different ... and it would change in many ways what I have said." n104 Forty-eight Senators (forty-three Democrats, four Republicans, and one Independent) argued that the habeas-stripping provision was unconstitutional, that the courts would "clean it up," n105 and that Congress therefore should fulfill its responsibility to protect "that great writ." n106¶ When the Supreme Court agreed to rule on the constitutionality of the MCA, the Congress no longer supported the MCA's habeas-stripping provisions. Democrats had gained control of both Houses of Congress. Not surprisingly, there was next-to-no lawmaker criticism of Boumediene. In the week following the decision, no member [\*511] of the House, and only two Senators, made critical comments about the decision on the House or the Senate floor. n107¶ \* \* \* Supreme Court enemy combatant decisions were not out-of-step with prevailing social and political forces. Academics (including prominent conservatives), the media (again including conservative newspapers), former judges, and bar groups had all lined up against the administration. Interest groups too opposed the administration (including some conservative groups). Over the course of the enemy combatant litigation, the American people increasingly opposed the Bush administration. This opposition, in part, was tied to policy missteps (some of which implicated enemy combatant policy-making). These missteps were highly visible and contributed to widespread opposition to the Bush administration. For its part, Congress did not question the Court's role in policing the administration's enemy combatant initiative. By the time the Court decided Boumediene, voter disapproval of the President had translated into widespread opposition to the administration's enemy combatant initiative; a Democratic Congress supported habeas protections for enemy combatants and presidential candidates John McCain and Barack Obama called for the closing of Guantanamo Bay.¶ In the next part of this Essay, I will discuss the incremental nature of the Court's decision making. This discussion will provide additional support for the claims made in this section. Specifically, I will show that each of the Court's decisions was in sync with changing attitudes towards the Bush administration. More than that, Part II will belie the myth that Court enemy combatant decisions were especially consequential. Unlike newspaper and academic commentary about these cases, Court decision making had only a modest impact. Correspondingly, the Court never issued a decision that risked its institutional capital; the Court knew that its decisions would be followed by elected officials and that its decisions would not ask elected officials to take actions that posed some national security risk. [\*512] ¶ II. Judicial Modesty or Judicial Hubris: Making Sense of the Enemy Combatant Cases ¶ From 1952 (when the Supreme Court slapped down President Truman's war-time seizure of the steel mills) n108 until 2004 (when the Court reasserted itself in the first wave of enemy combatant cases), the judiciary largely steered clear of war powers disputes. n109 In part, the Court deferred to presidential desires and expertise. The President sees the "rights of governance in the foreign affairs and war powers areas" as core executive powers. n110 Correspondingly, the President has strong incentives to expand his war-making prerogatives. n111 For its part, the Court has limited expertise in this area, and, as such, is extremely reluctant to stake out positions that may pose significant national security risks. n112 The Court, moreover, is extremely reluctant to risk elected branch opprobrium. Lacking the powers of purse and sword, the Court cannot ignore the risks of elected branch non-acquiescence. n113¶ Against this backdrop, the Court's repudiation of the Bush administration's enemy combatant initiative appears a dramatic break from past practice. Academic and newspaper commentary back up this claim - with these decisions being labeled "stunning" (Harold [\*513] Koh), n114 "unprecedented" (John Yoo), n115 "breathtaking" (Charles Krauthammer), n116 "astounding" (Neal Katyal), n117 "sweeping and categorical" (New York Times), n118 and "historic" (Washington Post and Wall Street Journal). n119 Upon closer inspection, however, the Court's decisions are anything but a dramatic break from past practice. Part I detailed how Court rulings tracked larger social and political forces. In this Part, I will show how the Court risked neither the nation's security nor elected branch non-acquiescence. n120 The Court's initial rulings placed few meaningful checks on the executive; over time, the Court - reflecting increasing public disapproval of the President - imposed additional constraints but never issued a ruling that was out-of-sync with elected government preferences. Separate and apart from reflecting growing public and elected government disapproval of Bush administration policies, the Court had strong incentives to intervene in these cases. The Bush administration had challenged the Court's authority to play any role in national security matters. n121 This frontal assault on judicial power prompted the Court to stand up for its authority to "say what the law is." In Part III, I will talk about the Court's interest in protecting its turf - especially in cases implicating individual rights.¶ [\*514] Small Steps: Hamdi and Rasul. These decisions were a minimalist opening volley in Court efforts to place judicial limits on the Bush administration. While rejecting claims of executive branch unilateralism in national security matters, the Court said next-to-nothing about how it would police the President's enemy combatant initiative. Rasul simply held that Guantanamo Bay was a "territory over which the United States exercises exclusive jurisdiction and control," and, consequently, that the President's enemy combatant initiative is subject to existing habeas corpus legislation. n122 This ruling "avoided any constitutional judgment" and offered no guidance on "what further proceedings may become necessary" after enemy combatants filed habeas corpus petitions. n123 Hamdi, although ruling that United States citizens have a constitutional right to challenge their detention as an enemy combatant, placed few meaningful limits on executive branch detentions. Noting that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive," the Court ruled both that hearsay evidence was admissible, and that "the Constitution would not be offended by a presumption in favor of the Government's evidence." n124¶ The Bush administration, as John Yoo put it, saw the limited reach of Hamdi and Rasul as creating an "opportunity" for the administration to regain control over its detention policy. n125 In particular, the administration asked Congress to enact legislation that would limit federal court review of enemy combatant claims. The administration also launched Combatant Status Review Tribunals (CSRT) as a more formal substitute for unilateral executive determinations of a detainee's enemy combatant status. n126 Capitalizing on Rasul's failure to consider the constitutional dimensions of enemy combatant claims, CSRTs largely operated as a rubber stamp of administration determinations. In 2006, ninety-nine out of 102 detainees brought before CSRTs were designated as enemy combatants. n127 The Justice Department reconvened CSRTs to reconsider the remaining three cases [\*515] and, ultimately, the remaining three were determined to be enemy combatants. n128¶ Hamdi and Rasul were both "narrow, incompletely theorized [minimalist] decisions." n129 And while newspapers and academics focused their attention on the Court's open-ended declaration that "a state of war is not a blank check for the President," n130 the decisions did not meaningfully limit the executive. Well aware that Congress and the American people supported the President's military commission initiative, n131 the Court understood that a sweeping denunciation of administration policies might trigger a fierce backlash. n132 Moreover, by ruling that Congress had authorized the President's power to detain enemy combatants (through its post-9/11 Authorization for the Use of Military Force Resolution), and by suggesting that the Court would make use of pro-government presumptions when reviewing military commission decision making, the Court formally took national security interests into account. n133 Actions taken by the executive in response to these rulings underscore that the Court's de minimis demands neither risked national security nor executive branch non-acquiescence.¶ None of this is to say that the 2004 decisions were without impact. Following Rasul, for example, the administration understood that it needed to make use of some type of military court review - a requirement that may have impacted the military's handling of enemy combatants. At the same time, the Court did not issue a potentially debilitating blow to the Bush administration by decisively and resoundingly rejecting key elements of the administration's legal policy. n134 Instead, the Court simply carved out space for itself to review administration policy-making - without setting meaningful boundaries on what the administration could or could not do.

#### Congress will backlash against the plan and cut judicial pay

Philip A. Talmadge 99, Justice, Washington State Supreme Court, Winter, Seattle University Law Review, 22 Seattle Univ. L. R. 695, p. 701-704

The doctrine of judicial restraint has been encrusted in recent years with considerable ideological cant of both the left and the right. 17 The ideological discussion highlights particular political issues of the day. Many conservatives decry judicial activism with respect to the courts' role in racial desegregation in America or [\*702] reproductive rights issues. 18 Liberals complain today of judicial activism in property and economic issues. 19 But this doctrine need not be the captive of the left or the right. The doctrine itself has become "political" largely because it is not susceptible to rigorous and predictable definition. That the courts are not entirely trusted by the partisan branches of government to announce constitutional principles is illustrated by recent Washington legislation. In 1997, a bill was introduced in the Washington State House of Representatives with thirty-three sponsors. The bill challenged the doctrine of judicial review: "The doctrine of judicial review that the courts have the sole and final say in interpreting the Constitution on behalf of all three branches of government has been subject to serious analysis and criticism by scholars, jurists, and others for almost two hundred years." 20 The legislation's apparent intent was to undercut the finality and authority of judicial review of constitutional questions by permitting the legislature to disagree with a judicial interpretation of the Washington Constitution and to submit the issue to the voters in a statewide referendum. 21 [\*703] The sense that the courts are too powerful sometimes conflicts with direction to judges from the partisan branches to state their views more publicly. In 1997, twenty-two sponsors introduced in the Washington State House of Representatives a measure urging the Supreme Court to amend Canon 7 of the Code of Judicial Conduct to afford judges and judicial candidates the right to "speak freely and without fear of governmental retaliation, on issues that are not then before the court." 22 The United States Congress has also raised serious questions about judicial performance through a different methodology. The United States Senate's recent glacial pace in confirming nominees to judicial vacancies increases judicial workloads and instills trepidation in the minds of the nominees. 23 In recent legislation, 24 Congress [\*704] sought to restrain "judicial activism" by denying judges cost-of-living salary adjustments and limiting federal court jurisdiction. Various versions of the legislation would deny federal courts the power to release federal prisoners because of bad prison conditions and establish special procedures to hear challenges to state initiative measures. In summary, these issues illustrate the need for the courts continually to revisit and review the core constitutional functions of the judiciary. 25 Within the constitutional sphere, however, the courts should be active and the other branches of government constrained not to act unconstitutionally. The judiciary cannot "restrain" itself from declaring the enactments of legislative bodies violative of constitutional norms. The courts must vigorously protect individuals, particularly minorities, from majoritarian tyranny. But this protective role does not allow the courts to "constitutionalize" every controversy. Judicial self-restraint lends support to the legitimacy of judicial independence. In our system of separation of powers, achievement of the necessary balance between a judiciary vigorous within its constitutional sphere and independent of the partisan branches of government, and a judiciary restrained in its inclination to right every wrong, is no easy task. That necessary balance is, however, the essence of ordered liberty in the American constitutional system. Likewise, the other branches of government must regard the authority and independence of the judiciary by respecting judicial review, properly funding the courts, and avoiding the imposition of nonjudicial duties or ever-escalating caseloads. The fulfillment of separation of powers is found in the principles of restraint employed in the federal and state court systems.

#### Adequate funding for the judiciary is key to the rule of law – it’s watched internationally

Testimony of Associate Justice Anthony M. Kennedy 7 before the United States Senate Committee on the Judiciary Judicial Security and Independence February 14, http://judiciary.senate.gov/testimony.cfm?id=2526&wit\_id=6070

The provision of judicial resources by Congress over the years is admirable in most respects. Your expeditious consideration of the pending court-security bill is just one example of your understanding of our needs. Our facilities have been, and are, the envy of the judiciaries of the several States and, indeed, of judges throughout the world. Our staff, our libraries, our electronic data systems, and our courthouses are excellent. These resources have been the special concern of Congress. Your interest, your oversight, and your understanding of our needs set a standard for our own States and for nations around the world. Just one example is the Federal Judicial Center. When visitors come to Washington, we recommend they observe it to learn how a successful judicial-education center functions. Those visitors are awed by what they see. As you know, the Center produces an elaborate series of programs for judicial education, under a small budget emphasizing turn-key projects. Around the world, the allocation of scarce resources to judiciaries is, to be candid, a tough sell. There are urgent demands for funds for defense; for roads and schools; for hospitals, doctors, and health care; and for basic utilities and necessities such as clean water. Even rich countries like our own find it hard to marshal the necessary resources for all these endeavors. What, then, is the reception an elected representative receives when he or she tells constituents the legislature has increased funding for judicial resources? The report, to be frank, is not likely to generate much excitement. Perhaps this is an educational failure on our part, for there is a proper response to this predictable public reaction. It is this: An efficient, highly qualified judiciary is part of the infrastructure necessary in any society that seeks to safeguard its freedom. A judiciary committed to excellence secures the Rule of Law; and the Rule of Law is a building block no less important to the advance of freedom and prosperity than infrastructure systems such as roads and utilities. Without a functioning, highly qualified, efficient judiciary, no nation can hope to guarantee its prosperity and secure the liberties of its people. The Committee knows that judges throughout the United States are increasingly concerned about the persisting low salary levels Congress authorizes for judicial service. Members of the federal judiciary consider the problem so acute that it has become a threat to judicial independence. This subject is a most delicate one and, indeed, is difficult for me to address. It is, however, an urgent matter requiring frank and open exchange of views. Please permit me to make some remarks on the subject.

#### That causes nuclear war [gender paraphrased].

Charles S. Rhyne 58, Founder and Senior Partner of Rhyne & Rhyne law firm. “Law Day Speech for Voice of America.” May 1, American Bar Association. http://www.abanet.org/publiced/lawday/rhyne58.html

In these days of soul-searching and re-evaluation and inventorying of basic concepts and principles brought on by the expansion of man’s vision to the new frontiers and horizons of outer space, we want the people of the world to know that we in America have an unshakable belief in the most essential ingredient of our way of life—the rule of law. The law we honor is the basis and foundation of our nation’s freedom and the freedom for the individual which exists here. And to Americans our freedom is more important than our very lives. The rule of law has been the bulwark of our democracy. It has afforded protection to the weak, the oppressed, the minorities, the unpopular; it has made it possible to achieve responsiveness of the government to the will of people. It stands as the very antithesis of Communism and dictatorship. When we talk about “justice” under our rule of law, the absence of such justice behind the Iron Curtain is apparent to all. When we talk about “freedom” for the individual, Hungary is recalled to the minds of all men. And when we talk about peace under law—peace without the bloodbath of war—we are appealing to the foremost desire of all peoples everywhere. The tremendous yearning of all peoples for peace can only be answered by the use of law to replace weapons in resolving international disputes. We in our country sincerely believe that [hu]mankind’s best hope for preventing the tragic consequences of nuclear-satellite-missile warfare is to persuade the nations of the entire world to submit all disputes to tribunals of justice for all adjudication under the rule of law. We lawyers of America would like to join lawyers from every nation in the world in fashioning an international code of law so appealing that sentiment will compel its general acceptance. Man’s relation to man is the most neglected field of study, exploration and development in the world community. It is also the most critical. The most important basic fact of our generation is that the rapid advance of knowledge in science and technology has forced increased international relationships in a shrunken and indivisible world. Men must either live together in peace or in modern war we will surely die together. History teachers that the rule of law has enabled [hu]mankind to live together peacefully within nations and it is clear that this same rule of law offers our best hope as a mechanism to achieve and maintain peace between nations. The lawyer is the technician in man’s relationship to man. There exists a worldwide challenge to our profession to develop law to replace weapons before the dreadful holocaust of nuclear war overtake our people.

### 1NC

#### The United States federal judiciary should rule that the war powers authority of the President of the United States to introduce nuclear armed forces into hostilities against a government for inadvertently releasing nuclear material used in an attack against the United States or its allies without Congressional approval will be limited to retaliation against the Democratic People’s Republic of Korea, and that nuclear use will not be considered if the Democratic People’s Republic of Korea notifies the United States of an inadvertent release of nuclear material before such material is used in an attack on the United States or its allies.

#### The United States federal government should repudiate and ban policies authorizing nuclear use against governments other than the Democratic People’s Republic of Korea for inadvertently releasing nuclear material used in an attack against the United States or its allies.

#### The United States federal government should substantially increase resources devoted to nuclear forensics and attribution, including fallout forensics, the establishment of an international database of nuclear tags, and publicly disclosing successful results of nuclear attribution missions.

#### The counterplan solves the case---North Korea is a crucial exception to every aff argument

#### Limiting retaliation for negligence to North Korea eliminates the threat of retaliation against Russia and Pakistan, the two states that are key to the entire case---and deterrence is uniquely successful against North Korea

Levi 8 – Michael A. Levi, the David M. Rubenstein senior fellow for energy and the environment at the Council on Foreign Relations, previously fellow for science and technology at CFR, “Deterring State Sponsorship of Nuclear Terrorism,” online: http://www.cfr.org/content/publications/attachments/Nuclear\_Deterrence\_CSR39.pdf

Threatening retaliation against countries like Russia and Pakistan in response to terrorist attacks stemming from lax security practices is unwise. It undercuts efforts to work cooperatively with those states to improve their nuclear security; dissuades those states from informing others if they discover that their nuclear weapons or materials are ever stolen, thus undermining any efforts to recover them; and makes it difficult to work with those states in the aftermath of an attack to prevent further detonations. At the same time, U.S. threats are likely to do little to actually encourage many critical states to take nuclear terrorism more seriously—Russia and Pakistan, in particular, face terrorist threats of their own, and the prospect of nuclear attacks on Moscow or Islamabad by Chechen separatists or Islamist radicals is surely greater motivation for strengthened nuclear security than the possibility that, following an attack on Washington, the United States might somehow retaliate. (To the extent that retaliatory threats are military in nature, they will also often be incredible; it is implausible, for example, that the United States would retaliate militarily against Russia. On the other hand, more plausible threats, such as economic or political ones, are far weaker.) Adapting deterrence to cases of lax security is likely to increase, rather than decrease, the nuclear terrorist threat. The United States should, in most cases, emphasize cooperation instead while explicitly ruling out retribution.

North Korea is a critical exception: it is unique among nuclear states in that there is a real prospect that, absent the possibility of retaliation, its leaders might deliberately transfer nuclear materials to a terrorist group. (Other states—including Iran as well as Pakistan under different leadership—might fit this description in the future.) Strategists are thus **correct to adapt Cold War deterrence to this case**. But this task is not as simple as having the ability to attribute nuclear materials to North Korea and threatening to retaliate following any attack. It requires careful thought about how to maximize the credibility of U.S. threats and about how to ensure that U.S. strategy does not dangerously and unnecessarily provoke Pyongyang.

#### The counterplan is goldilocks---eliminating threats against states other than North Korea means they’ll cooperate on attribution---that massively boosts our ability to attribute transfers to North Korea. This makes the CP’s threat of retaliation credible and internationally accepted.

Levi 8 – Michael A. Levi, the David M. Rubenstein senior fellow for energy and the environment at the Council on Foreign Relations, previously fellow for science and technology at CFR, “Deterring State Sponsorship of Nuclear Terrorism,” online: http://www.cfr.org/content/publications/attachments/Nuclear\_Deterrence\_CSR39.pdf

Attribution efforts should not, in most cases, be aimed at directly bolstering a new deterrence strategy. This is true simply because deterrence is the wrong tool to be using against most countries. Instead, attribution efforts can focus on two goals. First, they should be designed to enable both unilateral and cooperative measures aimed at preventing follow-on attacks in the aftermath of a nuclear detonation by helping pinpoint the source of any attack.25 **Freeing up most countries from threats of retaliation** will help **encourage the information sharing** involved in such efforts.

Second, and of greater direct relevance here, **U.S. efforts should be aimed at improving attribution against North Korea**. The United States **already has substantial abilities** to attribute nuclear weapons or materials to North Korea, as it has had access to the main known North Korean nuclear facilities at Yongbyon for many years, and has likely **accumulated samples of North Korean nuclear materials**.26 The greatest ambiguity in attributing any material to North Korea likely comes from the fact that North Korean reactor design is replicated in many other places in the world, complicating efforts to positively identify the source of any materials.

Building better capacity to exclude other countries with similar facilities as sources of materials would thus **be invaluable**. This can best be done cooperatively, by having others contribute to a database of nuclear sources—and **by adopting a declaratory policy that does not threaten most countries**, the United States would enhance its ability to **build an effective database**.27 Beyond that, if countries fear that a comprehensive database will enable a deterrence approach with which they disagree—for example, if they fear that U.S. threats against North Korea are reckless—they will be reticent to share information, which would in turn weaken deterrence. That implies that the United States, as a central part of its efforts to build a nuclear signature database, should work with other countries to coalesce around agreement on the basic features of an acceptable deterrence policy. In doing this, the United States will need to be flexible in how it approaches deterrence.

#### The net-benefit---threatening retaliation against inadvertent North Korean transfers is vital to deterring nuclear terrorism. North Korea will respond to the plan by transferring nuclear weapons and claiming that it was inadvertent---this guarantees nuclear terror

Levi 8 – Michael A. Levi, the David M. Rubenstein senior fellow for energy and the environment at the Council on Foreign Relations, previously fellow for science and technology at CFR, “Deterring State Sponsorship of Nuclear Terrorism,” online: http://www.cfr.org/content/publications/attachments/Nuclear\_Deterrence\_CSR39.pdf

Uncertainty surrounding attribution is, of course, compounded by uncertainty regarding North Korean intent. How should this affect U.S. strategy? This presents more difficult problems than uncertainty in physical attribution does. The United States could place the burden of demonstrating intent on itself, declaring that it will retaliate only if it believes that a transfer was intentional. Alternatively, it could state that it **will not distinguish between cases of authorized and unauthorized transfers**, declaring that either is the result of irresponsible behavior. The United States would thus threaten to retaliate in response to **any nuclear detonation that can be traced to North Korea. This second option is wisest**.

A policy that allows for retaliation only if the United States is certain that an attack is the result of an intentional transfer will **be a very weak one**, since the odds that the United States will be able to unambiguously determine intent are extremely low. That, in turn, would **introduce a large loophole** and **deeply undercut any threat to retaliate following even an authorized transfer.**20 This suggests that the second option—declaring that the United States **will not distinguish between authorized and unauthorized transfers—would be better**. In particular, adopting this approach would maintain a clear signal that the United States would retaliate militarily in the face of an authorized transfer, just as it would if faced with a North Korean missile or bomber attack.

## Case

## Adv 1

### No Retal

#### No retaliation

Ruwe 8 (Daniel, 5/27, http://danielruwe.blogspot.com/2008/05/barack-obama-gaffe-machine.html)

Another revealing Obama quote is his answer to a debate question regarding a hypothetical terrorist attack on an American city. (Remember when there was a presidential debate about every two weeks? That seems so long ago). Obama’s answer: “the first thing we’d have to do is make sure we’ve got an effective emergency response, something that this administration failed to do when we had a hurricane in New Orleans. And I think we have to review how we operate in the event of not only a natural disaster but also a terrorist attack. The second thing is to make sure that we’ve got good intelligence. . . . But what we can’t do is then alienate the world community based on faulty intelligence, based on bluster and bombast.” If that answer still is Obama’s position (Obama’s views are maddeningly hard to pin down), then he clearly has not the vaguest idea of how to respond to a terrorist attack. The emergency response required for a terrorist attack is completely different than that required for a natural disaster—for example, natural disasters are handled first by state and local governments, while terrorist attacks fall squarely into the federal government’s bailiwick. In addition, terrorist attacks are preventable. Also, Obama might want to consider retaliating against those who attacked us, a concept missing from his reply. Lack of retaliation against America’s enemies seems to be a premise of his foreign policy—if we talk to them, they won’t attack us. He seems to base his opposition to the Iraq War not so much on the strategic reasons behind it, but because he seems to think that war in general is almost always unacceptable. This quote is revealing because he rarely enunciates this idea so openly.

#### No nuclear retaliation

Korb 10(Lawrence J. Korb “Obama's Nuclear Policy Enhances America's Moral Position, Security” http://politics.usnews.com/opinion/articles/2010/04/26/obamas-nuclear-policy-enhances-americas-moral-position-security.html 4/26/10)

The policy of not using nuclear weapons against nonnuclear states was first enunciated back in 1957 by President Dwight Eisenhower. As described by Professor Campbell Craig at the University of Southampton, Eisenhower took this step to combat the growing clamor that the United States could wage and win a limited nuclear war. Ronald Reagan went further, arguing in 1984 that a nuclear war could not be won and should not be fought. U.S. conventional weapons are becoming so devastating that there is no need to use nuclear weapons to respond to an attack on the United States, even if that attack should involve chemical or biological weapons. Even if the United States did say it would use nuclear weapons against nonnuclear states, would that policy be credible? After all, our policymakers refused to use nuclear weapons and accepted a stalemate and defeat in the wars in Korea and Vietnam, where over 100,000 American servicemen and women were killed. General Charles Horner, the Allied Air Force Commander during the First Gulf War, put it quite graphically some 14 years ago when he said, "I came to the realization that nuclear weapons had little utility when I realized that even if Saddam Hussein had used a nuclear weapon on us, we would have to retaliate on a conventional basis."

### Russia

#### The risk of nuclear theft in Russia is low

Bunn 10 [Matthew Bunn, Associate Professor at Harvard University’s John F. Kennedy School of Government, “Securing the Bomb 2010,” http://www.nti.org/media/pdfs/Securing\_The\_Bomb\_2010.pdf?\_=1317159794]

When the Soviet Union collapsed in 1991, many important elements of nuclear security—which had been based on a closed society, closed borders, close surveillance of all nuclear-related personnel by the KGB, and nuclear workers who got the best of everything Soviet society had to offer—collapsed along with it. Since then, through Russia’s own efforts and cooperation with the United States and other countries, nuclear security in Russia has improved dramatically. The nuclear security initiative launched by U.S. President George W. Bush and Russian President Vladimir Putin at Bratislava in 2005 was completed at the end of 2008, with extensive security upgrades in place for all but a modest number of nuclear weapon sites and buildings with weapons-usable nuclear material. Cooperative upgrades are continuing at buildings where cooperation was agreed after the initial Bratislava list was prepared, and other cooperation to strengthen sustainability, regulations, inspections, training, material accounting and control procedures, security culture, and more is ongoing. (See “Progress in Nuclear Security Upgrades in Russia and the Eurasian States,” p. 35.)

Throughout the Russian nuclear complex, the most egregious weaknesses of the past—gaping holes in security fences, lack of any detector at all to set off an alarm if someone were carrying out bomb material in a briefcase—appear to have been fixed, making nuclear thefts far more difficult to accomplish. At the same time, the Russian economy improved dramatically over the past decade (though it has taken a substantial hit from the current world economic crisis), and that, combined with an overall revival of both the civilian and military sides of Russia’s nuclear establishment, has largely eliminated the 1990s-era desperation that created unique incentives and opportunities for nuclear theft. No longer are there guards leaving their posts to forage in the forest for food, as occurred in the late 1990s. And strengthened central control and the renewed strength of the FSB, the successor to the KGB, undoubtedly also contribute to deterring attempts at nuclear theft. Overall, the risk of nuclear theft in Russia has been reduced to a fraction of what it was a decade ago. 26 Nevertheless, there remain strong grounds for concern, discussed below.

#### No Russia war---no motive or capability

Betts 13 Richard is the Arnold A. Saltzman Professor of War and Peace Studies @ Columbia. “The Lost Logic of Deterrence,” Foreign Affairs, March/April, Vol. 92, Issue 2, Online

These continuities with the Cold War would make sense only between intense adversaries. Washington and Moscow remain in an adversarial relationship, but not an intense one. If the Cold War is really over, and the West really won, then continuing implicit deterrence does less to protect against a negligible threat from Russia than to feed suspicions that aggravate political friction. In contrast to during the Cold War, it is now hard to make the case that Russia is more a threat to NATO than the reverse. First, the East-West balance of military capabilities, which at the height of the Cold War was favorable to the Warsaw Pact or at best even, has not only shifted to NATO's advantage; it has become utterly lopsided. Russia is now a lonely fraction of what the old Warsaw Pact was. It not only lost its old eastern European allies; those allies are now arrayed on the other side, as members of NATO. By every significant measure of power -- military spending, men under arms, population, economic strength, control of territory -- NATO enjoys massive advantages over Russia. The only capability that keeps Russia militarily potent is its nuclear arsenal. There is no plausible way, however, that Moscow's nuclear weapons could be used for aggression, except as a backstop for a conventional offensive -- for which NATO's capabilities are now far greater.¶ Russia's intentions constitute no more of a threat than its capabilities. Although Moscow's ruling elites push distasteful policies, there is no plausible way they could think a military attack on the West would serve their interests. During the twentieth century, there were intense territorial conflicts between the two sides and a titanic struggle between them over whose ideology would dominate the world. Vladimir Putin's Russia is authoritarian, but unlike the Soviet Union, it is not the vanguard of a globe-spanning revolutionary ideal.

### Pakistan

#### Pitt is a NYT news writer, no credibility and should be thrown out

#### No scenario for nuclear acquisition from Pakistan

Michael Clarke '13, PhD in Asian and International Studies and an Australian Research Council (ARC) Research Fellow at the Griffith Asia Institute, 4/17/13, "Pakistan and Nuclear Terrorism: How Real is the Threat?" Comparative Strategy, Vol. 32 No.2

\*\*C2= command and control system- ensures that the state's nuclear weapons will only be used according to the principles of its nuclear doctrine

This article demonstrates that while nuclear terrorism is indeed possible, there remain significant obstacles for terrorists to overcome in order to acquire sufficient fissile or radiological material from Pakistani sources. It also identifies the potential for terrorists to acquire fissile or radiological material due to problems at each level of Pakistan's nuclear complex. However, the potential for some of these problems to increase the likelihood of nuclear terrorism tends to be overstated. For example, it has been suggested that Pakistan's nuclear first use doctrine combined with a delegative C2 system could open a window of opportunity for terrorists to seize either an intact nuclear weapons or key components of nuclear weapons. This scenario, however, is improbable given that Pakistan appears on balance to have a more assertive C2 system and stores its nuclear weapons unassembled and dispersed across the country. Nonetheless, separate storage and dispersal could create more points of access for terrorists to acquire components of nuclear weapons, such as the AF&F mechanism or fissile cores.¶ In the Pakistani context, although the technical/scientific obstacles to nuclear terrorism detailed in the first section of this chapter remain, there are numerous question marks not only over the state's capacity to manage and secure nuclear material but also over the epistemic side of the equation. [95](http://www.tandfonline.com/doi/full/10.1080/01495933.2013.773700#EN0095) There remain concerns about the potential for individuals employed in Pakistan's nuclear complex, and with specific technical/scientific knowledge regarding nuclear materials, either to leak such information to extremists or to closely collaborate with them. Although Pakistan has put in place a PRP to guard against such an occurrence it remains unclear as to how rigorously it is implemented. The threat stemming from the epistemic side of the equation may also be set to increase given Pakistan's proposed expansion of its nuclear power generation capacity, as such an expansion will require a large cadre of trained and qualified personnel.¶ Thus, much of the speculation and commentary about the potential for nuclear terrorism in Pakistan tends to emphasize scenarios in which hypothetical terrorists are aided and abetted in the acquisition of an intact nuclear weapon or fissile material by individuals employed in the nuclear complex or rogue elements of the military. This focus has tended to result in the downplaying of the real and complex barriers to terrorists acquiring intact weapons and fissile or radiological material.

#### No Pakistani collapse

Sunil Dasgupta '13 Ph.D. in political science and the director of UMBC's Political Science Program and a senior fellow at Brookings, 2/25/13, "How will India respond to civil war in Pakistan," East Asia Forum, http://www.eastasiaforum.org/2013/02/25/how-will-india-respond-to-civil-war-in-pakistan/

Bill Keller of the New York Times [has described Pakistani president Asif Ail Zardari](http://www.nytimes.com/2011/12/18/magazine/bill-keller-pakistan.html?pagewanted=all&_r=0) as overseeing ‘a ruinous kleptocracy that is spiraling deeper into economic crisis’. But in contrast to predictions of an unravelling nation, British journalist-scholar [Anatol Lieven argues](http://www.anu.edu.au/vision/videos/6291/) that the Pakistani state is likely to continue muddling through its many problems, unable to resolve them but equally predisposed against civil war and consequent state collapse. Lieven finds that the strong bonds of family, clan, tribe and the nature of South Asian Islam prevent modernist movements — propounded by the government or by the radicals — from taking control of the entire country.¶ Lieven’s analysis is more persuasive than the widespread view that Pakistan is about to fail as a state. The formal institutions of the Pakistani state are surprisingly robust given the structural conditions in which they operate. Indian political leaders recognise Pakistan’s resilience. Given the bad choices in Pakistan, they would rather not have anything to do with it. If there is going to be a civil war, why not wait for the two sides to exhaust themselves before thinking about intervening? The 1971 war demonstrated India’s willingness to exploit conditions inside Pakistan, but to break from tradition requires strong, countervailing logic, and those elements do not yet exist. [Given the current conditions](http://www.eastasiaforum.org/2012/12/30/pakistans-bleak-outlook-lightened-by-the-game-changer-with-india/) and those in the foreseeable future, India is likely to sit out a Pakistani civil war while covertly coordinating policy with the United States.

## Adv 2 – PQD

### No Solvency

#### There’s no chance the plan spills over---the plan will just be distinguished away

Jonathan L. Entin 12, Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations, 45 Case W. Res. J. Int'l L. 443

Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive's position, it generally has done so on relatively narrow grounds.¶ Consider the Espionage Act cases that arose during World War I. Schenck v. United States, n63 which is best known for Justice Holmes's [\*452] announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant's having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." n64 The circumstances in which the speech took place affected the scope of First Amendment protection: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." n65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort n66 and of Eugene Debs for a speech denouncing the war. n67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States, n68 but only Justice Brandeis agreed with his position. n69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes's opinions for the Court in the earlier cases. n70¶ Similarly, the Supreme Court rejected challenges to the government's war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs. n71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts. n72 In addition, the Court upheld the validity of the Japanese internment program. n73 Of course, the Court did limit the scope of the [\*453] program by holding that it did not apply to "concededly loyal" citizens. n74 But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated. n75 Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees. n76¶ The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region. n77 The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, n78 but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone. n79 The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges. n80¶ The picture in the post-2001 era is less clear. In three different cases the Supreme Court has rejected the executive branch's position, but all of those rulings were narrow in scope. For example, Hamdi v. Rumsfeld n81 held that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to have a neutral decision-maker determine the factual basis for his detention. There was no majority opinion, however, so the implications of the ruling were ambiguous to say the least. Justice O'Connor's plurality opinion for four members of the Court concluded that Congress had authorized the president to detain enemy combatants by passing the Authorization for Use of Military Force n82 and that the AUMF satisfied the statutory requirement of congressional authorization for the detention of U.S. [\*454] citizens. n83 Justice Souter, joined by Justice Ginsburg, thought that the AUMF had not in fact authorized the detention of American citizens as required by the statute, n84 which suggested that Hamdi should be released. But the Court would have been deadlocked as to the remedy had he adhered to his view of how to proceed. This was because Justices Scalia and Stevens also believed that Hamdi's detention was unlawful and that he should be released on habeas corpus, n85 whereas Justice Thomas thought that the executive branch had acted within its authority and therefore would have denied relief. n86 This alignment left four justices in favor of a remand for more formal proceedings, four other justices in favor of releasing Hamdi, and one justice supporting the government's detention of Hamdi with no need for a more elaborate hearing. To avoid a deadlock, therefore, Justice Souter reluctantly joined the plurality's remand order. n87¶ Hamdi was atypical because that case involved a U.S. citizen who was detained. The vast majority of detainees have been foreign nationals. In Hamdan v. Rumsfeld, n88 the Supreme Court ruled that the military commissions that the executive branch had established in the wake of the September 11 attacks had not been authorized by Congress and therefore could not be used to try detainees. n89 A concurring opinion made clear that the president could seek authorization from Congress to use the type of military commissions that had been established unilaterally in this case. n90¶ Congress responded to that suggestion by enacting the Military Commissions Act of 2006, n91 which sought to endorse the executive's detainee policies and to restrict judicial review of detainee cases. In Boumediene v. Bush, n92 the Supreme Court again rejected the government's position. First, the statute did not suspend the writ of [\*455] habeas corpus. n93 Second, the statutory procedures for hearing cases involving detainees were constitutionally inadequate. n94 At the same time, the Court emphasized that the judiciary should afford some deference to the executive branch in dealing with the dangers of terrorism n95 and should respect the congressional decision to consolidate judicial review of detainee cases in the District of Columbia Circuit. n96¶ Detainees who have litigated in the lower federal courts in the District of Columbia have not found a sympathetic forum. The U.S. Court of Appeals for the D.C. Circuit has not upheld a single district court ruling that granted any sort of relief to detainees, and the Supreme Court has denied certiorari in every post-Boumediene detainee case in which review was sought. n97 In only one case involving a detainee has the D.C. Circuit granted relief, and that case came up from a military commission following procedural changes adopted in the wake of Boumediene. n98 About a month after this symposium took place, in Hamdan v. United States n99 the court overturned a conviction for providing material support for terrorism. The defendant was the same person who successfully challenged the original military commissions in Hamdan v. Rumsfeld. n100 This very recent ruling emphasized that the statute under which he was prosecuted did not apply to offenses committed before its enactment. n101 It remains to be seen how broadly the decision will apply. [\*456] ¶ Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In Arar v. Ashcroft, n102 the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. n103 And in Mohamed v. Jeppesen Dataplan, Inc., n104 the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. n105 Unlike Arar, in which the defendants were federal officials, n106 this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. n107 Although at least four judges on the en banc courts dissented from both rulings, n108 the Supreme Court declined to review either case. n109

#### The plan can’t set a precedent---Roberts is a sly dog

William D. Araiza, Law Prof @ Brooklyn, Summer 2012, “PLAYING WELL WITH OTHERS-BUT STILL WINNING,” 46 Ga. L. Rev. 1059, ln

How can a judge undermine precedent while still following it? This Essay considers the methods by which Supreme Court Justices may weaken precedent without explicitly overruling cases by strategically adopting an approach to stare decisis that is less explicitly aggressive than their colleagues'. Adding to the literature of "stealth overruling," this Essay considers examples of such methods from Chief Justice Roberts's first five years on the Supreme Court. These examples indicate that Chief Justice Roberts knows how to engage in stealth overruling and, more broadly, how to use his colleagues' preferences to maintain a formal commitment to judicial humility while achieving jurisprudential change. As such, they reveal important insights about how Justices can operate strategically to achieve their preferences within both the opportunities and the confines inherent in a multi-judge court. After five years, many have accused the Roberts Court of aggressively attacking precedent. No less a figure than Justice O'Connor, whose retirement marked the effective start of that Court, has expressed concern about the Roberts Court's willingness to overrule prior decisions. n1 Then-Judge Roberts's famous confirmation hearing analogy of judging to umpiring n2 and his professed respect for stare decisis n3 make for a dramatic narrative in which a nominee piously describes a humble role for judges but then, once safely confirmed, sets out with a wrecking ball. The charge may have merit, but a short essay is not the vehicle to make that determination. Simply pointing to a few high-profile [\*1061] overrulings, as critics sometimes do, proves little. n4 Rather, an in-depth examination of the issue requires considering the situations where the overruling dog did not bark-that is, where the Court could have overruled a prior case but declined to do so. n5 Such an investigation also calls for both historical perspective and nuance. n6 Reaching interesting conclusions about the Roberts Court's treatment of stare decisis requires that we identify a baseline of how previous Courts have treated that principle. If impressionistic conclusions based on a few dramatic examples are enough to consider the charge proven, then the Rehnquist n7 and Warren n8 Courts are presumably guilty also. Moreover, not all overrulings are created equal. Determining the extent of the Roberts Court's alleged disregard of precedent also requires considering the importance of the precedents the Court has in fact rejected. Consider Justice White's dissent in INS v. Chadha. n9 White characterized the majority's rejection of the legislative veto as effectively striking down hundreds of statutes and eliminating a then-major feature of the modern administrative state. n10 Chadha was not a case where the Court overruled precedent. Justice White's complaint about the far-reaching nature of the Court's decision, however, reminds us that identifying judicial aggressiveness, whatever its form, requires [\*1062] more than simply adding up the number of cases where the Court has acted aggressively. n11 This Essay considers the Roberts Court and stare decisis from a different angle. It examines several methods by which Chief Justice Roberts arguably has used the multi-judge nature of the Supreme Court to his advantage in undermining precedent without explicitly calling for its overruling. n12 These examples do not prove that the Court as a whole, or the Chief Justice in particular, is bent on undoing the work of prior Courts. Instead, they illustrate the ways in which a Justice can work within the formal confines of precedent to achieve fundamentally different results, either in the short or long term. n13 The methods described below depend in part on the distinction between the result a court reaches in a case and the reasoning it employs. The nature of the Supreme Court as a multi-judge court makes this distinction possible: often times, the Court may agree on a result but split sharply on its reasoning. n14 This opens up room for a creative Justice to undermine precedent, even as the Justice expresses reasons that appear moderate-in particular, more moderate than those who are more inclined to overrule explicitly. In so doing, the Justice may create the conditions for the ultimate rejection of that precedent, even while publicly counseling restraint-indeed, even while voting to uphold that [\*1063] precedent. n15 In short, this Essay considers methods by which Justices can play well with others-both those that came before (via respect for stare decisis) and current colleagues (by strategically positioning themselves among them)-and still achieve their ultimate goal. n16 This Essay situates itself at the intersection of two ongoing debates about judicial behavior. The first examines the concept of stealth overruling-the practice of limiting or even eviscerating a precedent while ostensibly remaining faithful to it. n17 This phenomenon has become a major topic of scholarly discussion during the last five years, n18 as scholars have identified and analyzed examples of the Roberts Court engaging in such conduct-conduct generally thought to have resulted from the replacement of a sometimes centrist Justice O'Connor with a more reliably conservative Justice Alito. n19 The examples in this Essay illustrate instances where the Court or a plurality thereof arguably has engaged in such conduct. n20 The lessons one can draw from these examples will help shape an understanding of the stealth overruling phenomenon, and the extent to which the Roberts Court performs it. Second, this Essay engages the debate about the implications of the Supreme Court's character as a collegial body. Scholars long have acknowledged that critiques of the Court must account for its collegial nature rather than simply treating it as a purposive [\*1064] individual. n21 This Essay contributes to that debate by considering how Chief Justice Roberts may in certain cases strategically use his colleagues' calls for more explicit overruling of precedent as a tool in maintaining his and the Court's reputation as faithful to stare decisis while nevertheless pushing the law away from precedents.

### Offense

#### Setting a precedent against the PQD spills over to climate change cases---litigants are turning to the Courts now and asking them to abrogate the PQD

Laurence H. Tribe 10, the Carl M. Loeb University Professor, Harvard Law School; Joshua D. Branson, J.D., Harvard Law School and NDT Champion, Northwestern University; and Tristan L. Duncan, Partner, Shook, Hardy & Bacon L.L.P., January 2010, “TOOHOTFORCOURTSTO HANDLE: FUEL TEMPERATURES, GLOBAL WARMING, AND THE POLITICAL QUESTION DOCTRINE,” <http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf>

Two sets of problems, one manifested at a microcosmic level and the other about as macrocosmic as imaginable, powerfully illustrate these propositions. Not coincidentally, both stem from concerns about temperature and its chemical and climactic effects, concerns playing an increasingly central role in the American policy process. As those concerns have come to the fore, courts have correspondingly warmed to the idea of judicial intervention, drawn by the siren song of making the world a better place and fueled by the incentives for lawyers to convert public concern into private profit. In both the fuel temperature and global warming cases, litigants, at times justifying their circumvention of representative democracy by pointing to the slow pace of policy reform, have turned to the courts. By donning the cloak of adjudication, they have found judges for whom the common law doctrines of unjust enrichment, consumer fraud, and nuisance appear to furnish constitutionally acceptable and pragmatically useful tools with which to manage temperature’s effects. Like the proverbial carpenter armed with a hammer to whom everything looks like a nail, those judges are wrong. For both retail gasoline and global climate, the judicial application of common law principles provides a constitutionally deficient—and structurally unsound—mechanism for remedying temperature’s unwanted effects.

It has been axiomatic throughout our constitutional history that there exist some questions beyond the proper reach of the judiciary. In fact, the political question doctrine originates in no less august a case than Marbury v. Madison, where Chief Justice Marshall stated that “[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”1 Well over a century after that landmark ruling, the Supreme Court, in Baker v. Carr, famously announced six identifying characteristics of such nonjusticiable political questions, which, primarily as a “function of the separation of powers,” courts may not adjudicate.2 Of these six characteristics, the Court recently made clear that two are particularly important: (1) the presence of “a textually demonstrable constitutional commitment of the issue to a coordinate political department;” and (2) “a lack of judicially discoverable and manageable standards for resolving it.”3

The spectrum of nonjusticiable political questions in a sense spans the poles formed by these two principles. At one pole, the Constitution’s specific textual commitments shield issues expressly reserved to the political branches from judicial interference. At the other pole lie matters not necessarily reserved in so many words to one of the political branches but nonetheless institutionally incapable of coherent and principled resolution by courts acting in a truly judicial capacity; such matters are protected from judicial meddling by the requirement that “judicial action must be governed by standard, by rule” and by the correlative axiom that “law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”4

At a deeper level, however, the two poles collapse into one. The reason emerges if one considers issues that courts are asked to address involving novel problems the Constitution’s framers, farsighted though they were, could not have anticipated with sufficient specificity to entrust their resolution to Congress or to the Executive in haec verba. A perfect exemplar of such problems is the nest of puzzles posed by humaninduced climate change. When matters of that character are taken to court for resolution by judges, what marks them as “political” for purposes of the “political question doctrine” is not some problem-specific language but, rather, the demonstrable intractability of those matters to principled resolution through lawsuits. And one way to understand that intractability is to view it as itself marking the Constitution’s textual, albeit broadly couched, commitment of the questions presented to the processes we denominate “legislative” or “executive”—that is, to the pluralistic processes of legislation and treaty-making rather than to the principle-bound process of judicially resolving what Article III denominates “cases” and “controversies.” In other words, the judicial unmanageability of an issue serves as powerful evidence that the Constitution’s text reserves that issue, even if broadly and implicitly, to the political branches.5

It has become commonplace that confusion and controversy have long distinguished the doctrine that determines, as a basic matter of the Constitution’s separation of powers, which questions are “political” in the specific sense of falling outside the constitutional competence of courts and which are properly justiciable despite the “political” issues they may touch. But that the principles in play have yet to be reduced to any generally accepted and readily applied formula cannot mean that courts are simply free to toss the separation of powers to the winds and plunge ahead in blissful disregard of the profoundly important principles that the political question doctrine embodies. Unfortunately, that appears to be just what some courts have done in the two temperature-related cases—one involving hot fuels, the other a hot earth— that inspired this publication. In the first, a court allowed a claim about measuring fuels to proceed despite a constitutional provision specifically reserving the issue to Congress. In the second—a case in which the specific issue could not have been anticipated, much less expressly reserved, but in which the only imaginable solutions clearly lie beyond judicial competence—a court, rather than dismissing the case as it ought to have done, instead summarily dismissed the intractable obstacles to judicial management presented by climate change merely because it was familiar with the underlying cause of action. As this pair of bookend cases demonstrates, the political question doctrine is feeling heat from both directions.

#### That crushes global coordination necessary to solve climate change

Laurence H. Tribe 10, the Carl M. Loeb University Professor, Harvard Law School; Joshua D. Branson, J.D., Harvard Law School and NDT Champion, Northwestern University; and Tristan L. Duncan, Partner, Shook, Hardy & Bacon L.L.P., January 2010, “TOOHOTFORCOURTSTO HANDLE: FUEL TEMPERATURES, GLOBAL WARMING, AND THE POLITICAL QUESTION DOCTRINE,” <http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf>

But that being said, if the Second Circuit was implying that such claims are justiciable in part because they are relatively costless, it was wrong again. In the wake of the recent Copenhagen climate negotiations, America is at a crossroads regarding its energy policy. At Copenhagen, the world—for the first time including both the United States and China—took a tremulous first step towards a comprehensive and truly global solution to climate change.44 By securing a modicum of international consensus—albeit not yet with binding commitments—President Obama laid the foundation for what could eventually be a groundbreaking congressional overhaul of American energy policy, an effort that will undoubtedly be shaped by considerations as obviously political as our energy independence from hostile and unreliable foreign regimes and that will both influence and be influenced by the delicate state of international climate negotiations.45

Against this backdrop, courts would be wise to heed the conclusion of one report that what “makes climate change such a difficult policy problem is that decisions made today can have significant, uncertain, and difficult to reverse consequences extending many years into the future."46 This observation is even more salient given that America—and the world—stand at the precipice of major systemic climate reform, if not in the coming year then in the coming decade. It would be disastrous for climate policy if, as at least one commentator has predicted,47 courts were to “beat Congress to the punch” and begin to concoct common law “solutions” to climate change problems before the emergence of a legislative resolution. Not only does judicial action in this field require costly and irreversible technological change on the part of defendants, but the prior existence of an ad hoc mishmash of common law regimes will frustrate legislators’ attempts to design coherent and systematic marketbased solutions.48 Indeed, both emissions trading regimes and carbon taxes seek to harness the fungibility of GHG emissions by creating incentives for reductions to take place where they are most efficient. But if courts were to require reductions of randomly chosen defendants—with no regard for whether they are efficient reducers— they would inhibit the effective operation of legislatively-created, market-based regimes by prematurely and artificially constricting the size of the market. And as one analyst succinctly put it before Congress, “[a]n insufficient number of participants will doom an emissions trading market.”49

There is no doubt that the “Copenhagen Accord only begins the battle” against climate change, as diplomats, bureaucrats, and legislators all now begin the lengthy struggle to turn that Accord’s audacious vision into concrete reality.50 But whatever one’s position in the debate between emissions trading and carbon taxes, or even in the debate over the extent or indeed the reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding, or at least strongly incentivizing, all involved parties, are the only ones constitutionally entitled to fight that battle.

CONCLUSION

Some prognosticators opine that the political question doctrine has fallen into disrepute and that it no longer constitutes a viable basis upon which to combat unconstitutional judicial overreaching.51 No doubt the standing doctrine could theoretically suffice to prevent some of the most audacious judicial sallies into the political thicket, as it might in the climate change case, where plaintiffs assert only undifferentiated and generalized causal chains from their chosen defendants to their alleged injuries. But when courts lose sight of the important limitations that the political question doctrine independently imposes upon judicial power–even where standing problems are at low ebb, as with the Motor Fuel case–then constitutional governance, and in turn the protection of individual rights and preservation of legal boundaries, suffer. The specter of two leading circuit courts manifestly losing their way in the equally real thicket of political question doctrine underscores the urgency, perhaps through the intervention of the Supreme Court, of restoring the checks and balances of our constitutional system by reinforcing rather than eroding the doctrine’s bulwark against judicial meddling in disputes either expressly entrusted by the Constitution to the political branches or so plainly immune to coherent judicial management as to be implicitly entrusted to political processes. It is not only the climate of the globe that carries profound implications for our future; it is also the climate of the times and its implications for how we govern ourselves.

#### Warming is real, anthropogenic and causes extinction

Flournoy 12 -- Citing Feng Hsu, PhD NASA Scientist @ the Goddard Space Flight Center. Don Flournoy is a PhD and MA from the University of Texas, Former Dean of the University College @ Ohio University, Former Associate Dean @ State University of New York and Case Institute of Technology, Project Manager for University/Industry Experiments for the NASA ACTS Satellite, Currently Professor of Telecommunications @ Scripps College of Communications @ Ohio University (Don, "Solar Power Satellites," January, Springer Briefs in Space Development, Book, p. 10-11

In the Online Journal of Space Communication , Dr. Feng Hsu, a  NASA scientist at Goddard Space Flight Center, a research center in the forefront of science of space and Earth, writes, “The evidence of global warming is alarming,” noting the potential for a catastrophic planetary climate change is real and troubling (Hsu 2010 ) . Hsu and his NASA colleagues were engaged in monitoring and analyzing climate changes on a global scale, through which they received first-hand scientific information and data relating to global warming issues, including the dynamics of polar ice cap melting. After discussing this research with colleagues who were world experts on the subject, he wrote: I now have no doubt global temperatures are rising, and that global warming is a serious problem confronting all of humanity. No matter whether these trends are due to human interference or to the cosmic cycling of our solar system, there are two basic facts that are crystal clear: (a) there is overwhelming scientific evidence showing positive correlations between the level of CO2 concentrations in Earth’s atmosphere with respect to the historical fluctuations of global temperature changes; and (b) the overwhelming majority of the world’s scientific community is in agreement about the risks of a potential catastrophic global climate change. That is, if we humans continue to ignore this problem and do nothing, if we continue dumping huge quantities of greenhouse gases into Earth’s biosphere, humanity will be at dire risk (Hsu 2010 ) . As a technology risk assessment expert, Hsu says he can show with some confidence that the planet will face more risk doing nothing to curb its fossil-based energy addictions than it will in making a fundamental shift in its energy supply. “This,” he writes, “is because the risks of a catastrophic anthropogenic climate change can be potentially the extinction of human species, a risk that is simply too high for us to take any chances” (Hsu 2010 )

### AT: Groupthink

#### Courts don’t need to get involved with nuclear weapons – no evidence on this – CX proves they have ZERO internal link

#### \*Groupthink theory is wrong

Anthony Hempell 4, User Experience Consulting Senior Information Architect, “Groupthink: An introduction to Janis' theory of concurrence-seeking tendencies in group work., <http://www.anthonyhempell.com/papers/groupthink/>, March 3

In the thirty years since Janis first proposed the groupthink model, there is still little agreement as to the validity of the model in assessing decision-making behaviour (Park, 2000). Janis' theory is often criticized because it does not present a framework that is suitable for empirical testing; instead, the evidence for groupthink comes from largely qualitative, historical or archival methods (Sunstein, 2003). Some critics go so far as to say that Janis's work relies on "anecdote, casual observation, and intuitive appeal rather than rigorous research" (Esser, 1998, cited in Sunstein, 2003, p.142). While some studies have shown support for the groupthink model, the support tends to be mixed or conditional (Esser, 1998); some studies have revealed that a closed leadership style and external threats (in particular, time pressure) promote groupthink and defective decision making (Neck & Moorhead, 1995, cited by Choi & Kim, 1999); the effect of group cohesiveness is still inconclusive (Mullen, Anthony, Salas & Driskel, 1994, cited by Choi & Kim, 1999). Janis's model tends to be supported by studies that employ a qualitative case-study approach as opposed to experimental research, which tends to either partially support or not support Janis's thesis (Park, 2000). The lack of success in experimental validation of groupthink may be due to difficulties in operationalizing and conceptualizing it as a testable variable (Hogg & Hains, 1998; Park, 2000). Some researchers have criticized Janis for categorically denouncing groupthink as a negative phenomenon (Longley & Pruitt, 1980, cited in Choi & Kim, 1999). Sniezek (1992) argues that there are instances where concurrence-seeking may promote group performance. When used to explain behaviour in a practical setting, groupthink has been frames as a detrimental group process; the result of this has been that many corporate training programs have created strategies for avoiding groupthink in the workplace (Quinn, Faerman, Thompson & McGrath, 1990, cited in Choi & Kim, 1999). Another criticism of groupthink is that Janis overestimates the link between the decision-making process and the outcome (McCauley, 1989; Tetlock, Peterson, McGuire, Chang & Feld, 1992; cited in Choi & Kim, 1999). Tetlock et al argue that there are many other factors between the decision process and the outcome. The outcome of any decision-making process, they argue, will only have a certain probability of success due to various environmental factors (such as luck). A large-scale study researching decision-making in seven major American corporations concluded that decision-making worked best when following a sound information processing method; however these groups also showed signs of groupthink, in that they had strong leadership which attempted to persuade others in the group that they were right (Peterson et al, 1998, cited in Sunstein, 2003). Esser (1998) found that groupthink characteristics were correlated with failures; however cohesiveness did not appear to be a factor: groups consisting of strangers, friends, or various levels of previous experience together did not appear to effect decision-making ability. Janis' claims of insulation of groups and groups led by autocratic leaders did show that these attributes were indicative of groupthink symptoms. Moorhead & Montanari conducted a study where they concluded that groupthink symptoms had no significant effect on group performance, and that "the relationship between groupthink-induced decision defects and outcomes were not as strong as Janis suggests" (Moorhead & Montanari, 1986, p. 399; cited by Choi & Kim, 1999).

# Block

## Exec

### Public declaration

#### XOs, proclamations, memorandum, etc are legally binding---we can call our CP whatever we want

Graham G. Dodds 13, Associate Professor, pol sci, Concordia. Take Up Your Pen: Unilateral Presidential Directives in American Politics, 9-10

Beyond executive orders, proclamations, and memoranda, there are several other types of unilateral presidential directives that have at times been significant. For example, presidential determinations can be a means of exercising executive discretion in subjecting entities to regulations, as Hill Clinton’s “Presidential Directive” 95—45 exempted the Air Force’s secret “Area 51” military base in Nevada from environmental disclosure laws. So-called administrative orders have been used to create and organ izc the Federal Emergency Management Agency (FEMA). among other purposes. And the various types of national security directives are certainly important and afford presidents a powerful means of independent policymaking, but they are closely tied to the president’s capacity as commander in chief and are usually veiled in secrecy. Most national security directives are not made public. According to the General Accounting Office (GAO), even the relevant congressional committees often do not sec these dircctives,2¶ The ambiguous number and nature of unilateral presidential directives. and the unclear relations among them, can easily lead to confusion. For example, George H. W. Hush’s Executive Order 12.807 of 1992 was intended to direct the Coast Guard to return Haitian refugees to Haiti. However, the order did not specilically mention Haitian refugees per se. That detail was contarned in a press release, which stated: “President Hush has issued an executive order which will permit the US. Coast Guard to begin returning Haitians p.ckcd up at sea directly to Haiti.” In Salt a’. Ha,n an Ccntera Council, 509 U.S. 15$ (1993). the Supreme Court ruled that the press release was a sufficient articulation of the policy, as if incxaciitudc in unilateral presidential directives were to be expected and tokratcd.’ Such confusion can be compounded by the fact that presidents are generally free to decide what to call a particular directive and can even create entirely new types of diretives if they want.”¶ Given the ambiguity among the different types of unilateral presidential directives, ii makes sense to construe the topic broadly, rather than to locus narrowly on one parikular type. This book focuses mostly on executive orders, proclamations, and memoranda. They are arguably the most common, most important. and most accessible types of unilateral presidential directives, and they are similar in their Iustitications and usage. Furtherm ore, I focus on nonmilitary directives, since military orders are a fairly discrete set of unilateral presidential directives, and insofar as they are rooted in the president’s constitutional position as commander in chief, they may be less constitutionally controversial. I also exclude presidential signing statements from my analysis, since they also constitute a distinctly different type of unilateral presidential tool, and they differ from other directives in that they are less clearly legally binding.”¶ Authority¶ If executive orders, proclamations, memoranda. and other unilateral presidential directives merely expressed the presidents view, then they would he important but not necessarily determinative. However, these directives are not mere statements of presidential preferences; rather, they establish binding policies and have the force of law, ultimately backed by the full coercive power of the state. In Annstrong v. U.,jtcd Stairs, 80 U.s. (13 Wall.) 154 (1871), the Supreme Court considered the legal status of a proclamation and decided that such directives are public acts to which courts must “give effect.” In other words, in the eyes of the judiciary, unilateral presidential directives are just as binding as laws. In 1960, Senator Robert Byrd (1)-WV) advised his colleagues, “Keep in mind that an executive order is not statutory law.” Politically, that may he true, as unilateral presidential directives represent the will on1y of the chief executive and lack the direct endorse. ment of congressional majorities. But constitutionally and legally, a unilateral presidential directive is as authoritative and compulsory as a regular law, at least until such time as it is done away with by Congress. courts, or by a future unilateral presidential directive.

#### Presidential commitments credible

Marvin Kalb 13, Nonresident Senior Fellow at Foreign Policy, James Clark Welling Presidential Fellow, The George Washington University Edward R. Murrow Professor of Practice (Emeritus), Kennedy School of Government, Harvard University, 2013, "The Road to War," book,pg. 7-8, www.brookings.edu/~/media/press/books/2013/theroadtowar/theroadtowar\_samplechapter.pdf

As we learned in Vietnam and in the broader Middle East, a presidential commitment could lead to war, based on miscalculation, misjudgment, or mistrust. It could also lead to reconciliation. We live in a world of uncertainty, where even the word of a president is now questioned in wider circles of critical commentary. On domestic policy, Washington often resembles a political circus detached from reason and responsibility. But on foreign policy, when an international crisis erupts and some degree of global leadership is required, the word or commitment of an American president still represents the gold standard, even if the gold does not glitter as once it did.

## DA

### Link

#### Court involvement in national security causes massive blowback that crushes judicial legitimacy

Robert M. Chesney 9, Professor, University of Texas School of Law, NATIONAL SECURITY FACT DEFERENCE, 95 Va. L. Rev. 1361

Judicial involvement in national security litigation, as noted at the outset, poses unusual risks for the judiciary as an institution. Such cases are more likely than most to involve claims of special, or even exclusive, executive branch authority. They are more likely than most to involve a perception - on the part of the public, the government, or judges themselves - of unusually high stakes. They are more likely than most to be in the media spotlight and hence in view of the public in a meaningful sense. These cases are, as a result of all this, especially salient as a political matter. And therein lies the danger for the courts. Because of these elements, an inappropriate judicial intervention in national security litigation is unusually likely to generate a response from the other branches or the public at large that might harm the institutional interests of the judiciary, either by undermining its prestige and authority or perhaps even by triggering some form of concrete political response.

#### Court stripping destroys judicial legitimacy and separation of powers---even unsuccessful backlash can put the entire edifice of judicial review in question

Andrew D. Martin 1, Prof of Political Science at Washington University 2001. Statuatory Battles and Constitutional Wars: Congress and the Supreme Court

But the large policy payoff in the constitutional cases. What does the ability of the President and Congress to attack through overrides or other means constitutional court decisions imply in terms of the cost of the justices bear? If an attack succeeds and the court does not back down, it effectively removes the court from the policy game and may seriously or, even irrevocably harm its reputation, credibility, and legitimacy. Indeed, such an attack would effectively remove the court from policy making, thus incurring an infinite cost. With no constitutional prescription for judicial review, this power is vulnerable, and would be severely damaged if congress and the president were effective in attack on the Court. But even if the attack is unsuccessful, the integrity of the court may be damaged, for the assault may compromise its ability to make future constitutional decisions and, thus, more long-lasting policy. One does not have to peer as far back as scott v. sandford to find examples; Bush v. Gore (2000, U.S.) may provide one. To be sure, the new President and Congress did not attack the decision, but other members of government did of course, unsuccessfully at least in terms of the ruling’s impact. Yet, there seems little doubt that the critics (not to mention the decision itself) caused some major damage to the reputation of the court, the effects of which the justices may feel in the not-so-distant future.

#### The Court has zero legitimacy in foreign affairs cases which means the plan will be ignored---backlash will prompt Congress to question judicial review on domestic issues---that’s obviously way worse for all their modeling advs

Jide Nzelibe 4, Bigelow Fellow and Lecturer in Law, University of Chicago Law School, March, “The Uniqueness of Foreign Affairs,” 89 Iowa L. Rev. 941, Lexis

In many contexts, the courts are reluctant to involve themselves in foreign affairs controversies because of the perceived lack of institutional authoritativeness or legitimacy. The notion that the courts may invoke the doctrine in order to avoid a confrontation with the political branches is not entirely new. Indeed, one of the rationales that Professor Bickel put forth in support of the political question doctrine involved what he described as "the anxiety, not so much that the judicial judgment will be ignored, as that perhaps that it should but will not be ... ." n200 It is worth noting, however, that very little of the commentary has focused on the specific relationship between the substantive nature of foreign affairs and the institutional authoritativeness of the courts.¶ Commentators have largely rejected the "institutional legitimacy" rationale even while acknowledging its explanatory power in certain political question doctrine cases. n201 In essence, most of these commentators argue that the basic fear of being ignored by the political branches cannot justify the abdication of the judicial function in "high stakes" or controversial cases. As explained by Professor Redish, "it is highly unlikely that the dangers of adherence to a decision would be so great as to justify the risk of political backlash that the government's disregard of a Supreme Court decision would entail." n202 If the courts' reluctance to adjudicate on foreign affairs issues were cast as a mere opportunistic retreat from a clash with the political branches, then Professor Redish's concerns would be justified. In the context of the judiciary's limitations in a system of separated powers, however, those concerns seem misplaced.¶ To critics of the political question doctrine, such as Professor Redish, the question is not so much whether the courts have the requisite institutional legitimacy to review foreign affairs matters, but whether they risk diminishing any legitimacy they already possess. n203 These commentators assume as given the judiciary's institutional authoritativeness to rule on any [\*988] legal matter that comes before it. n204 That assumption is wrong. Rather than presuppose the judiciary's legitimacy to exercise a particular function, the proper analysis should focus on the source of the courts' institutional legitimacy to engage in judicial review generally, and then to ask whether such institutional legitimacy extends to foreign affairs cases. As demonstrated below, one significant misgiving that the courts may have about reviewing cases involving foreign affairs is that they simply lack the requisite institutional legitimacy to address these foreign affairs issues.¶ For the past two decades, the Supreme Court and commentators have examined, in great detail, the basis of the institutional legitimacy of courts. Social scientists like Tom Tyler and Gregory Mitchell have drawn upon extensive empirical evidence to demonstrate that courts, like other political institutions, "[need] a mandate entitling [them] to undertake the resolution of a controversial public policy issue." n205 In the absence of such a mandate, these commentators conclude that the courts will lack the requisite authoritativeness that ensures public compliance with judicial decisions. n206 Walter Murphy and Joseph Tanenhaus have offered similar arguments, suggesting that public consensus is integral to the judiciary's legitimacy: "In a political system ostensibly based on consent, the Court's legitimacy ... must ultimately spring from public acceptance ... of its various roles." n207 In Planned Parenthood of Pennsylvania v. Casey, n208 a plurality of the Supreme Court explicitly endorsed this theory of its institutional legitimacy. "The Court's power lies ... in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." n209¶ In the context of domestic affairs, the Court draws its legitimacy largely from its mandate to resolve issues related to protecting constitutional rights of individuals and underrepresented groups. n210 The Casey plurality concluded that the courts are able to sustain this legitimacy by "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." n211 In addition to general public support of the courts, the political branches also [\*989] have an incentive to acquiesce to the judiciary's institutional role of judicial review. Judicial review serves as an important legitimating function for the activities of the political branches. As Professor Choper explains, this legitimating function is "critically important for national unity; that public knowledge that an independent tribunal has approved political assumptions of authority adds dignity to the laws of the central government and inspires confidence that it is acting within its constitutional limited boundaries." n212 In any event, although the scope of such review may be subject to debate, the courts nonetheless enjoy a general presumption of legitimacy when they adjudicate on domestic constitutional questions. There is no reason to assume, however, that this presumption of legitimacy extends to foreign affairs cases.¶ In the context of foreign affairs, the political branches have little need for the judiciary's legitimating function. More importantly, the courts seem to understand their limited utility in constitutional foreign affairs disputes. One commentator has used the metaphor of a "faustian bargain" to describe this understanding between the courts and the political branches in foreign affairs. n213 In this bargain, the judiciary essentially ceded the power to review foreign affairs issues in return for an understanding that the political branches would consent to its authority to review domestic constitutional issues. n214 While the metaphor of a faustian bargain may seem like an overstatement, it nonetheless captures the underpinnings of the longstanding historical relationship between the political branches and the Supreme Court regarding the allocation of constitutional authority. n215 From an institutional perspective, the political branches do not seem to have much to gain by acquiescing to judicial oversight in foreign affairs. Unlike legal controversies in the domestic realm, the political branches do not seem to have any need for an impartial tribunal to dispense judgments regarding the scope of their foreign affairs activities. This observation is especially true when such activities take place in an international realm where nation states [\*990] do not always abide by the norms of international law and where there is no centralized decision-making authority. In that realm, the political branches may decide to act of a legal obligation in certain contexts, but not in others. Understandably, in many disputes involving foreign affairs issues, the government has usually asked the courts to abstain from reviewing any foreign affairs issue brought before them rather than request a particular outcome on the merits. n216¶ Unlike in domestic constitutional controversies, it is also doubtful that the judiciary can draw on the popular underpinnings of its legitimacy should the political branches ignore its foreign affairs determinations. As one commentator has explained, the public appetite for judicial involvement in international issues is not particularly strong. n217 The judiciary's lack of popular legitimacy in foreign affairs is particularly understandable when the relevant controversy touches on matters of national security. As demonstrated above, in matters involving the domestic operations of the government, the court plays an important role in legitimizing the activities of the other branches, as well as providing a reliable mechanism for the resolution of disputes between private individuals. When matters touch on the very existence of the state, however, such as when the state faces an external threat, the justifications for judicial involvement correspondingly diminish. n218 Thus, far from getting popular support in the event of a confrontation with the political branches, it is more likely that the courts will face public criticism for intervening improperly in foreign affairs or jeopardizing national security.¶ Interestingly, the judiciary's perceived lack of institutional authority to adjudicate foreign affairs controversies is not unique to the U.S. experience. As one commentator has observed, judicial timidity on foreign affairs issues is commonplace among other national legal systems. n219 This commentator correctly attributes this judicial apprehension to the fact that the political branches have no "incentive to bestow legitimacy on an international legal system, in which their state is only one actor among numerous actors, many of whom do not face judicial restrictions." n220

### 2NC Link Wall

#### Congress perceives plan as activist, that means they’ll cut pay, the impact is judicial independence and terrorism

HARLINGTON WOOD Judge, United States Court of Appeals for the Seventh Circuit. New York University Annual Survey of American Law 2001

Since the federal judges are protected from unjustified removal, is it nevertheless possible to discipline judges by cutting their salary, even if for only a short period? No, it is not. The Constitution provides that a federal judge's salary may not be reduced during the judge's tenure. 12 Congress can, however, increase the salaries of federal judges to keep up with the general level of legal compensation in the marketplace. Congress can also grant a cost of living increase to keep up with inflation. Most federal employees receive cost of living increases, but some in Congress for their own, reasons including political, have in the past voted "no" on extending this increase to federal judges. Some of us have thought Congress misunderstood and believed the Constitution prohibited not only a reduction in judicial salaries, but also a fair salary increase. [\*264] Often citing the low salaries of federal judges as a reason, sixty Article III judges retired or resigned from the bench between 1991 and 2002, marking it as the largest number of departures in federal judiciary history for any ten-year period. 13 Indeed, judges often see their law clerks recruited to leading private firms at starting salaries comparable to those of judges. 14 Not only is a reasonable judicial salary fair treatment of judges for their work, but it is also an important factor in judicial independence. A well-paid judge is less susceptible to deserting the bench for the more lucrative private practice or, in the very rarest of circumstances, succumbing to the temptation to do judicial favors for a fee. Judges who have accepted bribes may not only be subject to impeachment as judges, but also find themselves as defendants in front of the bench of another judge and possibly on their way to the penitentiary. 15 Reasonable judicial salaries also serve another very important purpose because fair compensation helps attract the most qualified lawyers to the bench. If serving as a judge were to mean a financial sacrifice impacting prospective judges and their families, only the rich would become federal judges. That should not be. In 2001, Congress did not forget the Third Branch entirely and gave the judges a cost-of-living increase, not a pay raise, for which the judges are grateful. However, since 1993, the judges have received only four of nine annual cost-of-living adjustments. 16 Judges have always been at some personal risk from disgruntled litigants and anti-government groups. 17 For example, an ordinary-looking [\*265] letter was delivered to me one February at the office, but its contents were not ordinary. It was a very mean and vicious threat about what would soon happen to me. The sender from the Chicago area got so enthusiastic about sending me his "valentine" that he forgot and conveniently put his name and return address on the envelope. Since we are now in a war with terrorists, the risks are much greater for everyone. Congress has the responsibility to look after the welfare of the judiciary because the judiciary cannot financially care for itself. The judicial structure must be kept healthy and safe, especially in times of national crises, or the terrorists will have achieved some part of their goal.

#### Best studies prove congress will cut pay and the judiciary will respond by not adhering to your precedent

Frank B. Cross\*, Herbert D. Kelleher Centennial Professor of Business Law at the McCombs School, University of Texas, and Professor of Law at the University of Texas Law School. Blake J. Nelson\*\* Assistant Professor of Political Science, Pennsylvania State University, Harrisburg. Article: Strategic Institutional Effects On Supreme Court Decisionmaking Northwestern University Law Review Summer, 2001

There is empirical evidence that Congress pays attention to Supreme Court decisions and punishes undesirable decisions with budget cuts, and that the Justices respond with decisions more amenable to congressional policy goals. Eugenia Toma hypothesized that the relationship between Congress and the Supreme Court was a contractual one in which budgetary favors are linked to politically acceptable decisions. 205 She empirically analyzed the Court's budget and its decisions. The greater the ideological distance between a term's decisions and the congressional average of the relevant House and Senate committees, the less money was appropriated for the Court's budget. 206 She also found that the Court responded to these signals and modified its decisions accordingly. 207 The effect was not an enormous one and not entirely consistent over the years, 208 but it was clearly [\*1469] present, enough to meet rigorous standards of statistical significance. 209 Congress may achieve indirectly through appropriations what it cannot do directly. 210

#### Pay cuts and budget stripping results from congressionally unpopular rulings

Frank B. Cross\*, Herbert D. Kelleher Centennial Professor of Business Law at the McCombs School, University of Texas, and Professor of Law at the University of Texas Law School. Blake J. Nelson\*\* Assistant Professor of Political Science, Pennsylvania State University, Harrisburg. Article: Strategic Institutional Effects On Supreme Court Decisionmaking Northwestern University Law Review Summer, 2001

Distinct from, but analogous to, jurisdiction stripping is the creation of non-Article III court systems. This action removes certain topics from the life-tenured federal judiciary's power and places it with "statutory judges." Such courts are not protected by the tenure or salary or other independence guarantees of the Constitution, granting Congress even more control over judicial outcomes. 179 Non-Article III courts may be created precisely for the additional "political control they permit." 180 The creation of such courts removes power from the Article III judiciary and transfers it into a structurally more pliable Article I judiciary. 181 c. Resource Punishment. - Perhaps the most salient constraint on courts involves congressional control over their resources. Judicial salaries are generally protected from being cut by Congress, but a displeased Congress may withhold salary increases or other resources. 182 There are few, if any, constraints on congressional control of funding for judicial support [\*1466] staff, courthouses, and other necessary resources of the Third Branch. Congress does not automatically defer to the Court's budget requests, nor does it automatically grant the Court some increase in resources to account for inflation or growing caseloads. Between 1946 and 1988, the real budget for the Court increased at an average of 3.2% per year, but annual changes in the budget have varied from a negative 9.8% to a positive 13.7%. 183 Plainly, Congress has both the power and inclination to manipulate appropriations to the courts. 184

### 2NC Latin America Impact

#### 1NC Kennedy evidence says judicial salaries are modeled globally – we’re the envy of the world

#### Latin American salaries are key to judicial independence and checking the executive

World Bank Fechnical Paper Number 319 9 1996The Judicial Sector in Latin America and the Caribbean http://72.14.253.104/search?q=cache:wW7QdZw3Eb4J:www.bancomundial.org.br/content/\_downloadblob.php%3Fcod\_blob%3D546+%22latin+america%22+%22judicial+salaries%22&hl=en&ct=clnk&cd=7&gl=us&client=firefox-a

It is also important that the individual judges have personal independence. Personal independence refers to the fact that judges have secure judicial terms and salaries, and the judiciary controls case assignments, court scheduling and judicial transfers to a different court. 37 Forced-reassignments can be particularly inimical to judge's personal independence.38 Personal independence for judges can be achieved through appropriate methods of appointment, removal and supervision. 39 In addition to reinforcing personal judicial independence, these measures also assist in assuring judicial accountability. Judges are public service providers and should not only be independent 40 and impartial but also accountable to the population they serve. Although many Latin American and Caribbean judiciaries lack independence, it has been argued that this lack of independence may be necessary for economic development. Currently, there is a tension between democracy and economic reform and between economic reform and social policy exists. 4 ' For example, during recent reforms in Latin America some countries have benefited from a strong executive that can act in an efficient manner. The dilemma is then how to, at the same time, provide for the institutional checks that guarantee accountability and oversight.42 This experience occurs most often when the executive has the power to issue decrees while underdeveloped or delegitimized judicial systems are not able to prevent executive abuse of power through effective judicial control or legislative oversight. 4 3 In several cases of stalemate between the legislative and executive, the executive has been able to bypass confrontations through decrees in order to achieve economic policy with little to nonexistent scrutiny from the judiciary. The Argentine and Peruvian experiences demonstrate such behavior. However, judicial review could be a key component of economic reforms. Moreover, without this oversight and consultation, economic reforms may be unstable and subject to reversal

#### Failure of Latin American democratization nuclear conflict

Donald **Schulz**, Chairman of the Political Science Department at Cleveland State University, March 20**00**, The United States and Latin America: Shaping an Elusive Future, p. 3&26-28, http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA375197&Location=U2&doc=GetTRDoc.pdf

In short, democracy and economic integration are not simply value preferences, but are increasingly bound up with hemispheric security. To take just one example: The restoration of democracy in Brazil and Argentina and their increasingly strong and profitable relationship in Mercosur have contributed in no small degree to their decisions to forsake the development of nuclear weapons. Perceptions of threat have declined, and perceptions of the benefits of cooperation have grown, and this has permitted progress on a range of security issues from border disputes, to peacekeeping, environmental protection, counternarcotics, and the combat of organized crime. Argentina has also developed a strong bilateral defense relationship with the United States, and is now considered a non-NATO ally.

<Schulz continues>

Until recently, the primary U.S. concern about Brazil has been that it might acquire nuclear weapons and delivery systems. In the 1970s, the Brazilian military embarked on a secret program to develop an atom bomb. By the late 1980s, both Brazil and Argentina were aggressively pursuing nuclear development programs that had clear military spin-offs.54 There were powerful military and civilian advocates of developing nuclear weapons and ballistic missiles within both countries. Today, however, the situation has changed. As a result of political leadership transitions in both countries, Brazil and Argentina now appear firmly committed to restricting their nuclear programs to peaceful purposes. They have entered into various nuclear-related agreements with each other—most notably the quadripartite comprehensive safeguards agreement (1991), which permits the inspection of all their nuclear installations by the International Atomic Energy Agency—and have joined the Missile Technology Control Regime. Even so, no one can be certain about the future. As Scott Tollefson has observed: • . . the military application of Brazil’s nuclear and space programs depends less on technological considerations than on political will. While technological constraints present a formidable barrier to achieving nuclear bombs and ballistic missiles, that barrier is not insurmountable. The critical element, therefore, in determining the applications of Brazil’s nuclear and space technologies will be primarily political.55 Put simply, if changes in political leadership were instrumental in redirecting Brazil’s nuclear program towards peaceful purposes, future political upheavals could still produce a reversion to previous orientations. Civilian supremacy is not so strong that it could not be swept away by a coup, especially if the legitimacy of the current democratic experiment were to be undermined by economic crisis and growing poverty/inequality. Nor are civilian leaders necessarily less militaristic or more committed to democracy than the military. The example of Peru’s Fujimori comes immediately to mind. How serious a threat might Brazil potentially be? It has been estimated that if the nuclear plant at Angra dos Reis (Angra I) were only producing at 30 percent capacity, it could produce five 20-kiloton weapons a year. If production from other plants were included, Brazil would have a capability three times greater than India or Pakistan. Furthermore, its defense industry already has a substantial missile producing capability. On the other hand, the country has a very limited capacity to project its military power via air and sealift or to sustain its forces over long distances. And though a 1983 law authorizes significant military manpower increases (which could place Brazil at a numerical level slightly higher than France, Iran and Pakistan), such growth will be restricted by a lack of economic resources. Indeed, the development of all these military potentials has been, and will continue to be, severely constrained by a lack of money. (Which is one reason Brazil decided to engage in arms control with Argentina in the first p1ace.) In short, a restoration of Brazilian militarism, imbued with nationalistic ambitions for great power status, is not unthinkable, and such a regime could present some fairly serious problems. That government would probably need foreign as well as domestic enemies to help justify it’s existence. One obvious candidate would be the United States, which would presumably be critical of any return to dictatorial rule. Beyond this, moreover, the spectre of a predatory international community, covetous of the riches of the Amazon, could help rally political support to the regime. For years, some Brazilian military officers have been warning of “foreign intervention.” Indeed, as far back as 1991 General Antenor de Santa Cruz Abreu, then chief of the Military Command of the Amazon, threatened to transform the region into a “new Vietnam” if developed countries tried to “internationalize” the Amazon. Subsequently, in 1993, U.S.-Guyanese combined military exercises near the Brazilian border provoked an angry response from many high-ranking Brazilian officers.57 Since then, of course, U.S.-Brazilian relations have improved considerably. Nevertheless, the basic U.S./ international concerns over the Amaazon—the threat to the region’s ecology through burning and deforestation, the presence of narcotrafficking activities, the Indian question, etc.—have not disappeared, and some may very well intensify in the years ahead. At the same time, if the growing trend towards subregional economic groupings—in particular, MERCOSUR—continues, it is likely to increase competition between Southern Cone and NAFTA countries. Economic conflicts, in turn, may be expected to intensify political differences, and could lead to heightened politico-military rivalry between different blocs or coalitions in the hemisphere.

## Tism Adv

### 2NC AT Retal---No Retal

#### No one would support retaliation --- their public outcry arguments ignore backlash against Iraq and Afghanistan

Bremmer 4—IR prof, Columbia. Faculty member at Stanford’s Hoover Institution. Senior Fellow, World Policy Institute. PhD in pol sci, Stanford (Ian, 11/13, Suppose a new 9/11 hit America . . ., http://www.newstatesman.com/200409130005)

What would happen if there were a new terrorist attack inside the United States on 11 September 2004? How would it affect the presidential election campaign? The conventional wisdom is that Americans - their patriotic defiance aroused - would rally to President George W Bush and make him an all but certain winner in November. But consider the differences between the context of the original 9/11 and that of any attack which might occur this autumn. In 2001, the public reaction was one of disbelief and incomprehension. Many Americans realised for the first time that large-scale terrorist attacks on US soil were not only conceivable; they were, perhaps, inevitable. A majority focused for the first time on the threat from al-Qaeda, on the Taliban and on the extent to which Saudis were involved in terrorism. This time, the public response would move much more quickly from shock to anger; debate over how America should respond would begin immediately. Yet it is difficult to imagine how the Bush administration could focus its response on an external enemy. Should the US send 50,000 troops to the Afghan-Pakistani border to intensify the hunt for Osama Bin Laden and "step up" efforts to attack the heart of al-Qaeda? Many would wonder if that wasn't what the administration pledged to do after the attacks three years ago. The president would face intensified criticism from those who have argued all along that Iraq was a distraction from "the real war on terror". And what if a significant number of the terrorists responsible for the pre-election attack were again Saudis? The Bush administration could hardly take military action against the Saudi government at a time when crude-oil prices are already more than $45 a barrel and global supply is stretched to the limit. While the Saudi royal family might support a co-ordinated attack against terrorist camps, real or imagined, near the Yemeni border - where recent searches for al-Qaeda have concentrated - that would seem like a trivial, insufficient retaliation for an attack on the US mainland. Remember how the Republicans criticised Bill Clinton's administration for ineffectually "bouncing the rubble" in Afghanistan after the al-Qaeda attacks on the US embassies in Kenya and Tanzania in the 1990s. So what kind of response might be credible? Washington's concerns about Iran are rising. The 9/11 commission report noted evidence of co-operation between Iran and al-Qaeda operatives, if not direct Iranian advance knowledge of the 9/11 hijacking plot. Over the past few weeks, US officials have been more explicit, too, in declaring Iran's nuclear programme "unacceptable". However, in the absence of an official Iranian claim of responsibility for this hypothetical terrorist attack, the domestic opposition to such a war and the international outcry it would provoke would make quick action against Iran unthinkable.

#### Recent events prove he won’t retaliate

IMB 11 (11 July 2011, Israel Matzav Blogspot, Obama's response to attack on US embassy in Damascus: He's going to file a lawsuit, http://israelmatzav.blogspot.com/2011/07/obamas-response-to-attack-on-us-embassy.html)

In an earlier post, I reported on attacks on the American and French embassies in Damascus by pro-Assad 'demonstrators.' I now have some updates on that post.

The US State Department on Monday formally condemned Syria for failing to protect the US embassy complex in Damascus from a violent assault it said was encouraged by a pro-government Syrian television station.

"A television station that is heavily influenced by Syrian authorities encouraged this violent demonstration," a State Department spokesperson said in a statement."

So what does the world's only superpower do? Send in the Marines to get the ambassador out and protect the embassy grounds? Not in the age of Obama. In the age of Obama the US threatens... to file a lawsuit.

"We strongly condemn the Syrian government's refusal to protect our embassy, and demand compensation for damages. We call on the Syrian government to fulfill its obligations to its own citizens as well," the statement said.

"We are calling in the Syrian charge [d'affaires] to complain," said the US official, who spoke on condition of anonymity.

"We feel they failed [in their responsibility to protect US diplomats]. We are going to condemn their slow response."

Spoke on condition of anonymity? The Secretary of State hasn't got the junk to stand up there and say we're withdrawing our ambassador and instead a low-level functionary speaking on condition of anonymity is trotted out to threaten to summon the Syrian Charge d'Affaires?!?

What happened to Teddy Roosevelt's 'speak softly and carry a big stick'? It looks like it's been replaced by Jimmy Carter's helicopter crash in the desert. Is this how Reagan would have responded? Is this how Bush II would have responded? Of course not. We would have seen Shock and Awe on all of Assad's palaces. Instead, Obama is going to file a lawsuit demanding compensation. What could go wrong?

#### Obama won’t retaliate to a terrorist attack.

AP 10 (AP, “United States Could 'Absorb' Another Terror Attack, Obama Says in Woodward Book,” September 22, 2010, http://www.foxnews.com/politics/2010/09/22/obama-divided-afghan-war-woodward-book/)

President **Obama**, after being warned repeatedly by his advisers about the threat of another terror attack on U.S. soil**, said in** an in**terview** two months ago **that the United States could "absorb" another strike**. The comment was included in the new book by journalist Bob Woodward, "Obama's Wars," excerpts of which were reported by The Washington Post and The New York Times. The book depicts the contentious debate the Obama administration endured to craft a new strategy in Afghanistan. According to the Post, **Obama spent the bulk of the exhaustive sessions pressing for an exit strategy and resisting efforts to prolong and escalate the war.**  **Despite warnings of another attack, he suggested the United States could weather a new strike.**  "We can absorb a terrorist attack**. We'll do everything we can to prevent it, but even a 9/11, even the biggest attack ever . . . we absorbed it and we are stronger," Obama reportedly said.**  According to the book, Obama said, "I have two years with the public on this" and pressed advisers for ways to avoid a big escalation in the Afghanistan war. "I'm not doing long-term nation-building. I am not spending a trillion dollars," he reportedly told Defense Secretary Robert Gates and Secretary of State Hillary Clinton in October 2009. "I want an exit strategy," he said at one meeting. Privately, he told Vice President Biden to push his alternative strategy opposing a big troop buildup in meetings. While Obama ultimately rejected the alternative plan, the book says, he set a withdrawal timetable because, "I can't lose the whole Democratic Party." The comment on absorbing an attack drew tough criticism Wednesday from Liz Cheney, daughter of former Vice President Cheney and chairwoman of Keep America Safe. "This comment suggests an alarming fatalism on the part of President Obama and his administration," she said in a statement. "Once again the president seems either unwilling or unable to do what it takes to keep this nation safe. The president owes the American people an explanation." But **a senior administration official defended the depiction of the president's actions.** "**The president comes across** in the review and throughout the decision-making process **as a commander in chief who is analytical, strategic and decisive, with a broad view of history, national security and his role,"** the official told Fox News, describing the debates as "well known." Lt. Gen. Douglas E. Lute, the president's Afghanistan adviser, is described as believing the president's review of the Afghanistan war did not "add up" to the decision he made. Richard Holbrooke, the president's special representative for Afghanistan and Pakistan, is quoted as saying of the strategy, "It can't work," according to The New York Times. Obama was among administration officials that Woodward interviewed for the book.

#### No retaliation—US won’t sacrifice moral dignity

Fisher 7**—**PhD candidate pol sci, U Colorado-Boulder (Uri, “Deterrence, Terrorism, and American Values,” February 2007, http://www.hsaj.org/?fullarticle=3.1.4)

In the aftermath of the September 11 attacks on the World Trade Center and the Pentagon, academics and policymakers were quick to dismiss the strategic role that deterrence could play in U.S. counterterrorism policy. President George Bush’s often quoted conclusion that traditional concepts of deterrence are meaningless against “shadowy terrorist networks” with no nation to defend and who are willing to engage in “wanton destruction” resonated throughout discussions on U.S. national security strategy. A 2002 RAND report asserted, “Deterrence is both too limiting and too naïve to be applicable to the war on terrorism.” 1 Since September 11, deterrent strategies have repeatedly been characterized as relics of the Cold War era of superpower confrontation. As a result, the White House has focused on defensive and preemptive counterterrorism strategies. The current administration argues that the U.S. can no longer wait for the worst security threats, such as terrorists acquiring chemical, biological, radiological, and nuclear weapons (CBRN), to materialize before acting.

Alternatively, many commentators and researchers, especially in the field of political science, maintain that deterrence remains a viable and utilizable tool in U.S. policymakers’ arsenal to combat terrorism. Regardless of which side of the fence analysis falls on this issue, however, an important aspect of the deterring terrorism argument receives very little attention – the role that ideals and values play in America’s ability to establish a deterrent mechanism against terrorists. I argue that deterrence, as a strategic concept, is not inapplicable to defending against terrorism; however, the U.S. would face considerable legal and moral quandaries if it were to carry out the necessary policies to deter terrorists and their supporters. To be sure, some elements of a terrorist organization can be deterred, but it is unlikely that U.S. policymakers are willing to sacrifice core American values in order to credibly signal to these actors that something “they hold dear” is in jeopardy if they commit or support terrorist aggression. To establish a deterrent mechanism against terrorist networks the U.S. would be required to explore a number of extremely heavy-handed policy options, such as regime change, nuclear retaliations, and expanding targeted killing operations to included terrorists’ family members and loved ones.

Implementing policies such as these are the only ways to effectively deter elements of a terrorist organization and its support structure. Nevertheless, doing so would force the U.S. to take certain positions that would come into conflict with American ideals and beliefs about justice, fairness, and human rights. Moreover, policy pronouncements that could deter terrorists would be inflammatory and would most likely be met with considerable domestic and international criticism. Even when the U.S. has “skirted” some of these policies in recent years to combat terrorism, controversy and disagreement have emerged over the morality and legality of such actions.

The simplistic argument that terrorists cannot be deterred is reductionist. Additionally, those who argue that deterrence maintains significant utility in the U.S. war on terror fail to acknowledge the level of harshness and brutality required of U.S. policy to establish a deterrent mechanism against members of terrorist networks. What really prevents the U.S. from deterring terrorists is not the simple unsuitability of the strategic concept of deterrence, but America’s humanity, civility, and idealism.

### 2NC AT Retal---Not Nuclear

#### Response wouldn’t be nuclear

Alexander 95 **–** professor of history, Longwood U (Bevin, The Future of Warfare, http://www.bevinalexander.com/books/future-of-warfare-intro.htm)

An irrational dictator might use the bomb, and there's the chance that a terrorist organization might secure a device and plant it somewhere, perhaps in a large city. This would bring on a catastrophe, but rational rulers would not automatically resort to nuclear holocaust. Instead, likely using precision strikes, nuclear or otherwise, they would attempt to destroy the dictator, his weapons and his scientists, or they could try to destroy the places in other countries where the guilty terrorists find refuge.

#### No escalation

Davis 2 – Professor of Policy Analysis, RAND Graduate School (Paul and Brian Jenkins, Deterrence and Influence in Counterterrorism, http://www.rand.org/publications/MR/MR1619/MR1619.pdf)

That is, al Qaeda could use WMD against the United States, but retaliation—and certainly escalation—would be difficult because (1) the United States will not use chemical, biological, or radiological weapons; (2) its nuclear weapons will seldom be suitable for use; and (3) there are no good targets (the terrorists themselves fade into the woodwork).

#### Obama won’t use nukes to fight terrorism

**AP 7** – 8-2-07, http://www.msnbc.msn.com/id/20093852/

WASHINGTON - Democratic presidential hopeful Barack **Obama said** Thursday **he would not use nuclear weapons "**in any circumstance" **to fight terrorism** in Afghanistan and Pakistan.

"I think it would be a profound mistake for us to use nuclear weapons in any circumstance," Obama said, with a pause, "involving civilians." Then he quickly added, "Let me scratch that. There's been no discussion of nuclear weapons. That's not on the table."

### Russia

#### Russian nuclear materials are secure

Matthews and Nemtsova 11 [Owen Matthews, Newsweek and The Daily Beast’s bureau chief in Moscow and Istanbul, and Anna Nemtsova, a correspondent for Newsweek and The Daily Beast based in Moscow; “A New Nuclear Scare Rocks Eastern Europe,” June 30 2011, http://www.thedailybeast.com/articles/2011/06/30/uranium-smuggling-arrests-in-moldova-revive-security-debate.html]

At the same time, Russian nuclear specialists have been quick to pour cold water both on suggestions that the material was in fact HEU and on claims by Moldovan police that the material may ultimately be traceable to Russia. For one, the €20 million price tag quoted by the smugglers is way too low for real HEU, says Sergey Novikov, spokesman for Russia’s nuclear-energy corporation, Rosatom. Moreover, Rosatom claims that security in Russia’s nuclear installations is now so tight that “not even low-grade uranium has appeared on the black market” in more than a decade. Novikov says, “This Moldovan story is grandmother’s fairy tales.”

Experts in the U.S. agree that Russia has come a long way from the scary days of the early 1990s, when nuclear scientists went unpaid for months and guards at nuclear facilities left their posts to go foraging in the forests for food. Declassified documents from 1994 released earlier this month paint a disturbing picture of post-Soviet Russia, a place where “no system of nuclear accounting existed” and stolen nuclear materials began showing up on the black market in Leningrad, Istanbul, and Munich.

Since then, in large part thanks to billions in assistance from the U.S. government, Russia seems to have cleaned up its act. Harvard’s Matthew Bunn produced a landmark report last year that gave Moscow high marks for nuclear security. A revived Russian economy “has largely eliminated the 1990s-era desperation that created unique incentives and opportunities for nuclear theft,” Bunn wrote. And the “strengthened central control and the renewed strength of the FSB, the successor to the KGB, undoubtedly also contribute to deterring attempts at nuclear theft.” He concluded, “Overall, the risk of nuclear theft in Russia has been reduced to a fraction of what it was a decade ago.”

#### They wouldn’t know how to detonate them and the bombs wouldn’t work

Mueller 7—pol sci prof and IR, Ohio State. Widely-recognized expert on terrorism threats in foreign policy. AB from U Chicago, MA in pol sci from UCLA and PhD in pol sci from UCLA (John, Reactions And Overreactions to Terrorism: The Atomic Obsession, 24 July 2007, http://psweb.sbs.ohio-state.edu/faculty/jmueller/APSA2007.PDF, AMiles)

There has been a lot of worry about "loose nukes," particularly in post-Communist Russia--weapons, "suitcase bombs" in particular, that can be stolen or bought illicitly. However, when asked, Russian nuclear officials and experts on the Russian nuclear programs "adamantly deny that al Qaeda or any other terrorist group could have bought Soviet-made suitcase nukes." They further point out that the bombs**,** all built before 1991, are difficult to maintain and have a lifespan of one to three years after which they become "radioactive scrap metal" (Badken 2004). Similarly, a careful assessment of the concern conducted by the Center for Nonproliferation Studies has concluded that it is unlikely that any of these devices have actually been lost and that, regardless, their effectiveness would be very low or even non-existent because they require continual maintenance (2002, 4, 12; see also Langewiesche 2007, 19). It might be added that Russia has an intense interest in controlling any weapons on its territory since it is likely to be a prime target of any illicit use by terrorist groups, particularly, of course, Chechen ones with whom it has been waging an vicious on-and-off war for over a decade. Officials there insist that all weapons have either been destroyed or are secured, and the experts polled by Linzer (2004) point out that "it would be very difficult for terrorists to figure out on their own how to work a Russian or Pakistan bomb" even if they did obtain one because even the simplest of these "has some security features that would have to be defeated before it could be used" (see also Langewiesche 2007, 19; Wirz and Egger 2005, 502). One of the experts, Charles Ferguson, stresses You'd have to run it through a specific sequence of events, including changes in temperature, pressure and environmental conditions before the weapon would allow itself to be armed, for the fuses to fall into place and then for it to allow itself to be fired. You don't get off the shelf, enter a code and have it go off. Moreover, continues Linzer, most bombs that could conceivably be stolen use plutonium which emits a great deal of radiation that could relatively easily be detected by passive sensors at ports and other points of transmission. The government of Pakistan, which has been repeatedly threatened by al Qaeda, has a similar very strong interest in controlling its nuclear weapons and material. It is conceivable that stolen bombs, even if no longer viable as weapons, would be useful for the fissile material that could be harvested from them. However, Christoph Wirz and Emmanuel Egger, two senior physicists in charge of nuclear issues at Switzerland's Spiez Laboratory, point out that even if a weapon is not completely destroyed when it is opened, its fissile material yield would not be adequate for a primitive design, and therefore several weapons would have to be stolen and then opened successfully (2005, 502).

#### Stolen nukes can’t be deployed

Frost 5 – intelligence analyst with the Canadian government (Robin, Adelphi, 45.378, December, “The nuclear black market”, InformaWorld)

Even if terrorists had been able to obtain any of these weapons, Sokov argues that they would have been difficult or impossible to deploy: the bombs might have been fitted with locks to prevent unauthorised deployment, or radioactive components may have decayed to the point of uselessness. Even if it were still fresh and fully functional, terrorists would only be able to 'mine' one for its nuclear materials, which they almost certainly could not reassemble into a functional weapon. These materials could, however, be used in one or more relatively harmless RDDs. This discussion necessarily involves a good deal of speculation - state secrets are state secrets, after all, and few are more closely held than those concerning nuclear weapons - but Sokov is unusually well qualified to address the matter.

## Deference

### AT: Deference Causes Lash-Out

#### Court deference is at an all-time high --- most recent cases prove

George D. Brown 11, Interim Dean and Robert F. Drinan, S.l., Professor of Law, Boston College Law School, 1/7/11, “Accountability, Liability, and the War on Terror -- Constitutional Tort Suits as Truth and Reconciliation Vehicles,” Florida Law Review, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1337&context=lsfp>

Still, the notion of national security deference is deeply ingrained in our constitutional tradition. Its institutional foundations make sense, as ably demonstrated by Professor Pushaw.415 The question that arises is whether things have changed with the Court's decisions in a series of "enemy combatant" cases since the onset ofthe war on terror.416 These cases have arisen in the context of petitions for habeas corpus. The Court, as Professor Pushaw puts it, "interpreted the habeas corpus statute generously,'.417 even to the point of distortion.418 On the other hand, the substantive results represented a mixed bag of defects and victories for the President. "[T]hese three cases did not necessarily signal a major shift in the Court's jurisprudence in which individual liberties will be upheld vigorously against executive claims of national security.'.419 Professor Pushaw wrote these words before Boumediene v. Bush,420 in which the Court took on both political branches. Boumediene, far more than its immediate predecessors, might be seen as the case that broke the back of national security deference.421 The majority opinion emphasized the judiciary's Marburybased role as the branch that says "what the law is,' 22 echoing its earlier statement in Hamdi v. Rumsfeld that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake. ,.424 ¶ On the other hand, it is possible to see Boumediene as resting primarily on the key role of habeas corpus. The Court proclaimed the writ's "centrality," noting that "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights. ,.425 I have raised elsewhere the argument that one should not extrapolate too far from the habeas cases, even if they are viewed as an assertion of the judicial role.426 Habeas raises the fundamental question of the lawfulness of executive detention and often presents the judiciary with familiar issues of the validity of procedures. Reverse war on terror suits would take the courts much further. ¶ Certainly, the Court's two most recent war on terror decisions show a reluctance to go further and may even constitute a retrenchment. The importance of Ashcroft v. I{lbar27 has already been noted. Holder v. Humanitarian Law Project's points in the same direction. Holder upheld a criminal statute that is a crucial component of the war on terror.429 It did so in the face of a vigorous First Amendment challenge, supported by three Justices.43o Both cases show deference toward the government and appreciation of the difficulties of waging the war on terror. Iqbal noted that "the Nation's top law enforcement officers [were acting] in the aftermath of a devastating terrorist attack .... ,.431 Holder's language is even stronger. The Court stated explicitly that deference was appropriate because "[t]his litigation implicates sensitive and weighty interests of national security and foreign affairs.'.432 Indeed, the opinion went further endorsing the preventive approach to counterterrorism and recognizing the government's need to often act "based on informed judgment rather than concrete evidence.'.433 In perhaps the ultimate demonstration of the importance of rhetoric, the Court's opinion closed with a citation of the Preamble to the Constitution and its recognition of the need to provide '''for the common defence [sic].".434 Iqbal and Holder stand in stark contrast to the habeas decisions of a few years earlier.

### Link---Perception

#### Court involvement kills the perception of resolve----it emboldens adversaries

John Yoo 6, Professor of Law, University of California at Berkeley School of Law, Courts At War, 91 Cornell L. Rev. 573

Article III itself also significantly limits the role of federal courts in performing certain functions. Once the President and Congress have enacted a statute or the President and Senate have made a treaty, the judiciary's constitutional responsibility is to execute those goals in the context of Article III cases or controversies, subject to any policymaking discretion implicitly given to the courts by Congress in areas [\*594] of statutory ambiguity or of federal common law. n117 Federal judges cannot alter or refuse to execute laws, even if the original circumstances that gave rise to the statute or treaty have changed. If a federal court, for example, finds that a defendant has violated the Helms-Burton Act by "trafficking" in property confiscated by the Cuban government, it is obligated to render judgment for an American plaintiff who once owned that property. n118 Article III requires a federal court to reach that decision even if the effects of the judgment in that particular case would harm the national interest. n119

Judicial decisions may harm the national interest because courts cannot control the timing of their proceedings or coordinate their judgments with the actions of the other branches of government. For example, the President might be engaged in a diplomatic campaign to pressure a Middle Eastern country into terminating its support for terrorism at the time that a judicial decision freed a suspected al Qaeda operative. A judicial decision along these lines could undermine the appearance of unified resolve on the part of the United States, or it might suggest to the Middle Eastern country that the executive branch cannot guarantee that it could follow through on its own counterterrorism policies. A court cannot take account of such naked policy considerations in deciding whether a federal statute has been violated or whether to grant relief, while the political branches can constantly modify policy in reaction to ongoing events. Even if the judiciary seeks guidance from the executive branch, such deference may undermine any appearance of judicial independence.

#### That collapses heg

John R. Bolton 9, Senior fellow at the American Enterprise Institute & Former U.S. ambassador to the United Nations, “The danger of Obama's dithering,” Los Angeles Times, October 18, http://articles.latimes.com/2009/oct/18/opinion/oe-bolton18

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

#### Strict adherence to the political question doctrine now – aff obviously changes that

Bradley 9/2 (Curtis A., William Van Alstyne Professor of Law – Duke Law School, “War Powers, Syria, and Non-Judicial Precedent,” Lawfare Blog, 2013, http://www.lawfareblog.com/2013/09/war-powers-syria-and-non-judicial-precedent/)

As an initial matter, we need to bracket the issue of whether Obama’s action will weaken his own power as a political matter. This is a complicated issue: on the one hand, it may signal weakness both to Congress and to other nations; on the other hand, if he obtains congressional authorization, he may be in an ultimately stronger political position, as Jack Goldsmith has pointed out. As I understand it, the claim being made by Spiro, Rothkopf, and others is that the power of the presidency more generally is being weakened. How might this happen? Not through an influence on judicial doctrine: Although courts sometimes take account of historic governmental practices when assessing the scope of presidential authority, they have consistently invoked limitations on standing and ripeness, as well as the political question doctrine, to avoid addressing constitutional issues relating to war powers. In the absence of judicial review, what is the causal mechanism by which the “precedent” of Obama seeking congressional authorization for the action in Syria could constrain future presidential action? When judicial review is unavailable, the most obvious way in which the President is constrained is through the political process—pressure from Congress, the public, his party, etc. In an extreme case, this pressure could take the form of impeachment proceedings, but it does not take such an extreme case for the pressure to have a significant effect on presidential decisionmaking. Indeed, it is easy to think of political considerations that might have motivated Obama to go to Congress with respect to Syria.

#### SQ rulings haven’t clarified the legal debate---the plan does

Jonathan L. Entin 12, Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations, 45 Case W. Res. J. Int'l L. 443

To be sure, the Supreme Court has decided some well-known national security cases. Among them are the Steel Seizure case, Youngstown Sheet & Tube Co. v. Sawyer; n2 the Pentagon Papers case, New York Times Co. v. United States; n3 the Iranian hostage case, Dames & Moore v. Regan; n4 and some notable First Amendment cases arising out of World War I, such as Schenck v. United States n5 and Abrams v. United States. n6 Then there are the Japanese internment decisions during World War II, notably Korematsu v. United States, n7 as well as Ex parte Quirin, n8 which upheld the use of military commissions to try German agents who landed in the United States as part of a sabotage mission. Most recently, the Supreme Court has addressed questions arising from the government's response to the attacks of September 11, 2001, in such cases as Hamdi v. Rumsfeld, n9 Hamdan v. Rumsfeld, n10 and Boumediene v. Bush. n11 These cases do matter, but they have not clearly resolved the constitutional and other legal issues that pervade the debate about presidential power and foreign affairs.

Beyond the limitations of the Supreme Court rulings, the judiciary probably will not contribute very much to the debate. Various procedural and jurisdictional obstacles make it difficult for courts to address the merits of disputes about war powers and foreign affairs. Even if those obstacles can be surmounted, those who decry what they view as presidential excess should note that the judiciary typically has taken a deferential role in reviewing challenges to executive action.

### AT: Knowles

#### Judicial reviews prevents quick action during a crisis --- causes failure

Robert Knowles 9, Acting Asst. Professor @ NYU School of Law, Spring, “American Hegemony and the Foreign Affairs Constitution,” 41 Ariz. St. L.J. 87, Lexis

Nonetheless, foreign relations remain special, and courts must treat them differently in one important respect. In the twenty-first century, speed matters, and the executive branch alone possesses the ability to articulate and implement foreign policy quickly. Even non-realists will acknowledge that the international realm is much more susceptible to crisis and emergency than the domestic realm. But speed remains more important even to non-crisis foreign affairs cases. n391 It is true that the stable nature of American hegemony will prevent truly destabilizing events from happening without great changes in the geopolitical situation - the sort that occur over decades. The United States will not, for some time, face the same sorts of existential threats as in the past. n392 Nonetheless, in foreign affairs matters, it is only the executive branch that has the capacity successfully to conduct [\*150] treaty negotiations, for example, which depend on adjusting positions quickly.¶ The need for speed is particularly acute in crises. Threats from transnational terrorist groups and loose nuclear weapons are among the most serious problems facing the United States today. The United States maintains a "quasi-monopoly on the international use of force," n393 but the rapid pace of change and improvements in weapons technology mean that the executive branch must respond to emergencies long before the courts have an opportunity to weigh in. Even if a court was able to respond quickly enough, it is not clear that we would want courts to adjudicate foreign affairs crises without the deliberation and opportunities for review that are essential aspects of their institutional competence. Therefore, courts should grant a higher level of deference to executive branch determinations in deciding whether to grant a temporary restraining order or a preliminary injunction in foreign affairs matters. Under the super-strong Curtiss-Wright deference scheme, the court should accept the executive branch interpretation unless Congress has specifically addressed the matter and the issue does not fall within the President's textually-specified Article I powers.

#### Judicial review hamstrings effective crisis response --- too inflexible and slow

Eric Posner 7, the Kirkland and Ellis Professor of Law @ U-Chicago, and Adrian Vermeule, the John H. Watson, Jr. Professor of Law @ Harvard, Jan 4, “Terror in the Balance: Security, Liberty, and the Courts,” Book

The deferential view does not rest on a conceptual claim; it rests on a claim about relative institutional competence and about the comparative statics of governmental and judicial performance across emergencies and normal times. In emergencies, the ordinary life of the nation, and the bureaucratic and legal routines that have been developed in ordinary times, are disrupted. In the case of wars, including the “war on terror,” the government and the public are not aware of a threat to national security at time 0. At time 1, an invasion or declaration of war by a foreign power reveals the existence of the threat and may at the same time cause substantial losses. At time 2, an emergency response is undertaken. ¶ Several characteristics of the emergency are worthy of note. First, the threat reduces the social pie – both immediately, to the extent that it is manifested in an attack, and prospectively, to the extent that it reveals that the threatened nation will incur further damage unless it takes costly defensive measures. Second, the defensive measures can be more or less effective. Ideally, the government chooses the least costly means of defusing the threat; typically, this will be some combination of military engagement overseas, increased intelligence gather, and enhanced policing at home. Third, the defensive measures must be taken quickly, and – because every national threat is unique, unlike ordinary crime – the defensive measures will be extremely hard to evaluate. There are standard ways of preventing and investigating street crime, spouse abuse, child pornography, and the like; and within the range, these ways are constant across jurisdictions and even nation-states. Thus, there is always a template that one can use to evaluate ordinary policing. By contrast, emergency threats vary in their types and magnitude and across jurisdictions, depending heavily on the geopolitical position of the state in question. Thus, there is no general template that can be used for evaluating the government’s response.¶ In emergencies, then, judges are at sea, even more so than are executive officials. The novelty of the threats and of the necessary responses make judicial routines and evolved legal rules seem inapposite, even obstructive. There is a premium on the executive’s capacities for swift, vigorous, and secretive action. Of course, the judges know that executive action may rest on irrational assumptions, or bad motivations, or may otherwise be misguided. But this knowledge is largely useless to the judges, because they cannot sort good executive action from bad, and they know that the delay produced by judicial review is costly in itself. In emergencies, the judges have no sensible alternative but to defer heavily to executive action, and the judges know this.

### Impact---Executive/Congress Dispute Resolution

#### Judicial war-powers rulings kill Executive-Congressional dispute resolution---causes Congress to snipe at the President

Jonathan L. Entin 12, Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University. War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations, 45 Case W. Res. J. Int'l L. 443

III. The Benefits of Political Resolution of Interbranch Disputes

Whatever the merits of the decisions discussed in the previous section, those rulings should give pause to those who might rely on [\*457] the judiciary as a check on what they regard as executive overreaching. When combined with the procedural and jurisdictional obstacles discussed in Part I, a more general lesson emerges: the judiciary cannot resolve all the questions that might arise in connection with war powers and foreign affairs. Nonetheless, the substantive and procedural limitations of judicial review provide an opportunity for greater civic and political engagement in decisions that can have profound consequences for our nation and the world.

If the courts cannot resolve these matters, questions of war and diplomacy, it should come as no surprise that they are getting worked out largely through political accommodation and negotiation. These accommodations and negotiations necessarily reflect the differing constitutional views of the legislative and executive branches as well as of the persons and groups that engage on these issues. Although many lament the quality of current political discourse, excessive reliance on the judicial process has undesirable consequences. The Supreme Court has had difficulty rendering consistent or principled decisions about legislative-executive relationships. n110 Sometimes the Court has taken a formalistic approach that emphasizes the need to maintain clear lines between the branches. n111 At other times, the Court has used a functional approach that emphasizes the importance of checks and balances to prevent the accumulation of excessive power in any particular branch. n112 In other words, judicial review does not always provide clear answers to complex questions.

The complexity of those questions is particularly evident in the military and diplomatic arenas. Reliance on the political process recognizes the uncertainties and contingencies involved in many of [\*458] these matters. n113 Moreover, interbranch negotiation rather than litigation recognizes that an effective government requires a degree of comity that is inconsistent with frequent reliance on the judiciary. n114 Our system rests on a rich set of subtle understandings and an implicit sense of political limits. n115 As a result, structural and institutional factors often dampen the inevitable conflicts that arise between Congress and the president. Excessive reliance on the judiciary tends to raise the stakes of conflict by clearly identifying winners and losers and by encouraging the assertion of extreme positions for short-term litigation advantage that might complicate the resolution of future disagreements. n116

In addition, the litigation process takes time. Of course, the Pentagon Papers case was resolved in less than three weeks after the New York Times published its first article on the subject. n117 Ordinarily, however, the judicial process proceeds at a much statelier pace. Consider another landmark case, albeit one that dealt with domestic issues. Cooper v. Aaron n118 was decided approximately one year after President Eisenhower dispatched federal troops to enforce the desegregation of Little Rock Central High School in the face of massive resistance encouraged by Arkansas Governor Orval Faubus. n119 Often, disputes over military and diplomatic matters are time-sensitive. Expedited judicial review might help, but events on the ground might well frustrate orderly judicial disposition.

#### Executive flexibility is vital to solve multiple nuclear threats

Li 9 Zheyao, J.D. candidate, Georgetown University Law Center, 2009; B.A., political science and history, Yale University, 2006. This paper is the culmination of work begun in the "Constitutional Interpretation in the Legislative and Executive Branches" seminar, led by Judge Brett Kavanaugh, “War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare,” 7 Geo. J.L. & Pub. Pol'y 373 2009 WAR POWERS IN THE FOURTH GENERATION OF WARFARE

A. The Emergence of Non-State Actors

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

### AT: Groupthink

#### No groupthink—executives are fragmented and pluralistic—Congress links harder

Posner and Vermeule, 7 – \*Kirkland and Ellis Professor of Law at the University of Chicago Law School AND \*\*professor at Harvard Law School (Eric and Adrian, Terror in the Balance: Security, Liberty, and the Courts p. 46-47)

The idea that Congress will, on net, weed out bad policies rests on an institutional comparison. The president is elected by a national constituency on a winner-take-all basis (barring the remote chance that the Electoral College will matter), whereas Congress is a summation of local constituencies and thus affords more voice to political and racial minorities. At the level of political psychology, decisionmaking within the executive is prone to group polarization and other forms of groupthink or irrational panic,51 whereas the internal diversity of legislative deliberation checks these forces. At the level of political structure, Congress contains internal veto gates and chokepoints—consider the committee system and the fi libuster rule—that provide minorities an opportunity to block harmful policies, whereas executive decisionmaking is relatively centralized and unitary.

The contrast is drawn too sharply, because in practice the executive is a they, not an it. Presidential oversight is incapable of fully unifying executive branch policies, which means that disagreement flourishes within the executive as well, dampening panic and groupthink and providing minorities with political redoubts.52 Where a national majority is internally divided, the structure of presidential politics creates chokepoints that can give racial or ideological minorities disproportionate influence, just as the legislative process does. Consider the influence of Arab Americans in Michigan, often a swing state in presidential elections.

It is not obvious, then, that statutory authorization makes any difference at all. One possibility is that a large national majority dominates both Congress and the presidency and enacts panicky policies, oppresses minorities, or increases security in ways that have ratchet effects that are costly to reverse. If this is the case, a requirement of statutory authorization does not help. Another possibility is that there are internal institutional checks, within both the executive branch and Congress, on the adoption of panicky or oppressive policies and that democratic minorities have real infl uence in both arenas. If this is the case, then a requirement of authorization is not necessary and does no good. Authorization only makes a difference in the unlikely case where the executive is thoroughly panicky, or oppressively majoritarian, while Congress resists the stampede toward bad policies and safeguards the interests of oppressed minorities.

Even if that condition obtains, however, the argument for authorization goes wrong by failing to consider both sides of the normative ledger. As for majoritarian oppression, the multiplicity of veto gates within Congress may allow minorities to block harmful discrimination, but it also allows minorities to block policies and laws which, although targeted, are nonetheless good. As for panic and irrationality, if Congress is more deliberative, one result will be to prevent groupthink and slow down stampedes toward bad policies, but another result will be to delay necessary emergency measures and slow down stampedes toward good policies. Proponents of the authorization requirement sometimes assume that quick action, even panicky action, always produces bad policies. But there is no necessary connection between these two things; expedited action is sometimes good, and panicky crowds can stampede either in the wrong direction or in the right direction. Slowing down the adoption of new policies through congressional oversight retards the adoption not only of bad policies, but also of good policies that need to be adopted quickly if they are to be effective.

#### Informal checks on groupthink are sufficient

Kennedy, 12 [ Copyright (c) 2012 Gould School of Law Southern California Interdisciplinary Law Journal Spring, 2012 Southern California Interdisciplinary Law Journal 21 S. Cal. Interdis. L.J. 633 LENGTH: 23138 words NOTE: THE HIJACKING OF FOREIGN POLICY DECISION MAKING: GROUPTHINK AND PRESIDENTIAL POWER IN THE POST-9/11 WORLD NAME: Brandon Kennedy\* BIO: \* Class of 2012, University of Southern California Gould School of Law; M.A. Regional Studies: Middle East 2009, Harvard Graduate School of Arts and Sciences; B.A. Government 2009, Harvard University.]

Neither the president nor the decision-making group members implement "hybrid" checks; the checks do, however, originate in the executive branch and directly affect the president and the group members. Hybrid checks relate to the bureaucratic machine and typically address the structural faults within the executive branch that can affect the core decision-making group. Although the president and his or her advisers constitute the insiders of the decision-making group, they ultimately belong [\*676] to a larger organization - the executive branch - and thereby become part of the bureaucratic machine.

1. Inter-Agency Process

The "inter-agency process" check involves getting approval for, or opinions about, a proposed decision from other agencies. n252 The inter-agency process is particularly common for national security and foreign policy decisions. n253 "Occasionally, it will operate at a higher level in principals' committees involving Cabinet-level or sub-Cabinet people and their deputies," thus directly checking the decision-making group members. n254

2. Intra-Agency Process

Another similar check is the "intra-agency process," in which the circulation of proposed decisions within the agency empowers dissidents and harnesses a diversity of thinking. n255 If nothing else, the process catches errors, or at least increases the odds of avoiding them, given the number of people who must review or approve a document or decision within the agency. n256

3. Agency or Lawyer Culture

The culture of a particular agency - the institutional self-awareness of its professionalism - provides another check. n257 "Lawyer culture" - which places high value on competency and adherence to rules and laws - resides at the core of agency culture; n258 its "nay-saying" objectivity "is especially important in the small inner circle of presidential decision making to counter the tendency towards groupthink and a vulnerability to sycophancy." n259

[\*677]

4. Public Humiliation

A final check in this category is the "public humiliation" check. n260 This check only comes into play when the previous three have failed, and involves the threat to ""go public' by leaking embarrassing information or publicly resigning."

## PQD Advantage

### AT: Asia Pivot

#### The pivot fails---no impact

Aaron L. Friedberg 12, Professor of Politics and International Affairs at the Woodrow Wilson School of Public and International Affairs at Princeton University, September/October 2012, “Bucking Beijing,” Foreign Affairs, Vol. 91, No. 5, p. 48-58

The problem with the pivot is that to date it has lacked serious substance. The actions it has entailed either have been merely symbolic, such as the pending deployment of a small number of U.S. marines to Australia, or have involved simply the reallocation of existing air and naval assets from other theaters. Apart from vague references to a new "air-sea battle" concept, which the Pentagon describes, in typical jargon, as "networked, integrated, attack-in-depth to disrupt, destroy and defeat" opposing forces, the administration has not made clear how it actually intends to respond to China's increasing military capabilities. To the contrary, having announced the new approach, Defense Department spokespeople have been at pains to avoid acknowledging the obvious fact that it will be aimed primarily at China. Especially in the current fiscal climate, it is hard to see how any administration could mobilize the public support necessary to maintain a favorable balance of power in Asia if it is not willing to be far more candid about the nature of the challenge posed by China's growing strength.

#### Multiple factors make Asia war unlikely

Vannarith 10—Executive Director of the Cambodian Institute for Cooperation and Peace. PhD in Asia Pacific Studies, Ritsumeikan Asia Pacific U (Chheang, Asia Pacific Security Issues: Challenges and Adaptive Mechanism, <http://www.cicp.org.kh/download/CICP%20Policy%20brief/CICP%20Policy%20brief%20No%203.pdf>)

Some people look to China for economic and strategic interests while others still stick to the US. Since, as a human nature, change is not widely acceptable due to the high level of uncertainty. It is therefore logical to say that most of the regional leaders prefer to see the status quo of security architecture in the Asia Pacific Region in which US is the hub of security provision. But it is impossible to preserve the status quo since China needs to strategically outreach to the wider region in order to get necessary resources especially energy and raw materials to maintain her economic growth in the home country. It is understandable that China needs to have stable high economic growth of about 8 percent GDP growth per year for her own economic and political survival. Widening development gap and employment are the two main issues facing China. Without China, the world will not enjoy peace, stability, and development. China is the locomotive of global and regional economic development and contributes to global and regional peace and stability. It is understandable that China is struggling to break the so-called containment strategy imposed by the US since the post Cold War. Whether this tendency can lead to the greater strategic division is still unknown. Nevertheless, many observers agree that whatever changes may take place, a multi-polar world and multilateralism prevail. The reasons or logics supporting multilateralism are mainly based on the fact that no one country can really address the security issues embedded with international dimension, no one country has the capacity to adapt and adopt to new changes alone, and it needs cooperation and coordination among the nation states and relevant stakeholders including the private sector and civil societies. Large scale interstate war or armed conflict is **unthinkable** in the region due to the high level of interdependency and democratization. It is believed that economic interdependency can reduce conflicts and prevent war. Democracy can lead to more transparency, accountability, and participation that can reduce collective fears and create more confidence and trust among the people in the region. In addition, globalism and regionalism are taking the center stage of national and foreign policy of many governments in the region except North Korea. The combination of those elements of peace is necessary for peace and stability in the region and those elements are **present and being improved in this region.**